THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Civil Action Nos. 2009-CP-40-01307, 2013-CP-40-02159
Appellate Case No. 2019-000868

Frieda H. Dortch, ... Appellant,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals, ... Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

This is a zoning dispute arising out of decisions made by the City of Columbia Board of Zoning Appeal (the "Board") concerning property owned by Appellant. The Board decided in 2008 that the structure on the property had lost its legal nonconforming status as a duplex. The Board also denied variance requests in 2008 and 2012 where Appellant was asking for a variance to the lot size requirements for a duplex. Appellant needed the variance because the lot on which the duplex was located was not large enough to accommodate a duplex.

In May of 2008, Appellant sought a zoning permit to renovate and reestablish a duplex. The City of Columbia zoning staff informed Appellant that it would not be able to issue a permit to perform work to a duplex because the structure had been vacant for a period of greater than 12 consecutive months. (R. p. 410)

Appellant filed an Application for Variance on June 11, 2008. (R. pp. 383-384) The Board held a public hearing on the variance request on July 8, 2008. (R. pp. 379; 409-409; 614-649) The Board denied the request and issued its written decision on January 16, 2009. (R. p. 350)

Concurrently with the request for a variance, Appellant sought a certificate of zoning compliance for a nonconforming use. Appellant filed an Application for a Certificate of Zoning Compliance-Nonconforming on May 14, 2008. (R. pp. 428-429) The Zoning Administrator did

not grant this application. (R. p. 429) Appellant sought review by the Board and a public hearing was held on September 9, 2008. (R. pp. 410-411; 416; 447-448; 652-683) The Board upheld the Zoning Administrator's decision regarding the nonconforming use of the structure and issued its written decision on January 16, 2009. (R. p. 365) Appellant filed an appeal to the circuit court from these decisions ("the 2009 appeal").

While the 2009 appeal was pending, Appellant filed another Application for Variance on November 14, 2012. (R. pp. 327-328) The Board also denied this application and issued a written order on March 12, 2013. (R. pp. 302-303) Appellant filed a separate appeal to circuit court arising out of this variance denial ("the 2013 appeal").

The circuit court consolidated the 2009 appeal and the 2013 appeal and affirmed all three decisions by the Board in a written order issued on March 25, 2019. (R. p. 39) Appellant filed a motion to reconsider which was denied by a Form 4 order on April 15, 2019. Appellant filed her Notice of Appeal on May 15, 2019.

Respondent objects to Appellant's Statement of the Case because it contains contested matters and does not cite to the record. Rule 208, SCACR, requires the Statement of the Case to "contain a concise history of the proceedings . . . [and t]he statement shall not contain contested matters . . . ." Rule 208(b)(1)(C), SCACR. "The brief shall contain references to the [record] to support the salient facts alleged." Rule 208(b)(4), SCACR. Almost the entirety of Appellant's Statement of the Case is without citation to the record. The requirement to include citations to the record is not alleviated simply because a party characterizes a matter as uncontested.

Despite Appellant's assertion that her Statement of the Case is "uncontested", Appellant includes only her version of the facts, in a light most favorable to her. The Statement includes argument regarding the form and content of the record below, and argument and citations to

authority regarding the issue of grandfathering. For example, despite contending that the statement of the case is "uncontested", Appellant devotes multiple pages in her brief addressing the record before the Board and why that record is irregular. Appellant states it is "uncontested that at neither of the first two BOZA hearings in 2008 was Dortch provided or shown materials which were provided to BOZA . . . ." This statement is completely unsubstantiated[1] and without a contemporaneous objection having been made at the time by Appellant, Respondent has no way to address such claims. Appellant's Statement of the Case includes other unsubstantiated factual claims, such as alleging that the City prosecuted Appellant for not making repairs.[2] Almost the entirety of Appellant's explanation of the "Proceedings Before BOZA in 2008" is argumentative. This section of Appellant's [initial] brief also contains references to other cases, involving other parties, before the Board in 2010 that should not be considered by this Court.[3]

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[1] For example, Appellant takes issues with public comment letters submitted to the Board. These letters were discussed at the hearing on July 8, 2008, without objection from Appellant. (R. p. 644) It appears from the transcript that Appellant was familiar with the letters and responded to them at the hearing.

[2] Appellant's claim that she was being prosecuted for not making repairs is a red herring. Apparently, she is trying to make the claim that the City prohibited her from making repairs and then prosecuted her for not converting the house to a single-family structure. There is no support for this claim in the record. The *only* testimony in the record on this point is from a City official explaining that exterior property maintenance violations existed for the property. (R. pp. 741-742) Along these same lines, it is admitted that Appellant was denied a zoning permit in 2008 to perform repairs to a duplex because she lost the legal nonconforming use. (R. pp. 628-629) There is no evidence whatsoever that Appellant was ever denied a permit prior to her first seeking a permit to renovate a duplex in December 2007 (or that Appellant was ever denied a permit to perform repairs to a single-family residence). (R. p. 637) It was at this time Appellant was denied a zoning permit to perform work to a duplex. There is no evidence Appellant has been prosecuted for not converting the structure to a single-family residence.

[3] The record on appeal in this matter should consist only of the testimony and other materials presented to or considered the Board. The record should not include matter which was not presented to the lower court or tribunal. Here, the Board is the lower tribunal and the circuit court was sitting as an appellate court. *See Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) ("When reviewing a Board decision, the circuit court sits as an appellate court. Its review is strictly limited to the facts and arguments raised to the Board below. Indeed, the circuit court is expressly forbidden from considering any new facts."). Those materials are limited to the

From Respondent's standpoint, this entire matter is fairly straightforward. Appellant applied to the Board for various forms of relief in her attempt to reestablish the use of the structure as duplex after the zoning administrator decided the structure had lost its legal nonconforming status. A total of three hearings were held by the Board, of which there are video and audio recordings and written transcripts. Other written evidence was presented to the Board at each hearing.[4] The Board applied the City's ordinances regarding variances and nonconforming uses and decided Appellant was not entitled to a variance or to the reestablishment of the nonconforming use as a duplex. The circuit court reviewed this record and affirmed the Board's decisions. Appellant's appeal from the circuit court's order is now before this Court.

STATEMENT OF FACTS

The first words uttered by Appellant, at the first hearing in this matter, on July 8, 2018, were: "I am requesting to reestablish duplex status of this property, 825 and 825 ½ Heidt Street, because the property has been vacant for more than 12 months." (R. p. 617) So began Appellant's saga to reestablish her property's use as a duplex after the admitted loss of its legal nonconforming use.

