

RECEIVED

Jan 29 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
In the Court of Common Pleas
Steven C. Kirven, Master-in-Equity

Case No. 2021-CP-37-00093
Appellate Case No. 2023-000918

Mountain View Pointe Owners Association, Inc.; Jane P. Hale; L. Shepard Hamrick, Jr.; Martha Hamrick; Matthew Williams; Sue Williams; Barry Noffze; Ruth Noffze; Michael Dorsey; Monica Dorsey; Jack J. Dorsey; Lucinda Dorsey; Kai Evensen; Lynn Elliot Amos, as Trustee of the Lynn Elliot Amos Qualified Personal Residence Trust; Lynn Keith Amos, as Trustee of the Lynn Keith Amos Qualified Personal Residence Trust; Charlene Finucan; John Prescott, Jr.; Elizabeth Prescott; Steven Trojan; Dottie Trojan; Leonard J. Stoecklein; Patricia Stoecklein; Dale Hill; Rebecca Hill; Larry Kuykendall, as Trustee of the Larry Kuykendall Revocable Trust; Larry Kuykendall as Trustee of the Elle Kuykendall Revocable Trust; Thomas McCaw; Roberta McCaw; Robert Albergotti; Elaine Albergotti; Frank Patterson; Frances Patterson; Brian Fox, and Jennifer Fox, ... Respondents,

v.

Rodney Halsell; Barbara Halsell; Graham R. Piper; Christine A. Piper, Michael Newton; Angela Newton; Gary Hutchinson; Daniel Horner; Lonnie Harper; Elleanor Harper; Christopher Tam; Amie Kerley; Karan Sandhu; and Gloria Sandhu, ... Defendants,

Of Whom Rodney Halsell and Barbara Halsell are the Appellants.

RECORD ON APPEAL
VOLUME I

Sarah P. Spruill
SC Bar No. 68337
Haynsworth Sinkler Boyd, P.A.
One North Main Street, 2nd Floor
Greenville, South Carolina 29601
(864) 240-3220
sspruill@hsblawfirm.com

Richard Hunt McDuff
SC Bar No. 76242
Merrell & McDuff (MJM Law, LLC)
119-B Professional Park Drive
Seneca, South Carolina 29678
(864) 882-2466
rick@mjmllawsc.com
Attorneys for Appellants

John S. Nichols
SC Bar No. 4210
Bluestein Thompson Sullivan, LLC
1614 Taylor Street
Columbia, SC 29201
(803) 779-7599
john@bluesteinattorneys.com

Larry C. Brandt
SC Bar No. 856
Larry C. Brandt, P.A.
P.O. Box 738
Walhalla, SC 29691
(864) 638-5406
lcb.brandtlawfirm@att.net
Attorneys for Respondents

INDEX

VOLUME I

Orders

Order of Reference dated October 28, 2021	1
Order of March 13, 2023	4
Order of May 31, 2023.....	33

Pleadings

Complaint.....	43
Amended Complaint	52
Answer of Defendants Halsell to Amended Complaint.....	62
Plaintiffs' Post-Trial Brief	68
Defendants Halsell Post-Trial Memorandum	128
Plaintiffs' Post-Trial Reply Brief to Defendants' Post-Trial Memorandum	140
Motion of Defendants Halsell to Alter or Amend Order	146

Transcripts

Transcript of Trial on October 26 - 27, 2022.....	150
Testimony	
Graham R. Piper	
Direct by Mr. Brandt	176
Cross by Mr. Hood	201
Examination by Mr. McDuff.....	203
Redirect Mr. Brandt.....	211
Jack J. Dorsey	
Direct Mr. Brandt	217
Cross by Mr. Hood	257
Examination by Mr. McDuff.....	269
Redirect Mr. Brandt.....	292
Robert D. Albergotti	
Direct Mr. Brandt	294
Cross by Mr. Hood	297
Examination by Mr. McDuff.....	304

Steven F. Trojan	
Direct Mr. Brandt	314
Cross Mr. Hood	317
Examination by Mr. McDuff.....	321
Roberta McCaw	
Direct Mr. Brandt	326
Cross Mr. McDuff	332
Elizabeth Prescott	
Direct Mr. Brandt	340
Cross Mr. Hood	343
Examination by Mr. McDuff.....	344
Rodney Halsell	
Direct Mr. Hood	361
Cross Mr. Brandt	426
Redirect Mr. Hood.....	460

VOLUME II

Graham Piper	
Direct Mr. McDuff	461
Examination by Mr. Brandt.....	472

Exhibits

Jt. Ex. 1	514
Jt. Ex. 1 (B)	580
Jt. Ex. 2	593
Jt. Ex. 3	596
Jt. Ex. 4	600
Jt. Ex. 5	604
Jt. Ex. 6	609
Jt. Ex. 7	615
Jt. Ex. 8	616
Jt. Ex. 9	617
Jt. Ex. 10	619
Jt. Ex. 11 (A).....	620
Jt. Ex. 11 (B).....	622
 Pl. Ex. 1.....	 624
Pl. Ex. 2.....	625
Pl. Ex. 3.....	629
Pl. Ex. 4.....	631
Pl. Ex. 5.....	633
Pl. Ex. 6.....	641
Pl. Ex. 7.....	650
Pl. Ex. 9.....	652

Pl. Ex.10.....	653
Pl. Ex. 11.....	663
Pl. Ex. 12 (A)	665
Pl. Ex. 12 (B)	666
Pl. Ex. 12 (C)	667
Pl. Ex. 12 (D)	668
Pl. Ex. 12 (E)	669
Pl. Ex. 12 (F)	670
Pl. Ex. 13.....	671
Pl. Ex. 14.....	672
Pl. Ex. 15.....	673
Pl. Ex. 16.....	674
Pl. Ex. 17 (A)	675
Pl. Ex. 17 (B)	676
Pl. Ex. 18.....	677
Pl. Ex. 19.....	678
Halsell Def. Ex. 1.....	686
Halsell Def. Ex. 2	687
Halsell Def. Ex. 3.....	688
Halsell Def. Ex. 4.....	689
Halsell Def. Ex. 5.....	690
Halsell Def. Ex. 6.....	691
Halsell Def. Ex. 7.....	692
Halsell Def. Ex. 8.....	693
Halsell Def. Ex. 9.....	694
Halsell Def. Ex. 10.....	695
Halsell Def. Ex. 11.....	696
Halsell Def. Ex. 12.....	697
Halsell Def. Ex. 13.....	698
Halsell Def. Ex. 14.....	699
Halsell Def. Ex. 15.....	700
Halsell Def. Ex. 16.....	701
Halsell Def. Ex. 17.....	702

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners)
Association, Inc., Michael Braunschweiger,)
Lori Tanner, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack J.)
Dorsey, Lucinda Dorsey, Kai Evensen,)
Kristie Burrows, Charlene Finucan, John)
Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J.)
Stoecklein, Patricia Stoecklein, Dale Hill,)
Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta)
McCaw, Robert Albergetti, Elaine)
Albergetti, Frank Patterson, Frances)
Patterson,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Eliaenor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, Gloria Sandhu, Michael,)
Gregorek, and Michelle Gregorek,)

Defendants.)

CONSENT
ORDER OF REFERENCE

Case #2021CP3700093

This matter comes before the Court pursuant to **SCRCP, Rule 53**, wherein the parties, by and through their respective attorneys, have mutually agreed to transfer the above-captioned matter to the Honorable Steven C. Kirven, Master-In-Equity for Oconee County, South Carolina, for ruling and determination upon all causes of action.

NOW, THEREFORE, IT IS ORDERED that the above-captioned case be, and the same hereby is, referred to the Honorable Steven C. Kirven, Master-In-Equity for Oconee County, South Carolina, to make appropriate findings of fact and conclusions of law, with

authority to enter a final judgment in the cause, with any appeal being directly to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

_____, 2021

Melissa C. Burton, Clerk of Court,
Oconee County, South Carolina,
Tenth Judicial Circuit

WE SO MOVE AND CONSENT:

s/ Larry C. Brandt
Larry C. Brandt (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
Walhalla, SC 29691
864/638-5406
lcb.brandtlawfirm@att.net
Attorney for Plaintiffs

s/ William C. Hood
William C. Hood (S.C. Bar #2601)
505 N. McDuffie Street
Anderson, SC 29691
864/375-0530
bill@wchoodlaw.com
Attorney for Defendants,
Barbara Halsell and Rodney Halsell

s/ Richard Hunt McDuff
Richard Hunt McDuff (S.C. Bar #76242)
MJM Law, LLC
119-B Professional Park Drive
Seneca, SC 29678
864/882-2466
Rick@mjmlawsc.com
Attorney for Defendants,
Christine A. Piper and Graham R. Piper



Oconee Common Pleas

Case Caption: Mountain View Pointe Owners Association Inc , plaintiff, et al VS
Rodney Halsell , defendant, et al
Case Number: 2021CP3700093
Type: Order/Referred to Master or Special Referee

So Ordered

Lisa C Burton

Electronically signed on 2021-10-28 09:41:25 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners Association,)
Inc., Jane P. Hale, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack)
James Dorsey, Jr. and Lucinda Dorsey, as)
Co-Trustees of the Dorsey Joint Revocable)
Trust, Kai Evensen, Lynn Elliot Amos, as)
Trustee of the Lynn Elliot Amos Qualified)
Personal Residence Trust, Lynn Keith)
Amos, as Trustee of the Lynn Keith Amos)
Qualified Personal Residence Trust,)
Charlene Finucan, John Prescott, Jr.,)
Elizabeth Prescott, Steven Trojan, Dottie)
Trojan, Leonard J. Stoecklein, Patricia)
Stoecklein, Dale Hill, Rebecca Hill, Larry)
Kuykendall, as Trustee of the Larry)
Kuykendall Revocable Trust, Larry)
Kuykendall, as Trustee of the Elke)
Kuykendall Revocable Trust, Thomas)
McCaw, Roberta McCaw, Robert)
Albergotti, Elaine Albergotti, Frank)
Patterson, Frances Patterson, Brian A. Fox,)
And Jennifer Fox,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Elianor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, and Gloria Sandhu.)

Defendants.)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Case #2021CP3700093

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER**

This is an action by the Mountain View Pointe Owner's Association and certain owners of lots in the Mountain View Pointe Subdivision based on an Amended Complaint filed on February 18, 2021 (collectively, the Plaintiffs). The Amended Complaint named as Defendants Rodney Halsell, Barbara Halsell, Graham R. Piper, and Christine A. Piper, against whom specific relief was sought, as well as several owners of lots in the Mountain View Pointe Subdivision who chose not to be named as parties plaintiff (the "Other Owners"). The Amended Complaint stated six causes of action. At the beginning of the trial, the Court granted an unopposed motion to dismiss the Second, Fourth and Fifth causes of Action. The remaining counts sought (i) a Declaratory Judgment declaring the rights of the parties with respect to certain easements over two parcels that abut the main entrance road into the subdivision on both sides of Mountain View Pointe Drive, and (ii) actual and punitive damages based on Halsells' trespass and/or gross negligence in constructing a driveway from Mountain View Pointe Drive across the Plaintiffs' Landscape Easement. The Other Owners were named so that the outcome of this case would be effective as against all Lot Owners.

With respect to the remaining causes of action, Defendants collectively, in their responsive pleadings and other filings, raised various counter-claims and defenses, including failure to state facts sufficient to constitute a cause of action, lack of standing to bring certain claims, absence of a judicial controversy, that the easements were never granted and could not have been granted due to the doctrine of merger, abandonment of the easements by the Plaintiffs, as well as estoppel and waiver. They also claimed that as abutting property owners, they had an absolute right to a driveway across the easements because they bordered a publicly maintained roadway (Mountain

View Pointe Drive) that was depicted on the plat referenced in their respective deeds. Defendants further asserted the defenses of estoppel, waiver, statute of limitations, and laches and, of course, denied that the Halsells cutting of a driveway across the easements constituted an unreasonable interference with the easements granted to the Plaintiffs.

At the beginning of the trial, the Court granted an unopposed motion to add Halsells' claim for easement by necessity.

Defendants Piper, who are lot owners within the subdivision and members of the POA, also filed a counter claim seeking a Declaration that the assessment of the owners of lots in the Subdivision for the costs of litigation was *ultra vires*.

On October 26-27, 2022, the Court conducted a bench trial in which it received testimony from eight witnesses and admitted a total of 67 Exhibits. The Judge, accompanied by all counsel, also made a site visit to the Subdivision and Parcels A and B. At the conclusion of the evidentiary phase, the Court granted the parties 30 days to prepare and submit post-trial briefs and responses to the post-trial brief(s) of the other parties.

Having thoroughly considered all the evidence, the parties' written submissions, and relevant authority, the Court now issues its Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On November 12, 2002, Crescent Communities S.C., LLC ("Crescent" or "Declarant"), as Declarant, recorded a Declaration (herein so called) of Covenants, Conditions and Restrictions for Mountain View Pointe ("MVP") ("the Subdivision"). See Cover Page of Joint Ex. 1A, which is a copy of the Declaration. The Declaration had been executed with the formalities of a deed.

2. The Subdivision is a high-end residential community of 29 single-family homesites as depicted on a plat (the “MVP Plat”) referenced in, and recorded on the same date as, the Declaration. *See Joint Ex. 2*, which is a copy of the MVP Plat.

3. The Plaintiffs in this case are the Owners (herein so called) of homesites ("Lots") in the Subdivision who elected to be Plaintiffs in this case, and the Mountain View Pointe Owners Association, Inc., (“the POA”), a South Carolina mutual benefit corporation that was incorporated in September 2002. *Joint Ex. 1A*.

4. The Defendants in this case are the Halsells, the Pipers and the Other Owners of lots in the subdivision who did not elect to be Plaintiffs in the matter.¹

5. The entrance to the Subdivision is at the intersection of Doug Hollow Road, a state road, and Mountainview Pointe Drive (“MVP Drive”), which was built by Crescent for the Subdivision. *Joint Ex. B*. Subsequently, Crescent deeded the fifty-foot (50’) right-of-way for MVP Drive to Oconee County, South Carolina, for maintenance and inclusion in the county road system. *See Joint Ex. 8*, which is a copy of the deed of right-of-way.

6. The MVP Plat depicts two parcels (one on each side of MVP Drive) that abut both Doug Hollow Road and MVP Drive and are designated as property of Crescent. *Joint Ex. 2*. The two parcels subsequently came to be known as Parcel A, a 4.7 acre parcel on the west side of MVP Drive that is currently owned by the Halsells, and Parcel B, a 17.03 acre parcel on the east side of MVP Drive that is currently owned by the Pipers. The MVP Plat also depicts a transmission tower easement on Parcel B in favor of Duke Energy. *Joint Ex. 7*. All of Parcel A is in the Control Free

¹ For economy of words, unless the reference is to all Defendants, references herein to “the Defendants” shall mean Rodney Halsell, Barbara Halsell, Graham R. Piper and Christine A. Piper.

Zoning District but a portion of Parcel A also is in the Lake Overlay District. Plaintiffs' Ex. 3, pg.

1. All of Parcel B is in both the Control Free Zoning District and in the Lake Overlay District.

7. Parcels in the Control Free District can be used for residential, commercial or industrial uses, subject only to set back requirements and a maximum height of sixty-five feet (65'). Oconee County, S.C., Rev. Ordinances, Ch. 38, art. X, §38-10.2 [Control free district (CFD)].

8. The portions of property in the Lake Overlay District used for residential purposes also are subject to lake buffer requirements for waterfront properties, a maximum density of two residences per acre and restrictions on the alteration of grade elevations. *Id. at* §38-11.1(4)(a)(i)(1) and (2)[Lake overlay district].

9. Property in the Lake Overlay District also may be used for commercial or industrial purposes, subject to a Special Exception Hearing by the Board of Zoning Appeals, which is instructed to use the standards in Appendix A to the regulation as a guide in considering such proposals. *Id. at* §11.1-(4)(a)(i)(4). The strict application of any such standard may be waived for good cause shown. *Id.*

10. The Declaration organizing and establishing the Mountain View Pointe Subdivision, and the Covenants and Restrictions placed thereon, are sufficiently clear and are not ambiguous and constitute an unconditional deed of two non-exclusive perpetual easements (the "Easements") from Crescent to the POA for the purpose of landscaping and maintaining the Entrance Monument area and an abutting twenty-five-foot wide (25') Landscape Easement Area on each side of Mountain View Pointe Drive extending from Doug Hollow Road, as state maintained roadway to the subdivision.

11. Section 7.9 of the Declaration describes the Easements, in part, by reference to the MVP Plat.

Declarant hereby grants, establishes, creates and reserves for the benefit of the Declarant and the [POA], and their successors and assigns, non-exclusive perpetual easements for the purpose of landscaping and maintaining the entryway and erecting and maintaining the Entrance Monument for the Subdivision [shown] *sic* as 'Entrance Monument Easement' on the [MVP Plat]. Declarant or the [POA] shall the have right to enter, landscape and maintain the Entrance Monument as an entryway to the Subdivision.

Declarant further hereby grants, establishes, creates and reserves for the benefit of Declarant or the [POA] and their successors and assigns, non-exclusive perpetual easements for the purpose of landscaping and maintaining the property adjacent to the main entry road for the Subdivision [shown] *sic* as 'Landscaping Easement' on the [MVP Plat]. Joint Ex. 1A, art. VII, §7.9 pgs. 24-25.

12. The MVP Plat depicts a "Sign Easement" and a "Landscape Easement" that collectively run the entire length of Parcels A and B where they abut MVP Drive (Joint Ex. 2) and clearly refer to the Entrance Monument easement area and the Landscape Easement Area, respectively.

13. The Landscape Easement Area is expressly designated as part of the Common Areas of the Subdivision. *Id.*, art.1, §1.12. Therefore, they are Property under Section 1.36 of the Declaration. Section 3.2 of the Declaration provides that Each Owner shall have the "non-exclusive easement and right to enjoy" the Common Areas. Joint Ex. 1A, art I, §3.2, pg.7.

14. The POA installed sod and sprinklers in the unpaved portion of the right-of-way and, for more than 19 years, has paid for the maintenance thereof.

15. Although the POA has chosen to leave most of the Landscape Easement Area in its natural wooded state, it has not abandoned the easements as claimed by the Defendants.

16. In 2013, Crescent sold Parcels A and B to the Pipers, subject to, among other things, “easements, covenants, restrictions and conditions of record” and “zoning, subdivision, land use and other laws, regulations or ordinances applicable to the Property.” Joint Ex. 6. The recorded plat describes Parcels A and B referenced in the deed depicts the Easements exactly as they are shown on the MVP Plat. Joint Ex. 7.

17. In early September 2020, Mr. Piper told the POA Board (the “Board”) that he had an offer to purchase Parcel A for \$200,000.00. Plaintiffs’ Ex. 5, and that the offeror wanted to construct a driveway across the Landscape Easement Area to access a residential garage for his car collection. Plaintiffs’ Ex. 3.

18. A few days later, the Defendants met with the Board to explain the proposal, after which Mr. Piper e-mailed the Board and the Halsells a handout he had prepared, outlining the proposal and the potential benefits to the POA and Owners of accepting the proposal. Plaintiffs’ Ex. 3.

19. In order to convince the Board that they were authorized to grant Halsells’ request, the proposal cites Section 6.1 of the POA’s By-laws, which, in relevant part, authorizes the POA to grant “all necessary easements and rights-of-way upon, over, under and across the Common Areas when it deems such action to be necessary and appropriate. . . .” Joint Ex. 1B, art. 6, §6.1.

20. Two days after the meeting, Mr. Piper sent a letter to Adam Chapman, the Planning Director of Oconee County, seeking support for Halsells’ proposed driveway off MVP Drive. The letter said, in part,

[w]hile a driveway from Doug Hollow Road to the proposed building is possible, such a driveway will require significantly more removal of trees,

more earthwork, and result in more hardscape. . . . The Pipers and Halsells believe that a driveway from Doug Hollow Rd. detracts from the wooded nature of the property today. . . . The Halsells as buyers, are looking for some assurance that a driveway on Mountain View Pointe Drive will be allowed by Oconee County or knowing that they must enter the property from Doug Hollow Rd., they will account for the extended length driveway in their offer. Plaintiffs Ex. 7.

21. Following the meeting, the Board polled the Owners, a super majority of which opposed the driveway across the Landscape Easement Area.

22. Accordingly, a representative of the Board notified the Defendants that the Board had determined that granting Halsells' request for a driveway would not be in the best interest of the homeowners and therefore, their request was denied.

23. On October 26, 2020, Plaintiffs' attorney, sent letters to the Defendants explaining the POA's position that a waiver of property owners' rights under the Landscape Easement would require consent of 100% of the Owners. Plaintiffs' Ex. 4 and Halsells' Ex. 11A.

24. In late November 2020, the Halsells delivered a letter to each Owner. In part, the letter stated that if the Owners did not agree to Halsells' proposal, then due to the topography of the property, Halsells "would be forced" to construct an 802' driveway running right behind "the nice neighborhood monument sign" and would require them to cut down three times more trees than under their proposal. Plaintiffs' Ex. 2.

25. On December 4, 2020, Halsells purchased Parcel A from the Pipers for the reduced price of \$150,000.00. See Plaintiffs' Exs. 5, 6, 8, and 9.

26. At trial, the Defendants gave conflicting testimony as to the reason for the \$50,000.00 price reduction from the original offer. The Court finds that the price reduction was due to the prospect of Halsells having to access their property from Doug Hollow Road, as that is

consistent with Mr. Piper's written correspondence to Mr. Chapman (Plaintiffs Ex.7), as well as Halsells subsequent application for and receipt of an encroachment permit from the SC Department of Highways and Public Transportation for a driveway off Doug Hollow Road. Plaintiffs' Ex. 10 (Application) and Plaintiffs' Ex. 11 (Permit).

27. The conveyance from Pipers to Halsells is subject to "those easements and/or rights-of-way as may appear on the premises and/or of record" Joint Ex.9. The deed also is necessarily subject to "zoning, subdivision, land use and other laws, regulations or ordinances applicable to the Property, since that was an exception to Crescents' deed to the Pipers."

28. The previously recorded Plat of Parcel A referenced in the Halsells' deed depicts the Easements exactly as they are shown on the MVP Plat. Joint Ex. 11.

29. In a January 12, 2021, letter, Halsells' counsel advised Plaintiff's counsel that the Halsells believed they had a right to install a driveway over the Landscape Easement Area, had acquired an encroachment permit and expected to start work soon. Joint Ex. 11B.

30. On or about January 22, 2021, Halsells began clearing an 80' by 25' swath of trees from the Landscape Easement Area, removed turf, curbing and guttering from the public road-right-of way, graded and entirely cleared the area needed for his driveway and demolished a section of the irrigation system running along the roadway as well as the berm in the Landscape Easement Area and roadbed. They then constructed a gravel driveway, ostensibly for the purpose of facilitating the construction of their building. In so doing, the Halsells impermissibly and unilaterally reduced the area of the landscape easement clearly defined in terms of location, length, and width and thereby completely deprived the POA of their easement rights in and to the area

whereupon they placed their driveway. The Court finds that these actions impermissibly and unreasonably interfered with Plaintiffs' full use and enjoyment of the Landscape Easement.

31. Halsells then proceeded with the construction of a large metal building on the steepest part of their property and as far from Doug Hollow Road, and as close to Mountain View Pointe Drive, as possible. Plaintiffs' Ex. 2.

32. In July 2022, Halsells widened the cleared areas in the Landscape Easement Area and roadbed and poured concrete curbing along their driveway and in August 2022, with the trial just a little more than two months away, paved and landscaped the driveway at a cost in excess of \$43,000. These actions further impermissibly and unreasonably deprived the Plaintiffs of the full use and enjoyment of the Landscape Easement.

33. It is clear that the Halsells proceeded with the purchase of Parcel A and, with Graham Piper's willful promotion, proceeded with the construction of the driveway with full knowledge that consent had not been received to breach the Landscape Easement and with willful disregard of the rights of the Plaintiffs.

34. Section 6.1 (j) and (m) of the POA Bylaws, respectively, empowers the Board to retain the services of legal firms to enforce the provisions of the Declaration. Joint Ex. 1B., art. 6, §6.1 (j) and (m), pg.7. One of the specific purposes of the enforcement powers granted to the POA in the Declaration is "to ensure, for the benefit of each Owner, the specific rights, privileges and easements in the Common Areas. . . ." Joint Ex. 1A, pg. 1. The Court finds and concludes that initiating the suit and pursuing the request for a declaratory judgment and other claims are within the POA's authority.

35. The Court finds that the Amended Complaint sets forth facts sufficient to state a claim for the relief sought therein.

36. By way of a Counterclaim, Pipers asserted that the POA's levy of a Special Assessment to fund this litigation is *ultra vires* and unfairly requires the Pipers to fund litigation against themselves. The Court finds that the Special Assessment was authorized under Section 5.5 of the Declaration.

37. The Court finds that a Special Assessment levied pursuant to Section 5.5 is applicable to all Owners. The fact that Pipers wear two hats in this litigation does not relieve them of their obligation to pay their share of any Special Assessments.

38. Mr. Halsell testified at trial that he would not agree to refrain from constructing any other driveways off MVP Drive because there were three undeveloped acres on Parcel A, thus clearly supporting the need for a Declaratory Judgment in favor of the Plaintiffs that driveways may not be constructed over the Landscape Easement without the express consent of the Owners.

39. Mr. Piper has been a strong advocate of the Halsells' position throughout this process and, in the context of defending the suit, Pipers denied that the Easements even exist.

40. The Court finds that the quality or esthetics of the buildings and other structures erected by Halsells on their property, or that might be erected in the future on Parcels A and B, is not relevant to the issue of whether such constructions unduly and/or unreasonably interfere with the use and enjoyment of the Landscape Easement by the POA as well as all Owners of Lots in the Subdivision.

41. Crescent's intent as expressed in the Declaration cannot be plainer or more obvious than when it is expressly stated in "Statement of Purpose" on page one of the instrument that

Crescent “desires to ensure the attractiveness of the Development, to prevent any future impairment thereof, to prevent nuisances and enhance the value of all properties within the Development.” Joint Ex.1, pg1.

42. Most all of the covenants, conditions and restrictions in the Declaration are in support of the stated purpose. Parcels A and B are not subject to most of those provisions.

43. Extrinsic evidence is not required to conclude that Crescent, as the developer of the Subdivision and owner of Parcels A and B, was in the business of developing and marketing high end lake front, lake view and lake access Lots and was aware that Parcels A and B were un-zoned and subject to relatively few other restrictions.

44. Clearly, Crescent’s intent was to provide for the ability to screen activity and future construction on Parcels A and B as viewed from Mountain View Pointe Drive so as to enhance the appeal and value of the subdivision, to provide the owners of lots within the subdivision such control so as to prevent future impairment thereof and to prevent nuisances, which would effectively negate curb cuts and driveways from Mountain View Pointe Drive to Parcels A and B.

45. The Court finds that the designation of the Easements in the Declaration as “non-exclusive” does not render the Declaration ambiguous or otherwise alter the clear and obvious intent of the instrument.

46. Parcels A and B are large and, being un-zoned and subject to minimal restrictions, there is potential for multiple non-conforming buildings with disparate uses on both parcels, as well as multiple driveways and owners.

47. Piper has created a narrow, unpaved path of sorts through the Landscape Easement Area to provide tractor access from MVP Drive to the pole barn-type structure covered in plastic

tarps on Parcel B where he stores his tractor. From the site visit, it did not appear that in so doing, Piper had altered the Landscape Easement Area. However, there is nothing to prevent the POA from planting trees or shrubbery in that location, which may effectively prevent the Pipers from utilizing that path in the future.

48. The Court finds that while it may cost more for the Halsells to construct a driveway off Doug Hollow Road, they could have done so. Indeed, they sought and obtained a permit to do so. As to the extra cost, the negotiated discount from the offer price was intended to mitigate the extra expense, which is due, in large part, to where they put their building. There was conflicting testimony as to whether the topography of Parcel A left Halsells no choice but to build their building where they did and whether a driveway off of Doug Hollow Road was unreasonable. The Court concludes that Halsells failed to prove necessity by a preponderance of the evidence.

49. The fact that there are transmission towers on Parcel B was known to Pipers when they bought the property and Pipers presented no evidence that a driveway could not be constructed under the power lines. The Court concludes that Halsells failed to prove necessity by a preponderance of the evidence.

50. None of the Defendants presented any evidence that a necessity existed at the time of the severance of Parcels A and B from the property in the Subdivision. MVP Drive was built by Crescent for the Subdivision and was cut off a hillside on the eastern border of Halsells' property. *See Halsells Ex. 14*. There is no evidence that MVP Drive was ever used to access Parcels A or B, or that Parcels A and B were ever accessed other than from Doug Hollow Road.

51. The Court concludes that Halsells and Pipers failed to carry their burden of proof that they are entitled to easements by necessity.

52. The Court finds that Defendants did not present any credible evidence or legal argument in support of their claims related to the statute of limitations, estoppel, waiver, and laches and therefore have failed to meet their burden with respect to their several asserted defenses.

53. The Plaintiffs have carried their burden of proof as to the existence and purpose of the Landscape Easement and that the Halsells have violated the Landscape Easement to the detriment of the Plaintiffs.

54. The POA and each individual Plaintiff has standing in this case and the actions of the POA office in bringing this action and assessing all Owners for the costs of the litigation is not an *ultra vires* act.

55. The facts are with the Plaintiffs and against the Defendants.

56. The “Other Owner” Defendants failed to appear or answer and are in default. Therefore, the Findings and Judgment in this case are also fully applicable to them.

57. Any Finding of Fact more properly considered a Conclusion of Law shall be deemed to be restated in the Conclusions and incorporated by reference therein.

II. CONCLUSIONS OF LAW

A. JURISDICTION, STANDING AND ADEQUACY OF PLEADINGS

1. Jurisdiction of this matter is conveyed via the South Carolina Declaratory Judgment Act, which provides in relevant part that “[c]ourts of record may declare rights, status and other legal relations whether further relief is or could be claimed. S.C. Code Ann. § 15-53-20 (2012). “Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . [or] contract and obtain a declaration of rights, status or other legal relations thereunder.” S.C.

Code Ann. § 15-53-30 (2012). “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. . . .” S.C. Code Ann. § 15-53-80 (2012).

2. This dispute falls squarely within the parameters of the Act. Moreover, all parties who have an interest that would be affected by a declaratory judgment have been made parties to the suit, including Halsells, Pipers and the Owners (some of whom elected to be Defendants and some of whom elected to be Plaintiffs). As members of the POA, the Owners clearly had an interest that would be affected by a declaratory judgment in this action.

3. Therefore, the Court finds Pipers’ challenge to the Plaintiffs’ standing to be without merit, as the POA was required to make all of the Owners a party to the action.

4. With respect to justiciable controversy, the South Carolina Supreme Court has clarified that, “Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for invocation of declaratory judgment action. *Power v. McNair*, 255 S.C. 150, 153-154, 177 S.E.2d 551 (Sup. Ct. 1970). The respective counsels’ letters placed in evidence in this case, the parties’ pleadings and other filings, as well as the Pipers’ advocacy on behalf of the Halsells and expressed intent with respect to future driveways, establish that there is a justiciable controversy as to both the Halsells and the Pipers.

B. VALIDITY AND EXISTENCE OF THE EASEMENTS

5. Pipers rely on *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578 (Sup. Ct. 2009) for their argument that no easement exists. In *Windham*, the seller of property under an installment contract reserved an easement for himself for the benefit of another tract of land he owned, but retained title to

the servient estate until all installment payments were made. The Court held that because, at the time of the purported grant of the easement, the seller owned both the dominant and servient estates, an easement “could not have been created.” *Id.* The holding was based on the doctrine of merger of title. *Id.* Simply put, an easement is the right to use the land of another, so the seller under the installment contract could not reserve an easement to himself, because it would not be an easement for the use of another’s land, but for the use of his own land. *See Haselden v. Schein*, 167 S.C. 534, 539, 166 S.E. 634, 635 (Sup. Ct. 1932). However, *Windham* is inapposite because here, the grant was not from Crescent to itself. Rather, the grant was from Crescent to the POA, a legally separate, non-profit mutual benefit corporation. Therefore, the Court finds and concludes that there was no merger of title, the Easements do exist and are enforceable by the POA.

6. Pipers also claimed that the Easements had been abandoned. In determining whether an easement has been abandoned, the intention of the owner to abandon is the primary inquiry. *Carolina Land Company, Inc. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (Sup. Ct. 1975). “The mere non-use of an easement for a period of however long does not amount to an abandonment, but there must be other action by the dominant estate owner that manifests either a present intent to relinquish the easement or purpose inconsistent [with the Landscape Easement’s] further existence.” *Id.* Thus, the fact that the POA has chosen to leave much of the Landscape Area in its natural wooded state is not evidence of abandonment. There is no evidence of the POA’s present intent to relinquish the Landscape Easement or of a purpose inconsistent with the Landscape Easement’s further existence. Thus, the Court finds and concludes that the Landscape Easement has not been abandoned.

C. CONSTRUCTION OF THE EASEMENTS

7. Under South Carolina law, easements are to be construed in accordance with the rules applied to deeds and other written instruments. *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001).

8. Restrictions on the use of property must be strictly construed, with doubts resolved in favor of the free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenant. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (Sup. Ct. 1998).

9. The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation. *Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248. The ambiguity, however, must be interpreted in light of good faith, reasonableness and what was necessarily the intent of the parties to the original agreement. *Proctor v. Steedley*, 398 S.C.561 575, 730 S.E.2d 357, 365 (Ct. App.2012).

10. In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole, and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed. *Snow v. Smith*, 416 S.C. 72, 89, 784 S.E.2d 242, 251 (Ct. App. 2016).

11. “An easement is a right which one person has to use the property of another for a specific purpose and gives no title to the land on which the servitude is imposed. *Snow*, 416 S.C. at 85, 784 S.E.2d at 249. Although the rights of the easement owner are paramount to those of the landowner as to the easement, the easement owner’s rights are not absolute but are limited, so both

the owners of the easement and the servient tenement may have reasonable enjoyment. The owner of an easement has all rights incident or necessary to its proper use and enjoyment. *Id.*

12. In this case, the width, length and location of the Easements are clear and unambiguous and there is nothing in the Declaration that restricts the Plaintiffs' use to only a portion of the Easement areas. Therefore, under the rule of strict construction, the Court must construe the easements to allow the Plaintiffs to use the entirety of the Easement areas for the intended use. See *Xanadu Horizontal Property Regime v Ocean Walk Horizontal Property Regime*, 306 S.C 170, 410 S.E.2d at 580 (Ct.App. 1991).

13. The servient estate owner and anyone claiming through them may use the Easement areas only in ways that do not interfere with Plaintiffs' full use and enjoyment of the Easements.

14. As discussed in the Findings of Fact, the Court found that Crescent's intent in granting the Landscape Easement was to allow the POA to beautify the entrance road into the Subdivision and, if necessary, screen future development activity on Parcels A and B from view and protect the Subdivision from increased noise, odors and other nuisances that might be attendant to such development.

15. The Court found no evidence that Crescent intended to allow the Defendants or future owners of Parcels A and B (or anyone claiming through them) to install driveways or other permanent structures in the Landscape Easement Area, or to restrict the POA and Owners from using any part of the Landscape Easement Area for the purpose for which it was intended or in a manner that interferes with the POA's or Owners' full use and enjoyment of the Landscape Easement Area.

16. The Court finds and concludes that the construction of a driveway or other permanent structure in the Landscape Easement Area is impermissible because it would totally preclude the Plaintiffs' from using portions of the Easement Areas obstructed by the driveway or other permanent structure for the intended use and therefore unreasonably interferes with the use and enjoyment of the Landscape Easement.

17. The Merriam-Webster Dictionary defines landscaping as "to modify or ornament (a natural landscape) by altering the plant cover". Another edition of the same dictionary defines it as "to modify (a natural landscape) by grading, clearing or decorative planting." The Court finds that Crescent did not intend that Defendants could modify the natural landscape of the easement area in ways that interfere with the use and purpose of the easement. The Court also finds that Crescent intended that, to ensure the cohesiveness and attractiveness of the Landscape Easement Area as a whole, the management and control of all vegetation, landscaping, and grading in the Easement areas would be vested in the POA.

18. The Court specifically finds that the designation of the Easements in the Declaration as "non-exclusive" does not render the Declaration ambiguous or otherwise alter the clear and obvious intent of the instrument. The term "non-exclusive" is well used and understood in the context of easement law.

19. Generally, easements are either "exclusive" or "non-exclusive." An "exclusive easement" means that only the original grantee may use the property for the purpose for which the easement is granted, to the exclusion of all others. Under a "non-exclusive easement" the servient estate owner can grant other parties additional easements for the same purpose on or over the same property. Most often, that term is used in the context of easements for ingress and egress, where

multiple parties may need to cross the same easement to reach other properties nearby. *See, e.g., Xanadu Horizontal Property Regime v Ocean Walk Horizontal Property Regime*, 306 S.C 170, 410 S.E.2d at 580 (Ct.App. 1991). There is no evidence here that any party other than the POA has been granted a Landscape Easement.

20. Also, in the case of a non-exclusive easement, the servient estate owner retains ownership of the fee, and may use the property for any purpose that does not interfere with the easement owner's use and enjoyment of the easement. *Snow*, 416 S.C. at 86, 784 S.E.2d at 249.

21. Although it would have been possible for Crescent to have granted an easement that was outside of the paradigm described above, there is no evidence in the deed that it intended to do so.

22. In no event may a subsequent grantee or the servient estate owner use the easement in a way that interferes with the original grantee's use or enjoyment of the easement. Thus, in *Xanadu Horizontal Property Regime v Ocean Walk Horizontal Property Regime*, 306 S.C 170, 410 S.E.2d at 580 (Ct.App. 1991), Xanadu was granted a non-exclusive easement for ingress and egress. The court determined that neither the subsequent grantee nor the servient estate owner could use the easement area in violation of the original grantee's easement. *See also Howorka v. Harbor Island Owners Assoc.*, 292 S.C. 381, 356, S.E.2d 433, 436 (Ct.App. 1987), ("The grantor of an easement retains dominion and use of the servient estate only to the extent his actions do not interfere with the grantee's reasonable enjoyment of the easement. Thus, any easement subsequently granted is subordinate, and the subsequent grantee acquires only the right to use the servient land in a manner consistent with the terms of the prior easement.").

D. DEFENDANTS' CLAIMS OF ENTITLEMENT TO DRIVEWAY ACCESS

23. The issue in this case is not whether abutting owners generally have a right of access over any public street adjacent to their property, but rather, whether the Defendants have a right to construct one or more driveways in the Easement areas which would unreasonably interfere with the full use and enjoyment of the Easements. As previously noted, the Court finds and concludes that they do not.

E. DEFENDANTS' CLAIMS OF EASEMENT BY NECESSITY

24. The elements of a claim for easement by necessity are (1) unity of title, (2) severance of title, and (3) necessity. *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 540 (Ct. App. 2012)]. “The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. The necessity element of easement by necessity must exist at the time of the severance and the person claiming a right to an easement by necessity must not create the necessity when it would not otherwise exist. This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel.” *Id.*(internal citations omitted).

25. The Court finds that the unity and severance criteria are met. However, as noted in the Findings of Fact, neither the Halsells nor the Pipers presented any evidence that a necessity existed at the time of the severance or that Parcels A and/or B were ever accessed other than from Doug Hollow Road. Moreover, neither the Halsells nor the Pipers have proved current necessity by a preponderance of the evidence.

F. HALSELLS' VIOLATION OF PLAINTIFFS' RIGHTS IN THE EASEMENTS

26. It is unfortunate that Halsells elected to proceed as they did. The old saying sometimes relied upon is that it is better to seek forgiveness than ask permission. In this case Halsells, with the assistance of Pipers, did seek permission from the POA, but it was denied. Halsells then elected to take their chances of asking for forgiveness after the fact, which was also denied as evidenced by the current litigation. It is clear that Halsells and Pipers both were well aware of the Landscape Easement and that placing a paved driveway over it would require permission. Halsells successfully negotiated a \$50,000 price reduction from Piper based on the knowledge that, very likely, Halsells ultimately would be forced to access their property via Doug Hollow Road. Halsells further prepared for that possibility by procuring the necessary permit from SCDOT to do so. Certainly, access via Doug Hollow Road will be more costly and perhaps not as convenient to Halsells, but that does not allow them to ignore the Landscape Easement as they have done.

27. Based on the facts of this case as earlier articulated, the Court concludes that the Halsells have willfully and unreasonably interfered with Plaintiffs' use and enjoyment of the Landscape Easement and have trespassed on Plaintiffs' easements (rights).

28. Defendants argue that, under South Carolina law, "[a] trespass is limited to interference with one's right to the exclusive peaceable possession of his property," citing *Ravan v. Greenville County*, 315 S.C. 447, 463, 434 S.E. 2d 296, 306 (SC App 1969), and that Plaintiffs are not entitled to possession of the Easement areas.

29. Plaintiffs contend that South Carolina clearly recognizes a cause of action for trespass in instances where the owner of a servient estate intentionally destroys an easement without the consent of the easement holder. *Ralph v. McLaughlin*, 428 S.C. 320, 350, 834 S.E.2d 213, 229 (Ct. App. 2019); *rev'd* on other grounds, *Ralph v. McLaughlin*, 432 S.C. 640, 856 S.E.2d 154 (Sup. Ct. 2021). Moreover, the *Ravan* case cited by Defendants also noted that a nuisance is "anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." However, the interference or inconvenience must be unreasonable to be actionable. *Ravan*, 315 S.C. at 350, 434 S.E.2 at 213 (citations omitted).

30. Based on the Court's finding that Halsells' actions unreasonably interfered with the Plaintiffs' use and enjoyment of the Landscape Easement, such actions clearly constituted a nuisance, which has the same consequences as a trespass. Halsells are liable for the restoration of the premises destroyed by their actions and for all damages Plaintiffs have incurred as a result of Halsells' unlawful conduct.

G. PIPERS' PATH THROUGH THE EASEMENT AREA

31. As stated previously, the Court concludes that, currently, Piper's tractor path, used only for access to his makeshift tractor storage hut, does not interfere with Plaintiffs' use and enjoyment of the easement. Of course, there is nothing to prevent the POA from planting trees or shrubbery in that location at a future point, which may make the path inaccessible to the Pipers.

H. PIPERS' COUNTER CLAIMS

32. The Pipers' counterclaim against the POA is without merit. Pipers wear two hats, one as Lot Owners and members of the POA and one as the owners of Parcel B. As noted in the Findings of Fact, the actions of the POA in taking the steps to finance this litigation were

appropriate and within its authority. Probably such was incumbent upon them under the circumstances. The Special Assessment was valid as against the Pipers.

III. JUDGMENT AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law:

1. The Court hereby declares the Easements to be existing, valid and enforceable against the Defendants.
2. Further, the Court hereby declares that the placement of a driveway or other permanent structure in the Landscape Easement Area unreasonably prohibits the POA from using the portion of the easement area obstructed thereby for the purpose for which it was granted and is a violation of the POA's rights in the Landscape Easement.
3. Further the Court hereby declares that any alteration of the natural landscape in the Landscape Easement Area that disrupts the natural screen provided thereby (including, without limitation, removal of or damage to vegetation and any grading in the Landscape Easement Area), without the express, written consent of the POA, unreasonably interferes with the POA's use of the Landscape Easement for the purpose for which it was granted and is a violation of the POA's rights therein.
4. Further the Court hereby declares that the Easements vest in the POA sole management and control of beautification, vegetation, landscaping, soil disturbance and grading in the Landscape Easement Area which is necessary in order to insure the full use and enjoyment of the Landscape Easement and any interference with the same by the servient estate owners or anyone claiming through them is a violation of the POA's rights in the Easements.

5. The Defendants and parties claiming through them are not entitled to an easement by necessity for purposes of accessing Parcels A and B.

6. The actions of the POA Board in levying Special Assessments for the purpose of funding this litigation is duly authorized in the Declaration and the Special Assessment already levied is effective as to the Pipers and all the Lot Owners.

7. The Halsells removal of all vegetation in a portion of the Landscape Easement Area of approximately 80' by 25', destruction of the berm and regrading of such portion of the Landscape Easement Area, removal of all vegetation from and regrading a portion of the unpaved roadbed, making a curb cut in MVP Drive, and installation of a driveway in those areas unreasonably interfered with the Plaintiffs' rights in the Landscape Easement and constituted a trespass and/or a nuisance.

8. It is Ordered that the Halsells shall restore all areas disturbed in connection with the construction of their driveway or related thereto, up to the westernmost border of the Landscape Easement Area, to the condition existing prior to their disturbance. Such restoration shall include, without limitation, removal of all concrete and other existing structures, and restoring the contour of the land and replacement of the trees removed with plants approved by the POA to provide screening comparable to those destroyed. The Halsells shall, within forty-five (45) days of this Order, submit to the POA a written proposal as to by whom, and within what time frame, and precisely how they propose to comply with this Order for the restoration of the Landscape Easement Area. The proposal shall also disclose the price quoted for the required work and landscaping materials. The POA shall within ten (10) days thereafter respond to the Halsells in writing either that they agree with the proposal or propose changes thereto. If the POA and the

Halsells have not reached an agreement within twenty (20) days thereafter, they shall so notify this Court. Upon receipt of such notice this Court shall schedule a hearing to resolve the matter and/or order such money damages against the Halsells as will allow the POA to undertake such restoration itself. Similarly, if they do reach an agreement, they shall provide such agreement to this Court by notice from parties' counsel and that agreement shall then be embodied in a Supplemental Order and Judgment. The parties will proceed with diligence to complete all required demolition and restoration.

9. This Court retains jurisdiction of this case pending the parties' compliance with the immediately preceding paragraph and with any further Order, should agreement be reached by the parties or further dispute arise as to the adequacy of the actual performance under any such agreement or Order.

IT IS SO ORDERED!

March _____, 2023

Steven C. Kirven, Master-In-Equity,
10th Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021 CP-37-00093

Mountain View Pointe Owners Association, Inc., et al.

Rodney Halsell, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691

William C. Hood
505 N. McDuffie Street
Anderson, SC 29621

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Virginia Hall Campbell

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Oconee Common Pleas

Case Caption: Mountain View Pointe Owners Association Inc , plaintiff, et al VS
Rodney Halsell , defendant, et al
Case Number: 2021CP3700093
Type: Master/Order/Form 4

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

Electronically signed on 2023-03-13 15:21:53 page 29 of 29

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners Association,)
Inc., Jane P. Hale, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack)
James Dorsey, Jr. and Lucinda Dorsey, as)
Co-Trustees of the Dorsey Joint Revocable)
Trust, Kai Evensen, Lynn Elliot Amos, as)
Trustee of the Lynn Elliot Amos Qualified)
Personal Residence Trust, Lynn Keith)
Amos, as Trustee of the Lynn Keith Amos)
Qualified Personal Residence Trust,)
Charlene Finucan, John Prescott, Jr.,)
Elizabeth Prescott, Steven Trojan, Dottie)
Trojan, Leonard J. Stoecklein, Patricia)
Stoecklein, Dale Hill, Rebecca Hill, Larry)
Kuykendall, as Trustee of the Larry)
Kuykendall Revocable Trust, Larry)
Kuykendall, as Trustee of the Elke)
Kuykendall Revocable Trust, Thomas)
McCaw, Roberta McCaw, Robert)
Albergotti, Elaine Albergotti, Frank)
Patterson, Frances Patterson, Brian A. Fox,)
And Jennifer Fox,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Elianor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, and Gloria Sandhu.)

Defendants.)

**SUPPLEMENTAL AND
AMENDED ORDER**

Case #2021CP3700093

This matter came before the Court on April 13, 2023, upon the Motion of Defendants Halsell seeking modification and clarification of the Court's Order filed on March 13, 2023, pursuant to ***Rule 52 and Rule 59 SCRPC***.

Present at the hearing were William C. Hood, Attorney for the Defendants, Rodney Halsell and Barbara Halsell; Defendants, Graham R. Piper and Christine A. Piper, along with their Attorney of Record, Richard H. McDuff; Larry C. Brandt, Attorney for the Plaintiffs; Roberta McCaw and Jim Dorsey of the Mountain View Pointe Property Owners Association Board of Directors; and several other individually named Plaintiffs of Mountain View Pointe Property Owners Association.

Upon commencement of the hearing, Mr. McDuff advised the Court that he had been dismissed as Attorney for the Pipers and asked to be relieved as their Attorney of Record going forward. He further advised that he had been asked by Defendants Halsell to represent them going forward with the consent of the Pipers. The Pipers then stated to the Court, on the record, that they had no objection to Mr. McDuff representing Mr. and Mrs. Halsell; therefore, the Motion of Mr. McDuff to be relieved as counsel for the Pipers is granted.

Mr. Hood then stated and argued the particulars of his Motion as set out in the Motion filed with the Court, after which Mr. Brandt responded on behalf of the Plaintiffs.

Mr. Hood noted that the Order did not indicate whether it was final and that there were provisions in the Order for the Master to resolve disputes between the parties in connection with the implementation of the Order. He therefore requested clarification as to whether the Court intended the Order to be final. Mr. Brandt pointed out that the Form 4 that was filed with the Order specifically indicated that the Order was intended to end the case, making it clear that the provisions in the Order cited by Mr. Hood were evidence that the Judge intended to retain

jurisdiction over the case only for purposes of implementing and enforcing the Order. The Court confirms that that is the case.

Another issue raised by Mr. Hood was that Plaintiffs had dismissed their request for an injunction at the trial. Mr. Brandt stated that to the extent the Plaintiffs waived their right to the prohibitive injunction at trial requested in the Second Cause of Action As To Halsells of the Amended Complaint, their request in their prayer for relief for a mandatory injunction requiring removal of Defendants Halsells' driveway and restoration of the premises disturbed thereby was not dismissed or, at least, was not intended to be dismissed. He, therefore, requested leave to file a motion to amend the pleadings pursuant to **Rule 15(b) SCRPC** to conform to the evidence to seek a mandatory injunction requiring Defendants Halsell, at their expense, to remove their driveway and reasonably restore the premises disturbed in connection therewith to their condition prior to the construction of the driveway. In this regard, the Court notes that the case was clearly tried by all parties upon the premise that if the Court ruled against Defendants Halsells' claim for use of the easement area for their driveway, Defendants Halsell would be required to remove the driveway and restore the premises disturbed. Mr. Halsell, in fact, testified that he was willing to do just that. Furthermore, based upon those considerations, the equities of the matter and to bring finality to the dispute between the parties, Plaintiffs' request for leave to Amend the Pleadings to conform to the evidence for the purpose of specifically asking for a mandatory injunction is proper and should be granted.

Next, Mr. Hood asserted that the Court had not properly considered their claim that the Plaintiffs, as successors to Crescent, were estopped from denying Defendants Halsells' right to access their property from Mountain View Pointe Drive. In fact, the Defendants Halsell did not present any evidence that the Plaintiffs were successors to Crescent or had otherwise assumed any

liability of Crescent. The Plaintiffs' interest in the Defendants Halsells' property is limited to their rights under the easements. In fact, it is the Defendants Halsell that are successors to Crescent and they acquired their property subject to those easements. Also, as Mr. Brandt pointed out, under South Carolina law, a critical element of an estoppel claim is that the party seeking the estoppel must lack knowledge of the facts. Here, the Defendants had full knowledge of the Plaintiffs' easement rights at the time they purchased their property. Such knowledge is fatal to an estoppel claim. *See, e.g., Boyd v. Bellsouth Telephone*, 633 S.E.2d. 136, 142, 369 S.C. 410 (S.C 2006).

Mr. Hood further raised the issue of his clients' rights, as abutting owners, to access their property from Mountain View Pointe Drive, which is a public roadway. That very issue, however, was raised in Defendants Halsells' Summary Judgment Motion, which the Court previously denied and again hereby denies. All of the cases cited by Defendants Halsell, in the Court's opinion, are inapposite to this case as they are factually distinguishable because of the intervening landscape easement which vests Plaintiffs with rights in and to the easement area that cannot be reconciled with Defendants Halsells' claims and use of a portion of the landscape easement area for a driveway. Mr. Hood likened this case to a line of cases that permit a servient estate owner to put a gate across an easement used for ingress and egress when there are valid reasons to do so (such as keeping out vandals or other trespassers). The Court finds those cases to be distinguishable from this case because, although a gate may make the dominant owners' use of the easement less convenient, so long as they are provided with a key to the gate, it does not totally prevent them from using any part of the easement area for the purpose for which it was intended. Defendants Halsells' driveway makes it impossible for the Plaintiffs to landscape the area paved over by concrete. Clearly, the landscape easement exists on Defendants Halsells' land, which they own in fee simple subject to the landscape easement, but to allow the use of a portion of the easement area

for a driveway requires the Court to reconcile the parties' respective uses with the established South Carolina case law pertaining to dominant and servient estates, which the Court finds it impossible to do. Specifically, the law requires that the Court strictly construe the unambiguous language in the easement that grants the Plaintiffs the right to landscape the entire easement area. *See, e.g., Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (Sup. Ct. 1998). As well, the law requires the Court to ascertain and effectuate the Grantor's intent in granting the easement. *See, e.g., Snow v. Smith*, 416 S.C. 72, 89, 784 S.E.2d 242, 251 (Ct. App. 2016). Here, the Court determined that the Grantor intended that the Plaintiffs would have the right to landscape the entire easement area. In that regard, considering the respective rights of the parties, the law clearly requires that any claimed rights of the servient estate owners (Halsells), such as the right to put a driveway across the easement area, cannot be reconciled with the right of the Plaintiffs, as the dominant estate owners, to use of the entire landscape easement area for landscaping. In the absence of any reasonable reconciliation of the respective parties' uses having been put forward for the Court's consideration by Defendants Halsell and with the Court's total inability to think of any way those uses may be reconciled, the property rights of the Defendants Halsell, whatever they may be, must give way to the rights of the Plaintiffs to landscape the entire easement area.

Lastly, the Court addressed Defendants Halsells' concerns about the potential of having to remove his driveway before his alternative driveway was complete and that the forty-five (45) day period set forth in the Order for obtaining proposals for the restoration was insufficient because (i) spring is a busy time for landscapers and (ii) if they are given adequate time to construct their replacement driveway before demotion of the current driveway, it may be difficult to secure proposals for work that might not start for some time. The Court agreed to amend the Order to extend the forty-five (45) day period for delivering a proposal to Plaintiffs to sixty (60) days and

to increase the Plaintiffs' time to respond to the proposal from ten (10) days to thirty (30) days. Additionally, by agreement of the parties, the amendment to the Order will reflect that Defendants Halsell will have up to eight (8) months from the date of the Order to construct their new driveway before being required to undertake the ordered restoration.

The Court believes that the Order is amply supported by the law and the facts and that no other explanations or amendments are required.

Based upon the above, **IT IS, THEREFORE, ORDERED** as follows:

1. Mr. McDuff is hereby relieved as counsel of record for Defendants Piper.
2. Plaintiffs' request for leave to file a Motion to Amend the Pleadings to conform to the proof in order specifically to seek a mandatory injunction is hereby granted.
3. The prior Order of the Court requiring the Defendants Halsell to remove their driveway and bear the cost of restoring the premises disturbed to their former state or condition shall hereby be amended to read as follows:

The Defendants Halsell shall restore all areas disturbed in connection with the construction of their driveway or related thereto, up to the westernmost border of the Landscape Easement Area, to the condition existing prior to their disturbance. Such restoration shall include, without limitation, removal of all concrete and other existing structures, and restoring the contour of the land and replacement of the trees removed with trees or plants comparable to those destroyed. The Defendants Halsell shall, within sixty (60) days of this Order, submit to the POA a written proposal as to by whom, and within what time frame, and precisely how they propose to comply with this Order for the restoration as ordered above. The proposal shall also disclose the price quoted for the required work and landscaping

materials. The POA shall within thirty (30) days thereafter respond to Defendants Halsell in writing either that they agree with the proposal or propose changes thereto. If the POA and the Defendants Halsell have not reached an agreement within twenty (20) days thereafter, they shall so notify this Court. Upon receipt of such notice this Court shall schedule a hearing to resolve the matter and/or order such money damages against Defendants Halsells as will allow the POA to undertake such restoration itself. Similarly, if they do reach an agreement, they shall provide such agreement to this Court by notice from parties' counsel and that agreement shall then be embodied in a Supplemental Order and Judgment. The restoration ordered above is to commence on the earlier of (i) the completion of Defendants Halsells' replacement driveway off of Doug Hollow Road or (ii) eight (8) months from the date of this Order. Defendants Halsell shall proceed with diligence to complete their replacement driveway off Doug Hollow Road. The parties will proceed with diligence to complete all required demolition and restoration.

4. All other injunctive relief and/or relief sought by Defendants Halsells' Motion is denied.

AND IT IS SO ORDERED!

_____, 2023

The Honorable Steven C. Kirven
Master-In-Equity, Oconee County Court
of Common Pleas, Tenth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021 CP-37-00093

Mountain View Pointe Owners Association, Inc., et al.

Rodney Halsell, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Larry C. Brandt

PO Box 738

Walhalla, SC 29691

ATTORNEY(S) FOR THE PLAINTIFF(S)

William C. HoodRichard McDuff

1219 Dunlap Road119 Professional Park Dr. #B

Anderson, SC 29621Seneca, SC 29678

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Virginia Hall Campbell

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Oconee Common Pleas

Case Caption: Mountain View Pointe Owners Association Inc , plaintiff, et al VS
Rodney Halsell , defendant, et al
Case Number: 2021CP3700093
Type: Master/Order/Form 4

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

Electronically signed on 2023-05-31 15:54:42 page 10 of 10

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners)
Association, Inc., Michael Braunschweiger,)
Lori Tanner, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack J.)
Dorsey, Lucinda Dorsey, Kai Evensen,)
Kristie Burrows, Charlene Finucan, John)
Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J.)
Stoecklein, Patricia Stoecklein, Dale Hill,)
Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta)
McCaw, Robert Albergotti, Elaine)
Albergotti, Frank Patterson, Frances)
Patterson,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Katherine Horner, Lonnie)
Harper, Elianor Harper, Christopher Tam,)
Amie Kerley, Karan Sandhu, Gloria)
Sandhu, Michael Gregorek, and Michelle)
Gregorek,)

Defendants.)

"NON-JURY"

SUMMONS
(Complaint Served)

Case #2021CP3700_____

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE SUMMONED AND REQUIRED to answer the Complaint in this action, copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribed at *P.O. BOX 738, WALHALLA, SOUTH CAROLINA 29691*, within *THIRTY (30) DAYS* after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the prescribed time, a judgement by default will be entered against you for the amount or other relief requested in the attached Complaint.

s/ Larry C. Brandt
Larry C. Brandt, Bar #856
LARRY C. BRANDT, P.A.
P.O. BOX 738
3691 BLUE RIDGE BLVD.
WALHALLA, SC 29691
864/638-5406
Attorney for Plaintiffs

February 8, 2021
Walhalla, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners)
Association, Inc., Michael Braunschweiger,)
Lori Tanner, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack J.)
Dorsey, Lucinda Dorsey, Kai Evensen,)
Kristie Burrows, Charlene Finucan, John)
Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J.)
Stoecklein, Patricia Stoecklein, Dale Hill,)
Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta)
McCaw, Robert Albergotti, Elaine)
Albergotti, Frank Patterson, Frances)
Patterson,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Katherine Horner, Lonnie)
Harper, Elianor Harper, Christopher Tam,)
Amie Kerley, Karan Sandhu, Gloria)
Sandhu, Michael Gregorek, and Michelle)
Gregorek,)

Defendants.)

