ALAN WILSON
ATTORNEY GENERAL

April 1, 2014

Joshua A. Gruber
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100 Ribaut Road
P.O. Box 1228
Beaufort, SC 29901

Dear Mr. Gruber:

By your letter dated December 9, 2013 you ask whether two joint resolutions are applicable to an agreement between Beaufort County and Del Webb Communities, Inc. Per your letter your explain:

> In 1993 Beaufort County entered into a contractual Development Agreement ("Agreement") with Del Webb Communities, Inc. The Agreement was originally approved to run a period of twenty (20) years from the date of enactment of the Agreement, December 16, 1993, expiring on December 16, 2013. A copy of this document has been enclosed for your reference. The Agreement was created pursuant to S.C. Code Ann. §6-31-10 through 6-31-160 as amended in June 1993 entitled South Carolina Local Government Development Agreement Act.
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> In 2010, the South Carolina General Assembly passed the Joint Resolution to Extend Certain Government Approvals Affecting the Development of Real Property Within the State (H4445) and in 2013 it passed the Joint Resolution to Suspend the Running of Certain Governmental Approvals Affecting the Development of Real Property within the State for the Period Beginning January 1, 2013 and Ending December 31, 2016 (H3774). These actions were done to suspend the running period of certain development permits as defined in those Joint Resolutions and exempted others such as those issued by the United States or federal law. The primary purpose of these Resolutions is to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by tolling the term of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources.

In light of this you inquire "whether or not the 2010 and 2013 Resolutions are applicable to the above referenced Agreement entered into between Del Webb and Beaufort County." You further ask, "if the Resolutions are applicable and the natural expiration date of the Agreement is December 16, 2013, how long must the Agreement be extended?" Our response follows.

Law

The South Carolina Local Government Development Act

In 1993, the General Assembly passed the South Carolina Local Government Development Agreement Act. S.C. Code Ann. §§ 6-31-10 et seq. (2004). As stated in Section 6-31-10, and noted by this Office, "the purpose of the Act is to provide certainty to developers by allowing them to enter into agreements with local governments under which if the local government approves the development plan, the developer is protected against changes in local laws that may impact the development process." Op. S.C. Atty. Gen., 2009 WL 276747 (January 8, 2009).

Section 6-31-10 of the Code lists the General Assembly's legislative intent and findings stating that in addition to providing certainty to developers, the general public benefits from developing agreements because they can result in, among other things, "affordable housing, design standards, and on and off-site infrastructure" since these benefits can be negotiated in return for the vesting of development rights. S.C. Code Ann. § 6-31-10(B)(4) (2004). Other benefits of development agreements noted by the General Assembly include facilitation, cooperation and coordination between various governmental agencies and providing developers with "reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enforce laws and regulations which promote the public safety and general welfare of the citizens of our State." S.C. Code Ann. §§ 6-31-10(B)(5)-(6) (2004).

As mentioned above, the Act achieves its legislative purpose by authorizing local governments to enter into and approve development agreements with developers pursuant to the terms of Chapter 31.[1] See S.C. Code Ann. § 6-31-30 (2004) ("A local government may establish procedures and requirements, as provided in this chapter, to consider and enter into development agreements with developers. A development agreement must be approved by the governing body

[1] Some requirements Chapter 31 places on local governments in regards to the process of entering into and approving development agreements include public hearings on the adoption and major modification of the development agreement (S.C. Code Ann. § 6-31-30 and § 6-31-50); describing the types of property that are subject to development agreements and the amount of time an agreement may last (S.C. Code Ann. § 6-31-40 (2004)); defining what a development agreement must and may provide in the agreement (S.C. Code Ann. § 6-31-60 and § 6-31-70 (2004)); and periodic review of compliance with the terms of the agreement (S.C. Code Ann. § 6-31-90 (2004)).

of a county or municipality by the adoption of an ordinance."). Certainty is provided to developers in the form of Section 6-31-80(A) of the Code which generally explains that "the laws applicable to development of the property subject to a development agreement, are those in force at the time of execution of the agreement." S.C. Code Ann. § 6-31-80 (2004). Exceptions to the general rule of Section 6-31-80(A) are mentioned in Section 6-31-80(B)(1)-(5) of the Code.[2]

