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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Scott Spouse, Circuit Court Judge

Appellate Case No. 2023-000953
Civil Case No. 2021-CP-07-00663

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

v.

City of Beaufort, City of Beaufort Inn, LLC,
and 303 Associates, LLC ..... Respondents.

FINAL JOINT BRIEF OF RESPONDENTS

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March 4, 2024
Columbia, South Carolina

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STATEMENT OF THE CASE

The Statement of the Case submitted by Appellants, West Street Farms, LLC and Mix Street Farms, LLC ("Appellants"), is divided into two subsections. Respondents, Beaufort Inn, LLC, 303 Associates, LLC (collectively, "Beaufort Inn") and the City of Beaufort (the "City") (all three parties together, "Respondents"), agree with the general procedural history summarized in the first subsection encaptioned, "Declaratory Judgment action challenging actions of the City of Beaufort as contrary to law."[1]

However, Respondents do not agree with the characterizations set forth by Appellants in the subsequent subsection encaptioned, "Subsequent and separate appeal of a Historic Design Review Board certificate of appropriateness award." Respondents, therefore, address and clarify the details of the separate Historic District Review Board (the "HRB") hearing and appeals in this Statement of the Case and again in their Statement of Facts.

This appeal is actually the fourth appeal to this Appellate Court arising from two long-pending development projects of the Beaufort Inn in the Beaufort Historic District (the "Historic District"), a hotel project (the "Hotel Project") and an associated parking garage project (the "Parking Garage Project") (collectively, the "Projects"). These appeals related to decisions of the HRB (an architectural review board) and the City of Beaufort Zoning Board of Appeals (the "ZBOA") approving certain aspects of those Projects. Indeed, in addition to this case, Appellants and their proxies have filed no less than five other appeals in the circuit court from decisions of

[1] By agreeing to the general accuracy of the procedural history set forth in the first subsection of Appellants' Statement of the Case, Respondents do not agree to be bound by the statements set forth therein that are inconsistent with the record or assert an argument that is contrary to the position taken by Respondents on appeal. Rather, due to their dissatisfaction with the Statement of the Case submitted by Appellants, Respondents have included their own Statement of the Case pursuant to Rule 208(b)(2), SCACR.

the HRB or the ZBOA in connection with these Projects, and those in which the circuit court has entered a final order, have been appealed to this Court.

The central issue in this case is whether the Hotel Project and the Parking Garage Project required Special Exceptions from the ZBOA to be constructed in the City. It is undisputed that neither Project asked for or received a Special Exception from the ZBOA. It is also undisputed that under the current City development ordinance ("Code"), which became effective on June 27, 2017, the two Projects are now properly categorized as "Large Footprint Buildings," and such buildings require Special Exceptions from the ZBOA to be built under the current Code.

It is also undisputed that the City's development ordinance in effect prior to the effective date of the Code, the Unified Development Ordinance ("UDO"), did not require a Special Exception for either Project. There is no disagreement among the parties on these points. The only issue for the circuit court to decide in this case was whether the two Projects were grandfathered under the UDO, or otherwise vested, so that neither project required a Special Exception. The position of Respondents is that both Projects were grandfathered under the UDO so Special Exceptions were not needed. Respondents presented testimony and documentary evidence on this issue during the circuit court trial on May 11, 2023.

However, Respondents' position is that this central issue *has already been decided by a circuit court on January 20, 2021*. That previously decided matter is also before this Court in *West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, City of Beaufort Historic District Review Board, and The Beaufort Inn, LLC,*" Civil Action No. 2021-CP-07-01231, now assigned

Appellate Case No. 2022-000300 (the "HRB Appeal").[2] As noted *supra*, the circumstances surrounding the HRB Appeal will be discussed in the Statement of Facts.

STANDARD OF REVIEW

This is a case brought pursuant to the South Carolina Declaratory Judgment Act, South Carolina Code Annotated Section 15-53-10, *et seq.* "A declaratory judgment action is legal or equitable, depending upon whether law or equity would have had jurisdiction if there had been no declaratory judgment procedure." *Elias v. Firemen's Ins. Co. of Newark, New Jersey,* 309 S.C. 129, 132, 420 S.E.2d 504, 505 (1992). The standard of review must be determined by the nature of the underlying issues. *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E. 2d 781, 782 (1991).

"[W]hether to grant or deny a declaratory judgment is, as it was before the adoption of the new rules of civil procedure, a matter that rests within the sound discretion of the circuit court. . . . Although the circuit court's exercise of discretion in this regard is subject to appellate review, its decision will not be disturbed on appeal, absent a clear showing of an abuse of discretion." *Med. Univ. of S.C. v. Taylor,* 294 S.C. 99, 102-03, 362 S.E.2d 881, 883 (Ct. App. 1987) (citations omitted); *see also Ott v. Tindal*, 297 S.C. 395, 377 S.E.2d 303 (1989). "An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without any evidentiary support." *City of Columbia v. Pic–A–Flick Video, Inc*., 340 S.C. 278, 281, 531 S.E.2d 518, 521 (2000).

[2] A nearly identical appeal of the HRB decision was also filed by the Historic Beaufort Foundation in Civil Action No. 2021-CP-07-01241. The circuit court also ruled in favor of Respondents in that case. That case has been appealed by Historic Beaufort and is consolidated within Appellate Case No. 2022-000300 with the case brought by Appellants. Respondents respectfully incorporate the arguments asserted in the briefs they filed in Appellate Case No. 2022-000300, as the arguments in that appeal are germane to the arguments in this one, as noted *infra*.

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Properties v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). "Where the action presents a question of law, as does this declaratory action, this Court's review is plenary and without deference to the trial court." *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co*., 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011).

An action involving the interpretation of statutes is an action at law. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E. 2d 484, 487 (2008). However, an issue of a landowner's vested rights is an equitable action. *See Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 268, 349 S.E.2d 891, 892 (Ct. App. 1986) (Court determined vested rights in equity action.) "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Ahrens v. State*, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011).

"Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994); *see also Holman v. S.C. Educ. Lottery Comm'n,* 441 S.C. 18, 29, 891 S.E.2d 701, 707 (Ct. App. 2023).

STATEMENT OF FACTS

A. The City's Regulatory Framework for the Parking Garage and Hotel Projects.

The Hotel Project and the Parking Garage Project were developed under the following regulatory framework of the City. The City's current Code governing development matters was enacted effective June 27, 2017, pursuant to enabling legislation codified by South Carolina Code Annotated Section 6-29-710, *et seq*. Prior to the enactment of the Code, the City's development

code was known as the UDO, which was first adopted on January 28, 2003 (last revised September 14, 2012). The Code superseded the UDO when enacted.

The UDO provided for an HRB at Section 2.7, which is a board of architectural review established pursuant to the State's enabling legislation for such bodies at South Carolina Code Annotated Section 6-29-870, *et seq*. (R. pp. 1001-1004). The Code, when enacted, similarly provided for the HRB at Section 10.7. (R. pp. 1018-1019). The HRB is essentially a specialized architectural review board with jurisdiction throughout the Historic District. Code § 10.7.2.A. (R. p. 1018). Generally speaking, the HRB reviews alterations to structures in the 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. (R. p. 1018). 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. (R. p. 1018). A "Certificate of Appropriateness" ("COA") is required before a new structure can be built in the Historic District. Code § 9.10.A.1. (R. p. 1011). 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.

The ZBOA is different from the HRB, as per Section 10.3.1.C.1 of the Code, the ZBOA "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." (R. p. 1016). The HRB serves a completely different function than the ZBOA, so there is no jurisdictional overlap or logical sequential process for the submittal of plans to one body before the other. The ZBOA per Section 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." (R. p. 1016). The ZBOA thus has no authority over HRB matters as the HRB is not an "Administrative Official" as defined in Code Section 13.1.

There is no provision in the Code requiring ZBOA approval of any project prior to HRB approval. Indeed, Code Section 9.2.5 expressly allows an applicant to apply for approvals concurrently at its own risk. (R. p. 1010). Further, Code Section 9.1.4 outlining "Permit/Process Type Table" has no indication of sequential ordering of applications as between the ZBOA and the HRB.[3] (R. pp. 1008-1009).

B. Background of the Parking Garage and Hotel Projects.

Respondents Beaufort Inn and 303 Associates are sister real estate investment companies owned by Beaufort residents. (R. p. 136, lines 18-22). Beaufort Inn and 303 Associates have renovated, restored and developed numerous historic structures and constructed a number of new buildings in the City. (R. p. 138, lines 3-12). They have received awards recognizing them for their historic preservation and appropriate new construction efforts. (R. p. 138, lines 13-17). For the last decade, Beaufort Inn has envisioned a much-needed downtown hotel and parking garage for the City.[4] (R. p. 139, line 5-p. 140, line 15). These efforts were welcomed by the City for years.

