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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FOURTEENTH JUDICIAL CIRCUIT

The Honorable Bentley D. Price

Appellate Court Case No. 2022-000300
Circuit Court Case No. 2021-CP-07-01241 and
Circuit Court Case No. 2021-CP-07-01231

Historic Beaufort Foundation, Appellant,

v.

City of Beaufort, City of Beaufort Historic District Review Board,
and The Beaufort Inn, LLC, Respondents.

AND

West Street Farms, LLC and Mix Farms, LLC, Appellants,

v.

City of Beaufort, City of Beaufort Historic District Review Board,
and The Beaufort Inn, LLC, Respondents.

INITIAL BRIEF OF APPELLANTS

June 22, 2022

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STATEMENT OF ISSUE ON APPEAL

The issues on appeal are (1) whether the Circuit Court erred in denying the appeal of the June 9, 2021 City of Beaufort Historic Review Board (“HRB”) decision and the order denying Appellants’ motion to reconsider on February 11, 2022, as the Board’s decision was based on numerous legal errors, and (2) whether the Circuit Court erred in denying the appeal as the Board based its decision on findings of fact that are not supported by the evidence in the record.

1. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HRB DECISION TO ISSUE A CERTIFICATE OF APPROPRIATENESS FOR THE HOTEL WHEN THE HOTEL’S PRELIMINARY APPROVAL HAD EXPIRED BY THE TERMS OF BOTH THE UDO AND THE BEAUFORT CODE?
2. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HRB DECISION TO ISSUE A CERTIFICATE OF APPROPRIATENESS FOR THE PARKING GARAGE WHEN THE PARKING GARAGE’S PRELIMINARY APPROVAL HAD EXPIRED BY THE TERMS OF BOTH THE UDO AND THE BEAUFORT CODE?
3. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HRB DECISION REGARDING THE PARKING GARAGE WHEN THE CITY HAD NEVER ISSUED A CERTIFICATE OF APPROPRIATENESS FOR THE PARKING GARAGE?
4. DID THE CIRCUIT COURT ERR IN AFFIRMING THE HRB DECISION WHEN THE BEAUFORT CODE’S REGULATION REGARDING LARGE FOOTPRINT BUILDINGS APPLIED TO THE HOTEL AND PARKING GARAGE STRUCTURES AND NEITHER HAD OBTAINED A SPECIAL EXCEPTION FROM THE ZONING BOARD OF APPEALS?
5. DID THE CIRCUIT COURT ERR IN AFFIRMING THE DECISIONS OF THE HRB WHEN THE BOARD MADE NO SUBSTANTIVE FINDINGS REGARDING THE HOTEL OR PARKING GARAGE’S COMPATIBILITY, LACK OF ADVERSE IMPACT, AND CONSISTENCY WITH ADOPTED PLANS IN THE NATIONAL HISTORIC LANDMARK DISTRICT?
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7. DID THE CIRCUIT COURT ERR IN FINDING THAT THE APPEAL IS BARRED BY LACHES, ESTOPPEL OR WAIVER?
8. DID THE CIRCUIT COURT ERR IN FINDING THAT THE DEVELOPER HAD A

VESTED RIGHT TO DEVELOP AND CONTINUE THE PROJECTS?

STATEMENT OF THE CASE

This is a consolidated appeal of the HRB's approval of two projects in the Town of Beaufort's National Historic Landmark District: (1) 812 Port Republic Street and 212 Scott Street, identified as R120, Tax Map 4, Parcel 984, for the construction of a 77-unit hotel building, with retail/commercial space on the ground floor and accommodations on the upper floors, including a rooftop bar and restaurant ("Hotel"); and (2) 918 Craven Street for the construction of a parking garage ("Parking Garage").

Background

Appellant Historic Beaufort Foundation ("HBF") is a nonprofit corporation organized in 1965 and existing pursuant to the laws of the State of South Carolina with its principal place of business located at 208 Scotts Street in Beaufort South Carolina. (November 16, 2021, Amended Memorandum in Support of HBF's Petition and Notice of Appeal at p. 2). HBF owns the John Mark Verdier House (the "Verdier House") located at 801 Bay Street and operates it as a museum open to the public. (Id.). The Verdier House is in the immediate vicinity of the property located at 812 Port Republic Street which is owned by Respondent Beaufort Inn, LLC, separated by less than one hundred (100) feet of real estate and two small, one-story buildings. (Id.).

Appellant West Street Farms, LLC ("West Street") owns 205, 207, 209, and 221 West Street which are immediately adjacent to and on the west side of the Hotel project. Appellant Mix Farms, LLC ("Mix Farms") owns 211 Scott Street, immediately adjacent to and on the east side of the Hotel project. All these properties are in the historic district of Beaufort. (November 12, 2021, Memorandum in Support of West Street Farms/Mix Farms' Petition and Notice of Appeal at p. 2). West Street and Mix Farms appeared and objected to the applications at the June 9, 2021,

hearing, and a letter from their counsel detailing the basis of the objections was submitted as part of the record for both applications. (June 9, 2021, HRB Transcript at pp. 159-160; Record on Appeal to Circuit Court at pp. 89-96).

