Circuit Court for Harford County
Case No.: 12-C-12-3214 OC

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1214

September Term, 2015

K. HOVNANIAN HOMES OF MARYLAND, LLC, *ET AL*.

v.

THE MAYOR AND CITY COUNCIL OF HAVRE DE GRACE, *ET AL*.

Meredith,
Graeff,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: November 3, 2017

K. Hovnanian Homes of Maryland, LLC ("Hovnanian") and Greenway Investments, LLC, appellants, appeal an order from the Circuit Court for Harford County granting summary judgment in favor of the Mayor and City Council of Havre de Grace (collectively, "the City"), appellees, in a suit in which appellants sought to enforce an alleged contract for recoupment of monies they had expended for capital improvements that benefited adjacent parcels of real estate. The contract was "approved" by a unanimous vote of the City Council, but was never signed by the Mayor. The parties filed cross-motions for summary judgment, and the circuit court entered judgment in favor of the City. This appeal followed.

QUESTION PRESENTED

Appellants present one question for our review:

> As a matter of law, did the City Council's approval of the Recoupment Agreement create a final and binding contract, leaving the Mayor only with a ministerial duty to sign the Agreement for purposes of recordation, or was the Mayor's signature necessary to create a binding contract?

For the reasons set forth herein, we shall vacate the circuit court's judgment in favor of the City and remand the case for further proceedings.

FACTUAL & PROCEDURAL BACKGROUND

Although both sides filed motions for summary judgment, we are obligated on appeal to view the facts in the record in the light most favorable to the non-moving party, which, as to the motion granted and from which this appeal was taken, means the appellants. *See Taylor v. NationsBank, N.A.*, 365 Md. 166, 174 (2001).

The controversy giving rise to this appeal concerned the development known as Greenway Farms, which was a subdivision of approximately 134 acres of farmland in Harford County. In 2005, Greenway Farms was owned by Greenway Investments, LLC (sometimes referred to herein as "Greenway Investments"). On February 17, 2005, the four owners of Greenway Investments, LLC entered into a contract with Hovnanian, under which Hovnanian would purchase all of the membership interests in Greenway Investments, LLC. At the closing upon the purchase contract on January 4, 2006, Hovnanian, with the four former owners' consent, assigned its rights under the purchase contract to Acacia Credit Fund 10-A, LLC ("Acacia"). As a result, Acacia became the owner of the four former owners' membership interests in Greenway Investments, LLC.

On October 17, 2005, Greenway Investments, LLC (which was then owned by Acacia) subdivided Greenway Farms into three parcels designated as Parcels 1, 2, and 3. The three parcels are also referred to in the record as "Phases 1, 2, and 3," indicating the order in which they were to be developed. Although Parcel 1 had direct access to public roads for ingress and egress, Parcels 2 and 3 did not have such access at the time the plat was recorded.

On December 22, 2005, Greenway Investments entered into a public works agreement with the City. The 2005 public works agreement provides, *inter alia*: "Developer shall at its own expense construct a bridge and appurtenant facilities . . . over the CSX Railroad tracks in the location shown on Exhibit D to the Resolution together with all roads servicing the Property and the Project." The 2005 public works agreement

also provided that the Developer would convey these facilities to the City, which would then be responsible for maintaining them. Greenway Investments and Hovnanian agreed that Hovnanian would construct the bridge, as well as access roads, water and sewer utilities, and storm water management facilities on Parcel 1.

Although Greenway Farms had been subdivided into three parcels at the time the 2005 public works agreement was entered into, all three parcels were then under the ownership of Greenway Investments, LLC. But this unity of ownership ended when a subsequent foreclosure sale of Parcels 2 and 3 resulted in the four *former* owners of Greenway Investments, LLC reacquiring control of Parcels 2 and 3 as Greenway Holding Parcel 2, LLC and Greenway Holding Parcel 3, LLC.

Because the 2005 public works agreement contemplated that the infrastructure improvements Hovnanian was making to Parcel 1 would provide roadway access and utility connections that would also be utilized by future homeowners of Parcels 2 and 3, Hovnanian and Greenway Investments negotiated with the City to provide for recoupment of a portion of the infrastructure costs from the owners of lots in Parcels 2 and 3.

