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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Circuit Court Case No. 2022-CP-07-00632
Court of Appeals Case No. 2022-001587

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315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives……………………..…………Respondents/Cross-Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PLBH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; and John Does 1-25 ....Appellants/Cross-Respondents.

BRIEF of RESPONDENTS/CROSS-APPELLANTS

FORD WALLACE THOMSON LLC
Ian S. Ford
Ainsley F. Tillman
Hunter H. James
715 King Street
Charleston, South Carolina 29403
(843) 277-2011
Attorneys for Respondents/Cross-Appellants

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ISSUES ON APPEAL

I. Is a declaratory judgment ripe "at any time after the expiration of 30 days from the commencement of the action"?

II. Do the covenants imposed by Developer, requiring transferees to pay fees to a for-profit endeavor as part of the real estate transfer, violate South Carolina's statutory prohibition against transfer fee covenants?

III. Is <u>mandatory</u> "membership" in a for-profit business unlawful?

This appeal involves the question of whether South Carolina law permits a developer to tie residential real property to its own commercial ventures, and to obligate homeowners to pay fees—at closing and thereafter—to developer's commercial, for-profit business in uncertain amounts that developer claims it can change, unilaterally, at any time.

STATEMENT OF THE CASE

Plaintiffs/Cross-Appellants ("Homeowners") filed this lawsuit on April 12, 2022. (R. p. 70). Pertinent to this appeal, Homeowners seek declaratory judgments on two ripe legal issues as to certain unambiguous covenants and contracts, and the application of certain unambiguous statutes to those instruments. (R. pp. 100-118, 132-134).

Defendants/Appellants ("Developers")[1] did not file Answers. Instead, Developers promptly moved to dismiss the Complaint and to compel arbitration. (R. p. 351).

This litigation involves determinations as to real property—Homeowners' homes—and the interpretation and enforceability of covenants and restrictions imposed on the property by Defendant Developer. Cognizant that the legal construction of unambiguous deeds and contracts is a question of law for the court, the Homeowners filed a Motion for Partial Summary Judgment on June 9, 2022, seeking preliminary declaratory judgments on discrete legal issues. (R. pp. 481-83; 821-855). The requested declaratory judgments would provide efficiency and structure to the litigation going

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[1] This litigation involves numerous parties, on both sides of the caption. In this cross-appeal, involving strictly legal issues, the individual identities of the parties are not material. Thus, for ease of understanding and recognition, the plaintiffs are referred to herein simply as "Homeowners," and defendants as "Developers" or "Developer."

forward.

Developers filed a Memorandum in Opposition to Homeowners' Motion for Partial Summary Judgment and a supporting Affidavit from a real estate attorney. The affidavit addressed the substance of the legal arguments but not the facts. (R. pp. 732-750).

Along with several other motions in this case, Homeowners' Motion for Partial Summary Judgment came for a lengthy hearing before the Honorable R. Ferrell Cothran, Jr., on July 20, 2022. Due to a technological error with the court reporter's recording device, the recording of the hearing apparently was destroyed and a transcript is not available.

Judge Cothran ruled on multiple motions at the hearing and in an Order filed on September 15, 2022. (R. pp. 1-33). Defendants filed their Answer on October 5, 2022. (R. pp. 299-346). On November 2, 2022, Judge Cothran filed an Amended Order (the "Order"). (R. pp. 34-66, R. p. 67). The Order contains rulings on each of the motions that were before Judge Cothran, including the Homeowners' Motion for Partial Summary Judgment.

Developers appealed the Order on November 16, 2022. On November 23, 2022, Homeowners filed the Cross-Appeal that is the subject of this brief.

STATEMENT OF FACTS

Palmetto Bluff is, in the Developers' own words, "one of South Carolina's premier and most-lauded residential / recreational communities." (R. p. 733). Homeowners each own residential property within the Palmetto Bluff community. (R. pp. 90-95). The

individual Defendants in this case include the developer and various entities engaged in the development, management, and sale of real property within Palmetto Bluff, as well as in commercial operations relating to the development and the community ("Developers"). (R. pp. 2-3, 96-98).

But Palmetto Bluff is <u>different</u> from other developments in South Carolina. Its developers have attempted to subject the residential property to an unlawful scheme, in which the private, residential lots are bound to a separate, commercial business owned by the Developer—located on adjacent property.

This appeal strictly involves covenants, contracts, and other documents, all of which were drafted by Developers. **Developers do <u>not</u> contend that the documents at issue are ambiguous.**

<u>The Community Charter for Palmetto Bluff</u>

The real estate title to Homeowners' residential property in Palmetto Bluff is subject to the Community Charter for Palmetto Bluff (the "Charter"), which Palmetto Bluff Development LLC[2] recorded with the Office of the Beaufort County Register of Deeds. (R. pp. 158-252). The Charter is the Developer's declaration of covenants, restrictions, and easements for the Palmetto Bluff development, and it "is intended to serve as a framework for community governance." (*Id*. at p. 164). All <u>residential</u> property within Palmetto Bluff is subject to the Charter. Commercial property is not subject to the Charter. (*Id*.).

