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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 and OMSHERA HOTEL GROUP, LLC,.....Respondents,

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.

BRIEF OF RESPONDENT OMSHERA HOTEL GROUP, LLC

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INTRODUCTION

Because the interests of Respondent Omshera Hotel Group, LLC ("Omshera") and Respondent The Charleston School of Law, LLC ("CSOL") are aligned with respect to the trial court's grant of judgment on the pleadings, Omshera joins in every respect with the arguments as propounded by CSOL in its Brief filed with this Court on September 16, 2024.

STATEMENT OF ISSUES ON APPEAL

Omshera adopts the Statement of Issues on Appeal as propounded by CSOL in its Brief.

STATEMENT OF THE CASE

Omshera adopts the Statement of the Case propounded by CSOL in its Brief, to which it adds the procedural fact that on September 22, 2023, Omshera filed its Return to CSOL's Motion for Judgment on the Pleadings, joining in CSOL's Motion. (R.p. 705)

STATEMENT OF FACTS

The Appellant City purchased the Subject Property at 431 Meeting Street from the U.S. Army Corps of Engineers for a consideration of $1,170,500.00 by quitclaim deed recorded April 26, 2005 (Am. Compl. ¶ 12; R.pp. 283-284). Thereafter, by quitclaim deed recorded July 1, 2005 the City sold the Subject Property to The Charleston School of Law, LLC ("CSOL") for $875,000.00. The cash discount of $295,500.00, the difference between the City's purchase and its sale price, was intended as an incentive for CSOL to remain on the peninsula City of Charleston. (Am. Compl. ¶ 15; Exhibit "2"; R.p. 284; R.p. 90)

The deed conveyance to CSOL was made subject to a possibility of reverter ("POR"), whereby title to the Subject Property would revert back to the City in the event the Property were not used for law school purposes under the terms specified in the deed.

As recounted in the principal briefs filed by the City and by CSOL, sale of the Subject Property by the City to CSOL was authorized by City Ordinance number 2004-150. Incorporated into the terms of Ordinance 2004-150, and physically attached to it as "Exhibit '1' is the full and complete Purchase and Sale Agreement ("PSA") made between the City and CSOL. (Am. Compl. ¶13 & 14; R.p. 284; Exhibit "1"; R.p. 80)

The written terms of the Purchase and Sale Agreement between the City and CSOL thus also became the written terms of the enabling ordinance as enacted by City Council.

Two provisions of the 2004 Ordinance are controlling of the issues joined in this appeal, as follows:

First, it is provided in Section 3 of Exhibit 1 to Ordinance 2004-150, in part: "3. *Title. At closing Seller shall convey the property to the Buyer by quit claim deed... the Buyer shall be prohibited from selling or otherwise transferring the property to a third party or entity without the Seller's prior written consent...".* (Emphasis added.) (R.p. 82)

Secondly, it is provided in Section 9.3 of Exhibit 1 to Ordinance 2004-150: "9.3. *Entire Agreement. This Agreement constitutes the entire agreement between the Buyer and the Seller and there are no agreements, understandings, warranties or representations between the Buyer and the Seller except as set forth herein. The Agreement cannot be amended except in writing executed by the Buyer and the Seller."* (Emphasis added.) (R.p. 85)

As alleged in CSOL's Complaint, on July 20, 2017 City Council by resolution unanimously approved and consented to CSOL's sale of the Subject Property to a third party, in an agreement made between CSOL and the City referred to as the "2017 Modification Agreement". As consideration for the City's agreement to CSOL's sale of the Property to a third party, and for the City's agreement to release the possibility of reverter ("POR"), the parties agreed that the City

would be paid 25% of the net proceeds from such sale. (Am. Compl. Ex. 8, Section 2.5.1.2; R.p. 123). The parties agreed that the City's release of the POR would be accomplished by quit claim deed. (2017 Modification Agreement Section 2.6; R.p. 123)..

Pursuant to the 2017 Modification Agreement, CSOL procured an appraisal of the Property, which opined the value to be $10,759,000.00. (Am. Compl. Ex. 9; R.p. 127).

In November of 2018, CSOL engaged in negotiations with Respondent Omshera, culminating in a draft PSA to sell the Property for $12,500,000.00 (R.p. 165). By subsequent agreement, the price was later increased to $12,850,00.00. (Am. Compl. Ex. 21; R.p. 199)

On November 15, 2018 the City's then-corporation counsel Susan Herdina signed a letter to CSOL confirming that the then - draft PSA with Omshera, for the initial price of $12,500,000.00, complied with the 2017 Modification Agreement, and that CSOL had the right to close the sale. (Am. Compl. Ex. 30; R.p. 221). The letter concluded with the salutation, "We look forward to the closing.".

