

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Elizabeth Souder,

Petitioner/Appellant,

v.

THE CITY OF COLUMBIA and THE
CITY OF COLUMBIA BOARD OF
ZONING APPEALS,

Defendants/Respondents.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2025-CP-40-07466

**PETITIONER/APPELLANT'S
REPLY TO THE BOARD'S
OPPOSITION BRIEF**

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INTRODUCTION

On April 2, this Court ruled that Libby's claims could proceed to the merits. Yet, the Columbia Board of Zoning Appeals ("Board" or "BZA") spends most of its opposition brief trying to undo that ruling. Nearly half of the Board's arguments are an almost verbatim recitation of the jurisdictional arguments this Court previously rejected earlier this year. The Board alternatively argues that some of Libby's claims and supporting evidence are not properly before this Court. But this argument rests on a fundamental misunderstanding of the applicable standard of review. Finally, the Board argues that this Court must defer to the Board's factual findings, even though the Board made no factual findings relevant to this case. None of these arguments are persuasive. This Court should adhere to its April 2 ruling, reject the Board's efforts to avoid merits review, and grant Libby her requested relief.

ARGUMENT

I. This Court Has Jurisdiction to Hear Libby's Claims and the Board's Recycled Arguments to the Contrary Fail.

Libby previously explained why this Court has jurisdiction to hear her claims. *See* Libby's Opposition to BZA Motion to Strike and/or Dismiss for Lack of Subject Matter Jurisdiction (filed Dec. 10, 2025). Under S.C. Code Ann. § 6-29-840(A), courts are empowered to determine "whether the decision of the [zoning] board is correct as a matter of law." And as the Supreme Court held in *McMaster*, constitutional challenges to ordinances raise "a question of law." *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 503–04, 719 S.E.2d 660, 662 (2011). Accordingly, the South Carolina courts routinely hear constitutional claims and other legal claims that

are raised via zoning appeals, even though such claims are outside the jurisdiction of a zoning board. *See, e.g., Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 568 (2007) (adjudicating an estoppel claim raised in a zoning appeal where the zoning board was a named respondent alongside the city); *McMaster*, 395 S.C. at 502–07 (adjudicating a constitutional claim brought in a zoning appeal filed against the BZA and the City of Columbia); *see also Merchant v. City of Columbia Zoning Adm’r*, No. 2010-CP-32-01368, 2012 WL 10129860, at *5–6 (S.C. Ct. Com. Pl. Apr. 4, 2012) (adjudicating an estoppel claim in a zoning appeal filed against the BZA and the City of Columbia).

At its April 2 hearing, this Court agreed with Libby’s jurisdictional arguments and thus rejected the Board’s motion to dismiss for lack of subject matter jurisdiction. BZA Br. at 2 (Board acknowledging its motion to dismiss was denied). The Court further ruled that Libby’s zoning appeal would move forward with both the Board and the City as respondents so that Libby “would have the forum to argue the constitutionality of the ordinance” and “[a]ll the necessary parties would be there.” Transcript of April 2, 2026 Hearing, attached as Exhibit 1, at 21:8–21:14, 22:22–25, 26:8–21, 27:5–21; *see also id.* at 34:4–14 (describing the path forward as following “the *McMaster* template”). That should have resolved this matter. Indeed, as the Court explained to the Board then, its April 2 ruling meant that, going forward, the Board “would very likely be in the background” as the City defends the constitutionality of its challenged ordinance. *Id.* at 24:17–20. Yet, rather than accepting this Court’s invitation to remain in the case, the Board has instead renewed

its jurisdictional objections this Court rejected at its April 2 hearing. *Compare* Defendant City of Columbia Board of Zoning Appeals' Memorandum in Support of Motion to Strike (filed Mar. 31, 2026), *with* BZA Br. at 9–16 (repeating substantial portions of the Board's prior arguments nearly verbatim).