On December 17, 2009, counsel for appellants forwarded a proposed recoupment agreement to the City. Counsel for the City responded that the proposed total amount recoupable ($3,253,118.65) was too high because that sum "includes $1,239,480.00 for the bridge over the CSX tracks and which has already been dedicated to public use" in

connection with the 2005 public works agreement. In a letter dated December 22, 2009, counsel for the City stated:

> The City's policy is to provide recoupment for public improvements, to be dedicated for public use. Here the dedication has already taken place for a portion of the improvements so the request as presented cannot be processed. If you seek a deviation from the City's policy you will need to take that request to the City Administration. If you are going to modify the request, please resubmit the requested reimbursement.

On January 14, 2010, appellants' counsel submitted a revised agreement "that deletes the bridge, and adjusts the amount of the recoupment accordingly." Counsel for appellants wrote: "Hovnanian would like to discuss this issue with the Mayor and Mr. [Larry Parks (the City's Director of the Department of Public Works)], however, and if the City is willing to change its policy, at least in this one instance because of the unique circumstances that attend dedication of the bridge, I suggest we can then draft a separate Agreement just for the bridge."

On June 11, 2010, counsel for the Greater Aberdeen Development Corporation -- the parent company of Greenway Holding Parcel 2, LLC and Greenway Holding Parcel 3, LLC -- sent a memorandum to the City Council contending that appellants had no right of recoupment for any public works other than the extension of Martha Lewis Boulevard.

In September 2010, appellants engaged in discussions with City officials, including Larry Parks, concerning recoupment. On September 7, 2010, appellants submitted to the City a revised document that appellants expected would be the final version of an "Infrastructure Capital Projects Cost Recoupment Agreement" (hereafter

referred to as the "Recoupment Agreement"). The Recoupment Agreement, attached as Exhibit A to appellants' complaint, provides in pertinent part:

INTRODUCTION/RECITALS

* * *

> G. [Hovnanian] or its designees, their successors and/or assigns are in the process of constructing/has constructed dwelling units in Phase 1, together with the installation of access and emergency roads, water and sewer lines, and storm water management ponds necessary to fully develop Phase 1 and the lots situated therein. This infrastructure benefits Phases 2 and 3, and is more particularly described on Exhibit A attached hereto and made a part hereof (collectively, the "Phase 1 Infrastructure").
>
> H. Greenway Investments and/or [Hovnanian] and/or their respective designees own legal title to the remaining lots in Phase 1 which have not been deeded to end users. Greenway Investments no longer owns Phase 2 and Phase 3.
>
> I. The owner(s) of Phase 2 and Phase 3 will directly benefit from the installation of the Phase 1 infrastructure. Phase 2 and Phase 3 require access for ingress and egress over Phase 1, and, in the event of development of Phases 2 and 3, each will require water and sewer service and storm water management ("SWM") facilities. In consideration of this Agreement, [Hovnanian] agrees to construct and dedicate Rakokous Drive, an extension of Martha Lewis Boulevard, to the boundary of Phase 2, and to construct and dedicate Mohegan Drive, an extension of Martha Lewis Boulevard, to the boundary of Phase 3. **After acceptance of these dedications by the City, Phases 2 and 3 shall have access utilizing public roads through Phase 1. In further consideration of this Agreement, [Hovnanian] also agrees to construct and dedicate water and sewer lines and SWM facilities in Phase 1, in accordance with approved site plans, and [Hovnanian] and Greenway Investments agree to permit connections to water and sewer utilities and the use of the SWM facilities by Phases 2 and 3.** [Hovnanian] and Greenway [Investments] shall contemporaneously with the dedication of said portions of Rakokous Drive and Mohegan Drive and said water and sewer lines and SWM facilities also dedicate all other public streets (and any other public service facilities) in accordance with the Phase 1 Public works agreement.

