RECEIVED
Sep 16 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-000064
Case No. 2021-CP-10-05645

THE CHARLESTON SCHOOL OF LAW, LLC, a South Carolina limited liability company, ...Respondent.

v.

CITY OF CHARLESTON, a municipal corporation, and OMSHERA HOTEL GROUP, LLC, a North Carolina limited liability company, ... Defendants,

of which CITY OF CHARLESTON, a municipal corporation, is the.....Appellant.

INITIAL BRIEF OF RESPONDENT THE CHARLESTON SCHOOL OF LAW, LLC

H. Brewton Hagood (SC Bar #2438)
Daniel F. Blanchard, III (SC Bar #65432)
Mary Harriet Moore (SC Bar #105312)
ROSEN HAGOOD, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401
(843) 577-6726 (office)
bhagood@rosenhagood.com
dblanchard@rosenhagood.com
mhmoore@rosenhagood.com
Attorneys for Respondent The Charleston School of Law, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Other Jurisdictions

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court correctly grant the CSOL's motion for partial judgment on the pleadings against the City?

A. Did the circuit court correctly apply the legal standard for deciding the CSOL's motion for judgment on the pleadings?

B. Did the circuit court correctly grant the CSOL's motion for judgment on the pleadings despite the City's claim that discovery is necessary when the circuit court construed and applied the unambiguous terms and provisions of the contracts attached as exhibits to the pleadings and discovery would be futile to contradict their terms?

C. Did the circuit court correctly hold that a possibility of reverter is not land or an estate in land?

D. Did the circuit court correctly hold that S.C. Code Ann. § 5-7-260(6) and (7) do not apply to the release or extinguishment of a possibility of reverter?

E. Did the circuit court correctly find S.C. Code Ann. § 5-7-260(6) and (7) are inapplicable to the CSOL's claims against the City?

F. Did the circuit court correctly hold the 2004 Ordinance satisfies the requirements of S.C. Code Ann. § 5-7-260 because it authorized the City's mayor to execute the necessary documents to undertake and perform the transactions contemplated thereby, including a quitclaim deed releasing the possibility of reverter so the CSOL can sell the Property to a third party with the City's written consent, which was granted?

G. Did the circuit court correctly hold the release of the possibility of reverter does not necessitate an amendment to the 2004 Ordinance?

H. Did the circuit court correctly find the terms of the 2017 Modification Agreement and 2019 Modification Agreement render the possibility of reverter null and void?

I. Did the circuit court correctly hold the terms of the Purchase and Sale Agreement between the City and the CSOL were merged into the 2005 Deed?

J. Did the circuit court's order properly reserve for future adjudication the issues involving the City's other defenses or counterclaims which are not predicated on § 5-7-260?

INTRODUCTION

Appellant City of Charleston ("City") has appealed from the circuit court's order which granted Respondent The Charleston School of Law's ("CSOL") motion for partial judgment on the pleadings under SCRCP 12(c). In granting the motion, the circuit court construed and applied the clear and unambiguous provisions of the parties' written contracts as well as several deeds and instruments recorded with the register of deeds. These documents were attached as exhibits to the pleadings. The authenticity, execution, and terms of these documents are not in dispute; however, their legal effect is in controversy.

The underlying dispute concerns a parcel of property situated at 431 Meeting Street ("Property") in Charleston. The City had acquired this parcel in 2005 for the specific purpose of selling it to the CSOL to attract and induce it to open and operate a new law school on the downtown peninsula. As part of this inducement, the City executed a quitclaim deed dated July 1, 2005, and recorded that same day, by which it conveyed ownership of the Property to the CSOL for a price of $875,000.00 ("2005 Deed"). (Am. Compl. Exh. 2). This deed includes an attachment containing language creating a possibility of reverter ("POR") designed to ensure the CSOL used the Property for law school purposes. The POR provided that "all right title and interest to the Property shall automatically revert to the Grantor" in the event the Property "is not used solely for Law School Purposes" within the six (6) years commencing upon the deed's recordation. Id.

City Council authorized the sale of the Property to the CSOL by virtue of City of Charleston Ordinance Number 2004-150 ("2004 Ordinance"). (Am. Compl. Exh. 1; Memo. Supp Mot. For Judg. Plead. Exh. A). This ordinance explicitly approved the "Agreement of Purchase and Sale" between the CSOL and the City. Indeed, the ordinance expressly incorporates into its terms and recites in full the provisions of the contract between the CSOL and City, thereby making that

contract's terms part of the ordinance. Id.

Section 3 of the Agreement of Purchase and Sale expressly provides the CSOL may sell the Property to a third party with the City's "prior written consent." Id. Thus, by making the contract part of the 2004 Ordinance, the ordinance expressly contemplates the CSOL could sell the Property to any third party *with the City's written consent*. The 2005 Deed from the City to the CSOL also reiterates this language. (Am. Compl. ¶ 15 & Exh. 2 (Book J543/Page 039).

The 2004 Ordinance further gave the City's Mayor full authority to act for the City:

> ***The Mayor is hereby authorized to execute the necessary documents to enter into that certain Agreement of Purchase and Sale*** between the City of Charleston and the Charleston School of Law for the property … ***and to undertake and perform the transactions contemplated thereby***, said Agreement of Purchase and Sale being … attached hereto and incorporated by reference herein.

(Am. Compl. Exh. 1; Memo. Supp Mot. For Judg. Plead. Exh. A). (emphasis added). The City delegated to the Mayor the authority to act on the City's behalf not only to execute the contract with the CSOL, but also to effectuate those transactions contemplated by the contract, such as the CSOL's subsequent sale of the Property to a third party with the City's written consent.

The CSOL had purchased the Property from the City with the intention of building a law school building on the land. (Am. Compl., p.6). However, after acquiring the Property, the CSOL discovered it was not economically feasible for it to construct a permanent law school building on the Property in view of, among other things, the ordinances and laws that existed with respect to restrictions or requirements involving parking and maximum height of new construction.

Consequently, in 2017, following several extensions of the parties' agreements, the CSOL and the City executed a written contract (the "2017 Modification Agreement") under which the City gave its consent to the CSOL's sale of the Property to a third party. (Am. Compl. Exh. 8). The City's Mayor signed the 2017 Modification Agreement on the City's behalf after it was

unanimously approved by resolution of the City Council. Under its terms, the CSOL is allowed to sell the Property to a third party, the CSOL agrees to divide the sale proceeds with the City pursuant to a distribution formula, and the City agrees to execute and deliver a quitclaim deed releasing or rendering null and void the POR so the CSOL's sale of the Property to the third party can close. In return, the 2017 Modification Agreement significantly increased the monies the City was to receive from the CSOL. (Am. Compl. ¶26-27 & Exh. 8).[1]

In November of 2018, in reliance upon its agreements with the City, the CSOL entered a contract to sell the Property to a third-party buyer, OmShera Hotel Group, LLC ("OmShera"). (Am. Compl. ¶43). Before entering this contract, the CSOL provided a copy of the proposed contract to the City's then-Corporation Counsel (Susan Herdina, Esquire) for the City's approval. (Am. Compl. ¶2 & Exh. 30). The City's counsel sent a letter to the CSOL expressly confirming that the proposed sales contract complies with the CSOL's agreements with the City and that the CSOL has the right to close on the sale of the Property to Omshera under those agreements. (Am. Compl. Exh. 30). OmShera has agreed to buy the Property for $12.85 million and has already paid $700,000.00 in non-refundable earnest money funds towards this purchase price. (Am. Compl. ¶43, 52). The CSOL has already paid 25% ($166,250.00) of this earnest money to the City in compliance with their agreements, which payment the City accepted without objection. (Am. Compl. ¶53-55).

Despite the forgoing, the City later reneged on its agreements with the CSOL and refuses to give a quitclaim deed so the CSOL can close on its sale of the Property to OmShera. The City

[1] As discussed further below, the City and the CSOL also subsequently executed another agreement dated July 19, 2019, which the Mayor signed and the City Council approved, under which they confirmed the CSOL's ability to sell or exchange the Property, to divide the resulting proceeds between the CSOL and City pursuant to a distribution formula, and for the City to eliminate the POR (the "2019 Modification Agreement"). (Am. Compl. Exh. 31).

has used its refusal to execute a quitclaim deed as leverage to extract yet further financial concessions from the CSOL. The City's actions have prevented the CSOL from closing on its sale of the Property to OmShera, thereby jeopardizing the sale, causing delay and significant financial harm to the CSOL, and subjecting the CSOL to potential legal exposure to OmShera.

