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 REPLY BRIEF OF APPELLANT THE CITY OF FOLLY BEACH

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Folly Beach[1] makes the following points in reply to Respondent's brief.

ARGUMENT IN REPLY

1. Respondent ignores material language in the marsh buffer ordinance and fails to offer any other interpretation for such language other than that contended by Folly Beach.

Respondent contends that the "plain language of the Folly Beach Code provides that review can be done at one of many occasions, but not on multiple occasions." Respondent, however, concentrates on one isolated word in the marsh buffer ordinance: "or," while ignoring and failing to offer any interpretation for the material language relied upon by Folly Beach: "as appropriate." *See S.C. Coastal Council v. S.C. State Ethics Comm'n*, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991) ("[T]he courts must not look merely at a 'particular clause in which a word may be used but rather looks at the word and its meaning in conjunction with the purpose of the whole statute, and in light of the object and policy of the law." (citing *Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258 (1984)); *see CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Accordingly, we read the statute as a whole and should not concentrate on isolate phrases within the statute."); *see also Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 654, 819

[1] Shorthand references already defined in Folly Beach's principal brief are continued in this reply brief (e.g. "Folly Beach" is Defendant/Appellant the City of Folly Beach; "Respondent" is Plaintiff, Respondent, Clam Farm Partnership, LLC, which

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).

Respondent contends that the use of "or" indicates that review for compliance with the marsh buffer standards may be conducted at one of several occasions in the alternative. Respondent subsequently contends that "[h]ad [Folly Beach] intended to apply marsh buffer standards at numerous phases of development, "and" instead of "or" would have been utilized in the marsh buffer standards. Surprisingly, Respondent explicitly notes the reason for the inclusion of "or" as opposed to "and" but fails to recognize the connection. As noted by Respondent, "not every project has a planned development master plan or a subdivision plat (see single family homes), so it is nonsensical for the four regulation cited to be linked as if they occur on every project." Respondent correctly points out that every development does not involve a planned development master plan or subdivision plat; however, all development which involves vertical construction, whether it be a subdivision or a single family home, requires a site plan and building permit. Site plans and applications for building permits are, in most circumstances, submitted long after the submission and approval of a planned development master plan or a subdivision plat, as will also be the case here.

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is also referred to as "Clam Farm".).

While this will come as no surprise, real property is generally altered dramatically between submission of subdivision plat and submission of a site plan and application for building permit, including circumstances where the property at issue is adjacent to a critical area. Therefore, in certain circumstances "as appropriate", i.e. when OCRM has altered the critical area demarcation before submission of a site plan, as is the case here, Folly Beach is authorized and obligated to review for compliance with the marsh buffer standards. Respondent must surely concede that this interpretation is correct in certain circumstances, i.e. when OCRM alters or amends the critical area demarcation at least five (5) years after its previous critical area demarcation, which effectively dismantles its entire argument.

The inclusion of "at the time of site plan" and "as appropriate" in the general development context, the entirety of the marsh buffer ordinance, and the purpose and reasoning behind the marsh buffer ordinance, makes clear that Folly Beach's interpretation of the marsh buffer ordinance is the only one which makes sense. See Folly Beach Code § 166.04-03 (A) ("all development in the city shall provide and maintain marsh buffers with the standards in this section."); Folly Beach Code § 166.04-03 (C) ("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)."); (R. pp. 281-

298.); *see also Mikell v. City of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (holding that great deference is afforded to the decisions of those charged with interpreting and applying local zoning ordinances).

2. Respondent mischaracterizes and misinterprets the Vested Rights Act and incorrectly believes that it allows Respondent to selectively ignore certain pre-existing ordinances, which were terms and conditions of the Final Plat.

Quite frankly, Respondent misunderstands the history of the concept of vested rights which ultimately lead to the enactment of the Vested Rights Act of 2004. Respondent contends that "the trial court was correct in holding that Respondent has vested rights in the [Final] Plat (whether or not there are subsequent regulation changes). . . . Unsurprisingly, Respondent fails to cite to any authority in support of this contention, presumably because none exists.