J. **The owner(s) of Phase 2 and Phase 3 are benefited by [Hovnanian's] agreements, but all of the costs to provide such access, utilities and SWM facilities have been (or will be) constructed and paid for by [Hovnanian]. Developer and the City recognize and acknowledge that it would be inequitable to impose all such costs on [Hovnanian], resulting in a windfall advantage for the owner(s) of Phases 2 and 3, unless provisions are made for a pro-rata recovery of such costs by [Hovnanian].**

* * *

L. This Agreement is being executed for the purpose of reimbursing [Hovnanian] for a pro-rated portion of the Phase 1 Infrastructure benefiting Phase 2 and Phase 3 from the owner(s) of Phase 2 and Phase 3 in order for such owner(s) to utilize the Phase 1 Infrastructure, and the parties desire to set forth in writing their respective rights, liabilities, and duties.

K. **The Mayor and City Council of Havre de Grace have determined that this Agreement is necessary to provide for the general welfare and safety of City residents, and this Agreement is required to protect the equitable and legal property rights of the Developer, and to permit the development of Phases 2 and 3 in accordance with the original intent of the parties for development as described in the Phase 1 Public Works Agreement.**

* * *

AGREEMENT

NOW, THEREFORE THIS AGREEMENT FURTHER WITNESSETH, for and in consideration of the explanatory statements, and the covenants, promises, and acknowledgments contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be bound hereby, agree as follows:

1. Recitals. The preceding recitals are incorporated into, and shall constitute a part of this Agreement.

2. Recoupment.

A. [Hovnanian] shall be reimbursed in accordance with the terms of this Agreement over a period not to exceed twenty-one (21) years from the Effective Date of this Agreement for the stipulated cost described in Section 2.D below actually incurred [by Hovnanian] for constructing the Phase 1 Infrastructure.

B. The City shall reimburse [Hovnanian] only to the extent of recoupment fees actually received by the City pursuant to this Agreement from properties within Phase 2, Phase 3, and including Parcel 3A (collectively, the "Service Area"). The City shall not be obligated to reimburse [Hovnanian] from any operating, capital, or other funds of the City; and [Hovnanian] shall not be entitled to any credits or setoff against other user charges, area connection charges, or any other monies due to the City from [Hovnanian]. The City shall reimburse [Hovnanian] for the cost of the Phase 1 Infrastructure solely from monies received by the City from the properties in the Service Area. The applicable fees or charges are further described herein. It is understood by the parties hereto that there is no guarantee that any or all of the properties within the Service Area will make building permit applications for new construction upon Phase 2 and/or Phase 3.

C. Each Phase within the Service Area shall be subject to the recoupment fees described herein and shall pay the applicable charge at or prior to the time when a building permit application for new construction upon Phase 2 and/or Phase 3 is submitted to the City.

D. **The actual allocated cost of the Phase 1 Infrastructure is $1,368,094.47. This cost has been incurred by [Hovnanian] in connection with the Phase 1 Infrastructure that benefits Phase 2 and 3.** The maximum amount of recoupment to which [Hovnanian] shall be entitled is the actual cost of the Phase 1 Infrastructure constructed by [Hovnanian] pro-rated on the basis of projected lots to be developed in Phases 1, 2 and 3.

E. **In order to reimburse [Hovnanian] as provided herein, the City will impose and collect the recoupment fee described herein from the owner(s) of Phase 2 and Phase 3 at the same time a building permit application for new construction upon Phase 2 and/or Phase 3 is submitted to the City by such owner(s)**. As to any building permits that have been issued by the City for the development of residential dwelling units in Parcel 3A prior to the Effective Date of this Agreement, the City will impose and collect the recoupment fee described herein from the

owner(s) of such units prior to, and as a condition for, the issuance of any use and occupancy pertaining to the unit.

F. **No property in the Service Area shall be allowed to utilize the Phase 1 Infrastructure unless the applicable recoupment fee, as described herein, is first paid to the city**.

G. The City shall remit all recoupment fees received pursuant to this Agreement to [Hovnanian] within forty-five (45) days after the end of the calendar quarter within which the City receives the recoupment fees, less $100 for each recoupment fee it collects as an administrative charge for the City's administration of this Agreement, payable to the City from the recoupment fees received pursuant to this Agreement; however, the City will remit no recoupment fees to [Hovnanian] until the Phase 1 Infrastructure has been declared operational, in writing, by the City, and dedicated to and accepted by the City.