The CSOL commenced this lawsuit to enforce its contracts with the City, which were unanimously approved by the City's Council, so the CSOL's sale of the Property to OmShera can finally close. (Am. Compl.). OmShera was also included as a defendant given its interest involving the Property. As a defense against the CSOL's claims and as purported justification for the City's refusal to deliver the quitclaim deed, the City's Answer now argues the 2017 Modification Agreement and 2019 Modification Agreement are "illegal and unenforceable" because the City's release of the POR assertedly requires authorization by yet another ordinance pursuant to § 5-7-260. See City's Answer. Section 5-7-260 states in pertinent part as follows:

> In addition to other acts required by law to be done by ordinance, those acts of the municipal council shall be by ordinances which: . . .
>
> (6) ***Sell or lease or contract to sell or lease any lands of the municipality***; and
> (7) ***Amend or repeal any ordinance described in items (1) through (6) above***.
>
> In matters other than those referred to in this section council may act either by ordinance or resolution.

S.C. CODE ANN. § 5-7-260(6)-(7) (emphasis added).

The City argues these sections mandate that its City Council must pass a second ordinance before the Mayor can execute a document releasing the POR in the 2005 Deed. The City claims that because its Council did not pass such an ordinance, the 2017 Modification Agreement and 2019 Modification Agreement (although approved by resolution of City Council and executed by the Mayor on the City's behalf) cannot be enforced and are illusory agreements, even despite the

fact the City accepted $166,250.00 in payments from the CSOL under those very same agreements and has never returned or repaid any of those funds.

The City's argument predicated on § 5-7-260(6)-(7) is the linchpin of its refusal to deliver a quitclaim deed releasing the POR so the CSOL can close on the sale of its Property to OmShera and is the centerpiece of the City's defenses against the CSOL's claims in this suit. Indeed, the City's Answer repeats sixty-five or more times the identical claim that the 2017 Modification Agreement and 2019 Modification Agreement were "not approved by ordinance and [are] therefore illegal and unenforceable pursuant to S.C. Code Ann. § 5-7-260." See City's Answer.

On November 20, 2023, the circuit court granted the CSOL's motion for judgment on the pleadings and dismissed the City's affirmative defenses and counterclaims which raise § 5-7-260. (Order p.18). Based on the circuit court's construction of the documents attached to the pleadings, the court held the City's defenses based on § 5-7-260 fail as a matter of law (1) because the statute has no application to a POR, which is ***not*** an estate in land, and (2) even assuming *arguendo* the statute could be construed to apply to the POR, the 2004 Ordinance already authorizes the Mayor to execute the necessary documents to facilitate the CSOL's transfer of the Property to a third party with the City's written consent, which would include a quitclaim deed releasing or rendering null and void the POR so the CSOL can close on the sale of the Property to a third party.

In dismissing the City's defenses and counterclaims premised on § 5-7-260, the circuit court did not determine or resolve any factual disputes. Instead, it construed the unambiguous contracts and instruments and applied settled law to those documents. When the case presents a question as to the construction of a written contract and the contract's language is clear and unambiguous, the question is not one of fact but one of law. The circuit court's rulings are sound and should be affirmed by this court.

STATEMENT OF THE CASE

On December 22, 2021, the CSOL filed an Amended Complaint averring causes of action as follows:

1. Breach of Contract/Breach of Covenant of Good Faith & Fair Dealing—Action for Damages – as to the City,
2. Breach of Contract/Breach of Covenant of Good Faith & Fair Dealing-–Specific Performance – as to the City,
3. Declaratory Judgment – as to all Defendants,
4. Estoppel - Equitable and Promissory Estoppel – as to the City,
5. Temporary, Preliminary, and Permanent Injunction – as to the City, and
6. Attorneys' Fees and Costs pursuant to S.C. CODE ANN. § 15-77-300 - as to the City.

(Am. Compl.). The CSOL asserts the closing could have taken place and the net proceeds of $9,478,906.00 disbursed to the CSOL by February 16, 2021, if the City's actions had not thwarted the Property's sale. Prejudgment interest totaling $2,147,361.75 had already accrued on the net proceeds as of September 26, 2023, pursuant to S.C. CODE ANN. § 34-31-20(A).

The City filed its Amended Answer on March 25, 2022. (Am. Answer). The City's Answer argues the 2017 Modification Agreement and 2019 Modification Agreement are "illegal and unenforceable" because the City's release of the POR assertedly requires authorization by an ordinance pursuant to S.C. CODE ANN. § 5-7-260. See City's Answer.

On September 9, 2021, the CSOL filed a Motion for Judgment on the Pleadings as to (1) the City's liability under the CSOL's causes of action for breach of contract/breach of covenant of good faith and fair dealing and declaratory judgment and as to (2) the City's affirmative defenses and counterclaims asserting § 5-7-260 as a defense. (Mot. Judg. on Pleadings). The motion asserts the City's defenses and counterclaims which are premised on § 5-7-260 fail as a matter of law. The CSOL filed a memorandum in support of its motion on September 14, 2023. (Mem. Supp. Pl.'s

Mot. J. on Pleadings). The City filed a memorandum in opposition to the CSOL's motion on September 21, 2023. (Mem. Opp. Pl.'s Mot. J. on Pleadings).

The circuit court conducted a hearing on the motion on September 26, 2023. (Hearing Trans.). By order filed November 20, 2023, the circuit court granted the CSOL's motion. (11/20/2023 Order). On November 30, 2023, the City filed a Motion to Reconsider. (Mot. Recons.). The CSOL filed a memorandum in opposition to the City's Motion to Reconsider on December 7, 2023. (Mem. Opp. Mot. Recons.). The circuit court denied the City's Motion to Reconsider by order filed December 12, 2023. (12/12/2023 Order). On January 12, 2024, the City appealed the circuit court's order granting the CSOL's Motion for Judgment on the Pleadings.

STATEMENT OF THE FACTS

City's Sale of Property to CSOL; 2005 Deed with POR:

The City acquired the Property from the U.S. Army Corps of Engineers for the purpose of selling it to the CSOL to operate a law school on the downtown peninsula. The City executed a quitclaim deed dated and recorded July 1, 2005, by which it conveyed ownership of the Property to the CSOL for a price of $875,000.00 ("2005 Deed"). (Am. Compl. ¶ 15 & Exh. 2; City's Answer ¶ 15). The CSOL paid $10,000.00 to the City and executed a promissory note in the principal amount of $865,000.00 with a maturity date of July 1, 2015 ("Note"), which was secured by a mortgage on the Property ("Mortgage"). (Am. Compl. ¶ 20 & Exhs. 3 & 4; City's Answer ¶ 20).

The 2005 Deed includes an attachment labeled "Exhibit B – Possibility of Reverter and Restriction." (Am. Compl. ¶ 15 & Exh. 2; City's Answer ¶ 15). Under the heading of "Possibility of Reverter," the attachment contains language creating a possibility of reverter ("POR") which states in part as follows:

> In the event that the property is not used solely for Law School Purposes at any point within the six (6) year period beginning as of the date this Deed is recorded

> in the RMC Office for Charleston County and in addition the permanent development construction to facilitate such usage is not commenced within six (6) years of the date this Deed is recorded in the RMC Office for Charleston County, all right title and interest to the Property shall automatically revert to the Grantor.

(Am. Compl. ¶ 15 & Exh. 2; City's Answer ¶ 15).

City Council voted to specifically authorize the sale of the Property to the CSOL by virtue of Ordinance Number 2004-150 ("2004 Ordinance"). (Am. Compl. ¶ 13 & Exh. 1; City's Answer ¶ 13). This ordinance approved the contract between the CSOL and the City. Indeed, the ordinance expressly incorporates into its terms and recites in full the Agreement of Purchase and Sale between the CSOL and City, thereby making the contract's terms part of the ordinance. Id.

Section 3 of the Agreement of Purchase and Sale, made part of the 2004 Ordinance, provides in part as follows:

> The Buyer [CSOL] shall be prohibited from selling or otherwise transferring the Property to a third-party or entity *without the Seller's [City's] prior written consent*, unless such sale or transfer is to facilitate an exchange of property by Buyer or other good faith accommodation with the owner of the Mid-Town Development, which is generally described as that certain block of land lying generally between Meeting, King, Wolfe and Spring Streets.

Id. (emphasis added). The 2005 Deed reiterates this language on "Exhibit B" attached thereto under the heading of "Restriction." (Am. Compl. ¶ 15 & Exh. 2 (Book J543/Page 039); City's Answer ¶ 15 (Grantee is "prohibited from selling or otherwise transferring the Property … to a third-party or entity without the Grantor's prior written consent ….")).

