

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

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

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2021-CP-07-01241

ORDER DENYING APPEAL

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SC Court of Appeals

This matter came before me on January 6, 2022 as an appeal (“Appeal”) from the City of Beaufort Historic District Review Board decision of June 9, 2021 by the Petitioner Historic Beaufort Foundation (“Petitioner” or “HBF.”)

Respondents City of Beaufort (“City”) and City of Beaufort Historic District Review Board (“HRB”) (collectively, “City Defendants”) and Respondent Beaufort Inn, LLC (“Beaufort Inn”) filed responses denying the allegations of the Appeal.

All parties filed memoranda in support or in opposition to the Appeal, and a transcript of the proceedings before the HRB was in the record. After consideration of the party’s respective arguments, I DENY the Appeal on the grounds stated herein.¹

¹ With the consent of all parties, this matter was heard simultaneously with a virtually identical appeal of the same HRB decision filed by West Street Farms, LLC and Mix Farms, LLC in Civil Action No. 2021-CP-07-01231. A separate but substantively identical order will be filed in that case.

I. INTRODUCTION

A. General Background

The following background information is in the Record on Appeal. This matter arises from two long-pending development projects in the Historic District of downtown Beaufort: a hotel project (“Hotel Project”) and associated parking garage project (“Parking Garage Project”) being developed by Respondent Beaufort Inn, and the latest decisions of the City’s Historic District Review Board (HRB) (an architectural review board) approving certain aspects of those projects. Notwithstanding years of approvals by these projects at various stages by the HRB starting in 2016, Petitioner waited until after the Parking Garage Project approval was nearly complete, and two years after the Hotel Project received final approval, to file an appeal of the last and latest HRB decisions of June 9, 2021 regarding these projects.

The City of Beaufort’s current development code (“Code” or “the Beaufort Code”) governing development matters was enacted effective June 27, 2017 pursuant to the State of South Carolina’s enabling legislation at S.C. Code § 6-29-710 *et seq.* Prior to the enactment of the Beaufort Code, the City’s development code was known as the Unified Development Ordinance (“UDO”) which had been adopted on January 28, 2003 (last revised September 14, 2012.) The Beaufort Code superseded the UDO when enacted. The UDO provided for a Historic District Review Board (“HRB”) at Section 2.7 which is a board of architectural review established pursuant to the State’s enabling legislation for such bodies at S.C. Code Ann. § 6-29-870 *et seq.* The Beaufort Code, when enacted, similarly provided for the HRB at Section 10.7.

The HRB is essentially a specialized architectural review board, which has jurisdiction throughout the Beaufort Historic District. B.C. § 10.7.2.A. Generally speaking, the HRB reviews alterations to structures in the Beaufort Historic District and “will seek to preserve and

protect the historic character and architectural integrity of Beaufort’s National Landmark Historic District.” B.C. § 10.7.1.B. Among its duties, the HRB reviews and takes action on “any Major Certificates of Appropriateness” pursuant to Section 9.7.1 of the Code. B.C. § 10.7.2.B.1. A “Certificate of Appropriateness” (“COA”) is required before a new structure can be built in the Historic District. B.C. § 9.10.A.1.

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.² Each of these steps requires a public notice and a public hearing by the HRB, with time for citizen comment at these hearings. Even though a COA may be issued by the HRB, the City must still issue building permits for the work to be performed.

Both the UDO and the Beaufort Code are relevant to matters in this Appeal as both the Parking Garage Project and the Hotel Project received their first approvals in 2016 pursuant to the UDO, prior to the enactment of the Beaufort Code, so the two projects have traversed both the former and current codes over the years. Petitioner specifically challenge the application of the UDO and the Beaufort Code to these projects as part of the Appeal.