H. The amount of money to be paid by each property owner whose property is located within the Service Area in order to utilize the Phase 1 Infrastructure shall be $3,304.57 for each residential dwelling unit for which a building permit is issued after the date of this Agreement, and/or, as the case may be, for each residential dwelling unit in Parcel 3A for which a building permit was issued before the date of this Agreement, but before the issuance of a use and occupancy permit.

* * *

5. Amendments. This Agreement may be amended or modified by the City and Developer from time to time by written instrument executed on behalf of Developer and the City and approved by the Mayor and City Council of Havre de Grace at a regular or special legislative session.

* * *

8. No Restriction on City Powers. Nothing in this Agreement shall be construed to limit the power of the City to pass any ordinance generally applicable within the City limits of Havre de Grace relating to the health, safety, and welfare of the citizens of Havre de Grace or relating to the collection of taxes or other fees or charges.

> 9. Declaration of Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Maryland.
>
> * * *
>
> **20. City Council Approval: The City Council of Havre de Grace has approved this Recoupment Agreement, and authorized the Mayor to sign the Agreement, by an affirmative vote at the meeting of the City Council on October 4, 2010.**

(Emphasis added.)

The proposed Recoupment Agreement (including the recitation in paragraph 20 confirming that it had been approved by the City Council on October 4, 2010) was presented to the City Council in advance of the October 4 meeting. The minutes of that meeting reflect that "the agreement was approved 6-0." The minutes of the October 4, 2010, meeting state:

> A motion was made by Councilmember Correri and seconded by Councilmember Shank to approve the Infrastructure Capitol [sic] Cost Recoupment Agreement. After Councilmember Craig explained the rationale of the agreement, the agreement was approved 6-0.
>
> Mayor Dougherty read public notes into the record regarding the agreement. They are as follows: **1**. **The cost of the recoupable improvements was $1,997,640.00, note that sum was for only a portion of the public works in the project which directly affected phase 2 and 3**. **The figure of $1,368,094.00 was the pro rata portion attributed solely to phase 2 and 3**, the other portion ($629,546.00) along with the other costs which were not included in the $1,997,640.00 figure was placed against phase 1[.] **2**. The infrastructure cost was divided between phases 1 and phases 2 and 3. Larry [Parks] removed $649,546.99 and applied that to phase 1 entirely and $1,368,094.00 was applied against phase 2 and 3. **3**. Larry [Parks] has not proved a windfall to phase 1. **4**. The 21 years matches the time frames for the other recoupment agreements in place for Greenway. **This recoupment agreement will be exchanged with [appellants'] dedication of the public streets and water/sewer lines and**

> **storm water lines for public use**. **The owners of phases 2 and 3 will no longer be faced with restricted access to Rt. 40 as [Hovnanian] has threatened in the past.** Thanks.

(Emphasis added.)

Despite the unanimous approval of the Recoupment Agreement by the City Council, it was never signed by the Mayor. Shortly after the meeting at which the Recoupment Agreement was approved, the owners of Parcels 2 and 3 raised objections. In an e-mail sent on October 15, 2010, counsel for the Greater Aberdeen Development Corporation, who represented the interests of the owners of Parcels 2 and 3, wrote to the City Attorney: "I am imploring the Mayor to veto the above resolution for many reasons too numerous to put in an e-mail . . . ." The Greater Aberdeen Development Corporation requested a meeting with the Mayor, contending that the approval of the Recoupment Agreement "was done without due process, either procedural or substantive," and "would result in a windfall gain to [Hovnanian] and Acacia . . . ."

On October 20, 2010, appellants transmitted a copy of the Recoupment Agreement containing their executives' signatures to the City Attorney, and requested that the City return fully signed copies to Hovnanian. The Recoupment Agreement contained signature blocks for the Director of Administration, the Mayor and City Council of Havre de Grace, the City Attorney ("for legal sufficiency"), and the Director of the Department of Public Works ("for approval").

