RECEIVED
Sep 25 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

HONORABLE CARMEN T. MULLEN, III, Circuit Court Judge

Appellate Case No. 2023-000277

SLF III – HARDEEVILLE, LLC, ... Respondent,

v.

RSV – HARDEEVILLE, LLC, ... Appellant.

FINAL BRIEF OF RESPONDENT

J. David Black, SC Bar No. 68499
MAYNARD NEXSEN, PC
1230 Main Street
Post Office Box 2426
Columbia, South Carolina 29202
Phone: (803)771-8900
dblack@maynardnexsen.com

Cheryl D. Shoun, SC Bar No. 5092
MAYNARD NEXSEN, PC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, South Carolina 29402
Phone: (843)720-1762
cshoun@maynardnexsen.com

Scott Talley, SC Bar No. 70364
TALLEY LAW FIRM, P.A.

291 S. Pine Street
Spartanburg, SC 29302
Phone: (864) 595-2966
scott@talleylawfirm.com

Attorneys for Respondent
SLF III – Hardeeville, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

II. PROCEDURAL HISTORY 8

STANDARD OF REVIEW 10

ARGUMENT 12

I. THE UNAMBIGUOUS LANGUAGE IN THE REED-HTI ASSIGNMENT DEMONSTRATES THAT CONVERSION RIGHTS WERE EXCLUDED 12

II. THE UNAMBIGUOUS TERMS OF THE REED-HTI ASSIGNMENT ARE CONTROLLING 15

(1) The Absence of Language Which Could Have Been Included Does Not Alter the Express Provisions of the Reed-HTI Assignment 15

(2) The Unambiguous Terms of the Reed-HTI Assignment Demonstrate That Conversion Rights Were Excluded from the Assignment 18

III. THE REED-HTI ASSIGNMENT CLEARLY AND UNMISTAKABLY RESTRICTS USE OF THE PROPERTY 19

IV. THE REED-HTI ASSIGNMENT IS UNAMBIGUOUS 22

V. THE CIRCUIT COURT'S CONSTRUCTION OF THE REED-HTI ASSIGNMENT IS NOT CONTRARY TO PUBLIC POLICY 23

VI. RSV MAY ONLY DEVELOP 155 ACRES FOR LIGHT INDUSTRIAL USE 24

VII. HARDEEVILLE WAS NOT A REQUIRED PARTY TO THE DECLARATORY JUDGMENT ACTION 28

VIII. THE CIRCUIT COURT PROPERLY DECLINED TO CONSIDER PAROL EVIDENCE SUBMITTED BY RSV 30

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Abu-Shawareb v. S.C. St. Univ.,
364 S.C. 358, 613 S.E.2d 757, (Ct. App. 2005) 16

Batchelor v. Am Health Ins. Co.,
234 S.C. 103, 107 S.E.2d 36, (1959) 22

Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.,
392 S.C. 506, 709 S.E.2d 85, (Ct. App. 2011) 17

Cf. Crenshaw v. Erskine College,
432 S.C. 1, 850 S.E.2d 1, (2020) 13

Community Services Associates, Inc. v. Wall,
421 S.C. 575, 808 S.E.2d 831, (Ct. App. 2017) 15, 21

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,
424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) 19

Fed. Pac. Elec. V. Carolina Prod. Enters.,
298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) 19

Felts v. Richland County,
303 S.C. 354, 400 S.E.2d 781 (1991) 10

Fleming v. Rose,
350 S.C. 488, 567 S.E.2d 857 (2002) 11, 21

Hamilton v. CCM, Inc.,
274 S.C. 152, 263 S.E.2d 378, (1980) 19

Hardy v. Aiken,
369 S.C. 160, 631 S.E.2d 539 (2006) 10

Hawkins v. Greenwood Development Corp.,
328 S.C. 585, 493 S.E.2d 875, (Ct. App. 1997) 21

Hofer v. St. Clair,
298 S.C. 503, 381 S.E.2d 736 (1989) 10

Jordan v. Security Group, Inc.,
311 S.C. 227, 428 S.E.2d 705, (1993) 28

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.,
268 S.C. 80, 232 S.E.2d 20, (1977) 24

Lanham v. Blue Cross & Blue Shield of S.C., Inc.,
349 S.C. 356, 563 S.E.2d 331, (2002) 10

Lindsay v. Lindsay,
328 S.C. 329, 491 S.E.2d 583, (Ct. App. 1997) 16

Loadholt v. S.C. State Budget and Control Bd., Div. of General Services, Ins. Reserve Fund,
339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000) 10

McGill v. Moore,
381 S.C. 179, 672 S.E.2d 571, (2009) 28

Moser v. Gosnell,
334 S.C. 425, 513 S.E.2d 123 (Ct. App. 1999) 15

Murray v. The Texas Co.,
172 S.C. 399, 174 S.E.2d 231, (1934) 19

Rodarte v. Univ. of S.C.,
419 S.C. 592, 799 S.E.2d 912, (2017) 17

Schulmeyer v. State Farm Fire and Cas. Co.,
353 S.C. 491, 579 S.E.2d 132, (2003) 17

Sea Pines Plantation Co. v. Wells,
294 S.C. 266, 363 S.E.2d 891 (1987) 22

Shipyard Prop. Owners' Ass'n v. Mangiaracina,
307 S.C. 299, 414 S.E.2d 795, (Ct. App. 1992) 21

