THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2016-CP-07-02712



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APPELLATE CASE NO. 2020-000617

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Beachwalk Hotel & Condominium Association, Inc.
and Beachwalk Hilton Head, LLC

Petitioners,

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.

Respondents.

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Return to the Petition for a Writ of Certiorari

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/s/ Gregory M. Alford
Gregory M. Alford, Attorney at Law
ALFORD LAW FIRM, LLC
2 Corpus Christi, Suite 305
Hilton Head Island, SC 29928
(843) 842-5500
gregg@alfordlawsc.com

*Attorneys for Respondent*
*The Town of Hilton Head Island and/or The Town of Hilton Head Board of Zoning Appeals*

Hilton Head, SC
September 18, 2023

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## QUESTION PRESENTED FOR REVIEW

Respondent The Town of Hilton Head Island and/or The Town of Hilton Head Board of Zoning Appeals agrees with and herein incorporates by reference Petitioners Beachwalk Hotel & Condominium Association, Inc. and Beachwalk Hilton Head, LLC's (hereinafter "Petitioners") Question Presented for Review.

## COUNTER-STATEMENT OF THE CASE

Respondent agrees with and herein incorporates by reference Petitioners' Statement of the Case contained in Petitioners' Petition for a Writ of Certiorari (the "Petition"), with the following additions:

As to the procedural history of this case, this Petition is the Petitioners' tenth attempt to overturn the determination of the Town of Hilton Head Island's LMO Official, Nicole Dixon ("LMO Official"), approving the Respondent SDC's development of its Welcome Center on Parcel E (hereinafter sometimes referred as "Welcome Center"). The various hearings and motions in which Petitioners' have argued to overturn the LMO Official's determination can be summarized as follows:

1. Petitioners' objection to LMO Official's Determination Letter, which was denied by the LMO Official. (R. pp. 1553-1555).
2. Petitioners appeal of the LMO Official's Determination Letter to the Town of Hilton Head Island Board of Zoning Appeals ("BZA"), which was denied. (R. p. 1516).
3. Petitioners moved the BZA to reconsider its decision on Petitioners' appeal. Petitioners' motion was denied by the BZA. (R. p. 551).
4. Petitioners appealed the BZA's decisions to the circuit court. During the course of the circuit court appeal, the judge remanded the case to the BZA to answer three questions.

The BZA held a hearing to answer the three questions, and the BZA, essentially, reheard the entire matter. At the end of the BZA hearing, the BZA, again, denied the appeal of the Petitioners. (R. pp. 1133-1139).

5. The case was then returned to the circuit court, wherein the circuit court held a final hearing on the merits of the case. The circuit court issued an order on September 11, 2019, affirming the LMO Official's determination and upholding the BZA's decisions. (R. pp. 4-12).
6. Additionally, Petitioners filed a motion for summary judgment in the circuit court, which was heard during the final merits hearing. The circuit court denied Petitioners' motion. (R. pp. 4-12).
7. The Petitioners moved the circuit court to reconsider its decision affirming the LMO Official's determination and upholding the BZA's decisions. The circuit court denied Petitioners' motion to reconsider. (R. pp. 1-3).
8. The Petitioners appealed the circuit court's decision to the South Carolina Court of Appeals. The Court of Appeals unanimously affirmed the circuit court's decision.
9. The Petitioners moved the Court of Appeals to reconsider its decision affirming the circuit court's affirmation of the LMO Official's determination and upholding the BZA's decisions. The Court of Appeals denied Petitioners' motion to reconsider.
10. The Petitioners now pursue a Petition for a Writ of Certiorari.

Petitioners own the site of the Beachwalk Hotel as they assert in their Petition. Heretofore, the Beachwalk Hotel was formerly operated as a hotel and/or residential condominiums, but now is, and for many years has been, out of operation, dilapidated, and in poor repair and disuse. (R. p. 5). Additionally, there was extensive discussion of the condition of the Beachwalk Hotel during

the BZA hearing in this matter, in which the condition of the Beachwalk Hotel was described as vacant for years, boarded up, an eyesore, and in terrible disrepair. (R. p. 654, line 21-p. 655, line 21).[1] There remain at least nine acres of open space out of the 15.1 acres in the Waterside PD-2 District, not including any Respondent's use of Parcel E. (R. p. 683, line 16).

## STATEMENT OF THE FACTS

The Respondent herein incorporates by reference the record of this matter.

## ARGUMENT

### I. The Petition has no basis in Rule 242(b) SCACR.

The Petitioner's sole allegation of error is:

> "In this case, the Court of Appeals' decision hinges on the following statement in its Opinion that "[t]he record suggests the local planning official reasoned that the Town considered average density when it approved the 1987 documents and that the approval established the average densities that would be allowed in this district." A "suggestion in the record" is not sufficient to support affirming the BZA's decision, and, therefore, the Court of Appeals erred in finding that the BZA's decision was supported by evidence in the record."

