



## **BACKGROUND AND PROCEDURAL HISTORY**

This matter is one of a series of attacks on three pending development projects by 303 Associates in the City's downtown Historic District (the "Historic District"): a hotel with rooftop bar, a parking garage, and a three-story apartment and commercial building (the "Apartment Project"). Specifically, this is an appeal of an HRB decision preliminarily approving the Apartment Project and is the sixth lawsuit filed by either the Petitioners, entities owned by competing developer Graham Trask, or the Historic Beaufort Foundation (the "HBF"), all third parties in disagreement with decisions made by citizen review boards of the City relating to these projects. The common theme of each lawsuit is that the height, mass, and scale of the projects are inappropriate for the Historic District. In response, Respondents contend Petitioners and the HBF have not timely raised their challenges and waived their right to appeal. Alternatively, Respondents assert all projects comply with the requirements of the applicable City development code, here the Beaufort Code, so Petitioners have not met their burden of proving the board's decision was arbitrary and capricious.

The Beaufort Code provides for an HRB, which is a specialized architectural review board that considers and acts on projects located within the Historic District, including new construction. Beaufort Code § 10.7.1. When reviewing design applications, the HRB follows a stepped procedure of Conceptual Approval, Preliminary Approval, and Final Approval. Developers may go through all three steps or skip to the Preliminary Approval or Final Approval stages. The process can take years to complete, especially on large projects.

The Beaufort Code requires any appeal of an HRB decision to be filed in circuit court within thirty days of that decision. Beaufort Code, § 9.10.2.I ("Any party aggrieved by the

decisions of the HRB may appeal to the circuit court within 30 days of the decision.”); *see also* S.C. Code Ann. § 6-29-900(1) (“The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.”).

Here, 303 Associates began with Conceptual Approval, and the HRB conceptually approved the mass, height, and scale of the Apartment Project during a meeting held February 10, 2021 and issued that approval in writing on February 16, 2021. At that point, Petitioners had thirty days to appeal the Conceptual Approval and failed to do.

The HRB then granted Preliminary Approval of the project on December 8, 2021, which as discussed herein, is the only HRB decision relating to the Apartment Project timely appealed by Petitioners. The HRB did not consider the height, mass, and scale of the project at that meeting.

The HRB later granted Final Approval on July 22, 2022. When granting Final Approval, the HRB ratified the decisions made at the conceptual and preliminary approval levels. Petitioners failed to appeal this decision as well.

### **ARGUMENTS ON APPEAL**

Petitioners attack the Apartment Project by generally disagreeing with its overall mass, scale, and height. However, during the Conceptual Approval stage on February 10, 2021, the HRB unanimously approved the mass, scale, and height of the Apartment Project and issued its approval in writing on February 16, 2021, and there was no appeal of this Conceptual Approval by any party. The HRB then granted Preliminary Approval of the Apartment Project at its December 8, 2021 meeting, at which time the height, mass, and scale of the Apartment Project were not considered because they had already been approved at the Conceptual Approval stage. The Apartment Project received Final Approval by the HRB at its July 22, 2022 meeting. The Final

Approval was a ratification of both the Conceptual Approval and the Preliminary Approval. There was no appeal of this Final Approval by any party.

Despite seeking HRB approval at all available stages, the Petitioners appealed only the HRB decision granting Preliminary Approval of the Apartment Project. For the reasons set forth herein, that appeal was untimely and is not supported by the record, so it is denied.

### **STANDARD OF REVIEW**

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

“In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [HRB] is correct as a matter of law.” *Helicopter Solutions, Inc.*, 414 S.C. at 9 (quoting *Wyndham Enterprises, LLC*, 401 S.C. at 147-48). “However, a decision of a [HRB] will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.* (quoting *Wyndham Enterprises, LLC*, 401 S.C. at 148). “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cnty. of Richland v. Simpkins*, 348 S.C. 664,

668, 560 S.E.2d 902, 904 (Ct. App. 2002), holding modified by *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)).

### **CONCLUSIONS OF LAW**

Upon review of the Record on Appeal, the Court finds there is sufficient evidence to support the reasoning and decision of the HRB and, therefore, the appeal is denied.

A. **The Appeal of Preliminary Approval of the Apartment Project is Untimely and Moot.**

It is too late to appeal the mass, height, and scale of the Apartment Project. “Any party aggrieved by the decisions of the HRB may appeal to the circuit court within 30 days of the decision.” *See* Beaufort Code § 9.10.I and S.C. Code § 6-29-900(A) (“The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.”).