Silver v. Aabstract Pools & Spas, Inc.,
376 S.C. 585, 658 S.E.2d 539, (Ct. App. 2008) 28

Small v. Springs Industries, Inc.,
292 S.C. 481, 357 S.E.2d 452 (1987) 10

SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla,
415 S.C. 72, 781 S.E.2d 115, (Ct. App. 2015) 21

State v. Sweat,
386 S.C. 339, 688 S.E.2d 569 (2010) 13

Tupper v. Dorchester County,
326 S.C. 318, 487 S.E.2d 187, (1997) 11

U.S. Leasing Corp. v. Janicare, Inc.,
294 S.C. 312, 364 S.E.2d 202, (Ct. App. 1988) 15

White v. J.M. Brown Amusement Co.,
360 S.C. 366, 601 S.E.2d 342, (2004) 22

Williams v. Tamsberg,
425 S.C. 249, 821 S.E.2d 494, (Ct. App. 2018) 11

STATUTES

S.C. Code Ann. § 15-53-80 ..... 25, 27

RULES

Rule 56, SCRCP 10, 28

TREATISES

Restatement (Second) of Contracts
§ 203(c) (1979) 13

STATEMENT OF ISSUES ON APPEAL

I. Whether, in construing the unambiguous Reed-HTI Assignment, the circuit court erred in finding that Conversion Rights were not assigned to RSV.

II. Whether, in finding Conversion Rights were excluded from the unambiguous Reed-HTI Assignment, the circuit court erred in not considering language which could have been included in the assignments, but was not.

III. Whether the circuit court erred in finding the unambiguous Reed-HTI Assignment provisions assigning rights for up to 75 upland acres of General Commercial and the balance of the Property only for residential and certain other specified uses "and for no other use or purpose" plainly and unmistakably restricted the use of the property.

IV. Whether the circuit court erred in agreeing with the parties that the Reed-HTI Assignment is unambiguous.

V. Whether the circuit court's construction of the unambiguous Reed-HTI Assignment was error as contrary to public policy of the City of Hardeeville.

VI. Whether, in construing the unambiguous assignments, the circuit court erred in finding RSV was only assigned the right to develop 155 acres for light industrial use.

VII. Whether the circuit court erred in granting a declaratory judgment when the City of Hardeeville was not a party.

VIII. Whether, in construing the unambiguous assignments, it was error for the circuit court not to consider parol evidence.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

RSV is the owner of approximately 800 acres of land located in Hardeeville, South Carolina, known as the "Savannah Tract." (R. 33 (Compl. ¶ 26).) The Savannah Tract lies entirely within, and is part and parcel with, a larger tract known as the "Hardeeville Tract." (*Id*.) SLF also owns land within the Hardeeville Tract. (R. 31 (*Id*. at ¶ 18).) The permitted uses and development of the Hardeeville Tract, and thus of the Savannah Tract, are subject to and controlled by that certain Development Agreement and exhibits thereto, including without limitation the Hardeeville Tract PDD Concept Plan, entered into in or about April 2006, by the City of Hardeeville and the owner of the property at the time, Copper Station Holdings, LLC (the "DA"). (R. 37-443; 533 (*Id*. at Ex. A; Ans. ¶ 6).) The DA provides for mixed use, residential and commercial development of the Hardeeville Tract, subject to and limited by the terms and conditions set forth therein. (R. 51-53 (Compl. at Ex. A, § VII).) The DA sets a "base overall residential density cap of 9,784 units," and designates 1,026 acres for light industrial use. (*Id*.) The DA also provides "the right to convert residential acreage to any commercial and/or light industrial acreage," with no cap on the acreage converted (the "Conversion Rights"). (*Id*.)

Various assignments of certain development rights in and to the Hardeeville Tract, all of which are of public record, occurred beginning 2006.[1] (R. 464-496, 503-524; 533-536 (*Id*. at Exs. D-F, H-I; Ans. ¶¶ 8-24).) RSV obtained its development rights pursuant to a chain of assignments from Reed-HTI, LLC ("Reed-HTI"). (R. 33-34; 534 (Compl. ¶ 27; Ans. ¶ 14).) Reed-HTI had obtained such development rights pursuant to two assignments, referred to as the "Reed-HTI Assignment" and the "SLF/Reed-HTI Assignment" (together, the "Assignments"). (R. 31; 534 (Compl. ¶¶ 16-17; Ans. ¶ 10).)

The Reed-HTI Assignment. The Reed-HTI Assignment, dated on or about March 6, 2008, was to Reed-HTI, as assignee, from JPR Land Co., LLC ("JPR"), as assignor, and assigned the right to develop up to 2,262 Residential Dwelling Units and up to 75 upland acres of General Commercial. (R. 483-496 (Compl., Ex. F).) It expressly excluded, and reserved unto JPR to be assigned to SLF, any and all development rights not expressly set forth therein, and provided that such restrictions shall run with the land, to be enforceable against any successor or

[1] More specifically, the assignments at issue pertain to certain real property known as the Reed-HTI Property (the "Reed-HTI Property" or "Property"). (R. 31-34 (Compl. ¶¶ 17, 22, 27).) The Savannah Tract comprises a portion of the Reed-HTI Property, both of which lie within and are part and parcel of the Hardeeville Tract. (R. 29, 33 (*Id*. at ¶¶ 9, 26).)

assign of Reed-HTI, and made SLF a third-party beneficiary to the assignment. (*Id*.) Specifically, the Reed-HTI Assignment states:

> (a) Assignor does hereby transfer, assign, convey and deliver unto Assignee, its successors and assigns, Assignor's rights, privileges and obligations under the Development Agreement to develop (i) up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD), and (ii) up to 75 upland acres of General Commercial (including all Permitted Uses set forth under the General Commercial designation) as currently defined in the PDD, except for the Excluded Obligations identified below. Accordingly, Assignee may (i) develop and use up to 75 upland acres of the Property for any and all "Permitted Uses" set forth under the "General Commercial" designation as currently defined in the PDD, and (ii) ***develop and use the balance of the Property only for*** (A) up to 2,262 Residential Dwelling Units (in the aggregate) of Single-Family Residential, Multi-Family Residential (but only for multi-family units with an average sales price in excess of $180,000 per unit), and Model Homes/Sales Center, (B) Community Recreation, (C) Institutional/Civic, (D) Maintenance Areas, (E) Open Space, (F) Roads, (G) Setback and Buffers, (H) Signage Control, (1) Silviculture, (J) Wetlands, (K) Utilities, and (L) Recreational Vehicle Parks, as all of the foregoing use categories are currently defined in the PDD, ***and for no other use or purpose.*** The foregoing rights hereby assigned by Assignor to Assignee shall be subject to the terms, obligations and conditions of and under the PDD and the Development Agreement. ***Other than those rights assigned hereby as specifically set forth above***, Assignor shall not be required to assign or transfer to Assignee, and ***Assignee shall not be entitled to, any other development rights under the Development Agreement or the PDD, all of which are retained by Assignor to be assigned to SLF – Hardeeville, LLC ("SLF").***

(b) ***Assignee hereby covenants and agrees not to develop or use the Property (i) in a manner inconsistent with the foregoing development rights assigned by Assignor to Assignee pursuant to Paragraph 1(a) above, or (ii) for any use not specifically listed in Paragraph 1(a) above, and that such restriction shall be a covenant and restriction running with the Property and shall be binding upon and enforceable against Assignee, its successors and assigns, and any subsequent owner(s) of the Property (or any portion thereof), and shall inure to the benefit of and be enforceable by Assignor and SLF*** and their respective representatives, successors and assigns (and by any subsequent owner of all or any portion of the property subject to the PDD owned or to be owned by SLF). The foregoing restriction may be enforced by any remedy available at law or in equity, including without limitation, injunctive relief and/or specific performance, and the prevailing party in such action shall be entitled to recover its court costs and reasonable attorneys' fees. The failure, in any one or more instances, to insist upon compliance with the foregoing restriction, shall not constitute or be construed as the waiver of such restriction but the same shall continue and remain in full force and effect.

(c) Notwithstanding anything herein to the contrary, Assignee shall not convert (and shall have no right to convert) any of the 75 upland acres designated for General Commercial to use for Residential Dwelling Units or for the purpose of increasing the number of Residential Dwelling Units. . . .

(f) ***…The rights and obligations hereby assigned and assumed shall be covenants running with the land, binding upon the parties hereto and their successors and assigns.***

(g) ***SLF is hereby deemed a third party beneficiary*** of this Partial Assignment and Assumption with respect to the rights and remedies of SLF as provided herein.

(R. 485-487 (*Id*. at § 1(a)-(g) (emphasis added)).)

Contemporaneous with the Reed-HTI Assignment, on or about March 6, 2008, JPR, as assignor, assigned to SLF, as assignee, all of JPR's remaining rights, privileges, titles and interests under the DA and the PDD (excluding only those rights previously assigned by JPR to AJA, LLC, to which 24.17 acres of Light Industrial and 3.12 acres of Commercial were assigned on May 24, 2007, and by JPR to Reed-HTI pursuant to the Reed-HTI Assignment), including, without limitation, all of JPR's remaining rights, privileges, titles and interests under the DA and the PDD to develop any and all uses permitted or designated under the DA and/or the PDD (including, by means of example only and without limitation, all commercial, mixed use, business park, ***light industrial***, residential, hotel, civic, recreation, and all other uses permitted or designated under the DA and/or the PDD). (R. 503-514 (Compl., Ex. H)

The SLF/Reed-HTI Assignment. The SLF/Reed-HTI Assignment, dated on or about September 4, 2008, was entered into between SLF and Reed-HTI, pursuant to which SLF assigned to Reed-HTI the right to develop up to 155 acres for light industrial use. (R. 515-524 (Compl., Ex. I).) Specifically, it states:

> SLF does hereby transfer, assign, convey and deliver unto Reed-HTI, its successors and assigns, SLF's rights, privileges and obligations under the Development Agreement to develop,

> ***on the Reed-HTI Property, up to one hundred fifty-five (155) acres of Light Industrial use***, as currently defined in the PDD. The foregoing assignment is in addition to and supplements those rights previously transferred under the Reed-HTI Assignment, and otherwise ***does not amend or modify any term, covenant or restriction in the Reed-HTI Assignment other than to allow Reed-HTI to develop up to 155 acres of Light Industrial on the Reed-HTI Property*** (all of which covenants and restrictions in the Reed-HTI Assignment applicable to the Reed-HTI Property shall continue to apply in full force and effect except for allowing up to 155 acres of Light Industrial development on the Reed-HTI Property)…***Other than those rights assigned hereby as specifically set forth above***, SLF shall not be required to further assign or transfer to Reed-HTI, and ***Reed-HTI shall not be entitled to, any other development rights held by SLF under the Development Agreement or the PDD now held by SLF, all of which are retained by SLF***…The rights and obligations hereby assigned and assumed shall be ***covenants running with the land, binding upon the parties hereto and their successors and assigns***.

