THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2015-CP-10-6186

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

v.

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

BRIEF OF APPELLANTS

Capers G. Barr, III
SC Bar No: 00542
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
cgb@barrungermcintosh.com
Attorney for Appellants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

CASES: PAGE

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in concluding that the Board of Architectural Review did not apply a relaxed standard of review of Respondents' application for approval because their Property was only "marginally visible" from a public way?

II. Did the Circuit Court err in failing to address, at all, Appellants' argument that the Board of Architectural Review erred by failing to decide at its second, resumed hearing on Respondents' application, one of the principal reasons for having deferred hearing the application in the first place?

STATEMENT OF THE CASE

Respondents Eugene M. Woodard and Janice S. Woodard live at 107 King Street in the City of Charleston. Appellant Thomas Tisdale lives at 109 Broad Street, which adjoins 107 King Street on its north side. Appellants Park and Martha Dougherty live at 111 Broad Street, to the west of Mr. Tisdale, and they also adjoin the property of Mr. and Mrs. Woodard to the north.

The Woodards applied to the City of Charleston Board of Architectural Review ("BAR") on August 17, 2015 for the approval of an addition to 107 King Street, to be added to its west side, thus making the addition visible to the public from Broad Street through the driveway corridor between the Dougherty home and the Tisdale home.

A hearing on the Woodards' application was heard by the BAR on September 9, 2015. At that first hearing, the BAR deferred a decision on the application, giving instructions to Mr. and Mrs. Woodard and their architect to re-address certain issues. Following reapplication by the Woodards on October 5, 2015, a rescheduled hearing was held October 14, 2015, at which the application was approved. At both hearings the Appellants, and others, spoke in opposition to the application; and other persons spoke in support.

Mr. Tisdale and Mr. and Mrs. Dougherty filed their appeal to the Circuit Court on November 13, 2015. The Charlestowne Neighborhood Association also filed its Motion for Leave to File *Amicus Curiae* Brief, and an *Amicus Curiae* Brief, on March 28, 2016.

At hearing on March 30, 2016 before the Honorable J. C. Nicholson, Jr., the Court heard oral arguments, accepted the *Amicus Curiae* Brief of Charlestowne Neighborhood Association, and thereafter filed his Order denying the appeal on May 4, 2016. Appellant's Motion for Reconsideration was thereafter denied by Order dated June 14, 2016, received by Appellants June 23, 2016.

Appellants timely filed this Appeal on July 20, 2016.

STATEMENT OF FACTS

Introduction. This is an Appeal from a decision of the City of Charleston Board of Architectural Review ("BAR") approving an addition to the property at 107 King Street, owned by Respondents Eugene and Janice Woodward. (The "Woodard Property".)

This is a case of statutory interpretation and application. The City of Charleston Board of Architectural Review was created to regulate the architectural appearance of structures in Charleston's historic districts by the authority of state statutes. (South Carolina Code Sections 6-29-870, *et. seq.*). The City of Charleston Code of Ordinances, Sections 54-206 *et seq,* vests the BAR with jurisdiction over all structures that are visible from a street, public thoroughfare or public right-of-way. See R.p. 83.

In this case the BAR approved a structure on the Woodard Property that is plainly visible from Broad Street, containing architectural features substantially disharmonious with neighboring homes and with the character of the historic district south of Broad Street, featuring a thirty-six panel window wall more suited to an institutional use or, if a residence, one located in a more

contemporary neighborhood. Appellants acknowledge that these conclusions are esthetic, and are not within the purview of a reviewing court.

However, there is a dominant legal issue in this case: The BAR erroneously concluded that because the structure would only be marginally visible from Broad Street, seen at an angle, that the standard of architectural review was thereby relaxed. The BAR thus improperly applied a "marginally visible" standard to this case. The Code of Ordinances does not allow for such relaxed scrutiny. Once BAR jurisdiction is invoked because the structure is visible, the BAR must apply a complete and consistent scope of review. The BAR erred as a matter of law by invoking a relaxed standard.

Factual Overview

The Woodard Property is one lot removed from the southwest corner of King and Broad Streets in the City of Charleston historic district, less than a block from the Charleston County Judicial Center. The Property is diminutive in size, originally constructed as a kitchen house, an earlier dependency to the home of Appellant Thomas Tisdale at 109 Broad Street. The Tisdale home was originally constructed in approximately 1774.

