THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

J.C. Nicholson, Jr., Judge

Case No.: 2011-CP-10-2028

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

v.

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

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BRIEF OF RESPONDENT
BERKELEY ELECTRIC COOPERATIVE, INC.

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STATEMENT OF THE CASE

This is an appeal from the court's order affirming the grant of a variance by the Town of Awendaw Board of Zoning Appeals ("BZA") to Berkeley Electric Cooperative, Inc. ("BEC") reducing the width of a buffer required along its northern property line. (R. p. 1.) The town's twenty foot wide water line easement also extends along that property line. *Id.* BEC asked for the variance to resolve the conflict between the easement and the town's buffer requirements. (R. pp. 1, 111-112, 117-118.)

The buffer requirements and standards are set forth in the town's zoning ordinance. (R. p. 29.) For BEC's site, the ordinance requires a twenty foot semi-opaque buffer incorporating five understory trees and four canopy trees per 100 feet of property line. *Id.,* § 8.1.1. Drainage easements, detention areas, parking, storage areas, and buildings cannot be located in the buffer. *Id.,* § 8.1.2. Due to the location of the town's easement, and because utility easements must be free of obstructions, BEC sought a variance reducing the planted buffer area while increasing the density of the plantings in remaining buffer.[1] (R. pp. 117-118.)

BEC presented its variance application to BZA at a public hearing on November 1, 2010. (R. p. 108.) BZA took questions and comments regarding BEC's request from the general public and, after discussion, voted unanimously to grant the variance. (R. p. 109.). The minutes of the hearing, along with findings

[1] The twenty foot easement plus the five foot vegetated screen effectively increase the non-buildable buffer zone along BEC's boundary to a width of 25 feet.

of fact and conclusions of law supporting BZA's decision to grant the variance, were approved on March 7, 2011. *Id.*

Appellants Joseph and Susan Bettelli filed a notice of appeal of BZA's decision on March 17, 2011. (R. p. 95.) An amended notice of appeal was filed on or about July 22, 2011.[2] (R. p. 96.) The appeal was heard by the Honorable J. C. Nicholson, Jr. on March 12, 2012.[3] (R. p. 1.) Appellants argued that BZA's findings and conclusions were not supported by any facts and that the board had a conflict of interest because BEC had granted the town an easement for a water line that was situated in the buffer area. (R. p. 55, lines 5-15; p. 91, lines 17-21.)

After hearing argument, the court remanded the case back to BZA ordering that the board provide a return with factual findings explaining: a.) why the easement had to be in the buffer zone; b.) why the easement could not follow an alternative route; c.) why the authorization will not be a substantial detriment to adjacent property or the public good; and d.) how the granting of the variance was not arbitrary or capricious due to the apparent conflict of interest. (R. p. 20-21.)

BZA submitted its return and a second hearing was held on November 15, 2012. On April 3, 2013, the Court denied the Bettelli's appeal. (R. p. 3.) The Court ruled that BZA properly considered the statutory factors set forth in S.C.

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[2] Appellants' initial notice failed to specify why the decision was contrary to law as required by S.C. Code of Laws Ann. § 6-29-820(A). There is no provision allowing a notice of appeal to be amended. *See* S.C. Code of Laws § 6-29-820; *Austin v. Board of Appeal,* 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).

[3] The court's order states that the hearing was March 12, 2012. The transcript of the hearing is dated March 15, 2012. (R. p. 41.)

Code of Laws Ann. § 6-29-800(A)(2) for granting the variance, that there was no conflict of interest when the variance was granted, and that appellants were not entitled to have a different or more expensive buffer erected by BEC. (R. pp. 1-3.) Appellants' motion for reconsideration and to alter or amend the order denying their appeal was denied. Appellants filed and served this appeal on June 4, 2013.

STATEMENT OF FACTS

BEC's property is located on the outskirts of Awendaw along Highway 17. (R. p. 53, line 13-p. 54, line 3; p. 106.) Appellants' property is situated along the northern boundary of the BEC parcel. *Id.* According to Charleston County property records, BEC purchased the tract in 2001; appellants purchased their neighboring parcel in 2002.