Respondent City of Beaufort, South Carolina (the “City”) is a municipal corporation as defined in S.C. Code Ann. § 5-1-20 and body politic created by and subject to the laws of the State of South Carolina. (July 9, 2021, HBF Petition and Notice of Appeal at pp. 1-2; July 9, 2021, West Street Farms/Mix Farms Petition and Notice of Appeal at pp. 1-2). Respondent City of Beaufort Historic District Review Board (the “Board” or “HRB”) is a five-member Board of architectural review appointed by the members of Beaufort City Council pursuant to Section 10.7 of The Beaufort Code Section in accordance with the authority granted by S.C. Code Ann. § 6-29-870. (Id.). According to the City’s website, the Board’s mission is “to aid in the preservation, protection and enhancement of the Beaufort National Historic Landmark District.” (November 16, 2021, Amended Memorandum in Support of HBF’s Petition and Notice of Appeal at p. 3).

Respondent Beaufort Inn LLC (the “LLC”) is a limited liability company organized and existing pursuant to the laws of the State of Georgia that is authorized to do business and does business in Beaufort County, South Carolina. (July 9, 2021, HBF Petition and Notice of Appeal at p. 2; July 9, 2021, West Street Farms/Mix Farms Petition and Notice of Appeal at p. 2). Upon information and belief, the LLC owns the two parcels located in the City of Beaufort that are the subject of this Petition and Notice of Appeal: 812 Port Republic Street (Property Identification No. 120-004-000-0984); and 918 Craven Street (Property Identification No. 121-004-000-0850-0000). (Record on Appeal to Circuit Court at pp. 106, 123-126).

The current ordinance in the City of Beaufort that governs development and building approvals is The Beaufort Code, which was adopted effective June 27, 2017, and was updated on

July 10, 2018. (November 16, 2021, Amended Memorandum in Support of HBF’s Petition and Notice of Appeal at p. 4; November 12, 2021, Memorandum in Support of West Street Farms/Mix Farms’ Petition and Notice of Appeal at p. 2). The Beaufort Code repealed and replaced the Unified Development Ordinance (“UDO”) which governed development and building prior to that date. (Id.). Under the UDO, Section 3.1 (M)(3)(c) specifically outlines expiration dates for City approvals: conceptual and preliminary approvals expire after 18 months and cannot be renewed beyond 18 months. Likewise, under The Beaufort Code, a conceptual or preliminary approval is valid only for eighteen months. (Id.).

The Parking Garage

There are three levels of approval required to achieve a Certificate of Appropriateness: Conceptual, Preliminary, and Final. On August 17, 2016, the Board granted conceptual approval with conditions for the Parking Garage. (Record on Appeal to Circuit Court at p. 99). On July 12, 2017, the Board approved a motion for the Parking Garage to undergo significant revision and come back to the Board with a simpler design. (Id. at p. 103). By July 2017, The Beaufort Code had already been approved and was in effect. On September 20, 2017, the Board gave preliminary approval for the Parking Garage plan with various conditions. (Id. at p. 103). The then current drawings were approved as submitted, and the Applicant was tasked with refining the design details to receive final approval. (Id. at p. 142, 160). Lauren Kelly, acting for the City, described that preliminary approval in a letter dated October 9, 2017, referencing September 20, 2017, HRB meeting. (Id. at p. 229).

Under either the UDO or The Beaufort Code, preliminary approval for the Parking Garage expired on March 20, 2019, 18 months after the September 20, 2017, preliminary approval date. David Prichard, on behalf of the City, in two letters dated June 21, 2019, and July 1, 2020,

erroneously issued an extension of a “Certificate of Appropriateness” for the Parking Garage that had never been issued and did not exist. (Id. at Supplement to Record on Appeal to Circuit Court at pp. 10-11). The Parking Garage never received a “Certificate of Appropriateness” from the Board, a requirement under both the UDO and The Beaufort Code. Under either ordinance, a Certificate of Appropriateness could only be issued after final approval, which the Parking Garage never achieved. Also, in those two letters, David Prichard referenced The Beaufort Code section 9.1.4 as the governing code. Mr. Prichard did not reference the UDO. (Id.).

The Hotel

The Hotel was originally presented for review and approval to the HRB on September 14, 2016. At this time, HRB staff advised the LLC to revise its plans, including the elevation of the Hotel, based on staff and board comments and return to the HRB for another conceptual review. The LLC made its new submission of the project to the City in 2017. The Beaufort Code was adopted on June 27, 2017 and replaced the UDO as of that date. Lauren Kelly, representing the City, originally presented the Hotel project in a July 12, 2017, HRB meeting, approximately two weeks after the Beaufort Code was adopted. The approved official July 12, 2017, minutes quote Lauren Kelly saying, “this project (the Hotel) is being evaluated under the new Beaufort Code,” confirming that the Hotel was considered under the Beaufort Code, and not the UDO. (The July 12, 2017 Meeting Minutes included in the Record on Appeal to the Circuit Court at p. 200 are incomplete. Counsel for Respondents have consented to Appellants’ request to supplement the record pursuant to SCACR 212(b) in order to include in the record a complete copy of the July 12, 2017 Meeting Minutes).