Appellants Dougherty live next door to Mr. Tisdale to the west, at 111 Broad Street, separated from the Tisdale home by a low hedge and a two-car driveway. From Broad Street there exists a view corridor between the Tisdale home and the Dougherty home through which the proposed addition to 107 King Street would be plainly visible.

The record contains a number of photographs and sketches that depict the physical configurations presented by this case:

At R.p. 41 is an aerial photograph on which 107 King Street is designated "Proposed Demolition". To the north of 107 King Street (left in the photograph) is the Tisdale home at 109

Broad Street. Immediately below the Tisdale home, to the west, is the home of Petitioners Dougherty at 111 Broad Street.

At R.p. 42 a broader aerial perspective is shown, in which the Charleston Judicial Center is seen in the top right of the photograph.

At R.p 43 the western elevation of the Woodard Property is shown. The BAR has approved demolition of the small room in the foreground, and of the chimney. Later exhibits show the proposed addition. At R.p. 44 is another view of the west elevation of 107 King, also showing the rear of the Tisdale home at 109 Broad.

At R.p. 45 the east elevation of 107 King Street is shown, as seen from King Street.

At R.p. 46 is a photograph of the Tisdale home at 109 Broad. The proposed addition to the Woodard Property would be visible through the piazzas of the Tisdale home and through the driveway.

At R.p. 47 the photograph shows the Dougherty home to the right, and the Tisdale home to the left, with the driveway "view corridor" between.

At R.p. 48 is an architectural rendering that depicts the proposed addition at issue in this case. The mass and height of the addition and its modernistic, incongruous design can be seen, inconsistent with every home in the neighborhood.

At R.p. 49 and R.pp. 386-394 are architectural drawings, depicting the west elevations of the addition and of the Tisdale home, at the top section of the drawing. In the bottom section of the drawing is depicted the south elevations, also showing the Dougherty home to the left. The west elevation of the proposed addition is a "window wall" consisting of a bank of 36 square, modernistic windows not appropriate to or in consonance with the Old and Historic District of Charleston.

Visibility from Broad Street. At R.p. 50 is an architectural rendering, showing the perspective of the proposed addition to the Property from the Tisdale driveway at 109 Broad. From a slightly different perspective, the next rendering also shows visibility from Broad Street, also showing the Dougherty home to the right. R.p. 51.

At R.p. 52 is a drawing that depicts visibility corridors and distances from Broad and Orange Streets, respectively, to the proposed addition.

The applications to the BAR: Mr. & Mrs. Woodard first made application to the BAR on August 17, 2015 for the proposed addition. R.p. 53. At hearing before the BAR on September 9, 2015 the application was deferred "for a re-study based on staff comments 1-5 and Board comments to reconsider a smaller total footprint, decrease in height and design of 'window wall'." The staff comments are attached as R.pp. 54 – 55.

A second application was made October 5, 2015 R.p. 56, and hearing was held on October 14, 2015 (R.pp. 57 - 82), (transcript), at which the application was approved by a vote of 4-2.

BAR colloquy regarding "visibility":

Noteworthy to the issue of "visibility" and a relaxed standard of review are the verbal exchanges made during the two BAR hearings.

At the hearing on September 9, 2015, at which the application was deferred, Mr. Dowd, the city architect, stated: "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 Street. It is visible from the west, from Orange Street above the 6-foot-high wall and without vegetation and it is partially visible from King Street." (R.p. 130 lines 15 – 24).

In that first hearing Lou Perella, a King Street neighbor of the Woodard Property, spoke against the application. Mr. Perella, who lives at 99 King Street, raised the question whether this design would be approved by the BAR if the building faced King Street. (R.p. 116 line 12 to R.p. 117 line 2).

During the BAR colloquy in its deliberation at the first hearing, Board Member Wallace stated:

> By Mr. Wallace: "In answer to Mr. Perella's question, if that were on Broad Street, if that were 111 Broad Street instead of the existing house and that façade was there, I would not approve it."
>
> Unidentified Voice: "We wouldn't like it."
>
> Unidentified Voice: "I would not approve it."
>
> The Chairperson: "Mr. Epps. Mr. Epps, this is board time. (R.p. 138 lines 7 - 15).
>
> (Emphasis added above.)