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[2] Defendant Palmetto Bluff Development LLC is one of a constellation of development entities at work in Palmetto Bluff. Within the recorded instruments, it calls itself the "Founder." Within this brief, it is referred to, along with the other defendants, as "Developer" or "Developers."

The Charter establishes the homeowners' association for Palmetto Bluff, which is the Palmetto Bluff Preservation Trust (the "Trust"). (R. p. 173). Each owner of residential property becomes a member of the Trust, which is a mutual benefit nonprofit corporation under South Carolina law. *See generally* S.C. Code § 33-31-101 *et seq.* According to the Charter, the Trust's function is to own, operate, and maintain the common areas of the Community and to enforce the governing documents of the Community. (R. p. 165). The Trust holds title to the common property, in which each residential owner has an interest by virtue of membership in the Trust. The common property is subject to the Charter. Residential property owners are bound to pay assessments to the Trust, to maintain the common property.

So far, so good. There is no legal problem with the Trust (a homeowners' association) owning common property for the common benefit of residential owners and assessing them for its maintenance. Those assessments touch and concern land bound by the Charter (*i.e.,* the residential property and common property), in which residential owners have a real property interest in common with the other owners. (*See* R. pp. 168-169, Ch. 2: Property Rights).

But, deep into the Charter—on page 55 of its numerous provisions—the Developers run afoul of the law. Chapter 19 of the Charter is an apparently stand-alone provision that slides in the Palmetto Bluff Club (the "Club"). (R. p. 218). Although the Charter fails to mention it, the Club is the Developers' separate, for-profit business. It is located on a separate parcel of land from the residential and common property:

CHAPTER 19: PALMETTO BLUFF
CLUB

> By acceptance of a deed, each Owner shall automatically become a member of the Palmetto Bluff Club and shall automatically assume and agree to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference. Each Owner's obligations pursuant to the Palmetto Bluff Club Documents, including, without limitation, the obligation to pay club dues, user fees and other charges, shall be covenants running with the land with respect to the Owner's Unit. The Palmetto Bluff Club Documents establish a charge and continuing lien encumbering each Unit for the monetary obligation of the Owner or Owners of that Unit pursuant to the Palmetto Bluff Club Documents. The Palmetto Bluff Club Documents may be amended from time to time without the consent of the Owners. Founder shall provide each initial purchaser of a Unit with copies of the Palmetto Bluff Club Documents prior to or at the time of conveyance of the Unit. The Trust shall provide current copies of the Palmetto Bluff Club Documents to any Owner upon request.

(*Id.*). **By this provision, buried in the covenants, the Charter purports to obligate residential owners to "join" a separate, *for-profit* business on separate property not subject to the Charter.** This requirement is purportedly mandatory ("shall") and "automatic" upon "acceptance of a deed" to residential property. (*Id.*). The Palmetto Bluff Club is a business which profits from operating multiple pools, a racquet sports complex, restaurants, a spa, fitness facilities, etc. Many of these amenities are available for paid use by the public and for those outside the community. Developer claims it can raise the prices as it pleases, and it can change the facilities as it pleases. Developer takes the position it has no legal duty—fiduciary or otherwise—to the property owners who

purportedly are land-bound to support this for-profit business.

Developers have never recorded the "Palmetto Bluff Club Documents"[3] with the Beaufort County Register of Deeds, although the Charter states that it incorporates them by reference. (R. pp. 166, 264).

When a homeowner "automatically" "joins" the business called Palmetto Bluff Club, he purportedly gains no ownership interest in the Developer's Club business or its property whatsoever. (R. p. 211) ("Neither membership in the Trust not ownership or occupancy of a Unit shall confer any ownership interest in or right to use any [Club] Amenity . . ."); (*see also* R. pp. 255-257 § 2.3).

And although the Club business plan refers to residential owners as its "members," this term is misleading—"membership" in the Club is not like membership in a non-profit, mutual-benefit corporation like the Trust.[4] According to the Developers, **no one has any ownership interest in the Club, except the Developers.**[5] (R. pp. 211, 255-257). Club "members" allegedly **do not** get an easement in the Club property; instead, they are issued a revocable personal license, which purportedly can be changed, limited, restricted, or terminated at any time—unilaterally—in the sole discretion of the

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[3] The Palmetto Bluff Club has copious rules, guidelines, procedures, policies, agreements, and other purported governing documents, all of which ostensibly can be—and are—changed unilaterally at any time in the sole discretion of the Developers without notice.