During this July 12, 2017, meeting, the HRB granted the Hotel preliminary approval. (Id.). According to the Beaufort Code, such preliminary approval expired on January 12, 2019, i.e., 18

months after the HRB issued such preliminary approval. The Applicant’s next request for approval for the Hotel, however, was almost 27 months later, on October 9, 2019, for a “Certificate of Appropriateness.” Notably, the “Certificate of Appropriateness,” dated October 9, 2019, and signed by John Dickerson, the then chairman of the Board, specifically referenced the Beaufort Code and its Section 9.4.1 as the governing authority. It did not reference the UDO at all. (Record on Appeal to the Circuit Court. at p. 247).

On June 9, 2021, the LLC appeared before the Board seeking two approvals: (a) Agenda Item No. IV(C) 812 Port Republic Street: Change after Certification for the Hotel, and (b) Agenda Item No. IV(D) 918 Craven Street, New Construction for the Parking Garage. (June 9, 2021 Transcript at p. 27, 112). The Board approved these plans on June 9, 2021. (Id. at pp. 111-112, 174-175).

Large Footprint Buildings

As approved by the Board, the Parking Garage is 4 levels tall with a front facade of approximately 300 linear feet, square footage of approximately 160,000 square feet, volumetric mass approaching 3 million cubic feet, and room for over 475 vehicles. (November 16, 2021, Amended Memorandum in Support of HBF’s Petition and Notice of Appeal at p. 7-8; November 12, 2021, Memorandum in Support of West Street Farms/Mix Farms’ Petition and Notice of Appeal at p. 9). The Hotel has a fourth-story roof-top bar, a front façade of approximately 170 linear feet, square footage of approximately 50,000, and volumetric mass of approximately 1 million cubic feet. (Id.).

Each of these structures individually are multiple times larger across all dimensions and metrics than any other building in historic downtown Beaufort. (November 16, 2021, Amended Memorandum in Support of HBF’s Petition and Notice of Appeal at p. 8). As a point of

comparison, the Verdier House is approximately 5,500 square feet and has volumetric mass of 50,000 cubic feet. (Id.). The Parking Garage is 60 times larger, and the Hotel is 20 times larger in volumetric mass than the Verdier House. (Id.).

The Hotel and the Parking Garage are in the Downtown Core District (T5-DC) zoning district under the Beaufort Code. (November 12, 2021, Memorandum in Support of West Street Farms/Mix Farms' Petition and Notice of Appeal at p. 4). In the T5-DC transect zoning district, buildings are restricted to 100 feet building width at the frontage. Beaufort Code Sec. 2.4.1(D)(3). Buildings that exceed 100 feet building width must comply with the Large Footprint Building standards in Beaufort Code Sec. 4.5.10. Beaufort Code Sec. 2.4.1(D)(3), footnote 9. The Beaufort Code defines Large Footprint Buildings as “a type often used by big-box, national retailers. In the T4 and T5 transect zones, they shall be integrated into the streetscape or screened with Liner Buildings (see Section 4.5.9).” Beaufort Code Sec. 4.5.10(A). Large Footprint Buildings have various specific development requirements under Beaufort Code Sec. 4.5.10 (B)(1)-(7). One preliminary and fundamental requirement for Large Footprint Buildings is that in the Historic District, except along Boundary Street, Large Footprint Buildings “are permitted by Special Exception only.” Beaufort Code Sec. 4.5.10 (B)(5).

The Hotel and the Parking Garage Project are located within the Beaufort Historic District (HD) Overlay as defined by Beaufort Code Sec. 2.7.1 and as shown on the official Zoning Map of the City of Beaufort. November 12, 2021, Memorandum in Support of West Street Farms/Mix Farms' Petition and Notice of Appeal at p. 5). Special Exceptions to the Beaufort Code may only be granted by the City of Beaufort Zoning Board of Appeals (“ZBOA”) Beaufort Code Sec. 10.3.1(C)(3). The ZBOA has not considered or issued Special Exceptions for either the Hotel Project or the Parking Garage.

The Hotel as currently submitted has a 179-foot building width and, as such, must follow the Beaufort Code requirements for Large Footprint Buildings as specified in Sec. 4.5.10. (Id.). The Hotel Project has not applied for or received a Special Exception by the ZBOA. When the applications for preliminary approval of the Hotel were presented to the Board in 2017, neither the City staff members nor the Applicant's agents presenting these plans for approval made the members of the Board aware that these projects as planned were Large Footprint Buildings or of the requirement for Special Exception approval by the ZBOA of Large Footprint Buildings before further planning approval could be obtained. In fact, the Board was told at the 2017 meeting when that version of the Hotel Project was presented that "no zoning issues existed." (Id. at 5-6).

Like the Hotel, the Parking Garage is also a Large Footprint Building, having a frontage of 300 feet. Like the Hotel, the LLC has not sought or received a Special Exception from the ZBOA.

Appeal to the Circuit Court

After the Board's June 9, 2021, decision, HBF and West Street/Mix Farms both timely appealed the decision to the Circuit Court pursuant to S.C. Code Ann. § 6-29-900 and The Beaufort Code Section 9.10. Pursuant to S.C. Code Ann. § 6-29-900(A) "[a] person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court..." S.C. Code Ann. § 6-29-900(A). Section 9.10.2(I) similarly provides that "[a]ny party aggrieved by the decisions of the HRB may appeal to the circuit court within 30 days of the decision.

