THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000038
Circuit Court Case No. 2021-CP-10-00562

Clam Farm Partnership, LLC,

Respondent,

v.

The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Charleston County, and The City of Folly Beach,

Defendants,

Of which The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management and The City of Folly Beach are,

Appellants.

FINAL BRIEF OF APPELLANT THE CITY OF FOLLY BEACH

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in granting Respondent's Motion for Partial Summary Judgment with respect to Folly Beach?

A. Did the circuit court err in holding that the Vested Rights Act entitles Respondent to complete construction in contravention of the marsh buffer ordinance, Folly Beach Code § 166.04-03, and the Vested Rights Act, S.C. Code Ann. § 6-29-1500(A), despite acknowledging that the marsh buffer ordinance had been in effect for over a year before the following: (1) the approval of the Final Plat; (2) the Contract of Sale between Respondent and Stanley Martin Homes and (3) any expenditures with respect to the Subject Property?

B. Did the circuit court err in holding that the Vested Rights Act entitles Respondent to develop the Subject Property in a manner neither envisioned nor depicted in the Final Plat?

C. Did the circuit err in holding that Folly Beach Code §§ 166.04-02 and 166.04-03 does not authorize the City of Folly Beach to review for compliance with the marsh buffer standards at various times throughout the development process?

STATEMENT OF THE CASE

In 2006, Clam Farm Partnership, LLC (referred to herein as "Clam Farm" or "Respondent") purchased real property located on Bowens Island Road in the City of Folly Beach, Charleston County, South Carolina, including real property identified as Charleston County TMS Numbers 331-00-00-336 through 331-00-00-348 ("Subject Property"), which forms a portion of a larger development located in

The Preserve at Clam Farm adjacent to Bowens Island Road in the City of Folly Beach.[1] (R. pp. 24-25.)

Around this time, Respondent also obtained certain permit coverage for site work under the NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities, commonly referred to as a "Land Disturbance Authorization" and identified as "S/W Permit Number 10-06-01-08" from the Office of Ocean and Coastal Resources Management (referred to herein as "OCRM"). (*See* R. p. 27, ¶ 14.) Due to economic conditions created by the Recession of 2008, Joint Resolutions of the South Carolina, in 2009 and 2013 respectively, extended the expiration date of the Land Disturbance Authorization until February 14, 2021. (*See* R. p. 27, ¶¶ 14-16.)

On or about September 29. 2016, after a field survey, OCRM established and approved a critical line with respect to the Subject Property and The Preserve at Clam Farm in general (referred to herein as "2016 Critical Line"). (R. pp. 28-29, ¶ 19; R. pp. 48-49.) The 2016 Critical Line is signed by D.J. Thompson, an employee of OCRM, and states the following, in pertinent part:

> CRITICAL AREAS, BY THEIR NATURE ARE DYNAMIC AND SUBJECT TO CHANGE OVER TIME. BY DELINEATING THE PERMIT AUTHORITY OF THE DEPARTMENT, THE DEPARTMENT IN NO WAY WAIVES ITS RIGHT TO ASSERT

[1] On or about 2012, Respondent developed certain phases of the Preserve at Clam Farm. (See R. pp. 28-29, ¶ 19). The development of such property is, however, not at issue in this matter and, therefore, will not be discussed in detail.

> PERMIT JURISDICTION AT ANY TIME IN ANY CRITICAL AREA ON THE SUBJECT PROPERTY, WHETHER SHOWN HEREIN OR NOT.
>
> . . .
>
> THIS CRITICAL LINE SHOWN ON THIS PLAT IS VALID FOR FIVE YEARS FROM THE DATE OF THIS SIGNATURE, **SUBJECT TO THE CAUTIONARY LANGUAGE ABOVE**.

(*See id*.) (emphasis added).