[3] The circuit court made these express findings about the interrelationship, or rather lack thereof, of the HRB and the ZBOA in its Order in the HRB Appeal. (R. pp. 32-33).

[4] There was a third project at issue originally, the "Apartments Project." At the time the Complaint in this action was filed, none of the Projects had a Special Exception. However, since the Complaint was filed, the Apartments Project has received a Special Exception from the ZBOA. (R. pp. 468-469). The Apartments Project required a Special Exception because, unlike the other two projects at issue, the Apartments Project arose after the enactment of the Code, so it was not grandfathered into the UDO. (R. pp. 468-469). Appellants appealed (and lost) that grant of the Special Exception for the Apartments Project at the circuit court level in *West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, City of Beaufort Board of Zoning Appeals, and 303 Associates, LLC,* Civil Action No. 2021-CP-07-01639. Appellants have also appealed yet another HRB decision granting preliminary approval to the Apartments Project. *See West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, City of Beaufort Historic District Review Board, and 303 Associates, LLC,* Civil Action No. 2022-CP-07-0039. Regardless, the Apartments Project

(R. p. 140, lines 16-25). The City needs downtown parking, and Beaufort Inn was able to offer a portion of the proposed garage parking available to the public. (R. p. 140, line 19-p. 141, line 9).

The Projects were complex and would take years to bring to fruition, as Beaufort Inn had to navigate the many requirements of the City, recognizing the historic context in which the Projects would exist. Indeed, after the Projects were introduced to the City, the City and Beaufort Inn entered into a Memorandum of Understanding on March 22, 2017 ("MOU")[5] that contained provisions demonstrating the commitment of the City and Beaufort Inn to the process. (R. p. 148, lines 12-22; R. pp. 769-771).

With respect to the Parking Garage Project, the MOU provides in pertinent part:

1. "WHEREAS, the above-described property ('Subject Property') is currently utilized as a private vehicle parking lot; and"
2. "WHEREAS, Beaufort Inn, LLC, ('Owner') is the owner of record of certain real property located adjacent to the southwest corner of the intersection of Port Republic Street and Scott's Street, City of Beaufort, ….; and"
3. "WHEREAS, the City of Beaufort ('City') utilizes 27 parking spaces under the provisions of an Easement Agreement granted by 303 Associates, LLC, predecessor to Beaufort Inn, LLC, ….; and"
4. "WHEREAS, The City desires to retain said parking spaces and Beaufort Inn, LLC, is agreeable to designating another parcel of property in 'downtown' Beaufort to be subject to the terms of the aforesaid Easement Agreement; and"
5. "WHEREAS, the City of' Beaufort Master Civic Plan encourages infill and development of the 'downtown' area of the City of Beaufort, and the consolidation of surface parking spaces into a consolidated parking facility is a method to facilitate such infill and development; and"
6. "WHEREAS, 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; and"
7. "WHEREAS, Beaufort Inn, LLC, and the City of Beaufort desire to memorialize by written instrument the terms of their Agreement in regard to the Subject

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claim included in the Complaint initiating the case that is the subject of this appeal was mooted by these actions.

[5] The MOU was entered into when the City's UDO was in effect.

Property, the adjoining property, and the projected alternate property site as to parking spaces and in other particulars, all of which is provided for in the Easement Agreement referenced herein."

8. "Projected Use of Subject Property: Beaufort Inn, LLC, plans to eliminate the private parking lot described herein ***and thereafter construct a hotel*** on the Subject Property and its adjoining parcel of property on Port Republic Street…"

9. "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."

10. "Easement Agreement (Parking). Beaufort Inn, LLC, agrees hereunder that all rights granted to the City of Beaufort under the Easement Agreement as to the Subject Property ***will be transferred to that certain planned parking garage facility*** **to** be constructed on a parcel of property owned by the Owner which is located in Block 70, City of Beaufort. The parties understand that construction of said parking garage facility is also subject to approval by the City of Beaufort and the City's Historic Review Board."

11. "***The parties agree that the 27 parking spaces allocated to the City in the projected parking garage*** to be constructed on Block 70, City of Beaufort, are to be located on the ground floor, in the vicinity of an access point in the parking garage. The City shall be entitled to begin using the allocated parking spaces, and its other rights under the subject Easement Agreement, in the projected garage facility upon completion of construction of said facility…"

12. "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."

(Italics and bold added).[6] (R. pp. 769-771).

With respect to the Hotel Project, the MOU provides in pertinent part:

1. "WHEREAS, Beaufort Inn, LLC, contemplates the construction of a hotel complex on the Subject Property, which project will extend onto its adjoining

[6] The MOU is also in the Record as part of Beaufort Inn's Answer ("Answer"). (R. pp. 47-67). The Answer tracks the development efforts of Beaufort Inn for the Projects, from the inception of the Projects under the UDO to their status as of the time the Answer was filed in May 2021. All the exhibits to the Answer were exhibits at trial. (R. pp. 702-937).

property …, ***and contemplates investing significant funds in designing said hotel complex which, once constructed***, will result in the loss of said parking spaces; and"

2. "Projected Use of Subject Property: Beaufort Inn, LLC, plans to eliminate the private parking lot described ***herein and thereafter construct a hotel*** on the Subject Property and its adjoining parcel of property on Port Republic Street…"

3. "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."

(Italics and bold added). (R. pp. 769-771).

The timeline below demonstrates the history of these Projects and the significant steps taken by Beaufort Inn and the City in pursuit of these Projects:

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 specifically designated individual parking spaces located on real property owned by Beaufort Inn. (R. p. 148, line 18-p. 149, line 5; R. pp. 702-704).

2. On **December 13, 2013**, Beaufort Inn acquired title to the Parking Garage Project parcel. (R. p. 148, lines 14-20; R. pp. 706-708).

3. On **August 17, 2016**, the HRB held a meeting, during which it provided conceptual approval of the Parking Garage Project. The HRB also discussed the possibility that demolition of 918 Craven and 310 West would be required in order for Beaufort Inn to pursue the development of the Parking Garage Project. (R. p. 143, l. 21-p. 146, line 7; R. pp. 709-741).

4. On **September 14, 2016**, the HRB reviewed and approved the initial concept for the Hotel. (R. pp. 534-539).

5. On **September 16, 2016**, based on the input received at the HRB meeting on August 17, 2016, Beaufort Inn submitted applications to the City to demolish the two structures potentially required for it to pursue development of the Parking Garage Project, one located on 918 Craven, and the other located on 310 West. (R. pp. 752-757).

6. 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. (R. p. 146, lines 8-p. 147, line 61; R. pp. 758-766). 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. (R. p. 147, lines 2-12; R. pp. 758-766).

7. On **November 14, 2016**, the HRB provided Certificate of Appropriateness ("COA") approval for the 310 West demolition project (which was only a project because it was required for the Garage Parking Project). (R. p. 147, lines 17-20; R. p. 767).

8. From **December 2016** through **February 2017**, Beaufort Inn and the City had numerous discussions regarding the design of the hotel and the City's willingness to accept ownership of Scott Street to facilitate the proposed colonnade design. (R. p. 148, lines 14-22).

9. 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 the Garage Parking Project.) (R. p. 758).

10. On **March 22, 2017**, in furtherance of prior discussions, Beaufort Inn and the City executed the referenced MOU. (R. p. 771).

11. 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.) (R. p. 150, line 20-p. 151, line 4; R. p.772).

12. 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," (ii) "all setback requirements are met" and (iii) "the removal of two structures on the property has been approved by the HRB." (R. 151, line 5-p. 152, line 3; R. pp.773-780).

13. On **July 25, 2017**, in accordance with the MOU and the UDO, the HRB provided a COA approval for the Hotel Project design ("Hotel Project COA"). Two (2) separate approvals were issued: (i) one approval for plans including the colonnade amenity, and (ii) plans that do not include the colonnade amenity in the event SCDOT did not allow its design. (R. p. 805). (The City later took over SCDOT's prior decision-making authority, so the colonnade plans are now the only approved plans.)

14. 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 $10,000 for the relocation of the building located at 918 Craven Street. (R. p. 152, lines 18-p. 153, line 3; R. pp. 781-782).

15. On **November 3, 2017**, the City issued a Relocation Permit to allow Beaufort Inn to move 918 Craven to 1012 Newcastle Street. (R. p. 153, lines 5-8; R. p. 783).