It is clear from the exchange on the record that Mr. Epps, the Woodards' architect, had interjected a comment during the Board's deliberations and that Chairperson Ewing was admonishing him to be silent. More importantly, the Woodards' own architect was acknowledging that he would not have designed this thirty-six panel window wall for a building on Broad Street, itself.

If the design was not appropriate if placed on Broad Street, it should likewise not be appropriate if it is visible from Broad Street. Even Board member Wallace stated this.

At the second hearing on October 14, 2015, there was also discussion about the issue of "visibility" of the proposed addition from nearby streets, as follows:

1. By Mr. Epps (Architect for Respondents Woodard): "I'm trying to gather up if I could make a collection of everyone's concern. First of all, the massing. The comparison of the existing building to the proposal, you cannot distinguish—you cannot perceive that in any way from any public right-of-way.

And as the board has expressed over and over again, your concern about what's visible from the public right-of-way. Well, the comparative masses of the two buildings are not. They simply aren't. R.p. 185 line 24 to R.p. 186 line 8)

2. By Mr. Epps: "The idea that this simple box is inappropriate for the existing house, which is a simple box, is certainly an unfair comment. I don't know. I showed the visibility from the various points of public space, and simply put, it's just not evident here that this has any negative impact on the neighborhood or the city whatsoever" (R.p. 187 line 23 to R.p. 188 line 5).

3. By Mr. Dowd (Staff Architect for the City of Charleston): "Well, I would agree with one point and would point out to the board that the mass of the addition relative to the mass of any existing building is really not apparent from any street or right-of-way, and so it should not be a consideration of the board. I'd point out a few things I mentioned previously. Visibility is from the north through the piazza of 109 Broad Street and from the west from Orange Street above the six-foot-high wall and discounting vegetation, and the stepback in plan designed the transitional hyphens are good moves...I think visibility is really the issue here, and have to say that we went out and looked at it on the site, and this is really **marginally visible**, and the areas that are visible are the areas that are under purview according to the ordinance...And otherwise, we feel they've satisfied all the board's conditions of reducing the height and reducing the footprint. It's **marginally visible** from the rights of way and not unlike some of the contemporary additions to historic structures we've seen executed by W.G. Clark that fit pretty well in some tight areas of the City. So we're recommending conceptual approval with conditions noted and final review by the staff." (R.p. 189 line 4 to R.p. 190 line 14).

4. By Mr. Faust (BAR Member): "Anyway, I think it's an inappropriate design because **you can see it from the street**, it's a curtain wall, and it's totally inappropriate with the neighborhood, and I can't support it" R.p. 194 lines 16 – 20).

5. By Mr. Alexander (BAR Member): "And I'm also reminded on the visibility. We don't ever talk that much about it as much as - - it's not that we should - - I don't - - it's just the visibility is the thing that really draws me back to how much BAR

should really have an impact on this design." (R.p. 200 lines 19 – 24).

6. By Chairperson Ewing (Chair of the BAR): "Well, I disagree with you all. I think one of the ways this building should be looked at is that it is a dependency for 109. Were it still attached to 109 we would not allow it to come out to the edge of the piazza. I think the mass is too - - it needs to be tucked back. That's the natural order of those buildings. I understand they have a problem, but when you look at how - - where - - this addition from the air comes almost to there, and then when you look at the plan here, even though it shows that it's back, it's out another six feet or so than where this is. So I'm not quite sure. This stops - - what we're looking at here stops almost to the piazza, and then you look at this plan, it goes out farther. I don't think if this were still one piece of property we would ever have approved this because of height and mass, and I cannot support this application." (R.p. 201 line 11 to R.p. 202 line 6).

(Emphasis added above, throughout.)

The City of Charleston Ordinances: The architectural standards of the City, by which BAR decisions are evaluated, are set forth in Chapter 54, Part 6, of the City of Charleston Code of Ordinances. At R.pp. 83 - 90 is a complete copy of Chapter 54, Part 6.

It seems clear that Charleston City Council vested the BAR with jurisdiction over the exterior architectural appearance buildings within specified districts where a building is "visible" from a public way. Paraphrased, the ordinances provide:

"No structure...shall be erected...nor shall the exterior architectural appearance of any structure which is visible from a public right-of-way be altered until after...approval by the BAR" (Section 54-232(a)).

