THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Judge

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Case No. 2011-CP-10-2028

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

v.

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

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BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES

I. **DID THE TRIAL COURT ERR IN AFFIRMING THE GRANT OF A VARIANCE IN THE ABSENCE OF ANY EVIDENCE IN THE RECORD THAT THE ELEMENTS SET FORTH IN S.C. CODE ANN. § 6-29-800(A)(2) NECESSARY TO ESTABLISH ENTITLEMENT OF THE PROPERTY TO A VARIANCE WERE MET?**

II. **DID THE TRIAL COURT ERR IN FAILING TO FIND THE GRANT OF A VARIANCE AN ARBITRARY ACT IN LIGHT OF THE INHERENT CONFLICT OF INTEREST IN AWENDAW'S EXACTION OF AN EASEMENT FROM BERKELEY ELECTRIC AS A PREREQUISITE TO SITE APPROVAL?**

## STATEMENT OF THE CASE

On November 1, 2010, the Town of Awendaw's Board of Zoning Appeals (hereafter "Awendaw" or"BOZA") approved, *inter alia,* a variance to its zoning ordinance allowing the vegetated buffer area between Berkeley Electric Cooperative's (hereafter "BEC") commercial property and Joseph M. and Susan B. Bettelli's (hereafter "appellants" or "Bettellis") residential property to be reduced from the twenty feet width required by the ordinance to five feet. This decision was set forth in written findings of fact and conclusions of law as required by S. C. Code Ann. Section 6-29-800(F) and were approved and signed on March 7, 2011.

Appellants timely appealed the variance decision and, on March 12, 2012, the appeal was heard by the Honorable J. C. Nicholson, Jr. in Charleston. Following that hearing, Judge Nicholson issued a Temporary Order on July 17, 2012, remanding the matter to BOZA to make specific factual findings and file a Return.

On November 15, 2012, BOZA filed the Return, and on that same date Judge Nicholson heard arguments from counsel for all parties. Thereafter, on April 3, 2013, Judge Nicholson signed an Order affirming the grant of the variance, and written notice of this decision was received by appellants on April 15, 2013. Appellants filed a Motion for Reconsideration and to Alter or Amend on April 24, 2013. This motion was denied by the Court on May 8, 2013, and appellants received written notice of that denial on May 14, 2013.

This appeal followed.

## STANDARD OF REVIEW

The powers of the BOZA and the standard to apply in considering requests for variances is set forth as follows:

> [T]o 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;
>
> ©) 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).

This Court's review of a zoning board of appeals' decision, as was that of the lower court, is governed by S.C. Code Ann. § 6-29-840.

## ARGUMENT

1. **Because the record is devoid of any evidence the BEC property would be subject to unnecessary hardship if it were required to maintain a twenty foot vegetated buffer between its property and that of appellants, the decision affirming the grant of a variance should be reversed.**

A variance allows a zoning board to modify an otherwise legitimate zoning restriction when, because of unusual conditions, the restriction may be more burdensome than intended and creates an unnecessary hardship on the property owner. It has been held that in order to obtain a variance on the ground of unnecessary hardship, there must at least be proof that a particular property suffers a singular disadvantage by operation of the zoning requirements. Hodge v. Pollock, 223 S.C. 342,

75 S.E.2d 752 (1953); Rest. Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999), certiorari denied, 528 U.S. 1020, 120 S.Ct. 528, 145 L.Ed. 409 (1999). "In order to grant a variance, the Board must make the factual determination that each of the four elements[1] above favor granting the variance. *See* Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock ,*supra.*" Rest. Row Associates v. Horry County, *supra,* 516 S.E.2d at 445.

While a zoning board of appeals has some discretion, it must apply the standards established by the zoning ordinance, and "the decision of the zoning board will not be upheld where it is based on errors of law, or fraud, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or in a discriminatory manner or where, in general, the board has abused its discretion." 58 Am.Jur., Zoning, Section 231. (Cited in Hodge v. Pollock, *supra,* 223 S.C. at 348, 75 S.E.2d at 754 - 755).

It is important to keep in mind exactly what BEC was seeking when it appeared before BOZA on November 1, 2010. An examination of the meeting minutes and written findings of fact and conclusions of law show BEC was asking to remove some grand trees that existed in its building footprint and seeking architectural and site plan approval of its building and parking areas. R. p. 107. The variance relating to the buffer reduction, however, in no way furthered BEC's use of its property. Instead, the reduction was necessitated by the Town of Awendaw's earlier extraction of a water line easement from BEC that would extend from a well on BEC's property to Highway 17.

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[1]The four elements the Court has reference to in the cited case are substantially similar to those set forth in S.C. Code Ann. § 6-29-800(A)(2).

