

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001530

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SC Court of Appeals

Thomas S. Tisdale, Park R. Dougherty
and Martha T. Dougherty..... Appellants,

v.

City of Charleston, City of Charleston Board
Board of Architectural Review, Eugene M. Woodard
and Janice S. Woodard..... Respondents.

JOINT INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did Circuit Court correctly affirm the BAR's decision, where the BAR's decision was not incorrect as a matter of law, the BAR did not abuse its discretion, and the BAR's decision was fully supported by the evidence in the record?

- II. Did the Circuit Court correctly reject Appellants' argument that the decision should be reversed because the BAR failed to address one of the grounds for deferring the application at the initial meeting, where the BAR commented the Applicant should reconsider an aspect of the design and the record shows it was reconsidered and even modified?

STATEMENT OF THE CASE

Respondents Eugene M. Woodard and Janice S. Woodard (The "Woodards"), are the owners of 107 King Street Charleston, South Carolina 29401 (the "Property" or "107 King"). The Woodards applied to Respondent Charleston Board of Architectural Review ("BAR") for conceptual approval of a small addition to the rear of the existing house on the Property. **(BAR Application dated 9/17/15)**. The matter came before the BAR at the September 9, 2015 meeting. **(BAR Tr. 9/9/15)**. At that meeting, the BAR received comments from staff and the public. Its members also made comments on the application, deciding to defer decision to a later meeting. **(BAR Tr. 9/9/15 44:13-45:11)**.

In response to the BAR's comments from the September 9, 2016 meeting, the Woodards modified their design. The revised design was reviewed by the BAR at its meeting on October 14, 2015. **(BAR Tr. 10/14/15)**. The BAR granted conceptual approval by a vote of 4-2. **(BAR Tr. 10/14/15 52:22-53:17)**.

Appellants Thomas S. Tisdale ("Tisdale") and Park R. Dougherty and Martha T. Dougherty (the "Doughertys") (collectively, "Appellants"), owners of 109 Broad Street and 111 Broad Street, respectively, filed an appeal from the BAR's decision granting conceptual approval. **(Petition and Appeal from the Board of Architectural Review)**.

The Circuit Court heard the appeal on March 30, 2016 and issued an Order affirming the decision of the BAR on May 4, 2016. **(Tr. 3/30/16); (Order)**. Appellants filed a Motion to Alter or Amend, which was denied by Order dated June 14, 2016. **(Motion to Reconsider); (Form 4 Order dated 6/14/16)**. Appellants filed a Notice of Appeal and this appeal followed. **(Notice of Appeal filed 7/21/16)**.

FACTS

The Woodards are the owners of 107 King, which was formerly a kitchen house to 109 Broad Street. **(9/9/15 BAR Tr., 3:10-13, 4:13-16)**. An addition was added to the structure at 107 King in the 1960s. **(9/9/15 BAR Tr. 8:16)**. Additions on the rear side of structures in this area of the peninsula are very common and consistent with the character of the neighborhood. See **(9/9/15 BAR Tr. 9:13-13-21)** (Woodards' architect discussing the character of the area and additions to other structures).

The Woodards applied to City of Charleston Board of Architectural Review ("BAR") to demolish the 1960s addition and replace it with a new, larger addition. **(BAR Applications dated 5/5/15)**. The demolition of the existing addition was approved and the Woodards applied to the BAR for conceptual approval of the new addition. **(BAR Application dated 9/17/15)**. With the proposed addition, the size of the entire house, inclusive of the addition, would be approximately 2000 square feet. **(9/9/15 BAR Tr. 6:21-24)** (Epps: "With the work that we're proposing to do, the total package, so to speak, is I think right around 2,000 square feet. Even with the addition by any standard, it's a modest endeavor."). The proposed addition included a window system on the west elevation, which Appellants find to be "the most offensive and most disputed architectural feature of the proposed addition" **(Appellants' Initial Brief, 19)**.