[4] The Nonprofit Corporation Act, which governs the Trust, defines members and their rights. There are no such statutory protections for "members" of the club business. (*see* fn. 5).

"Membership" in the Club business is a little like "membership" in Costco or Sam's Club, except it's ostensibly "automatic" and "mandatory" and purports to go with your house.

[5] Automatic "Membership" in the Club does not equate to membership in the limited liability company Palmetto Bluff Club LLC. (R. p. 256, § 2.3).

Developer. (R. p. 270, "The provisions of this Membership Plan do not grant any ownership rights in the Club Property or Club Facilities in favor of any member but, rather, grant a non-exclusive **license** to use the Club Facilities subject to full compliance with all obligations imposed by this Membership Plan.") (emphasis added).[6]

Indenture to the Club is purportedly automatic—the Charter states that on accepting a deed, residential owners "shall automatically assume and agree to be bound by all the terms and conditions of the Palmetto Bluff Club Documents." (*Id.* R. p. 271). The Palmetto Bluff Club Documents which purportedly "automatically" bind residential owners are a **mystery** . . . they are not attached to the Charter, and they have never been recorded with the Beaufort County Register of Deeds. According to the Charter, the Developer is to provide a copy of the Club Documents "at the time of conveyance," at which point (according to the Charter), the documents *already* "automatically" bind the

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[6] The Club business owns certain amenities (restaurants, swimming pools, pickleball courts, etc.). Elsewhere in the Charter, the Club's amenities are identified as "Private Amenities." (R. p. 211, p. 229 ¶ 46). According to the Charter, a "Private Amenity" is "real property [and improvements] located adjacent to, in the vicinity of, or within the Community . . . which are owned and operated . . . by persons other than the Trust for recreational purposes on a club membership, daily fee, use fee, public, or private basis or otherwise . . . ." (R. p. 229 ¶ 46). The Charter makes clear that residential owners have "no ownership interest in or right to use any Private Amenity," and that the Club "shall have the right, from time to time in [its] sole and absolute discretion and without notice, to amend or waive the terms and conditions of use . . . including, without limitation, eligibility for and duration of use rights, categories of use and extent of use privileges, and number of users, and shall also have the right to reserve use rights and to terminate use rights altogether." (R. p. 211 § 16.1).

See also, R. p. 375-376 § VI: "Membership in the Club grants to the member a **revocable license** to use the Club Facilities, but **does not give a members a vested or prescriptive right or easement** to use the Club Facilities. Membership in the Club is not an investment in the Club or Palmetto Bluff Club LLC and **does not provide a member with an equity or ownership interest or any other property interest in the Company or Club or the Club Facilities**. A member only acquires a **revocable license** to use the Club Facilities in accordance with the terms and conditions of the Membership Plan and Rules and Regulations, as the same may be amended from time to time, and this Membership Agreement." (emphasis added).

purchaser who has "joined" the Club "by acceptance of a deed." (R. p. 218). The Club Documents set the amount of "dues, fees, and other charges" which must be paid. Notably, the Club Documents ostensibly "may be amended from time to time without the consent of the Owners." (*Id.*).

In other words, the Charter purportedly mandates that anyone accepting a deed to residential property is automatically bound to a nearby for-profit club business and must pay fees to it, in an undisclosed amount which is subject to unilateral change at the whim of the Developers.[7]

<u>The Declaration of Recreational Covenant for Palmetto Bluff</u>

In addition to the Charter's "automatic" indenture, the Developer recorded the Declaration of Recreational Covenant for Palmetto Bluff (the "Recreational Covenant"). (R. p. 255). The Recreational Covenant also states that it "shall run with the title to all Residential Property." (R. p. 256). Like the Charter, the Recreational Covenant makes "membership" in the Developer's for-profit club business automatic and mandatory. Memberships are automatically issued by the Club to each owner of residential property in Palmetto Bluff. (R. p. 256, § 2.1). Among other things, the Plan[8] referred to in the

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[7] **A brief pause for an analogy:** Owner of Tract A, a house, also owns Tract B, on which Owner runs a business called "Cotsco." Wanting to ensure Cotsco's financial success forever, Owner conveys residential Tract A subject to a requirement that its residents must "join" Cotsco and pay monthly "fees" to Cotsco for so long as they own Tract A, pursuant to Cotsco's rate schedule, which Cotsco can change at any time. Cotsco's "dues" start at $500/month, but once you're a "member" you can buy a hot dog and soda combo for $1.50.

If buyers sell Tract A, new buyers must "join" Cotsco. As the owner of Cotsco, Owner pockets every penny Tract A pays to Cotsco, forever.

[8] The Recreational Covenant refers often to all "terms and conditions" of the "Palmetto

Recreational Covenant purports to require the payment of "Membership Joining Fees, Club Dues, User Fees and other charges as set forth herein" *as a condition of membership*. (R. p. 271).

