THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
Administrative Court Law

H.W. Funderburk, Jr.
Administrative Law Court Judge

C.A. No.: 19-ALJ-30-0131-AP

Appellate Case No. 2019-001809

Compass Collegiate Academy, Inc.....Appellant,

v.

Charleston County School District.....Respondent.

FINAL BRIEF OF RESPONDENT

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1. Did the Administrative Law Court correctly hold that the Appellant's appeal was moot?
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3. Did Appellant fail to preserve other issues for appellate review?

STATEMENT OF THE CASE

On January 31, 2019, Appellant Compass Collegiate Academy, Inc. ("CCA") filed an application to operate a public charter school with Respondent Charleston County School District Board of Trustees ("District Board"). At a special called meeting on April 8, 2019, the District Board conducted a public hearing on CCA's application. The Board heard from CCA, which supported its application with a PowerPoint presentation, and asked questions of the CCA team. After deliberation, the District Board ruled on CCA's application and voted in public session 6-1 in favor of a motion to deny the application based on its failure to meet several requirements, all of which were articulated on the record.

Two weeks later, on April 16, 2019, the South Carolina Public Charter School District Board ("SCPCSD") held its regularly scheduled meeting. At that meeting, the SCPCSD Board approved CCA's application for a charter. See, April 2019 minutes, http://www.sccharter.org/board-meeting-documents-2019/. CCA later that day announced on its Facebook page that with this approval from SCPCSD it would officially begin serving Charleston area scholars in August 2020. See, https://www.facebook.com/CCACharleston/.

CCA filed its Notice of Appeal of the District Board's denial of its application with the Administrative Law Court ("ALC") on May 7, 2019. By letter dated May 20, 2019, the District Board sent CCA its written order signed by its chairman on April 17, 2019. In its appeal to the ALC, CCA argued various grounds for reversal, including that its application was approved as a

matter of law for failure to rule within 90 days; that the Board evaluated its application using incorrect standards and based on clearly erroneous conclusions; that the Board failed to give proper notice under applicable law; and the Board erred in not giving CCA a public hearing. In its response to CCA's appeal, the District Board disputed those grounds on the merits and argued additionally that CCA's appeal to the ALC was moot due to the approval of CCA's charter application by another charter granting authority. The ALC issued a lengthy and well-reasoned order dated October 10, 2019, dismissing CCA's appeal as moot and declining to address the remaining issues. CCA did not file a motion to alter or amend the ALC's judgment. Instead, by letter dated October 25, 2019, CCA filed its Notice of Appeal with this Court.

STANDARD OF REVIEW

The standards established by the Administrative Procedures Act govern the review on an appeal from a decision from the ALC:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-610(B).

A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. *Id.* The District Board's findings are presumptively

correct, and therefore, the challenging party bears the burden of proving its decision was erroneous in view of the substantial evidence in the record. *Leventis v. S.C. Dep't of Health & Environmental Control*, 340 S.C. 118 (Ct. App. 2000). The South Carolina Supreme Court has defined substantial evidence as:

> [r]elevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises a question of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding.

Porter v. SCPSC, 333 S.C. 12, 20-21 (1998).

ARGUMENTS

1. The Administrative Law Court Correctly Held That CCA's Appeal was Moot.

The ALC correctly held that CCA's appeal of the District Board's denial of its application became moot when its same charter application was approved by another charter granting authority, SCPCSD. (R. p. 13) Appellant argues that because there is no executed charter contract between CCA and SCPCSD, the ALC erred in holding that its appeal was moot. Appellant also argues that even if there were an executed contract, its appeal would not be moot, because it could terminate the contract with SCPCSD's consent. (Brief of Appellant, pp. 9-10.) For the reasons set forth below, these arguments are without merit.

An appellate court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [an] existing controversy. This is true when some event

occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief." *Id.* at 346, 195 S.E.2d at 715. "Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable." *Curtis v. State,* 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). In this case, the ALC correctly found that an intervening event – the SCPCSD Board's approval of CCA's charter application – rendered CCA's appeal nonjusticiable because it was impossible for the ALC or any court to grant any effectual relief.

