THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT
FOURTEENTH JUDICIAL CIRCUIT

The Honorable Bentley D. Price

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

Historic Beaufort Foundation, ...Appellant,

v.

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

AND

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

v.

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

PETITION FOR REHEARING

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INTRODUCTION

The denial of this appeal warrants a rehearing under Rule 221, SCACR. On October 30, 2024, the Court of Appeals issued a summary opinion affirming the decision of the Court of Appeals following oral argument on September 24, 2024. The opinion of the Court overlooked or misapprehended the factual issues and the legal arguments specified more fully below. Specifically, the Court erred in concluding that the appeal was untimely because the Appellant was not required to appeal conceptual or preliminary approvals under a long-established precedent that holds that only final judgments are subject to appeal. The parking garage did not receive final approval until June 9, 2021, and this appeal was timely filed within thirty (30) days of that decision. Moreover, any final approval issued for the Hotel project before June 9, 2021, does not bar this appeal because the Hotel design approved at that meeting was materially different from any design approved before that date.

Instead of dismissing this appeal on procedural grounds, the Court should grant a rehearing in this matter to consider the significant substantive issues raised by the Appellants. Neither the Parking Garage nor the Hotel had the requisite valid approvals from the City of Beaufort for the HRB to proceed to consider these applications. Beyond that, the merits of each of these structures fail to meet even the minimal threshold of requirements for approval in Sections 4 and 9 of The Beaufort Code and the Beaufort Preservation Manual. The Board failed as a matter of law to fulfill its responsibility under The Beaufort Code in approving these applications. For these reasons, and those articulated below, the Appellants respectfully request a rehearing pursuant to Rule 221, SCACR.

BACKGROUND

This is a consolidated appeal of the HRB's approval of two projects in the Town of

Beaufort's National Historic Landmark District for the construction of a 77-unit hotel building, including a rooftop bar and restaurant ("Hotel"); and for the construction of a parking garage ("Parking Garage"). The current ordinance in the City of Beaufort that governs development and building approvals is The Beaufort Code, which was adopted effective June 27, 2017, and was updated on July 10, 2018. (R. p. 791 – p. 777). The Beaufort Code repealed and replaced the Unified Development Ordinance ("UDO") which governed development and building prior to that date. (Id.).

The Parking Garage

There are three levels of approval were required to achieve a Certificate of Appropriateness for the Garage: Conceptual, Preliminary, and Final. On August 17, 2016, the Board granted conceptual approval with conditions for the Parking Garage. (R. p. 047). On July 12, 2017, the Board approved a motion for the Parking Garage to undergo significant revision and come back to the Board with a simpler design. (Id. at p. 661). By July 2017, The Beaufort Code had already been approved and was in effect. On September 20, 2017, the Board gave preliminary approval for the Parking Garage plan with various conditions. (Id. at p. 559). The then-current drawings were approved as submitted, and the Applicant was tasked with refining the design details to receive final approval. (Id.).

Under either the UDO or The Beaufort Code, preliminary approval for the Parking Garage expired on March 20, 2019, 18 months after the September 20, 2017, preliminary approval date. David Prichard, on behalf of the City, in two letters dated June 21, 2019, and July 1, 2020, erroneously issued an extension of a "Certificate of Appropriateness" for the Parking Garage that had never been issued and did not exist. (R. pp. 676-677). The Parking Garage never received a "Certificate of Appropriateness" from the Board, a requirement under both the UDO and The

Beaufort Code. Under either ordinance, a Certificate of Appropriateness could only be issued after final approval, which the Parking Garage never achieved. Also, in those two letters, David Prichard referenced The Beaufort Code section 9.1.4 as the governing code. Mr. Prichard did not reference the UDO. (Id.).

The Hotel

Like the Garage, the Hotel was subject to several levels of review prior to final approval. The Hotel was originally presented for review and approval to the HRB on September 14, 2016. At this time, HRB staff advised the LLC to revise its plans, including the elevation of the Hotel, based on staff and board comments and return to the HRB for another conceptual review. The LLC made its new submission of the project to the City in 2017. The Beaufort Code was adopted on June 27, 2017 and replaced the UDO as of that date. Lauren Kelly, representing the City, originally presented the Hotel project in a July 12, 2017, HRB meeting, approximately two weeks after the Beaufort Code was adopted. The approved official July 12, 2017, minutes quote Lauren Kelly saying, "this project (the Hotel) is being evaluated under the new Beaufort Code," confirming that the Hotel was considered under the Beaufort Code, and not the UDO. (R. p. 661). (The July 12, 2017 Meeting Minutes included in the Record on Appeal to the Circuit Court at p. 200 are incomplete. Counsel for Respondents have consented to Appellants' request to supplement the record pursuant to SCACR 212(b) in order to include in the record a complete copy of the July 12, 2017 Meeting Minutes).