The matter first came before the BAR at its September 9, 2015 meeting. (**BAR Tr. 9/9/15**). At that meeting, BAR staff member and architect Dennis Dowd presented the application. (**BAR Tr. 9/9/15 3:4-4:8**). In his presentation, Mr. Dowd explained the request for conceptual approval for new construction of a rear addition and modifications to an existing structure. (**9/9/15 BAR Tr. 5-7**).¹ In his presentation, Mr. Dowd showed the board a view, without vegetation, from every angle: looking west from King Street, looking northwest from King, looking south through the piazza and driveway of 109 Broad Street, and looking east from Orange Street. (**9/9/15 BAR Tr. 3:14-4:1**).

The Woodards' architect, Robert Epps ("Mr. Epps"), presented the plans for the addition. (**9/9/15 BAR Tr. 8:12-10:5; 27:22-31:11**). As part of his presentation and in response to comments, he explained that the proposed addition was less than the maximum size allowed under the zoning ordinance and had a much larger setback than required by the zoning ordinance. (**9/9/15 BAR Tr. 5:4-12**) ("So, as you can see, even as modest as the property is, the Woodards did not design to the max, that is, what would be permitted. And even considering that the difference between the proposal and the max totals out to about 300 square feet, you can, I think, appreciate the fact that, on a house this small, giving up 300 square feet is no minor act on the part of the Woodards."); **29:1-4** ("the zoning ordinance governing the development of property says that the setback going back to 111

¹ The City of Charleston follows a 1-4 rating system with Category 1 being structures which are Exceptional and must be preserved at all costs to Category 4 which are buildings of architectural value without which the character of buildings in groups 1-3 would be lessened. The Woodards property and the Appellants properties are not rated. See City of Charleston Ordinance 54-235 (rating system); (**9/9/15 BZA Tr. 3:7-9 & 5:19-25**) ("Now just so you know, 109 [the Tisdale house] is not a rated structure. 111 [the Daugherty house] is not a rated structure. 107 is not a rated structure, nor is 105 a rated structure. In fact, we've had 107 inspected as to its historic fabric. And what we have been told is that virtually all the historic fabric has, in fact, been removed from the house.")

is only three feet. We're 25 feet away from that setback"). He also explained that the design was specifically tailored, with the masonry addition corresponding to the plane of the porch at 109 Broad, to respect the view corridor from 109 Broad street. (9/15/15 BAR Tr.15:14-18) ("what we have tried to do because of the view down from the corridor of 109 Broad Street, we wind up the masonry work to correspond to the plane of the porch of 109 so that view corridor will remain intact.").

Mr. Epps also showed the board what aspects of the proposal would be visible from the right-of-way. He utilized visual aids illustrating the view from King Street, Board Street and Orange Street. (9/9/15 BAR Tr. 6:25-7:15; 8:16-9:12).

Appellants and others spoke in opposition to application. (9/9/15 BAR 9/9/15 Tr. 11:9-27:16). The opposition comments were based upon their dislike of the aesthetic aspects of the design. They expressed their personal opinions that the design was not in harmony with the neighborhood because the design did not look like it was from the early days of Charleston. Appellants preferred a garden rather than the proposed addition, and were upset that they would be able to see some of the addition from King, Broad, or Orange Streets. See generally, (9/9/15 Tr. 11:9-27:16); see specifically as to Appellants, (9/9/15 BAR Tr. 11:23-12:7 (Mr. Dougherty: "Regarding the matter of the visibility matter that Mr. Epps mentioned, what he failed to mention is there's a beautiful garden there today that, in other words, filling it up with this large addition would fill up a garden. So the view today -- you will see it in the pictures that I've provided. You'll see some photographs that show you the view that we have today of this structure. And it's vastly superior, I would say, to the proposed structure."); 14:7-8 (Mr. Tisdale: "And it really should be upsetting to the City of Charleston because it disrupts history."); 18:11-20 (Mrs. Dougherty: "I also

want to point out that Charleston is not just a bunch of structures, historic buildings. It's also gardens. If everybody built a huge structure in the back of their garden, what would downtown Charleston look like? What would the historic aspect be of all these huge houses piled together, lumped together, trying to preserve the original historic, and then lump sum another structure next to it. And you filled up the whole space of the lot with structure.”).