After CSOL presented a copy of Ms. Herdina's letter to Omshera, on November 26, 2018 Omshera signed the initial PSA with CSOL. (Am. Compl. ¶ 47; R.p. 293; R.pp. 165, 181).

On July 19, 2019, 24 months after entering into the 2017 Modification Agreement, the City and CSOL signed a second modification agreement, the "2019 Modification Agreement" which, *inter alia*, confirmed the agreement between the City and CSOL to release the POR in consideration for payment by CSOL to the City of 25% of the net sales proceeds as therein described. (Am. Compl. ¶ ¶ 58-61; R.pp. 296-297; R.p. 223)

It is inferable from the pleadings and their numerous exhibits, and it is indeed specifically provided in Exhibit 36 to the Complaint, that after Omshera signed the PSA with CSOL on November 26, 2018, it undertook to engage in due diligence by retaining counsel who obtained

necessary zoning approvals from the City's Board of Zoning Appeals-Zoning ("BZA-Z") for the use of the Subject Property for a hotel; and also by engaging architects who obtained conceptual design approval of the hotel project from the City's Board of Architectural Review ("BAR"). There was never the slightest suggestion by the City during these due diligence collaborations that the City would later renege on the 2017 and 2019 Modification Agreements.

As alleged in paragraphs 52 and 53 of CSOL's Amended Complaint, on or about March 31, 2020, pursuant to the Omshera Purchase Agreement, Omshera paid a total of $700,000.00 in earnest money funds to CSOL, said funds to be non-refundable to Omshera and to be credited towards the purchase price at closing. On May 5, 2020, CSOL paid $166,250.00 to the City of Charleston, pursuant to the 2017 Modification Agreement, which amount reflected 25% of the net proceeds received by the City of Charleston from Omshera as of that date. The City retains the funds to this day.

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).*

ARGUMENTS

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

A. The 2004 Ordinance Was Not "Amended", Contrary To The City's Arguments.

Appellant City argues at pages 9-10 of its Brief that the validity of the 2017 and 2019 Modification Agreements are "...essential to CSOL's claims. These alleged agreements seek to amend or repeal the 2004 ordinance to eliminate the Reverter Clause. To be valid under (Code) Section 5-7-260, they had to be approved by ordinance, which they never were."

Importantly, however, and contrary to the City's position, the 2004 Ordinance by its own terms contemplates and provides for the sale of the Subject Property by CSOL to a third party, "with the consent of the City". (Am. Compl. Exhibit "1"; Ordinance Section 3; R.pp. 082-083). The Ordinance provides: "The Buyer shall be prohibited from selling or otherwise transferring the Property to a third party or entity without Seller's written consent..." (emphasis added.) The

converse of this proposition is that CSOL may sell the Property to a third party with the City's consent.

That is exactly what happened in this case. Moreover, the ordinance was not "amended", at all, which is a central point of the City's appeal. Rather, the transaction merely implements an unambiguous provision of the 2004 Ordinance; that is, the provision that the Property may be sold to a third party "with the City's consent".

If, as the City argues, a second ordinance is necessary to ratify a sale to a third party, the terms of the existing ordinance authorizing such a sale with the City's "consent" would be rendered meaningless, because any ordinance may be amended by a second ordinance, as the statute upon which Appellant relies so provides. The City's argument to this point thus contradicts the established maxim of statutory construction that the courts will not construe a statute in a way that leads to an absurd result or renders it meaningless. *Florence County Democratic Party v. Florence County Republican Party* 398 S.C. 124, 727 S.E. 2d 418 (S. Ct. 2012). The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). The statutory language must be construed in light of the intended purpose of the statute. Id. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. See *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General Assembly intended to accomplish something by its choice of words and would not do a futile thing); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act,

but rather intended its statutes to accomplish something); *Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

Instead, in this instance, the original ordinance was implemented according to its own terms, which authorize sale of the Property to a third party with the City's consent. Therefore, with the consent of the City through its City Council, a sale to a third party was approved. And in this instance, the sale to the third party – Respondent Omshera – was approved not only once by City Council in the 2017 Modification Agreement, but a second time, again in the 2019 Modification Agreement. In each instance, the Agreements were approved by unanimous vote of City Council, as before recited.

As for the City's almost sanctimonious argument that the possibility of reverter is "a binding servitude on the Property… deemed to run with the land in perpetuity" required to be included "in any deed or other legal instrument by which (CSOL) divests itself of either the fee simple title are any other lessor estate in the Property or any portion thereof", it is nevertheless a cardinal rule of the law of servitudes that "a release by the beneficiary of a servitude modifies or extinguishes the beneficiary's interest in the servitude to the extent specified in the instrument of release". *Restatement Third of Property; Servitudes, Section* 7.3; *Marathon Finance Co. v. HHC Liquidation Corp.* 325 S.C. 589, 483 S.E.2d 757 (Ct App. 1997).