During this July 12, 2017, meeting, the HRB granted the Hotel preliminary approval. (Id. at p. 666). According to the Beaufort Code, such preliminary approval expired on January 12, 2019, i.e., 18 months after the HRB issued such preliminary approval. The Applicant's next request for approval for the Hotel, however, was almost 27 months later, on October 9, 2019, for a

"Certificate of Appropriateness." Notably, the "Certificate of Appropriateness," dated October 9, 2019, and signed by John Dickerson, the then chairman of the Board, specifically referenced the Beaufort Code and its Section 9.4.1 as the governing authority. It did not reference the UDO at all. (R. p. 047).

On June 9, 2021, the LLC appeared before the Board seeking two approvals: (a) Agenda Item No. IV(C) 812 Port Republic Street: Change after Certification for the Hotel, and (b) Agenda Item No. IV(D) 918 Craven Street, New Construction for the Parking Garage. (R. p. 160 – p. 245). The Board approved these plans on June 9, 2021. (Id. at pp. 244-245 – pp. 307-308).

PROCEDURAL HISTORY

After the Board's June 9, 2021, final decision, Appellants each timely appealed the Board's final decision to the Circuit Court pursuant to S.C. Code Ann. § 6-29-900 and The Beaufort Code Section 9.10. A hearing was held on January 6, 2022, at the Beaufort County Court of Common Pleas. On January 20, 2022, the Honorable Bentley D. Price issued an order denying the appeals of HBF and West Street/Mix Farms. (R. p. 649). The Appellants jointly filed a motion to reconsider on January 28, 2022, which was denied on February 11, 2022. HBF and West Street/Mix Farms each filed a notice of appeal of the Circuit Court decisions to the Court of Appeals on March 11, 2022. The appeals were consolidated by the Court of Appeals and the parties were informed of that by a letter from the Deputy Clerk of Court dated March 24, 2022.

STANDARD OF REVIEW

The Court of Appeals' standard of review of a board of architectural review's decision is the same as that of the trial court. *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 479–80, 366 S.E.2d 15, 18 (Ct.App.1988) (holding the appellate court will not reverse the circuit court's affirmance of the board unless the board's findings of fact have no evidentiary

support, or the board commits an error of law). In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the evidence. *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) (citing *Gurganious v. City of Beaufort,* 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct.App.1995).

ARGUMENT

1. THE APPEAL WAS TIMELY

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

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

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

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

Likewise, the cases citing that statute do not provide any clarity as those decisions do not address the issue of whether a HRB decision granting conceptual or preliminary approval is subject to immediate appeal. To the extent that the prior order of this Court deemed this argument as abandoned for failure to cite controlling authority, the Appellants believe that this is a novel question on which there is no precedent.

The language of the statute indicates "any decision" of the board may be appealed to the Circuit Court and does not specify whether that appeal must be from preliminary, conceptual, or final approvals. S.C. Code Ann. § 6-29-900. It is a fair reading of the statute's plain language that if any decision may be appealed, then preliminary, conceptual, or final approvals may all be appealed without regard to whether appeals are taken of the preceding approval. If the Respondents' (and apparently the Court's) reasoning is adopted, however, all decisions, including a conceptual decision, which can be far from final and bearing little resemblance to the final decision, must be appealed if the interested party is to be allowed to appeal any later decision of the board.