“NON-JURY”

COMPLAINT

Case #2021CP3700_____

Plaintiffs, complaining of the Defendants, would respectfully show unto the Court:

1. Plaintiff, Mountain View Pointe Owners Association, Inc., is a duly created and incorporated organization of the property owners of Mountain View Pointe Community located in Oconee County, South Carolina, established pursuant to the laws of the State of South Carolina.

2. All individually named Plaintiffs, to-wit: Michael Braunschweiger, Lori Tanner, L. Shepard Hamrick, Jr., Martha Hamrick, Matthew Williams, Sue Williams, Barry Noffze, Ruth Noffze, Michael Dorsey, Monica Dorsey, Jack J. Dorsey, Lucinda Dorsey, Kai Evensen, Kristie Burrows, Charlene Finucan, John Prescott, Jr., Elizabeth Prescott, Steven Trojan, Dottie Trojan, Leonard J. Stoecklein, Patricia Stoecklein, Dale Hill, Rebecca Hill, Larry Kuykendall, Elka Kuykendall, Thomas McCaw, Roberta McCaw, Robert Albergotti, Elaine Albergotti, Frank Patterson, Frances Patterson, are property owners within Mountain View Pointe Community and are members of the Plaintiff, Mountain View Pointe Owners Association, Inc.

3. Defendants, Rodney Halsell and Barbara Halsell, are residents of Oconee County, South Carolina. They do not own property within Mountain View Pointe Community and are not members of the Mountain View Pointe Owners Association, Inc.; however, they own property adjacent to Mountain View Pointe Drive, an Oconee County maintained public roadway leading from Doug Hollow Road into the Mountain View Pointe Community which is a part and parcel of Mountain View Pointe Community.

4. Defendants, Graham R. Piper and Christine A. Piper, are residents of Oconee County, South Carolina, own property within Mountain View Pointe Community, are members of Mountain View Pointe Owners Association, Inc., and also own a tract of land containing approximately 17.03 acres that lies outside of Mountain View Pointe Community that is subject to the landscape easement and to the east side of Mountain View Pointe Drive.

5. The individually named Defendants, Michael Newton, Angela Newton, Gary Hutchinson, Daniel Horner, Katherine Horner, Lonnie Harper, Elianor Harper, Christopher Tam, Amie Kerley, Karan Sandhu, Gloria Sandhu, Michael Gregorek, and Michelle Gregorek, are property owners in Mountain View Pointe Community but have chosen not to be Plaintiffs in this

lawsuit but are named parties Defendants in this action because they have individual interests in the landscape easement and their interests will necessarily be affected by the resolution of the issues in controversy.

6. The real property that is the subject of this action is located in Oconee County, South Carolina, and all persons, matters, and things complained of herein are within the jurisdiction and venue of this Court.

7. On or about September 9, 2002, Crescent Communities South Carolina, LLC, formally created Mountain View Pointe Community and established the Plaintiff, Mountain View Pointe Owners Association, Inc., by incorporating same with the South Carolina Secretary of State.

8. Thereafter on November 12, 2002, Crescent Communities South Carolina, LLC filed a declaration of Covenants, Conditions, and Restrictions dated October 21, 2002 defining the purpose of the Mountain View Pointe Community and providing rules for the governance of the Mountain View Pointe Community. Those Covenants, Conditions, and Restrictions are recorded in the Register of Deeds Office, Oconee County, South Carolina, in Deed Book 1250 at Pages 093-158 inclusive and are incorporated herein by reference as if they were repeated and restated verbatim.

9. At various times thereafter, Crescent Properties sold lots of land within Mountain View Pointe Community each of which were/are subject to the Covenants, Conditions, and Restrictions recorded in Deed Book 1250, Pages 093-158, records of Oconee County, South Carolina.

10. Section 3.1 of the Covenants and Restrictions provides that the common areas to the Association be owned and maintained by the Association and that all common areas shall remain private property and shall not be considered as dedicated to the use and benefit of the public

with the exception of the public roads which would eventually be dedicated and accepted for public maintenance by the Oconee County Public Works Department or other governmental entity.

11. On or about July 16, 2013, Crescent Communities South Carolina, LLC conveyed to Defendants, Graham R. Piper and Christine A. Piper, by Special Warranty Deed, recorded on August 26, 2013 in Deed Book 1982, Pages 91-96, records of Oconee County, South Carolina, two (2) parcels of land designated as Parcel A containing 4.715 acres and Parcel B containing 17.030 acres, neither of which is in the Mountain View Pointe Community. A plat of this property conveyed by the deed was also recorded in Plat Book 754, Page 5, records of Oconee County, South Carolina, and shows the parcels to be adjacent to Mountain View Pointe Drive and subject to the landscape easement which is the subject of this action.

12. The deed specifically conveyed the property subject to easements, covenants, restrictions, and conditions of record and rights-of-way of public and private streets and roads and the plat of the property conveyed shows the twenty-five (25') foot landscape easement on each side of Mountain View Pointe Drive and, more specifically, on the properties conveyed.

13. Subsequently, on or about December 2, 2020, Graham R. Piper and Christine A. Piper conveyed to Defendants, Rodney Halsell and Barbara Halsell, Parcel A containing 4.715 acres, more or less, shown on plat recorded in Plat Book B754, Page 5, records of Oconee County, South Carolina, same being a portion of the property conveyed to Graham A. Piper and Christine A. Piper by deed of Crescent Communities of South Carolina, LLC, dated July 16, 2013 and recorded August 26, 2013, in Deed Book 1982, Page 91, records of Oconee County, South Carolina. The conveyance was also made subject to those easements and/or rights-of-way as may appear on the premises and/or of record and all zoning and setback requirements.

14. In or about September 2020, the Defendants, Halsells, approached the Plaintiff, Mountain View Pointe Owners Association, Inc., Board of Directors and requested permission to construct a driveway or road across the twenty-five (25') foot landscape easement on the western side of Mountain View Pointe Drive so that they could access their 4.715 acre tract (Tract A shown on plat recorded in Plat Book B443, Page 2, and Plat Book A754, Page 5) from Mountain View Pointe Drive.

15. At or about the same time that the Halsells requested permission to put a driveway across the twenty-five (25') foot landscape easement, the Pipers were asked if they would agree to never making any driveway cuts across the landscape easement. They refused, and indeed Mr. Piper expressly stated that they did intend to make a driveway cut across the easement sometime in the future. Moreover, during the years and months that the Pipers have owned Parcel B, they have expressed various ideas as to how they might develop that property, including making driveway cuts. Thus, it is clear that the Pipers have every intention of eventually making one or more driveway cuts across the easement.

16. Neither Parcel A, owned by the Halsells, nor Parcel B, owned by the Pipers, are landlocked. Both have ready access to their properties off of Doug Hollow Road.

17. The impending driveway cut by the Halsells and the threatened driveway cuts by the Pipers are unnecessary. Such encroachments on the landscape easement that benefits Mountain View Pointe Community and the owners of lots therein are an undue burden on that easement.

18. The Association's Board of Directors have surveyed the members of the Homeowners' Association and have received numerous objections to any permission being granted; therefore, the Board of Directors has advised the Halsells and Pipers that the Association

would not grant permission for either of the Defendants to encroach upon the landscape easement and, as of the filing of this action, permission has not been granted.

19. Notwithstanding the Association's refusal to grant Defendant Halsell permission to put in a driveway across the landscape easement on the western side of Mountain View Pointe Drive, the Halsells have entered upon the easement and cut trees, shrubs, plants, etc. and disturbed the landscaping that was there. They have also placed stakes on the easement for the purpose of making a driveway or road cut and have obtained an encroachment permit from Oconee County, without complying with the County rules and regulations pertaining to same, to connect a driveway with Mountain View Pointe Drive that would cut across the entire twenty-five (25') foot width of the landscape easement of Plaintiffs. Defendant, Halsells, has further notified Plaintiffs that, notwithstanding the fact that they do not have permission to burden the landscape easement of the Plaintiffs with their road or driveway, they are going to install the road anyway within the next few days.

20. As a result of the above, Plaintiffs are informed and believe that this Court should inquire into the matter and issue its order interpreting the Covenants, Conditions, and Restrictions of Mountain View Pointe Community, declaring the rights of the parties herein, permanently enjoining the Defendants from invading and/or constructing roadways across the landscape easement and/or interfering with the rights of Plaintiffs in any way.

21. The Plaintiffs request that the Court order that Defendant Halsells cease and desist in using the landscape easement or any portion thereof in any manner that would diminish the area of the landscape easement and/or interfere with the landscaping of same by Mountain View Pointe Owners Association and permanently enjoin them from any such actions in the future.

22. Plaintiffs further request that this Court order the Halsells to immediately restore any area within the landscape easement to its previous state or condition, and if the Halsells cannot do so, that Plaintiffs be granted judgment against them for any and all damages incurred.

23. The Defendants Halsells' acts in regard to the landscape easement, and their interference with the Plaintiffs rights therein, have been done negligently, grossly negligently, willfully, and maliciously in complete disregard of the rights of the Plaintiffs, thereby entitling Plaintiffs to punitive damages in addition to any actual damages incurred.

24. Plaintiffs also request that the Court, having declared the rights of the respective parties, permanently enjoin the Pipers from encroaching upon the landscape easement in the future by making any nature of driveway cuts across the easement.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

- a) Declaring the rights, obligations, duties, and responsibilities of the parties in regard to the landscape easement granted to Plaintiffs by the Covenants, Conditions, and Restrictions of Mountain View Pointe Community.
- b) Permanently enjoining the Defendants from placing driveways or roads across the landscape easement of Plaintiff and/or doing anything to interfere with Plaintiff's rightful use of the easement.
- c) Ordering the Halsells to restore the landscape easement to its condition prior to their work in the easement area or, in the alternative, awarding damages to the Plaintiffs to restore the area to its prior condition.
- d) Granting to Plaintiffs such punitive damages as it determines appropriate against Defendant Halsells as well as any actual damages incurred by Plaintiffs for

Defendant Halsells interference with their right to exercise and enjoy the landscape easement as intended.

- e) Granting such other and further relief as to this Court is just and proper.

Respectfully submitted,

s/Larry C. Brandt
Larry C. Brandt (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638-5406
864/638-7873 (fax)
lcb.brandtlawfirm@att.net
Attorney for Plaintiffs

February 8, 2021
Walhalla, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners)
Association, Inc., Michael Braunschweiger,)
Lori Tanner, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack J.)
Dorsey, Lucinda Dorsey, Kai Evensen,)
Kristie Burrows, Charlene Finucan, John)
Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J.)
Stoecklein, Patricia Stoecklein, Dale Hill,)
Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta)
McCaw, Robert Albergotti, Elaine)
Albergotti, Frank Patterson, Frances)
Patterson,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Eliaior)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, Gloria Sandhu, Michael,)
Gregorek, and Michelle Gregorek,)

Defendants.)

“NON-JURY”

AMENDED SUMMONS
(Amended Complaint Served)

Case #2021CP3700093

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE SUMMONED AND REQUIRED to answer the Complaint in this action, copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribed at *P.O. BOX 738, WALHALLA, SOUTH CAROLINA 29691*, within *THIRTY (30) DAYS* after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the prescribed time, a judgement by default will be entered against you for the amount or other relief requested in the attached Complaint.

s/ Larry C. Brandt
Larry C. Brandt, Bar #856
LARRY C. BRANDT, P.A.
P.O. BOX 738
3691 BLUE RIDGE BLVD.
WALHALLA, SC 29691
864/638-5406
Attorney for Plaintiffs

February 18, 2021
Walhalla, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners)
Association, Inc., Michael Braunschweiger,)
Lori Tanner, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack J.)
Dorsey, Lucinda Dorsey, Kai Evensen,)
Kristie Burrows, Charlene Finucan, John)
Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J.)
Stoecklein, Patricia Stoecklein, Dale Hill,)
Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta)
McCaw, Robert Albergotti, Elaine)
Albergotti, Frank Patterson, Frances)
Patterson,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Elianor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, Gloria Sandhu, Michael,)
Gregorek, and Michelle Gregorek,)

Defendants.)

“NON-JURY”

AMENDED COMPLAINT

Case #2021CP3700093

Plaintiffs, complaining of the Defendants, would respectfully show unto the Court:

JURISDICTION AND VENUE

1. Plaintiff, Mountain View Pointe Owners Association, Inc., is a duly created and incorporated organization of the property owners of Mountain View Pointe Community located in Oconee County, South Carolina, established pursuant to the laws of the State of South Carolina.

2. All individually named Plaintiffs, to-wit: Michael Braunschweiger, Lori Tanner, L. Shepard Hamrick, Jr., Martha Hamrick, Matthew Williams, Sue Williams, Barry Noffze, Ruth Noffze, Michael Dorsey, Monica Dorsey, Jack J. Dorsey, Lucinda Dorsey, Kai Evensen, Kristie Burrows, Charlene Finucan, John Prescott, Jr., Elizabeth Prescott, Steven Trojan, Dottie Trojan, Leonard J. Stoecklein, Patricia Stoecklein, Dale Hill, Rebecca Hill, Larry Kuykendall, Elka Kuykendall, Thomas McCaw, Roberta McCaw, Robert Albergotti, Elaine Albergotti, Frank Patterson, Frances Patterson, are property owners within Mountain View Pointe Community and are members of the Plaintiff, Mountain View Pointe Owners Association, Inc.

3. Defendants, Rodney Halsell and Barbara Halsell, are residents of Oconee County, South Carolina. They do not own property within Mountain View Pointe Community and are not members of the Mountain View Pointe Owners Association, Inc.; however, they own property adjacent to Mountain View Pointe Drive, an Oconee County maintained public roadway leading from Doug Hollow Road into the Mountain View Pointe Community, a portion of which is subject to the landscape easement that is the subject of this action.

4. Defendants, Graham R. Piper and Christine A. Piper, are residents of Oconee County, South Carolina, own property within Mountain View Pointe Community, are members of Mountain View Pointe Owners Association, Inc., and also own a tract of land containing approximately 17.03 acres that lies outside of Mountain View Pointe Community that is subject to the landscape easement and on the east side of Mountain View Pointe Drive.

5. The individually named Defendants, Michael Newton, Angela Newton, Gary Hutchinson, Daniel Horner, Lonnie Harper, Elianor Harper, Christopher Tam, Amie Kerley, Karan Sandhu, Gloria Sandhu, Michael Gregorek, and Michelle Gregorek, are property owners in Mountain View Pointe Community but have chosen not to be Plaintiffs in this lawsuit but are

named parties Defendants in this action because they have individual interests in the landscape easement and their interests will necessarily be affected by the resolution of the issues in controversy.

GENERAL ALLEGATIONS

6. The real property that is the subject of this action is located in Oconee County, South Carolina, and all persons, matters, and things complained of herein are within the jurisdiction and venue of this Court.

7. On or about September 9, 2002, Crescent Communities South Carolina, LLC, formally created Mountain View Pointe Community and established the Plaintiff, Mountain View Pointe Owners Association, Inc., by incorporating same with the South Carolina Secretary of State.

8. Thereafter on November 12, 2002, Crescent Communities South Carolina, LLC filed a declaration of Covenants, Conditions, and Restrictions dated October 21, 2002 defining the purpose of the Mountain View Pointe Community and providing rules for the governance of the Mountain View Pointe Community. Those Covenants, Conditions, and Restrictions are recorded in the Register of Deeds Office, Oconee County, South Carolina, in Deed Book 1250 at Pages 093-158 inclusive and are incorporated herein by reference as if they were repeated and restated verbatim.

9. At various times thereafter, Crescent Properties sold lots of land within Mountain View Pointe Community each of which were/are subject to the Covenants, Conditions, and Restrictions recorded in Deed Book 1250, Pages 093-158, records of Oconee County, South Carolina.

10. Section 3.1 of the Covenants and Restrictions provides that the common areas to the Association be owned and maintained by the Association and that all common areas shall

remain private property and shall not be considered as dedicated to the use and benefit of the public with the exception of the public roads which would eventually be dedicated and accepted for public maintenance by the Oconee County Public Works Department or other governmental entity.

11. On or about July 16, 2013, Crescent Communities South Carolina, LLC conveyed to Defendants, Graham R. Piper and Christine A. Piper, by Special Warranty Deed, recorded on August 26, 2013 in Deed Book 1982, Pages 91-96, records of Oconee County, South Carolina, two (2) parcels of land designated as Parcel A containing 4.715 acres and Parcel B containing 17.030 acres, neither of which is in the Mountain View Pointe Community. A plat of this property conveyed by the deed was also recorded in Plat Book 754, Page 5, records of Oconee County, South Carolina, and shows the parcels to be adjacent to Mountain View Pointe Drive and subject to the landscape easement which is the subject of this action.

12. The deed specifically conveyed the property subject to easements, covenants, restrictions, and conditions of record and rights-of-way of public and private streets and roads and the plat of the property conveyed shows the twenty-five (25') foot landscape easement on each side of Mountain View Pointe Drive and, more specifically, on the properties conveyed.

13. Subsequently, on or about December 2, 2020, Graham R. Piper and Christine A. Piper conveyed to Defendants, Rodney Halsell and Barbara Halsell, Parcel A containing 4.715 acres, more or less, shown on plat recorded in Plat Book B754, Page 5, records of Oconee County, South Carolina, same being a portion of the property conveyed to Graham A. Piper and Christine A. Piper by deed of Crescent Communities of South Carolina, LLC, dated July 16, 2013 and recorded August 26, 2013, in Deed Book 1982, Page 91, records of Oconee County, South Carolina. The conveyance was also made subject to those easements and/or rights-of-way as may appear on the premises and/or of record and all zoning and setback requirements.

14. In or about September 2020, the Defendants, Halsells, approached the Plaintiff, Mountain View Pointe Owners Association, Inc., Board of Directors and requested permission to construct a driveway or road across the twenty-five (25') foot landscape easement on the western side of Mountain View Pointe Drive so that they could access their 4.715 acre tract (Tract A shown on plat recorded in Plat Book B443, Page 2, and Plat Book A754, Page 5) from Mountain View Pointe Drive.

15. At or about the same time that the Halsells requested permission to put a driveway across the twenty-five (25') foot landscape easement, the Pipers were asked if they would agree to never making any driveway cuts across the landscape easement. They refused, and indeed Mr. Piper expressly stated that they did intend to make a driveway cut across the easement sometime in the future. Moreover, during the years and months that the Pipers have owned Parcel B, they have expressed various ideas as to how they might develop that property, including making driveway cuts. Thus, it is clear that the Pipers have every intention of eventually making one or more driveway cuts across the easement.

16. Neither Parcel A, owned by the Halsells, nor Parcel B, owned by the Pipers, are landlocked. Both have ready access to their properties off of Doug Hollow Road.

17. The impending driveway cut by the Halsells and the threatened driveway cuts by the Pipers are unnecessary. Such encroachments on the landscape easement that benefits Mountain View Pointe Community and the owners of lots therein are an undue burden on that easement.

18. The Association's Board of Directors have surveyed the members of the Homeowners' Association and have received numerous objections to any permission being granted; therefore, the Board of Directors has advised the Halsells and Pipers that the Association

would not grant permission for either of the Defendants to encroach upon the landscape easement and, as of the filing of this action, permission has not been granted.

19. Notwithstanding the Association's refusal to grant Defendant Halsell permission to put in a driveway across the landscape easement on the western side of Mountain View Pointe Drive, the Halsells have entered upon the easement and cut trees, shrubs, plants, etc., substantially disturbed the landscaping that was there, have graded out the area within the easement, have started actual construction of a driveway across the entire width of the landscape easement, and have obtained an encroachment permit from Oconee County without complying with the County rules and regulations pertaining to same and/or disclosing their dispute with the Plaintiffs at the time the landscape easement was applied for. All of these acts by the Halsells were committed with the knowledge that they did not have permission to burden the landscape easement of the Plaintiffs with their road or driveway.

FIRST CAUSE OF ACTION AS TO ALL PARTIES
(Declaratory Judgment)

20. As a result of the above, Plaintiffs are informed and believe that this Court should inquire into the matter and issue its order interpreting the Covenants, Conditions, and Restrictions of Mountain View Pointe Community, declaring the rights of the parties herein, permanently enjoining the Defendants from invading and/or constructing roadways across the landscape easement and/or interfering with the rights of Plaintiffs in any way.

SECOND CAUSE OF ACTION AS TO HALSELLS
(Injunction)

21. The Plaintiffs request that the Court order that Defendant Halsells cease and desist in using the landscape easement or any portion thereof in any manner that would diminish the area

of the landscape easement and/or interfere with the landscaping of same by Mountain View Pointe Owners Association and permanently enjoin them from any such actions in the future.

THIRD CAUSE OF ACTION AS TO HALSELLS
(Negligence)

22. The Defendant Halsells' acts in regard to the landscape easement, and their interference with the Plaintiffs rights therein, have been done negligently, grossly negligently, willfully, and maliciously in complete and wanton disregard of the rights of the Plaintiffs, thereby entitling Plaintiffs to punitive damages in addition to any actual damages incurred.

FOURTH CAUSE OF ACTION AS TO HALSELLS
(Breach of Contract)

23. Although the Halsells own the fee upon which a portion of the landscape easement is situated, they purchased their land from the Pipers with the full knowledge of the easement thereby becoming the grantor of the easement the same as if they had personally granted the easement to Plaintiffs originally. As a result, their acts complained of herein constitute a breach of their contract with Plaintiffs, thereby becoming liable for the breach of same.

FIFTH CAUSE OF ACTION AS TO HALSELLS
(Breach of Contract Accompanied by Fraudulent Act)

24. Plaintiffs are also informed and believe that the Defendant Halsells, in obtaining their encroachment permit for the driveway from Oconee County, South Carolina, failed to disclose to the County, prior to the issuance of the permit, the dispute with the Plaintiffs as they had a duty to do; therefore, their breach of their contract with Plaintiffs was/is accompanied by a fraudulent act rendering them liable for all actual damages which have been incurred by Plaintiffs for the destruction of the easement area and their wanton disregard of the Plaintiffs' rights, as well as punitive damages in such amount as is reasonable and necessary to deter them from such conduct in the future.

SIXTH CAUSE OF ACTION AS TO HALSELLS
(Trespass)

25. The acts of the Halsells in entering upon the landscape easement, destroying the vegetation on a portion thereof, grading the land, and preventing Plaintiffs from the full use and enjoyment of the entire landscape easement constitutes a trespass upon the easement and against the Plaintiffs' property rights. Furthermore, the trespass was committed willfully and in wanton disregard for the rights of the Plaintiffs as well as all other landowners within the Mountain View Pointe Community; therefore, they are liable to Plaintiffs for all actual damages incurred by Plaintiffs under law of trespass together with punitive damages in such an amount as is necessary to prevent them from committing the same or similar conduct in the future.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

- a) Declaring the rights, obligations, duties, and responsibilities of the parties in regard to the landscape easement granted to Plaintiffs by the Covenants, Conditions, and Restrictions of Mountain View Pointe Community.
- b) Permanently enjoining the Defendants from placing driveways or roads across the landscape easement of Plaintiff and/or doing anything to interfere with Plaintiff's rightful use of the easement.
- c) Ordering the Halsells to restore the landscape easement to its condition prior to their work in the easement area or, in the alternative, awarding damages to the Plaintiffs to restore the area to its prior condition.
- d) Granting to Plaintiffs such punitive damages as it determines appropriate against Defendant Halsells as well as any actual damages incurred by Plaintiffs for Defendant Halsells interference with their right to exercise and enjoy the landscape easement as intended.

- e) Granting such other and further relief as to this Court is just and proper.

Respectfully submitted,

s/Larry C. Brandt
Larry C. Brandt (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638-5406
864/638-7873 (fax)
lcb.brandtlawfirm@att.net
Attorney for Plaintiffs

February 18, 2021
Walhalla, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE) IN THE COURT OF COMMON PLEAS

Mountain View Pointe Owners Association,)
Inc., Michael Braunschweiler, Lori Tanner,)
L. Shepard Hamrick, Jr., Martha Hamrick,)
Matthew Williams, Sue Williams, Barry Noffze,)
Ruth Noffze, Michael Dorsey, Monica Dorsey,)
Jack J. Dorsey, Lucinda Dorsey, Kai Evenson,) ANSWER OF DEFENDANTS HALSELL
Kristie Burrows, Charlene Finucan, John Prescott,) TO AMENDED COMPLAINT
Jr., Elizabeth Prescott, Stocklein, Patricia Stocklein,)
Dale Hill, Rebecca Hill, Larry Kuykendall, Elke)
Kuykendall, Thomas McCaw, Roberta McCaw,) Case No. 2021CP3700093
Robert Albergotti, Elaine Albergotti,)
Frank Patterson, and Frances Patterson,)
Plaintiffs,)
vs.)
Rodney Halsell, Barbara Halsell, Graham R. Piper,)
Christine A. Piper, Michael Newton, Angela)
Newton, Gary Hutchinson, Daniel Horner, Lonnie)
Harper, Elianor Harper, Christopher Tam, Amie)
Kerley, Karen Sandhu, Michael Gregorick , and)
Michelle Gregorick,)
Defendants.)
_____)

Defendants Rodney Halsell and Barbara Halsell, answering the Amended Complaint,
allege as follows:

FOR A FIRST DEFENSE
(Response to Averments)

1. Each allegation of the Amended Complaint not specifically admitted is denied.

2. The allegations of Paragraphs 1 through 4, inclusive, are admitted.

3. These Defendants do not have sufficient information to form a belief as to the allegations of Paragraph 5.

4. The allegations of Paragraphs 6 through 13, inclusive, are admitted, except, however, to the extent, if any, Paragraph 10 alleges that these Defendants' property is common area under the Covenants and Restrictions, which is denied.

5. Paragraph 14 is admitted only insofar as it alleges that Defendants Halsell approached Plaintiff Owners' Association about their intent to place a driveway on their lot to provide access to Mountain View Pointe Drive, a public road adjoining their property. These Defendants specifically deny that they sought "permission" to install a driveway on their own property, or that any permission was required, and allege that their intent was to recognize the interest of the Owners' Association by virtue of the landscape easement and try to accommodate the interests of all affected to the extent possible.

6. Paragraph 15 is denied to the extent it alleges that Defendants Halsell sought permission to install a driveway or that permission for a driveway was required. These Defendants do not have sufficient information to form a belief as to the remaining allegations of Paragraph 15.

7. Paragraph 16 is admitted only to the extent it alleges that Parcels A and B have legal access to both Mountain View Pointe Drive and Doug Hollow Road.

8. The allegations of Paragraph 17 are denied.

9. These Defendants do not have sufficient information to form a belief as to the allegations of Paragraph 18 as to any membership survey by the Association or the results thereof. As to the remaining allegations of Paragraph 18, these Defendants deny that they have

sought permission for a driveway, and that permission is required, but admit that the Association has indicated that it has the right to prohibit them from installing a driveway to access their own property, which these Defendants deny.

10. Paragraph 19 is denied insofar as it alleges that these Defendants sought permission to install a driveway, or that permission is required. The remaining allegations are admitted insofar as they allege that these Defendants have begun the installation of a driveway to access their property from Mountain View Pointe Drive, which includes a portion of the landscape easement area. The allegations of this Paragraph are otherwise denied.

11. The allegations of Paragraphs 20, 21, and 22 are denied.

12. The allegations of Paragraph 23 are admitted insofar as it is alleged that these Defendants own fee title to their property, including that portion of which is within the subject landscape easement, and that they purchased their property with knowledge of the easement. The remaining allegations of this Paragraph are denied.

13. As to the allegations of Paragraph 24, these Defendants deny that they failed to disclose any information required of them in applying for a permit for their driveway, that they breached any contract with Plaintiffs or that they committed any fraudulent act resulting in any damages or liabilities of any kind to Plaintiffs.

14. The allegations of Paragraph 25 are denied.

FOR A SECOND DEFENSE

15. The First, Second, Third, Fourth, Fifth and Sixth Causes of action fail to state facts sufficient to constitute causes of action.

FOR A THIRD DEFENSE

16. The First Cause of Action for declaratory judgment fails to state an actual justiciable

controversy. Plaintiff seeks merely an advisory opinion “interpreting the Covenants, Conditions, and Restrictions of Mountain View Pointe community”, without making a plain statement of the controversy the Court is requested to adjudicate. The Court therefore lacks jurisdiction to grant a declaratory judgment.

FOR A FOURTH DEFENSE

17. As to the Fifth Cause of Action, any wrongful act or omission of these Defendants in obtaining a permit from Oconee County for their driveway as alleged in Paragraph 24, which is denied, is not directly related to any alleged breach of contract between these Defendants and the Plaintiffs, which is also denied. The application for a permit from the county was an administrative transaction with a third party, completely separate from the issues of this action, not involving any of the Plaintiffs, and which cannot be used by the Plaintiffs herein to assert a claim for punitive damages against these Defendants.

FOR A FIFTH DEFENSE

18. As to the Sixth Cause of Action, an action for trespass requires an interference with, or invasion of, the Plaintiffs’ interest in the exclusive possession of the property. Plaintiffs do not have actual or constructive possession of the property within the landscape easement, nor are they entitled to such, and therefore do not have a cause of action for trespass.

FOR A SIXTH DEFENSE

19. These Defendants’ property abuts Mountain View Pointe Drive and, under well-established law of this State, they have, as an appurtenance thereto, a right of access over such abutting street. Their right of access arose under the same deed and plat upon which Plaintiffs rely to assert their easement rights, and such right of access is not dependent upon necessity. Section 7.9 of the Declaration of Covenants, Conditions and Restrictions for Mountain View Pointe,

referenced in the Amended Complaint, describes the landscape easements as “non-exclusive perpetual easements for the purpose of landscaping and maintaining the property adjacent to the main entry road for the subdivision.” Construing this description of the landscape easement, and its depiction on the plat, in the manner least restrictive to these Defendant’s property rights, the easement does not prevent the right of access to Mountain View Pointe Drive which is appurtenant to their property.

FOR A SEVENTH DEFENSE

20. Plaintiffs are estopped to deny these Defendants’ right of access to and use of Mountain View Pointe Drive.

FOR AN EIGHTH DEFENSE

21. Defendants intend to install a single private driveway of reasonable and normal dimensions and of quality equal to or exceeding any driveways within the adjoining Mountain View Pointe subdivision. During the more than eighteen years since the landscape easement was created, there have been no trees, shrubs, plants or other landscaping features placed with the easement area where the driveway is to be built. The only maintenance which has been performed in the area has been the cutting of grass adjacent to Mountain View Pointe Drive, and most of that has been within the street right of way. The proposed driveway is necessary to the reasonable enjoyment of these Defendants’ property and does not materially interfere with the easement’s non-exclusive purpose of “landscaping and maintaining the property adjacent to the main entry road”.

WHEREFORE, having answered the Amended Complaint herein, the Defendants Rodney Halsell and Barbara Halsell pray that the Amended Complaint be dismissed and for such

other relief as the Court may find proper.

March 8, 2021

s/William C. Hood
William C. Hood
S. C. Bar No. 2601
505 N. McDuffie Street
Anderson, SC 29621
Ph.: 864-375-0530

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners Association,)
Inc., Jane P. Hale, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack)
James Dorsey, Jr. and Lucinda Dorsey, as)
Co-Trustees of the Dorsey Joint Revocable)
Trust, Kai Evensen, Lynn Elliot Amos, as)
Trustee of the Lynn Elliot Amos Qualified)
Personal Residence Trust, Lynn Keith)
Amos, as Trustee of the Lynn Keith Amos)
Qualified Personal Residence Trust,)
Charlene Finucan, John Prescott, Jr.,)
Elizabeth Prescott, Steven Trojan, Dottie)
Trojan, Leonard J. Stoecklein, Patricia)
Stoecklein, Dale Hill, Rebecca Hill, Larry)
Kuykendall, as Trustee of the Larry)
Kuykendall Revocable Trust, Larry)
Kuykendall, as Trustee of the Elke)
Kuykendall Revocable Trust, Thomas)
McCaw, Roberta McCaw, Robert)
Albergotti, Elaine Albergotti, Frank)
Patterson, Frances Patterson, Brian A. Fox,)
And Jennifer Fox,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Elleanor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, and Gloria Sandhu.)

Defendants.)

PLAINTIFFS'
POST-TRIAL BRIEF

Case #2021CP3700093

TABLE OF CONTENTS

	<u>PAGE</u>
I. TABLE OF AUTHORITIES.....	iii
II. BACKGROUND AND REVIEW OF EXHIBITS.....	1
III. LEGAL ISSUES.....	7
IV. ARGUMENT.....	9
A. <u>CONSTRUCTION OF THE EASEMENTS</u>.....	9
B. <u>HALSELL’S ACTIONS IN THE EASEMENT AREAS ARE IMPERMISSIBLE</u>.....	11
1. CONSTRUCTION OF A DRIVEWAY ACROSS THE EASEMENT AREAS FOR PURPOSES OF ACCESSING PARCELS A AND B IS IMPERMISSIBLE AS A MATTER OF LAW.....	11
2. CONSTRUCTION OF A DRIVEWAY ACROSS THE EASEMENT AREAS FOR PURPOSES OF ACCESSING PARCELS A AND B IS IMPERMISSIBLE BECAUSE IT WAS CONTRARY TO CRESCENT’S INTENT AND WOULD INTERFERE WITH THE USE AND PURPOSE OF THE EASEMENT.....	17
a. Evidence of Crescents Intent.....	17
i. The Statement of Purpose in the Declaration.....	18
ii. Parcels A and B are Not on the MVP Plat.....	18
iii. Location of the Entrance Monument.....	19
iv. The Easements granted to the Association run the entire length of both properties.....	19
v. Crescent Designated Easements Granted to the Association as Being Part of the Common Areas.....	19
vi. Contrary to the Defendants’ Assertions, Crescent Made the Easements, Easement Areas and the Roadways Subject to Certain Provisions of the Declaration and MVP Plat.....	19

b. A Driveway over the Easement Areas Would Interfere with the Use and Purpose of the Easements.....	21
3. REMOVAL OF VEGETATION, TRIMMING OF VEGETATION, TAKING OTHER ACTIONS THAT HAVE A DELETERIOUS EFFECT ON VEGETATION, DISTURBANCE OF THE SOIL IN THE EASEMENT AREAS, EXCAVATING AND PAVING, OR THE PLACEMENT OF ANYTHING IN THE EASEMENT AREAS THAT WOULD BE VISBILE FROM THE STREET ALSO REQUIRES CONSENT, WOULD BE CONTRARY TO THE GRANTORS INTENT AND WOULD INTERFERE WITH THE USE AND PURPOSE OF THE EASEMENTS.....	23
C. <u>THE DEFENDANTS ARE BOUND BY THE EASEMENTS</u>	24
D. <u>CLEARLY THERE IS A JUSTICIABLE CONTROVERSY WITH RESPECT TO THE DEFENDANTS</u>	27
E. <u>SECTION 7.9 OF THE DECLARATION IS AN EXPRESS GRANT OF THE EASEMENTS TO THE ASSOCIATION</u>	27
F. <u>WINDHAM V. RIDDLE AND THE DOCTRINE OF MERGER OF TITLE HAVE NO BEARING ON THIS CASE</u>	30
G. <u>THE HALSELLS AND THE PIPERS DO NOT HAVE A RIGHT OF DRIVEWAY ACCESS FROM MVP DRIVE</u>	32
H. <u>THERE IS NO EVIDENCE THAT THE ASSOCIATION HAS ABANDONED ITS EASEMENTS</u>	34
I. <u>THE HALSELLS ARE NOT ENTITLED TO AN EASEMENT BY NECESSITY</u>	35
J. <u>THE COUNTER CLAIM THAT ALLEGES UNAUTHORIZED SPECIAL ASSESSMENT TO FUND THE EXPENSES OF THIS LITIGATION IS BASED ON A MISREADING OF THE LANGUAGE OF SECTION 5.5 OF THE DECLARATION</u>	38
V. MEANING OR DEFINITION OF LANDSCAPING.....	39
VI. DAMAGES.....	42
VII. CONCLUSION.....	45

TABLE OF AUTHORITIES

PAGECASES

<i>Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.</i>	14, 15
221 Kan. 579, 561 P.2d 818 (Sup. Ct. 1977)	
<i>Beck v. Northwestern Railroad</i>	26
99 S.C. 310, 83 S.E. 335 (Sup. Ct. 1914)	
<i>Binkley v. Rabon Creek Watershed Conservation District</i>	9, 15
348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001)	
<i>Boyd v. Bellsouth Telephone</i>	37
359 S.C. 209, 597 S.E.2d 161 (Ct. App. 2004)	
<i>Briarcliffe Acres v. Briarcliffe Realty Co.</i>	29, 30
262 S.C. 599, 206 S.E.2d 886 (Sup. Ct. 1974)	
<i>Carolina Land Company, Inc. v. Bland</i>	26, 34
265 S.C. 98, 217 S.E.2d 16 (Sup. Ct. 1975)	
<i>Gardner v. Mozingo</i>	9, 10, 13
293 S.C. 23, 358 S.E.2d 390 (Sup. Ct. 1987)	
<i>Hardin v. SCDOT</i>	32
371 S.C. 598, 641 S.E.2d 437 (Sup. Ct. 2007)	
<i>Haselden v. Schein</i>	31
167 S.C. 534, 166 S.E. 634 (Sup. Ct. 1932)	
<i>Howorka v. Harbor Island Owners Assoc.</i>	8, 33
292 S.C. 381, 356 S.E.2d 433 (Ct. App. 1987)	
<i>Jacobs v. Service Merchandise Co., Inc.</i>	12
297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988)	
<i>Johnson v. Highway101 Investments, LLC</i>	16
156 Idaho 1, 319 P.3d 485 (Sup. Ct. 2014)	
<i>Martin v. Bay</i>	16
400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012)	

TABLE OF AUTHORITIES

PAGECASES

<i>Oliver v. McWhirter</i>	26
112 S.C. 555, 100 S.E. 533 (Sup. Ct. 1919)	
<i>Paine Gayle Properties, LLC v. CSX Transportation, Inc.</i>	35
400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012)	
<i>Plott v. Justin Enterprises</i>	9
374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007)	
Citing: <i>S.C. Public Service Authority v. Ocean Forest, Inc.</i>	
275 S.C. 552, 273 S.E.2d 773 (Sup. Ct. 1981)	
<i>Power v. McNair</i>	27
255 S.C. 150, 177 S.E.2d 551 (Sup. Ct. 1970)	
<i>Ralph v. McLaughlin</i>	42
428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019)	
<i>Ralph v. McLaughlin</i>	42
432 S.C. 640, 856 S.E.2d 154 (Sup. Ct. 2021)	
<i>Snow v. Smith</i>	9
416 S.C. 72, 784 S.E.2d 242 (Ct. App. 2016)	
<i>S.C. Public Service Authority v. Ocean Forest, Inc.</i> [cited in <i>Plott</i>]	9
275 S.C. 552, 273 S.E.2d 773 (Sup. Ct. 1981)	
<i>S.C. State Highway Dept. v. Allison</i>	32
246 S.C. 389, 143 S.E.2d 800 (Sup. Ct. 1965)	
<i>Windham v. Riddle</i>	30, 31
381 S.C. 192, 672 S.E.2d 578 (Sup. Ct. 2009)	
<i>Xanadu Horizontal Property Regime v. Ocean Walk Property Regime</i>	12, 13, 14,
306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991)	15, 16, 33
Citing: <i>Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.</i> ,	
221 Kan. 579, 561 P.2d 818 (Sup. Ct. 1977)	

TABLE OF AUTHORITIES

PAGE

STATUTES

<i>S.C. Code §40-28-20</i>	41

ORDINANCES

<i>State of South Carolina County of Oconee Ordinance 2013-16</i>	33
<i>Code of Ordinances Oconee County, South Carolina</i>	17, 18
Chapter 32, Article VI, Sec. 32-218 [Nonresidential subdivisions]	
Chapter 32, Article VI, Sec. 32-218(b)(4) [Nonresidential subdivisions]	
<i>Code of Ordinances Oconee County, South Carolina</i>	31
Chapter 32, Article VI, Sec. 32-220(a) [Plat requirements and review procedures]	
<i>Code of Ordinances Oconee County, South Carolina</i>	3, 4
Chapter 38, Article 10, Sec. 38-10.2 [Control free district (CFD)]	
<i>Code of Ordinances Oconee County, South Carolina</i>	3
Chapter 38, Article 11, Sec. 38-11.1 [Lake overlay district]	
<i>Code of Ordinances Oconee County, South Carolina</i>	3
Chapter 38, Appendix A	

PUBLICATIONS

<i>Pennsylvania Wildlife, "Neighborly Natural Landscaping"</i>	22
The Pennsylvania State University (2016)	

BACKGROUND AND REVIEW OF EXHIBITS

The Plaintiffs in this case are the Owners (herein so called) of 21 of the 29 homesites (“Lots”) in the Mountain View Pointe Subdivision, along with the Mountain View Pointe Owners Association, Inc., (“the Association”), a South Carolina mutual benefit corporation that was incorporated in September 2002 (**Joint Exhibit 1A**, Page 48).

The Subdivision was created in November 2002, when Crescent Communities S.C., LLC (“Crescent”), as Declarant, recorded a Declaration (herein so called) of Covenants, Conditions and Restrictions for Mountain View Pointe (“MVP”) (“the Subdivision”), a residential community of 29 single-family homes as depicted on a Plat (the “MVP Plat”) referenced in, and filed on the same date as, the Declaration. The Declaration and MVP Plat are **Joint Exhibits 1A and 2** respectively. The Declaration was signed by a representative of Crescent, in the presence of two witnesses, and was acknowledged by a Notary Public of the State of North Carolina (**Joint Exhibit 1A**, Cover Page and Signature Page 42).

The entrance to the Subdivision is at the intersection of Doug Hollow Road and the 50’ road right-of-way that serves as the main entrance road into the Subdivision (“MVP Drive”) (**Joint Exhibit 2**).

There are two parcels shown on the MVP Plat at the front of the Subdivision that abut both Doug Hollow Road and MVP Drive. Those properties are designated as property of Crescent. Only the portion of those parcels designated as “Landscape Easement” and “Sign Easement,” are shown with metes and bounds and measurements. *Id.* As discussed below, these two parcels subsequently came to be known as Parcel A, a 4.75-acre parcel on the west side of MVP Drive that is currently owned by the Halsells, and Parcel B, a 17.030-acre parcel on the east side of MVP Drive that is currently owned by the Pipers.

The Defendants in this case are Halsells, Pipers and the Owners of eight Lots in the Subdivision who elected not to be Plaintiffs in this case.¹

Notation #5 on the MVP Plat under the heading “Easements,” provides, “AREAS SLOPED AND GRADED FOR ROAD CONSTRUCTION ARE NOT TO BE DISTURBED WITHOUT PERMISSION FROM THE ENVIRONMENTAL CONTROL COMMITTEE (the ‘ECC’).” *Id.* The ECC is appointed by the Association (**Joint Exhibit 1A**, Article IX, §9.2, Page 33).

The Declaration’s Statement of Purpose provides:

[Crescent] desires to **ensure the attractiveness of the Development, to prevent any future impairment thereof, to prevent nuisances and enhance the value of all properties within the Development.** Furthermore, [Crescent] desires to provide “for the construction, maintenance and upkeep of any Common Areas and related easements within the Development, all for the **common use and benefit of all Owners**” [Emphasis supplied] (**Joint Exhibit 1A**, Page 1).

Section 7.9 of the Declaration is an *express grant* to the Association of two non-exclusive perpetual easements (collectively, “the Easements”). Among other things, the Easements are for the purpose of “landscaping and maintaining” the easement areas (**Joint Exhibit 1A**, §7.9, Pages 24-25). The location and dimensions of the easements are clearly defined and depicted on the MVP Plat (**Joint Exhibit 2**). Collectively, the Easements run along the **entire length** of what would later be designated Parcels A and B where they abut MVP Drive. *Id.*

In 2013, Crescent sold Parcels A and B to the Pipers. The deed from Crescent to the Pipers describes the property by reference to a plat that Crescent had recorded shortly before closing. Copies of the deed and plat are **Joint Exhibit 6** and **Joint Exhibit 7**, respectively.

¹ For economy of words, unless the reference is to all Defendants, references herein to “the Defendants” shall mean Rodney Halsell, Barbara Halsell, Graham R. Piper and Christine A. Piper.

Parcels A and B are in the Oconee County Control Free Zoning District, which means they are not subject to zoning of any kind. (Halsell Proposal, **Plaintiffs' Exhibit 3**, Page 1, and testimony of Mr. Piper.) The parcels can be used for residential, commercial or industrial uses (*Code of Ordinances Oconee County, South Carolina*, Chapter 38, Article 10, Sec. 38-10.2 [Control free district (CFD)]). The only construction standards applicable to those properties are set-back requirements and a maximum building height of 65 feet. *Id.*

At trial, Mr. Piper testified that all of Parcel B is in the Oconee County Lake Overlay District. Part of Parcel A also is in the Lake Overlay District (**Plaintiffs' Exhibit 3**, Page 1; *Code of Ordinances Oconee County, South Carolina*, Chapter 38, Article 11, Sec. 38-11.1 [Lake overlay district]).

Except for the lake buffer requirements for waterfront properties, the Lake Overlay regulations for property used for residential purposes impose only one additional restriction, which is a maximum density of two residences per acre (*Code of Ordinances Oconee County, South Carolina*, Chapter 38, Article 11, Sec. 38-11.1(d)(1)(a)(1) [Lake overlay district]). For Parcel B, that is more houses than are in the entire Subdivision.

At trial Mr. Piper erroneously testified that property in the Lake Overlay could only be used for residential purposes. In fact, property in the Lake Overlay District also can be used for commercial or industrial purposes, subject to a Special Exception Hearing by the Board of Zoning Appeals, which is instructed to use Appendix A to the regulations as a guide. For good cause shown, the Board of Zoning Appeals may waive the strict application of any standard in Appendix A (*Code of Ordinances Oconee County, South Carolina*, Chapter 38, Appendix A).

In early September 2020, Mr. Piper told the Association Board (the "Board") that he had an offer to purchase Parcel A for \$200,000.00 (**Plaintiffs' Exhibit 5**), and the offeror wanted to

construct a driveway across the Landscape Easement Area to access a five to six car rustic style residential garage for his car collection.

On September 7, 2020, the Defendants met with the Board to explain the proposal. After the meeting, Mr. Piper sent the Board and the Halsells a handout he had prepared, outlining the proposal and the potential benefits to the Owners and the Association of agreeing to the proposal, viz. no tit-for-tat conflict with the Halsells, residential designation for Parcel A, increased property values (projected investment more than the average value of MVP interior homes), potential to negotiate characteristics of the driveway, and no litigation (Plaintiffs' Exhibit 3).

Two of the alleged benefits (no ‘tit for tat’ with the Halsells and “no litigation”) sounded more like threats. One of them was at best misleading--the zoning of the property does not change because the Halsells have designated their enormous metal garage as “residential,” unless they were to apply for a change in zoning, which they have not done (*Code of Ordinances Oconee County, South Carolina*, Chapter 38, Article 10, Sec. 38.10.2 [Control free district (CFD)]). Moreover, in addition to being incredibly insensitive, the callous notion that their building would increase the value of property in the Subdivision because their investment in their garage will be more than the value of the homes on the interior lots totally misses the point; those are *homes* and they belong in the Subdivision; the Halsells’ garage does not. The potential to negotiate characteristics of the driveway also was not viewed as a benefit because, as hereafter discussed below, those characteristics would need to be approved by the Association or the ECC.

According to Mr. Dorsey’s testimony at trial, following the September 7 meeting, the Board polled the Owners, and Owners of more than 2/3 of the Lots opposed the driveway across the Landscape Easement Area. The reasons for their opposition varied. At trial, Owners testified to some of their concerns, including concern about the aesthetics of the neighborhood, the potential

adverse effect on property values and the precedent they would be setting if they were to grant consent.

According to Mr. Halsell's testimony, several weeks after the September 7 meeting, a representative of the Board emailed the Defendants, advising them that after careful consideration and discussions with the Owners, the Board had determined that granting their request for a driveway would not be in the best interest of the homeowners and therefore, their request had been denied.

Two days later, Mr. Piper sent a letter to Adam Chapman, the Planning Director of Oconee County, seeking support for Halsells' proposed driveway off of MVP Drive. The letter said, in part,

[w]hile a driveway from Doug Hollow Road to the proposed building is possible, such a driveway will require significantly more removal of trees, more earthwork, and result in more hardscape. . . . The Pipers and Halsells believe that a driveway from Doug Hollow Rd. detracts from the wooded nature of the property today. . . . The Halsells as buyers, are looking for some assurance that a driveway on Mountain View Pointe Drive will be allowed by Oconee County or knowing that they have to enter the property from Doug Hollow Rd., they will account for the extended length driveway in their offer (**Plaintiffs Exhibit 7**).

Subsequently, the Association Board (the "Board") met with Larry Brandt, who opined that 100% of the Owners would need to consent to a waiver of rights under the Easements. Mr. Brandt sent a letter to the Pipers explaining his position (**Plaintiffs' Exhibit 4**).

In late November 2020, Mr. Halsell delivered a letter to each Owner, stating that the Halsells were going to close on Parcel A the following week and, if the Owners did not agree to the Halsells' proposal, then due to the topography of the property, Halsells **would be forced** to construct an 802' driveway running right behind "the nice neighborhood monument sign" and which would require them to cut down three times more trees than under their proposal. He offered

to purchase a consent for \$10,000, which he deemed to be “astronomically more than it was worth” (**Plaintiffs’ Exhibit 2**).

On December 4, 2020, the Halsells purchased Parcel A from the Pipers for the reduced price of \$150,000.00 (**Plaintiffs’ Exhibit 8**). In late December 2020, Mr. Halsell applied for and was granted an encroachment permit for a driveway off of Doug Hollow Road (**Plaintiffs’ Exhibit 10** [Application] and **Plaintiffs’ Exhibit 11** [Permit]). The permit is of no consequence to the issue before the Court since the construction of the driveway even with the permit is subject to all matters of record affecting the property.

In a letter dated January 12, 2021, Halsells’ counsel, Mr. Hood, advised that the Halsells believed they had a right to install a driveway in the easement areas, had acquired an encroachment permit and expected to start work soon (**Joint Exhibit 11B**). Mr. Hood urged the parties to try to work out the issues before the project began. The parties’ attorneys scheduled a meeting for January 25, 2021.

On January 22, 2021, the Halsells began clearing an 80’ by 25’ swath of mature trees from the Landscape Easement Area. They then removed the turf from the public road-right-of way, graded the entire cleared area for a driveway and demolished much of the berm in the Landscape Easement Area and roadbed.

Subsequently, the Halsells began construction of a metal building approximately 12,000 sq. feet in area, 140’ long, 70’ wide and 30’ tall. As completion of construction neared, the Halsells posted a “No Trespassing” sign near the base of their driveway and installed cameras to deter anyone from entering the portion of the Landscape Easement Area and MVP Drive that the Halsells had destroyed.

Per Mr. Halsell's testimony, in mid-July 2022, Halsells poured concrete curbing for their driveway and, in August, on the verge of trial, paved the entire driveway. The cost of the paving project, including landscaping, was more than \$43,000.

At the outset of the trial, the Halsells requested to be allowed to amend their answer to assert a defense of easement by necessity.

At trial, Mr. Halsell testified that he told Mr. Dorsey that he would not consent to not putting other driveways off of MVP Drive. The reason given was that he had three more acres and it would devalue his property if they had to be accessed from Doug Hollow Road.

Mr. Halsell testified at length about his efforts to be a good neighbor and he seemed befuddled as to why the homeowners were not interested in negotiating a diminution of their easements. He also seemed to think this conflict is only about his driveway and cannot understand why the homeowners are concerned about precedent that would be set if they were to grant permission for his driveway.

LEGAL ISSUES

At the heart of this case is the Plaintiffs' request for a Declaratory Judgment with respect to the parties' rights and duties under the Declaration and the MVP Plat.

The testimony, evidence and law overwhelmingly support Plaintiffs' contentions that:

- The Easements were granted in the Declaration which was executed with all the formalities of a deed and duly recorded. Therefore, the Easements are valid and enforceable against the current and future owners of Parcels A and B and anyone claiming through them.
- Driveways across the Landscape Easement area are impermissible as a matter of law, or alternatively, because they are inconsistent with the grantor's intent and would interfere with the use and enjoyment of the Easements.
- Removal of vegetation, trimming of vegetation, taking other actions that have a deleterious effect on vegetation, disturbance of the soil in the easement areas,

excavating and paving or the placement of anything in the easement areas that would be visible from the street requires consent, would be contrary to the grantor's intent and would interfere with the use and purpose of the Easements.

- Since the Association's Landscape Easement is first in time, any subsequent easements conferred by Crescent would be subordinate to the Association's Easements, and the subsequent grantee would only have the right to use the servient land in a manner consistent with the terms of the prior Easements granted to the Association [*Howorka v. Harbor Island Owners Assoc.*, 292 S.C. 381, 356 S.E.2d 433 (Ct. App. 1987)].
- This rule is applicable to any rights the Defendants may have acquired as abutting landowners or by virtue of acquiring property described in a plat that depicts MVP Drive.
- There is a justiciable controversy between the Plaintiffs and the Defendants.
- The Halsells are not eligible for or entitled to an easement by necessity.
- The counterclaim is without merit.

The Defendants' affirmative defenses, which seem to be limited only by their imagination, are mostly diversions. The Defendants variously contend:

- The Easements were never granted.
- The Easement could not have been granted under applicable law due to the doctrine of merger of title. Therefore, because Crescent owned the Lots in the Subdivision and Parcels A and B when the Easements were granted, the Easements do not exist and have never existed.
- The Easements were abandoned, there is no justiciable controversy, and the individual Plaintiffs lack standing.
- The easements shown on their plats are unrelated to the easements shown on the MVP Plat.
- They are not subject to the provisions of the Declaration.
- They have a right to driveway access off of MVP Drive because their property abuts MVP Drive and because the plats referred to in their respective deeds depict MVP Drive.
- And finally, the Halsells assert that they are entitled to an easement by necessity.

ARGUMENT

A. CONSTRUCTION OF THE EASEMENTS

A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments [*Binkley v. Rabon Creek Watershed Conservation District*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001)].

Restrictions on the use of property shall be strictly construed, with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenant.

In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole, and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed [*Snow v. Smith*, 416, S.C. 72, 89, 784 S.E.2d 242, 251 (Ct. App. 2016)].

“Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense” [*Plott v. Justin Enterprises*, 374 S.C. 504, 513-514, 649 S.E.2d 92 (Ct. App. 2007), *citing*, *S.C. Public Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (Sup Ct. 1981)]. “The terms of an unambiguous deed may not be varied or contradicted by evidence from sources other than the deed itself” [*Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-392 (Sup. Ct. 1987)].

The language in a deed is ambiguous if it is *reasonably* susceptible to more than one interpretation [*Snow v. Smith*, 416, S.C. 72, 85, 784 S.E.2d 242, 248) (emphasis supplied)]. The ambiguity, however, must be interpreted in light of good faith, reasonableness and what was

necessarily the intent of the parties to the original agreement [*Gardner v. Mozingo*, 293 S.C. 23, 358 S.E.2d 390 (Sup. Ct. 1987)].

At the end of the trial, the Master in Equity asked the parties to think about the appropriate definition of “non-exclusive” in the context of the Easements. Commonsense, informed by the use of “non-exclusive” in other transactional contexts, suggests that in a “non-exclusive” transfer, the transferor retains rights in the retained property including the power to subsequently transfer rights in the retained property to another person; provided, however, neither the transferor nor any subsequent transferee may use the transferred property/right in a manner that limits or diminishes the prior transferee’s rights in the property. Similarly, whether or not the grant expressly states that an easement is non-exclusive, the grantor of the easement – i.e., the holder of the servient estate, can use the transferred property so long as such use does not interfere with the prior easement grantee’s use and enjoyment of the easement.

One way of ascertaining Crescent’s intent (within the four corners of the document as required), is to look at the other easements or rights that are designated as non-exclusive in the Declaration. There are three, one being the grant in Section 3.2 of the Declaration of the easement to the Owners for the use and enjoyment of the Common Areas. Here the term non-exclusive applies to all the Common Areas, not just the Easement Areas. The logical definition in the context of the use and enjoyments of the Common Areas is that the easement is non-exclusive as among the individual grantees.

The second reference is in Section 3.4, “Rights in the Roadways,” which grants each Private Road Lot Owner, Declarant and the Association, their successors and assigns, the perpetual, non-exclusive right to use the Private Roads within the Private Road Easements, for the purpose of pedestrian and vehicular access, ingress, egress and regress to and from

each Private Road Lot, for installation and maintenance of the Private Roads, drainage facilities and other utilities to serve the Private Road Lots. The Private Road Lot Owners rights only extend and apply to the Private Road(s) fronting their respective Private Road Lots. In this instance “non-exclusive” clearly means as “among” the multiple grantees.

Similarly, Section 6A.1 of the Declaration, “Creation of the Lien and Personal Obligation for Boatslip, Supplemental Boatslip and Special Boatslip Assessments,” references “the non-exclusive right to use the pier and access area which comprise the Community Boatslips” (**Joint Exhibit 1A**). That also seems to use the term non-exclusive to mean as among multiple Community Boatslip lessees.

Based upon the uses of the term “non-exclusive” with reference to other easements or rights granted in the Declaration, one could infer that the non-exclusive language in Section 7.9 is intended to mean non-exclusive as between the Declarant and the Association, both of which are grantees of the Easements.

Defendants have yet to substantiate any authority for the proposition that they and the owners of the easements have equal rights. Plaintiffs cannot conceive of a reasonable interpretation that would permit driveway access over the Landscape Easement area.

B. HALSELL’S ACTIONS IN THE EASEMENT AREAS ARE IMPERMISSIBLE

1. CONSTRUCTION OF A DRIVEWAY ACROSS THE EASEMENT AREAS FOR PURPOSES OF ACCESSING PARCELS A AND B IS IMPERMISSIBLE AS A MATTER OF LAW

Many cases hold that under the rule of strict construction, it is improper for a servient estate holder to prohibit an easement owner from using any portion of a clearly defined easement area for the purposes for which the easement was granted, without regard to what is necessary to the

current owner's use or enjoyment of the easement [*Xanadu Horizontal Property Regime v. Ocean Walk Properties Regime*, 306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991) and *Jacobs v. Service Merchandise Co., Inc.*, 297 S.C. 123, 130, 375 S.E.2d 1, 5 (Ct. App. 1988)]. Here the Declarations are clear and explicit:

Declarant hereby grants, establishes, creates and reserves for the benefit of the Declarant and the Association, and their successors and assigns, non-exclusive perpetual easements for the purpose of landscaping and maintaining the entryway and erecting and maintaining the Entrance Monument for the Subdivision [shown] *sic* as 'Entrance Monument Easement' on the Map. Declarant or the Association shall the have right to enter, landscape and maintain the Entrance Monument as an entryway to the Subdivision.

Declarant further hereby grants, establishes, creates and reserves for the benefit of Declarant or the Association and their successors and assigns, non-exclusive perpetual easements for the purpose of landscaping and maintaining the property adjacent to the main entry road for the Subdivision as 'Landscaping Easement' [as shown] *sic* on the Map (**Joint Exhibit 1A**, Article VII, Section 7.9, Pages 24-25).