By making the terms of the Agreement of Purchase and Sale part of the 2004 Ordinance, the ordinance contemplates the CSOL could sell the Property to any third party *with the City's written consent*. The 2005 Deed confirms this point. In sum, both the 2004 Ordinance and 2005 Deed specifically permit the CSOL to sell or transfer the Property to any third party with the City's written consent.

That is precisely what happened in the instant case—*i.e.*, the City gave its written consent to the CSOL's sale of the Property to a third party (OmShera). In contracts referred to as the 2017 Modification Agreement and 2019 Modification Agreement, which the City Council approved by resolution, the City consented to the CSOL's sale of the Property to a third party provided the City receives a designated share of the sales proceeds.

The 2004 Ordinance further gave the City's Mayor full authority to act as follows:

> *The Mayor is hereby authorized to execute the necessary documents to enter into that certain Agreement of Purchase and Sale* between the City of Charleston and the Charleston School of Law for the property … *and to undertake and perform the transactions contemplated thereby*, said Agreement of Purchase and Sale being … attached hereto and incorporated by reference herein.

Id. (emphasis added). As a result, once the City gave its written consent to the CSOL's sale of the Property to a third party, the City ordinance authorizes the Mayor "to undertake and perform" the transactions contemplated by the Agreement of Purchase and Sale, which would include a deed or release of the POR so the CSOL can close on a sale of the Property to such third party.

To complete the CSOL's sale of the Property to a third party, the "Mayor is hereby authorized to execute the necessary documents ... to undertake and perform the transactions contemplated thereby." Id. This includes executing documents consenting to the CSOL's sale of the Property to a third party and releasing the POR. The Mayor, pursuant to the authority granted in the ordinance, has full authority to execute the necessary documents to facilitate the City's consent to the CSOL's sale or transfer of the Property to a third party (OmShera). Specifically, the Mayor was given the authority to release the POR to accomplish the sale.

2017 Modification Agreement:

In 2017, the CSOL negotiated an agreement with the City allowing it to sell the Property

to any third party. On July 20, 2017, following several extensions of the parties' agreements,[2] the City's Council unanimously approved a modification to the POR, which was memorialized in a written agreement executed by the City and the CSOL entitled "Agreement: 431 Meeting Street" ("2017 Modification Agreement"). (Am. Compl. ¶ 24 & Exh. 8; City's Answer ¶ 24). This 2017 Modification Agreement allows the CSOL to sell or exchange the Property to any third party and, in return, the CSOL will share the sale proceeds with the City pursuant to a distribution formula, and the City will execute and file a quitclaim deed to make clear on the public record the POR is null, void, and of no further force or effect.[3]

This 2017 Modification Agreement, which the City's Council unanimously approved by resolution and the Mayor signed, significantly increases the monies the City is to receive from the CSOL. It ensures the City will receive a minimum of $1 million (in excess of the Note payoff) for the release of the POR if the Property is sold or exchanged to a third party. It further ensures the City will receive an even larger share of the proceeds if the Property is sold or exchanged for a price exceeding $7.46 million, which was the approximate amount for which a nearby property had recently been sold. (Am. Compl. ¶¶ 25-27; City's Answer ¶¶ 25-27).

---

[2] By document entitled Modification of Promissory Note and dated November 16, 2009, the City extended the Note's maturity date to July 1, 2017 ("2009 Note Modification"). (Am. Compl. ¶ 21 & Exh. 5; City's Answer ¶ 21). The City also made a corresponding modification to the Mortgage by virtue of a Mortgage Modification Agreement dated November 16, 2009 ("2009 Mortgage Modification"). (Am. Compl. ¶ 22 & Exh. 6; City's Answer ¶ 22). By a document dated on its face as November 16, 2009, but not executed until March 25, 2010, the CSOL agreed to extend the POR in the 2005 Deed from July 1, 2011 to July 1, 2017 ("2010 Extension"). (Am. Compl. ¶ 23 & Exh. 7; City's Answer ¶ 23). Otherwise, the POR would have lapsed by its terms.

[3] As discussed below, the City and the CSOL also subsequently executed another agreement dated July 19, 2019, which the Mayor signed and the City Council unanimously approved, confirming the CSOL's ability to sell or exchange the Property to a third party, to divide the resulting proceeds between the CSOL and City pursuant to a distribution formula, and to eliminate the POR ("2019 Modification Agreement"). (Am. Compl. ¶ 58 & Exh. 31; City's Answer ¶ 58).

Section 2.1 of the 2017 Modification Agreement includes, *inter alia*, an agreement by the CSOL and City to have the Property appraised by a professional MAI appraiser (assuming no POR) and to allow for the CSOL to immediately market the Property for sale or exchange upon completion of the appraisal, with the City having the right to approve any real estate broker or agent employed by the CSOL. (Am. Compl. ¶ 28; City's Answer ¶ 28). Section 3.1 states that if an offer meets or exceeds the appraised value of the Property, the CSOL shall have the right to accept the offer and close the transaction. (Am. Compl. ¶ 29; City's Answer ¶¶ 29).

During the term of the 2017 Modification Agreement, Section 2.3.1 further specifically authorizes and permits the CSOL to sell or exchange of the Property to any third party upon the payment to the City of the greater of (a) the $865,000.00 principal amount of the Note plus an additional $1 million (a total of $1,865,000.00) or (b) 25% of the sales price (net of the real estate commission, appraisal costs, and deed stamps), with the remaining balance of the sale proceeds to be retained by or distributed to the CSOL. (Am. Compl. ¶ 30; City's Answer ¶ 30). Section 2.3.1.3 expressly requires the City to satisfy the Note and Mortgage in the event of a sale of the Property during the term of the 2017 Modification Agreement and the payment to the City of the amount set forth above. Id.

Section 2.5 of the 2017 Modification Agreement provides that if the agreement's term expires before the Property is sold or exchanged, then the CSOL shall pay the principal and all accrued interest and unpaid interest on the Note. (Am. Compl. ¶ 31; City's Answer ¶ 31). Section 2.5.1.2 also provides that if the CSOL transfers the Property after the term of 2017 Modification Agreement expires, then, at the closing of such transfer, the City will be paid a share of the transfer proceeds calculated as follows:

> [T]wenty-five percent (25%) of the portion of the sales price attributable to the land (but not the value of any improvements on the land), or twenty-five (25%) of the then-appraised

> value of land value of the Property pursuant to an appraisal dated within six months of closing (but not the value of any improvements) less (a) the amounts set forth in Section 2.5.1.1 [the real estate commission, appraisal costs, and deed stamps] and (b) Eight Hundred Sixty Five Thousand and No/100 Dollars ($865,000.00).

(Am. Compl. ¶ 24 & Exh. 8 § 2.5.1.2; City's Answer ¶ 24). The remaining balance of the sale proceeds to be retained by or distributed to the CSOL. Id.

Section 2.6 of the 2017 Modification Agreement states that at the closing of any sale of the Property, the City shall execute and file a quitclaim deed (a) to delete, eliminate, and render null and void the POR contained in the 2005 Deed and (b) to acknowledge satisfaction of any and all rights or claims that the City has under the 2017 Modification Agreement. (Am. Compl. ¶ 32; City's Answer ¶ 32). The maturity date for the CSOL's repayment of the principal indebtedness evidenced by the Note was extended to July 1, 2019, and the CSOL and City agreed to make corresponding modifications to the Mortgage and POR in the 2005 Deed. (Am. Compl. ¶ 33; City's Answer ¶ 33).

2017 Appraisal and Listing Agreement for Sale of Property:

In accordance with the 2017 Modification Agreement, the CSOL retained the services of Charleston Appraisal Service, Inc. ("CAS"), a MAI appraiser, to conduct a professional appraisal of the Property. (Am. Compl. ¶ 34; City's Answer ¶ 34). CAS provided a written appraisal report with an "as of" date of August 14, 2017. (Am. Compl. ¶ 35 & Exh. 9; City's Answer ¶ 35). The report states that the Property's fair market value was $10,759,000.00 as of the valuation date based on the assumption the Property's use would not be restricted by the POR in the 2005 Deed. Id. On September 26, 2017, the CSOL entered into a Listing Agreement with Clement, Crawford & Thornhill, Inc., professional real estate brokers, to sell the Property for an asking price of $12.5 million. (Am. Compl. ¶ 36 & Exh. 10; City's Answer ¶ 36).

2018 Purchase Agreement with Vanderking Acquisition Co., LLC:

On March 29, 2018, the CSOL entered a Real Property Purchase Agreement with a potential third-party buyer, Vanderking Acquisition Co., LLC, for a sales price of $10,800,000.00 ("Vanderking Purchase Agreement"). (Am. Compl. ¶ 37 & Exh. 11; City's Answer ¶ 37). The agreement disclosed the 2017 Modification Agreement between the CSOL and City. (Am. Compl. ¶ 38; City's Answer ¶ 38). Section 29 of the Vanderking Purchase Agreement includes the CSOL's representations and warranties to Vanderking involving the 2017 Modification Agreement, including that the CSOL is in compliance with the agreement and has not received any notice of default thereunder. Id.

