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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

MIKELL R. SCARBOROUGH, Master in Equity

Appellate Case No. 2019-001289

Raven's Run Homeowners Association, Inc., ... Appellant/Respondent,

v.

Crown Pointe Association, Inc.; Lois K. Novak as Trustee of the Lois K. Novak Living Trust dated 10/14/2013; Laurie T. Herron and Mark D. Herron; James B. Kubu and Melissa F. Kubu; Leila June Johnson; Danny Ta and Anita McCauley; Robert E. Luby, Jr., and Barbara Luby; Joshua D. Coonce; Lucius Roy Junevicus; Katherine Kinlaw; Thomas K. Kuyk and Melissa Ward; Roland Franklin Wooten, III, and Teresa Key Wooten; Michael P. Horvath; Timothy E. Moylan and Karen G. Moylan; Carl A. Counasse and Maureen Counasse; David A. Frielinghaus and Holly C. Frielinghaus; Christopher S. Finley and Holly M. Finley; Shirley D. Spigner a/k/a Shirley Deanna Spigner; Deirdre C. Knight; Robert Shane Johnson; Eric R. Sigman; Lamar R. Graves, Jr., and Terry W. Graves; Mary Elizabeth Gladden; Philip Wallace and Naomi Grad; Thomas Edwin Davis and Luis Miguel Gonzalez Melchor; John R. Funkhouser and Jennifer L. Funkhouser; Gregory S. Cooper and Jane B. Cooper; Frank C. Jones, Jr., and Elise Ubele Jones; William P. Topping and Kris B. Topping; LaRhonda S. Ptichko; Kenneth L. Tully and Anna J. Tully; Defendants,

Of Whom James B. and Melissa F. Kubu, and
Leila June Johnson are the .... Respondents

And Katherine Kinlaw is the .... Respondent/Appellant.

PETITION FOR REHEARING OF APPELLANT/RESPONDENT RAVEN'S RUN HOMEOWNERS ASSOCIATION, INC.

The Court awards fee simple title to what it labeled the "Disputed Land" to the Crown Pointe Association, Inc. ("Crown Pointe"), even though it is not party to this appeal and despite its express ***disavowal*** of any claim to ownership of the Disputed Land. The Court reaches this astonishing outcome by refusing to consider a 1985 deed—which unambiguously conveyed the Disputed Land to Raven's Run—and incorrectly relying on the text of two quitclaim deeds—which unambiguously conveyed ***different*** land, wholly separate from the Disputed Land. The Court also claims the Disputed Land is depicted on a certain plat—even though it clearly ***is not***—and that the Disputed Land is not depicted on a Charleston County tax map—even though it clearly ***is***. Finally, the Court does all of this despite admitting that ***the grantor intended for Raven's Run to own the buffer strip in which the Disputed Land lies***.

For all of these reasons, Appellant/Respondent Raven's Run Homeowners Association, Inc. ("Raven's Run") respectfully petitions for rehearing of the decision of the Court filed on November 9, 2022 (the "Opinion") addressing, among other issues, ownership of the 10- to 12-foot wide buffer strip of land that runs around the Raven's Run lake. The Court erred in holding that Raven's Run does not own the Disputed Land, *i.e.*, that portion of the buffer strip that lies between the rear lot lines of Lots 37E through 66E of the Crown Pointe subdivision and the water's edge of the lake. (Op. at 6-7.) The Court should reconsider its decision and hold that Raven's Run owns the entirety of the buffer strip, which includes the Disputed Land.

BACKGROUND

The Raven's Run "lake" is a non-navigable drainage pond that lies between the Raven's Run subdivision and the Crown Pointe subdivision.[1] The lake is surrounded by a 10- to 12-foot wide buffer strip of land. The Disputed Land is that portion of the buffer strip that lies between the rear lot lines of Lots 37E through 66E of the Crown Pointe subdivision and the lake.

Raven's Run brought this litigation when some of the owners of Crown Pointe Lots 37E through 66E began cutting down the trees, shrubbery, and other greenery on the Disputed Land. Raven's Run sued the owners of Lots 37E through 66E as well as Crown Pointe. Neither ***Crown Pointe*** nor ***any of the lot owners ever*** claimed ownership of the Disputed Land. Just before the summary judgment hearing began, Crown Pointe represented to the special master that it "does not own the property," *i.e.*, the Disputed Land. (R. p. 134.)[2] The Respondents here—the only three lot owners who did not settle—also ***explicitly*** represented to the special master during the summary judgment hearing that they do not own the Disputed Land. (R. pp. 138, 158, 176.)

This Court acknowledged that a 1985 deed from RAC Enterprises conveyed

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[1] Rain water is the only source of water for the lake. Thus, the width of the buffer strip that surrounds the lake varies depending on the amount of rain that falls or drains into it.

