STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC 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.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ratliff Family has lived and operated its boat service business John's Marine Service at the dead end of Ellenburg Road on Lake Keowee for more than forty years, since 1981. For decades, Oconee County informed the public with a posted sign that the dead-end section of Ellenburg Road was not maintained by the county. Over these decades, Oconee County paved, re-paved, and striped the centerline of the public section of the road, but the Ratliff Family paved and maintained its own section of the road.

Given this history, it came as a shock to the Ratliff Family when, in 2021, a developer seeking a right-of-way variance asserted before the Board of Zoning Appeals that the Ratliff Family's section of road was public and when Oconee County joined in that position, now claiming for the first time that the county held a prescriptive easement over the Ratliff Family's property by longtime maintenance. The Ratliff Family disputed this fact, but the Board of Zoning Appeals approved the variance without requiring the developer/applicant to prove that the Ratliff Family's section of road was public. This shifted the burden onto the Ratliff Family to prove in a different forum that Oconee County does not have rights over its property. The Ratliff Family now seeks this Court's review of the Board of Zoning Appeals' variance approval.

QUESTIONS PRESENTED

1. Under S.C. Code § 6-29-800, can a zoning variance be granted on the ground of "unnecessary hardship" when the applicant purchased the property subject to the very governmental restrictions of which he complains?

2. Under S.C. Code § 6-29-800, can a developer obtain a variance solely to increase his profits by increasing the density of its development, contrary to an existing county ordinance?

3. Under S.C. Code § 6-29-800, can a board of zoning appeals shift the burden of proof from a developer/applicant onto neighboring landowners?

4. Under S.C. Code § 6-29-800, can a county board of zoning appeals approve a variance to a county ordinance based on assumptions instead of evidence?

5. Under S.C. Code § 6-29-800, is a board of zoning appeals required to make written explanatory findings in its order instead of simply restating the statute?

STATEMENT OF THE CASE

This is an appeal from an Oconee County Board of Zoning Appeals' ("BOZA") grant of a road right-of-way variance application for the construction of a new public road to service a proposed nineteen-home subdivision on Lake Keowee. County ordinances allow the development of three homes under the existing road conditions but the nineteen-home subdivision that the developer seeks to build requires a wider road right-of-way and direct access to a public road. The existing roadway that the developer seeks to connect to the development dead ends on Appellants' and Respondents' (Globe and Farmes) property, each owning roughly to the center of the road. Appellants contend that this existing dead-end section of roadway is private and has been privately maintained by their family for decades. Developer and Respondents contend it is a public road.

Before the BOZA, the developer argued that the development will have direct access to an existing public road and sought a variance from the 50-foot road right-of-way requirement. Appellants disputed that Oconee County has any rights over, what for decades has been, their private driveway. The BOZA heard both parties' positions on this issue, reviewed submitted documents, and twice delayed a vote on the variance application so that Oconee County could gather additional facts on whether the disputed section of road is public by virtue of a prescriptive easement or other means.

Ultimately, at the third hearing, the BOZA granted the variance request without a resolution of the public road dispute, instead choosing to assume that Oconee County has a prescriptive easement over the existing roadway and leaving the resolution of that issue to Appellants to pursue in a different forum, should they choose to do so. Once the BOZA assumed that the roadway was

public, it then granted the variance based on its conclusion that existing conditions limiting development to a lower density than the developer proposed would be an unnecessary hardship on Respondents. Appellants contend that: (1) limitations on development density that existed at the time the owner purchased the property cannot qualify as an unnecessary hardship; and (2) limitations on development density standing alone cannot qualify as an unnecessary hardship because this is solely a profit consideration, which is prohibited by the variance statute.

The Supreme Court should grant certiorari to:

(1) Correct the Court of Appeals' opinion that conflicts with this Court's precedent holding that conditions existing at the time of purchase cannot later be the basis for a statutory finding of unnecessary hardship;

(2) Provide guidance on the variance statute's prohibition of profitability considerations, specifically as it relates to limitations on development density;

(3) Prevent the BOZA from shifting the burden of proof on a disputed factual issue from the variance applicant onto the adjacent landowners;

(4) Clarify that the BOZA does not have jurisdiction to rule, or make assumptions, on disputed issues of fact that fall outside of its limited statutory jurisdiction to hear variance requests, and to provide guidance to future boards on how to handle such scenarios; and

(5) Remind boards of zoning appeals that that they are required to make written explanatory findings on each statutory element of a variance, particularly where such elements are highly contested or complex.

