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SC Court of Appeals

ELECTRONICALLY FILED - 2021 Feb 25 9:54 AM - CHARLESTON - COMMON PLEAS - CASE#2018CP1000148

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 DEWBERRY 334 MEETING STREET,)
 LLC,)
)
 APPELLANT,)
)
 v.)
)
 CITY OF CHARLESTON AND CITY OF)
 CHARLESTON BOARD OF)
 ARCHITECTURAL REVIEW-LARGE,)
)
 RESPONDENTS.)
 _____)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 2018-CP-10-00148

ORDER ON APPEAL

Presiding Judge:	Hon. Deadra L. Jefferson
Appellant’s Attorney:	G. Trenholm Walker, Esq.
Defendant’s Attorney:	Daniel S. McQueeney, Jr., Esq.
Date of Hearing:	January 4, 2021
Court Reporter:	N/A

This matter is before the Court on the appeal of the Appellant, Dewberry 334 Meeting Street, LLC (hereinafter “Dewberry” or “Appellant”), pursuant to S.C. Code Ann. Section 6-29-900 (A) - (B), from the decision of the City of Charleston Board of Architectural Review-Large (hereinafter “BAR” or “Respondent”) rendered at its meeting on December 13, 2017. This Motion is disposed of without the necessity of a hearing pursuant to the Chief Justice's April 3, 2020 Order, As Amended December 16, 2020, Section (c)(4). This Motion is listed on the January 4, 2021 Charleston County Motions Roster published December 7, 2020. The Appellant filed its Petition and Grounds for Appeal on November 20, 2020. The Respondent filed its Brief in Opposition on December 4, 2020. The Appellant filed a Supplemental Brief on January 4, 2021.

On January 12, 2018, Dewberry filed its Notice of Appeal and simultaneously filed its request for mandatory pre-litigation mediation in accordance with S.C. Code Ann. § 6-29-915. The

mediation, conducted by attorney Wade H. Logan, III, Esq. and negotiations thereafter did not result in a resolution. The City filed the record of the proceedings before the BAR on October 30, 2020, as allowed under the Third Amended Scheduling Order entered on October 27, 2020.

In its Petition and Grounds for Appeal Dewberry requests that this Court reverse the final decision of the BAR denying approval of the exterior illumination of The Dewberry Charleston Hotel, owned by Dewberry, located at 334 Meeting Street in the City's Old and Historic District, and requiring the removal of certain exterior lights.

Appellant Dewberry 334 Meeting Street, LLC argues that the City of Charleston Board of Architectural Review committed an error of law in denying after-the-fact approval to certain light fixtures and appurtenant lighting elements installed as part of the conversion of the former federal office building at 334 Meeting Street into a hotel. Dewberry also challenges the BAR's authority to evaluate these elements and the specificity of the standards applicable to the BAR's review.

The Court has reviewed the Record on Appeal, the filings and legal briefs of counsel for the parties, and applicable law. Based on the foregoing, and as more particularly set forth herein, the Court Affirms the decision of the BAR and dismisses this appeal.

STANDARD OF REVIEW

"The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence." S.C. Code Ann. § 6-29-930(A). "In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." *Id.*; Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 234, 642 S.E.2d 565, 566 (2007). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Austin v. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004)

(quoting Restaurant Row Assoc. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)); see also Clear Channel Outdoor, 372 S.C. at 234, 642 S.E.2d at 566.

The Court “gives great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” Arkay, LLC v. City of Charleston, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (citing Gurganious v. City of Beaufort, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)). “The appellate court is not free to substitute its judgment for that of the [board].” Gurganious, 317 S.C. at 487, 454 S.E.2d at 916. A court “will not reverse a zoning board’s decision unless the board’s findings of fact have no evidentiary support or the board commits an error of law.” Arkay, LLC, 418 S.C. at 91-92, 791 S.E.2d at 308; see also Christ Central Ministries v. City of Columbia Board of Zoning Appeals, 424 S.C. 358, 360-61, 818 S.E.2d 30, 31 (Ct. App. 2018).