The reasoning adopted by the Court below and highlighted by the Respondents in their brief is contradicted by well-established legal principles of finality and ripeness. Generally, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final. *Mid-State Distribs., Inc. v. Century*

Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). Additionally, an issue is not ripe if it is "contingent, hypothetical, or abstract" *Jowers v. S.C. Dept of Health and Envtl. Control*, 423 S.C. 343, 815 S.E.2d 446 (2018), citing *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

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

By their very nature, the decisions of the HRB involve value judgments that change and evolve as a project moves through the complex approval process. Evaluating architecture in a piecemeal manner, as contemplated by the three application stages, is complex. The height, mass and scale of buildings cannot truly be evaluated without looking at other design elements in total. The very names "conceptual" and "preliminary" demonstrate that any approvals in those categories are prime examples of decisions that are not final and an appeal from such a decision would likely be met with a claim that it is not ripe because in both instances the design and details of the structures are likely to change. A clear example of that is evident in the record before the

Court. On July 25, 2017, a letter was issued to the Respondent's architect, Goff D'Antonio Associates, stating that the Board granted preliminary approval of the Hotel with conditions at the July 12, 2017 meeting. (R. 574-575). However, by the time that Respondent received final approval of the Hotel on June 9, 2021, not only was the design different but it was prepared by a different architecture firm. (R. 590-611).

The only point in the process in which the issues change from abstract architectural and design concepts to concrete decisions that can be meaningfully reviewed in court is at the final approval stage. Moreover, requiring interested parties like the Appellants to appeal every conceptual and preliminary decision at every stage of the process to ensure timeliness would exponentially increase the demands on municipal resources and create much more certainty. Therefore, the Respondents' assertion that the appeal is untimely is unfounded. The Court below erred in finding that the Appellants' challenge to decisions made during the conceptual and preliminary approvals were not timely and the Appellants respectfully request that this Court reconsider its per curiam decision. Further, Appellants respectfully ask this Court to decide the significant substantive issues discussed fully in the briefs previously submitted, which are summarized in the following sections.

2. FINAL APPROVAL SHOULD HAVE BEEN DENIED BECAUSE ANY PRIOR APPROVALS OF THE HOTEL EXPIRED BEFORE THE HEARING

At the outset of the hearing on June 9, 2021, on the Hotel application, the Chair announced that the application would be considered under the Unified Development Ordinance ("UDO"). The Beaufort Code was adopted on June 27, 2017 and replaced the UDO as of that date. The Hotel Project was originally presented in a September 2016, Board meeting, before The Beaufort Code was adopted. The official July 12, 2017, minutes indicate that the Hotel "is being evaluated under the new Beaufort Code," and by extension not the UDO. On July 25, 2017, a letter was issued to

the applicant Goff D'Antonio Associates for the LLC, from the City and signed by Lauren Kelly, stating that the Board granted preliminary approval with conditions. These minutes also state that "the approval expires 12 months from the date of the letter (July 25, 2017) unless the applicant has an active submittal pending review by staff and/or HRB. Under the UDO, specifically item 3.1.M.3c, conceptual and preliminary approvals expired after 18 months and cannot be renewed beyond 18 months. Under table 9.1.4 of The Beaufort Code any approval under that ordinance expired 24 months thereafter. However, the next approval for the Hotel was not issued until nearly 27 months later, on October 9, 2019, when the owner was issued a "Certificate of Appropriateness." Therefore, the Hotel's preliminary approval expired under the terms of the ordinance prior to the alleged approval of the Hotel's "Certificate of Appropriateness."

Since the Hotel had no valid preliminary approval under either the UDO or The Beaufort Code on June 9, 2021, and it was legal error for the Board to consider the application for final approval as a necessary legal prerequisite had not been satisfied. The Court of Appeals should reconsider its affirming the Circuit Court on this issue.

3. ANY APPROVAL OF THE GARAGE EXPIRED PRIOR TO JUNE 9, 2021

The approval of the Parking Garage suffers from a similar legal infirmity. On August 17, 2016, the Board granted conceptual approval with conditions for the Parking Garage. Assuming, without conceding, that the Garage was conceptually approved under the UDO, the Parking Garage received preliminary approval from the City as evidenced by a letter written by Lauren Kelley, former project development planner for City of Beaufort dated October 9, 2017, which referenced a September 20, 2017 Board meeting. A copy of that letter was included in the application for the June 9, 2021 meeting at page 195.

The preliminary approval for the Parking Garage was granted after the UDO was repealed

and replaced by The Beaufort Code. Under the terms of the UDO and the Beaufort Code that approval expired on March 20, 2019, i.e., 18 months after the issuing of the preliminary approval and could not be renewed. Consequently, the Parking Garage application was not eligible for consideration of final approval at the June 9, 2021, hearing, because the preliminary approval for the Garage expired over two years before the Board heard the final approval application and the Court of Appeals should reconsider its per curium opinion affirming this decision.