Factual Background

Appellants (the "Ratliff Family") have owned 599 Ellenburg Road since 1981 and operated John's Marine Service on Lake Keowee at the dead end of Ellenburg Road since 1982. (R. p. 248). The property beyond the existing dead end is a fifteen-acre arrowhead-shaped peninsula on

Lake Keowee referred to as Arrowhead Point. The “stem” section of Arrowhead Point abuts property owned by the Ratliff Family, roughly in the middle of the existing roadway, and the “body” is to the northeast and juts out into Lake Keowee. The nature and extent of Oconee County’s rights over the section of roadway owned by the Ratliff Family and Respondents Globe and Farmes (the “Disputed Section of Road”) is highly contested. Respondents are seeking to develop Arrowhead Point into a nineteen-home subdivision, which pursuant to Oconee County ordinances requires direct access to the public road system and a 50-foot right-of-way. (R. p. 164 (Ord. Sec. 26-2(c), (c)(1)); p. 165 (Sect. 26-3(a)). Because the existing roadway is only 31.9’ at its narrowest section, Respondents requested an 18.1’ variance. (R. p. 636). The BOZA granted the variance request based on the assumption that Oconee County holds a prescriptive easement over the Disputed Section of Road by virtue of longtime county maintenance. Appellants dispute this fact.

History of 585 Ellenburg & 599 Ellenburg

After the Ratliff Family purchased 599 Ellenburg Road in 1981, around the mid-1980's Oconee County paved a portion of Ellenburg Road from Knox Road to approximately the western edge of 585 Ellenburg, at which location Oconee County installed an "End of County Maintenance" sign. (R. p. 684, line 21-p. 686, line 12; R. pp. 252, 255-258, 482, 484). Oconee County did not pave the roadway all the way to the dead end of what is now known as Ellenburg Road, where T.B. Ellenburg (owner of 585 Ellenburg) and John and Jan Ratliff (owners of 599 Ellenburg) owned property. (R. p. 684, line 21-p. 686, line 12). Around this same time, T.B. Ellenburg and John Ratliff decided to work together to pave their respective sections of the remaining roadway running in front of 585 & 599 Ellenburg Road. For forty years the families have maintained their sections of roadway as private property. (R. p. 684, line 21-p. 686, line 12; R. pp. 159-160 ¶¶ 3-8; R. p. 482). At various times Oconee County has striped the centerline of

Ellenburg Road and intentionally stopped short of 585 Ellenburg and has never striped to 599 Ellenburg and the dead end. (R. pp. 137-144, 252, 255-258, 480, 483).

In 2009, Jan Ratliff, who has been an owner of 599 Ellenburg since 1981, along with her daughter-in-law, met with employees of the Oconee County Roads and Bridges Department. (R. p. 159 ¶ 2). These employees provided Ms. Ratliff with a plat indicating that Oconee County's maintenance of Ellenburg Road ended at green highlighted marker at 565 Ellenburg Road. (R. p. 159 ¶¶ 3-4; R. p. 482). According to Jan Ratliff, the green marker was where the "End of County Maintenance" sign had been located for years before it was moved by an unknown person. (R. p. 159 ¶ 6). Also according to Jan Ratliff, her family has continuously maintained their paved portion of Ellenburg Road to the east of the endpoint of county maintenance and Oconee County has not performed any maintenance on that section of roadway. (R. p. 160 ¶ 8).

Laurie Ellenburg Bright is the granddaughter of T.B. Ellenburg who sold part of his farmland for the creation of Lake Keowee. (R. p. 292). Ms. Bright grew up and resided at 591 Ellenburg Road for forty years. (R. p. 292). According to Ms. Bright's affidavit, after the creation of Lake Keowee, an "End of County Maintenance" sign was stationed between 575 Ellenburg and 585 Ellenburg Road. (R. p. 292 ¶ 6). Ms. Bright drove past this sign for years and particularly recalled the location of the sign because it was located next to a bathtub that her grandfather used to water his cattle. (R. p. 292 ¶ 6). This information was provided to the BOZA.