B. The Parking Garage Project

As mentioned, both the Parking Garage Project and the Hotel Project have been in process for years. The record reflects that the Parking Garage Project was first presented by Beaufort Inn to the HRB at its August 17, 2016 meeting. This was prior to the enactment of the Beaufort Code. After a lengthy meeting with much discussion, the HRB gave unanimous conceptual approval of

² See B.C. § 9.10.2 at diagram stating “HRB Review and Decision (Approved, Approved with Conditions, Denied) 2-3 Phases (Conceptual, Preliminary, and Final are Typical).” Also see, Appendix I to the UDO, which has similar descriptions.

the Parking Garage, calling it a “496 space, 186,000 square foot parking garage.” As noted in the HRB meeting minutes, the mass, scale and height of the proposed Parking Garage were discussed and approved.³ The HRB (including the HBF’s designee on the HRB) then unanimously gave conceptual approval of the mass, height and scale.

No party appealed the decision of the HRB granting conceptual approval of the mass, height and scale of the Parking Garage Project, including the HBF, which had its Executive Director present.

The HRB then at its November 9, 2016 meeting advised Beaufort Inn that a condition of further development of the Parking Garage was the demolition of a structure owned by Beaufort Inn at 310 West Street. The HRB voted unanimously to allow this demolition, and issued a COA dated November 14, 2016 granting Beaufort Inn permission for the demolishing of 310 West Street. By follow up hearing on February 8, 2017, and letter dated February 15, 2017, the HRB issued a COA to Beaufort Inn, LLC to relocate the building at 918 Craven Street, again as part of the Parking Garage Project. The City then issued permits for both this demolition and building relocation, which were completed by Beaufort Inn. There was no appeal of either of these decisions of the HRB.

On September 20, 2017, the HRB met and unanimously voted to grant preliminary approval to the Parking Garage Project as subsequently memorized by the City’s October 9, 2017 letter. The preliminary approval did not change the height, mass and scale issues, which had previously received conceptual approval. Many members of the public, and representatives of

³ Of note for this Appeal and the appeal of the HBF, the Executive Director of the Historic Beaufort Foundation at the time, Maxine Lutz, was present at the meeting and expressly stated “this seems like a wonderful way to develop this parcel,” but then qualified that statement that the HBF was “primarily interested in the height, mass, and scale of a parking garage.” Further, under the UDO, the HBF was able to designate a seat on the HRB, so the HBF’s designee was sitting on the HRB at this time.

HBF, were present and participated in this September 20, 2017 HRB meeting. There was similarly no appeal of this preliminary approval of the Parking Garage Project.

The Parking Garage Project was submitted to the HRB for final approval at its June 9, 2021 meeting. The final approval did not involve any elements of mass, scale or height but dealt with the architectural and aesthetic details set forth in preliminary approval. As noted the HRB's October 9, 2017 preliminary approval letter, the *only things that needed to be addressed* by Beaufort Inn for final approval were:

the type and color of the concrete, a lighting plan, a plan for screening mechanical equipment, removal of awnings, and a certified arborist report and plan for the 'treatment of trees.' The HRB clarified that the current drawings were approved as submitted, and that the applicant was tasked with refining the details listed in order to receive final approval.

Thus, for all practical purposes, the hearing on final approval of Garage Parking Project had a very limited agenda and list of items to be considered.

After a 4 ½ hour hearing, involving many members of the public, the HRB voted 3-1 to give final approval to the Parking Garage Project. The HRB issued a letter dated June 15, 2021 confirming final approval.

C. The Hotel Project

The Hotel Project matter currently being appealed is a request for final approval of a change after certification. That is, the Hotel Project itself had already had final approval and a COA was issued in 2019. Beaufort Inn by its current application simply requested several changes to the original HRB COA approval to construct the Hotel Project. To that end, Beaufort Inn applied for a "Change after Certification" for the Hotel Project on December 25, 2020. Beaufort Inn obtained preliminary approval of the Change after Certification at the HRB's February 10, 2021 Meeting. Thus, the Hotel Project only came up at the June 9, 2021 HRB meeting for final approval of this

Change after Certification.