A hearing was held on January 6, 2022, at the Beaufort County Court of Common Pleas. On January 20, 2022, the Honorable Bentley D. Price issued an order denying the appeals of HBF and West Street/Mix Farms. (January 6, 2022, Circuit Court Transcript at p. 38). The Appellants

jointly filed a motion to reconsider on January 28, 2022, which was denied on February 11, 2022. HBF and West Street/Mix Farms each filed a notice of appeal of the Circuit Court decisions to the Court of Appeals on March 11, 2022. The appeals were consolidated by the Court of Appeals and the parties were informed of that by a letter from the Deputy Clerk of Court dated March 24, 2022.

STANDARD OF REVIEW

The Court of Appeals’ standard of review of a board of architectural review's decision is the same as that of the trial court. *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 479–80, 366 S.E.2d 15, 18 (Ct.App.1988) (holding the appellate court will not reverse the circuit court's affirmance of the board unless the board's findings of fact have no evidentiary support, or the board commits an error of law).

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the evidence. *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) (citing *Gurganiou v. City of Beaufort*, 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct.App.1995)).

ARGUMENT

- I. **THE CIRCUIT COURT ERRED IN DENYING THE APPEAL AS THE APPROVALS BY THE BOARD ARE INVALID DUE TO NUMEROUS LEGAL ERRORS**
 - A. **The Board erred in granting final approval under the UDO because any prior approvals had expired by the terms of the ordinance.**

At the outset of the hearing on June 9, 2021 on the Hotel application, the Chair announced that the application would be considered under the Unified Development Ordinance (“UDO”). That announcement was surprising. The Beaufort Code was adopted on June 27, 2017 and replaced the UDO as of that date. The Hotel Project was originally presented in a September 2016,

Board meeting, before The Beaufort Code was adopted. The September 14, 2016, minutes failed to record a vote; however, the July 12, 2017, minutes indicate that Preliminary Approval was granted in September 2016.

The official July 12, 2017, minutes indicate that the Hotel “is being evaluated under the new Beaufort Code,” confirming that the Hotel was considered under The Beaufort Code and not the UDO. During the July 12, 2017, meeting, the minutes failed to record whether the approval was Conceptual or Preliminary. However, on July 25, 2017, a letter was issued to the applicant Goff D'Antonio Associates for the LLC, from the City and signed by Lauren Kelly, stating that the Board granted preliminary approval with conditions at the July 12, 2017 meeting for two submissions: one with, and one without, the colonnade. These minutes also state that “the approval expires 12 months from the date of the letter (July 25, 2017) unless the applicant has an active submittal pending review by staff and/or HRB. Under the UDO, specifically item 3.1.M.3c, conceptual and preliminary approvals expire after 18 months and cannot be renewed beyond 18 months. Under table 9.1.4 of The Beaufort Code any approval under that ordinance expired 24 months thereafter. However, the next approval for the Hotel was not issued until nearly 27 months later, on October 9, 2019, when the owner was issued a “Certificate of Appropriateness.” Therefore, the Hotel’s preliminary approval expired under the terms of the ordinance prior to the alleged approval of the Hotel’s “Certificate of Appropriateness.”

It is telling that the “Certificate of Appropriateness,” dated October 9, 2019, and signed by the chairman of the Board confirms that the Hotel was evaluated under The Beaufort Code. The Certificate of Appropriateness specifically referenced Section 9.4.1 of The Beaufort Code. It did not reference the UDO.

Since the Hotel had no valid preliminary approval under either the UDO or The Beaufort

Code on June 9, 2021, and it was legal error for the Board to consider the application for final approval as a necessary legal prerequisite had not been satisfied.

B. Any approval of the Parking Garage under the UDO expired before June 9, 2021

The approval of the Parking Garage suffers from a similar legal infirmity. Any application that the Board had previously granted the Hotel was granted under The Beaufort Code, not the UDO, and that approval had expired by the terms of the ordinance.

There are three levels of approval required to achieve a Certificate of Appropriateness: Conceptual, Preliminary, and Final. On August 17, 2016, the Board granted conceptual approval with conditions for the Parking Garage. Assuming, without conceding, that the Garage was conceptually approved under the UDO, the Parking Garage received preliminary approval from the City as evidenced by a letter written by Lauren Kelley, former project development planner for City of Beaufort dated October 9, 2017, which referenced a September 20, 2017 Board meeting. A copy of that letter was included in the application for the June 9 meeting at page 195. The approved official July 12, 2017 minutes quote Lauren Kelly saying, “this project (the Hotel) is being evaluated under the new Beaufort Code,” confirming that the Hotel is being considered under the Beaufort Code and not the UDO. This is also noted in a letter from David Prichard dated July 1, 2020, granting extension of the COA for the Parking Garage and referencing the September 20, 2017 preliminary approval with conditions, which as of the date of the letter, had not yet been addressed.