16. On **September 20, 2017**, the HRB at its meeting provided preliminary approval for the Parking Garage Project effective that date ("Preliminary COA"). (R. p. 153, line 21-p. 154, line 1). 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" and that "the proposal requires the removal of the two structures, 918 Craven Street… and 310 West Street." (R. pp. 790-796).

17. The HRB sent a letter dated **October 9, 2017**, stating that drawings for the Parking Garage Project were approved as submitted. (R. p. 797).

18. On **May 23, 2018**, a representative of Beaufort Inn communicated to City staff that delays in approvals for the Parking Garage Project had accordingly delayed progress relating to the construction of the hotel. (R. p. 807).

19. 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. (R. p. 154, line 21-p. 155, line 4; R. pp. 798-799). JoCo was paid $20,700 for this work. (R. p. 155, lines 5-16; R. p. 800).

20. 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. (R. p. 801). Beaufort Inn's request letter references "work, including demolition and removal of structures, as well as additional studies, has been ongoing." (R. p. 801). The HRB provided a one-year extension to the Preliminary COA on **June 21, 2019**. (R. p. 156, lines 2-p. 157, line 8; R. p. 676).

21. On **October 9, 2019**, the HRB provided a COA for the Hotel Project construction with the exception of changing false doors to windows. (R. p. 808).

22. On **November 13, 2019**, the HRB provided COA approval for the demolition of a structure on 812 Port Republic required to develop the Hotel Project. (R. p. 809). However, the approval of the demolition was contingent on Respondents pulling a building permit to commence construction for the Hotel Project. (R. p. 809). The HRB Meeting Minutes clarify that the HRB agreed that the demolition of 812 Port Republic was required for Respondents to pursue development of the Hotel Project. (R. p. 810).

23. 812 Port Republic Street had to be demolished to make way for the Hotel Project. (R. pp. 809-810). The HRB approved demolition on **November 13, 2019**, the City issued a permit on **December 17, 2020**, and demolition occurred later in **December 2020**. (R. pp. 810-811).

24. On **July 1, 2020**, a second one-year extension was granted by the City. (R. p. 157, lines 10-15; R. p. 678). The City granted many such extensions for projects due to the interference in City functions caused by the pandemic. (R. p. 157, lines 15-18).

25. On **September 11, 2020**, Respondents submitted a letter to the City stating that since the Hotel Project "has achieved the required HRB approvals and we are

moving forward with development," Respondents agreed to relocate the City's twenty-seven parking spaces per the MOU. (R. p. 812). Thus, Respondents were still performing pursuant to the MOU, an agreement reached under the UDO. (R. p. 171, lines 11-17).

26. On **January 25, 2021**, Respondents applied for a Change After COA in order to pursue non-material development changes relating to a rooftop bar and solar panels on the exterior of the hotel and submitted additional requested information from the City relating to the Change After COA request on this date. (R. p. 813). (The application was actually made on December 20, 2020, and delayed at City Staff's request.) (R. p. 813). This Change After COA is consistent with the MOU.

27. On **December 21, 2022**, the City granted a construction permit to Beaufort Inn for the construction of the Hotel Project. (R. p. 201, line 22-p. 202, line1).

28. Also on **December 21, 2022**, the City granted a construction permit to Beaufort Inn for the construction of the Parking Garage Project. (R. p. 201, line 22-p. 202, line1).

29. Beaufort Inn is currently performing preliminary clearing work for the Hotel Project. Tree work occurred **February 20, 2023**. Fencing, which barricaded the entire site, was erected on **March 8, 2023**. (R. p. 174, line 25-p. 175, p. 3).

The above timeline demonstrates that the City and Beaufort Inn were in regular contact for all approvals necessary for the development of the Projects from their inception. Unlike many projects, Beaufort Inn had to secure demolition and relocation approvals for existing buildings on the Project sites from the City. (R. pp. 783, 811). Each such approval was part of the overall process and connected to the Projects. (R. p. 148, lines 12-22; R. pp. 769-771). Beaufort Inn invested hundreds of thousands of dollars in the development of these Projects in reliance on these City permits and approvals. (R. p. 170, lines 18-25).

The Hotel Project received its final required City approval with a COA granted by the HRB on October 9, 2019. (R. p. 808).[7] The final time the Hotel Project and the Parking Garage Project

[7] This final approval was not appealed. (R. p. 164, 17-25). In fact, none of the dozens of prior HRB approvals, City permits, and other City actions in furtherance of these Projects were appealed by anyone in the years prior to the June 9, 2021 HRB meeting. No complaints were made even though Mr. Graham Trask, owner of the Appellants, was well aware of Respondents' development activities years before Trask's companies brought this lawsuit. (R. p. 165, lines 1-3).

sought an approval from the HRB was June 9, 2021. (The Hotel Project issue before the HRB on June 9, 2021 had nothing to do with the original approvals of the Hotel Project two years prior, rather only concerned some post-approval changes to that Project.) (R. pp. 211-410). The Parking Garage Project also received a final required City approval at the June 9, 2021 HRB meeting. (R. p. 379, line 20-p. 385, line 9).

Appellants knew of the Projects when all prior approvals were issued, yet waited until the June 9, 2021 meeting of the HRB to get involved.[8] (R. p. 173, line 24-p. 174, line 3). At this HRB meeting, Appellants, through Mr. Graham Trask ("Trask") and the written correspondence of his counsel, raised (among other things) the same argument made in this lawsuit: that the Hotel Project and the Parking Garage Project must each have Special Exceptions granted by the ZBOA before the HRB should grant any other approvals. (R. p. 260, line 20-p. 269, line 9; R. p. 282, line 8-p. 290, line 17; R. p. 343, line 16-p. 351, line 18; R. p. 369, line 17-p. 370, line 16; R. 999, I.R. 421-428[9]).

The position of Respondents is that neither Project requires a Special Exception from the ZBOA under the current Code because both Projects were initiated by Beaufort Inn under the prior UDO. The Respondents, including the City, contend that the two Projects are grandfathered under

[8] The Complaint in this lawsuit was filed on April 5, 2021, and the Amended Complaint was filed April 6, 2021. (R. p. 38).

[9] Pursuant to the Notice of the Incorporation by Reference of the Record on Appeal filed in Appellate Case No. 2022-000300, made part of the record in this matter on pages 998-1000, all references to the two-volume Record on Appeal filed on November 29, 2022, in South Carolina Appellate Case No. 2022-000300, the consolidated appeal of *Historic Beaufort Foundation v. City of Beaufort, et seq*. and *West Street Farms, LLC v. City of Beaufort, et seq*., have been made using the following format: (R. 999; I.R. _____). The first record reference is to the page number of the substantive language of the Notice of Incorporation filed in this matter (referred to as "R"), and the second reference is to the page number of the portion of the incorporated record being cited (referred to as "I.R.").

the UDO, which has no Large Footprint Building section requiring a Special Exception, so no Special Exception was required for either of the Projects.[10]

The same issues arose among the same parties when litigating the HRB Appeal before Judge Bentley Price, who ruled the Appellants were too late in their many appeals of the HRB decision and, more importantly for this appeal, that the Projects were grandfathered under the UDO.

C. Appellants Presented the ZBOA Special Exception Argument to the HRB and to the Circuit Court.

As noted *supra*, following the filing of this lawsuit in April of 2021, and unrelated to any issue with the ZBOA, the Hotel Project and the Parking Project received final approvals by the HRB at its June 9, 2021 meeting.

The Special Exception issue was first introduced before the HRB *by the Appellants*. Prior to the HRB hearing on June 9, 2021, counsel for Appellants wrote a letter ("Appellants' Objection Letter") to the City Attorney objecting to the HRB's consideration of the two projects. (R. p. 999, I.R. 421-428).

Appellants' Objection Letter at its third page (R. 999, I.R. 423), among other things, expressly cited *this lawsuit* and raised the Special Exception issue:

> Furthermore, my clients object to either of these matters proceeding at all and contend that they must be rejected and dismissed. On their behalf, I am contending in court that each project is a Large Footprint Building under the Beaufort Code and that neither has received a Special Exception as required by Beaufort Code in Sec. 4.5.10 (B) (5). This objection forms one of the bases of my clients' legal action currently pending in the Court of Common Pleas in Beaufort County, *West Street Farms, LLC and Mix Farms,* LLC *v.* City *of Beaufort, Beaufort Inn, LLC and 303 Associates, LLC,* 2021-CP-07-00663. **The applicants, not having received Special Exceptions from the City of Beaufort Zoning Board of Appeals for**

[10] It is significant that this is the rare case before a court where both the property owner and the local government agree that the property is grandfathered under the local government's prior zoning code, and it is a third party contesting that fact.

