THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2012-213635

ESTATE OF MARY MELINDA BALLARD..................................Respondent,

v.

CITY OF CHARLESTON BOARD OF ARCHITECTURAL REVIEW and THE CITY OF CHARLESTON...Appellants.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. In denying Appellant's demolition application, the BAR acted outside the scope of its authority and its decision was arbitrary and capricious and, therefore, the Circuit Court's Order should be affirmed.

II. As an additional and alternative basis for affirming the Circuit Court's decision, the standards of the City of Charleston Zoning Ordinance for the demolition of structures located in the Old and Historic District are not specific and are so vague and inadequate that they fail to provide notice to applicants or to BAR members of applicable standards to be followed by the BAR in reaching a decision.

III. As an additional basis for affirming the decision of the Circuit Court, the BAR failed to provide a written order pursuant to Zoning Ordinance § 54-240(h).

STATEMENT OF CASE

On November 22, 2010, the City of Charleston Board of Architectural Review ("BAR") heard the application of Respondent Melinda Ballard[1] for after-the-fact approval of the "front entrance door replacement/modifications, front flanking doors modification, window replacement throughout the house, door and window pediments and urns on masonry piers." The BAR issued a verbal decision at the hearing denying her request and never issued a written decision. On December 22, 2010, Respondent filed a petition setting forth her grounds for appeal to the Charleston County Court of Common Pleas in accordance with S.C. Code Ann. § 6-29-900 (2004).

The Circuit Court heard the appeal on July 25, 2011, and, on September 2, 2011, issued its Order ruling against Respondent on all appeal grounds, except that it found that the BAR had failed to identify the alterations to Respondent's house that should be removed and remanded the case to the BAR "for the sole and limited purpose of informing [Respondent] what changes need to be made to her home and allowing her an appropriate time to make/comply with the changes."

On September 19, 2011, Respondent served the Notice of Appeal of that Order. By Order, dated February 3, 2012, the Court of Appeals determined that, because the Circuit Court had remanded the matter to the BAR, that Court's Order was not immediately appealable and could only be appealed after the BAR considered the remand.

On March 28, 2012, the BAR held a hearing on the remanded matter and issued a written Order, dated April 11, 2012. This written order went far beyond the scope of the BAR's jurisdiction following remand. In its Order, the BAR stated that it gave attorneys for the Appellant and the City an opportunity to comment, and "they reiterated to the Board that the

[1] Melinda Ballard died on June 2, 2013. Her estate is defending this appeal. All references to Respondent include both Ms. Ballard and her Estate after her death.

purpose of the hearing was to advise the Owner/Applicant of the modifications needed to be made to her home and the time period within which those modifications be made." Therefore, any finding of fact or conclusion of law beyond that limited scope of remand should not be considered. Respondent timely appealed that decision to the Circuit Court.

Subsequently, Respondent submitted an application to the BAR to allow her to demolish the structure that had been the subject of the previous hearings and orders. On May 23, 2012, the BAR heard this application and, by verbal motion only, denied Respondent's application. Respondent timely appealed that decision to the Circuit Court.

The Honorable R. Markley Dennis, Jr., Circuit Court Judge, consolidated and heard both appeals, and subsequently issued an Order, dated November 13, 2012, reversing the BAR's decision with regard to Respondent's application for a demolition permit and finding the remaining appeal moot. Appellants timely appealed the Circuit Court's Order reversing the BAR's denial of the demolition application.

FACTS

Respondent's house located at 15 Orange Street, in the City of Charleston, was built in 2002. See Transcript of 5/23/12 BAR Hearing, p. 4, ll. 17-18.[2] Although this structure is located in the "Old and Historic District," it is not a historic house and, instead, is totally new construction. T.R.2, p. 4, ll. 1-3. Respondent purchased her residence in April 2004. T.R.2, p. 5, ll. 9-11. The original windows installed were defective and had to be replaced with similar windows in 2005. T.R.1, p. 7, ll. 10-11. The 2005 replacement windows were also defective and allowed water intrusion into Ms. Ballard's house causing extensive water damage. T.R.2, p. 5, ll. 17-25. Respondent installed replacement windows and doors which stopped the water intrusion.