[2] Crown Pointe did not participate in the summary judgment hearing. It appeared at the beginning of the hearing solely for the purpose of informing the special master that it had reached a settlement with Raven's Run, the terms of which it read into the record.

ownership of the lake to Raven's Run. (Op. at 8.) The Court also admits that RAC Enterprises intended "to convey the Disputed Land to Raven's Run HOA." (Op. at 6 n.2.) However, the Court refused to consider whether the 1985 deed conveyed ownership of the buffer strip surrounding the lake to Raven's Run, despite acknowledging that RAC Enterprises intended to convey the entire buffer strip, including the Disputed Land, to Raven's Run. (Op. at 6 and n.2.). Instead, the Court held that the Disputed Land was conveyed to Crown Pointe through "the 2001 and 2002 quitclaim deeds" (Op. at 7), even though Crown Pointe had expressly ***disavowed*** any ownership of the Disputed Land and those deeds plainly convey totally different property. Moreover, the Court held that Crown Pointe owns all of the Disputed Land—*i.e.*, that part of the buffer strip that lies between the rear lot lines of Crown Pointe Lots 37E through 66E—even though Crown Pointe is not a party on appeal and even though only the segments of the buffer strip[3] immediately behind three Crown Pointe lots—those owned by Kinlaw, the Kubus, and Johnson—are at issue in this appeal.[4]

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[3] The lengths of these segments of the buffer strip would be determined by the lengths of the rear property lines of the three lots in question.

[4] Of those three, only Kinlaw and the Kubus participated in the appeal. Raven's Run properly served Respondent Leila June Johnson with the notice of appeal and with its briefs, but Johnson has never filed a brief, never appeared in this Court nor gave any other indication that she intends to participate in this appeal. Under these circumstances, the Court should have summarily reversed as to Johnson. *See* Rule 208(a)(4), SCACR ("Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper."); *see also Robinson v. Hassiotis*, 364 S.C. 92, 93 n.2, 610 S.E.2d 858, 859 n.2 (Ct. App. 2005) (noting that permissible actions under Rule 208(a)(4) include reversal).

ARGUMENT

Rehearing is appropriate when the Court has overlooked or misapprehended [the appellant's] argument," *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), or when a "material fact or principle of law has been either overlooked or disregarded." *State v. Haygood*, 413 S.C. 239, 240, 776 S.E.2d 262, 263 (2015); *see Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). Here, rehearing is warranted because the Court overlooked, disregarded, or misapprehended several key points.

I. Crown Pointe Is Not a Party on Appeal and Never Claimed Ownership of the Disputed Land

In describing the procedural history, the Court stated that "Raven's Run HOA and Crown Pointe HOA filed cross-motions for summary judgment, ***each*** asserting it owned the Disputed Land." (Op. at 3 (emphasis added).) This is absolutely incorrect. From the moment of its creation some 30 years ago until the present, Crown Pointe has ***never*** claimed ownership of the Disputed Land at any time, including in its summary judgment motion and other filings below. Crown Pointe's summary judgment motion merely contended that the evidence did not support Raven's Run's ownership of the Disputed Land, ***not*** that Crown Pointe owned the Disputed Land. (R. p. 112 (Crown Pointe Mot. for Summ. J. at ¶ 3).)

Astoundingly, this Court's decision declares that Crown Pointe is now the fee simple owner of the Disputed Land, even though it:

- has ***never*** claimed ownership of the Disputed Land, before or

after this lawsuit was filed;

- has ***never*** paid property taxes on the Disputed Land;
- is ***not*** a party to this appeal;
- had settled with Raven's Run and was ***no longer*** a party at the time of the summary judgment hearing; and
- explicitly ***disavowed*** ownership of the Disputed Land when it was stating the terms of the settlement to the special master.

The Court's decision thus deprives Raven's Run of the benefit of its settlement agreements with Crown Pointe and with the individual property owners who also settled prior to summary judgment.[5]

II. The 1985 Deed Conveyed the Lake and the Buffer Strip, Including the Disputed Land, to Raven's Run

A. The 1985 Deed (E150) Is a Conveyance in Its Own Right

Raven's Run argued in its briefing that the buffer strip, in which the Disputed Land lies, was conveyed to Raven's Run by RAC Enterprises via deeds recorded in 1985

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[5] Moreover, the Court's decision has unintended consequences. There is no dispute that Raven's Run has paid all of the taxes on the land designated by tax map number 561-01-00-093 since 1985. (R. pp. 351-352.) According to the Court's decision, Crown Pointe now owns and thus must pay taxes on the Disputed Land—and Raven's Run has no further obligation to pay those taxes. However, because the Disputed Land is part of the buffer strip and therefore is included in tax map number 561-01-00-093, there is no mechanism by which the county can bill Crown Pointe for the taxes it now owes, nor is there any way for the county to subtract that amount from the tax bill to Raven's Run for tax map number 561-01-00-093.