> **either the Hotel nor the Parking Garage, may not proceed to obtain approval for either of these applications from the HDRB, and the HDRB has no jurisdiction to consider these applications. These two particular applications pending before the HDRB must be rejected and dismissed.**

(Emphasis added).

The Appellants raised the Special Exception issue as a threshold jurisdictional issue so that it had to be considered for the HRB to proceed with its decision. It is well-settled that subject matter jurisdiction is a threshold matter to be determined by the adjudicatory body. *See, e.g.*, *Judy v. Judy*, 393 S.C. 160, 712 S.E. 2d 408, 412 (2011); *Thompson v. Swicegood,* 430 S.C. 648, 845 S.E. 2d 920, 926 (Ct. App. 2020); *Capital City Ins. Co. v. BP Staff, Inc*., 382 S.C. 92, 674 S.E. 2d 524, 528 (Ct. App. 2009).

Because of the Appellants' Objection Letter to the HRB, the Beaufort Inn Respondents filed their Answer in this lawsuit with the HRB for its consideration as part of the June 9, 2021 hearing. (R. 999, I.R. 429-449). Beaufort Inn's Answer traces the development steps taken with the City between 2016 and 2021 with exhibits demonstrating the efforts and expenditures by Beaufort Inn in support of those effects and recites Respondents' position that the Projects were grandfathered under the UDO. (R. 999, I.R. 429-611).

Thus, the HRB had before it the exact Special Exception issue as this lawsuit only because Appellants raised the issue before it. Ultimately, the HRB disagreed with the complaints of the Appellants and approved the Hotel Project and the Parking Garage Project at the June 9, 2021 meeting.

The Appellants then appealed the final approvals of the HRB to the circuit court.[11] It is in that case where Judge Price issued an order critical to the circuit court's decision in this case.

[11] A nearly identical appeal of the HRB decision was also filed by the Historic Beaufort Foundation in Civil Action No. 2021-CP-07-01241. The circuit court also ruled in favor of

The HRB Appeal is significant here because the Appellants raise factual and legal issues in this case that overlap with the issues raised before the HRB and in the HRB Appeal. Specifically, the Appellants argued before the HRB and before the circuit court in the HRB Appeal that the (new) Code and not the (prior) UDO applied to the Parking Project and the Hotel Project, so each Project required a Special Exception from the ZBOA before either could proceed to the HRB. (*See* Trask Testimony before HRB, R. p. 260, line 20-p. 269, line 9; R. p. 282, line 8-p. 290, line 17; R. p. 343, line 16-p. 351, line 18; R. p. 369, line 17-p. 370, line 16; Appellants' Objection Letter to the HRB, R. 999, I.R. 421-428; Amended Petition Appealing HRB Decision (July 9, 2021, Amended Complaint), R. pp. 77-86 and R. 999, I.R. 56-65; Transcript of HRB Appeal Hearing R. 411-450 and R. 999, I.R. p. 612-651). Appellants characterized this as a subject matter jurisdiction issue, as noted.

Further, the Special Exception issue was raised by citizen comments directly to the HRB. Wayne Vance, the President of the Historic Beaufort Foundation, argued at the June 9, 2021 hearing that the HRB should not move forward because the projects required Special Exceptions. (R. p. 248, line 18-p. 250, line 23; R. p. 296, line 13-p. 298, line 2; R. p. 340, line13-p. 343, line 12). Mr. Trask, the owner of the Appellant corporations, also attended that June 9, 2021 meeting and spoke. (R. p. 260, line 20-p. 269, line 9; R. p. 282, line 8-p. 290, line 17; R. p. 343, line 16-p. 351, line 18; R. p. 369, line 17-p. 370, line 16).

Respondents in that case. Further, since then, the Appellants have also filed a lawsuit challenging the ZBOA's award of a Special Exception to the Apartments Project, see *infra*, and they have also appealed yet another HRB decision granting preliminary approval to the Apartments Project. *See West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, City of Beaufort Historic District Review Board, and 303 Associates, LLC,* Civil Action No. 2022-CP-07-0039. Thus, including this one, the Appellants themselves have pending in this Court no less than five lawsuits trying to stop Respondents' projects.

Second, the Appellants specifically raised in their appeal of the HRB ruling before the circuit court their claim that the HRB had no jurisdiction because Special Exceptions for the projects had not been obtained. In their Petition initiating the HRB Appeal, Appellants alleged:

> **C. Neither application could proceed before the HRB without each of these Large Footprint Buildings having first obtained a special exception from the City of Beaufort Board of Zoning Appeals**.
>
> 28. Neither the Hotel nor the Parking Garage could proceed at all before the HRB without having first received a special exception from the City of Beaufort Zoning Board of Appeals, which neither had received.
>
> 29. Each project is a Large Footprint Building under the Beaufort Code and neither has received a Special Exception as required by Beaufort Code Sec. 4.5.10(B)(5).
>
> 30. As outlined in this petition, The Beaufort Code controls both of these projects, as neither the Hotel nor the Parking Garage have vested rights under state law that would make the UDO the governing law for these applications. Rather, The Beaufort Code applies.
>
> 31. The applicants, not having received Special Exceptions from the City of Beaufort Zoning Board of Appeals for either the Hotel or the Parking Garage, could not proceed to obtain approval for either of these applications from the HRB, and the HRB had no jurisdiction to consider those applications.

(Emphasis in original). (R. pp. 81-82; R. p. 999, I.R. p. 60-61). Thus, Appellants not only raised these issues before the HRB, but they specifically alleged them as a defense to the HRB decision in their Appeal. The circuit court rightfully and *necessarily* addressed these arguments raised by Appellants in the HRB Appeal. Appellants directly attacked the subject matter jurisdiction of the HRB and the circuit court in that matter. As noted *supra*, subject matter jurisdiction is a threshold issue that must be addressed by the court. Thus, this issue was necessarily decided by the HRB and the circuit court in the HRB Appeal.

The circuit court's January 20, 2022 Order Denying [the HRB] Appeal specifically rejected the same contentions made now by the Appellants. (R. pp. 15-34; p. R. 999, I.R. pp. 21-39).

The circuit court wrote:

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 Respondents, 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.

(Price Order Denying HRB Appeal, pp. 17-19; R. pp. 31-33; R. 999, I.R. pp. 17-19).

The circuit court even mentioned *this lawsuit* in the Order:

> Prior to this Appeal, Petitioners filed a declaratory judgment action against Beaufort Inn and the City on April 5, 2021 captioned "*West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, Beaufort Inn, LLC, and 303 Associates*," Civil Action No. 2021-CP-07-00663, which makes the same specious claim at [sic] they do here: that the Beaufort Code requires the Hotel Project and the Parking Garage Project to have Special Exceptions as Large Footprint Buildings.

(Price Order Denying HRB Appeal, p. 18 fn19; R. p. 32; R. 999, I.R. 18).

Thus, both the HRB and then the circuit court in the HRB Appeal were presented by the Appellants with the issue of whether the two Projects were governed by the Code or the UDO, and both determined that the two Projects were grandfathered into the UDO. As noted, the Order Denying Appeal is currently before this Court on appeal. *See* S.C. Appellate Court Case No. 2022-000300.

ARGUMENT

I. THE APPELLANTS' ARGUMENTS ON COLLATERAL ESTOPPEL ARE BARRED BECAUSE THE COURT DID NOT ADDRESS COLLATERAL ESTOPPEL IN ITS ORDER AND APPELLANTS DID NOT FILE A MOTION TO RECONSIDER TO PRESERVE THIS ARGUMENT.

The circuit court clearly explained why it rejected Appellants' Declaratory Judgment claims based on several reasons, but the Appellants challenge those findings in their Brief with only conclusory arguments and fail to include even a single reference to a legal authority in support of those arguments. *See*, *infra* at Section II. Rather, the Appellants choose to attack the circuit court's order solely on the basis that the circuit court "should have analyzed this case based on the doctrine of collateral estoppel…" (Appellants Brief, p. 11). Appellants then proceed to cite case law applicable only to collateral estoppel for the bulk of the legal arguments in their Brief.

(Appellants Brief, pp. 11-15).[12] However, the circuit court nowhere in its Order discussed collateral estoppel. Appellants did not raise this issue in a SCRCP Rule 59(e) motion to reconsider. Appellants' failure to present the issue of collateral estoppel to the circuit court bars them from arguing this issue in this appeal.

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); *Risher v. S.C. Dep't of Health & Env't. Control,* 393 S.C. 198, 208,712 S.E. 2d 428, 433 (2011); and *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939) (requiring that the party bringing an issue before the appellate court must first bring it to the attention of the lower court for issue preservation purposes).