The items Beaufort Inn requested to be changed from the original approved COA were: (1) slight changes in exterior design for storefronts; (2) revised cornice design, (3) revised portecochere design, (4) change in type of doors, and (5) a proposed new roof deck. The rooftop change was to add a rooftop amenity space. However, in their Appeal, Petitioner attempt to reargue matters decided years ago by the HRB, and in doing so seek to vastly expand the scope of what was actually heard at the June 9, 2021 HRB meeting. The issues complained of now by the Petitioner involve elements of the Hotel Project which were approved in 2019, and which were not challenged or appealed at that time, and an element of the Hotel roof design that already received an unchallenged preliminary approval in February 2021.

The Hotel Project was first presented to the HRB, and it received unanimous HRB conceptual approval, on September 14, 2016. Therefore, like the Parking Garage Project, the Hotel Project began under the UDO. (Indeed, at the HRB meeting of June 9, 2021, the chair of the HRB recognized that the Hotel Project was vested in the UDO.) There was no appeal of the HRB's conceptual approval.

The Hotel Project's preliminary approval was issued unanimously by the HRB on July 25, 2017. There was no appeal of the preliminary approval of this COA approving the Hotel Project design.⁴ The Hotel Project was granted a final approval and Certificate of Appropriateness at the HRB's October 9, 2019 meeting. The HRB issued its Certificate of Appropriateness by letter dated October 9, 2019. There was no appeal of this COA.

⁴ The HRB also required that Beaufort Inn demolish the building at 812 Port Republic Street in order to build the Hotel Project, per the HRB meeting minutes for the November 13, 2019 meeting. The HRB granted Beaufort Inn a COA demolish this building on November 13, 2019. There was no appeal or other challenge from this decision. Beaufort Inn obtained a demolition permit from the City per this COA on December 17, 2020, and completed this demolition.

As noted, the Hotel Project's Change after Certification received preliminary approval at the HRB's February 10, 2021 meeting. This included preliminary approval of the change in the mass and type of roof design. There was no appeal of this preliminary approval.

Notwithstanding Petitioner's claims, the HRB felt that the prior approvals of the Hotel Project were final and could not be changed by the HRB. At the beginning of the June 9, 2021 HRB meeting under appeal, the Chair noted:

I will explain, also, at this point that we are at final, which means mass, scale, and all of those items have all been dealt with and voted upon in advance. We will not be relitigating them, we will not be going back over all of those details today. We're only here today to review the last details for this project and then to make a decision to approve or not.

This is consistent with the view the HRB took of prior approvals of the Parking Garage Project as well. The Change after Certification for the Hotel Project was then approved by a 3-1 vote of the HRB.

II. STANDARD OF REVIEW

The HRB is a board of architectural review as permitted by S.C. Code § 6-29-870 (Supp. 2020) and established by the Beaufort Code. B.C. § 10.7. "The board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance." S.C. Code § 6-29-880. The Beaufort Code provides such authority at § 10.7.2.B.

"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 Enters., LLC v. City of North Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012)); see S.C. Code § 6-29-930(A)(Supp. 2020) ("The findings of fact by the board of architectural review must be treated in the same manner as a finding of fact by a jury, and the court

may not take additional evidence.”) “A reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board's findings.” *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000).

“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 Sols., Inc.*, 414 S.C. at 9, 776 S.E.2d at 757 (alteration in original) (quoting *Wyndham Enters.*, 401 S.C. at 147-48, 735 S.E.2d at 661). “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 Enters.*, 401 S.C. at 148, 735 S.E.2d at 661). “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 *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

III. PETITIONER’S ARGUMENTS

The relief sought by the Petitioner is that the approvals given the projects by the HRB be reversed and remanded by this Court to the HRB for further proceedings. Petitioner interprets further proceedings to mean that all approvals for the two projects must be vacated and Beaufort Inn must start the entire HRB approval process for each project anew. For the reasons stated below, Petitioner’s Appeal is rejected.⁵

Before addressing any of the Petitioner’s arguments, the Court must discuss the overriding legal principle that moots nearly all of the grounds for these appeals, that is, the timeliness of the

⁵ Each basis outlined in this Order for the rejection of the Appeal is an independent and alternative basis for denial of the Appeal, and each basis thus stands on its own.