Section 29 of the Vanderking Purchase Agreement further states: "At Closing, a portion of the Purchase Price shall be paid to the City pursuant to the terms of the [2017 Modification Agreement], and [the CSOL] shall cause the City to comply with the terms of the [2017 Modification Agreement], including without limitation, Section 2.6 thereof." (Am. Compl. ¶ 39; City's Answer ¶ 39). As stated above, Section 2.6 of the 2017 Modification Agreement provides that at the closing of the sale of the Property, the City shall execute and file a quitclaim deed (a) to delete, eliminate, and render null and void the POR contained in the 2005 Deed and (b) to acknowledge satisfaction of any and all rights or claims that the City has under the 2017 Modification Agreement.

On May 14, 2018, the City's then-Corporation Counsel (Frances I. Cantwell, Esquire) addressed a letter to Ed Bell, as the CSOL's President, confirming on the City's behalf the contract between the CSOL and Vanderking to sell and purchase the Property for the sales price of $10,800,000.00 complied with the 2017 Modification Agreement. (Am. Compl. ¶ 41 & Exh. 12; City's Answer ¶ 41). The letter states in part: "Since the Purchase Price exceeds the appraisal [of

$10,759,000.00 by CAS], pursuant to Section 3.1 of the [2017 Modification Agreement], the [CSOL] has the right to close the transaction pursuant to the [2017 Modification Agreement]." The letter also states the City had reviewed the Vanderking Purchase Agreement and it "acknowledges that the representations and warranties of [the CSOL] in Section 29 concerning the [2017 Modification Agreement] are true and correct." Ms. Cantwell ended her letter with: "We look forward to the closing."

The closing of the sale to Vanderking ultimately did not occur. The Vanderking Purchase Agreement was not consummated and expired. (Am. Compl. ¶ 42).

2018 Purchase Agreement with OmShera Hotel Group, LLC:

On November 26, 2018, the CSOL entered a new Purchase Agreement with OmShera for an initial sales price of $12.5 million ("OmShera Purchase Agreement"). The price was later increased to $12.85 million. (Am. Compl. ¶ 43 & Exhs. 13-29; City's Answer ¶ 43).

The OmShera Purchase Agreement likewise disclosed the 2017 Modification Agreement. (Am. Compl. ¶ 44; City's Answer ¶ 44). Section 9.26 of the OmShera Purchase Agreement includes the CSOL's representations and warranties to OmShera involving the 2017 Modification Agreement, including that the CSOL is in compliance with that agreement and has not received any notice of default thereunder. (Am. Compl. Exh. 13 § 9.26). Section 9.26 further states: "At Closing, a portion of the Purchase Price shall be paid to the City pursuant to the terms of the [2017 Modification Agreement], and [the CSOL] shall cause the City to comply with the terms of the [2017 Modification Agreement], including without limitation, Section 2.6 thereof." Id. As noted above, Section 2.6 of the 2017 Modification Agreement provides that at the closing of the sale of the Property, the City shall execute and file a quitclaim deed (a) to delete, eliminate, and render null and void the POR contained in the 2005 Deed and (b) to acknowledge satisfaction of any and

all rights or claims that the City has under the 2017 Modification Agreement. (Am. Compl. Exh. 8 § 2.6).

Before entering this contract with OmShera, the CSOL provided a copy of the proposed contract to the City's then-Corporation Counsel (Susan Herdina, Esquire) for the City's approval. On November 15, 2018, Ms. Herdina addressed a letter to Mr. Bell confirming on the City's behalf that the OmShera Purchase Agreement for the initial sales price of $12.5 million complies with the 2017 Modification Agreement and that the CSOL has the right to close on the sale of the Property to OmShera. (Am. Compl. ¶ 46 & Exh. 30; City's Answer ¶ 46). Ms. Herdina's letter states in part: "Since the Purchase Price meets the requirements set forth in the [2017 Modification Agreement], pursuant to Section 3.1 of the [2017 Modification Agreement], the [CSOL] has the right to close the transaction pursuant to the [2017 Modification Agreement]." She ended her letter with: "We look forward to the closing." The CSOL thereafter tendered a copy of Ms. Herdina's letter to Omshera, which then executed the OmShera Purchase Agreement dated November 26, 2018. (Am. Compl. ¶ 47; City's Answer ¶ 47).

CSOL's 2019 Payment of Note and City's Satisfaction of Mortgage:

On April 29, 2019, Ms. Herdina addressed another letter to Mr. Bell stating the City was providing notice to the CSOL pursuant to Section 4 of the 2017 Modification Agreement that the City will not extend or renew the term of the 2017 Modification Agreement, which was set to expire on July 20, 2019. (Am. Compl. ¶ 48 & Exh. 38; City's Answer ¶ 48). This letter states in part: "Further, pursuant to Section 2.5 [of the 2017 Modification Agreement], if the property is not sold or exchanged by July 20, 2019, please pay on that date the principal amount of the Note ($865,000.00) and all accrued and unpaid interest on the Note. Thereafter, if the Charleston School

of Law transfers the Property, following the closing please transfer funds to the City according to the division of proceeds set out in Section 2.5.1 [of the 2017 Modification Agreement]."

The letter's reference to the "division of proceeds" refers to Section 2.5.1.2 of the 2017 Modification Agreement, which provides that if the CSOL transfers the Property after the term of 2017 Modification Agreement expires, then, at the closing of such transfer, the City will be paid a share of the transfer proceeds equaling:

> [T]wenty-five percent (25%) of the portion of the sales price attributable to the land (but not the value of any improvements on the land), or twenty-five (25%) of the then-appraised value of land value of the Property pursuant to an appraisal dated within six months of closing (but not the value of any improvements) less (a) the amounts set forth in Section 2.5.1.1 [the real estate commission, appraisal costs, and deed stamps] and (b) Eight Hundred Sixty Five Thousand and No/100 Dollars ($865,000.00).

(Am. Compl. ¶¶ 24 & 50 & Exh. 8 § 2.5.1.2; City's Answer ¶¶ 24 & 50). The remaining balance of the sale proceeds to be retained by or distributed to the CSOL. Id.

On July 18, 2019, the CSOL paid the City the principal amount of the Note ($865,000.00) and all accrued and unpaid interest. (Am. Compl. ¶ 51; City's Answer ¶ 51). The CSOL paid a total of $317,751.23 in interest to the City in addition to paying the principal amount of $865,000.00. The Note has been paid in full by the CSOL and the Mortgage on the Property has been fully satisfied by the City. Id.

2019 Modification Agreement:

By virtue of a document dated July 19, 2019 ("2019 Modification Agreement"), the CSOL and City further modified the POR. (Am. Compl. ¶ 58 & Exh. 31; City's Answer ¶ 58). This agreement was also approved unanimously by resolution of the City's Council. Id. It modified the POR in the 2005 Deed to conform that document to the terms and provisions of the 2017 Modification Agreement. It confirms or affirms the CSOL's ability to sell or exchange the Property,

divide the proceeds of the sale between the CSOL and City pursuant to a distribution formula, and eliminate the POR in the 2005 Deed. Id.

In exchange for the City's release of the POR, the 2019 Modification Agreement provides the City is to be paid valuable consideration. (Am. Compl. ¶ 60; City's Answer ¶ 60). Specifically, the 2019 Modification Agreement added a section to the POR stating that if the CSOL transfers the Property, either directly by deed, or indirectly (such as, without limitation, through a long term ground lease or sale or exchange at the corporate or entity level), then, at the closing of such transfer, the City will be paid a share of the transfer proceeds calculated as follows:

> [T]wenty-five percent (25%) of the portion of the sales price attributable to the land (but not the value of any improvements on the land), or if the transfer is an exchange, twenty-five (25%) of the then-appraised value of land value of the Property pursuant to an appraisal dated within six months of closing (but not the value of any improvements), but in either case, less (a) the amount of the real estate commission, the appraiser (if applicable), and deed stamps and (b) Eight Hundred Sixty Five Thousand and No/100 Dollars ($865,000.00).

(Am. Compl. ¶ 58 & Exh. 31; City's Answer ¶ 58). The remaining balance of the sale proceeds to be retained by or distributed to the CSOL. Id.

The 2019 Modification Agreement also added another section to the POR as follows:

> At closing of any such sale or exchange and payment of the aforesaid amounts to the City, the City of Charleston will execute and file a quit-claim deed (a) to delete, eliminate and render null and void the Possibility of Reverter … as contained in [the 2005 Deed], and (b) to acknowledge satisfaction of any and all rights or claims the City of Charleston has under the [2017 Modification Agreement].