Appellant first applied for a variance on June 11, 2008. (R. pp. 383-384) In her application, Appellant proposed "interior & exterior renovations to re-establish a duplex." (R. p. 383) Appellant acknowledged that the zoning ordinance (§ 17-275 of the City Code) required a lot size of at least 10,000 square feet for a duplex but her lot contained only 7,644 square feet. (R. p. 384)

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transcripts, audio/video recordings, and other materials submitted by Respondent to the circuit court. (R. pp. 243; 302-347; 350; 365; 379-464; 614-744)

[4] In the Statement of the Case, Appellant seems to take issue with the materials constituting the record in this matter. However, Appellant does not argue for their exclusion and, in fact, relies on those records for her statement of the case. Given that Appellant does not argue for the exclusion of the records, and includes them in her Designation of Matter, Respondent considers this issue abandoned and will not address this matter further.

The application submitted by Appellant required her to demonstrate how she would satisfy the criteria for a variance as found in section 17-112[5] of the zoning ordinance. (R. p. 384) Appellant stated extraordinary and exceptional conditions pertained to her property because it had been built and maintained as a duplex, and it would be "costly" to convert to a single-family residence. (R. p. 384)

At the hearing on this application, on July 8, 2008, Appellant stated she was "requesting to reestablish duplex status of this property . . . because the property has been vacant for more than 12 months." (R. p. 617) Appellant explained that the property had been vacant for about two years and that the water and electricity had been turned off. (R. p. 617) The property suffered a fire loss in April 2004, but Appellant claimed her brother still lived in the property for about a year after the fire. (R. p. 618) The fire damaged the back porch of the home and a back bathroom. (R. pp. 620-621)

Appellant testified she first approached the City in December 2007 to obtain a permit to do a "basic upgrade of the property." (R. pp. 619; 637) She planned to replace burnt wood, paint, and re-do bathrooms, windows, and the back structure of the house. (R. p. 619) She explained that she had to renovate the back of the house because of the fire, but she intended to "re-do the entire house." (R. p. 620)

Appellant testified it would be an "economical hardship" on her to renovate the home into a single-family residence if she could not reestablish a duplex. (R. pp. 630-631) Appellant stated she would utilize the structure as a single-family home if she could not use it as a duplex. (R. p. 645)

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[5] *See* City Code § 17-112(3)b.1 (stating the elements necessary for the granting of a variance) [R. pp. 772-773]

At the hearing, Appellant agreed with a board member's statement that Appellant had some responsibility to occupy the property and use it as a duplex. (R. p. 635) Appellant did not present any evidence of occupancy other than by her brother, for "about a year" after the fire. (R. p. 618).

At the conclusion of the hearing, the Board voted to deny the request for a variance on the grounds that Appellant had not shown any extraordinary or exceptional conditions pertaining to the property. (R. pp. 647-649) The Board issued a written decision on January 16, 2009. (R. p. 350)

Appellant also applied on May 14, 2008 for a Certificate of Zoning Compliance for a nonconforming use.[6] (R. pp. 410; 416; 428-429) In this application, Appellant stated she was requesting to maintain grandfather status, and that she was in the process of upgrading the property. (R. p. 429) This matter reached the Board for a hearing after Appellant filed an appeal of the Zoning Administrator's decision to deny a zoning permit to renovate the structure as a duplex. (R. p. 416) Appellant contended the use should be grandfathered because the "property was occupied after the fire." (R. p. 416)

The Board heard this appeal on September 9, 2008, from the Zoning Administrator's determination that the property had lost its grandfather status. (R. p. 654) At this time, the Board had already denied Appellant's request for a variance. (R. p. 654)

At the hearing, Appellant contended she should not lose grandfather status because her brother was living in the property in 2006. (R. p. 657) In November 2005 the property had been

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[6] *See* City Code § 17-83(a) (stating no structure shall be structurally altered without a zoning permit first being issued by the zoning administrator, and that a zoning permit shall not be issued except in conformity with the zoning ordinance); City Code § 17-84(a) (allowing for the issuance of a certificate of nonconforming use upon acceptance of reasonable proof that the nonconformity has not been vacant, abandoned or discontinued for any period of 12 consecutive months within the past six years). (R. pp. 766-768)

posted and occupancy was prohibited. (R. p. 658) The notice posted on the property stated the building was unsafe and its use or occupancy was prohibited by the building official. (R. p. 443) The last time the City found someone in the property was shortly after the fire that occurred in April 2004. (R. pp. 426; 659) However, Appellant contended her brother lived on the property the "entire time." (R. p. 660)

Appellant testified that no one had been living in the house in the last twelve months. (R. p. 662) This would have constituted a period from September 2007 to September 2008. Appellant testified she took charge of the property in December 2007. (R. p. 662) Thus, she stated, "[t]hat's all I can attest to." (R. p. 662) But later Appellant testified that her brother lived in the property until Appellant purchased the property in December 2007. (R. p. 669)

The electricity was cut to the property at the time of the fire. (R. p. 660) Water service was discontinued as of August 2005. (R. pp. 443; 659; 669) The City's inspection history states that the property was vacant as of November 7, 2005, and placards were placed on the structure. (R. pp. 423; 661) In October 2005, Appellant's brother (Wayne Hatten) had called and said he would be out of the house by November 1, 2005. (R. p. 423)

At the conclusion of the hearing, the Board adopted a motion to uphold the Zoning Administrator's decision that the legal nonconforming use of the property had been lost. The Board issued a written decision on January 16, 2009. (R. pp. 682-683)

Appellant again applied for a variance on November 14, 2012. (R. pp. 327-328) In this application, Appellant stated that her property did not conform to the zoning ordinance because her lot contained only 6,786 square feet and section 17-275 of the zoning ordinance requires 5,000 square feet per unit. (R. p. 328). In support of her contention that extraordinary and exceptional

conditions pertain to the property, Appellant stated that the house has been a duplex for over 50 years. (R. p. 328)

The Board held a hearing on this application on February 12, 2013. Appellant explained, in her view, the property was extraordinary and exceptional because it was not new construction, "it's not a huge improvement of something that already exists, it is a use and a structure that already exists, in its present configuration." (R. p. 695) Appellant talked about the history of the structure's use as a duplex, and intimated it would cost over $200,000 to *replace*. (R. p. 696) Appellant stated it would be very expensive to convert the structure into a single-family residence. (R. p. 696)

At the conclusion of the hearing, the Board voted unanimously to deny the request for a variance. (R. pp. 743-744) The Board issued a written decision on March 12, 2013. (R. pp. 302-303)

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY STATED AND APPLIED THE STANDARD OF REVIEW EMPLOYED BY APPELLATE COURTS FOR DECISIONS MADE BY ZONING BOARDS.

The circuit court correctly stated the standard of review employed by appellate courts for decisions made by zoning boards. In this case, the Board issued three decisions based on the facts as presented to the Board. There should not be any dispute about the standard employed by an appellate court when reviewing a decision by a zoning board. In a recent case, the Court of Appeals clearly and succinctly set forth the standard of review as follows:

> The appellate court gives great deference to the decisions of those charged with interpreting and applying local zoning ordinances. The appellate court is not free to substitute its judgment for that of the [Board]. Accordingly, we 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.

Croft v. Town of Summerville, 428 S.C. 576, 837 S.E.2d 219 (Ct. App. 2019).