Because Awendaw requires easements of this nature to remain clear of vegetation so as not to hinder maintenance in the event of a water line break or similar occurrence, BOZA apparently directed BEC to apply to reduce the buffer to five feet so that there would not be any vegetation in the easement. It is thus patently obvious that the buffer reduction was for the benefit of the Town of Awendaw and only impacted BEC to the extent it needed to appease the town in order to obtain site plan approval.

The lower court recognized the absence of any evidence in the record before it justifying the buffer reduction in its Temporary Order. "Upon review of the record submitted and consideration of the arguments and briefs of the parties, this Court concludes the Order on Variance Application issued by BOZA pursuant to S. C. Code Ann. Section 6-29-800(F) does not contain sufficient information to allow a determination whether the findings are supported by the evidence and, therefore, whether the law has been properly applied." R. p. 20. Accordingly, the court remanded the matter to BOZA with instructions to make a return that would:

> a. include factual findings explaining why the easement, granted to the Town for the purpose of purchasing water, must be located in the required buffer zone; and
> b. include factual findings explaining why the easement could not be routed in another direction; and
> c. include factual findings explaining why the authorization of the variance will not be of substantial detriment to adjacent property (in this case, plaintiff's property) or to the public good, and why the character of the district will not be harmed by the granting of the variance (S.C. Code Ann. 6-29-800(A)(2)); and
> d. include factual findings demonstrating how the granting of the variance is not arbitrary of [sic] capricious due to the apparent conflict of interest. *Id.*

Additionally, the court directed that "[a]ll findings of fact shall be sufficiently detailed so as to enable this Court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." R. p. 21.

The document subsequently submitted by BOZA utterly failed to comply with the Temporary

Order. R pp. 22-40 (hereafter "Return").

In reply to the query as to why the easement had to be located in the buffer area and could not be re-routed, the Return candidly states, "The purpose of the easement is to allow the Town to connect the existing BEC well with the Town's existing water system." R. p. 26. This admission underscores the indisputable fact that the reduction of the buffer is for the benefit of the Town in maintaining its water line and not in furtherance of BEC's use of the property. Furthermore, the Return contends the easement cannot be re-directed because "virtually the entire site is paved or used for buildings." *Id.* While that may be true now, it was not true on November 1, 2010, when the variance was granted. This is the equivalent of justifying a variance based on facts not present when the decision was made, which is not permissible under the ordinance. S.C. Code Ann. § 6-29-840 provides that an appeal of a zoning decision is limited to the certified record and the court may not take additional evidence. While the court did remand this matter to BOZA, and the statute allows a remand for a rehearing[2], in this case, BOZA did not conduct a new hearing. Instead, the document attached to the Return was prepared in advance of the meeting held by BOZA on November 5, 2012, and was simply read into the record at the start of the meeting. Furthermore, appellants were advised at the commencement of that meeting that it was not a public hearing and that while they would be allowed to make comments after the document was read into the record, BOZA was not going to consider anything said with regard to the decision to grant the variance beyond that written statement.

While the Return states that the November 5 hearing "did not present new evidence to the

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[2]"In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." S.C. Code Ann. § 6-29-840(A).

board," ( R. p. 25) that statement is not only disingenuous, it is false. In addition to referencing the paving of the site, which occurred after November 1, 2010, the return also references "factual considerations provided by engineers, architects and representatives from" BEC. *Id.* Most, if not all, of those "factual considerations" were developed post-November 1, 2010.

BOZA also failed to articulate how it determined there will be no detrimental impact to adjacent properties. In its initial Findings of Fact and Conclusions of Law, BOZA merely echoed the language of the statute without referencing any supporting factual proof or analysis of the impacts. Instead it focused on the benefit the Town was receiving.

> With regard to the buffer reduction, the applicant has provided a twenty-foot easement at the Town's request for a waterline so that the Town can purchase water from Berkeley's well. This waterline will be part of the Town's Phase III water system. The twenty-foot easement must connect the well to Highway 17. This easement must also be clear of any obstructions.
>
> The Board finds that the useable area would be greatly reduced if the twenty-foot buffer were required. The applicant is providing a dense buffer of a variety evergreen shrubs that should grow to ten or twelve feet tall at maturity.
>
> The granting of this variance will not be of substantial detriment to the adjacent property or the public good and the character of the district will not be harmed by the granting of this variance.
>
> R. pp. 111-112.

