THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, III, Circuit Court Judge
Trial Court Case No.: 2020-CP-27-00495

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Case No. 2023-000277

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SLF III - HARDEEVILLE, LLC,.....Respondent,

v.

RSV - HARDEEVILLE, LLC,.....Appellant.

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# BRIEF OF APPELLANT

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Keating L. Simons, III
S.C. Bar No. 5111
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
klsimons@simonsanddean.com

Attorneys for Appellant

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## STATEMENT OF ISSUES ON APPEAL

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II. Whether the court erred construing the Reed-HTI Assignment to prohibit conversion of property from residential to light industrial use where the parties could have explicitly provided for such a prohibition but did not do so.

III. Whether the court erred in concluding that broad, general language in the Reed-HTI Assignment was sufficient to prove an intent to create a restrictive covenant.

IV. Whether the court erred in failing to strictly construe the Reed-HTI Assignment and resolve doubts and ambiguities therein in favor of RSV's free use of its property.

V. Whether the court erred in construing the Reed-HTI Assignment in a manner that would be contrary to the public policy of the City of Hardeeville.

VI. Whether the lower court erred in holding that RSV may only develop for Light Industrial use the 155 acres referenced in the SLF/Reed-HTI Assignment.

VII. Whether the court erred in granting declaratory relief in the absence of the City of Hardeeville as a party.

VIII. Whether the court erred in failing to consider the affidavit of Mr. Bird and the exhibits attached thereto.

## STATEMENT OF THE CASE

Respondent SLF-Hardeeville, LLC ("SLF") commenced this action on October 12, 2020. [R. p. 27] The complaint states a cause of action for declaratory relief concerning certain real property owned by Appellant RSV-Hardeeville, LLC ("RSV"). Specifically, SLF requested that the court issue an order finding and declaring that RSV is prohibited from developing more than 155 acres of its property for Light Industrial use. [Comp., ¶ 33, Prayer; R. pp. 35 - 36]

RSV moved to dismiss the complaint on November 16, 2020, on two grounds. First, that the City of Hardeeville had or claimed an interest that would be affected by the court's declaration and the case should not proceed in its absence as a party. Second, that the property owned by SLF was

under a contract of sale to a purchaser such that the purchaser was a real party in interest who should be joined as a plaintiff. [R. p. 546]

On January 12, 2021, SLF filed a motion for summary judgment. [R. p. 549] On January 25, 2021, in support of its motion to dismiss and in opposition to SLF's motion for summary judgment, RSV filed an affidavit of Brana Snowden, Planning Director for the City of Hardeeville. [R. p. 1348]

On February 15, 2021, RSV filed its answer to the complaint denying that SLF is entitled to the declaratory relief sought and asserting affirmative defenses: that SLF was not injured or damaged and the case should be dismissed for lack of a justiciable controversy; that the relief sought would impair, frustrate and impede an ordinance adopted by the City of Hardeeville such that the relief sought could not be granted in the absence of the City as a party; that the City of Hardeeville had determined that RSV possessed the necessary development rights to permit the development of RSV's property for Light Industrial use and such determination by the City constituted a defense to the claims of SLF; that the City's determination that RSV possessed the necessary development rights constituted a legislative finding of the City and a defense to SLF's claims; that the ordinance approving the development of the property for Light Industrial use was adopted after public notice and hearings such that SLF's claims were barred by waiver and estoppel; and, that pursuant to an assignment in its chain of title to the property in question, RSV possessed development rights that were freely convertible from residential to Light Industrial, such that RSV should be permitted to develop its property in accordance with the ordinance adopted by the City of Hardeeville. [R. p. 533]

RSV's motion to dismiss and SLF's motion for summary judgment were heard by the Honorable Bentley D. Price on February 1, 2021. Both motions were denied in a Form 4 order entered on April 9, 2021. [R. p. 2]

On April 26, 2021, the Honorable Roger M. Young entered an Order for Case Assignment to the Business Court providing that exclusive jurisdiction over the case be assigned to the Honorable Carmen T. Mullen. [R. p. 5]

On October 28, 2021, the matter came before the court for a hearing on motions to compel discovery made by both parties. As a result of the hearing, the court deferred ruling on the discovery disputes pending consideration of cross-motions for summary judgment to be filed by the parties. [R. pp. 1326 - 1347]

On December 6, 2021, RSV filed its motion for summary judgment. [R. p. 551] It was supported by an accompanying affidavit of Stephen S. Bird, Esquire [R. p. 1384] and the previously filed affidavit of Brana Snowden.[R. p. 1348] On the same day, SLF renewed its motion for summary judgment and filed a memorandum in support. [R. p. 595]

By letter emailed to the court on December 13, 2021, SLF raised questions concerning RSV's reference to the affidavits of Mr. Bird and Ms. Snowden. [R. p. 1403] RSV responded by letter to the court emailed on December 14, 2021. [R. p. 1405]

On March 11, 2022, SLF filed a memorandum in opposition to RSV's motion for summary judgment. [R. p. 1284]

On March 14, 2022, RSV filed a reply memorandum in opposition to SLF's summary judgment motion and in support of RSV's motion for summary judgment. [R. p. 1290]

On March 20, 2022, the court sent an email to counsel indicating a ruling in favor of SLF and requesting that SLF submit a proposed order and provide a copy to RSV's counsel. [R. p. 1408]

On April 8, 2022, SLF counsel submitted a proposed order that, among other things, included an attorney's fees award. RSV objected to the court's consideration of this and the court directed

the parties to brief by motion or letter the attorney's fees and costs issue.

On April 29, 2022, RSV filed a memorandum and exhibit in opposition to an award of attorney's fees. The same day, SLF filed a motion for attorney's fees and costs.

On May 31, 2022, the court entered its Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment. [R. p. 7] RSV timely filed Defendant's Notice of Motion and Motion to Reconsider, Alter and Amend on June 9, 2022, and sent a copy to Judge Mullen by email the next day. [R. p. 1305] SLF filed a memorandum in opposition on June 24, 2022. [R. p. 1315] The court denied the motion to reconsider by a Form 4 order entered on January 24, 2023. [R. p. 21] RSV timely filed and served notice of appeal on February 22, 2023. [R. p. 1423] Because one of SLF's lawyers was inadvertently not named on the notice, RSV served and filed another notice of appeal on February 23, 2023. [R. p. 1427]

This is an action for declaratory judgment; there is no specific dollar amount involved on appeal.

## STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty*., 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)).

An action for breach of restrictive covenants and damages is at law. *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992). On the other hand, "[a]n action to enforce restrictive covenants by injunction is in equity." *Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994).

In reviewing the grant of summary judgment, the appellate court applies the same standard as the circuit court. *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005) (citing *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[T]he evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Osborne,* 346 S.C. at 7, 550 S.E.2d at 321.

