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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000300

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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.

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[INITIAL] BRIEF OF RESPONDENTS

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HISTORIC REVIEW BOARD

September 21, 2022  
Columbia, South Carolina

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## STATEMENT OF THE CASE

These appeals arise from two long-pending development projects in the Historic District in the City of Beaufort (“City”): a hotel project (“Hotel Project”) and associated parking garage project (“Parking Garage Project”) (collectively, the “Projects”) by Respondent Beaufort Inn, LLC (“Beaufort Inn”), and the latest decisions of the City of Beaufort Historic District Review Board (“HRB”) (an architectural review board) approving certain aspects of those projects.

Notwithstanding years of approvals of the Projects at various stages by the HRB, Petitioners waited until after the Parking Garage Project approvals were nearly complete, and years after the Hotel Project was *finally* approved, to file an appeal of the last and latest HRB decisions regarding the Projects. Simply put, if Petitioners wanted to protest the height, mass and scale issues involved with the Projects, as they attempt to do in their petitions, Petitioners waited far too late, and are not statutorily permitted to do so now.

These appeals of the HRB decisions are but one part of a recent fight by Petitioners West Street Farms, LLC and Mix Farms, LLC (collectively, the “Trask Petitioners”), two entities owned or controlled by Graham Trask, and the Historic Beaufort Foundation, Inc. (“HBF”), which for years sat on the sidelines as the Projects were developed without complaint.<sup>1</sup> (R.\_\_\_\_) Circuit Court Order Denying Appeal, p. 2; p. 18, fn. 9 (“Order”).<sup>2</sup> Prior to these petitions by the Trask Petitioners and HBF, the Trask Petitioners began a broad attack on the Projects by a lawsuit filed on April 5, 2021 in the Beaufort County Court of Common Pleas captioned “*West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, Beaufort Inn, LLC, and 303 Associates,*” Civil Action No. 2021-

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<sup>1</sup> Indeed, during the years of conceptual and preliminary approvals of these projects, HBF had a designated seat on the HRB, which voted unanimously in favor of these earlier applications. (R.\_\_\_\_) Circuit Court Order Denying Appeal, p. 4.

<sup>2</sup> The Circuit Court issued two nearly identical Orders Denying Appeal in the two cases that are jointly before this Court. Rather than recite to the two Orders, Respondents will simply refer to “Order” for the sake of simplicity.

CP-07-00663 (“Lawsuit”), which seeks to attack these two projects and another, claiming that the three projects did not comply with the City of Beaufort’s development code, primarily on the basis that the three projects each required a special exception by the City’s Zoning Board of Appeals to move forward. (R.\_\_\_\_) Order, p. 18, fn. 9.<sup>3</sup>

The appeals before this Court are appeals pursuant to S.C. Code Ann. § 6-29-900(A) of the decisions of the City of Beaufort Historic District Review Board on June 9, 2021 that granted a final approval to the Parking Garage Project and granted a Change after Certification to the already approved Hotel Project. The Honorable Bentley D. Price heard the two appeals on January 9, 2022 and denied the appeals each by a separate Order Denying Appeal filed on January 20, 2022. The Circuit Court denied Petitioners’ motions to reconsider on February 11, 2022. This joint appeal by both Petitioners followed.

***The Development Agreement between Beaufort Inn and the City***

Beaufort Inn for years has discussed a parking garage project and hotel project with the City. The City was cooperative as it needs downtown parking, and Beaufort Inn was able to offer a portion of the garage parking available to the public.

The Projects were complex and would take years to bring to fruition, as Beaufort Inn had to navigate the many requirements of the City of Beaufort, recognizing the historic context in which the Projects would exist. Indeed, after the Projects were introduced to the City, the City

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<sup>3</sup> The City and Beaufort Inn, LLC each answered the Complaint in the Lawsuit, and each asserted in their respective Answers that both the Hotel Project and the Parking Project were begun, and work progressed under various permits issue under a prior development code, (the UDO as defined below) and therefore Beaufort Inn, LLC had vested rights under that prior development code, so that no special exception by the ZBOA was needed for those two projects. The voluminous Answer of Beaufort Inn, LLC to the Lawsuit (“BI Answer”) was also filed with the HRB for its June 9, 2021 hearing and is part of the Record here. (R.\_\_\_\_). See Exhibit 3 to Record, R. 297-479. Although the Lawsuit concerns matters outside the purview of the HRB, and are not properly part of these appeals, the BI Answer and its exhibits, which are part of the Record here, provide background and context to the decisions of the HRB and the Circuit Court that are part of the current appeals.

and Beaufort Inn entered into a Memorandum of Understanding on March 22, 2017 (“MOU”)<sup>4</sup> that contained provisions demonstrating the commitment of the City and Beaufort Inn to the process.

Specifically, the MOU envisioned that Beaufort Inn would eliminate a private parking lot, construct a parking garage which had some spaces dedicated for public use, and thereafter construct a hotel. (R. \_\_.) The MOU recognized that “relocating the parking spaces from the current Easement area (i.e., the Subject Property) to the parcel contemplated herein will contribute to and assist with the successful implementation of the City of Beaufort Master Civic Plan.” (R. \_\_.) The MOU further provided in pertinent part:

The parties agree that both the City as well as the City of Beaufort Historic Review Board have the authority to approve any and all construction on the projected project site, to include specifically the overhanging balconies/porches, supporting columns and other design features fronting on Scott's Street and Port Republic Street referenced herein. The City, for itself, and in recognition of the extensive project design and planning expenses / costs that have been and will be incurred by Owner, agrees that it will grant such approvals, without exception, following the approval thereof by the City of Beaufort Historic Review Board.

(R. \_\_.) And later the MOU provides:

The parties agree to communicate and cooperate with one another in good faith to facilitate the planned construction of the hotel on the Subject Property / project site herein, and the relocation of the City's parking spaces to the projected parking garage facility to be constructed on another parcel of property of Beaufort Inn, LLC, in Block 70, City of Beaufort.

(R. \_\_.)

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<sup>4</sup> The MOU was entered into when the Unified Development Code (“UDO”) was in effect, prior to the adoption of the Beaufort Code (“Code”) on June 27, 2017. (R. \_\_). Order, p. 2. The MOU is in the Record as part of Beaufort Inn’s Answer (“Answer”) that was filed in the Lawsuit. (R. \_\_). The Answer tracks all of the development efforts of Beaufort Inn for the Parking Garage Project and the Hotel Project, from the inception of the Projects under the UDO to their current status after the June 9, 2021 HRB meeting.

