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Jun 08 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston County
Court of Common Pleas in the Ninth Circuit

The Honorable Bentley 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,

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

RESPONDENT’S REPLY TO THE CITY OF FOLLY BEACH’S RETURN TO
RESPONDENT’S MOTION FOR RELIEF FROM AUTOMATIC STAY TO FILE MOTION
FOR TEMPORARY INJUNCTION

Pursuant to Rule 241, SCACR, Respondent hereby replies to the City of Folly Beach’s (the “*City*”) Return to Respondent’s Motion for Relief from Automatic Stay to File Motion for Temporary Injunction.

ARGUMENT

1. An Order Lifting the Automatic Stay is Necessary to Prevent a Contested Issue From Becoming Moot.

As set forth in Respondent’s Motion, on July 10, 2020, the City approved a subdivision plat which delineated the lot lines, the marsh buffer setback and easements for the subject property. *See Exhibit 2* to Respondent’s Motion. This had the effect of establishing the developable area of the property – i.e. the area upon which dwellings could be constructed. *Exhibit 5* to Respondent’s Motion, Order at 11. The circuit court found that the approval of the Subdivision Plat (including the marsh buffer setback on the Plat) “gave the [Respondent] vested rights to develop according to the dimensions in the Subdivision Plat.” *Id.* at 12. Specifically, the circuit court issued a declaratory judgment in favor of the Respondent declaring that:

Plaintiff 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.

There is no question that the Vested Rights Act provides for a two-year vested rights period. S.C. Code Ann. § 6-29-1560(a). Therefore, the vested rights that the Respondent has in the Subdivision Plat – as clearly defined in the circuit court’s order – arguably expire on July 10, 2022. Were the Respondent’s vested rights in the Subdivision Plat to expire, it would arguably be forced to re-submit the Subdivision Plat at a later date, which would allow the City to then refuse approval for any number of different reasons, including a new application of the marsh buffer. This would therefore render moot one of the primary issues in this case – whether the Respondent has the right to complete site grading and submission of building plans according to the areas delineated in the Subdivision Plat.

The City does not argue that the Subdivision Plat will not become ineffectual due to the expiration of the vested rights period. Instead, the City chooses to argue, without any logical connection to the actual issue at hand, that “Respondent has gotten way ahead of itself.” It is unclear what that statement means, as the City attempts to support it with statements about building plans to be submitted, equitable tolling, and other completely irrelevant arguments.¹ The issue on appeal is whether the circuit court properly issued a declaratory judgment order finding that the Respondent had vested rights in the Subdivision Plat. Those vested rights would arguably be rendered moot by the statutory expiration of those vested rights. Therefore, relief from the automatic stay is necessary for the Respondent to seek an injunction precluding the expiration during the pendency of this action so that the enforceability of the Subdivision Plat does not become a moot issue. Nothing else is relevant, and seeking this relief is in no way a sign that the Respondent is “getting way ahead of itself” (whatever that means).

2. The Motion for Relief from the Automatic Stay is not Fatally Flawed.

The City argues that Respondent’s Motion is fatally flawed because: (1) it is not verified; and (2) it should have been presented to the circuit court. As to the first argument, Respondent has attached a compliant verification to this Reply. As to the second argument, the City’s argument is hard to fathom. The Complaint in the underlying case was filed on February 2, 2021 and the subject summary judgment order was entered on November 21, 2021, eight months prior to the possible expiration of the vested rights in the Subdivision Plat. That summary judgment order

¹ In footnote 5 to the City’s Return, the City urges the Court to condition any grant of this Motion on an order precluding Respondent from submitting any site plans, applications for building permits or other submissions during the pendency of the appeal. The reason for this request is unclear, and it is inappropriate. The submission, approval or denial of applications for building permits *et al.* were not before the circuit court and are therefore not before this Court. The relief requested would serve no useful purpose other than to absolve the City from its legal duty to consider developer submissions in the ordinary course of business.

made it clear that the Appellants had improperly hindered development on the subject property and, in doing so, had forced Respondent to resort to the court system. The Respondent, facing legal bills to enforce its clearly defined statutory rights as confirmed in the subject summary judgment order, hoped, perhaps naively, that the Appellants in this action would realize that they had improperly impeded Respondent's development rights and would permit development as originally contemplated. That has not happened, and Respondent is now faced with the potential expiration of its vested rights in the Subdivision Plat within roughly one month. It is not surprising that Appellants would argue that Respondent's predicament is its own fault. But that is simply not the case. As set forth in the Motion, these are sufficient extraordinary circumstances to warrant consideration of the Motion by this Court. *See* Rule 241(d)(1), SCACR.

CONCLUSION

For the reasons set forth above, the Appellant requests an expedited order lifting the automatic stay in the circuit court and permitting Appellant to file a motion for temporary injunction of the expiration of its vested rights in the Subdivision Plat.

Charleston, South Carolina
June 8, 2022

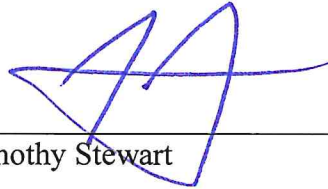
WOMBLE BOND DICKINSON (US) LLP

s// Matt Tillman

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VERIFICATION

Personally appeared before me, Timothy Stewart, who, being first duly sworn, deposes and says as follows: I have read the Motion for Relief from Automatic Stay to File Motion for Temporary Injunction filed on May 24, 2022, as well as the above Reply to the City of Folly Beach's Return to Respondent's Motion for Relief from Automatic Stay to File Motion for Temporary Injunction and know the contents of those documents. I make this verification on behalf of Clam Farm Partnership, LLC, where I serve as Manager. The facts and allegations recited therein are true and correct based upon my personal knowledge and upon my review of my business records, which are maintained and relied upon in the ordinary course of business. As to allegations therein set out on information and belief, I believe them to be true and accurate. I am duly authorized to make this verification.



Timothy Stewart

SWORN to and subscribed before me
this 8th day of JUNE, 2022

Print: Jacquelyn Maynard
Sign: [Signature]
Notary Public, State of South Carolina
My Commission Expires: 02/10/2024

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I, Matthew Tillman, of Womble Bond Dickinson (US) LLP, attorneys for the Respondent, Clam Farm Partnership, LLC, hereby certify that the Respondent’s Reply to

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 Appellants The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Charleston County, and The City of Folly Beach on June 8, 2022, by emailing a copy of the same to all counsel of record:

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Charleston South Carolina
Dated: June 8, 2022