On April 9, 2019, the City of Folly Beach (referred to herein as "Folly Beach" or "Appellant") passed Amended Ordinance 05-19, which, among other things, amended Folly Beach Code § 166.04-03 "Marsh Buffers" to require a 15 linear feet buffer landward from the critical area demarcation as identified or certified by OCRM for all new construction, substantial improvements, impervious surface, and land-disturbing activities. (*See* R. p. 29, ¶ 20).[2] Folly Beach Code § 166.04-02, which governs the time of review for compliance with marsh buffer standards, has been in effect since March 23, 2010 and was not amended at this time.[3]

On or about September 18, 2019, Respondent entered into a Contract of Sale with Stanley Martin Homes with respect to the Subject Property. (*See* R. p. 90.) Under the Contract of Sale, Respondent is obligated to "deliver 25 buildable

[2] The previous provision of this ordinance required "any subsequent development, redevelopment, or land disturbing activities [to] maintain a minimum marsh buffer of at least 10 linear feet landward from the critical area demarcation. . . ."
[3] Folly Beach Code §§ 166.04-02 and 166.04-03 are collectively referred to herein as "marsh buffer ordinance."

residential lots (including the Subject Property) to Stanley Martin Homes. (*See* R. p. 90.) If the lots are not "buildable", Stanley Martin Homes is apparently under no obligation to purchase the Subject Property. As such, Respondent needed the circuit court to essentially find the Subject Property "buildable" even though Folly Beach has yet to consider a building permit for the homes in issue. The circuit court did so, finding a vested right to "construct buildings" even though only a subdivision plat is all that had been issued by Folly Beach at this time.

The Final Plat Showing the Adjustment of the Property Lines Between Lots 36 through 45, 49 and 50, 54 and 55, 57 and 58 and Showing Lots 33-35, 46-48, 51-53, 56 and HOA Areas 1-12, a New 12' Ingress/Egress Easement, (2) Two New Fire Access Easements, a New Private Ingress/Egress Easement and a New 28' Ingress/Egress Private Access Easement (referred to herein as "Final Plat"), which included the Subject Property, was approved by Aaron Pope of Folly Beach on or about July 10, 2020, over a year after the effective date of Amended Ordinance 05-19, and over five months after Respondent entered into a Contract of Sale with Stanley Martin Homes concerning the Subject Property. (R. p. 29, ¶ 20; R. p. 90.)

The Final Plat only delineates property boundaries, described and dedicated rights-of-way and easements, and included the marsh buffer required by Folly Beach Code § 166.04-03, which was fifteen (15) feet landward of the 2016 critical line established by OCRM. The Final Plat, however, does not detail the location of,

or authorize, any proposed or existing development, such as structures or paving, among other things. (R. pp. 281-294.) (emphasis added). As such, Respondent would ultimately be required to submit both site plans and applications for building permits, among other things, for each respective lot in the Subject Property before commencing any vertical construction at the Subject Property. (*Id*.) The Final Plat (i.e. subdivision approval) in no manner made the lots "buildable".

Since the fall of 2020, on several occasions, and as recent as late July 2021, low-lying areas of the Subject Property have become inundated with water during high tide and other events.[4] (R. pp. 281-298.) Folly Beach received several complaints and communications that Respondent or those working on its behalf had performed construction-related activities in critical areas, including but not limited to the placement of silt fencing in addition to other grading and site work. (*See Id*.)

On October 23, 2020, OCRM entered the Subject Property to conduct an inspection of the critical areas. (*See* R. p. 91.) On November 2, 2020, Kathy V. Kowalchick, Compliance Project Manager for OCRM, issued a "Notice to Comply" to Respondent, stating that "[d]epartment staff observed the following in tidelands critical area without authorization from the Department: portions of silt

[4] The Subject Property has become inundated with water during high tides and other events (e.g. a northeast wind) since July 2021. This date is stated merely in reference to the evidence considered at the time this action was commenced.

fencing. . .[,]" which was a violation of the South Carolina Coastal Zone Management Act. (*Id*.) [5]

On November 9, 2020, OCRM, again, visited the Subject Property, during which it staked and flagged a revised critical line (referred to herein as "2020 Critical Line"). (*See* R. p. 31, ¶ 28.) OCRM subsequently, on November 25, 2020, informed Respondent that any further work in critical areas would result in additional enforcement. (R. p. 91.)

