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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 Farmes, a South Carolina Limited Partnership,

Respondents.

APPELLANTS' PETITION FOR REHEARING

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Appellants request rehearing pursuant to Rule 221(a), SCACR, regarding this Court's Opinion filed February 19, 2025.

I. The BOZA Abused Its Discretion When It Violated the Law By Approving the Variance Based on Impermissible Considerations of Profit Maximization.

The panel correctly points out that, as a matter of law, the Oconee County Board of Zoning Appeals (the "BOZA") may not consider the fact that Arrowhead Point could be developed and utilized more profitably as a basis to approve the variance. (Order at 5, n.4 (quoting S.C. Code. Ann. § 6-29-800(A)(2)(d)(i) ("The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance.")). The panel cites the BOZA's chairman's statement that the BOZA did not consider the economic impact on county tax revenues of the future nineteen-home development. (Order at 5). However, this is only one side of the economic and profit equation. The other side is, of course, the economic impact on the owner/developer of the property. On this side of the economic equation, the BOZA did consider the fact that Arrowhead Point could be developed more profitably with the variance because it would permit an increase in density from three lots to nineteen. The increase from three homes without the variance to nineteen homes with the variance is based solely on profit. The BOZA's consideration of greater profit was an error of law, and therefore, the BOZA's decision should be reversed.

"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." S.C. Code Ann. § 6-29-840(A). "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." *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 182, 813 S.E.2d 874, 880-81 (Ct. App. 2018). "An abuse of discretion occurs when a trial court's decision is unsupported by

the evidence or controlled by an error of law." *Id.* (citations omitted). Here, the BOZA abused its discretion when it considered the owner/developer's ability to generate more profit from the property in deciding whether to grant a variance, in direct violation of the variance statute.

When analyzing the variance request, the BOZA was required to make findings on four criteria, the third of which is that "because of [extraordinary] conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property." S.C. Code Ann. § 6-29-800(A)(2)(c). In reaching this finding, the BOZA was prohibited from considering whether the variance would enable the subject property to be utilized more profitably:

> The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance.

S.C. Code. Ann. § 6-29-800(A)(2)(d)(i).

Under the existing road-width ordinance, Arrowhead Point can be developed into three lots. Unsatisfied with this density, the developer sought a variance so that it could develop Arrowhead Point into nineteen lots. The panel identifies this difference in density as the reason the BOZA concluded that the existing ordinance effectively prohibited or unreasonably restricted utilization of Arrowhead Point. However, this is an improper consideration because the restriction existed at the time that Globe and Farmes purchased the property and increasing development density is solely an economic and profit consideration, which the BOZA is statutorily prohibited from using as a basis to grant a variance. S.C. Code. Ann. § 6-29-800(A)(2)(d)(i).

The record is devoid of any non-economic, non-financial reasons identified by the BOZA supporting its determination on this statutory element. For this reason, the variance order should be reversed. The BOZA's decision to grant a variance—despite its failure to identify on the record any permissible evidence for a statutorily required prerequisite—constitutes an abuse of discretion.

See, e.g., *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976) (describing an abuse of discretion as a decision "controlled by some error of law" or "based upon factual, as distinguished from legal, conclusions, [that are] without evidentiary support").

Moreover, this is not a situation where zoning or road width requirements changed after Globe and Farmes purchased Arrowhead Point. The law is well settled that a "claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work as an unnecessary hardship upon him." *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 217, 516 S.E.2d 442, 447 (1999) (citing *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965)). Nothing changed in the ordinance after Globe and Farmes purchased the property that would make the existing development limitation unreasonably restrictive. Globe and Farmes purchased Arrowhead Point in 2008, knowing that road right-of-way requirements limited the type of drive entrance into the property and limited development to three lots. The County proved that the roadway requirements date back to 2006. (R. p. 902, lines 7-12). The Ratliff Family provided the BOZA with ordinances reflecting that the 50' right-of-way requirement had been in place at least since 2006, before Globe and Farmes purchased the property. (R. p. 880, line 10-p. 881, line 9, pp. 167-179). County staff, Mr. Reid, agreed that the 50' right-of-way requirement had been in place since 2006. (R. p. 902, lines 7-12). The evidence clearly shows that the road-with restriction was in place when Globe and Farmes purchased the property, and they cannot now be heard to complain. The law does not allow that.

Like Globe, Farmes, and the developer, in *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965), Rush argued that he would suffer an unnecessary hardship from the denial of his request to modify the zoning of a portion of his land from residential to commercial. The South Carolina Supreme Court disagreed. The Court observed that Rush knew or should have known

that the portion of land he was now trying to rezone was restricted to residential development when he purchased it. *Id.* at 278, 143 S.E.2d at 532. The Court explained that "[o]rdinarily, a claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property *after the enactment of a zoning regulation* complain that a nonconforming use would work an unnecessary hardship upon him." *Id.* (emphasis added). Further, "[w]here one purchases realty with intentions to apply for [a] variance, he cannot contend that restrictions cause[d] him such peculiar hardship that entitles him to special privileges which he seeks." *Id.* at 278-79, 143 S.E.2d at 532 (citation omitted). Therefore, it was important to the Court's decision that there had been no change in zoning since Rush's purchase. *Id.* at 280, 143 S.E.2d at 532-33.

