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.

REPLY BRIEF OF APPELLANTS

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STATUTES

STATEMENT ON ISSUES ON APPEAL:

Appellants incorporate the Statement of Issues on Appeal as set out in their principal Brief.

STATEMENT OF THE CASE:

Appellants incorporate the Statement of the Case as set out in their principal Brief.

STATEMENT OF FACTS:

Appellants incorporate the Statement of Facts as set out in their principal Brief.

APPELLANTS' ARGUMENT:

In response to Appellants Argument I, that the BAR applied a relaxed standard of scrutiny because the addition to Respondents property is "marginally visible", Respondents concede that relaxed scrutiny would be inappropriate, thus conceding the legal point that "visibility" is the factor that vests jurisdiction of the BAR with authority to approve or disapprove building designs.

In response to the merits of the argument, Respondents argue that there is no evidence in the record to support the proposition that a relaxed scrutiny was applied in this case; and that, as found by the Circuit Judge, "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 a structure is visible". (Respondent's Brief at 15, citing Order page 4). Respondent's argument is a fair one, but only as far as it goes.

"Visibility" of the exterior of a structure is the factor that vests the BAR with jurisdiction. City Code Sections 54-231, 54-232. R.p. 83. In this case the proposed addition to 109 King Street consists of a window wall containing 48 window panels on the north, west and south elevations. Of the 48 window panels, 36 of them are visible from Broad Street, a public right-of-way. See architectural drawings at R.p. 49 and R.pp. 386 - 394; view corridor at R.p. 52. (The reference by

Appellants in their Initial Brief to a 36 panel window wall at page 6, is in error. The window wall in actuality consists of 48 window panels, of which 36 are visible.) (See R.pp. 393, 394).

Unlike the case of an appeal from a decision of a Board of Zoning Appeals, when the BAR rules on a case it does not file an order with findings of fact and conclusions. Thus, the "record" must be gleaned from exchanges made during the public hearing session and the BAR's deliberative session. Appellants' principal Brief cites excerpts from the two hearings in this case during which the issue of "visibility" is discussed extensively. (Appellants' Brief pp.5-8). Unlike a typical appeal from a zoning decision, which invokes a comparison to the jury verdict standard whether factual findings on the merits of an application are supported by "any evidence", the "any evidence" standard is really not the question here. Rather, the legal question is whether the BAR relaxed its standard. Certainly, as cited by Respondents, several of the BAR members eloquently defended the architectural design submitted by Respondents. However, Appellants respectfully suggest, that same design would never have been approved had it been proposed for a building located, full frontal, on historic Broad Street.

Boards of Architectural Review are creatures of state legislation. (See Code of Laws of South Carolina for 1976 as Amended, Section 6-29-870, *et. sec.*). Boards of Architectural Review consist of appointed community volunteers who typically serve without compensation. The Court should take notice that the City of Charleston's interests in the preservation of its historic districts long predate Boards of Architectural Review.

The appointed BAR is supported by a staff, in the case of Charleston consisting of a city architect/preservation officer and numerous staff members. Although a Board of Architectural

Review is expected to be independently minded, it is guided in its administration and its decision-making by the city architect and his staff.

At the final hearing in this case on October 14, 2015, when the public hearing session was closed, the city architect addressed the Board. The first words out of his mouth were about visibility. After first observing that the mass of the addition in this case is not readily apparent from a right of way, Mr. Dowd, the city architect, reported to 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 this is really marginally visible, and the areas that are visible are the areas that are under purview according to the ordinance. (R.p. 189 lines 18 - 23).**

Without repeating the extensive exchanges made between Board Members at both meetings about visibility, which are summarized in Appellants' principal Brief, Mr. Dowd's advice and the subsequent exchanges consist of more than substantial evidence in the record of this case to show that a relaxed standard was applied because of marginal visibility.

The design proposed by the Respondents would never – not in a million years- have been approved, full-frontal on Broad Street. There are record exchanges supporting that proposition, in which Respondents' own architect conceded he would not have submitted the same design for a building, full frontal on Broad Street. (See Appellants' principal Brief page 6; R.p. 138 lines 7-15).

Accordingly, it is the essence of the error in this case, and the principal argument of this appeal, that the BAR approved a design only because it was marginally visible. This is legal error, because visibility is the factor that vests the BAR with jurisdiction. Once jurisdiction is vested, the BAR's scrutiny must apply even handedly, and regardless of the degree of visibility.

CONCLUSION

Because "visibility" triggers the jurisdiction of the BAR, when the architectural appearance of a structure is visible from a public right-of-way, it must be held to the same standard of review whether the visibility is full frontal or, as is this case, "marginally visible". To suggest that varying degrees of visibility effect the degree of scrutiny, is to suggest an ambiguous and subjective standard to what is otherwise a clear jurisdictional requirement. Accordingly, the decision of the Circuit Judge and of the Board of Architectural Review must be reversed. Alternatively, the case should be remanded to the Board of Architectural Review for reconsideration in light of the Court's findings.

Respectfully Submitted,

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February 23, 2017

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served a copy of the Reply 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:

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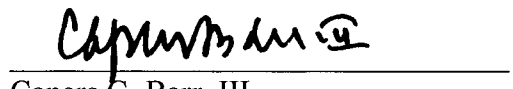

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