After learning about BEC's decision to construct a regional service center on the parcel, the Town of Awendaw proposed using any well installed on the property as a public water source. On May 18, 2010, BEC agreed to donate its well to the town when the municipal water system reached the area. (R. p. 118.) BEC agreed to drill a well incorporating a larger bore to accommodate future use by the town and granted the town a twenty foot water line easement leading from the well directly to Highway 17. (R. pp. 111-112; p. 118.)

On October 12, 2010 BEC submitted an application for a variance from Article 8.1.1 of the Awendaw Zoning Ordinance to remove a number of grand trees from the site and for a variance from Article 7.1.1 allowing BEC to reduce

the width of the required buffer area along its northern property line. (R. pp. 113-119.) BEC subsequently supplemented its application with updated site plans and lighting proposals for review by BZA. (R. pp. 39-40.)

BEC presented its application to BZA on November 1, 2010. (R. p. 108.) BEC representatives and staff from Awendaw's Planning Department "explained all items." *Id.* The development was intended to serve Awendaw's power needs. (R. p. 111) This is the only parcel of this size in this area on Highway 17 with zoning that will permit the proposed use. *Id.* The tract is 28 acres in size, approximately eleven acres of which are protected wetlands. *Id.* The property is bisected by a drainage ditch. The wetlands, ditch, and grand trees reduce the buildable area of the property. *Id.*

BEC's site plans include a large warehouse with storage yard, an office building with a community meeting space, and paved parking areas. *Id.* Landscaping is provided throughout the parking areas, including the planting of 228 new trees. *Id.* Nine acres of wooded wetlands have been preserved on the site. (R. pp. 39-40, 111, 113-118.)

BEC's plans call for a well to be installed near the northern corner of the property. (R. p. 39.) This site provides the best combination of soil conditions, water quality, and depth of water source. (R. p. 26.) The town's twenty foot utility easement extends from the wellhead approximately 900 feet along the northern boundary of the parcel to Highway 17. (R. pp. 26, 39-40, 106.) The

easement follows the most direct and least expensive route from the well to the highway. *Id.* With the easement, the town will be able to install a water main connecting the well to lines extending along the highway as part of the town's Phase III water system. *Id.*

Pursuant to § 8.8.1 of the town's zoning ordinance, commercial sites are required to install a 20 foot semi-opaque buffer along their boundaries. (R. p. 29.) Buffer areas are to be planted with five understory trees and four canopy trees for every 100 linear feet of boundary. *Id.* BEC was required to provide such a buffer along its northern boundary. (R. pp. 29, 108-109, 110-112, 118.) However, the town's twenty foot wide utility easement also runs along BEC's northern boundary. *Id.* The town requires that utility easements be clear of any obstructions. (R. p. 112.) Compliance with the town's buffer ordinance requirements will encroach on the town's utility easement and relocating the easement will diminish the area available for development on the site. (R. pp. 26, 111-112, 118.)

As shown in the plans, virtually all of the buildable area on BEC's property was to be covered by structures or pavement. (R. pp. 26, 39-40, 113-118.) Positioning the utility easement along the northern boundary of the tract is not only the most direct route, it was the only feasible one. *Id.* Any other route from the well to Highway 17 would pass through the already limited buildable area available on the site. *Id.* The proposed water line cannot be routed underneath

any buildings, and to lay the line beneath paved parking and/or landscaped areas would significantly increase the costs of installation and make maintenance and repairs more difficult and expensive. *Id.*

Because of the conflict between the buffer requirements and the utility easement, BEC proposed reducing the planted buffer area from 20 feet to five feet. *Id.* A five foot buffer incorporating five varieties of large evergreen shrubs would be established in the reduced buffer area to form an opaque screen lasting throughout the year. *Id.*

After BEC's presentation, "comments and questions were then taken from the board and the public." (R. p. 108.). BZA then engaged in a discussion about the requested variances. (R. pp. 108-109.) The board discussed whether it was certain that the town would be getting its water from this site for its Phase III water system. *Id.* Also, members deliberated whether the town actually required the full twenty feet for its water line. *Id.* One board member observed that if the buffer was to be reduced, BZA needed to be sure that the town would in fact use the easement to extend a water main from the well to the road. *Id.* The town planner advised BZA that the town's engineer was already working on the Phase III extension and that the town would indeed use BEC's well as a water source at some point in the future when funding became available. *Id.* Town staff recommended that the variances requested by BEC be approved. *Id.*

BEC's request for a variance from the town's buffer area requirements was unanimously approved. *Id.* BZA determined that the usable area of BEC's property would be significantly reduced if the town were to require strict conformity with its buffer area ordinance. (R. p. 111.) As a condition, BZA further required that a chain link fence incorporating dark green slats be erected along the property line and that understory trees and shrubs be planted behind the fence to form a dense buffer that would be superior to the semi-opaque buffer of sparsely planted trees required by the ordinance. (R. p. 27.)