Id.

Under this language, the POR is rendered null and void and has been replaced with the obligation to divide the proceeds upon sale of the Property. If the Property is never sold, title remains in the CSO and does not revert to the City. The 2019 Modification Agreement was

recorded with the Charleston County Register of Deeds on August 15, 2019, and is part of the chain of title for the Property. (Am. Compl. ¶ 58 & Exh. 31; City's Answer ¶ 58).

CSOL's Payment to City of Share of OmShera's Earnest Money Deposit:

On March 31, 2020, OmShera paid a total of $700,000.00 in earnest money funds to the CSOL, with these funds to be non-refundable to OmShera and to be credited towards the purchase price at closing. (Am. Compl. ¶ 52; City's Answer ¶ 52). On May 5, 2020, the CSOL paid $166,250.00 to the City to honor the CSOL's obligations under the 2017 Modification Agreement and 2019 Modification Agreement. (Am. Compl. ¶ 53; City's Answer ¶ 53). This amount reflected 25% of the net proceeds ($700,000.00 - $35,000.00 real estate commission = $665,000.00 x .25 = $166,250.00) the CSOL had received thus far from OmShera.

The City did not object to the payment or the CSOL's calculation of the payment. The City accepted the $166,250.00 from the CSOL without objection or reservation of rights and has not returned or repaid any of the funds. (Am. Compl. ¶¶ 55-56; City's Answer ¶¶ 55-56).

City's Refusals to Eliminate POR to Allow Closing of Sale of Property to OmShera:

The CSOL and OmShera performed due diligence towards an anticipated closing of the sale of the Property. (Am. Compl. ¶ 62; City's Answer ¶ 62). The CSOL and OmShera have since notified the City they desire and intend to close the sale of the Property pursuant to the OmShera Purchase Agreement and that, as part of such a closing, the CSOL intends to disburse and divide the sales proceeds to the CSOL and City in accordance with the 2017 Modification Agreement and 2019 Modification Agreement. (Am. Compl. ¶ 63; City's Answer ¶ 63).

Despite the prior November 15, 2018 letter from the City's Corporation Counsel assuring the CSOL the OmShera Purchase Agreement "meets the requirements" of the 2017 Modification Agreement, the CSOL "has the right to close the transaction pursuant to the [2017 Modification

Agreement]," and the City "look[s] forward to the closing" of the sale, the City has since refused to execute and deliver a quitclaim deed releasing the POR so the sale can close. (Am. Compl. ¶¶ 46 & 84 & Exh. 30; City's Answer ¶¶ 46 & 84).

STANDARD OF REVIEW

When reviewing a grant of a judgment on the pleadings, the appellate court applies the same legal standards as the trial court. Ziegler v. Dorchester Cnty., 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019); Ballard v. Admiral Ins. Co., 442 S.C. 22, 34, 897 S.E.2d 183, 189 (Ct. App. 2023). Rule 12(c) allows a party to move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." S.C. R. Civ. P. 12(c). "The standard is almost identical to the standard employed in considering a Rule 12(b)(6) motion 'with the key difference being that on a 12(c) motion, the court is to consider the answer as well as the complaint.'" Kissel v. Hess Corp., 2010 WL 2721964, at *1 (D.S.C. May 27, 2010) report and recommendation adopted, 2010 WL 2721922 (D.S.C. July 9, 2010). A court should grant the motion when the [pleading] fails to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

"When considering such motion, the court must regard all properly pleaded factual allegations as admitted." Ballard, 442 S.C. at 33, 897 S.E.2d at 188. The court may consider the pleadings, exhibits attached thereto, and documents incorporated therein by reference. See S.C. R. CIV. PRO. 10(c); Carolina First Corp. v. Whittle, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000). The court also may consider other materials that are public records or appropriate for the taking of judicial notice without converting the motion into one for summary judgment. See S.C. R. EVID. 201(f); Doe v. Bishop of Charleston, 407 S.C. 128, 135 n.2, 754 S.E.2d 494, 498 n.2 (2014); In re MI Windows and Doors, Inc., 2013 WL 3207423, *2 (D.S.C. 2013).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENT CSOL'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS.

A. The circuit court applied the correct standard for deciding the CSOL's motion and did not prematurely grant the motion.

The City states in conclusory fashion that the circuit court's order misapplies the correct standard for granting a judgment on the pleadings and further argues a judgment on the pleadings was improper "because the allegations in [CSOL's] operative complaint and the City's operative answer conflict." (City's Init. Brief p.8). The City also makes the naked claim that "discovery is necessary" to resolve the issues raised in the CSOL's motion. Id. These arguments lack merit.

While the City says there are conflicts in the parties' pleadings, it nowhere points to any *factual dispute* in the pleadings that would preclude the circuit court from granting a judgment on the pleadings involving the particular issues or claims addressed in its order. Rather, the City's brief emphasizes its *conflicting legal arguments* concerning the state statute at issue and its *conflicting interpretations* of the governing documents (ordinance, deed, contracts). The mere fact the parties have differing opinions about the law or conflicting interpretations of the documents is not grounds for denying a motion for judgment on the pleadings. Such conflicts are not factual issues. Baker Hosp. v. Firemans Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (1994) ("A judgment on the pleadings … is not proper if there is *an issue of fact* raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment." (emphasis added)).

In deciding a Rule 12(c) motion, the court deems admitted all properly pleaded facts; however, "[t]he motion does not admit the inferences drawn by the [nonmoving] party from the facts nor does it admit conclusions of law." Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 235, 394 S.E.2d 855, 856 (Ct. App. 1990). "While the Court considers the facts in the light

most favorable to the nonmoving party, the Court need not accept the legal conclusions drawn from the facts, and need not accept as true unwarranted inferences, unreasonable conclusions or arguments." Kinsale Ins. Co. v. Seaboard Ventures Inc., No. 4:22-CV-00944-RBH, 2023 WL 3096520, at *3-4 (D.S.C. Apr. 26, 2023) (quoting Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008)) (internal quotation marks omitted). The court may consider the pleadings, exhibits thereto, and documents incorporated therein by reference. See S.C. R. CIV. PRO. 10(c); Carolina First, 343 S.C. at 190 n.7, 539 S.E.2d at 410 n.7.

When the case presents a question as to the construction of a written contract and the contract's language is clear and unambiguous, the question is not one of fact but one of law. Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 415 S.E.2d 428 (Ct. App. 1992); see also S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (construction of a clear and unambiguous deed is a question of law for the court). When the contract is unambiguous, courts look only to the language of the contract itself and not to extrinsic evidence to discover the parties' intent—i.e., that intention must be found within the contract's "four corners." Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009). The parol evidence rule prevents introduction of extrinsic evidence "to contradict, add to, subtract from, vary or explain" the terms of a written instrument. Proffitt v. Sitton, 244 S.C. 206, 210, 136 S.E.2d 257, 259 (1964); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577, 581 (1990).

Judgment on the pleadings is particularly appropriate where a claim's availability or viability is governed by the terms of an unambiguous contract. See Lane v. Krein, 297 S.C. 133, 135, 375 S.E.2d 351, 352 (Ct. App. 1988) (affirming judgment on the pleadings when partnership agreement's terms showed minority partner lacked capacity to pursue claim without majority vote of partnership); VoiceAge Corp. v. RealNetworks, Inc., 926 F.Supp.2d 524, 529 (S.D.N.Y. 2013)

("Thus, a motion for judgment on the pleadings 'can be particularly appropriate in breach of contract cases involving legal interpretations of the obligations of the parties."); Ballard, 442 S.C. at 34, 897 S.E.2d at 189 (affirming judgment on the pleadings in declaratory judgment action involving interpretation and application of provisions of insurance policy).

Likewise, judgment on the pleadings is proper where the party's claims or defenses are not viable under the law. See Douglas v. Boyce, 336 S.C. 318, 325, 519 S.E.2d 802, 806 (Ct. App. 1999) (affirming judgment on the pleadings where state statute did not grant cause of action claimed by plaintiff); Bouchelle Inc. v. Canopius US Ins., C/A No. 2016-CP-10-04984 (Charleston Cty. Comm. Pleas Jan. 9, 2018) (granting judgment on the pleadings where plaintiff lacked standing to pursue claims); Doe v. Citadel & Marlin Quincy Pryor, C/A No. 2016-CP-10-03320 (Charleston Cty. Comm. Pleas March 7, 2017) (granting judgment on the pleadings where the South Carolina Tort Claims Act barred plaintiff's tort claims); Parker v. Estate of Franklin Lafayette, C/A No. 2016-CP-10-00204 (Charleston Cty. Comm. Pleas Feb. 26, 2019) (granting judgment on the pleadings where statute of limitations barred plaintiff's claims).