The preliminary approval for the Parking Garage was granted on September 20, 2017, after the UDO was repealed and replaced by The Beaufort Code. Under the terms of the UDO and the Beaufort Code that approval expired on March 20, 2019, i.e., 18 months after the issuing of the preliminary approval and could not be renewed. Consequently, the Parking Garage application

was not eligible for consideration of final approval at the June 9, 2021, hearing, because the preliminary approval for the Garage expired over two years before the Board heard the final approval application.

Like the Hotel, the Parking Garage also had no approval under either the UDO or the Beaufort Code on June 9, 2021, and it was clear legal error for the Board to proceed on the application.

C. The Board never issued a Certificate of Appropriateness for the Parking Garage

The Board granted final approval for the Parking Garage based on an erroneous understanding that the Parking Garage had previously been granted a “Certificate of Appropriateness.” Both the UDO and The Beaufort Code require an applicant to apply for a Certificate of Appropriateness. There are three levels of approval required to achieve a Certificate of Appropriateness: Conceptual, Preliminary, and Final. The Board then votes on final approval of the project. When the Board grants final approval, a Certificate of Appropriateness may be issued.

The consideration of a Certificate of Appropriateness is not a mere technicality. It is a substantial compliance issue and vital to the Board’s approval process as shown by the language of Section 9.10(c) of The Beaufort Code which details the following process and criteria for granting a Certificate of Appropriateness:

In reviewing an application, the [Board] shall conduct a public meeting and consider, among other things, the historic, architectural and aesthetic features of such structure, the nature and character of the surrounding area, the use of such structure and its importance to the city, the character and appropriateness of design, scale of buildings, arrangement, texture, materials and color of the structure in question, and the relation of such elements to similar features of structures in the immediate surroundings.

David Prichard, Director of Economic Development and Community Planning for the City of Beaufort issued two letters dated June 20, 2019, and July 21, 2020, which were included in the

materials for the June 9 meeting at pages 196 and 197 which purported to extend a “Certificate of Appropriateness” for the Parking Garage that never actually existed in the first place. To further compound the legal confusion, Mr. Prichard referenced section 9.1.4 of The Beaufort Code as the basis for the extensions. Mr. Prichard did not reference the UDO. Clearly, it was error for the Board to consider the application for the Parking Garage, since the prior approval under the UDO had expired, and any further action relating to the parking Garage would have to proceed under The Beaufort Code.

Instead of considering the Parking Garage application submitted for the June 9th meeting under the UDO, the Board should have required the applicant to begin the process anew under the terms of The Beaufort Code. The Beaufort Code is clear on this point. Section 1.4.2 (B) provides that

If the applicant elects to have the pending application reviewed in accordance with the prior standards, the City shall review and decide the application in good faith and in accordance with any time frames established by the prior standards. If the application is approved, and the approval or subsequent authorization of the approved development expires or becomes invalid (e.g., for failure to comply with time limits or the terms and conditions of approval), any subsequent development of the site shall be subject to the procedures and standards of this Code.

The Board, by failing to follow this clear directive, committed legal error, and the Circuit Court decision denying the appeal should be reversed.

D. Neither application should have been considered in the absence of a Special Exception from the City of Beaufort Board of Zoning Appeals.

Both the Hotel and the Parking Garage, respectively, amount to a Large Footprint Building as that term is defined under The Beaufort Code. The Beaufort Code controls consideration of both projects. Section 4.5.10 (B)(5) of The Beaufort Code requires a Large Footprint Building to secure a Special Exception from the Zoning Board of Appeals (“ZBOA”). According to the rules that the City wrote for itself, neither application could proceed before the Board without satisfying

the condition precedent of obtaining a Special Exception from the ZBOA. It was noted in previous meetings that there were no zoning issues with the project. However, the applicant did not request or receive a Special Exception for either project. Absent the Special Exceptions required by Section 4.5.10 (B)(5) of The Beaufort Code the Board had no jurisdiction to consider either application approved on June 9.

II. THE CIRCUIT COURT'S DECISION SHOULD BE REVERSED BECAUSE THERE IS NO SUPPORTING EVIDENCE IN THE RECORD FOR THE BOARD'S FINDINGS.

In addition, the Circuit Court erroneously denied the appeal as Respondent, Beaufort Inn, LLC, failed to present any evidence to the Board that the Hotel or Parking Garage qualified for approval under the guidance documents that govern the Board's decision-making as a matter of law, as provided in The Beaufort Code, Section 9.10.2 (B). Absent such evidence, the record is clear the Board's decision to grant approval was arbitrary and capricious and an error of law.

As noted earlier, the Parking Garage plan that was approved is 4 levels tall with a front facade of approximately 300 linear feet, square footage of approximately 160,000 square feet, volumetric mass approaching 3 million cubic feet, and accommodates over 475 vehicles. The Hotel has a fourth-story roof-top bar, a front façade of approximately 170 linear feet, square footage of approximately 50,000; and volumetric mass of approximately 1 million cubic feet. At the hearing on June 9, the 4th floor rooftop bar was treated as previously approved even though the addition of that element indisputably affected the height, scale, and mass of the Hotel. The applicant did not present evidence on those issues and the Board approved the Hotel without giving any consideration to the effect of the 4th floor on the Hotel's height, scale, and mass. That decision was not based on any evidence in the record and was contrary to law.