ARGUMENT

Appellants argue that the court erred in affirming BZA's grant of a variance claiming that there is *no* evidence in the record that BEC would suffer unnecessary hardship in complying with the town's buffer requirements. Appellants' Brief, p. 3. Appellants further argue that the sole purpose of the variance was to facilitate the town's ability to maintain the easement, and that this constitutes a conflict of interest. Appellant's Brief, p. 10. Based on this purported conflict of interest, Appellants conclude that the grant of the variance was arbitrary and an abuse of discretion. *Id.* As demonstrated above and as discussed below, BZA's ruling was a fact-based and legitimate exercise of its powers. Accordingly, the court properly affirmed BZA's decision to grant the buffer variance requested by BEC.

In reviewing the questions presented by the appeal of a variance determination, the court shall determine only whether the decision of the board is

correct as a matter of law. *Austin v. Board of Zoning Appeals for Hilton Head,* 262 S.C. 29, 362 S.E.2d 209, 211- 212 (S.C. App. 2004). Findings of fact by a board of appeals must be treated in the same manner as a finding of fact by a jury. S.C. Code of Laws Ann. §6-29-840. Courts reviewing the decisions of zoning boards and other administrative agencies may look to written documents as well as records of proceedings as sufficient formats for final decisions. *Austin,* 211.

A court will refrain from substituting its judgment for that of the reviewing body. *Id.* A board of adjustment's decision should be given great weight and the discretion vested in such a board should not be interfered with unless arbitrary or clearly erroneous. *Hodge v. Pollock et. al.*, 223 S.C. 342, at 348, 75 S.E.2d 752, at 754 (1953). The 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. v. City of Charleston,* 376 S.C. 610, 658 S.E.2d 544, 545 (Ct. App. 2008). As stated by our Supreme Court:

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952).

I. APPELLANTS FAIL TO ESTABLISH THAT THE BOARD'S GRANT OF THE VARIANCE WAS NOT SUPPORTED BY FACTS.

In South Carolina, 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) the conditions of this property do not generally apply to other properties 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 this variance will not be of substantial detrimental impact to the 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 of Laws Ann. § 6-29-800(A)(2)(a)-(d).

BZA made these findings and explained them in writing as required. (R. pp. 26-40, 1-8-109, 111-112.) The court agreed, ruling that because of the easement BZA "was within its discretion in finding that Berkeley Electric's property had exceptional conditions" and that those conditions "did not apply to other properties in the area." (R. p. 3.) BZA "found that the proposed change from twenty to five feet of buffer had minimal impacts due to the proposed use of more dense vegetation." *Id.* Indeed, the approved buffer provided "more screening for the Bettelli's property" than required by the ordinance. *Id.* Finally,

"the granting of the easement would be of benefit for the public good rather than harming it."[4] *Id.*

Nevertheless, Appellants insist that BZA's decision was unlawful. Appellants contend that the buffer reduction "in no way furthered BEC's use of its property." Appellant's Brief, p. 4. Rather, the reduction was necessitated by the town's "earlier extraction of a water line easement."[5] *Id.* According to appellant, "BZA apparently directed BEC to apply to reduce the buffer to five feet so that there would not be any vegetation in the easement." *Id.* From this, appellants somehow conclude that 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 as needed to appease the town in order to obtain site plan approval. *Id.*

Appellants utterly fail to substantiate these claims. Appellants have the burden of showing that BZA's determination was arbitrary, capricious, an abuse of discretion, or has no reasonable relation to a lawful purpose. *Clear Channel Outdoor v. City of Myrtle Beach,* 372 S.C. 230, at 234 642 S.E.2d 565, at 567 (2007). Appellants' baseless conspiracy allegations fail to provide any grounds for invalidating BZA's approval of BEC's variance application.

