

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Judge

Appellate Case No. 2013-001286

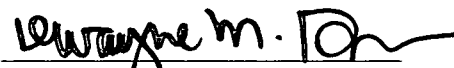
Joseph M. Bettelli, Jr. and Susan B. Bettelli..... Appellants,

v.

Town of Awendaw Board of Zoning Appeals and
Berkeley Electric Cooperative..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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November 6, 2013

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SC Court of Appeals

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AND THERE WAS SUFFICIENT EVIDENCE IN THE
RECORD TO SUPPORT ITS DECISION.

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STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT'S CONCLUSION THAT THE VARIANCE GRANTED BY THE RESPONDENT WAS PROPER SHOULD BE UPHELD SINCE THE DECISION WAS NEITHER ARBITRARY NOR CAPRICIOUS AND THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT ITS DECISION.

II. THE CIRCUIT COURT'S FINDING THAT THE RESPONDENT'S VARIANCE WAS PROPER SHOULD BE UPHELD SINCE IT WAS RATIONALLY RELATED TO A LAWFUL PURPOSE HAD MET THE CRITERIA REQUIRED BY STATUTE FOR THE GRANTING OF VARIANCES.

STATEMENT OF THE CASE

This case originated with an appeal from a decision rendered by the Respondent Town of Awendaw Board of Zoning Appeals. Respondent Awendaw granted a zoning variance to the Respondent Berkeley Electric Cooperative in a hearing dated November 1, 2010. (BZA Order #1011-01). In response to an application previously filed by Berkeley Electric. This variance allowed Berkeley Electric to reduce a vegetative buffer between its property and the property of the Appellants Joseph and Susan Bettelli from twenty feet to five feet. The variance was from a Town of Awendaw zoning ordinance that required a 20-foot vegetative buffer between adjacent commercial properties and residential properties. (Town of Awendaw Ordinance §8.1.1).

Respondent Berkeley Electric applied for the variance, which was unanimously granted by the Respondent Town of Awendaw Board of Zoning Appeals. That variance requested that the vegetative buffer be reduced (and also permission for some grand trees to be removed) so that more of the Respondents property could be available for construction. In considering the special circumstance for this request, the Respondent Awendaw considered the criteria set forth in S.C. Code §6-29-800(A)(2). Its decision was set forth in its order dated November 1, 2010. (Order # 1011-01). The Appellants appealed the Order from this

hearing on March 16, 2011. (Notice of Appeal, p. 1). This notice specified no grounds for the appeal of the Board of Zoning Appeals decisions. The Appellants then filed an Amended Notice of Appeal on July 21, 2011, alleging the granted variance did not meet the criteria set forth by statute. (Amended Notice of Appeal).

On March 12, 2012, the Honorable J. C. Nicholson, Jr. heard the appeal in this matter at an initial hearing. After reviewing the evidence and hearing from all parties, the court issued a Temporary Order dated July 17, 2012, remanding the case to the Respondent Town of Awendaw Board of Zoning Appeals. (Temporary Order, pp. 1-2) In that order, the court requested additional information regarding the Respondent Awendaw's specific factual findings which were to be set forth in a return to the court. (Temporary Order, pp. 1-2). In November, the Respondent Town of Awendaw filed a Return to the Court, further highlighting the factual considerations for its November 1, 2010 Order and specifically answering the courts questions from the March 12, 2012 hearing. (Respondent Return to Court, pp. 1-2). The court then heard arguments from each party on November 15, 2012 in light of the filed return.

After allowing the parties some additional time to resolve the matter by settlement, the court then issued a Final Order on April 3, 2013 upholding the original decision by the Respondent Town of Awendaw Board of Zoning Appeals to grant the variance. (Order of Trial Court, pp. 1-2). The Appellants filed a Motion for Reconsideration and to Alter or Amend on April 24, 2013 which was denied by the trial court on May 8, 2013. The Appellants then filed this Notice of Appeal on June 5, 2013.

STATEMENT OF FACTS

This case arises from the construction of a new service facility constructed by the Respondent Berkeley Electric Cooperative off of Highway 17 in the Town of Awendaw. In preparing the site for construction, the Respondent Berkeley Electric was required by ordinance to place a twenty foot vegetative buffer between its property and the property of the Appellants, whose residential property was adjacent to it. This zoning requirement applied to commercial properties which were situated next to a residential property. The applicant also sought to remove sixteen grand trees (trees eighteen inches or greater in diameter) from the site in order to construct their facility. Respondent Berkeley Electric's stated reason for the application, which sought to reduce vegetative buffer from twenty feet to five feet, was so that additional space on the property could be used for construction. A twenty foot water easement along the northern property line of the Respondent's property further limited the usable space on the property since by ordinance, the easement had to be kept clear for maintenance purposes.