Appeal with respect to the relief sought by Petitioner and the Court's subject matter jurisdiction to grant the relief requested.

A. Subject Matter Jurisdiction-Timeliness of Appeal

The UDO required any appeal of an HRB decision to be within thirty (30) days of the decision. *See* UDO § 3.20.I (“A person having substantial interest may make an appeal from a Historic District Review Board decision to the Circuit Court of Beaufort County within 30 days after the decision of the Board is postmarked.”) The same is now true of the Beaufort Code; there is still only a thirty-day window to appeal decisions of the HRB. *See* B.C. § 9.10.I (“Any party aggrieved by the decisions of the HRB may appeal to the circuit court within 30 days of the decision.”)⁶

“Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong.” *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 372 (1997). These UDO and Beaufort Code deadlines are of critical importance to the Appeal, as it is well settled that the failure to appeal within the ordinance timelines renders a circuit court with no subject matter jurisdiction to determine such appeal. *Vulcan Materials Co. v. Greenville Cty. 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 anytime 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 S.C.R.C.P. Rule 74.

⁶ Both time periods are as authorized by South Carolina law. *See* 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.”)

Each conceptual, preliminary, and final approval by the HRB for both projects was indisputably a “decision” under the UDO and the Beaufort Code. Thus, if any party was aggrieved by the subject matter of any of those decisions, the time to appeal was within thirty days of that decision per both the UDO and the Beaufort Code. The Petitioner has attacked both process (for example, contesting that extensions were not properly granted) and substance (whether or not the HRB decisions complied with the substantive requirements for the projects) with respect to approvals for these projects.

However, to the extent the matters they attack were decided at an HRB meeting prior to the June 9, 2021 meeting, the time for appealing those decisions has expired and those decisions cannot be challenged now. Nor can Petitioner use the final approval stage to reach back to prior approvals that were not appealed. Such a “claw back” would create uncertainty for both the City and property owners as the City could have to waste resources by having citizen committees re-hear the same matters over and over, and property owners would not be able to make informative decisions relying on City approvals on the use of their property.

The requirement of immediate appeal of HRB decisions on conceptual, preliminary and final approval is consistent with how the HRB itself views its processes. For example, the Petitioner attacks the Parking Garage Project and Hotel Project generally, disagreeing with the mass, scale and height and citing to many provisions of the Code and various documents Petitioner claim are relevant. However, the HRB members specifically discussed whether or not the HRB could revisit prior approvals given to Beaufort Inn for the Parking Garage Project and the HRB specifically decided it could not revisit those approvals, as three of the four HRB members specifically stated that it was not their position to revisit approvals given by the HRB at prior meetings. Therefore, the HRB specifically discussed and rejected Petitioner’s claims that the HRB

could revisit matters already decided favorably to Beaufort Inn in prior HRB meetings. “We give great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995).

This requirement for timely appeals is also consistent with the common law and avoids problematic situations where a property owner has relied on an HRB approval and created vested rights in the HRB approval by expending resources. It is axiomatic that when a government entity makes a land use decision regarding property, the property owner is entitled to rely on that decision and the government cannot later change that decision to the detriment of the property owner. *See e.g., Nuckles v. Allen*, 250 S.C. 123, 130, 156 S.E.2d 633, 637 (1967).

The Court agrees with the position of the City Defendants and Beaufort Inn in this Appeal that the Hotel Project and the Parking Garage Project are on these facts vested with respect to the approvals given. The record is replete with evidence that Beaufort Inn, for both the Hotel Project and the Parking Project, obtained HRB conceptual approvals under the UDO, then obtained later preliminary approvals from the HRB, and were granted demolition and relocation permits from the HRB necessary for Beaufort Inn to proceed with the projects.