### ***The Parking Garage Project***

Consistent with the Development Agreement, Beaufort Inn engaged in a substantial investment of time and money into the project for the Parking Garage Project. The timeline of such investments and efforts below is contained in Beaufort Inn's Answer to the Lawsuit (with exhibits) ("Answer") which was before the HRB for its decision:

1. On **October 9, 2007**, Beaufort Inn and the City entered into an Easement Agreement whereby Beaufort Inn granted the City a permanent easement for vehicle parking for twenty-seven (27) specifically designated individual parking spaces located on real property owned by Beaufort Inn.
2. On **December 28, 2012**, Beaufort Inn acquired title to the Parking Garage Project parcel.
3. On **August 17, 2016**, the City's Historic Review Board ("HRB") held a meeting where conceptual approval for the Parking Garage Project was provided. The HRB also discussed the possible demolition of 918 Craven and 310 West being required for Beaufort Inn to pursue development of the Parking Garage Project.
4. On **September 16, 2016**, based on the input received at the HRB meeting, Beaufort Inn submitted applications to the City to demolish two (2) structures required to pursue development of the Parking Garage Project, one located on 918 Craven, and the other located on 310 West.
5. On **November 9, 2016** at a meeting of the HRB, City staff advised the HRB that the 918 Craven demolition was required in order to develop the Parking Garage Project; however, the 918 Craven demolition project was delayed because the HRB expressed a preference that the building at 918 Craven be relocated rather than demolished. Beaufort Inn accommodated this preference and later received approval on **June 20, 2017** to relocate 918 Craven as opposed to demolishing it. The 310 West Street demolition project was approved at this meeting under the UDO.
6. On **November 11, 2016**, the HRB provided a Certificate of Appropriateness ("COA") approval for the 310 West demolition project (which was only a project because it was required for Beaufort Inn' Garage Parking Project.)
7. On **February 15, 2017**, the 918 Craven Street building relocation project approval was obtained (which was only a project because relocation or demolition was required for Beaufort Inn' Garage Parking Project.)

8. On **June 20, 2017**, Beaufort Inn obtained "Final Approval" for the demolition of the existing structure on 918 Craven Street. (However, as noted below, that structure was eventually relocated, not demolished.)
9. At the HRB Meeting on **July 12, 2017**, for the Parking Garage Project, the HRB approved "all height requirements." The meeting minutes state that the removal of two structures on the property was approved by the HRB and also provide that the "garage is being reviewed under the old UDO" (the Prior City Code), (ii) "all setback requirements are met" and (iii) "the removal of two structures on the property has been approved by the HRB."
10. Based on the HRB's expressed preference for relocation as opposed to demolition, on **August 31, 2017**, Beaufort Inn entered into a Property Relocation Agreement with BW Bale and Associates ("BW") whereby Beaufort Inn agreed to pay \$9,000 for the relocation of the building located at 918 Craven Street.
11. On **November 11, 2017**, the City issued a Relocation Permit to allow Beaufort Inn to move 918 Craven to 1012 Newcastle Street.
12. On **September 20, 2017**, the HRB at its meeting provided preliminary approval for the Parking Garage Project effective that date ("Preliminary COA"). Per the meeting minutes, the HRB provided "preliminary" approval to ensure that the mass, scale and size for the structure would remain unchanged in future HRB discussions, however the preliminary approval identified certain details which had not yet received approval, such as the color of the concrete, a lighting plan, a plan for screening mechanical equipment, removal of awnings, and a certified arborists plan for the treatment of trees. The meeting minutes also state that "all setbacks in this zone are zero feet." The minutes also state that "the proposal requires the removal of the two structures, 918 Craven Street... and 310 West Street.
13. The HRB sent a letter dated **October 9, 2017** stating that drawings for the Parking Garage Project were approved as submitted.
14. On **August 7, 2018**, as required by the HRB, Beaufort Inn entered into a Construction Agreement for the demolition of the building located at 310 West Street and a portion of 905 Port Republic Street with JoCo Construction, LLC ("JoCo") and JoCo pulled the building permit for the demolition project. JoCo was paid \$20,700 for this work.
15. On **June 19, 2019**, Beaufort Inn requested from the HRB an extension of the Preliminary COA issued on September 20, 2017 relating to the Parking Garage Project. Beaufort Inn' request letter references "work, including demolition and removal of structures, as well as additional studies, has been ongoing." The HRB provided a one-year extension to the Preliminary COA on **June 21, 2019**.
16. On **July 1, 2020**, a second one-year extension was granted by the City. The City granted many such extensions for projects due to the interference in City functions caused by the pandemic.

(R.\_\_\_\_). See Answer.

Thus, the City and Beaufort Inn were obviously in regular contact for all approvals necessary for the development of the Parking Garage Project and the Hotel Project. Unlike many projects, Beaufort Inn had to secure demolition and relocation approvals for existing buildings on the project sites from the City. Each such approval was part of the overall process and connected to the Projects.

For example, although the Parking Garage Project received preliminary approval from the HRB at the **September 20, 2017** meeting, the HRB had required Beaufort Inn to obtain a Certificate of Appropriateness (“COA”) for each of the demolition of buildings located at 918 Craven and 310 West Streets; these COAs were approved at the **November 9, 2016** HRB meeting.<sup>5</sup> (R.\_\_\_\_) Order, p. 4.

As stated above, at the request of the HRB, Beaufort Inn agreed to relocate rather than demolish 918 Craven, so on **February 15, 2017**, the 918 Craven Street building relocation project approval was obtained from the HRB. (R.\_\_\_\_) Order, p. 4.

To elaborate on the above timeline, the Parking Garage Project was first presented by Beaufort Inn to the HRB at its **August 17, 2016** meeting. This was prior to the enactment of the Beaufort Code. After a lengthy meeting with much discussion, the HRB gave unanimous conceptual approval of the Parking Garage, calling it a “496 space, 186,000 square foot parking garage.” (R.\_\_\_\_) Order, pp. 3-4.

As noted in the HRB meeting minutes, the mass, scale and height of the proposed Parking Garage were discussed and approved. (R.\_\_\_\_) Order, pp. 3-4. The Executive Director of the

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<sup>5</sup> These COAs were granted under the UDO. Pursuant to the UDO, these COAs were good for two years each and could be extended five times in one-year increments. See UDO, § 3.1.M.2. (R.\_\_\_\_).