A decision of a board of zoning appeals will not be overturned unless it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). "An abuse of discretion occurs when a . . . decision is unsupported by the evidence or controlled by an error of law." *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

II. THE ISSUE CONCERNING APPELLANT'S VESTED RIGHTS IS NOT PRESERVED FOR APPELLATE REVIEW.

The principal issued addressed by Appellant in the appeal to this Court is whether the application of the zoning ordinance unconstitutionally terminated her vested rights.

Appellant has not preserved this issue for appellate review. This issue was not set forth in Appellant's petition to the circuit court, and should not be considered by this Court. *See Newton v. Zoning Bd. of Appeals for Beaufort County*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011) (stating that to preserve an issue in an appeal from a board of zoning appeals an appellant must set forth her issues on appeal in a written petition and file that petition with the circuit court). The Board did not hear or decide any issue concerning vested rights, so it was incumbent upon Appellant to clearly set forth this issue in her petition for appeal.

In 2008, on the facts before it, the Board decided the property had lost its legal nonconforming use. Appellant petitioned for review of this decision on February 24, 2009, (R. p. 191) but, as the circuit court correctly found, she did not assert in the petition for appeal that the application of the ordinances was unconstitutional.

On February 24, 2009, Appellant, *pro se*, filed a notice of appeal to the circuit court concerning the Board's written decisions arising out of the variance request and the administrative appeal. (R. p. 191) Appellant asserted the decisions were in error, were an abuse of discretion, and were not supported by substantial evidence. (R. p. 191) These general statements in the petition

cannot be read to raise the specific issue of vested rights. The statements made in the 2009 petition can only be read as raising the issue that the evidence relied on by the Board was not sufficient to deny the request for grandfather status. This petition did not seek a ruling that the application of the ordinances deprived her of a vested right to reestablish use of the property as a duplex.

Over a year later, Appellant's counsel filed an Amended Petition of Appeal. (R. p. 193) However, the Amended Petition of Appeal did not raise the constitutional issue and, if it did raise the issue, the submission of the amended petition to the circuit court was improper and should not operate to preserve the issue. *See Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) (affirming the circuit court's refusal to allow an amendment to a petition of appeal and holding a circuit court is "expressly forbidden" from reviewing materials that were not considered by the zoning board). Appellant cannot preserve an issue for appeal through the filing of an amended petition in the circuit court.

Therefore, the constitutionality of terminating Appellant's vested rights was not preserved for appellate review, and should not be considered by this Court.

Because the issue concerning vested rights has not been preserved, this leaves only the issue of whether the Board erred in denying the request for a legal nonconforming use based on the evidence presented to the Board in 2008. However, Appellant's brief concentrates solely on the purely legal and unpreserved issue of whether the application of the City's ordinances is unconstitutional. To Appellant, in her appeal, the facts of vacancy of the property do not matter. Appellant does not even attempt to argue in her brief that the evidence of vacancy heard by the Board was not sufficient to support the Board's conclusion regarding the loss of the legal nonconforming status.

In other words, as discussed above, the issue regarding the alleged unconstitutional application of the City's ordinances is addressed in Appellant's brief but is unpreserved because Appellant did not raise this argument in her petition to the circuit court. Vice versa and likewise, the issue whether the Board's decision was supported by any evidence was raised in the petition for review, but has been abandoned because Appellant does not challenge the sufficiency of the evidence or the Board's conclusion in her brief. Appellant has abandoned any appeal concerning the sufficiency of the evidence concerning the finding of the loss of grandfather status.

Therefore, if this Court does not reach the constitutional issue or if Appellant does not succeed in this appeal on her claim that the application of the ordinances is unconstitutional, then this Court also does not need to reach the issue of whether the circuit court correctly decided to affirm the Board's decision that Appellant's property lost its legal nonconforming use.

III. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DETERMINATION THAT APPELLANT'S PROPERTY LOST ITS STATUS AS A LEGAL NONCONFORMING USE AS A DUPLEX.

A. There was evidence to support the Board's decision.

Pursuant to the any evidence standard of review, the circuit court correctly affirmed the Board's decision that the vacancy of the property extinguished the legal nonconforming use as a duplex. The issue facing the Board was whether to allow the use as a duplex to be reestablished or whether the legal nonconforming use had been lost by a 12-month period of vacancy. (R. pp. 416; 428-29; 655) The Board heard and received evidence concerning the vacancy of the property. (R. pp. 657-662; 669; 671) The circuit court found that the property was vacant starting November 2005, at the latest. (R. p. 47) Therefore, pursuant to the any evidence standard of review, the circuit court found the evidence in the record reasonably supported the Board's decision that the property had been vacant for a 12-month period and had lost its legal nonconforming status. (R. p. 47)

The electricity was cut to the property at the time of the fire. (R. p. 660) Water service was discontinued as of August 2005. (R. pp. 433; 659; 669) The City's inspection history states the property was vacant as of November 7, 2005, and placards were placed on the structure. (R. pp. 423; 443; 661) In October 2005, Appellant's brother (Wayne Hatten) had called and said he would be out of the house by November 1, 2005. (R. p. 423)

At the hearing, Appellant contended she should not lose grandfather status because her brother was living in the property in 2006. (R. p. 657) In November 2005 the property had been posted and occupancy was prohibited. (R. p. 658) The notice posted on the property stated the building was unsafe and its use or occupancy was prohibited by the building official. (R. p. 443) The last time the City found someone in the property was shortly after the fire that occurred in April 2004, but Appellant contended her brother lived on the property the "entire time." (R. pp. 426; 659-660)

Contrary to her testimony that her brother lived on the property the "entire time," Appellant testified that no one had been living in the house in the last twelve months. (R. p. 662) This would have constituted a period from September 2007 to September 2008. Appellant testified she took charge of the property in December 2007. (R. p. 662) Thus, she stated, "[t]hat's all I can attest to." (R. p. 662) But later Appellant testified that her brother lived in the property until Appellant purchased the property in December 2007.[7] (R. p. 669) However, in her uncontested Statement of the Case, Appellant states the property "continued to be occupied, primarily by Dortch's brother,

[7] Appellant's testimony on this point should be compared with her statement at the previous hearing that her brother lived in the property for about a year after the fire. (R. pp. 424; 618)

until at least November 1, 2005."[8] (App. Br. at 7) Appellant testified her first attempt to get a permit from the City was in January 2007.[9] (R. p. 671)

On the one hand, Appellant claimed her brother lived on the property the entire time. But, on the other hand, Appellant stated she could not attest to any facts concerning occupancy until she took charge of the property in December 2007.

At the conclusion of the hearing, the Board adopted a motion to uphold the Zoning Administrator's decision that the legal nonconforming use of the property had been lost. This motion was based on the facts adduced concerning the fire and the vacancy after the fire together with evidence that Appellant's first attempt to obtain a permit was not until 2007. (R. p. 682).