On January 8, 2021, Morgan H. Flake, Manager of Compliance and Enforcement Section of OCRM, issued correspondence to Respondent, again, noting that Respondent has installed silt fencing and performed other construction-related activities in critical areas. (R. p. 93.) Clam Farm ultimately accepted the 2020 Critical Line and noted the following:

> The developer is conditionally accepting the critical line as flagged by OCRM and as depicted in the attached plat is it relates to Lots 46 through 51 as well as Lots 53-55 to the extent such acceptance shall allow the developer to continue, without delay, its permitted construction activities as long as such activities are performed landward of the newly identified critical line.

(*See* R. pp. 239-243.)

Around this time, Clam Farm was allegedly reminded that Folly Beach Code § 166.04-02, an ordinance which had been in effect since March 23, 2010,

[5] This was the then existing tidelands critical area, i.e. the 2016 official line, not the later revised critical line, i.e. the 2020 critical line.

authorized and obligated Folly Beach, in light of the newly-identified 2020 Critical Line, which was accepted by Respondent, to review and enforce the fifteen (15) foot marsh buffer at the time of submission of a site plan and accompanying application for building permit, whenever such occurred. (R. pp. 33-34, ¶ 35; R. p. 93.). In that this could prevent Respondent from delivering "buildable lots" to its potential purchasers, litigation commenced.

Respondent filed this action on February 5, 2021, in the Court of Common Pleas, Charleston County. (R. pp. 23-47.). Folly Beach timely answered asserting various defenses. (R. pp. 52-73). On June 17, 2021, Respondent moved for partial summary judgment on its declaratory judgment claims against OCRM and Folly Beach and for preliminary injunction against OCRM. (R. pp. 85-105.) Folly Beach filed a memorandum in opposition of Plaintiff's Motion for Partial Summary Judgment and for Preliminary Injunction on September 20, 2021. (R. pp. 267-298.)

The circuit court heard the Motion for Partial Summary Judgment and for Preliminary Injunction on September 23, 2021, in person, the Honorable Bentley Price presiding. (R. pp. 397-436.) On November 18, 2021, the circuit court entered an Order Granting Plaintiff's Motion for Partial Summary Judgment and for Preliminary Injunction ("Order"). (See generally R. pp. 1-16.)

In granting partial summary judgment against Folly Beach, the Order notes the following:

> [Respondent] has a vested right to complete site grading **and to construct buildings** on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.

(R. p. 13)(emphasis added.) The circuit court failed to comprehend that its ruling was contradictory in its terms, internally inconsistent and impossible to comply with by Folly Beach.

The circuit court denied Folly Beach's motion for reconsideration of the Order on December 14, 2021 (R. pp. 310-315; R. pp. 20-22.) On or about January 11, 2022, Folly Beach timely served its Notice of Appeal from the Order and order denying reconsideration of the Order. (R. pp. 362-364.) For the reasons discussed in detail below, this Court of Appeals should reverse the Order with regards to Folly Beach, find summary judgment is not appropriate and remand this matter for a proper development of the record. Likewise, this Court should rule Folly Beach is under no court ordered obligation to issue building or other new permits to Respondent. An alleged vested right to grade property and establish lot lines does not equate to a vested right to build homes not in compliance with other provisions of the Folly Beach Code.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." *See* Rule 56(a), SCRCP. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Rule 56(c), SCRCP.

"Summary judgment should be granted when plain, palpable and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App 1995); *accord Moore v. Barony House Restaurant, LLC,* 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (*quoting Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *See Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "If triable issues exist, those issues must go to the jury." *Id*. Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable the non-moving party below." *Id*.