Although the language on the MVP Plat does not match exactly the terms used in Section 7.9, it is obvious that the terms "Landscape Easement" and "Sign Easement" as used on the MVP Plat refer, respectively, to the Landscape Easement Area and Entrance Monument. Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity [*Jacobs v. Service Merchandise Co., Inc.*, 297 S.C. 123, 128 375 S.E.2d 1, 4]. This insignificant mismatch between the language in Section 7.9 and the legend on the Plat is of no consequence and does not render the Declaration and the Plat as ambiguous.

Entrance Monument is defined in Section 1.16 of the Declaration to mean and refer to the easement areas reserved and granted by Declarant in Section 7.9 of [the] Declaration over a portion of the Common Areas as shown on the [MVP Plat] and any monuments and entrance signs located on such easement areas together with lighting, an irrigation system, landscaping and other Improvements, which may be constructed on such easement areas, to used as an entryway for the Subdivision.

Thus, Entrance Monument refers to the easement area, as well as things located in the area.

Landscape Easement Area is defined in Section 1.25 of the Declaration to mean and refer to the twenty-five (25) foot easement [area] [*sic*] granted by Declarant along both sides of the main entrance road into the Subdivision, all of which shall be maintained by the Association, as more particularly set forth in Section 7.9.

Again, while the drafting may be inartful, in view of the heading and the language used in the preceding paragraph with respect to the Entrance Monument, it is obvious that the word “area” was inadvertently left out of the sentence.

The MVP Plat shows the Landscape Easement Area on the east side of MVP Drive as being a 25’ strip of land adjacent to MVP Drive that begins at the northern border of the Sign Easement and ends at the southern border of Lot 1 in the Subdivision. The MVP Plat shows the Landscape Easement Area on the west side of MVP Drive as being a 25’ strip of land adjacent to MVP Drive that begins at the northern border of the Sign Easement and ends at the Southern Border of Lot 29 in the Subdivision. The location and dimensions of the Sign Easement on both sides of MVP Drive also are set forth with particularity on the MVP Plat (Joint Exhibit 2).

Thus, the area covered by the Landscaping Easement and Entrance Monument Easement is clearly defined. Further, there is no language in the grant that restricts the Association’s use to only a portion of the easement area. Therefore, the language of the easement is unambiguous and must be strictly construed, and it is improper to use extrinsic evidence to contradict the plain language of the deed [*Gardner v. Mozingo*, 293 S.C. 23, 25, 358, S.E.2d 390, 392 (Sup. Ct. 1987)].

The facts of the current case are almost identical to the facts in *Xanadu*. In that case, Third Financial Services granted Xanadu “[a] perpetual **non-exclusive** easement of ingress and egress located on a portion of property of [Third Financial] shown and described on a[n] attached plat” [*Xanadu Horizontal Property Regime v. Ocean Walk Property Regime*, 306 S.C. 170, 171, 410 S.E.2d 580, 581 (emphasis supplied)]. The plat depicting the easement showed a rectangular area

measuring 50 feet wide and 383 feet long, consisting of 0.44 acre, and adjoining South Forest Beach Drive. *Id.*

Subsequently, Ocean Walk, Third Financial's successor in title, granted JHP Hotel Corporation a similar, but not identical, right of ingress and egress over a portion of the same property as to which Xanadu had an easement. JHP contracted with Cleckley and McGee to construct parking spaces on a portion of the property over which both Xanadu and JHP held non-exclusive easements of ingress and egress. *Id.*

Xanadu sought to enjoin Ocean Walk, JHP and Cleckley from constructing parking spaces on the property as to which Xanadu had a perpetual, non-exclusive easement of ingress and egress. *Id.*

The trial judge recognized that the parking spaces “[will] result in the present paved passageway on the easement being narrowed,” but denied the injunction, holding that “the planned parking spaces did not unlawfully [*sic*] interfere with Xanadu’s . . . easement” (*Xanadu Horizontal Property Regime v. Ocean Walk Property Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581 (Ct. App. 1991).

The South Carolina Court of Appeals reversed. It found that the grant of the easement by Third Financial to Xanadu was specific in its terms as to the easement’s width, length and location. Therefore, Xanadu could not be restricted in its use of the ingress/egress easement to any degree by the placement of parking spaces thereon. *Xanadu*, citing, *Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818 (Sup. Ct. 1977), “The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite” and “[t]he expressed terms of the grant are controlling in such case....” (Several other case and treatise citations are

omitted, all of which are in line with *Aladdin*). The Court of Appeals correctly reversed the decision of the trial court in *Xanadu* and remanded the case for entry of an injunction against Ocean Walk (Third Financial's assignee), JHP and Cleckley.

To put the rule of decision here simply, what may be necessary or useful to the servient estate is not controlling [*Aladdin*, 221 Kan. 579, 561 P.2d 818 (Sup. Ct. 1977)].

Xanadu dealt with an easement for ingress and ingress. In *Binkley*, 348 S.C. 58, 69, 558 S.E.2d 902, 909 (Ct. App. 2001), the court applied the same principle to a flowage easement. “(Although, as Rabon Creek argues, it was unnecessary, and in fact improper, for the trial court to take further evidence regarding the intent of the parties to the easement, the trial court correctly found the easement extended to the top of the dam. Given the clear and unambiguous language granting Rabon Creek flowage rights over the dam, the easement without doubt extends to the top of the dam and must be strictly construed).”

The underlying principle of those cases should yield the same result in this case. This case is even more compelling than *Xanadu*, in which the Court of Appeals reversed the trial court determination that the narrowing of the easement did not interfere with *Xanadu*'s right of ingress and ingress. Here, the diminution of the easement area denies the Association access to the area of the easement where it is needed most. The Halsells' driveway across the landscape easement prohibits the Association from landscaping and maintaining the portion of the easement area obstructed by the driveway. Just as in *Xanadu*, the easement area is clearly defined and there is no language in the grant that limits the Associations' use of the Landscape Easement Area to only a portion thereof. Therefore, the language is clear and unambiguous and should be strictly construed.

It should be noted that subsequent cases have determined that if one term of an easement is ambiguous and another is not, the unambiguous term should be strictly construed, whereas further evidence regarding intent is appropriate as to the ambiguous term [*Martin v. Bay*, 400 S.C. 140, 152, 732 S.E.2d 667 (Ct. App. 2012)]. (Finding that the easement's location and boundaries were unambiguous and so were strictly construed. Because there was no mention of access, the Master was entitled to consider all of the circumstances in determining the access that was intended.)

The Court's attention is further invited to the case of *Johnson v. Highway 101 Investments, LLC*, 156 Idaho 1, 319 P.3d 485 (Sup. Ct. 2014), which cites the *Xanadu* case, as well as a multitude of other cases from other jurisdictions, all of which recognize that the majority rule is that a permanent structure is per se unreasonable if it diminishes an easement with definite location and dimensions such as the case here. In the *Johnson* case, a sign was erected within a roadway easement 25' in width thereby reducing the width of the easement by 6' and leaving only 19' unobstructed. In that case, there was no claim that the 19' was insufficient to handle the traffic along said roadway as the traffic along said roadway could easily pass without being blocked or necessarily impeded. The Court reasoned that a permanent structure that does not interfere with the dominant owner's right to use the entire dimension of the easement, such as an underground pipeline, may be lawfully located within the boundaries of the easement if they do not encroach or restrict the dominant owner's easement rights expressly granted. The Court also reasoned that the application of the rule that a permanent structure may not be per se unreasonable if it diminishes an easement with definite location or dimensions where the easement was not conveyed by grant, such as a prescriptive easement or easement by necessity or where the easement was conveyed by grant but lacks a definite location or dimensions. In the case at bar, however, the easement is

definitely located with dimensions expressly set forth and the purpose and intended use of the easement is clearly stated. Accordingly, the *Johnson* Court adopted the majority rule in keeping with *Xanadu* that a permanent structure is per se unreasonable if it diminishes the area of an easement expressly granted in cases where the easement is specifically located, dimensions are expressly set forth and the purpose of the easement is clearly stated. That is exactly the situation in this case as the landscape easement was definitely located, the purpose for the easement was expressly stated, and the boundaries and dimensions of the easement are specifically set forth.

2. CONSTRUCTION OF A DRIVEWAY ACROSS THE EASEMENT AREAS FOR PURPOSES OF ACCESSING PARCELS A AND B IS IMPERMISSIBLE BECAUSE IT WAS CONTRARY TO CRESCENT'S INTENT AND WOULD INTERFERE WITH THE USE AND PURPOSE OF THE EASEMENT.

Even if the court does not agree that driveways across the Easement Areas are impermissible as a matter of law, Plaintiffs contend that they are not permitted because the grantor did not intend that Parcels A and B would be accessed from MVP Drive and because driveways would interfere with the use and purpose of the Association's Easements.

a. Evidence of Crescent's Intent

Crescent was a major developer in the Lake Keowee area. It would have understood the importance of protecting a residential subdivision from neighboring parcels with potentially disparate uses. In addition to the principles and standards that are appropriate to the planning of all subdivisions, under current subdivision regulations, proposed subdivisions that include land that is proposed for commercial, industrial or nonresidential purposes must comply with additional principles and standards (*Code of Ordinances Oconee County, South Carolina* Chapter 32, Article VI, Sec. 32-218 [Nonresidential subdivisions]). Among those principles and standards is the following:

Every effort shall be made to protect adjacent residential areas from potential nuisances from a proposed commercial or industrial subdivision, including the provision of extra depth in parcels backing up on existing or potential residential development and provisions for a permanently landscaped buffer strip when necessary (*Code of Ordinances Oconee County, South Carolina* Chapter 32, Article VI, Sec. 32-218(b)(4)).

There are many indicia that Crescent did not intend that Parcels A and B could be accessed from MVP Drive:

i. The Statement of Purpose in the Declaration

[Crescent] desires to **ensure the attractiveness of the Development, to prevent any future impairment thereof, to prevent nuisances and enhance the value of all properties within the Development.** Furthermore, [Crescent] desires to provide “for the construction, maintenance and upkeep of any Common Areas and related easements within the Development, **all for the common use and benefit of all Owners** (Joint Exhibit 1A, Page 1) [emphasis supplied].

Nothing could be more out of character with a residential neighborhood than exposing the neighborhood to unsightly uses on adjacent properties or increased traffic, noise, and, potentially, nuisances and noxious odors. It is clear from the Declaration that Crescent intended the Landscape Easement to create a natural screen from adjoining uses (or if necessary as in the case at bar by additional plantings to screen the neighborhood from unsightly or noxious uses). The Statement of Purpose in the Declaration makes Crescent’s intent abundantly clear. “. . .[T]o ensure the attractiveness of the Development, to prevent any future impairment thereof, to prevent nuisances and enhance the value of all properties within the Development.”

ii. Parcels A and B are Not on the MVP Plat

The *only* part of Parcels A and B that are included in the MVP Plat with specificity and included in the definition of Property are the Landscape Easement Area and Entrance Monument. (Joint Exhibits 1A, Sections 1.36 and 2). So, although the Defendants purchased their property as described on a plat, Parcels A and B were not identified or described on the MVP Plat.

iii. Location of the Entrance Monument

The Entrance Monument is at the intersection of MVP Drive and Doug Hollow Road, not at the start of Lots 29 and 1, those being the southernmost homesites in the Subdivision. As noted below, the easement areas are designated as “Common Areas,” so clearly, they are inside the Subdivision.

iv. The Easements granted to the Association run the entire length of both Parcels A and B.

The Easements granted to the Association run the entire length of both properties. That fact further supports the idea that the Easements were intended, at least in part, to provide a buffer from property not subject to all provisions of the Declaration and the potentially disparate uses to which those properties could be put.

v. Crescent Designated Easements Granted to the Association as Being Part of the Common Areas.

Section 1.12 of the Declaration defines “Common Area” and “Common Areas” specifically to mean and refer collectively to certain specified items, such as the Entrance Monument and Landscape Easement Area, as well as to “any other property designated on the [MVP Plat] as ‘Common Area,’ ‘Common Open Space,’ ‘COS’ or other similar designation” (Joint Exhibit 1A, Page 3). It cannot have been intended that driveways of abutting owners would be included in the Common Areas.

vi. Contrary to the Defendants’ Assertions, Crescent Made the Easements, the Easement Areas and the Roadways Subject to Certain Provisions of the Declaration and MVP Plat.

By virtue of being designated as Common Areas, the Easement Areas are included in the definition of “Property” under Section 1.36 of the Declaration. Also expressly included in the definition of Property are “easements that the Association may have or hereafter acquire in any

property adjacent to the Development.” “Property” also includes the Roadways in the Subdivision (**Joint Exhibit 1A**, Page 5).

Paragraph 5 of the Statement of Purpose in the Declaration provides that. “Declarant desires to subject the Property to the covenants, conditions, restrictions, easements, charges and liens hereinafter set forth, each and all of which is and are for the benefit of the Property and each (**Joint Exhibit 1A**, Statement of Purpose, Page 1, Paragraph 5).

Thus, by virtue of being “Property,” the Easements, the Easement Areas and the Roadways are expressly made subject to the Declaration. Although most provisions of the Declaration specifically apply only to Lots or Owners, some are also applicable to the “Property,” most notably Section 9.1 of the Declaration, which says, in relevant part,

Notwithstanding anything contained in this Declaration to the contrary, **no construction activity of any type including, without limitation, . . . erection of any Improvements or exterior additions or alterations to any Improvement on the Property. . . .** shall be commenced erected or maintained until. . . an application for approval has been submitted to the ECC and. . . the ECC has given written approval for the plans and specifications for the Improvements, the location of such Improvements, and the commencement of construction, all in accordance with the terms and requirements of the Guidelines (**Joint Exhibit 1A**, Page 33).

Currently, the Environmental Control Committee (“ECC”) is comprised of the Association’s Board members.

Under Section 1.21 of the Declaration, “‘Improvement’ or ‘Improvements’ mean any and all man-made changes or additions to any portion of the Property” (**Joint Exhibit 1A**, Page 4). Since this approval applies to both the Common Areas and the Roadways, ECC approval would be required for a driveway to be constructed over MVP Drive and over the Easement Areas.

In addition to the rule governing the Roadbeds in Section 9.1 of the Declaration, Notation #5 under the heading “Easements” on the MVP Plat provides, “Areas sloped and graded for Road Construction are not to be disturbed without permission from the [ECC]” (**Joint Exhibit 2**).

Moreover, Notation #5 on the MVP Plat and the application of Section 9.1 of the Declaration to the Roadways are not dependent on the Easement Areas being part of the Common Areas.

b. A Driveway over the Easement Areas Would Interfere with the Use and Purpose of the Easements.

Defendants narrowly construe the Association’s Easements to be somehow limited to the existing plantings and landscaping, but the Easements are not so limited, and, in fact, the breadth of the Landscape Easement entitles the Owners to make adjustments as circumstances change and, potentially, to landscape 100% of the Landscape Easement Area.

Mountain View Pointe is a peaceful, heavily wooded residential neighborhood (unlike Parcels A and B), and the Lots and the Owners in the Subdivision are subject to **all** of the Covenants, Conditions and Restrictions in the Declaration.

The Subdivision has a long, wooded entrance. Owners testified at trial that they were reassured by the trees along MVP Drive, and the expectation was that the trees would mature and be even more effective as a screen, which has turned out to be the case. The Association has chosen to maintain much of the Easement Areas in their natural, wooded state as, up until now, they provided a shield from the adjacent properties and the potential disparate uses to which they could be put.

There were no improvements on Parcels A or B until the Halsells started their construction. Hence there was no need to provide additional landscaping in the Landscape Easement Area. This

approach is consistent with fulfilling the Statement of Purpose in the Declaration. It is also consistent with a growing trend to leave natural vegetation, shrubs and trees as ecologically friendly landscaping [*Pennsylvania Wildlife, "Neighborly Natural Landscaping,"* The Pennsylvania State University (2016) (Attached Hereto)]. A material part of the natural landscaping that enhanced the beauty and value of properties in the MVP Subdivision has been removed by the Halsells and it will be necessary going forward for the Association to plant additional trees and shrubs to obscure the view of the Halsells' 30 foot tall, 10,000 square foot building. Based on statements by the Pipers as to their potential uses of Parcel B, the Association will in all likelihood be called upon to plant screening vegetation in the Landscape Easement Area on the Pipers' side of MVP Drive to buffer any unsightly uses and views of Parcel B.

Parcels A and B are in a Control Free District, which means for all intents and purposes they are not subject to any zoning or use restrictions. As mentioned previously, Oconee County Planning and Zoning regulations describe what uses of property are prohibited in a Residential District. They include things such as salvage yards and junkyards, mini storage units, light manufacturing, heavy manufacturing, waste management services, and retail uses of up 5,000 to 50,000 sq feet. **All** those things are permitted in the Control Free District. As a result, there could be multiple uses on a single property, or there could just be more massive metal "residences" that could be up to 65 feet tall, even in the Lake Overlay District.

Parcels A and B are effectively unzoned and there are no restrictions on what can be developed on those parcels, except for some minimal restrictions on residential density and some additional standards applicable to commercial and industrial uses which in no way makes properties used for such purposes appropriate for a residential neighborhood. Taken to its logical

conclusion, the position urged by the Defendants could lead to a paving over the entire Easement Areas and the absurd result that Crescent's grant of the Landscape Easements means nothing.

Only the Easement Areas on Parcels A and B, not the entirety of the Parcels, are subject to a limited few of the restrictions in the Declaration: those are binding on the Defendants and those limitations should be enforced in order to protect the integrity of the Easements so they can fulfill the purposes for which they were granted, to wit, to permit the Association to use the Easement Areas to screen unsightly buildings and/or noxious uses.

It is impossible to landscape concrete, and it is ironic that the Halsells destroyed the Landscape Easement Area just where it was most needed. And the same would be true of every other driveway which would not permit screening of the property it accesses. Plus, under the Defendants' reading of the term "non-exclusive," every time the property turned over, or the owners peeled off another section of the property to sell or rent for a new use, the Association would have to negotiate how much of the Landscape Easement they would give up to accommodate those new uses.

3. REMOVAL OF VEGETATION, TRIMMING OF VEGETATION, TAKING OTHER ACTIONS THAT HAVE A DELETERIOUS EFFECT ON VEGETATION, DISTURBANCE OF THE SOIL IN THE EASEMENT AREAS, EXCAVATING AND PAVING, OR THE PLACEMENT OF ANYTHING IN THE EASEMENT AREAS THAT WOULD BE VISIBLE FROM THE STREET ALSO REQUIRES CONSENT, WOULD BE CONTRARY TO THE GRANTORS INTENT AND WOULD INTERFERE WITH THE USE AND PURPOSE OF THE EASEMENTS

For the reasons set forth in the introductory paragraphs of Section 2(a) and in subsections 2(a) (i, iv, v and vi), the actions described in the heading clearly were not intended by Crescent. Also, the reasons that driveways would interfere with the use and enjoyment of the Easements described in Section 2(b) are equally applicable to the actions described in this section. In addition,

the actions described in this section would require the Association to undertake landscaping measures that would not otherwise be required and would be inferior to the status quo in fulfilling the purpose for which the Easements were granted.

C. THE DEFENDANTS ARE BOUND BY THE EASEMENTS

The deed of Parcels A and B from Crescent to the Pipers (the “Piper Deed”) references a plat recorded by Crescent (the “Piper Plat”) prior to the date of Crescent’s deed to the Pipers (**Joint Exhibit 6** and **Joint Exhibit 7**, respectively).

The deed from the Pipers to the Halsells (the “Halsell Deed”) (**Joint Exhibit 9**) references a survey (the “Halsell Plat”) prepared for the Halsells who recorded it with the Oconee Register of Deeds prior to the date of the Halsell Deed (**Joint Exhibit 10**).

In their Motion for Summary Judgment, the Halsells (i) misconstrue the derivation of the Halsell Deed (**Halsells’ Motion for Summary Judgment**, A.1, Page 2), (ii) deny any link between the Landscape Easement and Sign Easement on the MVP Plat and the easements on the Halsell Plat (*Id.*, A.4, Pages 4-5), (iii) assert that the easements shown on the Halsell Plat were reserved in the deed from Crescent to the Pipers (the “Piper Deed”) (*Id.*, B, Page 4), and (iv) that the Plaintiffs, as Assignees of Crescent, were therefore estopped from denying Halsells’ access to MVP Drive (*Id.*, B, Pages 4-5). These baseless premises are contrary to well settled real property law; yet they pervade much of the Halsells’ argument. Likewise, the Pipers’ Motion for Summary Judgment asserted that while the Piper Deed provides that the property conveyed is subject to matters affecting title on the Piper Plat and easements of record, it did not reference the Landscape Easement or the MVP Plat (**Pipers Motion for Summary Judgment**, II.X., Page 6).

As well, the Pipers’ Motion for Summary Judgment asserts: “Parcels ‘A’ and ‘B’ are not and have never been subject to the CCR’s of the Mountain View Pointe subdivision, including,

but not limited to any reference therein to a Landscape Easement or Entrance Monument Easement. It is of no relevance that the 2013 Crescent Deed to the Pipers generically references a ‘Plat’ and ‘easements’ because Crescent was the owner of the parcels at the time of conveyance” (*Id*, III. 3., Pages 8-9).

These factual errors are fundamental to many of the Defendants’ incorrect conclusions as to the burdens that were imposed on Parcels A and B by the Declaration and the MVP Plat. Section 2(a)(vi) above discusses in detail the provisions of the Declaration and MVP Plat that require the Associations or the ECC’s approval of construction in the Easement Areas. Therefore, in order to simplify the legal analysis, it is necessary to clarify the facts.

Crescent’s conveyance to the Pipers of Parcels A and B was subject to “easements, covenants, restrictions and conditions of record,” and “zoning, subdivision, land use and other laws, regulations or ordinances applicable to the Property” (**Joint Exhibit 6**). Notably, the derivation in the Piper Deed goes back to 1965, the date Crescent’s affiliate acquired the subject property. *Id*.

In what is a too clever attempt to bolster the Pipers’ and Halsells’ defenses, the deed from the Pipers to the Halsells (the “Halsell Deed”) only recites that it is subject to, “those easements and/or rights-of-way as may appear on the premises and/or of record and all zoning and setback requirements.” In the Halsell Deed, the Defendants purposely omitted the language from the Piper Deed that Parcel A was subject to “covenants, restrictions and conditions of record” and “subdivision, land use and other laws, regulations or ordinances applicable to the Property,” (**Joint Exhibit 6**). To complete their unsupportable end run around the facts and applicable law, the Pipers included a derivation clause in the Halsell Deed that only goes back as far as the Piper Deed. *Id*. The Defendants’ clever drafting omissions do not change the enforceability by the Plaintiffs

against the Defendants of the Landscape and Sign Easements or the provisions detailed in Section 2(a)(vi) above.

Obviously, the Pipers could only convey what they had to the Halsells, viz, property subject to all the burdens to which the property was subject in the hands of the Pipers. Therefore, the Halsells are bound by and subject to items in the Piper Deed that were omitted from the Halsell Deed. The derivation of the Halsell Deed and Halsells' chain of title also go back to 1965.

The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument or writing which forms a link in a chain of title to the property proposed to be acquired [*Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (Sup. Ct. 1975)]. Moreover, the purchaser is bound to exercise diligence in pursuing the inquiries thereby suggested [*Beck v. Railroad*, 99 S.C. 310, 83 S.E. 335 (Sup. Ct. 1914); *Oliver v. McWhirter*, 112 S.C. 555, 100 S.E. 533 (Sup. Ct. 1919)].

The MVP Plat and the Declaration were duly recorded in 2002. Therefore, both are a link in the Pipers' and the Halsells' chains of title, and the Pipers and Halsells are deemed to have constructive notice of the provisions thereof. Likewise, Halsells are deemed to have constructive notice of the Piper Deed, which was recorded in 2013. In addition, the Pipers most certainly have actual knowledge of the MVP Plat and Declaration, since Mr. Piper testified that a copy of the Declaration was given to them prior to or upon the purchase of their Lot in the Subdivision, and the MVP Plat was referenced therein. Mrs. Piper previously served on the Association Board. Moreover, the initial Halsell proposal cited provisions of the Declaration (**Plaintiffs' Exhibit 3**).

D. CLEARLY THERE IS A JUSTICIABLE CONTROVERSY WITH RESPECT TO THE DEFENDANTS

The South Carolina Supreme Court has clarified that, “Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for invocation of declaratory judgment action [*Power v. McNair*, 255 S.C. 150, 153-154, 177 S.E.2d 551 (Sup. Ct. 1970)].

The Association made it clear to both the Defendants that neither of them had a right to a driveway across the Easement Areas. Mr. Hood’s letter of January 12, 2021, which advised the Association that Halsells believed they did have a right to install a driveway in the Landscape Easement Area, had acquired a permit and expected to start work soon, most certainly evidenced a justiciable controversy (**Plaintiffs’ Exhibit 11B**). Ms. Prescott and Mr. Trojan testified that Mr. Piper said he intended to make multiple driveway cuts off of MVP Drive. Although Mr. Piper denied having said that, the Pipers’ Motion for Summary Judgment, which alleges that the Easements were never granted and never existed, as well as Pipers’ Answers to the Amended Complaint, make it abundantly clear that there is a justiciable controversy as to the Pipers.

E. SECTION 7.9 OF THE DECLARATION IS AN EXPRESS GRANT OF THE EASEMENTS TO THE ASSOCIATION

The Declaration was signed by a representative of Crescent on October 20, 2002, in the presence of two witnesses and was acknowledged before a notary public of the State of North Carolina (**Joint Exhibit 1A**, First Page and Signature Page 42). Thereafter it was filed with and became a part of the real property records of the Oconee County Register of Deeds.

The granting language in Section 7.9 of the Declaration is clear. **Declarant hereby grants, establishes, creates and reserves for the benefit of Declarant and the Association,**

and their successors and assigns, non-exclusive perpetual easements” (*Id.*, Article VII, §7.9, Page 25).

It does not matter that Section 3.1 of the Declaration provides “[o]n or before ten (10) years from the date [the Declaration is] recorded, Declarant shall convey fee simple title by limited warranty deed (or grant of easement) to the Common Areas to the Association” (**Joint Exhibit 1A**, Page 7). The fact that Crescent could grant easements in other documents in no way impacts the validity of the grant to the Association contained in Section 7.9 of the Declaration. There were no separate grants of the Easements because none were required. The language in Section 3.1 of the Declarations clearly applies only to easements granted after the Declaration was filed.

There were no conditions to the grants, and the Declaration was executed with the formalities of a deed and duly recorded, therefore, the grants were effective on the date of recordation.

In their Motion for Summary Judgment, the Pipers stated, incorrectly, that by a deed recorded April 13, 2005, (the “Original Deed”), Crescent deeded to the Association the “Common Open Areas” identified in the MVP Plat (**Pipers Motion for Summary Judgment**, §2.T). Further, they asserted that, in a Corrective Deed recorded on June 20, 2004, **Joint Exhibit 4**, the Association deeded that “same” property back to Crescent, and that Crescent never deeded the area containing the Landscape Easement back to the Association (*Id.*, §2.U). Copies of the Original Deed and the Corrective Deed are **Joint Exhibit 3** and **Joint Exhibit 4**, respectively.

Pipers’ confusion is based on an erroneous assumption in footnote 1 of their Motion for Summary Judgment, that “Common Areas” are interchangeably referred to as “Common Open Area” or “Common Open Space” (**Pipers Motion for Summary Judgment**, II.J., Page 4).

In fact, “Common Area” and “Common Areas” are umbrella terms that include the items specified, no one of which may be used interchangeably with the terms “Common Area” or “Common Areas” :

Section 1.12 of the Declaration defines “Common Area” and “Common Areas” specifically to mean and refer *collectively* to the Entrance Monument, Street Lights, Landscape Easement Area, Public Roads (prior to their acceptance for maintenance by the Oconee Public Works Department or other governmental entity) any other property designated on the [MVP Plat]] as “Common Area,” “Common Open Space,” “COS” or other similar designation” (**Joint Exhibit 1A**, Page 3).

There is no property on the MVP Plat labeled “Common Open Space,” so none was conveyed in either the Original Deed or the Corrective Deed. There is an approximately .057 acre parcel located adjacent to Lot 7 and 8 that was labeled “COS,” as well as an access easement in favor of the Boatslip Owners running along the boundary line between Lot 7 and 8. In a Replacement Deed dated August 18, 2008, Crescent deeded back the area labeled on the MVP Plat as “COS” and the access easement, “[that] being the identical property conveyed to Crescent in the [Corrective Deed].” Exhibit B to the Replacement Deed (**Plaintiffs’ Exhibit 19**). Clearly, the deed (transaction) did not involve the Sign Easement off of Doug Hollow Road or the Landscape Easement clearly delineated and defined on both sides of MVP Drive.

The Easements described in the Declaration are very much like the easements characterized in **Briarcliffe Acres v. Briarcliffe Realty Co.**, 262 S.C. 599, 206 S.E.2d 886 (Sup. Ct. 1974). In **Briarcliffe**, the South Carolina Supreme Court interpreted a similar declaration in which a developer agreed to “vest with [the owner’s association] the rights, powers and privilege of management and control over . . . the lakes, parks, roads, easements, beach-front areas and other facilities of nature and kind for the general use of the community.” *Even without an express grant of an easement*, the Court held that the declaration effected a dedication to private uses of the

common areas, which is nothing more or less than an easement [*Id.*, 262 S.C. 599, 206 S.E.2d 886 (Sup. Ct. 1974)]. The court further held the easement was perpetual and irrevocable and affirmed the trial court's order enjoining the developer from interfering with the owners' association's exercise of its management and control of the common areas.

Thus, even if it were determined that there never had been an express grant of the Easements, the holding in *Briarcliffe* suggests that one was created by the language of the Declaration itself, particularly whereas in this case, protection of the screening provided by the wooded entryway was assumed or expected to be a protected part of the Development and was an inducement to the purchase of lots.

F. *WINDHAM V. RIDDLE AND THE DOCTRINE OF MERGER OF TITLE HAVE NO BEARING ON THIS CASE.*

In their Motion for Summary Judgment, the Pipers allege that due to the holding in *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578 (Sup. Ct. 2009), no Landscape Easement or Entrance Monument Easement was created by either the MVP Plat or the Declaration.

In *Windham*, Covington, who owned two Tracts of land (1-A and 1-B) entered into an unrecorded installment sale contract with Windham for Tract 1-B, retaining title until all payments under the contract had been made. The contract also said Covington would have a 50' easement across Tract 1-B for the maintenance of an irrigation system. Before Windham had finished his payments under the contract, Covington sold Tract 1-A to the Riddles, subject to the irrigation easement. A year or so later, Covington transferred title to Tract 1-B to Windham, who filed a Declaratory Judgment action asserting that the easement was an easement in gross granted only to Covington. Therefore, the easement was extinguished upon the sale of Tract 1-A to the Riddles. Ultimately, the South Carolina Supreme Court agreed with Riddle's assertion that the easement was in gross.

The Court also agreed with the Court of Appeals' determination that because, at the time the installment contract was signed Covington held title to both the dominant and servient estates, an easement "could not have been created" at that time [*Windham*, 381 S.C. 192, 672 S.E.2d 578 (Sup. Ct. 2009)].

The lower court's decision was based on *Haselden v. Schein*, 167 S.C. 534, 539, 166 S.E. 634, 635 (Sup. Ct. 1932), which reasons, "[t]here can be no doubt that, if the owner of the servient estate over which a right of way exists, acquires the fee-simple title to the dominant estate, the right of way is extinguished, because the essential ingredient of a right of way would be wanting; it would not be a right of way over another's land, but over his own land."

Pipers erroneously assert that because Crescent held title to both the dominant estate (the Subdivision) and the servient estate (Parcels A and B), at the time of the creation of the Subdivision, neither a Landscape Easement nor Entrance Monument Easement exists and have never existed (**Pipers Motion for Summary Judgment**, IV., Page 4).

Fundamentally, Pipers' position is not consistent with the law governing subdivisions. Under current regulations, lots proposed to be created through the creation of a subdivision may not be sold until a final plat showing the subdivision has been approved by the planning director and recorded with the Oconee County Register of Deeds [*Code of Ordinances Oconee County, South Carolina*, Chapter 32, Article VI, Sec. 32-220(a)]. Therefore, the developer of a subdivision necessarily owns all of the land in the subdivision at the time of recordation. If the Pipers are correct, all easements set out in subdivision declarations and plats are extinguished the moment they are recorded with the Oconee County Register of Deeds. Moreover, easements are broadly defined in the regulations to include "one or more specific property rights by the property owner permitting a specific use or uses to the public, a corporation, or another person or entity" (*Id*).

Plaintiffs see no way to reconcile Pipers' position with how subdivisions work. The reservation, private dedication and grant of easements from the developer of a platted subdivision to an owner's association and/or the property owners in the development is commonplace and unassailable.

Also, *Windham* is inapposite because it is predicated on the fact that the grantor and the grantee of the easements were the same. In this case, the grant in the declaration was from Crescent to the Association, which is a legally separate, non-profit mutual benefit corporation. Therefore, there was no merger of title. The Declaration containing the grant was executed by Crescent with all the formalities of a deed and filed of record with Oconee County.

G. THE HALSELLS AND THE PIPERS DO NOT HAVE A RIGHT OF DRIVEWAY ACCESS FROM MVP DRIVE

The Halsells cite several cases involving eminent domain or public obstruction of road access that establish that in South Carolina, a property owner has a private easement for access to and from any public road that abuts his/her property, as an appurtenance thereto, regardless of whether he/ she has access to and from an additional public road [*Hardin v. SCDOT*, 371 S.C. 598, 641 S.E.2d 437 (Sup. Ct. 2007) and *S.C. State Highway Dept. v. Allison*, 246 S.C. 389, 143 S.E.2d 800 (Sup. Ct. 1965)].

But this case is not about eminent domain or a public obstruction of the rights of an abutting owner. The Pipers and the Halsells acquired their property subject to "easements, covenants, restrictions and conditions of record," and "zoning, subdivision, land use and other laws, regulations or ordinances applicable to the Property."

The right to driveway access that the Defendants assert is a private easement. In *Howorka v. Harbor Island Owners Assoc.*, 292 S.C. 381, 356 S.E.2d 433 (Ct. App. 1987), the court established a hierarchy of easements:

The grantor of an easement retains dominion and use of the servient estate only to the extent his actions do not interfere with the grantee's reasonable enjoyment of the easement. Thus, any easement subsequently granted is subordinate, and the subsequent grantee acquires only the right to use the servient land in a manner consistent with the terms of the prior easement.

That notion also is inherent in the *Xanadu* decision insofar as the holding precluded both the servient estate owner and the subsequent grantee of an easement from using the property in a way that violated the prior easement granted to Xanadu [*Xanadu*, 306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991)].

The application form for an encroachment permit is appended to *State of South Carolina County of Oconee Ordinance 2013-16*. It requires the applicant to certify:

OCONEE COUNTY'S APPROVAL, PERMITTING OR INSPECTION(S) OF THIS PROJECT DOES NOT MEAN THAT THE PROJECT IS IN COMPLIANCE WITH ALL APPLICABLE SUBDIVISION, AND/OR HOMEOWNER'S ASSOCIATION, OR SIMILAR ENTITY'S BUILDING AND LAND USE REQUIREMENTS OR RESTRICTIONS. BY SIGNING BELOW, YOU ACKNOWLEDGE THAT COMPLIANCE WITH ANY SUCH STANDARDS IS YOUR RESPONSIBILITY.

That language clearly acknowledges that compliance with applicable Subdivision and/or Homeowner's Associations Restrictions is required even though an encroachment permit may be granted.

As previously discussed, per notation #5 on the MVP Plat ("Areas Sloped And Graded For Road Construction Are Not To Be Disturbed Without Permission From The Environmental Control Committee") and Section 9.1 of the Declaration, installing a driveway over MVP Drive

and/or the Easement Areas requires ECC approval. And, even if approval were granted (or deemed to be not required) it would only give access over MVP Drive, not the Landscape Easement Area. That would require approval from the ECC under Section 9.1 of the Declaration, which requires ECC approval of Improvements on the Property, and a waiver of the Association's and Owners' rights under their respective easements, because driveways are not permitted in the easement areas as a matter of law and/or because they interfere with the use and purpose of the easement, and Crescent did not intend to grant a private easement for driveway purposes.

Additionally, the Defendants' purchasing the Parcels subject to the burden of the Association's Easements as well as covenants, conditions, restrictions of record and subdivision regulations amounts to a waiver by them of any rights to construct a driveway in the Easement Areas.

H. THERE IS NO EVIDENCE THAT THE ASSOCIATION HAS ABANDONED ITS EASEMENTS

In determining whether an easement has been abandoned, the intention of the owner to abandon is the primary inquiry [*Carolina Land Company, Inc. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (Sup. Ct. 1975)]. The intent to abandon need not be express but may be inferred from all the facts and circumstances of the case. *Id.* In order to prevail on a claim of abandonment, the Defendants must prove "the abandonment by clear and unequivocal evidence." *Id.*

"The mere non-use of an easement for a period of however long does not amount to an abandonment, but there must be other action by the dominant estate owner that manifests either a present intent to relinquish the easement or purpose inconsistent [with the easement's] further existence." *Id.*

As already discussed, prior to the Halsells beginning construction, there was no need for any active landscaping, planting or maintenance. The natural beauty of the trees and shrubs in the Landscape Easement area functioned very well to screen MVP Drive from disparate, noxious or unsightly uses by the owners of Parcels A and B. Halsells' actions and those threatened by the Piper have (or will in the future) make active management of vegetation in the Easement Area essential to achieving its purpose, to wit, to screen MVP Drive from disparate development of Parcels A and B. The record is devoid of any evidence that the Association has abandoned its rights to the Easements.

I. THE HALSELLS ARE NOT ENTITLED TO AN EASEMENT BY NECESSITY

The elements of a claim for easement by necessity are (1) unity of title, (2) severance of title, and (3) necessity [*Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012)]. “The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible.” The necessity element of easement by necessity must exist at the time of the severance and the person claiming a right to an easement by necessity must not create the necessity when it would not otherwise exist. This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel” [*Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012)].

Plaintiffs concede that the Halsells satisfy the unity and severance criteria. There is, however, no evidence that a necessity existed at the time of severance or now exists. MVP Drive did not exist until Crescent cut through the terrain immediately adjacent to the Halsells property to create MVP Drive, and the Halsells' property abuts a state highway (Doug Hollow Road). Mr.

Halsell testified that due to the topography of the property there was no other place he could put his building. Mr. Dorsey, who had been a builder, testified that Seneca was in the foothills of the Appalachian Mountains, so that building here necessarily means moving dirt. Upon his review of the topo map, Mr. Dorsey testified that he believed there were several alternatives for siting the Halsell's building on the property. Apparently, Mr. Halsell believed that also. On the witness stand Mr. Halsell acknowledged that he had told Mr. Dorsey that he would not agree to no more driveway cuts off of MVP Drive because that would devalue his property if others had to access their building off of Doug Hollow Road. That statement amounts to an admission that there are building sites on Parcel A other than the one the Halsells chose for their building.

Clearly any claimed necessity is of the Halsells own doing. In December 2020, Mr. Halsell applied for and was later granted an encroachment permit from SCDOT for a driveway off of Doug Hollow Road. Mr. Halsell now claims it will cost him as much to build a drive off of Doug Hollow Road as it cost to purchase the property (which is a convenient estimate since some jurisdictions use that amount as a measure of necessity; however, South Carolina does not use this standard for determining necessity). Of course, a driveway off of Doug Hollow Road will cost more than a driveway off of MVP Drive, since the Halsells sited their building entrance on their 4.75 acre property 802 feet from Doug Hollow, but only 75 feet from MVP Drive.

It is also of note that Mr. Halsell negotiated a \$50,000 reduction from his original offer price for having to bring in a driveway off of Doug Hollow Road (**Plaintiffs' Exhibits 6 and 8**). Mr. Piper admitted that if Mr. Halsell had to access his property from Doug Hollow, he was going to have to adjust the price. At trial, Mr. Piper reiterated that Mr. Halsell in fact had reduced the price for that reason. When asked whether the reduction might have been related to the cost of

potential litigation, Mr. Piper said he never would have agreed to pay the Halsell's attorneys' fees since he would have his own attorneys' fees to pay.

Additionally, per Mr. Halsell's testimony, in late summer 2022, with the trial scheduled for mid October, Mr. Halsell paved and landscaped his driveway at a cost of almost \$44,000. That is money that could have been applied toward the cost of a driveway off of Doug Hollow. Moreover, the cost to remediate the paved areas back to their natural state will be greater than if he had just left his gravel driveway in place until the issues in this lawsuit were resolved.

In *Boyd v. Bellsouth Telephone*, 359 S.C. 209, 597 S.E.2d 161 (Ct. App. 2004), the Court of Appeals explained that:

The doctrine of easement by necessity is based upon the presumption that the grantor intended the grantee of a landlocked parcel to have access to his property, a right recognized as essential to the enjoyment of the land. Thus this doctrine only provided reasonable access to the dominant estate when there is [no other access to the grantees property]; it [the doctrine of easement by necessity] does not provide a means for ensuring a preferred method of access to a particular portion of the tract when access to the tract is otherwise available.

The Halsells made the decision to site their building far from Doug Hollow Road, which was and remains a viable access point to their property. They proceeded with construction of the building and landscaping and paving over an 80 foot wide section of the Landscape Easement with full knowledge that the Association and the Owners objected and would likely file suit to protect their interest in the benefits of the Easements. Under these circumstances this Court should give no weight to claims by the Halsells of a right to an easement by necessity and that request should be denied.

J. THE COUNTER CLAIM THAT ALLEGES UNAUTHORIZED SPECIAL ASSESSMENT TO FUND THE EXPENSES OF THIS LITIGATION IS BASED ON A MISREADING OF THE LANGUAGE OF SECTION 5.5 OF THE DECLARATION.

The levy of the Special Assessment to fund legal expenses is within the Board's authority under Section 5.5 of the Declaration, which reads:

In addition to the Annual Assessment authorized above, the Association may levy, in any calendar year, a Special Assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of (i) the construction of any Common Area Improvements which are not originally constructed by Declarant; (ii) the reconstruction, repair or replacement of the Common Areas, including all Improvements located thereon, and including fixtures and personal property related thereto; or (iii) *any other extraordinary, unanticipated cost which cannot otherwise be funded through the established Assessments for that current year.*[emphasis supplied]

Once again, the Pipers rely on a strained and unworkable interpretation of a provision in order to support their spurious claims. Anyone who has ever diagrammed a sentence would conclude that in the following phrase: "the Association may levy, in any calendar year, a Special Assessment applicable to that year only for the purpose of defraying, in whole in part the cost of . . ." the words "applicable to that year only" modify the Special Assessment. Thus, the import of that language is that the Special Assessment is non-recurring. It does not say, "for the purpose of defraying costs incurred in the current year," which is how the Pipers read that phrase.

Especially in a situation like the one here, where it is impossible to foresee the turns the litigation might take (whether it will settle, whether the Defendants will file meritless motions for summary judgment, etc.), or to project the amount that is going to be incurred in a specific timeframe. These expenses were both unanticipated and extraordinary. The Board never anticipated that the owners of Parcels A and B, which are not part of the Subdivision, would (i) assert a right to access their property from a road in the Subdivision without the permission of the

Association or the ECC as required by notation #5 on the MVP Plat and Section 9.1 of the Declaration, and in violation of the Association's Easements, (ii) disturb the area that was graded and sloped for road construction, (iii) remove the sod in the roadbed, (iv) put an 80' gash in the Landscape Easement Area by removing all vegetation therein, (v) regrade the Landscape Easement Area and the roadbed, (v) destroy the berm and (vi) pave a 40 foot wide part of the Landscape Easement.

Although the Halsells originally sought the Associations permission for their proposed construction of their driveway, when it was denied, they moved forward with construction anyway. Moreover, the driveway they have constructed is not the 25' driveway they proposed, but a 40' driveway for which they cleared a 49' width of land at the curb and an 80' width of land at the top of the Landscape Easement Area. The Board initiated the lawsuit with the concurrence of a super-majority of the Owners who agreed that, in light of the foregoing events, the action was necessary to defend and protect the aesthetics of the Subdivision and the value of the Owners' properties. The fact that the Board has paid legal expenses in the past does not change the fact that the expenses in this action are extraordinary, due both to the anticipated amount and the principles at stake in the lawsuit.

MEANING OR DEFINITION OF LANDSCAPING

Upon conclusion of the trial of this matter, the Court requested the parties address the word landscaping and the definition of the term in the Briefs to follow so as to assist the Court in determining what the word means and/or encompasses.

In response to that direction, Plaintiffs submit that the term must be interpreted to mean what Crescent Properties intended it to mean when it placed the Covenants, Conditions and Restrictions on the property and recorded the plat of Mountain View Pointe creating what is called

the Landscape Easement and Monument Area. Clearly, Crescent did not mean driveways across the easements along Mountain View Pointe Drive as Crescent gave to the POA control of all common areas and imposed upon it not only the authority but an absolute duty to maintain the easement areas and empowered the POA to assess the property owners for the cost of the maintenance of the easement. It is, therefore, submitted that the Court need not look any further than the documents of record and its statement of purpose to determine what Crescent Communities intended the term to mean when the easement was granted and it did not include driveways off of Mountain View Pointe Drive.

Notwithstanding Plaintiffs' belief that consideration of anything but Crescent's intention is merited, Plaintiffs' counsel has researched the term in an effort to find a legal definition; however, there does not seem to be one. Most cases touching on the subject are in the context of interpreting HOA documents, master deeds and governmental regulations and statues and is what the Plaintiffs urge the Court to do here in determining Crescent's intent when it placed the easements on the property. One definition of landscaping that Plaintiffs have found states that "landscaping means an area used for trees, plants, decorative stonework, retaining walls, walkways or other landscape or architectural elements and may include air intake and exhaust shafts. Driveways in areas for loading, parking, or storing a vehicle, are not landscaping."

Another definition states that landscaping means "vegetation in the form of grasses, shrubs, flowers, ornamental plantings or any combination thereof."

Another definition states that it means and refers to "the improvement of a lot, parcel or tract of land with a combination of living plants, such as grasses, shrubs, trees and/or other plant materials and non-living materials such as rocks, mulch, walls, fences, and/or ornamental objects designed and arranged to produce an aesthetically pleasing affect."

Note, none of those definitions, however, include driveways, and one of them expressly states that driveways are not landscaping.

It is also interesting to note that *S.C. Code §40-28-20* defining landscape architecture states that the practice means performance of professional services, such as consultation, investigation, research, planning, design, preparation of drawings and specifications, and responsible inspection in connection with development of land areas where, and to the extent that, the dominant purpose of the services is the preservation, enhancement, or determination of proper site design, natural land features, planning, naturalistic and aesthetic values, the settings and approaches to structures or other improvements, the setting of grades and determining drainage and providing for drainage structures, and the consideration and determining of environmental problems.

The statute further states specifically that the practice does not include the design of structures, drainage structures and systems, and features which are not incidental and necessary to an overall landscape plan and site design and which have separate and self-contained purposes such as are ordinarily included in the practice of engineering and architecture and does not include the making of land surveys or final plats for official approval of recordation, except that a landscape architect may prepare and certify all design, grading, drainage and construction plans for roads in site related projects which are incidental and necessary to an overall or ongoing landscape plan and site design.

Based on the definitions stated, the documents of record and *S.C. Code §40-28-20* regulating landscape architecture, it is respectfully submitted that the Halsells' driveway does not qualify as landscaping.

DAMAGES

South Carolina clearly recognizes a cause of action for trespass in instances where a dominant estate inhibits, restricts and/or obstructs the dominate estate owner's rights in and to an easement [*Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019); *Ralph v. McLaughlin*, 432 S.C. 640, 856 S.E.2d 154 (Sup. Ct. 2021)].

The law of trespass, as set forth in the *McLaughlin* cases, further holds that bad faith, willful and wanton conduct in committing a trespass on an easement supports an award of not only actual damages but also punitive damages. In the *McLaughlin (2019)* case before the Court of Appeals, which was a jury trial, the Lower Court charged the jury as to such damages and correctly set forth the standard that if a trespass is willfully and wantonly committed in such cases, without due regard for the rights of the servient estate owners, punitive damages are proper. Although the Trial Judge in *McLaughlin* correctly charged the jury on punitive damages, the jury failed to award punitive damages but did return a verdict for nominal compensatory damages of \$1,000.00. Upon appeal, the Court of Appeals granted *Ralph* a new trial as it believed the verdict in favor of Plaintiffs was fully supported by the evidence, but the damages awarded were inadequate. The Court of Appeals then ordered a new trial on compensatory damages and punitive damages only. On Certiorari, the Supreme Court reversed the Court of Appeals, denied a new trial on damages and reinstated the jury's award of \$1,000.00 nominal compensatory damages. The Court clearly recognized, however, that a cause of action for trespass legitimately lies against the servient estate owner for an unreasonable or unlawful obstruction of the dominant owner's rights in and to the easement.

Certainly, compensatory damages are in order based on the facts of this case and punitive damages are merited. The evidence is abundant that the actions of the Halsells were done in bad

faith and deliberately perpetrated against Plaintiffs in a malicious, willful and wanton disregard of Plaintiffs' rights. Halsell admitted that he knew he would have to pay to restore the easement as best as it can be restored under the circumstances if the Court decides the case against him and, although he doesn't agree as to the amount, he does agree that it would be rather expensive to attempt to replace the vegetation he has removed, restore the berm and take up the concrete which he poured on the easement. There is ample evidence through the testimony of Jim Dorsey, the POA Board Chairman, that \$45,000.00 is a reasonable assessment of the cost of repair for the restoration based on three (3) estimates the Board has received. It is, therefore, submitted that \$45,000.00 is reasonable compensatory damages for which the Halsells should be ordered to pay.

As for Plaintiffs' claim for punitive damages in addition to the cost of restoration, Plaintiffs submit that punitive damages should be assessed as the Halsells' actions were clearly in willful and wanton disregard of the Plaintiffs' rights and they were grossly negligent by the following facts:

- a. The Halsells knew of the easement when they bought the property from the Pipers and that Plaintiffs objected to them cutting a driveway across the easement.
- b. The Halsells knew that litigation was most probable if they put a driveway across the easement without the property owners' consent as evidenced by his numerous emails and conversations with the POA.
- c. The Halsells had access to their property from Doug Hollow Road and did not have to cross the POA to access their lot -that is, they knew that a driveway off of Doug Hollow Road would be necessary unless they could convince the Plaintiffs to consent for them to cut a driveway from Mountain View Pointe Drive. Notwithstanding, however, they still knowingly proceeded to buy the property and then came to court brazenly claiming that they have an easement by necessity because it is more expensive to cut their driveway off of Doug Hollow Road.
- d. The Halsells are, and were, of the mindset from the start that they were going to put their driveway across the easement no matter what and dared the property owners to bring an expensive lawsuit to stop them or make them move it -that is, they anticipated

legal process but went forward anyway with a cavalier attitude notwithstanding legal advice warning of the problem.

- e. The Halsells poured concrete on their driveway after Summary Judgment was denied in this case, further evidencing their complete, total, willful, wanton and malicious disregard for the rights of the Plaintiffs.
- f. The Halsells' attitude clearly exhibited a callus and selfish disregard for the property owners as an entity association and as individual property owners in Mountain View Pointe.
- g. The correspondence and the Halsells' actions clearly show they wanted to tell the property owners what was best for them regardless of how the property owners felt or what their rights were. In essence, the Halsells did not care what the property owners desired, they wanted their driveway across the easement and were dead set on putting it there.
- h. The Halsells' initial offer to the Pipers of \$200,000.00 to purchase the property was knocked down by \$50,000.00 by the Halsells to cover legal fees if the property owners would not consent to their driving across the landscape easement. In essence, the Halsells willfully and wantonly decided well before they bought the property that legal action was going to be brought but they went forward with their driveway anyway.
- i. The Halsells purchased their building in October, two (2) months prior to purchasing the property, and had arranged for the building to be delivered before any issues had been decided.
- j. The Halsells' attitude has been rather cavalier throughout the whole process as evidenced by their attitude of "I don't care what you want, I'll tell you what is best for you or what rights you have" as shown in the emails and their proposal (**Plaintiffs' Exhibit 3**).

Certainly, under the facts of this case, punitive damages are in order. In that regard, it is respectfully submitted that compensatory damages in the range of \$45,000.00, plus substantial punitive damages in such an amount as the Court should determine should be awarded to Plaintiffs.

CONCLUSION

For the foregoing reasons, and for the reasons alleged in the Complaint which are fully supported by the evidence presented, the Plaintiffs' respectfully submit that the Court should issue its Order as follows:

1. Declaring the rights of all of the parties in and to the areas on the Plat of Mountain View Pointe designated as Landscape and Monument Easements;
2. Enjoining Defendant Pipers from putting any portion of a driveway or road from Mountain View Pointe Drive across the subject easements to their property that lies outside Mountain View Pointe Drive and/or Mountain View Subdivision without the unanimous consent of all Mountain View Pointe Property Owners and its Board of Directors;
3. Granting Plaintiff's judgment against Defendants Halsells on the first and third causes of action – i.e., Trespass and Negligence, and awarding compensatory damages against them in the sum of forty-five thousand dollars (\$45,000.00), together with punitive damages in a substantial sum and all costs incurred in bringing and prosecution of this action;
4. Granting to Plaintiffs the immediate right to begin the process of removing the Halsells' driveway from the Landscape Easement and restoring the Easement Area as Plaintiffs, in their discretion, should choose and/or deem necessary;
5. Permanently enjoining and restraining the Halsells from interfering with the removal of their driveway by Plaintiffs and the restoration/repair of the Easement Area.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

s/Larry C. Brandt
Larry C. Brandt, (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638 5406
864/638 7873 (fax)
larry@larrybrandtlaw.com
Attorney for Plaintiffs

November 16, 2022
Walhalla, South Carolina



Neighborly Natural Landscaping: Creating Natural Environments in Residential Areas

Someowners across America are changing the face of the typical American lawn. Using gardening and landscaping practices that harmonize with nature, they are diversifying their plantings, improving wildlife habitat, and reducing lawn mower noise, air and water pollution, and yard waste.

Various “natural” landscapes, planned for beauty and ease of maintenance using mainly native plants, are spreading throughout suburbia. These landscapes include wildflower meadows, butterfly gardens, and woodland habitats that attract birds.

Many natural landscape pioneers have discovered, however, that their neighbors sometimes view alternatives to the mowed lawn as untidy, a threat to property values, and even a health hazard. Worse, their township or borough may have a strict “weed law” that challenges their landscaping practices. In this fact sheet, we provide strategies for the natural landscape homeowner who is looking for neighborly ways to garden for nature.

Back to the Future

Perceptions of lawn beauty have changed with the times. In sixteenth-century England, the lawns of wealthy landowners were wildflower meadows starred with blooms. Grasses were perceived as weeds, and a garden boy’s job was to creep among the flowers picking out the grass. Our cur-

rent love affair with the closely mowed grass lawn dates from the nineteenth century. Using European grazed pastures and eighteenth-century formal gardens as their model, the Garden Clubs of America, the U.S. Golf Association, and the U.S. Department of Agriculture embarked on a campaign to landscape American lawns with a carpet of green. With the invention and spread of the lawn mower, the “common man” could have the same cropped turf as that of an aristocrat’s mansion.

Today, at least one American town has come full circle. In Seaside, Florida, turfgrass is banned. Only locally native species of wildflowers, shrubs, and trees are allowed in the landscaping of private yards. The result has been verdant neighborhoods of shrub-scrub dune vegetation, with its related birds and wildlife—and the residents love it. In most of America, however, the mowed lawn is still the norm, and weed laws are used to ensure conformity with this ideal.



Illustration by John Sidelinger

Spring peeper



PennState Extension

“Weed Laws”and Why They Exist

Noxious Weed Laws were first written to protect farmers from introduced weeds that could compete with crops or harm livestock. Pennsylvania’s first noxious weed law was adopted in 1862 to control the spread of Canada thistle, chicory, Johnson grass, and marijuana. Today, 11 plant species are on Pennsylvania’s control list: Canada thistle (*Cirsium arvense*), multiflora rose (*Rosa multiflora*), Johnson grass (*Sorghum halepense*), marijuana (*Cannabis sativa*), mile-a-minute vine (*Polygonum perfoliatum*), kudzu vine (*Pueraria lobata*), bull thistle (*Cirsium vulgare*), musk thistle (*Carduus nutans*), shattercane (*Sorghum bicolor* ssp. *drummondii*), jimsonweed (*Datura stramonium*), and purple loosestrife (*Lythrum salicaria*). Proposed additions are another variety of purple loosestrife (*Lythrum virgatum*), giant hogweed (*Heracleum mantegazzium*), and goatsrue (*Galega officinalis*).

But Pennsylvania’s law is less restrictive than those of some municipal ordinances. Typically, these ordinances restrict the height or type of plants that may be grown; the word “weed” is generally used to describe undesirable plants. Some ordinances state that if the weeds grow to more than a given height (somewhat arbitrary—examples are 18 inches, 12 inches, or even less), the municipality is authorized to levy fines or even to come mow the property and charge the landowner for time and labor. These municipal weed laws are not intended to protect farmers, but, in theory, to protect neighborhood property values by ensuring a conformity of mowed lawns. Lawn alternatives such as wildflower meadows are sometimes perceived by neighbors and officials as no different from a neglected lot: untidy, a health hazard, and a breeding ground for “vermin.”

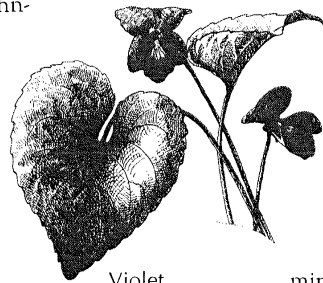
Natural Landscapes: Myths and Facts

Myth

“Meadows and natural landscapes are fire hazards.”

Facts

This argument is based on the unproven belief that the tall grass and wildflower stems in a meadow are highly flammable.



Violet

minutes.

U.S. Forest Service experts state that a grass fire can only sustain high heat for 20 seconds. For a fire to be potentially damaging to a home, it must burn within 4 feet of the home for 7.5 minutes.

Myth

“Natural landscapes attract vermin.”

Facts

The most feared “vermin” are rats and snakes. The vegetation in a natural landscape does not provide the type or quantity of food required to sustain a population of black or Norway rats. These nonnative rats do not eat the seeds of our native grasses and flowers. Rats are more likely attracted to human-produced food (corn, grain, pet foods, food scraps) provided in and near structures like barns or garbage dumps. A neglected lot with human-deposited food litter among the untended growth is indeed a rat magnet, but the managed natural landscape is not.

Snakes may find a hospitable habitat in either a traditional or a naturally landscaped yard if prey species, water sources, sunny areas for basking, and shelter are present. Snakes may find shelter under outbuildings, in rock walls, or in log piles; they are valuable neighbors because they eat true pests, such as mice, harmful insects, and slugs. Only 3 of Pennsyl-

vania’s 22 snake species are venomous (northern copperhead, timber rattler, and the endangered eastern massasauga).

Myth

“Natural landscapes harbor Lyme-disease ticks.”

Facts

Deer ticks (*Ixodes dammini*), the primary vectors for Lyme disease, can be found wherever there are suitable hosts. Because a benefit of natural landscaping is that it attracts and provides habitat for wildlife, the landscape may also harbor the ticks associated with that wildlife. As deer ticks move through their life cycle from larva to nymph to adult, their preferred hosts progress in size from white-footed mouse, to small woodland mammals, to white-tailed deer. Adult ticks tend to climb vegetation up to 3 feet high to wait for a large, warm-blooded animal to brush past.