Thus, the Board again claims that “this Court is without subject matter jurisdiction to hear and decide any issues outside of those specifically within the Board's authority to hear.” BZA Br. at 11. Yet, as shown above, courts routinely hear and decide issues that are outside of a zoning board's authority to hear, including constitutional claims. *See, e.g., Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999) (adjudicating several constitutional claims in a zoning appeal filed against the zoning board). The Board's opposition reinforces rather than undermines this Court's prior ruling. For example, the Board (at 12–13) attempts to distinguish *McMaster* on the ground “that the City of Columbia was also a party in [that zoning] appeal.” But the City is likewise a party here, which confirms rather than undermines this Court's previous holding that this case matches and should therefore follow *McMaster*. *See* Ex. 1 at 34:4–14. The Board similarly fails to distinguish *any* of the many other cases that undermine its argument. *See* BZA Br. at 12–14. Thus, after acknowledging that the Supreme Court (and the circuit court before it) heard constitutional claims raised in a zoning appeal in *Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023), the Board attempts to distinguish that case by pointing out that the city zoning official was named alongside the zoning board. BZA Br. at 13. But that makes that

case *more* like this one, not less. More importantly, it is no response to the fact that all the courts involved there—including the Supreme Court—adjudicated constitutional claims in a zoning appeal.

Finally, when addressing *Whaley v. Dorchester County Zoning Board of Appeals*, the Board simply declares that the Supreme Court got it wrong. BZA Br. at 13. But that naked assertion is not a sound basis for this Court to revisit its April 2 ruling. The Court should hear Libby’s claims.

II. The Board’s Evidentiary Arguments All Fail.

The Board alternatively asks this Court to dismiss Libby’s estoppel claim because some of the supporting evidence Libby included in her original Petition was not also raised to the Board below. BZA Br. at 4–6 (describing these evidentiary arguments as applying to Libby’s “claim for equitable estoppel”). Specifically, the Board offers three alternative evidentiary-based arguments designed to prevent this Court from adjudicating Libby’s estoppel claim in this zoning appeal. First, the Board asks this Court to “dismiss any portion of the appeal that relies on facts not included in the record below.” *Id.* at 6. Second, the Board alternatively asks this Court to strike any factual matter Libby included in her original Petition for Appeal that was not also presented to the Board below. *Id.* Third, as “a further alternative,” the Board argues that “the Court could stay this portion of the appeal and allow discovery to take place on whether the City would be estopped from prohibiting Plaintiff’s business.” *Id.* All these arguments rest on the same mistaken assumption about the

applicable standard of review that governs this case, and all thus fail for the same reason.

The Board's confusion stems from its failure to recognize that zoning appeals are governed by two distinct standards of review: one for questions of fact and another for questions of law. *See* Libby's Opening Br. at 2–3 (explaining the different standards). The standard for reviewing the Board's factual findings is as follows: "The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A). That standard—and its instruction that courts not take additional evidence—is inapplicable here, however, because this case does not involve a dispute or challenge to any of the Board's findings of fact. Indeed, the Board's limited factual findings here are unremarkable and consist of nothing more than a recitation of the relevant ordinances and the fact that a hearing took place concerning the zoning administrator's interpretation of that ordinance. *See* Petition Ex. A (Board Order).

This case instead involves a constitutional challenge to the underlying ordinance itself and therefore raises "a question of law." *McMaster*, 395 S.C. at 504 (holding as much). Accordingly, Libby's claims are reviewed under the Court's jurisdiction to determine whether the board's decision is "correct as a matter of law" or otherwise "contrary to law." *See* S.C. Code Ann. §§ 6-29-820(A), 6-29-840(A). That standard necessarily involves determining whether the board's decision violates the supreme law of the State as set forth in the South Carolina Constitution,

notwithstanding the fact that the Board itself lacks the capacity or jurisdiction to make such a finding. Indeed, this fact has been repeatedly recognized by the Supreme Court in its articulation of the applicable standard of review for zoning appeals. Thus, in the context of a zoning appeal governed by S.C. Code Ann. § 6-29-840(A), the Supreme Court has expressly held that courts may overturn “a decision of a city zoning board” if the decision “has no reasonable relation to a lawful purpose.” *Clear Channel Outdoor*, 372 S.C. at 234. That language reflects the standard for determining constitutional challenges, and thus implicitly reflects the fact that courts can (and do) review constitutional claims in zoning appeals. *See Ani Creation*, 440 S.C. at 278–79 (explaining that government restrictions on private property are unconstitutional when the restriction “has no reasonable relation to a lawful purpose” (citation omitted)).

