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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

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000038
Circuit Court Case No. 2021-CP-10-00562

Clam Farm Partnership, LLC,

Respondent,

v.

The South Carolina Department of Health and Environmental Control, Office of
Ocean and Coastal Resource Management, Charleston County, and The City of
Folly Beach,

Defendants,

Of which The South Carolina Department of Health and Environmental Control,
Office of Ocean and Coastal Resource Management and The City of Folly
Beach are,

Appellants.

**APPELLANT THE CITY OF FOLLY BEACH'S RETURN TO RESPONDENT'S
MOTION FOR RELIEF FROM AUTOMATIC STAY TO FILE MOTION FOR
TEMPORARY INJUNCTION**

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Attorneys for The City of Folly Beach

Pursuant to Rule 241, SCACR, Appellant the City of Folly Beach (referred to herein as “Appellant” or “Folly Beach”) hereby files this Return to Respondent’s Motion for Relief from Automatic Stay to File Motion for Temporary Injunction (referred to herein as “Motion”). This Motion should be denied in its entirety both to uphold the status quo intended by Rule 241, SCACR, and due to Respondent’s failure to comply with the mandatory procedures and requirements set forth in Rule 241, SCACR.

FACTUAL BACKGROUND

In 2006, Clam Farm Partnership, LLC (referred to herein as “Clam Farm” or “Respondent”) purchased real property located on Bowens Island Road in the City of Folly Beach, Charleston County, South Carolina, including real property identified as Charleston County TMS Numbers 331-00-00-336 through 331-00-00-348 (“Subject Property”), which forms a portion of a larger development located in The Preserve at Clam Farm adjacent to Bowens Island Road in the City of Folly Beach.¹

Around this time, Respondent also obtained certain permit coverage for site work under the NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities, commonly referred to as a “Land Disturbance Authorization” and identified as “S/W Permit Number 10-06-01-08” from the Office of Ocean and Coastal Resources Management (referred to herein as “OCRM”). (*See* Compl. ¶ 14.) Due to economic conditions created by the Recession of 2008, Joint Resolutions of the South Carolina, in 2009 and 2013 respectively, extended the expiration date of the Land Disturbance Authorization until February 14, 2021.

¹ On or about 2012, Respondent developed certain phases of the Preserve at Clam Farm. The development of such property is, however, not at issue in this matter and, therefore, will not be discussed in detail.

On or about September 29, 2016, after a field survey, OCRM established and approved a critical line with respect to the Subject Property and The Preserve at Clam Farm in general (referred to herein as “2016 Critical Line”).

On April 9, 2019, the City of Folly Beach (referred to herein as “Folly Beach” or “Appellant”) passed Amended Ordinance 05-19, which, among other things, amended Folly Beach Code § 166.04-03 “Marsh Buffers” to require a 15 linear feet buffer landward from the critical area demarcation as identified or certified by OCRM for all new construction, substantial improvements, impervious surface, and land-disturbing activities.² Folly Beach Code § 166.04-02, which governs the time of review for compliance with marsh buffer standards, has been in effect since March 23, 2010 and was not amended at this time.³

On or about September 18, 2019, Respondent entered into a Contract of Sale with Stanley Martin Homes with respect to the Subject Property. Under the Contract of Sale, Respondent is obligated to “deliver 25 buildable residential lots” (including the Subject Property) to Stanley Martin Homes.

The Final Plat Showing the Adjustment of the Property Lines Between Lots 36 through 45, 49 and 50, 54 and 55, 57 and 58 and Showing Lots 33-35, 46-48, 51-53, 56 and HOA Areas 1-12, a New 12’ Ingress/Egress Easement, (2) Two New Fire Access Easements, a New Private Ingress/Egress Easement and a New 28’ Ingress/Egress Private Access Easement (referred to herein as “Final Plat”), which included the Subject Property, was approved by Aaron Pope of Folly Beach on or about July 10, 2020, over a year after the effective date of Amended

² The previous provision of this ordinance required “any subsequent development, redevelopment, or land disturbing activities [to] maintain a minimum marsh buffer of at least 10 linear feet landward from the critical area demarcation. . . .”

³ Folly Beach Code §§ 166.04-02 and 166.04-03 are collectively referred to herein as “marsh buffer ordinance.”