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 which took place after approval of site specific development plans. *See 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) ("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); *see also Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 273, 349 S.E.2d 891, 894 (Ct. App. 1986) ("[A] landowner has no right to insist that his property not be restricted by a zoning regulation absent a showing that he has, **prior to the effective date of the regulation**, established a nonconforming use.") (emphasis added); *F.B.R. Inv'rs v. Cty. of Charleston,* 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991) ("[A] landowner acquires a vested right **to continue a nonconforming use already in existence at the time his property is zoned** in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare.") (emphasis added).

A vested right is the right to undertake and complete the development of property under the terms and conditions of a site specific development plan that has been approved by a local government, even if the regulations of the jurisdiction change in a manner that makes the approved development plan no longer in compliance. *See* 35 AM. JUR. 3D *Proof of Facts* § 385 (2007) ("While it is important to understand the distinction between vested rights and estoppel, it is essentially theoretical. In practice, courts seldom recognize any important differences between the two doctrines, apply them interchangeably, and even refer

to both as if they were one and the same.") (citing *Raley v. Cal. Tahoe Reg'l Planning Agency*, 137 Cal. Rptr. 699 (Cal. Ct. App. 1977)).

Assuming, *arguendo*, Respondent has acquired vested rights, such is not the equivalent to absolute, or selective, immunity from additional development conditions. Instead, Respondent, at best, only obtained vested rights to proceed with the development under the ordinances in effect at the time of approval of the Final Plat, including but not limited to the marsh buffer ordinance. *See* S.C. Code Ann. § 6-29-1520(10) (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). That is not what Respondent seeks and is clearly not what the trial court ordered via a grant of partial summary judgment.

Additionally, building code and building permit standards often permit the attachment of conditions on permit issuance regardless of prior subdivision tract approval. In fact, Respondent contends that the "[Final Plat] is a precursor to obtaining a building permit" and that "the lots would be built upon so long as Respondent complied with the requirements for a building permit." Respondent clearly recognizes that Folly Beach ordinances permit the attachment of conditions on building permit issuance regardless of subdivision plat approval.

In other words, Respondent contends it has a vested right, more accurately described as selective immunity, which allows it to choose to comply with certain pre-existing ordinances while refusing to comply with other pre-existing ordinances, such as the marsh buffer ordinance. This distorted view does not set forth or rely on the law applicable to vested rights under South Carolina law.

3. Respondent fails to realize that Folly Beach did not attempt, and has never attempted, to "alter the marsh buffer on the Final Plat."

Respondent contends that "the trial court correctly held that the Vested Rights Act precludes [Folly Beach] from altering the marsh buffer on the Final Plat." Respondent fails to comprehend that Folly Beach has never attempted or effectuated any amendment or alteration of the Final Plat. Instead, Clam Farm was merely reminded that Folly Beach Code § 166.04-02, an ordinance which had been in effect since March 23, 2010, in conjunction with the marsh buffer ordinance, 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.

As reflected in the Folly Beach Code, Folly Beach, like other local municipalities, has the authority to impose conditions on development regardless of prior approval of a subdivision plat. As discussed above, Respondent concedes that the "[Final Plat] is a precursor to obtaining a building permit" and that "the

lots would be built upon so long as Respondent complied with the requirements for a building permit." Put simply, Respondent understands and agrees that it is obligated to comply with pre-existing ordinances to obtain a building permit, including but not limited to those enumerated in Chapters 150, 165, 166, and 167 of the Folly Beach Code.

The conditions which Respondent complains of, i.e. the marsh buffer ordinance, do not arise from the Final Plat but were instead imposed in accordance with other authority granted to Folly Beach, i.e. the marsh buffer ordinance which had been in effect long before approval of the Final Plat and any expenditures on behalf of Respondent with respect to the Subject Property. Respondent essentially contends that it is entitled to building permits and site plans because Folly Beach would have been compelled to issue such upon mere application based upon approval of the Final Plat, a dramatic departure from local municipalities' general authority and involvement over development within its jurisdiction. This is not the law. It is likewise not a basis for the grant of partial summary judgment based upon the facts presented in this case.

CONCLUSION

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

[Signature page for Final Reply Brief of Appellant The City of Folly Beach, Appellate Case No. 2022-000038]

Respectfully submitted,

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Dated: September 16, 2022