Because Libby’s claims raise questions of law rather than questions of fact, they are therefore “reviewed as a matter of law *under a broader standard of review* than is applied in reviewing issues of fact.” *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (emphasis added) (citation omitted). The Board’s evidentiary arguments thus all fail because the Board incorrectly treats Libby’s claims as presenting questions of fact when they instead present questions of law. Contrary to the Board’s argument, this Court must therefore conduct “a broader and more independent review” of Libby’s claims than it would for questions of fact. *Id.* at 10. And when considering such questions of law—which necessarily fall outside the zoning board’s competency and jurisdiction and thus cannot be adjudicated

below—the Court may, and should, take as much additional evidence as necessary to fully adjudicate those claims.¹

All the Board’s evidentiary arguments (at 4–6) therefore fail because they all rest on the same flawed assumption that Libby’s legal claims should be reviewed as if they were fact questions. The Board does not even mention, let alone address, the precedent recognizing the two different standards of review. Instead, the Board’s entire argument is predicated on the false assumption that the fact-based standard is the *only* standard that exists for zoning appeals. *See* BZA Br. at 4 (arguing the fact standard applies here). For this, the Board relies exclusively on *Austin v. Board of Zoning Appeals*, which includes its assertion that this Court’s “review is strictly limited to the facts and arguments raised to the board below.” BZA Br. at 4–6, 15 (citing *Austin*, 362 S.C. 29, 38, 606 S.E.2d 209, 214 (Ct. App. 2004)). It is therefore necessary to address *Austin*’s context.

In *Austin*, the underlying issue involved only a single disputed question of fact. There, “the issue raised by *Austin* to the Board was *limited to the narrow factual question* of determining which of the two streets had a higher average traffic volume.” *Austin*, 362 S.C. at 35 (emphasis added). The Town determined that the two streets

¹ The Board (at 4) quotes the second half of one sentence in S.C. Code Ann. § 6-29-840(A) to support its claim that “[T]he court may not take additional evidence.” But the full sentence makes clear that the instruction that the court “may not take additional evidence” applies only in the context of reviewing the Board’s factual findings. *See* S.C. Code Ann. § 6-29-840(A) (“The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.”). This language says nothing about evidence for legal claims that fall entirely outside the zoning board’s jurisdiction and thus involve no factual determinations by that body.

in question had the same average daily traffic, whereas the petitioner disagreed. *Id.* at 32–33. Thus, the challenge in that case was a direct attack on the zoning board’s factual findings, and the governing standard of review appropriately reflected as much. Moreover, *Austin*’s issue and evidence preservation statement was made in the context of evaluating the appellant’s motion to amend her petition to “add two new grounds” to her appeal and submit additional evidence *that was not included in her original petition*. *Id.* at 33, 37–39. Thus, *Austin*’s holding is limited to the issue it actually decided: whether an appellant challenging the board’s *factual* findings can amend their petition several months later with additional evidence and arguments. *See id.* Here, Libby is not seeking to amend her Petition but is instead merely asking that this Court review it.

Moreover, we know that *Austin*’s issue preservation and closed record statement is *not* the law. Start with the issue preservation requirement. Seven years after *Austin* was decided, the Court of Appeals expressly held that there is no requirement for those filing a zoning appeal under S.C. Code Ann. § 6-29-840(A) to first raise their issues with the zoning board below. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116–17, 123, 719 S.E.2d 282, 284, 287 (Ct. App. 2011). The court there based its holding on an extensive analysis of S.C. Code Ann. § 6-29-840(A) and the surrounding statutory scheme to further hold that zoning appeals do “not allow for issue identification, or even party identification, prior to the filing of a petition with the circuit court.” *Newton*, 396 S.C. at 117 (footnote omitted). The court concluded that, “[t]he statute [governing zoning appeals] does not require

the appellant to attend a public hearing on the Board's decision *or even to communicate his concerns to the Board prior to filing his petition with the circuit court.*" *Id.* (emphasis added); *see also McMaster*, 395 S.C. at 503–08 (applying a *de novo* standard of review to constitutional claims raised in a zoning appeal); *Ani Creation*, 440 S.C. at 279–89 (same).

Crucially, *Newton*'s holding arose in the context of an exhaustive analysis conducted solely for the purpose of answering the issue preservation question. 396 S.C. at 116–17. *Austin*, by contrast, made its statement in the context of a narrow ruling on a motion to add new facts and evidence to a petition several months after it was filed. 362 S.C. at 33, 37–39. Thus, it is *Newton*'s later and more reasoned analysis that controls here. But there is, of course, much more authority than just *Newton*. Take, as just one example, the 2007 Supreme Court decision of *Clear Channel Outdoor*, where the Court heard a claim for estoppel in a zoning appeal, despite the fact that no such claim was raised to the zoning board below. 372 S.C. at 233, 235–36.