Given that it expressly ***disavowed*** ownership of the Disputed Land, Crown Pointe may not want to own the Disputed Land and incur the obligation to annually pay taxes on it. But since Crown Pointe is not a party to this appeal, it has no means of challenging the Court's decision.

(Deed E150) and 1987 (Deed R163). *See* Final Opening Br. of Appellant/Respondent at 3-4, 25; *see also* Final Reply Br. of Appellant/Respondent at 25 ("The ***1985 Deed*** plainly demonstrates the intent of RAC Enterprises to convey the buffer strip to Raven's Run." (emphasis added)). In its Opinion, however, the Court considered ***only*** the 1987 deed. (Op. at 6.) Because it found the 1987 deed unambiguous, the Court refused to consider the 1985 deed on the grounds that it was merely "extrinsic evidence." (*Id.*) This was error. The 1985 deed ***is a conveyance in its own right*** and should have been considered as such.

The 1985 deed (Deed E150) describes the property conveyed in two distinct ways: by reference to a recorded plat and, separately, by reference to the relevant tax map number. The first paragraph references a recorded plat:

> ALL those certain pieces , parcels or strips of land, bodies of water, roadways and marsh, below described, all of which are shown on a certain plat entitled "Phase I, Raven's Run …" recorded on December 3, 1985 … [in] Plat Book BG at pages 52, 53 and 54.

(R. p. 268.) As an initial matter, one of the referenced plats, BG-52, supports a finding that the 1985 deed conveys the lake ***and*** the buffer strip to Raven's Run. Plat BG-52 shows the lake and an outline of the land on the other side of the lake—indicating that the conveyance in the 1985 deed reached all the way across the lake to the boundary of the soon-to-be-developed Crown Pointe subdivision. (R. p. 342.)

The Court's refusal to consider the 1985 deed cannot be squared with its holding that "Deed E-150 [the 1985 deed] unambiguously conveyed the Lake to Raven's Run HOA in 1985." (Op. at 8.) If, as the Court held (Op. at 8), the 1985 deed was properly

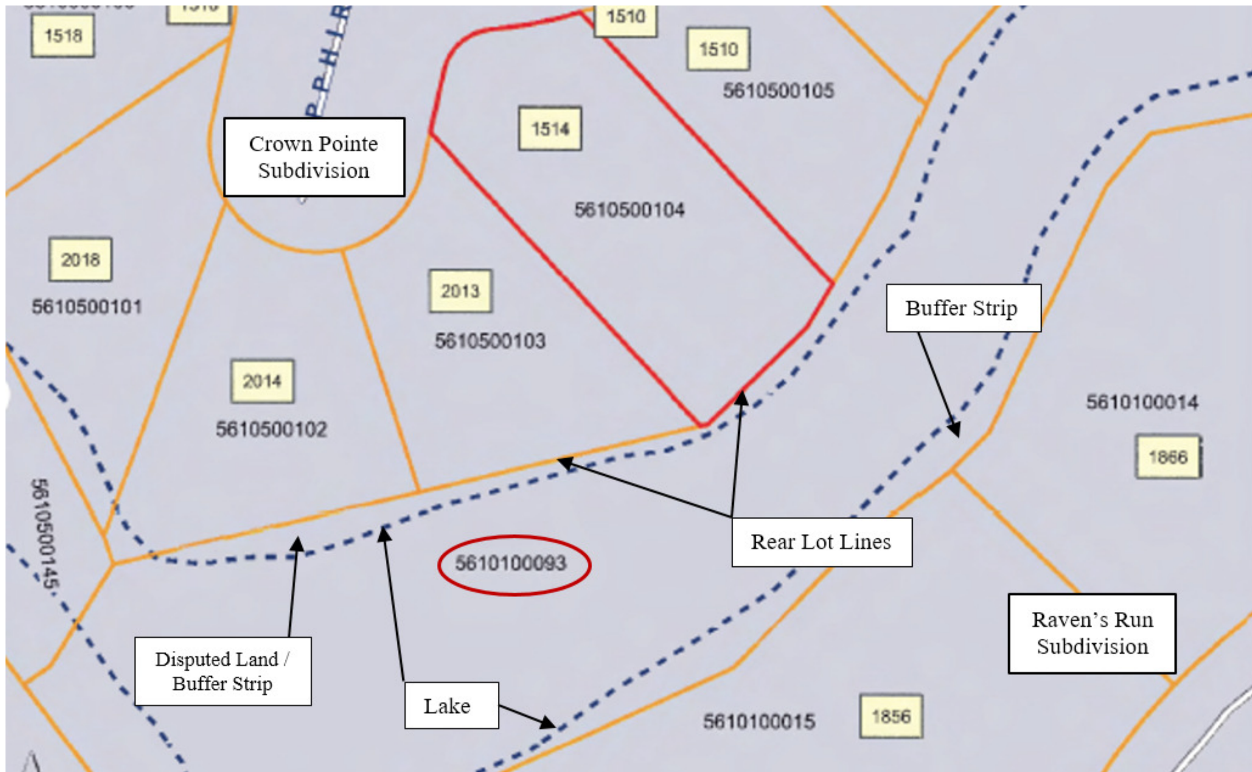
considered as to ownership of the lake, it should also have been considered as to ownership of the Disputed Land.