FINDINGS OF FACT

1. The Old and Historic District

In 1931, the City Council of Charleston (“the City Council”) established the first historic district in the United States in an area now known as the Old and Historic District. See 2 Zoning and Land Use Controls § 7.03[1] (2020) (“The first historic district in the United States was established by a 1931 ordinance in Charleston, South Carolina.”).

Under the City’s Zoning Ordinance (“CZO”), the City Council created special historic districts, including the Old and Historic District. CZO § 54-231.a. The City Council articulated the purpose of these districts, as follows:

In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the city, 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 tourist 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. These purposes are advanced through the preservation and protection of old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation.

CZO § 54-230.

“No structure which is within the Old and Historic District shall be erected, demolished or removed in whole or in part, nor shall the exterior architectural appearance of any structure which is visible from a public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review.” CZO § 54-232.a. “Evidence of the approval required above shall be a Certificate of Appropriateness issued by the [BAR] as created herein.” CZO § 54-232.e. “Such certificate shall be a statement signed by the chairman of the [BAR] or administrative officer, as applicable, stating that the new construction demolition, relocation or changes in the exterior architectural appearance for which application has been made are approved by the [BAR]” CZO § 54-232.e.

As in many jurisdictions, the City’s BAR consists of members with specialized knowledge and expertise. The BAR includes two (2) registered architects, an attorney, a licensed professional involved in construction or engineering, and a lay person. CZO § 54-233.b. All members must have “demonstrated experience in historic design or preservation” and at least one of several fields relating to planning, preservation, and/or real property. CZO § 54-233.b.

The CZO includes ordinances setting forth specific standards the BAR should consider in rendering its decisions and incorporates inventories, maps, and preservation standards to guide the BAR in applying the ordinances. The CZO provides: “In reviewing any application before it, the

Board of Architectural Review may approve, deny or conditionally approve an application.” CZO § 54-240.a. “If in the opinion of the Board, an application requires further study, action on an application may be deferred.” CZO § 54-240.a.

“In reviewing an application to demolish, or demolish in part, or remove, or alter the exterior architectural appearance of any existing structure, the Board of Architectural Review shall consider, among other things, the historic, architectural and aesthetic features of such structure, the nature and character of the surrounding area, the historic or culturally important use of such structure and the importance to the city.” CZO § 54-240.b. CZO § 54-240.d provides:

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

The City Council has adopted an inventory map, with several amendments and supplements, to, among other things, “provide guidance to the Board of Architectural Review.”

CZO § 54-235. Moreover, CZO § 54-236 provides, in relevant part:

In order to provide guidance and insight into desirable goals and objectives for the . . . Old and Historic District . . . for desirable types of development, and for the maintenance of consistent policies in guiding the building public toward better standards of design,” the BAR “shall be guided by the Secretary of the Interior’s Standards for Historic Preservation and the 2017 BAR PRINCIPLES FOR NEW CONSTRUCTION AND RENOVATION AND REPAIRS”
.....

2. The Dewberry Hotel

Appellant Dewberry owns and operates a hotel located at 334 Meeting Street in the City's Old and Historic District. R. at p. 3, lines 3-12. On October 16, 2017, Dewberry applied for after-the-fact approval of certain elements of the building impacting its exterior architectural appearance, including external light fixtures and appurtenant lighting elements. Id. at p. 33.

On December 13, 2017, the BAR held a hearing on Dewberry's request. Id. at p. 1. During the hearing, Lockie Brown, the vice-president of design for Dewberry, conceded that the lighting design should have been approved prior to installation.¹ Id. at p. 3, lines 22-23; p. 5, line 23-p. 6, line 6. Dennis Dowd, the City's architect, testified that the BAR "has consistently denied up and down lighting of buildings viewing it as detrimental to the character of historic structures and the city as a whole and to neighborhoods." Id. at p. 20, lines 14-21. Dewberry characterizes this testimony as suggesting the adoption of an "internal" standard. The Court finds that the Dewberry's characterization of this testimony is without merit. Dowd's testimony is more appropriately characterized as evidence tending to show and establishing that the BAR consistently applied the standards articulated in the ordinances adopted by City Council.