The Recreational Covenant purports to subject residential Owners to the financial obligation to pay membership "assessments, annual dues, minimum usage fees and other costs in accordance with the Plan" to the for-profit Club business for so long as they own residential property in Palmetto Bluff, regardless of their use or non-use of the Club amenities. (R. p. 257, § 3.1). The Recreational Covenant also purports to require Owners of residential property to maintain "membership" status in good standing, for as long as they own property at Palmetto Bluff.

Again, Owners of residential property are ostensibly given no real interest whatsoever in the Club's property or its facilities. The Recreational Covenant expressly states that a residential property owner purportedly acquires "No Ownership Interest." (R. p. 256) (emphasis in original). The Recreational Covenant purports to give residential Owners nothing more than the personal "privilege of using" the for-profit Club's facilities—subject to the Developer's self-chosen and often-changing rates, which are not of record and purportedly "which are subject to change at any time." (*Id*.)

The facts above—which are entirely taken from the Developer's own covenants and other documents *which Developer itself drafted*—are not in dispute.

Bluff Membership Plan," although the **Plan has never been recorded with the Register of Deeds**, and although the Plan purportedly can be amended unilaterally at any time without notice to the residential owners. (R. p. 255).

ARGUMENT

This litigation will be hard-fought over the course of its lifetime, and all signs portend that its life will be a long one. A key tactic by Developers is "litigation delay." Developers hope to prolong this lawsuit for years so that—before any substantive rulings are made—they can sprint forward full-speed on their seven-year business plan, which is to "flip" components of the community. (*See* R. pp. 80-81). Unfortunately, the lengthy appeal process is a tool that Developers may manipulate to extend the timeline for final resolution of this matter. **In other words, it is highly likely that Developers will appeal—piecemeal—every single conceivably appealable ruling the circuit court ever makes in this case.**

The parties are before this Court because <u>Developers</u> have appealed an Order ruling on various motions. (R. p. 34). Among other things, the Order correctly determined that an arbitration provision—buried within the same documents discussed above—is "invalid, unlawful, and unenforceable" as a matter of law. But within the same Order, the circuit court incorrectly found that declaratory judgment on strictly legal issues, based on the same documents, was "not ripe." (R. p. 35, 64). This ruling was mistaken as a matter of procedural law. Homeowners were and are entitled to preliminary declaratory judgments—judgments which would simplify and give structure to this complex case going forward, and which would short-circuit the inevitability of future appeals by Developer.

Developer's opposition to Homeowners' motion for declaratory summary judgments centered on the vague argument that the motion was "premature."

Developer superficially claimed that discovery was needed before the motion would be ripe . . . but it entirely failed to identify any specific factual dispute on which discovery might be necessary or to provide the required affidavit under Rule 56(e), SCRCP. **This is because there are <u>no facts at issue</u> as to the judgments requested**. Homeowners' motion hinges solely on questions of law and does not require, in any way, the application of disputed facts. The circuit court incorrectly found that declaratory judgment on these legal matters was premature, and it wrongly failed to provide the requested judgments.

The Order is before this Court for appellate review because Developers appealed it. This Court has jurisdiction and authority to reverse the circuit court, including as to its denial of the declaratory judgments. *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 470, 556 S.E.2d 397 (Ct. App. 2001) ("an order that is not directly appealable will be considered if there is an appealable issue before the court."), *citing Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App.1998), *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979). In the interest of judicial economy and efficiency—while the Order is before this Court—this Court should correct the circuit court's error by providing the requested declaratory judgments on matters of law. *Southern Bell Tel. and Tel. Co. v. Hamm*, 409 S.E.2d 775, 306 S.C. 70 (1991) ("since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now."); *see also Historic Charleston Holdings v. Mallon*, 673 S.E.2d 448, 381 S.C. 417 (2009) (deciding issues likely to be raised at a future time); *Jeter v. South Carolina Dept. of Transp.*, 633 S.E.2d 143, 369 S.C. 433 (2006) (determining legal issues in advance of remand for trial in interest of judicial economy).

I. A declaratory judgment is ripe "at any time after the expiration of 30 days from the commencement of the action."

The South Carolina Rules of Civil Procedure are not ambiguous. The Rules expressly permit "[a] party seeking. . . a declaratory judgment . . . [to move] <u>at any time after the expiration of 30 days from commencement of the action</u> . . . for a summary judgment in his favor upon all or any part thereof." Rule 56(a), SCRCP (emphasis added). Almost 60 days after initiating the lawsuit, and after defendants had responded by moving to dismiss, Homeowners sought such declaratory judgments. Homeowners' motion was based entirely on questions of law, to be decided without discovery or testimony, based on the unambiguous documents, statutory law, public policy, and the common law of South Carolina. The preliminary rulings requested by Homeowners were designed for efficient resolution of the litigation, because they would give legal direction to the case going forward.