"On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009). "The purpose of summary judgment is to

expedite disposition of cases which do not require the services of a fact finder." *Blumenthal Mills*, 365 S.C. at 220, 616 S.E.2d at 730. Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigation is not improperly deprived of a circuit on disputed factual issues." *Id*. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). For the reasons that follow, this Court should reverse the circuit court's grant of partial summary judgment with respect to Folly Beach.

ARGUMENT

I. The Circuit Court Improperly Granted Partial Summary Judgment Due to its Misapplication and Misinterpretation of Both the Vested Rights Act and Folly Beach Code.

With regard to its declaratory judgment claim, Clam Farm bears the burden of proving all of the elements necessary to support its request for relief:

> The plaintiff seeks affirmative relief under the declaratory judgment act, and of course the burden of proof rests upon her in this action, as well as in other actions, to prove the material allegations of her complaint by the greater weight or preponderance of the testimony. Our attention has not been called to any authority where the burden of proof in an action under the declaratory judgment act rests any less heavily upon the shoulders of the plaintiff than in the ordinary civil action.

See Martin v. Cantrell, 225 S.C. 140, 144, 81 S.E.2d 37, 38-39 (1954); *accord Crossman Cmtys. of N.C. Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 520, 769

S.E.2d 453, 460 (Ct. App. 2015) ("The burden of proof in a declaratory judgment action rests on the plaintiff."); *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557 564, 629 S.E.2d 690, 694 (Ct. App. 2006) ("The party bringing the action bears the burden of proof by the preponderance of the evidence.") For the reasons discussed in detail below, Clam Farm failed to carry its burden of showing entitlement to summary judgment. Therefore, this Court should reverse the circuit court's entry of partial summary judgment against Folly Beach.

The Order concluded that the Vested Rights Act, S.C. Code Ann. § 6-29-1500, *et seq*., entitles Respondent to commence and complete construction in contravention of the marsh buffer ordinance despite acknowledging that the ordinance had been in effect long before (1) the approval of the Final Plat; (2) the Contract of Sale between Respondent and Stanley Martin Homes; and (3) any expenditures with respect to the Subject Property. (R. pp. 12-13.) Unlike most vested rights claims, Folly Beach never attempted to change the rules unilaterally or in the middle of the game.

In reaching this conclusion, the circuit court disregarded, or failed to realize, that the Final Plat only delineated property boundaries, described and dedicated rights-of-way and easements, but does not detail, or authorize, the location of any proposed or existing development, such as structures or paving, among other things. (*See* R. pp. 281-294.) Put simply, the Order found that the approval of a final plat showing subdivided lots, which qualifies as a site-specific development

plan also entitles Respondent to develop the Subject Property in any manner it desires, regardless of whether such was defined, envisioned, or depicted in such plan, because Respondent allegedly has a vested right to do so.[6]

The circuit court also disregarded, and failed to even address, the affidavits of Aaron Pope and Eric Lutz, certain language of the marsh buffer ordinance, which explicitly envisions numerous stages of the development process in which review for compliance with the marsh buffer standards shall occur, at the time a site plan is submitted for example, "as appropriate." *See* Folly Beach Code § 166.04-02.

The Final Plat, which incorporated the 2016 Critical Line for the Subject Property, was reviewed for compliance with the marsh buffer standards, which Respondent concedes was appropriate. (R. p. 89) Respondent, however, contends that if the critical area is subsequently modified or altered for any reason after approval of "preliminary subdivision plat," Folly Beach is not authorized to ensure compliance with the marsh buffer standards at the "time of site plan," which is supported by neither the Vested Rights Act, S.C. Code Ann. § 6-29-1500, *et seq*. nor the Folly Beach Code.[7]

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[6] Assuming, *arguendo*, Respondent has a vested right pursuant to the issuance of the Final Plat, it is a right to grade the Subject Property, subdivide it into lots and other rights which relate to the process of subdividing land.