Ordinance 05-19, and over five months after Respondent entered into a Contract of Sale with Stanley Martin Homes concerning the Subject Property.

The Final Plat only delineates property boundaries, described and dedicated rights-of-way and easements, and included the marsh buffer required by Folly Beach Code § 166.04-03, which was fifteen (15) feet landward of the 2016 critical line established by OCRM. The Final Plat, however, does not detail the location of, or authorize, any proposed or existing development, such as structures or paving, among other things. (emphasis added). As such, Respondent would ultimately be required to submit both site plans and applications for building permits, among other things, for each respective lot in the Subject Property before commencing any vertical construction at the Subject Property but has not yet done so.

On November 9, 2020, OCRM, as it had done before, visited the Subject Property, during which it staked and flagged a revised critical line (referred to herein as “2020 Critical Line”). Clam Farm ultimately accepted the 2020 Critical Line and noted the following, after which it was allegedly reminded that Folly Beach Code § 166.04-02, an ordinance which had been in effect since March 23, 2010, authorized and obligated Folly Beach, in light of the newly-identified 2020 Critical Line, which was accepted by Respondent, to review and enforce the fifteen (15) foot marsh buffer at the time of submission of a site plan and accompanying application for building permit, whenever such occurred. In that this could, at some juncture, prevent Respondent from delivering “buildable lots” to its potential purchasers, litigation commenced.

ORDER ON APPEAL

On November 18, 2021, the circuit court entered an Order Granting Plaintiff’s Motion for Partial Summary Judgment and for Preliminary Injunction (“Order”). (See generally Nov. 18, 2021 Order Granting Plaintiff’s Mot. For Partial Summ. J. and Prelim. Inj.) In granting partial summary

judgment against Folly Beach, the Order notes the following: “[Respondent] has a vested right to complete site grading **and to construct buildings** on the Subject Property, so long as those buildings are within the buildable footprint outlined in the Subdivision Plat and such buildings conform in all other respects to the applicable requirements for obtaining a building permit.” (*Id.*, at 13)(emphasis added.) The circuit court denied Folly Beach’s motion for reconsideration of the Order on December 14, 2021. On or about January 11, 2022, Folly Beach timely served its Notice of Appeal from the Order and order denying reconsideration of the Order.

ARGUMENT

1. An Order Lifting the Automatic Stay Must Be Denied, After Which Both this Court Will Preserve Jurisdiction of this Appeal and All Contested Issues Will Remain Ripe

Put simply, Respondent has gotten way ahead of itself. Respondent contends that an order lifting the automatic stay and a subsequent injunction is necessary to carry out the purpose of the summary judgment order and to preserve jurisdiction of this appeal. Respondent contends that it has a vested right to “complete site grading and to construct buildings on the Subject Property.” On the contrary, Folly Beach contends that Respondent does not have a vested right to “complete site work operations and construct buildings” on the Subject Property in contravention of a pre-existing ordinance, especially in a manner neither envisioned nor depicted in the Final Plat.

Rule 241(c)(2), SCACR states that courts should consider whether lifting of an automatic stay is necessary “to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Neither of these factors weigh in favor of lifting the automatic stay in this case. The South Carolina Court of Appeals will not lose jurisdiction over the appeal if the automatic stay is not lifted. In addition, the issues will not become moot. It is important to note that Respondent does not seek to enjoin or prevent Folly Beach from taking any action during the

pendency of this appeal, which would render a contested issue moot. Instead seeks to enjoin Folly Beach only when, and only if, the Summary Judgment Order is affirmed in all respects by this Court.⁴ In fact, Respondent’s motion for a preliminary injunction only seeks “an injunction precluding the expiration of the vested rights in the Suvdivision Plat . . . for a period of seven months following the conclusion of this lawsuit.”

Respondent, instead, seems to be requesting some sort of equitable tolling of the vested rights period enumerated in S.C. Code Ann. § 6-29-1560, which need not, and should not, be decided until determination of this appeal.⁵ See *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 687 S.E.2d 29, 33, 386 S.C. 108, 116-17 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of another.” (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App 2006))).

This appeal could ultimately terminate in any number of ways, many of which will render any action on this Motion moot. Until, and if, this Court affirms the Summary Judgment Order in whole, there is no damage or harm to Respondent, which renders any an order lifting an automatic stay and permitting Respondent to file a motion for temporary injunction premature.