HBF, Maxine Lutz, was present at the meeting and expressly stated that “this seems like a wonderful way to develop this parcel,” but then qualified that statement that the HBF was “primarily interested in the height, mass, and scale of a parking garage.” (R.\_\_\_\_) Order, p. 4, n. 3. The HRB then unanimously gave conceptual approval of the mass, height and scale. (R.\_\_\_\_) Order, p. 4.

No party appealed the decision of the HRB granting conceptual approval of the mass, height and scale of the Parking Garage Project, including the HBF, which had its Executive Director present.<sup>6</sup> (R.\_\_\_\_) Order, p. 4.

The HRB then at its **November 9, 2016** meeting advised Beaufort Inn that a condition of further development of the Parking Garage was the demolition of structure at 310 West Street. The HRB voted unanimously to allow this demolition, and issued a Certificate of Appropriateness dated **November 14, 2016** granting Beaufort Inn permission for the demolishing of 310 West Street, for the specific purpose of building the Parking Project in that space. (R.\_\_\_\_) Order, p. 4.

By follow up hearing on **February 8, 2017**, and letter dated **February 15, 2017**, the HRB issued a COA to Beaufort Inn, LLC to relocate the building at 918 Craven Street, again as part of the Parking Garage Project. (R.\_\_\_\_) Order, p. 4. The City issued permits for both this demolition and building relocation, which were completed by Respondent Beaufort Inn. (R.\_\_\_\_) Order, p. 4. There was no appeal of either of these decisions by the HRB, or of the Certificates of Appropriateness that were issued. (R.\_\_\_\_) Order, p. 4.

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<sup>6</sup> Petitioners in their Statement of Issues on Appeal No. 7 argue that the Circuit Court erred by finding laches, estoppel or waiver. Petitioners are apparently referring to the HBF representative’s participation in the decisions granting earlier approvals to Beaufort Inn, but the Court did not rule that there was an estoppel, waiver or laches in its Order and thus that issue is not addressed by Respondents in this Brief.

On **September 20, 2017**, the HRB met and unanimously voted to grant preliminary approval to the Parking Garage Project as memorized by the City's **October 9, 2017** letter. (R.\_\_\_\_) Order, p. 4. The preliminary approval did not change the height, mass and scale issues which had previously received conceptual approval. (R.\_\_\_\_) Order, p. 4. Many members of the public, and representatives of HBF, were present and participated in this September 20, 2017 HRB meeting. (R.\_\_\_\_) Order, p. 4. There was similarly no appeal of this preliminary approval of the Parking Garage Project. (R.\_\_\_\_) Order, pp. 4-5.

The Parking Garage Project was submitted to the HRB for final approval at its **June 9, 2021** meeting. The final approval did not involve any elements of mass, scale or height but dealt with the architectural and aesthetic details set forth in preliminary approval. (R.\_\_\_\_) Order, pp. 5-6. As noted the HRB's October 9, 2017 preliminary approval letter, the *only things that needed to be addressed* by Beaufort Inn for final approval were:

the type and color of the concrete, a lighting plan, a plan for screening mechanical equipment, removal of awnings, and a certified arborist report and plan for the 'treatment of trees.' The HRB clarified that the current drawings were approved as submitted, and that the applicant was tasked with refining the details listed in order to receive final approval.

(R.\_\_\_\_) Order, p. 5. Thus, for all practical purposes, the hearing on final approval of Garage Parking Project had a very limited agenda and list of items to be considered.

After a four and one half hour meeting, the HRB issued final approval of the Parking Garage Project. (R.\_\_\_\_) Order, p. 5.

### ***The Hotel Project***

The Hotel Project matter currently being appealed is different from the appeal of the Parking Garage Project, as the Hotel Project was before the HRB requesting a change after certification. That is, the Hotel Project already had final approval and a COA two years before

that meeting and Beaufort Inn by its current application was simply requesting several changes to the original HRB approval to construct the Hotel Project. (R.\_\_\_\_) Order, pp. 5-6.

However, in their appeal, Petitioners attempt to reargue matters decided years ago by the HRB, and seek to vastly expand the scope of what was actually heard at the **June 9, 2021** HRB meeting. The issues complained of now by the Petitioners involve elements of the Hotel Project which were approved in 2019, and which were not challenged or appealed at that time. The Hotel Project was first presented to the HRB and received unanimous HRB conceptual approval on **September 14, 2016**. (R.\_\_\_\_) Order, p. 6. This was prior to the enactment of the Beaufort Code in 2017. Therefore, the Hotel Project began under the UDO. (R.\_\_\_\_) Order, p. 6. (Indeed, at the HRB meeting of June 9, 2021, the chair of the HRB recognized that the UDO governed this matter. (R.\_\_\_\_) Order, p. 6.) There was no appeal of the HRB's conceptual approval. (R.\_\_\_\_) Order, p. 6.

The Hotel Project's preliminary approval was issued unanimously by the HRB on **July 25, 2017**. (R.\_\_\_\_) Order, p. 6. There was no appeal of the preliminary approval of this COA approving the Hotel Project design. (R.\_\_\_\_) Order, p. 6. The Hotel Project was granted a final approval and Certificate of Appropriateness at the HRB's **October 9, 2019** meeting. (R.\_\_\_\_) Order, p. 6. The HRB issued its Certificate of Appropriateness by letter dated October 9, 2019, and there was no appeal of this COA. (R.\_\_\_\_) Order, p. 6.

The HRB also required that Beaufort Inn demolish the building at 812 Port Republic Street in order to build the Hotel Project, per the HRB meeting minutes for the **November 13, 2019** meeting; the HRB granted Beaufort Inn a COA demolish this building on **November 13, 2019**. (R.\_\_\_\_) Order, p. 6. n. 4. As there was no appeal or other challenge from this decision, Beaufort

Inn obtained a demolition permit from the City per this COA on **December 17, 2020** and completed this demolition. (R.\_\_\_\_) Order, p. 6. n. 4.

The only reason this matter involving the Hotel Project is before the Court now is that Beaufort Inn determined that it wanted to make certain changes to the approved COA for the Hotel Project. To that end, it applied for a “Change After Certification” for the Hotel Project on **December 25, 2020**. (R.\_\_\_\_), Order, p. 5.

