

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Trial Court Case No. 2009-CP-22-1045

APPELLATE CASE NO. 2013-001644

John Steven Goodwin, Louise C. Goodwin, Thomas L. Puckett and Branda C. Puckett, Robert Nahama and Jeanne E. Nahama, Thomas Holland and Sharon Louise Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard N. Taylor, Robert K. Spillers (a/k/a Robert Spillers), and Deborah T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo and Deborah A. DiAngelo, Gary E. Owens and Joyce M. Owens, Fount L. Shults and Lynda M. Shults, and Dennis Ridgeway and Teresa Lynn Ridgeway, Appellants

v.

Landquest Development, LLC, Kyle V. Corkum, South Bay Properties, LLC, C. R. Thompson and Sons, LLC, Ronald L. Charlton, Bonnie N. Charlton, James R. Charlton and Bayside Property, Inc., the City of Georgetown, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, and National Land Sales, Inc., f/k/a Source One Communities, LLC, a/k/a South One Signature Communities Respondents

**RESPONDENTS HARTFORD CASUALTY INSURANCE COMPANY'S AND
HARTFORD FIRE INSURANCE COMPANY'S MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION TO DISMISS APPEAL**

Respondents Hartford Casualty Insurance Company and Hartford Fire Insurance Company (collectively, "Hartford Respondents") by and through their undersigned counsel, hereby submit this Memorandum of Law in Support of their Motion to Dismiss,

pursuant to Rule 240 of the South Carolina Appellate Court Rules. In support of their Motion, Hartford Respondents show unto this Court the following:

1. Appellants filed their Complaint on July 9, 2009.

2. The Complaint alleges:

(a) That the Appellants “are owners of various lots located in the subdivision situate in Georgetown County, South Carolina, known and designated as ‘Harbor Club on Winyah Bay’” [Complaint ¶1]

(b) Hartford Casualty Insurance Company issued a Subdivision Performance Bond, dated July 17, 2007, in the penal sum of \$7,882,359.00, on behalf of South Bay Properties, LLC, as Principal, in favor of the City of Georgetown, South Carolina, as Obligee, relating to certain improvements and site infrastructure in the subdivision. By Rider to the Bond, the Surety Company name was changed from Hartford Casualty Insurance Company to Hartford Fire Insurance Company. [Complaint ¶ 46] A copy of the Bond, which was incorporated by reference in the Complaint, is attached hereto as Exhibit A. [Affidavit of Lawrence M. Hershon, ¶ 5, February 5, 2014, attached hereto as Exhibit B]

(c) The developer, South Bay Properties, LLC, failed, neglected, and refused to complete the construction of the Project. [Complaint ¶ 54]

3. In their Complaint, Appellants allege a single cause of action against Hartford Respondents. Namely, Appellants seek a declaratory judgment as to Hartford

Respondents' legal duties and obligations to Appellants under the Bond. Appellants allege that they are suing Hartford Respondents under the Subdivision Performance Bond on the contention that "Plaintiffs were intended beneficiaries of the Subdivision Performance Bond. . . ." [Complaint ¶ 100]

4. Hartford Respondents dispute the contentions of Appellants as to their assertions of the rights they claim under the Bond. However, regardless of the lack of legal authority for their claim, due to events that have transpired since the dismissal of the underlying lawsuit the claim against Hartford Respondents is now moot.
5. On August 20, 2013, the City of Georgetown, as Obligee on the Bond, entered into an Agreement with Hartford Fire Insurance Company ("Hartford") whereby those parties to the Bond have agreed to have the improvements covered by the Bond constructed and installed. The Agreement is attached hereto as Exhibit C. [Aff. L. Hershon, ¶ 6]
6. On December 11, 2013, following completion of a bidding and contractor selection process, Hartford Fire Insurance Company entered into a Construction Contract with R.H. Moore Company, Inc. ("R.H. Moore"), pursuant to the aforementioned Agreement between Hartford and the City, to install the site infrastructure and utilities pursuant to plans and specifications approved by the City of Georgetown. The Construction Contract (without exhibits) is attached hereto as Exhibit D. [Aff. L. Hershon, ¶ 7-8]
7. Hartford issued a Notice to Proceed under the Construction Contract with R.H. Moore, effective January 13, 2014, and R.H. Moore commenced work on the

Project on or about that date. The Notice to Proceed is attached hereto as Exhibit E. [Aff. L. Hershon, ¶ 9]

8. “To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985)). “A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” *Graham*, at 71, 459 S.E.2d at 845 (citing *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by “[a]ny person interested under a deed ... written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a ... contract or franchise [and such person] may have determined any question of construction or validity arising under the instrument, ... contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” S.C. CODE ANN. § 15-53-30.
9. South Carolina appellate courts may only consider cases presenting a justiciable controversy. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Id.* at 26, 630 S.E.2d at 477 citing *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

10. Mootness has been described as “the doctrine of standing set in a time frame.” *Jackson v. State*, 331 S.C. 486, 489 S.E. 2d 915 (1997). An appellate court will not pass judgment on moot and academic questions or make an adjudication where there remains no actual controversy. *Id.* Moot appeals result when intervening events render a case non-judiciable. Mootness exists “when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Matthis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E. 2d 713, 715 (1973).

11. In their Complaint, Appellants seek a declaration that the City take appropriate action as to the Bond and require that the Hartford Respondents complete the site infrastructure for the Subdivision.

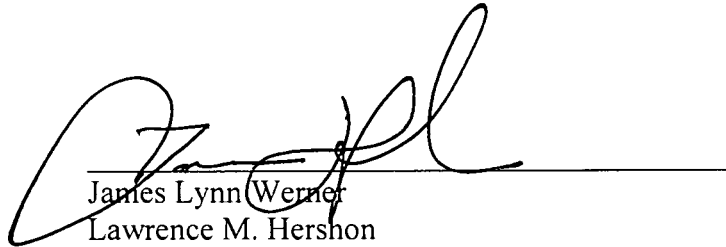
12. Because the City, as Oblige under the Bond, and Hartford Fire Insurance Company, as Surety under the Bond, have executed an agreement for construction of the improvements covered by Hartford’s Subdivision Performance Bond, a justiciable controversy no longer exists. Any adjudication by this Court on the issues raised on appeal will not settle the rights (if any) between Hartford and the Appellants, because the parties to the Bond have resolved any dispute related to the Bond and have agreed to complete the work covered under the Bond. As a result of the Agreement between the City and Hartford, there is no remaining issue with respect to the legal duties and obligations under the Bond and no remaining claim in the case requiring interpretation by the Court as to the Bond. By their Agreement, the City and Hartford have undertaken to provide and

perform the work at issue in the claim for declaratory relief. The claim is now moot.

13. The Appellants' claim has become moot. Therefore, the appeal as to Hartford Respondents should be dismissed. Accordingly, Hartford Respondents respectfully request that this Court issue an Order dismissing the Hartford Respondents from the above-referenced appeal.

WHEREFORE, the Hartford Respondents respectfully request that the appeal be dismissed as to each of the Hartford parties, and per Rule 240(b), SCACR, that all deadlines relating to the appeal be stayed pending a decision on the Motion to Dismiss.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTS
HARTFORD CASUALTY INSURANCE
COMPANY AND HARTFORD FIRE
INSURANCE COMPANY

February 5, 2014
Columbia, South Carolina