Each of these structures individually are multiple times larger by every measure than any

other building in historic downtown Beaufort. City staff requested scale models of these buildings in 2016, but the applicant was never required to present models illustrating the true impact of the Hotel and the Garage on the historic district. The applicant did not submit scale models in support of the applications and the Board's determination that the projects were compatible with the character of the surrounding neighborhood has no support in the record and is contrary to law.

The Verdier House, owned by the Appellant HBF, is one of the finest examples of federal architecture in South Carolina and is in the immediate vicinity of the proposed Hotel. As a point of comparison, the Verdier House is approximately 5,500 square feet and has volumetric mass of 50,000 cubic feet. The Parking Garage is 60 times larger, and the Hotel is 20 times larger in volumetric mass than the Verdier House. Construction of these massive new buildings would completely overwhelm the Verdier House and the rest of the built environment. The Hotel and the Parking Garage obviously benefit from their location in the National Landmark Historic District, but the neighboring properties and the district, in general, and the Verdier House, in particular, will be adversely impacted by light, noise, congestion, and other factors if the approval of those projects are not reversed. The HBF is not opposed to a hotel or a parking garage in the National Historic Landmark District; however, such projects must be sensitive to the National Historic Landmark District and appropriate in scale and design.

The Parking Garage and the Hotel are both infill projects which are subject to special criteria addressed in Section 4.1 of The Beaufort Code. Specifically, Section 4.1 provides:

4.1.1 PURPOSE

The purpose of this section is to:

- A. protect and enhance Beaufort's unique aesthetic character
- B. support high quality streets and public spaces

- C. encourage architecture that blends harmoniously with the natural surroundings and neighboring development
- D. safeguard property values and long-term economic assets
- E. carefully preserve the character of Beaufort’s National Historic Landmark District while permitting appropriate growth.

Section 4.7.2 of the Code is specific to the National Historic Landmark District. This section outlines principles for compatible infill in the National Historic Landmark District, which include, but are not limited to, the following excerpts:

- A. The District is the Resource, Not Only Its Individual Parts: Beaufort is comprised of a number of individually significant buildings. Additionally, Beaufort’s historic areas are significant as a collective whole, and shall be considered as such and protected in their entirety. This is the primary, overarching principle.
- B. New Construction Shall Reinforce the Historic Significance of the District: Infill buildings should relate to and strengthen the core characteristics of the district, as identified in the National Register nomination’s “Statement of Significance”.
- C. New Construction Shall Complement and Support the District: The Historic District has a distinct rhythm of massing, scale, and siting. Infill buildings should not deviate in a detracting manner from these elements, but appear as complementary members of the district.
- D. Infill Shall Be Compatible Yet Distinct: New buildings should be identifiable as being of their period of construction; however, they should not be so differentiated that they detract from – or visually compete with – their historic neighbors. Within historic districts, compatibility is more important than differentiation.
- E. The Exterior Envelope and Patterning of New Buildings Shall Reflect District Characteristics: Infill design elements, patterning, texture, and materials should reflect the aesthetic and historic themes of the district.

The Parking Garage and the Hotel, even in the absence of the Hotel’s proposed fourth story rooftop bar, are not compliant with any of the stated points of 4.1 Purpose and Intent of Infill Projects or the principles of Section 4.7.2 given their outsized proportions and are completely out of character in Beaufort’s National Historic Landmark District.

Additionally, there was no meaningful review of the architectural details of either the Hotel

or the Parking Garage on June 9. The applicant never constructed a sample wall to allow City staff or the Board an opportunity to review the building elements, construction materials or proposed workmanship. At the very least a sample should have been required and reviewed and Board approval without reviewing a sample had no basis in the record and was contrary to law.

The Hotel was granted approval with little or no details about the solar panels that will be installed on the building. It is apparent in the record that there was some concern by the Board about the design of the panels and their visibility, but no details were provided, and the Board simply abrogated its legal duty to review evidence and deny the approval if the evidence was lacking as it was in this instance.

Section 4.2.3 of The Beaufort Code provides:

4.2.3 RELATIONSHIP TO HISTORIC DISTRICT STANDARDS

- a. **Applicability:** In addition to the standards and guidelines in this article, any development located within the Beaufort Historic District is subject to the standards, guidelines, and procedures established in Section 9.10.
- b. **Conflicts:** In the event of a conflict between the requirements of this article and the requirements and guidance provided by the documents listed in 9.10.2.B, the later shall take precedence.

In Section 9 of The Beaufort Code, 9.10: CERTIFICATE OF APPROPRIATENESS outlines the following specific criteria that infill projects in the Historic District must meet in order to be approved to include: a) Compatibility; b) No Adverse Impact; and c) Consistency with Adopted Plans.

Neither the Parking Garage nor the Hotel are compatible in downtown historic Beaufort given their height, scale, and mass; they will each individually have irreparable adverse impact on the character of downtown Beaufort. Moreover, the director of its State Historic Preservation

Office, W. Eric Emerson, Ph.D., wrote a letter in August 2016 discouraging the approval of the Parking Garage. In that letter Dr. Emerson stated, “When we refer to the established design guidelines for the City of Beaufort, (Beaufort Preservation Manual dated 1979, and the 1990 Supplement), we see more inconsistencies with the guidelines than consistencies.” The contents of the Park Service notification to the City and Emerson’s letter were part of the record before the Board and referenced in the public comments to the Board.