In this case, the circuit court's order is clear it granted the CSOL's motion based on its interpretation of the 2004 Ordinance as well as the subsequent deed and written contracts between the City and the CSOL. (11/20/2023 Order). The CSOL attached copies of these documents as exhibits to its Amended Complaint. The Amended Complaint alleges the City's Council approved the contracts by resolution and the City's Mayor signed them on the City's behalf. (Am. Compl.). The City's Answer nowhere disputes these facts. (Def. City's Am. Answer). The City does not dispute the execution or authenticity of the ordinance, deed, or contracts. As a result, there is no factual issue or "conflict" in the pleadings that would prevent the circuit court from deciding the

issues raised in the CSOL's motion. The only conflict involves the proper application of state law to the uncontroverted documents, not the resolution of factual disputes.

The City argues that although its Council approved the contracts by resolutions and the Mayor signed them on the City's behalf, the CSOL's contracts with the City supposedly are nevertheless illegal under S.C. CODE ANN. § 5-7-260(6) and (7) because the Council did not enact a second ordinance approving them. The City posits that § 5-7-260(6) and (7) required a second ordinance before the City could execute a contract releasing the POR contained within the 2005 Deed from the City to the CSOL. This is strictly a legal determination, not a resolution of any factual issue. The legal issues before the court involve whether § 5-7-260(6) or (7) requires the contracts in question to be accomplished or approved by another City ordinance rather than a resolution and whether the original ordinance (the 2004 Ordinance) already satisfies the requirements of § 5-7-260(6) and (7).

The circuit court's order decided these legal issues against the City. (11/20/2023 Order). It found the City's defenses based on § 5-7-260 fail as a matter of law (i) because the statute has no application to a POR, which is *not* an estate in land, and (ii) even assuming *arguendo* the statute could be construed to apply to the POR, the 2004 Ordinance already authorizes the Mayor to execute the necessary documents (quitclaim deed or release of POR) to facilitate the CSOL's sale of the Property to a third party with the City's consent, which was given. (11/30/23 Order, pp.18-29).

These findings are properly based on the well-pled factual allegations in the Amended Complaint, which include the terms and provisions of the ordinance, deeds, and contracts. The City does not dispute any of these facts; instead, it argues the contracts are invalidated by operation of § 5-7-260. It is unnecessary to conduct discovery to resolve that legal question. In fact,

additional discovery would be futile when the governing documents are unambiguous and extrinsic evidence would be inadmissible to vary their terms. Roper, LLC v. Harris Teeter, Inc., No. 2013-YP-327, 2013 WL 8539469, at *2 (S.C. Ct. App. July 17, 2013) ("[W]e find no merit to Germania's assertion it should be allowed to conduct discovery. As stated above, we hold the Letter Agreement was not ambiguous. Therefore, no further discovery was needed.").

Importantly, even if the City believed it did not have sufficient time to conduct discovery to oppose the motion, it should have promptly filed a motion seeking additional discovery time. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (finding that if the appellant "believed he did not have sufficient time [to uncover evidence and speak with any potential witnesses], [he] should have promptly filed a motion seeking additional discovery time"). The City never pursued such a motion.

The City also never moved for a continuance of the motion hearing to pursue further discovery, thus waiving the issue of additional discovery. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (argument that trial court prematurely ruled on motion was waived when party did not move for a continuance in which to pursue further discovery); Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996) (whether judge erred in granting summary judgment because discovery requests were outstanding was waived when party did not ask court to continue case so discovery could be completed); Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) (parties waived argument that court erred in granting motion while parties had motion to compel outstanding when the parties failed to move for a continuance).

In sum, the circuit court did not misapply the correct standard in granting the CSOL's motion. It did not prematurely grant the CSOL's motion.

B. The circuit court properly found § 5-7-260 is inapplicable because the release of the possibility of reverter does not involve land or an estate in land nor does it repeal or amend an ordinance approving the sale or lease of municipal land.

The City argues that § 5-7-260(6) & (7) purportedly required the City to enact a second ordinance approving the POR's release or modification. (City's Init. Brief pp.8-12). These statutes require a municipal ordinance for the City to "sell or lease or contract to sell or lease *any lands of the municipality*" or to "amend or repeal any ordinance" selling or leasing or contracting to sell or lease *any lands of the municipality*. S.C. CODE ANN. § 5-7-260(6) & (7) (emphasis added). However, as a matter of law, those sections are inapplicable to the POR and its release.

As the circuit court observed, South Carolina's courts have long held that a POR is not an "estate in land" which can be conveyed, alienated, or devised—rather, it is a mere right of possibility. Indeed, the City's brief nowhere disputes or quarrels with this settled principle.

Section 5-7-260(6) is inapplicable because a POR does not involve any lands of the City. "The [POR] is the interest remaining in the grantor after conveying a fee simple conditional or a fee simple determinable." 27 S.C. JUR. Mortgages § 19 (2023) (citing Waller v. Waller, 220 S.C. 212, 66 S.E.2d 876 (1951) and Purvis v. McElveen, 234 S.C. 94, 106 S.E.2d 913 (1959)). For centuries, South Carolina's courts have consistently ruled that a POR is not an "estate in land" which can be conveyed, alienated, or devised—rather, it is a mere right of possibility. "The possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate." Vaughn v. Lanford, 81 S.C. 282, 62 S.E. 316, 317 (1908). "The [POR] is a mere right, at most, and … it cannot be of grant, devise or inheritance." Adams v. Chaplin, 10 S.C. Eq. 265, 279 (S.C. App. L. & Eq. 1833). "The [POR] is this mere floating right of possibility." Id.

In Purvis, the South Carolina Supreme Court discussed many older cases holding that "[t]he interest remaining in the grantor after he has conveyed land in fee simple determinable or

conditional is a [POR]." 234 S.C. at 99, 106 S.E.2d at 916. The Court concluded that this POR "is not an estate, but a mere possibility of acquiring one." Id. "It cannot be the subject of devise or inheritance" Id. "Nor can it be conveyed." Id. This is because a conveyance of land in fee simple determinable or conditional leaves "nothing in the grantor that can be the subject of devise or inheritance." Id. at 100, 106 S.E.2d at 916. The Court further said:

> [T]he grantee's estate may continue forever, but is liable to termination upon the happening of an uncertain event. . . . But the inalienability of the [POR] . . . results from the fact that the whole estate has passed from the grantor, and the only interest remaining in him, viz.: the [POR], is an interest too nebulous, under the common law concept, to be devised or conveyed.

Id. at 100-01, 106 S.E.2d at 916; see also Hull v. Hull, 24 S.C. Eq. 65, 78 (S.C. App. Eq. 1850) ("This reverter is not considered in law as an estate. It is too small and remote an interest to have that character impressed upon it. It is too remote and contingent to be valued. There is no appreciable interest left in the donor."); 27 S.C. JUR. Mortgages § 19 (A POR "is neither a present nor future estate, but a mere possibility of acquiring one. It may not be the subject of inheritance or devise. South Carolina follows the common law rule that the [POR] is not alienable, and therefore, may not be the subject of a mortgage." (footnotes omitted)).

Similarly, in Waller, the South Carolina Supreme Court held that "[t]he [POR], after the termination of a fee conditional, being a mere possibility, is not an estate." 220 S.C. at 220-21, 66 S.E.2d at 881. The Court further said:

> It is neither a present nor a future right, but a mere possibility that a right may arise upon the happening of a contingency, which is not the subject of either devise or inheritance. This is because the grant or devise of a fee conditional passes the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which can be the subject of devise or inheritance . . . .

Id. (quoting Blount v. Walker, 31 S.C. 13, 9 S.E. 804, 807 (1889)). "[H]e who has the [POR], has no present interest, either in law or in fact, and the presumption is, that he will never have any, the

whole estate, according to the cases, is in the tenant in fee conditional." Deas v. Horry, 11 S.C. Eq. 244, 249 (S.C. App. L. & Eq. 1835); see Crawford v. Masters, 98 S.C. 458, 82 S.E. 793, 794 (1914) ("Such a right [POR], according to the views before expressed, is not regarded as property; it is a mere possibility, analogous in some degree to an heir apparent's right of succession.").