Petition at 11.

This allegation of error is not at all supported by the rest of the text of the Court of Appeals opinion (discussed further below) but more importantly to this Court, the allegation of error does not even get close to gravity required to invoke this Court's attention under Rule 242.

Rule 242(b) of the South Carolina Appellate Court Rules says:

> Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

[1] It is certainly undisputed that, during the course of this litigation, the Beachwalk Hotel structure has been demolished and the site is now an empty lot.

> (1) Where there are novel questions of law.
> (2) Where there is a dissent in the decision of the Court of Appeals.
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
> (4) Where substantial constitutional issues are directly involved.
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

The Petition should be denied because there are no special and important reasons for it to be granted. While the Respondent understands that the above five listed characteristic reasons neither control nor fully measure this Court's discretion to grant review it is important to note that the Petition does not raise a single issue listed above, in spite of petitioners' argument that the Court of Appeals' standard of review is supposedly in conflict with a prior decision of this Court. See *Infra,* Argument II at 4-6. Also, the Petitioners' question for review does not come close to the gravity of any of the five characteristic reasons typically granted review by this Court.

For these reasons alone the Petition should be denied.

## II. The Court of Appeals applied the appropriate standard of review in reaching its determination.

The Petitioners assert that the Court of Appeals erred in its determination that there is sufficient evidence in the record before the BZA to support its decision to permit Respondents' welcome center. Petition at 10. The Petitioners assert that the Court of Appeals' determination is in conflict with prior holdings of this Court because the Court of Appeals did not use the standard of review found in *Boehm v. Town of Sullivan's Island Bd. Of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018). [*Id*.]. Despite the Petitioners' claim the standard of review used in *Boehm* is substantively identical to the standard of review used in the Court of Appeals' decision.

In fact, the standard of review used by the Court of Appeals is substantively *verbatim* the standard of review used in *Boehm*. There is no legal distinction between the standard of review used by the Court of Appeals and the standard of review used in *Boehm*.

The Court of Appeals applied the following standard of review in its opinion:

> "[S]ection 6-29-840 [of the South Carolina Code (Supp. 2022)] prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board." *Austin v. Bd. Of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). The statute provides "[t]he 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) (Supp. 2022). A jury's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the jury's findings. *Austin*, 362 S.C. at 35, 606 SE.2d at 212.
>
> We apply the same standard here. "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." *Id*. at 33, 606 S.E.2d at 211. "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id*. (quoting *Rest. Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *County of Richland v. Simpkins*, 328 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

*Beachwalk Hotel & Condo. Assoc., Inc., et al v. The Town of Hilton Head Island Bd. of Zoning Appeals, et al*, Op. No. 2020-000617 at 4 (S.C. Ct. App. Filed June 7, 2023).

The standard of review used in *Boehm* is:

> "[S]ection 6-29-840 [of the South Carolina Code] prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board." Austin v. Bd. of Zoning Appeals , 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). That section provides "[t]he 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) (Supp. 2017). A jury's factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the jury's findings. Austin , 362 S.C. at 35, 606 S.E.2d at 212.
>
> "On appeal, we apply the same standard of review as the circuit court below.... In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." Id. at 33, 606 S.E.2d at 211. "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Id. (quoting Rest. Row Assocs. v. Horry Cty. , 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) ). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Newton v. Zoning Bd. of Appeals for Beaufort Cty. , 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting Cty. of Richland v. Simpkins , 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002) ).

*Boehm*, at 182-83, 813 S.E.2d at 880-81; and Petition at 10-11.

Any assertion by the Petitioners that the Court of Appeals did not apply the correct standard of review is incorrect. The Court of Appeals did apply the standard of review found in *Boehm* to this matter, applied it correctly, reached the correct conclusion, and in doing so created no conflict with existing precedent, despite Petitioners' assertion to the contrary.

## III. The record contained ample evidence to support the Court of Appeals' determination to affirm the BZA's decision to permit the proposed development.

The Court of Appeals did not err in holding that there was sufficient evidence in the record before the BZA to support its decision to permit the proposed development. The determination was not in conflict with the applicable standard of review, or the prior holdings of this Court. Pursuant to the standard of review found in *Boehm* and the Court of Appeals' opinion, the Court of Appeals' determination was appropriate.

The Petitioners' argument that a "suggestion in the record" is "not sufficient to support affirming the BZA's decision" ignores the context of the Court of Appeals' statement.

> The record suggests the local planning official reasoned that the Town considered average density when it approved the 1987 documents and that the approval established the average densities that would be allowed in this district. We cannot say the planning official clearly erred in adopting this interpretation or that the board of zoning appeals clearly erred in letting the approval stand. Beachwalk believes that average density should be calculated with the ordinance's present density requirements for a planned unit development (PUD) and correctly observes the ordinance would not allow a PUD to be developed in this way if the development was started today, from scratch. We take the point, and it is a good one. **Even so, the reason we think it misfires is because this development has an approved master plan. It is not starting from scratch. We cannot say it was arbitrary or capricious for the Town to let the planning official's interpretation of the location ordinance stand as setting average density limits for this district when the Town approved the 1987 documents and incorporated that approval into the land management ordinance**.