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Questions of law may be decided with no particular deference to the trial court." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

## STATEMENT OF FACTS

RSV is the owner of a tract of land consisting of approximately 800 acres located in Hardeeville, South Carolina, known as the "Savannah Tract." [Comp., ¶ 26; R. p. 33] At issue in this case is the extent to which RSV may develop the Savannah Tract for Light Industrial use. The Savannah Tract is zoned as a Planned Development District ("PDD") under a Development Agreement ("DA") as a portion of a larger tract known as the Hardeeville Tract. [Snowden Aff., ¶ 4; R. p. 1349] The City of Hardeeville (the "City") determined that under the PDD and DA, RSV is entitled to develop 577.15 acres of the property for Light Industrial use. Accordingly, the City passed an ordinance adopting and approving a Master Plan authorizing the development of the

Savannah Tract for such use.

SLF contends that RSV may only develop 155 acres of the Savannah Tract for Light Industrial use and brought this action seeking a declaratory judgment to that effect. SLF alleges that two documents in the chain of title to the Savannah Tract property now owned by RSV create covenants running with the land that restrict development of the Savannah Tract to include no more that 155 acres of light industrial use. [Comp., ¶ 32; R. p. 35] A history of the property and the parties' dealings is necessary to an understanding of the issues presented.

Insofar as is relevant here, the previous owner of the Hardeeville Tract was Copper Station Holdings, LLC ("Copper Station"). In April of 2006, Copper Station and the City entered into the DA; it was recorded on May 2, 2006. [Comp. ¶ 8; R. p. 29] The DA, together with exhibits thereto, including the Planned Development District for the Hardeeville Tract as approved by City Council on March 2, 2006 and the Municipal Zoning and Development Ordinance ("MZDO") adopted by the City, as amended through March 2, 2006, controls the development, zoning and permitted uses of the Savannah Tract. [Snowden Aff. ¶ 5; R. p. 1349]

The Development Agreement provides for development of a limited number of residential dwelling units:

> VII. DENSITY.
>
> Mixed use, residential and commercial development on the Property shall be the densities and uses as set forth in the PDD approval, as set forth below:
>
> A. Residential Units. The Residential Unit density is as follows: base overall residential density cap of 9,784 units. [Comp., Exhibit A, DA, p. 10; R. p. 51]

Included as Exhibit B to the Development Agreement is the Hardeeville Planned Unit Development District and Conceptual Master Plan ("PDD"). The PDD also limits the number of

permitted residential dwelling units in the Hardeeville Tract at Section 2(C): "There will be a base overall residential density cap of 9,784 units." [PDD, Ex. B to DA, p. 12; R. p. 120]

Importantly, neither the Development Agreement nor the PDD imposed any sort of cap or limit on development of the property for light industrial use. To the contrary, both documents permitted the Owner to freely convert acreage from residential to light industrial use without limit.

The Development Agreement provides at Section VII(A):

> The Owner and Developer shall also have the right to convert residential acreage to any commercial and/ or light industrial acreage. There will not be a cap on the conversion of residential to light industrial / commercial acreage. [Comp., Ex. A, DA, p. 11; R. p. 52]

The PDD provides at Section 2(C):

> The Owner and Developer shall also have the right to convert residential acreage to any commercial and/or light industrial acreage. There will not be a cap on the conversion of residential to light industrial **/** commercial acreage. [PDD, Ex. B to DA, p. 12; R. p. 120]

Thus, in identical language, each of the controlling documents establishes in the owner a right to freely convert acreage from residential use to light industrial use with no cap on the number of acres so converted. This right established by the DA and PDD may be referred to herein as "Conversion Rights." At the heart of this case is SLF's contention that RSV does not possess such Conversion Rights with respect to the development of the Savannah Tract.

In May of 2006, Copper Station conveyed 1,163.89 acres of the Hardeeville Tract to Reed-HTI, LLC ("Reed-HTI") and the remaining 5,284.38 acres to JPR Land Co., LLC ("JPR"). [Comp. ¶¶ 9-10; R. pp. 29 - 30] Reed-HTI and JPR are related entities owned and/or controlled by John P. Reed. [Bird Aff. ¶ 5; R. pp. 1384 - 1385] In real estate practice, development rights are not conveyed by deed but are considered personal property and are transferred by assignment. [Bird Aff. ¶¶ 7-8;

R. p. 1385 ] As part of the transaction, Copper Station assigned all of its development rights under the DA and the PDD to JPR. [Comp. ¶ 12; R. p. 30] The recorded instruments reflect consideration paid to Copper Station by Reed-HTI of $10,080,000.00 and that by JPR of $35,000,000.00. [Comp., Ex. B, C; R. pp. 452, 458]

In November of 2007, JPR and SLF agreed to form a joint venture to develop the property and entered into a Contribution Agreement to effect that purpose. [1] The parties later elected to change the nature of the transaction from a joint venture to a sale by JPR to SLF and entered into a Purchase and Sale Agreement to accomplish that. [Bird Aff. ¶ 11; Ex. C; R. pp. 1386, 1397] This Agreement provided that another Reed entity, Reed Development, Inc. ("Reed Development"), would serve as Property Manager and be paid management fees, sales commissions and a share of net profits. The Agreement also provided that the development rights under the DA and PDD, all of which were owned by JPR at that time, would be split between SLF and Reed-HTI.

Closing of the Purchase and Sale Agreement occurred on March 6, 2008. [Bird Aff., Ex. A; R. p. 1399] As part of the transaction, JPR assigned to Reed-HTI rights under the DA and PDD to develop 2,262 residential dwelling units and 75 acres of General Commercial. This instrument, referred to as the Reed-HTI Assignment, is attached to the Complaint as Exhibit F and is the document central to the outcome of this case.

At the closing, JPR also conveyed its remaining 5,163.83 acres of the Hardeeville Tract to SLF for a stated consideration of $60,000.000.00. [Comp., ¶ 18, Ex. G; R. pp. 31, 498] JPR also assigned to SLF all developments rights under the DA and PDD not previously assigned to Reed-

[1] The Contribution Agreement was entered into by Stratford Land Fund III, L.P. The SLF entity involved here as plaintiff is a successor by assignment to that SLF entity. [Bird Aff., Ex. B, C; R. pp. 1392, 1397]

HTI or to another company not involved in this case. [Comp., ¶¶ 19-20, Ex. H; R. pp. 31-32, 504] At this time, so much of the Purchase and Sale Agreement as called for Reed Development to serve as Property Manager for the development of the property acquired by SLF remained in full force and effect.

Following the closing, certain disputes and differences arose between the parties. In particular, the parties were unable to reach agreement concerning management of the project and the net profit participation of Reed Development. These disagreements led to discussions and negotiations concerning terminating the parties' business dealings and relationships. [Bird Aff., ¶ 13; R. pp. 13-14]

Effective September 4, 2008, the parties entered into a Post-Closing Agreement. [Bird Aff., ¶ 14, Ex. A; R. pp. 1387, 1389] Among other matters, the Post-Closing Agreement eliminated the provision of the Purchase and Sale Agreement calling for Reed Development to act as Property Manager and receive payments for that service. This was accomplished by a Mutual Release entered into by the Reed entities and the SLF entities. [Bird Aff., Ex. C; R. p. 1397]

The Post-Closing Agreement also provided for an exchange of development rights between the parties, whereby SLF agreed to assign to RSV rights to develop 155 acres of Light Industrial and RSV agreed to assign to SLF rights to develop 418 residential dwelling units. This exchange of development rights was effectuated pursuant to the SLF/Reed -HTI Assignment attached to the complaint as Exhibit I.