9.10.2.B.1 then specifically required that the Board utilize the “Beaufort Preservation Manual,” August 1979, and the “Beaufort Preservation Manual, Supplement,” August 1990 in evaluating infill projects. The manual specifically mandates that new construction have appropriate scale, absolute size, massing, and proportions to the surrounding buildings and townscape. The manual also includes illustrations of examples of prohibited buildings such as those that are significantly taller and/or wider and/or have a significantly larger footprint and/or have a significantly larger mass than surrounding buildings and within the townscape. The size and incompatibility of Hotel and the Parking Garage are immensely beyond even the illustrated prohibited structures.

Sections 4, 9, and the Beaufort Preservation Manual all clearly prohibited Board approval of the Parking Garage and prohibited a fourth story rooftop bar for the Hotel. It is also important to note that the HRB cannot take economics or use into consideration in approving projects. The UDO, which has been superseded by The Beaufort Code, also required that the Board evaluate infill buildings and structures in the same manner as The Beaufort Code to ensure their: compatibility, no adverse impact, and consistency with adopted plans. The UDO also required that the Board abide by the “Beaufort Preservation Manual.”

Counsel for the applicant argued in support of the Parking Garage that a parking Garage in

the district is part of the City's master plan; however, neither the Vision Beaufort 2009 Comprehensive Master Plan nor the City of Beaufort Master Plan of 2014 contemplated a facility of the nature, size or scale of the Parking Garage approved on June 9. Instead, those plans envisioned a parking Garage in the Historic District that was publicly owned for the benefit of citizens and visitors and appropriately scaled. The Parking Garage that was approved will be privately owned primarily for the benefit of the applicant's Hotel and other businesses. It is completely out of scale and proportion with the surrounding buildings and the overall character of the Historic District.

The applicants did not present evidence before the Board, or make arguments to the Board, establishing even a minimum compliance with any of the guidelines the Board is required to apply in its decision-making under The Beaufort Code (or the UDO, even if it were to apply). Based on this dearth of evidence before the Board, the Board erred in granting the relief requested by the applicants in the absence of even a minimum threshold of evidence by the applicant.

III. THE APPEAL IS TIMELY

The Court below erred in concluding that many of the issues raised by Appellants above are time-barred because each conceptual, preliminary, and final approval by the HRB for both projects was "indisputably" a decision which had to be appealed within thirty (30) days of each decision. No statutory provision or case law is cited in support of that conclusion. Instead, the Court concluded that allowing aggrieved parties to appeal from final approval of a development would waste the City's resources, create uncertainty and be inconsistent with the DRB's view of its functions. However, an evaluation of those arguments does not withstand scrutiny.

The Order Denying the Appeal provides a detailed account of the multi-layered process of obtaining the required approvals for projects like the Hotel and the Garage. That process took

several years in this instance, but the Appellants have no input or control over the timing and pace of the approvals. In a broad sense the approval process for each project involved conceptual approval, preliminary approval, and final approval.

The statute itself does not offer any guidance on the issue of whether all those decisions are subject to immediate appeal. Specifically, the statute authorizing this appeal provides:

A person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review. S.C. Code Ann. § 6-29-900

Likewise, the cases citing that statute do not provide any clarity as those decisions do not address the issue of whether a DRB decision granting conceptual or preliminary approval is subject to immediate appeal.

However, the reasoning adopted by the Court below are contradicted by well-established legal principles of finality and ripeness. Generally, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). Additionally, an issue is not ripe if it is “contingent, hypothetical, or abstract” *Jowers v. S.C. Dept of Health and Env'tl. Control*, 423 S.C. 343, 815 S.E.2d 446 (2018), citing *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

By its nature, the decisions of the DRB involve values and judgments that change and evolve as a project moves through the complex approval process. The very names “conceptual”

and “preliminary” demonstrate that any approvals in those categories are prime examples of decisions that are not final and an appeal from such a decision would likely be met with a claim that it is not ripe because in both instances the design and details of the structures are likely to change. The only point in the process in which the issues change from abstract architectural and design concepts to concrete decisions is at the final approval stage. Moreover, requiring interested parties like the Appellants to appeal every conceptual and preliminary decision at every stage of the process to ensure timeliness would not reduce the demands on municipal resources or create more certainty. Instead, the process suggested would have the completely opposite effect. Therefore, Court below erred in finding that the Appellants’ challenge to decisions made during the conceptual and preliminary approvals were not timely.

IV. THE APPEAL IS NOT BARRED BY LACHES, WAIVER OR ESTOPPEL

In the Order denying the appeal, the Circuit Court noted that the Garage was granted conceptual approval by the HRB “including HBF’s designee on the HRB.” During briefing and oral argument, the Respondents noted that a member of the Historic Beaufort Foundation (HBF) who also serves on the HRB voted in favor of the projects in earlier stages of the process and did not object until “after Respondent had utilized significant time and money in the projects in reliance on those votes signifying HBF’s approval.”