The Respondent Berkeley Electric Respondent filed an application with the Awendaw Board of Zoning Appeals and requested the variance at a public hearing scheduled on November 1, 2010. At that hearing, the Board of Zoning Appeals heard evidence from the Applicant as to why the variance should be permitted. In considering the application, the board specifically noted the requirements of the Section 6-29-800(A)(2) of the South Carolina Code, including any special characteristics of the property, whether the variance would negatively impact neighboring properties, and whether the character of the district would be harmed by the granting of the variance. After consideration of these factual considerations the board unanimously voted to grant the variance to the Respondent.

The board placed extra conditions on the Applicant to ensure that neighboring parcels would be protected. Specifically, the board required that the vegetation and shrubs in the condensed buffer be of a more dense and increased variety so as to increase screening between the Respondent's property and the Appellant's property. (Return to Court, pp. 2). The board also required that the Respondent have its general site plan, exterior lighting plan, and architectural plans approved with the goal of protecting the adjacent properties from excessive light or noise. (Return to Court, pp. 2) Although the hearing was held on November 1, 2010, the board reduced its findings of facts and conclusions of law in number 1011-01 on March 7, 2011. The Appellants filed a Notice of Appeal and Request for Pre-Litigation Mediation with the Charleston County Clerk of Court on March 17, 2011.

That appeal was heard by the Honorable G. C. Nicholson, Jr. on March 12, 2012. At that hearing, after hearing from both sides, Judge Nicholson remanded the case back to the Board of Zoning Appeals in order to receive more factually specific bases for the board's findings. These findings were returned to the court for its consideration as a Return to the court. (Respondent's Return to Court). That return detailed more of the factual considerations for the Respondent Awendaw's decision initially set forth in its Order dated November 1, 2010. (Respondent's Return to Court). After reviewing the Return on November 15, 2012 and hearing arguments from each party as to the propriety of the boards' decision, the court took the matter under advisement, during which time the parties tried to negotiate a resolution. After the parties communicated that they failed to resolve the matter amongst themselves, the court issued its Final Order on April 3, 2013 affirming the Respondent Board of Zoning Appeals decision to grant the variance to the Respondent Berkeley Electric. This appeal followed.

STANDARD OF REVIEW

A zoning board's finding of fact are final and conclusive on appeal and should 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 2003). Accordingly, the trial court reviewing the decision of a municipal board does not review the case *de novo*. Instead, the circuit court has limited appellate review of decisions from administrative and regulatory agencies under S.C. Code Ann §6-7-780. A decision of a municipal zoning board will be overturned only if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. Friends of McLeod, Inc. vs. City of Charleston, 376 S.C. 610, 658 S.E.2nd 544 (S.C. App. 2008).

On appeal to the circuit court, a zoning board's decision should not be interfered with unless it is arbitrary or clearly erroneous. Clear Channel Outdoor vs. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2nd 76 at 78 (S.C. App. 2004). The court may reverse or modify a decision only if there is an error of law or if the decision is arbitrary and capricious or an abuse of discretion. S.C. Code § 1-23-380(g)(1976 as amended). A court will refrain from substituting its judgment for that the reviewing body in a zoning decision, even if it disagrees with the decision. Friends of McLeod, 658 S.E.2nd 545. An appellate court reviewing the decision of a trial court which has reviewed a board decision will look to see if the trial court was clearly erroneous in its finding. Friends of McLeod, Incorporated vs. City of Charleston, 376 S.C. 610, 658 S.E.2nd 544 (S.C. App. 2008).

LEGAL ARGUMENT

I. THE CIRCUIT COURT'S CONCLUSION THAT THE VARIANCE GRANTED BY THE RESPONDENT WAS PROPER SHOULD BE UPHELD SINCE THE DECISION WAS NEITHER ARBITRARY NOR CAPRICIOUS AND THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT ITS DECISION.

Section 6-7-780 of the South Carolina Code provides, in pertinent part:

“The findings of fact by the board of appeals shall be final and conclusive on the hearing of such appeal. In determining the questions presented by the appeal the court shall determine only whether the decision of the board is correct as a matter of law.”