B. Tax Map Number 561-01-00-093 Includes the Disputed Land

The settled law in South Carolina is that reference to a tax map number in a deed is probative evidence of the grantor's intent. *See Millvale Plantation v. Carrison Family Ltd. P'ship*, 401 S.C. 166, 175, 736 S.E.2d 286, 290 (Ct. App. 2012) ("[T]he parties' decision to include tax map references in their deeds ***is significant and reflects their intent to convey the specific acreages described therein***." (emphasis added)); *cf. Marichris, LLC v. Derrick*, 384 S.C. 345, 353-54, 682 S.E.2d 301, 305-06 (Ct. App. 2009) (allocating ownership interests in property based on, *inter alia*, a handwritten notation on the deed).

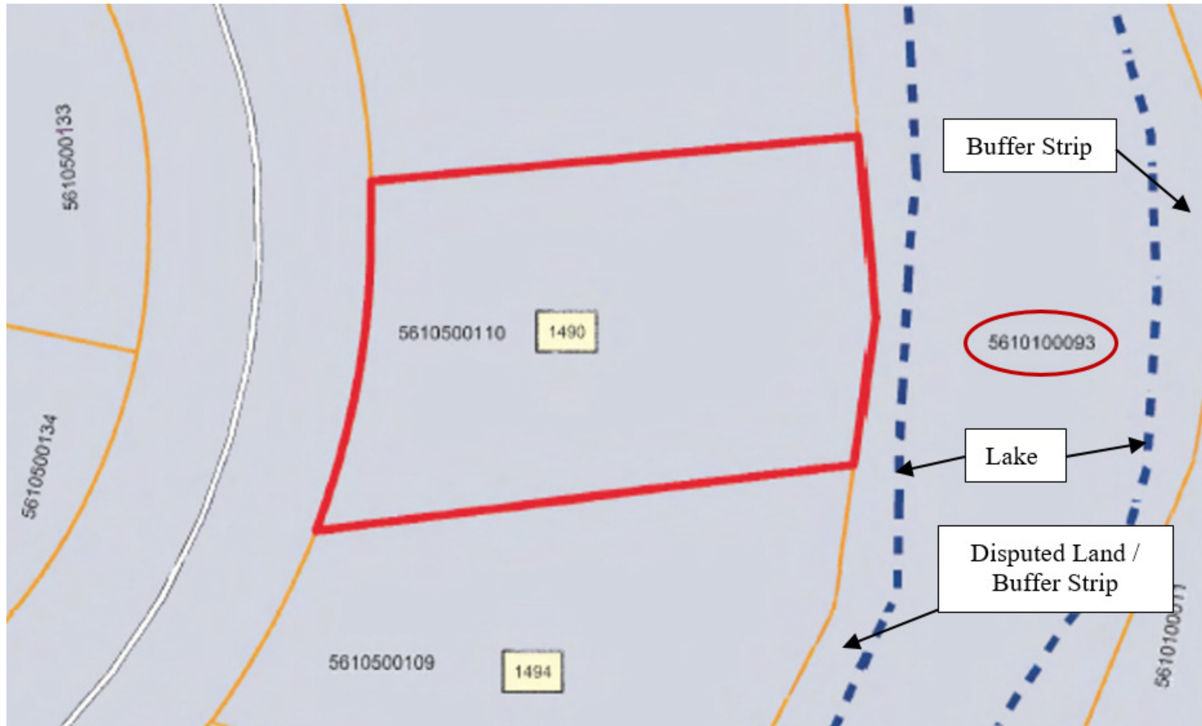
The 1985 deed and the 1987 deed both ***specifically incorporate by reference*** tax map number 561-01-00-***093***. (R. pp. 118 (1987 deed), 268 (1985 deed).). The Court stated, however, that it was "not convinced that the tax map references … demonstrate Raven's Run HOA owns the Disputed Land." (Op. at 6) To the contrary, it could not be clearer. The Court mistakenly overlooked evidence in the record clearly showing that tax map number 561-01-00-***093*** includes the lake ***and*** the buffer strip, which includes the Disputed Land. At page 280 of the Record on Appeal is a printout from the Charleston County geographical information system (GIS). It clearly shows, for example, the Kubus' lot outlined in red (the last three digits of its tax map number are ***104***) and the boundaries of adjacent lots. Johnson's lot (the last three digits of its tax map number are ***105***) is next to

the Kubus' lot with the rear lot line shown in orange. The lake is shown as a dotted blue line. Thus, both the lake and the buffer strip are ***within*** the boundaries of tax map number 561-01-00-***093***, as shown in the excerpted image below, in which the buffer strip is shown as the land between the rear lot lines of Crown Pointe subdivision and the dotted blue line of the lake:



(R. p. 280 (red circle and labels added).) The printouts above and below also show that the buffer strip extends all the way around the lake.