"The exterior architectural appearance of any structure (either) more than 100 years old...which is within the Old City District and which is visible from a public right-of-way, shall not be changed until after...approval by the BAR." (Section 54-232(c))

"Within the Old City District, no new structure which will be visible from a public right-of-way upon its completion shall be erected until approval by the BAR." (Section 54-232(d)).

The phrase "*exterior architectural appearance* shall include architectural character, general composition and general arrangement of the exterior of a structure, including the kind, color and texture of the building material and type and character of all windows, doors, light fixtures, signs and impertinent elements, visible from a street or public thoroughfare" (Section 54-231(b)).

(Emphasis added throughout.)

Significantly, Section 54-231 quoted above sets forth the "type and character of windows" as a noteworthy exterior architectural feature that must be evaluated by the BAR. The windows of the proposed addition in this case bear scrutiny, in particular, because of that provision.

City Council also clearly expressed its general intent and purposes for creating standards for architectural review in Section 54-230: "It is deemed essential by the City Council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourists and residents alike be preserved; some of these qualities being:

- the continued existence and preservation of historic areas and structures;
- continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between structures of historic design and those of more modern design;
- that such purpose is advanced through the preservation and protection of the old historic or architecturally worthy structures and quaint neighborhoods which impart a district

aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation.

The Code further charges the BAR with the responsibility to consider any proposed structure in the context of its surroundings. Section 54-240, for example, requires the BAR to consider not only the proposed structure, which in this case is an addition, but must do so in light of the "nature and character of the surrounding area, the use of such structure and the importance to the City."; and further, "the relation of such elements to similar features of structures in the immediate surroundings. The BAR shall not...make requirements except for the purpose of preventing developments which are not in harmony with the prevailing character of Charleston, or which are obviously incongruous with this character." (Section 54-240).

The Code requires disapproval of a proposed structure, because of "...the absence of unity and coherence in composition not in consonance with the dignity and character of the present structure (in 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). (Section 54-240i).

The City's position. At hearing before the circuit court the City agreed that "visibility" of architectural features is the factor that invokes the jurisdiction of the BAR, and that the Board is not empowered to relax its scrutiny because the architectural features are marginally visible. (R.p. 529 line 16 to R.p. 530 line 3) In its order the Circuit Court recognizes this to be the City's position. R.p. 3.

SCOPE OF REVIEW

The City having agreed that the proper application of "visibility" in Charleston City Ordinances 54-231 and 54-232 cited above is to invoke the jurisdiction of the BAR, the principal question for review by this Court is whether the Circuit Court erred in concluding that the BAR did

not apply a relaxed standard of review in this case because of the "marginal visibility" of the Woodard Property. Appellants believe this to be an issue of fact.

In reviewing a decision by a BAR the Circuit Court should act when the Board abuses its discretion by committing errors of law or bases its decisions on facts not supported by the evidence. *Blind Tiger, Inc. vs. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361 (Ct. App. 2005); *Gurganious vs. City of Beaufort, 317* S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995). Furthermore, the standard of review by the appellate court of a BAR decision is the same as that of the Circuit Court. *Blind Tiger, supra.; Fairfield Ocean Ridge vs. Town of Edisto Beach,* 294 S.C. 475, 479-480, 366 S.E.2d 15, 18 (Ct. App. 1988).

A decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no relation to a lawful purpose, or if the board has abused its discretion. *Dunes West Golf Club, LLC vs. Town of Mt. Pleasant,* 401 S.C. 280, 737 S.E.2d 601 (S.Ct. 2013); *Wyndham Enterprises vs. City of North Augusta,* 401 S.C. 144, 735 S.E.2d 659, (Ct.App. 2012).

Where issues involve questions of the construction of an ordinance they are reviewed under a broader standard of review than is applied to reviewing issues of fact. *Mikell vs. County of Charleston,* 386 S.C.153, 687 S.E.2d 326 (S.Ct. 2009). Although greater deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, "a broader and more independent review is permitted when the issue concerns the construction of an ordinance. The determination of legislative intent is a matter of law. *Mikell, supra, citing Charleston County P.R.C. vs Somers,* 319 S.C. 65, 459 S.E.2d 841 (1995).

The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. *Charleston County P.R.C. vs. Somers, supra.*

ARGUMENT I

THE CIRCUIT COURT ERRED IN FINDING THAT THE BOARD OF ARCHITECTURAL REVIEW DID NOT APPLY A RELAXED STANDARD OF REVIEW OF RESPONDENTS' APPLICATION BECAUSE OF THE "MARGINAL VISIBILITY" OF RESPONDENTS' PROPERTY FROM A PUBLIC WAY.