The Post-Closing Agreement also provided for certain transfer restrictions on Reed-HTI's Light Industrial property. This was accomplished pursuant to a Covenant and Agreement whereby Reed-HTI agreed: that for a period of ten (10) years, the 155 acres of property designated for light

industrial use could only be sold in parcels no larger than 20 acres, except for 2 parcels of 25 acres; and, that no more than one such parcel could be sold to or owned by any one Person and/or its Affiliates, as these terms were carefully and explicitly defined in the Covenant and Agreement.

A number of salient points are derived from the foregoing. These were sophisticated parties dealing with real property with a combined value in excess of $70,000,000. Their negotiations took place over nearly a year, from November of 2007 to September of 2008. At all times, they were represented by legal counsel. Over this period the "deal" changed a number of times, evolving from a joint venture to a sale coupled with a management agreement and ultimately to a breakup requiring a mutual release of claims. The record shows that during this process no less than thirteen (13) written instruments were executed by the parties.

It is undisputed that under the DA and the PDD, RSV had the right to convert its property from residential to light industrial use. Mr. Bird, who represented the Reed entities throughout their dealings with SLF has attested:

> During the course of dealings between my clients and the people representing the Stratford Land Fund entities there was no discussion or consideration of modifying or limiting an owner's right to convert property from residential to other uses. No prohibition against converting property from residential use to light industrial use was ever bargained for or agreed to. Had there been such, it would have been expressly included in the documents. [Bird Aff., ¶ 18; R. pp. 1387-1388]

None of the thirteen (13) documents entered into by the parties expressly addresses the conversion of property from residential to other uses. Only one of the documents addresses conversion of uses at all. That document, the Reed-HTI Assignment, attached to the Complaint as Exhibit F, the document upon which SLF's case depends, includes an express prohibition of conversion of property from General Commercial to residential use. It makes no mention of

conversion the other way around, from residential to Light Industrial or other uses. Nevertheless, SLF argued and the lower court agreed, that broad, general language in the Reed-HTI Assignment was sufficient to establish a restrictive covenant running with the land negating RSV's Conversion Rights under the DA and PDD.

## ARGUMENT

### I. THE REED-HTI ASSIGNMENT INCLUDES LANGUAGE SHOWING THAT THE CONVERSION RIGHTS ASSOCIATED WITH THE RESIDENTIAL DWELLING UNITS ASSIGNED THEREBY WERE INTENDED TO BE INCLUDED.

The Reed-HTI Assignment assigned to RSV the assignor's rights under the DA to develop 2,262 residential dwelling units as that term is defined in the DA and PDD. RSV argued that these rights included the Conversion Rights associated with the 2,262 residential dwelling units assigned under the document. The court rejected this argument based on language in the assignment it construed as limiting RSV's permitted use of the 2,262 residential dwelling units to residential use only and for no other purpose. RSV submits that the lower court erred in its construction of the Reed-HTI Assignment in four respects.

First, the court ignored language in the Reed-HTI Assignment expressing an intent that the Conversion Rights be included in the development rights transferred by the assignment. This point will be addressed in this section of this brief.

Second, the Reed-HTI Assignment included an express prohibition against converting property from General Commercial to residential use. That fact, coupled with the absence of an express prohibition against converting property from residential to light industrial or other uses, is dispositive in precluding a finding that the parties intended to exclude the Conversion Rights from the scope of the assignment. Based on a factually erroneous characterization of the Reed-HTI

Assignment as "an agreement among themselves," the court effectively and erroneously placed the burden of proof on RSV, rather than upon SLF where it belonged. This point will be developed in Section II.

Third, South Carolina law sets a high bar to establish a restrictive covenant limiting an owner's rights to the use of its property. The language in the Reed-HTI Assignment relied upon by the lower court does not expressly refer to the Conversion Rights but is instead broad and general. RSV submits that such language is insufficient to establish a restrictive covenant under the heightened standard of review applicable here. This will be addressed in Section III.

Fourth, South Carolina law is clear that restrictive covenants are to be narrowly and strictly construed, with all doubts or ambiguities resolved in favor of an owner's free use of his property. At a minimum, the three points described above are sufficient to raise questions about whether the Reed-HTI Assignment was intended to prohibit Conversion Rights to the assignee. As a matter of law, the doubts and questions raised must be resolved against SLF and in favor of RSV's free use of its property. This will be covered in Section IV.

The intention of the parties under the Reed-HTI Assignment "must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Thomas–McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977). And the Reed-HTI Assignment should "be interpreted so as to give effect to all of [its] provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am.Jur.2d *Contracts* § 385 (1991)). Here, the court based its ruling on some of the language in the document without considering other language.

The Reed-HTI Assignment, at item 1(a)(i), transferred:

> Assignor's rights, privileges and obligations under the Development Agreement to develop (i) up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD)

The Reed-HTI Assignment, at item 3(a), elaborated:

> Assignor does hereby assign and transfer to Assignee all of Assignor's rights, title and interest under the Development Agreement to develop up to 2,262 Residential Dwelling Units (as such term is currently defined in the Development Agreement and the PDD)

At the time of this assignment, JPR's "rights, privileges and obligations" to develop the 2,262 residential dwelling units included the Conversion Rights to convert those residential dwelling units into light industrial use. "All" of assignor's rights under the DA with respect to the 2,262 Residential Dwelling Units included the Conversion Rights with respect to those units. This language expresses an intent of the parties to include the Conversion Rights within the reach of the assignment. The court did not address this language in its order.

The court ignored other language as well. In both items 1(a)(i) and 3(a), the Reed-HTI Assignment refers to assigning to assignee the rights to develop "up to 2,262 Residential Dwelling Units (*as such term is currently defined in the Development Agreement and the PDD*)." (emphasis added) The term "residential dwelling units" is not included in the list of definitions in the DA. The PDD does not include a list of definitions. Neither document includes a specific definition of "residential dwelling unit." However, the characteristics of "residential dwelling units" are set forth in Section VII (A) of the Development Agreement and in Section 2 of the PDD. In the absence of any other definition, we must look to these sections for the meaning of "as such term is currently defined in the Development Agreement and the PDD."

The DA provides at Section VII(A):

> The Owner and Developer shall also have the right to convert residential acreage to any commercial and/or light industrial acreage. There will not be a cap on the conversion of residential to light industrial / commercial acreage.

The PDD provides at Section 2(C):

> The Owner and Developer shall also have the right to convert residential acreage to any commercial and/or light industrial acreage. There will not be a cap on the conversion of residential to light industrial/ commercial acreage.

The Conversion Rights are explicitly included among the attributes of residential dwelling units set forth in the DA and the PDD. Thus, by definition, the rights assigned to develop 2,262 residential dwelling units "as such term is currently defined in the Development Agreement and the PDD" includes the Conversion Rights established by Section VII (A) of the DA and Section 2 (C) of the PDD.