Likewise, the GIS printout for Kinlaw's lot (the last three digits of its tax map number are ***110***) shows the lake and the buffer strip ***within*** the boundaries of tax map number 561-01-00-***093***:



(R. p. 290 (red circle and labels added).)[6] Again, the strip of land between the dotted blue line representing the lake and the solid orange/red line representing the rear boundary of lots in Crown Pointe is the buffer strip, which is clearly shown as part of the land identified as tax map number 561-01-00-***093***.

Critically, there is no other tax map number that might apply to the lake and the buffer strip, which included the Disputed Land. This GIS printout conclusively shows

[6] Kinlaw's lot is located a few lots down from Johnson's and the Kubus' lots.

that tax map number 561-01-00-093 encompasses all land and water between the rear lot lines of Crown Pointe subdivision lots, including Lots 37E through 66E, facing Raven's Run subdivision, and the lots in Raven's Run subdivision on the opposite side of the lake facing Crown Pointe subdivision. All that was necessary for RAC Enterprises to convey the lake and the buffer strip (including the Disputed Land) around the lake would have been for the deed to simply state that "RAC conveys to Raven's Run HOA all of the property identified as tax map number 561-01-00-093." Of course, RAC Enterprises did this by specifically incorporating by reference this tax number in the 1985 deed and the 1987 deed. *See Millvale Plantation*, 401 S.C. at 174-75, 736 S.E.2d at 290.

III. The Court Erred in Relying on the 2001 Quitclaim Deeds and Plat BK-2

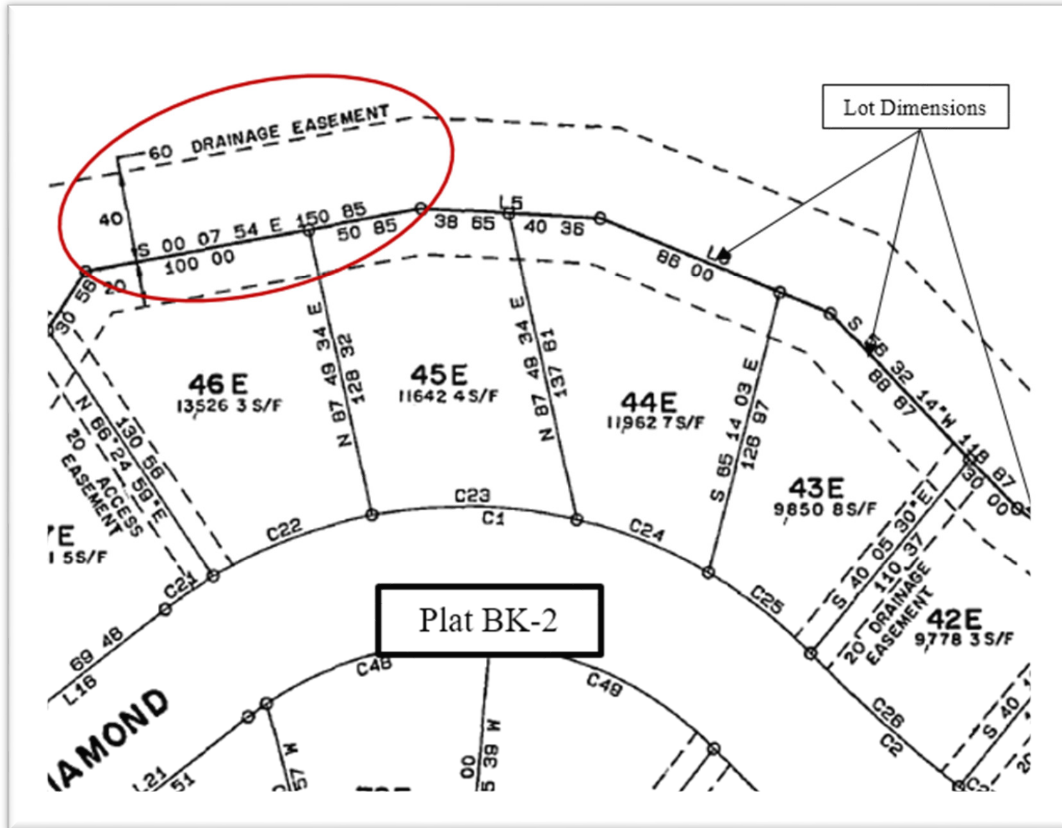
The Court also overlooked or misapprehended the undisputed evidence in determining that the Disputed Land—which, again, is simply a portion of the buffer strip that surrounds the Raven's Run lake—was "depicted on Plat BK-2" (Op. at 4) and was conveyed to Crown Pointe "through the 2001 … quitclaim deeds." (Op. at 7.)[7]