Section 10.7.3 of the Beaufort Code provides the following specifications for the number and composition of the members of the HRB:

The HRB shall consist of 5 members with an interest, competence, or knowledge in historic preservation. All HRB members shall be residents of the city, own property in the city, or own or operate a business in the city. To the extent that such is available in the community, 2 members shall, be professionals in the disciplines of historic preservation, architecture, landscape architecture, history, architectural history, planning, archeology, or related disciplines. Three of the members shall either live or own property in the Historic District. One of the 5 members shall be recommended by the Historic

Beaufort Foundation.

At the time of the vote on June 9, the seat on the board which had been filled by Chuck Symes who was recommended by HBF to serve in that capacity had been vacant since April 2021. Mr. Symes moved out of the area, and therefore was not allowed to serve on the board any longer. Therefore, only 4 board members were present on June 9, 2021, for the final votes and did not include Mr. Symes. A new board took the helm July 1, 2021 and included Maxine Lutz who had been recommended by HBF to serve.

Moreover, Section 10.7.3(A) of the Code, as amended, states that one HRB member shall be recommended for consideration by HBF. It does not state that the member recommended by HBF is a representative of HBF. HBF does not have a seat on the HBF and does not have a representative on the HRB. Therefore, the voting record of that individual HRB member is not dispositive of Petitioner's claims in this appeal.

Furthermore, neither the language of Section 10.7.3 nor the facts of this case provide a basis to deny the appeal based on Laches. Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Historic Charleston Holdings, LLC v. Mallon*, 673 S.E.2d 448, 456 (S.C. 2009), citing *Hallums v. Hallums*, 371 S.E.2d 525, 527 (S.C. 1988). To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. *Id.* citing *Strickland v. Strickland*, 650 S.E.2d 465, 469 (S.C. 2007). Here, although the projects took a significant amount of time to progress through the approval process, the Petitioner had no control over the timing of that process. The HRB's final decision on the Hotel and Parking Garage projects was not made until June 30, 2021, and the Petitioner filed a prompt and timely appeal

from that decision within the time limitations provided in S.C. Code Ann. § 6-29-900 and Section 9.10 of The Beaufort Code. Consequently, the Respondents cannot prove the required elements of laches.

Likewise, the estoppel defense is substantively lacking. The doctrine of estoppel applies if a person, by his actions, conduct, words, or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury.” *Rushing v. McKinney*, 633 S.E.2d 917, 924 (Ct.App.2006). As to the party being estopped, the essential elements are (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are different or inconsistent with those that the party subsequently attempts to assert; (2) intention or expectation that the conduct will be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. *Brading v. County of Georgetown*, 490 S.E.2d 4, 7 (SC 1997). As to the party claiming estoppel, “the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.” *Id.* 490 S.E.2d at 7–8. That defense is not supported by the record in this matter primarily because the conduct alleged as the basis for the defense is not the concealment or misrepresentation of facts.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 415 S.E.2d 384, 387–88 (S.C. 1992). The record is devoid of evidence that Petitioner voluntarily and intentionally abandoned its right to object to the approvals granted by the HRB on June 9, 2021.

V. THE DEVELOPER DID NOT HAVE A VESTED RIGHT TO DEVELOP/CONTINUE THE PROJECTS

Finally, the Court erred in finding that the LLC had vested rights to develop and/or continue the projects because of various factors including applications, decisions, approvals, and permits submitted and approved, agreements and assurances by the City and the expenditure of funds by the LLC. None of those factors are sufficient to confer vested rights. The Vested Rights Act, effective July 1, 2005, was enacted to clarify when a landowner acquires those rights. Under the Vested Rights Act, a vested right is established for two years upon the approval of a site-specific development plan. *Id.* § 6-29-1530 (A)(1).¹ That Act generally requires the local government to establish a point in time in the zoning or land development plan approval process, before issuing the building permit, at which the landowner's right to use or develop vests, *id.* Section 6-29-1540 provides criteria for the standards and procedures in local land development ordinances and regulations. Under § 6-29-1560 of the Vested Rights Act, the issue of significant owner and government acts only comes into consideration if the local governing body does not have local development ordinances or regulations. The City of Beaufort adopted those standards and procedures, and therefore the factors relied upon by the Court below do not apply in this instance to justify a finding that the LLC had vested rights.

CONCLUSION

Appellants respectfully request an order reversing the decision of the Circuit Court. Neither the Parking Garage nor the Hotel had the requisite valid approvals from the City of Beaufort for the HRB to proceed to consider these applications. Beyond that, the merits of each of these structures fails to meet even the minimal threshold of requirements for approval in

¹ In the Act a site specific development plan is defined as a plan describing “with reasonable certainty the types and density of uses for specific property,” and may include a “planned unit development; subdivision plan; preliminary or general development plan; variance; conditional use or special use permit plan;” etc.. *Id.* § 6-29-1520(9)

Sections 4 and 9 of The Beaufort Code and the Beaufort Preservation Manual. The Board failed as a matter of law to fulfill its responsibility under The Beaufort Code in approving these applications, and, as a result, the Circuit Court's order denying the appeal should be reversed.

Respectfully submitted,

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