<u>Board of Zoning Appeals Hearings</u>

The BOZA held three hearings on Respondents' variance application because the Ratliff Family disputed Oconee County's rights along the Disputed Section of Road. The Variance Application initially came before the BOZA on November 30, 2021, then again on January 24, 2022, and finally for a vote on April 25, 2022. The pertinent facts before the BOZA on whether Oconee County held a prescriptive easement over the Disputed Section of Road were as follows:

November 30, 2021 BOZA Meeting:

- Developer sought a road right-of-way variance over the Disputed Section of Road and asserted that Oconee County has a prescriptive easement over the Disputed Section of Road by longtime County maintenance.[1]

- Ratliff Family informed BOZA that:

  - They disputed that Oconee County held an easement over the Disputed Section of Road;[2]

  - Their family had paved and maintained the Disputed Section of Road since 1982;[3]

  - County's centerline yellow road striping did not go to the end of the road and stopped before John's Marine Service;[4]

  - Ellenburg Road reflected a difference in paving quality where the County had stopped paving in prior years.[5]

- BOZA tabled the variance application pending a resolution of whether Oconee County holds a prescriptive easement over the Disputed Section of Road.[6]

January 24, 2022 BOZA Meeting

- Variance again on the BOZA agenda;[7]

- Oconee County agreed land under roadway belongs to private parties;[8]

- County Attorney explained question was whether Oconee County maintained the paved traveling surface of the Disputed Section of Road such that it holds a prescriptive easement;[9]

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[1] (R. p. 642, lines 7-13; p. 746, line 24-p.747, line 4).
[2] (R. p. 660, line 22-p. 661, line 5; p. 663, line 9-p. 664, line 22).
[3] (R. p. 678, line 25-p. 680, line 3; p. 684, line 21-p. 685, line 11).
[4] (R. p. 663, line 9-p. 664, line 5; p. 679, lines 4-9; *see also* R. pp. 138-144 (images of the road striping)).
[5] *Id.*
[6] (R. p. 777, line 20-p. 778, line 15; p. 781, lines 6-11).
[7] (R. p. 798, line 25-p. 799, line 20).
[8] (R. p. 799, line 25-p. 800, line 2).
[9] (R. p. 800, lines 2-3; p. 802, lines 18-20).

- County Attorney received an affidavit from Jan Ratliff conflicting information from roads and bridges department on longtime maintenance;[10]

- Jan Ratliff's affidavit recounted a meeting in 2009 with Oconee County employees who indicated on a map the location of the end of county maintenance, which was the same location that an End of County Maintenance sign had been located for years;[11]

- County Attorney informed BOZA that what Oconee County has done, or its level of maintenance on the Disputed Section of Road over the previous twenty years, is what defines what Oconee County can do going forward;[12]

- BOZA postponed a vote on the Variance Application until a later time.[13]

<u>April 25, 2022 BOZA Meeting</u>

- Variance Application again on the BOZA agenda;

- BOZA asked county staff to present information on the existence of a prescriptive easement over the Dispute Section of Road;

- County Attorney identified a second affidavit received from Laurie Ellenburg Bright that calls into question the prescriptive easement;[14]

- Laurie Ellenburg Bright's affidavit stated that she grew up and resided next door to the Ratliff Family for 40 years and she recalled an "End of County Maintenance" sign up the road before her family's property and before the Ratliff Family property;[15]

- County roads and bridges employee Kyle Reid informed BOZA that all he had was institutional knowledge that it was historical state road and now county maintained but stated that neither the state nor the county had any records showing this to be true;[16]

- County did not present any records of public maintenance of the Disputed Road Section at any of the three hearings;

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[10] (R. p. 800, lines 3-22).
[11] (R. p. 159 ¶¶ 2-6).
[12] (R. p. 804, line 24-p. 805, line 6).
[13] (R. p. 814, line 24-p. 815, line 1).
[14] (R. p. 830, line 5-p. 831, line 13).
[15] (R. p. 484).
[16] (R. p. 835, lines 1-3, line 24-p. 836, line 10).