A. Plat BK-2 Does Not Depict the Disputed Land

The Court erred in stating that "Plat BK-2 depicted the Disputed Land." (Op. at 4.) In fact, Plat BK-2 ***does not*** depict the Disputed Land. Plat BK-2 depicts ***some*** of the lots—Lots 37E through 49E—adjacent to the Raven's Run lake, but it shows only the

[7] The Court incorrectly referred to "the 2001 and 2002 quitclaim deeds." (Op. at 7.) There is no "2002 quitclaim deed." Both quitclaim deeds were executed on December 18, 2001. (R. pp. 85, 333.)

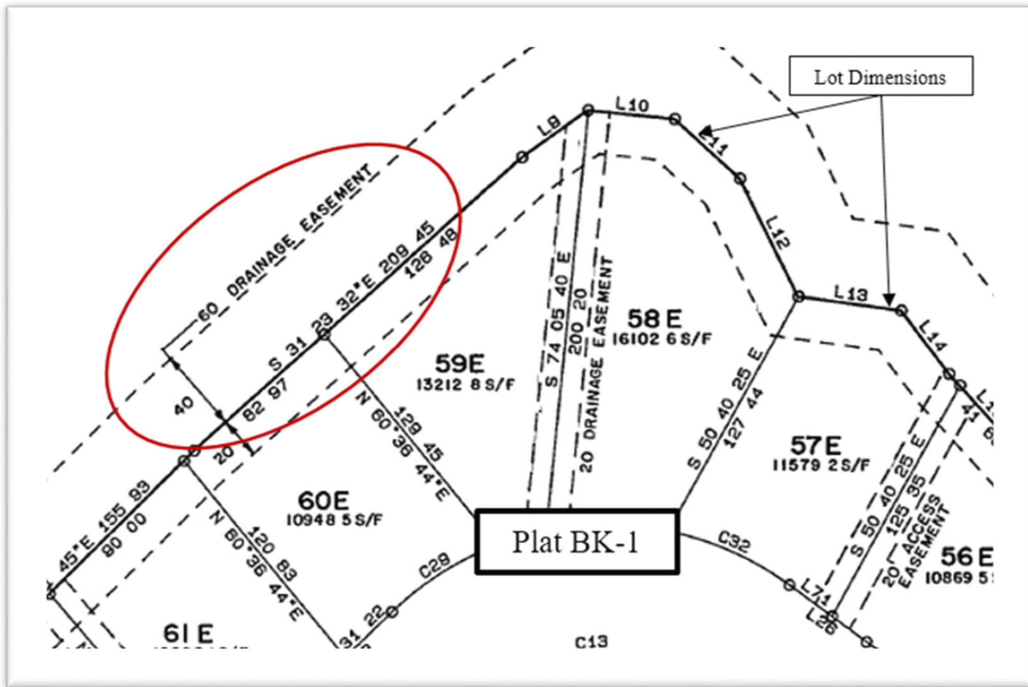
dimensions of those lots and the 60-foot drainage easement (which the Court correctly determined is irrelevant):



(R. p. 345 (red circle and label added).). If the Disputed Land were depicted on Plat BK-2, it would appear ***between*** the solid line showing the rear boundary of the lots and the dashed line showing the end of the 60-foot drainage easement. Therefore, Plat BK-2 ***does not*** depict the Disputed Land.

The Court's conclusion that Plat BK-2 depicts the Disputed Land is flatly contrary to its conclusion that Deed O-161—which references ***Plat BK-1***, recorded together with

Plat BK-2[8], and Plats BK-3 and BK-4—"unambiguously conveyed only the individual Crown Pointe lots." (Op. at 7.) Just like Plat BK-2, Plat BK-1 shows ***only*** the lot lines and the irrelevant drainage easement:



(R p. 380 (red circle and labels added).)

B. The 2001 Quitclaim Deeds Do Not Convey the Disputed Land

The 2001 quitclaim deeds have nothing whatsoever to do with the Raven's Run lake, the buffer strip, or the Disputed Land. There is another small lake adjacent to the East Crossing Subdivision and the western side of the Crown Pointe Subdivision, as well as a "green area" separating those two subdivisions. The 2001 quitclaim deeds convey

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[8] Plats BK-3 and BK-4 were also recorded along with Plats BK-1 and BK-2. Plat BK-3 depicts ***only*** the East Crossing Subdivision. (R. p. 382.) Plat BK-4 is a lines and curves table. (R. p. 383.)

these areas. In the first quitclaim deed, RAC Enterprises conveyed to East Crossing-Crown Pointe Association, Inc., the following property:

> ALL that certain common area, including any "lake" and "green area", located in East Crossing Subdivision … as shown on [Plat BK-3] …
>
> **ALSO**
>
> ALL that certain common area, including any "lake" and "green area", ***located in*** Crown Pointe Subdivision … as shown on that certain plat entitled "Plat Showing Crown Pointe Subdivision, ***Lots 25E – 49-E and Lots 67-E – 79-E*** …" dated August 3, 1986, and recorded in the RMC Office for Charleston County on August 21, 1986 in Book BK at Page 2.
>
> …
>
> TMS # 561-05-00-***145***

(R. pp. 84-85 (emphasis added).)