On or about November 12, 2010, the City Attorney advised appellants that the owners of Parcels 2 and 3 now objected to the Recoupment Agreement because, they

claimed, the owners of Parcels 2 and 3 intended to submit a new development plan that would not require the lots built on those parcels to make use of the infrastructure improvements contemplated by the original development plan which were installed or to be installed to Hovnanian. To allay this concern, appellants agreed on January 12, 2011, at a meeting between Hovnanian and the Administrative Committee of the City Council, to a "ministerial clarification" of the Recoupment Agreement as requested by the Administrative Committee. The clarification would provide expressly that, "if a residence developed in Parcel 2 or 3 did not, and could not, utilize any Parcel 1 infrastructure, no recoupment fee would be applicable to such residence."

In an affidavit filed by appellants in support of their motion for summary judgment, counsel for Hovnanian stated: "The City's attorney and the Administrative Committee [of the City Council] assured Hovnanian that because the revision did not involve a material change to the [Recoupment] Agreement, no further approval by the City Council was required." On January 20, 2011, Hovnanian sent a revised Recoupment Agreement to the City. The revised Recoupment Agreement included a new paragraph 2.I., confirming that future buyers of lots in Parcels 2 and 3 would not be obligated to pay a recoupment fee to appellants if those buyers' parcels did not benefit from Parcel 1 infrastructure. On February 11, 2011, the City's attorney advised Hovnanian that the Recoupment Agreement was being sent to the Mayor for his signature. But, after further delay, Hovnanian's counsel "was then told the Mayor wanted a meeting of interested

parties to give the Owners of Parcels 2 and 3 an opportunity to discuss their objections directly with the Mayor."

Between late March 2011 and May 2011, Hovnanian and the City Attorney exchanged correspondence. By letter dated May 18, 2011, appellants gave the City Attorney notice that the City was "in actual or anticipatory breach of the [Recoupment Agreement]," and that, despite the City Council's approval, "the Mayor has not signed the Agreement, thereby preventing its recordation." According to counsel for Hovnanian, on May 25, 2012, "the City's attorney advised Hovnanian, for the first time, that the City's approval of dedication documents and Stormwater and Forest Declarations were conditions precedent to the Mayor's signature." A letter dated May 25, 2011, from the City Attorney to appellants' counsel warned that the Council was contemplating reconsideration of its approval, and further emphasized the need for the City to have deeds of dedication in hand before it would execute the Recoupment Agreement. The letter stated in pertinent part:

> Apparently, these [deeds] have not been prepared. While I understand that [Hovnanian] is reluctant to execute the deeds unless done so simultaneously with the Recoupment Agreement, the City would be remise [sic] to execute the Recoupment Agreement without those documents in hand and thoroughly reviewed.
>
> In addition to the deeds, [Special Counsel for the City] spelled out the need for a storm water management declaration and a forest conservation declaration. Until approved drafts of these documents are in hand, which [Special Counsel] made rather clear at our meeting on March 2, 2011, any signature by the Mayor on the redrawn recoupment agreement could be premature.

According to counsel for Hovnanian, appellants worked to meet these conditions precedent and, on June 4, 2012, Greenway Investments signed the requested Deed of Dedication, which was thereafter signed by the Mayor and recorded.

But, according to counsel for Hovnanian, after the dedication, the City then took the position that it was contrary to City policy to enter into an agreement for recoupment of costs for infrastructure improvements that had already been dedicated to the City. Counsel for Hovnanian stated in his affidavit: "The City's attorney then advised Hovnanian that because the access roads and utility infrastructure were dedicated to the City, it was the policy of the City not to enter into recoupment agreements pertaining to roads and infrastructure owned by the City . . . and the Mayor refused to sign the Recoupment Agreement."

The Recoupment Agreement was never signed by the Mayor. Nevertheless, residential lots were developed on Parcel 3A (a subdivision of Parcel 3), and 33 building permits were issued, but no recoupment fees were collected by the City. If the City had collected fees in the amount per unit stated by the Recoupment Agreement, the total amount collected for those 33 lots would have been $109,050.81.