(R. 517-518 (*Id*. at § 1(b) (emphasis added)).)

In or about May of 2019, RSV submitted to the City for approval a master plan for the Savannah Tract, which seeks to develop, among other things, over 577 acres for light industrial use (the "Master Plan"). (R. 34; 534-535; 1114-1282 (Compl. ¶ 28; Ans. ¶ 15; SLF's Mot., Ex. J).) The City approved the Master Plan in or about July of 2019. (*Id*.)

II. PROCEDURAL HISTORY

SLF initiated this lawsuit on October 12, 2020, seeking a declaratory judgment that RSV only possesses the right to develop up to 155 acres of the Savannah Tract for light industrial use, and seeking an award of its reasonable attorneys' fees and costs. (R. 30-532 (Complaint).) RSV moved to dismiss the action, and SLF moved for summary judgment. (R. 546-548; 549-550 (RSV's Mot. to Dismiss; SLF's Mot. for Summary Judgment).) Both motions were denied by Form 4 Order, entered on April 9, 2021 by the Honorable Bentley D. Price. (R. 2-4 (4/9/21 Order).) The case was thereafter assigned to the Business Court for Jasper County, and exclusive jurisdiction over the case was assigned to the Honorable Carmen T. Mullen. (R. 5-6 (4/26/21 Order).)

A hearing on cross-motions to compel discovery was held on October 28, 2021, at which time the Parties agreed that, prior to ruling on the discovery issues raised in the motions, the Court should determine whether or not the DA and the Assignments are ambiguous, and both parties took the position that such documents are unambiguous in their favor. (R. 1328-1330; 1336-1337; 1341-1342 (Tr. at 3:15-5:8, 11:24-12:1, 16:5-17:4).) Accordingly, the Court agreed to consider cross-motions for summary judgment, based upon the controlling documents. (R. 1342-1343 (Tr. 17:5-18:6).)

The parties filed their respective motions on December 6, 2021 ("SLF's Motion" and "RSV's Motion," respectively). (R. 551-575; 595-610 (RSV's Mot.; SLF's Mot.).) In support of its Motion, SLF submitted a certified copy of the DA and certified copies of the

deeds and assignments relative to the property at issue. (R. 611-1282 (SLF's Motion, Exs. A-J).) In support of its Motion, RSV submitted the Affidavit of Stephen S. Bird, the attorney for John Reed, who is the principal of Reed-HTI, JPR and RSV, and the Affidavit of Brana Snowden, the Planning Director for the City of Hardeeville. (R. 576-594; 1348-1383 (Bird Aff.; Snowden Aff.).)

The circuit court entered its order granting SLF's Motion and denying RSV's Motion on May 31, 2022 (the "Order") and entered judgment in favor of SLF on its claim for declaratory judgment. (R. 7-20 (Order).) On June 9, 2022, RSV filed a Motion to Reconsider, Alter and Amend the Order. (R. 1305-1314 (RSV's Mot. to Reconsider, Alter and Amend).) The circuit court denied the motion by Form 4 order on January 24, 2023 (the "Form 4 Order"). (R. 21-26 (Form 4 Order).) RSV appealed the Order and Form 4 Order on February 22, 2023. (R. 1423-1424 (RSV's Notice of Appeal).)

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). An action to construe a contract is one at law. *Hofer v. St. Clair*, 298 S.C. 503, 508 381 S.E.2d 736, 739 (1989) (citing *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987)). "An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." *Felts*, 303 S.C. at 356, 400 S.E.2d at 782. An action at law retains its character, "and the Court of Appeals must affirm where there is any evidence to support the judge's findings." *Loadholt v. S.C. State Budget and Control Bd., Div. of General Services, Ins. Reserve Fund*, 339 S.C. 165, 169, 528 S.E.2d 670, 672 (Ct. App. 2000) (citing *Felts*, 303 S.C. at 356, 400 S.E.2d at 782)).

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A trial court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. *See also Tupper v. Dorchester County*, 326

S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Williams v. Tamsberg*, 425 S.C. 249, 258, 821 S.E.2d 494, 499 (Ct. App. 2018) (citing *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002)).

ARGUMENT

I. THE UNAMBIGUOUS LANGUAGE IN THE REED-HTI ASSIGNMENT DEMONSTRATES THAT CONVERSION RIGHTS WERE EXCLUDED

RSV was not assigned the right to convert the residential acreage to industrial acreage. The Reed-HTI Assignment assigned only certain, limited rights under the DA and PDD, and unambiguously states in Paragraph 1(a) that it assigned only the right to use up to 75 upland acres of the Reed-HTI Property for General Commercial, "and use the balance of the Property only for" Single-Family Residential, Multi-Family Residential, or other specifically identified uses, "and for no other use or purpose." That paragraph further provides that "Assignee shall not be entitled to, any other development rights under the [DA] or the PDD, all of which are retained by Assignor to be assigned to [SLF]." Pursuant to the Reed-HTI Assignment, the "Assignee covenant[ed] and agree[d] not to develop or use the Property (i) in a manner inconsistent with" the development rights specifically enumerated in Paragraph 1(a) "or (ii) for any use not specifically listed in Paragraph 1(a)." Such restriction was expressly made "a covenant and restriction running with the Property … binding upon and enforceable against Assignee, its successors and assigns, and any subsequent owner(s) of the Property (or any portion thereof) … inur[ing] to the benefit of and [ ] enforceable by Assignor and SLF …."