Even assuming that Rush would suffer financial hardship from the refusal to rezone his property, the Court explained that "mere disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions ordinarily does not warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship." *Id.* at 280-81, 143 S.E.2d at 533. Additionally, the Court repeated its observation from *Simmons v. Board of Adjustment*, where it concluded that "it must be assumed that any hardship, financial or otherwise, resulting from existing conditions were contemplated at the time of the purchase." *Id.* at 281, 143 S.E.2d at 533 (quoting *Simmons*, 226 S.C. 459, 465, 85 S.E.2d 708, 711 (1955)). That is the same situation here. Any financial hardship with developing Arrowhead Point should have been contemplated by Globe and Farmes when they purchased the property in 2008 and reflected in the purchase price. Financial hardship alone is an insufficient reason to grant a variance. *Restaurant Row Assoc.*, 335 S.C. at 218, 516 S.E.2d at 447.

This is not a situation where a developer is attempting to change the type of development permitted on a property, where zoning restrictions were enacted after the owner's purchase of the property, or where no use of the property was possible. The only difference between being able

to develop the property into three homes and nineteen homes is that higher density will make the development more profitable.

The Court of Appeals should reconsider and reverse its decision.

II. The BOZA Abused Its Discretion When It Shifted the Burden of Proof Away from the Developer and onto the Adjacent Landowners.

The Court of Appeals panel recognized Appellants' burden shifting argument, but it did not give this argument sufficient weight in its analysis. Appellants argue that the BOZA abused its discretion when it shifted the burden of proof away from the developer/variance applicant and onto the adjacent landowners. As the variance applicant, the developer "bore the burden of proving its entitlement to a variance." *Restaurant Row Assoc.*, 335 S.C. at 216, 516 S.E.2d at 446. When the BOZA granted the variance based on the assumption that the Ratliff Family's section of Ellenburg Road is public, it shifted and modified the burden of proof: instead of the developer having to prove that it had the requisite access to a public road to grant the variance, the Ratliff Family had to disprove the assumption that their land was burdened by a public easement. This burden shifting was an error of law.

Access to the public road was an essential element of the development and, therefore, an essential element of the variance. The developer was required to prove it. The BOZA recognized this fact, which is why it postponed ruling on the variance application twice. (R. p. 766, line 19-p. 767, line 14 ("That's our first question, do we have authority?"); (R. p. 781, lines 6-11; R. p. 800, lines 2-24, p. 810, lines 10-12). When staff reported that information they gathered on the prescriptive easement was mixed,[1] the BOZA was faced with the question of whether it could move forward to decide the variance.

[1] The panel's order calls attention to the 2020 plat of 585 Ellenburg Road as showing Ellenburg Road is "subject to r/w public." First, this statement on the plat was contested by Appellants and in separate litigation the surveyor testified that he had no basis for this statement. (Br. Appellant

Ultimately, rather than making the developer carry its burden to prove that the existing road was a public road, the BOZA simply assumed it was. (R. p. 908, lines 8-13 (Chairman indicating they would go ahead and decide the application as though there were an easement)). In so doing, the BOZA shifted the burden from the developer to prove the existence of a public road onto the adjacent landowners. This was error.

III. The BOZA Failed to Set Forth Written Explanatory Findings.

The BOZA did not explain its findings, as required by law. It simply repeated the statutory language, which is an abuse of discretion.

The variance statute requires the BOZA to make written findings on each statutory element.

> (2) A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

S.C. Code Ann. § 6-29-800(A)(2).

This Court has explained that for narrow or relatively simple issues, exhaustive written findings may not be required in all instances. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). However, in this instance the BOZA was statutorily required to set forth written findings on the required statutory elements. *See id.* ("While an exhaustive written decision may not be warranted when a narrow issue may be addressed succinctly by the Board, <u>further detail will surely be required in more complicated cases</u>.").

Written findings are particularly important in this case where the variance request was strongly opposed by the community and the adjacent landowners. *See id.* ("Indeed, thorough

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22-23). Second, the primary Ratliff Family property at issue in this appeal at the location of the variance is 599 Ellenburg Road, not 585 Ellenburg Road. (R. p. 601 (Staff Opinion identifying 599 Ellenburg Road as the closest addressed parcel)). The only plat on record for 599 Ellenburg Road is dated 1974 and does not identify a public right-of-way on this property that the Ratliffs purchased in 1981. (R. p. 091, the "Bearden" property). Appellants request that the panel correct its opinion on this issue as the record does not reflect a public right-of-way on 599 Ellenburg Road.

written findings and determinations eliminate potential confusion and ensure the will of the Board is accurately transmitted to the affected parties and reviewing courts."); *cf.*, *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 267 ("The failure to specifically rule on the issues precludes appellate review of the issues." (citing *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992))).

Here, the BOZA did not make any specific written findings on the statutory elements. The BOZA's written order simply repeats the language of the statutory elements but does not set forth any findings. (R. pp. 635-36). That was reversible error.

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PROOF OF SERVICE

I certify the Appellants' Petition for Rehearing has been served 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 Farmes, 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 March 6, 2025.

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PROOF OF SERVICE

I certify that the Appellants' Petition for Rehearing has been served on the Respondent, Ridgewater Engineering & Surveying, LLC, by depositing a copy in the U.S. Mail, postage pre-paid, addressed as follows:

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