Members of the BAR rejected Dewberry's request based on the impact of the unapproved lighting on the exterior architectural appearance of the building and the character of the Old and Historic District:

¹ Dewberry asserts, without citation to the record, that Dewberry did not file an application "of its own accord," instead averring that it did so only at the City's insistence. See Appellant's Brief in Support of Appeal at p. 1. This assertion does not change Dewberry's concession at the BAR hearing that the ordinances apply. Dewberry raised no challenge to the applicability of the BAR's authority and presented no evidence as to the issue at the hearing. The Court notes that the "sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires." Newton v. Zoning Bd. of Appeals for Beaufort Cnty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011). But this preservation requirement does not permit a party to reverse course on appeal. See Gurganious, 317 S.C. at 488, 454 S.E.2d at 915 ("It is well settled that one cannot present and try his case on one theory and then change his theory on appeal.").

This building, being the scale that it is, does create a unique condition; and the uniqueness of that condition is that when you—when you dramatically light a building of this scale, as was noted during public comment, it does reinforce the size.

And we've just spent a lot of time trying to make sure that new buildings in the historic district are in conformance with the scale and this sort of fabric and this—this lighting scheme is entirely—(Inaudible.)

I think that—that this sort of dramatic lighting scheme, uplights and downlights, and certain—(Inaudible.) And things like that does place a detrimental effect on the character of the historic district. And I agree with [staff's] recommendations—(Inaudible.)

Id. at p. 26, lines 9-25; p. 27, lines 20-22; p. 29, lines 17-23. One member of the BAR commented that he had previously mistaken the hotel for the U.S.S. Yorktown. Id. at p. 27, line 20-p. 28, line 4. Another board member observed that similar buildings in the area did not have such external lighting. Id. at p. 25, line 22-p. 26, line 8.

The external lighting elements addressed by the BAR are outlined in a staff report to the BAR, included at pages 101-102 of the Record on Appeal. They are also shown in site plans included in the Record, and specifically delineated as follows:

- a) 34 in-ground “uplights” at every column around the building (R. at p. 53) (Denied);
- b) 13 lights on the west canopy (Id. at p. 58) (Denied);
- c) 13 lights at the east elevation (Id. at p. 58) (Denied);
- d) 44 exterior downlights at the 8th floor (Id. at p. 61) (Denied);
- e) 30 parapet lights at the roof (Id. at p. 61) (Denied); and
- f) Uplighting of 9 sconce lights at the ballroom (Id. at p. 69) (Denied); and
- g) Downlighting of 9 sconce lights at the ballroom (Id. at p. 102) (Granted); and
- h) 24 recessed lights at the exterior corridor and canopy (Id. at 102) (Granted); and

The BAR granted 2 of the 8 lighting requests by Dewberry, and denied approval of much of the new external lighting based on the adverse impacts to the exterior architectural appearance of the building and the character of the Old and Historic District.² R. at p. 28, lines 8-18; p. 30,

² The Dewberry submitted 15 requests in total to the BAR, of which only 8 requests dealt with external lighting. Of the 15 total requests, 9 were approved by the BAR.

line 3-p. 31, line 14. The BAR required the external lighting fixtures to be removed. Id. at p. 30, line 15-p. 31, line 14.

Pursuant to section 6-29-900(B)(2) of the South Carolina Code, Dewberry timely filed its notice of appeal with a request for pre-litigation mediation.

CONCLUSIONS OF LAW

I. The CZO expressly authorizes the BAR to review and approve, disapprove, or conditionally approve any alterations to the exterior architectural appearance of a building or structure within the Old and Historic District.

The touchtone of the BAR’s authority is “exterior architectural appearance.” See 2 Zoning and Land Use Controls § 7.03[1] (2020) (“Generally, historic district ordinances designate a portion of the jurisdiction as an ‘historic area’ and establish a committee to review any proposed changes in the exterior architectural appearance of structures within that area.”). The General Assembly embraced the same standard in the enabling legislation for boards of architectural review. See S.C. Code Ann. § 6-29-870(a) (authorizing local governments to establish a board of architectural review to apply restrictions and conditions governing “the right to erect, demolish, remove in whole or in part, or alter the exterior appearance of all buildings or structures” within designated historic districts).