In response, Mr. Epps explained that modern and contemporary architecture is not prohibited by the City Ordinances and “[t]here’s nothing in the BAR ordinance or standards that says any proposal you work has to be neo-traditional or do-it-yourself history or whatever way you want to phrase it. In fact, it says that modern architecture and traditional architecture should receive the same fair judgment. . .” (9/9/15 BAR Tr. 29:22-30:2).

Mr. Dowd, recommended that the BAR defer the application, mainly on the basis that certain technical submittal requirements needed to be completed prior to full approval. (9/9/15 BAR Tr. 35:14-17) (“We’re going to recommend deferral, and it’s mainly for submittal requirements. Also, we think perhaps the height scale and mass should be studied a little further.”). As part of the recommendation, Mr. Dowd specifically noted that the Woodards and their architect had done several things to make the plan appropriate, discussed what issues supported his recommendation for deferral, and reminded the board which aspects of the proposal would be visible from the public right of way:

I think there are essentially three issues to consider here; the issue of visibility, the issue of submittal requirements and the issue of preservation standards and appropriateness of the proposal.

In terms of visibility, it is visible from the north through the piazza of 109 Broad. It is visible from the west, from Orange Street above the six-foot high wall and without vegetation. And it is partially visible from King Street.

* * *

The Charleston standards, which are based on the national preservation standards require that additions to historic structures be differentiated from the original. And I don't think anybody could argue that's not the case with this proposal. The exception of that being the proposal to paint the addition brick white to match the existing, which really would not be appropriate. There are some things that Mr. Epps has done here in developing the plan that works well. He's got some step-backs in plan and transitional hyphens that are good moves, I think, to differentiate from the original house.

Perhaps the addition could be a little less contrasting stylistically and still achieve differentiation.

(9/9/15 BAR Tr. 33:15-24; 34:23-35:13).

The BAR voted to defer decision on the application. **(9/9/15 BAR Tr. 44:13-45:11; 45:10).** The motion for deferral, made by board member Wallace and seconded by board member White was as follows:

MR. WALLACE: I move for deferral based on staff comments one through five; based on the fact that the addition could possibly be smaller. It needs to be reconsidered for the total footprint of the addition and that it possibly could be slightly less tall as well.

And that the architecture, while it can be contemporary, should reconsider especially the window wall in the rear of the building.

(9/9/15 BAR Tr. 44:13-21).

In response to the BAR's comments from the September 9, 2016 meeting, the Woodards modified the plans for the addition. The revised design was heard by the BAR at its meeting on October 14, 2015. **(10/14/15 BAR Tr.).** At the October 14, 2016, Mr. Dowd again showed the views from King, Broad, and Orange Street. **(10/14/15 BAR Tr. 2:21-25; 4:13-16).** Mr. Dowd reminded the board of the reasons the application was deferred, of staff's prior comments, and of the boards prior comments. **(10/14/15 BAR Tr. 4:4-8; 4:9-5:5; 5:6-19).**

Mr. Epps then presented the revised plans that addressed the concerns raised at the last meeting. He also specifically addressed the comments about the style of the addition by showing examples of other similar additions or structures on the Charleston peninsula. **(10/14/15 BAR Tr. 6:1-12:6)**. Specifically, as to the bay window, Mr. Epps explained that in the revised plan less of the addition was visible from the right of way because the building had been moved back several feet and the glass in the bay window had been reduced by one third. **(10/14/15 BAR Tr. 10:3-7)** (explaining that the height had been reduced and the addition pulled back in so that less of it was visible from King Street); **(10/14/15 BAR Tr. 10:16-20)** (“we moved the building back in several feet, and we reduced the glass in the bay window by one-third so that the bay window itself doesn’t protrude out any farther than the piazza of 109 Broad.”). After the reduction in size, repositioning, and reduction in glass, the proposed addition would be 130 feet from Orange Street and 90 feet from Broad street. **(10/14/15 BAR Tr. 9:8-9)**.