On the same day, East Crossing-Crown Pointe Association, Inc. executed a quitclaim deed conveying a portion of the property conveyed in the first quitclaim deed to Crown Pointe Association, Inc.:[9]

> ALL that certain common area, including any "lake" and "green area", ***located in*** Crown Pointe Subdivision … as shown on that certain plat entitled "Plat Showing Crown Pointe Subdivision, ***Lots 25E – 49-E and Lots 67-E – 79-E*** …" dated August 3, 1986, and recorded in the RMC Office for Charleston County on August 21, 1986 in Book BK at Page 2.

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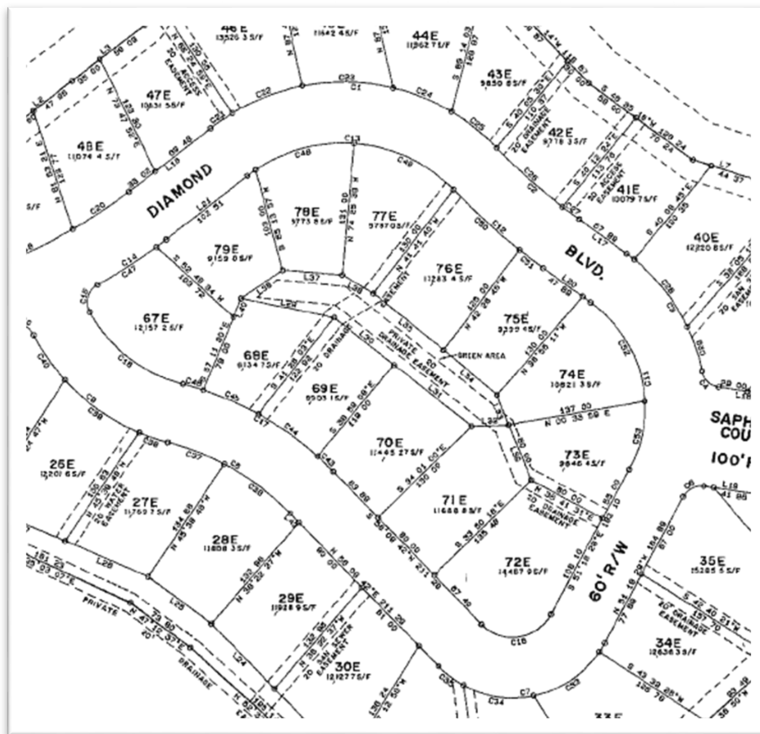
[9] Apparently, the purpose of the successive quitclaim deeds was to consolidate and transfer ownership of the common areas of the East Crossing and Crown Pointe subdivisions to their respective homeowners associations.

….

TMS # 561-05-00-***145*** (a portion)

(R. p. 332 (emphasis added).)