Appellants claim that the terms of the Temporary Order show that the "lower court recognized the *absence of any evidence* in the record before it

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[4] The court obviously meant "variance" rather than "easement."

[5] Appellants thus admit that the utility easement preceded BEC's request for the buffer reduction.

justifying the buffer reduction." Appellant's Brief, p. 5 (emphasis added.) Appellants are incorrect. The Temporary Order actually states:

> … this Court concludes the Order on Variance Application issued by BZA 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.

Temporary Order (emphasis added.) The court does not state that there was an absence of any evidence in the record.

The court remanded the matter back to BZA "for the purpose of making a return to the court." *Id.* In the return, BZA was to provide facts explaining why the easement had to be located in the buffer area and why it could not be routed in another direction. *Id.* The court also wanted facts explaining why the authorization of the variance would not be a substantial detriment to adjacent property or to the public good, and why the character of the district will not be harmed by the granting of the variance as required by S.C. Code § 6-29-800(A)(2)(d). *Id.* Last, the court asked for factual findings demonstrating that the granting of the variance was not arbitrary or capricious due to an apparent conflict of interest. *Id.*

Appellants contend that the return submitted by BZA "utterly failed to comply with the Temporary Order. Apparently, the Court did not agree—after the return was submitted, it affirmed BZA's grant of the variance. (R. pp. 1-3.)

There has never been any dispute that the purpose of the utility easement was to enable the town to connect BEC's well with the town's water system. (R. pp. 1-3, 26-28, 39-40, 108-109, 111-112, 113-118.) Yet, from this, appellants somehow conclude that it is an "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." Appellants Brief, p. 6. Appellants are mistaken. BEC granted the easement to the town months before the site plans were prepared. (R. p. 118.) The town requires that utility easements be kept clear of obstructions. (R. p. 112.) The best location for the easement is along the northern boundary of the property—where the buffer is to be located. (R. p. 26.) That is the most direct route to the highway, and any other route will cut into or through the limited buildable area available on the property. *Id.*

Perhaps BEC should have just planted the buffer over the easement. If it had, the town would have been within its right to come in and mow the plantings down. Appellants would then have no screening vegetation in the buffer at all. If BEC did not replant the buffer, appellants would surely complain that BEC had failed to comply with the buffer ordinance. If BEC replanted, the town would be within its rights to clear the easement, again. The reasonable solution was for BEC to apply for the variance.

Appellants attack BZA's factual finding that the easement could not be redirected, arguing that the board's claim that "virtually the entire site is paved or

used for buildings" might be true now, but was "based on facts not present when the decision was made, which is not permissible under the ordinance." Appellant's Brief, p. 6. Appellants misstate the record. In its return, BZA states:

> An examination of the BEC site plan shows that virtually the entire site is paved or used for buildings.

(R. p. 26.) BZA did not, as appellants claim, offer an explanation based on the current condition of BEC's property. Its determination was properly based on its *examination of the site plans* which were provided to BZA as part of BEC's variance application. (R. pp. 26, 39-40, 118.)

In the same paragraph, appellants contend that BZA did not conduct a new hearing on the variance as required, but that it merely held a meeting. Appellant's Brief, p. 6. According to appellants, the facts explaining BZA's response to the issues raised by the Court were "prepared in advance" and "simply read into the record at the start of the meeting." *Id.* Appellants claim that they were told the meeting was not a public hearing, yet they admit they were allowed to attend and to make comments after the document was read into the record. *Id.* Appellants further complain that they were told that "BZA was not going to consider anything said in regard to the decision to grant the variance beyond that written statement." *Id.*, pp. 6-7.

Appellants fail to reference anything in the record supporting these allegations. The Temporary Order requires that BZA provide a return that

addresses the issues specified by the court.[6] The order does not stipulate any particular format that was to be followed by BZA in generating that return. Appellants evidently miss the irony in arguing that BZA improperly relied on new or additional evidence while at the same time complaining that BZA failed to hold a hearing to consider new or additional evidence in compiling its return. Appellants' unsupported and unreasonable contentions on this point must be disregarded.