The HRB approved the height, mass, and scale of the Apartment Project when it granted Conditional Approval at its February 10, 2021 meeting. This Conditional Approval, like all other conceptual, preliminary, and final approvals by the HRB, was indisputably a “decision” under the Beaufort Code requiring appeal within thirty days. Petitioners cannot use subsequent phases of the stepped approval process as an opportunity to appeal prior decisions for which the thirty-day deadline for appeal has already passed. Such a “claw back” ability would create uncertainty for the City and property owners by impeding their ability to make further land use decisions based on matters that have already been conceptually, preliminarily, and finally approved.

The Beaufort Code deadline is of critical importance to this Appeal, as it is well-settled that the failure to appeal within the ordinance timeline deprives a circuit court of subject matter jurisdiction to determine such appeal. *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning*

*Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000) (“Nevertheless, the timeliness of an appeal from a zoning board’s decision is a jurisdictional requirement and, as such, may be raised at any time by either party or *sua sponte* by this Court.”); *see also Burnett v. S.C. State Highway Dep’t*, 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969) and Rule 74, SCRPC.

Thus, the Beaufort Code requires the aggrieved party to appeal a decision of the HRB within thirty days of that decision or the court has no subject matter jurisdiction to hear the appeal. Petitioners’ failure to appeal the mass, height, and scale of the Apartment Project decision, part of the Conceptual Approval occurring at the HRB meeting held February 10, 2021, forecloses the Petitioners from bringing it up again. As the Petitioners attack the existence of the Apartment Project itself, rather than a specific issue reviewed for Preliminary Approval by the HRB on December 8, 2021, the present Appeal is untimely and denied.<sup>1</sup>

Finally, the HRB’s Final Approval of the Apartment Project was not appealed, so the Petitioners’ appeal of the prior Preliminary Approval is moot. “A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.” *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667(Ct. App. 2009) (citing *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001)). The present Appeal, regardless of its outcome, cannot have a practical effect on Petitioner’s challenge of the height, mass, and scale of the Apartment Project because the Conditional Approval of the project’s size and additional matters

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<sup>1</sup> The question of whether the Beaufort Code required the Petitioners to appeal the initial Conceptual Approval of height, mass, and scale was decided against the Petitioners in a prior state court lawsuit and affirmed by the South Carolina Court of Appeals following this Court’s entry of a Form 4 Order denying Petitioner’s present appeal. *See Historic Beaufort Foundation v. City of Beaufort, et al*, Unpublished Opinion No. 2024-CP-372, filed October 30, 2024. Thus, as an additional sustaining ground, the Petitioners are collaterally estopped from relitigating that issue now. *See Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164, 166 (1986).

later approved via Preliminary Approval were ratified by the Final Approval occurring July 22, 2022. That decision was not appealed and is now final, making Petitioners' appeal of the HRB's Preliminary Approval moot. For this reason, too, this Appeal is denied.

B. There is Evidence to Support the HRB's Decision.

The Petitioners challenge only the height, mass, and scale of the Apartment Project, which was not a listed discussion item at the HRB meeting on December 8, 2021 because those matters had already been approved at the Conceptual Approval stage. Regardless, there is clear evidence in the record to support the HRB's decision.

A court may not reverse the finding of the HRB unless the [HRB's] findings of fact have no evidentiary support or the [HRB] commits an error of law. *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Furr v. Horry Cnty. Zoning Bd. of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014) (quoting *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565 (2007)). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster Cnty.*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001).

**1. The Petitioners' Liner Building Claim Is Wrong.**

Petitioners contend that Section 4.5.9 of the Beaufort Code requires a Liner Building between a large footprint building, or a building with a frontage of over 100-feet that is held to the same standards as a large footprint building, and primary street frontage. However, Section 4.5.10.B.2 provides an exception, and liners are not required when a large footprint building provides an entry on the primary street frontage and a minimum of 40% clear and unobstructed

glazing along that street. Petitioners also claim there was not 40% clear and unobstructed glazing along Port Republic or Charles Street. However, the HRB specifically granted approval of the glazing.

The decisions of the HRB on these issues are clearly within the discretionary authority of the HRB. What is or is not sufficient glazing is a discretionary call for the HRB that this Court cannot second guess. Petitioners fail to meet their burden. They do not argue that the HRB's decision was arbitrary; rather, they generally disagree with prior HRB decisions that were not challenged. Thus, the HRB decision is affirmed.