These decisions remain the law in South Carolina. In the more recent case of S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens, 309 S.C. 388, 424 S.E.2d 465 (1992), several grants of property had been made to Brookgreen Gardens, an eleemosynary corporation, in fee simple determinable with a POR if the property was used for any purpose other than what was allowed in Brookgreen's corporate charter. Id. at 390, 424 S.E.2d at 466. The court applied the holding in Purvis and recognized that "[t]he future interest which accompanies the fee simple determinable is the [POR]." Id. at 392, 424 S.E.2d at 467 (citing Purvis). It noted that a POR "has been held in South Carolina as non-transferable by will to a non heir, or by *inter vivos* alienation to a third party; however, it may be released to the party holding the fee simple determinable." Id. A "release [by the holder] serves to eliminate the condition on the fee simple determinable estate, rendering the possessory interest a fee simple absolute." Id. at 393, 424 S.E.2d at 467; see Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904, 907 (1942) (holding POR may be released to the tenant in fee conditional, so as to make his estate an absolute fee simple).

In the present case, it is uncontroverted the City's 2004 Ordinance expressly authorized the sale of the Property to the CSOL. This sale of the Property was completed at the closing when the City executed and delivered the 2005 Deed to the CSOL. At that point, the City no longer had any estate in the Property because it was transferred to the CSOL. Rather, the City conveyed the whole of its fee interest to the CSOL and the CSOL held title to the Property in fee simple—*i.e.*, with a fee simple determinable interest. As the older cases explain, the 2005 Deed conveyed a "fee simple

determinable" to the CSOL and the "whole estate was gone" from the City. Waller, 220 S.C. at 220, 66 S.E.2d at 876.

As owner of a fee simple determinable interest, the CSOL was the only party with a present interest in the Property and thus had full control over the Property. In contrast, the City retained a mere POR, which is neither a present nor future estate, but a mere possibility of acquiring one in the future. All of the City's fee interest or estate passed to the CSOL in 2005, leaving nothing in the City which could be the subject of a sale or conveyance. The City merely held a POR, which does not constitute an estate in land and is an interest too nebulous to be conveyed. It follows that the City's release of the POR or its agreement to do the same do not involve a sale of municipal land or a contract to sell or lease any municipal land. The agreements between the CSOL and City subsequent to the 2005 Deed did not involve a sale or lease or contract to sell or lease municipal land because *municipal land is not involved when the City releases a POR.*[4]

Because the POR is not land or an estate in land, the POR can be released without the necessity of an ordinance or approval by ordinance. This is precisely what the 2017 Modification Agreement and 2019 Modification Agreement accomplished. By virtue of those agreements, the City agreed to allow the CSOL to sell the Property to a third party and to release the POR in exchange for the CSOL's payment to the City of a portion of the sales proceeds. These agreements do not involve the "[sale] or lease or contract to sell or lease any lands of the municipality" under § 5-7-260(6) because the POR held by the City is not land or an estate in land. It is merely a

[4] In numerous other instances the City has executed and recorded deeds with a POR in favor of the City without any ordinance approving those transactions or conveyances, thus indicating the City itself does not believe an ordinance is needed. (Mem. Supp. Pl.'s Mot. J. on Pleadings Exhs. C-G). The court may take judicial notice of these materials without converting same to a motion for summary judgment. See S.C. R. EVID. 201(f); Doe, 407 S.C. at 135 n.2, 754 S.E.2d at 498 n.2; MI Windows, 2013 WL 3207423 *2.

possibility of acquiring an estate in the future. As a result, § 5-7-260(6) is inapplicable.

Likewise, § 5-7-260(7) is inapplicable because the 2017 Modification Agreement and 2019 Modification Agreement do not involve the amendment or repeal of any ordinance *selling or leasing municipal land*. For § 5-7-260(7) to apply, the City must show the agreements repealed or amended an ordinance selling or leasing municipal land to the CSOL. The City's brief fails to cite any provision in the 2017 Modification Agreement or the 2019 Modification Agreement stating they repeal or amend the City's sale of the Property to the CSOL. Further, neither of those agreements purports to amend or repeal any ordinance selling or leasing municipal land.

The most the City can muster is the claim that "to alter or extinguish" the POR in effect "is to amend the 2004 Ordinance," although it cites no legal support for this claim. (City's Init. Brief p.10). The simple fact that in 2017 and 2019 the City agreed to release a right which the 2004 Ordinance had authorized the City to retain when it sold the Property to the CSOL in 2005 does not repeal or amend the ordinance approving the sale. The sale was approved in 2004 and was completed in 2005 as authorized. Nothing in the 2017 Modification Agreement or the 2019 Modification Agreement purports to alter this fact. In 2017 and 2019, the City later agreed to release a right which it had still held after the sale. However, as the circuit court correctly ruled, because this right was not land or an estate in land, by definition the release of the POR could not act to repeal or amend an ordinance selling or leasing municipal land. (11/20/23 Order p.23).

The City's construction of § 5-7-260(7) ignores its plain language, which provides that it applies when an ordinance *selling or leasing municipal land* is being amended or repealed. It nowhere states it applies to the repeal or amendment of an ordinance simply involving a mere right that is not land. For the reasons discussed above, the City did not need an ordinance to authorize the creation or retention of a POR with respect to the Property because the POR does not involve

any sale or lease of municipal land—it merely is a right. If the retention of a POR does not require an ordinance, then the release of a POR cannot require an ordinance.

In any event, as explained further below, it was unnecessary to amend the 2004 Ordinance for the CSOL to sell the Property to a third party because the ordinance already allows the CSOL to sell the property to a third party *with the City's written consent* and, as part of such sale, explicitly authorizes the City's Mayor "to undertake and perform" the transactions contemplated by the ordinance. This authorization encompasses the City's execution of a quitclaim deed or release of the POR so the CSOL can close on its sale of the Property to a third party made with the City's consent, which was given by virtue of the 2017 Modification Agreement and 2019 Modification Agreement between the City and the CSOL. The 2004 Ordinance already authorizes the Mayor to execute a release of the POR once the CSOL sells the Property to a third party with the City's written consent, which was given by the City.

In sum, the circuit court correctly held as a matter of law that § 5-7-260(6) & (7) have no applicability to the 2017 Modification Agreement and 2019 Modification Agreement and it was unnecessary to have another ordinance authorizing the Mayor to execute those agreements. After 2005, because the City no longer had any estate in the Property, a new ordinance was not legally required for the City to release the POR or to enter into the 2017 Modification Agreement or 2019 Modification Agreement. As a matter of law, § 5-7-260 does not require that the agreements between the CSOL and the City subsequent to the 2005 Deed (including the 2009 Note Modification, 2009 Mortgage Modification, 2010 Extension, 2017 Modification Agreement, and 2019 Modification Agreement) be accomplished or enacted by ordinance or approved by ordinance.

Because a municipal ordinance was unnecessary to modify or release the POR, the City's reliance upon Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 417 S.E.2d 579 (1992), is misplaced. In Berkeley Elec., the court held a municipal ordinance was necessary for a town to enter a contract with an electric utility granting it a franchise to provide electrical services to customers located within the town's limits because § 5-7-260(4) requires an ordinance for a municipality to "grant, renew or extend franchises." S.C. CODE ANN. § 5-7-260(4). However, Berkeley Elec. does not control this case because none of the CSOL's contracts with the City involve a contract to grant, renew, or extend a franchise. Further, as explained above, § 5-7-260(6) & (7) are inapplicable because the release of the POR does not involve the City's land or the amendment or repeal of any ordinance involving the City's land. The POR is not land. Because the 2017 Modification Agreement and 2019 Modification Agreement are not covered by § 5-7-260(6) or (7), nothing in Berkeley Elec. holds those contracts are void or unenforceable.

C. The circuit court correctly held the 2004 Ordinance satisfies the requirements of § 5-7-260 because it authorized the City's mayor to execute the necessary documents to undertake and perform the transactions contemplated thereby, which include a quitclaim deed releasing the POR so the CSOL can sell the Property to a third party with the City's written consent, which was given.

The City's repeats its argument that the Mayor supposedly lacked authorization to execute the 2017 Modification Agreement and the 2019 Modification Agreement under the terms of the 2004 Ordinance. (City's In. Brief pp.12-14). This argument should again be rejected for the same reasons explained in the circuit court's order.

The 2004 Ordinance authorized the Mayor to execute the necessary documents to undertake and perform the transactions contemplated in the 2004 Agreement of Purchase and Sale between the City and CSOL involving the Property, which agreement is attached to the ordinance and became a part thereof. (Am. Compl. Exh. 1). The 2004 Ordinance states in part:

> *The Mayor is hereby authorized to execute the necessary documents to enter into that certain Agreement of Purchase and Sale* between the City of Charleston and the Charleston School of Law for the property … *and to undertake and perform the transactions contemplated thereby*, said Agreement of Purchase and Sale being … attached hereto and incorporated by reference herein.

(Id.) (emphasis added).

