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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr.

Case No. 2022-CP-37-00396
Appellate Case No. 2022-001796

John's Marine Service, Inc., Frances J. Ratliff, Edward J. Ratliff, Jr., James L. Ratliff,
Lucretia B. Morgan, Sherri Akers Crisp, and Amy Cawthon,

Appellants,

v.

Oconee County Board of Zoning Appeals, Ridgewater Engineering & Surveying, LLC, Globe, a
South Carolina Limited Partnership, and Farnes, a South Carolina Limited Partnership,

Respondents.

REPLY BRIEF OF APPELLANTS

David L. Paavola, SC Bar No. 100714
Kenison, Dudley & Crawford, LLC
1122-B Barnwell Street
Columbia, South Carolina 29201
(864) 242-4899
paavola@conlaw.com
Attorney for Appellants

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ARGUMENT IN REPLY

Respondents fail to address any of the issues on appeal raised by the Ratliff Family. Instead, Respondents argue that Ellenburg Road was a state road that reverted to Oconee County when Lake Keowee was formed, and that the record contains sufficient evidence to support the Oconee County Board of Zoning Appeals's ("BOZA") decision that Oconee County has a prescriptive easement across the Ratliff Family's property (also referred to as the "Private Driveway"). The Ratliff Family disputes both issues and contends that BOZA lacked jurisdiction to decide either. Respondents do not identify the source of BOZA's jurisdiction to decide these disputed issues. Accordingly, these are improper grounds upon which to uphold the BOZA's Variance Order.

Even assuming BOZA could decide these disputed issues, Respondents do not address the Ratliff Family's contention that BOZA did not fully evaluate all of the required legal elements of a prescriptive easement under a clear and convincing evidence standard, and therefore, it abused its discretion.

Respondents offer no response to the Ratliff Family's argument that, assuming the existence of a prescriptive easement, BOZA unilaterally expanded the easement by approving a variance that will greatly increase the burden, and create new burdens, on the Ratliff Family's properties.

Finally, Respondents do not address the Ratliff Family's argument that BOZA abused its discretion when it did not review the detrimental impact of the variance on the Ratliff Family's properties in light of the drawings submitted by the Ratliff Family and Ridgewater, the applicant, showing that under certain scenarios the Ratliff Family property would be required for placement of the new roadway.

BOZA was not the proper body to resolve the predicate disputed factual and legal issues that arose during the variance hearings. BOZA recognized this fact and sought guidance from Oconee County, but then moved forward and made a determination anyway. In so doing, BOZA deprived the Ratliff Family of their due process rights to have the disputed issue of whether Oconee County has an easement across their property determined by a court of competent jurisdiction before the variance was approved. This was error and an abuse of discretion.

I. Whether Ellenburg Road Was Ever a State Road is a Disputed Issue of Fact.

Respondents assert that the entirety of Ellenburg Road was originally a state road and then became a county road when Lake Keowee was formed. However, this is not an uncontroverted fact as Respondents claim and it is not a disputed issue of fact that the BOZA had jurisdiction to resolve during a variance hearing.

Oconee County Roads and Bridges employee Kyle Reid, in response to a question from BOZA about whether Ellenburg Road “is definitely a county road,” reported that he contacted the state and the state had no record of Ellenburg Road ever being a state road. Mr. Reid told BOZA that Oconee County’s position that Ellenburg Road was a former state road that reverted to a county road is based solely on “institutional knowledge,” not any documentation or testimony from any person with actual knowledge:

To our -- *to our institutional knowledge*, yes, sir, it -- it is a county road, all the way to the end as shown on -- on the plan.

...

Well, first, I’ve contacted the *state and they don’t have any record* of Ellenburg Road that -- *that shows that it was a state road*. Now all of the *institutional knowledge* again says that it was a state road. As far as anything that where the state abandoned their maintenance responsibility and gave it to the county, again there is no record that shows that, the -- *the state did not have any records as such and we don’t have any records as such to that end*. So, *it is institutional knowledge that has – that has led us to that we own to that point of the road*.

(BOZA Hearing Tr. 28:1-3, 28:24-:29:10 (April 25, 2022) (emphasis added)). Respondents cite public comments made by Jay Ratliff as supporting their position proving that Ellenburg Road was a state road. However, Mr. Ratliff was simply offering comments about his childhood memory of his parents' address and the location of roads before the lake existed, he was not offering an opinion about whether these roads were in fact part of the state system. (Br. Appellants 22). Mr. Ratliff's comments were far from determinative of this issue, and certainly should have less weight than the South Carolina Department of Transportation telling Oconee County that it has no records reflecting that Ellenburg Road was ever a state road.

It is far from an uncontroverted fact that Ellenburg Road was once a state road that reverted to Oconee County after the lake was formed. To the extent BOZA resolved this disputed fact and used this conclusion to form the basis of its variance approval, this was another disputed fact that was outside of BOZA's limited jurisdiction to determine a variance request and was error.