4. THE BOARD NEVER ISSUED A CERTICATE OF APPROPROPRIATENESS FOR THE GARAGE

The Board granted final approval for the Parking Garage based on an erroneous understanding that the Parking Garage had previously been granted a "Certificate of Appropriateness." The consideration of a Certificate of Appropriateness is not a mere technicality. It is a substantial compliance issue and vital to the Board's approval process as shown by the language of Section 9.10(c) of The Beaufort Code which details the process and criteria for granting a Certificate of Appropriateness.

David Prichard, Director of Economic Development and Community Planning for the City of Beaufort issued two letters dated June 20, 2019, and July 21, 2020, which were included in the materials for the June 9, 2021, meeting which purported to extend a "Certificate of Appropriateness" for the Parking Garage that never actually existed in the first place. To further compound the legal confusion, Mr. Prichard referenced section 9.1.4 of The Beaufort Code as the basis for the extensions. Mr. Prichard did not reference the UDO. Clearly, it was error for the Board to consider the application for the Parking Garage, since the prior approval under the UDO had expired, and any further action relating to the parking Garage would have to proceed under The Beaufort Code. The Court of Appeals should reconsider its opinion affirming the Circuit Court.

5. NEITHER PROJECT SHOULD HAVE BEEN CONSIDERED WITHOUT A SPECIAL EXCEPTION FROM THE BOARD OF ZONING APPEALS

Both the Hotel and the Parking Garage, respectively, amount to a Large Footprint Building as that term is defined under The Beaufort Code. Section 4.5.10 (B)(5) of The Beaufort Code requires a Large Footprint Building to secure a Special Exception from the Zoning Board of Appeals ("ZBOA"). According to the rules that the City wrote for itself, neither application could proceed before the Board without satisfying the condition precedent of obtaining a Special Exception from the ZBOA. However, the applicant did not request or receive a Special Exception for either project. Absent the Special Exceptions required by Section 4.5.10 (B)(5) of The Beaufort Code the Board had no jurisdiction to consider either application approved on June 9. The Court of Appeals should reconsider its opinion affirming the Circuit Court on this issue.

6. THE FACTUAL RECORD DOES NOT SUPPORT APPROVAL

In addition, the Circuit Court erroneously denied the appeal as Respondent, Beaufort Inn, LLC, failed to present any evidence to the Board that the Hotel or Parking Garage qualified for approval under the guidance documents that govern the Board's decision-making as a matter of law, as provided in The Beaufort Code, Section 9.10.2 (B).

The Garage plan that was approved is 4 levels tall with a front facade of approximately 300 linear feet, square footage of approximately 160,000 square feet, volumetric mass approaching 3 million cubic feet, and accommodates over 475 vehicles. The Hotel has a fourth-story roof-top bar which was a new element first presented during the meeting on June 9th, a front façade of approximately 170 linear feet, square footage of approximately 50,000; and volumetric mass of approximately 1 million cubic feet. At the hearing on June 9, the 4th floor rooftop bar was treated as previously approved even though the addition of that element indisputably affected the height, scale, and mass of the Hotel. The applicant did not present evidence on those issues and the Board

approved the Hotel without giving any consideration to the effect of the 4th floor on the Hotel's height, scale, and mass. Each of these structures individually are multiple times larger by every measure than any other building in historic downtown Beaufort. City staff requested scale models of these buildings in 2016, but the applicant was never required to present models illustrating the true impact of the Hotel and the Garage on the historic district.

The Parking Garage and the Hotel are both infill projects which are subject to special criteria addressed in Section 4.1 of The Beaufort Code. The Section 4.1 criteria include preservation of Beaufort's National Historic Landmark District while permitting appropriate growth. Section 4.7.2 of the Code is specific to the National Historic Landmark District. This section outlines principles for compatible infill in the National Historic Landmark District.

The Parking Garage and the Hotel, even in the absence of the Hotel's proposed fourth story rooftop bar, are not compliant with any of the stated points of 4.1 Purpose and Intent of Infill Projects or the principles of Section 4.7.2 given their outsized proportions and are completely out of character in Beaufort's National Historic Landmark District.