[2] This transcript will hereafter be referenced as T.R.2. The transcript of the hearing held on November 22, 2010 (which is dated March 17, 2011) will be referenced as T.R.1.

T.R.1, pp. 7-8; T.R.2, p. 5, ll. 21-25. Respondent did not obtain approval from the BAR for this work, but, because she did not believe that she was changing the exterior appearance of her house, she did not believe that she needed approval. T.R.1, p. 8, ll. 22-24.

Respondent currently has a lawsuit pending in the Charleston County Court of Common Pleas against a number of defendants as a result of the defective windows and doors and the defective installation of the windows and doors (C/A No: 2009-CP-10-7646).

Respondent took steps to mitigate the damage to her house, including installing the replacement windows and doors and placing other temporary exterior finishes to stop the water intrusion. T.R.1, p. 5, l. 25 to p. 6, l. 14; T.R.2, p. 5, ll. 21-25; p. 6, ll. 6-10. At the BAR hearing on November 22, 2010, Respondent presented her application for "after the fact" approval of the changes that she had made to her house. Several residents gave their positions regarding her application, including one neighbor who stated that the application should be denied, not because the changes were not aesthetically pleasing or did not meet the BAR standards, but solely because she had failed to follow the process. T.R.1, p. 18, l. 17 to p. 20, l. 17.

The BAR issued a verbal decision at the November 22, 2010, hearing denying her request and never issued a written decision. On December 22, 2010, Respondent filed a petition setting forth her grounds for appeal to the Charleston County Court of Common Pleas in accordance with S.C. Code Ann. § 6-29-900 (2004). The procedural history of that appeal is set forth hereinabove.

Despite all measures taken by Respondent to protect and rehabilitate her house, the damage caused by the water intrusion was severe and the cost to replace and repair the damage greatly exceeds the cost to demolish and rebuild the residence. Respondent and her experts have discovered extensive structural damage to rim girders, floor joists, studs, structural beams, and

other building materials, prompting a structural engineer to warn that Respondent's house is at risk of collapse. T.R.2, p. 6, ll. 1-5. Additionally, testing has revealed that toxigenic fungi are present throughout Respondent's house. T.R.2, p. 8, ll. 19-25; p. 9, ll. 1-2.

As a result of the extensive structural damage and mold contamination caused by the water intrusion, Respondent submitted an application to the BAR seeking its approval to demolish her house. In connection with that application, Respondent submitted extensive documentation including, but not limited to:

a. photographs of the extensive structural damage;

b. evidence of the mold contamination, including diagrams showing the many locations the mold has been detected;

c. photographs of all sides of the house and contiguous properties; and

d. a copy of the Respondent's proposed Request for Proposals for Demolition Services which contains a projected schedule for demolition and the scope of work.

See Application for Demolition Permit.

The BAR held a hearing on Respondent's application on May 23, 2012, and, against the recommendation of its staff architect, unanimously denied it without making any findings of fact. Although the BAR's staff architect, Dennis Dowd, AIA, recommended that Respondent's application be approved with certain conditions and pointed out that Respondent's house was not historic, that her documentation was very thorough, and that the potential impact of the demolition on adjacent properties was addressed in Respondent's documentation, the BAR summarily denied her application. T.R.2, p. 18, ll. 20-25; p. 19, ll. 18-25; p. 20, ll. 7-19, 25; p. 21, ll. 1-3; p. 24, ll. 21-25; p. 25, ll.1-6. The BAR has never issued a written order or any other

written notice to Respondent in direct contravention of Zoning Ordinance 54-240(h) ("In case of disapproval, the Board of Architectural Review shall state the reasons therefore in a written statement to the applicant…"). See Dennis Order, p. 4.