Despite agreeing that the Reed-HTI Assignment is unambiguous, and despite the express language of the Reed-HTI Assignment, RSV argues that other language in the Reed-HTI Assignment suggests an intent that Conversion Rights be transferred with the

assignment. The circuit court considered and correctly rejected this tortured interpretation of the Reed-HTI Assignment. Specifically, RSV points to the provision in Paragraph 1(a) assigning the right to develop "up to 2,262 Residential Dwelling Units (as such term is currently defined in the [DA] and the PDD]" and the provision in Paragraph 3(a), which provides "[f]or purposes of illustration only," that the Assignor "assign[ed] and transfer[ed] to Assignee all of Assignor's rights, title and interest under the [DA] to develop up to 2,262 Residential Dwelling Units (as such term is currently defined in the [DA] and the PDD …." Although the term "Residential Dwelling Units" is neither defined in the DA or in the PDD, RSV points to density provisions in those documents allowing for the conversion of residential acreage to commercial and/or light industrial acreage.

RSV's argument fails because the Reed-HTI Assignment is the more specific and controlling instrument, pursuant to which RSV obtained its development rights. *Cf. Crenshaw v. Erskine College*, 432 S.C. 1, 28, 850 S.E.2d 1, 15 (2020) ("[a] proper construction of a contract requires the court to give effect to specific terms over any general language") (citing Restatement (Second) of Contracts § 203(c) (1979), and *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569 (2010)). The Reed-HTI Assignment unequivocally assigned development rights for only those uses "specifically listed in Paragraph 1(a)" of the Reed-HTI Assignment "and for no other use or purpose." To the extent the Reed-HTI Assignment references the term "Residential Dwelling Units" in the DA and PDD, *what that term means*

is not equivalent to *what rights are afforded to uses associated with that term*. That is, what constitutes a Residential Dwelling Unit is fundamentally distinct from whether densities applicable to residential uses may be transferred to other, non-residential uses. The interpretation advanced by RSV compares apples to oranges—it is wrong according to logic and wrong according to the express language of the controlling assignment instrument.

The infirmities in RSV's argument notwithstanding, one need not engage in semantical gymnastics regarding the definition of "Residential Dwelling Units" where the Conversion Rights are not "specifically set forth" in the assignment. The plain language of the Reed-HTI Assignment provides that the only development rights assigned are those "specifically set forth" in Paragraph 1(a), and that all others are retained for the benefit of SLF. RSV concedes that Conversion Rights are not specifically identified anywhere in the Reed-HTI Assignment, but argues, peculiarly, that because they are not "specifically referenced" in the assignment, those rights "remain in full force and effect" pursuant to Paragraph 10. However, Paragraph 10 merely provides that rights in the DA and PDD which are not assigned by the Reed-HTI Assignment are not thereby extinguished. To the contrary, as set forth in Paragraph 1(a), they are "retained by Assignor to be assigned to [SLF]." That such Conversion Rights were not extinguished has no bearing on the requisite and dispositive fact that they were not assigned.

RSV has not identified any provisions in the Reed-HTI Assignment demonstrating that Conversion Rights were included in the assignment and the arguments advanced by RSV are contrary to the Reed-HTI Assignment's express terms.

II. THE UNAMBIGUOUS TERMS OF THE REED-HTI ASSIGNMENT ARE CONTROLLING

(1) The Absence of Language Which Could Have Been Included Does Not Alter the Express Provisions of the Reed-HTI Assignment

RSV asks the Court to ignore the express provisions of the Reed-HTI Assignment providing that the Property may be developed "only for" those uses "specifically listed in Paragraph 1(a)" and "for no other use or purpose," and instead construe the Reed-HTI Assignment to include Conversion Rights based on the absence of an express provision to the contrary. Such a construction is impermissible, however, and would contradict the plain and ordinary meaning of the express terms of the Reed-HTI Assignment. *See Community Services Associates, Inc. v. Wall*, 421 S.C. 575, 582, 808 S.E.2d 831, 835 (Ct. App. 2017) (holding that "[w]hen the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning") (quoting *Moser v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123 (Ct. App. 1999)); *see also U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988) (holding that silence in a contract does not permit the use of parol evidence that is inconsistent with or contradictory to the writing, or that adds a term to an otherwise express agreement).

Despite agreeing that the Reed-HTI Assignment is unambiguous, (R. 1328-1329; 1336-1337 (Tr. 3:15-4:3, 11:24-12:1)), RSV now seeks to create an ambiguity based on language that *could have been* included in the Reed-HTI Assignment. Specifically, RSV argues the assignment expressly prohibits the conversion of property *to* residential use, and that the parties *could have* expressly prohibited the conversion of property *from* residential use, but did not. The Reed-HTI Assignment, however, *does* expressly and clearly prohibit development and use of the property for any use or purpose other than those uses specifically listed in Paragraph 1(a). RSV may not create an ambiguity where one does not exist, nor may the purported absence of a more express term create an ambiguity in an otherwise unambiguous contract. *See Lindsay v. Lindsay*, 328 S.C. 329, 337, 491 S.E.2d 583, 587 (Ct. App. 1997) (holding that "[w]hether or not an ambiguity exists in an agreement … must be determined from the language of the instrument"); *see also Abu-Shawareb v. S.C. St. Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (holding that silence alone does not create an ambiguity in a contract).