II. BOZA Lacked Jurisdiction to Decide Whether a Prescriptive Easement Exists over the Ratliff Family Property.

Respondents do not dispute that the question of whether Oconee County has a prescriptive easement over the entire length of Ellenburg Road, including the Ratliff Family's private property, was a predicate factual and legal issue to the BOZA's determination on the Variance Application. Respondents also do not challenged the Ratliff Family's position that BOZA lacked jurisdiction to decide this issue. BOZA's comments on this issue show that it agreed in principle with the Ratliff Family that: (1) a determination of the existence of a prescriptive easement was a predicate to its determination on the Variance Application, BOZA Hearing Tr. 86:15-22, 163:19-164:14, 174:20-175:15, 178:6-11 (Nov. 30, 2021); and (2) that BOZA did not have the jurisdiction to determine the existence of the prescriptive easement, BOZA Hearing Tr. 100:1-101:13 (Apr. 25, 2022) ("we

are not competent to decide that issue”; “we ought to go ahead and . . . decide this as though there were an easement”).

Even so, the BOZA simply assumed the existence of a prescriptive easement without waiting for a legal determination on this issue from a court of competent jurisdiction. (BOZA Hearing Tr. 101:8-13 (Apr. 25, 2022)). Based on this assumed prescriptive easement, the BOZA then determined it could grant the Variance Application for a future public road that will tie into this existing prescriptive easement. In assuming the existence of the prescriptive easement, the BOZA resolved this factual and legal dispute in favor of Oconee County and the developer, and effectively did the very thing it recognized that it did not have the power to do. This was error.

III. BOZA Did Not Apply the Correct Legal Standard for Prescriptive Easement.

The BOZA abused its discretion when it assumed that Oconee County holds a prescriptive easement over the Ratliff Family’s property. The existence of a prescriptive easement must be proven by clear and convincing evidence, its existence cannot merely be assumed to exist. *Bundy v. Shirley*, 412 S.C. 292, 306, 772 S.E.2d 170-71 (2015). Oconee County did not present any evidence to BOZA of its continued uninterrupted use of the Private Driveway for twenty years, it did not produce *any* maintenance records reflecting work done on the Private Driveway at *any* point in time, and it did not present any testimony from county employees, or anyone else, who had personal knowledge of ever having performed maintenance work on the Private Driveway. The only “evidence” cited by Oconee County for asserting the existence of a prescriptive easement over the Private Driveway was “institutional memory.” BOZA Hearing Tr. 23:5-24:13; 28:1-3, 28:24-29:10 (Apr. 25, 2022)). Institutional memory is not evidence.

Conversely, the Ratliff Family presented evidence to the BOZA including (1) two affidavits stating that Oconee County placed an End of Maintenance sign at or around 585 Ellenburg Road where it stayed for decades, Ex. D, R. p. 292; (2) documents and public statements

that the Ratliff Family have maintained the Private Driveway for the last forty years, Ex. D, R. p. 288, BOZA Hearing Tr. 45:8-13 (Apr. 25, 2022); and, (3) photographs depicting the end of Oconee County's centerline yellow striping before the Private Driveway began, R. p. 63, 66, 291, Ex. A. Oconee County's own tax maps show a clear delineation as to where the public right of way ends along Ellenburg Road. Ex. D; R. p. 290.

Given the evidence before it, and the fact that BOZA did not require proof by clear and convincing evidence, the BOZA's assumption that Oconee County held a prescriptive easement over the Private Driveway was arbitrary, capricious, and an abuse of discretion. Accordingly, the Variance Order should be reversed.

IV. BOZA Erred in Unilaterally Expanding Easement Burden on the Ratliff Family's Properties.

Respondents do not address the Ratliff Family's contention that the BOZA could not unilaterally expand the easement burden on the Ratliff Family's properties and create new and substantial burdens on their land as part of this variance application process. Assuming the existence of a prescriptive easement, the only pre-existing burden on the Private Driveway would have been occasional county maintenance—though Oconee County presented no documentation of any prior maintenance. Granting a variance for a private development of nineteen homes with an estimated 200 trips per day driving along the Ratliff Family's property will result in a material increase in the burden of vehicular traffic. Transforming the Private Driveway into a public road also places new burdens on the Ratliff Family's properties. John's Marine has been operating at its current location for forty years. The Ratliff Family testified that John's Marine will no longer be able to operate on the property should the Private Driveway be transformed into a public road for nineteen new homes. (BOZA Hearing Tr. 45:8-49:9 (Apr. 24, 2022); R. p. 289). This is a new

and substantial burden that has never been placed on the Ratliff Family's land and a restriction the Ratliff Family never assented to. (*Id.*)

It was arbitrary, capricious, and an abuse of discretion for BOZA to approve the Variance Application that will materially increase the existing easement burden and create new burdens on the Ratliff Family's land. The owner of an easement cannot materially increase the burden on the servient estate nor impose new or additional burdens. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012). Yet, this exactly what the BOZA decision did. This was an error of law and the Variance Order should be reversed.