Certainly, Respondents argued that collateral estoppel applied in this matter before the circuit court. (R. p. 108, line 16-p. 110, line 3; R. p. 132, lines 306; R. p. 196, lines 1-23; R. p. 202, lines 17-24). Appellants argued before the circuit court that it did not. (R. p. 196, line 15-p. 199, line 2; R. p. 207, line 19-p. 208, line 20). As stated, no SCRCP Rule 59(e) motion was filed by Appellants. The circuit court therefore had no opportunity to consider the very point addressed by the Appellants: that the circuit court should not have exercised its discretion to deny declaratory judgment based in part on Appellants' failure to exhaust administrative remedies and should have, instead analyzed the case using collateral estoppel rubric.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Where a party raises an issue, but

[12] Appellants by (improperly) arguing that collateral estoppel does not apply to defeat their claims apparently are anticipating Respondents' arguments that the trial court order can be sustained on that basis as an additional sustaining ground. *See infra* at Section III.

the issue is never ruled on by the trial court and the party fails to file a motion to alter or amend, the issue is not preserved. *Summersell v. S.C. Dep't of Pub. S*afety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999). Appellants failed to file a SCRCP Rule 59(e) motion before the trial court raising the issue that the trial court should have analyzed the issue using a collateral estoppel framework but did not. Even if in error, the trial court had no chance to correct any such error. Thus, the Appellants are clearly precluded from raising that issue as a basis for appeal here. *Summersell*, 522 S.E.2d at 145-46.

II. THE APPELLANTS FAILED TO ADDRESS THE CIRCUIT COURT'S REFUSAL TO ENTER A DECLARATORY JUDGMENT OR INJUNCTION, ABANDONING THOSE ISSUES; THUS, THE JUDGMENT MUST BE AFFIRMED.

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, 168, 432 S.E.2d 482, 484 (1993). 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, 171, 714 S.E.2d 869, 878 (2011). Likewise, if a court's decision can be upheld on more than one ground, the appellate court will affirm the decision unless the appellant appeals all grounds because, again, any unappealed grounds becomes the law of the case. *Biales*, 432 S.E.2d at 484. Further, an appellate court will not consider conclusory arguments or arguments lacking a citation to legal authority, as by failing to make a substantive argument with a legal basis in support of all issues raised in the initiating brief, the appellant abandons the appeal of the unsupported issues. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010) ("Moreover, the half-page argument made by the Fund falls far short of overcoming the substantial evidence standard of review. Hence, the Fund has abandoned this issue.").

As expounded on more thoroughly in subsections (A) through (C) below, Appellants have not presented this Court with any law or argument explaining why the holdings set forth in the circuit court's Order were incorrect, so they have waived their ability to challenge the legal basis for the Order on appeal. As noted by this Court:

> Additionally, "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson,* 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 505-06, 812 S.E.2d 438, 441 (Ct. App. 2018). In particular, the failure to cite legal authority is often cited as an abandonment of an issue on appeal. *See also Palmer v. State*, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019); *Mead v. Beaufort Cnty. Assessor,* 419 S.C. 125, 139, 796 S.E.2d 165, 172-73 (Ct. App. 2016); and *Bryson v. Bryson,* 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). Therefore, Appellants have abandoned any attempted appeal of the issues decided by the Court, and this Court must affirm the judgment on this basis. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 fn.3 (2003).

The reasoning behind this abandonment rule is sound. All issues and arguments must be raised in the Initial Brief. Rule 211(b), SCACR. If Appellants are permitted to wait until the submission of their Reply Brief to substantively argue for the first time that the circuit court was wrong with respect to the articulated grounds for its Order, 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 of circumventing SCACR Rule 211(b). "South Carolina law clearly states that short, conclusory statements made without supporting authority are

deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).[13]

This Court should affirm.

A. The Refusal to Overrule Another Circuit Court Judge.

The circuit court refused declaratory relief based, in part, on the rule stated in *Charleston Cnty. Dep't of Soc. Servs. v. Fuller*, 317 S.C. 283, 454 S.E.2d 307, 310 (1995) that one Circuit Judge cannot effectively overrule the order of another Circuit Judge.[14] (Order Denying Appeal, pp. 2, 4-5; R. pp. 4, 6-7,). The circuit court held that to conclude the Hotel Project and the Parking Garage Project required ZBOA approval through the granting of Special Exceptions would effectively overrule Judge Price's order denying the HRB Appeal because he had already ruled on the identical issues and, when doing so, found Special Exceptions were not required under the applicable development ordinance – the prior UDO. In their Brief, Appellants simply ignore this basis for the circuit court's Order and instead attack the opinion on the basis that it does not expressly address collateral estoppel. Having failed to challenge the propriety of the circuit court's decision that it cannot overrule another circuit court judge so it must deny Appellants' request for

[13] Appellants in the circuit court argued that Beaufort Inn was not entitled to certain extensions it received from the City of Beaufort in the permitting process and therefore was precluded from arguing that the two projects were grandfathered. (R. p. 189, line 18-p. 293, line 6). The propriety of those extensions is much of the subject matter of the HRB Appeal. Regardless, Appellants have not challenged the circuit court's ruling based on the propriety of those extensions, and thus those issues are not before this Court. The Court will not consider a point not raised as an issue on appeal. Rule 208(b)(1)(B), SCACR. *See Allen v. Pinncle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011).

[14] Appellants incorrectly referred to this holding the "two judge rule." The "two-judge rule" referred to the concurrence of a circuit court judge to the opinion of a master-in-equity. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976), *abrogated by Matter of Est. of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018). This rule was rendered obsolete by the 1999 amendment to S.C. Code § 14-11-85 which prohibited the practice of appeals from masters to circuit court judges.

declaratory judgment, Appellants have abandoned the issue on appeal. *Equivest Fin., LLC*, 812 S.E.2d at 441.

This Court should affirm.

B. The Discretionary Decision to Decline Declaratory Relief.

The circuit court refused to grant declaratory relief because it felt another remedy would be more effective under the circumstances, citing *Bank of Augusta v. Satcher Motor Co., Inc.,* 249 S.C. 53, 152 S.E.2d 676 (1967). (Order, p. 4; R. p. 6). "A declaratory judgment action is not a substitute for a new trial or an appeal, nor can it operate to supersede former adjudications or proceedings already pending." *Wessinger v. Rauch*, 288 S.C. 157, 341 S.E.2d 643, 644 (Ct. App. 1986).

> Nor should such relief be granted when the remedy is invoked merely to try issues or determine the validity of defenses in pending cases. While declaratory relief will not be refused, if otherwise appropriate, merely because there is another remedy available or because of the pendency of another suit, these are factors which may be considered by the Court in determining whether its discretion should be exercised in favor of assuming jurisdiction. The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.

Williams Furniture Corp. v. S. Coatings & Chem. Co., 216 S.C. 1, 7, 56 S.E.2d 576, 578 (1949) (citations omitted).

"The decision to grant a declaratory judgment is a matter which rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse." *Hyde*, 442 S.E.2d at 583. "An abuse of discretion occurs when a court's order is controlled by an error of law or there is no evidentiary support for the court's factual conclusions." *Wilson v. Dallas*, 403 S.C. 411, 425, 743 S.E.2d 746, 754 (2013).

> An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is

> vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

Nowhere in their Brief do Appellants argue that the circuit court abused its discretion with respect to its decision to decline to issue a declaratory judgment because such relief cannot be used to circumvent the need to exhaust administrative remedies or to challenge the ruling of another circuit court judge on the same issue. An appeal of the offending circuit court order, here the order denying the HRB Appeal, is instead the appropriate remedy and one that the circuit court noted has been exercised by Appellants.[15] To the extent Appellants attempt to assert a conclusory argument challenging the circuit court's discretionary ruling in Argument Section I of their Brief, Appellants fatally omit a reference to a single supporting case or statute. Appellants have, once again, abandoned this issue on appeal.