Several provisions of the CZO compel the Court to conclude that City Council acted within its legislatively-granted authority by extending the BAR’s approval authority to apply to all alterations to the exterior architectural appearance of structures within the Old and Historic District, subject to exceptions not applicable in this case, such as areas not visible from the public right-of-way.

For example, CZO § 54-232.a provides:

No structure which is within the Old and Historic District shall be erected, demolished or removed in whole or in part, nor shall the

exterior architectural appearance of any structure which is visible from a public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review.

CZO § 54-240.f bolsters the Court’s decision to affirm the decision of the BAR, providing:

The Board of Architectural Review may refuse a permit or Certificate of Appropriateness for the erection, reconstruction, alteration, demolition, partial demolition, or removal of any structure within the Old and Historic District, which in the opinion of the Board of Architectural Review, would be detrimental to the interests of the Old and Historic District and against the historic character and public interest of the city.

“The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature.” Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 654 (2002). “If a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning.” Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).

Dewberry provides no meritorious reason for the Court to ignore the broad authority that the City Council conferred on the BAR, or to create a new, judicially-imposed exception to such authority for exterior illumination. In this respect, the City Council expressly excludes certain areas from the BAR’s broad authority. See CZO § 54-232.a (areas not visible from the public right-of-way; see also CZO § 54-242 (expressly stating exemptions to article). The City Council could have proscribing the BAR from exercising authority over exterior architectural appearance in the Old and Historic District except in very limited circumstances. It did not do so, and the Court will not review such an inherently legislative decision.

CZO § 54-231.b defines “exterior architectural appearance” to include “architectural character, general composition and general arrangement of the exterior of a structure, its height,

scale and mass in relation to its immediate surroundings, the kind, color and texture of the building material and type and character of all windows, doors, light fixtures, signs and appurtenant elements that are visible from a street or public right-of-way.” The plain language of this statute does not suggest that the BAR’s jurisdiction is limited to only certain structures or appurtenances that alter exterior architectural appearance. Rather, the expressed intent of the City Council, as reflected in Sec. 54-230 of the CZO, and as implemented through Sec. 54-232.a and 54-240.f of the CZO, is that a certificate of appropriateness will be required for any alteration to a structure in the Old and Historic District, unless expressly provided to the contrary.

The Court also recognizes that the definitions of “height,” “scale,” and “mass” in the CZO emphasize the importance of visibility and context—belying Dewberry’s theory that “exterior architectural appearance” solely relates to “physical” characteristics. See, e.g., CZO § 54-231.f (“Scale” means “building elements and details and the relationship of the building to itself, to humans, and to structures in its immediate surroundings, in terms of its visual unity, continuity and proportions.”).

II. The CZO provides sufficient guidance to the BAR on the criteria for evaluating alterations to the exterior architectural appearance of buildings within the Old and Historic District.

The Court holds that Dewberry has not shown by clear and convincing evidence that the CZO’s standards are unconstitutionally vague.

“A municipal ordinance is a legislative enactment and is presumed to be constitutional.” Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). “The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose.” Id. “The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on [appellant] to show the

arbitrary and capricious character of the ordinance through clear and convincing evidence.” Id. This burden requires the attacker to negate “every conceivable basis which might support it.” North Charleston Land Corp. v. City of North Charleston, 281 S.C. 470, 474, 316 S.E.2d 137, 139 (1984) (citing Lehnhausen v. Lake Shore Auto Parts Company, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006 (1973)).

Moreover, as set forth by the South Carolina Supreme Court in Bob Jones University, Inc. v. City of Greenville,

The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish desired end unless there is plain violation of the constitutional rights of citizens. There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality has acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.

243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963).

The City Council articulated the following criteria governing the BAR’s review of an application to alter the exterior architectural appearance of any existing structure in the Old and Historic District:

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

CZO § 54-240.b.