The transactions contemplated by the Agreement of Purchase and Sale include the CSOL's sale of the Property to a third party made *with the City's written consent.* Section 3 of the Agreement of Purchase and Sale between the City and CSOL provides in part as follows:

> The Buyer [CSOL] shall be prohibited from selling or otherwise transferring the Property to a third-party or entity *without the Seller's [City's] prior written consent*, unless such sale or transfer is to facilitate an exchange of property by Buyer or other good faith accommodation with the owner of the Mid-Town Development, which is generally described as that certain block of land lying generally between Meeting, King, Wolfe and Spring Streets.

(Id.) (emphasis added). The 2005 Deed from the City to the CSOL further reiterates this language on the "Exhibit B" attached thereto under the heading of "Restriction." (Am. Compl. ¶ 15 & Exh. 2 (Book J543/Page 039); Def. City's Answer ¶ 15).

The 2004 Ordinance and 2005 Deed clearly contemplate and permit the CSOL to sell or transfer the Property to any third party with the City's written consent. That is what happened in this case. After the 2005 Deed, the City later executed written contracts with the CSOL in which the City gave its written consent to the CSOL's sale of the Property to a third party. The 2004 Ordinance further authorized the Mayor "to undertake and perform" the transactions contemplated by the Agreement of Purchase and Sale, which would embrace the City's execution of a quitclaim deed or release of the POR so the CSOL can close its sale of the Property to such a third party with the City's consent.

In both the 2017 Modification Agreement and 2019 Modification Agreement, the City specifically consented to the CSOL's sale of the Property to a third party with the City to receive

a share of the proceeds. (Am. Compl. ¶¶ 24 & 58 & Exhs. 8 & 31; Def. City's Answer ¶¶ 24 & 58). The City's Council approved both of these agreements by resolution and the Mayor signed them on the City's behalf. (Id.) The City nowhere points to any statute or other law requiring the City to enact an ordinance authorizing the Mayor to execute a contract on the City's behalf consenting *to the CSOL's sale of its own property* to a third party or releasing the POR so the CSOL can close such a sale. To the contrary, state law provides the City can authorize such a contract by resolution, which is what occurred in this case. See S.C. CODE ANN. § 5-7-260 ("In matters other than those referred to in this section council may act either by ordinance or resolution.").

In addition to the above, before the OmShera Purchase Agreement was completed, the CSOL submitted the proposed contract to the City for review and approval. On November 15, 2018, the City's Corporation Counsel confirmed in a letter sent to the CSOL's President that the CSOL's sale of the Property to OmShera complies with the CSOL's contracts with the City and that the CSOL has the right to close on the sale of the Property to OmShera. (Am. Compl. ¶ 46 & Exh. 30; Def. City's Answer ¶ 46). The City's letter "look[ed] forward to the closing." (Id.). In short, the uncontroverted terms of the agreements show the City consented in writing to the CSOL's sale of the Property to OmShera.

Once the City consented to the CSOL's sale of the Property to OmShera, the 2004 Ordinance gave the Mayor full authority to execute any documents necessary to undertake and perform that transaction. The 2004 Ordinance says the "Mayor is hereby authorized to execute the necessary documents ... to undertake and perform the transactions contemplated thereby." This includes executing documents consenting to the CSOL's sale of the Property to OmShera and releasing the POR. The Mayor, pursuant to the authority granted in the 2004 Ordinance, has full

authority to execute the necessary documents to facilitate the City's consent to the CSOL's transfer of the Property to OmShera. To accomplish such a transfer, the Mayor has authority to release the POR.

For the CSOL's sale of the Property to OmShera to close, it is necessary for the City to execute a quitclaim deed or release of the POR rendering it "null and void" so the CSOL can convey clear title to OmShera. The City obligated itself to deliver such a document to the CSOL under the terms of the 2017 Modification Agreement and the 2019 Modification Agreement. (Am. Compl. Exh. 8 ¶2.6 and Exh. 31 ¶3.a). The terms of those agreements, which the City Council approved and the Mayor signed, memorialize the City's consent to the CSOL's sale of the Property to OmShera as well as the City's agreement to release the POR so the CSOL can complete such this sale. The 2004 Ordinance authorizes the Mayor to execute such a release of the POR. (Am. Compl. Exh. 1).

In summary, even assuming for argument's sake that § 5-7-260(6) & (7) could apply to the POR, the 2004 Ordinance authorized the Mayor to execute the necessary documents to facilitate the CSOL's transfer of the Property to a third party made with the City's consent. It is unnecessary for the City to enact yet another ordinance authorizing the Mayor to execute a quitclaim deed or document releasing the POR. The 2004 Ordinance already grants this authority.

D. The circuit court correctly held the terms of the Purchase and Sale Agreement between the City and the CSOL were merged into the 2005 Deed.

The heading to one section of the City's brief claims the "circuit court erred in finding that the merger doctrine extinguished the 2004 Ordinance." (City's In. Brief p.14). However, the City fails to cite any language in the circuit court's order actually stating such a ruling. This is because the order in fact makes no such ruling. The City is arguing against a straw person argument.

What the circuit court's order actually says is as follows:

> As a matter of law, the Agreement of Purchase and Sale between the CSOL and the City relating to the Property was merged into the 2005 Deed. The execution, delivery, and acceptance of the 2005 Deed extinguished any antecedent agreements between the CSOL and the City involving the Property by operation of law.

(11/30/23 Order, p.27). Contrary to the City's attempt to mischaracterize or distort the order, the terms of the order state the antecedent contract between the City and the CSOL concerning the Property (the 2004 Agreement of Purchase and Sale) was merged into the 2005 Deed. It does not state the 2005 Deed extinguished the 2004 Ordinance.

Settled law holds that the execution, delivery, and acceptance of a deed extinguishes any antecedent contracts or agreements between the parties concerning the subject property. Wilson v. Landstrom, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) ("The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed."); Charleston & W. C. Ry. Co. v. Joyce, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) ("We have held that the general rule is that a deed made in full execution of a contract of sale of land merges the provisions of the contract therein, and that this rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed."). The City's motion fails to cite any law holding to the contrary.

In truth, the City's argument is a red herring. For the reasons previously discussed, it was unnecessary to extinguish the 2004 Ordinance for the Mayor to execute the 2017 Modification Agreement or 2019 Modification Agreement. Neither of those agreements purports to extinguish or modify any municipal ordinance. They act to release or modify the POR in the 2005 Deed.

E. The circuit court did not grant judgment on the pleadings involving the City's other defenses or counterclaims which are not predicated on § 5-7-260; it's order expressly reserved those issues for future adjudication.

As a final argument, the City contends it was "premature" for the circuit court to make rulings as to the City's liability because the City has raised additional affirmative defenses that do not depend on the applicability of § 5-7-260(6) or (7). (City's In. Brief p.15). Yet, the City's own brief concedes the circuit court's order expressly states its holdings concerning liability are "subject to the Court's future adjudication of the City's affirmative defenses that are not predicated on § 5-7-260(6) or (7)." (11/30/23 Order, p.29). The order further acknowledges the City "has raised additional affirmative defenses, including fraudulent inducement, that do not depend on the applicability of § 5-7-260(6) or (7) and, which if the City proves, could defeat the CSOL's claims." (Id. at pp.27-28). The order "leaves unresolved for now the City's affirmative defenses to the extent they are *not* based on § 5-7-260(6) or (7)" and states "[t]hose other affirmative defenses will be determined by future adjudication of the Court." (Id. at p.28).

The circuit court's order merely grants partial judgment on the pleadings as to those claims or defenses predicated on § 5-7-260(6) or (7). It leaves unresolved the City's other claims and defenses which are not predicated on those statutes. The order narrows the issues to the extent warranted by the CSOL's motion and goes no further than what is appropriate. The City's brief is devoid of any law showing this is erroneous.

CONCLUSION

For the reasons and arguments presented above, this Court should affirm the circuit court's order granting Respondent CSOL's Motion for Judgment on the Pleadings.

Respectfully submitted,

ROSEN HAGOOD, LLC

By: *Daniel F. Blanchard, III*
H. Brewton Hagood, Esquire (SC Bar #2438)
Daniel F. Blanchard, III Esquire (SC Bar #65432)
Mary Harriet Moore, Esquire (SC Bar #105312)
40 Calhoun Street, Suite 450
Charleston, SC 29401
Telephone: (843) 577-6726
Email: bhagood@rosenhagood.com
Email: dblanchard@rosenhagood.com
Email: mhmoore@rosenhagood.com
ATTORNEYS FOR RESPONDENT THE CHARLESTON SCHOOL OF LAW, LLC

September 16, 2024
Charleston, South Carolina.