To reduce exposure possibilities, the natural landscape should have setbacks or paths for the human visitor to walk on without brushing against vegetation. The best prevention against Lyme disease is a careful check of body and clothes after being in an area likely to have ticks. More details on Lyme disease are available from your county extension office or health department.

Myth

“Natural landscapes are breeding grounds for mosquitoes.”

Facts

Mosquitoes need standing water to breed. Even the fastest-maturing breeds require standing water for at least 10 consecutive days. A turf lawn, with its shallow root system, is more likely to be unable to soak up all the water from a heavy rain and have long-standing puddles than a natural landscape with its deeper-rooted native plants. Natural landscapes tend to be planned to take full advantage of native plants whose water requirements match the local rainfall and soils. Natural land-

scapes also improve habitat for mosquito predators, like birds.

Owners of ornamental ponds in either traditional or natural landscapes can take steps to control mosquitoes. They can keep mosquito-eating fish, float Bt “dunks” (floating, slow-release *Bacillus thuringiensis* bacteria, which kill only mosquito larvae and not beneficial and harmless aquatic life), or use pumps and waterfalls to keep the water moving.

Myth

“Natural landscapes produce pollen that causes suffering for those with allergies.”

Facts

Wind-borne pollens are the primary cause of hay fever. Any plant with showy flowers (like the much-maligned goldenrod) is pollinated by insects, not wind. The main hay fever culprit in our area is ragweed, which thrives in disturbed or eroded areas like roadsides. Other major allergenic plants are pigweed, goosefoot (both non-native “weeds”), and the nonnative grasses in turf lawns or pastures—Kentucky bluegrass, Bermuda grass, and timothy. Some tree species with wind-borne pollen, such as oak, also are allergenic.

Perennial native plants and native grasses, the primary components of natural landscapes, generally do not produce wind-borne, allergenic pollen. In fact, encouraging these species to grow crowds out weedy pioneer species like ragweed that germinate and thrive at lawn edges.

Jack-in-the-pulpit

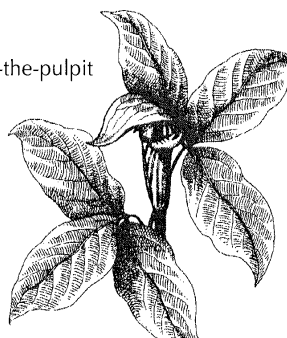


Illustration by Rae Chambers

Myth

“Natural landscapes lower property values because they are ‘messy’ and unattractive.”

Facts

Real estate with distinctive, well-done natural landscaping actually possesses a marketing edge and has a positive effect on property values. Developers cite the natural landscapes retained in their developments as an asset and charge more for naturally landscaped homes than for homes in areas with traditional landscaping. High-quality natural features like woodland corridors can preserve and strengthen a community’s unique characteristics. Neighborhood organizations, environmental restoration professionals, landscape architects, and nurseries are turning more often to natural landscaping for aesthetic and economic reasons, as well as for environmental benefits like reduced stormwater runoff and improved wildlife habitat.

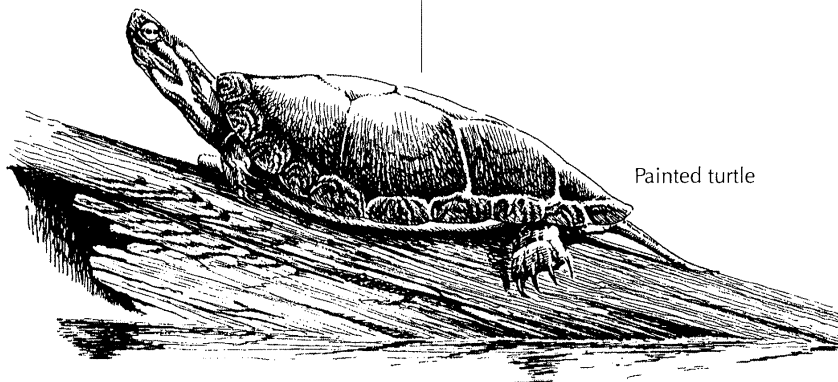
First Steps Toward a Lawn Alternative

The first step in establishing an alternative to lawn is to gain the approval of neighbors and township officials. To find out if your municipality has a weed law, contact your borough or township office and ask about landscaping ordinances. If a law does exist, ask for a copy. Weed laws, if not carefully worded, may equate natural landscaping with unmanaged landscapes. Some communities require that homeowners file an application for natural landscaping and obtain approval from a majority of neighbors. More recently enacted and enlightened weed laws allow natural landscaping “by right” without case-by-case neighbor or municipal permission. These more progressive laws take three main approaches to regulating natural landscapes:

1. A setback or buffer strip on the periphery that is maintained at a maximum height may be required. Vegetation behind the setback is unregulated except for the control of noxious weeds.
2. Broadly worded exceptions may be given for beneficial landscapes. Exceptions may include native plantings; plantings to aid and attract wildlife; erosion control; soil fertility improvement; educational programs; cultivation for consumption, business, or pleasure; and wooded areas.
3. Natural landscaping may be actively promoted. Some townships require that developers include scenic easements, planted with native wildflowers and grasses. Others employ naturalists and biologists to aid homeowners and communities in planning and maintaining natural landscapes.

The next step before beginning work on your landscape is to speak to your neighbors. Explain what you are planning and why. Be sure to speak of the advantages of attracting songbirds and butterflies, eliminating the use of pesticides, and reducing noise and air pollution from

Illustration by John Sidelinger



Painted turtle

mowing. Share with them literature on the topic, such as Penn State's *Pennsylvania Wildlife No. 5: Meadows and Prairies: Wildlife-Friendly Alternatives to Lawn*. If you tell your neighbors in advance what you are doing and why, it will increase their understanding and reduce their apprehension.

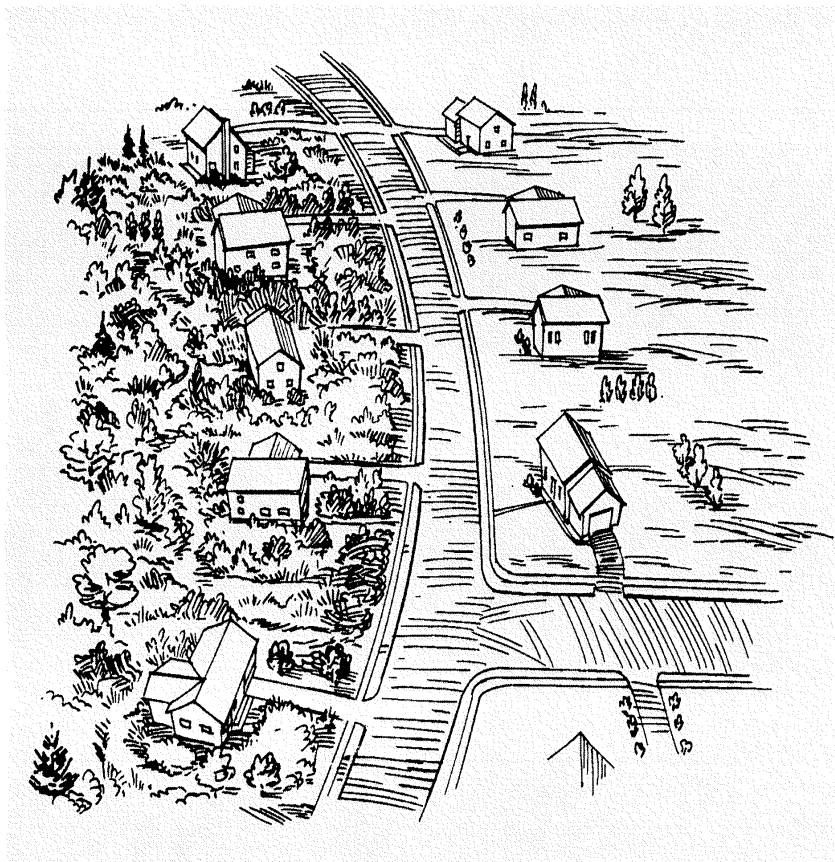
Possibilities for educating your neighbors and municipal officials include:

1. Coordinating a meeting to highlight the benefits of natural landscaping. Your county extension office or local conservation/environmental organizations may be able to assist you.
2. Offering tours to homes, schools, corporate landscapes, or nature centers that use or are installing natural landscaping.
3. Making publications and fact sheets on the topic available. They can be obtained from your county extension office or local and national conservation organizations. (See "Sources of Assistance and Habitat Certification Programs.")
4. Joining forces with like-minded landowners. Open-space management committees or environmental advisory councils can serve as both a voice for natural landscaping and a source of information. The more people who practice natural landscaping, the better for the environment and the more acceptable it becomes. Also, neighbors can link hedgerows and other natural habitats on their properties to form wildlife corridors.
5. Offering to work with municipal officials to revise weed laws.

Benefits of Natural Landscapes: Points to Stress

When you speak with neighbors and municipal officials, emphasize these benefits:

- **Reduced maintenance costs.** Natural landscapes require no or infrequent watering once established, need no or infrequent



Natural landscaping (on the left side, above) adds to property values, provides aesthetic benefits, reduces maintenance needs and costs, and creates valuable wildlife habitat.

mowing, and need no commercial lawn maintenance services. The National Wildlife Federation estimates that the typical lawn costs \$700 per acre per year to maintain. A wildflower meadow can be maintained for \$30 per acre.

- **Low maintenance.** Instead of requiring intensive fall preparation, natural landscapes function best if stalks and seedheads are left standing and leaf litter is not raked away. Seedheads provide winter food for songbirds; stalks make winter shelter for beneficial insects. Leaf litter enriches the soil, shelters overwintering insects and spiders, and insulates hibernating amphibians. Limbs of dead trees may need to be pruned for safety, but nonhazardous snags (dead trees) can be left standing as habitat for cavity-nesting birds, such as woodpeckers,



Illustration by Jeffery Mathison

bluebirds, tree swallows, chickadees, and wrens. Constructing brush piles, instead of running dead branches through a chipper, can provide winter shelter for a variety of wildlife species, including Carolina wrens, white-throated sparrows, and song sparrows. Salamanders find shelter under downed logs.

■ **Less yard "waste."** The National Wildlife Federation estimates that 18 percent of municipal solid waste collected is organic yard waste: cut grass, raked leaves, branch trimmings, and dead ornamentals. All of this material can be used in the natural landscape for compost, mulch, brush piles, or wildlife food or shelter.

■ **Water savings.** Most turfgrasses, including Kentucky bluegrass, are actually northern European species best suited to a cool, damp climate, and they need heavy irrigation during hot, dry summers. The National Wildlife Federation estimates that 30 percent of the water consumed on the East Coast goes for watering lawns. Natural landscaping conserves water that would otherwise be used on lawn irrigation because native plants are adapted to local rainfall levels.

■ **Improved water quality.** The Environmental Protection Agency (EPA) estimates that homeowners apply 10 times as much chemical pesticide to their lawns as farmers apply to cropland. Excess chemicals run off with rainfall into local waterways. Native plants need fewer or no fertilizer and pesticide applications. EPA research also proves that native vegetation outperforms turfgrass in filtering contaminated water.

■ **Improved soil aeration.** National Wildlife Federation studies show that where pesticides are applied, 60–90 percent of earthworms are killed. Nonpesticide-treated soil has a healthy population of worms and other organisms that mix and aerate the soil as they feed on decomposing organic residues.

■ **Reduced stormwater runoff and improved water table.** Native plant landscapes outperform turfgrass in absorbing runoff and replenishing groundwater supplies.

■ **Reduced soil erosion.** Native meadow plants and grasses have longer roots (up to 5–10 feet) than turfgrass (4–6 inches) to better hold soil in place.

■ **Reduced air and noise pollution because less mowing is required.** Lawn mowing

equipment is noisy and a heavy air polluter. The EPA estimates that the average lawn mower emits 11 times the air pollution of a new car for each hour of use.

■ **Reduced electric use and cost.** Natural landscaping with trees and shrubs can provide shade and windbreaks to lower the costs of home air conditioning and heating.

■ **Creation of distinctive and attractive properties that preserve local identity.** With a natural landscape, your property can reflect Pennsylvania's unique ecosystems.

■ **Greater visual interest and diversity throughout the year.** Ornamental grasses look spectacular in winter. Ornamental berries on native shrubs provide color and attract a variety of birds through fall and winter.

■ **Habitat restoration and protection.** Natural landscaping preserves plant biodiversity lost to suburban sprawl and provides habitat for attractive and beneficial wildlife. In some regions, backyards may be the last sanctuary for at-risk plant species.

■ **Recreation.** The fastest-growing outdoor sport in America is birdwatching. A natural landscape attracts more bird species and affords opportunities for photography, painting, and quiet relaxation.

■ **More leisure time.** Natural landscapes can reduce or eliminate the need to spend precious free time mowing during the growing season.



Working with Officials to Improve Weed Laws

If you are faced with a restrictive weed law, your most constructive option is to work cooperatively with local officials to improve the law. Older, more restrictive weed laws were written to protect public health and safety based on the best knowledge of the day. However, new knowledge has replaced outdated beliefs about the "hazards" of natural landscaping (see "Natural Landscapes: Myth and

Facts"). Educating your municipal officials can help to create a more enlightened law. Conservation organizations in your area can be valuable allies in your education efforts.

What Will Your Improved Weed Law Contain?

A progressive weed law protects residents' fundamental rights to choose their own landscaping. Ideally, no filing of applications or payment of fees is required for residents to engage in legitimate natural landscaping. Restrictions in the ordinance have an up-to-date, rational basis founded on protecting public health, safety, or welfare, or addressing truly neglected properties. Property owners are required to address clear-cut nuisances, such as ragweed that is allowed to flourish, or noxious weeds that are not controlled.

The ordinance does not legislate conformity or aesthetics, or allow residents to control their neighbors' landscapes. Neighbors do, however, have a right to complain about a property so covered with brambles or vines that it looks totally neglected. "Weed commissioners" are trained to recognize the difference between natural landscapes and neglected properties. If a property is clearly neglected, the municipality can still reserve the right to levy fines and/or cut the vegetation. Addressing violations at a zoning hearing allows the property owner due process of law before the municipality takes action.

An enlightened ordinance recognizes that natural landscaping is less ecologically damaging than the traditional, high-maintenance lawn. Such an ordinance may recommend that the property owner refrain from indiscriminate use of pesticides, fertilizers, and irrigation in turfgrass management. A good ordinance encourages the preservation and restoration of diverse, natural plant communities along with environmentally sound practices. It recognizes that this approach may reduce environmental contaminants like pesticides and help to reduce yard waste.

Designing a Natural Landscape "Garden"

One of the best ways to win approval and keep your neighbors happy is to design your lawn alternative as an easily recognized "garden" that looks intentional, not unkempt. People like order, purpose, and tidiness. The following strategies can help your landscape look "tended":

- **Use borders.** A border can be a mowed edge or "setback" (some townships specify widths in setback ordinances), a hedge, a fence, an edge of low plants, or a path of stone or woodchips. The border acts as a buffer, keeping plants from obstructing sight lines or "flopping" onto your neighbor's lawn, the sidewalk, or the street. It also acts as a frame, adding to the tended look of the landscape.

- **Use curved lines for borders, if possible.**

The human eye enjoys, and responds positively to, curved lines; natural areas tend toward curves.

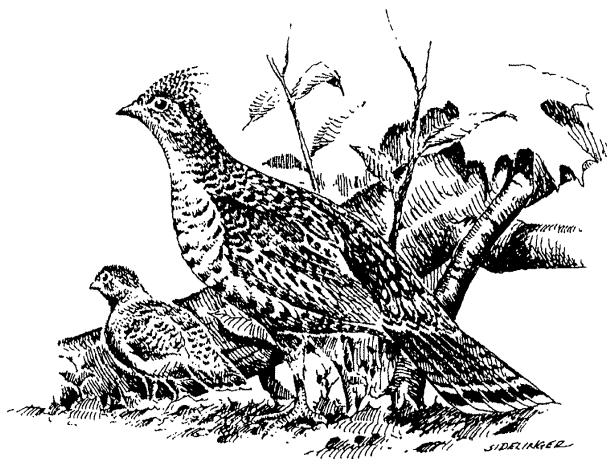
- **Start small.** Changing your entire yard in one fell swoop may alarm the neighbors and outrun your learning curve! Start by having a small wildflower garden or re-creating the native forest understory under your trees. Expand gradually, imitating nature's processes of gradual succession, rather than sudden takeover.

- **Determine your site conditions and match them with appropriate plants.** Attempting to plant a sun-loving meadow under trees where a forest understory is more appropriate will be frustrating, probably unsuccessful, and the result unattractive. Rather than fighting to overcome a wet or a shady area, find plants that will thrive in those conditions.

- **Use native plants wherever possible.** Some ornamentals, though once highly recommended, have proved to be highly aggressive and displace native species. Invasive nonnatives have spread to become serious problems in Pennsylvania's nature centers and parks. The Federal Interagency Committee for the Management of Noxious and Invasive Weeds estimates that the total economic impact of invasives on the U.S. economy equals or exceeds \$13 billion per year! Also, nonnative species generally have less wildlife value.

- **Manage invasives.** Be alert for the species on the Pennsylvania Noxious Weed Control List, and remove them promptly. Your neighbors will not welcome these invasive plants into their property. A properly managed, well-established wildflower meadow will need to be mowed once a year, at the appropriate time, to discourage invasives. Hand-pulling, mechanical removal, and trimming may be needed to control some species. The least-preferred method, use of herbicides, may be indicated in some cases.

- **Humanize.** Human elements are welcoming and invite the viewer into the landscape. Options are paths, benches, bird feeders, bird baths, sundials, gazing



Ruffed grouse

Illustration by John Sidelinger

balls, artifacts like an old farm tool, or ornamental statues. They add to the perception that the landscape is planned and not untended.

- **Advertise.** Signage to inform passersby of your project can be placed on your property before, during, and after the landscaping project (see list of lawn sign sources below).
- **Certify your landscape as a wildlife habitat with a local or national conservation organization.** The certifying organization may then provide you with either a certificate or a sign for public display (see "Sources of Assistance and Habitat Certification Programs").
- **Share your enthusiasm with your neighbors** by drawing a map of your natural landscapes and making it available in a brochure box in your yard. You might even include a listing of the plants you used and where you got them.
- **Respect your neighbors' rights.** Just as you have a right to a natural landscape, your neighbor has a right to turf. Being self-righteous does not win converts!

Last Resorts: Challenging Weed Laws

What if you have researched your local laws and found them to be restrictive? And what if you've applied for and been denied a variance, and all efforts to educate your municipal officials have failed? Installing a natural landscape in defiance of your local weed law may begin with your landscape being mowed and/or fines being imposed, and end with your case going to court. Many challengers to weed laws have won in court; some have not. Advice on legal arguments for challenging local weed laws can be found through the EPA, Wild Ones, and the National Wildlife Federation (see "Sources of Assistance and Habitat Certification Programs").

In a worst-case scenario with an uncooperative municipality, a nonconfrontational option may be to have "pocket" ornamental wildflower gardens, with well-defined edging, within a traditional lawn. Your neighbors may be so charmed by the butterflies and birds attracted to your yard that they follow your example. Gradually, a network of residents may work together to convert the municipal officials and revise the weed laws.



Illustration by Rae Chambers

Sources of Assistance and Habitat Certification Programs

National Wildlife Federation
Website: www.nwf.org/Garden-For-Wildlife.aspx?campaignid=WH10DGWP&s_src=CWH_404Page_Featur

Wildlife Habitat Council
8737 Colesville Road, Suite 800
Silver Spring, MD 20910
Telephone: 301-588-8994
Website: www.wildlifehc.org

Wild Ones—Natural Landscapers, Ltd.
PO Box 1274
Appleton, WI 54912-1274
Telephone: 877-394-9453
Website: www.wildones.org

Natural Landscape/Habitat Yard Signs

1. Signs may be purchased through the mail from Wild Ones (see "Sources of Assistance").
2. Owners of sites approved for certification by the Windstar Institute can purchase signs during the certification process (see "Sources of Assistance").
3. Create your own sign. For example: "This area is intentionally not being mowed. We are creating a natural meadow with wildflowers for several important environmental reasons." Or: "Meadow in progress. Step 1: Preparing site. Step 2: Planting. Step 3: Mowing annually."

For More In-Depth Information

Brandywine Conservancy, Environmental Management Center, PO Box 141, Chadds Ford, PA 19317
Telephone: 610-388-2700
Website: www.brandywineconservancy.org/conservancy

Pennsylvania Noxious Weed Control List. Available from the Pennsylvania Department of Agriculture, 2301 N. Cameron Street, Harrisburg, PA 17110-9408.
Website: plants.usda.gov/java/noxious?rptType=State&statefips=42

Authors

Kathleen Geist, recycling education program assistant; Sally Pick, recycling education program director; and Margaret C. Brittingham, professor of wildlife resources

Acknowledgment

Partial funding for this fact sheet was provided by Pennsylvania's Wild Resource Conservation Fund.

Illustrations

Illustration on page 2 © Penn State College of Agricultural Sciences

extension.psu.edu

Penn State College of Agricultural Sciences research and extension programs are funded in part by Pennsylvania counties, the Commonwealth of Pennsylvania, and the U.S. Department of Agriculture.

Where trade names appear, no discrimination is intended, and no endorsement by Penn State Extension is implied.

This publication is available in alternative media on request.

Penn State is an equal opportunity, affirmative action employer, and is committed to providing employment opportunities to all qualified applicants without regard to race, color, religion, age, sex, sexual orientation, gender identity, national origin, disability or protected veteran status.

Produced by Ag Communications and Marketing

© The Pennsylvania State University 2016

Code UH142 2/17pod

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)

Case No.: 2021-CP-37-00093

Mountain View Pointe Owners)
 Association, Inc., L. Shepard Hamrick, Jr.,)
 Martha Hamrick, Matthew Williams, Sue)
 Williams, Barry Noffze, Ruth Noffze,)
 Michael Dorsey, Monica Dorsey, Jack J.)
 Dorsey, Lucinda Dorsey, Kai Evensen,)
 Charlene Finucan, John Prescott, Jr.,)
 Elizabeth Prescott, Steven Trojan,)
 Dottie Trojan, Leonard J. Stoecklein,)
 Patricia Stoecklein, Dale Hill, Rebecca Hill,)
 Larry Kuykendall, Elke Kuykendall,)
 Thomas McCaw, Roberta McCaw, Robert)
 Albergetti, Elaine Albergetti, Frank)
 Patterson, and Frances Patterson,)

Plaintiffs,)

VS.)

Rodney Halsell, Barbara Halsell, Graham R.)
 Piper, Christine A. Piper, Michael Newton,)
 Angela Newton, Gary Hutchinson, Daniel)
 Horner, Katherine Horner, Lonnie Harper,)
 Elianor Harper, Christopher Tam, Amie)
 Kerley, Karan Sandhu, Gloria Sandhu,)
 Brian Fox, and Jennifer Fox,)

Defendants.)

**POST-TRIAL MEMORANDUM
 OF DEFENDANTS
 RODNEY HALSELL AND
 BARBARA HALSELL**

The background narrative of this case has been well-established in the summary judgment proceedings and at trial. It also appears that the relevant facts are largely undisputed and/or established by documentary evidence. Accordingly, this Memorandum will focus on those facts, the applicable legal principles, and the issues for determination by the Court.

HALSELLS' RIGHT OF ACCESS

The initial plat for Mountain View Pointe Subdivision (Joint Ex. 2) was recorded, along with the Restrictions (Joint Ex 1-A), on November 12, 2002. That plat depicted twenty-nine lots on the northern side of the property and, on the southern end, two unnumbered parcels separated by a roadway (MVP Drive) running from the lots to Doug Hollow Road. Both of those parcels abutted the road all the way from the lots to Doug Hollow Road. At that time, the road and unnumbered parcels were owned by the Developer, Crescent, and provided the only access route to the subdivided lots. Later, by deed recorded December 6, 2005, Crescent conveyed that 50 foot right of way to Oconee County for construction and maintenance. (Joint Ex 8)

The property on both sides of the road was conveyed by Crescent to the Pipers by deed recorded August 26, 2013 (Joint Ex 6). That deed recited a consideration of \$200,000.00 and referenced Plat Book B-443 at Page 2 (Joint Ex 6) which designated the property as Parcel A containing 4.715 acres, and Parcel B containing 17.030 acres, both fronting on the road as shown on the original subdivision plat (Joint Ex 2).

Upon conveyance of the parcels by reference to the plat, the Pipers acquired an easement with respect to the road shown on the plat. In McAlister v. Smiley 301 S.C. 10, 389 S.E.2d 857 (SC1989), our Supreme Court recognized as a rule of law (emphasis added), that “where a conveyance of land describes a parcel as bounded by a street designated in the conveyance, or refers to a map on which spaces for streets, parks or other common uses are shown, but the conveyance says nothing about a creation of an easement or a dedication to public use, the conveyee of the land acquires an easement with respect to the street or the areas shown on the map.” The Court further stated that “such an easement inures to the benefit of the grantee and his successor in title. The existence of the easement will be implied by law unless it appears that the

grantor specifically intended otherwise (emphasis added). As in McAlister, there is no indication whatever in this case that Crescent intended to negate the creation of the easement. Neither the deed, the referenced plat nor the landscape easement itself indicated any intent, much less specific intent, on the part of Crescent to negate access to and use of the road. If such had been its intent, it could have, among other things, easily reserved or excepted from the conveyance a buffer strip along the roadway.

The McAlister Court cited the earlier case of Cason v. Gibson 217 S.C. 500, 61S.E.2d 58 (SC1950) which further explained the rationale for implying such an easement in these circumstances: “Many courts base the right of the grantee and his assigns, in the circumstances present here, upon the theory of implied grant or covenant, more probably upon the ground of equitable estoppel, and some upon a combination of these concepts. Hence the following conclusion of a text writer: ‘If a grantor in conveying land bounds it upon a street, he and his heirs are estopped to deny that there is such a way or street, and the right of the grantee to its use’”. As a Seventh Defense, the Halsells have alleged that Plaintiffs, as successors to Crescent, are estopped to deny the Halsells’ access to and use of the street.

Further, the conveyance of the right of way to Oconee County for construction and maintenance (Joint Ex 8) gives additional support to the Halsells’ right to access and use of the road. “While the owner of a lot on a public street has the same right to the use of the street that rests in the public, he at the same time has other rights which are special to him; and the right of ingress and egress is one of them. This right of access is appurtenant to his lot and is private property. To destroy that right is to damage that property.” (emphasis added) Huggin v. Gaffney Development Co., 229 S.C. 340, 92 S.E. 2d 883 (SC 1956), quoting Brown v. Hendricks, 211 S.C. 395, 45 S.E. 2d 606.

The same property right was also enunciated in Hardin v. SCDOT, 371 S.C. 598, 641 S.E. 2d 437 (2007), upholding an award of compensation in an inverse condemnation case, and stating that “a property owner in South Carolina has an easement for access to and from any public road, that abuts his property regardless of whether he has access to and from additional public roads.”

THE LANDSCAPING EASEMENT

It is undisputed that a “25-foot landscape easement” appears on the plat referenced in the Restrictions, and the subsequent plats referenced in the deed from Crescent to the Pipers (Joint Ex 7) and the deed of Parcel A from the Pipers to the Halsells (Joint Ex 10). Section 7.9 of the Restrictions (Joint Ex 1-A) states: “Declarant [Crescent] further hereby grants, establishes, creates and reserves for the benefit of Declarant and the Association, and their successors and assigns, non-exclusive perpetual easements for the purpose of landscaping and maintaining the property adjacent to the main entry road for the subdivision shown as Landscaping Easement on the Map.” Thus, the easement is described only as being for landscaping and maintenance and as non-exclusive.

Testimony at trial was consistent to the effect that, up to the present time, the landscaping and maintenance activity along both sides of MVP Drive has consisted of installing and maintaining strips of grass on both sides of the road, most of which lies within the road right of way and not within the landscaping easement; and installing and maintaining two small “beds” of ornamental plants on each side of the road, most of which also lie in the road right of way. Accordingly, the substantial majority of the easement area has remained in trees and other natural vegetation.

The landscaping easement is expressly designated as “non-exclusive”. South Carolina case law gives little guidance as to the distinction between exclusive and non-exclusive easements. However, our case law is clear on the nature and interpretation of easements generally. “An easement is a right which one person has to use the land of another for a specific purpose and gives no title to the land on which the servitude is imposed.” Windham v. Riddle, 381 S.C. 192, 672 S.E. 2d 578 (SC 2009). “Where language in a plat reflecting an easement is capable of more than one construction, the construction which least restricts the property will be adopted.” Tupper v. Dorchester County, 326 S.C. 318, 487 S.E. 2d 187 (1997).

Case law from other states gives a fairly consistent assessment of non-exclusive and exclusive easements. A Florida court succinctly noted the distinction: “An exclusive easement is one for the sole benefit of the easement holder and excludes any use thereof by the grantor servient owner. A non-exclusive easement, on the other hand, permits use by the servient owner.” Gelfand v. Mortgage Investors of Washington, 453 S. 2d 897 (Fla. App, 1984). Our Court of Appeals in Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 S.E. 2d 1 (SC App 1988) seemed to follow the same distinction. Noting that an easement is distinct from ownership of the land, the Court found that the dominant owner’s right to use an easement parcel was not exclusive, but a right to be shared with the owner of the fee.

The Supreme Court of Alabama, in Duke v. Pine Crest Homes, Inc., 358 S. 2d 148 (Ala 1978) stated that “an exclusive easement is an unusual interest in land; it has been said to amount almost to the conveyance of the fee. No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention...”

Also, an Alabama Appeals Court, referencing cases from other states concluded: ‘A principle of concurrent, rather than exclusive, use underlies the law concerning easements (citations omitted).’ ‘Therefore, use of an easement by both the dominant and the servient landowners must be permitted in accordance with their individual interests.’ Price v. McNeil, 771 S.2d 1054 (Ala Civ App 2000).

ARGUMENT

A. ESTOPPEL

Defendants Halsell contend that Plaintiffs, as successors to Crescent, the owner and developer of the subject property, are estopped to deny the existence of MVP Drive and the Halsells’ right to its use, as more fully set forth above. Crescent conveyed the Halsell property to the Pipers by deed referencing Plat Book B443, Page 2 (Joint Ex 7) which depicts Parcel A as abutting MVP Drive. Such conveyance, as a rule of law, gave rise to an easement with respect to the street which inures to the benefit of grantee and his successors in title. McAlister v. Smiley, *supra*; Cason v. Gibson, *supra*.

B. DETERMINATION OF PARTIES’ RESPECTIVE INTERESTS

Should the Court reject the estoppel defense, the issue remains as to how the respective interests of the parties should be reconciled. At trial, Plaintiff witnesses asserted the right to virtually full dominion and control over the easement area. The only right they conceded to the Pipers and Halsells was to walk on the landscape easement.

This position is completely at odds with the case law. The landscape easement is expressly described as non-exclusive, yet Plaintiffs claim a level of control that would “amount to almost a

conveyance of the fee” as would be the case with an exclusive easement. Duke v. Pinecrest Homes, Inc., supra.

The Alabama Court in Price v. McNeil, supra, recognized that the principle of concurrent use, rather than exclusive use, underlies the law of easements. A similar approach in South Carolina as to easements generally is clearly stated by our Supreme Court in Hill v. Carolina Power & Light Co., 204 S.C. 83,28S.E.2d 545 (SC1943) and more recently followed in Snow v. Smith, 416 S.C. 72, 784S.E. 2d 242 (SC App 2016): “The unrestricted grant of an easement conveys all such rights as are incident or necessary to its reasonable and proper enjoyment. The right to use such land and the space above it remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement. The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there can be due and reasonable enjoyment of both. In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated.”

Consistent testimony from all parties indicated that for approximately twenty years, Plaintiffs have actually utilized a small portion of the total easement area for actual landscaping purposes. The portion of the Halsells’ driveway located in the landscape easement is approximately 25 feet x 30 feet (750 Square feet) of a total 28,125 square feet on the Halsell side of the road. This cannot be said to unreasonably interfere with Plaintiff’s general landscaping rights. Any motives or concerns of Plaintiffs beyond their general interest in landscaping are not relevant in determining the scope of their easement or any interference with it.

At the same time, the driveway as built allows the reasonable enjoyment of the Halsells’ right to access their property to and from MVP Drive. In this regard, it must be noted that any

landscaping done by the Halsells in connection with installation of the driveway is not precluded by the existence of the landscaping easement, since it is expressly described as non-exclusive.

No cases have been found which define “landscaping” in circumstances similar to this case. Dictionary definitions of the term vary somewhat. The Merriam-Webster Dictionary defines landscaping as “to modify or ornament (a natural landscape) by altering the plant cover”. Another edition of the same dictionary defines it as “to modify (a natural landscape) by grading, clearing or decorative planting.” The Oxford English Dictionary definition is “the process of making a yard or other piece of land more attractive by altering the existing design, adding ornamental features and planting trees or shrubs.” All the definitions are similar in that they contain words such as “decorative”, “attractive”, “ornament” and “ornamental”. Under any of these definitions, the Halsells submit that, contrary to Plaintiffs’ assertions, every square foot is not necessary to their reasonable use and enjoyment of a non-exclusive general landscaping easement along the entrance road. Instead, it appears that by refusing to accept any access at all, the Plaintiffs’ attempt to use the easement as a virtual wall to limit or control the use made of the otherwise unrestricted property. The scope of the easement urged by Plaintiffs is certainly not “as little burdensome to the servient estate as possible for the use intended.” Hill v. Carolina Power & Light, supra.

As noted by Richard M. Unger in his *Treatise on the Law of Easements in South Carolina*, published by the South Carolina Bar, “Normally, obstructions to easements involve gates which impede the dominant owner’s access. The Courts have employed a balancing test to determine if a gate constructed by the servient owner is reasonable.” This balancing test arises from Watson v. Hoke, 73 S.C. 361 53 S.E. 2d 537 (1906) in which the Supreme Court’s upheld the decision of the circuit court not to require removal of gates placed across Plaintiff’s right of way over Defendant’s pasture. The Court held that the servient owner could enclose his land, using gates,

“provided they are necessary to the enjoyment of his property, and are not so numerous and of such size and construction as to constitute an unreasonable burden on the right of way. This is not only the manifestly reasonable view, but it is supported by various authorities.”

Applying the Wilson balancing test to this case, and paraphrasing the language of the Court in Wilson, the Halsells contend they “should be able to access their land, using a single driveway from Mountain View Pointe Road, which is necessary for the reasonable enjoyment of their property, and not of such size and construction as to constitute an unreasonable burden on the landscaping easement, and that this is manifestly reasonable under the circumstances.” This is the only actual controversy which exists and upon which the Court can make a declaratory judgment. There is no other plan, proposal or act upon which there is disagreement, and any further action by the Court would amount to an advisory opinion.

C. NECESSITY

Should the Court determine that these Defendants are not entitled to access from MVP Drive under the foregoing arguments, the only other available access would be from Doug Hollow Road. Defendants Halsell contend that this does not afford them a reasonable means of access and have plead an affirmative defense based upon necessity.

As will be seen from Joint Ex 10, seventy-five feet of the Halsell frontage on Doug Hollow is also within the landscape/monument easement. The Halsells applied for and received an encroachment permit from SCDOT, in January 2021, allowing a driveway off Doug Hollow just to the west of the Monument easement (Pl. Exs 10 and 11). At that point, there is a high embankment along Doug Hollow. (See Halsell Exs. 14 and 15 and photos attached to encroachment permit application, Pl Ex. 10).

Rod Halsell testified that extensive grading and earthmoving would be required from that point. He also testified that in order to prevent the driveway from being very steep, (See Halsell Ex 16 indicating elevations in this area), the driveway would cross behind the monument easement area and then go along the landscape easement and MVP Drive, up to the building site, thus necessitating the removal of many trees. In addition to the substantial earthmoving involved, the driveway would be more than twice as long as a driveway off MVP Drive and the estimated cost expected to approach the amount paid for the property (\$150,000.00). One witness for Plaintiff acknowledged the substantial cost for such driveway.

The doctrine of easement by necessity “presumes or implies that the grantor intended for the grantee of a landlocked parcel to have access, which is one of the rights essential to the enjoyment of land.” (emphasis added) Morrow v. Dyches 328 S.C. 522 492 S.E.2d 420 (SC App 1997). “In South Carolina, a grantee claiming an implied easement of necessity...need not prove the right of way was absolutely necessary for his enjoyment of the land conveyed. ‘Reasonable necessity will suffice.’” Hayes v. Tompkins 287 S.C. 298, 337 S.E. 2d 888 (S.C. App 1985).

In Hayes, the Plaintiff’s property adjoined a public road, but access from that road was obstructed by a deep gully and some “draws” along that side of the road. The Court determined that the only reasonable access to the property was by a right of way over adjoining property which was part of the original tract, and which had been obstructed by the Defendants. Similarly, in the present case, the Halsells have no reasonable access except from MVP Drive, which Plaintiffs seek to prevent

REMAINING CLAIM OF PLAINTIFFS

Plaintiffs First, Second and Fourth Causes of Action are addressed in the foregoing argument. The Third and Fifth Causes of Action were dismissed at trial on Halsells' motion for directed verdict.

The Sixth Cause of Action alleges trespass by the Halsells upon the easement and seeks actual and punitive damages. The Halsells' argument for right of access over the easement is set forth above. In addition, these Defendants contend they cannot have trespassed on land they own and have possession of. "A trespass is any interference with one's right to the exclusive peaceable possession of his property." Ravan v. Greenville County, 315 S.C. 447, 434 S.E. 2d 296 (SC App 1969). Here, Plaintiffs, as owners of the easement, do not have, and are not entitled to, possession of the easement area. Additionally, as their easement is expressly non-exclusive, they certainly cannot claim exclusive possession. By definition, an easement "is a non-possessory right to limited use of land owned by another without taking a part thereof." Lester v. Galambos, 811 S.E. 2d 661 (N.C., App 2018).

As to any claim for punitive damages, there is no evidence at all that the Halsells acted "willfully and in wanton disregard for the rights of the Plaintiffs" as alleged. It is undisputed that the Halsells and the Pipers made repeated efforts to reach accord with Plaintiffs. Before taking any action, the Halsells conferred with two attorneys, both of whom advised that they had a right to access their property from MVP Drive. Further, no action was taken until counsel for both sides conferred, and upon failure to reach a resolution, Plaintiff's counsel was advised of the Halsells' intent to proceed with a driveway and resolve the issue through litigation. (See Joint Exs. 11-A and 11-B)

CONCLUSION

“The party alleging...an unreasonably burdensome or inconsistent use has the burden of proving his allegation.” Shenandoah Acres, Inc. v. Connor, 256 Va. 337, 505 S.E.2d 369 (1998). Plaintiffs have not provided evidence of how or why the driveway is unreasonably burdensome or an inconsistent use. They have not demonstrated how, under their view, there can be “due and reasonable enjoyment of both.” Hill v. Carolina Power & Light Co., supra. The Halsells contend that all remaining claims of the Plaintiffs should be dismissed.

Respectfully submitted,
William C. Hood
S.C. Bar No. 2601
505 N. McDuffie Street
Anderson, SC 29621
Ph.: 864-375-0530
Attorney for Defendants Halsell

November 14, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

Mountain View Pointe Owners Association,)
Inc., Jane P. Hale, L. Shepard Hamrick, Jr.,)
Martha Hamrick, Matthew Williams, Sue)
Williams, Barry Noffze, Ruth Noffze,)
Michael Dorsey, Monica Dorsey, Jack)
James Dorsey, Jr. and Lucinda Dorsey, as)
Co-Trustees of the Dorsey Joint Revocable)
Trust, Kai Evensen, Lynn Elliot Amos, as)
Trustee of the Lynn Elliot Amos Qualified)
Personal Residence Trust, Lynn Keith)
Amos, as Trustee of the Lynn Keith Amos)
Qualified Personal Residence Trust,)
Charlene Finucan, John Prescott, Jr.,)
Elizabeth Prescott, Steven Trojan, Dottie)
Trojan, Leonard J. Stoecklein, Patricia)
Stoecklein, Dale Hill, Rebecca Hill, Larry)
Kuykendall, as Trustee of the Larry)
Kuykendall Revocable Trust, Larry)
Kuykendall, as Trustee of the Elke)
Kuykendall Revocable Trust, Thomas)
McCaw, Roberta McCaw, Robert)
Albergotti, Elaine Albergotti, Frank)
Patterson, Frances Patterson, Brian A. Fox,)
And Jennifer Fox,)

Plaintiffs,)

vs.)

Rodney Halsell, Barbara Halsell, Graham)
R. Piper, Christine A. Piper, Michael)
Newton, Angela Newton, Gary Hutchinson,)
Daniel Horner, Lonnie Harper, Elleanor)
Harper, Christopher Tam, Amie Kerley,)
Karan Sandhu, and Gloria Sandhu.)

Defendants.)

**PLAINTIFFS' POST-TRIAL
REPLY BRIEF TO DEFENDANTS'
POST-TRIAL MEMORANDUMS**

Case #2021CP3700093

The Meaning of Non-Exclusive

Although, the Defendants quote, without context, snippets from opinions of courts outside South Carolina, contrary to the Defendants' assertions, there is no dearth of authority in South Carolina regarding a servient estate owner's retained rights in property as to which an easement has been granted to another. In fact, the Defendants cite *Snow v. Smith*, 416 S.C. 72, 784 S.E.2d 242 (Ct. App. 2016), which holds that "Although the rights of the easement owner are paramount to those of the landowner as to the easement, the easement owner's rights are not absolute but are limited, so both the owners of the easement and the servient tenement may have reasonable enjoyment."

The corollary to that is "[t]he right to use such land and the space above it remains in the owner of the fee so long as such right is consistent with the purpose and character of the easement. In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible" [*Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (Sup. Ct. 1943) (also cited by Defendants)]. The Defendants suggest that the last sentence in the quote from *Hill* shifts the focus of the inquiry from whether their use of the Easement Areas is consistent with the use and purpose of the Easements, to whether the Association's use of the Easements for the purposes for which they were granted interfere with the Defendants' desire to access their property from MVP Drive. But in applying the enunciated standard to the issues in *Hill*, the court says simply, "In the case at bar, the full right to enjoy the land and the space overhead in any way not inconsistent with the defendant's easement, remained in the...owner of the fee, simply because it was not granted...It was for the jury to say whether [the fee owner's] presence, occupation, and conduct was

inconsistent with the full enjoyment of the defendant's easement" [*Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (Sup. Ct. 1943)].

It is not incumbent upon the Plaintiffs to ponder what uses the Defendants may make of their retained interests in the Easement Areas, so long as the Defendants' uses do not interfere with the use and purpose of the Easements.

Easement by Necessity

As discussed in Section IV.I of the Plaintiffs' post-trial brief, the necessity required for easement by necessity must exist at the time of the severance and the person claiming the right to easement by necessity must not create the necessity when it would not otherwise exist. This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel [*Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012)]. Defendants ignore those required aspects of an easement by necessity, as well as the fact that Crescent granted the Easement and the control thereof to the Property Owner's Association without reserving any right for even Crescent to access Parcels A and B across the Easement. Surely, that is strong evidence that Crescent did not intend to access Parcels A & B across the Landscape Easement, or for anyone else to be able to access Parcels A and B across the Landscape Easement, without the consent of the POA and the owners of the lots within the Subdivision.

Notwithstanding those facts, Halsells further assert that when the MVP Subdivision was created, Crescent owned both MVP Drive and parcels A and B and that MVP Drive provided the only access route to Parcels A and B [**Halsells Post Trial Memorandum**, Page 2]. Again, Crescent granted the Landscape Easement to the POA and gave the POA unfettered authority to grant and/or deny encroachments and to control and maintain the Easements. Surely, Crescent did

not intend to relinquish such control to the Property Owner's Association and then breach the Easement itself to access Parcels A and B without POA consent, nor did it intend for anyone else to do so either. Furthermore, there is also absolutely no evidence that Parcels A and B could only be accessed from MVP Drive at any time. In fact, Mr. Piper testified at trial that at the time the Pipers acquired Parcels A and B, Parcel B was encumbered by a lease to the Lighthouse restaurant for overflow parking. The Defendants have presented no evidence that those parking spaces were ever accessed from MVP Drive or that any part of Parcels A and B were ever accessed from MVP Drive prior to the Pipers' purchase of those properties.

The Halsells also argue that due to the cost of putting a roadway off of Doug Hollow Road onto their property, they have an undue hardship from which they should be excused by the court or an implied easement of some sort. They complain that it would be so much more expensive to put a driveway to their property off of Doug Hollow Road rather than MVP Drive, so the court should allow them to access their property off MVP Drive. Plaintiffs submit, however, that it is not an undue hardship but a mere inconvenience for them, as the most convenient way is not the standard and does not entitle them to relief [*Merrimon v. McCain*, 201 S.C. 76, 21 S.E.2d. 404 (Sup. Ct. 1942); *Steele v. Williams*, 204 SC 124, 28 S.E.2d. 644 (Sup. Ct. 1944); *Boyd v. Bell South Telephone and Telegraph Company, Inc.*, 369 S.C. 410, 633 S.E.2d 136 (Sup. Ct. 2006)]. Furthermore, the Halsells knew of the Easement when they purchased the property from the Pipers, so any claimed hardship is of their own doing or making by which they cannot benefit.

For that reason, as well as the other reasons cited in the Plaintiffs' Post-Trial Brief and this Reply Brief, the Defendants claim of easement by necessity fails.

Equitable Estoppel

The essential elements of equitable estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially [*Boyd v. Bellsouth Telephone*, 369 S.C. 410, 633 S.E.2d 136 (Sup. Ct. 2006)].

“A properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of title or reasonable means of discovering it. One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled.” *Id.*

The Defendants cannot claim lack of knowledge because they are imputed with knowledge of all documents in their chain of title, including the Declaration and the MVP Plat.

Landscaping and Maintaining

Plaintiffs have submitted evidence that in today’s environment landscaping can include naturalization or preservation of existing natural vegetation. Although the Defendants have fixated on the term “landscaping,” as the Pipers point out in their Post-Trial Memorandum, the Declaration charges the Association with landscaping and *maintaining* the property, as well as with *maintaining* the Common Areas.

The Merriam Webster Dictionary, defines “maintain” and “maintaining” to mean: “to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline.” It lists the following as synonyms for “maintain”: conserve, keep up, preserve and save. Plaintiffs believe that broadening the focus to both landscaping and maintaining the property is more consistent with the purpose of the easements as set forth in the Plaintiffs’ Post Trial Brief, Section IV.B.2.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

s/Larry C. Brandt
Larry C. Brandt, (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638 5406
864/638 7873 (fax)
larry@larrybrandtlaw.com
Attorney for Plaintiffs

November 22, 2022
Walhalla, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Case No.: 2021-CP-37-00093

Mountain View Pointe Owners)
Association, Inc., Jane P. Hale, L. Shepard)
Hamrick, Jr., Martha Hamrick, Matthew)
Williams, Sue Williams, Barry Noffze, Ruth)
Noffze, Michael Dorsey, Monica Dorsey,)
Jack J. Dorsey, Lucinda Dorsey, Kai)
Evensen, Lynn Elliot Amos, as Trustee of)
the Lynn Elliot Amos Qualified Personal)
Residence Trust, Lynn Keith Amos, as)
Trustee of the Lynn Keith Amos Qualified)
Personal Residence Trust, Charlene Finucan,)
John Prescott, Jr., Elizabeth Prescott, Steven)
Trojan, Dottie Trojan, Leonard J. Stoecklein,)
Patricia Stoecklein, Dale Hill, Rebecca Hill,)
Larry Kuykendall, as Trustee of the Larry)
Kuykendall Revocable Trust, Larry)
Kuykendall as Trustee of the Elle)
Kuykendall Revocable Trust, Thomas)
McCaw, Roberta McCaw, Robert)
Albergotti, Elaine Albergotti, Frank)
Patterson, and Frances Patterson, Brian Fox)
and Jennifer Fox,)

Plaintiffs,)

v.)

Rodney Halsell, Barbara Halsell, Graham R.)
Piper, Christine A. Piper, Michael Newton,)
Angela Newton, Gary Hutchinson, Daniel)
Horner, Lonnie Harper, Elianor Harper,)
Christopher Tam, Amie Kerley, Karan)
Sandhu, and Gloria Sandhu,)

Defendants.)

MOTION OF DEFENDANTS HALSELL
TO ALTER OR AMEND ORDER

The Defendants Rodney Halsell and Barbara Halsell, through their undersigned counsel, move the Court, pursuant to Rules 52 and 59, SCRCP, for an Order altering or amending the Order filed herein on March 13, 2023, as follows:

1. The Order should be amended to indicate whether the Order is intended to be final Judgment or an appealable order within the meaning of Rule 72, SCRCP, pertaining to appeal, it being noted that the Order provides for supplemental hearing and orders.

2. As Plaintiffs' cause of action for injunction was dismissed at trial by consent, Defendants request the Order be amended to indicate if the provisions of Paragraph 8 of Section 3 are intended to constitute an injunction.

3. The Order should be amended so as to find the facts specially and state separately its conclusions of law as to these Defendants' seventh affirmative defense of estoppel, as provided by Rule 52, SCRCP. The Order only makes a general finding under Paragraph 52, Findings of Fact, that Defendants "did not present any credible evidence or legal argument in support of" their claim, which is patently inaccurate (see page 3 of Halsells' Post Trial Memorandum and also argument on summary judgment).

4. Halsells, in their Answer, at trial, and in their Post Trial Memoranda, have contended that they and Plaintiffs each have rights and interests in the easement area which are not mutually exclusive, the Plaintiffs by virtue of the easement and the Halsells by virtue of their fee simple ownership, with its appurtenant right of access. Halsells have argued that these respective interests should be reconciled in such a way as to allow each the reasonable use and enjoyment thereof. In Paragraph 11 of Section C, the Order quotes *Snow v. Smith* to the effect that "the easement owner's rights are not absolute but are limited so both the owners of the easement and the servient tenement may have reasonable enjoyment." However, the Order sets forth no factual

findings or legal conclusions supporting its provision in the Order vesting in the POA “sole management and control of beautification, vegetation, landscaping, soil disturbance and grading in the easement area” and denying the Halsells access from MVP Drive, thus severely restricting rights incident to ownership of the property which the Halsells own and pay taxes on. The Order should be amended to set forth the specific findings and legal conclusions to justify such action.

5. As to Defendants’ right of access which is appurtenant to their ownership, the Order frames the issue not as whether an owner is entitled to access an abutting street (thus impliedly recognizing such right), but whether the Halsells could construct a driveway over the easement. In doing so, the Order necessarily assumes that the Defendants’ rights under the easement in some way have precedence over the right of the Halsells to access their property. However, the Order sets forth no factual findings or conclusions of law justifying such an assumption and should be amended to do so.

6. Paragraphs 18 and 19 under Conclusions of Law, relating to the meaning and significance of “non-exclusive” as opposed to “exclusive” easements, does not set forth any legal reasoning, authority or other basis for the same and the Order should be amended to do so.

7. Under Paragraph 40, Findings of Fact, the Order states that the quality or esthetics of structures erected on the subject property is “not relevant” to the issue of unreasonable interference with use and enjoyment of the easement. However, in Paragraph 44 thereafter, the Order finds that it was “clearly” Crescent’s (the developer) intent that the easement “provide for the ability to screen activity, future construction.... so as to enhance the appeal and value of the subdivision”. The Order should be amended to set forth specific findings and legal conclusions to clarify how Crescent’s intent was “clearly” determined consistently with the provisions of Paragraph 40.

8. In Paragraphs 12-13, 15-16 and 22 of Conclusions of Law, the Order cites and relies upon Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime, 306 S.C. 170 (SCApp 1991). As noted in Haleslls' Post Trial Memoranda, Xanadu and the cases cited therein concerned easements for ingress and egress and were based upon considerations specifically applicable to such easements. In view of the Order's reliance upon Xanadu in the present case involving a general landscape easement, the Order should be amended to set forth the facts and legal conclusions underlying reliance on the case in this matter.

9. The provisions of Paragraph 8 on Page 25 should be amended to clarify whether or not the restoration ordered has to be completed before the Halsells can construct a driveway from Doug Hollow Road. The Halsells request that they be allowed to construct an alternate driveway before undertaking the restoration ordered, or they will be left with no access to their property for a substantial time. Also, it is requested that additional time be allowed for submitting a proposal for restoration, it being noted that Spring is the busiest season of the year for landscapers and they will not have sufficient time to obtain proposals. Also, if restoration is not required until an alternate driveway can be installed, it would be premature to obtain proposals at this time.

Respectfully submitted,

s/William C. Hood
S.C. Bar No. 2601
505 N. McDuffie Street
Anderson, SC 29621
Ph.: 864-375-0530
Attorney for Defendants Halsell

March 23, 2023

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE CASE NO. 2021-CP-37-00093

Mountain View Pointe Owners Association, Inc., Jane P. Hale, L. Shepard Hamrick, Jr., Martha Hamrick, Matthew Williams, Sue Williams, Barry Noffze, Ruth Noffze, Michael Dorsey, Monica Dorsey, Jack James Dorsey, Jr. and Lucinda Dorsey as Co-Trustees of the Dorsey Joint Revocable Trust, Kai Evensen, Lynn Elliot Amos as Trustee of the Lynn Elliot Amos Qualified Personal Residence Trust, Lynn Keith Amos as Trustee of the Lynn Keith Amos Qualified Personal Residence Trust, Charlene Finucan, John Prescott, Jr., Elizabeth Prescott, Steven Trojan, Dottie Trojan, Leonard J. Stoecklein, Patricia Stoecklein, Dale Hill, Rebecca Hill, Larry Kuykendall as Trustee of the Larry Kuykendall Revocable Trust, Larry Kuykendall as Trustee of the Elke Kuykendall Revocable Trust, Thomas McCaw, Roberta McCaw, Robert Albergotti, Elaine Albergotti, Frank Patterson, Frances Patterson, Brian A. Fox and Jennifer Fox,

Plaintiffs,

vs.

Rodney M. Halsell, Barbara Halsell, Graham R. Piper, Christine A. Piper, Michael Newton, Angela Newton, Gary Hutchinson, Daniel Horner, Lonnie Harper, Elianor Harper, Christopher Tam, Amie Kerley, Karan Sandhu and Gloria Sandhu.

Defendants.

TRANSCRIPT OF RECORD

DATE: 10/26/22 & 10/27/22
BEFORE: Honorable Steven C. Kirven
 Master-in-Equity 10th Judicial Circuit
COURT REPORTER: Virginia H. Campbell

1 **APPEARANCES**

2 Larry C. Brandt, Esquire Attorney for Plaintiffs

3

4 William C. Hood, Esquire Attorney for Defendants,

5 Rodney & Barbara Halsell

6

7 Richard H. McDuff, Esquire Attorney for Defendants,

8 Graham R. & Christine A.

9 Piper

10

11 Plaintiffs present:

12 Jane Hale, Matthew Williams, Sue Williams, Jack Dorsey,

13 Lucinda Dorsey, Lynn Keith Amos, Elizabeth Prescott,

14 Steven Trojan, Dottie Trojan, Dale Hill, Rebecca Hill,

15 Robert Albergotti, Elaine Albergotti, Frank Patterson,

16 Tom McCaw

17 Also, Michael Braunschweiger (sequestered before

18 testimony began)

19

20 Defendants present:

21 Rodney Halsell, Barbara Halsell, Graham R. Piper and

22 Christine A. Piper

23

24

25

1	INDEX	
2		<u>Page No.</u>
3	Introduction of case and preliminary matters	9
4	Motions	13
5	Introduction of Exhibits into Evidence	
6	Plaintiffs' Exhibits 1 - 11, 12A - 17B	21
7	Court/Joint Exhibits 1A - 11B	22
8	Defendant Piper Exhibits 1 - 12	23
9	Defendant Halsell Exhibits 1 - 17	23
10	Testimony of Graham R. Piper	
11	Direct Examination by Mr. Brandt	27
12	Cross Examination by Mr. Hood	52
13	Examination by Mr. McDuff	54
14	Redirect Examination by Mr. Brandt	62
15	Testimony of Jack J. Dorsey	
16	Direct Examination by Mr. Brandt	68
17	Plaintiffs' Exhibit 18 admitted into evidence	81
18	Plaintiffs' Exhibit 19 admitted into evidence	104
19	Cross Examination by Mr. Hood	108
20	Examination by Mr. McDuff	120
21	Redirect Examination by Mr. Brandt	143
22	Testimony of Robert D. Albergotti	
23	Direct Examination by Mr. Brandt	145
24	Cross Examination by Mr. Hood	148
25	Examination by Mr. McDuff	155

1	Testimony of Steven F. Trojan	
2	Direct Examination by Mr. Brandt	165
3	Cross Examination by Mr. Hood	168
4	Examination by Mr. McDuff	172
5	Testimony of Roberta McCaw	
6	Direct Examination by Mr. Brandt	177
7	Cross Examination by Mr. McDuff	183
8	Testimony of Elizabeth Prescott	
9	Direct Examination by Mr. Brandt	191
10	Cross Examination by Mr. Hood	194
11	Examination by Mr. McDuff	195
12	Court Adjourned on 10/27/23 at 3:58 p.m.	
13	Day Two - October 27, 2022 beginning @ 10:30 a.m.	
14	Motions by Mr. Hood	204
15	Testimony of Rodney Halsell	
16	Direct Examination by Mr. Hood	212
17	Cross Examination by Mr. Brandt	277
18	Redirect Examination by Mr. Hood	311
19	Testimony of Graham R. Piper	
20	Direct Examination by Mr. McDuff	312
21	Cross Examination by Mr. Brandt	323
22	Motion by Mr. McDuff	
23	End of Trial	364
24	Certificate of Reporter	365
25		

1 *COURT REPORTER WAS NOT ALLOWED TO CHECK OUT EXHIBITS
2 FOR COPYING PURPOSES. PLEASE CONTACT CLERK OF COURT FOR
3 COPIES.