Additionally, there was no meaningful review of the architectural details of either the Hotel or the Parking Garage on June 9. The applicant never constructed a sample wall to allow City staff or the Board an opportunity to review the building elements, construction materials or proposed workmanship. The Hotel was granted approval with little or no details about the solar panels that will be installed on the building. Section 4.2.3 of The Beaufort Code provides that [i]n addition to the standards and guidelines in this article, any development located within the Beaufort Historic District is subject to the standards, guidelines, and procedures established in Section 9.10. In Section 9 of The Beaufort Code, 9.10: CERTIFICATE OF APPROPRIATENESS outlines the following specific criteria that infill projects in the Historic District must meet in order to be

approved to include: a) Compatibility; b) No Adverse Impact; and c) Consistency with Adopted Plans. Neither the Parking Garage nor the Hotel are compatible in downtown historic Beaufort given their height, scale, and mass; they will each individually have irreparable adverse impact on the character of downtown Beaufort. Moreover, the director of its State Historic Preservation Office, W. Eric Emerson, Ph.D., wrote a letter in August 2016 discouraging the approval of the Parking Garage.

9.10.2.B.1 then specifically required that the Board utilize the "Beaufort Preservation Manual," August 1979, and the "Beaufort Preservation Manual, Supplement," August 1990 in evaluating infill projects. The manual specifically mandates that new construction have appropriate scale, absolute size, massing, and proportions to the surrounding buildings and townscape and includes illustrations of examples of prohibited buildings. The size and incompatibility of Hotel and the Parking Garage are immensely beyond even the illustrated prohibited structures.

Sections 4, 9, and the Beaufort Preservation Manual all clearly prohibited Board approval of the Parking Garage and prohibited a fourth story rooftop bar for the Hotel. It is also important to note that the HRB cannot take economics or use into consideration in approving projects. The UDO, which has been superseded by The Beaufort Code, also required that the Board evaluate infill buildings and structures in the same manner as The Beaufort Code to ensure their: compatibility, no adverse impact, and consistency with adopted plans. The UDO also required that the Board abide by the "Beaufort Preservation Manual."

The applicants did not present evidence before the Board, or make arguments to the Board, establishing even a minimum compliance with any of the guidelines the Board is required to apply in its decision-making under The Beaufort Code (or the UDO, even if it were to apply). Based on

this dearth of evidence before the Board, the Board erred in granting the relief requested by the applicants in the absence of even a minimum threshold of evidence by the applicant. The Court of Appeals should reconsider its order affirming the ruling of the Circuit Court.

7. THE DEVELOPER DID NOT HAVE A VESTED RIGHT TO DEVELOP/CONTINUE THE PROJECTS

Finally, the Court erred in finding that the LLC had vested rights to develop and/or continue the projects because of various factors including applications, decisions, approvals, and permits submitted and approved, agreements and assurances by the City and the expenditure of funds by the LLC. None of those factors are sufficient to confer vested rights. Under the Vested Rights Act, a vested right is established for two years upon the approval of a site-specific development plan. *Id*. § 6-29-1530 (A)(1).[1] That Act generally requires the local government to establish a point in time in the zoning or land development plan approval process, before issuing the building permit, at which the landowner's right to use or develop vests, *id*. Section 6-29-1540 provides criteria for the standards and procedures in local land development ordinances and regulations. Under § 6-29-1560 of the Vested Rights Act, the issue of significant owner and government acts only comes into consideration if the local governing body does not have local development ordinances or regulations. The City of Beaufort adopted those standards and procedures, and therefore the factors relied upon by the Court below do not apply in this instance to justify a finding that the LLC had vested rights. The Court of Appeals should reconsider its opinion affirming the Circuit Court's ruling on this issue.

CONCLUSION

Appellants respectfully request a rehearing pursuant to Rule 221, SCACR on the grounds

[1] In the Act a site specific development plan is defined as a plan describing "with reasonable certainty the types and density of uses for specific property," and may include a "planned unit development; subdivision plan; preliminary or general development plan; variance; conditional use or special use permit plan;" etc. *Id*. § 6-29-1520(9).

that the appeals were timely and should be considered on the merits. The Court of Appeals should reconsider its opinion affirming the decision of the Circuit Court, which should have been reversed for the reasons argued herein.

Respectfully submitted,

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