[7] Simply put, Folly Beach is prohibited from enforcement of the marsh buffer ordinance even when reviewing site plans for residential construction applications even when it is aware OCRM has altered the critical line and that certain parcels are, at times, inundated with coastal flooding.

A. The Circuit Court Erroneously Disregarded the Unambiguous Language of the Vested Rights Act, Which Does Not Entitle Respondent to Complete Construction in Contravention of the Pre-Existing Marsh Buffer Ordinance, Which Had Been In Effect Long Before (1) the Approval of the Final Plat; (2) the Contract of Sale between Respondent and Stanley Martin Homes; and (3) Any Expenditures with respect to the Subject Property.

Courts and legislatures have historically utilized the vested rights doctrine to determine whether landowners have proceeded sufficiently far down the path of development of their land that the *local government or municipality* should not be allowed to enforce *newly enacted zoning ordinances* against them. That is not the case here. Respondent is, instead, asking this Court to rule that it is entitled to complete construction, which is neither envisioned nor depicted in the Final Plat, in contravention of a zoning ordinance which had been in effect long before the approval of the Final Plat, the Contract of Sale between Respondent and Stanley Martin Homes, and *any* expenditures by the Respondent with respect to the Subject Property. Respondent concedes that it has spent approximately $68,730.24 on the 13 lots that comprise the Subject Property *after the Final Plat was recorded on July 10, 2020*. (R. pp. 171-176) (emphasis added).

The General Assembly enacted the Vested Rights Act (referred to herein as the "Act") in 2004 with an effective date of July 1, 2005. 2004 S.C. Acts 2849. A "vested right," as defined under the Act, is "the right to undertake and complete the development of property *under the terms and conditions of a site specific*

development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." S.C. Code Ann. § 6-29-1520(10) (Supp. 2005) (emphasis added); *see also* S.C. Code Ann. § 6-29-1560(A) ("[t]he landowner's rights are considered vested in the types of land use and density or intensity of uses defined in the development plan and **the vesting is not affected by later amendment to a zoning ordinance or land-use or development regulation** . . . .") (emphasis added).

Prior to the enactment of the Act, our courts considered whether the landowner had a building permit to construct the desired project and whether the landowner made expenditures after the issuance of the building permit to determine if the landowner held a vested right to continue with his or her project *after the enactment or change in a zoning ordinance*. *See Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986) (emphasis added).

The vested rights doctrine grew out of a concern that municipalities were abusing their discretion with respect to enactments and amendments of land-use and zoning rules. The concern, here, is not present; instead, the concern is an ordinance which had been in effect long before both the approval of the Final Plat and any expenditures. No vested rights are implicated or infringed by Folly Beach's actions. In fact, *Boehm v. Town of Sullivan's Island Bd. of Zoning*

Appeals, 423 S.C. 169, 186-87, 813 S.E.2d 874, 883 (Ct. App. 2018), the primary case relied upon by Respondent, acknowledges as much:

> A landowner will be held to have acquired a vested right to continue and complete construction of a building or structure, and to initiate and continue a use, despite a restriction contained in an ordinance or an amendment thereof **where, prior to the effective date of the legislation** and in reliance upon a permit validly issued, he has, in good faith, (1) made a substantial change of position in relation to the land, (2) made substantial expenditures, or (3) incurred substantial obligations."

(emphasis added).

Here, Respondent complains of no subsequent ordinance or amendment, only an ordinance, the later part of which had been in effect for over a year at the time of approval of Final Plat and over five (5) months before the Contract of Sale between Respondent and Stanley Martin Homes. Yet, Respondent asks this Court to excuse it from complying with such and the circuit court did so in clear contravention of applicable law.