In a three-count complaint filed against the City, appellants sought Declaratory Relief (Count One). Appellants contended in their complaint that, "[w]hen the City Council approved the Agreement, in the presence of the Mayor, and without a dissenting vote, it was constituted as a final, binding contract between the City, Greenway [Investments], and Hovnanian." Appellants requested a declaration that the Recoupment

Agreement (or the revised Recoupment Agreement containing revised paragraph 2.I) be deemed a valid, binding, and enforceable contract, and further, a declaration that "[t]he execution of the Recoupment Agreement is a ministerial duty that Wayne H. Dougherty, as the Mayor of Havre de Grace, is required to exercise, and the Mayor and City are required to record the fully executed Recoupment Agreement in the Land Records for Harford County." Second, appellants petitioned the circuit court for a writ of mandamus (Count Two) to compel the execution and recording of the Recoupment Agreement. Third, appellants asserted a claim for breach of contract (Count Three), requesting damages in the amount of $1,368,094.47 for the "actual and anticipated breach of the Recoupment Agreement."

Appellants and the City filed cross-motions for summary judgment. After a hearing, the circuit court denied appellants' motion for summary judgment, and granted the City's motion. The circuit court summarized its ruling by stating: "The Court finds that (1) the October 4, 2010 City Council vote to approve the Agreement in question did not create a valid or binding contract and (2) the Mayor was under no ministerial duty to sign the agreement." The court explained that, in its view, this conclusion was compelled by Section 34 of the Havre de Grace Charter, which "must be read in conjunction with Section 19B and D of the City Charter." More fully, the court opined:

> After reading the Havre de Grace Charter and Code, the Court finds that there is a prescribed process for the City to enter into contracts via resolutions and ordinances. The Court notes that Section 34 of the Charter outlines the duties of the City Council which states in pertinent part:

> In addition to the State and County laws that the City shall employ or enforce, the City Council shall have the power to pass and create resolutions and ordinances not contrary to the laws and Constitution of the State related to the following subject matters; with the list intended to be illustrative and not a limitation:... City property ... property, acquisition ... public utilities ... streets or public ways...

The City Council is, therefore, empowered to enter and form contracts as they pertain to property and the acquisition thereof by the City. This section of the Charter, however, must be read in conjunction with Section 19B and D of the City Charter [which] reads as follows:

> B. All resolutions and ordinances shall be attested by the Director of Administration and ordinances shall be delivered to the Mayor within five (5) days after passage for Mayoral approval or veto. The Mayor shall have fourteen (14) days after delivery to approve or veto an ordinance, and where the Mayor vetoes an ordinance, written reasons for the veto shall accompany the veto message delivered to the City Council...
>
> D. Any resolution or ordinance not enacted within one hundred eighty (180) days after its introduction shall be deemed to have failed.

Considering the plain language of the charter, it is the opinion of the court that the City Council may propose contracts, motions, resolution[s] and ordinances which must either be attested to by the Director of Administration or be approved or vetoed by the Mayor. Neither of these two actions occurred in the present case. The Charter further provides that if no action is taken after 180 days, the proposal has failed. It has been more than four and a half years since the City Council approved the Agreement and it has yet to be acted upon by the Mayor.

Where additional approval is needed, as required by a city's charter, a valid and binding contract does not exist. Foster & Kleiser v. Baltimore County, 57 Md. App. 531, 538, 470 A.2d 1322, 1326 (1984). . . . Foster holds that when final approval is required, an offer has not been extended and a contract has not been created. Id. at 538, 1326. The City Council Meeting on October 4, 2010, therefore, only amounted to preliminary negotiations on appeal [sic] and the bargain could not be concluded or binding on the City until the Mayor signed the resolution.

> The Court finds that there was not a lawful or binding contract between the parties in this case.

This appeal followed.

STANDARD OF REVIEW

Maryland Rule 2-501 provides:

> (f) **Entry of judgment.** The court shall enter a judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. . . .

On appeal from a circuit court's ruling granting summary judgment, we apply the *de novo* standard of review. As we stated in *Reiner v. Ehrlich*, 212 Md. App. 142, 151 (2013) (internal quotation omitted):

> A circuit court's decision to grant summary judgment is reviewed *de novo*. *Iglesias v. Pentagon Title & Escrow*, LLC, 206 Md. App. 624, 657, 51 A.3d 51 (2012). We must determine whether there was "a genuine dispute of material fact on the summary judgment record" and "whether the party that obtained summary judgment was entitled to judgment as a matter of law." *Id*.