Notwithstanding Petitioners’ claims, the HRB felt that the prior approvals of the Hotel Project were final and could not be changed by the HRB. At the beginning of the June 9, 2021 HRB meeting under appeal, the Chair noted:

I will explain, also, at this point that we are at final, which means mass, scale, and all of those items have all been dealt with and voted upon in advance. We will not be relitigating them, we will not be going back over all of those details today. We’re only here today to review the last details for this project and then to make a decision to approve or not.

(R.\_\_\_\_) Order, p. 7. This is consistent with the view the HRB took of prior approvals of the Parking Garage Project as well, *see supra*. The Change after Certification for the Hotel Project was then approved by a 3-1 vote of the HRB. (R.\_\_\_\_) Order, p. 7.

Thus the HRB meeting concluded with final approval of the Parking Garage Project and approval of the Change after Certification of the Hotel Project.

These appeals followed.

### ***The Two City Development Ordinances at Issue***

The applicability of the City’s prior and current development ordinances permeates the issues in these cases. As noted by the Circuit Court:

The City of Beaufort’s current development code (“Code” or “the Beaufort Code”) governing development matters was enacted effective June 27, 2017 pursuant to the State of South Carolina’s enabling legislation at S.C. Code Ann. § 6-29-710 *et seq.* Prior to the enactment of the Beaufort Code, the City’s development code was known as the Unified

Development Ordinance (“UDO”) which had been adopted on January 28, 2003 (last revised September 14, 2012.) The Beaufort Code superseded the UDO when enacted. The UDO provided for a Historic District Review Board (“HRB”) at Section 2.7 which is a board of architectural review established pursuant to the State’s enabling legislation for such bodies at S.C. Code Ann. § 6-29-870 *et seq.* The Beaufort Code, when enacted, similarly provided for the HRB at Section 10.7.

The HRB is essentially a specialized architectural review board, which has jurisdiction throughout the Beaufort Historic District. Code § 10.7.2.A. Generally speaking, the HRB reviews alterations to structures in the Beaufort Historic District and “will seek to preserve and protect the historic character and architectural integrity of Beaufort’s National Landmark Historic District.” Code § 10.7.1.B. Among its duties, the HRB reviews and takes action on “any Major Certificates of Appropriateness” pursuant to Section 9.7.1 of the Code. Code § 10.7.2.B.1. A “Certificate of Appropriateness” (“COA”) is required before a new structure can be built in the Historic District. Code § 9.10.A.1.

On large projects that can take years to develop, the HRB under both the UDO and the Code follows a stepped procedure of conceptual approval, preliminary approval, and final approval

(R.\_\_\_\_) Order, p. 2.<sup>7</sup>

The UDO required any appeal of the HRB to be within thirty (30) days of the decision. See UDO, ¶ 3.20.I.<sup>8</sup> (R.\_\_\_\_). See S.C. Code Ann. § 6-29-900(1)(“The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.”) The same is now true of the Beaufort Code; under the Code, there is still only a thirty-day window to appeal decisions of the HRB. See Code, ¶ 9.10.I.<sup>9</sup> (R.\_\_\_\_).

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<sup>7</sup> See Code Section 9.10.2 at diagram stating “HRB Review and Decision (Approved, Approved with Conditions, Denied) 2-3 Phases (Conceptual, Preliminary, and Final are Typical).” Also see, Appendix I to the UDO, which has similar descriptions. (R.\_\_\_\_).

<sup>8</sup> UDO Section 3.20.I stated: “A person having substantial interest may make an appeal from a Historic District Review Board decision to the Circuit Court of Beaufort County within 30 days after the decision of the Board is postmarked.” (R.\_\_\_\_).

<sup>9</sup> Beaufort Code § 9.10.I states: “Any party aggrieved by the decisions of the HRB may appeal to the circuit court within 30 days of the decision.” (R.\_\_\_\_).

## STANDARD OF REVIEW

“On appeal, the findings of fact by the [HRB] shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.” *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 8–9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration in original) (quoting *Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012)); see S.C. Code Ann. § 6-29-840(A) (“The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.”).

“In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [HRB] is correct as a matter of law.” *Helicopter Solutions, Inc.*, 414 S.C. at 9 (quoting *Wyndham Enterprises, LLC*, 401 S.C. at 147–48). A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” *Furr v. Horry Cnty. Zoning Bd. of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014) (quoting *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007)). “However, a decision of a [HRB] will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.* (quoting *Wyndham Enterprises, LLC*, 401 S.C. at 148).

“An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.” *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)). The party challenging a

governmental body's decision bears the burden of proving the decision is arbitrary.” *Pressley v. Lancaster Cnty.*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

## ARGUMENT

### **I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE PETITIONERS’ APPEALS WERE UNTIMELY.**

The issues raised by Petitioners in their appeals concern claimed violations by the HRB of the mass, height and scale of each of the two Projects. Under both the UDO and the Beaufort Code, a person aggrieved by a “decision” of the HRB has thirty days to appeal that decision. See UDO Section 3.20.I; Beaufort Code § 9.10.I. (R.\_\_\_\_). Also see S.C. Code Ann. § 6-29-900(1). The Circuit Court properly found that it far too late for Petitioners to appeal the mass, height and scale of the Projects as such matters had been decided in prior HRB meetings and Petitioners failed to appeal from those decisions. (R.\_\_\_\_) Order, pp. 9-13. Should the Court uphold the Circuit Court on this issue, all of Petitioners’ Issues on Appeal are mooted.<sup>10</sup>

Parking Garage Project. There had been multiple levels of approvals by the HRB of the Parking Garage Project prior to the June 9, 2021 HRB meeting. The June 9, 2021 meeting only covered certain limited additions that were not material to mass, scale or height of the Parking Garage. Any complaint with the mass, scale or height of the Parking Garage could and should have been made as an appeal of the HRB decisions on such on many prior occasions.

There was no appeal of any of the following decisions of the HRB regarding the Parking Garage Project:

- August 17, 2016 HRB Meeting grants conceptual approval (mass, height and scale) of Garage Parking Project.
- November 9, 2016 HRB Meeting grants COA for demolition (and later relocation) of 918 Craven Street and the demolition of 310 West Street for Parking Garage Project.

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<sup>10</sup> The lack of timeliness of the appeals is the subject of Appellants Issue No. 6.