Respondent appealed to the Circuit Court. The two appeals were consolidated and after a hearing on both, the Honorable R. Markley Dennis, Jr., issued his Order reversing the BAR decision with regard to the demolition permit and finding the first appeal moot. Appellants filed a timely appeal of the reversal of the BAR's denial of the demolition application.

ARGUMENT

STANDARD OF REVIEW

On appeal, the findings of fact by a zoning board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6–29–930 (Supp. 2011). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Restaurant Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Id.

I. In denying Appellant's demolition application, the BAR acted outside the scope of its authority and its decision was arbitrary and capricious, so that the Circuit Court Order should be affirmed.

The BAR's denial of Respondent's application to demolish her hazardous and structurally unsound house is unlawful and exceeds the power granted to the BAR. The BAR only has those powers as granted by the zoning ordinance. See S.C. Code Ann. § 6-29-880 ("The board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance."). The zoning ordinance provides that the BAR may deny an application to demolish a structure within the old and historic district in two situations:

1. When, in the opinion of the BAR, demolition would be "detrimental to the interests of the old and historic district and against the public interests of the city," see Zoning Ordinance § 54-240(c); or

2. If it determines the structure is "of such architectural or historical interest that the removal will be detrimental to the public interest." See Zoning Ordinance § 54-240(j).

No other grounds for denial of an application for the demolition of a non-historic structure within the BAR's jurisdiction are provided by the Zoning Ordinance. Neither of those situations is present in the current matter, and the BAR did not make any findings of fact in support of either one of these situations. As discussed below, the BAR failed to even issue a written Order setting forth any findings. However, a review of the transcript from the hearing makes it abundantly clear that neither of the two grounds for denying a demolition permit is present and that the evidence and testimony elicited at the hearing do not support the BAR's denial.

Various neighbors and citizens testified at the hearing. However, this testimony was largely speculative and irrelevant to the factors required to be considered by the BAR. For example, Mr. Gurley, a representative from the Preservation Society of Charleston, testified that he was concerned that allowing demolition of Respondent's home due to the mold damage would set an unfavorable precedent, prompting the owners of historic homes to also seek demolition on the basis that mold is present in their homes. T.R.2, p. 11, ll. 2-8. While this concern may be classified as going to the public interest, Dennis Dowd, the BAR's staff architect, clearly stated during the hearing that the BAR staff was "not concerned" about the Preservation Society's concerns as to precedent. T.R.2, p. 19, ll. 20-25. Mr. Dowd explained that each application had to be viewed and acted upon individually. T.R.2, p. 19, l. 25; p. 20, l. 1.

Mr. Gurley and several others also testified that they were concerned about what would be rebuilt on the site if demolition was permitted. T.R.2, p. 11, ll. 9-11, p. 13, ll. 4-7. In fact, in their Initial Brief, Appellants state: "Even where the BAR allows a structure to be demolished, it is typically conditioned on approval of a replacement structure..." (App. Initial Brief, p. 8).

However, the Zoning Ordinance does not permit this practice. The neighbors' and board members' concerns about what might occur after demolition are speculative and it was not proper for the BAR to consider such concerns as part of its deliberations. Mr. Dowd acknowledged as much when he stated that the Zoning Ordinance does not allow the BAR to defer its decision on the application until it knows what will happen post-demolition and that the BAR is also not permitted to "condition [approval] upon what may happen in the future." T.R.2, p. 11, ll. 2-6.

Several neighbors testified that they were concerned that Respondent had failed to adequately explain how their homes and street would be protected if demolition were to take place. T.R.2, p. 12, ll. 11-15; p. 13, ll. 23-25; p. 16, ll. 9-11; p. 17, ll. 1-12. In their Brief, Appellants speculate that "[i]t is a major undertaking to demolish an over 5000 square foot brick home on a historic, narrow, one-way street with historic structures both on the property and immediately adjacent to it" and that it would be "a major construction project causing disruption of the street and heavy equipment that will potentially harm the surrounding structures." (App. Initial Brief, pp. 4, 7). Of course, these same circumstances were present when the house was constructed in 2002. Regardless, not only is there no evidence to support the BAR's speculations, the record establishes that the demolition would not adversely affect surrounding properties. See Application for Demolition Permit. Mr. Dowd, the BAR's staff architect, explained this to the BAR by stating that Respondent's application and supporting documentation was "very thorough" and did "a pretty good job actually of, you know, addressing potential concerns of surrounding property owners." T.R.2, p. 18, ll. 21-22; p. 20, ll. 7-19.