The cardinal legal error of the BAR in this case was in concluding that the degree of visibility of a structure from a street bears some correlation to the degree of scrutiny to which an application must be regarded. That the BAR acknowledged a relaxed standard because the structure at issue was "marginally visible" is apparent from the colloquies restated in the excerpts from the transcripts of hearing, stated in the factual overview, above.

The intent of City Council in enacting South Carolina Code Sections 54-230, *et. seq.* is specifically enumerated. Section 54-230 states Council's "Purpose of Creating" the Old and Historic and Old City Districts, to achieve "a harmonious outward appearance of structures" to "preserve property values and to attract tourists and residents alike", achieved by preserving historic areas and structures, and by the "continued construction of structures in the historic styles and a general harmony as to style". The legislative purpose is advanced through the preservation and protection of old or architecturally significant structures "and quaint neighborhoods which impart a district aspect to the City and which serve as visible reminders of the cultural heritage of the city, state and nation."

Nowhere in the ordinance can language be found to suggest that the degree or amount of visibility of architectural features should have any bearing on the extent to which design standards are to be imposed. However, by imposing a "marginally visible" standard in its review of this case the BAR has introduced a subjective, ambiguous and slippery scale to an otherwise clear and unambiguous statement of legislative intent. If simple visibility is not sufficient to trigger a full review

of the design, then what extent of visibility is required? The answer to the question is that the legislative intent does not support the parsing of degrees of visibility.

The appeal to the Circuit Court in this case had been principally premised on the argument that the City Ordinance standard of "visibility" in sections 54-231 and 54-232 is jurisdictional and that once jurisdiction is established the same standards of scrutiny must be applied by the BAR in each case, regardless of the degree of visibility. Appellants argued to the Circuit Court that, in this case, the BAR erred by improperly considering the "marginal visibility" of the Woodard Property to apply a relaxed standard of scrutiny to its architectural features.

The City now concedes the jurisdictional aspect of "visibility", and also now concedes that no relaxed standard of scrutiny should apply in a case of "marginal" visibility such as here. The City argues, however, that no such relaxed scrutiny was applied in this case.

In its Order the Circuit Court agrees with the City, and holds that no relaxed scrutiny was applied in this case.

The principal issue in this appeal thus becomes whether there is evidence in the record that reasonably supports the Circuit Court's finding that a relaxed standard of scrutiny was not applied by the BAR in this case. The corollary question is whether there is evidence that a relaxed standard was applied by the BAR.

At both the first and second BAR hearings there was extensive discussion about the marginal visibility of the Woodard Property's architectural features. Indeed, the term, "marginal visibility" was introduced by Mr. Dowd, the City architect who is principal advisor to the BAR. (R.p. 189 lines 18 – 23.)

In the exchange at the first BAR hearing on September 9, 2015 Board member Wallace clearly stated that he would not approve the Woodard Property's façade if it were on Broad Street, a

proposition with which the Woodards' own architect agreed. R.p. 138 lines 7 - 15; also discussed infra at page 6. The exchange between Board member Wallace, Mr. Epps, and the Chair occurred after City Architect Dowd had presented visibility as one of "three issues to consider here". (R.p. 130 lines 15 – 24).

At the second hearing on October 14, 2015 Mr. Dowd reiterated the "basic(ally) three issues: visibility, submittal requirements and preservation standards and appropriateness." (R.p. 155 lines 9 – 12) At the same hearing Architect Epps argued, as he should have as advocate for his clients, that visibility "has no negative impact on the neighborhood or the City". (R.p. 185 line 34 to R.p. 186 line 8; and R.p. 187 line 23 to R.p. 188 line 5).

During Board deliberations at the second, October 14, 2015 hearing, Mr. Dowd advised the Board, "I think visibility is really the issue here, and have to say that we went out and looked at it on the site, and there is really marginal visibility and the areas that are visible are under purview...It's marginally visible from the rights of way and not unlike some of the contemporary additions to historic structure we've seen executed..." (R.p. 189 line 18 to R.p. 190 line 14.)

Thereafter Board Members Faust and Alexander also spoke about visibility; Faust opposing the application and Alexander in support. (R.p. 194 lines 16 - 20 [Faust]; R.p. 200 lines 19 – 24 [Alexander].)