- September 20, 2017 HRB Meeting grants preliminary approval (mass, height and scale) for Parking Garage Project with October 9, 2017 City letter.

Because there were no appeals of these prior decisions of the HRB, Petitioners are barred from appealing them at the final approval stage. (R.\_\_\_\_\_) Order, pp. 9-13.

Hotel Project. Likewise, there was no appeal of the HRB's final approval for the Hotel Project that was granted at the HRB **October 9, 2019** meeting. Indeed, there was no appeal from that decision or from the conceptual or preliminary design approval decisions of the HRB beforehand. Petitioners could and should have appealed these decision if they did not agree with the COA or the issues that were approved. Their failure to so appeal renders the Court without jurisdiction to hear an appeal of any issue decided at that HRB meeting, including the issuance of the Hotel Project COA. *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117, 122, 1998 WL 433642 (1998) n. 6.

Further, the HRB determined that the only issues that could be discussed properly at the June 9, 2021 HRB meeting with respect to the Change after Certification Request for the Hotel Project were the changes under consideration by the HRB *at that meeting*, not any prior approvals granted. The Court should defer to the HRB's determination of the scope of its agenda. *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995). Thus, the appeals of the Petitioners to the extent they address any complaint about the Hotel Project other than the matters raised only in the Change after Certification application are untimely and should be denied.

The Circuit Court provided a through explanation of its reasoning held in its Order at page 9-12 with respect to those reasons why the appeals as to both Projects were time barred:

The UDO required any appeal of an HRB decision to be within thirty (30) days of the decision. *See* UDO § 3.20.I (“A person having substantial interest may make an appeal from a Historic District Review Board decision to the Circuit Court of Beaufort County within 30 days after the decision of the Board is postmarked.”) The same is now true of the Beaufort Code; there is still only a thirty-day window to appeal decisions of the HRB. *See* B.C. § 9.10.I (“Any party aggrieved by the decisions of the HRB may appeal to the circuit court within 30 days of the decision.”)\*

“Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong.” *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 372 (1997). These UDO and Beaufort Code deadlines are of critical importance to the Appeal, as it is well settled that the failure to appeal within the ordinance timelines renders a circuit court with no subject matter jurisdiction to determine such appeal. *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000) (“Nevertheless, the timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at anytime by either party or *sua sponte* by this Court.”); *see also Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969) and S.C.R.C.P. Rule 74.

Each conceptual, preliminary, and final approval by the HRB for both projects was indisputably a “decision” under the UDO and the Beaufort Code. Thus, if any party was aggrieved by the subject matter of any of those decisions, the time to appeal was within thirty days of that decision per both the UDO and the Beaufort Code. The Petitioner has attacked both process (for example, contesting that extensions were not properly granted) and substance (whether or not the HRB decisions complied with the substantive requirements for the projects) with respect to approvals for these projects.

However, to the extent the matters they attack were decided at an HRB meeting prior to the June 9, 2021 meeting, the time for appealing those decisions has expired and those decisions cannot be challenged now. Nor can Petitioner use the final approval stage to reach back to prior approvals that were not appealed. Such a “claw back” would create uncertainty for both the City and property owners as the City could have to waste resources by having citizen committees re-hear the same matters over and over, and property owners would not be able to make informative decisions relying on City approvals on the use of their property.

The requirement of immediate appeal of HRB decisions on conceptual, preliminary and final approval is consistent with how the HRB itself views its processes. For example, the Petitioner attacks the Parking Garage Project and Hotel Project generally, disagreeing with the mass, scale and height and citing to many provisions of the Code and various documents Petitioner claim are relevant. However, the HRB members specifically discussed whether or not the HRB could revisit prior approvals given to Beaufort Inn for the Parking Garage Project and the HRB specifically decided it could not revisit those approvals, as three of the four HRB members specifically stated that it was not their position to revisit approvals given by the HRB at prior meetings. Therefore, the HRB

specifically discussed and rejected Petitioner’s claims that the HRB could revisit matters already decided favorably to Beaufort Inn in prior HRB meetings. “We give great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995).

This requirement for timely appeals is also consistent with the common law and avoids problematic situations where a property owner has relied on an HRB approval and created vested rights in the HRB approval by expending resources. It is axiomatic that when a government entity makes a land use decision regarding property, the property owner is entitled to rely on that decision and the government cannot later change that decision to the detriment of the property owner. *See e.g., Nuckles v. Allen*, 250 S.C. 123, 130, 156 S.E.2d 633, 637 (1967).

The Court agrees with the position of the City Defendants and Beaufort Inn in this Appeal that the Hotel Project and the Parking Garage Project are on these facts vested with respect to the approvals given. The record is replete with evidence that Beaufort Inn, for both the Hotel Project and the Parking Project, obtained HRB conceptual approvals under the UDO, then obtained later preliminary approvals from the HRB, and were granted demolition and relocation permits from the HRB necessary for Beaufort Inn to proceed with the projects.

It is well established in South Carolina that a project that is begun under one ordinance cannot be stopped or limited by a subsequent change in that ordinance. *Boehm v. Town of Sullivan’s Island Board of Zoning Appeal*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018); *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). If HRB conceptual and preliminary approval decisions could be challenged at the final approval stage, the City Defendants could face legal challenges by property owners of interference with the property owner’s vested rights.\*\*

Thus, even if it wanted to, the HRB cannot revisit and revoke its prior approvals given to Beaufort Inn, as Beaufort Inn has vested rights in the application of the UDO and those approvals. As the City Defendants cannot revoke the approvals, the Petitioner by the Appeal cannot force the City Defendants to do what they are otherwise legally prohibited from doing.

For these reasons, the Petitioner is precluded from appealing any matter that was the subject of the conceptual, preliminary, or final approvals of the Hotel Project, as final approval was granted to that project in October 2019. Likewise, Petitioner is precluded from appealing any matter that was the subject of the preliminary approval of the Change after Certification of the Hotel Project on February 10, 2021.

(R.\_\_\_\_). Order, pp. 9-13. The Circuit Court in footnote 6 (at \*) also stated “Both time periods are as authorized by South Carolina law. See S.C. Code Ann. § 6-29-900(A)(“The appeal must be

filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.”<sup>11</sup> (R.\_\_\_\_) Order, p. 9, n. 6.