Nor could the Reed-HTI Assignment's inclusion of a provision prohibiting the conversion of property *to* residential use create an ambiguity. The Reed-HTI Assignment assigned only residential and commercial development rights. Accordingly, the potential conversion of commercial property to residential use is relevant to the scope of the development rights assigned. Because the Reed-HTI Assignment did not assign *any* development rights for light industrial use, the conversion of residential property for

light industrial use was not at issue, as it was not contemplated by or within the scope of the Reed-HTI Assignment. Thus, even if the Court could properly consider language the parties *could have included*—which, for the reasons set forth above, it cannot—no ambiguity would result.

(2) The Unambiguous Terms of the Reed-HTI Assignment Demonstrate That Conversion Rights Were Excluded from the Assignment

RSV argues it was SLF's burden to demonstrate the parties' intent "to restrict RSV's conversion rights" and that the circuit court improperly shifted the burden onto RSV to prove the converse. This argument is flawed in numerous respects. First, it presupposes RSV obtained Conversion Rights pursuant to the Reed-HTI Assignment—which, for the reasons set forth herein, it did not. Second, SLF sought a declaration of rights and, once the circuit court determined the Reed-HTI Assignment was unambiguous, its terms alone decided its force and effect. *See Beaufort Cty. Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (holding that where the court determines the contract language is clear and unambiguous, "the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect"); *see also Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (holding that, where a contract is unambiguous, the court "must enforce the language as written, for it is the objective expression of what the parties meant to agree upon when they made their contract, not the secret, subjective meaning one party later reveals"); *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132, 134 (2003) (explaining that "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language").

In stating, as an additional sustaining ground, that the parties to the Reed-HTI Assignment, JPR and Reed-HTI—as parties related to RSV—could have included the

Conversion Rights in the Reed-HTI Assignment or reserved them unto JPR for the benefit of the Reed entities, but did not, the circuit court did not impose an improper burden of proof on RSV. To the contrary, the circuit court's ruling was based on its finding that the assignment instruments, including the Reed-HTI Assignment, are unambiguous, and on the express terms the clear meaning thereof is "to convey only the development rights expressly set forth therein, to the exclusion of all others, including the Conversion Rights." (R. 17 (Order at 11).) In other words, no portion of the circuit court's ruling was based on its observation that, as related entities, the parties to the Reed-HTI Assignment could have assigned the Conversion Rights and/or reserved them to the benefit of RSV, had that been their intent, but did not. The circuit court's statement was merely that the intent expressed in the Reed-HTI Assignment was necessarily that of the related Reed-entities, as the only named parties to the Reed-HTI Assignment. Such observation was merely in response to arguments raised by RSV, which the circuit court rejected as contrary to the unambiguous language of the Reed-HTI Assignment.

III. THE REED-HTI ASSIGNMENT CLEARLY AND UNMISTAKABLY RESTRICTS USE OF THE PROPERTY

Under South Carolina law, a restriction on the use of property is enforceable when it is created in "express terms or by plain and unmistakable implication." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citation omitted). RSV argues the circuit court correctly recognized this requirement but did not properly apply it. Specifically, RSV argues, without any controlling legal authority, that the language in the

Reed-HTI Assignment providing the assignee could develop the property "only" for residential use, and for "no other use or purpose" are words of "general import," insufficient to satisfy the "plain and unmistakable" requirement. In support of its position, RSV makes the novel legal argument that the "plain and unmistakable" requirement for restrictive covenants is similar to the heightened standard of review applicable to indemnity agreements. However, even if the cases involving indemnity agreements were controlling here—which they are not—they are inapposite. In those cases, the court found language that "the agent shall hold the company 'harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising'" was "broad and comprehensive" but "provocative of some doubt," because it was drafted and inserted into the contract by the defendant for its own benefit. *Murray v. The Texas Co.*, 172 S.C. 399, 174 S.E.2d 231, 232 (1934). *See also Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); *Fed. Pac. Elec. V. Carolina Prod. Enters.*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). Thus, the courts determined that, if it was the understanding of the parties that the plaintiff agreed to relieve it from all liability for its own negligence, it could have done so, but did not. *Id*.

This case does not involve an indemnification agreement and the mere fact that SLF is made a third-party beneficiary to the Reed-HTI Assignment is no basis to construe its provisions against SLF. This is particularly so where, as here, the named parties to the assignment are related to each other and to RSV, and the circuit court found—and both

parties agreed—the assignment instrument is unambiguous, such that there are no "doubts" to resolve. RSV not only provides no legal authority for its argument, but also fails to demonstrate the most fundamental element of its argument—namely, that the Reed-HTI Assignment is ambiguous.

IV. THE REED-HTI ASSIGNMENT IS UNAMBIGUOUS

Without ever demonstrating that the circuit court was wrong in finding the Reed-HTI Assignment unambiguous, RSV argues that all doubts and ambiguities should have been resolved against SLF, and in favor of unrestricted land use. Indeed, RSV maintains its argument to the circuit court that the Reed-HTI Assignment is unambiguous, (R. 1328-1329; 1336-1337 (Tr. 3:15-4:3, 11:24-12:1)), yet argues, from the other side of its mouth, that it is ambiguous merely because the parties offer competing constructions. *See* Appellant's Br. 26 ("Even though neither party asked it to, the lower court should have found the assignment to be ambiguous….") According to RSV, where parties offer competing constructions of a restrictive covenant, as a matter of law, the construction that would not restrict the use of property must be adopted. While this argument would be convenient for RSV, if true, a restrictive covenant is not ambiguous merely because the parties construe it differently. If such were the case, all disputed restrictive covenants would be ambiguous.