Again, at the second meeting, Appellants and others spoke about their distaste for the design or voiced other complaints. See **(10/14/15 BAR Tr. 14:10-15:21)** (Mr. Dougherty discussing his distaste for the size and design of the addition); **16:14-18:25** (Mr. Tisdale arguing that the addition should not be approved because it has not been designed to look like the existing buildings in the area); **19:20-22:16** (Mrs. Dougherty arguing among other things that “[t]he historic character of the property should be retained and preserved.”).

Staff recommended conceptual approval and the BAR granted conceptual approval by a vote of 4-2. **(10/14/15 BAR Tr. 39:12-14; 52:22-53:17)**. Each of the 4 members who voted in favor of conceptual approval explained their reasoning in some detail. **(10/14/15**

BAR Tr. 43:23-46:7 (Board Member White); 46:8-47:15 (Board Member Harrison); 47:16-49:10 (Board Member Wallace); 49:11-50:10 (Board Member Alexander).

On November 13, 2015, Appellants filed their appeal of the BAR's decision granting conceptual approval. (**Petition and Appeal from the Board of Architectural Review**). The Circuit Court heard the appeal on March 30, 2016 and issued an Order affirming the decision of the BAR on May 4, 2016. (**3/30/16 Tr.**). At the hearing Appellants' counsel made the same arguments now on appeal.

In a written order denying the appeal and affirming the decision of the BAR, the Circuit Court rejected Appellants' primary argument, i.e., that the BAR applied a relaxed standard because only portions of the proposed addition would be visible from the right of way. (**Order**). The Court explained that there was no actual proof in the record of any "relaxed" standard of review. (**Order, 4**). The Court went on to explain that the comments relied upon by Appellants in fact did not show the BAR applied a relaxed standard. Instead the comments cited by Appellants were completely consistent with the BAR's limited jurisdiction to review only visible features of structures:

Appellants direct the Court's attention to various passages of the transcript where the limited visibility of the structure from the public ways is discussed. Appellants also point to a discussion between several individuals including a board member and the project architect regarding the structure not being appropriate on Broad Street. As noted above, this Court must review the decision of the Board the same as a jury verdict. *The Court is not persuaded these references prove the Board was applying a relaxed visibility standard. Because the Board's jurisdiction is limited to portions of a structure that are visible, it seems reasonable to discuss how much or little of the structure is visible.* Likewise, the Board is within its rights to discuss how a structure might be appropriate for one location, but not for another. Further, the comment of one Board member during the debate and discussion of a project does not fatally undermine the decision of the Board. These passages do not constitute adequate proof the Board applied the incorrect standard or considered improper evidence.

(Order, 4-5) (double emphasis added). Appellants filed a Motion to Alter or Amend, which was denied by Order dated June 14, 2016. **(Motion to Reconsider); (Form 4 Order dated 6/14/16).** Appellant filed a Notice of Appeal and this appeal followed. **(Notice of Appeal filed 7/21/16).**

STANDARD OF REVIEW

The standard of review from the BZA is provided by statute. Specifically, on appeal from a Board of Architectural Review, “[t]he findings of fact by the board . . . are final and conclusive . . . and the court may not take additional evidence.” S.C. CODE § 6-29-930. “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.*” Id. (emphasis added).

The standard of review on appeal to this Court, is the same as that of the trial court. See Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct.App.1988) (holding the appellate court will not reverse the circuit court's affirmance of the board unless the board's findings of fact have no evidentiary support or the board commits an error of law). Therefore, the Court should act only in those situations where the BZA has abused its discretion by committing errors of law or bases its decision on findings of fact which are not supported by the evidence. See Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (S.C. App. 2005); See also, Gurganious v. City of Beaufort, 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995).

In Gurganious, this Court affirmed that a decision of a board of architectural review, similar to a decision of a board of zoning appeals, may be reversed only if unsupported by the evidence or clearly erroneous, or if its decision is not fairly debatable but is instead arbitrary and an abuse of discretion. See Gurganious, at 486, 454 S.E.2d at 915 (“To the

extent the BOARD's decision is unsupported by the evidence or is clearly erroneous, its decision is not fairly debatable but is instead arbitrary and an abuse of discretion.”). As such, the findings of fact by a board of architectural review shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. See S.C. Code Ann. § 6-29-930; Austin v. Board of Zoning Appeals, Town of Hilton Head Island, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405-6, 552 S.E.2d 42, 44 (Ct. App. 2001). In this regard, it is well-settled that “the factual findings of the jury will not be disturbed unless a review of the record discloses that there is *no evidence* which reasonably supports the jury’s findings.” Vulcan Materials Co. v. County of Greenville, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000) (emphasis in original) (citations and internal quotation omitted).