Appellants next accuse BZA of outright lying, arguing that the Board's statement that "the November 5th hearing 'did not present new evidence to the board' is not only disingenuous, it is false.'" Appellants' Brief, p. 7. In support of this, appellants reference BZA's supposed reliance on the fact that the site had already been paved over, discussed *supra*, and that the return references "factual considerations provided by engineers, architects, and representatives from BEC." *Id.* (interior quotes omitted.) Appellants conclude that "most, if not all, of those 'factual considerations' were developed post-November 1, 2010." *Id.*

Appellants' accusation is baseless on a number of levels. Appellants' mischaracterization of BZA's statements and their corresponding charge that BZA improperly relied on "new" evidence to support its findings have already been addressed in detail. *See* Argument, pp. 12-13, *supra*. The statement that BZA's return was based on "factual considerations provided by engineers, architects, and representatives from BEC" is found in a memorandum summarizing BZA's

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[6] Appellants' counsel was responsible for preparing the Temporary Order.

factual findings that was prepared by the town's attorney. (R. p. 25.) BZA's substantive return, along with BEC's site plans and photos, was attached to and filed with that summary. (R. pp. 22-40.)

BEC's site plans were, in fact, developed and prepared by engineers, architects, and BEC representatives. (R. pp.39-40, 113-118.) BEC representatives, including an engineer from Stantec, appeared at the initial hearing on November 1, 2010 and presented BEC's variance application and site plans to BZA for review and approval. (R. p. 108.) Appellants fail to provide any support whatsoever for their claim that "most, if not all" of BZA's "factual considerations" were developed post-November 1, 2010.

Appellants contend that in its order granting the variance, BZA merely echoed the language of the statute without referencing any supporting factual proof or analysis of the impacts. Appellants' Brief, p.7. In support of this, appellant includes a selection of text from BZA's order. *Id.* That text actually includes the following finding of fact: "The applicant is providing a dense buffer of a variety of evergreen shrubs that should grow to ten to twelve feet tall at maturity." (R. p. 112.) Thus, BZA's order granting the variance clearly *does* reference supporting facts for its decision. (R. pp. 111-112.)

Likewise, appellants argue that the return submitted by BZA "fails to provide factual support for the conclusion that adjacent properties will suffer no

detriment from the reduced buffer." Appellants' Brief, p. 8. As stated in BZA's return, section 6-29-800(A)(2)(ii) of the South Carolina Code provides that

> In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or uses as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare.

Return; S.C. Code of Laws Ann. § 6-29-800(A)(2)(ii). "In its original approval, BZA sought to protect the values of the adjacent property by including some very strong conditions." (R. p. 27.) BZA required that BEC submit its general site plan, exterior lighting plan, and architectural plans for approval by the board. *Id.* By this, BZA sought to mitigate the impact, if any, of the reduced buffer by tightly controlling the development of the site, including landscaping and lighting. (R. pp. 27, 108-109, 111-112.) With more trees and shrubs required throughout the site, and with carefully directed lighting, any plantings lost due to the reduced buffer would not be missed. Appellants deride such efforts, as "the absolute minimum that should be expected of a zoning board," (Appellants' Brief, p. 8) but this kind of project oversight is not part of BZA's usual duties and such stringent approvals by the Board would not be normally required for a commercial development under the town's zoning ordinance.[7] Awendaw Zoning Ordinance, § 1.3.3.

[7] According to Town of Awendaw Zoning Ordinance, §1.3.3, the Board of Zoning Appeals' authority is limited to final decision making authority on special exceptions, variances, and appeals of administrative decisions on zoning matters.

As stated by BZA in its return,

> These conditions led to the BZA requirement that a chain link fence be placed along the property line and that dark green slats be included to form a virtually opaque fence six feet tall. Behind this fence, understory trees and shrubs that can grow to 20 to 30 feet tall will be planted. All this will be within the reduced 5 foot buffer. This will form a more dense and opaque buffer that is required in the 20 foot buffer by the zoning ordinance. The ordinance only requires a "semi-opaque" buffer with canopy trees and understory trees. No shrubs are required in the 20 foot buffer. In addition, the site plan approved requires that the parking lot adjacent to the buffer contain 21 canopy trees, 61 understory trees, and 91 shrubs. None of this is required in the 20 foot buffer described in the ordinance. Therefore, it is the BZA's position that the 5 foot buffer with a slat fence and a greatly increased number of shrubs and the landscaped parking lot will be more protection for the adjacent property than the required 20 foot buffer prescribed by the ordinance.