"When both sides file cross-motions for summary judgment, as in the present case, the judge must assess each party's motion on its merits, drawing all reasonable factual inferences against the moving party." *MAMSI Life & Health Insurance Company v. Callaway*, 375 Md. 261, 278 (2003).

The Court of Appeals has observed that "[t]he existence of a dispute as to some non-material fact will not defeat an otherwise properly supported motion for summary judgment, but if there is evidence upon which the jury could reasonably find for the non-

moving party or material facts in dispute, the grant of summary judgment is improper." *Okwa v. Harper*, 360 Md. 161, 178 (2000).

As the Court of Appeals noted in *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541-42 (2007), "[o]n appeal from an order entering summary judgment, we review 'only the grounds upon which the trial court relied in granting summary judgment.'" (Quoting *Standard Fire Ins. v. Berrett*, 395 Md. 439, 450 (2006).)

DISCUSSION

Appellants contend that the City entered into a binding and enforceable contract on October 4, 2010, when the City Council voted unanimously "to approve the [Recoupment Agreement]." According to appellants, the circuit court erred when it ruled that, as a matter of law, the Mayor's signature was required to create an enforceable contract with the City. Appellants assert that the Mayor's signature upon the Recoupment Agreement was merely a ministerial act, and that the Mayor therefore had no discretion to choose *not to sign* the Recoupment Agreement. Consequently, appellants argue, the City is bound by the terms of the Recoupment Agreement despite the absence of Mayor Dougherty's signature.

We agree with Hovnanian that the three sections of the Charter cited by the motion court as the basis of its decision do not support the conclusion that the approval of the Mayor was required for the City to enter into a binding contract. As quoted above, the opinion of the circuit court cited three specific Charter provisions: Sections 19B, 19D, and 34. In our view, neither those sections, either individually or in combination, compel

the conclusion that, if the City Council approves a contract, subsequent review and approval of the Mayor is required in order for the City to proceed with the contract.

Section 19 of the City Charter is captioned "Resolutions and Ordinances; passage, veto power." Section 19A addresses the manner in which the City Council may adopt either a resolution, a charter amendment resolution, or an ordinance. The minutes of the meeting at which the City Council voted to approve the Recoupment Agreement do not identify the Council's action as either a resolution or an ordinance. The minutes refer to the matter as a "motion." Charter Section 19, on its face, does not appear to govern motions. Hovnanian argues that, in the absence of any Charter provision (or applicable ordinance or resolution), the procedures that must be followed by the City Council in conducting City business are governed by the common law of municipal corporations. With respect to the manner of conducting meetings of the City Council, Charter Section 32 provides: "The City Council shall have authority to formulate and carry out rules of order by resolution for its proceedings and be governed thereby. If no resolution adopting such rules exists, Robert's Rules of Order shall apply where not inconsistent with the Charter or any ordinance or resolution." Although appellants acknowledge in their brief that, "[a]s a practical matter, however, there is no substantive difference between a motion and a resolution," citing 5 McQuillin, *Municipal Corporations*, (3d ed., 2010 rev.) § 15:8, they also observe that, unlike a resolution, a motion may be presented orally (citing Robert's Rules of Order) as was done in the case of the Recoupment Agreement.

But appellants further assert that, even if the vote to approve the Recoupment Agreement is viewed as a resolution, as that term is used in the City Charter, Sections 19B and 19D do not require discretionary approval by the Mayor. Charter Section 19 provides, in relevant part:

> A. **All resolutions**, except Charter amendment resolutions**, shall be adopted by a majority of affirmative votes of the City Council members present and voting by roll call vote**. . . . [The balance of Section 19A addresses Charter amendments and ordinances.]
>
> B. **All resolutions and ordinances shall be attested by the Director of Administration** *and ordinances shall be delivered to the Mayor* within five (5) days after passage for Mayoral approval or veto. The Mayor shall have fourteen (14) days after delivery *to approve or veto an ordinance*, and where the Mayor vetoes an ordinance, written reasons for the veto shall accompany the veto message delivered to the City Council.
>
> C. The City Council can override the veto with five (5) affirmative votes in favor of the ordinance at the next regularly scheduled City Council meeting after the delivery of the veto message. If the veto is overridden or **if the Mayor fails to act within fourteen (14) days of delivery, the ordinance shall be treated as if it had been approved by the Mayor**.
>
> D. **Any resolution** or ordinance **not enacted within one hundred eighty (180) days after its introduction shall be deemed to have failed.**

(Boldface and italics added.)