Further, the court’s review is “strictly limited to the facts and arguments raised to the board. Indeed, the circuit court is expressly forbidden from considering any new facts.” Austin, at 38, 606 S.E.2d at 214. Additionally, “[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 County, 355 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (citation omitted).

ARGUMENT

I. The Circuit Court correctly affirmed the BAR's decision, because the BAR's decision was not incorrect as a matter of law, the BAR did not abuse its discretion, and the BAR's decision was fully supported by the evidence in the record.

a. The Circuit Court correctly affirmed the BAR decision based upon the certified record on appeal.

The record clearly establishes that the BAR did not violate any of the governing ordinances, and the Circuit Court correctly affirmed its decision granting conceptual approval. The Appellants' disagreement with the decision of the majority and its refusal to apply their personal aesthetic opinions does not provide a basis for reversal.

The City of Charleston zoning ordinance provides specific direction to the BAR in its review of applications for the alteration of an existing structure.

In passing upon an application to demolish, or demolish in part, or remove, or alter the exterior architectural appearance of any existing structure, the Board of Architectural Review shall consider, among other things, the historic, architectural and aesthetic features of such structure, the nature and character of the surrounding area, the use of such structure and the importance to the city.

* * *

Among other grounds for considering a design inappropriate and requiring disapproval and resubmission are the following defects: Arresting and spectacular effects, violent contrasts of materials or colors and intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, the absence of unity and coherence in composition not in consonance with the dignity and character of the present structure (in the case of repair, remodeling or enlargement of an existing structure) or with the prevailing character of the neighborhood (in the case of a new structure).

Charleston Zoning Ordinances 54-240(b) & (i).

A separate ordinance restricts the BAR's review of an application to the exterior architectural appearance of the proposed structure that is visible from the public right of

way. See e.g., Charleston Zoning Ordinances, 54-232; 54-231 (defining “exterior architectural appearance” as “the type and character of all windows, doors, light fixtures, signs and appurtenant elements, visible from a street or public thoroughfare.”).

In the present case, the BAR carefully considered the exterior architectural appearance of the proposed addition. In fact, the BAR deferred the initial application and encouraged the Woodards to reconsider certain aspects of the exterior architectural appearance. The Woodards and the architect converted the feedback from the first meeting into a revised plan that contained several modifications to the initial design, including a reduction of the amount of glass in the west elevation window system.

It is clear from the arguments and reasoning of the board members that the majority properly applied the standards in the above ordinances in granting conceptual approval. Each of the board members who voted in favor of approval offered comments on the exterior architectural appearance and the relevant considerations from section 240. For example, Board Member White discussed his view of the relationship of the proposed design to the surrounding area:

[Board Member] White: You know, harmony is a big consideration an orchestra is made up of a lot of instruments that are so different from one another, and yet they still can react in harmony. It's not all just violins. Within this one image . . . we have from 109 Broad to 107 Broad . . . and then 107 King and 105 and 105-1/2 King. You have about 150 years of architectural history right there. The Board of Architectural Review was never intended and the ordinance does not read to suggest architectural expression stops at . . . some date on a calendar. *What is shown here, in my view, is very sensitive to the height, scale, and mass of the surrounding elements.* . . . It's stucco-on-masonry. So is the building its being attached to. The overall percentage of glazing is not astronomically greater than what you might see glazing the south or west facade of a proper single house The height of the building is not so tall as to be out of context or keeping with the surrounding areas. . . . I think that Mr. Stockton, who is one of the most well-regarded preservationists and also a long-time member of this board, *has correctly identified this building is not out of keeping with the*

historic district. It has been put on a little diet, which is exactly what it needed. . . *It is without arresting effects.* It does not substantially alter the streetscape. *It does not fall out of harmony with the surrounding historic buildings.* . . .