The Charter and the Recreational Covenant are recorded instruments which encumber Homeowners' titles, and Homeowners asked for a determination from the court as to the validity and enforceability of certain provisions within those instruments of record, as against their title. **South Carolina's Uniform Declaratory Judgments Act is designed for this very purpose:**

> Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code § 15-53-30.

The circuit court was mistaken that a motion for declaratory judgment is "not ripe" at the outset of the case, when Rule 56(a) expressly permits one to be filed. Indeed, the Rule's allowance of such motions is in the best interest of efficiency and economy for both the court and litigants. The purpose of any summary judgment is to expedite the disposition of issues which do not require the services of a fact finder.[9] *Bankers Trust of South Carolina v. Benson*, 267 S.C. 152, 226 S.E.2d 703 (1976) (finding summary judgment was proper on plaintiff's motion made 33 days after filing complaint, despite lack of discovery). The standard is set forth "in Rule 56(c), SCRCP: summary judgment is proper 'when there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (summary judgment was proper four months after complaint was filed). "[W]hen plain, palpable, indisputable facts exist on which reasonable minds cannot differ, Summary Judgment should be granted." *Hedgepath v. AT&T*, 348 S.C. 340 at 355, 559 S.E.2d 327 at 336 (Ct. App. 2001).

Importantly, Developer failed to identify ***any*** specific material facts in dispute, or which would require discovery, or which otherwise make a declaratory judgment "not ripe." Rule 56(e) requires the defending party to "set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP, "Defense Required." Developer did not submit affidavits or other testimony demonstrating a disputed material issue. Developer did not argue that the covenants are ambiguous. Developer did not argue that the "governing documents" are ambiguous. Instead, Developer vaguely protested that

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[9] Black's Law Dictionary defines "summary" as "Without the usual formalities; esp., without a jury. **Immediate, done without delay**." (7th Ed.) (emphasis added).

such an early judgment would be "premature." (R. p. 64).

The Rule is equally clear that a court "shall" enter a summary declaratory judgment if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. The construction of an unambiguous contract is a question of law. The construction of an unambiguous deed is a question of law. The construction of statute is a question of law.

This Court should correct the lower court's error in finding that Homeowners' motion, seeking immediate declaratory judgments on matters of law, were "not ripe." The grounds for declaratory judgment are discussed below, and Homeowners respectfully request this Court to reverse the circuit court's denial of the motions and grant the requested judgments. *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979) ("While not normally appealable, this issue is before the Court due to the appealability of the first issue.").

II. The covenants imposed by Developer, requiring transferees to pay fees to a for-profit endeavor as part of the real estate transfer, violate South Carolina's statutory prohibition against transfer fee covenants.

South Carolina has a statutory prohibition against real property transfer fee covenants, which the Palmetto Bluff documents violate as a matter of law. S.C. Code § 27-1-70 (the "Statute"). The Statute sets forth the public policy of the State, which "favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes which do not touch and concern the property."[10]

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[10] Although there is a great deal of common law on this matter, including what it means for a covenant to "touch and concern" the land, it is important that this code section expressly identifies transfer fee covenants as not touching and concerning the land. (*See infra*, III).

S.C. Code § 27-1-70(B)(1). Both the Statute and the provisions within Defendants' documents are unambiguous, and this question is a matter of law for this Court. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018) ("Determining the proper interpretation of a statute is a question of law . . ."); *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (the construction of a clear and unambiguous contract is a matter of law for the court.); *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("the construction of a clear and unambiguous deed is a question of law for the court.").

Pursuant to the Statute, a "transfer" means the conveyance of property; a "transfer fee" is a fee or charge "imposed by a transfer fee covenant." S.C. Code § 27-1-70(A). The Statute's definition of a "transfer fee covenant" contains four elements:

> **"Transfer fee covenant"** means [1] **a provision in a document**, <u>whether recorded or not</u> and however denominated, [2] **which purports to run with the land** or bind current owners or successors in title to specified real property located in this State, and [3] **which obligates a transferee or transferor of all or part of the property to pay a fee or charge** [4] **to a third person upon transfer** of an interest in all or part of the property, or in consideration for permitting this transfer.