Without the necessity of debating whether a possibility of reverter rises to the level of a "servitude running with title to the land", and even if that were so, even such a servitude may nevertheless be released by agreement of the parties. In this case, in two agreements ratified by

resolutions of City Council, the City agreed to release the POR. On both occasions, the resolutions passed by unanimous vote.

It is more than noteworthy to observe, at this point, that the decision to initiate and to implement the approvals of the 2017 Modification Agreement and the 2019 Modification Agreement by the device of unanimous resolutions of City Council, rather than by Ordinance, was the City's. Although this Respondent does not concede that an Ordinance was necessary to effect the approval of the Modification Agreements, the City now argues that it should be allowed to capitalize on what it claims to be an error, of which it, the City alone, was the author.

It is also germane to this debate that the consideration flowing from the City to CSOL, enabling the City to retain a possibility of reverter in the first place, was financial: the City discounted its sale price for the Property to CSOL by the amount of $295,500.00 in the first instance. On the other hand, in the 2017 and 2019 Modification Agreements the City agreed that CSOL could sell the Property to a third party, Omshera, and from the sales proceeds the City would be paid 25% of the net, in consideration for the City's agreement to release the possibility of reverter. The estimated calculation of the City's 25% of net proceeds amounts to more than 3 million dollars. See Exhibit "1" to Exhibit "32" of CSOL's Complaint, entitled "Proceeds Spreadsheet". (R.p. 233)

As discussed in the Statement of Facts above, the 2004 Ordinance provides, in two instances, that the ordinance may be amended by agreement of the parties, to wit, the City of Charleston and CSOL.

In addition to the provision in Ordinance 2004-150 permitting sale of the Subject Property to a third party with the consent of the City, the City ordinance also provides that it may be amended by agreement of the parties. In Section 9.3 of Exhibit 1 to the Ordinance, which consists

of the PSA, it is provided: "*9.3. Entire Agreement. This Agreement constitutes the entire agreement between the Buyer and the Seller and there are no agreements, understandings, warranties or representations between the buyer and the seller except as set forth herein. The agreement cannot be amended except in writing executed by the Buyer and the Seller.*" (emphasis added). (R.p. 85)

B. No Ordinance Was Required In Order To Release The Possibility Of Reverter.

Notwithstanding the plain language of Ordinance 2004-150, Appellant City also argues at page 10 of its brief that because the 2004 Ordinance approved the sale of municipal lands to CSOL pursuant to Code Section 5-7-260(6) that, therefore, "To alter or extinguish the reverter clause – a key provision of the 2004 Ordinance – is to amend the 2004 Ordinance." (emphasis in original). Accordingly, the City argues, because the 2017 and 2019 Modification Agreements were not approved by a separate ordinance those agreements are "invalid and unenforceable".

The City's central premise is that "to alter or extinguish the reverter clause… is to amend the 2004 Ordinance". But there is no substance to the argument. The City cites no authority for its bald assertion that to alter or extinguish the reverter clause is to amend the 2004 Ordinance. As for the proposition that a POR is not an interest in land, as CSOL persuasively argues in its Brief, the City casually dismisses the point with the tacit acknowledgment that, although the POR is not an estate in land, the Circuit Court "erroneously conclud(ed) that the effort to alter or extinguish it did not require an ordinance".

Other than its argument that the Reverter Clause is "a key provision of the 2024 Ordinance", the City advances no plausible argument, or legal authority, why the agreement to release the POR must be accomplished by ordinance.

It is indisputable that the POR is not an "interest in land", as CSOL persuasively establishes in its Brief. Therefore, Code Section 5-7-260(6) is not implicated. Apparently acknowledging that the POR is not an interest in land and therefore Section 5-7-260(6) is not implicated, the City next argues that the agreement for its release "is to amend the 2004 ordinance" thus attempting to implicate 5-7-260(7). But that cannot be so because, as argued above, inherent in the terms of the ordinance itself is the provision that it may be amended by consent of the parties.

The burden on this point is carried by the Appellant City of Charleston. The City cites no authority to support the proposition that there is any inherent characteristic unique to a possibility of reverter that requires it to be either created or released by ordinance. The reason the City cannot cite an authority, is because there is none. As before argued, a POR is not an interest in land; moreover, the ordinance itself provides for its self-amendment, even if an amendment were necessary.

Thus, and more specifically to the point, even if the agreement to release the POR is an amendment to the ordinance, it is plainly an amendment contemplated by the terms of the ordinance itself, that may be accomplished by consent of the parties.

The POR was created in exchange for money consideration: a discounted purchase price to CSOL of $295,500.00. The same parties then agreed that the POR would be released for money consideration, for a substantially greater sum than the smaller purchase price discount: three million dollars to the City, compared with the purchase price discount. This is not to suggest that the difference in values carries any legal import. However, and particularly to the extent that the City attempts to cast the disparity in terms of optics, the City comes out well in the end.