Section 54-240.d of the CZO supplements the criteria set forth in CZO § 54-240.b, as follows:

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

CZO § 54-240.d.

CZO § 54-240.f further permits the BAR to refuse a permit for the alteration of any structure in the Old and Historic District, “which in the opinion of the [BAR], would be detrimental to the interests of the Old and Historic District and against the historic character and public interest of the City.”

The Court finds that the record is void of any evidence that the CZO’s standards are arbitrary and capricious. In the absence of such evidence, the Court finds that the CZO’s standards are valid and enforceable.

Moreover, the Court finds the Respondent’s cited authority unpersuasive on this issue. Schloss Poster Advert. Co. v. Rock Hill, 190 S.C. 92, 93, 2 S.E.2d 392, 393 (1939), discusses invalidating an ordinance for lack of specificity. The ordinance at issue in Schloss reads as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the City of Rock Hill without having first obtained from the city council a permit to do so.” Id.

The Schloss court invalidated the ordinance because the ordinance was totally void of standards to apply. See id. at 96, 2 S.E.2d at 394 (“Thus the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, the two are applying for precisely the same privileges under the same circumstances.”). Moreover, the Court of Appeals later held in Peterson, “[i]n Schloss, the ordinance in question was totally void of any standards or conditions, making arbitrary discrimination and abuses by the City possible.” The Court of Appeals held that, “it was in no sense a zoning ordinance because it did not prescribe regulations, but instead committed zoning decisions to the unrestrained will of the City authorities for any reason deemed satisfactory to them.” 312 S.C. at 171-72, 439 S.E.2d at 323.

The Court finds that the City’s present governing ordinances stand in contrast to the ordinance addressed in Schloss as the City’s ordinances are not arbitrary or capricious.

In the time since Schloss, appellate courts in South Carolina have exhibited restraint in striking down ordinances under a challenge of “vagueness,” especially in the zoning context. For example, in Hodge v. Pollock, 223 S.C. 342, 347-48, 75 S.E.2d 752, 754 (1953), the Supreme Court of South Carolina addressed whether the “unnecessary hardship” test for a variance should be invalidated, explaining: “The office of the variance is to permit modification of an otherwise legitimate restriction in the exceptional case where, due to unusual conditions, it becomes more burdensome than was intended, and may be modified without impairment of the public purpose.” The Court emphasized the lack of an all-inclusive definition of “unnecessary hardship,” but still upheld the “wide discretion” conferred on the zoning board: “A board of adjustment is vested with a wide discretion in determining whether a variance should be granted in a particular case on the ground of unnecessary hardship.” Id. “Its decision should be given great weight and the discretion

vested in such board should not be interfered with unless arbitrary or clearly erroneous.” Id.; see also City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (refusing to invalidate an ordinance prohibiting “loud and unseemly” noise as unconstitutionally vague).

In Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 234-35, 489 S.E.2d 630, 632 (1997), the Court refused to invalidate a zoning ordinance on grounds of vagueness: “[A] municipality may delegate the administration of its ordinances to a board provided the board’s discretion is sufficiently limited by clear rules and standards.” In Peterson Outdoor, the Supreme Court of South Carolina expressly upheld the standards set forth in the subject ordinance, but required a remand to the local government to apply them: “[T]he City validly exercised its authority in enacting the CAB Ordinance and in delegating the enforcement of this ordinance to the CAB.” Id. at 235, 489 S.E.2d at 632.

The City Council is not required to adopt other ordinances addressing external lighting, such as the one adopted by the Town of Mount Pleasant, as the Respondent suggests. The specificity of Mount Pleasant’s ordinance has no legal impact on the constitutionality of the City’s governing ordinances. So long as the CZO meets the constitutional requirements, nothing invalidates an ordinance simply because it could be more specific. That decision is properly encompassed by the legislature.