The reasons given by the members of the BAR to reject the staff architect's recommendation and to support their votes to deny the application are no less speculative or

arbitrary. As stated hereinabove, the scope of the BAR's discretion in its consideration of Respondent's application is limited by the Zoning Ordinance to a determination of whether demolition would be "detrimental to the interests of the old and historic district and against the public interests of the city," and whether the structure is "of such architectural or historical interest that the removal will be detrimental to the public interest." See Zoning Ordinance § 54-240(c) & (j). BAR member Wertimer opined that they needed "more substantial evidence of the imminent danger that this structure poses to life." T.R.2, p. 22, ll. 14-17. The Zoning Ordinance does not give the BAR the authority to deny a demolition application if an applicant does not prove that the structure at issue is deadly. BAR member DeMarco, after conceding that he is not an engineer, opined that Respondent should be required to "reinforc[e] the structure so it doesn't collapse and fix what they need to fix." T.R.2, p. 22, ll. 22-23; p. 23, ll. 1-2. The Chair of the BAR and member White both also opined that Respondent should just "fix" her home. T.R.2, p. 23, ll. 17-19; p. 24, ll. 15-19. The evidence presented by Respondent clearly establishes that "fixing" the structure, even if possible, would be far more of an undertaking than demolishing it. The BAR's reliance on its members' subjective and uninformed opinions that Respondent should "fix" her house rather than demolish it was misplaced, arbitrary, and capricious. Moreover, it goes beyond the authority granted to the BAR by the Zoning Ordinance and therefore constitutes an abuse of discretion. Member DeMarco did say that he's "always liked the design of the house. It's elegant in its simplicity and to lose that I think would be a shame." T.R.2, p. 23, ll. 5-7. Additionally, member Harrison opined that Respondent's home "is one of those prime examples of a Randolph Martz design." T.R.2, p. 21, ll. 22-23. These statements of opinion fall short of establishing that Respondent's non-historic, structurally unsound house is of such architectural or historical significance that its demolition would be detrimental to the public interest. A review of

the transcript makes it clear that the real motivating factor behind the BAR's denial of Respondent's demolition application is the desire to punish Respondent for what the BAR perceives as her past transgressions. A neighbor present at the BAR hearing repeated the phrase: "Where the law ends, tyranny begins." Respondent could not agree more. Here, the BAR has absolutely ignored the legal scope of its review and authority and has grossly abused its power. Even its staff architect, Mr. Dowd, recommended that the BAR approve Respondent's application. T.R.2, p. 20, l. 25; p. 21, l. 1.

In Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), a landowner sought review of the City of North Augusta Board of Zoning Appeals' (BZA) denial of a special exception request to sell fireworks. The landowner argued the BZA acted outside the scope of its authority, and its decision was arbitrary, capricious, and violated Appellants' right to equal protection. During the BZA hearing, fourteen residents of nearby residential neighborhoods testified against the special exception. Residents' concerns included increased traffic, decreased property values, and a negative image of the community due to multiple fireworks retailers in the same area. At the conclusion of the BZA hearing, the BZA voted unanimously to deny the request, finding that it was "not in harmony with nearby residential developments" and would have "a detrimental impact on existing and proposed residential development in the area." Pursuant to section 18.4.5.4.3(b) of the applicable Zoning Code, the BZA was required to evaluate permits for special exceptions on the basis of the following criteria:

> 1. That the special exception complies with all applicable development standards contained elsewhere in this Chapter and with the policies contained in the Comprehensive Plan. (Rev. 12–1–08; Ord.2008–18)
>
> 2. That the special exception will be in substantial harmony with the area in which it is to be located.