In reaching this conclusion, the ALC found that the South Carolina Charter Schools Act, S.C. Code §59-40-10 et seq., does not authorize a charter school committee to submit multiple charter applications simultaneously to different sponsors or contemplate a scenario whereby a charter application could be approved by two different charter grating authorities. The ALC noted that the Act repeatedly refers to "a" sponsor or "an" application and uses the word "or" when referring to bodies to which one may apply for a charter. (R. p. 8.) The use of the term "or" indicates the Legislature's intent to allow an applicant to choose between alternative charter granting authorities when submitting a charter application and not to multiple proposed sponsors. As the ALC noted, if a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). (R. pp. 4-5.) *See also, Gilstrap v. South Carolina Budget and Control Bd.,* 310 S.C. 210, 423 S.E.2d 101 (1992) (in construing a statute, the Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation). In this case, the Act's plain and unambiguous language, the repeated use of singular terms, "a," "an" and "or," convey that an applicant is only permitted to submit one application to one sponsor for any charter school.

The South Carolina Attorney General issued an opinion, which is instructive in this matter, examining a similar education statute regarding school choice, S.C. Code §59-19-350. *2017 WL 5203263* (S.C.A.G., Oct. 31, 2017). That statute reads as follows:

> (A) A local school district board of trustees of this State desirous of creating an avenue for new, innovative and more flexible ways of educating children within their district, may create a school of choice within the district that is exempt from state statutes which govern other schools in the district and regulations promulgated by the State Board of Education...

The Attorney General's opinion interpreted this language, which is virtually the same as the language in the Charter Schools Act, to indicate the legislature's intent that a singular meaning be given to "a school of choice." The General Assembly made a clear choice in the use of the singular tense there as it did in with the Charter Schools Act. The plain and unambiguous language evidences the legislature's intent to allow an applicant to submit one application to one potential sponsor, and Appellant lacks the statutory authority to pursue its proposed charter school through a second application to the District Board. *See*, *Richland Cnty. Sch. Dist. Two v. South Carolina Dept. of Educ.,* 335 S.C. 491 (Ct. App. 1999) where the Court of Appeals found that the use of the plural "scales" evidenced an intention that teacher pay in the District should be based on two separate pay schedules, a "state" pay scale and an "average school supplement" pay scale, citing, *Emerson Elec. Co. v. Wasson,* 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986) ("The legislature's use of the plural 'taxpayers' instead of 'taxpayer' indicates that corporations filing consolidated returns are not to be considered a single entity."). To read it otherwise would lead to the absurd result of an application potentially being approved by two different sponsors leading to two simultaneously binding contracts for the same charter school. *See, Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cnty.,* 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (stating that courts ordinarily will reject a proposed statutory meaning "when to accept it would lead to a result so

plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention") (quoting *Kiriakides v. United Artists Communications, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

The ALC also correctly found that once an application is approved by a sponsor, that approval becomes a binding agreement on both parties. (R. p. 9.) By operation of law, S.C. Code §59-40-70(F), with the SCPCSD Board's approval of CCA's charter application, CCA entered into an agreement with that sponsor, and CCA could no longer seek approval from the District Board, nor could the ALC render an order directing such.

Appellant argues that this finding is erroneous because an approved charter application is not a binding "contract" and seems to take the position that, without an executed contract, it is free to enter into another agreement with a different charter grating authority. This is not correct.

The statute is clear that the approved application is an agreement. Pursuant to S.C. Code §59-40-60(A), an approved charter application constitutes an *agreement* between the charter school and the sponsor. (Emphasis added.) If the Board from which the applicant is seeking sponsorship approves the application, it becomes the charter school's sponsor and *shall* sign the approved application. S.C. Code §59-40-70(F).[1] (Emphasis added.) In its application to the District Board, Appellant acknowledged this arrangement with a statement of authorization. (R. p. 150.) In this section of its application, CCA states: "[w]e hereby certify that this charter application has been duly authorized by the sponsor listed above. This authorization indicates that *the terms of this application constitute a contractual agreement* between the two organizations represented below pursuant to Section 59-40-60 of the South Carolina Charter School Act (1996)." (Emphasis

[1] Cf. S.C. Code §59-40-70(B) which states that if the Board does not make a ruling on the application for a charter school within 90 days, "the application is considered approved. Once the application has been approved by the board of trustees or area commission, the charter school may open at the beginning of the following year."

added.) Appellant, through its application, acknowledged that a contractual agreement is formed when the application is authorized or approved. It is disingenuous for Appellant now to argue that an approved charter is not a binding contractual agreement.