The concluding provision of the Reed-HTI Assignment, item 10, provides:

> Reaffirmation of Terms. All other terms, conditions, rights and privileges contained in the Development Agreement not specifically referenced herein shall remain in full force and effect and binding upon the parties hereto and their successors and assigns. (emphasis in original)

The Conversion Rights, again the right of the owner to convert acreage from residential to light industrial or other uses, are not "specifically referenced" in the assignment. Thus, by express language in the Reed-HTI Assignment, those rights are preserved and "remain in full force and effect." The court did not consider this language in the assignment.

In summary, there is language in the Reed-HTI Assignment showing an intent that the Conversion Rights associated with the 2,262 residential dwelling units be included within its scope: that "all" rights were assigned; that the definition of "residential dwelling units" included the

Conversion Rights; and, that all other rights under the Development Agreement not specifically referenced remain in full force and effect. Based on these provisions, the court should have found that the Conversion Rights were assigned to Reed-HTI and should have denied SLF's motion on this ground. At a minimum, as will be addressed in Section IV, the court should have strictly construed the Reed-HTI Assignment against SLF and in favor of RSV's free use of its property.

## II. THE REED-HTI ASSIGNMENT SHOULD NOT BE CONSTRUED TO PROHIBIT CONVERSION FROM RESIDENTIAL TO LIGHT INDUSTRIAL USE WHERE THE PARTIES COULD HAVE EXPLICITLY PROVIDED FOR SUCH A PROHIBITION BUT DID NOT DO SO.

The Reed-HTI Assignment, at item 1(a)(ii), assigned JPR's rights to develop:

> Up to 75 upland acres of General Commercial (including all Permitted Uses set forth under the General Commercial designation) as currently defined in the PDD.

Importantly, in the Reed-HTI Assignment the parties explicitly dealt with the potential conversion of use of these 75 acres of General Commercial at item 1(c):

> Notwithstanding anything herein to the contrary, Assignee shall not convert (and shall have no right to convert) any of the 75 upland acres designated for General Commercial to use for Residential Dwelling Units or for the purpose of increasing the number of Residential Dwelling Units.

Had the parties intended to deny to the assignee the right to convert the 2,262 residential dwelling units to light industrial use they clearly knew how to do so had that been their intent. The document includes no language expressly modifying or eliminating the assignee's rights to convert acreage from residential use to other permitted uses, including light industrial. The parties could have included an express prohibition on the conversion of property from residential to light industrial or other uses, but did not do so.

That the Reed-HTI Assignment includes no explicit provision prohibiting conversion of

acreage *from* residential use but does expressly prohibit converting acreage *to* residential use, precludes a finding that a limitation on the right to convert residential dwelling units to other uses was intended. *See Henry v. Chambron,* 304 S.C. 351, 354, 404 S.E.2d 518, 520 (Ct. App. 1991)("The restriction could have prohibited modular homes by a simple expression of the intent to do so."); *Forest Land Co. v. Black*, 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950)("If the intention of the grantor had been to utterly prevent the use of any kind of motorboard [sic] on Forest Lake, such intention could have been expressed in very clear and simple terms.")

The court "cannot imply language into the [restrictive covenant] that is not written, even if a different interpretation would be more favorable in the present day." *Hanold v. Watson's Orchard Property Owners Ass'n, Inc.*, 412 S.C. 387, 399, 772 S.E.2d 528, 535 (Ct. App. 2015). "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). The Reed-HTI Assignment contained explicit language preventing conversion of General Commercial use to residential use. A court should not imply the presence of similar language preventing conversion of residential to light industrial, language the parties could have included but chose not to.

The reason for treating conversions from commercial to residential differently from conversions from residential to light industrial is readily apparent. The controlling documents establish an overall residential density cap of 9,784 units. [Comp., Ex. A, p. 10; PDD, Ex. B to DA, p. 12; R. pp. 51, 120] If RSV were to convert property from commercial to residential use the

residential units available to SLF to develop would be reduced. Thus, SLF's insistence that the Reed-HTI Assignment prohibit conversion from commercial to residential use is not surprising. On the other hand, as explained by the City's Planning Director, there is no cap on development for light industrial and, therefore, RSV's conversion of property from residential to light industrial use does not impact SLF's development rights in any way. [Snowden Aff., ¶ 23; R. pp. 1354-1355] The controlling documents confirm the Planning Director in this regard. [Comp., Ex. A, DA, Article VII (A) and Hardeeville Planned Unit Development District and Conceptual Master Plan, Section 2 (C); R. pp. 52, 120]

The lower court's consideration of the express prohibition of conversion of General Commercial in the Reed-HTI, was influenced by a mischaracterization of the Reed-HTI Assignment as "an agreement among themselves," referring to JPR and Reed-HTI. The court's order included:

> Moreover, and as is apparent from the undisputed record before the Court, JPR, Reed-HTI, and RSV are related entities. Thus, by way of the Reed-HTI Assignment, the Reed entities entered into an agreement amongst themselves, with full knowledge that SLF was expressly made a beneficiary thereto. Had JPR and Reed-HTI, the parties to the Reed-HTI Assignment, desired to assign the Conversion Rights to Reed-HTI and/or to reserve them unto JPR for the benefit of the Reed entities, they could have done so, but clearly did not. [Order, p. 10; R. p. 16]

This reasoning was flawed in two respects. First, it was contrary to the undisputed facts before the court. While it is true that only JPR and Reed-HTI executed the Assignment, SLF was expressly named therein as third party beneficiary, presumably at its insistence. Moreover, the document was only one of multiple documents executed at the closing that occurred on March 6, 2008. Other documents include the deed by which JPR conveyed its remaining 5,163.83 acres of the Hardeeville Tract to SLF for a stated consideration of $60,000.000.00. [Comp., ¶ 18, Ex. G; R. pp.

31, 498] JPR also assigned to SLF all developments rights under the DA and PDD not previously assigned to Reed-HTI (or to another company not involved in this case). [Comp., ¶¶ 19-20, Ex. H; R. pp. 31-32, 504] The Reed-HTI Assignment was not merely an agreement "among" the Reed entities, rather it was a part of the larger agreement "among" all three of the parties. *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp*., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)(instruments executed in the course of same transaction are construed together).

Second, having erroneously mischaracterized the Reed-HTI Assignment, the lower court then stated that had the Reed entities desired to assign Conversion Rights to Reed-HTI, "they could have done so, but clearly did not." By this reasoning, the court placed the burden of proof on RSV. Rather than SLF having to establish the parties intended to restrict RSV's Conversion Rights, RSV was effectively required to prove the converse, that the Conversion Rights were expressly included within the scope of the assignment. This was error. SLF brought this action seeking a declaration that a covenant running with land restricted RSV's use of its property. At all times the burden rested upon SLF to show that the parties intended to create a restrictive covenant prohibiting the Conversion Rights otherwise associated with the development rights assigned to Reed-HTI under the Reed-HTI Assignment. *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83-84, 781 S.E.2d 115, 121 (Ct. App. 2015)(the party who seeks to enforce a restrictive covenant has the burden of proving that the non-moving party intended to create a covenant); *Charping v. J.P. Scurry & Co.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988)(the burden was on Charping to prove Townsend's clear intention to create a covenant that would run with the land).