> 3. That the special exception will not discourage or negate the use of surrounding property for use(s) permitted by right.

On appeal, the landowner contended the BZA's decision to deny their special exception was based solely on opinion and conjecture. The BZA argued the residents' sworn testimony regarding the detrimental change in character to the neighborhood by the proliferation of fireworks stores, the decreased property values of the residential homes in the area, and the negative impact on future residential growth was ample evidence to the support the BZA's decision. The Court disagreed, finding the BZA's decision to be arbitrary and capricious:

> Regarding the third criterion, the BZA determined the special exception would not discourage or negate the use of the commercially zoned property immediately surrounding the property, but would have a detrimental impact on existing and proposed residential development. At the hearing, residents testified as to their concerns regarding the proposed fireworks business. These concerns included an increase in traffic, a decline in property values, and a detrimental impact on the character of the surrounding area. The testimony proffered was based on speculation and opinion. Although property owners can generally testify as to the value of and damage to their own property, here only one of numerous witnesses addressed the special exception's effect on property value. Moreover, the property owner did not testify about his specific parcel but rather testified broadly about the undesired fireworks store's possible effect on the neighborhood's home values as a whole. This testimony was not competent to support the denial of the special exception.

Additionally, the Court noted that while there was testimony that residents felt the fireworks business would increase traffic, they failed to offer any competent, non-conjectural evidence to support their opinions. The Court reversed the circuit court's decision to affirm the BZA because "the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony."

In the present matter, just as in Wyndham, the decision of the BAR is vague, unspecific, arbitrary and capricious and is without legal or factual support and therefore constitutes an abuse of discretion and is patently unlawful. Although there are no findings of fact, the BAR's decision

was presumably based on opinion and speculation testimony and was a reaction to public comments that brought up the prior application of Appellant to make changes to the exterior of her residence. The BAR considered matters outside of those that it was permitted to consider pursuant to the Zoning Ordinance and State law, failed to consider the very relevant and thorough evidence presented by Appellant, and failed to base its decision on competent, substantial, and material evidence.

The decision of the Circuit Court should be affirmed and this Court should remand the case to the BAR with the specific direction that it grant Respondent's application for a demolition permit.

II. As an additional and alternative basis for affirming the Circuit Court's decision, the standards of the City of Charleston Zoning Ordinance for the demolition of structures located in the Old and Historic District are not specific and are so vague and inadequate that they fail to provide notice to applicants or to BAR members of applicable standards to be followed by the BAR in reaching a decision.

The Ordinance establishing the BAR is unconstitutional due to its failure to set reasonable standards to be followed by the BAR in passing upon demolition applications. In determining whether or not to approve an application for demolition, the Zoning Ordinance requires only that the BAR decide whether demolition would be "detrimental to the interests of the old and historic district and against the public interests of the city," and whether the structure is "of such architectural or historical interest that the removal will be detrimental to the public interest." See Zoning Ordinance § 54-240(c) & (j). The Zoning Ordinance fails to define the material terms of this section and further fails to provide any guidance to applicants or BAR members with regard to what are legitimate considerations of the BAR when reviewing such demolition applications.

In Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (S.C. 1997), the S.C. Supreme Court discussed the enactment of architectural review board ordinances:

> Ordinances, such as the CAB Ordinance, are a valid exercise of a municipality's authority. Municipalities are granted broad police powers to enact ordinances with respect to any subject which appears necessary and proper for the security, general welfare and convenience of the municipality.... This authority includes the power to enact regulations based on aesthetic considerations.... Municipalities are also granted broad zoning and planning powers.... Further ***a municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards***....
>
> A strong presumption exists in favor of the validity and application of zoning ordinances.... In the context of zoning, a decision of a reviewing body ... will not be disturbed if there is evidence in the record to support its decision.... A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.... However, a decision of a municipal zoning board will be overturned if arbitrary.... Further, "the decision of the zoning board will not be upheld where it is based on errors of law, ... or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, ... or where, in general, the board has abused its discretion." ... ***When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary***.... "The concept of vagueness or indefiniteness rests on the constitutional principle that ***procedural due process requires fair notice and proper standards for adjudication***."... [Emphasis added.]