(R. p. 27.) These factual findings support BZA's determination that granting the variance will not be of substantial detriment to adjacent property.

According to appellants, BZA "suggests that a six foot high fence and a lot of shrubs in the five foot buffer will provide greater protection than a twenty foot vegetated buffer." Appellants' Brief, p. 9. Following this backhanded concession, appellants argue that

> BZA 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 foot high.

Id. Appellants again appear to be arguing facts that did not exist when the variance was granted. Furthermore, appellants fail to provide any explanation about how the alleged fill vitiates the conditions imposed by BZA or detracts from the screen provided by the buffer. The fill does not make the fence any shorter on

the appellants' side, or any less opaque on either side. If anything, the extra fill would make the plantings on BEC's side of the fence two foot taller which would presumably provide more screening.

Appellants further complain that BEC erected the fence in the middle of the buffer, leaving an "effective planting area" of 2 ½ feet on either side. *Id.* Appellants claim that BZA and BEC have "consistently failed to respond to their contention that effective screening vegetation cannot be planted and maintained in such an area." *Id.* Appellants have never provided a factual basis for their claim that the fencing, as situated, precludes planting of the scheduled understory trees and shrubs. Furthermore, appellants' complaints go to whether the reduced buffer requirements have been properly implemented, not whether the variance is lawful. To the extent appellants are correct and the location of the fencing interferes with the planting of the vegetation, appellants should bring the issue to the Town for relief, not this Court.

Obviously, appellants are frustrated and dissatisfied with BZA's ruling. It is clear that appellants thoroughly disagree with BZA's factual determinations and reasoning, and that they believe BZA's decision to be a substandard piece of logic and thinking. Nevertheless, the court cannot set aside the board's view of the matter just to inject its own—or appellants'— ideas into the picture of things. *See Talbot v. Myrtle Beach Board of Adjustment, supra,* 222 S.C. 165, at 173, 72

S.E.2d 66, at 70. BZA's approval of BEC's application for a variance to reduce the buffer was supported by facts and its decision was correct as a matter of law.

II. BZA DID NOT HAVE A CONFLICT OF INTEREST IN CONSIDERING BEC'S APPLICATION FOR A VARIANCE.

Appellants repeat their claim that the buffer "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." Appellants' Brief, p. 10. As discussed *supra,* BEC agreed to give the town an easement to connect the company's well to the road months before it applied for the variance. BEC had a duty to accommodate the easement and try to incorporate it into its future plans for developing the site. BEC's solution was to run the easement along its northern boundary. However, pursuant to ordinance, the town requires a twenty foot wide buffer in that area. Therefore, BEC applied for a variance to reduce the width of the buffer. BZA approved the application, ruling that BEC had established that enforcement of the buffer ordinance would result in unnecessary hardship based on the findings required by S.C. Code § 6-29-800(A)(2)(a)-(d).

The town already had the easement, so it had no interest in the outcome of BEC's application. Appellants failed to reference any facts in the record showing that BEC's grant of the easement was conditioned on BZA's approval of the variance. There is no conflict of interest.

Appellants complain that BZA's return "is void of any such factual findings or legal discussion" regarding their claim that the granting of the variance was arbitrary and capricious based on the apparent conflict of interest. Appellants' Brief, p. 11. Appellants are, again, incorrect. BZA's return provided a detailed response to the court's inquiries, establishing that there was no conflict of interest and setting forth the legal and factual underpinnings of its decision. (R. pp. 27-28.) The court agreed: "No conflict of interest existed between the Town of Awendaw and Berkeley Electric Coop when the variance in this matter was originally granted." (R. p. 2.) The court explained:

> A municipality has the right, duty and obligation to provide for the general welfare of its citizens and the safe installation and maintenance of a water line reasonably and rationally fits within this duty. If the Town receives no financial or pecuniary benefit from the placement of the buffer in this case, I do not find that a conflict of interest existed when it granted the requested variance to the Berkeley Electric Co-op.

Id.