The term "nonconforming" is one that is "applied to lots, structures, uses of land or structures . . . which were lawful before the passage of the [zoning] ordinance . . . but which are prohibited by [the zoning ordinance] or which are not in compliance with the requirements of [the zoning ordinance]. City Code § 17-55. (R. p. 760)

The zoning ordinance recognizes that there may be lots and uses of land and structures which were lawful before passage of the zoning ordinance. Therefore, the zoning ordinance is intended to allow the nonconformities "to continue until they are removed, but not to encourage their survival." City Code § 17-201. (R. p. 778)

A nonconforming use shall not be reestablished after vacancy, abandonment or discontinuance for any period of 12 consecutive months. City Code § 17-202(e). (R. pp. 778-79)

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[8] *See* Rule 208(b)(1)(C), SCACR ("Any matters stated or alleged in appellant's statement shall be binding on appellant.").

[9] Appellant's testimony on this point should be compared with her statement at the previous hearing that she first approached the City to obtain a permit in December 2007 which is consistent with her testimony that she did not obtain full ownership of the property until December 2007. (R. pp. 637; 662)

Likewise, the zoning administrator may not issue a certificate of zoning compliance for a nonconforming use unless the zoning administrator receives reasonable proof that the nonconformity has not been vacant, abandoned or discontinued for any period of 12 consecutive months within the last six years. City Code § 17-84(b)(1). (R. p. 767)

The Board did not err in finding that the duplex was a nonconformity that should not have been grandfathered. There was evidence in the record supporting the Board's decision that the use had been vacant, discontinued, or abandoned for at least a 12-month period at some point in the past. There is evidence that there was no water or electricity for many years together with evidence that Appellant's brother moved out and Appellant made no attempt to obtain a permit for the property until almost three years after the fire. This Court should affirm the circuit court's decision if there was any evidence to support the Board's decision. *See Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004) (applying any evidence standard of review and finding that evidence supported the loss of a nonconforming use), aff'd by 372 S.C. 230, 642 S.E.2d 565 (2007). The burden of proving a nonconforming use is on the party claiming a prior nonconforming use. *Whaley v. Dorchester County Bd. of Zoning Appeals*, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999). Appellant did not meet this burden. The Board, as the finder of fact, was free to disbelieve Appellant's wildly inconsistent testimony concerning the occupancy of the property. *See Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) ("A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.").

B. Respondent did not force the vacancy of the property.[10]

[10] This issue is not preserved because it was not raised in the petition for appeal from the Board's decision to deny the reestablishment of the nonconforming use. (R. p. 191) *See Newton, supra.*

Appellant now attempts to excuse the vacancy by arguing that the vacancy was "forced" by the City. Appellant would have this Court find that the vacancy was caused by the City's prohibition on occupancy starting on or about November 7, 2005. However, this conclusion is not supported by the record.

There is no evidence the City forced Appellant, or her brother, to vacate the property. A fire occurred in April 2004, at which time the electricity to the property was cut. (R. pp. 617-18; 659; 669) In August 2005, the water service was terminated. (R. p. 433) Appellant admits that the fire damaged the back portion of the house including one of the bathrooms. (R. pp. 619-621; 669) There is absolutely no evidence that repairs could not have been performed earlier, thus preventing the posting of the property, other than for Appellant's stated reason that she was trying to buy out her brother's share of the property and that she did not approach the City to obtain a permit until December 2007. (R. pp. 635-37) Appellant repaired the damage to the back of the house in 2009. (R. pp. 620-21; 708-09) Neither Appellant nor her brother filed any objection to or appeal from the City's posting of the property. Appellant should not be permitted to collaterally attack the posting of the property through this appeal. Appellant asks this Court for relief in the form of directing the "building department to grant Dortch a repair permit . . . ." The "building department" is not a party to this appeal and the zoning official does not issue building permits. The building department's determination to post the property as unsafe for occupancy is separate from any zoning determination.[11] There is no evidence the City "forced" the vacancy through the building department's application of property maintenance codes. The building department's independent decision to post a property should not invalidate the Board's decision finding that the property lost

[11] *See* Appellant's statement that building permits and zoning permits are obtained from separate offices and that she was able to obtain a building permit for exterior repairs. (R. p. 232)

its legal nonconforming use. It was incumbent upon Appellant to do the repairs that would have prevented the posting of the property. Her failure to do so does not mean the vacancy was "forced."[12]

After lengthy discussion, testimony, and evidence at the September 2008 meeting, the Board reached the conclusion that the property had lost its grandfather status based on vacancy of the use as a duplex for a 12-month period. There is evidence in the record to support this conclusion. There is no evidence the City "forced" the vacancy.

The notion of a "forced" vacancy is Appellant's only rebuttal to the facts and conclusion that the use had been vacant for at least a 12-month period. Appellant cannot, and does not, deny that the property was vacant for a 12-month period.

C. Section 17-275 of the City Code does not permit duplexes on lots less than 10,000 square feet and it can be reasonably understood.

Because there was evidence in the record of a 12-month period of vacancy, Appellant's only other avenue of relief is to challenge the applicability of the zoning ordinances in the first place.

Appellant argues that use as a duplex is not nonconforming because the zoning ordinance, § 17-275, does not require 10,000 square feet of lot area for the duplex and leaves citizens guessing as to its requirements.[13] *See Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995) (stating an ordinance should be given a "practical, reasonable

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[12] Assuming her brother occupied the property through November 1, 2005, and then was "forced" out, Appellant still would have had a year from this date to obtain a permit to perform repairs to a duplex and save the legal nonconforming use, but Appellant never approached the City for a permit until at least January 2007.

[13] This argument should be deemed waived as it was not raised in the petition for review to the circuit court. *See Newton, supra.*

and fair interpretation consonant with the purposes, design, and policy of the lawmakers."). This position is clearly not supported by the terms of the zoning ordinance. Moreover, Appellant has conceded all along that her lot size was not large enough, i.e., nonconforming – it is only now, 10 years later, that she posits a new argument based on a tortured reading of the zoning ordinance's lot-size requirements.

Section 17-275 of the zoning ordinance contains a schedule of major height and area requirements for all zoning districts. (R. pp. 782-85) Lot area requirements must comply with the schedule unless modified by other conditions not present in this appeal. (R. pp. 782-85)

The schedule is straightforward and easily applied to dwelling units within each of the districts. For the subject RG-1 district,[14] the minimum lot area for the first dwelling unit is 5,000 square feet. Each additional dwelling unit on a lot in RG-1 also requires 5,000 square feet of lot area. (R. pp. 782-85)

The schedule as a whole contains a note stating that, "[d]etached single-family units shall require 5,000 square feet per unit and the density shall meet the same requirements for the first unit." Footnote "g" simply restates this general note. (R. p. 784)

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[14] The City's zoning ordinance divides the city into various districts "within which are regulated and restricted the erection, construction, reconstruction, alteration, repair or use of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes." City Code § 17-231(a). (R. p. 780)The zoning district of the subject property is RG-1 (General Residential District). (R. p. 410) City Code § 17-231(c). This district, along with RG-1A and RG-2 districts, "are intended as medium and high density residential areas permitting progressively higher population densities, characterized by single-family detached, two-family detached and multiple-family structures, and garden type apartments." City Code § 17-235. (R. p. 782) A dwelling is any building designed, occupied or intended for human occupancy. City Code § 17-55. (R. p. 755) A two-family detached dwelling is commonly known as a duplex. *Id.* A dwelling unit means any dwelling designed, occupied or intended for occupancy by a single-family unit. *Id.*

The column in the schedule labeled "Each Additional Unit" is clearly not limited to single-family detached units. It is applicable to any type dwelling units.