4 INDEX OF EXHIBITS

5 Plaintiffs' Exhibits

6	No.	Description
7	1	Handwritten note from Rodney Halsell to Mr. and
8		Mrs. Piper, updated, with the words "Landscape
9		Easement Exists" at top
10		(1 page)
11	2	Defendants Halsell's introduction letter to Mt.
12		View Pointe Owners Assoc. (4 pages undated)
13	3	Halsell proposal dated 9/7/2020 (2 pages)
14	4	Letter of Larry C. Brandt to Mr. and Mrs. Piper
15		dated 10/26/2020 (2 pages)
16	5	Agreement Contract to Buy and Sell Real Estate with
17		typed in purchase price of \$200,000.00 and pen
18		markings changing it to \$150,000.00 (8 pages)
19	6	Agreement/Contract to Buy and Sell Real Estate
20		signed by Rodney Halsell, buyer, on 10/12/2020 and
21		Graham and Christine Piper, Sellers, on 10/13/2020
22		(9 pages)
23	7	Letter from Graham Piper to Adam C. Chapman,
24		Planning Director, Oconee County, SC, dated
25		9/28/2020 (2 pages)

1 8 Settlement Statement for the Sale of the Property
2 by Mr. and Mrs. Piper to Rodney Halsell
3 and Barbara Halsell showing that the purchase price
4 was, in fact, \$150,000.00 (2 pages)
5 9 Acknowledgment and Certification signed at closing
6 on 12/2/2020 by Rodney and Barbara Halsell (1 page)
7 10 Application for Encroachment Permit filed by Rodney
8 Halsell with the SC Department of Transportation
9 dated 12/2/2020 (10 pages)
10 11 SC Dept. of Transportation encroachment permit
11 issued to Rodney Halsell dated 1/7/2021 pertaining
12 to Doug Hollow Road (2 pages)
13 12A Photo
14 12B Photo
15 12C Photo
16 12D Photo
17 12E Photo
18 12F Photo
19 13 Photo
20 14 Photo
21 15 Photo
22 16 Photo
23 17A Photo (black & white with red marks)
24 17B Photo (color with red marks)
25 18 Photo of Driveway

1 19 Deed Book 1677, pages 284-292
2 COURT/JOINT EXHIBITS
3 1A Covenants and Restrictions for Mountain View
4 Pointe Subdivision recorded in Deed Book 1250
5 at Page 093, records of Oconee County
6 1B By-Laws of Mountain View Pointe Owners Assoc., Inc.
7 recorded in Deed Book 1742 at Pages 188-200
8 2 Plat recorded in Plat Book A910 at Pages 1-2
9 3 Deed from Crescent Communities to Mountain View
10 Pointe Owners Association, recorded in Deed
11 Book 1411, at page 237
12 4 Corrective Deed from Mountain View Pointe Owners
13 Assoc. to Crescent Communities, recorded in
14 Deed Book 1426, at Page 274
15 5 Deed from Crescent Communities to Defendants Piper
16 for Lot 7 of Mountain View Pointe, recorded in Deed
17 Book 1367, at Page 226 referencing Plat recorded in
18 Plat Book A910 at Pages 1-2 (Exhibit 2)
19 6 Deed from Crescent Communities to Defendants
20 Piper for Parcels A & B, recorded in Deed Book
21 1982, at Pages 91-96
22 7 Plat recorded in Plat Book B443, at Page 2
23 8 Deed from Crescent Communities to Oconee County for
24 a road right-of-way recorded in Deed Book 1465 at
25 Page 285

1 9 Deed from Defendants Piper to Defendants Halsell
2 recorded in Deed Book 2632, at Page 210,
3 referencing Plat recorded in Plat Book B754, at
4 Page 5 (Exhibit 10)

5 10 Plat recorded in plat Book B754, at Page 5

6 11A Letter from Larry C. Brandt, attorney, to
7 Defendants Halsell dated 10/26/2020

8 11B Letter from William C. Hood, attorney, to
9 Mr. Larry C. Brandt dated 1/12/2021

10 DEFENDANT PIPER EXHIBITS

11 1 Email dated 4/21/21 @ 10:00 am of Roberta McCaw
12 (2 pages)

13 2 Email dated 6/4/21 from Dorsey to Piper
14 Re: Special Assessment (2 pages)

15 3 Mountain View Pointe Owners Assoc. Meeting dated
16 3/13/21 (2 pages)

17 4 Community Income, Expense & Proposed Budget for
18 2022 (3 pages)

19 5 Mountain View Pointe Owners' Assoc. Notice and
20 Call of 2022 Annual Meeting (7 pages)

21 6-12 Photos

22 DEFENDANT HALSELL EXHIBITS

23 1-16 Photos

24 17 Landscaping Details

25

1 BY THE COURT:

2 This is civil action number 2021-CP-37-00093 and the
3 caption as I have it now is Mountain View Pointe
4 Owners Association, Incorporated, Jane P. Hale, L.
5 Shepard Hamrick, Jr., Martha Hamrick, Matthew
6 Williams, Sue Williams, Barry Noffze, Ruth Noffze,
7 and I'm sorry if I'm not pronouncing that correctly,
8 Michael Dorsey, Monica Dorsey, Jack James Dorsey,
9 Jr. and Lucinda Dorsey as Co-Trustees of the Dorsey
10 Joint Revocable Trust, Kai Evensen, Lynn Elliot Amos
11 as Trustee of the Lynn Elliot Amos Qualified
12 Personal Residence Trust, Lynn Keith Amos as Trustee
13 of the Lynn Keith Amos Qualified Personal Residence
14 Trust, Charlene Finucan, John Prescott, Jr.,
15 Elizabeth Prescott, Steven Trojan, Dottie Trojan,
16 Leonard J. Stoecklein, Patricia Stoecklein, Dale
17 Hill, Rebecca Hill, Larry Kuykendall as Trustee of
18 the Larry Kuykendall Revocable Trust, Larry
19 Kuykendall as Trustee of the Elke Kuykendall
20 Revocable Trust, Thomas McCaw, Roberta McCaw, Robert
21 Albergotti, Elaine Albergotti, Frank Patterson,
22 Frances Patterson, Brian A. Fox and Jennifer Fox,
23 Plaintiffs. The Defendants are Rodney Halsell,
24 Barbara Halsell, Graham R. Piper, Christine A.
25 Piper, Michael Newton, Angela Newton, Gary

1 Hutchinson, Daniel Horner, Lonnie Harper, Elianor
2 Harper, Christopher Tam, Amie Kerley, Karan Sandhu
3 and Gloria Sandhu. Now, that's the caption that was
4 written in the Order that I signed yesterday which
5 was a Consent Order that deleted certain Plaintiffs
6 and added certain Defendants and so on, I think a
7 lot of them are just names on one kind or another.
8 Is that the correct caption?

9 BY MR. BRANDT:

10 Yes, sir, as far as I can remember.

11 BY THE COURT:

12 Okay. Now, I'm going to get the Plaintiffs to state
13 their name for the record and tell us who you
14 represent starting with the Plaintiff.

15 BY MR. BRANDT:

16 I'm Larry Brandt and I represent the Plaintiffs,
17 Mountain View Pointe Owners Association. I've not
18 been retained by any of the other individual
19 Plaintiffs but basically they're made a party to be
20 given a choice to participate and each one of them
21 declared they wanted to be a plaintiff too in this
22 case so I'll be representing all the interests of
23 all the Plaintiffs.

24 BY THE COURT:

25 All right. Over here, Mr. Hood?

1 BY MR. HOOD:

2 Your Honor, I'm Bill Hood and I'm representing the
3 Defendants, Rodney and Barbara Halsell.

4 BY MR. MCDUFF:

5 Rick McDuff, representing Graham and Christine
6 Piper.

7 BY THE COURT:

8 What about the remaining Defendants?

9 BY MR. MCDUFF:

10 They're not represented by anybody.

11 BY MR. BRANDT:

12 They have not filed an Answer so I move to find them
13 in default. I gave them a chance, if they're here
14 I'd let them speak, if they want to. I don't know
15 that they are.

16 BY THE COURT:

17 Any of those people here of the names I read out
18 other than the Halsells and the Pipers?

19 BY MR. MCDUFF:

20 No, Judge.

21 BY THE COURT:

22 They're not here?

23 BY MR. BRANDT:

24 Yeah, but ---

25 BY THE COURT:

1 Well, I mean apparently they're in default, so you
2 can include that in the ultimate Order whoever draws
3 it up.

4 BY MR. BRANDT:

5 I will, Your Honor.

6 BY THE COURT:

7 All right, the other thing that I ---

8 BY MR. MCDUFF:

9 Judge, if I may interrupt, I believe that the
10 Newtons did file some sort of response to the
11 initial Complaint that they I think filed with the
12 Clerk of Court. It may, I'm assuming it's in the
13 court file.

14 BY THE COURT:

15 Well, I'm not sure if there is or not to tell you
16 the truth.

17 BY MR. BRANDT:

18 Well, they didn't send it to me so.

19 BY MR. MCDUFF:

20 What's that?

21 BY MR. BRANDT:

22 I didn't get it but.

23 BY THE COURT:

24 They're not here today so.

25 BY MR. MCDUFF:

1 Right.

2 BY THE COURT:

3 So whatever, we'll check on that. Okay, the other
4 thing that I noticed in reviewing this thing is
5 there was a motion filed fairly recently by the
6 Defendants I think seeking to amend. Is that Mr.
7 Hood's motion or Mr. McDuff's?

8 BY MR. HOOD:

9 That's my motion, Your Honor.

10 BY THE COURT:

11 Well, that Motion to Amend Defendant Halsells'
12 Answer to Amended Complaint that was filed on
13 October 18 and I guess it was served at that same
14 time electronically or otherwise?

15 BY MR. HOOD:

16 Well, let me explain that, Your Honor. I circulated
17 a Consent to Amend some time ago, I don't recall
18 exactly what day it was, and Mr. McDuff on behalf of
19 his clients agreed to consent to it; Mr. Brandt was
20 unable to consent to it. But in any event, when I
21 first circulated the Consent he needed some time to
22 talk to his numerous clients about it and ended up
23 determining that he could not consent and so we
24 agreed then to just go ahead and have that heard and
25 disposed of today we proceed so.

1 BY THE COURT:

2 I mean so you want to purge it?

3 BY MR. HOOD:

4 No, I want to go ahead and have the court consider
5 it.

6 BY THE COURT:

7 All right. Well, I believe the motion as I recall
8 was a motion to amend the Defendant's Answer and
9 raise a ninth defense which basically says that the
10 Defendants are entitled to implied easement of
11 necessity; is that basically it?

12 BY MR. HOOD:

13 That's correct, Your Honor. And the reason I filed
14 the motion is and as I've explained to both counsel,
15 I'm not really sure that has to be an affirmative
16 defense but I wanted to go ahead and add that in as
17 a precaution because I wouldn't want to go through
18 all this and then maybe have the chance of somebody
19 coming back and saying, oh, that should have been an
20 affirmative defense. I don't think it presents any
21 issues of prejudice or disadvantage to any of the
22 parties involved because the factual issues that
23 that amendment deals with are already in the
24 pleadings. Mr. Brandt's Complaint affirmatively
25 alleges that there is no necessity on the part of

1 the Halsells to obtain access in the manner that
2 we're attempting to obtain access to ---

3 BY THE COURT:

4 And by denying that you made ---

5 BY MR. HOOD:

6 And I denied that, so that issue really is joined; I
7 just want to officially make it an affirmative
8 defense in the event somebody might decide that's
9 wrong.

10 BY THE COURT:

11 All right, I got it. Mr. Brandt?

12 BY MR. BRANDT:

13 Your Honor, the only reason I'd have to oppose it
14 would basically be the tardiness of the filing. I'm
15 prepared to go forward and defend against the
16 necessity, my case has been prepared in that regard.
17 The only thing there may be I might think of an
18 affirmative defense to that that I should have pled
19 and so I would ask them if it comes up that I would
20 be able to introduce to anything I think affirmative
21 and such as acquiescence and there's mixed law on
22 that issue too as to whether it's an affirmative
23 defense or not.

24 BY THE COURT:

25 Well, as you both know or all three of you know, I

1 mean you can amend your pleadings based on the
2 evidence submitted as the trial progresses. So if
3 there's evidence about that issue, then you can do
4 that during the trial and I think the point, I see
5 the valid point is that you don't want to come back
6 later and have an issue like that standing out there
7 that could say, oh, we get to re-litigate this thing
8 based on that issue.

9 BY MR. BRANDT:

10 I agree with that.

11 BY THE COURT:

12 And thirdly, even though you didn't file this motion
13 until the 18th which is less than 10 days ago,
14 apparently he made it known to you ---

15 BY MR. BRANDT:

16 He did.

17 BY THE COURT:

18 --- earlier than that. So I would be inclined to
19 allow him to go ahead and put it in and obviously if
20 you have defenses that, you know, you need to add in
21 the record you can present evidence and then amend
22 yours.

23 BY MR. BRANDT:

24 Well, I've already had prepared my case before he
25 even mentioned that in regard to the necessity

1 argument.

2 BY THE COURT:

3 So it sounds like no prejudice would be involved?

4 BY MR. BRANDT:

5 So there wouldn't be really any prejudice.

6 BY THE COURT:

7 All right. Well, I'm going to go ahead and allow

8 that to be done so we can go ahead and get

9 everything in and then we can get hopefully a late

10 determination. All right, anything else on a

11 preliminary basis?

12 BY MR. BRANDT:

13 No, sir, I can't think of any.

14 BY THE COURT:

15 Mr. Hood, have you got anything?

16 BY MR. HOOD:

17 No, nothing else at this time, Your Honor.

18 BY THE COURT:

19 All right. Well, there's some mention made of after

20 we take all the testimony today and maybe tomorrow

21 that there be some time for some briefs to be

22 submitted; and has that been discussed?

23 BY MR. MCDUFF:

24 It has, Judge.

25 BY MR. BRANDT:

1 We did.

2 BY MR. MCDUFF:

3 We discussed it on Monday when we all met and our
4 thought was and tell me if I'm wrong, is we thought
5 about that each party would have 20 days after the
6 closing of all the evidence in the case to submit
7 their briefs on the issues, and then each party to
8 have an additional 10 days to file rebuttals to
9 whatever is set forth in the briefs.

10 BY THE COURT:

11 Okay. And everybody is agreeable to that?

12 BY MR. HOOD:

13 Well, I'm not going to contest it really, Your
14 Honor, but I would prefer maybe shortening that time
15 down a little bit, say 15 days to get it. What I'm
16 thinking there is this case is already running late
17 and I'm hopeful maybe that we can get it disposed of
18 before you get in the holidays and all that so.

19 BY THE COURT:

20 Well, and I've still got to think about it.

21 BY MR. HOOD:

22 Well, you think fast though I'm sure so.

23 BY THE COURT:

24 I think better over a turkey dinner. Well, I think
25 that's probably a reasonable timeframe, 20 days and

1 10 days to respond. I don't think five days is
2 going to make a whole lot of difference so we'll go
3 with the 20 days and the 10 days as proposed. All
4 right, now, we're ready to proceed with the trial
5 and I normally allow the attorneys to give me a
6 brief opening statement if they choose to do that
7 but you don't have to. You know, we had a summary
8 judgment motion that was argued on this case a while
9 back, so I'm pretty familiar with the gist of the
10 case so if y'all -- but if you want to make an
11 opening statement then that's fine; if you don't we
12 can proceed right on into the testimony?

13 BY MR. BRANDT:

14 I don't care. I think we hashed it out in the
15 summary judgment pretty well the center of the case,
16 what the issues are and what each party's position
17 is so.

18 BY THE COURT:

19 Okay. And we'll get to do some of that at the end
20 too, so if y'all want to?

21 BY MR. HOOD:

22 Yeah, we waive.

23 BY MR. MCDUFF:

24 We'll waive, Judge.

25 BY MR. BRANDT:

1 We'll waive.

2 BY THE COURT:

3 All right, well, we're ready to start the testimony.

4 Mr. Brandt, call your first witness.

5 BY MR. BRANDT:

6 Your Honor, before we take testimony there is one
7 other thing is that we have agreed, I've submitted a
8 list of Plaintiffs' Exhibits that's been pre-marked
9 and the Defendants have agreed there's no
10 objections.

11 BY THE COURT:

12 Well, let me get this straight now here. I've got a
13 bunch of stuff up here. I've got what's called a
14 list of Plaintiffs' Exhibits 1 through 11 and I've
15 also got a second set of Plaintiffs' Exhibits 12-A
16 through 17B.

17 BY MR. BRANDT:

18 Yes, sir.

19 BY THE COURT:

20 So are all those exhibits, is there any objection to
21 any of those exhibits from the Defendants?

22 BY MR. MCDUFF:

23 No objection.

24 BY MR. HOOD:

25 No objection.

1 BY THE COURT:

2 So those will all be admitted without objection.

3 (PLAINTIFFS' EXHIBIT NUMBERS 1 - 11, 12A - 17B ADMITTED
4 INTO EVIDENCE)

5 BY THE COURT:

6 Then I also have a set of what's called Court
7 Exhibits, it looks like 1A through ---

8 BY MR. MCDUFF:

9 12B.

10 BY MR. BRANDT:

11 Basically you could call them Joint Exhibits.

12 BY THE COURT:

13 Well, I've got 11B.

14 BY MR. MCDUFF:

15 11B.

16 BY MR. BRANDT:

17 But we marked them as Court Exhibits as a matter of
18 public records.

19 BY THE COURT:

20 Or Joint Exhibits, either one. But does anybody
21 have any objection to these?

22 BY MR. MCDUFF:

23 No objection, we're all in agreement.

24 BY MR. HOOD:

25 No objection.

1 BY THE COURT:

2 All right. Those will be admitted also.

3 (COURT/JOINT EXHIBIT NUMBERS 1A - 11B ADMITTED INTO
4 EVIDENCE)

5 BY THE COURT:

6 Then I've got another set of documents here which is
7 Defendant Pipers' Exhibits.

8 BY MR. MCDUFF:

9 And we're 1 through 12.

10 BY THE COURT:

11 1 through 12?

12 BY MR. MCDUFF:

13 Yes, sir.

14 BY THE COURT:

15 Is there any objection to these exhibits, Mr.
16 Brandt?

17 BY MR. BRANDT:

18 No.

19 BY THE COURT:

20 Mr. Hood?

21 BY MR. HOOD:

22 No, Your Honor.

23 BY THE COURT:

24 All right. Those exhibits will be admitted without
25 objection.

1 (DEFENDANT PIPER EXHIBITS 1 -12 ADMITTED INTO EVIDENCE)

2 BY THE COURT:

3 And then we have another set of items which says

4 Halsell Exhibits and I believe it's ---

5 BY MR. HOOD:

6 1 through 17, Your Honor.

7 BY THE COURT:

8 --- 1 through 17. Any objection to those?

9 BY MR. BRANDT:

10 No.

11 BY MR. MCDUFF:

12 No.

13 BY THE COURT:

14 All right, so those will be admitted without

15 objection.

16 (DEFENDANT HALSELL EXHIBITS 1 - 17 ADMITTED INTO
17 EVIDENCE)

18 BY THE COURT:

19 All right. Anything further?

20 BY MR. BRANDT:

21 Sir?

22 BY THE COURT:

23 Anything further?

24 BY MR. BRANDT:

25 No, sir.

1 BY THE COURT:

2 All right, Plaintiff, call your first witness.

3 BY MR. BRANDT:

4 I call Mr. Piper.

5 BY MR. MCDUFF:

6 Judge, at this time I don't know if there are any
7 nonparty witnesses in the room, in the courtroom,
8 and I would like to have them, invoke the rule to
9 have them sequestered until they come and testify.

10 BY THE COURT:

11 Nonparty witnesses?

12 BY MR. MCDUFF:

13 Nonparty witnesses.

14 BY MR. BRANDT:

15 No, all of them are party witnesses. I don't have
16 any today that are nonparty.

17 BY MR. MCDUFF:

18 I thought Mr. Braunschweiler was, he's no longer a
19 party.

20 BY MR. BRANDT:

21 He's not a party. Mr. Braunschweiler would be the
22 only one. He was the President of the POA I think
23 or Chairman of the Board of the POA at the time this
24 the incident had started. He has since sold his
25 property, but he was a party to begin with.

1 BY THE COURT:

2 Is he going to be a witness?

3 BY MR. BRANDT:

4 He may very well be a witness.

5 BY THE COURT:

6 Well, I think he's entitled to have him sequestered
7 if he wants to so.

8 BY MR. BRANDT:

9 Well, I don't want him sequestered, but he's just
10 going to testify as to matters that he had in
11 regards ---

12 BY THE COURT:

13 Well, I'm talking about they want him sequestered;
14 they want him outside the courtroom until it's time
15 for him to testify. So what's his name? What's the
16 name?

17 BY MR. MCDUFF:

18 Braunschweiger, Michael Braunschweiger.

19 BY THE COURT:

20 Mr. Braunschweiger, I'm going to have to ask you to
21 step outside the courtroom. They've asked for you
22 to be outside while the other testimony is presented
23 so that theoretically it won't, you know, it won't
24 color your testimony or inform you one way or the
25 other and they're within the rules to request that,

1 so I'm going to ask you step outside if you would
2 please, sir?

3 BY MR. BRAUNSCHWEIGER:

4 All right, is there a place I can sit? I don't
5 stand very well.

6 BY THE COURT:

7 Anywhere out in the lobby, anywhere outside that's
8 fine. I mean I think there's some seating out in
9 the outside area and if y'all are worried about him
10 hearing you, you may want to close the door but
11 that's up to you.

12 (MICHAEL BRAUNSCHWEIGER LEAVES COURTROOM)

13 BY THE COURT:

14 All right, so your witness called was, what's his
15 name?

16 BY MR. BRANDT:

17 Mr. Piper, one of the Defendants.

18 BY THE COURT:

19 Mr. Piper?

20 BY MR. PIPER:

21 Yes, sir.

22 BY THE COURT:

23 All right, sir, if you'll come around here to the
24 witness stand and be sworn in.

25 BY COURT REPORTER:

1 Would you raise your right hand? Do you solemnly
2 swear or affirm to tell the truth, the whole truth
3 and nothing but the truth so help you God?

4 BY MR. PIPER:

5 I do.

6 TESTIMONY OF GRAHAM R. PIPER

7 DIRECT EXAMINATION BY MR. BRANDT:

8 Q. Mr. Piper, do you still own property in Mountain
9 View Pointe?

10 A. Yes, I do.

11 Q. And when did you buy your property and where you
12 live I believe that's Lot 7?

13 A. Lot 7 we purchased I believe it was 2005.

14 Q. And at the time that you purchased your property or
15 prior to that, did you review the Covenants and
16 Restrictions of Mountain View?

17 A. We received them at closing, so I would say it was
18 after that we actually reviewed them.

19 Q. But you got a copy at the closing?

20 A. Yes.

21 Q. And when you received it at closing did you ever
22 review any of the plats of Mountain View Pointe?

23 A. There was a limited plat that just showed the
24 development portion, so it was half a page. It did
25 not show anything but the lots of Mountain View

1 Pointe Subdivision.

2 Q. Was it a portion of the larger plat?

3 A. I believe so.

4 Q. Okay. And I'll show you I think it's Court Exhibit

5 3?

6 BY MR. MCDUFF:

7 2. Are you looking for the big plat, Larry?

8 BY MR. BRANDT:

9 Yeah.

10 BY MR. MCDUFF:

11 It's easier or...

12 Q. Well, you can see it better. Yeah, this is a plat

13 you can read with your eyes and was this what you

14 received, part of this plat?

15 A. What I received was a section of a photocopy of

16 that.

17 Q. Of just that portion?

18 A. That half of it, yes.

19 Q. Did you ask to see the plat of the entire

20 subdivision when you went to close?

21 A. No, I was really only concerned with Lot 7.

22 Q. And do you know -- you didn't go ask the attorney

23 that closed it for you? Who did the closing?

24 A. I believe it was Michael Smith.

25 Q. And did he have a bigger plat? A smaller version of

1 this thing, of course, but they were condensed but
2 you can't read them on the record very well so?

3 A. I do not recall.

4 Q. Okay. And, of course, you didn't go to the
5 courthouse and inquire either to view the big one --

6 -

7 A. No.

8 Q. --- that may be on record?

9 A. No.

10 Q. And did you receive a copy of the Covenants and
11 Restrictions?

12 A. Yes, at closing.

13 Q. Did you read them?

14 A. Yes.

15 Q. Was there a landscape easement discussed in the
16 Covenants and Restrictions?

17 A. Yes.

18 Q. And the monument?

19 A. Yes.

20 Q. And were they labeled or included in that plat as a
21 common area of Mountain View Pointe?

22 A. I think given that I only had that portion of it, I
23 mean they were mentioned in the CCRs but like I said
24 I did not have the complete plat ---

25 Q. Since this case ---

1 A. --- at that time.

2 Q. Since this case has started have you reviewed the
3 Covenants and Restrictions?

4 A. Yes.

5 Q. At the time that you purchased the property were
6 those Covenants and Restrictions in place?

7 A. For Lot 7, yes.

8 Q. Yes. And for the entire subdivision?

9 A. As far as I know for Lots 1 through 29, yes.

10 Q. What about the road and the ---

11 A. The roadway is always issued as a public road.

12 Q. As a landscape easement, where did you think the
13 landscape easement was?

14 A. There was a stone monument at the front entrance on
15 the left-hand side as you come in.

16 Q. And do you admit that it's still there?

17 A. The stone monument is still there, yes.

18 Q. And do you admit that the landscaping on both sides
19 of the road is still there?

20 A. There's landscaping in the road right-of-way, yes.

21 Q. And who has been paying for that landscaping around
22 the road there and down at the monument all these
23 years?

24 A. The HOA.

25 Q. That you belong to?

1 A. Yes.

2 Q. And you've contributed money or been assessed fees
3 based on that in the budget every year?

4 A. Yes.

5 Q. And I show you -- later on you purchased some more
6 property from Crescent, didn't you?

7 A. Yes, I did.

8 Q. And that's A and B? Wait a minute.

9 A. Yes, Parcels A and B I believe in 2013, yes.

10 Q. Okay. I'm going show you, we'll go back a step or
11 two. Here is Court Exhibit 1A, it's a Declaration
12 of Covenants, Conditions and Restrictions for
13 Mountain View Pointe. Have you seen that before
14 this case started?

15 A. Yes.

16 Q. And you've read it?

17 A. Yes.

18 Q. And when did you first read that; do you recall?

19 A. It was sometime after closing in 2005.

20 Q. Okay, so you knew. And when did you buy Lots A and
21 B there on that side?

22 A. Parcels A & B, in 2013.

23 Q. 2013?

24 A. So five years later.

25 Q. And you were aware of the Covenants in place?

- 1 A. Excuse me, eight years later.
- 2 Q. Now, were you aware when you sold the property, you
- 3 sold the property to Mr. Halsell, one piece?
- 4 A. Yes, I sold him this piece.
- 5 Q. The 4.17 acres?
- 6 A. Yeah, 4.7 acres.
- 7 Q. And when you sold it did you give him a plat?
- 8 A. I believe so, yes.
- 9 Q. Okay. In your deed and maybe we'll get to that if
- 10 it's in here, but you sold ---
- 11 A. I at least showed it to him.
- 12 Q. And most of the record, the deed, the plat by which
- 13 you conveyed to him, did it show a landscape
- 14 easement?
- 15 A. Yes, it showed what's shown on this.
- 16 Q. And I want to show you now Plaintiffs' Exhibit
- 17 Number 1, a copy of it, and ask you if you've ever
- 18 seen that document before?
- 19 A. I've seen this original note, yes.
- 20 Q. And what does that -- is it Rod Halsell, did Rod
- 21 Halsell write you that note?
- 22 A. Yes, as far as I know.
- 23 Q. And that note basically, you know, he's inquiring
- 24 about are you willing to sell half of your property?
- 25 A. Correct.

1 BY THE COURT:

2 What exhibit is that you're referring to?

3 Q. Plaintiffs' Exhibit 1. And there's writing at the
4 top of this document, do you recognize that writing?

5 A. Yes.

6 Q. Whose writing is it?

7 A. There's actually two writings there; there's mine at
8 the very top describing the phone conversation after
9 I called Mr. Halsell saying "rustic style building".

10 Q. Well, somewhere there's writing here that says I
11 think -- what's that?

12 A. That's from my wife asking me what documents.

13 Q. And what did he offer you?

14 A. The initial offer was \$200,000.

15 Q. Okay. And whose writing is this that says
16 "landscape easement exists"?

17 A. That is my wife's, Chris Piper.

18 Q. And "hobby garage", who wrote that?

19 A. My wife wrote that.

20 Q. Okay. Did you write this "rustic style building" at
21 the top?

22 A. That's my writing, yes.

23 Q. Why didn't you write it on the first page?

24 A. I was having a conversation with Mr. Halsell. After
25 he sent me this note I called him back at the phone

1 number listed and just asked him what his interest
2 in the land was and what he planned to do with it.

3 Q. And was that note from what he told you?

4 A. That was just my notes on what he told me. That was
5 my interpretation of what he said.

6 Q. I'm going to show you Exhibit Number 2.

7 BY MR. MCDUFF:

8 Is that Plaintiffs' Exhibit Number 2 or Court
9 Exhibit 2?

10 Q. Court Exhibit Number 2, take a look at that, take a
11 minute to compare it to that one. This is a smaller
12 copy and it's hard to see.

13 A. Right.

14 Q. But is that just a mirrored copy of this one?

15 A. As far as I can tell, yes.

16 BY THE COURT:

17 And just for the record when the term "Court
18 Exhibit" is used by any of the attorneys in this
19 case they are really referring to what I think as
20 Joint Exhibits.

21 BY MR. BRANDT:

22 They are.

23 BY THE COURT:

24 There's really no Court Exhibits per se just for
25 sake of clarification.

- 1 Q. Fine. Did your conversations with Mr. Halsell
2 produce any formal offers from him?
- 3 A. I'm sorry?
- 4 Q. Well, he contacted you to inquire about you willing
5 to sell property?
- 6 A. Correct.
- 7 Q. And was he specifically inquiring about the piece
8 here the 4.17 acre?
- 9 A. Correct, just Parcel A.
- 10 Q. And how much land did you owe, I mean own out there,
11 the total tract you bought?
- 12 A. The total tract is 21 acres, plus or minus. It was
13 4.17 on Parcel A and 17 acres on Parcel B.
- 14 Q. Okay. And did they convey to you and reference a
15 plat that showed that 4.17 acres when you bought it?
- 16 A. When we purchased the land from Crescent I believe
17 everything referenced back to this plat. This is
18 not the same plat.
- 19 Q. Well, I'm not trying to beat you up or anything; I
20 just want to set the record straight that when it
21 sold to you it was conveyed to you by a plat which
22 is of record and there's a reference in the deed
23 that the landscape easement existed even on his
24 tract that you were selling him?
- 25 A. Yes.

1 Q. And you disclosed that to Mr. Halsell?

2 A. Yes, that we believed the landscape easement
3 existed.

4 Q. Now, I'm going to show you Plaintiffs' Exhibit
5 Number 5; have you ever seen that document before?

6 A. Yes.

7 Q. And when did you see it?

8 A. I'm trying to think if it was September 2020.

9 Q. But you never did sign that one, did you? You need
10 to look at it?

11 A. No, I didn't.

12 Q. And why didn't you sign the one that had the 200 in
13 it? It's got 150, who wrote that 150 or scratched
14 through it?

15 A. I believe I did.

16 Q. You scratched through the 200 and put 150 and then
17 you wrote 150,000; in essence you changed the
18 numbers?

19 A. Yes.

20 Q. Why was the number changed?

21 A. Legally there was a concern with crossing the
22 nonexclusive easement and that if a driveway were to
23 come off of Doug Hollow it would cost significantly
24 more money in excavation and paving costs and Mr.
25 Halsell didn't believe the property was worth as

1 much if he had to do that.

2 Q. And Plaintiffs' Exhibit Number 6, have you seen that
3 document before?

4 A. Yes, this is the final sales contract.

5 Q. That's the contract that was actually closed upon?

6 A. Correct, this is what we signed and agreed to, yes.

7 Q. To sell to Mr. Halsell and again that's Plaintiffs'
8 Exhibit Number 6, okay. And when you sold the lot
9 to Mr. Halsell -- well, let me go back and what's
10 been marked as Court Exhibit or Joint Exhibit Number
11 5, have you seen that before?

12 A. Yeah.

13 Q. Is that the deed to which property?

14 A. This appears to be Lot 7.

15 Q. That's where you live?

16 A. Correct.

17 Q. I show you now Court or Joint Exhibit Number 6 and
18 ask you if you've seen that document before or the
19 original of that document before?

20 A. Yes, this is for the 21 plus acres.

21 Q. 21 or the whole tract?

22 A. Well, it's 21.7 acres, it's a little over. It's 17
23 here and 4.7 here.

24 Q. All right, thank you. On this one I'm going to show
25 you Exhibit Number 7; is that the plat that you used

1 to convey the property to the Halsells?

2 A. I believe so.

3 Q. And this as it appears to be in B443 at Page 2 for
4 the record, Your Honor.

5 BY MR. MCDUFF:

6 Larry, for the record could you put in the record
7 the date of that plat? I can do it if you want me
8 to, it's April 3, 2013.

9 Q. It's in there, it's April 3, 2013. And so when you
10 sold the property what you sold to Mr. Halsell is
11 Parcel A?

12 A. Correct.

13 Q. And this is the plat you used?

14 A. Yes.

15 Q. And when you sold the property to the Halsells and I
16 show you Number, Exhibit 9 ---

17 BY THE COURT:

18 That's Court 9?

19 Q. Court 9/Joint Exhibit 9. Is that the deed?

20 A. Yes.

21 Q. And keep the copy. Did you sell it subject to that
22 plat and any easements and restrictions of record?

23 A. We placed the property has no restrictions; as far
24 as easements, I mean it was what shown on the plat
25 and that was based off the 2013 when we purchased it

1 from Crescent.

2 Q. All right, when y'all purchased it from Crescent. I
3 show you Court Exhibit or Joint Exhibit Number 2 and
4 again ---

5 A. Correct, it's a small version.

6 Q. --- a small version of that one?

7 A. Yeah.

8 Q. And that bottom version which you sold the property
9 by, Exhibit 10, Joint Exhibit 10, does that
10 basically depict the same property?

11 A. Right, it's just the half, yeah.

12 Q. And then we've got another Exhibit 7, 15th day of
13 July of 2013 that was recorded in Volume B443 at
14 Page 2 and that's just another version of that
15 portion of the big plat over there, correct?

16 A. As far as I can tell, yes.

17 Q. All right. Did you and Mr. Halsell prior to your
18 negotiations look at all these plats and go over
19 them?

20 A. I don't think we looked at all the different plats.
21 I think we had one copy of them that looked at
22 Parcels A and B. I couldn't tell you whether it was
23 the 2002 version or, a copy of the portion of the
24 2002 version or the 2013 version.

25 Q. But all the plats that's dealt with that property

1 shows that landscape easement, doesn't it?

2 A. Yes.

3 Q. Now, I hand you a copy of Plaintiffs' Exhibit Number
4 7, it's dated September 28th of 2020, it's a letter
5 to Adam C. Chapman and have you seen that before?

6 A. Yes.

7 Q. Did you write that letter?

8 A. Yes, I did.

9 Q. Why did you write that letter?

10 A. I was looking for input from Mr. Chapman on what was
11 necessary to secure a driveway onto Parcel B --
12 excuse me, Parcel A.

13 Q. Is that because Halsell is wanting a break on the
14 purchase price because of that easement's existence?

15 A. (no verbal response)

16 Q. Well, I'll direct your attention to the paragraph at
17 the top of page 2 here and it says, "the Halsells as
18 buyers are looking for some assurance that the
19 driveway on Mountain View Pointe Drive will be
20 allowed by Oconee County. By knowing they have to
21 enter the property from Doug Hollow Road, they want
22 to account for the extended length of their driveway
23 in their offer." Is that ---

24 A. Yes.

25 Q. --- that's talking about the \$50,000 deduction?

1 A. Yes.

2 Q. And this letter is dated way back in September; do
3 you recall the date that you sold the property to
4 the Halsells, the day it closed?

5 A. I believe the closing was December 3rd or early on.

6 BY THE COURT:

7 What year are we talking about?

8 A. 2020.

9 BY THE COURT:

10 2020, all right.

11 Q. After you sold to Mr. and Ms. Halsell, did you
12 assist in any way Mr. Halsell's attempts to get
13 access off of Doug Hollow?

14 A. After we sold, no.

15 Q. For the record I want to show you Plaintiffs'
16 Exhibit Number 8 which is a deed, it's a Joint
17 Exhibit, it's a deed from Crescent to Oconee County
18 for the roadway and have you ever seen that document
19 before?

20 A. No.

21 Q. At the time you sold to Mr. Halsell you were aware
22 of the landscape easement on that property?

23 A. I was aware of a nonexclusive landscape easement ---

24 Q. Yes. And ---

25 A. --- potentially existing.

1 Q. And did you do any kind of research or try to
2 determine whether or not a driveway could be put
3 across that landscape easement?

4 A. Other than reaching out to the County Planning, no.

5 Q. Okay. I show you now Plaintiffs' Exhibit Number 10,
6 Application for an Encroachment Permit.

7 BY MR. MCDUFF:

8 Larry, are you referencing Plaintiffs' Number 10?

9 Q. Yes.

10 A. Okay.

11 Q. And that has a plat attached to it or a portion of a
12 plat?

13 A. Yep.

14 Q. So at least that portion of the plat you showed to
15 Mr. Halsell at some particular time or did he just
16 go figure it out himself?

17 A. I, I would guess this portion was obtained by Mr.
18 Halsell, but there would be a copy of this small
19 version of record.

20 Q. And the date on this, but I think it was sometime in
21 December or December 2nd? Right there?

22 A. Yes, December 2nd.

23 Q. So the day that he purchased the property from you
24 he went down to file for that encroachment permit?

25 A. That appears to be the case.

1 Q. Plaintiffs' Exhibit Number 11 purports to be a
2 permit, an encroachment permit that's been granted;
3 would you agree and what date does it say it is?

4 A. That's January 7th, 2021.

5 Q. And does it have an expiration date on it?

6 A. Expiration date, January 7th of 2022.

7 Q. Okay. So he had a full year to exercise it,
8 correct?

9 A. Yes.

10 Q. Okay. Now, at some point in time you received a
11 letter from me explaining the position of the POA?

12 A. Yes, I believe in October or the end of October of
13 2020.

14 BY MR. MCDUFF:

15 It's Plaintiffs' 4, Larry.

16 Q. Plaintiffs' 4, this letter?

17 A. I believe that's the letter, yes.

18 Q. Did you ever respond to that?

19 A. I did.

20 Q. In writing?

21 A. Yeah, I believe I sent you a reply.

22 Q. Okay. At the time you got that letter did you go
23 seek legal advice?

24 A. No.

25 Q. Did Mr. Halsell to your knowledge?

1 A. I don't know.

2 Q. He never talked to you and told you that he had
3 consulted with an attorney?

4 A. He had been talking with an attorney for the
5 purposes of establishing a closing and for
6 negotiating the sales contract, what conversations
7 he had with his client or his attorney.

8 Q. Okay. I show you Plaintiffs' Exhibit 3, it's dated
9 September 7th, 2020; have you ever seen that
10 document?

11 A. Yes.

12 Q. And when did you first see that?

13 A. I wrote this document.

14 Q. Before he sent it?

15 A. I wrote this document and presented it to the MVPOA
16 Board as well as to Rod and Barbara also.

17 Q. But down in that letter in the paragraph, the second
18 from the bottom, does it reference that he had an
19 attorney?

20 A. Yes.

21 Q. And does he say what she told him?

22 A. Yes.

23 BY MR. MCDUFF:

24 Judge, at this point I think this is what Ann
25 Sullivan communicated and it's all multiple hearsay

1 and not relevant to the issues in this case. So if
2 she's going to testify it's a different matter.

3 BY THE COURT:

4 What's the name?

5 BY MR. MCDUFF:

6 Ann Sullivan.

7 BY THE COURT:

8 Ann Sullivan?

9 BY MR. MCDUFF:

10 Yeah, she's a real estate lawyer here in Seneca.

11 BY THE COURT:

12 Mr. Brandt?

13 BY MR. BRANDT:

14 She's present in the courtroom.

15 BY THE COURT:

16 All right, she's present in the courtroom so
17 overruled.

18 Q. Well, what does it say in this letter that she told
19 him?

20 A. Let's see, the assessment was the property owner
21 retains the right to access the property, including
22 the easement area, and that the MVPOA has the right
23 to plant and maintain the easement area. The
24 example given was that the property owner could
25 install a driveway across an easement and the POA

1 could come in, dig a hole and plant a tree.

2 Q. That wouldn't work, would it?

3 A. (no response)

4 Q. Do you agree with that?

5 BY MR. MCDUFF:

6 Judge, it calls for him to ---

7 A. I'm assuming it ---

8 BY THE COURT:

9 Hold on, hold on, hold on, hold on. We've got an
10 objection I think?

11 BY MR. MCDUFF:

12 Yes, I do. Objection, it calls for him as a witness
13 to render a legal opinion.

14 BY MR. BRANDT:

15 I'm not asking for that; I'm asking how he
16 interpreted that.

17 BY THE COURT:

18 Well, I'm going to allow it so I'm going to overrule
19 your objection.

20 Q. In this instance you go out there and put in a
21 driveway and the Property Owners Association goes
22 out back there and plants more trees or plants, that
23 won't work, will it?

24 A. Somebody has got to break their back to get a hole
25 in the concrete.

1 Q. Yeah. Well, what if they took a tractor out there
2 and dug up the concrete; they could do that so it
3 can't work that way, can it?

4 A. (no response)

5 Q. Did you participate in any negotiations with Mr.
6 Halsell or the Property Owners Association; was
7 there talk back and forth about it?

8 A. And as I said for that exhibit, we had a meeting
9 with the MVPOA Board on September 7th, 2020 prior to
10 the sale of the property introducing them to the
11 Halsells and their interest in the property.

12 Q. Okay. The POA, what was their position?

13 A. Their position was they didn't want to see any
14 driveways.

15 Q. And why?

16 A. They said they didn't want to see any driveways.

17 Q. Well, do you think, was the easement area that green
18 area going down out Mountain View Pointe Drive, did
19 that have any bearing on your personal consideration
20 to purchase your property there?

21 A. No. I think as I stated I was interested in Lot 7
22 and the portion we sold was just for lots and other
23 people.

24 Q. Well, when you went out there to look at that
25 property how long did you shop around for property

1 before you bought in this area?

2 A. We actually did it by boat. We came from the water
3 and we headed -- we were living at Six Mile on the
4 lake so just the other side of the power plant and
5 we found that by boat by way of water.

6 Q. You had never basically driven out there, I'm
7 talking about Doug Hollow and then it turns into
8 Mountain View Pointe Drive?

9 A. We did before purchasing it but that wasn't the
10 primary way we found it.

11 Q. And it was really nice looking, wasn't it? A nice
12 looking driveway, it was dressed up on both sides,
13 would you agree?

14 A. In 2005 I mean it was, or 2004 when we were looking
15 and 2005, I mean it was and still is a bunch of
16 small row of trees and thereafter where they had
17 cleared it they had left whatever pine and stuff
18 growing. I mean Parcels A and B are mostly wooded
19 undeveloped property.

20 Q. Well, tell us when you bought that property was it
21 wooded on both sides; was it fully wooded on both
22 sides at the time you bought that?

23 A. Give or take, but I mean it's small shrub, it's not
24 even mature hardwoods or anything.

25 Q. But they were growing, weren't they?

- 1 A. Yes, sir.
- 2 Q. And they grew from the time that you first looked at
3 it until Mr. Halsell cut the trees out there?
- 4 A. Yes.
- 5 Q. And whatever is out there was still growing?
- 6 A. When it doesn't come a storm I'd say yeah.
- 7 Q. In 2013 when you sold the property to the Halsells -
8 --
- 9 A. We bought the property in 2013.
- 10 Q. Okay, 2013, but you sold it in 2021?
- 11 A. 2020.
- 12 Q. 2020?
- 13 A. December of 2020, yes.
- 14 Q. Parcels A & B. And were you satisfied with the way
15 that the landscape easement was being kept up by the
16 Property Owners Association?
- 17 A. Yes.
- 18 Q. And how would you characterize it in pretty dry
19 weather, the shoulders and the easement?
- 20 A. They kept the grass mowed and the leaves blown off
21 of the road right-of-way, yes.
- 22 Q. And if you today go out there, other than this part,
23 they may think the driveway is pretty, but including
24 the driveway is it still well-kept?
- 25 A. Yes.

1 Q. Why do you suppose that Crescent put an easement
2 down both sides of the landscape?

3 BY MR. MCDUFF:

4 This calls for speculation, Judge.

5 BY THE COURT:

6 Well, he can ask if he knows the answer to that
7 question.

8 A. I have, I have no clue why they did it. I can
9 speculate on all sorts of things, I mean why they
10 didn't make lots and include that in the subdivision
11 is beyond me. You know, if they wanted the HOA to
12 own that property, why didn't they deed it to them?

13 Q. I understand that.

14 A. You know, they could have developed it and had more
15 lots for the development, there's all sorts of
16 speculation.

17 Q. Yes, sir. So basically we would have to read all
18 the documents and try to determine the intentions of
19 the parties at the time that the documents were
20 created, would you agree with that or do you think
21 the intention in view of whatever they wanted was
22 irrelevant?

23 A. I think the fact that they did not put covenants,
24 conditions or restrictions on the property, the fact
25 that they didn't title it over to the HOA or deed it

1 over as real property. I assume they wanted to
2 leave it and exclude it from the subdivision for a
3 purpose, I don't -- but other than that, that's all
4 I can assume from the documents and from.

5 Q. So the documents would really speak from themselves,
6 won't they?

7 A. Yeah, I mean the CCR mentions a nonexclusive
8 easement and my understanding the titling doesn't
9 provide them any title or deeded property here.

10 Q. The CCRs basically call it a common element or
11 common property of the subdivision.

12 A. I admit it describes there being some common areas;
13 it does not say specifically what they are. It does
14 say there is a sign monument and there is a
15 landscape easement; it does not specifically
16 describe any property.

17 Q. Okay. Would you agree, regardless whether we think
18 it's a nonexclusive easement or not, that even,
19 quote, "nonexclusive", whether you accept that or
20 not, that property was conveyed with everybody
21 knowing that easement was there?

22 A. The plat says it was planned. I mean based on the
23 plat and it being planned, I thought it was there.
24 I've since found out from my attorney that it wasn't
25 titled over to the HOA so, no, I can't tell you

1 that.

2 Q. Did the Covenants and Restrictions even have a
3 provision in there that turns control over to the
4 HOA of that easement?

5 A. I would have to -- I'm sorry, you would have to show
6 me the section. I didn't memorize the form.

7 Q. Did you know whether or not there was basically a
8 requirement in the Covenants and Restrictions of the
9 Property Owners Association that basically put a
10 duty on the Property Owners Association to keep that
11 landscape easement?

12 A. Yes, I believe they are responsible for maintaining
13 common areas. It depends on what the definition of
14 the common areas is and if it really exists.

15 Q. But you don't accept that as a common area?

16 A. At this point I don't know. I'm waiting for this
17 court or judge to decide whether it is or isn't.

18 Q. All right, nothing further.

19 BY THE COURT:

20 All right.

21 CROSS EXAMINATION BY MR. HOOD:

22 Q. May it please the court? Mr. Piper, am I correct in
23 understanding you to say that in your initial
24 discussions with Mr. Halsell you pointed out the
25 landscape easement to him?

1 A. Yes.

2 Q. All right. And was there any particular reason why
3 you felt a need to point that out to him?

4 A. When we walked the property, reviewed things and
5 looked at things he asked about the easement from
6 Mountain View Pointe, the public road that the
7 majority of the road frontage is on for that parcel
8 and potential access and I told him that that may or
9 may not be in conflict, that we would talk to the
10 HOA and see if an agreement could be reached.

11 Q. Well, did you have any reason to believe at that
12 time that there may be some issues concerning that
13 matter?

14 A. I know from talking with some of my neighbors that,
15 you know, they do not want to see any development on
16 that property so my assumption would be that the
17 board would listen to its members and if there was a
18 concern they would bring it up.

19 Q. So you're saying you saw some potential for there to
20 be some conflict there?

21 A. There was that potential, yes.

22 Q. Okay. And that then entered into the negotiation of
23 the purchase price?

24 A. Yes.

25 Q. And I believe in responding to Mr. Brandt you

1 indicated that the consideration of the purchase
2 price took into account the possibility of having to
3 bring a driveway in from Doug Hollow; is that
4 correct?

5 A. I don't think it represented full consideration, but
6 it certainly represented a consideration.

7 Q. But that was a consideration. Was the potential for
8 litigation fees or attorney's fees also a potential
9 expense or consideration that may have entered into
10 that calculation?

11 A. No, or I would've asked him to cover all my legal
12 fees for this.

13 Q. Excuse me. You would've asked who to cover your
14 fees?

15 A. I would've asked Mr. Halsell to cover my fees if I
16 thought I was going to be sued and spending money.

17 Q. Okay, all right, I guess I understand that. Thank
18 you.

19 EXAMINATION BY MR. MCDUFF:

20 Q. Mr. Piper, I'm going to be very brief. And, Judge,
21 I'm going to reserve the right to recall him in our
22 case.

23 BY THE COURT:

24 All right.

25 Q. Mr. Piper, do you have Joint Exhibit 1A in front of

1 you that's the Covenants, Conditions and

2 Restrictions?

3 A. Yes, sir.

4 Q. If you'd turn to page 25 of the CCRs and look at the
5 very top of that page?

6 A. Yes.

7 Q. And go back to the prior page, is that part of
8 Section 7.9 beginning on page 24?

9 A. Yeah, 7.9 Entrance Monument.

10 Q. Okay. And then if you go to page 25, does it
11 reference a landscape easement? I'm talking about
12 the Covenants.

13 A. Entrance Monument?

14 Q. Look toward the bottom of that paragraph at the top
15 of the page.

16 A. Yes, perpetual easement, nonexclusive perpetual
17 easement for the purpose of landscaping.

18 Q. Okay. And Crescent Communities SC, LLC was the
19 developer of Mountain View Subdivision, correct?

20 A. Yes.

21 Q. And they're the ones that created these Covenants,
22 correct?

23 A. Yes.

24 Q. And so they provided there was going to be a
25 landscape easement as shown in this exhibit which is

1 a Joint Exhibit ---

2 A. Yes.

3 Q. --- along Mountain View Pointe Drive?

4 A. Yes.

5 Q. And at that same time that the purported easement
6 was created, the landscape easement was created,
7 this plat also shows what is known as Parcels A and
8 B, correct?

9 A. Yes.

10 Q. And Parcel A is the 4 point some odd acre tract and
11 then Parcel B is the one with the transmission lines
12 running through it?

13 A. Yes.

14 Q. And Parcel B is the one you retained?

15 A. Correct.

16 Q. And at the time that these Covenants were written
17 Crescent owned what's identified as Parcels A and B
18 on this plat, correct?

19 A. Yes.

20 Q. All right. Mr. Brandt asked you about, you know,
21 what the intent was; isn't it equally possible that
22 Crescent made this a nonexclusive easement so that
23 in the event it ever developed either Tracts A or B,
24 Parcels A or B, it would be able to access those
25 parcels off of Mountain View Pointe Drive?

1 A. Yes.

2 Q. Now, you were asked about a letter you wrote which I
3 think is Plaintiffs' Exhibit Number 7. It was a
4 letter you wrote to the Planning Director for Oconee
5 County. One should be Joint 5 and the other should
6 be Plaintiffs' 5.

7 BY MR. BRANDT:

8 That'd be Exhibit 7.

9 BY MR. MCDUFF:

10 I'm sorry, Larry?

11 BY MR. BRANDT:

12 7.

13 BY MR. MCDUFF:

14 Yeah, I was looking, I think it's Plaintiffs' Number
15 7.

16 BY MR. BRANDT:

17 You're talking about the letter to Chapman?

18 BY MR. MCDUFF:

19 The letter to Chapman.

20 BY MR. BRANDT:

21 Plaintiffs' 7.

22 Q. This is a letter you wrote on September 24th of 2020
23 and isn't this a letter you wrote as a result of
24 what was communicated to you after the Property
25 Owners Association board meeting regarding the

1 Halsell proposal?

2 A. Correct.

3 Q. And what were told that was the outcome of the board
4 meeting on the Halsell proposal?

5 A. They had no interest or would not permit or had no
6 interest in allowing a driveway across from Mountain
7 View Pointe Drive.

8 Q. And was it communicated to you that they don't want
9 any access at all in the landscape easement area by
10 anybody?

11 A. Yes.

12 Q. So they in essence, the board wants and the Property
13 Owners Association wants to treat it as an exclusive
14 easement?

15 A. Yes.

16 Q. Now, the Property Owners Association does not have
17 title to the property where that landscape easement
18 is along Mountain View Pointe Drive, correct?

19 A. No, no, they don't.

20 Q. Who pays the taxes on that property where that
21 landscape easement is?

22 A. I think until we sold the property my wife and I
23 have paid the property taxes on that property and
24 have continued to pay the property taxes on Parcel

25 B.

1 Q. So the third, where the landscape easement is I
2 guess would be on the, to orient myself, would be
3 maybe on the east side, southeast side?

4 A. Correct, we own Parcel B on the east side.

5 Q. On the east side of Mountain View Point Drive which
6 is about 21 acres, give or take?

7 A. 17 acres.

8 Q. 17 acres, I'm totaling 21 acres. Now, on Parcel B
9 have you done anything to gain access from Mountain
10 View Point Drive through the landscape easement?

11 A. Yes. Shortly after we bought the property we cut a
12 walking path onto that property across the easement.
13 In fact, we've cut two; we cut an initial walking
14 path very close to Lot 1 and that goes down a steep
15 area that had some steeping stones and was not as
16 friendly. As walking the property more after owning
17 it we found a flatter place to walk in and we cut a
18 walking path in on it.

19 Q. Using a tractor?

20 A. We bought a tractor in 2017 and at that time we
21 widened that path and we've been driving that
22 tractor in and off of that property on that across
23 the easement to access that property.

24 Q. So according to what you were told by the POA board
25 that would be a prohibited breach for entry into the

1 landscape easement?

2 A. They've never complained about it in the past.

3 Q. Well, let me ask you this. Have any of the

4 Plaintiffs in this case, including Mr. Dorsey and

5 Mr. Braunschweiger is outside, used that entryway

6 that you've created through the landscape easement

7 to access your Parcel B?

8 A. Yes. Mr. Dorsey has been generous and helped me

9 when I've gotten my tractor stuck and he's come over

10 on his four-wheel utility vehicle and pulled me out

11 of some tight spots. And Mr. Braunschweiger has

12 traversed that in his golf cart checking to see how

13 his golf cart performed off road and I believe some

14 other neighbors have traversed it as well in their

15 utility vehicles for various reasons.

16 Q. All right. Let me show you what are introduced into

17 as evidence as, let's see here, Piper 9, 10, 11 and

18 12 and see if you can identify these photographs?

19 A. 9, 10 and 11 are pictures of the what I would call

20 the tractor path in and out of the property coming

21 on and off of Mountain View Pointe Drive from the

22 property.

23 Q. And how many feet wide is that tractor path or path

24 you created where the tractor is?

25 A. I've got a 6-foot root rake and a five-foot bucket

1 and I mean the tractor itself is over 20 feet, about
2 20 feet long and it's at least 6-feet wide, so to
3 give myself room I've got at least an 8-foot width
4 on that path.

5 Q. Right through the landscape easement area?

6 A. Yes.

7 Q. And the last Exhibit Number 12, what does that
8 depict?

9 A. That's a picture of a little tractor shed that I've
10 built just to store my tractor; it's 8 feet wide and
11 20 feet long.

12 Q. And is that on Parcel B?

13 A. Correct, that's on Parcel B somewhere up in this
14 area.

15 Q. All right, you're indicating toward closer to Lot 1
16 on Parcel B on Exhibit 2?

17 A. Yes.

18 Q. On Joint Exhibit 2.

19 BY MR. BRANDT:

20 Could you show me where he's pointing?

21 Q. Yeah, sure. Here, Larry, you want to come up?

22 BY MR. BRANDT:

23 Yeah, I just want to watch. Where did he put it?

24 A. The tractor shed is back in here and the path runs
25 somewhere in here and then the path goes all the way

1 out to transmission line right-of-way.

2 BY MR. BRANDT:

3 All right, I got it.

4 BY MR. MCDUFF:

5 All right, I don't have any further questions.

6 BY THE COURT:

7 All right, any redirect?

8 REDIRECT EXAMINATION BY MR. BRANDT:

9 Q. No one has ever tried to deny you from walking on
10 your property within the easement area?

11 A. No.

12 Q. Nobody has tried to deny Mr. Halsell from walking on
13 the easement area of his property, have they?

14 A. Not that I'm aware of.

15 Q. Now, would you agree that this easement, whatever it
16 is whether it's nonexclusive or exclusive, that it
17 is a well-defined area; in essence, as far as the
18 length, by the plats the length of the easement
19 claimed and the width is established by the
20 documents, aren't they?

21 A. It's defined by the plan, yes.

22 Q. Okay. So we can look at it and calculate back and
23 we know the easement is 25 feet on the plat,
24 correct?

25 A. Yes.

1 Q. And I have not calculated the full length, but we
2 could take this and calculate the distance off that
3 plat from one end to the other, correct?

4 A. Yes.

5 Q. And whatever was granted was granted for a specific
6 purpose which is also well-defined as landscape?

7 A. Well, I think that gets back to the question of was
8 it granted and I think we've got documentation that
9 says otherwise ---

10 Q. Well, ---

11 A. --- or substantively really in question.

12 Q. Yeah. But it was intended by the document, reading
13 the face of the document, that that area is to be
14 used for landscaping, does it not? Under the CCR
15 does it not?

16 A. And I think if you look at it and I guess what I
17 heard from the judge earlier, if we drive out there
18 we'll find out that any landscaping that's been done
19 is predominantly in the road right-of-way.

20 Q. Okay, I'm not going to get into legal sparring with
21 you but I understand your testimony. That's your
22 answer and that's good.

23 BY MR. COURT:

24 And just for the record I don't think I said that. I
25 mean I'm not sure when you said you heard the judge

1 saying that, but I don't think I said that.

2 BY MR. MCDUFF:

3 No, you haven't said that, Judge. I think the
4 parties' lawyers have talked about if you would like
5 to go out there and do a site visit.

6 BY THE COURT:

7 Okay. Well, we'll cross that bridge when we get to
8 it. All right, anything further from this witness?

9 BY MR. BRANDT:

10 No.

11 BY THE COURT:

12 All right, Mr. Piper, you can step down. It's 11:45
13 and we've been going about an hour and 15 minutes.
14 Let's take a short break, about five minutes or so,
15 and then what's your thinking on -- well, let me
16 back up. Mr. Brandt, can you give me some idea of
17 how many witnesses you may have? I'm not going to
18 hold you to a specific number but just for planning
19 purposes?

20 BY MR. BRANDT:

21 I will probably have four, maybe five.

22 BY THE COURT:

23 Does that include ---

24 BY MR. BRANDT:

25 I think I would certainly finish testimony from my

1 clients today. I might have one who's got a
2 problem, depending on how the trial goes, that I
3 need to call him tomorrow morning because he's not
4 available today and that would be the landscaper who
5 has given us an estimate of what it would cost to
6 restore the area to a reasonable condition and I
7 think other than that it would be probably three or
8 four.

9 BY THE COURT:

10 And does that include Mr. Piper?

11 BY MR. BRANDT:

12 Excuse me?

13 BY THE COURT:

14 Does that include Mr. Pipe or is that additional?

15 BY MR. BRANDT:

16 No, I just called Mr. Piper.

17 BY THE COURT:

18 I know, but you said you've got three or four, is
19 that three or four more?

20 BY MR. BRANDT:

21 More, but they'll be more than three, yes, sir.

22 BY THE COURT:

23 All right. What about from the defense side? I'm
24 just trying to get an idea of how much time we need
25 to be worried about here.

1 BY MR. HOOD:

2 Your Honor, I anticipate just having one witness.

3 BY THE COURT:

4 All right.

5 BY MR. MCDUFF:

6 And I'm just going to re-call I think Mr. Piper to
7 testify in my case in chief.

8 BY THE COURT:

9 Well, as you know, this case was, we set aside two
10 days for this case so I want to be sure to get
11 everything done within that two-day period. But
12 we've also got to figure out, and I'm flexible on
13 lunch breaks and other things of that nature, I mean
14 as far as I'm concerned we don't have to have a
15 lunchbreak but I imagine probably a lot of folks
16 would probably like one so we'll plan on some kind
17 of fairly short lunchbreak. I think we need to go
18 ahead and get a little bit more down the road on
19 this next thing and then we'll see about how late
20 you want to work. If you've got any thoughts on
21 that, I mean we can go to 5 o'clock, 6 o'clock,
22 whatever; but normally I would say about 5 o'clock
23 would be about where we would end at latest but if
24 we need to do more we can. So just bear all that in
25 mind and think about it. So we'll take a short five

1 way it will give you time during lunch to think up
2 some more questions.