It is well established in South Carolina that a project that is begun under one ordinance cannot be stopped or limited by a subsequent change in that ordinance. *Boehm v. Town of Sullivan’s Island Board of Zoning Appeal*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018); *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986). If HRB conceptual and preliminary approval decisions could be challenged at the final approval stage, the

City Defendants could face legal challenges by property owners of interference with the property owner's vested rights.⁷

Thus, even if it wanted to, the HRB cannot revisit and revoke its prior approvals given to Beaufort Inn, as Beaufort Inn has vested rights in the application of the UDO and those approvals. As the City Defendants cannot revoke the approvals, the Petitioner by the Appeal cannot force the City Defendants to do what they are otherwise legally prohibited from doing.

For these reasons, the Petitioner is precluded from appealing any matter that was the subject of the conceptual, preliminary, or final approvals of the Hotel Project, as final approval was granted to that project in October 2019. Likewise, Petitioner is precluded from appealing any matter that was the subject of the preliminary approval of the Change after Certification of the Hotel Project on February 10, 2021.

⁷ “Vested rights under zoning ordinances are undergirded by the same constitutional footing which precludes retroactive application of zoning ordinances.” *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986). However, Petitioner argues that Beaufort Inn may not claim a vested right, even though the City Defendants concede it has vested rights in the application of the UDO to the project, because Beaufort Inn has failed to comply with the Vested Rights Act, S.C. Code § 6-29-1510, *et. seq.* (“VRA”), and therefore it obtained no vested rights. This is incorrect for several reasons. First, the VRA nowhere states that it is the exclusive method of establishing vested rights by a property owner in South Carolina. It is well settled in South Carolina that a statutory scheme creating a remedy of some type is not deemed to create an exclusive remedy unless the statute expressly so provides. *See e.g., Tilley v. Pacesetter Corp.*, 333 S.C. 33, 40–41, 508 S.E.2d 16, 20 (1998)(creation of specific remedy by statute did not mean it was the sole one at law); *Pinckney v. Pettijohn Builders, Inc.*, 289 S.C. 405, 407, 346 S.E.2d 533, 534 (Ct. App. 1986)(Collection of Rent by Distraint Statute not exclusive remedy); and *Wimberly v. Barr*, 359 S.C. 414, 419, 597 S.E.2d 853, 856 (Ct. App. 2004)(timber cutting statute not the exclusive remedy). Conversely, where the legislature intends a statute to create an exclusive remedy, it has expressly said so. *See e.g., Dickert v. Metro. Life Ins. Co.*, 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993)(workers compensation is exclusive remedy); *Wimberly v. Barr*, 597 S.E.2d at 857 (S. C. Tort Claims Act is exclusive remedy.) North Carolina, with its similar vested rights act, has recognized that its vested rights act is not meant to be the sole method of establishing vested rights, and that the traditional framework of substantial reliance on municipal actions is still an avenue of relief for property owners. *Simpson v. City of Charlotte*, 115 N.C. App. 51, 56, 443 S.E.2d 772, 776 (1994). The same reasoning applies here; the South Carolina Supreme Court has recognized “the purpose of the Act was to protect, preserve, and create vested rights in development permits.” *Grays Hill Baptist Church v. Beaufort Cty.*, 431 S.C. 630, 640, 850 S.E.2d 29, 34 (2020). Limiting the ability of a property owner to acquire vested rights to those under a statutory scheme is anathema to the purpose for the VRA. The VRA merely provides another vehicle by which a property owner and developer can achieve some certainly in the development process—but it is not the only method.

The only issues that can be subject to any appeal by Petitioner are those matters before the HRB for the first time at the June 9, 2021 meeting and were additional design changes required by the HRB after preliminary approval of the Change after Certification request of Beaufort Inn. That included the proposed roof deck that was contested at the June 9, 2021 HRB hearing. As noted, the only matter at issue in the HRB June 9, 2021 hearing was final approval of the design changes to the roof and other parts of the Hotel Project, but Petitioner only challenges the roof design changes from that hearing—something that the HRB had already granted preliminary approval for at its February 10, 2021 hearing. Therefore, all of Petitioner’s Appeal with respect to the Hotel Project is time barred.