It just so happens that in the RG-1 district, the area required for the first unit and for each additional unit is the same at 5,000 square feet each. (R. p. 783) For other districts, that uniformity may not be the case.

As an example, in RG-1, the first unit requires 5,000 square feet of lot area, and each additional unit also requires 5,000 square feet. (R. p. 783) Therefore, two single-family detached dwellings on a parcel would require a lot size of 10,000 square feet. A duplex would require a lot size of 10,000 square feet. A triplex would require a lot size of 15,000 square feet, and so on, with the maximum density of units being approximately 8.7 per acre.

For the denser RG-2 district, the first unit requires 5,000 square feet, and each additional unit requires 2,500 square feet. (R. p. 783) Footnote "g" is applicable to the RG-2 district. Therefore, two single-family dwelling units on a parcel would require 10,000 square feet of lot area, while a duplex would require only 7,500 square feet. (R. pp. 783-84)

Appellant's tortured reading of section 17-275 is not supported by the clear and understandable nature of the schedule, and it can be clearly understood by people of ordinary intelligence. Appellant claims that the City "would have the reader look for confusion . . . in order to develop doubt as to this straightforward meaning" of the schedule. (App. Br. at 34) It is Appellant who has manufactured confusion and doubt in a reasonably understandable statutory scheme.

D. The application of an objective time limitation for reestablishment of a nonconforming use does not deprive Appellant of vested rights.

As the next avenue for avoiding the finding of vacancy and the loss of the legal nonconforming status, Appellant argues the application of section 17-202(e) of the City Code unconstitutionally deprived Appellant of her vested right to use the property as a duplex.[15] Apparently, Appellant contends that she can forever continue to use the property as a duplex until such time as she affirmatively discontinues such use.

On the merits, Appellant misapprehends the law of nonconforming uses as related to vested rights. Appellant is not entitled to reestablish the nonconforming use as a vested right if there has been "vacancy, abandonment or discontinuance for any period of 12 consecutive months . . . ." City Code § 17-202(e). (R. pp. 778-79) The evidence at the hearing in September 2008 demonstrated that the nonconforming use had been vacant or discontinued for a period of 12 months.

The overriding public policy of zoning laws is aimed at the reasonable restriction and eventual elimination of nonconforming uses. *See Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 187, 813 S.E.2d 874, 883 (Ct. App. 2018) ("[T]he intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use."); *see also Christy v. Harleston*, 266 S.C. 439, 442, 223 S.E.2d 861, 862 (1976) (stating the purpose of zoning ordinances is to permit and regulate nonconforming uses in the reasonable hope of eliminating such uses without unnecessary hardship to property owners in the newly zoned areas); S.C. Code Ann. § 6-29-730 (2004) (providing that the governing authority may enact regulations for the termination of nonconformities by specifying the period or periods in which the nonconformity is required to cease).

[15] As previously discussed, this issue is not preserved for appellate review.

"A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 498, 536 S.E.2d 892, 901 (Ct. App. 2000), quoting *F.B.R. Investors v. County of Charleston*, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991); *see Gurganious v. City of Beaufort*, 317 S.C. 481, 490, 454 S.E.2d 912, 917-18 (Ct. App. 1995) ("Once a valid zoning ordinance is enacted based upon a comprehensive zoning plan, it is generally recognized that nonconforming uses detract from the public purpose to be achieved by the plan.").

"It is well settled that the right to continue a nonconforming use may be lost by abandonment." *Conway v. City of Greenville*, 254 S.C. 96, 105, 173 S.E.2d 648, 652 (1970).

Appellant argues *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955) and its progeny do not permit a municipality to statutorily terminate nonconforming uses upon a cessation of use. However, *James* is patently distinguishable from the present case. The zoning ordinance in *James*, unlike the City's ordinance, did not provide any allowance for the continuation of a nonconforming use until some period of cessation of use. The Greenville ordinance required that any use of land which did not comply with the provisions of the ordinance had to be discontinued within one year from the effective date of the ordinance. *Id.* at 574, 88 S.E.2d at 665. Thus, pursuant to the ordinance, the landowner was required to discontinue the use to which he had been applying it. *Id.* at 581, 88 S.E.2d at 669. The supreme court held that the operation of the ordinance amounted to a taking and a violation of due process because it arbitrarily discontinued nonconforming uses. The court stated, "one's property may be continued to be used for the same purpose it was being used at the time of the passage of the zoning ordinance." *Id.* at 578, 88 S.E.2d at 667. This is also true in Columbia, South Carolina. One's property may continue to be used

for the same purpose, *unless* that purpose or use is vacated, discontinued, or abandoned. Appellant could have continued the nonconforming use forever had its use not been discontinued by her brother moving out of the property together with Appellant's failure to take any action for over two years to obtain any permits to reestablish the use as a duplex. The City of Columbia's ordinance does not arbitrarily order a discontinuance of use like the ordinance at issue in *James*.

In other words, Appellant had a vested right to continue the use of her property as a duplex until such time as the use was cut off for a period of 12 months by vacancy, abandonment or discontinuance of that use. None of the authorities cited by Plaintiff prevent a municipality from legislating the extinguishment of nonconforming uses after a period vacancy, discontinuance, or abandonment.

City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538 (2001), involved the proper construction of an ordinance concerning abandoned and obsolete signs. The ordinance in question provided that "[a]ny sign which advertises or pertains to a business . . . or purpose which is no longer conducted or that has not been in use for three months . . . shall be deemed to be an obsolete or abandoned sign." *Id.* at 46, 543 S.E.2d at 539. The city argued the intent of the ordinance was to provide a three-month objective period of abandonment for signs. *Id.* at 47, 543 S.E.2d at 540. The supreme court interpreted the ordinance to contain no time frame for abandonment. Therefore, the supreme court applied the common law of abandonment. Under the common law, abandonment of a nonconforming use must be accompanied by an intent to relinquish the right to use the property for a nonconforming use. *Id.* at 48, 543 S.E.2d at 540.

The supreme court resorted to the common law only because the city's ordinance did not provide an objective time frame for abandonment. *Id.* Had the ordinance contained an objective time frame for abandonment, the court would not have required any subjective intent to the

abandon the use. *Juel* does not stand for the proposition that objective time limits for termination of nonconforming uses are unenforceable.