S.C. Code § 27-1-70(A)(4) (emphasis added). The Palmetto Bluff governing documents are loaded with provisions which meet each element of this definition. Those documents—both recorded and not—are mirrors of precisely what the Statute prohibits: [1] the documents contain provisions [2] which purport to run with the land and to bind successors in title, and [3] they purport to obligate future property transferees to pay fees and charges [4] to the Developer's for-profit club business upon the transfer of an interest in the property. (R. pp. 218; 256-257, Art. I, Art. III). Moreover, the provisions purport to

bind successors in title to continue to pay "Joining Fees, Club Dues, User Fees and other charges" to the Club, as a condition of ownership and transfer. (*Id.*; *see also, e.g.,* R. pp. 256 § 2.2 ("Upon transfer of title to a Residential Unit . . . the Club Operator shall issue a new Membership to the new Owner(s)"); R. pp. 265, 270-271 ("By acceptance of a deed, every Owner of a residence or homesite within Palmetto Bluff shall become a 'Community Member' of the Club and shall automatically assume and agree to be bound by all of the terms and conditions of this Membership Plan, including the obligation to pay Membership Joining Fees, Club Dues, User Fees and other charges as set forth herein . . .")).

While the Statute identifies exceptions to the definition of a transfer fee covenant, a purported covenant requiring transferees to pay fees to a for-profit business is not among them. For example, the Statute excepts payments to a homeowner's association, so long as the association is a nonprofit or a 501(c) organization.[11] But the Developer's commercial Club business is unequivocally <u>not</u> a non-profit or tax-exempt corporation.[12] **The Developer's Club business is a for-profit limited liability company industriously running restaurants, hosting events, and operating amenities in a resort where it can—quite literally—charge whatever it likes.**

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[11] The reason for this exception? Assessments to be paid to a nonprofit association that holds title to common areas, in which its members have a common interest, legitimately <u>do</u> touch and concern the land—because that money goes right back into the common property.

[12] Notably, the Developer's declaration of "Member Dues and Fees," specifies that taxes must be paid on the $20,000 "joining fee" and $4,615 annual dues to the Club (which amounts are increased unilaterally and without notice to the members). Also notably, no taxes are required on the annual assessment to the Trust, which is a non-profit HOA. (R. p. 854, "Palmetto Bluff Member Dues and Fees for 2021").

The Legislature expressly recognizes that an obligation to pay money to a third-party entity, which purports to run with the land, does not actually touch and concern the land. S.C. Code § 27-1-70(B)(1). The money paid to a for-profit third party does not go back into commonly-owned land. Here, the Joining Fees and Dues which must be paid as a condition of closing, go directly into the Developer's pockets: "Membership Joining Fees and other amounts paid to the Club are the property of the Club and may be used for any purpose determined appropriate by the Club." (R. p. 277).

The Statute states that a transfer fee covenant violates public policy because it "impairs the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation, regardless of the duration of the covenant or the amount of the transfer fee." S.C. Code § 27-1-70(B)(2). It is easy to see why such covenants violate public policy—Palmetto Bluff is the perfect example. Palmetto Bluff's transfer fee covenants ostensibly require each successive owner to "join" and pay the Developer whatever fees the for-profit Club business might be charging (the "Joining Fee" purportedly may be increased at any time in the Club's "sole discretion") and to pay whatever other "dues, fees, and charges" that the Developer chooses to impose (the fees purportedly may be increased at any time in the Developer's "sole discretion."). (R. pp. 253-254, 277-278).

These uncertain, unpredictable, but ostensibly required fees are unreasonable and indefinite. *See Vickery v. Powell*, 225 S.E.2d 856, 267 S.C. 23 (1976) (indefinite covenants are not enforceable). **The reasonableness of such a provision is not a question of fact. The Statute specifically declares that transfer fee covenants violate public policy**

because they are—*per se*—an unreasonable restraint on alienation of title. S.C. Code § 27-1-70(B)(2). Our Legislature has so determined.

More disturbing: Palmetto Bluff's "transfer fee covenant" requirement is in exchange for something that—buried within the documents' fine print—the Developer ostensibly can restrict, limit, or take away *entirely* if they choose. (*See* R. p. 211, § 16.1) (Developer has "the right, from time to time in [its] *sole and absolute discretion and without notice*, to amend or waive the terms and conditions of use . . . including, without limitation, eligibility for and duration of use rights, categories of use and extent of use privileges, and number of users, and shall also have the right to reserve use rights and to terminate use rights altogether.") (emphasis added). The Legislature recognized that reasonable buyers would hesitate to buy into such an arrangement, and so it made transfer fee covenants unlawful. No one wants to buy property with an unpredictable future.