Likewise, the Petitioner is precluded from appealing any matter that was the subject of the conceptual and preliminary approvals of the Parking Garage Project, and Petitioner can only appeal those matters decided for the first time at the HRB’s June 9, 2021 meeting. That in this case would be just those matters that the HRB had to review in order to provide final approval to the Parking Garage Project.

B. The HRB’s Final Approval Regarding the Change after Certification of the Hotel Project is supported by Evidence in the Record.

Petitioner at the June 9, 2021 HRB meeting did not directly challenge any of these changes to the Hotel Project except the rooftop change. Mr. Graham Trask complained at the meeting about mass and scale of the entire Hotel Project, not just the matters at issue with respect to the changes proposed at the meeting. Trask also claimed that the new “rooftop bar increases the size and scale of this hotel by 25 percent because it’s a 4th floor.” The HRB chair acknowledged that the HRB would consider that issue, but not the original mass and scale of the Hotel Project.

However, this claim by Trask was refuted by the Hotel Project design architect, Ken

Ramsey, who pointed to the plans and said that a 4th floor was not being added and the size of the building was not being increased by 25%. The HRB obviously accepted Mr. Ramsey's testimony over the opinion of Mr. Trask, as it approved Beaufort Inn's application. Assessing development plans, and differing interpretations of those plans, is part of the normal function of the HRB. In this case, after making such assessment, the HRB decided in favor of the applicant. There was clearly 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.)

C. The HRB Properly Granted the Parking Garage Project Final Approval.

Petitioner only advance two arguments with respect only to the Parking Garage Project. First, it argues that the time period for a final approval by the HRB had run, and so final approval should not have been granted. Second, it disagrees with the HRB's decision almost entirely on matters that were conclusively established at the conceptual and preliminary approval stages—that is the scale, size, height and mass of Parking Garage Project.

1. **There was no error in the HRB accepting the extensions.**

Petitioner argues that the prior approvals granted to Beaufort Inn for the Parking Garage Project expired before the June 9, 2021 HRB meeting, and thus the application for final approval was not properly before the HRB. Petitioner asserts that the UDO did not allow for an extension totaling more than 18 months, and there was more than an 18 month gap between the preliminary approval of the HRB on September 20, 2019 and the June 9, 2021 HRB meeting. Petitioner claims that the approvals granted previously on the Parking Garage Project had thus expired, and so Beaufort Inn was required to start the Parking Garage Project approval process again.

However, the City granted two extensions to Beaufort Inn, one by letter of June 21, 2019 and one by letter of July 1, 2020, pursuant to § 9.1.4 of the Beaufort Code, which allows up to five one-year extensions. There are no time limitations on extensions for conceptual, preliminary, or final approvals for COAs other than those stated in § 9.1.4. See B.C. § 9.1.9.C. Thus, the City was within its discretion to provide such extensions, and such extensions were accepted by the HRB in its discretion. See *Gurganiou v. City of Beaufort*, 454 S.E.2d at 916

Petitioner cites to § 1.4.2 (B) of the Beaufort Code stating that the City Defendants and Beaufort Inn were required to follow the UDO time limits on extensions. However, that is not what § 1.4.2(B) requires. This section does not address extensions of the application process other than to say the City “shall review and decide the application in good faith and in accordance with any time frame established by the prior standards.” This language clearly requires the City not to use the crossover of applicable codes to delay a project; otherwise, there would be no need to reference a “good faith” requirement.