There is no express provision in the Reed-HTI Assignment plainly stating an intent to create a restrictive covenant depriving Reed-HTI of the Conversions Rights accorded to it under the DA

and PDD. Further, the undisputed facts establish the absence of any such intent. As stated by Mr. Bird in his affidavit, at no time during the course of dealings between the parties was there any discussion or consideration given to modifying or limiting an owner's right to convert property from residential to other uses. Had there been an agreement to do so, "it would have been expressly included in the documents."

By placing the burden of proof on RSV, based upon a factually erroneous characterization of the Reed-HTI Assignment, the circuit court committed legal error requiring reversal.

## III. THE BROAD, GENERAL LANGUAGE IN THE REED-HTI ASSIGNMENT RELIED UPON BY THE LOWER COURT IS INSUFFICIENT TO PROVE AN INTENT TO CREATE A RESTRICTIVE COVENANT.

South Carolina law sets a high bar to be met by a party seeking to establish a restrictive covenant. "Restrictions on the use of property are historically disfavored." *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987)). "The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956)). However, for a restriction upon the free use of real property to arise by implication, it is not enough that the implication be reasonable. The Court of Appeals has emphasized that any such implication must be *unmistakable*. *Community Services Associates, Inc. v. Wall*, 421 S.C. 575, 584, 808 S.E.2d 831, 836 (Ct. App. 2017)(emphasis in original).

The court recognized the "plain and unmistakable" requirement of South Carolina jurisprudence in regard to restrictive covenants but failed to properly apply it. The lower court focused its attention on language in the assignment providing that the assignee could use the property "only" for residential use and "no other" use or purpose. RSV submits that these are words of general import, and though broad and comprehensive, are insufficient to meet the heightened standard of review that should be applicable to restrictive covenants.

In South Carolina, a contract of indemnity that purports to relieve an indemnitee from the consequences of its own negligence is subject to a heightened standard of review. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Under this heightened standard, such contracts are to be strictly construed and the intention to indemnify the indemnitee against losses resulting from its own negligent acts must be "expressed in clear and unequivocal terms." *Concord & Cumberland*, 424 S.C. at 647 (*quoting Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)). This rule of construction is premised upon public policy considerations: "Furthermore, applying this heightened standard serves the policy goal of encouraging Superior to act with due care in the future because the indemnity clause may not shield it from liability." *Concord & Cumberland*, 424 S.C. at 649.

Rules of construction applied in the restrictive covenant context are similar to those applied in *Concord & Cumberland*. Restrictive covenants are also subjected to a heightened standard of review. They are to be "strictly construed, with all doubts resolved in favor of the free use of the property." *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380. A restriction on the use of property will not be found in the absence of "express terms or by plain and unmistakable implication." *Id*. These

rules of construction, like those in *Concord & Cumberland*, are based on public policy considerations. "The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991).

RSV submits that the strict construction/express terms/unmistakable implication standard applicable to restrictive covenants is substantively indistinguishable from the strict construction/clear and unequivocal terms standard applied to indemnity agreements. Both are premised upon public policy considerations and both require, albeit in different language, a heightened standard of review requiring sufficiently explicit expressions of intent. Why does this matter here?

In *Concord & Cumberland* this Court considered whether "broad and comprehensive" language meets the requisite heightened standard of review. 424 S.C. at 651, 819 S.E.2d at 172. In addressing this issue, the court cited to *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), in which the court considered whether words of "general import" were sufficient to meet the "clear and unequivocal terms" requirement. In answering the question in the negative in that case, the *Federal Pacific* court relied upon *Murray v. The Texas Co.*, 172 S.C. 399, 174 S.E. 231 (1934). There the Supreme Court had this to say:

> While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company "harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station," is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff

> agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.

174 S.E. at 232.

Returning to *Federal Pacific*, the Court of Appeals there held:

> As in *Murray*, the language employed by the indemnity provision in the instant case is also broad and comprehensive and is provocative of some doubt; and since the indemnity provision was inserted for Federal Pacific's benefit and Federal Pacific seeks to use the provision to absolve itself from liability for its own negligence, that doubt should be resolved in favor of Carolina Production.

298 S.C. at 28.

The result here should be no different. The provisions in the Reed-HTI Assignment allegedly restricting Reed-HTI's use of its property were included for SLF's benefit - why else would SLF require that the Reed-HTI Assignment name SLF as a third party beneficiary? As in *Murray*, if SLF intended that the Reed-HTI Assignment eliminate or restrict Reed-HTI's rights to convert acreage from residential to light industrial or other uses it could have seen that the document did "plainly state" such a restriction. After all, it was paying JPR a price of $60,000,000 and was in a position to demand an explicit restriction in that regard. Since it failed to do so, and because SLF seeks a construction of the document against public policy, the words of general import relied upon by SLF, even though broad and comprehensive, are insufficient to meet the heightened standard of review applicable to the construction of restrictive covenants.

Moreover, to the extent there is some doubt whether the broad language relied upon by SLF is sufficient to meet the heightened standard of review applicable to restrictive covenants, that doubt should be resolved against SLF, just as doubt was resolved against the purported indemnitees in

*Murray* and *Federal Pacific*. Resolving doubt against SLF is also called for by cases dealing with restrictive covenants. *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380 (all doubts resolved in favor of the free use of the property); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)(any doubt or ambiguities in a covenant are resolved in favor of the presumption of free and unrestricted land use); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 367, 628 S.E.2d 902, 916 (Ct. App. 2006)(ambiguities in restrictive covenants must be strictly construed against the party seeking to enforce them); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992)(where language of restrictive covenant is capable of two or more constructions, the court will adopt that construction that least restricts the property); *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)(amendment provision ambiguous as to whether "any change or amendment" includes an extension of the duration of the restrictive covenants, ambiguity resolved in favor of free use of property). If "any change or amendment" is insufficient to include one extending the duration of a restrictive covenant, then "only" and "no other" are insufficient to restrict RSV's conversion rights absent explicit language to that effect.

RSV submits that the court erred in holding that the language it relied upon in the Reed-HTI Assignment evidenced an intent in plain and unmistakable terms to create a restrictive covenant prohibiting RSV from exercising its rights under the DA and PDD to convert property from residential to light industrial use.