The circuit court opined that the "plain language [of Sections 19B and 19D] of the charter" compels the conclusion "that the City Council may propose contracts, motions, resolution[s] and ordinances which must either be attested to by the Director of Administration or be approved or vetoed by the Mayor. Neither of these two actions occurred in the present case." But the "plain language" of these Charter provisions (a) makes no express reference to either motions or contracts; (b) expressly requires that only

"ordinances" need to be delivered to the Mayor for approval or veto; and (c) provides that a "resolution" passed by the City Council is merely "attested by the Director of Administration" without any discretionary leeway for the Director to approve or reject the resolution. In other words, assuming that the motion approving the Recoupment Agreement was a "resolution" within the scope of Charter Section 19, it was not subject to veto by the Mayor.[1]

Because the circuit court erred in construing Charter Section 19B to provide that resolutions of the City Council were not valid until approved by the Mayor, the circuit court also erred in concluding that *Foster & Kleiser v. Baltimore County*, 57 Md. App. 531, 538 (1984), supported the grant of summary judgment. In *Foster*, approval of the contract by the Baltimore County Council was required by an express contingency in the contract, *id*. at 533, as well as a provision in the Baltimore County Charter, *id*. at 537. In this case, however, neither the Recoupment Agreement nor the City Charter included a provision stating that the contract was subject to further negotiation and evaluation by the Mayor after the Recoupment Agreement approved by the City Council.

The circuit court also pointed to Charter Section 19D, and stated: "The Charter further provides that if no action is taken after 180 days, the proposal has failed. It has been more than four and a half years since the City Council approved the Agreement and

[1] Moreover, we note that, even if the motion had been an ordinance that was subject to the Mayor's approval or veto under Section 19B, the Charter provides in Section 19C that, if the Mayor neither approves nor vetoes the ordinance within fourteen days, which appears to be what happened after the City Council passed the motion in this case, "the ordinance shall be treated as if it had been approved by the Mayor."

it has yet to be acted upon by the Mayor." We fail to see the applicability of Section 19D. Assuming the motion to approve was a "resolution," it was passed by the City Council well within 180 days of its introduction, and it did not "fail" for lack of enactment. As noted above, Section 19B and 19C provide for Mayoral approval (or veto) only in the case of ordinances – which the Recoupment Agreement clearly was not – and, even when Mayoral approval is required, if the Mayor fails to act within fourteen days, the ordinance passed by the City Council is "treated as if it had been approved by the Mayor" and would not "fail" simply because the Mayor did not perform the ministerial act of documenting Mayoral approval.

The circuit court also pointed to Section 34 of the Charter, which is captioned "City Council: specific powers," as a reason for granting summary judgment. But Charter Section 34 provides in pertinent part:

> A. In addition to the state and county laws that the City shall employ or enforce, the City Council shall have the power to pass and create resolutions and ordinances not contrary to the laws and Constitution of the state related to the following subject matters; with the list intended to be illustrative and not a limitation:
>
> . . . [A]ssessments, . . . , bridges, buildings, City property, community services, . . . , construction, . . . property, . . . , public utilities, . . . , rights of way, sidewalks, sewers and sewer service, . . . , special assessments, . . . , streets or public ways, . . . , taxation and collection, . . . water service, . . . , zoning.
>
> B. The enumeration of powers in this section is not to be construed as limiting the powers of the City to the subjects mentioned or requiring that the City pass or create resolutions or ordinances concerning these subjects.

Charter Section 34 does not provide a basis for granting summary judgment in favor of the City.

As noted above, when we consider an appeal from an order granting summary judgment, we ordinarily review only the grounds relied upon by the circuit court. Accordingly, although the City has proffered additional arguments in its brief urging us to affirm the judgment of the circuit court, we decline to address them because the circuit court did not rely upon those arguments in making its ruling.

We vacate the judgment of the circuit court, and remand the case for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED AND CASE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.