Once a sponsor approves a charter, it is then required to negotiate and execute a supplemental charter contract with each approved charter school. S.C. Code §59-40-55(B)(3). Pursuant to S.C. Code §59-40-60(B),

> "[a] contract between the charter school and the sponsor *must* be executed and *must* reflect all provisions outlined in the application as well as the roles, powers, responsibilities, and performance expectations for each party to the contract. A contract must include the proposed enrollment procedures and dates of the enrollment period of the charter school. All agreements regarding the release of the charter school from school district policies must be contained in the contract..." (Emphasis added.)

The requirement that a supplemental contract later be entered into does not negate the binding nature of the charter approval. The requirement for an additional, separate contract is in place so that the parties can negotiate additional terms outside of the application, such as administrative communications and operational procedures between the parties and fine tune whether the charter school is bound by the District's policies, etc. The finding that both the approved application and contract are to be considered binding is further supported by the language in Section 59-40-110(C) which states:

> "[a] charter must be revoked or not renewed by the sponsor if it determines that the charter school: (1) committed a material violation of the conditions, standards, performance expectations, or procedures provided for in the charter application **or** charter school contract or both; (2) failed to meet the academic performance standards and expectations as defined in the charter application **or** charter school contract or both..." (Emphasis added.)

Clearly, the Act contemplates that both the approved application and the contract in their own right are agreements with independently binding conditions and standards.

Appellant argues that even if there was a binding contract as a result of the approved agreement, the appeal should not be considered moot because the Act allows CCA to terminate the charter and contract with the consent of the sponsor. (Appellant's brief, p. 10.) Appellant acknowledges that it cannot terminate the agreement unilaterally. It must have the sponsor's consent. The mere possibility of obtaining the consent of the sponsor to terminate a contractual agreement is speculative. Indeed, the SCPCSD has an elaborate and formal procedure for consideration of such "transfer" requests. (See, http://www.sccharter.org/2018/02/16/draft-transfer-policy).[2] The policy specifically states that it "may, *but is not required to,* grant the transfer request." (Emphasis added.) There is nothing in the record either before the ALC or this court to suggest that SCPCSD would consent to such a termination or transfer. Moreover, when determining whether to release one of its charter schools to another sponsor pursuant to its own policy, the SCPCSD Board may consider the "readiness of the receiving sponsor to accept the transferring school." Under the circumstances of this case in which the charter application has been denied by the District Board, this consideration would clearly weigh against the SCPCSD Board granting CCA's request for a transfer.[3] The ALC correctly found that CCA and SCPCSD had entered into a binding agreement and that the relief sought by CCA's appeal could not be granted.

The South Carolina Charter Schools Act clearly establishes a statutory scheme in which an approved charter application immediately binds both parties to this agreement. The approving

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[2] According to its publicly published Board minutes, the SCPCSD Board had the first reading of this policy, Board Policy III.T.3.F **Request to Transfer to Another Sponsor Policy,** on February 8, 2018; a second reading with amendments occurred on March 8, 2018, and it appears that the third and final reading occurred during the April 12, 2018 Board meeting.

[3] See also, https://www.thestate.com/news/local/education/article202891014.html, "[p]ublicly funded charter school system in 'state of chaos,' SC senator says" discussing the SCPCSD's denial of four charter school's requests for charter transfers to other sponsors.

body then becomes the school's sponsor and it must negotiate and execute a charter contract including the provisions outlined in the application. As such, once CCA's application was approved by the SCPCSD Board, those parties had a binding agreement for CCA to operate a charter school and for SCPCSD to be its sponsor. Even assuming CCA had the authority under the Act to simultaneously submit applications to multiple sponsors, that intervening act rendered CCA's appeal of the District Board's denial moot because the ALC could no longer grant any effectual relief or order the District Board to be its sponsor. The ALC correctly analyzed and applied statutory construction principles in finding that the Legislature only intended an applicant to submit one application to one potential sponsor for each charter school. (R. p. 10.) The ALC correctly noted that to find otherwise would create the untenable circumstance of multiple applications resulting in multiple binding contracts for the same charter school. (R. pp. 12-13.)