Consequently, even if this Court were to read *Austin* as broadly as the Board urges—notwithstanding *Newton*'s express holding to the contrary—*Austin* was subsequently abrogated by the Supreme Court cases of *Clear Channel Outdoor*, *McMaster*, and *Ani Creation*. Indeed, this Court itself recently rejected the Board's issue preservation and jurisdictional argument when it adjudicated an unraised constitutional claim brought in an appeal like this one. *Allen Univ. v. City of Columbia Design/Dev. Rev. Comm'n*, No. 2023-CP-40-01426, at 8 (S.C. Ct. Com. Pl.

Sep. 27, 2024) (rejecting the same issue preservation and jurisdictional arguments the Board is making before adjudicating an unraised constitutional claim, while explaining that “it would have been futile [for the Petitioner] to raise these issues before the [Commission], who is without authority to hear a constitutional challenge”).

Austin involved a single disputed question of fact, and its holding is limited to that context. Its statement on issue preservation is simply not the law. *See Newton*, 396 S.C. at 116–17. And its statement that the courts cannot consider evidence unless it was first raised to the zoning board below only applies to fact questions like the one at issue there. As Libby explains *infra*, courts reviewing constitutional claims for the first time are of course permitted to review the relevant evidence.

III. This Court May Consider Libby’s Evidence, But Libby Also Prevails on the Limited Record Below.

The Court should consider all the evidence Libby presented in her Petition and accompanying exhibits. *See Clear Channel Outdoor*, 372 S.C. at 236 (adjudicating an estoppel claim in a zoning appeal and describing the relevant facts as having been presented to the Court by the Petitioner); *see also Merchant*, 2012 WL 10129860, at *5–6 (adjudicating an estoppel claim in a zoning appeal filed against the BZA and the City of Columbia).

This Court is empowered to review legal questions that are beyond the scope of a zoning board’s limited jurisdiction. *See supra* Part I; S.C. Code Ann. § 6-29-840(A) (authorizing courts to determine “whether the decision of the [zoning] board is correct as a matter of law”). It is an inherent part of that power that this Court be able to

review the evidence necessary to adjudicate those legal questions that fall outside a zoning board's jurisdiction. Indeed, that is precisely what happened in *Clear Channel Outdoor*. There, the Supreme Court adjudicated an estoppel claim by relying on the Petitioner's evidence, including the Petitioner's assertions and beliefs. *See* 372 S.C. at 235 (describing the relevant facts for Petitioner's estoppel claim as having been supplied by the Petition and referencing what the Petitioner "believe[d]"). Yet, because the Petitioner did not raise that estoppel claim to the zoning board below, the Court must have been relying on evidence the Petitioner submitted to the Court as part of its zoning appeal. *See Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 463, 602 S.E.2d 76, 78 (Ct. App. 2004), *aff'd*, 372 S.C. 230, 642 S.E.2d 565 (2007) (where no reference to a claim for estoppel appears in the preceding Court of Appeals decision that described the underlying board proceedings).

Consequently, the Board's argument that this Court should strike any "factual material that was not considered by the Board" fails. *See* BZA Br. at 5–6. The Board again relies solely on *Austin* and its inapplicable standard of review for this argument, but as explained above, *Austin* simply has no place in this case. Furthermore, it is particularly odd for the Board to fault Libby for failing to develop her estoppel claim below, given that the Board readily admits (at 11) that it lacked jurisdiction to hear *any* of Libby's claims, including her claim for estoppel. And, indeed, when Libby's counsel attempted to raise the issue of estoppel with the Board, the Board Chair chided him for doing so. *See* Libby's Opening Br. at 9–10, Ex. 3 (BZA Hearing Transcript) at 10:7–19, 34:15–35:22. Consistent with the Supreme Court's

approach in *Clear Channel Outdoor*, this Court should likewise consider all the evidence Libby submitted in her original Petition to adjudicate her properly pled claims.