Thus, the failure of any party to appeal any of the prior approvals by the HRB of the Parking Garage Project means that the Court is without jurisdiction to hear an appeal of any matter decided at a prior HRB meeting. As the Petitioners attack the existence of the Parking Garage Project itself (based on mass, scale and size-matters decided long ago), and nothing specifically with respect to those minor issues reviewed for final approval by the HRB at its June 9, 2021 meeting, their appeals are untimely and must be denied.<sup>12</sup>

## **II. THE CIRCUIT COURT AND THE HRB PROPERLY REJECTED PETITIONERS’ CLAIMS THAT APPROVAL OF THE PROJECTS WAS PROCEDURALLY BARRED.**

Petitioners’ First, Second, and Third Issues on Appeal all rely on broad based allegations that the HRB failed to comply with procedural requirements of either the UDO or Beaufort Code with respect to extensions for the Parking Garage Project and Hotel Project they claim were either not granted at all or were not timely granted.

### **A. The Hotel Project.**

The Circuit Court expressly rejected this contention in its Orders at pp. 14-17. (R. \_\_\_\_)

As an initial matter, as noted *supra*, the time to appeal any such argument for the Hotel Project had long passed since final approval of that project occurred in October of 2019, which

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<sup>11</sup> There was a footnote 7 in the Order [at \*\*] more specifically addressing the vesting of the projects that is addressed *infra*.

<sup>12</sup> As noted, the only item at the June 9, 2021 HRB meeting that Petitioners timely challenged with respect to the Hotel Project was the change to the rooftop design. The Circuit Court found that there was sufficient evidence in the Record to support the HRB’s approval of the Change after Certification. (R.\_\_\_\_) Order, pp. 13-14. The Appellants failed to challenge this finding. Therefore, it is the law of the case. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 714 S.E.2d 869 (2011).

disposes of any argument by Petitioners that extensions should not have been granted. As stated by the Circuit Court:

The only issues that can be subject to any appeal by Petitioner are those matters before the HRB for the first time at the June 9, 2021 meeting and were additional design changes required by the HRB after preliminary approval of the Change after Certification request of Beaufort Inn. That included the proposed roof deck that was contested at the June 9, 2021 HRB hearing. As noted, the only matter at issue in the HRB June 9, 2021 hearing was final approval of the design changes to the roof and other parts of the Hotel Project, but Petitioner only challenges the roof design changes from that hearing—something that the HRB had already granted preliminary approval for at its February 10, 2021 hearing. Therefore, all of Petitioner’s Appeal with respect to the Hotel Project is time barred.

(R.\_\_\_\_) Order, p. 13. This defeats any arguments made by Appellants in their Issue Nos. 1, 5 and 6 specifically.

**B. The Parking Garage Project**

The Circuit Court also expressly rejected the contention that the Parking Garage Project did not have proper extensions in its Order as follows:

Petitioner only advance two arguments with respect only to the Parking Garage Project. First, it argues that the time period for a final approval by the HRB had run, and so final approval should not have been granted. Second, it disagrees with the HRB’s decision almost entirely on matters that were conclusively established at the conceptual and preliminary approval stages—that is the scale, size, height and mass of Parking Garage Project.

**1. There was no error in the HRB accepting the extensions.**

Petitioner argues that the prior approvals granted to Beaufort Inn for the Parking Garage Project expired before the June 9, 2021 HRB meeting, and thus the application for final approval was not properly before the HRB. Petitioner asserts that the UDO did not allow for an extension totaling more than 18 months, and there was more than an 18 month gap between the preliminary approval of the HRB on September 20, 2019 and the June 9, 2021 HRB meeting. Petitioner claims that the approvals granted previously on the Parking Garage Project had thus expired, and so Beaufort Inn was required to start the Parking Garage Project approval process again.

However, the City granted two extensions to Beaufort Inn, one by letter of June 21, 2019 and one by letter of July 1, 2020, pursuant to § 9.1.4 of the Beaufort Code, which allows up to five one-year extensions. There are no time limitations on extensions for

conceptual, preliminary, or final approvals for COAs other than those stated in § 9.1.4. See B.C. § 9.1.9.C. Thus, the City was within its discretion to provide such extensions, and such extensions were accepted by the HRB in its discretion. See *Gurganious v. City of Beaufort*, 454 S.E.2d at 916

Petitioner cites to § 1.4.2 (B) of the Beaufort Code stating that the City Defendants and Beaufort Inn were required to follow the UDO time limits on extensions. However, that is not what § 1.4.2(B) requires. This section does not address extensions of the application process other than to say the City “shall review and decide the application in good faith and in accordance with any time frame established by the prior standards.” This language clearly requires the City not to use the crossover of applicable codes to delay a project; otherwise, there would be no need to reference a “good faith” requirement.

Clearly the HRB did not construe § 1.4.2 (B) to bar final approval of the Parking Garage Project. Given the many interrelated acts by the City requiring approvals on this Project at various stages, as well as interconnected approvals needed for existing structure demolition and relocation, it would be inequitable and patently unfair for the HRB to give Beaufort Inn written extensions and then have this Court vacate those extensions. Further, as noted, Beaufort Inn has constitutionally protected vested rights in the two projects; the change in the ordinance cannot in any way impair those vested rights. *Boehm v. Town of Sullivan’s Island Board of Zoning Appeal*, *supra*. The application of timelines in the UDO that do not exist or are no longer in the ordinance clearly would impair such rights. Simply put, § 1.4.2 (B) cannot be construed to make a project *harder* to develop simply because of a crossover of codes. That would not be the “good faith” required of the City.

Further, Petitioner ignores B.C. § 1.4.4.A: “Other Approved Development Permits and Approvals.” Section 1.4.4.A provides:

Any other development that has received approval of a development permit or approval of a portion of a development—including any required Traffic Impact Analysis and/or Archaeology Survey—before the effective date of this chapter or any amendments thereof **may** be carried out in accordance with the terms and conditions of the development permit or approval and the procedures and standards in effect at the time of the approval, provided the permit or approval does not expire and otherwise remains valid. If significant changes are made to the development, associated studies and surveys required as part of the development process shall be redone. If the development permit or approval expires, is revoked (e.g., for failure to comply with time limits or terms and conditions), or otherwise becomes invalid, any subsequent development of the site shall be subject to the procedures and standards of this Code.