*Beachwalk Hotel & Condo. Assoc., Inc., et al v. The Town of Hilton Head Island Bd. of Zoning Appeals, et al*, Op. No. 2020-000617 at 4 (S.C. Ct. App. Filed June 7, 2023).(**Emphasis** Added)

Further relevant facts established in the record that were considered by the Court of Appeals are contained in the circuit court's order filed on September 11, 2019, (the order affirmed by the Court of Appeals in its June 7, 2023 Opinion) being:

> In this decision, I find that there was, in fact, substantial evidence in the record before the BZA to support the decision of the BZA in upholding the November 28, 2016 Determination Letter issued by the Town's Senior Planner, Ms. Dixon, and her underlying Notice of Action (DPR-oo1056-2016). Without limitation, some of this evidence included the following:
>
> 1. The proposed development of Parcel E as a commercial building for a welcome center for timeshare sales activities, check-ins, etc. is a use that is, in fact, among the uses allowed under the current RD District zoning of the subject property.
>
> 2. The proposed development of Parcel E as a commercial building with a square footage of 7,500 is less than the 8,000 square feet of nonresidential uses allowed per net acre in the RD District.

3. The subject property, Parcel E, contains 1.068 acres and appears to qualify for as much as 8,544 square feet of nonresidential or commercial construction.

4. The subject property, Parcel E, is a part of what is today called the Waterside PUD, formerly known as the Town Center PUD.

5. The rights to develop Parcel E under the Categorical Exemption Certificate for the Town Center PUD, as issued by the Town of Hilton Head Island in 1995, expired in 2000.

6. Parcel E was not developed before the expiration in 2000 of the Categorical Exemption Certificate and, therefore, did not become vested, beyond that date in 2000, as to uses, densities and design standards under the Categorical Exemption Certificate.

7. Under the master plan protected by the 1995 Categorical Exemption Certificate, Parcel E could have been developed to the extent of 16,787 square feet of nonresidential uses and 12,916 square feet of retail.

8. The proposed development of Parcel E at 7,500 square feet is substantially less that the 16,787 square feet of office and 12,916 square feet of retail formerly permitted under the master plan formerly protected by the 1995 Categorical Exemption Certificate.

9. The proposed development of Parcel E at 7,500 square feet does not exceed the square footage limitations for nonresidential construction under the current RD District zoning or under the former, previously-vested, master plan for Town Center PUD.

10. The Determination Letter recites numerous other facts in the history of this Parcel E, and the Town Center PUD of which it is a part (now known as Waterside PUD), concerning the history of open space requirements, calculations, distributions, allocations, and sharings within the PUD.

11. Despite numerous questions in the record by BZA members, and by this court, to the Appellants/Petitioners, the Appellants/Petitioners have failed to demonstrate any cognizable harm, damage, or injury to them or their property located within the PUD if the Respondent/Defendant SDC

> Properties, Inc. is permitted to develop its Parcel E as presently approved by the Town of Hilton Head Island.
>
> 12. If the view of the Appellants/Petitioners were to prevail, there would be no allowable economic utility for the subject property, Parcel E, since no development, construction, or permitted use can take place thereon.
>
> In addition to the substantial supporting evidence found, I have concluded as a matter of law that the Town's Staff Planner (Nicole Dixon) and the BZA properly considered every aspect of this matter, through extensive considerations and deliberations in the original reviews and proceedings, and in the BZA's remand hearing, and committed no error of law, no arbitrariness or unreasonableness, and no abuse of discretion.

R. pp. 4-12.

The Court of Appeals' determination is appropriate considering the evidence contained in the record, the applicable law, and the standard of review. The Petition should be denied.

## CONCLUSION

The Petition has no basis in Rule 242(b), SCACR, to be granted certiorari. The Court of Appeals' determination resulting from its correct application of the appropriate standard of review was not and could not have been in conflict with any prior controlling precedent. The Petition ignores the Court of Appeals' proper reliance on the extensive evidence in the record which supports its determination. Therefore, Respondent Town respectfully requests that this Honorable Court deny the Petitioners' Petition for a Writ of Certiorari.

[Signature page to follow]

/s/ Gregory M. Alford
Gregory M. Alford, Attorney at Law (#6932)
ALFORD LAW FIRM, LLC
2 Corpus Christi, Suite 305
Hilton Head Island, SC 29928
(843) 842-5500
gregg@alfordlawsc.com

*Attorneys for Respondent*
*The Town of Hilton Head Island and/or The Town of Hilton Head Board of Zoning Appeals*

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