There is no dispute that Respondent has made expenditures at the Subject Property; however, all of such expenditures occurred long after the enactment of the zoning ordinance it now complains of. *See F.B.R. Investors v. County of Charleston,* 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991) (finding no vested right for one phase of the project when no effort had been expended on this particular phase at the time the zoning change occurred); *see also City Ice Delivery Co. v. Zoning Board of Adjustment of Charleston*, 262 S.C. 161, 203 S.E.2d 381

(1974) (finding that the company failed to establish a vested right with respect to a specific aspect of the project because it had not expended any funds on this aspect prior to the enactment of the prohibitive zoning).

Respondent's additional concerns relate to state-mandated regulations, OCRM's assertion of permit jurisdiction in areas in the Subject Property which it now deems to be critical areas. DHEC has direct permitting authority over the critical areas pursuant to statutory provisions in S.C. Code Ann. § 48-39-10, *et seq*., and DHEC's Critical Area Regulations, S.C. Code Reg. § 30-1, *et seq*. Folly Beach has no permit jurisdiction or authority with respect to establishing or altering critical areas; on the contrary, it must accept and abide by the critical areas and critical line demarcations established by DHEC.

Respondent knew, or should have known, that "critical areas, by their very nature are dynamic and subject to change over time" and that OCRM is authorized to "assert permit jurisdiction at any time in any critical area on the subject property, whether shown herein or not," both of which are explicitly and conspicuously noted on the 2016 Critical Line. Respondent, or contractors, acting on its behalf were grading the Subject Property when the water inundation took place. Respondent knew or should have known of this condition. As such, they should have known the 2016 critical lines were subject to change when reviewed by OCRM. Such logic or lack thereof makes a mockery of the efforts made by this

state as well as coastal communities such as Folly Beach to protect wetlands. In light of the circuit court's ruling, Folly Beach is mandated to issue permits on properties, some of which is or should be protected wetlands.

Respondent also knew, or should have known, that its Final Plat was subject to *pre-existing* ordinances, meaning if the critical area changed before the submission of a site plan and application for building permit, Folly Beach was authorized and obligated to ensure that all new construction maintains a minimum marsh buffer of fifteen (15) linear feet landward from the critical area demarcation identified by OCRM. *See* S.C. Code Ann. § 6-29-1520(10) (defining A "vested right," as defined under the Act, is "the right to undertake and complete the development of property *under the terms and conditions of a site specific development plan* or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." (emphasis added). The marsh buffer ordinance, in addition to all pre-existing and applicable provisions of the Folly Beach Code, were undoubtedly "the terms and conditions of [the Final Plat]."

For these reasons, the Vested Rights Act does not entitle Respondent to "complete site work operations and construct buildings on the Subject Property," none of which was defined or depicted on the Final Plat, in contravention of the pre-existing marsh buffer ordinance which had been in effect long before (1) the

approval of the Final Plat; (2) the Contract of Sale between Respondent and Stanley Martin Homes; and (3) any expenditures with respect to the Subject Project.

B. The Circuit Court Erroneously Disregarded the Unambiguous Language of the Vested Rights Act, Which Does Not Entitle Respondent to Develop the Subject Property in a Manner Neither Envisioned Nor Depicted in the Final Plat.

The Order held that Respondent has a vested right "to construct buildings on the Subject Property" in contravention of the unambiguous language of the Vested Rights Act. As discussed above, the Final Plat only delineated property boundaries, described and dedicated rights-of-way and easements, but does not detail the location of, or authorize, any proposed or existing development, such as structures or paving, among other things. (R. pp. 281-294) As such, Respondent would ultimately be required to submit both site plans and applications for building permits, among other things, for each respective lot in the Subject Property before commencing any vertical construction at the Subject Property. (*Id*.)