(10/14/15 BAR Tr. 44:9-46:7) (double emphasis added).

After Board Member White's comments, Board Member Harrison offered comments to the height, scale and mass and pointed out that this and other projects have used glass in the city to create space while making it seem small. She expressed that when you expand a use of a structure, you want to "add on in a sensitive way *that doesn't negatively impact the historic nature of your home or the neighborhood*, and for the amount of area that we are talking about, it is extremely nominal." (10/14/15 BAR Tr. 46:17-21) (double emphasis added). Board Member Harrison continued and specifically discussed her view of the successful design of the glass bay window:

And I think that is the most telling example as to how we have utilized glass in the city to create space and add on additional square footage, and I think this is probably the most -- this is an appropriate way of adding that additional square footage, but yet diminutively placing it on without adding some, you know, large structure with brick, stucco, cladding. And I think this is ultimately the way you're supposed to try and make something very small and diminutive and hide, and I think this is how it's successfully done.

(10/14/15 BAR Tr. 47:4-15).

Board member Wallace then stated: "I think it's evident that over the last 40 years or more, we have had modern architecture integrated into the Old and Historic District, and *I don't think this is so blatantly modern that it is out of character or scale*, but even saying that, if you look at other documents, not just our[] [standards] in the City of Charleston, but, for example, the President's Advisory Council on Historic Preservation says that if you do an addition to a historic building, it should look like an addition. . . . That's a national standard . . . accepted by the National Trust for Historic Preservation and other

preservation groups . . . for many, many years. . . .” (10/14/15 BAR Tr. 48:3-19) (double emphasis added)

Finally, Board member Alexander explained: “I would certainly agree with Mr. White . . . there are interpretations to harmony that don’t have to reflect the same architectural style as what building you’re next to.” (10/14/15 BAR Tr. 48:3-19).

As is clear from the comments of these board members, the BAR carefully evaluated the proposed design under the standards expressed in the controlling ordinances, concluding that the revised design was appropriate for this site. Appellants have not identified any finding that was unsupported by the record, or shown that the Board committed a legal error or acted arbitrarily or capriciously in its decision.

For the reasons discussed above, the Circuit Court correctly affirmed the BAR decision. See (Order, 3) (“Based on a review of the record, it appears the Board decided by a majority vote that the structure was compatible and harmonious with the surrounding structures.”). The Circuit Court should be affirmed.

b. The BAR did not apply a relaxed standard of review.

Appellants have asserted that the BAR applied a “relaxed” standard of review in its review of the proposal. Appellants argue that because board members and others at the meetings discussed which aspects of the proposal would be visible from the public right of way, it follows that the BAR must have applied a relaxed standard of review. (**Appellants’ Initial Brief, 12-17**). As is plainly apparent from the record, including the previously quoted excerpts, the BAR fully considered the entire addition and directly followed the ordinances’ specific guidelines, going so far as to refer to their application to this proposed structure in their comments in support of conceptual approval.

The BAR did not discuss, much less make a finding, applying a relaxed standard of review. In fact, as is clear from the record of the two meetings, the review was intense, thorough, and thoughtful. The Circuit Court correctly determined that the record did not establish that the BAR applied a relaxed standard of review. **(Order, 4)** (“Appellants direct the Court’s attention to various passages of the transcript where the limited visibility of the structure from the public ways is discussed. Appellants also point to a discussion between several individuals including a board member and the project architect regarding the structure not being appropriate on Broad Street. As noted above, this Court must review the decision of the Board the same as a jury verdict. The Court is not persuaded these references prove the Board was applying a relaxed visibility standard.”); **(Order, 5)** (“These passages do not constitute adequate proof the Board applied the incorrect standard or considered improper evidence.”). As found by the Circuit Court, Appellants have not identified anything in the record which shows that a relaxed standard of review was applied. Instead, Appellants have highlighted passages discussing the visibility of the proposed structure from the right-of-way and simply concluded *ipse dixit* that the BAR must have applied a relaxed standard of review. Because Appellants’ argument is unsupported by the record, it should be rejected.