3 BY MR. BRANDT:

4 Sir?

5 BY THE COURT:

6 That way it will give you time during lunch to think
7 up some more questions of this witness.

8 BY MR. BRANDT:

9 Yeah.

10 BY MR. MCDUFF:

11 There you go.

12 BY MR. BRANDT:

13 Well, if I've got to call a witness I want to call
14 Mr. Jack Dorsey.

15 BY THE COURT:

16 Mr. Dorsey, how about coming around to the witness
17 stand please.

18 BY COURT REPORTER:

19 Do you solemnly swear or affirm to tell the truth,
20 the whole truth and nothing but the truth so help
21 you God?

22 BY MR. DORSEY:

23 I do.

24 TESTIMONY OF JACK DORSEY

25 DIRECT EXAMINATION BY MR. BRANDT:

1 Q. Mr. Dorsey, state your name in full.

2 A. Jack James Dorsey.

3 Q. And how old are you, sir?

4 A. I am 70.

5 Q. And where do you live?

6 A. I live in Mountain View Pointe Subdivision.

7 Q. And what lot?

8 A. Lot 11.

9 Q. Give us a little bit about your background, where
10 you were born and grew up?

11 A. Well, I grew up in Florida; I went to college at a
12 university in Tennessee; and then moved to Atlanta
13 where I completed my master's degree. I lived in
14 Atlanta for roughly 40 years I guess before we made
15 the move here in retirement. During the time in
16 Atlanta I was an educator, retired; I was a head
17 football coach for 40 something years I guess; and I
18 also during my younger days was also a builder. I
19 had a construction company and built custom homes
20 along with speculative homes and I developed two
21 subdivisions during my time as a construction guy.

22 Q. Would you consider yourself very familiar with
23 basically covenants and restrictions on
24 subdivisions?

25 A. Yes, sir, I would say so.

1 Q. And how many homes do you think you've built and
2 sold over your career?

3 A. I'd say, not knowing exactly I would say somewhere
4 in the 50 to 60 range.

5 Q. What year was it your bought your home in Mountain
6 View?

7 A. I think we bought our lot in 2008 and then we
8 started construction on our home six years ago
9 roughly, five to six years ago.

10 Q. And before you moved here you lived in Atlanta?

11 A. We lived in Marietta, in Cobb County, Georgia.

12 Q. Okay. And what year was it you started looking at
13 property in Oconee County?

14 A. I guess somewhere around 2008, you know, '07 or '08,
15 I don't remember the exact time. We actually owned
16 a lot in Toccoa, Martin, Georgia to be exact, on
17 Lake Hartwell and through owning that lot kind of
18 discovered the Keowee Lake area and decided that we
19 wanted to make the switch from Hartwell to Keowee if
20 we could.

21 Q. And when you came to look at Oconee property how
22 many homes or subdivisions did you look at?

23 A. Well, before we came and contacted a realtor to show
24 us around through internet research I probably
25 researched in the neighborhood between 20 and 30

1 pieces of property between Google Earth, going into
2 the Oconee County website and looking at topos of
3 lots trying to narrow that down to a list of between
4 18 and 20 that we contacted a real estate guy about
5 to come physically take us to those properties.

6 Q. And why did you choose Mountain View Pointe?

7 A. Well, there was several big factors. As we looked
8 at lots, obviously there's two main reasons that we
9 bought the lot that we bought. Number one, there's
10 no question that our Lot Number 11 was a little bit
11 off the main channel of the lake which was important
12 to us and we had a view of the mountains; there's no
13 question that was number one. The second most
14 important thing to us was the Covenants and
15 Restrictions and what attracted us to Mountain View
16 Pointe was that road of undeveloped property at the
17 time coming into the subdivision off of Doug Hollow
18 Road.

19 Q. Prior to purchasing the property, did you read the
20 Covenants and Restrictions?

21 Q. We did, they were available online and our real
22 estate agent helped us find those and I also
23 researched the plat; and it became very obvious that
24 I was fully aware of the landscape easement that
25 existed and in my opinion the Restrictive Covenants

1 of the subdivision certainly addressed that the
2 development was in control of that landscape
3 easement which would protect and give the
4 opportunity to protect whatever may come in on
5 either side of that property. In my research it was
6 obvious that there was hardly any zoning, if any, in
7 Oconee County. So, you know, you have to assume you
8 have no control over what may come in from one side
9 of that property to the other. But I felt assured
10 that the landscape easement that was on the plat
11 registered with the courthouse and described in the
12 Covenants and Restrictions that that was the
13 protection that we needed in case something was to
14 come in at a further time.

15 Q. The landscape easement, is it on that plat ---

16 A. Yes, it's here and it was on the plat that I looked
17 at initially.

18 Q. And is it referred to in the plat of your property?

19 A. Yes, I think. Now, I say the plat of my property; I
20 don't, I can't really recall if it's mentioned in my
21 particular lot, Lot Number 11, but it is mentioned
22 in the Covenants and Restrictions.

23 Q. And did you read again the Covenants and
24 Restrictions?

25 A. Yes, we read those, my wife and I, before we

1 purchased it.

2 Q. How big a factor was it in choosing Mountain View
3 Pointe to live in there?

4 A. I wouldn't have purchased in there if I thought I
5 was going to have to deal with what we're dealing
6 with now.

7 Q. And how does that, did you believe, affect your
8 property?

9 A. Well, I don't know if we can determine that, it
10 would just be an estimation in my opinion. But I
11 can just speak for myself, if that structure that's
12 there was and I was looking for property, I would be
13 very hesitant about buying in our subdivision. What
14 kind of detriment that it may be, that would just be
15 speculative on my part but I would like to think
16 especially if something continues to go in on the
17 other side of the road that we have no control over
18 and have no, if we lose our ability to screen that
19 off coming to our subdivision, it could be extremely
20 detrimental to our property values in my opinion.

21 Q. Basically we have these pictures that we put in as
22 Defendant's Exhibit Number 9 and 10 for Piper. No,
23 these two.

24 A. Yes, sir.

25 Q. Does that represent, basically a fair representation

1 of what ---

2 A. What's there?

3 Q. --- of what's referred to as a tractor?

4 A. There is a little space there coming in. If you
5 don't really know that it's there, in my opinion you
6 wouldn't, you could probably ask half the people
7 here that just moved in and they wouldn't even know
8 it's there. It was ---

9 Q. Where is it?

10 A. It's kind of as you come in it's on the eastern side
11 of Mountain View Pointe Drive not too awful far from
12 the beginning of Lot Number 1 and, you know, there
13 is no, there's no gravel, there's no concrete,
14 there's no -- it's just a hole in the woods to be
15 quite honest with you that Graham chose to take his
16 tractor down there occasionally and I mean when I
17 say occasionally I mean occasionally; rarely have I
18 seen. And, yes, as he mentioned he called me one
19 time as a neighbor to come pull his tractor out and
20 I asked him what's the best way to get wherever you
21 are and he told me about this little space and I was
22 able to squeeze in basically touching branches as I
23 went through to get, to help pull him out as any
24 good neighbor would do.

25 Q. And what did you go into that area with?

- 1 A. I have a little Honda SUV, well, not SUV, but a
2 side-by-side I guess you would say Honda Pioneer
3 small little ATV or whatever you call those things.
- 4 Q. How wide is it?
- 5 A. How wide is it?
- 6 Q. Yeah.
- 7 A. Well, my car path is six-feet wide and my tires are
8 inside of that on my car path that goes, my concrete
9 car path that goes to my boat dock, my tires don't
10 hang over that, so it's less than six feet.
- 11 Q. Less than six feet?
- 12 A. Yes, I've never really measured it.
- 13 Q. And you say as you went in there to assist him that
14 you were brushing the branches on these side bushes?
- 15 A. Yeah, yeah, absolutely.
- 16 Q. Okay. Is his utility building or what he testified
17 was down there, is it on what you consider the
18 landscape easement?
- 19 A. No, it's back in the woods, it's on his property,
20 yes.
- 21 Q. But it's on the property from where?
- 22 A. It would probably be if I guess somewhere in this
23 area.
- 24 Q. Okay. And that would be ---
- 25 A. I think the east side of Mountain View Pointe Drive

1 probably ---

2 BY MR. MCDUFF:

3 That's Exhibit 15.

4 Q. Yeah, I'm looking for where I put it.

5 A. --- closer to Lot Number 1 than anything else I
6 guess would be a fair description of where it's
7 located. It's kind of on 2.

8 Q. No, it's not 2.

9 BY MR. MCDUFF:

10 It's Joint 2.

11 BY MR. BRANDT:

12 What?

13 BY MR. MCDUFF:

14 It's Joint 2, the plat.

15 Q. No wonder, I was looking in the wrong pile. Here's
16 the Joint Exhibits right here.

17 A. I mean it's definitely on his property, there's no
18 question.

19 Q. Okay. And that's basically depicted in, well,
20 here's 2, Court Exhibit 2 or Joint 2?

21 A. Yeah, it's on the eastern side, I guess that would
22 be eastern side of Mountain View Point Drive closer
23 to Lot Number 1 than any other landmark that I can
24 describe.

25 Q. And as far as where is the Halsell lot now and ---

1 A. He's on the western side and he's more up in this
2 area.

3 Q. So when you say that ---

4 A. I mean I don't, there's just land there so it's hard
5 to describe.

6 Q. Yeah. So he would be on the far side, over here on
7 this side?

8 A. That's Graham's side there.

9 Q. Okay.

10 A. He would be closer to Lot Number 1 kind of up in
11 this area.

12 Q. Okay. And there's not an easement going across this
13 way there, is there?

14 A. There's not an easement for him to come off of Lot
15 Number 1 that I'm aware of, no.

16 Q. Okay. What kind of protections do you think the
17 landscape easements gives you to sustain?

18 A. To me the landscape easement is extremely important
19 because it gives us as a development a way to create
20 screens from whatever happens to go on Parcels A or
21 B. Without that landscape easement, we have no way
22 as a development to protect our property values out
23 through there when and if something else is
24 developed or we can't even, we can't screen off
25 what's, you know, what's there now. We all totally

1 understand we have no control on what's being built
2 in Parcels A and B, we have zero control of that.
3 But that landscape easement is crucial to the health
4 of our development and our property values. It's
5 the only barrier that we have and that in my opinion
6 is why Crescent put that in there for this very
7 reason. And when you look at this from my
8 perspective in the construction, both of these
9 properties have ample road frontage on Doug Hollow
10 Road.

11 Q. We know in the discussions of the case that Mr.
12 Halsell is complaining of a hardship if he has to
13 come off Doug Hollow Road with a driveway relocated
14 on his property. But before we get to that, the
15 easement, this landscape easement, is it definitely
16 located on the ground?

17 A. It is, it's located, and as part of the board we
18 went to the trouble to have a certified surveyor
19 come out and mark exactly where the landscape
20 easement was on both sides of the road so that we as
21 a development had no misunderstandings about where
22 that easement was and it's still marked out there.

23 Q. And the easement is clearly delineated by width and
24 length by the document?

25 A. Yes, sir, it is.

1 Q. And the purpose of the easement granted to y'all in
2 the Mountain View Pointe Property Owners
3 Association, was it clearly stated in the Covenants
4 and Conditions?

5 A. In my opinion it was extremely explained in the
6 Covenants.

7 Q. All right. In comparison to Mr. Piper's little
8 tractor path, has anybody ever objected to your
9 knowledge to Mr. Halsell walking or using it as a
10 footpath, a footpath on the easement on his
11 property?

12 A. Not that I'm aware of.

13 Q. How about on the other side of the Halsells?

14 A. Not that I'm aware of, no.

15 Q. And how big is the easement of the driveway that was
16 put in there by Mr. Halsell?

17 A. Well, the area of disturbance approximately back
18 where the back line of the easement is is somewhere
19 in the neighborhood of 80 feet, not his driveway
20 proper but what was disturbed from our landscape
21 easement. Where the trees were taken out is
22 approximately 80 feet wide at the back of the
23 landscape easement. Up on the road it's roughly 40
24 feet that was disturbed. So it kind of goes from 40
25 feet at the curb, then it widens out to

1 approximately 80 feet. And again, I'm not talking
2 about the concrete, I'm talking about what was
3 disturbed in taking out in terms of trees ---

4 Q. All right. Let me show you ---

5 A. --- along with a berm that was there, a natural berm
6 that got flattened.

7 Q. Let me show you a picture and that will be marked
8 next in order of Plaintiffs' Exhibits. What number
9 would that be? Have we got 18?

10 BY COURT REPORTER

11 No, sir.

12 Q. Well, let's mark this because I know it's not in
13 there. Let me mark this one as Exhibit 20.

14 BY COURT REPORTER:

15 18.

16 BY THE COURT:

17 That will be 18.

18 A. 18, Larry.

19 BY MR. BRANDT:

20 Well, I'm not certain what numbers I've got.

21 BY THE COURT:

22 Well, I will tell you that you've got 1 through 17B
23 so that will be 18.

24 BY MR. BRANDT:

25 18, all right.

1 BY THE COURT:

2 Otherwise we'll be wondering what happened to 18 and
3 19.

4 BY MR. BRANDT:

5 Yeah, we've got it marked.

6 (PLAINTIFFS' EXHIBIT NUMBER 18 MARKED FOR
7 IDENTIFICATION)

8 A. They want to take a look at it. You want to show it
9 to them?

10 BY MR. MCDUFF:

11 I thought that was in your exhibits already.

12 BY MR. BRANDT:

13 But he marked on this one and I want to keep them
14 separate.

15 BY MR. MCDUFF:

16 Keep them separate, all right.

17 BY THE COURT:

18 Any objection?

19 BY MR. MCDUFF:

20 No objection.

21 BY THE COURT:

22 All right. Plaintiffs' Exhibit Number 18 will be
23 admitted without objection.

24 (PLAINTIFFS' EXHIBIT NUMBER 18 ADMITTED INTO EVIDENCE)

25 Q. Plaintiffs' Exhibit 18, have you seen that?

- 1 A. I have, yes, sir.
- 2 Q. Does that depict the driveway or a width of the
3 driveway of ---
- 4 A. What I'm trying to point out here, this is
5 approximate and I want to make sure everybody
6 understands that, but that is approximately the back
7 of our landscape easement and it shows the width
8 that was taken out over to where the tree line
9 starts on the other side, so that's one tree line to
10 the other approximately at the back of the landscape
11 easement.
- 12 Q. All right. The curb here to that red line, did you
13 put the red line in there?
- 14 A. I did, yes, sir.
- 15 Q. Okay. And from the curb to that line is how far?
- 16 A. Well, from the back of the curb to that line is
17 approximately 35 feet.
- 18 Q. Okay. This would be, the red line, is that the ---
- 19 A. That's the tree line that was destroyed by his
20 construction.
- 21 Q. But that's the back line of your easement?
- 22 A. That's the back line of the easement.
- 23 Q. Y'all's easement?
- 24 A. That was, sir, approximately because there was not,
25 unfortunately there weren't any stakes that the

1 surveyor put out exactly in that location, so I had
2 to kind of eyeball from one stake to the other so
3 that's approximate.

4 Q. Let me find my exhibits here, my additional exhibit.
5 Yeah, let me see that one.

6 (OFF RECORD COMMENTS)

7 Q. The line -- so basically where he took out the trees
8 on your easement is back at this red line of your
9 easement you'd say that's 80 feet?

10 A. Approximately.

11 Q. Okay. And far is it then do you think it would be
12 then be, 25 feet?

13 A. Well, from the back of the curb, from the back of
14 the curb it's approximately 35 feet from the back of
15 the curb of the road to the back of the landscape
16 easement.

17 Q. Did you ever go out there and look and have anyone,
18 did you consult with any professional in determining
19 what it would take to return that area to a
20 reasonable state to achieve the goal?

21 A. We did, we asked three different landscape companies
22 to come out and give their opinions about what it
23 would take to restore that as much as possible. You
24 can never restore it back to the way it was, but at
25 least get the plantings in there that would over

1 time fill in and kind of hopefully bring that back
2 to somewhat the way it was.

3 Q. Well, in the event that the court determines that
4 Mr. Halsell has to restore the area tell us what
5 would need to be done to restore it?

6 A. Obviously, the berm would have to be replaced. As
7 you can see on these photographs, the land, the
8 natural lay of the land had to be lowered and
9 there's somewhat of a little bit of a graded hill
10 that goes back up if you're going on the left-hand
11 side that was part of that berm that raised the land
12 topo up from what the street elevation was and it
13 kind of came down to nothing on the right-hand side.
14 So there would have to be in my opinion in listening
15 to the landscape people in order to build that berm
16 back up there's probably going to have to be some
17 kind of wall constructed to hold the dirt to slope
18 back down towards the road because we're not going
19 to obviously be able to slope that ground back over
20 onto Mr. Halsell's property. We definitely don't
21 want to encroach on that whatsoever. And we'll have
22 to build a little wall that will kind of go down to
23 nothing so that we can bank that dirt up against
24 that wall and be able to have a place to plant new
25 plantings into that slope to create that screen and

1 hopefully over time block his building from sight
2 from our subdivision street.

3 Q. All right. Now, were you on the board when Mr.
4 Halsell begin to talk about wanting to make the
5 driveway cut?

6 A. I was at the meeting that Graham Piper called, yes,
7 sir, as a member; I wasn't the President at the
8 time, I was just a board member.

9 Q. When he proposed a driveway in there, to let him
10 take the driveway, how wide did he represent to the
11 board that he was going to construct?

12 A. I don't have that document in front of me, but I
13 want to say he mentioned something, a 24-foot
14 driveway.

15 Q. And it ended up disturbing your easement how much,
16 80 feet?

17 A. Well, the land disturbed was 80 feet; his driveway
18 is not 80 feet but he disturbed 80 feet.

19 Q. All right. And now was there any areas that would
20 have to be re-sodded?

21 A. Yes, he tore out all of our sod. He tore up some of
22 our irrigation, but he did have a man come out and
23 replace it very timely and we appreciated him doing
24 that. And he also, you know, his construction
25 coming in and out damaged one of our trees that were

1 in one of our beds that are located very close to
2 where he decided to breach the landscape easement
3 and so.

4 Q. And so it ended from 24 to 25 feet to an 80-foot
5 cut?

6 A. At the street out there the total amount disturbed
7 of the original landscaping there was approximately
8 40 feet.

9 Q. 40 feet from?

10 A. The curb, at the curb was about 40 feet going back
11 to 80 feet. So from way back over there all the way
12 to in here was approximately 40 feet. This, this is
13 a gravel drive. This is not -- that's a lot wider
14 than what the concrete actually ended up being.

15 Q. That's what he disturbed?

16 A. That's what he disturbed, yes, sir.

17 Q. And how about, did he put concrete in here?

18 A. There's a concrete, a significant concrete drive and
19 curbing, he ran curbing up the side of this
20 driveway.

21 Q. And would y'all expect if you were going to restore
22 this area that you'd remove the concrete?

23 A. Oh, yeah, he'll have to tear the concrete out, have
24 to take all the gravel that's underneath the
25 concrete, and they're going to have to come back in

1 with topsoil to bring that grade back up to level,
2 back to rebuild the berm, reconfigure the irrigation
3 system in that area to encompass the new plantings
4 where there was normal natural woods, and then re-
5 sod that with Palisades sod to match the other sod
6 that's there. He put some sod in but it was a
7 different species of what our other landscape stuff
8 was.

9 Q. All right. In your opinion based on your
10 consultations with professionals, et cetera, what
11 would you estimate the cost of restoration pursuant
12 to a plan that the homeowners would accept?

13 A. I would say, you know, looking at the two, like
14 everything these days there was quite a bit of
15 difference from one to the other, but if you just
16 kind of took a middle of the road average, roughly
17 40 to \$45,000 based on the estimates that we got.

18 Q. And did you ---

19 A. That's not my estimate; that's based the estimates
20 that we got.

21 Q. As a builder, basically your experience in this sort
22 of restoration and ---

23 A. Well, I know what the landscaping on my yard and my
24 house costs and that's very much in line with that I
25 can assure you.

1 Q. Well, did you ever receive any estimates that were
2 greater than ---

3 A. Oh, we had one as high as 80 something thousand and
4 another one around the 20 something thousand range;
5 this was kind of a middle of the road estimate.

6 Q. And y'all ---

7 A. It was the most, in my opinion it was one of the
8 more detailed estimates that we got as well.

9 Q. And would y'all be willing to accept if the court
10 requires restoration?

11 A. Well, I can't speak for the whole board but I think
12 that they would, yes.

13 Q. Okay, these are Plaintiffs' Exhibits 12A through
14 17B, they are photographs. I'm handing you 12A and
15 can you tell what that picture depicts?

16 A. Yes. This is the very first day that we noticed
17 that Mr. Halsell was out into our landscaped area
18 with some of his -- I don't know who these other
19 guys were, his friends, his neighbors, if they were
20 contractors, I have no idea, but they were out hand-
21 cutting and chainsaw cutting, I do think you can see
22 some of the equipment there. They started the
23 process to de-tree that area in the landscaping.

24 Q. And the way that's standing, these trees, was that -

25 --

1 A. Yeah, they were. This is before; they've already
2 cut down some of the smaller trees it appears, but
3 this is what they've begun to destroy.

4 Q. That's 12A. Now, 12B?

5 A. This picture is when some of the heavier equipment
6 came in and you can see where they started
7 disturbing our landscape easement digging up the sod
8 and going back up into his property with a track hoe
9 and starting the process of destroying the landscape
10 easement.

11 Q. The equipment that you see there, is that on the
12 landscape easement?

13 A. Well, I can't tell for sure. I mean it's close to
14 the back of the landscape easement line if I was
15 guessing, but I don't know for sure.

16 Q. But does that depicts the trees, at least the kind
17 of trees that were there?

18 A. Yeah, you can kind of get an idea on the right or
19 left of that what it did look like and they had
20 already wiped out when Mr. Halsell come out with his
21 crew and did that by hand.

22 Q. And he's another one, 12 C, what does that depict?

23 A. Just the same thing, but just where they started
24 unloading equipment. You can see their tracks going
25 through our landscape easement and digging up our

1 sod.

2 Q. Now we're on 12C?

3 A. 12C is just showing where they basically finished
4 the rough grading I would say. They've got the
5 ground driveway in. You can see where they've had
6 to feather back the berm that was there and he put
7 some mulch in and that was basically I guess in an
8 effort to kind of stop the erosion back into his
9 driveway and where that mulch is I would estimate is
10 the back of our landscape.

11 BY THE COURT:

12 Hold on a minute, hold on. I thought 12C was the
13 picture showing tracks going through?

14 A. This is E, 12E.

15 BY THE COURT:

16 12E? Where's D?

17 Q. It's one of the exhibits that we put in.

18 A. This little sticker says "E".

19 BY THE COURT:

20 Well, I know, but I'm just trying to keep track of
21 what's what when you describe it.

22 A. Let me see, this just says 18, that's 18 there.

23 Q. Well, don't ask ---

24 A. Here's A. I'm just looking at the pictures, I
25 wasn't looking at the ---

1 Q. We've gone through A, B, C.

2 BY THE COURT:

3 Well, you're talking about C and he said that was --

4 -

5 A. Well, the next one he handed me was E. I don't know

6 where D is.

7 BY THE COURT:

8 Have you got D, 12D or not or have you got two 12Cs?

9 A. I don't see a D. I don't know, it's messed up here.

10 I don't see a D.

11 BY THE COURT:

12 Well, how many Cs have you got?

13 A. Well, I better put my glasses on, too.

14 (OFF RECORD COMMENTS WHILE LOOKING FOR EXHIBIT)

15 BY MR. BRANDT:

16 Wait a minute, it's different.

17 A. Here's a D, here's a D. Are we looking for D?

18 BY THE COURT:

19 I was just saying you testified about 12C and you

20 were talking about showing the tracks from the heavy

21 equipment ---

22 A. Right, right.

23 BY THE COURT:

24 --- through the easement. Then you started talking

25 about 12C which was apparently was a different

1 picture?

2 A. It is.

3 BY THE COURT:

4 And so ---

5 A. Here's D.

6 BY THE COURT:

7 Well, which one? Let's go back and clear up about C

8 is and then what D is?

9 A. C is right here.

10 BY THE COURT:

11 That's with the tracks?

12 A. C is where the tracks or they're just now starting

13 cut into the woods.

14 BY THE COURT:

15 Okay, that's C.

16 A. D is when they finished that job and were kind of

17 winding up. As it appears they're winding up the

18 rough grading and they've got the driveway in and

19 heading out to his building site, and E is just

20 another shot of that, a closer-in shot of that.

21 BY THE COURT:

22 Okay, I've got it. All right.

23 DIRECT EXAMINATION BY MR. BRANDT RESUMES:

24 Q. I'm going to show you 17B and that's where I wanted

25 you to compare it with 17A.

1 A. That's roughly the same, this looks like the same
2 picture except one is in black and white and one is
3 in color.

4 Q. And you put the lines on there to depict ---

5 A. I did, I put these on both exhibits. I did it in
6 black and white so that it would show up a little
7 bit better but these are basically the same
8 pictures.

9 Q. Okay. Let me show you Plaintiffs' Exhibit 15.

10 A. This is a little different view of the same site
11 that shows the beginning of his metal building
12 that's going in and he's put in it appears at this
13 point some small bushes and has mulched the banks a
14 little bit better than in these other pictures for
15 erosion control. And you can see, I think that's
16 the chain that he put up; he draped a chain across
17 there to I'm sure keep unauthorized people from
18 going up into his job site.

19 Q. Where that chain is across there, is that how it ---

20 A. It appears to be behind, that looks like it's behind
21 the landscape easement.

22 Q. Okay. 16?

23 A. This is just another picture during the construction
24 phase after they started dropping in their trusses
25 for their roof structure, metal trusses, and kind of

1 depicts a pretty significant metal building in a
2 residential, off the residential road.

3 Q. In your opinion is that rustic-looking?

4 A. That picture right here is not rustic-looking; no,
5 it looks like a Walmart.

6 Q. And to get through here I want to show you 13, can
7 you tell me what that is?

8 A. 13 is an entrance of our subdivision kind of
9 depicting as it goes down Doug Hollow Road and it
10 also shows where his, where his road frontage on
11 Doug Hollow Road is in relationship to the entrance
12 of the subdivision.

13 Q. Okay. How is the topography of this area different
14 from the topography from on up the road?

15 A. Well, there is a bank there, it's the same bank that
16 our subdivision had to cut into to create Mountain
17 View Pointe Drive off of Doug Hollow Road. I would
18 say that bank at its highest point if I was guessing
19 maybe eight to ten feet. Once you get to the top of
20 that bank though the topo flattens out relatively.
21 I think what's important here is in this terrain; we
22 live in the foothills of the Appalachian Mountains,
23 banks and hills are pretty standard operating
24 procedure when you're talking about cutting into
25 lots and banks. I mean for somebody to bring a road

1 or a driveway in off of Doug Hollow Road, just like
2 the road of Mountain View Pointe, that's a fairly
3 average in my opinion and my experience. You know,
4 we don't live in Florida, these aren't flat lots so
5 you deal with hills and topos all the time as a
6 matter of fact. But in my opinion that in no way is
7 a deterrent for bringing a driveway in off Doug
8 Hollow Road.

9 Q. How difficult would it be for him to build a
10 driveway off of Doug Hollow?

11 A. It's just, the difficulty is it's not difficult at
12 all. If he wanted to leave his building where it is
13 now which is a decision he made, certainly it's
14 going to cost more money because it's farther away
15 from that building as it sits right now from Doug
16 Hollow to where his building is now. But if you
17 look at the topo of his property he had numerous
18 choices about where to stake his building and he
19 chose to put it where he put it, for no reason than
20 in my opinion he knew he was just going to bust
21 through our landscape easement and get to it the
22 easiest way he could.

23 Q. Okay. Mr. Halsell has put into evidence numerous
24 pictures and I show you Exhibit Number 1 of Halsell;
25 do you recognize that area?

1 A. I mean that could be any area on our road coming in.
2 There's nothing there that really, there's a stake
3 there but it's something -- I didn't put that stake
4 there so I don't know but.

5 Q. Does that represent though the type of trees that
6 was on ---

7 A. In that area, yes, sir, it does. I'm assuming, I
8 don't know where he took this picture. There's not
9 enough stuff there for me to recognize the exact
10 location.

11 Q. Do you recognize Exhibit 3 and what it shows?

12 A. This is, this looks like after you turn in off of
13 Doug Hollow to Mountain View Pointe Drive and you're
14 looking I guess maybe that's north I would suspect
15 going up Mountain View Pointe Drive from Doug Hollow
16 Road and it certainly depicts the natural area and
17 how wooded that area is going up through there.

18 Q. Well, let me kind of put these in as a group and
19 tell me what these depict. Now, this is Halsell
20 Exhibits 4 through 11 and address generally what
21 those documents depict?

22 A. These are just more pictures of Mountain View Pointe
23 off of Doug Hollow Road. This one is another shot
24 of that going up off of Doug Hollow Road I'm
25 assuming. I mean I don't -- and then there's

1 another picture deeper into the drive where you can
2 see the beginnings of where he put the gravel in for
3 his construction entrance. And it looks like the
4 next picture is beyond ---

5 Q. Which one are you looking at now?

6 A. Number 7 looks like it possibly could be after you
7 pass where he disturbed our landscape entrance
8 continuing on up Mountain View Pointe Drive. This
9 one, I don't know that I know exactly. This could
10 be one of the plantings that was put in by the
11 neighborhood right almost exactly beyond where he
12 eventually disturbed the land. His driveway comes
13 very close to that planting bed on the west side
14 coming up Mountain View Pointe Drive. Number 9
15 looks like another bed beyond the one passing his
16 driveway, probably the last bed. And I know one of
17 the interesting things here, this is where the sod
18 goes all the way just about to the landscape
19 easement. It's a wider section that the development
20 some years back assessed everybody to enhance and
21 create these beds through a special assessment some
22 years back before we moved there. We did own
23 property so we paid the assessment by the way. And
24 then this is on the right-hand side going in.

25 Q. That would be on the lot the Pipers still own?

1 A. Yeah, on the Piper side so to speak as it stands now
2 and before you get to his driveway, this is number
3 10.

4 Q. What driveway?

5 A. The one that Halsell cut in right there on the left.

6 Q. You can see the driveway?

7 A. Yeah, you can barely see it down here.

8 Q. Oh, down here, okay.

9 A. And then this is just another picture of one of the
10 plantings on the eastern side that the subdivision
11 created and planted ornamental plants. I don't know
12 exactly where that is on the road because I can't
13 tell.

14 Q. Exhibit 12?

15 A. This is I'm sure, this looks like where the driveway
16 has been poured and Mr. Halsell has come in and put
17 in some landscape plants and trees it looks like.

18 Q. Does it show his building on there?

19 A. Yes, his building is to the right and where he put
20 in his electric fence or gate to go into his
21 property.

22 Q. And Exhibit 13, do you recognize that?

23 A. Yeah, this is just looking straight into his
24 driveway off of Mountain View Pointe Drive after the
25 concrete was poured.

1 Q. And Exhibit 16?

2 A. 16 is a topo of his property and, you know, he
3 basically made the decision I guess to put his
4 building at the highest point on his property. But
5 as you can see from the very highest point to where
6 Doug Hollow Road is it's only about 64 or 65 foot
7 drop over that length of time, so on property from
8 out here that's a relatively flat piece of property.

9 Q. I've got some more pictures laying around here
10 somewhere.

11 A. They're right there.

12 Q. The exhibit next in order?

13 BY COURT REPORTER:

14 19.

15 (PLAINTIFFS' EXHIBIT NUMBER 19 MARKED FOR
16 IDENTIFICATION)

17 Q. This a deed in the public records of Oconee County.

18 BY MR. MCDUFF:

19 Larry, I think that's part of the Joint Exhibits.

20 BY MR. BRANDT:

21 No, I don't think this one is.

22 BY MR. MCDUFF:

23 What is it?

24 BY MR. BRANDT:

25 This is the subsequent deed and it's dated -- well,

1 I don't see the date.

2 BY MR. MCDUFF:

3 It was recorded in 2018. No, recorded the 18th day
4 of August of 20 ---

5 BY MR. BRANDT:

6 2008.

7 BY MR. MCDUFF:

8 2008, August 2008.

9 BY MR. BRANDT:

10 Yeah, 2008 is in the public records and I would move
11 that into the record as my exhibit too as Exhibit
12 19.

13 BY THE COURT:

14 Any objection?

15 BY MR. HOOD:

16 Give us a minute, Your Honor, we need to figure this
17 out.

18 BY THE COURT:

19 All right. If it's in the public records it's going
20 to be probably in anyway.

21 BY MR. MCDUFF:

22 Yeah, I'm trying to figure out what. Okay, this is
23 that easement that goes between Lots 7 and 8 for the
24 community boat dock.

25 BY MR. BRANDT:

1 No, it's supposed to be basically a deed to the
2 Mountain View Pointe Owners Association.

3 BY MR. MCDUFF:

4 It is, but it deals with the easement that goes by
5 the type of lot down to the community boat ---

6 BY ROBERTA MCCAW:

7 Looking back at all the property, if you look at the
8 second page of derivation there it says it's all of
9 the property that was deeded ---

10 BY MR. MCDUFF:

11 Excuse me, I'm not taking your testimony right now
12 but.

13 BY ROBERTA MCCAW:

14 I was speaking out.

15 BY MR. HOOD:

16 Excuse me, Your Honor, I think what we're trying to
17 figure out is how is that relevant to what we're
18 talking about?

19 BY MR. MCDUFF:

20 Because here's what it says, here's Exhibit B what
21 was deeded, in that "COS" it says that stands for
22 "common open space, a parcel containing
23 approximately 0.57 acres, more or less, located
24 adjacent to Lot 7 and Lot 8", and that's the Pipers'
25 lot is Lot 7, "together with an exclusive easement

1 in favor of the boat slip lot owners as defined in
2 the declaration of over the", labeled "15-foot
3 access easement running along the boundary between
4 Lots 7 and 8 filed and as more particularly shown on
5 a plat entitled Mountain View Pointe dated October
6 22, 2002, recorded November 12, 2002 in Plat Book
7 A910 at Pages 1 and 2." Plat A910 at Pages 1 and 2
8 is Exhibit, Joint Exhibit Number 2. We object to
9 the relevance because this doesn't deed anything
10 back to the Association that deals with this, with
11 these easements; it only deeds an easement between
12 Lots 7 and 8 for a community boat slip.

13 BY MR. BRANDT:

14 There's basically the derivation there as "being the
15 identical property conveyed to Crescent Communities
16 by Corrective Title to Real Estate recorded in Deed
17 Book 1426 at 274" and that's where I'm saying the
18 relevance is because there was a Corrective Deed,
19 they call it a Corrective Deed which does have a
20 conveyance back to Crescent, and this is a deed that
21 we'd say they deeded back to Mountain View Pointe
22 Owners Association ---

23 BY MR. MCDUFF:

24 But, Larry, this does not deed the easement area; it
25 deeds a specific 15-foot access easement between

1 Lots 7 and 8 according to Exhibit B, that's what it
2 deeds.

3 BY MR. BRANDT:

4 All right.

5 BY THE COURT:

6 Let me do this, I'll go ahead and let him admit it.
7 I understand what you're saying, but it is a part of
8 the public record so I think it's admitted based on
9 that. But relevance and the weight of it will be
10 determined by his examination and it may be totally
11 irrelevant in that sense, but it may not be.

12 BY MR. MCDUFF:

13 And I'm just preserving for the record an objection
14 on the basis of relevancy.

15 BY THE COURT:

16 All right.

17 BY MR. MCDUFF:

18 So that's all.

19 BY THE COURT:

20 That's fine. Which it's the discretion of the court
21 ---

22 BY MR. MCDUFF:

23 Of course.

24 BY THE COURT:

25 --- but you'll probably not get far on appeal with

1 that one but.

2 BY MR. MCDUFF:

3 I'm not trying to.

4 BY MR. BRANDT:

5 Well, this is a public record and we'll put that in.

6 BY THE COURT:

7 All right, so that's Plaintiffs' Exhibit 19 and it's
8 a deed. How about give me the Book and Page number
9 of that deed?

10 BY MR. MCDUFF:

11 It's 1677 at Pages 284 to 292 recorded with the
12 Office of the Register of Deeds on August 15, 2008.

13 BY THE COURT:

14 Gotcha, that's fine. All right, that's admitted
15 over objection for relevance.

16 (PLAINTIFFS' EXHIBIT NUMBER 19 ADMITTED INTO EVIDENCE)

17 BY MR. BRANDT:

18 Okay. I don't have anything further.

19 BY MR. MCDUFF:

20 We're at the 1 o'clock hour, Judge, or a couple of
21 minutes there before. Do you want me to start on
22 cross examination or do you want to ----

23 BY THE COURT:

24 Well, how long are you going to take?

25 BY MR. MCDUFF:

1 How long does my sermon usually take?

2 BY THE COURT:

3 Well, the part I listen to only takes a few seconds.

4 I tend to nod off when I'm listening to sermons, you
5 know.

6 BY MR. MCDUFF:

7 Well, Mr. Hood is going to go first. I don't know,
8 mine will take probably a half hour to 45 minutes I
9 would think.

10 BY THE COURT:

11 All right. Well, y'all want to take a break?

12 BY MR. BRANDT:

13 How long?

14 BY MR. MCDUFF:

15 A half hour to 45 minutes.

16 BY MR. HOOD:

17 If we're going to break I would say we need to do it
18 now because ---

19 BY THE COURT:

20 Well, I don't care if we go to lunch or not but, you
21 know, anybody that wants to take a lunchbreak raise
22 your hand? Anybody that wants to keep going raise
23 their hand? All right.

24 BY MR. MCDUFF:

25 I've got hypoglycemia so I've got to eat at regular

1 intervals.

2 BY MR. BRANDT:

3 I have a couple of other witnesses, Your Honor, and
4 I'd say just to be reasonable two more.

5 BY THE COURT:

6 Well, I mean I'm just saying let's try to go ahead
7 get some in on this witness and we can take a
8 lunchbreak. If people don't want to go to lunch it
9 doesn't matter to me?

10 BY MR. PIPER:

11 I mean if he needs to for a medical reason, then he
12 needs to eat.

13 BY MR. MCDUFF:

14 If somebody has a granola bar I can eat those and we
15 can ---

16 BY THE COURT:

17 Well, I mean is that -- are you being facetious?

18 BY MR. MCDUFF:

19 No, I was being serious.

20 BY THE COURT:

21 Do you have some kind of experience ---

22 BY MR. MCDUFF:

23 I have low blood sugar, I have to eat at regular
24 intervals or otherwise I'll start ---

25 BY THE COURT:

1 That explains a lot.

2 BY MR. MCDUFF:

3 My mama told me something different but.

4 BY THE COURT:

5 All right, let's take a lunchbreak then. It's about
6 a few minutes after 1, actually it's 12:59 according
7 to my official clock so let's take an hour for lunch
8 and be back at 2 o'clock.

9 BY MR. MCDUFF:

10 All right.

11 BY MR. BRANDT:

12 All right.

13 (OFF THE RECORD @ 12:59 P.M. FOR LUNCHBREAK)

14 BY THE COURT:

15 All right, you ready to proceed?

16 BY MR. HOOD:

17 Yes, sir.

18 BY THE COURT:

19 All right, Mr. Dorsey, you're still under oath.

20 BY MR. DORSEY:

21 Yes, sir.

22 BY THE COURT:

23 We're going to continue. Mr. Brandt, you thought up
24 some more questions?

25 BY MR. BRANDT:

1 No, I don't think I had but one or two, but y'all go
2 ahead.

3 BY THE COURT:

4 All right, cross examination.

5 CROSS EXAMINATION BY MR. HOOD:

6 Q. Thank you, Your Honor. Excuse me, Mr. Dorsey, I'm
7 having a little voice problem with allergies.

8 A. Oh, I understand, I've been there myself, no
9 problem.

10 Q. If you don't understand me just let me know.

11 A. I will, thanks.

12 Q. Now, do I understand that you recognize that the
13 Halsells own property that fronts on a public road?

14 A. I recognize that they own property that fronts on
15 Mountain View Pointe Drive and Doug Hollow Road.

16 Q. Okay. And are both of those public streets?

17 A. I'm assuming they are; I haven't gone to the county
18 and certified that.

19 Q. And do you believe that as the owner of property
20 fronting on a public street you would have the right
21 of access to that street?

22 A. If there's no easements or restrictions saying
23 otherwise.

24 Q. So you would say an easement would prevent him
25 having access to his property?

1 A. In my opinion depending on how the easement was
2 written it very well could.

3 Q. And do you believe in this case that somehow the
4 landscape easement prevents him from having that
5 access?

6 A. Without permission from the HOA I do.

7 Q. And why is that?

8 A. Because that's what's stated in the Covenants.

9 Q. Well, the Covenants I don't think address the
10 question one way or the other about whether somebody
11 can ---

12 A. In my opinion, in my opinion it did before I bought
13 there.

14 Q. Well, explain that. What do you mean in your
15 opinion?

16 A. Well, there's language in several different places
17 in the CC, you know, I don't know if I've got the
18 acronyms correct or not, but the Covenants and
19 Restrictions that talks about the easement and there
20 is places in that document that says people can't
21 cross easements without the permission of the
22 Homeowners Association. Therefore, that's why they
23 asked our permission in my opinion whether they
24 could do that or not.

25 Q. Okay. Well, but you're referring to the

1 Restrictions that apply to the subdivision and this
2 property is not in the subdivision; is that right?

3 A. Well, it's the easement belongs to the subdivision.

4 Q. And that's all, all we have here is one thing and
5 that is that easement; is that right?

6 A. On that section of Mountain View Pointe Drive?

7 Q. Yeah.

8 A. What do you mean that's all?

9 Q. There's nothing else in the Covenants or
10 Restrictions that puts any limitations on the
11 property owned by the Halsells other than that one
12 strip that shows on the plat?

13 A. Well, by language in there that does put Mountain
14 View Pointe in control of that easement in my
15 opinion.

16 Q. Well, I would agree perhaps that it benefits the
17 owners in Mountain View Pointe, but I'm not sure
18 that I understand why you say it puts them in total
19 control of that area?

20 A. As I read the language that were in the CC, what are
21 those, the CC, whatever, that's the way I interpret
22 the language.

23 Q. Well, I don't want to beat that with you.

24 A. Okay.

25 Q. The documents I think will speak for themselves.

1 A. As do I.

2 Q. But you do agree that there's nothing that specifies
3 one way or the other about whether an owner's normal
4 right of access to a street would be preempted by
5 the landscape easement; you agree that that's not
6 specifically ---

7 A. I don't understand your question.

8 Q. Is there anything in any of the documents that are
9 involved in this matter that have all been
10 introduced into evidence to your knowledge that
11 specifically indicates one way or the other whether
12 this landscape easement would somehow preempt an
13 owner's normal right of access to the street
14 abutting his property?

15 A. Well, our documents don't address somebody that owns
16 some other piece of property; they address what's
17 been assigned to our subdivision so I can't speak to
18 that.

19 Q. Okay. Now, would you agree that the Halsells have
20 recognized the rights that the owners may claim
21 under the landscape easement?

22 A. Are they aware, is that what you mean?

23 Q. Well, I mean ---

24 A. They're aware.

25 Q. --- have they ever denied that there are rights or

1 interests that the owners have with respect to that
2 landscape easement?

3 A. I think their actions pretty much speak that they
4 don't, they're just going to do whatever they want
5 to do and, you know, they asked our permission as a
6 development and the answer was no and off they went.

7 Q. Okay. You phrase it as they asked for permission;
8 do you think they have to have your permission?

9 A. According to the way I interpreted our CCOs, yes, I
10 think they do, they have to have it. I think
11 anybody has to have permission of the Homeowners
12 Association to cross that easement.

13 Q. Okay, so you're assuming ---

14 A. It doesn't matter if it's me, you or anybody.

15 Q. You're assuming it indicates then that the owners or
16 the POA or whomever seem to have total dominion and
17 control over that landscape easement; is that what
18 you're claiming?

19 A. That's what I'm saying.

20 Q. Well, what rights does that leave the owners of
21 property with respect to that strip of land ---

22 A. He has rights ---

23 Q. --- whom by the way they own?

24 BY MR. BRANDT:

25 Objection, Your Honor. He's calling for a legal

1 conclusion of a layperson.

2 BY THE COURT:

3 Well, I agree and a lot of these questions have been
4 doing that and they also border on being very
5 argumentative. But just ask the questions; you're
6 on cross examination and I'll give you some leeway
7 on how you phrase your question but stay within
8 those limits.

9 Q. All right, thank you. Do you think there's any
10 reason why his interest in accessing the roadway can
11 exist at the same time of your rights under the
12 landscaping easement?

13 A. The only way as the way I read that it could exist
14 is if the Homeowners Association gives them
15 permission to enter that landscape easement with a
16 driveway.

17 Q. Okay. So it's all left up to the Owners
18 Association?

19 A. The way I understand it, yes, sir.

20 Q. Have you ever stated in conversation with Mr.
21 Halsell before that you really didn't have a problem
22 with his driveway?

23 A. I think I stated to him basically that I don't have
24 a problem with his building because I have no right
25 to have a problem with this building.

1 Q. Well, what about the driveway; have you ever stated
2 to him that you didn't have a real problem with it?

3 A. I don't recall saying that, no. That would be
4 unusual because I do have a problem.

5 Q. At the time the Halsells made their first
6 presentation to the board I believe you were a
7 member of the board at that time?

8 A. Yes, sir.

9 Q. And you were present at that meeting?

10 A. Yes, sir.

11 Q. And I believe at the conclusion of the meeting the
12 board indicated that it wanted to kind of poll the
13 owners out there and get their views on the matter?

14 A. Absolutely.

15 Q. Did y'all do that?

16 A. Yes, sir.

17 Q. And I take it that the predominant response was
18 negative; is that correct?

19 A. You know, we kind of split that up among us, but
20 when we reconvened it was, the initial response from
21 all of our lot owners out there was everybody except
22 one lot did not want a driveway off of Mountain View
23 Pointe Drive to any of those, either parcel.

24 Q. Well, I would say that was pretty predominately
25 negative then?

1 A. I would agree with that.

2 Q. What were the reasons you heard as far as the owners
3 being negative about it?

4 A. The reasons were that once any, basically once one
5 driveway was cut through there then it would open up
6 for other driveways; it would set a precedent for
7 future driveways to be cut on both sides of that
8 road which could certainly have a very negative
9 effect on the entrance of our subdivision and in
10 turn our property values that could be affected by
11 that. Because there's no zoning, you have no
12 control of what can go in there. Now, if there was
13 -- I would say that was the main, if I had to come
14 up with one thing that was probably it.

15 Q. Well, speaking of that, you earlier testified as to
16 what you thought the original purposes of the
17 landscape easement were?

18 A. Correct.

19 Q. And what was that?

20 A. To, one, landscape obviously, have the opportunity
21 to landscape; but also, if needed, to give you, to
22 have the space to screen if the need arose whatever
23 may be developed on those properties that were
24 connected to our subdivision.

25 Q. Okay. Now, if the intent of I guess it was Crescent

1 at that time when all this was being done was to put
2 a barrier between the street and whatever may end up
3 behind it, would you agree that that could easily
4 have been done by simply reserving a buffer strip
5 along the side of the road?

6 A. I have no idea what Crescent thought. That would be
7 -- I have no idea.

8 Q. Well, I realize you don't, but would you agree that
9 that is certainly one thing that could've been done?

10 A. I have no idea what restrictions they were under, I
11 can't answer that question.

12 Q. Well, you testified that you were a developer and
13 you were familiar with covenants and restrictions?

14 A. I don't know what their restrictions were or
15 weren't, I have no way of knowing that. I mean I
16 could speculate but that's all it would be.

17 Q. Well, the point is I guess that I'm trying to get to
18 is you do recognize that ordinarily Mr. Halsell has
19 an interest in accessing or having access,
20 reasonable access to his property?

21 A. From Doug Hollow he does, from Doug Hollow Road.

22 Q. And you have an interest in utilizing the easement
23 for its intended purposes?

24 A. Me personally? We do as a development.

25 Q. Well, when I speak of you I'm speaking of the group.

- 1 A. Okay.
- 2 Q. And I'm suggesting that, do you believe it is
3 possible that both of those things can happen at the
4 same time?
- 5 A. Not without permission of the subdivision.
- 6 Q. And that's just arbitrarily in the hands of you?
- 7 A. Not me, whoever is on the board ---
- 8 Q. Meaning?
- 9 A. --- and the voting members that are attached to
10 that.
- 11 Q. All right, let me ask you this; you live in Mountain
12 View Pointe?
- 13 A. Yes, sir.
- 14 Q. I believe you said Lot 11?
- 15 A. Correct.
- 16 Q. And do you have access to the street in front of
17 your house?
- 18 A. I do.
- 19 Q. And why do you have that legal access?
- 20 A. Because the county allowed us to put a driveway into
21 there.
- 22 Q. Because you're the owner of the property?
- 23 A. Yeah, but there's not an easement on my property.
- 24 Q. Well, you're not right about that.
- 25 A. Well, there's a utility easement and I understand

- 1 that. They could come dig my sod up anytime they
2 want to, I understand that. But this landscape
3 easement starts at the end of that county easement
4 and goes 25 feet.
- 5 Q. Well, the utility easement in front of your house
6 runs the entire length of your lot.
- 7 A. I understand that, sure, everybody's does.
- 8 Q. But when you drive into your house every day you
9 cross over an easement?
- 10 A. That I have permission to cross from the county by
11 virtue; everybody out there does.
- 12 Q. The county gives you permission to cross over a
13 utility easement?
- 14 A. I guess they do, I'm assuming they would.
- 15 Q. Well, could Mr. Halsell get permission from the
16 county ---
- 17 A. I don't know.
- 18 Q. --- to cross over your easement? He got an
19 encroachment permit to ---
- 20 A. Well, that's the same thing I'm assuming I have.
- 21 Q. Well, it either gives authority but it doesn't give
22 him authority?
- 23 A. I guess it gives him authority to go right up to the
24 edge of that encroachment, but then that
25 encroachment that has nothing to do with the

1 easement, the county will tell you that. They have
2 no dog in the fight from the end of their utility
3 easement beyond there.

4 Q. Well, the point is you cross over an easement to
5 access your property; you said earlier you can't
6 cross over an easement?

7 A. Well, this is a county easement I guess you'd say.
8 I understand where you're trying to get to there,
9 sir, but ---

10 Q. But it is not a county easement; it is an easement
11 created by the development plans, the same way as
12 the landscape easement was.

13 A. I disagree.

14 Q. I'm just trying to figure out how the two are
15 different?

16 A. Well, I don't know, I don't know. I don't have an
17 answer for that.

18 Q. Well, it was earlier stated as an example in some of
19 the testimony about what were the problems would be
20 here having a driveway going over the easement and
21 the example that was used, well, what if the owners
22 or the POA decides to put a tree in the middle of
23 Mr. Halsell's driveway, that would create a problem
24 and so for that that was the reason given you can't
25 put a driveway in, right?

1 A. I don't know that that was the reason that you can't
2 put a driveway in; that was just some attorney's
3 opinion in an example of how that could possibly
4 work, that was one person's opinion.

5 Q. Well, let me ask you this. What if the power
6 company decided to put a pole in the middle of your
7 driveway?

8 A. I guess they could if they decided to do that if
9 it's inside their easement.

10 Q. Do you think that would be permissible, you wouldn't

11 ---

12 A. I don't -- if they decided they had to do that I
13 guess it is.

14 Q. All right, I think that's all I have. Thank you.

15 BY THE COURT:

16 All right. Mr. McDuff?

17 EXAMINATION BY MR. MCDUFF:

18 Q. Good afternoon, Mr. Dorsey.

19 A. How are you?

20 Q. I'm well, thank you.

21 A. Did you get something to eat?

22 Q. I did, I did, I appreciate it, sir. All right, so
23 you are currently the President of the POA Board,
24 correct?

25 A. Yes, sir.

1 Q. And Ms. McCaw who is seated over here next to you
2 and next to your legal counsel is also on the board,
3 correct?

4 A. Yes, sir.

5 Q. And Ms. McCaw is I guess a recovering lawyer as
6 well?

7 A. So she says.

8 Q. As a member of the board you are governed by what we
9 call the Covenants, Conditions and Restrictions, the
10 CCRs, correct?

11 A. The way I understand it, yes.

12 Q. And also the Bylaws that were adopted for the
13 community as well?

14 A. Yes, sir.

15 Q. And have you read the CCRs?

16 A. I have.

17 Q. And so they are marked I believe as Joint Exhibit
18 Number 1 and I'm going to find these. This is
19 Exhibit 1A. Now, I first want you to turn to page
20 three and there's a stamp at the top where it's book
21 and page and it would be Book 1250, Page 100.

22 BY MR. BRANDT:

23 What was that?

24 A. Well, now you lost me there on that.

25 BY MR. BRANDT:

1 What was that reference again?

2 Q. The reference is page three in the CCRs, but if you
3 look at the stamp in the top right-hand corner where
4 it was recorded with the county it would be Book
5 1250 at page 100.

6 A. Page three.

7 Q. Page three, you're with me, right. Do you see
8 Section 1.1.2?

9 A. Yes, sir.

10 Q. All right, it says, it defines "common areas would
11 include, shall refer and mean collectively to the
12 entrance monument, street lights in the landscape
13 easement area", correct?

14 A. That's what I'm reading, yes.

15 Q. And if you go over to the next page, page four, and
16 look at Section 1.2.3, it defines, "the landscape
17 easement area is a 25-foot easement granted by
18 Declarant" which would have been Crescent
19 Communities, correct, "along both sides of the main
20 entrance road into the subdivision, all of which
21 shall be maintained by the Association as more
22 particularly set forth in Section 7.9"; is that a
23 fair reading of it?

24 A. I think so, yeah.

25 Q. And then if you go to Section 7.9 which is on page

1 25?

2 A. Okay.

3 Q. If you'll look at the top, the paragraph at the top
4 of that page it looks like the very last sentence
5 where it says "Declarant further hereby grants,
6 establishes and creates and reserves for the benefit
7 of the Declarant and the Association, their
8 successors and assigns, nonexclusive perpetual
9 easements for the purpose of landscaping and
10 maintaining the property adjacent to the main entry
11 road for the subdivision as landscaping easement on
12 the map"?

13 A. That's what it says.

14 Q. All right. Now, go back to page four again to
15 Section 1.2.5.

16 A. Okay.

17 Q. It defines, Section 1.2.5 defines the map as the
18 plat recorded at A910, Pages 1 and 2, correct?

19 A. Somebody wrote that in, yes.

20 Q. Okay, that's how it was recorded, you know, written
21 in because that usually happens when the plat gets
22 recorded the Register of Deeds gives it a Book and
23 Page Number and then it gets written in
24 subsequently.

25 A. I don't know who wrote that in, but I'll take your

1 word for it.

2 Q. All right, but I'll represent that's how it appears
3 in the public records and that is what we've
4 identified, that plat at A910 is the plat shown here
5 that's been marked as Exhibit 2, Joint Exhibit 2;
6 would you agree with that?

7 A. I guess.

8 Q. Now, would you agree with me that these Covenants
9 were recorded in 2002?

10 A. Yes, I guess I mean if that's what it says, yea.

11 Q. Look at the front page and it will say recorded and
12 it will give you the date of recording at the very
13 top, November of 2002?

14 A. Yes, I see that.

15 Q. All right, so in November of 2002 when these
16 Covenants were created and the plat was recorded,
17 Crescent Communities SC, LLC was the developer,
18 correct?

19 A. I wasn't around here at that time so I have no way
20 to know that.

21 Q. All right. So you if go with me then to page three
22 of the CCRs, again that's in Section 1.15 it defines
23 who the Declarant is, "shall mean and be refer to as
24 Crescent Communities SC, LLC", correct?

25 A. That's what it says, right.

1 Q. So you would agree with me that Crescent Communities
2 SC, LLC owned all the property in the Mountain View
3 Point Subdivision in 2002, correct?

4 A. I'm assuming they did.

5 Q. And they also owned the Halsell parcel, Parcel A?

6 A. Again I have no knowledge of that, but I'm assuming
7 they did.

8 Q. All right. And also the Piper parcel which is
9 Parcel B, correct?

10 A. I'm assuming you're correct.

11 Q. All right. So any landscape easement would've been
12 on property that was owned that the easement
13 would've been created by Crescent Communities SC,
14 LLC over and across property owned by it, correct?

15 A. Well, are you trying to say that this easement
16 would've been assessed or attached to every piece of
17 property that Crescent owned?

18 Q. No, I'm just saying you would agree with me that the
19 property that would've been burdened by this
20 landscape easement that was created by Crescent
21 Communities SC, LLC, the burdened property would've
22 also been owned by Crescent Communities SC, LLC,
23 correct?

24 A. I'm assuming.

25 Q. You would agree with me, wouldn't you, that the

- 1 Pipers have not sought, filed any development plans
2 for Parcel B, correct?
- 3 A. Not to my knowledge.
- 4 Q. They haven't sought an encroachment permit from the
5 county, correct?
- 6 A. Not to my knowledge.
- 7 Q. And they have not in way, shape or form sought to
8 develop their property?
- 9 A. Just by conversations with other people of what
10 their future plans may be.
- 11 Q. May be hypothetically?
- 12 A. What they may be.
- 13 Q. Well, you're seeking to declare that the Pipers have
14 no right to access their property if they decide to
15 develop it, Parcel B, over and across from Mountain
16 View Point Drive, correct?
- 17 A. No, I think what we're trying to determine is does
18 that easement on either side of that road, is that
19 indeed in the control of the subdivision homeowners
20 association or not, and really what they develop in
21 their properties we have no dog in that fight. We
22 couldn't -- we have nothing to say about that; they
23 can do anything they want to on that property.
- 24 Q. Well, you would agree with me that the Pipers and
25 the Halsells both own the areas under this landscape

- 1 easement, don't they, the dirt?
- 2 A. It's my understanding that they are subservient
- 3 though to that easement.
- 4 Q. But they own the dirt, don't they?
- 5 A. Yes, they do.
- 6 Q. And so you agree with me that the CCRs, the
- 7 Covenants for Mountain View Pointe Subdivision are
- 8 not applicable to either Parcels A or B, are they?
- 9 A. I don't understand your question.
- 10 Q. Well, tell me where, and you said you believed that
- 11 the Covenants provided by the POA, the owners in the
- 12 community, had a right to determine and deny anybody
- 13 the right to cross over the landscape easement to
- 14 access either Parcels A or B, correct?
- 15 A. That's correct.
- 16 Q. All right. Where, tell us where specifically in the
- 17 CCRs it says that?
- 18 A. Well, I can't just point that out right now. But in
- 19 reading that it put that in the control of the
- 20 subdivision.
- 21 Q. And tell us, I mean we're here and this your day in
- 22 court for the POA, so where does it say that in the
- 23 Covenants?
- 24 A. I'd have to -- we'd have to take a recess and I'll
- 25 have to read this entire document.