Here, unlike *Juel*, there is no reason to resort to the common law or Appellant's subjective intent. Section 17-202(e) of the City Code includes an objective time frame for vacancy, abandonment, or discontinuance for any period of 12 consecutive months by the owner. This objective time frame should control and Appellant's intent is irrelevant. The City's discontinuance provision, specifically stating that it operates to prevent resumption of a nonconforming use after a specified period of time has elapsed, removes the factor of intent to abandon.

In *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995), a property owner challenged an architectural board's decision to deny grandfather status to a fence without regard to the issue of intent to abandon the nonconforming fence. The applicable ordinance contained an objective time limitation on the reestablishment of the use. *Id.* In the face of the objective time limitation, this Court declined to apply the common law definition of abandonment. *Id.* This Court affirmed the board's denial of a certificate of appropriateness for the fence. The architectural board found the nonconforming fence lost its grandfathered status because the prior fence had been destroyed over one year prior to the construction of the new fence. *Id.* The ordinance at issue stated, in part, that a nonconforming use could not be "[r]eused or reoccupied after discontinuance of use or occupancy for a period of one (1) year or more . . . ." *Id.* at 489, 454 S.E.2d at 917. This Court held the time allowed for reoccupation was reasonable and that the ordinance was properly applied without regard to the actual intentions of the property owner. *Id.* at 490, 454 S.E.2d at 918; *see also Toys R Us v. Silva*, 676 N.E.2d 862, 867 (N.Y. 1996) (finding the inclusion of an objective lapse period in a zoning ordinance removed the requirement of intent to abandon, stating "discontinuance of nonconforming activity for the specified period constitutes

an abandonment regardless of intent"); *Spicer v. Holihan*, 550 N.Y.S.2d 943 (N.Y. App. Div. 1990) (finding irrelevant an owner's intent not to abandon a prior nonconforming use and finding an ordinance prohibiting reestablishment after discontinuance of use for one year forecloses any inquiry as to the owner's intent); *Smith v. Bd. of Adjustment of City of Cedar Rapids*, 460 N.W.2d 854, 857 (Iowa 1990) (holding that, in dealing with perpetuation of nonconforming uses, municipalities may enact ordinances which dispense with subjective intent, and that such ordinances may effectively terminate nonconforming uses based solely on discontinuance of use for a specified period of time).

Moreover, the use of the term "vacancy" in the City's ordinance removes any element of intent. Other courts have held that the use of the words vacate or vacancy in zoning ordinances implied an objective standard allowing termination of a nonconforming use regardless of whether the owner intends to abandon the use. *See Wyatt v. Board of Adjustment-Zoning of the City and County of Denver*, 622 P.2d 85 (Colo. Ct. App. 1980) (finding the termination of a nonconforming use based on vacancy, without regard to intention to abandon use, where fixtures remained but a beauty shop had not been operated for 12 months); *Choi v. City of Fife*, 803 P.2d 1330 (Wash. Ct. App. 1991) (concluding that an owner may be held to have vacated a nonconforming use without showing that she intended to vacate).

To the extent that an intent to abandon needs to be demonstrated before a nonconforming use can be terminated, which is denied, the evidence heard and relied upon by the Board demonstrates this intent. Appellant failed, for a period in excess of 24 months after the posting of non-occupancy of the property, to take any action to reestablish the use of the property as a duplex. Appellant does not claim that she made any efforts during this time to reestablish the use of the property as a duplex. She did not contact anyone. She did not attempt to obtain any permits. She

did not appeal the posting of the property. In other words, the discontinuance and vacancy was voluntary. Now, many years later, Appellant simply asserts she intended all along to continue the use of the property as a duplex. The position urged by Appellant in this action would allow nonconforming uses to be extended indefinitely, on the whim of the landowner.

The Board's conclusion not to allow reestablishment of the nonconforming use, which should not be disturbed if there is any evidence to support it, is supported by the evidence that there was no water or electricity for many years and no attempt by Appellant to obtain a permit for the property for many years. Appellant's subjective, self-serving testimony regarding her intention should not be given credence now in the face of the objective evidence heard by the Board. *See Gurganious*, 317 S.C. at 488, 454 S.E.2d at 916 (holding that an owner's intentions are not to be regarded where a zoning ordinance contains an objective time limitation on the resumption of usage); *see also S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 862 A.2d 1204, 1211 (N.J. Super. Ct. App. Div. 2004) ("An unsubstantiated assertion of intention cannot carry the day, for that would . . . defeat advancement of the elimination policy.").

E. Appellant's additional challenges to the application of the zoning ordinance to the nonconforming use are not preserved.

Appellant also argues that section 17-202(e) of the City Code is inapplicable to situations involving reconstruction after damage, and that equitable tolling should be applied to the 12-month vacancy period. Neither of these arguments were raised in the petition for appeal from the Board's decision to deny the reestablishment of the nonconforming use. *See Newton, supra.* Therefore, these issues are not preserved for review.

IV. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DENIAL OF APPELLANT'S VARIANCE REQUESTS.[16]

Appellant has twice applied for variances to the lot size requirement in order to reestablish the use of the property as a duplex. (R. pp. 327; 383) The Board denied these applications by written decisions issued in 2009 and 2013. (R. pp. 243; 350) The circuit court correctly affirmed the Board's denial of Appellant's variance requests.

The Board may grant a variance from the terms of the zoning ordinance "as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of [the zoning ordinance] will, in an individual case, result in unnecessary hardship, so that the spirit of [the zoning ordinance] shall be observed, public safety and welfare secured, and substantial justice done." City Code § 17-112(3)a.1. (R. p. 772) The City's criteria for a variance are taken directly from S.C. Code Ann. § 6-29-800 (Supp. 2019). A variance may be granted in an individual case of unnecessary hardship only upon a finding by the Board that the following conditions have been met:

> (1) There are extraordinary and exceptional conditions pertaining to the piece of property;
> (2) The extraordinary and exceptional conditions do not generally apply to other property in the vicinity;
> (3) Because of the conditions, the application of the zoning ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
> (4) The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the

[16] If this Court agrees that Appellant lost the legal nonconforming use of the structure as a duplex, a variance should not be allowed to save the property from what Appellant lost. The Board can grant a variance to establish a change from the literal enforcement of the zoning ordinance, City Code § 17-112(3)a.1, but Appellant was asking for the Board to give back to her something she lost. "The [B]oard may not grant a variance the effects of which would be to allow the establishment of a use not otherwise permitted in a zoning district." City Code § 17-112(3)b.2. (R. pp. 772-73)

> character of the district will not be harmed by the granting of the variance.

