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STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF HENDERSON HENDERSON CO., C.S.C. SUPERIOR COURT DIVISION
FILE NUMBER 13 CVS 454

BY KC

COUNTY OF HENDERSON,
Plaintiff,

v.

ORDER

SEVEN FALLS LLC, *et al.*,
Defendants.

THIS MATTER came on to be heard before the Honorable Mark E. Powell, presiding over the December 8, 2014, session of the Henderson County Superior Court, and was heard on the Motion filed herein by the Plaintiff County. Present for the hearing of this matter were Charles Russell Burrell, attorney for Plaintiff, Walter C. Carpenter, guardian *ad litem* for entities unknown or not located possessing an interest in the property described in the Complaint, and T. William McGee, attorney for Defendant Synovus Bank/National Bank of South Carolina. From the record in this cause, the court makes the following findings:

1. The Court has made the following findings in this action in its previous Order, entered May 7, 2013:

1. The Defendant, Seven Falls LLC (hereafter "the Developer"), was the developer of Seven Falls Subdivision Sections 1, 1A and 2 (collectively these Sections are referred to elsewhere in this document as "the Subdivision"), which were to be a part of Seven Falls Golf and River Club, a golf course development to be located within Henderson County, North Carolina.

2. In order to be permitted, pursuant to N.C. Gen. Stat. §153A-331, and pursuant to the Henderson County Land Development Ordinance, Chapter 200A of the Henderson County Code, to sell lots in the Subdivision prior to completion of certain improvements required in the Subdivision ("the Improvements"), the Developer executed a Performance Guaranty, which was later extended, in favor of the County.

3. To further guarantee the Developer's completion of the Performance Guarantee, a surety bond was required by the County and subsequently obtained, in the amount of Six Million Dollars (\$6,000,000.00). This amount represented one hundred twenty-five percent (125%) of the project engineer-estimated cost of the Improvements.

4. The Developer defaulted under the terms of the Performance Guarantee.

5. After litigation with the surety (see Henderson County Clerk of Court file number 10-CVS-08, which is also found at in the Office of the Clerk of the North Carolina Court of Appeals at file 11COA1601, and in the Office of the Clerk of the North Carolina Supreme Court at file 375P12), the County received payment of this surety bond, in an amount totaling \$6,000,124.59 (\$3,257,097.80 from Clerk of Court, representing a deposit on behalf of the surety in 10-CVS-08, plus \$2,743,026.79 directly from the surety) as of October 10, 2012 (this total amount hereinafter "the Surety Bond Proceeds").

6. Henderson County has a duty, to the extent of the Surety Bond Proceeds, to complete the Improvements.

7. Since the time of the default of the Developer, the site comprising the Subdivision, and the work which was previously performed toward the obligations of the Developer to complete the Improvements, has degraded substantially, to the extent that the certified engineer most familiar with the project now estimates that the cost of completion of the Improvements will exceed the Surety Bond Proceeds.

8. As the funds required to complete the Improvements may now exceed the Surety Bond Proceeds, the County, in attempting to remedy the Developer's breach, could be subject to claims by the Defendants, or some of them, resulting from the failure to complete all of the work of the Improvements.

9. In addition, the Developer's failures has caused to be revoked certain permits, issued by (and subsequently revoked by) the United States Army Corps of Engineers, required for the installation of the improvements. Such Corps of Engineers permits required either the performance of work in mitigation of the results of certain crossing or affecting of the waters of the United States by bridge, culvert or other means, or payment of sums in lieu of such work. The cost of this work in mitigation, or the payment of sums in lieu of the same, was not included in the costs of the Improvements, as at the time of the negotiated of the Performance Guarantee the developer possessed such permits (since revoked by the Corps of Engineers).

2. In this Court's Order of July 15, 2013, the Court approved the expenditure of up to \$410,686.70 of the Surety Bond Proceeds to be expended for emergency remediation work on the site of the Subdivision, and the additional sum of \$1,473.52 reimbursement to the Plaintiff for previous expenditures.

3. At present, there remains held by the County the sum of \$5,594,095.33 of the Surety Bond Proceeds, plus an additional relatively modest sum held by the State as interest credited on these sums (deposited by the County with the State Treasurer).

4. The County has continued to work with the engineering firm authorized in the Court's previous orders herein, WGLA Engineering PLLC ("WGLA"), to move forward in determining the scope and character of the Improvements which may be made given the amount remaining of the Surety Bond Proceeds.

5. Because of the lapse in a permit from the United States Army Corps of Engineers (for stream crossings needed in the designed road network within the Subdivision) and the lapse in an agreement with Duke Energy (for the installation of electrical power within the Subdivision), both caused by the Developer's defaults, a significant expenditure for a Corps of Engineers permit (as noted below) will be required to build any of the road network in the Subdivision.

6. Consultants employed by WGLA estimate that the cost of the Corps of Engineers permit for the Subdivision (in the form of a "remediation fee" paid to the Corps, as opposed to the Corps' favored method of actual off-site wetlands remediation) will be in excess of \$1,100,000.00 (on February 8, 2013, the Corps estimated such fee as \$1,131,500.00), and must be paid prior to any improvement of the road network for the Subdivision.

7. WGLA estimates that once the remediation fee is paid to the Corps of Engineers, there will be insufficient of the Surety Bond Proceeds remaining to pay for all of the Improvements.

8. Prior to presenting to the Court a plan for constructing such of the Improvements as are possible with the remaining Surety Bond Proceeds, the County has sought the Court's permission to let bids, pursuant to North Carolina laws concerning public construction bidding, for the Improvements (both as a whole, separately, and in various combinations). No party has expressed any opposition to this.

9. This matter should return for hearing before this Court on February 16, 2015, for the Plaintiff County to present the Court with a recommended plan for the Improvements, or such of them as can be paid for with the remaining Surety Bond Proceeds.

10. At that time all parties will have the right to give input on such plan, or present their own plan, and the Court will make its determination of the plan to be followed for the Improvements.

11. At such time as bids are received, the County shall post the same on the worldwide web, with links found at <http://www.hcplanning.org/sevenfalls/index.html>. Further, the County shall post notice of its proposed plan upon such website by not later than one week prior to February 16, 2014.

WHEREFORE, IT IS ORDERED as follows:

1. That the Plaintiff County shall request proposals for the construction of all and various parts of the Improvements as shown on the plans referred to above and found on the website indicated above.

2. This matter shall come back before this Court for further hearing on February 16, 2015, for the Plaintiff County to present the Court with a recommended plan for the Improvements, or such of them as can be paid for with the remaining Surety Bond Proceeds. At that time all parties will have the right to give input on such plan, or present their own plan, and the Court will make its determination of the plan to be followed for the Improvements.

3. At such time as bids are received, the County shall post the same on the worldwide web, with links found at <http://www.hcplanning.org/sevenfalls/index.html>. Further, the County shall post notice of its proposed plan upon such website by not later than one week prior to February 16, 2014.

This the 9th day of December, 2014.



SUPERIOR COURT JUDGE PRESIDING

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Order has been served on all parties hereto by depositing a copy of the same in a postage prepaid envelope, properly addressed to the persons and entities listed on the attached pages.

This the ____ day of December, 2014.

Charles Russell Burrell
Attorney for Plaintiff