So, of the six members of the BAR the record supports discussions about visibility by three of them, Mr. Wallace at the first hearing and Messrs. Faust and Alexander at the second. City Architect Dowd, the BAR's principal advisor identified visibility as one of the three principal issues at both hearings, and he introduced the concept of "marginal visibility" to them. Finally, the Woodards' own architect Mr. Epps also discussed visibility himself, and conceded he would not have designed this façade if it were on Broad Street.

This extensive dialogue about visibility at the hearings belies the City's present concessions that visibility is the factor that invokes BAR jurisdiction, that it would not be proper for the BAR to relax its scrutiny where visibility is only marginal, and that the BAR did not do so in this case.

If the BAR agreed with or understood the City's currently stated position, that visibility invokes jurisdiction and that a relaxed scrutiny would not be appropriate in the case of marginal visibility, then it should not have been necessary for the BAR to discuss visibility at all, much less that visibility in this case is "marginal". Instead, visibility was discussed extensively by the Board, and it was identified by the Staff Architect as one of the principal "three issues" for the BAR to decide in this case.

City Architect Dowd observed that he had visited the site and that "there is really marginal visibility and the areas that are visible are under purview...It's marginally visible from the rights of way and not unlike some of the contemporary additions to historic structures we've seen." (R,p. 189 line 20 to R.p. 190 line 14). There could have been no other reason for Architect Dowd to make such an observation than to suggest that the marginal visibility somehow mitigates the architectural standards that would have otherwise been required in a case of full visibility. What other purpose could his observation serve?

It is important to note in this case that all of the architectural features of the disputed addition are visible from the street. This is not a case where only a corner is visible from the street and the bulk of the design is hidden around the corner. If anything, the marginal visibility in this case impacts only the duration of time the addition would be visible to a passerby. In this case the intersection of Broad and King Streets is notably jammed at many hours so that passers by-- residents and tourists, walking, riding in horse tour carriages and in cars-- will observe much more than a fleeting glance of what is added to the Woodard Property.

What Mr. Dowd's field observations produced was the approval of an architectural design that would never have been approved full frontal on Broad Street. From these circumstances it seems clear that Mr. Dowd was inviting the application of a relaxed standard because of the marginal visibility.

However, and to the contrary, the City ordinance is more exacting, requiring the same standards to apply whether a structure is marginally or fully visible. Without statutory authority any lesser standard for applying the ordinance invites subjective, arbitrary and capricious application.

There are, already, more than too many subjective criteria expressed in the City's architectural ordinances, Sections 54-230, *et seq.* To add another realm of subjectivity--marginal visibility--without legislative approval is folly.

The record in this case simply belies the City's current position—and concession—that visibility should not reduce the degree of scrutiny that was applied by the BAR in this case. If no relaxed standard was applied in this case then it would not have been necessary to discuss visibility at all, much less as one of the three "principal issues" for the BAR.

In conclusion, there is ample evidence in the record that the BAR did consider visibility and the degree of visibility as a factor relating to its scrutiny of the design features of the Woodard Property. The only logical conclusion to draw from the circumstances is that the Board applied a different standard to its scrutiny of the design features at issue because of their "marginal visibility". The only logical conclusion to be drawn is that the Board relaxed its standards of scrutiny here and approved features it would never have approved had the Property fronted Broad Street. Its conclusions were thereby arbitrary and capricious. *Dunes West Golf Club LLC vs. Town of Mt. Pleasant, supra; Wyndham Enterprises, LLC vs. City of North Augusta, supra.*

And to the contrary, there is no evidence in this record that the BAR did not apply a relaxed standard.

The decisions of the Circuit Court and of the BAR must be reversed. At the least, the case should be remanded to the BAR to make further findings in accordance with these arguments.

Particularly taking into consideration the record exchanges that the design now before the court would not be acceptable on Broad Street, it was error for the BAR to approve it, when it is clear that it is visible from Broad Street, a public way.

ARGUMENT II

THE CIRCUIT COURT ERRED BY FAILING TO ADDRESS, AT ALL, APPELLANTS' ARGUMENT THAT THE BAR FAILED TO ADDRESS AT ITS SECOND HEARING A PRINCIPAL GROUND FOR DEFERRING THE APPLICATION.