⁴ Plaintiff concedes that that Folly Beach has not yet taken any action, either before or after commencement of litigation, which it seeks to enjoin during the pendency of the appeal and states in pertinent part: “all activities were brought to a halt when OCRM entered the site, flagged a new proposed critical line less than five years after the OCRM Plat was filed, and issued cease and desist communications. This had the effect of precluding further site work, and further precluded [Respondent] from selling the Subject Property to Stanley Martin Homes.” Resp’t Mot. for Relief from Automatic Stay to file Mot. for Temp. Inj. at 3.

⁵ Pursuant to Rule 241(c)(3), if this Court is inclined to grant this Motion, Folly Beach respectfully requests that such grant be conditioned upon the following: Respondent shall not submit to Folly Beach any site plans, applications for building permits, or any other submissions whatsoever with respect to the Subject Property during the pendency of this appeal.

See Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (holding the purpose of the stay is to preserve the status quo pending the determination of appeal.); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (recognizing an injunction pending appeal “demands a significantly higher justification” and “is to be used ‘sparingly and only in the most critical and exigent circumstances’” (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers))). For these reasons, Respondent is not entitled to relief from the automatic stay to pursue a temporary injunction, which will undoubtedly judicially alter the status quo Rule 241, SCACR seeks to uphold.

2. The Motion for Relief from Automatic Stay is Fatally Flawed and Must Be Denied Due to the Failure to Comply with the Mandatory Procedures

Respondent has failed to comply the mandatory procedures and requirements for obtaining a lift of automatic stay, the failure of which mandates denial of this Motion in its entirety. Rule 241(d), SCACR sets forth the procedures required to obtain both a lift of automatic stay or supersedeas. Rule 241(d)(1) required Respondent to first make an application for an order lifting the automatic stay to the circuit court, which Respondent failed to do. Respondent notes that the “vested rights will arguably expire on July 10, 2022[,]” which it will use to argue extraordinary circumstances even though it fails to do so in its Motion. Unjustifiable delay on behalf of a party does not, and cannot, constitute extraordinary circumstances. Respondent was, of course, aware of the July 10, 2022 date when it filed its Motion for Partial Summary Judgment in the circuit court on June 17, 2021 and when Folly Beach filed its Notice of Appeal on January 11, 2022 but chose to do nothing.

Rule 241(d)(3), SCACR also mandates the following: “[a] person seeking an order lifting an automatic stay . . . must file a written petition verified by the client[,]” which shall contain,

among other things, the factual background, the grounds for the petition, and a showing that the application for this relief was made to the lower court and was unjustifiably denied or that the relief granted failed to afford the relief which Respondent requested. Respondent has failed to file any such verification. For these reasons, the Motion for Relief from Automatic Stay to File Motion for Temporary Injunction is fatally flawed and must be denied due to Respondent's failure to comply with the mandatory procedures set forth in Rule 241(d), SCACR.

CONCLUSION

For the reasons set forth above, Appellant the City of Folly Beach respectfully requests that Respondent's Motion for Relief from Automatic Stay to File Motion for Temporary Injunction be denied in its entirety.

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June 2, 2022

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I, Stephen L. Brown, of Clement Rivers, LLP, attorneys for Appellant The City of Folly Beach, hereby certify that the **APPELLANT THE CITY OF FOLLY BEACH'S RETURN TO RESPONDENT'S MOTION FOR RELIEF FROM AUTOMATIC STAY TO FILE MOTION FOR TEMPORARY INJUNCTION** was served on Respondent, Clam Farm Partnership, LLC, and all other parties to this appeal on June 2, 2022, by emailing (see attached) a copy of the same to all counsel of record:

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June 2, 2022

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Subject: Clam Farm Partnership, LLC v. SC DHEC et al. // Appellate Case No. 2022-000038
Attachments: Appellant the City of Folly Beach's Return to Respondent's Mtn for Relief from Automatic Stay to File Mtn for Temporary Injunction.pdf

Enclosed please find Appellant the City of Folly Beach's Return to Respondent's Motion for Relief from Automatic Stay to File Motion for Temporary Injunction which will be filed today in the above-referenced matter.

Thank you,

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