Next, the Board alternatively argues that Libby should only be allowed to introduce her evidence if she does so in a separate action that allows for discovery. BZA Br. at 5–6, 13, 16. But this Court already made clear that Libby’s claims were being heard in this zoning appeal, which was to proceed without discovery. Ex. 1 at 34:4–16 (Court describing this case’s path forward as “following the *McMaster* template” and noting that “they didn’t do discovery” there); *id.* at 27:14–21 (explaining that the case will “proceed with the appeal with the City [and the Board]” and that there would be “[n]o discovery”); *id.* at 22:11–16 (explaining the proposed path ultimately adopted by the Court as letting “the appeal go forward that doesn’t need any discovery against the City and [the Board]”). It is undisputed that Libby’s estoppel claim was properly pled and all parties have been on notice of both the claim and its supporting evidence since last November. *See* Petition ¶¶ 6–12, 17–20, 23–25, 119–37. If this Court felt that Libby’s estoppel claim could not proceed in this zoning appeal, it would have said so at the April 2 hearing. It did not. Instead, it denied the Board’s motion to dismiss and ordered the parties to set a briefing schedule to address the merits of Libby’s claims. The Board’s evidentiary arguments are nothing more than a backdoor way of relitigating its failed motion to dismiss. This Court should reject them.

Nevertheless, Libby is entitled to prevail on her estoppel claim even if this Court looks only to the evidence Libby presented to the Board that refused to hear her claims.² Those facts demonstrate that (1) zoning approved Libby's business in 2018, (2) Libby had a second driveway built and otherwise "invested heavily" in her business in reliance on the City's repeated, formal approvals of her business, and (3) the 2025 interpretation harmed Libby by depriving her of the business she built from the ground up. *See* BZA 015–16, 025–26, 094, 098–99.

Libby has thus satisfied the elements of estoppel even if this Court reviews nothing other than the information presented to the Board. No amount of discovery will change the fact that Libby justifiably relied on the City's formal approvals of her

² As it pertains to her claim for estoppel, there are only three categories of relevant information Libby included in her original Petition that were not also explicitly presented to the Board. That evidence consists of: (1) Libby's sincere belief that she was in compliance with the City ordinance, Petition ¶¶ 10–11, 128–29, (2) the specific dollar amount she spent on her second driveway, *id.* ¶¶ 18–19, and (3) copies of her business licenses that were signed by the Zoning Administrator and reflected that the license also served as a zoning permit. *Id.* at ¶¶ 11, 133, Petition Composite Ex. C. First, the fact that Libby believed she was in compliance with the ordinance is implicit from the board record, even if she herself never explicitly stated as much to the Board. *See, e.g.*, BZA 016, 022–23, 094–95, 098–99. Second, evidence of the specific dollar amount Libby spent on building her second driveway is not a necessary fact for Libby to prevail on her estoppel claim, as Libby presented evidence to the Board that she had a second driveway built in reliance on the City's approval of her business. BZA 098 (explaining that Libby and her husband "relied on the zoning approval in good faith and incurred expenses installing a driveway and other lesser expenses related to the business"). Third, that Libby was licensed from 2018 through April 30, 2025, is an undisputed fact, but this Court should also take judicial notice of the business licenses pursuant Rule 201, SCRE. Finally, although Libby believes this Court can consider her evidence as submitted in her original Petition, if the Court declines to do so and also determines that the record below is inadequate to properly adjudicate Libby's estoppel claim, Libby is happy to engage in any discovery the Court deems necessary.

business to her detriment. Thus, the only remaining element Libby must show is that she lacked knowledge and “the means of knowledge of the truth as to the facts in question.” *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). Libby had every reason to believe that her fenced-in pool constituted a “fully enclosed” structure and thus complied with UDO § 17-4.3(d)(6)(f). *See* Libby’s Opening Br. at 27–29. The Board implies (at 5–6) that it can undermine this fact by cross-examining Libby or otherwise using discovery to somehow refute Libby’s sincere belief that she complied with the City’s ordinance. Although the Board is wrong about that, its argument also fails because Libby is entitled to estoppel as a matter of law.

As Libby explained in her Opening Brief (at 26–30), her case is identical in all material respects to *Landing Dev. Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985). There, the issue was whether short-term rentals were allowed in structures that were zoned for “permanent occupancy” only. *Id.* at 218–19. The Court did not look to the developers’ personal understanding of whether “permanent occupancy” prohibited short-term rentals but instead focused exclusively on the City’s interpretation of that phrase. *Id.* at 219–20. There—just as here—the relevant language was not defined in the ordinance. *Id.* And there—just as here—the zoning administrator was the “only definitive source of information concerning the interpretation and enforcement of the ordinance.” *Id.* at 220; Petition Ex. 1 at UDO §§ 17-2.3(f)(1)(c)–(d). The Supreme Court ultimately held that the developers satisfied the lack-of-knowledge element because their belief that short-term rentals were permissible was “solidly founded on the City’s *consistent application of its zoning*

ordinance in allowing such rentals[.]” *Landing Dev. Corp.*, 285 S.C. at 220 (emphasis added).