Whether a contract is ambiguous, and construction of an unambiguous contract, are matters of law for the court. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "[W]hen 'the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning.'" *Wall*, 421 S.C. at 582-83, 808 S.E.2d at 835 (quoting *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992)). For

the reasons set forth above, the plain and express language of the Reed-HTI Assignment demonstrates that the Conversion Rights were excluded from the assignment, such that there are no "doubts" or "ambiguities" requiring construction by the Court, and accordingly that the Reed-HTI Assignment and the restrictions therein should be enforced according to their obvious meaning.

V. THE CIRCUIT COURT'S CONSTRUCTION OF THE REED-HTI ASSIGNMENT IS NOT CONTRARY TO PUBLIC POLICY

RSV has not identified any relevant public policy of the City of Hardeeville that is violated under the circuit court's construction of the Reed-HTI Assignment. *See SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) ("[c]ourts shall enforce [restrictive covenants] unless they are indefinite or contravene public policy") (quoting *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987)). An ordinance adopting a master development plan is not a cognizable public policy. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) (holding that contracts violating public policy "as expressed in constitutional provisions, statutory law, or judicial decisions" will not be enforced); *see also Batchelor v. Am Health Ins. Co.*, 234 S.C. 103, 108, 107 S.E.2d 36, 38 (1959) (same). The ordinance does not state its purported "preference" for light industrial development, and, even if it did, a mere preference for how private landowners use their property is not a "policy."

RSV argues the Snowden Affidavit demonstrates the City has legitimate interests in the development of properties within its boundaries. However, the affidavit does not

identify any "public policy" of the City, and the City's interests, no matter how legitimate, do not *ipso facto* create public policy. Moreover, none of the statements in the Snowden Affidavit, even if accepted as true, constitute expressions of statutory law. Indeed, even assuming, for the sake of argument, that the ordinance could be reasonably construed as "statutory law" capable of creating public policy, if the ordinance in fact expressed such public policy, RSV would not need to rely on an affidavit—it could simply quote the ordinance. It did not (and cannot) because the ordinance relates to the development of private property by private landowners and, quite simply, is not a policy document.

Notably, there is a significant argument that allowing the Master Plan to override and supersede a private agreement/restrictive covenant reached between two adjoining and willing land owners is violative of public policy. Parties should be and are free to contract. To entertain the efforts of a party to such an agreement to set it aside, based upon an unsupported allegation of the purported interest of a municipality in the development of the subject property, puts at issue every agreement reached between parties and would effectively throw the real estate development industry into a tail spin.

VI. RSV MAY ONLY DEVELOP 155 ACRES FOR LIGHT INDUSTRIAL USE

(1) RSV Cannot Possess Greater Development Rights Than Those Assigned to It or Its Predecessors in Interest

RSV only obtained rights to develop the Property for light industrial use pursuant to the SLF/Reed-HTI Assignment, which assigned the right to develop "up to one hundred fifty-five (155) acres of Light Industrial use." The SLF/Reed-HTI Assignment

"[did] not amend or modify any term, covenant or restriction in the Reed-HTI Assignment other than to allow [the assignee] to develop up to 155 acres of Light Industrial" on the Property. RSV argues this assignment did not take away any development rights it obtained under the Reed-HTI Assignment. However, this argument is based on the presupposition that the Reed-HTI Assignment transferred Conversion Rights. It did not. RSV's argument is a logical fallacy—it assumes the truth of what it is trying to prove, rather than supporting it.

The SLF/Reed-HTI Assignment did not affect or otherwise modify the rights RSV obtained pursuant to the Reed-HTI Assignment—on this everyone agrees. But that ends the inquiry. Because, as set forth above, the Reed-HTI Assignment did not assign any development rights for light industrial use, nor any Conversion Rights. Thus, RSV only obtained development rights for light industrial use pursuant to the SLF/Reed-HTI Assignment, which clearly and expressly limits such development to 155 acres.

(2) The Post-Closing Documents Have No Bearing On the Development Rights RSV Obtained Under the Reed-HTI Assignment

Undeterred, RSV argues that the SLF/Reed-HTI Assignment must be understood in the context of certain post-closing documents and the circumstances surrounding those documents, including, for example, the Great Recession and Economic Stimulus Act of 2008. RSV's argument fails for three primary reasons. First, RSV has not made the requisite showing that the post-closing documents and SLF/Reed-HTI Assignment should be considered and construed together. Specifically, in the absence of evidence to

the contrary, courts will generally consider and construe instruments together which were "executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction." *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). However, RSV has not established—and did not establish in the circuit court—any of these elements with respect to the SLF/Reed-HTI Assignment and the eight or so other documents it loosely references as being part of the "post-closing transaction." Br. 30-33.

Second, even if RSV is correct that the SLF/Reed-HTI Assignment and post-closing documents should be construed together, it is of no consequence. As the circuit court correctly determined: "To the extent they are relevant at all, the Post-Closing Documents pertain to the SLF/Reed-HTI Assignment and transfer restrictions on the 155 acres for light industrial use pursuant thereto. They have no bearing upon whether RSV was assigned Conversion Rights pursuant to the Reed-HTI Assignment, nor do they amend or replace the Reed-HTI Assignment." (R. 18 (Order at 12).)