The Court similarly rejects the Respondent’s emphasis on the City’s standards governing the illumination of signs. Again, the specificity of such regulations has no legal effect on the constitutionality of other provisions in the ordinance. As the City points out, signs inherently require special attention due to their First Amendment implications. Many historic district ordinances—like the City’s—have separate standards governing them. See Zoning and Land Use Controls § 7.03[3] (2020) (“Signs, of course, are typically on the outside of buildings and may

significantly affect the appearance of a building, site or district. Thus, most local governments with preservation ordinances include the erection or installation of signs under the scope of the ordinances, including the review processes.”).

Accordingly, the Court finds that the Respondent fails to meet its burden of establishing by clear and convincing evidence that the governing ordinances here are unconstitutionally vague.

III. Record evidence supports the BAR’s finding that the unapproved external light fixtures and appurtenant lighting elements overemphasized the size of the building to the detriment of the character of the historic district.

“The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence.” S.C. Code Ann. § 6-29-930(A). “In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.” *Id.* Generally, a trial court must uphold the decision of a zoning board unless there is no evidence to support it. *See* S.C. Code Ann. § 6-29-840 (2019) (“The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury.”); *Townes Assoc’s, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) (holding that factual findings of the jury will not be disturbed unless there is no evidence which reasonably supports the jury’s findings) (overruled on other grounds).

The decision of a municipal zoning board will be overturned only if it is “arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.* “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” *Boehm v. Town of Sullivan’s Island Board of Zoning Appeals*, 423 S.C. 169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018). For the following reasons, the Court finds that there is sufficient evidence to uphold the decision of the BZA, that the decision of the BZA is

not controlled by an error of law, and that the decision of the BZA is not arbitrary, capricious, or an abuse of discretion.

As set forth in the Record on Appeal, the BAR members raised concerns about how the unapproved external lighting over-emphasized the existing height and bulk of the hotel building:

This building, being the scale that it is, does create a unique condition; and the uniqueness of that condition is that when you—when you dramatically light a building of this scale, as was noted during public comment, it does reinforce the size.

And we've just spent a lot of time trying to make sure that new buildings in the historic district are in conformance with the scale and this sort of fabric and this—this lighting scheme is entirely—(Inaudible.)

I think that—that this sort of dramatic lighting scheme, uplights and downlights, and certain—(Inaudible.) And things like that does place a detrimental effect on the character of the historic district. And I agree with [staff's] recommendations—(Inaudible.)

R. at p. 26, lines 9-25; Id. at p. 27, lines 20-22; Id. at p. 29, lines 17-23.

Dennis Dowd testified that the BAR “has consistently denied up and down lighting of buildings viewing it as detrimental to the character of historic structures and the city as a whole and to neighborhoods.” Id. at p. 20, lines 14-21. Dowd’s testimony serves as the opinion of an expert on architecture regarding the impact of the lighting on the exterior architectural appearance of the building and the historic district. The Court finds that his testimony is sufficient to compel the Court to affirm the BAR’s decision.

The testimony of the board members is also supportive of the BAR’s conclusion. See Niggel v. Columbia, 254 S.C. 19, 25-26, 173 S.E.2d 136, 139 (1970) (special personal knowledge of board may be used as basis for decision, but only if stated in record). In this case, one board member supported the BAR’s finding that the external lighting overemphasized the size and scale of the building by explaining that he had previously mistaken the hotel for the U.S.S. Yorktown. R. at p. 27, line 20-p. 28, line 4. Another board member personally observed the lighting at the

hotel, both while driving past it and from the roof. Id. at p. 29, lines 14-23. Like Dowd, one board member observed that similar buildings in the area did not have such external lighting because the BAR historically did not approve of it. Id. at p. 25, line 22-p. 26, line 8.

The BAR's factual findings that the new external lights placed on the building overemphasized the height and scale of the building and detracted from the character of the historic district are supported by the record. The Court therefore affirms the BAR's decision and dismisses this appeal.

CONCLUSION

For each of the foregoing reasons, the BAR's decision is Affirmed and this appeal is Dismissed.

AND IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

February _____, 2021
Charleston, South Carolina
At Chambers



Charleston Common Pleas

Case Caption: Dewberry 334 Meeting Street LLC VS Charleston City Of ,
defendant, et al
Case Number: 2018CP1000148
Type: Order/Other

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128