The transcript of hearing on September 9, 2015 shows that board member Wallace moved to defer the application as follows:

> By Mr. Wallace: "I move for a deferral based on staff's comments 1 through 5; 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 could be slightly less tall as well.
>
> "And that the architecture, while it can be contemporary, should especially reconsider the window wall in the rear of the building." (R.p. 141 lines 13 - 21). (Emphasis added.)

The Chair repeated the motion:

> By the Chairperson: "That's the front of the building.
> "We have a motion by Mr. Wallace for deferral and restudy based on staff comments 1 thorough 5, reconsider the total footprint, reconsider the height, possibly step back the western elevation and reconsider the window wall."

> "That's been seconded by Mr. White. All in favor please signify by saying "aye"." (R.p. 141 line 24 to R.p. 142 line 7). (Emphasis added.).

However, the BAR staff did not note the condition to "reconsider window wall" in its notes for follow up action. See Staff Comments at (R.p. 54); and neither was the architecture of the window wall considered at the second hearing. Notably the context of the deferral motion was to reconsider its contemporary architecture. This was a material and substantive issue and had been the basis of discussion by all presenters at the first hearing. It is more than inferable that Member Wallace, in reciting that additional ground for deferral, was responding to the voices of those who spoke at the first hearing in opposition because of the modernistic and contemporary style of the addition's design. However, the issue apparently slipped through the cracks

Accordingly, the BAR erred in failing to address or to discuss "reconsideration of the window wall" at its second hearing. The window wall is obviously the most offensive and most disputed architectural feature of the proposed addition.

Moreover, the Circuit Court erred by failing to address this second ground at all, even after having been addressed with the question in Appellants' Motion to Alter or Amend. (R.p. 6 – 8).

CONCLUSION

Unlike many BAR disputes involving esthetic differences of opinion as to appearance, a subjective standard, this case presents two significant errors of law by the BAR: The Board's adoption of a "marginally visible" standard resulting in a relaxation of its degree of scrutiny, and in contravention of the plain language of the ordinance; and its failure to follow up on a reconsideration of the architectural design of the contested window wall as it had decided at its September 9, 2015 hearing.

For the reasons argued, the decision of the Circuit Court should be reversed. At the very least the case should be remanded to the BAR for reconsideration and to readdress the errors of law as presented.

Respectfully Submitted,

BARR, UNGER & McINTOSH, LLC

Capers G. Barr, III
SC Bar No: 00542
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (FAX)
cgb@barrungermcintosh.com
Attorney for Appellants Thomas S. Tisdale,
Park R. Dougherty and Martha T. Dougherty

Charleston, South Carolina
February 23, 2017

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Trial Court Case No. 2015-CP-10-6186
Appellate Case No: 2016-001530

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellants complies with Rule 211(b), SCACR.

BARR, UNGER & MCINTOSH

Capers G. Barr, III
SC Bar ID# 542
11 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 577-5083
Facsimile: (843) 723-9039
cgb@barrungermcintosh.com
Attorney for Appellants Thomas S. Tisdale, Park R. Dougherty and Martha T. Dougherty

Charleston, South Carolina
February 23, 2017

RECEIVED
MAR 01 2017
SC Court of Appeals

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Trial Court Case No. 2015-CP-10-6186
Appellate Case No: 2016-001530

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

v.

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

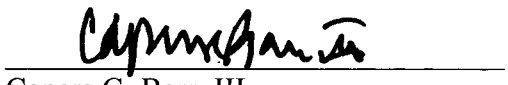
PROOF OF SERVICE

I certify that I have served a copy of the Brief of Appellants on counsel for Respondents by depositing a copy in the United States Mail, postage prepaid, on February 28, 2017 addressed as follows:

Timothy Alan Domin, Esq.
Clawson & Staubes, LLC
126 Seven Farms Dr., Ste. 200
Charleston, SC 29492

G. Trenholm Walker, Esq.
John P. Linton, Jr. Esq.
Walker Gressette Freeman & Linton, LLC
66 Hasell St.
Charleston, SC 29401

BARR, UNGER & MCINTOSH



Capers G. Barr, III
SC Bar ID# 542
11 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 577-5083
Facsimile: (843) 723-9039
cgb@barrungermcintosh.com
Attorney for Appellants Thomas S. Tisdale, Park R. Dougherty and Martha T. Dougherty

Charleston, South Carolina
February 28, 2017