And third, even considering the SLF/Reed-HTI Assignment and post-closing documents together, transfer restrictions are different from Conversion Rights and the document containing the transfer restriction is entirely unrelated to the Conversion Rights. That is, transfer restrictions on the 155 acres of light industrial property in a post-closing document cannot be used to construe the Reed-HTI Assignment, which is a substantively and temporally unrelated document.

VII. HARDEEVILLE WAS NOT A REQUIRED PARTY TO THE DECLARATORY JUDGMENT ACTION

RSV argues the City of Hardeeville should have been a party to this action pursuant to Section 15-53-80 of the Declaratory Judgments Act ("Act"). That section of the Act provides, in relevant part, "all persons shall be made parties who have or claim any interest which would be affected by the declaration" and "[i]n any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard." S.C. Code Ann. § 15-53-80. For at least two reasons, the City was not required to be named as a party. First, the City does not have any cognizable legal interest in privately held development rights, nor has RSV identified any such interest. Rather, RSV alleges that the City has an interest "in planning and development," and that such interests would be affected by the Court's declaration. Br. 34. However, that the City generally has an interest in planning and development does not grant it an interest in specific, private property rights. To hold otherwise would mean the City must be made a party to virtually any declaratory judgment action between private landowners involving land use or development simply because the City may have a preference for how the land is used or developed. The law makes no such requirement. Moreover, it is apparent from the record in

the circuit court that the City was aware of this proceeding. (R. 1348-1356 (Snowden Aff.).) Had the City claimed an interest in the outcome, it could have moved to intervene, but did not.

Second, this action does not involve the validity of the ordinance adopting the Master Plan. Rather, SLF sought relief pertaining solely to private property rights, and did not seek (nor did the circuit court issue) any declaration whatsoever as to the validity or invalidity of the ordinance; the ordinance simply is not at issue. It is axiomatic that restrictive covenants may limit development of a property beyond what may be authorized under the applicable zoning ordinance. A court's determination of a landowner's development rights pursuant to a restrictive covenant has no bearing upon, and certainly does not invalidate, a municipal ordinance granting broader development rights. And, the ordinance does not *require* RSV to develop the additional acreage at issue for light industrial use (R. 1378-1380 (Snowden Aff., Ex. D)), it merely permits such development. Moreover, the ordinance has no application to the restrictive covenants in the Assignments. Accordingly, the circuit court's declaration that the Assignments pursuant to which RSV obtained its development rights in the Property restrict development

to no more than 155 acres for light industrial use has no bearing upon the validity of the ordinance.

Section 15-53-80 of the Act is thus inapplicable and the City was not required to be made a party to the action.

VIII. THE CIRCUIT COURT PROPERLY DECLINED TO CONSIDER PAROL EVIDENCE SUBMITTED BY RSV

RSV argues that the parol evidence rule has no application here because "the [Bird] affidavit was not submitted to resolve ambiguity in the Reed-HTI Assignment," but to purportedly add "more to the story." Br. 35. This argument flies in the face of well-established principles of contract interpretation and, unsurprisingly, RSV does not cite to any legal authority in support of its argument. As the circuit court properly recognized, where a contract is unambiguous, the language found within the contract alone determines the instrument's force and effect. (R. 17 (Order at 11).) *See Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). In those circumstances, "the court does not look beyond the four corners to discern the parties' intentions" and the parties are barred from introducing evidence to alter or explain the contract's terms. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 592, 658 S.E.2d 539, 543 (Ct. App. 2008); *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009).

Accordingly, because the circuit court found the controlling documents to be unambiguous, it properly declined to consider the parol and extrinsic evidence submitted by RSV by way of affidavits.

CONCLUSION

For the reasons set forth above, this Court should affirm summary judgment on the declaratory judgment pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact and the undisputed facts establish that the assignments pursuant to which RSV obtained its development rights in the property expressly restrict development to no more than 155 acres for light industrial use, and clearly and unmistakably prohibit the conversion of property from residential to light industrial use.

Respectfully submitted,

s/Cheryl D. Shoun
J. David Black, SC Bar No. 68499
MAYNARD NEXSEN, PC
1230 Main Street
Post Office Box 2426
Columbia, South Carolina 29202
Phone: (803) 771-8900

dblack@maynardnexsen.com

Cheryl D. Shoun, SC Bar No. 5092
MAYNARD NEXSEN, PC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, South Carolina 29402
Phone: (843) 720-1762
cshoun@maynardnexsen.com

Scott Talley, SC Bar No. 70364
TALLEY LAW FIRM, P.A.
291 S. Pine Street
Spartanburg, SC 29302
Phone: (864) 595-2966
scott@talleylawfirm.com

Attorneys for Respondent
SLF III – Hardeeville, LLC

September 25, 2023
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

HONORABLE CARMEN T. MULLEN, III, Circuit Court Judge

Appellate Case No. 2023-000277

SLF III – HARDEEVILLE, LLC, ... Respondent,

v.

RSV – HARDEEVILLE, LLC, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief Complies with Rule 211(b), SCACR.

September 25, 2023

s/Cheryl D. Shoun
Cheryl D. Shoun, SC Bar No. 5092
MAYNARD NEXSEN, PC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, South Carolina 29402
Phone: (843)720-1762
cshoun@maynardnexsen.com

Attorney for Respondent
SLF III – Hardeeville, LLC