Notably, in addition to specific provisions within the Charter and other governing documents identified above, **the entire "Recreational Covenant" is an unlawful transfer fee covenant**, which this Court should hold is unenforceable under the Statute. (R. p. 255). In a nutshell, the [1] "Recreational Covenant," which is a recorded document [2] purports to run with the land, and [3] it requires transferees of residential property to pay a veritable panoply of fees [4] to the for-profit Club upon transfer of an interest in residential property.[13] Here is some pertinent language from the Recreational Covenant:

[13] **"'Transfer fee covenant'** means [1] **a provision in a document**, whether recorded or not and however denominated, [2] **which purports to run with the land** or bind current owners or successors in title to specified real property located in this State, and [3] **which obligates a transferee or transferor of all or part of the property to pay a fee or charge** [4] **to a third person**

> "Founder . . . hereby declares . . .[1] [that this Recreational Covenant] [2] **shall run with title** to all the Residential Property . . . [4] Upon transfer of title to a Residential Unit . . . the Club Operator shall issue a new Community Membership to the new Owner(s) . . . in accordance with the Plan [the Plan requires payment to the Club of dues and a joining fee] . . . [3] Each Owner of a Residential Unit, is deemed to **covenant and agree to pay the dues . . . and any other charges . . . [4] Upon transfer of title to a Residential Unit**, the grantee shall be jointly and severally liable with the grantor for Membership Fees due at the time of conveyance . . .".

(R. p. 255) (emphasis added). Because it meets each and every one of the four elements within the Statute's definition of a "transfer fee covenant," the Recreational Covenant is unenforceable, as a matter of law.

The Statute states that real property transfer fee covenants are unenforceable and against public policy. As a matter of law, the provisions of Palmetto Bluff's governing documents precisely match and meet each statutory element: the [1] documents at issue [2] purport to run with the land and bind successive owners, and [3] they require property transferees to pay fees [4] to a for-profit entity. They are therefore patently unenforceable and void as unreasonable restraints on alienation, pursuant to the Statute. This Court should so hold.

III. Mandatory "membership" in a for-profit business is unlawful.

The constellation of Palmetto Bluff governing documents purport to obligate residential property owners to pay fees to a for-profit Club business. The basis for this claimed requirement is Chapter 19 of the Community Charter. (*See supra* and R. p. 218). As discussed in Argument II, *supra*, the purported covenant to pay fees to the for-profit Club is an unenforceable transfer fee covenant. In addition to the unlawfulness of the

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upon transfer of an interest in all or part of the property, or in consideration for permitting this transfer." S.C. Code § 27-1-70(A)(4) (emphasis added).

fees themselves, the Charter's requirement to "join" and pay ongoing dues to a for-profit business does not touch and concern the land, and it violates public policy. *See White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) ("courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.").

The Community Charter is the Developer's declaration of covenants, conditions, restrictions, and easements for the Palmetto Bluff community. "Restrictive covenants affecting real property cannot be properly and fully understood without resort to property law." *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014).

In the common law of real property, there is a distinction between (1) personal and (2) real interests in real estate. Personal interests are referred to as licenses, or interests "in gross." Real interests are referred to as appurtenances, or "real" interests.

A "real" (or appurtenant) interest is one that "touches and concerns the land." *Epting v. Lexington Water Power Co.*, 177 S.C. 308 (1935) (real "covenant must relate to the reality demised, having for its object something annexed to or inherent in, or connected with the land."). Such interests run with the land, meaning they are bound to the land, and not to the person. *Kinard*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014) (real covenants "'run with the land,' meaning that they are enforceable by and against later grantees.").

In contrast, a license is an authority "to do one or more acts on another's land, <u>without possessing any interest therein</u>." *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400

S.C. 568, 735 S.E.2d 528 fn.6 (Ct. App. 2012) (emphasis added), *citing Main v. Thomason,* 535 S.E.2d 918, 342 S.C. 79, 92 fn.5 (2000) (interest was a mere license because respondent was not given any ownership interest in appellant's property); *see also Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375, 382 (1927) (license is a "mere personal privilege . . . incapable of transfer . . . and . . . not, therefore assignable or inheritable.").

A nutshell summary of hundreds of years of property law: "real" property interests involve a possessory interest in property, and they run with the land; "licenses" are personal, non-possessory, and they do not run with the land.

Here, "membership" in the Developer's for-profit business "**do[es] not grant any ownership rights in the Club Property or Club Facilities** in favor of any member but, rather, grants a **non-exclusive license** . . . ." (R. p. 270-271) (emphasis added). Moreover, the dues charged by the Developer's club business do not return to the land—they expressly are <u>not</u> for the maintenance or benefit of common property:

> Membership **Joining Fees and other amounts paid to [Palmetto Bluff Club LLC] are the property of [Palmetto Bluff Club LLC]** and may be used for any purpose determined appropriate by [Palmetto Bluff Club LLC].

(R. p. 277) (emphasis added). Palmetto Bluff Club LLC is a for-profit limited liability company, and the fees go straight to the Developer.

Therefore, as a matter of law, the purported requirement to "join" and pay dues to the Developer's separate for-profit club business in exchange for a mere revocable license is not a real covenant. It fails the "touch and concern" test because no appurtenant or possessory interest in property is given and because the dues charged do not return to

the land.[14]

The facts in *Midsouth Golf LLC v. Fairfield Habourside II Condominium Association, Inc.*, are analogous to the facts in this case. 652 S.E.2d 378 (N.C. App. 2007). *Midsouth Golf* involved the levy of a "Recreational Amenities Charge" on subdivision homeowners. The property supported by the amenity charge was owned by a third party. Homeowners had no property interest in the recreational amenities, but they had a revocable license to use the amenities on terms set by the separate owner of that property. Homeowners were also subject to assessments to support common properties owned by the homeowners' association in which homeowners had an easement of use that was appurtenant to their lots.