Not only did the City not condition its approval of the sale to third party Omshera on the preservation of the POR, which it could have done, but the City expressly agreed to accept significant dollar consideration in exchange for its release.

No additional ordinance was required in the circumstances.

CONCLUSION

No Ordinance was required to authorize sale of the Property.

The trial court's order granting judgment on the pleadings must be affirmed. It is plain and clear under the unambiguous terms of City Ordinance 2004-150 that the City and CSOL retained the legal right to agree to a sale of the Subject Property at 431 Meeting Street by CSOL to a third party, by their mutual consent.

It is also plain and clear that the City could have conditioned such a sale upon the continuation of the possibility of reverter. However, the City elected not to do that, and moreover City Council unanimously approved, on two occasions, in the 2017 and 2019 Modification Agreements not only the sale of the property to a third party, but also to accept compensation in exchange for its agreement to release the possibility of reverter by quitclaim deed.

The City has now refused to honor its agreement, for reasons that may come to light in later stages of this case. But it is clear the City acted with unambiguous legal authority to approve the sale by unanimous resolutions of City Council. No ordinance was required.

Omshera's $700,000.000 non-refundable earnest money deposit; and the City's retention of $166,250.00 of that sum.

By March 21, 2020, Omshera had obtained from Appellant City's Board of Zoning Appeals-Zoning its approval for the accommodations use of the Subject Property as a hotel. As of that date, Omshera designated funds that it paid to CSOL, a total of $700,000.00, as a non-

refundable earnest money deposit to be credited against the purchase price at closing. (Am. Compl. ¶ 52; R.p. 295). Of the $700,000.00 designated and paid by Omshera to CSOL, CSOL in turn remitted 25% of the net amount thereof, amounting to $166,250.00, to Appellant City, in accordance with the 2017 Modification Agreement, as consideration for the City's agreement to release the possibility of reverter. (Am. Compl. ¶ ¶ 52-57; R.pp. 295-296).

The Appellant City of Charleston accepted the payment from CSOL of $166,250.00, and has neither tendered nor offered to tender to CSOL or to Omshera a refund of the payment, notwithstanding the City's repudiation of the 2017 and 2019 Modification Agreements. (Am. Compl. ¶ ¶ 52-57; R.pp. 295-296).

Respondent Omshera is therefore caught in this case between a proverbial "rock and a hard place". As before stated, Omshera signed the PSA with CSOL to purchase the Subject Property, only after receiving a copy of the November 15, 2018 letter from the City attorney that the then-draft PSA between CSOL and OMS "meets the requirements set forth between the City and CSOL", and that CSOL "has the right to close the transaction". The City's encouraging salutation "we look forward to the closing", could in no way portend the calamitous position that the City has now chosen to take, by repudiating the agreements themselves.

In addition to the $700, 000.00 non-refundable earnest money deposit paid by Omshera to CSOL in March of 2020, it should be fairly inferable by this Court that Omshera has expended considerable additional funds in legal fees for obtaining zoning approvals, and architectural fees for obtaining Board of Architectural Review approval of a conceptual design of the hotel project. A total expenditure by Omshera in excess of one million dollars for these several purposes would not be speculative.

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,

BARR, UNGER & McINTOSH, LLC

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March 12, 2025
Charleston, South Carolina.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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Case No. 2021-CP-10-05645

THE CHARLESTON SCHOOL OF LAW, LLC, a South Carolina limited liability company and OMSHERA HOTEL GROUP, LLC,.....Respondents,

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.

CERTIFICATION OF BRIEF OF RESPONDENT OMSHERA HOTEL GROUP, LLC

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The undersigned hereby certifies that the Brief of Respondent OmShera Hotel Group, LLC complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court's Order dated April 15, 2014.

Respectfully,

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Charleston, South Carolina
March 13, 2025

THE STATE OF SOUTH CAROLINA
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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.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent Omshera Hotel Group, LLC, by transmitting a copy of the same via Email to:

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March 13, 2025

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RE: Charleston School of Law, LLC etal vs. City of Charleston, etal,
C/A No.: 2021-CP-10-05645 / Appellate Case No.: 2024-000064
Our File Number: 2019-1152.06

Dear Ms. Kitchings:

Enclosed for filing in the referenced appeal are the following:

1. One unbound Brief of Respondents (also in the Fed Ex mailing);
2. One bound Brief of Respondents (only in the Fed Ex mailing);
3. Certification of Brief pursuant to Rule 211(b), SCACR.
4. Proof of Service upon opposing counsel.

Please advise if anything further is required.

With kind regards,

Sincerely yours,

Capers G. Barr, III

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Enclosure (as stated)
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