## IV. RESTRICTIVE COVENANTS MUST BE NARROWLY AND STRICTLY CONSTRUED WITH ALL DOUBTS AND AMBIGUITIES RESOLVED IN FAVOR OF THE PRESUMPTION OF FREE AND UNRESTRICTED LAND USE

At this point we return to the point made in Section II that the Reed-HTI Assignment included an express prohibition against conversion from General Commercial to residential but did

not include express language prohibiting conversion from residential to light industrial. As discussed, the court's treatment of this point was driven by a mischaracterization of the Reed-HTI Assignment as an agreement "among" the Reed entities. But the lower court's order also includes another explanation for ignoring the absence of an express prohibition against conversion from residential to other uses:

> RSV argues that the Reed-HTI Assignment should be construed to include the Conversion Rights because it expressly prohibits the conversion of property to residential use, but does not expressly prohibit the conversion of property from residential use. That is, it suggests the Court should ignore the clear and unequivocal language that the property may be developed "only for" residential uses and "for no other use or purpose," and instead read a different meaning into the assignment based on the absence of an express prohibition against the conversion of residential to other uses. However, the Court may not create an ambiguity where one does not exist, particularly where doing so would result in an interpretation that is contradictory to the plain and ordinary meaning of the express terms of the assignment. [Order, pp. 9-10; R. pp. 15-16]

The court apparently concluded that consideration of the presence of an express prohibition of one type of conversion and the absence of an express prohibition of another, would create an "ambiguity where one does not exist." RSV submits that the Reed-HTI Assignment must be construed as a whole and the fact that the parties dealt with one type of conversion but not another cannot be ignored. Indeed, this fact should be dispositive, requiring a conclusion that the document unambiguously **did not** create a restrictive covenant barring conversion of property from residential to Light Industrial use.

That said, RSV agrees that consideration of the fact that the parties chose to deal with one type of conversion and not another leads to a construction of the Reed-HTI Assignment that is at odds with that adopted by the lower court. Thus, on this point the court was correct, that

consideration of this fact - as inconvenient as it may be - would create an ambiguity in the document. Stated differently, the fact that the parties expressly dealt with one type of conversion but not another, at a minimum raises legitimate questions about what was actually intended.

As addressed in the preceding section, the court identified language in the Reed-HTI Assignment that the court read to express an intent that conversion from residential to other uses be prohibited. For reasons previously stated, RSV disagrees with the lower court on this point. But let us assume, for the sake of argument, that the court was correct that some language in the assignment can be read to eliminate the Conversion Rights. The fact remains that there is also language in the Reed-HTI Assignment showing an intent that the Conversion Rights be included in the rights assigned thereby. This too leads to a conclusion that there are questions or ambiguities concerning the actual intent of the parties regarding Conversion Rights under the DA and PDD. *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)(a contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear); *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004)(a contract is ambiguous when it may fairly and reasonably be understood in more ways than one).

Restrictions on the use of real property must be "strictly construed, with all doubts resolved in favor of the free use of the property." *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380. "Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use." *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894. This Court must "begin with the premise that in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them." *Queen's Grant II*, 368 S.C. at 367, 628 S.E.2d at 916. When the language of a restrictive covenant is equally capable

of two or more constructions, that construction will be adopted which least restricts the property. *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992).

In this case, both sides argue that the Reed-HTI Assignment unambiguously supports their positions. Nevertheless, the parties have proferred conflicting constructions of the assignment; SLF points to language it deems favorable to its interpretation and RSV has done likewise. RSV submits that the absence of express language prohibiting conversion of property from residential to other uses and the inclusion of an prohibition of conversion the other way around, tips the balance in its favor. At a minimum, the competing constructions of the Reed-HTI Assignment offered by the parties raise questions or doubts about the proper construction of the document. Even though neither party asked it to, the lower court should have found the assignment to be ambiguous concerning the intent of the parties with respect to the Conversion Rights at issue. *See Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)(whether a contract is ambiguous is a question of law for the court).

Under the competing constructions of the Reed-HTI Assignment, one would restrict SLF's use of its property, the other would not. As a matter of law, the latter construction must be adopted and the court's order granting summary judgment reversed.

## V. PUBLIC POLICY INTERESTS OF THE CITY OF HARDEEVILLE REQUIRE CONSTRUING THE REED-HTI ASSIGNMENT IN FAVOR OF RSV'S FREE USE OF ITS PROPERTY

In support of its motion to dismiss and later for summary judgment and in opposition to that of SLF, RSV filed an affidavit of Brana Snowden, Planning Director of the City of Hardeeville. The court declined to consider the affidavit based upon the parol evidence rule. However, the affidavit was not submitted to resolve ambiguity in the Reed-HTI Assignment. To the extent that any

ambiguity exists in that document, it must be construed against SLF. Parol evidence cannot cure ambiguity in a restrictive covenant.

The Snowden Affidavit provides useful, relevant factual information about the history and zoning of the Savannah Tract property, the process by which the City approved the Master Plan for the Savannah Tract and the City's public policy interests in the development of that property for Light Industrial use.

The Master Plan adopted by the City of Hardeeville provides for the development of 577.15 acres of the Savannah Tract for light industrial use. SLF contends that only 155 acres of the Savannah Tract may be developed for light industrial use and that the balance, approximately 422 acres may only be developed for residential use, or not at all. SLF's position, if sustained, would effectively reduce - for all time - the inventory of property within the City of Hardeeville available for light industrial use.

The City, through its Planning Director, has made perfectly clear the City's preference for light industrial development stating that "development of the Savannah Tract for light industrial uses better serves the interests of the City." [Snowden Aff., ¶ 25; R. pp. 1355-1356] Such development produces additional tax revenues in comparison to residential development. Moreover, residential development results in significantly higher costs for services, such as schools, fire stations, police services and the like. Requiring that 422 acres of the Savannah Tract must be developed for residential use or not at, obviously "would impair, impede and frustrate the City's legitimate interests in planning for development of properties within the City," and interfere with the "City's interest in maintaining and enhancing its tax base."

The approval of the Master Plan by City officials, including City Council, is based upon a

determination that such development promotes the public interests of the City. This determination by the City constitutes a legislative finding that should be accepted by this Court in the absence of convincing evidence to the contrary. *See Richards v. City of Columbia*, 227 S.C. 538, 560, 88 S.E.2d 683, 694 (1955)(legislative findings of fact, while not binding upon the court, will not be overturned except by convincing evidence to the contrary). SLF has offered no such evidence. The only evidence in the record concerning public policy establishes that development of the Savannah Tract for light industrial use promotes public policy. Thus, for purposes of this action this Court must accept that fact as true and that SLF's proposed construction of the Reed-HTI Assignment would impair, impede and frustrate the City's legitimate interests in planning for development of properties within the City and thereby contravene the public policy of the City.

Restrictive covenants will not be interpreted or given effect if their application would be contrary to public policy. *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 486 (1991) (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)("Courts shall enforce such covenants unless they are indefinite or contravene public policy.")

The court erred in construing the Reed-HTI to create a restrictive covenant contrary to the public policy of the City of Hardeeville.

## VI. THE SLF/REED-HTI ASSIGNMENT DOES NOT CREATE A COVENANT RUNNING WITH THE LAND TO PROHIBIT CONVERSION OF PROPERTY FROM RESIDENTIAL TO LIGHT INDUSTRIAL USE

In September 2008, SLF, JPR and Reed-HTI entered into a Post-Closing Agreement that among other things, provided:

> The parties have agreed that (i) SLF shall assign to Reed-HTI rights to develop up to one hundred fifty-five (155) acres of Light Industrial

> use (as defined in the PDD), and (ii) Reed-HTI shall assign to SLF rights to develop up to four hundred eighteen ( 418) Residential Dwelling Units (as defined in the Development Agreement and the PDD). [Bird Aff., ¶ 14, Exhibit A, item 1; R. pp. 1387, 1389]

Pursuant to the Post-Closing Agreement, SLF and Reed-HTI entered into the assignment agreement attached to the complaint as Exhibit I ("SLF/Reed-HTI Assignment"). Item 1(b) of that assignment provides:

> SLF does hereby transfer, assign, convey and deliver unto Reed-HTI, its successors and assigns, SLF's rights, privileges and obligations under the Development Agreement to develop, on the Reed-HTI Property, up to one hundred fifty-five ( 155) acres of Light Industrial use, as currently defined in the PDD.