- Ratliff Family again informed BOZA it had been using the entirety of travel service for forty years to conduct business and provided pictures of the same.[17]

From November 2021 to April 2022, Oconee County had five months to come up with as much evidence as it could to present to BOZA showing that the Disputed Section of Road was in fact a county road or county-maintained road, but all they presented was "institutional knowledge" and, in the end, the BOZA decided to vote on the variance without this question being resolved. Significantly, Oconee County did not present any maintenance records for the Disputed Section of Road during any of the three BOZA hearings.

Prior to voting on the Variance Application, the BOZA observed that it was not competent to decide the prescriptive easement issue; however, it moved forward with a vote anyway based on its assumption that a prescriptive easement did in fact exist.

> MR. CHAIRMAN:
> Is anyone -- anyone not comfortable with that approach? Okay. Let's start out with the prescriptive easement. We've heard a lot of input on both sides, the county attorney, everyone else. What are your thoughts on the prescriptive easement?
>
> MR. EAGAR:
> I think -- I think from what we've heard so far that -- that does not bind us in any way in terms of whether, you know, and it -- from a decision standpoint we can go ahead with a decision that perceptively the easement doesn't impede us in any way from what I understood from Mr. Root, is that true?
>
> MR. ROOT:
> From my position, staying neutral, I believe you can craft an order that addresses the fact that the prescriptive easement may -- they may not express a direct opinion on the prescriptive easement but you address the variance of that pinch point, yes.
>
> MR. EAGAR:
> So I think that -- I think -- I think we should do that then and disregard the perceptive easement. This is a discussion?
>
> MR. CHAIRMAN:
> We are not competent to decide that issue.

[17] (R. p. 852, line 24-p. 853, line 20; p. 488).

MALE VOICE:
All right.

MR. CHAIRMAN:
We just don't -- we don't have the (inaudible).

MALE VOICE:
Right.

MR. CHAIRMAN:
We don't have business in that so we're not gonna decide that but as -- as John's suggesting we ought to go ahead and -- and decide this as though there were an easement and -- and if someone wants to go to court to --

MALE VOICE:
Yup.

MALE VOICE:
Yeah.
. . .

(R. p. 907, line 1 – 908, line 17).

The BOZA recognized that if Oconee County does not have a prescriptive easement, a new public road could not be built as the variance applicant requested.

MR. CHAIRMAN:
Well, I guess let's decide if there's no prescriptive easement there the county is not doing business down there and there isn't gonna be a road built, doesn't matter who's gonna, you know, it all depends on that getting decided somewhere.

(R. p. 912, line 14-19).

Ultimately, the BOZA voted to approve the variance application based on its assumption that the Disputed Section of Road is public, and then Appellants filed this appeal.

Unnecessary Hardship

On the question of unnecessary hardship, the developer argued that without the variance it would suffer an unnecessary hardship because the existing geography "only creates impossibility of use." (R. p. 643, line 1-6). The developer incorrectly told the BOZA that the existing road

right-of-way ordinances were not in place when Globe and Farmes purchased the property. (R. p. 643, line 13-21). Oconee County employees later corrected this mistake and confirmed the existing restrictions were in place when the property was purchased by Globe and Farmes. (R. p. 902, lines 7-12).

The BOZA did not analyze what use could be made of the property under existing conditions, only whether the developer's proposed use for a nineteen-home subdivision was possible. The BOZA's discussion shows that it accepted the developer's position that without the variance any use would be impossible. (R. p. 942, line 1-21 ("if he's gonna do something he's got to have a variance"; "I think without [the variance] he can't do anything.")). On the question of whether the geographic limitations effectively prohibited or unreasonably restricted utilization of the property, the BOZA did not undertake any separate analysis of the existing permitted uses, concluding that it had already exhausted that question. (R. p. 944, line 14-945, line 9 (entire discussion on unreasonably restrictive; "We've beat this horse to death.").

