

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

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FEB 25 2014

SC Court of Appeals

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 REPLY IN SUPPORT OF ITS
MOTION TO DISMISS APPEAL**

Appellants acknowledge that the Hartford Respondents have correctly cited to the law relating to the doctrine of mootness. Appellants fail to cite to any law in support of their response, and instead jump from unsubstantiated argument to unsubstantiated argument, without any factual support of record.

In this context, it is clear – and not challenged by Appellants – that (1) Appellants are not parties to the Subdivision Performance Bond and (2) the City of Georgetown entered into an agreement with Hartford to complete the site infrastructure. Appellants’ arguments appear to center around the notion that they claim some level of status or rights under the Subdivision Performance Bond as intended third-party beneficiaries. The Appellants’ arguments presented are unavailing for the following reasons:

Plaintiffs Have No Rights as Third-Party Beneficiaries

1. In South Carolina, it is beyond question that a surety’s obligation on a performance bond is contractual, and such obligation cannot be extended beyond the terms of the bond and the intent of the parties expressed therein. South Carolina Public Service Comm’n v. Colonial Constr. Co., 274 S.C. 571, 266 S.E.2d 76 (1980); SOCAR, Inc. v. St. Paul Fire & Marine Ins., 288 S.C. 287, 341 S.E.2d 822 (Ct. App. 1986). When the language in the bond is plain and unambiguous, the bond must be interpreted in accordance with such language and terms. Employers Ins. of Wausau v. Construction Management Eng’g., 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989). Moreover, for a third party (one not a party to the bond) to enforce the provisions of, or to collect under a performance bond, the bond itself must manifest a clear right granted to such third party. See Richmond Shopping Center v. Wylie N. Jackson Co., 255 S.E.2d 518 (Va. 1979); Novak & Co., Inc. v. Travelers Indemnity Co., 392 N.Y.S.2d 901 (N.Y. App. Div. 1977).

2. In this case, the Subdivision Performance Bond specifically identified by Appellants in their Complaint as the basis of their claims against Hartford clearly and unambiguously states:

No right of action shall accrue hereunder to or for the use or benefit of anyone other than the obligee, and the obligee's right hereunder may not be assigned. . . .

[See Subdivision Performance Bond, attached as Exhibit A to Motion]

3. Further, the Subdivision Performance Bond in issue expressly states that the Surety is bound under said Bond only to the City of Georgetown as the named Obligee. This provision of the Bond is consistent with the underlying statutory authority for such bond (when issued in the context of a proposed real estate/subdivision development). In S.C. CODE ANN. §6-29-1180, it is expressly established that "the surety must be in favor of the local government. . . ." Additionally, the City of Georgetown's Land Development Regulations pertaining to the Project and the Subdivision Performance Bond in question expressly provide that "the Performance Bond shall run to the governing authority or, if applicable, any other government unit having a legal responsibility for the construction and completion of said improvements." [City of Georgetown Land Development Regulations, §502.32/502.321, March 2008 revision attached hereto as Exhibit 1]
4. It is clear that Appellants are not parties to the Hartford Subdivision Performance Bond, and they were not required, or intended to be, by the underlying statutes and regulations which govern such Bond. Moreover, in order for one who is not a party to the performance bond to enforce its provisions or collect under it as a third-party beneficiary, the bond itself must clearly grant such right. See

Richmond Shopping Center, 255 S.E.2d 518; Novak & Co., 392 N.Y.S.2d 901.

Furthermore, to acquire rights under the bond, the party making claim must be an intended beneficiary and not merely an incidental beneficiary. Restatement (Second) of Contracts, §302 (1981). An intended beneficiary is one for whom the performance bond, on its face, states that the clear intention and primary object and purpose is to provide direct benefit.

5. In order to claim the status of an intended beneficiary, the contracting parties must have entered into their contract to benefit directly the party claiming intended beneficiary status. Bob Hammond Constr. Co. v. Banks Const. Co., 312 S.C. 422, 425, 440 S.E.2d 890, 892 (Ct. App. 1994). The mere fact that a plaintiff might ultimately and indirectly benefit from the contract is not sufficient. Id.
6. In this case, in addition to the reasons stated above, the terms of the Subdivision Performance Bond fail to support the conclusion that Plaintiffs are intended beneficiaries under the Bond because the terms expressly negate such a conclusion. The clear language of the Bond provides that there are no intended beneficiaries other than the City of Georgetown. The express provision of the Bond undeniably establishes that no rights arise under the Bond for the use or benefit of anyone other than the named Obligee – the City.
7. A number of jurisdictions have denied relief to parties claiming to be beneficiaries under performance bonds when they were not enumerated beneficiaries in the language of the bond. See United States ex rel. First Continental Nat'l Bank & Trust Co. v. Western Contracting Corp., 341 F.2d 383 (9th Cir. 1965) (bank, which had loaned money to a subcontractor to pay for laborers and materials, was