SLF contends that Reed-HTI's right to develop its property for light industrial use is limited to no more than the 155 acres referenced in the SLF/Reed-HTI Assignment. However, item 1(b) of the assignment also provides:

> The foregoing assignment is in addition to and supplements those rights previously transferred under the Reed-HTI Assignment, and otherwise does not amend or modify any term, covenant or restriction in the Reed-HTI Assignment other than to allow Reed-HTI to develop up to 155 acres of Light Industrial on the Reed-HTI Property (all of which covenants and restrictions in the Reed-HTI Assignment applicable to the Reed-HTI Property shall continue to apply in full force and effect except for allowing up to 155 acres of Light Industrial development on the Reed-HTI Property).

Under this language, the SLF/Reed-HTI Assignment transferred to Reed-HTI development rights "in addition to" those rights previously transferred to Reed-HTI from JPR under the Reed-HTI Assignment in March 2008. As discussed above, those previously transferred development rights included the Conversion Rights associated with the 2,262 RDUs conveyed to Reed-HTI by JPR. The SLF/Reed-HTI Assignment, like the Reed-HTI Assignment before it, includes no language specifically addressing, much less modifying or eliminating, the Conversion Rights established in

the Development Agreement and PDD or otherwise prohibiting the conversion of acreage from residential to light industrial use. No language in the assignment shows an intent to take away from Reed-HTI those development rights it previously acquired under the Reed-HTI Assignment. Rather, the assignment plainly states that it "does not amend or modify any term, covenant or restriction in the Reed-HTI Assignment."

Moreover, the SLF/Reed-HTI Assignment, like the Reed-HTI Assignment before it, also concludes at item 8 with the provision that:

> Reaffirmation of Terms. All other terms, conditions, rights and privileges contained in the Development Agreement not specifically referenced herein shall remain in full force and effect and binding upon the parties hereto and their successors and assigns.

Again, the parties were careful to provide that nothing would be construed to alter the "terms, conditions, rights and privileges contained in the Development Agreement" except those "specifically referenced." The rights contained in the Development Agreement to convert property from residential to light industrial use are not "specifically referenced" in either the Reed-HTI Assignment or the SLF/Reed-HTI Assignment. Likewise, neither of the assignments relied upon by SLF include an express provision prohibiting conversion of property from residential to light industrial use.

Some background is necessary to a proper understanding of the Post-Closing Agreement and the SLF/Reed-HTI Assignment. Initially, pursuant to a Contribution Agreement entered into between JPR and Stratford Land Fund III, L.P.("SLF III") in November 2007, the Hardeeville Tract property was to be developed by a joint venture entity to be formed by JPR and SLF III. However, the parties elected to change the nature of the transaction. Instead of participating in the development of the property as a co-venturer, it was agreed that JPR would sell the property to SLF III and JPR

would participate in the development as Property Manager. This change in the transaction was accomplished by a Purchase and Sale Agreement in February 2008 ("Purchase Agreement"). SLF III's rights under the Purchase Agreement were later assigned to SLF III - Hardeeville, LLC, Plaintiff herein. Closing of the Purchase Agreement, including the Reed-HTI Assignment relied upon by Plaintiff, occurred in March of 2008. [Bird Aff., ¶ 12, Ex. A, Recitals; R. pp. 1386, 1389]

Under Section 2.1 of the Purchase Agreement, Reed Development, Inc. was to receive, as Property Manager, an annual management fee of $175,000, certain sales commissions and up to 12% of the net profits generated by sales of the property. The parties also agreed that JPR, Reed Development, John Reed and their affiliates would be prohibited from acquiring property within two (2) miles of the property being acquired by SLF unless certain conditions were met. [Bird Aff., Ex. C, Recitals; R. p. 1397]

Subsequent to the March 2008 closing and SLF's acquisition of the property, the business relationship between the parties soured. In particular, the parties were unable to reach agreement concerning Reed Development's management of the property, compensation and profit share. [Bird Aff., ¶ 13, Ex. C, Recitals; R. pp. 1386-1387, 1398] Also, as the Court will recall, 2008 witnessed the "Great Recession," a period of rapidly declining economic activity and real estate values. The Economic Stimulus Act of 2008 was passed by Congress on February 7 and signed into law by President Bush six days later. Lehman Brothers declared bankruptcy on September 15, 2008. The parties here entered into the Post-Closing Agreement on September 4, 2008. [Bird Aff., ¶ 14; Ex. A; R. pp. 1387, 1389]

The Post-Closing Agreement involved much more that the mere assignment of 155 acres of light industrial development rights from SLF to Reed-HTI and the assignment of 418 residential

dwelling units from Reed-HTI to SLF. In particular, in recognition of the fact the parties no longer wished to do business together, Section 2.1 of the Purchase Agreement, and Reed Development's participation as Property Manager created thereby, referred to by the parties as the Management and Net Profits Agreement, were deleted. [Bird Aff., Ex. A, item 5; R. p. 1390] Further, the parties entered into a Mutual Release to resolve certain disputes that had arisen between them, "including disputes with regard to the Management and Net Profits Agreement." [Bird Aff., Ex. C, Recitals; R. p. 1398]

The Post-Closing Agreement also called for the execution of other instruments, including: Transfer Restrictions on Reed-HTI Light Industrial Property; a Non-Compete Covenant; and, an Amendment to Option Contract. [Bird Aff., Ex. A, items 2, 3 and 4; R. pp. 1389-1390] Of particular relevance here is item 2 in the Post-Closing Agreement, pursuant to which Reed-HTI executed and recorded a Covenant and Agreement with respect to the development rights for 155 acres of light industrial use assigned to it by SLF in the SLF/Reed-HTI Assignment. [Bird Aff., Ex. B; R. p. 1392] Therein, Reed-HTI agreed: that for a period of ten (10) years the 155 acres of property designated for light industrial use could only be sold in parcels no larger than 20 acres, except for 2 parcels of 25 acres; and, that no more than one such parcel could be sold to or owned by any one Person and/or its Affiliates, as these terms were carefully and explicitly defined in the Covenant and Agreement.