The *Midsouth Golf* court held that assessments to pay a recreational amenity charge did not touch and concern the homeowners' land because no real property interest in the amenities was attached to their lots. The *Midsouth Golf* court stated, "Defendants do not have any easement rights in the recreational amenity charge; they only have easement rights in the common areas, or parks within Fairfield Harbour. . . . We find this to be a key distinction and hold that, in the present case, the covenant to pay amenity fees does not touch and concern Defendant's properties." *Id.* Courts in several other states have

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[14] The Developer is aware that Chapter 19 is unlawful, and it is aware that it does not touch and concern the land. Tellingly, the Developer belatedly and ineffectively attempted to amend Chapter 19 of the Charter to include some half-hearted, misleading verbiage suggesting (but not granting) a tie to the land. The Fifty-Seventh Supplement to the Charter leaves Chapter 19 otherwise unaltered except to state that each Owner "acknowledges and agrees that mandatory membership in the Palmetto Bluff Club enhances the value of the Unit the Owner acquires because the availability of amenities owned by Palmetto Bluff Club are for all Owners within the Community." (R. p. 253, 57th Supplement to Community Charter). This additional language, **which still does not convey any real interest in the Club property does not magically transform a strictly personal license into a real covenant**.

held the same, in the same circumstances.[15]

As discussed above, and in accord of what other states have held, the South Carolina Legislature specifically found that covenants which do not touch and concern the land are against public policy, because they impair the marketability of title and constitute unreasonable restraints on the alienation of property. S.C. Code § 27-1-70(B). More importantly, **the Legislature declared that fees paid to a third-party (other than a homeowners' association) do not touch and concern the land**. *Id*. The Charter's purported "mandatory" and "automatic" requirement that owners pay dues to for-profit amenities business in exchange for a mere license, which may be revoked or terminated unilaterally at any time without notice, is *per se* against public policy. "Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal." *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 170 (1961) (emphasis added); *see also Ward v. W. Oil Co.*, 387 S.C. 268, 275 n.5, 692 S.E.2d 516, 520 n.5 (2010) (refusing to enforce an illegal contract because to do so "would violate statutory law and, in turn, public policy"), *Berkebile v. Outen*, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable"), *Batchelor v. American*

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15 *See, e.g.*, *Ebbe v. Senior Estates Golf and Country Club*, 61 Or.App. 398, 407, 657 P.2d 696, 701-02 (1983) (payment of an initiation fee for membership into a golf club did not touch and concern land when membership was mandatory for initial purchasers, but neither mandatory nor guaranteed for subsequent purchasers); *Carnegie at One Tower Drive, LLC v. Carnegie Heights Condominium Association*, Case No. NC-2016-0235 (R.I. Super. 2018) ("the affirmative covenant in paragraph five does not touch and concern the land because it is a requirement for initial Tower unit owners to purchase memberships in the Golf Club which [is] not upon, connected with, or attached to the [Tower units] in any way . . . because the covenant in question concerned payment of fees for a Golf Club membership and the initial Tower unit owners did not have any easement rights to the Golf Club facilities, the covenant did not touch and concern the land and thus is a personal covenant between the contracting parties.").

Health Ins. Co., 234 S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy—as expressed in constitutional provisions, statutes, or judicial decisions—are void).

The obligation within the governing documents of Palmetto Bluff, ostensibly binding owners to pay fees to a for-profit Club business located on "adjacent" property in exchange for a mere personal, revocable license are unlawful and void; they violate the public policy of this State which is opposed to covenants that do not touch and concern the land. This Court should so hold, as a matter of law.

CONCLUSION

For the reasons set forth above, this Court should reverse the circuit court's decision that declaratory judgments on clear questions of law are "not ripe" at the outset of litigation, and it should hold that (1) the covenants imposed by Developer, requiring transferees to pay fees to a for-profit endeavor as part of the real estate transfer, violate South Carolina's statutory prohibition against transfer fee covenants and that (2) mandatory "membership" in a for-profit business is unlawful.

Respectfully submitted,

FORD WALLACE THOMSON LLC

By: s/ Ainsley F. Tillman
Ian S. Ford (S.C. Bar No. 12463)
Ian.Ford@FordWallace.com
Ainsley F. Tillman (S.C. Bar No. 70551)
Ainsley.Tillman@FordWallace.com
715 King Street
Charleston, SC 29403
(843) 277-2011
www.FordWallace.com

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