The BOZA's entire analysis of whether existing conditions would effectively prohibit or unreasonably restrict utilization of the property is a mere four pages in the transcript. (R. pp. 942-944). This analysis falls well short of the statutory requirement for explanatory findings and fails to explore the existing permissible uses of the property and explain how existing limitations are unreasonably restrictive in a manner that does not take into consideration the profitability concerns of the owner and developer, which is a statutorily prohibited reason for approving a variance request. S.C. Code. Ann. § 6-29-800(A)(2)(d)(i).

In the end, the BOZA's written order granting the variance restated the statutory elements for variances but did not provide any explanatory findings for each element, in contradiction of the statutory requirement for explanatory written findings. (R. p. 636; S.C. Code Ann. § 6-29-800

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

ARGUMENT

I. The Court of Appeals' Opinion Conflicts with this Court's Precedent that Conditions Existing at the time of Purchase Cannot Form the Basis of Unnecessary Hardship.

This Court has previously held that conditions existing at the time of purchase cannot form the basis of an unnecessary hardship to justify a variance request. Respondents Globe and Farmes purchased Arrowhead Point knowing about the existing limitations on development. This is not a situation where zoning or road width requirements changed after Globe and Farmes purchased the property. In affirming the BOZA's variance order, the Court of Appeals' decision is in direct conflict with this Court's precedent because it allows conditions existing at the time of purchase to form the basis of an unnecessary hardship.

This Court has previously held 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)).

Here, nothing changed in the road right-of-way ordinances after Globe and Farmes purchased Arrowhead Point in 2008 that would make the existing development limitation unreasonably restrictive. Globe and Farmes purchased Arrowhead Point knowing that road right-of-way requirements limited the type of drive entrance into the property and limited development to three lots. The developer incorrectly informed the BOZA that the existing right-of-way restrictions did not exist when Globe and Farmes purchased the property. (R. p. 642, lines 13-21). The Ratliff Family corrected the developer's statement by providing 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 in 2008. (R. p. 880, line 10-p. 881, line 9, pp. 167-179). County staff 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 right-of-way restrictions were in place when Globe and Farmes purchased the property, and they cannot now complain about this restriction. 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. This 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 caused 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 this 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)). This is the same situation here. Any financial hardship with developing Arrowhead Point should have been contemplated by Globe and Farmes and reflected in the purchase price when they purchased the property in 2008. 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 an owner or 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 is possible. Existing conditions at the time of purchase cannot form the basis for a finding of unnecessary hardship, and the Court of Appeals' decision should be reversed to correct this error.

II. The BOZA Abused Its Discretion When it Approved the Variance Based on Impermissible Considerations of Profit Maximization.

The Court of Appeals' decision correctly explains that, as a matter of law, 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))). However, profit maximization was the sole basis for BOZA's finding of unnecessary hardship and approving the variance. (R. pp. 942-45).

Under the existing road right-of-way ordinance, Arrowhead Point can be developed into three lots. (R. p. 163 "Private driveways"). Unsatisfied with this density, the developer sought a variance so that it could develop Arrowhead Point more profitably into nineteen lots. However, "[t]he 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).

Addressing the issue of whether BOZA considered profitability, the Court of Appeals cited 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. (Court of Appeals 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. In fact, the Court of Appeals identified this difference in density as the sole reason the BOZA concluded that the existing ordinance effectively prohibited or unreasonably restricted utilization of Arrowhead Point. (Order at 9). The only reason given by the BOZA to support its finding of unreasonable hardship was that the developer "can't do anything," by which the board meant that existing conditions did not allow development of Arrowhead Point into nineteen lots as desired by the developer. (R. p. 942, lines 1-21; 944, line 14 – 945, line 9). BOZA did not consider the existing development potential.

The record is devoid of any non-economic, non-financial reasons identified by the BOZA supporting its determination on this statutory element. (R. p. 941, lines 1-21; 944, line 14 - 945, line 9). 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 variance—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").

The only difference between being able to develop Arrowhead Point into three homes and nineteen homes is that higher density will make the development more profitable. This is an improper consideration and the BOZA's order should be reversed.