Likewise, the circuit court denied Appellants' requests for injunctive relief and mandamus. (Price Order Denying HRB Appeal, p. 5; R. p. 7). Actions for injunctive relief and mandamus are equitable in nature. *Miller v. Borg-Warner Acceptance Corp*., 279 S.C. 90, 92, 302 S.E.2d 340, 341 (1983). "The granting or denying of injunctive relief is also addressed to the circuit court's sound discretion. In such cases, the circuit court's exercise of discretion will not be disturbed unless clearly against the weight of the evidence or controlled by an error of law." *Taylor*, 294 S.C. at 103, 362 S.E.2d at 883 (citation omitted). Nowhere in their Brief do Appellants argue that the circuit court

[15] Regardless, there was evidence in the record to support the circuit court's conclusion. The record included citations to the pleadings and Judge Price's Order in the HRB Appeal. The record also contained extensive testimony and exhibits explaining the steps taken by Beaufort Inn over the years that supported the grandfathering of the Hotel Project and the Parking Garage Project under the UDO and/or creation of vested rights. (R. pp. 15-34, 87-210, 533-937). The circuit court had an ample basis to compare the facts in this matter to the facts in the HRB Appeal; thus, the decision has evidentiary support.

abused its discretion with respect to its decision to decline to issue an injunction or mandamus, and Appellants have not presented this Court with applicable law in support of such an argument. This issue has, therefore, been abandoned on appeal.

Appellants devote less than a half page of their Brief to these issues. (Appellant's Brief, p. 10). There is no discussion of why the circuit court abused its discretion by refusing to issue a declaratory judgment or related equitable relief, like an injunction or mandamus. Having failed to make any arguments, or present the Court with any legal authority, explaining why the circuit court abused its discretion when denying its claims, Appellants have abandoned these issues in their appeal. *Equivest Fin., LLC*, 812 S.E.2d at 441.

This Court should affirm.

C. The Failure to Exhaust Administrative Remedies.

Finally, the circuit court denied the relief sought by Appellants because they have not exhausted the administrative remedies required by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, Sections 6-29-310, *et seq*., of the South Carolina Code of Laws 1976, as amended ("Comprehensive Planning Act"), for appeals from architectural review boards, like the HRB. (Price Order Denying HRB Appeal, pp. 3-4; R. pp. 5-6).

The doctrine of exhaustion of administrative remedies generally requires a party seeking relief from the action of an administrative agency to pursue all available remedies before seeking such relief from the courts. *See Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (holding plaintiff is generally required to exhaust administrative remedies before seeking relief from the courts, and dismissal for failure to do so is in the sound discretion of the trial judge); *see also Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 413, 563 S.E.2d

109, 115 (Ct. App. 2002) (stating a party is "clearly required to exhaust its administrative remedies prior to bringing suit" when challenging DHEC's denial of permit).

Exhaustion is required so that the administrative agency "may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). Furthermore, when factual disputes are involved, "one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde*, 442 S.E.2d at 583, citing *Meredith v. Elliot*, 247 S.C. 335, 147 S.E.2d 244 (1966).

For these purposes, where there is a specific statutory procedure for challenging the decision of an administrative agency, compliance with such procedure is a condition precedent for judicial review. *Meredith,* 147 S.E.2d at 249 ("Having failed to follow the administrative remedy created by the statute for the correction of errors in the valuation of their property, they are precluded from resorting to the courts for relief."); *Lominick v. City of Aiken*, 244 S.C. 32, 44, 135 S.E.2d 305, 310 (1964) ("It was incumbent upon the respondent Schwerin and, for that matter, the City Council of Aiken to appeal to the Zoning Board of Adjustment from the decision of the Building Inspector if they, or either of them, considered his decision erroneous. Not having done so, she cannot now attack the validity of his decision.").

The doctrine of exhaustion of administrative remedies applies to zoning matters. *Moore v Sumter Cnty. Council*, 300 S.C. 270, 387 S.E.2d 455, 457 (1990); *Dunbar v. City of Spartanburg*, 266 S.C. 113, 118, 221 S.E.2d 848, 850 (1976) ("The impact of the zoning ordinance upon this property cannot be determined at this time since the Landowner has failed to pursue his administrative remedies by applying for a variance.").

In an analogous case, this Court reversed the grant of a declaratory judgment by the circuit court when the same issues before the circuit court were before the State Employee Grievance Committee. *Taylor,* 294 S.C. at 103. As stated by the Court:

> The general rule followed by most jurisdictions is that a court will not entertain a declaratory judgment action "if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties [and] in which are involved and may be adjudicated the same identical issues that are involved in the declaratory judgment action." Annot., 135 A.L.R. 934-35 (1941); *Wessinger v. Rauch*, 288 S.C. 157, 341 S.E.2d 643 (Ct. App. 1986). The general rule is especially applicable "'where a special statutory remedy has been provided, or where another remedy will be more . . . appropriate under the circumstances.'" *Williams Furniture Corporation v. Southern Coatings & Chemical Co.*, 216 S.C. at 7, 56 S.E.2d at 578-79.
>
> . . .
>
> We therefore hold that the circuit court erred in granting MUSC a declaratory judgment and injunctive relief where there were pending before the Grievance Committee, the administrative agency vested with primary jurisdiction of the question in issue, i.e., the cause of Taylor's discharge, proceedings in which both Taylor and MUSC were parties and in which the issue raised by MUSC in the within action could have been raised. MUSC advanced no good reason, certainly none raising any jurisdictional issue, as to why Taylor's grievance should not have been determined in the manner prescribed by the State Employee Grievance Procedure Act. *See Ex Parte Allstate Insurance Company*, 248 S.C. 550, 151 S.E.2d 849 (1966) (exhaustion of administrative remedies is not required and injunctive relief is proper where jurisdictional issues involved).

Taylor, 362 S.E.2d at 883-84. Therefore, the *Taylor* court refused to allow the circuit court to disturb the legislatively proscribed process. *Id.*

Likewise, the Supreme Court upheld a circuit court's refusal to issue a declaratory judgment when the plaintiff sought an interlocutory review of a decision in an administrative process in *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390-91, 461 S.E.2d 819, 820-21 (1995). As noted by the court in *Wessinger*, "[t]he reason for this rule is obvious.

A subsequent case deciding an issue in a prior case would be a classic example of a tail wagging a dog." 288 S.C. at 160, 341 S.E.2d at 644.[16]

Appellants did not address the exhaustion of administrative remedies holding at all. It was their burden to do so. "Whether administrative remedies have been exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse." *Garris*, 461 S.E.2d at 821. Appellants devote less than a half page of their Brief to the basis articulated in the circuit court's order for denying its request for relief, and in that half page, Appellants fail to make a single substantive argument and blatantly omit a single reference to legal authority for their conclusory arguments. (Appellant's Brief, p. 10).[17] Having failed to substantively argue this basis for the circuit court's Order, Appellants have abandoned their attempt to appeal the circuit court's denial of their request for declaratory relief on the basis of their failure to exhaust administrative remedies in the HRB matter. *Equivest Fin., LLC*, 812 S.E.2d at 441.

This Court should affirm.

III. THE APPELLANTS ARE COLLATERALLY ESTOPPED FROM CLAIMING THAT THE PROJECTS REQUIRE SPECIAL EXCEPTIONS.

Although the circuit court did not rule that the Appellants are collaterally estopped from claiming the Projects require Special Exceptions from the ZBOA, the Respondents presented this issue to the circuit court. (R. pp. 108, lines 16-p. 110, line 3; R. p. 132, lines 3-4; R. p. 186, lines

[16] That the present case was filed before the HRB Appeal is irrelevant here; the Appellants introduced the same issues in a subsequent action that was decided before this case and should not be allowed to cry foul that the consequences of their actions in the HRB Appeal should not affect this case. The Appellants were not forced to introduce the Special Exception issue in the HRB Appeal but chose to do so.

[17] Regardless, there was evidence in the record to support the circuit court's conclusion. *See* footnote 13, *supra*.

1-23; R. p. 202, lines 17-24). Appellants recognize this by concentrating on the viability of Respondents' collateral estoppel argument in their appeal. Thus, affirming the circuit court's denial of Appellants' claims on the additional sustaining ground of collateral estoppel is appropriate for this Court.

> Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions. . . . The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. . . . It is within the appellate court's discretion whether to address any additional sustaining grounds.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); s*ee also Kreutner v. David,* 320 S.C. 283, 286, 465 S.E.2d 88, 90 (1995) ("This Court may affirm, however, for any reason appearing in the record. Rule 220(c), SCACR.")

Appellants argue that collateral estoppel does not apply in this case for two reasons: (1) the issues were not "actively litigated in the HDRB appeal," and (2) "the issue was not directly determined in the HDRB appeal and was not necessary to support the decision in that appeal." This is incorrect on both fronts.