## **2. The Petitioners Misstate the Parking Requirements.**

With respect to the standards applicable to large footprint buildings, Beaufort Code Section 4.5.10.B.7.a provides that in T5 districts “[a] minimum of 75% of all parking shall be located behind the primary building or a Liner Building.” The HRB agreed this means 75% of parking proposed on the development site must be behind a primary or liner building that is also on the development site. In 303 Associates’ application, there were no parking spaces proposed to be located on the Apartment Project site. Accordingly, this standard does not apply, and Petitioners’ argument to the contrary lacks merit.

Again, this is a discretionary decision of the HRB as to how the Beaufort Code applies. The Court of Appeals has stated: “We give great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Gurganius*, 317 S.C. at 487. ““The Board[’s] ... construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor.”” *Boehm v. Town of Sullivan’s Island Bd. of Zoning Appeals*, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018),

quoting *Purdy v. Moise*, 223 S.C. 298, 304-05, 75 S.E.2d 605, 608 (1953).

It is a well-settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. Nonetheless, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

*Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999), quoting *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952).

Thus, the HRB decision is affirmed on this basis as well.

**3. The Petitioners' Complaint About the HRB's Failure to Comply with the Beaufort Preservation Manual or Beaufort Civic Master Plan are Discretionary Decisions for the HRB.**

The Petitioners generally complain that the HRB's Preliminary Approval of the Apartment Project does not comply with requirements of the Beaufort Preservation Manual. The Petitioners then go on to compare the size and scale of the Apartment Project to other structures in the Historic District and at times cite provisions of the City's Master Plan.

However, in all cases with respect to these guidelines, the HRB's interpretations of these *suggestive* rules are a part of the HRB's subjective and discretionary role in enforcing generalized standards. The record shows the Apartment Project was compliant with all size, mass, and scale requirements. As there are no express statutory lines that the HRB must follow when interpreting the Preservation Manual and the Master Plan. Instead, the HRB is charged with making a decision that reflects the intent behind these guidelines, and it did just that. This Court cannot substitute its judgment for that of the HRB, and there is nothing arbitrary or capricious about the HRB decision on appeal that would require the Court to reverse the decision on the basis it did not comply with

the City's Preservation Manual and Master Plan. For this reason, too, the HRB's decision is affirmed and Petitioner's Appeal is denied.

C. Petitioners' Claim Regarding ZBOA Approval is Legally Unsound.

Petitioners claim the HRB should not have acted on the Apartment Project because it first required a Special Exception from the City's Zoning Board of Appeals (the "ZBOA") for "Large Footprint Buildings" as defined in the Beaufort Code. Beaufort Code § 4.510 (B)(5). The Court rejects this argument for several reasons. First and foremost, the ZBOA did grant a Special Exception. It simply did not do so prior to the HRB decision on appeal, which as addressed *infra*, is inconsequential.

Second, there is no provision in the Beaufort Code requiring ZBOA approval of any project *prior* to HRB approval. Beaufort 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. There is no support in the Beaufort Code for Petitioner's position that one must come before the other.

Third, the HRB and ZBOA have completely different functions, so there is no overlap or logical sequential process for one before the other. The ZBOA, per Section 10.3.1.C.1 of the Beaufort 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 Beaufort Code Section 13.1. 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 Petitioners' arguments that the HRB was without jurisdiction over these projects or otherwise should have abstained from making a decision. There

is no requirement that the Apartment Project receive a Special Exception from the ZBOA before being proposed to the HRB.<sup>2</sup>

### **CONCLUSION**

Based on the foregoing, the Court hereby affirms the December 8, 2021 decision of the City of Beaufort Historic Review Board with respect to the application of the Apartment Project by 303 Associates. The height, mass, and scale of the Apartment Project were addressed and decided by the City of Beaufort's Historic Review Board well before the Preliminary Approval currently on appeal. The prior HRB decision was by unanimous vote, and there was no challenge or appeal by anyone to that decision. Further, the HRB granted Final Approval of the Apartment Project after this Appeal was lodged, thus mooting it. Finally, Petitioners failed to show any error on the merits of the HRB's decision. For these reasons, Petitioners' Appeal is denied, and the underlying decision of the HRB is affirmed.

**IT IS SO ORDERED.**

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Honorable Edward W. Miller  
Court of Common Pleas, 14<sup>th</sup> Judicial Circuit

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<sup>2</sup> As an additional sustaining ground, the Petitioners litigated and lost the same issue in the prior case referenced in footnote 1, *supra*, so they are collaterally estopped from re-litigating that issue in their present appeal.



Beaufort Common Pleas

**Case Caption:** West Street Farms Llc , plaintiff, et al VS City Of Beaufort ,  
defendant, et al  
**Case Number:** 2022CP0700039  
**Type:** Order/Other

So Ordered

s/ Edward W. Miller