(Emphasis added.) In statutory construction, the use of the word “may” means the action is permissive. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980)(“The use of the word ‘may’ signifies permission and generally means that the action spoken of is

optional or discretionary.”); *Cricket Store 17, LLC v. City of Columbia Bd. of Zoning Appeals*, 428 S.C. 270, 276, 834 S.E.2d 209, 212 (Ct. App. 2019).

B.C. § 1.4.4.A clearly gives the HRB the *discretion* to apply the UDO or the Code with respect to timelines it applied to the Parking Garage Project. Thus, the HRB staff was free to apply the Beaufort Code timelines per this section of the Code, and was not required to follow the UDO. There was no error in the HRB allowing the extensions to stand and the Parking Project to move to final approval.

(R.\_\_\_\_\_) Order, pp. 14-17. In footnote 8, the Circuit Court also noted:

To the extent that B.C. § 1.4.4.A may be interpreted to conflict with § 1.4.2 (B), the interpretation of the HRB giving precedence to § 1.4.4.A must be given great weight. “We give great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). “The Board[s] ... construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor.” *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018), quoting *Purdy v. Moise*, 223 S.C. 298, 304-05, 75 S.E.2d 605, 608 (1953).

(R.\_\_\_\_\_) Order, p. 16, n. 8.

Petitioners quibble with the characterization of extensions by City staff, arguing that staff issued extensions for COAs that did not exist. Additionally, Petitioners also argue City staff erred in their interpretations of the applicable ordinance bind the City and HRB. However, staff comments and characterizations do not bind the City or HRB. Only the HRB itself, not its staff, has the authority to decide if approvals are proper. The HRB obviously determined that extensions (no matter what they were called) were properly given as the HRB proceeded with the approvals. There was evidence in the Record to support the HRB’s decision. Clearly both the City and Beaufort Inn understood that the extensions were more generally for the Projects and part of the ongoing cooperation between Beaufort Inn and the City in furtherance of Beaufort Inn’s vested rights.

**C. Beaufort Inn’s Vested Rights Defeat Petitioners’ Procedural Arguments.**

**1. The Vested Rights Act did Not Preempt Common Law Vesting of Rights.**

Both Beaufort Inn and the City agree that Beaufort Inn has vested rights in the Parking Garage Project and the Hotel Project as stated *supra*. The vested rights argument eviscerates the Petitioners’ claims of procedural defects in the HRB process as once Beaufort Inn was vested in the approvals given by the City, such vested rights could not be taken away by the City unilaterally. The Circuit Court concurred.

However, Petitioners in their Eighth Issue on Appeal claim that Beaufort Inn could have no rights vested in the Projects unless Beaufort Inn and the City had a special agreement pursuant to Vested Rights Act, S.C. Code Ann. § 6-29-1510, *et. seq.* (“VRA”). There was no such agreement pursuant to the VRA.

The Circuit Court expressly rejected this argument:

Vested rights under zoning ordinances are undergirded by the same constitutional footing which precludes retroactive application of zoning ordinances.” *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986). However, Petitioner argues that Beaufort Inn may not claim a vested right, even though the City Defendants concede it has vested rights in the application of the UDO to the project, because Beaufort Inn has failed to comply with the Vested Rights Act, S.C. Code § 6-29-1510, *et. seq.* (“VRA”), and therefore it obtained no vested rights. This is incorrect for several reasons. First, the VRA nowhere states that it is the exclusive method of establishing vested rights by a property owner in South Carolina. It is well settled in South Carolina that a statutory scheme creating a remedy of some type is not deemed to create an exclusive remedy unless the statute expressly so provides. *See e.g., Tilley v. Pacesetter Corp.*, 333 S.C. 33, 40–41, 508 S.E.2d 16, 20 (1998)(creation of specific remedy by statute did not mean it was the sole one at law); *Pinckney v. Pettijohn Builders, Inc.*, 289 S.C. 405, 407, 346 S.E.2d 533, 534 (Ct. App. 1986)(Collection of Rent by Distraint Statute not exclusive remedy); and *Wimberly v. Barr*, 359 S.C. 414, 419, 597 S.E.2d 853, 856 (Ct. App. 2004)(timber cutting statute not the exclusive remedy). Conversely, where the legislature intends a statute to create an exclusive remedy, it has expressly said so. *See e.g., Dickert v. Metro. Life Ins. Co.*, 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993)(workers compensation is exclusive remedy); *Wimberly v. Barr*, 597 S.E.2d at 857 (S. C. Tort Claims Act is exclusive remedy.) North Carolina, with its similar vested rights act, has recognized that its vested rights act is not meant to be the sole method of establishing vested rights, and that the traditional framework of substantial reliance on municipal actions is still an avenue of relief for

property owners. *Simpson v. City of Charlotte*, 115 N.C. App. 51, 56, 443 S.E.2d 772, 776 (1994). The same reasoning applies here; the South Carolina Supreme Court has recognized “the purpose of the Act was to protect, preserve, and create vested rights in development permits.” *Grays Hill Baptist Church v. Beaufort Cty.*, 431 S.C. 630, 640, 850 S.E.2d 29, 34 (2020). Limiting the ability of a property owner to acquire vested rights to those under a statutory scheme is anathema to the purpose for the VRA. The VRA merely provides another vehicle by which a property owner and developer can achieve some certainly in the development process—but it is not the only method.

(R. \_\_\_\_ ) Order, p. 12, fn. 7

The Circuit Court clearly explained why it rejected Petitioners’ argument that Beaufort Inn was required to follow the VRA and did not do so. However, Petitioners fail to challenge the Circuit Court’s reasoning.<sup>13</sup> Petitioners have not made any argument why the Circuit Court’s Order was incorrect in its holding. Petitioners only make a half-page, conclusory argument that the VRA applies and they do not even state *why* the VRA should be the exclusive method for assertion of vested rights. Therefore, that issue must be determined to be abandoned on appeal. *Jinks v. Richland Cnty.*, 355 S.C. 341, 585 S.E.2d 281 (2003).

The reasoning behind this abandonment rule is sound. All issues and arguments must be made in the Initial Brief. SCACR 211(b). If Petitioners for the first time argue why the Circuit Court was wrong in its rejection of the VRA in their Reply, Respondents will have been precluded from making arguments in support of the Court’s holding. Because of this, an appellant may not make new arguments in its Reply Brief as a method to circumvent SCACR 211(b). *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

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<sup>13</sup> Nor did Petitioners contest the Circuit Court’s logic in the Order in any filing before the Circuit Court, including their Motions to Reconsider. (R. \_\_\_\_). It is axiomatic that a litigant is required to raise an issue fairly to the trial court, thereby giving the trial court an opportunity to rule on the issue. *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010).