This was the sum total of BOZA's explanation of impacts on adjacent properties, including that of the appellants. The lower court properly found this recitation of the statute, absent more, was inadequate to meet the standard required. "An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." Hamm v. S. Carolina Pub. Serv. Comm'n, 309 S.C. 295, 300, 422 S.E.2d 118, 121 (1992). See also, Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S. Carolina, 338 S.C. 92, 525 S.E.2d 863 (1999). ("This

Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning.") "The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings [internal cite omitted]. Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact." Able Communications, Inc. v. S.C. Public Service Commission, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

The Return filed by BOZA, while more verbose on the issue of impacts to adjacent properties, still fails to provide factual support for the conclusion that adjacent properties will suffer no detriment from the reduced buffer. Instead, the Return speaks of vegetation required in the interior of BEC's property and a vague responsibility to "promote public safety." BOZA boldly states that it "sought to protect the values of the adjacent property by including some very strong conditions. The BZA required that BEC must have its general site plan, exterior lighting plan and architectural plans approved and that the well will be given to the Town. This is all aimed at protecting the adjacent properties." R. p. 27. That BOZA believes requiring approval of site plans and lighting and architectural details constitutes "very strong conditions" rather than what they actually are - the absolute minimum that should be expected from a zoning board - emphasizes its complete inability to comprehend and address the concerns of appellants and to fulfill its responsibilities.[3]

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[3]In fact, BOZA goes on its Return to assert, "This is the only time the BZA has granted a variance in its existence that such major conditions have been placed on the approval." R. p. 27. This admission is breathtaking in its audacity. In fact, the minutes of the November 1, 2010, meeting and the subsequent written findings state that BEC was seeking "general site plan and architectural approvals," ( R p. 111) in the first instance and not as a condition of approval of the buffer reduction variance.

To the extent BOZA actually addresses the buffer area (as opposed to the interior of the site and the well it is getting), it suggests that a six foot high fence and a lot of shrubs in the five foot buffer will provide greater protection to adjacent property than a twenty foot vegetated buffer. R. p. 27. BOZA fails to acknowledge, and the lower court neglected to note, that the fence was built before BEC placed two feet of fill on the site so that the fence is effectively four feet high. Further, the fence was erected in the middle of the five feet of buffer so that the effective planting area is only two and a half feet wide. R pp. 11-18. BOZA and BEC have consistently failed to respond to appellants' contention that effective screening vegetation cannot be planted and maintained in such a restricted area.

In sum, the lower court found that BOZA had failed in its original Order on Variance Application to articulate facts sufficient to support the granting of a variance, and, when given the opportunity to cure those defects on remand, failed once more to provide factual findings explaining why the easement had to be located in the required buffer zone, why it could not be re-routed, and why the authorization of the variance would not be of substantial detriment to adjacent property. As a consequence, the action of BOZA does not meet the statutory standards set forth in S.C. Code Ann. § 6-29-800(A)(2) as the Supreme Court said the application of those standards must be judged. Rest. Row Associates v. Horry County, *supra.* Accordingly, it was error for the lower court to affirm the variance. In fact, the Order of the lower court contains even less factual support for its conclusions than did the original BOZA Order on Variance Application which the court had remanded due to the failure to "contain sufficient information to allow a determination whether the findings are supported by the evidence and, therefore, whether the law has been properly applied." R. p. 20.

Because the initial record reviewed by the court was found to be insufficient to justify the variance and the Return filed after remand does not contain any factual findings, as was required by

the court, to support a conclusion that the BEC property would suffer an unnecessary hardship if the ordinance was strictly applied, the decision below should be reversed.

**II. Because the record demonstrates the only purpose of the variance from the buffer requirement was to facilitate the ability of the Town to maintain the easement it had obtained from BEC, there was a conflict of interest such that the grant of the variance constitutes an arbitrary action and abuse of discretion.**

An objective review of the record in this case leads to the inescapable conclusion that the vegetated buffer requirement was reduced for the benefit of the Town of Awendaw and its future water supply plans and had nothing to do with BEC's ability to develop its property. Accordingly, the grant of a variance to the buffer width was improper.

The November 1, 2010, minutes show that, in response to a question from a board member as to the necessity of a three-quarters reduction in the buffer, the town administrator "explained that the town's engineer was involved in the project and that the town would use the well at some point in the future." R. p. 109. The Order on Variance Application states, "With regard to the buffer reduction, the applicant has provided a twenty-foot easement at the Town's request for a waterline so that the Town can purchase water from Berkeley's well." R. pp. 111-112 (emphasis added).