327 S.C. at 234-35, 489 S.E.2d at 632-33 [citations deleted.]

The City of Charleston has delegated the administration of its historic preservation ordinances to its Board of Architectural Review, but it has failed to limit the BAR's discretion by clear rules and standards. Instead, the BAR members have boundless and unfettered discretion to decide, in their own subjective opinions, what the "public interest" requires insofar as demolition and what constitutes "architectural and historical interest."

In Schloss Poster Advertising Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392, 394 (1939), the South Carolina Supreme Court held:

> It seems to us clear upon authority and reason that if an ordinance is passed by a municipal corporation, which upon its face restricts the right or dominion which the individual might otherwise exercise over his property without question, not according to any general or uniform rule, but so as to make the due enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of city authorities who may exercise it so as to give exclusive profits or privileges to particular persons.... [Citations deleted].
>
> The ordinance before us is in no sense a zoning ordinance as provided in [the State code] nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.
>
> The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes no uniform rule upon which the special permission of the city is to be granted. Thus the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, the two are applying for precisely the same privileges under the same circumstances. The danger of such an ordinance is that it makes possible arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications whatever, other than the unregulated arbitrary will of the city authorities as the touchstone by which its validity is to be tested. Ordinances which thus invest a city council with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured....

The City of Charleston has violated the holdings of the Supreme Court in enacting a zoning ordinance which restricts a property owner's right to construct, modify or demolish his/her building if it is located within a certain designated district without providing strict standards to be followed by the BAR members. The Ordinance provides no standards, specific or general, to the BAR, which makes decisions solely based on its members' subjective opinions.

The City of Charleston Zoning Ordinance establishing the Board of Architectural Review is unconstitutional as written without any specific standards for the members of the BAR to

apply and should be declared to be void and invalid. Based on the unconstitutionality of the ordinance, this Court should affirm the decision of the Circuit Court.

III. As an additional basis for affirming the decision of the Circuit Court, the BAR failed to provide a written order pursuant to Zoning Ordinance § 54-240(h).

In contravention of Zoning Ordinance § 54-240(h), the BAR failed to provide Respondent with a written statement giving the reasons for its decision. Rather, the BAR filed the "record," which only included the transcript of the hearing and the documents filed by Respondent in support of her demolition application. S.C. Code Ann. § 6-29-930 (2004) provides the standard of review for an appeal from a municipality's architectural review board:

> [T]he resident presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on ***the certified record of the board proceedings***. The ***findings of fact*** by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter ***must be remanded to the board of architectural review for rehearing***. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law. [Emphasis added].

This section specifically requires the BAR to make "findings of fact." However, in this case, the BAR made no findings of fact so they cannot be "final and conclusive on the hearing of the appeal."

In Porter v. South Carolina Public Service Commission, 333 S.C. 12, 21-22 n. 3, 507 S.E.2d 328, 332-333 n. 3 (1998), as cited in Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 567-68, 641 S.E.2d 24, 28 (2007), the South Carolina Supreme Court established the requirement for administrative agencies when presenting their findings:[3]

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[3] Although Porter addressed the factual findings of the Public Service Commission, the South Carolina Supreme Court found "it applicable to all administrative agencies" in Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 641 S.E.2d 24, 28 n. 1 (2007).

> An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Where material facts are in dispute, the administrative body must make specific, express findings of fact. An administrative agency is not required to present its findings of fact and reasoning in any particular format, although the better practice is to present them in an organized and regimented manner.... We occasionally have upheld [administrative] orders which were conclusory in nature. We did so in years past because no statute explicitly required an administrative agency to make specific findings of fact or state its reasoning as a predicate for judicial review – although we have long believed that is the better practice.... [S]tatutes and our precedent require an administrative agency to make specific findings of fact and explain its rationale in sufficient detail to afford judicial review.