Clearly the HRB did not construe § 1.4.2 (B) to bar final approval of the Parking Garage Project. Given the many interrelated acts by the City requiring approvals on this Project at various stages, as well as interconnected approvals needed for existing structure demolition and relocation, it would be inequitable and patently unfair for the HRB to give Beaufort Inn written extensions and then have this Court vacate those extensions. Further, as noted, Beaufort Inn has constitutionally protected vested rights in the two projects; the change in the ordinance cannot in any way impair those vested rights. *Boehm v. Town of Sullivan’s Island Board of Zoning Appeal*, *supra*. The application of timelines in the UDO that do not exist or are no longer in the ordinance clearly would impair such rights. Simply put, § 1.4.2 (B) cannot be construed to make a project *harder* to develop simply because of a crossover of codes. That would not be the “good faith”

required of the City.

Further, Petitioner ignores B.C. § 1.4.4.A: “Other Approved Development Permits and Approvals.” Section 1.4.4.A provides:

Any other development that has received approval of a development permit or approval of a portion of a development—including any required Traffic Impact Analysis and/or Archaeology Survey—before the effective date of this chapter or any amendments thereof **may** be carried out in accordance with the terms and conditions of the development permit or approval and the procedures and standards in effect at the time of the approval, provided the permit or approval does not expire and otherwise remains valid. If significant changes are made to the development, associated studies and surveys required as part of the development process shall be redone. If the development permit or approval expires, is revoked (e.g., for failure to comply with time limits or terms and conditions), or otherwise becomes invalid, any subsequent development of the site shall be subject to the procedures and standards of this Code.

(Emphasis added.) In statutory construction, the use of the word “may” means the action is permissive. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980)(“The use of the word ‘may’ signifies permission and generally means that the action spoken of is optional or discretionary.”); *Cricket Store 17, LLC v. City of Columbia Bd. of Zoning Appeals*, 428 S.C. 270, 276, 834 S.E.2d 209, 212 (Ct. App. 2019).

B.C. § 1.4.4.A clearly gives the HRB the *discretion* to apply the UDO or the Code with respect to timelines it applied to the Parking Garage Project. Thus, the HRB staff was free to apply the Beaufort Code timelines per this section of the Code, and was not required to follow the UDO.⁸ There was no error in the HRB allowing the extensions to stand and the Parking Project

⁸ To the extent that B.C. § 1.4.4.A may be interpreted to conflict with § 1.4.2 (B), the interpretation of the HRB giving precedence to § 1.4.4.A must be given great weight. “We give great deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). “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).

to move to final approval.

2. There was evidence in the record supporting the HRB's final approval.

Second, Petitioner complains about the same matters that were approved at the conceptual and preliminary stages of the HRB approval process, the scale, size, height and mass of the Parking Garage Project. Petitioner claims there was no evidence before the HRB supporting the scale, size, height and mass of the Parking Garage Project. Petitioner by this position demonstrates the fallacy of its arguments. There were not thousands of pages of plans, specifications, and reports before the HRB because that back up documentation was presented to the HRB many years before at the prior approval stage. Nonetheless, from a review of the record before the Court, it is clear that there is sufficient evidence to support the HRB's final approval of the Parking Garage Project, so that its decision could in no way be characterized as arbitrary or capricious or contrary to law.

D. There is No Requirement that the HRB Defer Decisions with Respect to Matters under the Jurisdiction of the City's Zoning Board of Appeals.

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 Defendants, 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.*⁹

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

⁹ This Appeal is but one part of a recent fight against the Hotel Project and the Parking Garage Project by West Street Farms, LLC and Mix Farms, LLC (collectively, the “Trask Petitioner”), two entities owned or controlled by Graham Trask, a real estate developer with property near the site of the Hotel Project and the Parking Project. Prior to this Appeal, the Trask 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 they do here: that the Beaufort Code requires the Hotel Project and the Parking Garage Project to have Special Exceptions as Large Footprint Buildings.

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.

IV. CONCLUSION

For the reasons aforestated, the Court DENIES the Appeal.

The Honorable Bentley Price

January ____, 2022
_____, South Carolina



Beaufort Common Pleas

Case Caption: Historic Beaufort Foundation VS Beaufort City Of , defendant, et al

Case Number: 2021CP0701241

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766