S.C. Code Ann. § 6-29-1500(A) explicitly provides that "the landowner's rights **are considered vested in the types of land use and density or intensity of uses defined in the development plan**. . . ." Similarly, S.C. Code Ann. § 6-29-1520(10) defines A "vested right," as defined under the Act, is "the right to undertake and complete the development of property **under the terms and conditions of a site specific development plan** or a phased development plan as

provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." (emphasis added).

Assuming *arguendo* Respondent has a vested right, the vested right is limited to the "uses defined in the [Final Plat]" and the "terms and conditions of the [Final Plat]." The Order found that the approval of a preliminary site-specific development plan, i.e. the Final Plat, entitles Respondent to develop the Subject Property in any manner it desires, regardless of whether such was defined, envisioned, or depicted in such plan. [8] Despite the fact that Respondent has neither submitted nor obtained any approval to commence vertical construction, the circuit court nevertheless found Respondent has a vested right to commence and complete vertical construction, thus seemingly divesting Folly Beach of any further authority or oversight with respect to the development of the Subject Property. It did so under totally contradictory terms.

In holding otherwise, this Court entirely disregarded the unambiguous language of the Vested Rights Act, the Final Plat, and the affidavits of Aaron Pope and Eric Lutz, all of which provided that the Final Plat only delineated property boundaries, described and dedicated rights-of-way and easements, and included the

[8] The circuit court confuses this issue further by stating, but not explaining, that such buildings must "conform in all other respects to the applicable requirements for obtaining a building permit." (R. p. 13). At the same time, the circuit court throws out these applicable requirements based upon its belief that such "flies in the face of the Vested Rights Act. . . "(R. p. 12, fn. 2)

critical line and accompanying fifteen (15) foot marsh buffer required by marsh buffer ordinance, but did not detail, or authorize, the location or features of any proposed or existing development, including but not limited structures, buildings, or residences. (R. pp. 281-294) (emphasis added).

The circuit court's ruling to the contrary places Folly Beach in the position of being required to issue permits for certain properties which flood on a regular basis. (R. pp. 281-298) It must do so because the circuit court determined OCRM lacked authority to relocate a critical line. Assuming the Subject Property receive all required permits as required by the circuit court, they will ultimately be sold to those who have no idea their property will likely flood on a regular basis because the circuit court misconstrued and misinterpreted both the Vested Rights Act and the marsh buffer ordinance as a matter of law.

C. The Circuit Court Erroneously Disregarded the Unambiguous Language of the Folly Beach Code Which Authorizes Folly Beach to Review for Compliance with the Marsh Buffer Standards at Various Times Throughout the Development Process, "As Appropriate."

Folly Beach Code § 166.04-03(A) provides that "all development in the city shall provide and maintain marsh buffers with the standards in this section." Folly Beach Code § 166.04-03(C) provides that "***all new construction, substantial improvements, impervious surface or land disturbing activities*** shall maintain a minimum marsh buffer of 15 linear feet landward from the critical area

demarcation as identified or certified by the Office of Ocean and Coastal Resources Management (OCRM).” (emphasis added)

The Folly Beach Code, specifically § 166.04-02, provides: “[r]eview for compliance with the standards of this section shall occur at the time of the site plan, § 162.03-06; zoning permit, § 162.03-13; planned development master plan, § 162.03-02; or subdivision preliminary plat, § 162.03-07, **as appropriate**.” (emphasis added). Folly Beach Code § 166.04-02, clearly and unambiguously, envisions numerous stages of the development process in which review for compliance with the marsh buffer standards shall occur, at the time of site plan for example, “**as appropriate**.” OCRM relocated the critical line in 2020 due to flooding of the areas in issue. Folly Beach has to review for compliance its marsh buffer requirements in accordance with this critical line. One can only imagine the litany of litigation which will flow from the circuit court prohibiting Folly Beach from reviewing for compliance marsh buffers under applicable ordinances when the first seasonal tide or northeast wind inundates someone’s property with salt water. This is especially true under the unique facts of this case and the limited record before this Court of Appeals and the circuit court.