V. BOZA Did Not Satisfy the Statutory Requirement to Conduct a Substantial Detriment Analysis.

Respondents do not address the Ratliff Family's argument that the proposed roadway could require a significant portion of their property and that the BOZA was statutorily required to conduct a substantial detriment analysis taking this into consideration. S.C. Code Ann. § 6-29-800(A)(2)(d). It is undisputed that the final location of the proposed roadway was unsettled when BOZA moved forward to approve the Variance Application. (BOZA Hearing Tr. 153:20-156:14 (Apr. 25, 2022); R. p. 416-418; Ex. C).

The Ratliff Family submitted scale drawings showing that in order for Ridgewater to meet the 31.9' right-of-way to construct the new public road, Ridgewater will either have to fill in a substantial amount of land currently underwater as part of Lake Keowee and belonging to Duke Energy, or the roadway will have to shift toward John's Marine and be placed on top of the location where John's Marine currently maneuvers boats and trailers. (R. p. 297-98; Ex. B at 2-3). Ridgewater's own revised drawings prepared in March 2022 before the April 2022 BOZA hearing showed that it needed to shift the proposed roadway 9.1' onto the Ratliff Family's property to build the new public road. (R. p. 285; Ex. C at 1).

Neither the BOZA's Variance Order, (R. p. 444), nor the hearing transcripts contain explanatory findings as to the fourth statutory element of "substantial detriment to adjacent uses," specifically as to how the variance is not detrimental to John's Marine considering the drawings provided by the Ratliff Family showing that in order for Ridgewater to meet the 31.9' minimum right-of-way, Ridgewater would have to encroach on the Ratliff Family's property. (R. p. 297-98; Ex. B at 2-3). As such, the BOZA's finding of no substantial detriment to the Ratliff Family's properties and its decision to approve the variance application without sufficient definiteness as to the final location of the roadway was arbitrary, capricious, and an abuse of discretion.

CONCLUSION

There is no conclusive evidence that Ellenburg Road was ever a state road that reverted to Oconee County once Lake Keowee was formed. The only testimony regarding the state's position on this issue came from Oconee County stating that the state has no records of Ellenburg Road ever being a state road. This is a disputed fact and not a basis upon which to affirm the Variance Order.

The BOZA recognized that it did not have jurisdiction to determine the predicate issue of whether Oconee County holds a prescriptive easement over the Ratliff Family's properties. Even so, BOZA effectively decided this disputed legal and factual question by assuming that Oconee County held a prescriptive easement. In making this assumption, the BOZA exceeded its limited jurisdiction to decide variance applications.

Even assuming that the BOZA could weigh the evidence before it and make its own assumption on the existence of a prescriptive easement, its assumption that Oconee County has an easement over the Ratliff Family's properties was not supported by the evidence and was arbitrary and an abuse of discretion. BOZA did not require Oconee County to prove each element of a

prescriptive easement by clear and convincing evidence, and it did not apply this burden when reviewing the evidence before it. This was error.

BOZA's decision to approve the Variance Application unilaterally changed the location and dimensions of the assumed public right-of-way on the Ratliff Family's property, and also materially increased the burden on the Ratliff Family's land. In approving the Variance Application, the BOZA granted Ridgewater the ability to construct a public road sending potentially 200 cars a day across the Ratliff Family's properties, interfering with its ability to conduct business. This is a unilateral material change in the easement burden on the Ratliff Family, something that Oconee County appeared to recognize that it could not do but did anyway.

Finally, BOZA approved the Variance Application without undertaking the required statutory analysis to determine whether the variance would be of substantial detriment to the surrounding area. The BOZA ignored drawings from the Ratliff Family demonstrating that unless the Ridgewater or the developer were planning to fill in land below the 804 boundary belonging to Duke, in order to meet its 31.9' minimum right-of-way Ridgewater must place the roadway on the Ratliff Family's property. BOZA did not explain why it chose to disregard the Ratliff Family's drawings or how it reconciled this information with Ridgewater's claim that the Ratliff Family would gain land as part of the project. This was arbitrary, capricious, and an abuse of discretion.

For these reasons, the Ratliff Family requests that the Variance Order be reversed.

/s/ David L. Paavola
David L. Paavola, SC Bar No. 100714
Kenison, Dudley & Crawford, LLC
1122-B Barnwell Street
Columbia, South Carolina 29201
(864) 242-4899
paavola@conlaw.com
Attorney for Appellants

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on James W. Logan, Jr., counsel for Respondent Oconee County Board of Zoning Appeals, by email sent to his primary e-mail address listed in the Attorney Information System, logan@loganandjolly.com and on Larry C. Brandt and Andrew K. Holliday, counsel for Respondents, Globe, a South Carolina Limited Partnership, and Farnes, a South Carolina Limited Partnership, by email sent to their primary e-mail addresses listed in the Attorney Information System, lcb.brandtlawfirm@att.net and andrew@drwmlaw.com, on May 12, 2023. See attached email.

/s/ David L. Paavola
David L. Paavola, SC Bar No. 100714
Kenison, Dudley & Crawford, LLC
1122-B Barnwell Street
Columbia, South Carolina 29201
(864) 242-4899
paavola@conlaw.com
Attorney for Appellants

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