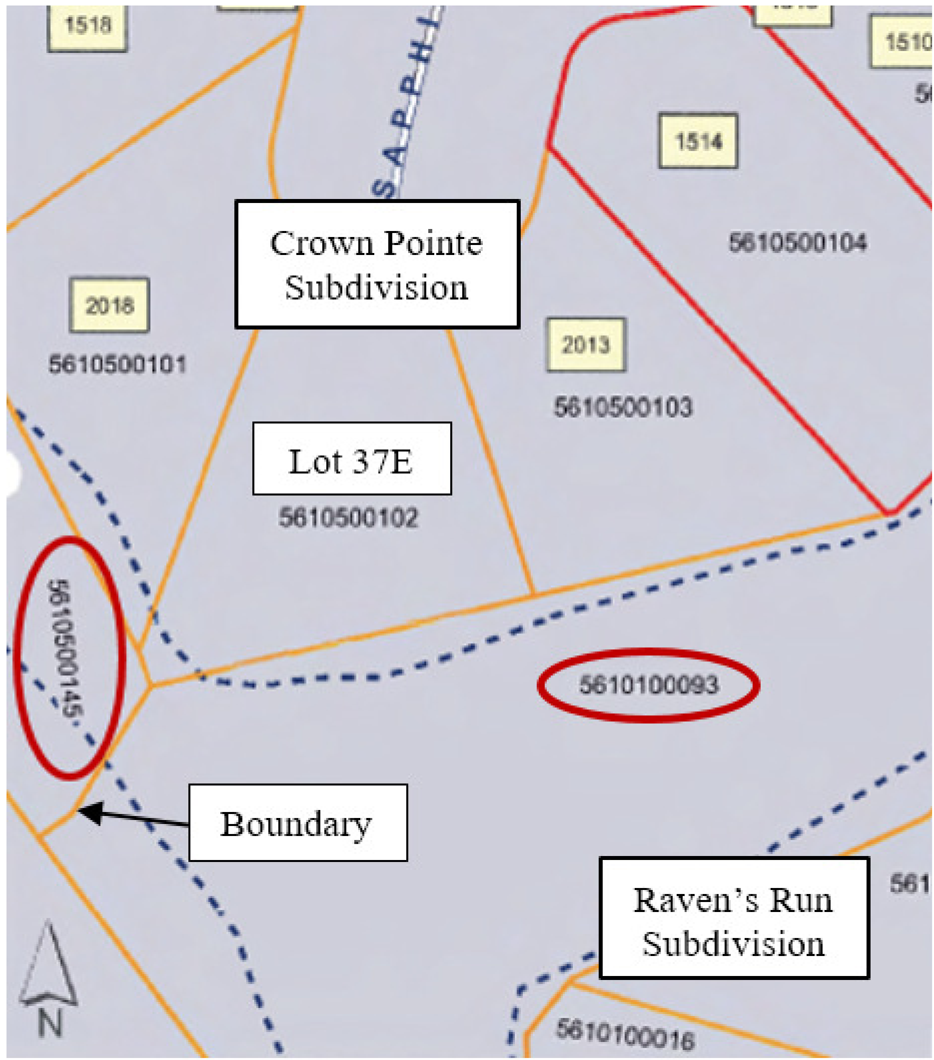
Consistent with the reference to common areas "located in" Crown Pointe subdivision, the referenced lots include Lots 67E through 79E, all of which lie wholly ***within*** Crown Pointe subdivision and do ***not*** abut any part of the Raven's Run lake or the buffer strip:



(R. p. 345 (Plat BK-2).)

Importantly, the 2001 quitclaim deeds incorporate by reference tax map number 561-05-00-***145***. (R. pp. 85, 332.) Tax map number 561-05-00-***145*** identifies the land and water abutting the East Crossing Subdivision and lots on the ***western*** side of, or ***within***,

the Crown Pointe subdivision. (R. p. 358). Tax map number 561-05-00-***145*** is entirely ***separate and distinct*** from tax map number 561-01-00-***093***. In fact, the GIS printout for the Kubus' property shows, in the lower left corner, the boundary between tax map number 561-01-00-***093***, conveyed to Raven's Run by the 1985 and 1987 deeds, and tax map number 561-05-00-***145***, conveyed in the 2001 quitclaim deeds:



(R. p. 280 (red circles and labels added).) The boundary between tax map number 561-05-00-145 and tax map number 561-01-00-093 lines up with the western edge of Lot 37E,

where the Disputed Land begins.

Finally, the description of the property conveyed does not support the Court's conclusion that the 2001 quitclaim deeds conveyed the Disputed Land—defined by the Court as that portion of the buffer strip that lies between the rear lot lines of Lots 37E through 66E of the Crown Pointe subdivision and the water's edge of the lake. (Op. at 6-7.). The 2001 quitclaim deeds ***do not include*** Lots 50E through 66E, and therefore could not possibly have conveyed the segment of the Disputed Land that lies behind those lots. If RAC Enterprises had intended to convey the Disputed Land through the 2001 quitclaim deeds, it would have included ***all*** of the lots bordering the Disputed Land. The fact that the 2001 quitclaim deeds do not include all of the lots bordering the Disputed Land precludes reading those deeds as conveying the Disputed Land.

Thus, the Court's conclusion that the 2001 quitclaim deeds conveyed the Disputed Land is contrary to the description in those deeds, including the specific reference to tax map number 561-05-00-***145***, which identified the land being conveyed.

IV. The Court Should Remand for Further Proceedings on the Trespass and Nuisance Claims

The Court dismissed the claims asserted by Raven's Run for trespass and nuisance on the basis of its conclusion that it does not own the Disputed Land. If the Court grants reconsideration as to ownership of the Disputed Land, it should also reconsider its dismissal of the trespass and nuisance claims. The evidence in the record shows that the cutting down of trees, shrubbery, and other greenery on the Disputed Land likely caused

actual, measurable damage to the value of lots in Raven's Run. (R. pp. 296-297 (Report of Charleston Appraisal Service Inc.).)

CONCLUSION

Reconsideration is warranted here because the Court's determination that Crown Pointe owns the Disputed Land appears to be the result of overlooking or misapprehending the text of the relevant deeds and the record evidence. Raven's Run respectfully asks the Court to grant reconsideration and hold that Raven's Run, not Crown Pointe, owns the Disputed Land, and to remand the trespass and nuisance claims for further proceedings.

s/ *William W. Wilkins*

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