not entitled to assert a claim under the performance bond); United States Fidelity & Guar. Co. v. A&A Machine Shop, Inc., 330 F.Supp. 1403 (S.D. Tex. 1971) (unpaid subcontractors and material suppliers were found not to be third-party beneficiaries under the performance bond and were denied recovery thereunder); Long v. City of Midway, 311 S.E.2d 508 (Ga. App. 1983) (person claiming to have sustained personal injury caused by the contractor was held not entitled to recover under the performance bond). Similarly, the validity of any claim against a performance bond by one who is not a named beneficiary under the bond has been deemed doubtful, at best, by South Carolina courts. See Carolina Winds Owners' Assoc. Inc. v. Joe Harden Builders, Inc., 374 S.E.2d 897 (Ct. App. 1988), cert. dismissed, Order No. 89-OR-229 (filed February 27, 1989), questioned on other grounds, Kennedy v. Columbia Lumber Co., Inc., 384 S.E.2d 730 (1989).

8. Because Appellants are clearly not named as beneficiaries under the Hartford Subdivision Performance Bond, and because Plaintiffs are not among those the Bond clearly and unequivocally defines as intended beneficiaries, Appellants have no right to sue on, to collect under, or to enforce the Subdivision Performance Bond. Therefore, all the arguments made by Appellants are superfluous in nature, as Appellants have no rights under the Bond. The City, as the Oblige of the Bond and only party to this Appeal with rights to enforce the Bond, reached an agreement for the bonded project to be completed. Therefore, with a claim for declaratory judgment as the only cause of action asserted against the Hartford Respondents, there is no justiciable controversy, as the City and Hartford have

undertaken to provide and perform the work at issue in the claim for declaratory relief.

Hartford's Bond Obligations Are Met by City-Hartford Settlement Agreement

9. As set forth above, the appeal should be dismissed on clear grounds. In addition, the entire argument posed by Plaintiffs that Hartford is not providing all of the construction required under the Subdivision Performance Bond is specious and erroneous.
10. Pursuant to Hartford's Subdivision Performance Bond, Hartford's obligation covers "site infrastructure (roads and utilities)" to be completed "in accordance with the plans and specifications prepared by Trico Engineering Consultants, Inc."
11. The cost estimate upon which Appellants place their emphasis did not create any obligations under Hartford's Bond, and it cannot to the extent that it would purport to impose requirements not authorized by or contained in the provisions of the City's Land Use Regulations, which establish which improvements are required improvements. The City's authority to require work under Hartford's Bond cannot exceed the required improvements already offered and established by the City's Land Use Regulations. Hartford is liable only for the cost of installing the work required by the Land Development Regulations and reflected on the approved Plans and Specifications on file with the City relating to roads and utilities. Plaintiffs, without foundation or authority, argue that all the items

specified in the cost estimate must be constructed, regardless of the limitations of state law and Georgetown's Land Development Regulations.

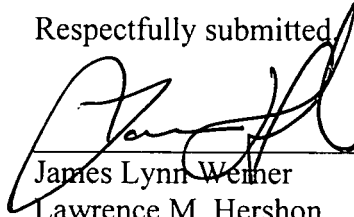
12. Hartford's Subdivision Performance Bond is a product of the State statutory scheme and a local regulatory scheme. The State Statute (S.C. CODE ANN. § 6-29-1180) provides that where the local land development regulations require the installation of "site improvements," then the Surety Bond must be in favor of the local government "to ensure that, in the event of default by the developer, funds will be used to install the required improvements at the expense of the developer."

13. The City of Georgetown's Land Development Regulations Section 501 requires that "every subdivision developer shall be required to grade and improve streets and alleys, and to install curbs, monuments, sewers, storm water inlets, and water mains in accordance with the specifications established by the City of Georgetown Planning and Zoning Commission. Additionally, Section 502 of the Land Development Regulations requires that the "subdivider shall submit" "financial guarantees covering all improvements required by this Ordinance" The financial guarantee may be in the form of a Surety Bond which shall "run to the governing authority having legal responsibility for the construction and completion of said improvements." If the subdivider has not completed all of the required improvements within the time specified in the Bond, "the governing authority may let or re-let the Contract and the subdivider and Performance Bond shall be severally and jointly liable for the cost thereof to the amount specified for such improvements in said Bond."