Appellants argue that BZA's assertion that the variance promoted the general welfare of the town "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." Appellants' Brief, p. 11. On the contrary, the detriment and, implicitly, the benefit of a variance "to the public good" is one of the factors that is to be considered in determining whether their strict application of an ordinance will result in unnecessary hardship. *See* S.C. Code of Laws § 6-29-

800(A)(2)(d). Moreover, BZA cited its duties under the general welfare clause in response to Appellants' conflict of interest allegations. (R. p. 27.) Appellants' claim that BZA had a conflict of interest in ruling on BEC's application is not based on—or limited to—the terms of S.C. Code of Laws Ann. § 6-29-800(A)(2). The town's paramount duty to promote the health, safety and welfare of its citizens is therefore a valid and cogent defense to appellants' allegations on this issue.

Citing *Rush v. City of Greenville*, 246 S.C. 268, 278, 143 S.E.2d 527, 532 (1965), appellants argue:

> 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 cannot be considered for such purpose.

Appellants' Brief, pp. 22-23. Appellants contend that "the 'hardship' was created by the Town of Awendaw in its acquisition of an easement in an area that it knew would be part of the required buffer once BEC sought site plan approval to develop the site." *Id.*

As indicated in the language quoted above, the hardship must be "intentionally created." *Id.* Appellants fail to cite to any facts in the record establishing that the hardship was intentionally created by either BEC or the town for the purpose of obtaining the variance. Further, section 6-29-800 of the S.C.

Code was entirely rewritten in 2003. *See* S.C. Code § 6-29-800, History. The proscription against self-created hardships discussed in *Rush v. City of Greenville*, *supra,* was not in included in the amended language of the statute and the continued authority of the decision is unclear. Indeed, recent cases involving claims of self-created hardship have nevertheless required that appellant establish that the grant of the variance was arbitrary or capricious. *See Black v. Lexington County Bd. of Appeals,* 396 S.C. 453, at 458, 722 S.C. 22, at 25 (Ct. App. 2012). Appellants have simply failed to carry that burden.

Appellants conclude by asserting:

> 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 conflict of interest cannot be made.

Appellants' Brief, p. 12. Counties and municipalities enact zoning ordinances. Zoning ordinances create the need for variances. Zoning appeals boards decide whether the strict application of the ordinance will result in unnecessary hardship warranting a variance. According to appellants' logic, all such boards have an inherent conflict of interest since they are passing judgment on situations they essentially created through their zoning ordinances. The fact that government makes the rules, and that it might arguably derive some benefit from the enforcement of those rules or from its decisions granting relief from those rules, does not create a conflict of interest. To hold otherwise would shut local government down.

CONCLUSION

There was no conflict of interest in BZA's approval of BEC's variance application. BZA's decision was properly based on facts supporting the findings required by S.C. Code of Laws Ann.§ 6-29-800(A)(2)(a)-(d). Appellants have failed to establish that BZA's determination was arbitrary or capricious. Accordingly, BEC respectfully requests that this Court affirm the circuit court's ruling upholding BZA's grant of the variance to BEC.

Alternatively, BEC respectfully requests that the Court affirm for any ground appearing on the record as provided in Rule 220(c) SCACR.

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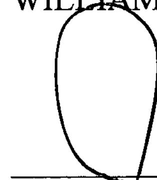

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Dated: December 20, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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J.C. Nicholson, Jr., Judge

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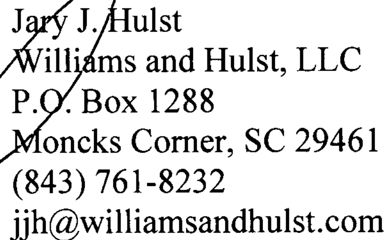
CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondent Berkeley Electric Cooperative, Inc., with regard to the above cited matter on all parties by depositing a copy of said Final Brief of Respondent in the United States Mail, postage prepaid, on December 23rd, 2013, addressed to the attorney for the Appellants, Christopher McG. Holmes, 222 W. Coleman Blvd., Ste. 124, Mount Pleasant, South Carolina 29464 and to the attorney for Town of Awendaw Board of Zoning Appeals, Dwayne M. Green, 602 Rutledge Avenue, Charleston, South Carolina, 29403.

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