Judge Nicholson recognized this inherent conflict when he heard arguments from counsel on March 15, 2012. R. p. 78, l. 8- p. 79, l. 11. So concerned was the court on this point that, at the close of arguments, counsel for BOZA was directed to submit a "memorandum on why it isn't a conflict of interest for the city to receive an easement, a 20-foot easement for water. ... Why isn't it a conflict of interest for the city to make a decision on reducing the variance and at the same time receive the benefit of the water. ... And therefore if it isn't a conflict, why isn't it capricious and arbitrary?" R. p. 91, l. 23- p. 92, l. 13. BOZA never submitted such a memorandum, so when Judge Nicholson issued his Temporary Order he specifically directed BOZA to include in its Return

"factual findings demonstrating how the granting of the variance is not arbitrary of [sic] capricious due to the apparent conflict of interest." R. p. 20.

The Return, however, is void of any such factual findings or legal discussion. In fact, in its Return BOZA abandoned any pretense that the variance was anything other than for the benefit of the Town. Instead, BOZA claimed that the "general welfare" clause found in S.C. Code Ann. § 5-7-30 permits it to adopt "any laws necessary for promotion of health, safety or welfare." R. pp. 27-28. In the conclusory manner it adopts in all of the public documents in this record, BOZA asserted without any factual underpinning "[t]he granting of this variance clearly promotes the health, public safety or welfare of the residents of the Town of Awendaw." *id.* The major problem with this attempted justification is that the "general welfare" advancement is not a valid basis to grant a variance from a zoning ordinance, and even less so in the absence of a finding that the property suffers an unnecessary hardship.

Even if BEC had some need for the buffer variance - other than satisfying the Town of Awendaw - it would still have been improper to grant it. A claim of hardship cannot be asserted by one who purchases property after enactment of the zoning restriction[4]. "Ordinarily, 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. A self-created or self-inflicted hardship intentionally created by an owner of premises for the purpose of laying a basis for an application for a variance

[4]In this instance, BEC either purchased this property knowing it was zoned for commercial uses and therefore would require a twenty foot vegetated buffer between it and adjacent residential properties, or it purchased the property and sought to have the zoning changed to commercial use, which would carry the same buffer requirement. Under either scenario, BEC cannot claim hardship based on the zoning classification.

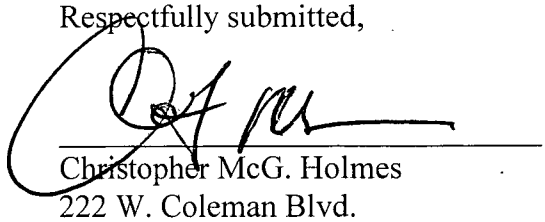
cannot be considered for such purpose. 58 Am.Jur., Zoning, Sections 208, 209, pages 1053 and 1054." Rush v. City of Greenville, 246 S.C. 268, 278, 143 S.E.2d 527, 532 (1965). Accord, Georgetown County Bldg. Official v. Lewis, 290 S.C. 513, 351 S.E.2d 584 (Ct. App. 1986); Rest. Row Associates v. Horry County, *supra*. This case presents an unusual twist to the cited principle. Here the "hardship" was created by the Town of Awendaw in its acquisition of an easement in an area it knew would be part of a required buffer once BEC sought site plan approval to develop the site. At its essence this case presents a situation where the entity that created the need for the variance also sits as the body to pass on the variance. A more compelling case of a conflict of interest cannot be made. While the lower court recognized this and directed Awendaw to address it, no plausible explanation has been advanced, and it was error for the court to affirm the variance in light of these facts.

## CONCLUSION

The record in this case fails to establish any basis for a finding of unnecessary hardship suffered by BEC if the full twenty feet of vegetated was required. No facts were presented to BOZA or enunciated by it in its initial findings of fact and conclusions of law or the subsequent Return demonstrating there are extraordinary and exceptional conditions pertaining to BEC's property which do not generally apply to other property in the area such that the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property. Further, BOZA has failed to articulate any facts to support its conclusion that granting the variance will not be of substantial detriment to adjacent property. Because this variance was granted by the Town of Awendaw for the benefit of the Town of Awendaw it constitutes a clear and

compelling example of a conflict of interest rendering the decision arbitrary and capricious. For all of these reasons the order of the lower court should be reversed and the variance held invalid.

Respectfully submitted,



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## CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief complies with Rule 211(b) SCAR.

December 18, 2013

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PROOF OF SERVICE

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I certify that I have served the final Brief of Appellants on all parties by depositing a copies of same in the United States Mail, postage prepaid, on December 27, 2013, addressed to the attorney for Respondent Town of Awendaw Board of Zoning Appeals, Dwayne M. Green, 602 Rutledge Avenue, Charleston, South Carolina 29403 and to the Attorney for Respondent Berkeley Electric Cooperative, J. Jay Hulst, PO Box 1288, Moncks Corner, South Carolina 29461.



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