As further explained in Porter and Lee County, "courts will not *sua sponte* search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets forth the agency's findings of fact and reasoning." Id.

In Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 486, 536 S.E.2d 892, 895 (Ct. App. 2000), the plaintiff, Vulcan, applied for a Certificate of Occupancy for a Nonconforming Use from the Greenville County Board of Zoning Appeals (BZA). The Greenville County Zoning Administrator denied Vulcan's application and Vulcan appealed the denial to the BZA, which held a full hearing into the matter on July 16, 1997, and on August 13, 1997, at which time it voted to uphold the denial of the Certificate. The Greenville County Code Enforcement Officer informed Vulcan of the Board's decision to uphold the denial of the Certificate of Occupancy in a letter dated August 18, 1997. Vulcan appealed the BZA's decision to the circuit court on September 17, 1997. After Vulcan filed its appeal, the BZA's chairman and secretary issued a document which purported to be the Board's "Final Decision and Order" in this matter. The document was dated October 23, 1997, and signed by the chairman and secretary. The circuit court rejected the October 23, 1997, letter because: (1) there was no evidence that the "four members of the Board who voted against Vulcan considered or assented

to the October document," (2) the "October Document ... [was] materially different from the decision set forth in the August transcript," and (3) "the August transcript sets forth the decision of the Board in its entirety, and this was confirmed in writing on August 18, 1997." In that case, instead of using the letter as the final decision, the circuit court utilized the BZA hearing transcript as the final decision of the BZA.

On appeal, the BZA argued that the circuit court erred in using the transcript. The Court of Appeals noted that, in the context of such hearings, "the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case." Id. at 494, 536 S.E.2d at 899 (citations omitted). In reviewing the transcript, as confirmed by the letter dated August 18, 1997, the Court found that it "was a writing and contained findings of fact and conclusions of law separately stated" and therefore "the trial court did not err in viewing the August transcript as the Board's final decision." Id. at 495, 536 S.E.2d at 899

In the present matter, the BAR has to use the hearing transcript as its "final decision," because there is nothing else in writing. However, unlike the transcript in Vulcan, the transcript from the Ballard BAR hearing does not contain findings of facts or any conclusions of law. There are simply no findings, rendering the transcript unsuitable for consideration as the BAR's "final order."

The BAR, acting as a body, made no findings of fact with regard to Respondent's application to demolish her house and its denial thereof. S.C. Code Ann. § 6-29-920 requires the BAR to file with the Court "the decision of the board including its findings of fact and conclusions." The BAR has failed to file any such decision. Because of this failure to abide by this statutory requirement, there is no way for the Court to determine the basis or propriety of the

BAR's decision in this matter. Because there was no evidence before the BAR upon which it could base any findings to support its decision, the Circuit Court's Order must be affirmed.

CONCLUSION

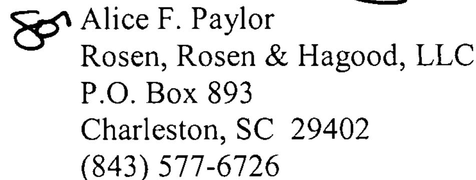
As set forth above, the BAR acted outside the scope of its authority in denying Respondent's application for a demolition permit and its decision was arbitrary, capricious, and without legal or factual support.

Additionally, the City of Charleston Zoning Ordinance fails to provide specific standards to be followed by applicants or BAR members in their decision making actions, the Ordinance is unconstitutional, and the BAR's actions in failing to approve Ms. Ballard's applications for changes to her house as well as for demolition are, therefore, not valid.

In the alternative, the City of Charleston BAR failed to comply with the City of Charleston Zoning Ordinance and the requirements of state law in denying Ms. Ballard's applications. Therefore, the decisions of the City of Charleston Board of Architectural Review were not valid.

Therefore, the decision of the Circuit Court should be affirmed.

Respectfully submitted,



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