A. <u>The Issues Were Actively Litigated Because the Appellants Raised Them Before the HRB, in the HRB Appeal to the Circuit Court, and to this Court on Appeal.</u>

A judge's decision affirming the determination of a citizen board may be a valid basis upon which to assert collateral estoppel if the issue was necessary for that judge's determination. *See, e.g.*, *Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 312, 408 S.E. 2d 230, 231 (1991) (the doctrines of *res judicata* and collateral estoppel preclude the relitigation in circuit court of issues previously decided by the State Grievance Committee); *Harnett v. Washington Harbour Condo. Unit Owners'*

Ass'n, 54 A.3d 1165, 1174 (D.C. 2012) (Collateral estoppel applied to decision of trial judge sitting in an appellate capacity reviewing decision of zoning board); and *City of Johnston v. Christenson*, 718 N.W.2d 290, 301 (Iowa 2006) (same).

As noted, Appellants raised their Special Exception argument before the HRB, in the HRB Appeal, and again to this Court, asserting that the Projects required Special Exceptions before the HRB could have subject matter jurisdiction to consider the applications submitted for the Hotel Project and the Parking Garage Project. This is the classic case of Appellants wanting their cake and eating it too. Had Appellants wanted to litigate the Special Exception issue exclusively in this case, they should have chosen not to participate in the administrative HRB process. Instead, Appellants opted to test their theory in multiple forums in an attempt to avail themselves of the most sympathetic tribunal. This is the precise manipulation of the legal system that the doctrine of collateral estoppel prevents. As such, collateral estoppel bars their claims.

B. Collateral Estoppel is Properly Applied to Decisions of Citizen Review Boards like the HRB.

As an initial matter, South Carolina courts recognize that collateral estoppel applies to the decisions of quasi-judicial boards and commissions, not just to court decisions. *See Bennett*, 305 S.C. at 313, 408 S.E.2d at 231 (Employee barred by collateral estoppel to litigate in court issues decided adversely against him by agency Grievance Committee.); *Perry v. State Law Enforcement Div.*, 310 S.C. 558, 562, 426 S.E.2d 334, 336 (Ct. App. 1992) (same.)

That the HRB is a quasi-judicial citizen review panel does not prevent its decisions from precluding the relitigation of the same issues in a separate forum outside of the statutory administrative appeal process. Indeed, it is well-recognized the collateral estoppel applies to decisions of such boards. *See, e.g.*, *Scott v. City of Newport*, 177 Vt. 491, 857 A.2d 317 (2004); *Jacquelin v. Zoning Hearing Board of Hatboro Borough*, 152 Pa. Cmwlth. 568, 620 A.2d 554

(1993); and *Set Products, Inc. v. Bainbridge Township Board of Zoning Appeals,* 31 Ohio St. 3d 260, 510 N.E. 2d 373 (1987). This principle of preclusion applies even if the citizen review panel's decision is under appeal. *Oxford Investments, L.P. v. City of Philadelphia*, 21 F. Supp. 3d 442 (E.D. Pa. 2014).

The South Carolina Legislature decided through its statutory enactments that disputes of this nature are best determined by citizen review panels in the communities where they live. *See*, *e.g.*, S.C. Code Ann. § 6-29-900, *et seq*. Zoning Review Boards and Architectural Review Boards in nearly every incorporated community in South Carolina make the types of decisions complained of by Appellants every day. That is the process provided for the citizens of South Carolina, and that is the process Appellants voluntarily followed by interjecting the Board of Zoning Appeals Special Exception issue before the HRB. Indeed, the courts of this state do not even have subject matter jurisdiction to determine disputes that fall within the authority of a citizen review board except as appellate courts upon timely appeal from the citizen board decision. *See 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 any time by either party or *sua sponte* by this Court.").

Appellants incorrectly attempt to analogize the decisions of *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) and *State v. Bacote*, 331 S.C. 330, 503 S.E.2d 161 (1998) to this situation. (Appellants' Brief, pp. 11-14). In both *Kunst* and *Bacote*, the courts recite the widely recognized common law rule that default judgments cannot be a basis for collateral estoppel because no issues have actually been litigated, as even if the party in default appears for the damages hearing, the circuit court begins the hearing with the premise that all facts related to the

cause of action have been admitted. *Kunst*, 404 S.C. at 655, 503 S.E.2d at 363. Appellants suggest these cases stand for the proposition that the absence of formal discovery in HRB matters means they did not have a full and fair opportunity to litigate their Special Exception argument before that quasi-judicial body, as required for collateral estoppel to apply to the HRB's decision. That is not the genesis of the test. The test is whether the litigant had a fair opportunity to litigate in the prior forum. *Id.* Respondents explain what it means to have the "opportunity to litigate" in detail *infra*, making it clear that when the Appellants chose to appear before the HRB to challenge the project applications and then participated in the associated administrative appeal process, they had an "opportunity to litigate" the issues decided such that the doctrine of collateral estoppel applies.

There is no opportunity to litigate *liability* in a default proceeding. *See, e.g.*, *Bacote*, 503 S.E.2d at 163 ("*In the context of a default judgment*, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation.") (Emphasis added). That is not the case here, where Appellants *invited* the threshold issue of subject matter jurisdiction to be determined by the HRB and circuit court. Appellants' complaint that there is no formal discovery in the HRB process is disingenuous given that the only reason the issue was before the HRB and the circuit court was that Appellants inserted it.

Moreover, as correctly noted by Appellants, the Supreme Court adopted the general rule of collateral estoppel as set forth in the Restatement (Second) of Judgments Section 27 (1982) in *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.,* 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Comment d to the Restatement (Second) of Judgments Section 27 explains the actual test for determining whether an issue has been fully and fairly litigated is:

> d. When an issue is actually litigated. When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the

> issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment (see Illustration 10), a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.

Restatement (Second) of Judgments § 27 (1982). Obviously, if a determination on a motion to dismiss is sufficient for the application of collateral estoppel, then "actually litigated" does not necessarily require discovery, depositions, etc.[18] As further noted in CJS on this issue:

> It is immaterial that the questions alleged to have been settled by a former adjudication were determined in a different kind of proceeding or a different form of action from that in which the estoppel is set up, the parties and the issues being such as otherwise would be concluded. It is also immaterial that the two proceedings are instituted for different purposes and seek different results. Unless it is provided otherwise by statute, the rule of conclusiveness applies to all judicial determinations, and the form in which the question arises, whether by petition, plea, exception, rule, or intervention, is immaterial.
>
> Decisions made in the course of proceedings not formally classed as actions at law, such as special proceedings or proceedings which are ancillary or incidental to the progress of litigation, are conclusive as to the points or questions actually decided, provided they are made on a contest or on opportunity given to the parties concerned to be heard, and the proceedings are not purely ex parte.

50 C.J.S. Judgments § 1006 (footnote citations omitted).

Clearly, the submission by Appellants of the Special Exception issue to the HRB and the circuit court in the appeal of the decision of the HRB *invited both* the HRB and the circuit court to decide this issue.

The doctrine of collateral estoppel ensures finality in litigation. Aggrieved parties cannot repeatedly raise the same issues against the same parties in an unending attempt to achieve a more

[18] That a default proceeding is different from a proceeding where there is actual litigation is also highlighted by the Restatement, "In the case of a judgment entered by confession, consent, or default, none of the issues [are] s actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action." Restatement (Second) of Judgments § 27, Comment e (1982).

favorable result by circumventing the available appeal process and instead pressing forward with a collateral proceeding requiring the relitigation of the same issues simply because the standard of review is more favorable. Appellants chose to appear before the HRB, present their Special Exception arguments, and avail themselves of the statutorily available appeal process. (*See* Trask Testimony before HRB, R. p. 260, line 20-p. 269, line 9; R. p. 282, line 8-p. 290, line 17; R. p. 343, line 16-p. 351, line 18; R. p. 369, line 17-p. 370, line 16; *see also* Appellants' Objection Letter to the HRB, R. 999, I.R. 421-428). The circuit court analyzed Appellants' legal argument based on the prior UDO and the current Code and expressly rejected it. (Price Order Denying HRB Appeal, R. pp. 15-34). The crux of Appellants' case is identical in the present matter – whether the special exception requirement for large footprint buildings contained in the current Code but not in the prior UDO applies to the Projects. (R. pp. 38-46). Appellants contend it does. Respondents contend it does not. This case is Appellants' second bite of the apple, so they are collaterally estopped from obtaining the relief sought.

The Court should affirm based on the additional sustaining ground that Appellants are collaterally estopped from asserting the Projects require Special Exceptions, having fully and fairly litigated and lost that precise issue before the HRB and in the HRB Appeal.