One of the reasons for this is that the development process generally includes the submission, review, and approval of various development documents at various stages in the process, which is likely to occur over an extended period of

time, as is the case here. (R. pp. 281-294) One of the other reasons, which interestingly enough is noted on the 2016 Critical Line, is that "critical areas by their nature and dynamic are subject to change over time." (R. pp. 133-135); *see also Vulcan Materials Co.,* 342 S.C. at 491, 536 S.E.2d at 898 (courts "review a zoning ordinance to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.'")[9]

Both Respondent and the circuit court conveniently ignore and disregard certain material language in the marsh buffer language: "as appropriate". *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 654, 819 S.E.2d 166, 174 (Ct. App. 2018) (holding that a provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective or redundant). Clam Farm and the circuit court also conveniently ignore and disregard the interpretations of those individuals authorized and obligated with interpreting and applying the marsh buffer ordinance. (R. pp. 281-294); *see also Mikell v. City of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (holding that great

[9] The circuit court and Respondent erroneously believe a vested right is the right to do as you please with your property, even if it floods or falls within environmentally sensitive maritime areas provided some type of permit has been issued. No concerns for those who later buy the flood prone properties or protection of environmentally sensitive maritime areas has been expressed or addressed by Respondent or the circuit court. The absence of <u>any</u> discussions of these issues is obvious and concerning.

deference is accorded to the decisions of those charged with interpreting and applying local zoning ordinances). The circuit court completely ignored the issues raised in Folly Beach's affidavits.

If a critical line demarcation is altered or modified after approval of a preliminary subdivision plat, and a new critical line is established before submission of a site plan and application for building permit, a practical, reasonable, and fair interpretation of Folly Beach Code § 166.04-02 clearly and unambiguously authorizes and obligates Folly Beach to review for compliance with the marsh buffer standards at the time of submission of site plan and application for building permit, "as appropriate." *See* Folly Beach Code § 166.04-03 ("[A]ll new construction, substantial improvements, impervious surface or land disturbing activities shall maintain a minimum marsh buffer of 15 linear feet landward from the critical area demarcation as identified or certified by the Office of Ocean and Coastal Resources Management (OCRM).") For reasons that are less than clear, especially for a grant of summary judgment, the circuit court concluded as a matter of law that Folly Beach must issue permits which are contrary to the requirements of its own code and ordinances. This is not an issue for summary judgment, especially when no discovery has taken place. Taken in the light most favorable to Folly Beach, certain lots in issue flood on a regular basis. Residences should and must be built 15 feet from the OCRM critical line to protect our

wetlands and the landowners. Review of such marsh buffers under these facts qualifies for "as appropriate".

Here, Respondent contends that a critical line established by OCRM is, unless an exception applies, valid for at least five (5) years. Put another way, Respondent concedes that OCRM is authorized to modify or alter a critical line five (5) years after its establishment. If this Court were to accept Respondent's "one-and-done" interpretation of the marsh buffer ordinance, Folly Beach would never be authorized to review for compliance with the marsh buffer standards at the time of submission of a site plan and application for building permit, regardless of whether such submission occurred five (5), ten (10), or even twenty-five (25) years after approval of a preliminary subdivision plat and regardless of the whether OCRM subsequently identified or certified a modified critical due to a change in property during such period of time, which, as discussed above, is customary. *See* S.C. Code § 48-39-210(B) ("[c]ritical areas by their nature are dynamic and subject to change over time.") This ignores the purpose of critical lines, marsh buffers and property rights for purchasers, not just developers.

For these reasons, Folly Beach Code §§ 166.04-02 and 166.04-03 clearly and unambiguously authorizes Folly Beach to review for compliance with the marsh buffer standards at various times throughout the development process, including but not limited to "at the time of site plan . . . as appropriate."

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the circuit court's grant of partial summary judgment to Respondent Clam Farm.

Respectfully submitted,

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