Additionally, as found by the Circuit Court, the discussion of visibility as an “issue” is completely consistent with the BAR’s task, and not evidence of some relaxed standard of review. The BAR’s jurisdiction is limited to those aspects of a proposed design that are visible from the public right of way. See (Order, 4) (“Because the Board’s jurisdiction is limited to portions of a structure that are visible, it seems reasonable to discuss how much or little of the structure is visible.”); see also, Charleston Zoning Ordinances, 54-232

(review limited to “exterior architectural appearance”); 54-231 (defining “exterior architectural appearance” as “the type and character of all windows, doors, light fixtures, signs and appurtenant elements, visible from a street or public thoroughfare.”). Even though the BAR’s jurisdiction is so limited, the BAR in this case fully considered the entire proposed addition, and the majority concluded that its design was consistent with the standards expressed in the ordinances. The thoughtful analysis evident from the comments of the Board members voting in favor of conceptual approval demonstrate that the ordinances’ standards were applied in full.

Therefore, the Circuit Court correctly rejected the argument that the BAR impermissibly applied a relaxed standard of review and should be affirmed.

II. The Circuit Court properly rejected Appellants’ argument that the decision should be reversed because the BAR failed to address one of the grounds for deferring the application at the initial meeting.

The Board deferred acting on the application at the first meeting “based on staff comments one through five; based on the fact that the addition could possibly be smaller. It needs to be reconsidered for the total footprint of the addition and that it possibly could be slightly less tall as well. And that the architecture, while it can be contemporary, should reconsider especially the window wall in the rear of the building.” (9/9/15 BAR Tr. 44:13-21). According to Appellants, the BAR erred in not addressing the last ground for deferral in its October 14, 2015 meeting where it granted conceptual approval. (Appellants’ Brief, 18-19). The Circuit Court correctly rejected this argument. See (Order denying Motion to Alter or Amend).

Appellants’ argument is based upon several unsupported positions. First, Appellants incorrectly assume that any comment made as part of a deferral motion must

result in a specific change to design. Appellants cite no ordinance, rule of procedure, or case law for this proposition. The BAR is authorized to review and consider the application with which it is faced. See City of Charleston Ordinance 54-240. The only charge of the BAR is to apply the standards set forth in the ordinances which it plainly did in this case.

Second, Appellants' argument overlooks that the Woodards changed the design of the bay window, which in their opinion is "obviously the most offensive and most disputed architectural feature of the proposed addition," in response to the comments at the first meeting. (**Appellants' Initial Brief, 19**). Among other changes, the amount of glass in the "most offensive" window system was reduced by one-third. See (10/14/15 BAR Tr. 10:16-20) ("we moved the building back in several feet, and we reduced the glass in the bay window by one-third so that the bay window itself doesn't protrude out any farther than the piazza of 109 Broad."); (10:3-7) (explaining that the height had been reduced and the addition pulled back in so that less of it was visible from King Street).

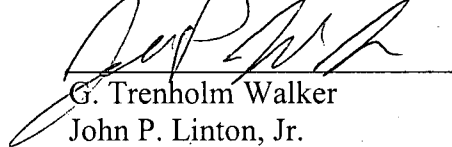
Finally, even if the window design had not been modified between the two hearings, the BAR clearly did not mandate that such a modification be made.² The BAR did not rule on the application in its first meeting but simply made comments for the applicant to consider before returning to the Board. The Circuit Court correctly observed that there was no unheeded directive. (**Tr. 28: 20-22**) ("THE COURT: They didn't say change it, they said reconsider. Apparently the architect reconsidered and didn't change it."). Further, as has been shown, the architect in fact not only considered the comment but changed the design to reduce the window area.

² Appellants incorrectly argued to the Circuit Court that the bay window was not changed at all prior to the second BAR meeting. (**Tr. 27:25-28:5**).

CONCLUSION

For the reasons stated above, the Circuit Court's decision affirming the BAR should be affirmed.

Respectfully Submitted,



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