- 1 Q. All right, let's start with the section on page 24
2 and 25 where it says, "Section 7.9, Entrance
3 Monument", read that Section 7.9. Does that state
4 anywhere in there ---
- 5 A. What, what page number?
- 6 Q. 24 and 25.
- 7 A. So what is your question in regards to that?
- 8 Q. My question is does that section in any way address
9 the right of the POA to be the gatekeeper to
10 determine whether or not somebody accesses either
11 Parcel A or B through the landscape easement?
- 12 A. It doesn't in that specific paragraph, but it does
13 in other paragraphs in this document in several
14 places.
- 15 Q. Well, and paragraph 7.9 says that this is a
16 nonexclusive easement, doesn't it?
- 17 A. It says that, yes.
- 18 Q. And, you know, if we look in the dictionary
19 nonexclusive means that it can be used by other
20 people, doesn't it?
- 21 A. I think that's a big debate in this what that means.
- 22 Q. Well, I'm taking the plain language of the ---
- 23 A. I don't have a dictionary, so I have no way to agree
24 or disagree.
- 25 Q. But you were an educator for years, weren't you?

1 A. I was, yes, but I don't know every word in the
2 dictionary.

3 Q. All right. So tell us, you're saying that there are
4 places in the CCRs where it says that the POA gets
5 to be the gatekeeper for who crosses that easement,
6 tell me where; it's your testimony, I'm asking?

7 A. Well, once again, unless we take a recess and I have
8 a chance to go through here and dissect this entire
9 document I can't answer that question to you.

10 Q. Well, it's fair to say as we sit here today you
11 can't tell us any particular provision in the CCRs
12 that gives the right to the POA to be the gatekeeper
13 as to who accesses their own property across the
14 easement, correct?

15 A. I'm not going to be able to tell you with you
16 handing me a document that's a hundred and something
17 pages long and for me just to regurgitate to you
18 exactly where that is in this document, I can't do
19 that.

20 Q. Well, let me ask you this. Since this, I guess
21 since this litigation was filed the POA paid to have
22 a surveyor go out there and survey and mark out the
23 actual road right-of-way, correct?

24 A. Correct.

25 Q. And you realized and learned through the survey that

1 what's depicted in the plat which is Joint Exhibit
2 Number 2 for the roadway is located doesn't match up
3 to the as-built, does it?

4 A. I can't -- that was not conveyed to me by the
5 surveyor so I couldn't tell you.

6 Q. And are you aware of the fact that over 99% on the
7 Piper's side -- now, let me, I'll state for the
8 record and you can verify this by measuring the
9 calls that are in that survey, the one that's on,
10 that's Exhibit 2, according to that they have 1353
11 feet along Mountain View Pointe Drive?

12 A. If you say so.

13 Q. All right. That's a little over three-quarters of
14 an acre, isn't it?

15 A. I haven't calculated it so I couldn't tell you.

16 Q. Assuming an acre is 43,560 square feet and you've
17 got 33,000 in chained square feet, that's a little
18 over three-quarters of an acre?

19 A. If that's what you say.

20 Q. And so are you aware of the fact that when you,
21 according to the as-built roadway, if you take a 50-
22 foot right-of-way as-built that over 99% of all the
23 landscaping along Mountain View Pointe Drive is
24 within the road right-of-way, not within the
25 landscape easement area?

1 A. Well, that's where I, that's where I think you're
2 wrong. I think trees, natural trees and shrubs and
3 underbrush is all part of landscaping; that is the
4 landscape.

5 Q. Okay. Landscape means that you, in my opinion, if
6 it's landscaped you've gone and you've intentionally
7 planted something there, you've maintained it,
8 you've cut it, you've trimmed it, ---

9 A. Well, your opinion and my opinion are totally wrong
10 ---

11 Q. What I'm thinking of and what you're talking about
12 is forestation and that's what you're talking about,
13 isn't it?

14 A. Any part of landscaping. Part of my yard is
15 natural, that's landscaping.

16 Q. Well, I'm talking about the area that's actually
17 maintained as a landscaped area?

18 A. It's all maintained.

19 Q. By the POA, where it cuts the grass and it plants
20 plants and bushes and shrubs and all those things
21 and beautifies and puts mulch in?

22 A. If a limb falls down in that wooded area, then the
23 company that we paid it's part of their job and part
24 of their duties to go in there and remove that and
25 take it off, so we maintain the wooded area as well

1 as the grassy areas because it's part of the
2 landscaping.

3 Q. Well, when a limb or tree has fallen in the past
4 you've gone to the Pipers and asked their permission
5 to be able to do that, haven't you, to ---

6 A. No, I did not ask their permission. They had a
7 question back when we did some landscaping and in
8 order to rectify that before we touched anything on
9 their land that they was on theirs, I went to Mr.
10 Sosebee who was the original surveyor on this and he
11 is the one that told me exactly where the landscape
12 was and his exact words to me were "if you as a
13 subdivision wanted to go down through there and take
14 every tree out of your landscape easement, you have
15 a right to do that."

16 Q. Well, the landscape easement though, you would agree
17 with me that most of what the POA maintains is 99%
18 of it on the Piper side is in the road right-of-way,
19 isn't it?

20 A. No, we take care of all of that. Just because we've
21 chose and don't, we might choose to do more down the
22 road but just because we don't choose to go in there
23 and take the trees out and put sod down, that
24 doesn't mean that isn't landscaped, I'm sorry.

25 Q. Well, can you tell me and point to any document that

- 1 there is that shows that the Mountain View Pointe
2 Owners Association, Inc., a South Carolina nonprofit
3 corporation, has been deeded or transferred any
4 ownership or easement rights in and to this
5 landscape easement?
- 6 A. This plat right here says there is a landscape
7 easement that's registered with the county.
- 8 Q. Well, I'm asking you to point to any document with
9 that right, the rights shown on this plat, have in
10 any way, shape or form been transferred by Crescent
11 Communities SC, LLC to Mountain View Pointe Owners
12 Association?
- 13 A. In terms of transfer what do you mean by transfer,
14 like an ownership?
- 15 Q. Deed, by deed or otherwise?
- 16 A. There's no deed, but it's in the language of the
17 CCRs as well as you know that.
- 18 Q. But the CCRs don't apply to properties outside the
19 subdivision, do they?
- 20 A. They apply to that easement because it says so in
21 that.
- 22 Q. All right. So Crescent Communities SC, LLC created
23 that easement, correct?
- 24 A. That's my understanding.
- 25 Q. And so where is there a document transferring that

1 right in that easement anywhere to the Property
2 Owners Association?

3 A. I don't know if there is or there isn't.

4 Q. In fact, there isn't one, is there?

5 A. Well, I don't know.

6 Q. Well, let me show you ---

7 A. I've never looked.

8 Q. I'm going to direct your attention to Joint Exhibits
9 3 and 4 and have you take a look at Exhibit Number
10 3.

11 A. And what am I going to do with this?

12 Q. I'm going to ask you some questions and I want you
13 to read it over.

14 A. I'm not going to answer questions on this document
15 unless I've had an opportunity to study it.

16 Q. Well, take your time.

17 A. (Long pause while reviewing document)

18 BY THE COURT:

19 Mr. McDuff?

20 BY MR. MCDUFF:

21 Yes, sir.

22 BY THE COURT:

23 This document has been admitted into evidence.

24 BY MR. MCDUFF:

25 It has been.

1 BY THE COURT:

2 So why will it not just speak for itself?

3 BY MR. MCDUFF:

4 Well, it does. Judge, if you're telling me to
5 saddle up and move along?

6 BY THE COURT:

7 Well, I don't know what your question is going to
8 be, but I mean ---

9 BY MR. MCDUFF:

10 They are in evidence.

11 BY THE COURT:

12 --- it's not good use of our time to sit here while
13 we read over documents. I mean the documents are in
14 the evidence.

15 BY MR. MCDUFF:

16 I understand.

17 BY THE COURT:

18 And I can read as good as Mr. Dorsey or you or most
19 of these other folks can.

20 BY MR. MCDUFF:

21 Probably better than me so.

22 BY THE COURT:

23 Well, could be. But I just want to move along and
24 if you have a specific question that he may know, he
25 may know or he may not know.

- 1 Q. All right, let me ask it this way so we can wind
2 this down. Mr. Dorsey, you're not aware of any
3 document deeding what Crescent Communities SC, LLC
4 did in an easement, not aware of any document
5 deeding that over to the Property Owners
6 Association, are you?
- 7 A. I'm not aware that there is such a document or there
8 isn't such a document.
- 9 Q. And you are not a civil engineer, are you?
- 10 A. I am not, no.
- 11 Q. You don't have a degree in civil engineering?
- 12 A. No, sir, I don't.
- 13 Q. Now, I want to have you turn with me to page -- pull
14 out the Covenants again, you need to get those.
- 15 BY MR. BRANDT:
- 16 Page of what?
- 17 Q. I haven't got there yet. All right, so page 14 ---
- 18 BY MR. BRANDT:
- 19 Of which document?
- 20 BY MR. MCDUFF:
- 21 Of Exhibit 1.
- 22 BY MR. BRANDT:
- 23 Huh?
- 24 BY MR. MCDUFF:
- 25 Of the CCRs.

1 BY MR. BRANDT:

2 Yeah.

3 Q. All right, page 14 deals with the annual
4 assessments, does it not?

5 A. It does.

6 Q. All right, and as a member of the board, it's your
7 responsibility to create a budget and pass a budget
8 and determine what annual assessments are going to
9 be against any particular property in the community,
10 correct?

11 A. There's a difference between assessments and dues is
12 my understanding.

13 Q. So the annual assessment, so you're saying there's
14 something different between annual dues and annual
15 assessments?

16 A. It's my recollection from reading and from other
17 board members that assessments are in addition to
18 the annual dues if they're deemed necessary.

19 Q. All right. In fact, if you go to the next page,
20 page 15, Section 5.5, the board exacted or imposed a
21 special assessment on the owners in Mountain View
22 Pointe, correct?

23 A. For what purpose?

24 Q. To fund this litigation?

25 A. Quote me your reference again please.

1 Q. Section 5.5 on page 15.

2 A. 5.5, that's correct.

3 Q. All right, so in 2021, June of 2021, you as the
4 President -- were you President in June of 2021?

5 A. I don't remember when I took over as President. I
6 think that was in March of that year, yes.

7 Q. All right, so you were President in June of 2021?

8 A. Yes.

9 Q. And on June the 1st of 2021 you notified the owners
10 in Mountain View Pointe Subdivision that the board
11 had voted to impose a special assessment on all
12 owners within the subdivision, correct?

13 A. We actually polled ---

14 Q. For a thousand dollars?

15 A. We polled our residents before we determine the
16 assessment amount to make sure that the majority of
17 the residents there were in agreement to move
18 forward with litigation and they were under the
19 understanding that there would be an assessment in
20 order to do that, yes.

21 Q. Well, so you imposed a special assessment to pay Mr.
22 Brandt to handle this litigation on behalf of the
23 POA, correct?

24 A. We did, yes, sir.

25 Q. And that was a thousand dollars per property owner,

- 1 per lot owner?
- 2 A. Correct.
- 3 Q. So that included imposing a thousand dollar special
4 assessment on the Defendants including the Pipers in
5 this case, correct?
- 6 A. Well, they own property, Lot Number 7, so they were
7 included on it.
- 8 Q. So you passed a special assessment to help them fund
9 your litigation against them?
- 10 A. They are a property owner, what they own in Parcel A
11 or B was no, had no bearing on this particular
12 situation.
- 13 Q. Would you agree with me that a special assessment is
14 solely for the purpose of defraying in whole or in
15 part costs applicable to that year only?
- 16 A. It says in here that you can assess only once a
17 calendar year a special assessment, but it's a
18 calendar year.
- 19 Q. It says, "In addition to the annual assessment
20 authorized above, the Association may levy in any
21 calendar year a special assessment applicable to
22 that year only."
- 23 A. I don't see the word "applicable".
- 24 Q. Applicable. Well, look at the second sentence, the
25 second line in Section 5.5.

- 1 A. It says, "For the purpose of defraying in whole" ---
- 2 Q. No, you're reading ---
- 3 A. --- "or in part" ---
- 4 Q. You're reading the line below it. On the second
- 5 line?
- 6 A. In other words I read this as you're allowed to make
- 7 a special assessment one time during a calendar
- 8 year.
- 9 Q. Well, it says "a special assessment applicable to
- 10 that year only"; isn't that what it says?
- 11 A. Well, it gives you some -- I mean it does, yes, it
- 12 says that, you're reading the same thing I'm
- 13 reading.
- 14 Q. Okay. But the special assessment that was imposed
- 15 by the board was to create a war chest if you will
- 16 to fund beyond 2021, wasn't it?
- 17 A. No, it was not. It was to pay the estimate that our
- 18 attorney gave us what the costs of this could be and
- 19 that's what we based that on.
- 20 Q. For the entire litigation, correct?
- 21 A. Well, I don't know how long. At that point we had
- 22 no idea that this litigation was going to take this
- 23 length of time.
- 24 Q. So as a board member it wasn't necessarily confined
- 25 for expenses for that year only, was it, for 2021?

1 A. It was specifically collected to have the funds
2 available to pay our attorney for what he basically
3 estimated that the initial part of this was going to
4 cost.

5 Q. Through trial?

6 A. He didn't say trial or not trial; he just said
7 costs.

8 Q. Up to appeal, correct?

9 A. Up to what?

10 Q. Up to appeal?

11 A. No, that was never discussed.

12 Q. All right. Well, you've sent a memo, the memo you
13 sent by email to the property owners, Piper Exhibit
14 2, this has been introduced into evidence; is this a
15 copy of the email you sent to the owners on June the
16 1st of 2021?

17 A. It just basically says that we were able to fund ---

18 Q. Ongoing litigation, doesn't it?

19 A. It says, "this far the HOA has been able to fund
20 attorney's fees from our emergency fund. These
21 funds are now exhausted. As a result, it is now
22 necessary to levy a special assessment. Please
23 refer to the Covenants if you have questions
24 regarding this." That's what it says.

25 Q. All right, let me show you, I think you're omitting

1 a part that says, "the board has voted to assess
2 each lot owner a thousand dollars for the purpose of
3 continuing to fund legal fees. We hope that these
4 funds will be sufficient; however, there is no
5 guarantee especially if any appeal is necessary or
6 taken"?

7 A. Down the road maybe.

8 Q. Those are your words, correct?

9 A. Those are the words of the board. I think this was
10 signed by the board of directors, not personally.

11 Q. But it was your email, wasn't it?

12 A. Well, it came from my email; but it was drafted by
13 the board, not by me personally.

14 Q. So, in fact, you would agree with me, wouldn't you,
15 that the assessment that was imposed upon property
16 owners was for the year beyond 2021, wasn't it?

17 A. I didn't know the answer to that.

18 Q. Well, we're here in 2022, correct?

19 A. We are.

20 Q. And so the same funds that were assessed against the
21 Pipers are now being used, and the other owners, are
22 now being used to pay Mr. Brandt's legal bill,
23 aren't they?

24 A. No. The last bill that we had to pay to Mr. Brandt
25 was out of that original assessment.

1 Q. The thousand dollar assessment?

2 A. Correct.

3 Q. That was in 2021. So the last bill would've been
4 this year in 2022, correct?

5 A. I don't know when that was.

6 Q. So you would agree with me that was not an expense
7 for that year only, his most recent legal bill?

8 A. Without looking at all the dates I couldn't tell you
9 that.

10 Q. All right, I don't have any further questions at
11 this time.

12 BY THE COURT:

13 All right. Is there any redirect, Mr. Brandt?

14 REDIRECT EXAMINATION BY MR. BRANDT:

15 Q. Basically all these questions that he's asked you
16 about assessments and everything can certainly be
17 explained by the document before you?

18 A. They do, but I don't really know what this has to do
19 with an easement.

20 Q. Yeah, I think he's got a claim in there for malice,
21 bad acts, basically violated. And basically the
22 assessments at one time is for that year and you can
23 assess for the expenses for that year?

24 A. Correct.

25 Q. And then the next year, is there anything to your

1 knowledge that would prevent the board from
2 assessing for paying more attorney fees?

3 A. Not if we have passed the calendar date which is one
4 year.

5 Q. Okay. So basically you merely were trying to defend
6 the subdivision as you had a right to do and you had
7 to have money to do that, correct?

8 A. Correct.

9 Q. All right. Has there been any other assessments
10 after that year?

11 A. No, sir.

12 Q. None?

13 A. None.

14 Q. Just that one year?

15 A. Just that one year to date.

16 Q. All right, I have nothing further.

17 BY THE COURT:

18 All right, Mr. Dorsey, you can step down. All
19 right, Mr. Brandt, what you got next for us?

20 BY MR. BRANDT:

21 I'd like to call Bob Albergotti.

22 BY COURT REPORTER:

23 Would you raise your right hand? Do you solemnly
24 swear to tell the truth, the whole truth and nothing
25 but the truth so help you God?

1 BY MR. ALBERGOTTI:

2 I do.

3 TESTIMONY OF ROBERT ALBERGOTTI

4 DIRECT EXAMINATION BY MR. BRANDT:

5 Q. Mr. Albergotti, please have a seat and state your
6 name in full.

7 A. Robert D. Albergotti.

8 Q. And do you live in Mountain View Pointe?

9 A. Yes.

10 Q. And what lot number?

11 A. 25.

12 Q. And how long have you ---

13 BY THE COURT:

14 What's that answer, I didn't hear you?

15 A. 2-5.

16 BY THE COURT:

17 25?

18 A. 25.

19 Q. How long have you lived there?

20 A. We completed the house in 2006. We used it
21 primarily as a summer home until 2014. At that time
22 my wife moved up here fulltime and we kept an
23 apartment in Dallas and I continued to work.

24 Q. And when you bought, what were some of the things,
25 amenities that you looked at the property, observed

1 out there, that attracted you to that neighborhood?

2 A. Well, the building site was a challenge. We had to
3 do quite a bit of retaining wall construction to
4 create a building site, but once we did that we had
5 a very big open view of a big part of the lake and
6 that was probably the biggest thing. The second was
7 when we bought this lot which was in 2004 I don't
8 think there were more than maybe five houses that
9 were in the subdivision at that time, five or six,
10 and so when you turn off of Doug Hollow you have a
11 pretty awful situation involving some old trailers
12 and stuff like that that's about half a mile or a
13 quarter mile up toward Highway 130 from the entrance
14 to the subdivision but once you get past those
15 trailers then it's all heavily wooded and there's a
16 monument and you turn into the subdivision and you
17 see basically, not a canopy, but a dense vegetation
18 on both sides of Mountain View Pointe Drive all the
19 way to the first lot.

20 Q. Was that important to you?

21 A. Well, I can only speak to that in hindsight because
22 what was important to me was the view. What I
23 didn't know was what could happen to the view. I
24 assumed it was protected. If I knew then what I
25 know now that there was going to be a Walmart built

1 adjacent to Mountain View Pointe Drive, I likely

2 would not have purchased the lot.

3 Q. Well, what about a building such as Mr. Halsell has
4 constructed?

5 A. Well, I was referring to that building because it
6 looks like a Walmart.

7 Q. Describe the building.

8 A. It's about 20 feet tall at the peak of the metal
9 building. It looks like a prefab building. It's
10 ugly, it looks like brownish-gray or something.
11 It's got a big 20-foot overhead door, a dinky little
12 front door painted white with a little canopy over
13 it and it's just a huge eyesore.

14 Q. Do you have an opinion as to what Mr. Halsell
15 constructing that building there does to the value
16 of your property if you attempted to resell it?

17 A. If we can reinstitute the landscaping that Mr.
18 Halsell removed, ---

19 BY MR. HOOD:

20 Excuse me, ---

21 A. --- then I ---

22 BY THE COURT:

23 Hold on, hold on a minute, hold on minute.

24 BY MR. HOOD:

25 I've got an objection to the relevancy of his

1 question and the testimony.

2 BY MR. BRANDT:

3 Property value and damages.

4 BY THE COURT:

5 Overruled.

6 BY MR. HOOD:

7 Well, he's talking about the building. The issue

8 here is not a building, it's a driveway.

9 BY THE COURT:

10 Overruled.

11 WITNESS CONTINUES:

12 A. I think if Mr. Halsell is permitted to leave that
13 existing driveway as it is and leave open an 80-foot
14 gash in our landscape easement that it will diminish
15 the value of my property now and into the future.

16 Q. Okay, nothing further.

17 BY THE COURT:

18 All right. Cross examination.

19 CROSS EXAMINATION BY MR. HOOD:

20 Q. Mr. Albergotti, you're indicating that you were
21 attracted to the subdivision by the entrance as it
22 existed at the time you bought there, correct?

23 A. Well, the -- yes.

24 Q. All right. And you didn't know at the time that
25 that property on both sides of the entrance road was

1 not part of the subdivision?

2 A. I didn't, I didn't know. I did not know whether the
3 property adjacent to Mountain View Pointe up to
4 where the Lots 1 and 20 now are was part of the
5 subdivision or not. I just assumed that the
6 subdivision would have rights to protect the beauty
7 of the entranceway to the subdivision.

8 Q. Okay. But that was an assumption?

9 A. It is, yeah, that's all it was.

10 Q. And it turned out to be incorrect, right?

11 A. Well, no, because I believe the subdivision, the
12 property owners and the HOA have an absolute right
13 to protect the integrity of the landscaping adjacent
14 to Mountain View Pointe Drive.

15 Q. But they don't have the right to control what's
16 built on the property?

17 A. Well, they don't have a right. We have no interest
18 in property that is outside the boundaries of the
19 landscape easement.

20 Q. That's my point.

21 A. Well, my point, too.

22 BY THE COURT:

23 They agree on something.

24 Q. Well, you're complaining that the building somehow
25 devalues your property?

1 A. No. No, that's not what I'm claiming. What I'm
2 claiming, I'm claiming the removal of the screen of
3 trees and shrubbery has exposed anyone who drives up
4 Mountain View Pointe Drive, so you cannot drive in
5 or out without seeing that building. If the
6 landscape easement was left with the integrity it
7 had before Mr. Halsell moved into our neighborhood,
8 then we would have no interest or no right to
9 complain about what went on the property outside the
10 boundaries of the landscape easement.

11 Q. Okay. You're talking about an 80, you called it an
12 80-foot gash in the easement?

13 A. I'm just talking about what Mr. Dorsey said from his
14 testimony when he showed you that picture that had
15 the lines on it.

16 Q. Okay. So I'm just trying to figure out what's in
17 this 80-foot gash you're referring to?

18 A. Well, it's the curb cut. There are paved curbs up
19 across the remainder of the road right-of-way and
20 through part of the landscape easement. There was a
21 berm there that blocked, if it was replaced, would
22 block a substantial portion of the view of Mr.
23 Halsell's building. But that 80-foot gash includes
24 the pavement, either the removal of vegetation or
25 the inclusion of improvements to his driveway and

1 entrance if they were on the landscape easement,
2 that's what I'm complaining about.

3 Q. Okay, so let me make sure I understand. The 80-foot
4 gash is the concrete driveway?

5 A. Well, I didn't actually have a copy of the picture;
6 I was listening to Mr. Dorsey's testimony and he
7 said it's 40 feet at the margin of the paved right-
8 of-way and then it expands out and becomes wider as
9 you go up the hill and over to the east side I guess
10 it is of the landscape easement.

11 Q. Well, let's focus within the landscape easement.
12 You have a portion of the driveway which is
13 concrete, correct?

14 A. I think they paved over the entire landscape
15 easement.

16 Q. Correct, the driveway crosses the landscape
17 easement.

18 A. Right.

19 Q. So within the landscape easement we have a portion
20 of the concrete driveway that is within the
21 landscape easement?

22 A. I'll agree with that.

23 Q. That is 25-feet wide, right?

24 A. Yes.

25 Q. The width?

1 A. 25 feet in depth if I heard Mr. Dorsey's testimony
2 correct at the margin of the landscape easement
3 abutting the property that Mr. Halsell owns which is
4 not burdened by the easement the distance is 80
5 feet.

6 Q. 80 feet of concrete?

7 A. 80 feet of ---

8 BY MR. BRANDT:

9 Vegetation.

10 A. --- vegetation, improvements, changes ---

11 Q. I'm focusing on the ---

12 A. --- to the landscaping. Oh, I didn't, I don't know
13 how much of that he's covering.

14 Q. Right. But it would be the 25-foot strip driveway,
15 plus the width of the concrete driveway would be the
16 ---

17 A. And the vegetation and removal of part of the berm
18 and those other things that were on the landscape
19 easement that Mr. Halsell removed.

20 Q. Okay. But you've got the portion of the concrete
21 driveway and then you've got slopes from that
22 driveway?

23 A. Yes, it used to have trees on it.

24 Q. Right. But now they've been replanted with other
25 landscaping; is that correct? There's trees back in

1 there?

2 A. They're not equivalent to what existed before.

3 Q. Well, it's not the same; but I'm asking you, it has
4 been re-landscaped, has it not?

5 A. No, that has not been re-landscaped with the
6 protections of our property owners from having to
7 view that large warehouse. There was no effort made
8 to protect people driving in and out of the
9 subdivision from having to see that barn.

10 Q. Do you believe that only the property owners have
11 the right to landscape in that area?

12 A. Yes.

13 Q. And why do you believe that?

14 A. Because that's what a landscape easement is. Common
15 sense tells you that the subdivision, if the
16 developer granted, which it did, granted to the
17 Homeowners Association rights to a perpetual 25-foot
18 easement beginning at the edge of the county right-
19 of-way, then I believe that we have an absolute
20 right to maintain and landscape that property. If
21 Mr. Halsell wants to walk across it that's fine, but
22 he didn't have a right to obliterate an 80-foot
23 portion of what I believe Crescent intended which
24 was that that beautiful drive that I saw in 2004
25 would remain intact and not diminish in its beauty

1 by the construction of a building in a way that
2 opens people on Mountain View Pointe to seeing the
3 building. Because the way it was in 2004 if that
4 barn had been built in there, you might have been
5 able to see the roof of it or something like that
6 but it would not be the eyesore that it is.

7 Q. Okay. Well, in describing the easement you said it
8 was a perpetual landscape easement but you left out
9 one word "nonexclusive"; does that make a difference
10 do you think where it says it's nonexclusive?

11 A. Not in terms of the common sense meaning of the
12 landscape easement. If Mr. Halsell wants to walk
13 across it or ride his bike across it or just, you
14 know, break off, pick up some sticks and go put them
15 in his fireplace or something like that, he could do
16 that. But the landscape easement does not mean 80-
17 foot gash in what was part of the beautification of
18 our subdivision.

19 Q. Well, I'm asking you what does the nonexclusive part
20 to you mean?

21 A. I just said, I just said, he can walk across there,
22 he can ride his bike, he can pick up sticks.

23 Q. No, I'm talking in terms of landscaping, it's a
24 landscape easement.

25 A. It's nonexclusive meaning that the person who owns

1 the fee retains some rights but not the right to
2 destroy the landscaping for some purpose that he
3 wants to use to access his property, his
4 improvements.

5 Q. Well, the person who owns the fee always has rights
6 in the servient estate exclusive or nonexclusive
7 easement; is that not correct?

8 A. Well, I'm not a real estate lawyer, I don't know the
9 nuances of that. I mean my lawyer can address it.
10 But what would landscape, I ask myself what else
11 could the words "landscape easement" mean other than
12 the people who have the benefit of that easement who
13 are the property owners of the HOA are not to have
14 the beauty of our subdivision diminished because of
15 some use by that landscape easement by Mr. Halsell
16 which diminishes the beauty of the subdivision. He
17 can come on the property, you know, do what he wants
18 to; he just can't cut down our trees and shrubs.

19 Q. Thank you.

20 BY MR. BRANDT:

21 I have another -- oh, I forgot about you.

22 EXAMINATION BY MR. MCDUFF:

23 Q. I'm just a fifth wheel in this whole thing. Mr.
24 Albergotti, good afternoon.

25 A. Good afternoon.

1 Q. Your testimony is that you believe there's a
2 diminution in the value of your property as a result
3 of the Halsell driveway through the landscape
4 easement across Mountain View Pointe Drive, correct?

5 A. Yes, I do.

6 Q. All right. Are you aware of the fact that 230
7 Mountain View Pointe Drive sold for, listed for 1.55
8 million in April of 2021 and sold 18 days later for
9 1.465 million dollars?

10 A. I wasn't aware of that.

11 Q. All right. How about 233 Mountain View Pointe Drive
12 which is an interior lot, isn't it?

13 A. I can't quarrel with that, I'll agree with whatever
14 you say.

15 Q. And this is out of the public record.

16 A. I know, but I haven't read the public record so I'm
17 sorry.

18 Q. Well, in asking the question I'm just saying these
19 are from the public record.

20 A. Okay, well, then I'm not going to argue with you
21 about that.

22 Q. All right, listed for 740 in February of 2020 and
23 sold in nine hours for 745,000; that's right across
24 from the Halsell property, isn't it?

25 A. I don't know.

- 1 Q. Then 256 Mountain View Pointe Drive sold, closed
2 under contract and closed on March 4th of 2021 for
3 2.15 million dollars, correct?
- 4 A. I don't know.
- 5 Q. And then current listings in the subdivision, 255
6 Mountain View Pointe Drive, whose house is that?
- 7 A. I don't know.
- 8 Q. Is that the Prescott house?
- 9 A. I didn't know they had they had their house up for
10 sale.
- 11 Q. Finucan currently listed for \$5,950,000?
- 12 A. I think I was aware of that.
- 13 Q. And how about Falling Leaf Court listed for 2.499
14 million dollars?
- 15 A. I think I know about that one, that's mine.
- 16 Q. That's your house, so you've got it on the market
17 for 2.499 million, correct?
- 18 A. That's correct.
- 19 Q. And what's your basis in that house, how much did
20 you pay for it, lot and construction included?
- 21 A. Over 2 million dollars.
- 22 Q. Now, you said that your belief is -- and you're an
23 attorney, aren't you?
- 24 A. Yes, I am.
- 25 Q. Licensed to practice law where?

1 A. Texas.

2 Q. In the State of Texas. Is that Crescent intended
3 that nobody penetrate this landscape easement except
4 to walk across it, correct?

5 A. I can't ascribe any other meaning to landscape
6 easement, exclusive or not, other than it is there
7 to maintain the beauty of the drive into the
8 subdivision.

9 Q. Well, it also could've been intended for Crescent to
10 maintain it as a nonexclusive easement because they
11 owned Parcels A and B when they created the
12 subdivision, correct?

13 A. Yeah, I think, yeah.

14 Q. So Crescent could've said, well, it's nonexclusive
15 because if we ever want to put an entryway into
16 Parcels A and B because we didn't want to develop
17 it, that could have been a reason too, correct?

18 A. Well, I think that would be a matter for the court.
19 If the grantor of the easement, the grantor in
20 something called a landscape easement decided that
21 it wanted to disrupt that landscape easement to
22 access property that it didn't include in the
23 subdivision, I think that would be a lawsuit.

24 Q. Well, and so you're telling me that my question is a
25 question for the court to decide, but your opinion

1 is not, correct?

2 A. All this is for the court to decide.

3 Q. But you've just rendered your opinion that it's your
4 belief that landscape easement means the only thing
5 absent the blessing provision in the fiat of the
6 Property Owners Association, nobody can do anything
7 with that including the owners of those parcels
8 except walk thru it without the blessing of the POA,
9 correct?

10 A. No. I'd say if Crescent resources still owned that
11 property and they wanted to cut curb cuts across the
12 landscape easement to develop the retained property
13 in Parcels A and B, I'm saying that they would be
14 estopped in my judgment from being able to do that
15 since they granted Mountain View Pointe Homeowners
16 Association and the lot owners an easement to
17 protect the beauty of the drive into that
18 subdivision.

19 Q. But they also made it a nonexclusive easement,
20 didn't they? And you're a lawyer, ---

21 A. Same answer, same answer.

22 Q. --- nonexclusive means that other people can use it,
23 doesn't it?

24 A. But if in your example of Crescent, I don't believe
25 Crescent could do that without getting the

1 permission of the Homeowners Association and the
2 homeowners because they signed a document in 2002
3 that said that that landscape easement was for the
4 beautification of the subdivision.

5 Q. Well, you're a lawyer and familiar with the Doctrine
6 of Merger of the Servient and the Dominant
7 Tenements. When the owner of the dominant tenement
8 and servient tenement are the same ---

9 A. I have a general idea of real estate law. I went to
10 law school in Louisiana and their civil code state
11 and their property laws aren't unlike anything in
12 the other 48 states.

13 Q. But you're licensed to practice law in a noncivil --
14 -

15 A. That's right, but I've never taken any courses in
16 real property and I really don't know any of the
17 nuances of servient and dominant estates other than
18 what I've learned talking with my counsel and my
19 subdivision mates.

20 Q. So you're not aware of the fact when the owner of
21 the burdened estate and the one that has the right
22 to the easement are one in the same, under the law
23 there's no easement created?

24 A. That's nonsensical.

25 Q. Well, tell me where you get that. It's called

1 merger of the dominant and servient estates; where
2 do you get your opinion from?

3 A. My opinion is based upon the fact that every real
4 estate development that I'm familiar with is created
5 by the owner of the property setting up the
6 documentation to memorialize what can and what
7 cannot happen in that subdivision. And the fact
8 that -- well, let me make a correction, I believe
9 from what I saw in the documents that Crescent
10 conveyed the landscape easement to the Homeowner's
11 Association for the benefit of the homeowners prior
12 to what is in the Covenant document itself. There
13 as a Declaration of Covenants, whatever it is, one
14 of our CCRs, and in that the Declarant is Crescent
15 and the beneficiary of the declaration is the
16 Homeowners Association.

17 Q. Well, does it say ---

18 A. But it's not two people, I mean it's not a single
19 person conveying an easement to himself and thus
20 merging to dominant estate and servient estate in
21 this case.

22 Q. Well, where is the deed of conveyance that conveys
23 the interest Crescent had to the Property Owners
24 Association?

25 A. It's in the declaration.

- 1 Q. Well, that's not a deed; I asked you where there was
2 a deed?
- 3 A. It doesn't have to be a deed. They, they agreed
4 that their property would be burdened for the
5 benefit of the Homeowners Association with this
6 landscape easement.
- 7 Q. All right, I want you to look with me at Section 3.1
8 of the ---
- 9 A. I'm not going to read -- I'm not going to testify
10 from that document unless you want me to read it.
- 11 Q. Well, you said you saw something that said that
12 there was a conveyance from the Crescent Communities
13 ---
- 14 A. Coming from my memory, I thought that there was a
15 conveyance in the CCRs.
- 16 Q. Well, tell me where then. Just tell me if you know
17 where it is.
- 18 A. I don't.
- 19 Q. So you're just saying that---
- 20 A. I know that there is a declaration by Crescent that
21 includes the grant of the landscape easement ---
- 22 Q. Well, I'm going to tell you ---
- 23 A. -- and there's another party to that document which
24 is the Homeowners Association.
- 25 Q. Well, I'm going to tell you that Section 3.1

1 contemplated the conveyance of common areas to the
2 Property Owners Association at some future date
3 after the filing of the Covenants but that never
4 happened.

5 A. I don't know. I would think that's right but.

6 Q. Now, you said that there are these horrible, I think
7 horrid trailers that you have to pass on Doug Hollow
8 Road coming into the subdivision, correct?

9 A. Yeah, on the other side of the hill, yes.

10 Q. And those are my clients of my mine by the way so,
11 those horrid trailers. Now, when you go right past
12 the subdivision there's a commercial establishment,
13 a bar and restaurant, a cabana bar and a marina and
14 a full-scale restaurant and bar operation, isn't
15 there?

16 A. Yeah, completely obscured from our subdivision.

17 Q. But still if you drive ---

18 A. You don't see if you drive into our subdivision.

19 Q. But you can hear the noise from the partiers?

20 A. No, I live right across the cove from the restaurant
21 and I never hear anything over there.

22 Q. At the Cabana with the people driving out there?

23 A. I never hear a thing.

24 Q. So that doesn't bother you?

25 A. Well, there's nothing to bother me because I don't

1 hear anything.

2 Q. All right, I don't have any further questions.

3 BY MR. BRANDT:

4 I have nothing further.

5 BY THE COURT:

6 All right, you can step down.

7 BY MR. ALBERGOTTI:

8 Thank you.

9 BY THE COURT:

10 Mr. Brandt, your next witness, who is it?

11 BY MR. BRANDT?

12 It is Steve Trojan.

13 BY THE COURT:

14 Who?

15 BY MR. TROJAN:

16 Steve Trojan.

17 BY THE COURT:

18 I just like to know who it is that's going to be a
19 witness.

20 BY COURT REPORTER:

21 Would you raise your right hand? Do you solemnly
22 swear or affirm to tell the truth, the whole truth
23 and nothing but the truth so help you God?

24 BY MR. TROJAN:

25 I do.

1 TESTIMONY OF STEVEN F. TROJAN

2 DIRECT EXAMINATION BY MR. BRANDT:

3 Q. Mr. Trojan, state your name in full.

4 A. Steven F. Trojan.

5 Q. And where do you live?

6 A.

7 Q. And how long have you lived there?

8 A. Since 2015, so approximately seven years. I've
9 owned property there since 2003.

10 Q. That's when you bought your property?

11 A. That's when we bought the property.

12 Q. Where were you living when you bought it?

13 A. Upstate New York.

14 Q. Where?

15 A. Upstate New York, in Norwich, New York.

16 Q. And what did you do for a living when you were
17 working?

18 A. I was a dentist.

19 Q. And are you retired now?

20 A. Yes, I am.

21 Q. When you came down and viewed Mountain View
22 Subdivision, what attracted you to that place to
23 buy?

24 A. Well, we're probably one of the unusual ones. My
25 wife and I bought in a weekend. We had come down to

1 visit some friends. We contacted a real estate
2 agent, Delane Graham, who showed us around. We were
3 impressed with Mountain View Pointe because of the
4 entryway. At that time there weren't very many
5 houses in 2003 in the subdivision and we made a
6 decision fairly quickly to buy our lot. At the time
7 our real estate agent went through and gave us this
8 plat, I had brought my copy but since you had one
9 here, and she went through the plat with us showing
10 us our lot and also described the property on the
11 entranceway either way. We were led to believe that
12 that property would never be developed so, but
13 that's, you know, subsequently we found out we
14 didn't own that land so. But, yeah, we were taken
15 by the natural beauty and the nice drive into the
16 neighborhood.

17 Q. Well, we've got an issue here with the easement that
18 was shown and was the plat that you bought by a plat
19 like this one or depicted in the ---

20 A. Exactly the same thing as that full size.

21 Q. And so it showed the landscape easement?

22 A. Yes.

23 Q. How big a factor was that in what you ---

24 A. Well, it was a big factor because the natural beauty
25 of the area and the drive into it. You know,

1 subsequently we couldn't, didn't quite understand
2 why we were never deeded that property but, you
3 know, that was, you know, before we knew about it.
4 You know, we always thought it was going to be part
5 of Mountain View Pointe.

6 Q. Well, I know there's some high-end homes out there,
7 at least in relation to us country bumpkins here in
8 Walhalla. But you think that if they're allowed to
9 access these pieces of property off of Mountain View
10 Pointe Drive and not being restricted in any way
11 would affect you if you started to try to sell a
12 house?

13 A. I would think, I would think it would. In listening
14 to the testimony that both Plat A and Plat B both
15 have access to road; they're not, they're not
16 landlocked, they have access. The reason they chose
17 not to I'm not sure, but they have every right to go
18 ahead and go off of Doug Hollow Road. Right now the
19 HOA pays for not only the landscaping but the
20 lighting and irrigation on either side of the
21 street. Those people would have access to that
22 without having to pay for things.

23 Q. And was the promise of a barrier there to screen out
24 whatever goes on those other two lots important to
25 you?

1 A. Very important. We've had several people come as
2 guests and they all remark how terrible, terrible
3 that looks to have I call it a Tractor Supply in a
4 residential neighborhood.

5 Q. You're talking about the driveway that's there now
6 that Mr. Halsell put in?

7 A. The driveway and, you know, the building.

8 Q. There would've been nothing there if that easement
9 still had the trees on it?

10 A. You wouldn't be able to see it. He has every right
11 to go ahead and build that building but, you know,
12 my opinion is it's not through that easement.

13 Q. Okay, I have nothing further.

14 BY THE COURT?

15 Cross examination.

16 CROSS EXAMINATION BY MR. HOOD:

17 Q. Mr. Trojan, you've indicated that the entranceway
18 was a big factor in your locating or buying a lot in
19 Mountain View Pointe?

20 A. Yes.

21 Q. And you also indicated that you thought, did you say
22 that you thought it was a part of Mountain View ---

23 A. I thought it was part, I thought it was part of
24 Mountain View Pointe. And subsequently, I take
25 care, my wife and I take care of the landscaping at

1 the monument planting flowers. Behind that is
2 controls for the irrigation which I also control and
3 the electricity. That part is not even in our
4 easement, it's past that so I always thought that
5 that was all part of it, you know. Subsequently,
6 some years later I found out we didn't own that
7 property.

8 Q. Well, I think actually that's on Mr. Halsell's
9 property, isn't it?

10 A. Yes, it is, but my understanding is we have absolute
11 rights to go there by Duke because it's their, you
12 know, in their parliament, irrespective the fact
13 that Mr. Halsell went ahead and put a sign saying no
14 trespassing which I dismissed because I had to get
15 to the irrigation controls.

16 Q. But he's never made any complaint to the homeowners
17 or the board about ---

18 A. But he put a sign very specifically saying "no
19 trespassing" trying to deny the fact of us getting
20 to the controls for the irrigation and the
21 electrical that lights up the monument.

22 Q. Did you stop getting access to them?

23 A. No, I didn't stop because I just disregarded the
24 sign and then subsequently he pulled the sign.

25 Q. He didn't do anything, did he?

- 1 A. No, just put the sign up, that's enough intent.
- 2 Q. I guess I'm just trying to understand why you're
- 3 attributing to him that that was directed at you?
- 4 A. It was directed at somebody.
- 5 Q. It was just a no trespassing sign, wasn't it?
- 6 A. Yeah, but it's directly in a path that very
- 7 specifically goes to the electrical and the
- 8 plumbing.
- 9 Q. So in any event, you thought the property on both
- 10 sides of the entrance was part of the subdivision
- 11 and that is ---
- 12 A. When I bought it, yes.
- 13 Q. And when did you find out that was not the case?
- 14 A. Well, when Crescent declared bankruptcy and had to
- 15 sell off that land.
- 16 Q. Do you know when that was?
- 17 A. Gosh, I can't remember how long after we bought it.
- 18 I don't know, 2000 and I don't know when Crescent
- 19 declared bankruptcy and gave up all their land.
- 20 Q. So it seems like that you along with some other
- 21 people who have testified here today have been very
- 22 critical of the building that's there while at the
- 23 same time acknowledging that you don't have any
- 24 control over the building; is that right?
- 25 A. Correct. Well, we do have control over, we feel we

1 have control, is the sight of that building.

2 Q. The site of the building?

3 A. Being able to see it.

4 Q. Oh, you mean is the visual?

5 A. The sightline which has been interrupted.

6 Q. Okay. So would it be correct to say that to some
7 extent at least there's an attempt to use what is a
8 nonexclusive landscape easement as a way to try to
9 control what use is made of the property on both
10 sides of the road?

11 A. I wouldn't think so. The landscape easement is
12 designed to shelter that roadway from anything that
13 might be there although most of us thought when we
14 initially bought thought it would never be
15 developed.

16 Q. Well, do you agree that when this whole issue we're
17 discussing today came up and members of the, the
18 owners there were being polled by the board of
19 directors as to their views on it some of the
20 concern was that permitting access to Mr. Halsell's
21 lot would somehow would be I think the words were
22 set a precedent; were you aware of that?

23 A. Well, nobody is denying his access to the lot.

24 Q. No, but answer, just answer my question. Was that a
25 discussion or comments that were made that you heard

1 during that time period, y'all were going to set a
2 precedent for what might happen across the street?

3 A. Not to my knowledge.

4 Q. You never heard that?

5 A. No, I might not have been part of that conversation.

6 Q. Okay. All right, thank you.

7 BY THE COURT:

8 Mr. McDuff?

9 EXAMINATION BY MR. MCDUFF:

10 Q. Mr. Trojan, you bought your lot in 2003, correct?

11 A. Correct.

12 Q. In 2003 on the drive into the subdivision along
13 Mountain View Pointe Drive there was nothing there,
14 was there?

15 A. The monument was there.

16 Q. The monument, but no landscaping or anything else?

17 A. No, not at the time because the subdivision was just
18 getting organized.

19 Q. So there was nothing there, so that wasn't an issue
20 for you with the beauty of driving in because you
21 bought it before there was any landscaping?

22 A. Well, there were trees there.

23 Q. Of course, it was forested?

24 A. It was forested, yes.

25 Q. And you were led to believe by your real estate

1 agent that the properties, Parcels A and B, would've
2 been, you know, nothing could be developed on those
3 things and preserve the integrity of the area,
4 correct?

5 A. Yes, but.

6 Q. Have you sued your real estate agent for fraudulent
7 misrepresentation?

8 A. No, because I have no way of proving that.

9 Q. And would you agree with me that if you required
10 either the Halsells or the Pipers to come in from
11 Doug Hollow Road to develop their properties, for
12 instance, Mr. Halsell could take down every single
13 living thing on his property and put a driveway in
14 and his building would be tremendously exposed,
15 correct?

16 A. Probably, yeah, and he could do that.

17 Q. He could do that; so there's nothing that would
18 prohibit him from stripping that property of every
19 single living thing?

20 A. He did a pretty good job of it.

21 Q. All right, to build, to build a structure though,
22 correct?

23 A. Yeah. If you look at, if you look at the picture
24 from the satellite view, he did a pretty good job of
25 stripping the thing.

1 Q. Well, I'm looking at the pictures your lawyer put
2 in, presented, that showed Doug Hollow Road there
3 and it's all grown up and everything and there's no
4 landscaping removed or any shrubbery removed or
5 trees. So he could do that, he could strip the
6 entire property if he came in off of Doug Hollow
7 Road but he chose to come in a different way, didn't
8 he?

9 A. Yeah, that's what he chose.

10 Q. And the Pipers haven't sought to develop their
11 property, have they?

12 A. Not that we know of.

13 Q. All right. And wouldn't you agree with me that it
14 may be the most environmentally friendly thing to
15 do, conscious thing to do, to have the shortest
16 point to a structure instead of building a long
17 drive, clearing the property and putting up an 1100
18 or 1200 foot drive up through the property?

19 A. The most environmentally protected thing to do would
20 be not develop that property.

21 Q. Oh, so this gets back to -- and this answers the
22 question because this is the Plaintiffs' way to
23 control and regulate the use of the ---

24 A. No, there's no control. Once that property is sold
25 there's no control because he can go off of Doug

1 Hollow Road as can the Pipers can go off Doug Hollow
2 Road.

3 Q. I don't have any other questions. Thank you.

4 BY THE COURT:

5 Anything in redirect?

6 BY MR. BRANDT:

7 Nothing.

8 BY THE COURT:

9 All right. Sir, you can step down.

10 BY MR. BRANDT:

11 I'd like to call Roberta McCaw.

12 BY THE COURT:

13 Who is that?

14 BY MR. BRANDT:

15 Roberta McCaw.

16 BY THE COURT:

17 Roberta?

18 BY MR. BRANDT:

19 McCaw.

20 BY THE COURT:

21 All right, Ms. McCaw, please come to the witness
22 stand.

23 BY COURT REPORTER:

24 Do you solemnly swear or affirm to tell the truth,
25 the whole truth and nothing but the truth so help

1 you God?

2 BY MS. MCCAWE:

3 I do.

4 BY MR. MCDUFF:

5 Larry, how many more have you got?

6 BY THE COURT:

7 Have you got somewhere to be?

8 BY MR. MCDUFF:

9 No. He said he was going to have about four, so

10 Roberta will be four.

11 BY THE COURT:

12 Well, I said I'm not going to hold him to that just

13 like I won't hold you to one.

14 BY MR. MCDUFF:

15 I may get hungry again, you never know.

16 BY THE COURT:

17 Well, you've might have to kill over this time.

18 BY MR. MCDUFF:

19 I was afraid you were going to say that.

20 BY THE COURT:

21 All right, let's go ahead. We've been doing really

22 good so.

23 TESTIMONY OF ROBERTA MCCAWE

24 DIRECT EXAMINATION BY MR. BRANDT:

25 Q. All right. Ms. McCaw, state your name for the

- 1 record.
- 2 A. Roberta McCaw.
- 3 Q. And where do you live?
- 4 A. I live at in Mountain View
- 5 Pointe.
- 6 Q. And are you on the board of director of Mountain
- 7 View Pointe?
- 8 A. I am.
- 9 Q. And what do you or did you do for a living?
- 10 A. I was an attorney.
- 11 Q. Speak up.
- 12 A. I was an attorney.
- 13 Q. And where did you practice?
- 14 A. I practiced in Connecticut where I went to law
- 15 school and I did that for 13 years in a private
- 16 firm. In a large firm I did mergers and
- 17 acquisitions and then I came to Georgia to be
- 18 general counsel of a public company and once that
- 19 company was sold in 2008 I retired and I've got
- 20 dragged back in was general counsel to a second
- 21 public company.
- 22 Q. I now show you what's been marked as Exhibit 3 of
- 23 the Court's Exhibits. Can you tell me what that is?
- 24 A. Yes, this is the initial deed from Crescent to the
- 25 Association of property that is labeled "COS",

1 Common Open Space, Access Area, and the seven
2 community boat slips.

3 Q. And when you say the COS or Common Open Area?

4 A. Yeah.

5 Q. This plat that's Court Exhibit Number 2 does it show
6 the area that is referred to in that deed?

7 A. Well, the COS which is over here, it's this small
8 piece that's adjacent to you, you know, near the
9 community boat slips, excuse me, and there's an
10 access area also that is here that's between Lots 7
11 and 8 and that's on the map. There's nothing on the
12 map labeled Common Open Space.

13 Q. So it's not labeled as a landscape easement here on
14 this access easement?

15 A. No, it's the deed refers just to access area or COS
16 or common open space.

17 Q. There is a deed, Exhibit 4?

18 A. Uh-huh.

19 Q. If you'd had an opportunity to look at that and tell
20 me what that is?

21 A. That is a Corrective Deed whereby the Association
22 deeded back the property to the Association. Excuse
23 me, the Association deeded it back to Crescent, the
24 same property that they had, that had been conveyed
25 to them and it's specifically set out as described -

1 - well, I'm not going to say more.

2 BY MR. MCDUFF:

3 Judge, I'm just going to object. Is she giving
4 legal opinions at this point in time?

5 BY MS. MCCAWE:

6 I'm just reading the document.

7 BY THE COURT:

8 And I'm going to ask you if you could to speak up,
9 I'm having a hard time hearing you.

10 A. Okay, I'm sorry.

11 Q. What's the date on that?

12 A. The date on that is June 21st, 2005.

13 Q. Now, I show you the deed that's Exhibit 19 that's
14 been offered before and there was a contest to it,
15 but tell me when the date is it's deeded?

16 A. It's ---

17 Q. It's 1677 at Page 284 to 292.

18 A. It's August 18th, 2008.

19 Q. 2008?

20 A. Yes.

21 Q. And what does that do?

22 A. So this is a deed by which Crescent deeded back the
23 property that had been deeded to them in a
24 Corrective Deed to the Association.

25 Q. Okay. And what property was deeded back?

1 A. What was deeded back was the property labeled "COS",
2 that little bit of land which is on this and the
3 exclusive access easement area in favor of the boat
4 slip owners.

5 Q. Does that talk about, how does it describe the
6 property?

7 A. "COS Parcel containing approximately 0.057 acres,
8 more or less, located adjacent to Lot 7 and Lot 8,
9 together with an exclusive access easement in favor
10 of the boat slip lot owners as defined in the
11 declaration.

12 Q. Any other description of any property that went in
13 there?

14 A. No.

15 Q. So it only applies -- now, was the deed where they
16 deeded to y'all the first time whenever y'all deeded
17 it back, did it include anything other than the boat
18 slips and the COS?

19 A. Well, it did not because it said -- the original to
20 us was -- let me see which one I have, August 2005,
21 was the COS common open space access area. This is
22 property labeled as COS, common place and open area
23 and there's no property labeled "Common Open Space".
24 So the only thing that was needed was the COS and
25 that.

1 Q. Well, is that the same as the common areas?

2 A. No, it's not. This was something they said in their
3 motion for summary judgment, the common open space
4 and common areas were synonymous but they're clearly
5 not.

6 Q. Well, it talks about the description of the property
7 here, that it's being given by Crescent Communities
8 to Mountain View Pointe is reversing what?

9 A. It's reversing the Corrective Deed because it says
10 in the very last -- this is not. This is the
11 Corrective Deed. Larry, are you meaning to -- well,
12 let's see, this one, right?

13 Q. Well, my question to you is if there's been any
14 question about what we're talking about there, .057
15 acres or something?

16 A. No, it's very ---

17 Q. .57 acres?

18 A. Well, what makes it clear is in this final deed.
19 Once again, they deed back the CO, they describe the
20 exact same property, "COS Parcel containing
21 approximately 1.057 acres, more or less, located
22 adjacent to Lot 7 in the access areas" and then they
23 say, "this being the identical property conveyed to
24 Crescent Communities SC, LLC by Corrective Title to
25 the Real Estate" referencing this document. So what

1 they deeded back was what the Association should
2 have deeded to them.

3 Q. All right. So are you aware of any deed on record
4 that would have conveyed the entire property of
5 access, I mean the ---

6 A. The easement areas?

7 Q. Yes.

8 A. Well, it's a declaration.

9 Q. Yeah, but these easement areas here along the
10 landscaping easement ---

11 A. I now believe that the declaration is a deed. It
12 was exercised with the formalities of a deed.

13 Q. Yeah.

14 A. It's in subsection 7.9, the one which says "I hereby
15 grant", so I think it was deeded there.

16 Q. All right. And the Homeowners Association out there
17 or Property Owners Association always exercised
18 basically the landscape easements, paid for
19 landscaping and other maintenance?

20 A. We did, the areas that they chose to landscape
21 rather than to leave natural they paid for that.

22 Q. Okay, nothing further.

23 BY THE COURT:

24 Cross examination.

25 BY MR. MCDUFF:

1 We're switching it up this time.

2 BY THE COURT:

3 Oh, okay.

4 BY MR. MCDUFF:

5 Keeping you on your toes.

6 BY THE COURT:

7 I might get confused.

8 CROSS EXAMINATION BY MR. MCDUFF:

9 Q. If I understand your testimony correct, Ms. McCaw,
10 your testimony is there is no deed of conveyance of
11 any of the landscape easement from Crescent
12 Communities SC, LLC to the Mountain View Pointe
13 Owner's Association, Inc., correct?

14 A. No, there is a deed, it's a deed of conveyance, it's
15 a declaration.

16 Q. Well, let me ask you this and look at Exhibit Number
17 1, the common exhibit, Joint Exhibit Number 1,
18 Section 1.1.2.

19 A. Yes.

20 Q. All right. And before I get to that, you admitted
21 in writing that there was never a deed for the
22 landscape easement from the developer to the
23 Association, didn't you?

24 A. I may have created your confusion and I understand
25 that. I wrote a private email to Chuck Lovelace at

1 the Mountain Lakes Community Association which is an
2 association of community of associations and they
3 are there as a resource when I was trying to get my
4 arms around the law and the issues in this case just
5 to understand if I'm a homeowner there. I called
6 them to see if they'd ever had any experience with
7 this, had they ever seen a situation where parcels
8 outside a subdivision had tried to access some
9 property from a subdivision. They hadn't, not
10 surprisingly. But when I saw that private email
11 attached to your Affidavit, excuse me, attached to
12 your Motion for Summary Judgment I asked them, of
13 course, what's up, how did this private
14 communication end up as an ---

15 Q. As an exhibit, correct?

16 A. --- as an exhibit, you know, in a lawsuit, and they
17 were understandably appalled. They did an
18 investigation and after which they said, wrote me to
19 say that a member of the board of directors had
20 resigned so. But I was not, this was not intended
21 as a -- you could say at that point I think it was
22 an admission. It wasn't intended as that, it was a
23 private conversation that I was trying to understand
24 it and I've since took a more careful look at the
25 documents and I understand now that the declaration

1 was, in fact, a deed.

2 Q. The declaration was a deed?

3 A. Yes.

4 Q. Although it doesn't control any property outside the
5 four corners of the subdivision itself, right? It's
6 a deed of conveyance of a land easement on property
7 owned by Mr. Halsell, Ms. Halsell and the Pipers?

8 A. No, it was property owned by the declarant.

9 Crescent was the declarant in this, "the Declarant
10 hereby grants"; Crescent was the declarant and they
11 owned that property at the time.

12 Q. That's right. So you had the servient tenement and
13 the dominant tenement and the owner being one and
14 the same, don't you?

15 A. No, you don't because the servient tenement is or
16 the dominant tenement, excuse me, is the Mountain
17 View Property Owners Association; it's not the
18 declarant, it's not -- it's separately delineated.

19 Q. Well, we'll get to that in a minute. Getting back
20 to your email on April 21st of 2021 to Chuck
21 Lovelace, in this email you admitted there was never
22 a deed of the landscape easement to the Property
23 Owners Association, didn't you?

24 A. No, what it said there was they deeded it, deeded it
25 back, and then there's no evidence that they ever

1 deeded it back to the Association.

2 Q. Well, let me read it to you. It says the definition
3 of common areas in Section 1.2 and I think that was
4 an error because this is 1.1.2 ---

5 A. Okay.

6 Q. --- of the declaration includes the landscape
7 easement. In Section 3.1 states/provides "on or
8 before 10 years from the date that this declaration
9 that is recorded Declarant" that's Crescent "shall
10 convey fee simple title by Limited Warranty Deed to
11 the common areas to the Association to be owned and
12 maintained by the Association." That never
13 happened, those are your words?

14 A. Well, it didn't and then I later I understood it's
15 because it didn't need to happen because the
16 declaration was itself a deed.

17 Q. Where do you get that? Where in the, where in the
18 legal jurisprudence of the State of South Carolina
19 does it say Covenants, Conditions and Restrictions
20 for a Homeowners Association amounts to a deed of
21 conveyance?

22 A. It's granting an easement. It says, the language in
23 itself says that, it says "Declarant hereby grants"
24 in 7.9.

25 Q. Well, where does it ---

1 A. And it's executed, it's got two witnesses, it's been
2 notarized.

3 Q. But also look at Section 3.1, it contemplates and
4 you've cited it that at a later point in time there
5 would be a deed of conveyance to the common area
6 which was defined by Section 1.1.2 which includes
7 the landscape easement from the Declarant, Crescent,
8 to MVPOA, correct?

9 A. Yes. In this case they didn't need to because they
10 were already granted.

11 Q. Even though as a lawyer you stated that never
12 happened?

13 A. I said there wasn't a deed, a deed subsequent to
14 that.

15 Q. No, you didn't say that in this email. Now, take a
16 look and see where you say subsequent to that and
17 said "that never happened"?

18 A. Well, I'm telling you what ---

19 Q. That's what your interpretation is?

20 A. --- my interpretation is, yes. That's my
21 interpretation is this isn't -- the deed is a
22 declaration, that the declaration is a deed, excuse
23 me.

24 Q. What's your interpretation of that in the same email
25 that was supposed to be private saying the Halsells

1 are very vindictive people?