As stated in your letter and mentioned in the agreement attached to your letter, Beaufort County entered into a twenty year development agreement with Del Webb Communities, Inc. on December 16, 1993. As required by Section 6-31-30 of the Code, the development agreement was adopted via ordinance. The agreement indicates that both the agreement and ordinance were recorded in "the Office of the Register of Deeds for Beaufort County, South Carolina in Deed Book 4806 at Page 967." By doing so, Del Webb acquired a vested property right which would protect them from the effect of subsequently enacted local legislation or procedural changes in local government. See Op. S.C. Atty. Gen., 2009 WL 276747 (January 8, 2009) ("[T]he purpose of the Act is to provide certainty to developers by allowing them to enter into agreements with local governments under which if the local government approves the development plan, the developer is protected against changes in local laws that may impact the development process."); S.C. Code Ann. § 6-31-10(B)(6) ("Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted local legislation

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[2] Section 6-31-80(B)(1)-(5) states:

> Subject to the provisions of Section 6-31-140, a local government may apply *subsequently adopted laws* to a development that is subject to a development agreement *only if the local government has held a public hearing and determined*:
>
> > (1) the laws are not in conflict with the laws governing the development agreement and do not prevent the development set forth in the development agreement;
> >
> > (2) they are essential to the public health safety, or welfare and the laws expressly state that they apply to a development that is subject to a development agreement;
> >
> > (3) the laws are specifically anticipated and provided for in the development agreement:
> >
> > (4) the local government demonstrates that substantial changes have occurred in pertinent conditions existing at the time of approval of the development agreement which changes, if not addressed by the local government, would pose a serious threat to the public health, safety, or welfare; or
> >
> > (5) the development agreement is based on substantially and materially inaccurate information supplied by the developer.

S.C. Code Ann. § 6-31-80(B)(1)-(5) (2004) (emphasis added).

or from the effects of changing policies and procedures of local government agencies which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project."); see also Hammes, Patricia, Development Agreements: The Intersection of Real Estate Finance and Land Use Controls, 23 U. Balt. L. Rev. 119, 123 (1993) (explaining that a development agreement "vests or conveys a right to develop according to an initial plan" while "freezing the applicable land use scheme and conveying the right to develop.").

The Permit Extension Joint Resolution of 2010

The "Permit Extension Joint Resolution of 2010" ("the 2010 Resolution") was passed on May 19th of 2010.[3] S.C. Act No. 297, 118th Sess. (2010). There, the General Assembly through its recitations, explained that because of the financial crisis and its effect on, among other things, the real estate market and various industries associated with the real estate market, those within such markets who would otherwise have to go through the often costly process of seeking government approvals or renewals of various permits, waivers and variances, would have the time for seeking such approvals tolled. Id. Specifically, Section Three of the 2010 Resolution, which applied retroactively to "development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2012" said "the running of the period of the development approval and any associated vested right is suspended during the period beginning January 1, 2008, and ending December 31, 2012." S.C. Act No. 297, § 3. The 2010 Resolution defined "development approval" as an approval issued by "the State, an agency or subdivision of the State, or a unit of local government, regardless of the form of the approval, that is for the development of land or for the provision of water of wastewater services by a governmental entity." S.C. Act No. 297, § 2. It further elaborated on such "development approvals in subsections (a) through (i). Id. Notably, subsection (h) specifically includes within the definition of development approval, "an approval by a county . . . regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit." Id.

In addition to the definitions and related tolling language mentioned in Sections Two and Three of the 2010 Resolution, Section Four of the 2010 Resolution listed limitations on the construction and implementation of the tolling period. S.C. Act No. 297, § 4. Meanwhile, Section Five of the 2010 Resolution required agencies and subdivisions of the State affected by the 2010 Resolution to post a notice in the State Register[4] "listing the types of development approvals that the agency or subdivision issues and noting the extension provided in the joint resolution." S.C. Act No. 297, § 5. Section Five further noted, "[t]his Section does not apply to

[3] See S.C. Acts No. 297, 118th Sess., §1 ("This joint resolution must be known and may be cited as the 'Permit Extension Joint Resolution of 2010'.").

[4] See e.g. 2010 S.C. Reg. Text 226986 ("Section 5 of the 'Permit Extension Joint Resolution of 2010,' H.4445, requires that the Department of Health and Environmental Control ('DHEC') list the types of development approvals that are provided for in that joint resolution.").

units of local government." Id. Finally, Section Six of the 2010 Resolution stated it "must be liberally construed to effectuate the purposes of this joint resolution." S.C. Act No. 297, § 6.