Accordingly, because the Columbia Zoning Administrator had “consistently represented that [Libby’s swim lessons] were permitted [under UDO § 17-4.3(d)(6)(f)]” by issuing zoning permits that stated as much, Libby likewise “lacked the knowledge or means to know that [her swim lessons] were prohibited.” 285 S.C. at 220. No amount of discovery will change that legal conclusion, and this Court can thus rule for Libby on her estoppel claim based on the limited record before the Board.

IV. Libby’s Police Power Argument Is Properly Before This Court.

The Board also relies on *Austin* to argue that this Court should not hear the police power argument Libby raised in her Opening Brief, simply because it was not specifically described as such in her “Petition for Appeal.” BZA Br. at 6–8. But, as the Board acknowledges, *Austin* merely affirmed the circuit court’s denial of “an appellant’s motion to state additional grounds for her appeal.” *Id.* at 8. Libby’s police power argument, however, is not an additional ground for appeal, nor does it introduce or rely on any new facts not found in her original Petition.

Libby has always argued that the challenged ban, as applied to her private swim lessons, arbitrarily deprives her of her right to use her property and is not reasonably related to any legitimate governmental interest. Petition ¶¶ 99–101, 105–07. Her police power argument thus merely supplies an additional and more specific reason that her substantive due process claim succeeds. In other words, it is inherently unconstitutional and a violation of due process for the government to

“restrict[] the use of privately owned property” by taking an action that exceeds the scope of its “authority” under the “police power.” *See McMaster*, 395 S.C. at 505–08 (treating the two questions as interchangeable); *see also Painter v. Town of Forest Acres*, 231 S.C. 56, 57–58, 97 S.E.2d 71, 71–72 (1957) (same); *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96–97, 596 S.E.2d 917, 923 (2004) (same). Indeed, the Board itself concedes as much. BZA Br. at 8 (acknowledging that “an invalid exercise of police powers can constitute a deprivation of property without due process”).

At bottom, the Board’s argument elevates form over substance. That Libby *briefed* the police power argument separately does not alter its legal substance. Libby clearly alleged that the ordinance violated her due process rights. *See* Petition ¶¶ 93–107. Her specific argument that the ordinance exceeds the City’s police power is just another way of proving as much. The Court should hear it.

V. This Court Does Not Need to Defer to the Board’s Factual Findings Because the Board Did Not Make Any Factual Findings Concerning Libby or the Nature of Her Business.

The Board concludes its opposition by arguing that its decision was proper and should be affirmed because there was an alleged “disputed fact” concerning noise. BZA Br. at 19–20. In support, the Board cites the testimony of the lone individual who sought to shut Libby down based on speculative fears that evaporated when he eventually moved in next door. *See* BZA 017 (documenting that this individual began complaining before ever moving in or seeing or hearing the lessons himself, only to then text Libby to say that he had “no issue with what you were doing over there right now” once he saw Libby’s lessons himself).

Moreover, that lone individual's testimony was contradicted by letters from more than 30 people with firsthand experience of Libby's business, in addition to the three people who testified in person on Libby's behalf. *See* Petition ¶¶ 82–88, Ex. O (Minutes for BZA hearing) at 4; BZA 049–90. But it is not just the lopsided nature of the evidence that undermines the Board's argument. The real problem is that—contrary to the Board's suggestion otherwise—there is no *finding* of fact for this Court to defer to. *See* BZA Br. at 19–20. In reality, the Board made no factual findings whatsoever about any aspect of Libby's business. *See* Petition Ex. A (Board Order). It instead simply affirmed the City's decision to shut Libby down, solely because her swim lessons take place outdoors. *See id.*; Libby's Opening Br. at 9–10, Ex. 3 at 38:5–7 (BZA Board Chair: "It's either fully enclosed or it's not fully enclosed. That's the bottom line. There's no other issue relevant."), 44:2–12 (similar). For the reasons explained above and in Libby's Opening Brief, that decision cannot stand.

CONCLUSION

This Court should grant Libby's zoning appeal, declare that Libby be allowed to resume her private swim lessons, and reverse the Board's decision to the extent that it holds otherwise.

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July 27, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2026 a true and correct copy of the foregoing **PETITIONER/APPELLANT'S REPLY TO THE BOARD'S OPPOSITION BRIEF** was served via electronic filing upon the following counsel of record:

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