S.C. Code Ann. §6-7-780 (Supp 2013).

In reviewing the factual findings of the Respondent Town of Awendaw Board of Zoning Appeals, the court was reviewing whether the board was applying the correct criteria and whether there were facts in the record to rationally support the boards decision.

The Respondent Awendaw Board of Zoning and Appeals considered Respondent Berkeley Electric Cooperative’s request for a variance in light of S.C. Code §6-29-800(A)(2). Specifically, the board examined whether (a) there were extraordinary and exceptional conditions pertaining to the particular piece of property; (b) whether the conditions generally applied to other properties in the vicinity; (c) whether 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) whether the authorization of a variance would be a substantial detriment to adjacent property or the public good and the character of the district will not be harmed by granting of the variance. S.C. Code § 6-29-800(A)(2).

In the Respondent’s return to the court, the Respondent detailed the factual considerations for its November 1, 2010 order. (Respondent Awendaw Return to Court, pp 1-2.) The trial court requested this additional information in its July 17, 2012 Temporary Order which sought more information from Respondent Town of Awendaw on how it came to its

decision. (Temporary Order, pp. 1-2). The Respondent Awendaw highlighted the factual considerations from the record on how it came to its decision to grant the variance, including each prong of 6-29-800(A)(2) it considered in coming to its conclusion.

Specifically, there were extraordinary and exceptional conditions pertaining to the particular piece of piece of property, including the existence of wetlands and an easement on the land which would reduce the applicant's usable area on the property. (Respondent BZA Order #1011-01 and Respondent's Return to the Court). The easement is such that it could not be built over because the water line within the easement could not be maintained.

Additionally, the Respondent Awendaw's board found that these conditions did not generally apply to other properties in the vicinity. (Respondent's Return to the Court). The existence of the conditions would also unreasonably restrict the use of the property in the judgment of the Respondent Town of Awendaw Board of Zoning Appeals. (Respondent's Return to the Court). Lastly, the board found that the variance would not be of substantial detriment to the adjacent property or the public good since the more dense vegetation which was proposed actually provided more screening between the properties as was originally required by the Town ordinance. (Respondent Awendaw's Return to the Court).

Respondent Awendaw's Board of Zoning Appeals unanimously granted the variance, finding there were factual considerations to support the Respondent Berkeley Electric's application. When the trial court reviewed the respondent's order and the return detailing these findings, the court only needed to be satisfied that there were factual considerations in the record to support the board's finding, and that the decision to grant the variance was rationally related to a lawful purpose. "A circuit court should not disturb the findings of the board unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the

board has acted illegally on in excess of its lawfully delegated authority.” Fontaine v. Peitz, 291 S.C.536, 538, 354 S.E.2d 565, 566 (S.C. 1987).

The granting of the variance was reasonably related to a lawful purpose, namely the maintenance of a town water line which was for the benefit of the citizens of the residence of Awendaw. (Respondent BZA Order #1011-01). The board made a factual finding that there was no reasonable alternative to route the easement through the Respondents property. (Respondent BZA Return to the Court). The Respondent Board of Zoning Appeals sought to protect the values of the adjacent property by including strong conditions in its order, especially that its general site plan, exterior lighting plan, and architectural plans be given to the town. (Respondent BZA Order #1011-01). The board noted that never before had the Respondent placed such conditions on a Respondent in respect to adjacent property owners. (Respondent Awendaw Board of Zoning Appeals Return to the court).

Further, the minutes of the November 1, 2010 Board of Zoning Appeals meeting reflect that the board considered issues of light and noise in support of its finding that the granting of the variance would “not be of substantial detriment to the adjacent property or the public good and the character of the district would not be harmed by the granting of the variance” (Awendaw Board of Zoning Appeals Order #1011-01 November 1, 2010). The factual considerations included that the eleven acres of wetlands on the Applicant’s property rendered almost half of the property unsuitable for construction. (Respondent’s Return to Court). This presence of unusable wetlands on the property was an extraordinary and exceptional condition pertaining to the applicant’s particular piece of property that did not exist on other properties.

“A court will uphold the decision of a reviewing body if there is any evidence in the record to support its decision.” Clear Channel Outdoor, 602 S.E.2nd at 79. In the present case there was clearly factual basis in the record which the Respondent considered when deciding to grant its variance. The trial court sitting as an appellate court, clearly exercise its obligation not to substitute its judgment for that of the reviewing body in a zoning decision, even if it disagreed with the decision. If a variance has a reasonable relationship to a lawful purpose, then it should be upheld. Restaurant Row Association vs. Horry County, 335 S.C. 209, 216, 516 S.E.2nd 442, 446 (S.C. 1999).