IV. THE APPELLANTS HAVE NOT MET THEIR BURDEN OF SUCCESSFULLY CHALLENGING A ZONING DECISION OF THE CITY OF BEAUFORT.

As an additional sustaining ground asserted by Respondents before the circuit court but not addressed in its Order, this Court should affirm the circuit court's denial of Appellants' claims because they have not met the heightened standard of proof required to successfully challenge a municipal zoning decision in a lawsuit filed outside the statutory appeal process of the Comprehensive Planning Act. (R. p. 107, line 20-p. 108, line 15). As discussed *supra*, the Special Exception argument asserted by Appellants is a collateral attack of a municipal zoning decision

made by the City. (R. pp. 81-82, 85-86). Further, the City admits in its pleadings that the Hotel Project and the Parking Garage Project are grandfathered under the UDO and thus do not require Special Exceptions. *See* Answer of City of Beaufort. (R. pp. 68-76). Such an attack of a municipal land use decision requires Appellants to meet the significant burden of showing the City abused its discretion in a manner that resulted in a violation of their constitutional rights. Appellants have failed to meet this burden, so the circuit court appropriately denied all claims asserted in their Petition.

> A governmental body's decision on the use of land is a legislative function. *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987). Judicial inquiry into legislative motivation is to be avoided. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989). "Such inquiries endanger the separation of powers doctrine, representing a substantial judicial 'intrusion into the workings of other branches of government.'" *Id.* at 1257 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 n18, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977)).

Pressley v. Lancaster Cnty., 343 S.C. 696, 707, 542 S.E.2d 366, 371 (Ct. App. 2001).

The decision regarding whether a property is grandfathered by a prior zoning ordinance is a classic land use decision to be made by a governmental entity through its interpretation of its own ordinances. The law in South Carolina is clear as to a court's very limited power to interfere with such zoning decisions:

> [T]he action of a municipality regarding the rezoning of property will not be overturned by a court if the municipality's decision is 'fairly debatable.' This is because the municipality's action is presumed to have been validly exercised and because it is not the court's prerogative to pass upon the wisdom of the municipality's decision. Only where the municipality's action is so unreasonable as to impair or destroy constitutional rights will the court declare the municipality's action unconstitutional.

Hampton v. Richland Cnty., 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987) (quotations and citations omitted).

The City has the power to enact regulations, resolutions, and ordinances that are "necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good governing in it[.]" S.C. Code Ann. § 5-7-30; *see also* S.C. Code Ann. § 6-29-710(A) ("Zoning ordinances must be for the general purposes of guiding development in accordance with promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare."). The position of the City asserted through the HRB and later reasserted through its judicial admissions with respect to the land use matters presented by Appellants is, therefore, part of the general local governing power given to the City by the General Assembly and should not be second-guessed by the courts. A Florida court aptly explained the vast discretion courts must afford municipalities when interpreting and enforcing their own land use ordinances as follows:

> [T]he City's discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is analogous to a prosecutor's discretion to file, prosecute, abate, settle, or dismiss a criminal or civil lawsuit. The prosecutor's discretion in this regard is a pure executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law.

Detournay v. City of Coral Gables, 127 So. 3d 869, 873 (Fla. Dist. Ct. App. 2013) (citation omitted).

Through the relief sought in their Petition, Appellants challenge the City's interpretation of the prior UDO and current Code. Therefore, Appellants must show the HRB's decision and the City's agreement that the Hotel Project and the Parking Project are grandfathered into the prior UDO in some way violates their constitutional rights. Appellants have not submitted any evidence that the City's actions were "so unreasonable as to impair or destroy constitutional rights," nor have they attempted to make such an argument. As such, Appellants claims fail.

Accordingly, this Court should affirm the Order denying all Appellants' claims on the additional substantive ground that Appellants have not met their burden of proof.

V. THE PROJECTS ARE GRANDFATHERED OR OTHERWISE VESTED UNDER THE UDO.

As another additional sustaining ground, this Court may review the record and address the underlying merits of this action. As noted *supra*, "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, L.L.C.,* 526 S.E.2d at 723.

This Court, as an additional sustaining ground, should review the evidence presented by Appellants and Respondents and conclude on the merits that neither the Hotel Project nor the Parking Garage Project required a Special Exception because both projects were (1) grandfathered under the UDO which required no Special Exception, and/or (2) Beaufort Inn had vested rights in the two projects being completed under the UDO with no Special Exception requirement.

The evidence presented by the parties was not disputed; Appellants introduced no testimony and relied solely on documentary evidence that all parties stipulated was admissible. (R. p. 111, line 13-p. 131, line 7; R. p. 189, lines 9-12). Respondents called a single witness, Courtney Worrell of 303 Associates, who testified extensively about the history of the Projects (R. pp. 134, line 16-p. 175, line 23), the grandfathering of the Projects under the UDO (R. p. 150, lines 16-19; R. p. 171, line 11-p. 172, line 14), and the hundreds of thousands of dollars spent by Beaufort Inn/303 Associates in reliance on the various City approvals. (R. p. 144, line 22-p. 145, line 3; R. p. 152, lines 6-17; R. p. 154, lines 4-9; R. p. 155, lines 5-16; R. p. 167, line 25-p. 168, line 10; R. p. 170, line 13-p. 171, line 10).

Ms. Worrell testified that the Hotel Project received unanimous HRB conceptual approval on September 14, 2016, when the UDO was in effect. (R. p. 160, line13-p. 161, line 2). She also

testified that the Parking Garage Project was initiated before the HRB on August 17, 2016, also when the UDO was in effect. (R. p. 162, lines 15-18). The subsequently enacted Code has an express grandfathering provision that allows a property owner to use the prior enacted UDO if it so chooses. Code § 1.4.2.A.[19] This Court may also review the undisputed evidence and determine the Projects were grandfathered under the UDO.

Also, because of the myriad City approvals and subsequent investment by Beaufort Inn of hundreds of thousands of dollars in reliance on those approvals, Ms. Worrell testified that Beaufort Inn believed it had acquired vested rights in the two Projects. (The circuit court in the HRB Appeal also agreed on this point, stating that the Projects were vested, citing *Nuckles v. Allen,* 250 S.C. 123, 130, 156 S.E.2d 633, 637 (1967) and *Boehm v. Town of Sullivan's Island Board of Zoning Appeal*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018). (R. p. 170, line 18-p. 171, line 17; *see* Price Order Denying HRB Appeal, pp. 9-13, 17-19; R. pp. 23-27, 31-33 and R. p. 999, I.R. pp. 29-33, 37-39). Based on the undisputed evidence, this Court may also hold that Beaufort Inn acquired vested rights in the Projects.[20] "Ordinarily, an appellate court reviews cases in equity by finding

[19] As noted *supra*, the circuit court in the HRB Appeal specifically recognized and approved the application of this grandfathering to the two Projects. (Price Order Denying HRB Appeal, p. 18; R. p. 32 and R. p. 999, I.R. p. 38).

[20] Respondents have found no South Carolina case law directly outlining the nature of the burden for Respondents to prove vested rights, nor the standard of review. However, in *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 268, 349 S.E.2d 891, 892 (Ct. App. 1986), the court determined vested rights in an equity action. Some courts have held that the vested rights determination is equitable in nature. *See, e.g.*, *Friends of Yamhill Cnty., Inc. v. Bd. of Comr's of Yamhill Cnty*., 237 Or. App. 149, 160, 238 P.3d 1016, 1022-23 (2010), *aff'd on other grounds sub nom, Friends of Yamhill Cnty., Inc. v. Bd. of Comm'rs of Yamhill Cnty*., 351 Or. 219, 264 P.3d 1265 (2011); *Cobleskill Stone Prod., Inc. v. Town of Schoharie*, 169 A.D.3d 1182, 1186, 94 N.Y.S.3d 658, 663 (2019); *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1191 (2004); *Bell Atl. Mobile Sys., Inc. v. Borough of Clifton Heights, Delaware Cnty*., 661 A.2d 909, 912 (Pa. Commw. Ct. 1995). In Georgia, the rule is derived from equitable estoppel. *Cohn Communities, Inc. v. Clayton Cnty*., 257 Ga. 357, 358, 359 S.E.2d 887, 889 (1987). In South Carolina, the defense of estoppel is equitable in nature. *Gaymon v. Richland Mem'l Hosp*., 327 S.C. 66, 68, 488 S.E. 2d 332, 333 (1997) (finding that a

facts in accordance with its own view of the preponderance of the evidence." *Matter of Est. of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544 (2018).

Thus, as an additional sustaining ground, this Court may find that the two Projects were grandfathered and vested under the UDO, so neither required a Special Exception from the ZBOA. For this reason, the Court should again affirm.

CONCLUSION

The Trial Court should be affirmed for any of the many reasons cited by Respondents.

This 4th day of March, 2024.

Respectfully submitted,

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defense of equitable estoppel interposed in a law case should be tried by the court as an equitable issue.)