Why is all of this important? In South Carolina,

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

*Klutts Resort Realty, Inc. v. Down'Round Dev. Corp*., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

The SLF/Reed-HTI Assignment - that SLF would have the Court construe to prohibit the conversion of property from residential to light industrial use - was only one of a number of documents executed as part of the same, post-closing transaction in September 2008. Thus, the SLF/Reed-HTI Assignment must be construed in light of these other documents, particularly including the Covenant and Agreement imposing transfer restrictions upon the 155 acres of light industrial property. As previously discussed, there is no language in the SLF/Reed HTI Assignment expressly and explicitly prohibiting Reed-HTI from converting its residential property to light industrial use. It is inconceivable that the parties silently intended to prohibit such conversion by implication in light of the specific steps they took to negotiate and provide for the size of light industrial parcels Reed-HTI could sell, to whom such sales could be made and the period of time these restrictions would be in place. Moreover, as discussed above, the Reed-HTI Assignment, executed six months prior to the Post-Closing Agreement, expressly prohibited the conversion of property from commercial to residential use. Again, had the parties truly intended that Reed-HTI be prohibited - for all time - from developing more than 155 acres of its property for light industrial use, or from converting other acreage owned by Reed-HTI from residential to light industrial use, they would have so provided in explicit terms.

## VII. DECLARATORY RELIEF SHOULD NOT HAVE BEEN GRANTED IN THIS CASE ABSENT THE PRESENCE OF THE CITY OF HARDEEVILLE AS A PARTY

This action for declaratory relief is governed by the Declaratory Judgments Act. S.C. Code Ann. §§ 15–53–10, et seq. The Act includes two provisions pertinent here, both included in Section § 15-53-80. One is that "all persons shall be made parties who have or claim any interest which

would be affected by the declaration." The other is: "In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard." It is undisputed that the declaration sought by SLF herein would negatively impact the City of Hardeeville by effectively reducing the number of acres available for light industrial development in the Savannah Tract below the level deemed appropriate and in the public interests of the City. Because the City's interests in planning and development would be affected by this Court's declaration, the plain words of the statute require that the City be made a party.

Likewise, there can be no question but that the relief sought by SLF "involves the validity" of a municipal ordinance adopted by the City of Hardeeville. The term "validity" is not defined in the Act. Thus, the statute must be construed in accordance with the plain and ordinary meaning of the words used. *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900 (1988). A common definition of "valid" is "legally binding due to having been executed in compliance with the law." The Oxford College Dictionary, 2nd. Ed., 2007. Correspondingly, "invalidate" is to "deprive (an official document or procedure) of legal efficacy because of contravention of a regulation or law." *Id*. A definition of "validity" is "legal sufficiency, in contradistinction to mere regularity." Black's Law Dictionary, 5th Ed., 1983. "Valid" means "having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or set aside." *Id*.

In this case, it is undeniable that the declaration sought by SLF would defeat the efficacy of the municipal ordinance adopting the Master Plan and deprive the City of the public policy benefits sought to be realized thereby. The City's ordinance effectively, if not directly, would be overthrown and set aside. Thus, under the plain words of the Act, the City is entitled to be made a party before its ordinance and the public policy it seeks to further are invalidated.

Because the interests of the City of Hardeeville are directly at stake in this proceeding, the plain words of the Declaratory Judgments Act require that the City be heard before its interests are cast aside by an order effectively nullifying the City's ordinance. Even if hearing from the City is not commanded by the Act, as a matter of sound judicial discretion arising from a reasonable respect for the interests of the City and the City officials acting in accordance therewith, the court should have declined to grant the declaratory relief sought by SLF in the absence of the City as a party.

## VIII. THE AFFIDAVIT OF MR. BIRD SETS FORTH FACTS RELEVANT TO THE ISSUES BEFORE THE COURT THAT SHOULD HAVE BEEN CONSIDERED BY THE LOWER COURT

In support of its motion for summary judgment and in opposition to that of SFL, RSV filed an affidavit of Stephen S. Bird, Esquire. For many years Mr. Bird has represented John P. Reed, a principal in JPR, Reed Development, Reed-HTI and RSV, and Mr. Bird represented these entities in the transactions involved in this case. The court declined to consider the affidavit based upon the parol evidence rule. However, the affidavit was not submitted to resolve ambiguity in the Reed-HTI Assignment. To the extent that any ambiguity exists in that document, it must be construed against SLF. Parol evidence cannot cure ambiguity in a restrictive covenant.

Throughout this case, SLF has sought to limit the materials available for the court's consideration to only those documents it selected to attach as exhibits to its complaint. Mr. Bird's affidavit shows that there is much more to the story. His affidavit, and the exhibits attached thereto, reveal as much. RSV will not recount the details here; they are set forth in the statement of facts above. RSV submits that the history of the parties' dealings, the various iterations of the "deal" between them and the identification of thirteen (13) documents executed by the parties during that process - none of which include an express prohibition of conversion of property from residential

to other uses - are all matters relevant and necessary to a proper consideration of the issues in this case.

It bears repeating that Mr. Bird, an officer of the court, under oath and with personal knowledge, has stated:

> During the course of dealings between my clients and the people representing the Stratford Land Fund entities there was no discussion or consideration of modifying or limiting an owner's right to convert property from residential to other uses. No prohibition against converting property from residential use to light industrial use was ever bargained for or agreed to. Had there been such, it would have been expressly included in the documents. [Bird Aff., ¶ 18;R. pp. 1387-1388]

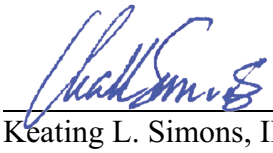
Mr. Bird's affidavit was filed long before the lower court ruled on the parties' respective motions. SLF had every opportunity to respond with affidavits of its own, but chose not to do so. If there were any evidence that the parties actually intended, as a matter of fact, to prohibit conversion of the Savannah Tract property from residential to Light Industrial or other uses, surely SLF would have produced it. Rather than do so, SLF has asked the lower court, and no doubt will ask this Court, to adopt a tortured, one-sided view of a single document, the Reed-HTI Assignment, and prevent the development of the Savannah Tract in a manner desired by RSV and in the best interests of the City of Hardeeville.

## CONCLUSION

For all the reasons stated, under the undisputed facts of record, including those set forth in the affidavits filed by RSV, SLF has failed to meets its burden to show that it is entitled to judgment as a matter of law as to the existence of a restrictive covenant preventing RSV's development of its property for the purposes set forth in the Master Plan adopted and approved by the City of Hardeeville. This Court should reverse the lower court's grant of summary judgment in favor of

SLF.

Respectfully submitted,



Keating L. Simons, III
S.C. Bar No. 5111
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132
klsimons@simonsanddean.com

Attorneys for Appellant

September 14, 2023

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, III, Circuit Court Judge
Trial Court Case No.: Case No. 2020-CP-27-00495

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Case No. 2023-000277

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SLF III - HARDEEVILLE, LLC,.....Respondent,

v.

RSV - HARDEEVILLE, LLC,.....Appellant.

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**CERTIFICATE OF COUNSEL**

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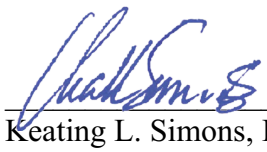
As required by Rule 211(a), SCACR, the undersigned certifies that Appellant's Final Briefs complies with Rule 211(b), SCACR.



Keating L. Simons, III
S.C. Bar No. 5111
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132

Attorneys for Appellant

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