II. THE CIRCUIT COURT’S FINDING THAT THE RESPONDENT’S VARIANCE WAS PROPER SHOULD BE UPHELD SINCE IT WAS RATIONALLY RELATED TO A LAWFUL PURPOSE HAD MET THE CRITERIA REQUIRED BY STATUTE FOR THE GRANTING OF VARIANCES

The trial court followed the proper standard of review in upholding Respondent Town of Awendaw Board of Zoning of Appeals decision. The trial court specifically requested that Respondent issue a Return to the Court to more specifically detail the factual reasons behind its decision. This remand showed that the trial court wanted to know what the factual basis was for the Respondent’s granting of a variance in this instance. Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local ordinances. Purdy v. Moise, 223 S.C. 298 302, 75 S.E.2d 605, 607 (1953) *cited in* Clear Channel Outdoor v. City of Myrtle Beach, 602 S.E. 2d 76 at 79.

Once Respondent Town of Awendaw forwarded this return, the trial court only needed to be satisfied that there was a factual basis for the Board’s decision that was rationally related to a lawful purpose. In this instance, the Applicant/Respondent Berkeley Electric demonstrated that the property had unique characteristics that would substantially

limit its use of the property were the variance not granted. Additionally, the characteristics of the property were particular to the specific parcel owned by the Respondent such that the issuance of a variance was granted.

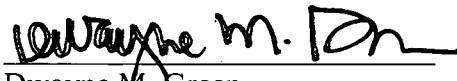
Most importantly, the trial court found that the Board also considered the final two prongs of S.C. Code Section 6-29-800(A)(2). (Final Order, pp 1-2). The variance would not be detrimental to adjacent properties or the character of the community due to the special conditions placed upon Respondent Berkeley Electric and there was public purpose that was served by the granting of the variance. The need for the variance was in part necessitated by a twenty foot easement which was along the northern border of the Respondent Berkeley Electric's property. The necessity of keeping this easement clear as required by ordinance, was so that the water line which would be placed in the easement could be maintained. The board found that there clearly was a lawful purpose rationally related to the public good which comprised part of the reason the variance was granted.

The trial court satisfied its obligation to insure that there was a factual basis for the board's ruling and this basis was neither arbitrary nor capricious as required by statute. S.C. Code 6-29-800(A)(2). Town of Awendaw Board of Zoning Appeals properly considered the four factors set forth in S.C. Code Section 6-29-800(A)(2) in deciding to grant a variance to the Respondent Berkeley Electric Cooperate. The trial court specifically remanded the case back to the Board of Zoning Appeals to insure there was a sound factual basis for the granting of the variance. These factual determinations, included in the Return to the Court, demonstrated that the trial court properly discharged its duty in reviewing the propriety of the granted variance.

CONCLUSION

Based on the above, the ruling of the trial court should be upheld as it was neither an abuse of discretion, nor arbitrary and capricious. Accordingly, the decision to let stand the initial decision of the Respondent Awendaw Board of Zoning Appeals should be upheld.

Respectfully Submitted,
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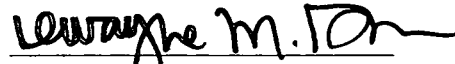
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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on all attorneys of record by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2013, addressed to the attorneys of record Christopher McG. Holmes and John B. Williams. I also have served Julie J. Armstrong, Charleston County Clerk of Court in the same manner at Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina 29401.

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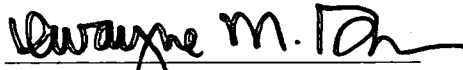
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Initial Brief complies with Rule 208(a)(1) and (b)(1) SCACR.



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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following be included in the Record of Appeal:

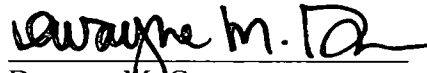
1. Order, April 9, 2013
2. Temporary Order, July 17, 2012
3. BOZA Return, November 15, 2013
4. Appellant's Motion for Reconsideration and to Alter or Amend, April 24, 2013
5. Amended Notice of Appeal. July 21, 2011

I certify that this designation contains no matter which is irrelevant to this appeal.

[SIGNATURE PAGE FOLLOWS]

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A handwritten signature in black ink that reads "Dwayne M. Green". The signature is written in a cursive style and is positioned above a horizontal line.

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