City Code § 17-112(3)b.1.(i) - (iv). (R. p. 773)

The Board must also find that the reasons set forth in the application justify a variance, and that the variance is the minimum variance that will make possible the reasonable use of the land. City Code 17-112(3)b.6. (R. p. 773) Finally, in order to grant a variance, the Board must find that the granting of a variance will be in harmony with the general purpose and intent of the zoning ordinance, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. City Code 17-112(3)b.7. (R. p. 773)

"Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions." *Restaurant Row*, 335 S.C. at 215, 516 S.E.2d at 445-46; *see also Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953) ("It is generally held that before a variance can be allowed on the ground of 'unnecessary hardship', there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation."). The general rule is that variances are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. 8 McQuillin, Municipal Corporations § 25:179.32 (3d ed. 2010). A variance should be strictly construed and granted only in cases of extreme hardship where the requirements of the ordinance are present. *Id.*

An applicant bears the burden of proving its entitlement to a variance and the board correctly denies a variance if the applicant fails to meet the requirements of each element of the ordinance. *Restaurant Row*, 335 S.C. at 215, 516 S.E.2d at 445. A board's decision will not be disturbed if there is evidence in the record to support it. *Id.* at 215, 516 S.E.2d at 446.

A. Appellant's 2008 request did not meet the criteria to establish a variance and the Board did not err in denying the request.

Appellant first applied for a variance on June 11, 2008. (R. pp. 383-84) Appellant proposed "interior & exterior renovations to re-establish a duplex." (R. p. 383) Appellant acknowledged that the zoning ordinance (§ 17-275 of the City Code) required a lot size of at least 10,000 square feet for a duplex but that her lot contained only 7,644 square feet. (R. p. 384) Appellant stated extraordinary and exceptional conditions pertained to her property because it had been built and maintained as a duplex, and it would be "costly" to convert to a single-family residence. (R. p. 384)

At the hearing on this application, Appellant stated she was "requesting to reestablish duplex status of this property . . . because the property has been vacant for more than 12 months." (R. p. 617) Appellant explained that the property had been vacant for about two years and that the water and electricity had been turned off. (R. p. 617)

Appellant testified she first approached the City in December 2007 to obtain a permit to do a "basic upgrade of the property." (R. pp. 619; 637) She planned to paint, replace burnt wood, and re-do bathrooms, windows, and the back structure of the house. (R. p. 619) She explained that she had to renovate the back of the house because of the fire, but she intended to "re-do the entire house." (R. p. 620) Appellant did not present any estimates for the work or any estimates demonstrating the difference in cost between the planned renovations as opposed to converting the structure to a single-family home.

Appellant testified it would be an "economical hardship" to renovate the home into a single-family residence if she could not reestablish a duplex, but she would utilize the structure as a single-family home if she could not use it as a duplex. (R. pp. 630; 645)

Appellant's evidence did not demonstrate "extraordinary and exceptional *conditions pertaining to the piece of property.*" City Code § 17-112(3)b.1. (R. p. 773) The use of the structure on the property as a duplex is not an extraordinary and exceptional *condition pertaining to the property.* Appellant's entire body of evidence on this factor was that the structure had been a duplex for a long time. On this point, Appellant admitted at the outset of the hearing that the structure had been vacant and was nonconforming and she was seeking to reestablish it as a duplex. Therefore, her argument as to extraordinary conditions basically took the form of stating that a nonconforming use is an extraordinary and exceptional condition that should allow a variance. Appellant's request was this: My duplex is nonconforming; therefore, my duplex is extraordinary and exceptional. If this were the standard, nonconforming uses would never be amortized out of existence and would always be grounds for a variance. Appellant is using her stated reason for the variance request, i.e., to maintain a duplex, as the grounds for the variance request.[17]

The Board was not required to accept Appellant's facts or reasoning at face value. The Board was correct in deciding, based on the facts presented to it, that there were no extraordinary and exceptional conditions that pertained to the piece of property. Just because Appellant says the property has been a duplex for a long time does not make the conditions pertaining to the property extraordinary and exceptional. The Board, as the fact finder, can take its own view of the evidence.

This Court's opinion in *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992), is an example of a variance being granted because of extraordinary and exceptional conditions pertaining to a property. The developer had purchased a piece of property

[17] It is important to note Appellant can continue to use the property for residential purposes. This situation is very different from that in *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 438 S.E.2d 273 (Ct. App. 1993), where the owner was entitled to a variance because the landowner had no other possible use for the property without a variance.

with plans to build an 80-unit motel. *Id.* at 381, 418 S.E.2d at 320. However, the passage of the Beachfront Management Act resulted in the loss of property, preventing the developer from meeting the parking requirements for the planned motel. *Id.* The developer presented evidence of extraordinary and exceptional conditions pertaining to the property, entitling it to a variance in the board's discretion. *Id.* This Court affirmed the granting of a variance. *Id.* at 384, 418 S.E.2d at 322. In the present case, Appellant has not presented any evidence of extraordinary and exceptional conditions of the property. Appellant based her request on the loss of grandfather status. This is not an extraordinary and exceptional condition pertaining to the property.

A variance can be granted where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship. City Code § 17-112(a)1. (R. p. 772) It cannot be stressed enough that the unnecessary hardship urged by Appellant is not from a literal enforcement of the ordinance but rather from Appellant's own failure to maintain the grandfathered status of the property.

Appellant's testimony and evidence consisted of nothing more than vague statements that the property had been a duplex since the '60s, and it would be an "economical hardship" if the variance was not granted. The alleged economic hardship needs to be compared with Appellant's testimony that she already planned to conduct extensive repairs to the property. She failed to show the Board the difference in cost between her renovation plans and the cost to convert to a single-family unit. See Restaurant Row, 335 S.C. at 218, 516 S.E.2d at 447 (stating that financial hardship does not automatically constitute unnecessary hardship).

Appellant's evidence did not show that, because of the conditions pertaining to the property, the application of the zoning ordinance would effectively prohibit or unreasonably restrict the utilization of the property. Appellant acknowledged she would utilize the property as a

single-family residence, and she did not prove to the Board that the costs to do so prohibited or unreasonably restricted the utilization of the property.

Appellant's evidence also did not demonstrate that the conditions, i.e., an undersized lot, do not generally apply to other property in the vicinity. Appellant did not provide any facts concerning this criterion. Appellant stated there were four duplexes on the street, out of 13 parcels, but she did not inform the decision makers about the lot sizes of the other parcels.

Finally, Appellant argues that the Board abused its discretion by treating the variance request as a use variance rather than an area variance. This point is without merit. The Board treated the variance request exactly as it was requested by Appellant. Appellant asked for a variance to reestablish the use of the property as a duplex. Appellant now asserts that a standard of leniency should be applied to area variances. However, whether the variance was one for use or for area, the Board applies the same criteria. The Board in this case applied the applicable criteria to the request as presented by Appellant. There was no abuse of discretion for an alleged failure to recognize some distinction between area and use variances.

Appellant simply did not meet her burden of proving an entitlement to a variance. The Board did not err in failing to grant the requested variance. The evidence heard by the Board supported its decision that Appellant had not met the criteria for a variance. This Court should not substitute its judgment for the Board if the decision is fairly debatable.

B. Appellant's 2012 request did not meet the criteria to establish a variance and the Board did not err in denying the request.