14. The cost estimate contains many items (including a clubhouse, among other items) that are not within the specified “required improvements” under the City’s established Land Development Regulations. Both the state statute and the Land Development Regulations limit the scope of the bond to coverage of the “required improvements” under the adopted regulations. The City could not exceed its authority to require improvements, or a bond to cover improvements, which had not been authorized by enacted statute or regulation. Attempts by a city to require things beyond what has been enacted is *ultra vires* and unenforceable. See Berkley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 308 S.C. 205, 10, fn. 4, 417 S.E.2d 579, 582, fn. 4 (1992). In other jurisdictions this issue has previously arisen in litigation and courts have consistently ruled that a city may not require improvements not already mandated by the existing statutes or regulations. See, e.g., New Jersey Shore Builders Assoc’n v. Township of Marlboro, 591 A.2d 950 (N.J. Super. 1991); Bama, Inc. v. Anne Arundel County, 451 A.2d 1261 (Md. Ct. Spec. App. 1982).
15. Therefore, by entering into an agreement to complete the “site infrastructure (roads and utilities),” Hartford has met its obligations under the Subdivision Performance Bond, and the City of Georgetown has properly enforced its Land Use Regulations. While the Plaintiffs have no rights to enforce the Subdivision Performance Bond, even if they did, the obligations of the Bond have been met, and the claim for declaratory judgment is moot.

WHEREFORE, the Hartford Respondents respectfully request that the appeal be dismissed as to each of the Hartford parties.

Respectfully submitted,



James Lynn Werner

Lawrence M. Hershon

Parker Poe Adams & Bernstein LLP

P. O. Box 1509

Columbia, SC 29202

Telephone: 803-255-8000

Facsimile: 803-255-8017

jimwerner@parkerpoe.com

lawrencehershon@parkerpoe.com

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

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Columbia, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that on February 25, 2014, he served the foregoing **RESPONDENT HARTFORD'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPEAL** on all counsel of record by placing a copy of it in the United States Mail, first class postage prepaid, addressed as follows

RECEIVED

FEB 25 2014

SC Court of Appeals

K. Douglas Thornton, Esq.
Thornton Law Firm, LLC
1025 Third Avenue
Conway, SC 29526

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue North, Suite 109
Myrtle Beach, SC 29577

Charles T. Smith, Esq.
608 Cypress Street
Georgetown, SC 29440

Joseph Kevin Qualey, Esq.
23 Broad Street
Charleston, SC 29401

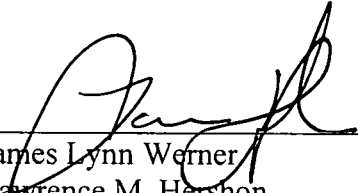
Ronald L. Richter, Jr., Esq.
18 Broad Street, Mezzanine
Charleston, SC 29401

Elise Freeman Crosby, Esq.
405 Dozier Street
Georgetown, SC 29440

Andrew F. Lindemann, Esq.
Davidson & Lindemann, PA
P. O. Box 8568
Columbia, SC 29202

Kristin G. Atkins, Esq.
Donald G. Hunt, Jr., Esq.
124 North Main Street, Suite 204
Fuquay Varina, NC 27526

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE.]



James Lynn Werner
Lawrence M. Hershon
Parker Poe Adams & Bernstein LLP
P. O. Box 1509
Columbia, SC 29202
Telephone: 803-255-8000
Facsimile: 803-255-8017
jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

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

February 25, 2014
Columbia, South Carolina



Lawrence M. Hershon
Associate
Telephone: 803.253.8918
Direct Fax: 803.255.8017
lawrencehershon@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

February 25, 2014

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1015 Sumter Street
Columbia, SC 29211

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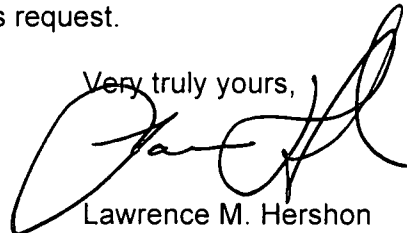
Re: *John Steven Goodwin et al. v. Landquest Development, LLC et al.*
Trial Court Case No. 2009-CP-22-1045
Appellate Case No. 2013-001644

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondents Hartford Casualty Insurance Company's and Hartford Fire Insurance Company's Reply in Support of its Motion to Dismiss Appeal. Please return a file-stamped copy of the Reply and Proof of Service to my courier.

By copy of this letter, I am today serving the Reply and Proof of Service on counsel for Appellants and the other Respondents.

Thank you for your attention to this request.

Very truly yours,

Lawrence M. Hershon

LMH:dmc
Enclosure

cc: K. Douglas Thornton, Esq. (w/enc.) – *via U.S. Mail*
John M. Leiter, Esq. (w/enc.) – *via U.S. Mail*
Charles T. Smith, Esq. (w/enc.) – *via U.S. Mail*
Joseph Kevin Qualey, Esq. (w/enc.) – *via U.S. Mail*
Ronald L. Richter, Jr., Esq. (w/enc.) – *via U.S. Mail*
Elise Freeman Crosby, Esq. (w/enc.) – *via U.S. Mail*
Andrew F. Lindemann, Esq. (w/enc.) – *via U.S. Mail*
Kristin G. Atkins, Esq. (w/enc.) – *via U.S. Mail*

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