2. Even if This Court Were to Disagree with the ALC in Dismissing the Appeal for Mootness, it Should Uphold the Dismissal Based on Other Sustaining Grounds in the Record.

A respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." *I'On LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 419,526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723."The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

In this case, one of the bases for denying CCA's application was the fact that it failed to include any termination procedure for teachers employed by the charter school as required by

S.C. Code §59-40-60(F)(13). (R. p. 5)[4] Although there is some description of a general grievance procedure, the application wholly fails to address the required due process rights of a teacher facing termination. Even though required by this section, the application also fails to state whether or not the provisions of the Teacher Employment and Dismissal Act ("TEDA") apply to the teachers employed by the school. *See also*, S.C. Code Reg. 43-601, III (N)(2), which states that "if the charter school does not adopt procedures for the employment and dismissal of teachers outlined in [TEDA], the charter school must establish employment and termination procedures that provide for notice and a right to a hearing before the governing board." The District Board noted this deficiency in its Evaluation Rubric, and this alone was a sufficient basis to deny the application. (R. pp. 51-52)

This deficiency is not insignificant. As demonstrated by *McNaughton v. Charleston Charter Sch. for Math and Science, Inc.*, 411 S.C. 249 (2015), there can be substantial financial liability to charter schools and their sponsors for wrongful termination/breach of contract claims. In *McNaughton*, a teacher brought suit after the charter school improperly halted her grievance of her termination claiming that she did not have standing to continue the procedure. *Id* at 257. The charter school was held liable for damages and attorney's fees in excess of $130,000. *Id.* at 258-59. Although Appellant attempts to raise various issues in its brief, Appellant never addresses its failure to meet this statutory requirement which alone is sufficient to uphold the denial of its application. Because the application did not address this mandatory provision, the District Board's denial on this basis is supported by substantial evidence.

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[4] Appellant's brief erroneously states that the District Board denied the application based on the failure to meet four of the fifteen requirements under Section 59-40-60. (Appellant's brief, pp. 12-13). The District Board denied the application not on four but on five specified grounds. Appellant overlooks and fails to address that fifth ground - the employment issue - in its brief. The District Board found that it clearly failed to meet this requirement and CCA does not even address this issue in its appeal.

Additionally, Respondent respectfully submits that the District Board's other four reasons for the denial of CCA's application, alone or in conjunction, are supported by substantial evidence and this Court can affirm the ALC's denial of CCA's appeal on any of those additional sustaining grounds. If this Court considers any of these additional sustaining grounds, Respondent respectfully prays reference to its brief filed below with the ALC.

3. CCA Failed to Preserve Other Issues for Appellate Review.

Though an appellate court may consider a respondent's additional reasons to affirm a lower ruling, that court may not reverse for any reason appearing in the record. *Id.* at 421-422, 526 S.E.2d at 724. As stated in *I'On LLC*:

> The losing party must first try to convince the lower court that it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. (internal cites omitted) If the losing party has raised an issue in the lower court, but the court failed to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. (emphasis added). *Id.*
>
> *See also*, *Elam v. S.C. Dep't Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file such a motion when an issue or argument has been raised, *but not ruled on*, in order to preserve it for appellate review." (emphasis in original)).

This rule is true for administrative appeals as well. *See*, *Home Medical Systems, Inc. v. South Carolina Dept. of Revenue*, 382 S.C. 556, 562 (2009), which held that "Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals. *See, e.g., Brown v. South Carolina Dep't of Health & Envtl. Control,* 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review)."

In this case, the ALC's decision only addresses the issue of mootness and did not rule on any other issues raised and argued by CCA. CCA did not file a motion to alter or amend asking the ALC to rule on those other issues. CCA spends the majority of its brief arguing that this Court should reverse the ALC and review the application to address the merits of the other arguments raised to the ALC. However, the law is clear that where, as here, the ALC did not rule on those issues and CCA did not file a motion to alter or amend the judgment, those issues are not preserved for appellate review.

Should this Court address the other issues, Respondent relies on the arguments set forth in its brief filed with the ALC. (R. pp. 430-449)

CONCLUSION

For all of the above reasons, Respondent Charleston County School District respectfully requests that this Court uphold the Administrative Law Court's decision.

Respectfully submitted,

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