Appellant again applied for a variance on November 14, 2012. (R. pp. 327-28) In this application, Appellant stated that her property did not conform to the zoning ordinance because her lot contained only 6786 square feet and section 17-275 of the zoning ordinance requires 5,000

square feet per unit. (R. p. 328). In support of her contention that extraordinary and exceptional conditions pertain to the property, Appellant stated the house has been a duplex for over 50 years. (R. p. 328)

The Board held a hearing on this application on February 12, 2013. The Board issued its written decision on March 12, 2013, finding extraordinary and exceptional conditions did not exist for the property, the conditions did not generally apply to other property in the vicinity, the denial of the variance would not effectively prohibit or unreasonably restrict the use of the property, and the variance would be of substantial detriment to adjacent property or the public good, and the character of the district would be harmed. (R. pp. 302-303)

At the hearing, Appellant explained, in her view, the property was extraordinary and exceptional because it was not new construction, "it's not a huge improvement of something that already exists, it is a use and a structure that already exists, in its present configuration." (R. p. 695) Appellant talked about the history of the structure's use as a duplex, and intimated it would cost over $200,000 to *replace*. (R. p. 696) Appellant stated it would be very expensive to convert the structure into a single-family residence. (R. p. 696)

Appellant's argument and evidence as to exceptional conditions did not differ much from her application in 2008. Appellant claims that the nonconforming use of the structure should automatically equate to exceptional and extraordinary conditions pertaining to the property. The Board and the circuit court did not err in deciding this was not so. The Board found the structure had lost its legal nonconforming status, and that there were many other nonconforming duplexes in the area and former duplexes that had been converted to single-family dwellings. (R. p. 303)

A property is not rendered exceptional and extraordinary simply because it was utilized in the past as a duplex and is now nonconforming. The Board correctly declined to declare the

condition of the property to be exceptional such as to allow the reestablishment of grandfathered status.[18] The circuit court correctly found "Appellant cannot now use the loss of [legal] nonconforming status to gain back what she lost by claiming it makes the property extraordinary and exceptional." (R. p. 51)

To address the variance criterion that the extraordinary "conditions do not generally apply to other property in the vicinity," City Code § 17-112(3)b.1.(ii), Appellant stated there were only about five duplexes in the "general neighborhood" and that "there aren't many duplexes, in the area." (R. pp. 698-99) Appellant acknowledged that she did not know whether the extraordinary conditions applied to the other duplexes in the area. (R. p. 699) This criterion requires an owner to show that her property is unique and faces a singular disadvantage. Appellant's evidence did not demonstrate that the use of the property as a duplex on an undersized lot did not generally apply to other properties in the vicinity.

The third criterion asks whether, because of the extraordinary conditions, the requirements of the zoning ordinance would effectively prohibit or unreasonable restrict the use of the property. On this point, Appellant first argued she "won't be able to use it, at all." (R. p. 700) When questioned by the Board on this assertion and asked for specifics, Appellant admitted she did not know if conversion to single-family was totally impossible, but she vaguely concluded it would be unreasonable. (R. p. 700) In conclusory fashion, without any details or explanation that the Board was seeking, Appellant testified the zoning restriction deprived her of a reasonable economically viable use of the property. (R. pp. 728-29) Appellant did not present any written estimates or testimony from a contractor. Simply stating that cost is a hindrance should not suffice for a

[18] *See* City Code § 17-112(3)b.2. (stating the Board may not grant a variance the effects of which would be to allow the establishment of a use not otherwise permitted in a zoning district). (R. p. 773)

variance – there is likely a very small pool of variance applicants who would admit that money was no object.

The Board correctly found the application of the ordinance to the property would not effectively prohibit or unreasonably restrict the use of the property. The Board found the structure could be converted to a single-family dwelling and the conversion costs had not been substantiated. (R. pp. 303; 740) Financial burden does not necessarily constitute an unreasonable restriction. *Restaurant Row*, 335 S.C. at 218, 516 S.E.2d at 447; *see* S.C. Code Ann. § 6-29-800 (Supp. 2019) ("The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance.").

The fourth criterion asks whether the variance, if granted, would be a substantial detriment to adjacent property or to the public good, and whether the character of the district would be harmed. The Board found the additional density from the duplex would harm the area. (R. p. 303) Appellant's property is located in the least dense area of the City's general residential district. *See* City Code § 17-275. (R. pp. 782-83) Appellant argued the character of the district would not be harmed because two-family dwellings are allowed in the district. Appellant also argued the public good would be better served by allowing the duplex rather than the structure being demolished, condemned, or vacant. (R. p. 701) To Appellant, there was no middle ground. However, Appellant's application stated that "[m]ost of the surrounding property is already single-family" and "there are only about five duplex units in the area." (R. p. 344) This assertion runs counter to Appellant's position that her duplex on an undersized lot will not harm the character of the area because of density.

Because the zoning district allows for additional density based only on lot size, the Board did not err in finding the character of the district would be harmed by the additional density.

Appellant's undersized lot would contribute to density that is not permitted in the zoning district. Appellant argued that density concerns were allayed because the property was located next to a park, and she proposed to include parking in the rear of the lot to address density. (R. p. 698) However, a nearby resident testified as to the density of the street and his concern that increased density resulting from the variance would hinder the further improvement of the block. (R. pp. 735-37) The nearby resident also expressed his concerns about overflow parking from an adjacent duplex. (R. p. 736) This evidence supports the Board's judgment that the variance would be of substantial detriment to adjacent property and the public good.

In addressing the requirement that a variance proposal be in harmony with the purpose and intent of the zoning ordinance and not detrimental to the public welfare, Appellant stated the proposal was in harmony because two-family dwellings are allowed in the applicable district but Appellant acknowledged the density concerns and the fact that her lot size was not nearly large enough to accommodate a duplex. (R. p. 702).

On this point, the Board found the granting of the variance would not be in harmony with the general purpose and intent of the zoning ordinance to permit nonconformities to continue until they are removed, but not to encourage their survival. City Code § 17-201 and -202. (R. pp. 303; 778) The Board did not err in reaching this conclusion. At the time the Board heard this application, the Board had previously ruled the property had lost its legal nonconforming status. The Board properly exercised its judgment in not reversing a previous ruling by the Board which would have run counter to the intent of the zoning ordinance.

Appellant again did not meet her burden of proving an entitlement to a variance. The Board did not err in failing to grant the requested variance. Appellant was required to show that she met all the criteria for a variance. *See Restaurant Row*, 335 S.C. at 215, 516 S.E.2d at 445 (stating the

board must find that each of the elements are met for granting a variance). The evidence heard by the Board supported its decision that Appellant had not met all of the criteria.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the circuit court correctly affirmed the decisions of the City of Columbia Board of Zoning Appeals.

Respectfully submitted,

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June 25, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Civil Action Nos. 2009-CP-40-01307, 2013-CP-40-02159
Appellate Case No. 2019-000868

Frieda H. Dortch, ...Appellant,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals,.....Respondent.

CERTIFICATE OF COMPLIANCE

This is to certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

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