The Permit Extension Joint Resolution of 2013

On June 20th of 2013, the Permit Extension Joint Resolution of 2013 ("the 2013 Resolution") was passed. S.C. Act No. 112, 120th Sess. (2013). The 2013 Resolution utilized the exact same recitals and had the same substantive effect as the 2010 Resolution. Compare S.C. Act No. 297, 118th Sess. (2010) with S.C. Act No. 112, 120th Sess. (2013). As a result, the 2013 Resolution, which like the 2010 resolution was retroactive, applied to "development approval that is current and valid on December 31, 2012" and further said "the running of the period of the development approval and any associated vested right" would be suspended during the period beginning January 1, 2013, and ending December 31, 2016." S.C. Act No. 112, § 4. In other words, the 2013 Resolution simply acted as an extension of the 2010 Resolution's retroactive suspension of the running period for development approvals as well as the vested rights for valid developmental approvals. Likewise, the definitions section of the 2013 Resolution, while rearranged in format, included the same definition of "development approval" and like the 2010 resolution, included, among others, "an approval by county . . .regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit." S.C. Act No. 112, § 2(3)(f).

In addition to the 2013 Resolution's near duplication of the 2010 Resolutions' definitions and related tolling language, Section Five of the 2013 Resolution essentially copied Section Four of the 2010 Resolution which listed limitations on the construction and implementation of the tolling period. S.C. Act No. 112, § 5. Meanwhile, Section Six of the 2013 Resolution, like Section Five of the 2010 Resolution, required agencies and subdivisions of the State affected by the 2010 Resolution to post a notice in the State Register[5] "listing the types of development approvals that the agency or subdivision issues and noting the extension provided in the joint resolution." S.C. Act No. 112, § 6. Section Six of the 2013 Resolution, just like the 2010 Resolution noted, "[t]his Section does not apply to units of local government." Id. Finally, Section Seven of the 2013 Resolution, consistent with Section Six of the 2010 Resolution, stated it "must be liberally construed to effectuate the purposes of this joint resolution." S.C. Act No. 112, § 7.

[5] See e.g. 2013 S.C. Reg. Text 332527 ("Section 6 of the 'Permit Extension Joint Resolution of 2013,' H.3774, requires that the Department of Health and Environmental Control ('DHEC') list the types of development approvals that are provided for in that joint resolution.").

Analysis

1. Whether the Joint Resolutions Apply to the Agreement Between Del Webb and Beaufort County

Returning to your first question, whether the 2010 and 2013 Resolutions apply to the agreement entered into between Del Webb and Beaufort County, we believe that they do. Specifically, it is the opinion of this Office that the 2010 and 2013 Resolutions apply to the development agreement between Del Webb and Beaufort County because: (A) both Resolutions explain their respective provisions "must be liberally construed to effectuate the purpose" of the Resolutions, which, as described above, is to, "prevent wholesale abandonment of already approved projects" and avoid a waste of resources, something that could potentially occur to the already approved developments in this case; (B) both Resolutions explain that they are intended to apply to, among others, "real estate developers" as well as local government, the entities that are both parties to the present agreement; and (C) a development agreement which is properly approved and recorded pursuant to the South Carolina Local Government Development Agreement Act confers a vested right to the developer and therefore, since both Resolutions expressly state that they apply to development approvals "*and any associated vested right*" the Resolutions apply to development agreements in particular. In other words, we believe the Resolutions apply to the agreement between Del Webb and Beaufort County because the provisions of the Resolutions, when liberally construed, appear to apply to the class of entities at issue (developers and local government), as well as the particular type of agreements these entities have entered into—local government development agreements.

A. The Provisions of the Resolutions Must Be Liberally Construed so as To Effectuate their Purpose Meaning they Should be Interpreted to Prevent the Wholesale Abandonment of Development Projects and Avoid a Waste of Public and Private Resources

As a starting point we note both Resolutions state their provisions must be liberally construed[6] to effectuate their purpose, which according to the recitals in both Resolutions, is to prevent the wholesale abandonment of already approved projects and to prevent a waste of public and private resources. See S.C. Act No. 297 ("[I]t is the purpose of this joint resolution to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by tolling the time of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources."); S.C. Act No. 112 ("[I]t is the purpose of this joint resolution to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by

[6] S.C. Act No. 297, § 6 ("The provisions of this joint resolution must be liberally construed to effectuate the purposes of this joint resolution."); S.C. Act No. 112, § 7 ("The provisions of this joint resolution must be liberally construed to effectuate the purposes of this joint resolution.").

tolling the time of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources."). As a result, this Office, when analyzing whether both Resolutions should apply to the agreement between Del Webb and Beaufort County, will liberally construe their respective provisions to prevent the wholesale abandonment of already approved projects, such as the one at issue here, and avoid a waste of public and private resources.