Thus, Petitioners have abandoned any argument contesting the Court’s holding and should not be allowed to proceed further on this issue. Given that Beaufort Inn’s approval rights in the Projects are vested as the law of the case, Petitioners’ procedural arguments are moot.

2. If Petitioners Lose Their Vested Rights Act Exclusivity Argument, the Law of the Case is that Beaufort Inn had Vested Rights.

If Petitioners lose their VRA exclusivity argument, Petitioners nowhere else contest the Circuit Court’s determination that Beaufort Inn’s rights in the two Projects are vested under South Carolina law. Thus, the Circuit Court’s holdings that Beaufort Inn was vested in the Projects moots any argument by Petitioners that procedural steps were not properly followed. Specifically, the Petitioners nowhere challenged the Circuit Court’s holdings in several places that Beaufort Inn had vested rights:

- “The Court agrees with the position of the City Defendants and Beaufort Inn in this Appeal that the Hotel Project and the Parking Garage Project are on these facts vested with respect to the approvals given.” (R.\_\_\_\_) Order, page 1.
- “Thus, even if it wanted to, the HRB cannot revisit and revoke its prior approvals given to Beaufort Inn, as Beaufort Inn has vested rights in the application of the UDO and those approvals.” (R.\_\_\_\_) Order, page 12.
- “Further, as noted, Beaufort Inn has constitutionally protected vested rights in the two projects; the change in the ordinance cannot in any way impair those vested rights.” (R.\_\_\_\_) Order, page 15.
- “Since the Hotel Project and the Parking Garage Project are grandfathered or otherwise vested under the UDO, the newer Beaufort Code Large Footprint Building requirement does not apply.” (R.\_\_\_\_) Order, page 18.

The failure of Petitioners to challenge these findings of the Circuit Court binds them to these findings as the law of the case (as long as they do not prevail on their Eighth Issue on Appeal.) It is fundamental that an appellate court should affirm a lower court’s ruling if the appealing party does not challenge that ruling. *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993). The failure to challenge is considered an abandonment on the issue on appeal. *Id.* It does not matter if the

ruling is right or wrong, if not appealed, it nonetheless becomes the law of the case. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 714 S.E.2d 869 (2011). If a court’s decision can be upheld on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case. *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996).

The failure of the Petitioners to challenge these holdings means the vested rights in the approvals of the Projects are the law of the case, which effectively disposes of any argument Petitioners make on procedural deficiencies in the approval process for the Projects.

**III. THE CIRCUIT COURT AND HRB PROPERLY REJECTED PETITIONERS’ CLAIM THAT THE PROJECTS REQUIRED PRIOR ZONING BOARD OF APPEALS APPROVAL BEFORE THE HRB ACTED ON THE PROJECTS.**

Petitioners claim that the HRB should not act on either the Parking Garage Project or the Hotel Project because they argue that both require a Special Exception issued by the City’s Zoning Board of Appeals (“ZBOA”) for a Large Footprint Building pursuant to the Beaufort Code. The Circuit Court expressly and properly rejected this contention in its Order. Specifically, the Circuit Court stated:

Petitioner, citing no authority, claims that the HRB was precluded from hearing the Hotel Project matter and the Parking Garage Project matter because it alleges that neither project should be permitted under the Beaufort Code because both buildings are allegedly “Large Footprint Buildings” as defined at B.C. § 4.510 (B)(5). Large Footprint Buildings under this section of the Beaufort Code are required to have a Special Exception from the City of Beaufort’s Zoning Board of Appeals (“ZBOA”) to go forward. Thus, Petitioner reasons, the two projects do not qualify under applicable zoning and so should not be considered by the HRB. The Court rejects this argument.

First, as noted, the Parking Project and the Hotel Project were initiated under the UDO, not the Beaufort Code. As held by the HRB, and admitted by City Defendants, these two projects were to be assessed under the UDO, not the Beaufort Code. The Beaufort Code also provides that these projects are grandfathered under the UDO as they were initiated when the UDO was in effect. B.C. § 1.4.2.A. Critically, the UDO did not have a section like the Large Footprint Building in the Beaufort Code. Consequently, no Special Exception by the ZBOA was required for either the Hotel Project or the Parking Garage

Project. Since the Hotel Project and the Parking Garage Project are grandfathered or otherwise vested under the UDO, the newer Beaufort Code Large Footprint Building requirement does not apply. *Boehm v. Town of Sullivan's Island Board of Zoning Appeal, supra.*

Second, there is no provision in Beaufort Code requiring ZBOA approval of any project prior to HRB approval. Indeed, B.C. § 9.2.5 allows an applicant to apply for approvals concurrently at its own risk. Further, B.C. § 9.1.4 outlining “Permit/Process Type Table” has no indication of sequential ordering of applications as between the ZBOA and the HRB. There is no support in the Beaufort Code for Petitioner’s position that one must come before the other.

Third, the HRB has completely different functions from ZBOA, and so there is no overlap or logical sequential process for one before the other. The ZBOA per B.C. § 10.3.1.C.1 of the Code: “shall hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an Administrative Official in the enforcement of the Code.” The ZBOA thus has no authority over HRB matters as the HRB is not an “Administrative Official” as defined in B.C. § 13.1. As noted by HRB member at the June 9, 2021 meeting, the HRB does not determine Special Exceptions, so any issue for a Special Exception was not an impediment to the HRB.

Therefore, there is no validity to the arguments by Petitioner that the HRB was without jurisdiction over these projects or otherwise should have abstained from deciding anything because of its allegation that they needed Special Exceptions from the ZBOA.

(R.\_\_\_\_) Order, pp. 17-19. (Footnote omitted.)

Once again, the Petitioners provide no analysis explaining why the Circuit Court’s Order is incorrect. Therefore, Petitioners have abandoned that any argument contesting these findings. *Jinks*, 355 S.C. 341. Regardless, as correctly noted by the Circuit Court, there is no validity to the arguments by Petitioners regarding Special Exceptions before the HRB, and the HRB properly disregarded such arguments.

## CONCLUSION

Each Order Denying Appeal should be affirmed.

This 21st day of September, 2022.

Respectfully submitted,

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