THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FOURTEENTH JUDICIAL CIRCUIT

The Honorable Bentley D. Price

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

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

AND

West Street Farms, LLC and Mix Farms, LLC, ...Appellants,
v.
City of Beaufort, City of Beaufort Historic District Review Board,
and The Beaufort Inn, LLC,.....Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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Throughout this brief, Appellants address three points raised by Respondents in their brief dated September 21, 2022. Appellants incorporate herein all previous arguments made in their Initial Brief.

I. THE APPEAL IS TIMELY.

In their brief, Respondents focus heavily on the argument that the present appeal is not timely (Resp. Br. pp. 13-17). However, they fail to address the substance of the HRB decision that is the center of this appeal. Respondents do not present any support for their assertion that many of the issues raised by Appellants are time-barred because each conceptual, preliminary, and final approval by the HRB for both projects was "indisputably" a decision which had to be appealed within thirty (30) days of each decision. No statutory provision or case law is cited in support of the conclusion that an appeal of the final decision of the HDRB is untimely.

The Order Denying the Appeal provides a detailed account of the multi-layered process of obtaining the required approvals for projects like the Hotel and the Garage. That process took several years in this instance, but the Appellants have no input or control over the timing and pace of the approvals. In a broad sense the approval process for each project involved conceptual approval, preliminary approval, and final approval.

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

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

Likewise, the cases citing that statute do not provide any clarity as those decisions do not address the issue of whether a HRB decision granting conceptual or preliminary approval is subject to immediate appeal. The language of the statute indicates "any decision" of the board may be appealed to the Circuit Court and does not specify whether that appeal must be from preliminary, conceptual, or final approvals. S.C. Code Ann. § 6-29-900.

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

Respondents argue the appeal is untimely because the Appellants did not appeal the HRB's conceptual or preliminary design approval as to the Hotel (Resp. Br. p. 14). However, the developer was not required to restart the approval process when the height, scale, and mass were fundamentally changed by the addition of the fourth story to the Hotel. In fact, the HRB failed to reconsider conceptual approval when 303 Associates submitted for final approval a building with four stories, plus solar panels, rather than 3 stories that had been approved at conceptual and preliminary stages. The addition of the new floor alters the entire proportion of the building. Appellants did not have the opportunity to appeal from conceptual and preliminary approval of the building that was given final approval because the building that was finally approved with the

fourth story rooftop bar was not given any conceptual or preliminary review by HRB. Therefore, this appeal is timely.

By its nature, the decisions of the HRB involve values and judgments that change and evolve as a project moves through the complex approval process. Evaluating architecture in a piecemeal manner as contemplated by the three application stages is complex. Height, mass and scale of building cannot truly be evaluated without looking at other design elements in total. The very names "conceptual" and "preliminary" demonstrate that any approvals in those categories are prime examples of decisions that are not final and an appeal from such a decision would likely be met with a claim that it is not ripe because in both instances the design and details of the structures are likely to change. The only point in the process in which the issues change from abstract architectural and design concepts to concrete decisions is at the final approval stage. Moreover, requiring interested parties like the Appellants to appeal every conceptual and preliminary decision at every stage of the process to ensure timeliness would not reduce the demands on municipal resources or create more certainty. Instead, the process suggested would have the completely opposite effect. Therefore, the Respondents assertion that the appeal is untimely is unfounded. The Court below erred in finding that the Appellants' challenge to decisions made during the conceptual and preliminary approvals were not timely.

II. MS. LUTZ' VOTING RECORD IS NOT REFLECTIVE OF THE HISTORIC BEAUFORT FOUNDATION'S POSITION REGARDING THE PARKING GARAGE.

Respondents point out in their brief that Maxine Lutz attended the HRB August 17, 2016 meeting and expressly stated that the Parking Garage was a "wonderful way to develop the parcel" (Resp. Br. pp. 6-7). Respondents insinuate that comments from Ms. Lutz, who was recommended by HBF to serve on the review board, indicate HBF did not oppose the project. Further, in the

Order denying the appeal, the Circuit Court stated that the Parking Garage was granted conceptual approval by the HRB "including HBF's designee on the HRB." (R. p. 004).

However, it is incorrect to suggest that the voting record of an individual HRB member is indicative of HBF's position regarding the project. Section 10.7.3(A) of the Beaufort Code, as amended, states that one HRB member shall be recommended for consideration by HBF. It does not state that the member recommended by HBF is a representative of HBF. HBF does not have a seat on the HRB and does not have a representative on the HRB. Therefore, the voting record of that individual HRB member is not dispositive of Petitioner's claims in this appeal.

III. RESPONDENTS' CONCLUSION THAT APPELLANTS HAVE ABANDONED THEIR ARGUMENTS REGARDING THE VESTED RIGHTS ACT IS INCORRECT.

Respondents' position is that Appellants fail to argue why the Circuit Court erred in rejecting Appellants' argument that Beaufort Inn was required to follow the Vested Rights Act and did not do so, and thus that issue should be abandoned on appeal (Resp. Br. p. 22).

Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. *See* Rule 208(b)(1)(B); *see also Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 164, 866 S.E.2d 562, 575 (2021). However, Appellants' position regarding vested rights is specifically set forth in the statement of issues. Even if it were not, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments. *Greenville Bistro*, 435 S.C. 146, 164, 866 S.E.2d 562, 171.

In the initial brief, Appellants explain that the reason the Court erred in finding that the LLC had vested rights to develop and/or continue the projects because of various factors including applications, decisions, approvals, and permits submitted and approved, agreements and assurances by the City and the expenditure of funds by the LLC. Appellants go on to describe what

the VRA requires and argue that the factors the Court relies on do not apply in this case to justify that the LLC had vested rights, differentiating between what the VRA requires and the facts of the present case (App. Br. p. 24).

Section 6-29-1540 of the VRA provides criteria for the standards and procedures in local land development ordinances and regulations. Under Section 6-29-1560, the issue of significant owner and government acts only comes into consideration if the local governing body does not have local development ordinances or regulations. Respondents, relying only on North Carolina law, appear to argue that this is a basis for these rights outside of the Act (Resp. Br. p. 22). However, this provision does not provide some separate independent basis for establishing vested rights. As pointed out in Appellants' initial brief, the City of Beaufort adopted local standards and procedures, and therefore the factors relied upon by the Court below do not apply in this instance to justify a finding that the LLC had vested rights. Respondents have presented no South Carolina precedent suggesting otherwise.

It is clear that Appellants reject the Circuit Courts' ruling and argue that the factors relied upon by the Court do not support the conclusion that the LLC has vested rights. Respondents conclude, without support, that due to the length and focus of Appellants' argument in their initial brief, this issue must be abandoned on appeal. Appellants have met the threshold to preserve this issue on appeal and therefore respectfully conclude Respondents' conclusion this issue must be abandoned is incorrect.

CONCLUSION

For the reasons set forth herein, along with those set forth in their initial brief, Appellants respectfully request the Court reverse the decision of the Circuit Court.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

The undersigned hereby certify that the Final Brief of Appellants and Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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