B. The Resolutions Apply to Agreements Between Real Estate Developers and Local Government such as Those that are Currently at Issue

Understanding we must construe the provisions of both Resolutions liberally so as to effectuate their purpose, we believe we should next determine whether the Resolutions were intended to apply to the general class of entities who are party to the agreement here (i.e. real estate developers and local governments). We believe that they do. Specifically, the Resolutions, within their respective recitations, explain that they apply to "real estate developers, redevelopers, including home builders, commercial, office, and industrial developers." See S.C. Act No. 297 (2010); S.C. Act No. 112 (2013). Likewise, it is equally clear that the Resolutions are meant to apply to local government approvals. For example, Section two, subsection three of both the 2010 and 2013 Resolutions define a "development approval" as an approval issued by a "subdivision of the State, or a unit of local government, regardless of the form of the approval, that is for the development of land . . ." S.C. Act No. 297, § 2(3); S.C. Act No. 112, § 2(3). Further, as mentioned above, Section Two, subsection (3)(h) in both Resolutions apply to an "approval by a county . . . regarding a subdivision of land, a site specific development plan or a phased development plan[.]" S.C. Act No. 297, § 2(3)(h); S.C. Act No. 112, § 2(3)(h). Thus, it is clear that both Resolutions are designed to apply to the class of entities that are at issue here; real estate developers and local government.

C. The Resolutions Apply to a Properly Approved and Recorded Development Agreement Entered into Under The South Carolina Development Agreement Act Because they Apply to Vested Rights Associated with Development Approvals

Moreover, it is the opinion of this Office that the provisions of the respective Resolutions, when liberally construed, reveal the Resolutions were intended to apply not only to the class of entities that are subject to the agreement here, but also to the particular type of agreement at issue in this case, a development agreement entered into pursuant to the South Carolina Local Government Development Agreement Act (i.e. Section 6-31-10, et seq.). We believe this to be the case because both Resolutions specify that, in addition to development approvals, the Resolutions are intended to apply to vested rights "associated" with such approvals. See S.C. Act No. 297, § 3 ("[T]he running of the period of the development approval *and any associated vested right* is suspended during the period beginning January 1, 2008, and ending December 31,

2012.") (emphasis added); S.C. Act No. 112, § 4 ("[T]he running of the period of the development approval *and any associated vested right* is suspended during the period beginning January 1, 2013, and ending December 31, 2016.") (emphasis added).

Here, because a properly approved and recorded development agreement entered into pursuant to the terms of the South Carolina Local Government Development Agreement Act clearly confers a vested right to the developer in that it essentially "freezes" local development laws, it is evident that the Resolutions should apply to the agreement between the parties in this case. Indeed, a review of the legislative intent of the Act, as well as the concept of Local Development Agreements in general, clearly support this conclusion as it indicates a developer's rights vest as a result of the approval of such an agreement. See e.g. S.C. Code Ann. § 6-31-10(B)(6) ("Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted local legislation or from the effects of changing policies and procedures of local government agencies which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project."); see also Hammes, 23 U. Balt. L. Rev. at 123 (explaining that a development agreement "vests or conveys a right to develop according to an initial plan" while "freezing the applicable land use scheme and conveying the right to develop."). Therefore, the Resolutions, by explaining that they apply to vested rights associated with development approvals, would appear to reach development agreements entered into under the Act. Accordingly, we believe the Resolutions apply to the agreement between Del Webb and Beaufort County.

2. How Long Must the Agreement Be Extended

Having determined that both the 2010 and 2013 Resolution apply to the agreement between Del Webb and Beaufort County, we must now address your second question—how the applicability of both Resolutions affect the expiration date of the development agreement. We believe that because the 2010 Resolution applied retroactively beginning January 1, 2008 and extends, via the 2013 Resolution, until December 31, 2016, the length of the development agreement would be effectively extended during that timeframe unless both parties agreed to terminate the agreement at an earlier date. E.g. S.C. Code Ann. § 6-31-100 ("A development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest."). In other words, absent an agreement to the contrary, the agreement's twenty year time period, which according to your letter, started on December 16, 1993, would be tolled pursuant to the 2010 Resolution starting on January 1, 2008 and would continue to be tolled until January 1, 2017 when the 2013 Resolution's tolling provision would expire. Thus, assuming there is no mutual consent to terminate the development agreement at an earlier time, the timeframe for performance under the agreement was tolled after 14 years and 16 days starting on January 1, 2008, and will resume, with five years and 349 days remaining on it, on January 1, 2017.

Conclusion

In conclusion, we believe both the 2010 and 2013 Resolutions apply to the agreement between Del Webb and Beaufort County. As a result, absent an agreement to the contrary, it is the opinion of this Office that the timeframe for performance under the development agreement is currently tolled at fourteen years, 16 days and, starting January 1, 2017, will start again at fourteen years, 17 days meaning the agreement would expire five years and 349 days from January 1, 2017.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General