III. The BOZA Abused Its Discretion When It Shifted the Burden of Proof Away from the Variance Applicant and Onto the Adjacent Landowners.

The Court of Appeals 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 to prove the existence of a public road 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 a 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 Oconee County staff reported that the facts they gathered on the prescriptive easement were mixed, the BOZA was faced with the question of whether it could move forward to decide the variance.

Ultimately, rather than making the developer carry its burden to prove that the existing road was public, 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 and should be corrected.

IV. The BOZA Did Not Have Jurisdiction to Decide the Legal and Factual Dispute Over the Public/Private Nature of the Road.

The BOZA did not have jurisdiction to decide, or make a conclusory assumption about, a determinative factual and legal dispute over whether Oconee County has a prescriptive easement over the Disputed Section of Road owned by the Ratliff Family. In hearing evidence on the prescriptive easement, assuming the existence of a prescriptive easement, and then approving the variance application based on this assumption, the BOZA effectively determined this disputed legal and factual question. In this manner, BOZA acted outside of its limited statutory jurisdiction to hear and decide variance applications. Neither the lower court nor the Court of Appeals addressed this jurisdictional issue. This was error.

The BOZA is a body of limited jurisdiction. S.C. Code Ann. § 6-29-800 (setting forth the powers of a board of zoning appeals). Concerning variances, a board of zoning appeals' jurisdiction is limited to the following:

> (2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:
>
> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
>
> (b) these conditions do not generally apply to other property in the vicinity;
>
> (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and

> (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

S.C. Code Ann. § 6-29-800(A)(2). The BOZA does not have jurisdiction to hear and decide factual and legal disputes falling outside of these limited findings.

Prior to voting to approve the variance application, the BOZA recognized that this disputed issue of whether Oconee County held a prescriptive easement across the Disputed Section of Road had to be determined. (R. p. 766, line 19-p. 767, line 14 ("That's our first question, do we have authority?")). This was the reason the BOZA did not vote when the application first came before it on November 30, 2021, (R. p. 781, lines 6-11), and the reason the application was not decided at the January 24, 2022 meeting, (R. p. 800, lines 2-24, p. 810, lines 10-12).

Had the prescriptive easement and character of the Disputed Section of Road not been in dispute, the BOZA could have moved forward on the variance application without jurisdictional questions. However, once it became clear that the character (public or private) of the Disputed Section of Road was contested, the BOZA did not have the jurisdiction to resolve the prescriptive easement issue or the jurisdiction to move forward on the variance application under an assumption that effectively resolved the factual dispute over the prescriptive easement in the variance applicant's favor, which is what happened here.

Not only did the BOZA assume the existence of the prescriptive easement, it then approved modified boundaries of the easement, ordered certain sections of the easement to be abandoned, and modified the burden of the easement on the Ratliff Family's property. (R. p. 636 (Corrected Order Approving Variance)). The BOZA did not have the jurisdiction to make these determinations. This was an abuse of discretion and legal error. Accordingly, the variance order should be reversed.

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

The BOZA did not explain its findings in writing, as required by law. Its final order 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).

South Carolina courts have 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, further detail will surely be required in more complicated cases.").

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 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 each required statutory element. 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.

CONCLUSION

For all of the reasons stated above, this Court should grant certiorari to (1) preserve its precedent that existing conditions cannot form the basis of an unnecessary hardship for a variance request; (2) clarify that limitations on development density are profit considerations; (3) correct the BOZA's burden shifting error; (4) provide guidance to future boards of zoning appeals on handling disputed issues of fact that fall outside of their limited statutory jurisdiction; and, (5) provide additional guidance to boards of zoning appeals on making written explanatory findings.

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May 16, 2025

CERTIFICATE OF COUNSEL

I, the undersigned counsel for Appellants, hereby certify that a Petition for Rehearing was made and finally ruled on by the Court of Appeals. The Petition was filed on March 6, 2025. It was finally ruled on by the Court of Appeals on April 17, 2025.

Respectfully,

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May 16, 2025

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May 16 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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.

PROOF OF SERVICE

I certify the Appellants' Petition for Writ of Certiorari 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 May 16, 2025.

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