2 A. That was an opinion.

3 Q. So what you're saying that Exhibits 3, 4 and 19,
4 Joint Exhibits 3, 4 and Plaintiffs' Exhibit 19, all
5 they do is convey this .057 acres which was this
6 walkway to the common boat slips, granted it, took
7 it back, and then granted it again in 2008?

8 A. It also included the access area.

9 Q. All right. Even though there's a deed, that doesn't
10 include the landscape easements though, does it?

11 A. It doesn't.

12 Q. So the record within Oconee County with the Office
13 of the Register of Deeds you did a title search,
14 didn't you?

15 A. No.

16 Q. You pulled documents of title, you provided this to
17 your counsel today, didn't you?

18 A. I didn't. I just got these off the website.

19 Q. You went to Oconeesc.com and you went to the
20 Register of Deeds and printed this off, right?

21 A. Right.

22 Q. So you did some sort of title examination?

23 A. No, they were cited. They had cited this in their -
24 - they cited them in their Motion for Summary
25 Judgment.

1 Q. So anywhere is there anybody in this known universe
2 of Plaintiffs or in this courtroom or outside the
3 courtroom or anyplace else that can say there's a
4 deed on record with the Office of the Register of
5 Deeds granting, transferring easement rights to the
6 Property Owners Association from Crescent?

7 A. This is -- well, this is on record with the Office
8 of the ---

9 Q. I'm saying a deed of conveyance; is there a deed
10 that says title to real estate?

11 A. It references a deed.

12 Q. So title to real estate, is there a document that
13 says ---

14 A. It doesn't have to be. An easement doesn't ---

15 Q. I wasn't asking you what this has to be. I'm asking
16 you is there anything of record, and you've searched
17 some of the records because you've pulled up Exhibit
18 19 showing that there was a title to real estate for
19 any interest from the developer to the Property
20 Owners Association in and to those landscape
21 easements on properties owned by the Halsells and
22 the Pipers?

23 A. Well, at the time they were owned by the declarant
24 and they granted the easement in this document.

25 Q. To itself, didn't they?

1 A. Pardon me?

2 Q. To itself?

3 A. Not it wasn't to itself; it was to the Association
4 which is a mutual benefit corporation, it's a
5 separate entity.

6 Q. I don't have any further questions, Judge.

7 BY THE COURT:

8 Mr. Hood, have you got any?

9 BY MR. HOOD:

10 I have no questions, Your Honor.

11 BY THE COURT:

12 Any redirect?

13 BY MR. BRANDT:

14 No, sir.

15 BY THE COURT:

16 All right, so you can step down.

17 BY MR. BRANDT:

18 I have one other short witness and then we'll be
19 through.

20 BY THE COURT:

21 All right, well, good for me. Bring them on. Who
22 is that going to be?

23 BY MR. BRANDT:

24 Ma'am?

25 BY THE COURT:

1 What's her name?

2 BY MR. BRANDT:

3 Betsy Prescott.

4 BY THE COURT:

5 Betsy?

6 BY MR. BRANDT:

7 Betsy.

8 BY MS. PRESCOTT:

9 My legal name is Elizabeth Prescott.

10 BY COURT REPORTER:

11 Ms. Prescott, would you raise your right hand? Do
12 you solemnly swear or affirm to tell the truth, the
13 whole truth and nothing but the truth so help you
14 God?

15 BY MS. PRESCOTT:

16 I do.

17 TESTIMONY OF ELIZABETH PRESCOTT

18 DIRECT EXAMINATION BY MR. BRANDT:

19 Q. Betsy, state your name in full.

20 A. Elizabeth Ann Prescott.

21 Q. And where do you live?

22 A.

23 Q. And how long have you lived there?

24 A. We bought the lot in December of 2003, we started
25 construction of our home in 2007, my husband, John,

1 moved there in 2008. Since it was 2008, we couldn't
2 sell our house in Indiana so I didn't move there
3 until January of 2010.

4 Q. Okay. Now, since you've been there living in that
5 community have you participated with the Property
6 Owners Association in any kind of official role?

7 A. I was on the board for six years and I'm still the
8 Treasurer for the Association.

9 Q. And how long have you been the Treasurer?

10 A. This will be my seventh year.

11 Q. And through the years I want to address has the
12 Homeowners Association been paying for the
13 maintenance and upkeep on the landscape easement?

14 A. Yes.

15 Q. And do you have any idea of how much money that has
16 been paid?

17 A. In 2010 was when we undertook to do major
18 improvements to the landscape as has been pointed
19 out by other witnesses. Most of the landscape
20 easement is covered by natural wooded areas which we
21 were leaving intact. My personal view is that
22 because both A and B were not included in our
23 subdivision in the beginning that Crescent put those
24 landscape easements on there to protect our addition
25 because both A and B have access off of Doug Hollow

1 Road. But we do, in 2010 we undertook major
2 landscaping and since that time I have updated my
3 figures and through to date we have spent
4 \$152,232.76 in terms of water, irrigation,
5 irrigation repairs, mulching and plantings and the
6 maintenance of that whole area along Mountain View
7 Pointe Drive.

8 Q. And how were those -- where did you get the funds
9 for it?

10 A. That's from our homeowners dues. We also pay for
11 the street lights that are along there and I just
12 did a little calculation on last year. The
13 landscape, the portion of the dues that went to
14 water, irrigation, maintenance and plants was 67% of
15 what we pay in our dues. The street lights were 22%
16 of the dues. So it's a major portion of what we pay
17 goes to maintain that whole area along Mountain View
18 Pointe Drive.

19 Q. So basically the maintenance, upkeep and maintenance
20 of the landscape easements are included in your
21 annual fees?

22 A. Right.

23 Q. Have you had any increases of the annual?

24 A. We've had to increase dues because all of those
25 things. When we had the increase in water expenses,

1 and that varies from year to year depending on
2 whether we're in a drought, but Seneca Light and
3 Water increased our rate for water. Duke has
4 increased the rate for our lights. The maintenance
5 this year in August increased our maintenance fee
6 from about \$660 to 710 a month so. So, yes, those
7 seem to go up every year.

8 Q. And obviously the only way you can get your money is
9 through the dues?

10 A. Correct.

11 Q. Okay, I don't have anything further.

12 BY THE COURT:

13 All right. Cross examination?

14 CROSS EXAMINATION BY MR. HOOD:

15 Q. I just have one quick question I think. Ms.
16 Prescott, even though you just gave us the
17 expenditures in connection with landscaping, is
18 there anything about Mr. Halsell's driveway that is
19 going to impact what you just testified to? Does
20 that change anything from that standpoint?

21 A. Other than we no longer have the ability to screen
22 from view whatever development goes on in both A and
23 B. It doesn't affect what we're paying for because
24 we still have to pay for that. But I'd also like to
25 point out that he placed his driveway right across

1 from one of our street lights that he does not pay
2 for that he now gets the benefit of the light for
3 his driveway because he doesn't not contribute to
4 any of the expense of this yet he gets the benefit
5 of the beauty of the landscaping that we have done.

6 Q. But he ---

7 A. And his construction crews also broke off half of a
8 Japanese maple tree.

9 Q. Okay. Well, he contributes his taxes that goes to
10 the maintenance of the road, but he doesn't get to
11 use the road that adjoins his property; is that
12 right?

13 A. He can drive on it, but it doesn't give him the
14 right to cut a drive way into it when he's got
15 access off of Doug Hollow Road.

16 Q. Thank you.

17 EXAMINATION BY MR. MCDUFF:

18 Q. Ms. Prescott, just very briefly. The Property
19 Owners Association, you're currently on the board
20 and serve as Treasurer?

21 A. I am not currently on the board but I do serve as
22 Treasurer.

23 Q. Okay. And when did you roll off the board?

24 A. Last March.

25 Q. And so how is your husband, John, doing?

- 1 A. As far as I know all right.
- 2 Q. So you were on the board in June of 2021, correct?
- 3 A. Correct.
- 4 Q. And you were aware of the fact that the board voted
- 5 to impose a special assessment on the owners within
- 6 Mountain View Pointe Subdivision, correct?
- 7 A. That's correct.
- 8 Q. Of a thousand dollars per lot?
- 9 A. Yes.
- 10 Q. And that was for the purpose of funding ongoing
- 11 litigation, correct?
- 12 A. That's correct because the vote was 28 to 1 to deny
- 13 permission for the driveway and when it became
- 14 obvious that it was going to have to go to
- 15 litigation the majority of homeowners still wanted
- 16 to pursue that and we had to have a way to pay for
- 17 it.
- 18 Q. Okay. So you had a war chest to pay for the
- 19 litigation up to and through today, correct?
- 20 A. Well, we haven't finished paying for it but.
- 21 Q. So part of the special assessment was to pay for us
- 22 being here today, correct?
- 23 A. Most of that special assessment was spent before
- 24 today.
- 25 Q. All right. But there's still some left over from

1 this special assessment, correct?

2 A. No, sir.

3 Q. All right, the assessment is exhausted. But it was
4 used, that money was used in 2022, wasn't it, to pay
5 legal bills?

6 A. A little bit of it, the majority of it was spent in
7 2021.

8 Q. All right. But some of it was used this year?

9 A. Yes.

10 Q. So it was beyond the year of 2021 when the special
11 assessment was imposed, correct?

12 A. Correct.

13 Q. And the Covenants also provide that legal fees are
14 paid out of the annual assessments, aren't they?

15 A. Well, we could refund the special assessment and
16 just raise the annual assessment.

17 Q. All right, you could do that, but you did it by way
18 of special assessment?

19 A. That is correct.

20 Q. Putting it against the Pipers who you are suing?

21 A. We are suing them as the owners of one of the
22 outside parcels of the addition, not as a homeowner
23 within the addition.

24 Q. And so let me ask this. You're suing them as an
25 owner of Parcel B along Mountain View Pointe Drive

1 and they haven't attempted to do anything but
2 develop their property in any way, shape or form,
3 have they?

4 A. They have not, but they have stated the intention of
5 wanting to put four driveways on that side of the
6 road.

7 Q. At some point, unknown point in the future, correct?

8 A. Correct.

9 Q. But they haven't, as we sit here today they haven't
10 done nothing, have they?

11 A. They have cut a tractor path through there and they
12 have blueberry plants on there.

13 Q. And have you used that tractor path like other
14 members of the Plaintiff?

15 A. I have not. I only went to their blueberry path at
16 the invitation of Chris Piper one time.

17 Q. I see. And have you sued them over the tractor path
18 or over the -- you just want them, don't want them
19 to use their property and cut in off of Mountain
20 Pointe Drive?

21 A. We don't want driveways across our landscape
22 easement because any driveway cut like that prevents
23 us from using the landscape easement as a screening
24 for whatever development they decide to put on
25 either one of those properties.

1 Q. You would agree that landscape easement is a
2 nonexclusive easement, wouldn't you?

3 A. That's what I keep hearing.

4 Q. And you're familiar with the Covenants, aren't you?

5 A. Somewhat.

6 Q. All right. Have you read Section 7.9?

7 A. Probably at some point in time.

8 Q. All right. It clearly uses the term "nonexclusive
9 easement", doesn't it?

10 A. Okay.

11 Q. Do you disagree with that?

12 A. No.

13 Q. And isn't this just a way to -- everybody doesn't --
14 nobody in the community wants these properties
15 developed and they want to have it basically green
16 open space, don't you?

17 A. I personally don't care what they put on those two
18 pieces of property as long as we have the ability to
19 screen from view whatever it is.

20 Q. What if they put chicken houses on it?

21 A. If they want to put chicken houses on it and I can
22 block it off with trees and shrubs and whatever,
23 they can put chicken houses on it.

24 Q. You just don't want them -- you want them to have to
25 put 1100 or 1200 feet of driveway in off of Doug

- 1 Hollow Road to access the property?
- 2 A. Whatever they place it depends on where they put it
- 3 on the property how long the driveway would be.
- 4 Q. Now, you ---
- 5 A. And it could be a long driveway off of Mountain View
- 6 Pointe on Part B depending on where they decide to
- 7 place something.
- 8 Q. And one of the things you're seeking, although the
- 9 Pipers haven't done anything with their property,
- 10 you're seeking an injunction. You know what an
- 11 injunction is, don't you?
- 12 A. Yes.
- 13 Q. That means there's an Order of the court telling
- 14 them they can't do, can or can't do certain things
- 15 with their property, right?
- 16 A. Right.
- 17 Q. Now, is the Property Owners Association in a
- 18 position to post potentially a multi-million dollar
- 19 bond to secure an injunction?
- 20 A. No.
- 21 Q. All right, I don't have any questions.
- 22 BY THE COURT:
- 23 Any redirect?
- 24 BY MR. BRANDT:
- 25 None.

1 BY THE COURT:

2 All right, you can step down. So that's pretty much
3 it for you?

4 BY MR. BRANDT:

5 We rest.

6 BY THE COURT:

7 It is now 3:55. Have you got any more updates on
8 your list of witnesses?

9 BY MR. MCDUFF:

10 I've just got just one.

11 BY THE COURT:

12 And you've got one?

13 BY MR. HOOD:

14 One.

15 BY THE COURT:

16 Well, it seems like this may be a good time to stop
17 for the day unless y'all want to do something
18 different. Any preference to proceed or not? We
19 can come back in the morning and finish before lunch
20 probably. Does that suit?

21 BY MR. HOOD:

22 That works for us.

23 BY THE COURT:

24 One question and I want y'all to think about this
25 and I'd like some enlightenment, but is a fence

1 landscaping?

2 BY MR. BRANDT:

3 Ornamental fences, no, when look up the common
4 meaning of landscape.

5 BY THE COURT:

6 Well, that's why I'm asking the question, I don't
7 know.

8 BY MR. BRANDT:

9 No, it is not ---

10 BY THE COURT:

11 Well, you don't have to get into that right now, but
12 just kind of think about it.

13 BY MR. BRANDT:

14 The common meaning of landscaping.

15 BY THE COURT:

16 I don't know. All right, if there's nothing further
17 for now we'll adjourn for the day and be back in the
18 morning at 10:30.

19 BY MR. BRANDT:

20 10:30?

21 BY THE COURT:

22 Well, do y'all want to start earlier than 10:30? I
23 don't care.

24 BY MR. MCDUFF:

25 If we can that'd be great.

1 BY THE COURT:

2 Well, let's start -- I've got to come from Anderson
3 so it takes me a little while to get here, but let's
4 just say 10 o'clock then.

5 BY MR. MCDUFF:

6 (COURT ADJOURNED 10/26/22 AT 3:58 P.M.)

7 (DAY TWO - 10/27/22 AT 10:00 A.M.)

8 BY THE COURT:

9 All right, let's get started. This is, of course,
10 day two of civil action number 2021-CP-37-00093. I
11 believe at the close of yesterday's proceedings the
12 Plaintiff was resting his case. Is that where we
13 are?

14 BY MR. BRANDT:

15 Yes, I did rest my case, but I might reopen it and
16 just move to make a motion to put the scene into
17 evidence and have you go visit it and look at what
18 we're talking about.

19 BY THE COURT:

20 All right. Is there any objection?

21 BY MR. MCDUFF:

22 We have no objection to that, Judge.

23 BY MR. HOOD:

24 No objection.

25 BY THE COURT:

1 All right. Other than that, is there anything
2 further from the Plaintiff, the Plaintiffs' case in
3 chief?

4 BY MR. BRANDT:

5 Nothing further.

6 BY THE COURT:

7 All right, we're ready to proceed with the
8 Defendants' case.

9 BY MR. HOOD:

10 Your Honor, before we proceed with that I'd like to
11 put a motion on the record.

12 BY THE COURT:

13 All right.

14 BY THE HOOD:

15 The Plaintiff has alleged several different causes
16 of action against the Halsells and I refer first of
17 all to the third cause of action in the Complaint
18 which alleges negligent breach of the Plaintiffs'
19 rights under the easement. I don't think there's
20 any question but that any duty of any kind between
21 the Halsells and the Plaintiffs in this case arise
22 under the documents that we've been going through
23 yesterday and that would make that duty to
24 contractual in nature and, in fact, they allege in a
25 separate cause of action that very fact that the

1 circumstances we have or the relations between the
2 parties are governed by those documents and there's
3 actually a cause of action in their breach of
4 contract. But I'm speaking or addressing the third
5 cause of action which alleges negligent breach and
6 I'm basing my motion on, this is Foxfire Village
7 versus Black Veatch, 304 SC 366, a 1991 case, "as a
8 matter of law if the duty owed arises merely from
9 agreement of the parties, breach of the duty does
10 not create a cause of action for negligent conduct.
11 Where the cause of action is predicated on the
12 alleged breach or even negligent breach of a
13 contract between the parties, an action in tort will
14 not lie." So I don't think he can have the same set
15 of facts and circumstances and allege a breach of
16 contract and at the same time turn the same issue
17 into a tort. So as a matter of law, I think that
18 cause of action should be dismissed. Next, as to
19 the fifth cause of action, he alleges a breach of
20 contract accompanied by a fraudulent act. Now, I
21 don't recall anywhere in yesterday's testimony the
22 word "fraud" or "fraudulent act" even being
23 mentioned, much less proven, so I think there's a
24 complete lack of evidence to support that cause of
25 action and again we'd move that it be dismissed.

1 Lastly, the sixth cause of action alleges trespass.
2 Now, citing Ravan versus Greenville County, 315 SC
3 447, a 1993 case, "a trespass is any interference
4 with one's right to the exclusive peaceable
5 possession of its property. An action of trespass
6 will not lie unless the Plaintiff had either actual
7 or constructive possession at the time of the
8 trespass." Now, that last sentence I'm citing in
9 Daniels versus Coleman, 253 SC 218. So there's no
10 evidence whatsoever that the Plaintiffs have ever
11 been in actual exclusive possession of this property
12 nor do I believe they would have any right to be.
13 So under those circumstances that's some cases to
14 indicate an action for trespass cannot lie under
15 these circumstances and I would move that that sixth
16 cause of action be dismissed as well.

17 BY THE COURT:

18 All right. Any response?

19 BY MR. BRANDT:

20 As to the trespass cause of action, I think there's
21 a case that talks about it's well settled that you
22 can trespass on the easement and that there's a
23 cause of action and South Carolina recognizes in
24 that in the McLaughlin case, and I don't have the
25 cite right handy, but basically there what happened

1 the facts went up and it was on a violation of an
2 easement and they sued and asked for punitive
3 damages. And they went, it was a field, they found
4 the trespass and they awarded some punitives and the
5 court basically did not reject the trespass claim,
6 but it said they did not think it rose to the level
7 of punitives willful wanton and so the State of
8 South Carolina does recognize a cause of action for
9 trespass. And again, I don't have the cite right
10 handy but I think, I don't remember if we touched on
11 that point in summary judgment motions but I haven't
12 read that, our brief and I haven't read what we
13 submitted for summary judgment, but it's Ralph
14 versus McLaughlin.

15 BY MR. HOOD:

16 Your Honor, the citation for that case is 428 SC
17 320.

18 BY THE COURT:

19 What's the name of it?

20 BY MR. HOOD:

21 Ralph versus McLaughlin.

22 BY MR. BRANDT:

23 428 what?

24 BY MR. HOOD:

25 428 South Carolina, SC, 320.

1 BY MR. BRANDT:

2 3?

3 BY MR. HOOD:

4 320.

5 BY MR. BRANDT:

6 320.

7 BY MR. HOOD:

8 It's a 2019 case.

9 BY MR. BRANDT:

10 But they did not reject the trespass as a cause of
11 action.

12 BY THE COURT:

13 All right. What about the other two that he had?

14 BY MR. BRANDT:

15 And breach of contract, the way we did breach of
16 contract would be somewhat of a ---

17 BY THE COURT:

18 Well, now, he's talking about breach of contract
19 accompanied by a fraudulent act.

20 BY MR. BRANDT:

21 Well, I'll withdraw that, I agree you need to
22 dismiss that one as to the Pipers.

23 BY MR. MCDUFF:

24 Well, the only cause of action against us is
25 declaratory judgment in count one so.

1 BY MR. BRANDT:

2 Yeah.

3 BY THE COURT:

4 So he didn't have a cause of action against the
5 Pipers on breach of contract with fraudulent act?

6 BY MR. MCDUFF:

7 No. There's only one cause of action for
8 declaratory relief against the Pipers.

9 BY THE COURT:

10 Okay. So but you're not agreeing ---

11 BY MR. BRANDT:

12 He's not done anything. At the time when we brought
13 it I think we were seeking to make sure that no
14 further breaches of that was done and we had some
15 evidence that indicated that the Pipers had made
16 statements that they may be wanting to cut a
17 driveway across there too; and what we would argue
18 there is -- but he hasn't done anything yet, he
19 hasn't cut one yet.

20 BY THE COURT:

21 Well, so if you didn't bring a cause of action
22 against the Pipers for that, that's okay. Now, what
23 about the Halsells?

24 BY MR. BRANDT:

25 I didn't bring it against the Halsells. Well, he's

1 got property over there too and he's got a trespass
2 cause of action also.

3 BY THE COURT:

4 Well, we're talking about the breach of contract
5 covered by fraudulent act.

6 BY MR. BRANDT:

7 We don't have it, I admit that.

8 BY THE COURT:

9 So you're willing to ---

10 BY MR. BRANDT:

11 Yeah.

12 BY THE COURT:

13 Okay, we'll get rid of that one then. And what
14 about the negligent breach, the negligence breach of
15 the rights under the easement theory?

16 BY MR. BRANDT:

17 Well, the facts that we have is what we have and
18 negligent breach of the right-of-way or the easement
19 is sort of kin to the trespass cause of action. I
20 choose to go on trespass.

21 BY THE COURT:

22 Well, I don't know that you can choose at this
23 point.

24 BY MR. BRANDT:

25 So you can dismiss that one, too.

1 BY THE COURT:

2 Okay, suits me. All right, so Plaintiffs agree and
3 we've dismissed cause of action under 3, I guess
4 that's against Halsell and also cause of action on 5
5 against Halsell. Trespass is cause of action number
6 6 and I think there's enough question there, I'm
7 going to deny that one and you can certainly take
8 that up later on at the end of the testimony if you
9 so choose, but we'll go with leaving that one in so
10 everybody is clear on that. The cause of action on
11 number 3 is I guess directive verdict for Halsell
12 was granted and same thing on cause of action number
13 5, and number six is denied.

14 BY MR. HOOD:

15 Thank you, Your Honor.

16 BY MR. BRANDT:

17 Well, what are we left with?

18 BY THE COURT:

19 The only thing left is 1, 2, 4, 6 and however many
20 more that were in there; I don't know if there were
21 any more. We're just getting rid of 3 and 5 against
22 Halsell, that's all; everything else is still in.

23 All right, Mr. McDuff, have you got anything?

24 BY MR. MCDUFF:

25 I'm going to reserve until close of all the

1 evidence, Judge.

2 BY THE COURT:

3 All right, well, that's fine. Anything further from
4 the Defendants before we start their case?

5 BY MR. HOOD:

6 No, Your Honor.

7 BY THE COURT:

8 All right. Well, I'm assuming Mr. Halsell will go
9 first?

10 BY MR. HOOD:

11 Well, I believe that's what we agreed on.

12 BY THE COURT:

13 Well, he's the first named Defendant, so Mr. Hood
14 let's proceed with the Defendant Halsell case.

15 BY COURT REPORTER:

16 Would you raise your right hand? Do you solemnly
17 swear or affirm to tell the truth, the whole truth
18 and nothing but the truth so help you God?

19 BY MR. HALSELL:

20 I do.

21 TESTIMONY OF RODNEY HALSELL

22 DIRECT EXAMINATION BY MR. HOOD:

23 Q. Okay, Rod, will you first state your name for the
24 court?

25 A. Yeah, Rodney Charles Halsell.

- 1 Q. And where do you live?
- 2 A. I live in Seneca, South Carolina.
- 3 Q. What's the address?
- 4 A. In Waterford Subdivision,
- 5 Q. All right. And how long have you been there?
- 6 A. We purchased the property in 2010. It was a part-
- 7 time residence for eight years and at the end of
- 8 2018 when my wife and I retired we moved here
- 9 fulltime just four years ago.
- 10 Q. Okay. So you've been in this area for four years?
- 11 A. Yes, sir, four years fulltime. I actually worked, I
- 12 lived in Hartwell and worked in the Lavonia area in
- 13 the mid '90s and early 2000s also before I got back
- 14 here fulltime.
- 15 Q. Okay. And where is your residence relative to
- 16 Mountain View Pointe?
- 17 A. It's about two miles away.
- 18 Q. I believe you're on the lake, too?
- 19 A. Yes, sir, I'm on the lake, also.
- 20 Q. Would you tell us just a little bit about your
- 21 background including your employment?
- 22 A. Sure. I started working for a company called
- 23 AutoZone right out of high school when I was 17
- 24 part-time working in stores as a sales clerk. Over
- 25 the course of a 33 and a half year career I worked

1 my way up to Senior Vice President of a supply chain
2 where I led a group of about 6,000 AutoZoners across
3 the country that distributed parts for our stores.
4 I had experience building distribution centers. I
5 had multiple projects, probably about five, in
6 excess of five or six projects to an excess of
7 3,000,000 square feet that we built throughout my
8 career, and I did that until I met the golden
9 retirement and we moved here fulltime.

10 Q. I guess being in the supply chain end of it you're
11 probably glad you're retired now?

12 A. I am, I think I timed that pretty good. I still
13 hear from a lot of my friends and fellow co-workers;
14 I don't miss what's going on the last couple of
15 years for sure.

16 Q. All right. Up until the issues we're discussing
17 here today, had you had any prior knowledge or
18 contact with or involvement with Mountain View
19 Pointe Subdivision in any way?

20 A. I had not, no, sir.

21 Q. So turning to the issue of the property that's in
22 question here, tell us what your purpose and intent
23 in acquiring the property was to begin with?

24 A. To build a personal residential garage, hobby
25 garage, entertainment area. We like to host our

1 friends, our neighbors, family, so I was looking for
2 an opportunity to consolidate. I had multiple
3 pieces of property in multiple storage units in
4 various locations in the area and I wanted to get
5 everything in one place and put it all under one
6 roof and have a hobby garage and put all our cars
7 and boat trailers and jet ski trailers together in
8 one spot.

9 Q. All right. So kind of what were your considerations
10 in trying to locate a site for that property?

11 A. Well, it took some time. I started looking just
12 prior to retirement and I continued on once I
13 retired here at the end of 2018 and I looked. I can
14 tell you that I researched every piece of dirt from
15 Ingles on Highway 130 in Seneca all the way north of
16 Keowee Key, about an 11-mile stretch of Highway 130
17 in that area, I looked on both sides of the
18 corridor. Duke owns about 2500 acres around their
19 site. I wanted to get something that was close to
20 my home that was adequate, that it was zoned
21 properly to build what I wanted to build and I found
22 it in this particular location when I was able to
23 identify that. The same way I was looking at other
24 properties and I had mailed out probably 10 to 12
25 different letters or phone calls and emails once I

1 found a piece of property that was -- none of these
2 properties were for sale. I would just drive by and
3 see if it was a vacant lot and then I would look
4 online to see how the property was classified and
5 then I would look to try to find the phone number
6 and if I couldn't find a phone number I would just
7 mail a handwritten note to the property owner asking
8 them if they would be interested in selling the
9 property.

10 Q. Specifically how did you identify this property as a
11 ---

12 A. On the Oconee County Tax Assessor's website it was
13 classified as unclassified, the class was
14 unclassified farmland which means it's unrestricted
15 and you can build whatever you wanted to build on
16 the property, so that's how I identified it. I had
17 driven past it multiple times but I had seen it on
18 the site and.

19 Q. So what was your primary limiting factors in
20 locating, in finally coming up with a site?

21 A. Can you rephrase the question?

22 Q. In other words what were the limitations with all
23 these different properties you looked at?

24 A. Well, a lot of people, respectfully so, they grew up
25 on the property or their grandparents owned the

1 property. There's was property that I'm sure
2 everybody on this side of the room is familiar with
3 on the corner of Doug Hollow and Katelynn, it's an
4 old homeplace, an old brick home and it's got four
5 or five metal storage buildings. The brother wanted
6 to sell me that property but the sister didn't want
7 to sell me the property because it had been in the
8 family so long. But most of these people didn't
9 want to, didn't want to sell their property About a
10 third of them you never even heard from so not
11 everybody didn't respond to you right so, and there
12 was a couple of them that the topography was just
13 extremely steep. Once I was able to actually get a
14 closer view of the land in person it just wasn't
15 suitable, economically it wasn't suitable.

16 Q. Well, when you identified this particular property
17 then as a prospective site, how did you go about
18 contacting and dealing with Mr. Piper?

19 A. I actually wrote him a handwritten note and got to
20 him in his mailbox.

21 Q. And I believe that note was in ---

22 A. That was around August of 2020, the first half of
23 August of 2020.

24 Q. I believe that note was introduced into evidence
25 yesterday; is that right?

1 A. I believe so, yes, sir.

2 Q. And did you have a realtor involved in the
3 transaction?

4 A. Not until after I -- I have a realtor who's a
5 friend, a very predominant realtor, Melanie Fink, in
6 the area that we've used before, we used to purchase
7 our current home through and she knew what I was
8 looking for and she had kept her eyes open as well.
9 But as this search had gone on multiple years I was
10 doing a lot of legwork myself. I wasn't going to
11 her and bothering her and wasting her time. But
12 once I identified the piece of property I did go
13 have a conversation with Melanie to let her know,
14 hey, this is what I've identified as a potential
15 site.

16 Q. Now, I assume Mr. Piper responded to your note?

17 A. He did, he responded within just a couple of days I
18 heard back from him.

19 Q. All right. And what happened from there?

20 A. From there he told me that he would be interested in
21 selling the property. We talked about walking the
22 property and getting together which we did, Mr. and
23 Ms. Piper and my wife and I walked the property
24 within a matter of a week of me putting that note in
25 his box.

1 Q. Okay. At any time while you were walking the
2 property or discussing it with Mr. Piper did this
3 landscape easement come up?

4 A. Yes, sir, yes, sir. He mentioned that there was a
5 landscape easement exactly where it's been talked
6 about so far here in court.

7 Q. All right. And did that create any issue in your
8 mind at that point in time?

9 A. No, sir. It was something that I needed to look
10 into and learn more about and understand exactly
11 what it meant and -- go ahead.

12 Q. All right. And did you do that?

13 A. I did. My realtor had also pointed it out to me.
14 Well, she sent me a plat of it and I can't remember,
15 it was almost, I mean it was within 24 to 48 hours
16 that Mr. Piper and my realtor said that there was a
17 landscape easement there, so I've always been aware
18 the landscape easement was there. I asked for the
19 verbiage in the CCRs that my realtor actually sent
20 to me, 7.9 specifically that was talked about some
21 yesterday.

22 Q. So did you seek advice, legal advice, concerning the
23 significance of the landscape easement?

24 A. I did, I did. Obviously not being a real estate
25 attorney or a real estate expert, I did seek that

1 advice to clearly understand what rights I would
2 have as a property owner and what rights the HOA
3 would have in regards to the landscape easement.

4 Q. All right. So what attorney did you contact?

5 A. It was actually Ann Sullivan who was going to be the
6 closing attorney on the sale of the property.

7 Q. Okay. And basically what did you learn from her?

8 A. I learned from Ann that as a property owner I did
9 have the right to access the property off of the
10 county public road. She identified that, you know,
11 it's a nonexclusive landscape easement, and I had
12 done some online research as well, and when you look
13 up, you know, and do lots of online research and see
14 about nonexclusive easements, nonexclusive easements
15 are identified as an agreement where the receiving
16 party cannot restrict individuals, including the
17 property owners, from having access to his or her
18 property. So I took the information I had gathered
19 online, I took the feedback from the conversation I
20 had with Ms. Sullivan and felt I had every right to
21 access my property.

22 Q. Okay. Did Ms. Sullivan give you any other advice or
23 recommendation?

24 A. She told me that I should, you know, sit down with
25 the neighborhood and let the neighborhood know what

1 my plans were because it was a nonexclusive
2 landscape easement.

3 Q. All right. And what was the intent of that?

4 A. The intent of that was just to, you know, let the
5 neighborhood know that, you know, we're looking at
6 this piece of property and this is what we're going
7 to look at the property for. I've been on HOA
8 boards before; my wife and I both have been, you
9 know, presidents of the boards of homeowners
10 associations, you know, with subdivisions with a
11 hundred plus houses in it and, you know, based on
12 our past experience and knowing that the landscape
13 easement was there we felt it was the right thing to
14 do is to sit down as a potential buyer for this
15 property, and Mr. Piper was gracious enough, he
16 actually arranged the meeting, set the meeting up
17 and created a document to flow that conversation.

18 Q. Did you want to try avoid any conflict with the
19 neighborhood?

20 A. Absolutely, yes, sir. That's, that's why we were
21 open and let them know what we were doing. You
22 know, one side you can look at it is we didn't have
23 to contact the neighborhood whatsoever. But that's
24 not, that's not who we are, that's not how I operate
25 and I wanted to be open and transparent and that's

1 exactly what I did by sitting down with Mr. Dorsey
2 and Mr. Mike Braunschweiler and Betsy Prescott in
3 our meeting that we had on September the 7th, on
4 Labor Day.

5 Q. All right. Now, so at what point did you decide you
6 wanted to buy the property?

7 A. I would say in August.

8 Q. And would that have been shortly after your
9 conference with the attorney?

10 A. Yes, sir, that would be after, yeah, I had already
11 had conversations with the attorney and done what
12 research I could find from what a nonexclusive
13 landscape easement means.

14 Q. All right. And did you reach an agreement on price
15 with Mr. Piper?

16 A. We had some discussion on what the price would be at
17 that point in time, yes, sir.

18 Q. What was that?

19 A. \$200,000 for roughly the five acres.

20 Q. But there was no actual contract signed at that
21 price at the time?

22 A. No, sir, he and I had talked. I mean it was a very
23 open conversation, open dialogue, and we talked
24 about the price and we planned on having the meeting
25 with the neighborhood and, you know, he and I

1 discussed a 30 to 60-day due diligence period
2 because I needed to get with the Oconee County
3 Zoning and Planning Director which I did to make
4 sure I could build what I wanted to build. I just
5 had things, I wanted to take my builder to the site
6 and walk the site with my builder and do those
7 things. So we had talked about a price, but we
8 hadn't locked in on the exact price or I didn't have
9 a signed contract until mid-October.

10 Q. All right. So you've mentioned several times of the
11 intent to have a meeting or a communication with the
12 homeowners?

13 A. Yes, sir.

14 Q. And who specifically set that up?

15 A. Mr. Piper did; Mr. Piper was nice enough to arrange
16 that meeting.

17 Q. All right. And this is in reference to the meeting
18 that you eventually had on September the 7th; is that
19 right?

20 A. Yes, sir.

21 Q. And there was entered into evidence yesterday
22 Exhibit Number 3 I believe which is a Joint Exhibit
23 or excuse me that's Plaintiffs' Exhibit 3 which is
24 dated September the 7th and the heading on it is
25 "Halsell Proposal"; do you have a copy of that in

1 front of you?

2 A. I do.

3 Q. Now, who was present at the meeting?

4 A. Mr. and Ms. Piper were present, my wife, Barbara,
5 and I were present, we had Jim Dorsey present, Mike
6 Braunschweiger and Betsy Prescott. And this was,
7 everybody is all familiar that 2020 was the year of
8 Covid, so I appreciate them. We couldn't talk with,
9 you know, many people in the group but they were
10 willing to open up their doors at Mike's house and
11 let us come in and talk about our plans. But, yeah,
12 we were kind of spread out, we were on one couch,
13 Ms. Prescott was over here to our left, the board,
14 Mr. Dorsey and Braunschweiger, were to our right and
15 the Pipers were on the couch across from us.

16 Q. All right. Now, the names you've mentioned in
17 addition to the two of you and the Pipers, those
18 were the members of the board?

19 A. Yes, sir, it was three board members. I was advised
20 that there were three members of the board and we
21 were going to be meeting with the board and tell the
22 board our intention of developing the property.

23 Q. All right. And who was the chairman of the board at
24 that time?

25 A. I would say the President was Mike Braunschweiger.

- 1 Q. All right. And I believe later Mr. Dorsey at some
2 point became ---
- 3 A. Yes, sir.
- 4 Q. --- President or Chairman; is that correct?
- 5 A. Yes, sir, that is correct.
- 6 Q. So how did the meeting go; who and how was your
7 proposal presented to the board?
- 8 A. The meeting pretty well, if you look at that
9 document that you just talked about, this document
10 pretty well steered the conversation and the
11 meeting. Mr. Piper was kind of the moderator or the
12 meeting lead I would say and he was basically
13 introducing us to the board and telling the board
14 what we were looking at doing with the property or
15 he was looking at selling the property, that I had
16 approached him to purchase the property and I was
17 looking to develop the property.
- 18 Q. Did they ask very much in the way of details or seek
19 other information from you or?
- 20 A. No, sir. They, they didn't really seek much
21 information. They wanted to -- you know, once we
22 told them we were looking to build a hobby garage
23 and a place to bring our cars together and boat
24 trailers and jet ski trailers and we were going put
25 a driveway off Mountain View Pointe, they said they

1 didn't want to see any development on the property
2 and it wouldn't be in the best interest of the
3 neighborhood and they're not going to support any
4 driveways coming off of Mountain View Pointe.

5 Q. Now, there was considerable testimony yesterday,
6 including from the board members, to the effect that
7 y'all had come to them seeking permission or consent
8 to put in a driveway; is that correct?

9 A. No, we were, we were coming to bring them in the
10 loop to let them know that Mr. Piper thought, you
11 know, and I certainly agreed with it because of our
12 past experience with boards and, you know, wanting
13 to be open and transparent this is what we're going
14 to do with the property, we felt it was the right
15 thing to do, sit down with the board. And, you
16 know, technically did we have to do it? No, sir,
17 but we thought that was the right thing to do.

18 Q. But you didn't feel that you had to get specific
19 permission or consent from them?

20 A. No, sir. I could've, I could've purchased this
21 property without having any meeting with the board
22 of the HOA.

23 Q. All right. Now, if you would on the second page of
24 Plaintiffs' Exhibit 3 there's a section in here at
25 the bottom that says "Objective" and I guess that's

1 saying what was the objective of the meeting. Would
2 you read what that says please?

3 A. Yes, sir. The Objective shows "determine a mutually
4 agreeable arrangement to secure a driveway off
5 Mountain View Pointe across the landscape easement."

6 Q. All right. Mutually agreeable arrangement?

7 A. Yes, sir.

8 Q. It doesn't say anything about consent?

9 A. No, sir.

10 Q. It doesn't say anything about permission?

11 A. No, sir.

12 Q. You were just trying to be agreeable with the people
13 in the neighborhood?

14 A. Yes, sir.

15 Q. Now, listed above that, there's two headings,
16 "Benefits to the POA" and "Benefits to the Property
17 Owner" which would be I guess you and the Pipers at
18 that time and/or you, and the first one under both
19 of those says, "no tit-for-tat conflict". Now, what
20 does that mean to you?

21 A. That just means, no, we wasn't getting in any kind
22 of a match or a back and forth, you know, or wind up
23 in some place like this or spend the last two years
24 what we've been doing and still haven't completed.

25 Q. All right. Would you say then that that might be a

1 little more refined way of saying you didn't want to
2 get in a pissing contest with anybody?

3 A. Yes, sir, that'd be accurate.

4 Q. Okay. So you said, you indicated there at the end
5 of the meeting their reaction was generally that
6 they were opposed to any kind of driveway or any
7 kind of development on that property?

8 A. Yes, sir, they were and I will tell you that Ms.
9 Prescott, I don't recall making a single comment
10 during the meeting on behalf of the board. Mr.
11 Dorsey and Mr. Mike had all the conversation from
12 the board's perspective and they expressed that they
13 they're against, you know, they were kind of shocked
14 and surprised a little bit I believe that the land
15 was being sold and something was going to be put on
16 that property and you could just hear it, you know,
17 in the tone of their voice and see it on their face
18 and, you know, based on my professional work
19 experience you could read it, I mean the body
20 language was there that they weren't happy, you
21 know, and I guess ---

22 Q. Not comfortable with the situation?

23 A. No, sir, and I guess they, you know, had felt that
24 that land would never change forever even though
25 other people owned it. So Mr. Dorsey asked about

1 three times what's in it for us, what's in for us,
2 what's in it for us again and again, and Mr. Piper
3 answered that question each time and went through
4 those things we just talked about as far as the
5 benefits and how, you know, some of that land today
6 still is viable for a commercial operation and what
7 I was doing was taking that away by committing to
8 Oconee County Zoning that what I'm putting in is
9 residential. So Mr. Piper was trying to kind of
10 pave the way to show that there was some benefits
11 for the HOA, but it wasn't really being received.

12 Q. Okay. Well, you said they seemed to be a little
13 surprised at your proposal; were you surprised in
14 any way at their response?

15 A. Yeah, it's just everything was like automatically
16 no. You know, they would like slam the door, slam
17 the door, slam the door and they weren't open to
18 anything being developed on that property and they
19 said, you know, we're opposed to any development on
20 that property and we don't want to see anything
21 changed up there and we're not, you know, supporting
22 any driveways coming off Mountain View Pointe.

23 Q. Well, did you make any suggestion or proposal to
24 them at that point?

25 A. From what I recall we were talking about having a

1 driveway come off Mountain View Pointe. As far as,
2 you know, at one point, probably three-quarters of
3 the way through the meeting, after hearing Mr. Mike
4 and Jim Dorsey talk for a few minutes and pick up
5 the vibe from them, I actually said, well, if y'all
6 feel that strongly about the property never being
7 developed you need to quit talking to the people on
8 this couch and you need to talk to the people on
9 that couch and y'all need to buy the property from
10 them and I'll back away from it.

11 Q. So you told them they needed ---

12 A. I did.

13 Q. --- to talk to the Pipers ---

14 A. To the Pipers.

15 Q. --- about buying the property?

16 A. And there was, and there was, and there was dead
17 silence in the meeting for a few moments. It's one
18 of those you could there was awkward silence, but I
19 actually made that comment in the meeting to them.

20 Q. So what was your thought in suggesting that? I mean
21 what prompted you to make that suggestion that they
22 buy the property?

23 A. Just to kind of, you know, they were acting as if
24 they were owners of the property and what they were
25 trying to convey to me that, you know, you can't,

1 you can't put anything across that easement. And
2 keep in mind I had already talked with my attorney
3 and I had already done online research too and I
4 knew what my property right was as a property
5 owners, so they were just like putting a wall up
6 there by saying you can't do anything there and
7 we're not going to be agreeable to that and they
8 ended up closing out by saying, well, we're going to
9 have to go back and get with our people in the
10 neighborhood and you've had the opportunity to talk
11 to an attorney, we need the opportunity to talk to
12 our attorney, which was fair, so we'll follow back
13 up with you.

14 Q. All right. So after the meeting ended what was the
15 next thing that happened that you recall?

16 A. About 10 days later we hadn't gotten a response. So
17 on September 17th, on September 17th Mr. Piper
18 reached out via email to the three board members,
19 copied me, asked them for some feedback from our
20 meeting.

21 Q. All right. Did you ultimately get some feedback?

22 A. A few days later Ms. Prescott sent an email that
23 said we're going to deny your request to have a
24 driveway go across Mountain View Pointe landscape
25 easement and that it's not in the best interest of

1 our neighborhood. I think, let me rephrase, she
2 started out by saying in the email it's not in the
3 best interest of our neighborhood to grant you
4 access across the landscape easement for your
5 driveway.

6 Q. So at that point in time they didn't cite any
7 particular reason or justification why you could not
8 access the property; they just point blank said it's
9 just not what we want, it's not in our best
10 interest?

11 A. Yes, sir, there was no specific, you know, documents
12 or anything to refer to at that time.

13 Q. Did you reply back to that email?

14 A. I did. I replied back within 24 or 36 hours of that
15 email and told them I was, you know, sorry to hear
16 about, you know, the decision that they had made
17 although the property suits our needs and that we
18 would be back in contact.

19 Q. And what was your intent as far as what you were
20 going to do at that point?

21 A. To go back and have, you know, another follow-up,
22 same conversation all over again with my attorney as
23 well as talk to Mr. Piper and we had some brief
24 dialogue after that in regards to where do we go
25 with the purchase or sale of the property.

1 Q. All right. And do you recall what next
2 communications you had with anybody from the POA
3 was?

4 A. Yes, sir. So that was, so we had the meeting on the
5 17th and ten days later Graham reached out a few days
6 later because Betsy sent an email back responding
7 from the board. Graham and I had some conversations
8 and I talked with the attorney. So somewhere around
9 October 7th or 8th. After having considered
10 everything that the neighborhood, you know, taking
11 into account what their feedback was and thinking
12 about if we were to bring our driveway off of Doug
13 Hollow and what that would consist of and be a part
14 of, if we came off of Doug Hollow I wanted to call
15 Mike back ---

16 (Cellphone interruption)

17 Q. Stop. I'm sorry, Your Honor.

18 BY THE COURT:

19 You don't have the silent switch on your cell?

20 BY MR. HOOD:

21 I thought I had it on, Your Honor, I'm sorry.

22 A. So ---

23 BY MR. HOOD:

24 Wait just a minute, let me get this fixed so we
25 don't have another problem. By the way, of all

1 things that was a spam call.

2 BY THE COURT:

3 Was that an iPhone?

4 BY THE COURT:

5 No, this is a Samsung.

6 BY THE COURT:

7 Well, there's your problem.

8 BY MR. HOOD:

9 I'm not smart enough to use an iPhone. All right, I
10 think I'm fixed now. All, right, I'm sorry.

11 BY THE COURT:

12 All right.

13 DIRECT EXAMINATION RESUMED BY MR. HOOD:

14 Q. All right. Let's go back and start that over again.

15 A. So I was taking into account what the neighborhood
16 said in regards to Ms. Betsy's reply and having
17 thought about it and considered what, you know, they
18 had said in the meeting as far as not wanting
19 anything changed, bringing, based on the topography
20 of this lot, bringing a driveway off of Doug Hollow,
21 as unreasonable as it would be to go that route, it
22 would be extremely costly and remove a significant
23 amount of trees to bring, you know, an extra 600
24 feet of driveway, it's an extra 602 feet of driveway
25 coming off of Doug Hollow versus where the driveway

1 is today. So I called Mike back and I said, Mike, I
2 said, I want you guys making a fully educated
3 decision, I said because if we were coming off Doug
4 Hollow and we start taking down trees behind the
5 monument sign in the neighborhood once you take down
6 those trees that have been there for, you know, 20
7 or 30 years because those are the most mature trees
8 on the lot, it's done, the damage is done, and that
9 is changed forever. I said we're actually going to
10 take down more trees this way than what you're
11 saying no to what's going through the nonexclusive
12 landscape easement off of Mountain View Pointe.

13 Q. Now, were those trees you're referring to that would
14 have come down the same trees that were referred to
15 as a lush canopy of trees down the entranceway?

16 A. Some of those would be, yes, sir, yes. I called
17 Mike on October 8th and had that conversation with
18 him and told him that, you know, it doesn't make
19 sense to have two roads parallel right side by side
20 and I said the county or the developer or whoever
21 when they put that road in, they chose to put that
22 road and cut it that way instead of right up through
23 the middle of my property because of the topography
24 of the land. So we would come in right behind the
25 sign easement that I've always recognized, we'd come

1 in behind the sign easement and we would go parallel
2 the landscape easement until it gets up to the front
3 of the building and then go out. And Mike's comment
4 was that he understood, however, as a board member,
5 they could be sued if they don't enforce the
6 Covenants and Restrictions so he said nothing is
7 going to change.

8 Q Wait a minute. Do you know what he meant by that?

9 A. Quite frankly, sir, it sounded like a copout to me,
10 it sounded like he was saying, you know, as a board
11 member he could be sued if he didn't enforce the
12 Covenants and Restrictions and allowed us to come
13 through their landscape easement.

14 Q. Okay. And so otherwise what was Mike's response
15 then to that discussion with him?

16 A. That nothing, nothing is going to change and he said
17 we've talked to some of the neighbors and, you know,
18 our position remains the same so.

19 Q. Did he tell you again that they were consulting an
20 attorney and you'd hear from one?

21 A. He did, yes, sir.

22 Q. All right. And did you ultimately receive a letter
23 from Mr. Brandt?

24 A. Yes, sir, I did.

25 Q. And that would be I believe the document identified

1 as Joint Exhibit 11A; am I right on that?

2 A. Yes, sir, it was about two weeks later I got this
3 document from Mr. Brandt.

4 Q. All right. And after getting that letter from Mr.
5 Brandt did that spur you to do anything else? What
6 did you do next?

7 A. I shared it with my closing attorney and had a
8 conversation, a brief conversation, with her on the
9 phone again about it and nothing changed from our
10 prior conversations related to that. And then I had
11 more, more concern that as I said earlier in the
12 spirit of being open and transparent, when I got off
13 the phone with Mr. Mike on October 8th he said we've
14 talked to some of the neighbors and he never gave me
15 the impression that everyone had been talked with in
16 the neighborhood about it, but they had talked with
17 a group of neighbors and they were opposed to it.
18 So that's when I elected in November to write a
19 letter to every homeowner in the neighborhood to
20 introduce myself.

21 Q. Now, would you be referring there to Plaintiffs'
22 Exhibit Number 2?

23 A. Yes, sir, I am.

24 Q. And in that letter did you kind of go over the same
25 information you had presented to the board first and

1 then talked with Mike about next?

2 A. Yes, sir, this letter was, my intent for this letter
3 was to -- because again this was the year of Covid
4 and we couldn't get people together, you know, in
5 large groups, so this was my way to make sure that
6 everyone in the neighborhood was well educated and
7 could make an informed decision and to give feedback
8 to the board in regards to the information I had
9 received from the board. I wanted to make sure that
10 everything was completely upfront and onboard and
11 everything was wide open as far as what would take
12 place to make sure that everybody in the
13 neighborhood knew what the board had conveyed to me
14 in regards to you should take all those trees down
15 coming off Doug Hollow and have a 602 foot, extra
16 602-foot driveway coming to your building.

17 Q. All right. And I believe also in that letter you
18 referred to in Plaintiffs' Number 2, you also
19 invited anybody in the neighborhood who wished to
20 come to the site there and meet you and discuss the
21 issues or ask questions, and you asked them to or
22 offered to make yourself available I believe on
23 November the 28th?

24 A. Yes, sir. At the end of the meeting when I, you
25 know, had already stated that we wanted the land to

1 look as esthetically pleasing as possible and we're
2 sharing this with you as new neighbors as we intend
3 to be good neighbors for many, many years and in the
4 spirit of being a good neighbor I'll make myself
5 available on Saturday on 11/28 from 8 to 10 if you'd
6 like to meet me along MVP Drive to discuss the
7 driveway construction and answer any questions. So
8 that was my way of trying to go above and beyond to
9 reach out to everybody in the subdivision that would
10 have any questions about this development that they
11 could stop by and we could talk about it.

12 Q. All right. And did anybody show up?

13 A. Two people showed up.

14 Q. All right. Who were they?

15 A. One was one of the Defendants listed, Lonnie Harper,
16 he stopped by to say that, you know, he had heard
17 about the driveway and he wanted to know a little
18 bit about it and he introduced himself, told us
19 about his professional career and his family and how
20 long they had been in the neighborhood and he
21 encouraged us, you know, to go work it with the
22 neighborhood and, you know, go have a beer and sit
23 down and talk about it and that was pretty well the
24 extent of the conversation with Mr. Harper. He just
25 wanted us to work it out and rightly so avoid where

1 we are today and everything that's taken place up to
2 today.

3 Q. All right. Who else showed up?

4 A. The next person that showed up was Lori Tanner, I
5 believe she is Mr. Mike's wife, she came by on her
6 golf cart and she stopped and she inquired by first
7 saying, let me hear your sales pitch and I told her,
8 I said, ma'am, there is no sales pitch, I said, you
9 know, everything is laid out in the letter and I'll
10 be glad to answer any questions you have. She went
11 on to elaborate and say that he didn't agree with
12 her husband and she didn't agree with the board but
13 they only have one vote and his vote counts since
14 he's on the board so.

15 Q. She didn't agree with him in regards to what?

16 A. She didn't agree with him in regards to them trying
17 to block us from accessing our property.

18 Q. So two people out of the neighborhood showed up for
19 that?

20 A. Yes, sir, and we sat down there the full two hours
21 as we said we would.

22 Q. All right. After having then, having wrote this
23 letter and meeting with some of the residents, had
24 you decided to go ahead and proceed with purchasing
25 the property or did you thereafter?

1 A. I did, I actually proceeded. This was still during
2 my due diligence period, it was around October 12th
3 or 14th Mr. Piper and I, or prior to that we had some
4 conversation in regards to what feedback we had
5 received from the neighborhood and, you know, it had
6 the sense that we could wind up having litigation on
7 there, and we had conversations that it was just
8 going to cost more money for litigation or cost more
9 money coming off Doug Hollow and we renegotiated the
10 price because of the feedback from the neighborhood
11 and we signed a contract in October and we closed
12 December the 2nd.

13 Q. All right, and at a price of 150,000?

14 A. Yes, sir.

15 Q. So let's talk about then a little bit about your
16 thoughts in going ahead and proceeding to close on
17 the property despite the fact that you had not come
18 to any sort of terms with the community. What were
19 your thoughts in deciding to go ahead at that point?

20 A. Because of the conversation I had with my attorney,
21 as well as my online research, there was nothing
22 that showed legally that the neighborhood could do
23 what they thought they could do in the conversation
24 I just had, no, you can't cross the landscape
25 easement. So I felt I had every right as a property

1 owner where I could access my property.

2 Q. And had you inquired as to maybe an alternative if
3 need be to being able to actually come in on Doug
4 Hollow?

5 A. Yes, sir. As part of my due diligence that Mr.
6 Graham and I worked out in regards to having some
7 time before closing was to contact the SCDOT in
8 regards to getting a driveway permit off of Doug
9 Hollow. A wonderful lady there by the name of
10 Barbara Dean, she actually said I couldn't do that
11 until I owned the property. So I asked her as many
12 questions as I could about, you know, approving the
13 site but she couldn't do anything and really
14 wouldn't lock in on issuing that until I closed on
15 the property and she said once you close on the
16 property you can, you can submit it as the owner and
17 we'll approve it at that time.

18 Q. But did they provide you any assurance that you
19 could likely get a permit?

20 A. They did, they did. They were most concerned with
21 what the line of sight was up and down Doug Hollow
22 and making sure that there wasn't another drive
23 within around 25 feet or so.

24 Q. All right. And at the point in time then, even
25 after having made several attempts to accommodate

1 the homeowners, did you still at that time hold
2 forth any hope that maybe still there was some
3 possibility of working something out?

4 A. Yes, sir.

5 Q. All right. At what point did you first have any
6 consultation with me?

7 A. After I had written the letter to everyone in the
8 HOA around November 20th I contacted you in late
9 November. This was following the Saturday when I
10 sat in the street to answer any questions. I called
11 and made an appointment for your office on December
12 the 8th of 2020 and so ---

13 Q. And you had already received Mr. Brandt's letter at
14 that point?

15 A. Yes, sir, I had already received Mr. Brandt's
16 letter.

17 Q. All right. And so basically at our first meeting
18 what transpired?

19 A. I brought you up to, I basically brought you up to
20 speed on what had taken place from August up through
21 December on the property identified and what
22 conversations we'd had with the neighborhood, what
23 legal information out there was regarding their
24 Covenants on the nonexclusive landscape easement,
25 told you the conversations I'd had with my closing

1 attorney and I sought your legal advice to further
2 research and make sure there's nothing here being
3 missed that the other attorney hasn't missed and
4 nothing has been submitted in writing available to
5 me to show that we can't put a driveway in.

6 Q. And I think you also brought me Mr. Brandt's letter
7 so I could understand ---

8 A. Yes, sir.

9 Q. --- what their position was?

10 A. I gave you everything, yes, sir.

11 Q. All right. And what did you get back from me at
12 that point?

13 A. We were headed into the holiday season, work was
14 heavy and you told me it would be a few weeks and
15 probably right after the first of the year and you
16 contacted me the first week in January and validated
17 what I had already been told and read in regards to
18 having the right to access my property off the
19 county road, and that was the first week of January
20 of 2021.

21 Q. And did I give you any thoughts on what had been
22 your efforts to work with the community?

23 A. Yes, sir. You told me it looked like there was, you
24 know, a good track record to where you've reached
25 out to the community and tried to bring them in the

1 loop and tried to work with them.

2 Q. And did I encourage you to continue to try to do
3 that?

4 A. You did.

5 Q. And also I believe as a result of that meeting it
6 was decided that I would write a response to Mr.
7 Brandt's letter?

8 A. That is correct, yes, sir.

9 Q. And I believe that letter has been admitted as Joint
10 Exhibit 11B?

11 A. Yes, sir.

12 Q. All right. So after we received and responded to
13 Mr. Brandt's letter and we were through the
14 holidays, had there been any response or further
15 communication back from anybody on the other side?

16 A. No, sir.

17 Q. And so did you at that point decide to proceed on
18 with your building?

19 A. I did, I did.

20 Q. And what did that consist of as far as your initial
21 steps?

22 A. The initial steps were to hire my general contractor
23 for the building which was done in early January as
24 well.

25 Q. Had you already talked to that builder and

1 everything and ---

2 A. I had talked to him, over the recent months I had
3 talked with him and I actually had him come on site
4 and we had talked about the site development and we
5 had it narrowed down. We interviewed multiple
6 companies and we actually narrowed it down to a
7 specific one through the selection process, picked
8 that builder to hire him to do it.

9 Q. Okay. So you formally hired the builder?

10 A. Yes, sir, and he ordered the building the first week
11 of January. I mean technically I signed a contract
12 with him in mid-February, but as we'll get into here
13 shortly I mean he ordered the building and he was
14 doing work for me before I ever signed the contract
15 with him.

16 Q. And did you do anything else; did you actually start
17 doing any work on the ground?

18 A. Yes, sir, around January the 23rd I had, prior to
19 that I had dialogue with you to let you know that I
20 was going to go out and start with some of the
21 initial tree cutting on my property and in the
22 landscape easement because what I was to trying to
23 do is, you know, perceive any of the negative
24 feedback I anticipated from the neighborhood versus
25 the contractors receiving that when they show up to

1 start doing the work.

2 Q. All right. Now, let me jump back right here for
3 just a little bit. In regard to your commencing
4 work on the project and referring to my letter back
5 to Mr. Brandt, we're on Exhibit 11B, we made it
6 known then of your intent to go ahead, expressed our
7 position and let them know that you were going to
8 plan to go ahead and proceed with the work?

9 A. Yes, sir, and the words that he used and the words
10 that I believe that you used with Mr. Brandt was to
11 rough in the driveway, that we were going to go
12 ahead and rough in the driveway.

13 Q. And the purpose of that was what, so could you go
14 ahead and start?

15 A. Yes, sir, because there's like a three-month lead
16 time on the building and I needed to have the pad
17 and the building area ready for when that would
18 arrive. I needed to have access to my property, my
19 building site.

20 Q. All right. So you made your arrangements with the
21 builder, you started removing some trees; when did
22 you actually begin to actually move any dirt?

23 A. February the 7th or 8th.

24 Q. And did you get any reaction to that?

25 A. Yes, sir, I did and I anticipated some. As I said,

1 you know, my wife and I had been on boards before
2 and the neighborhood had given us their response
3 from our face-to-face meeting with them from back in
4 September through follow-up emails and some of the
5 board, primarily Mr. Mike came down, I don't
6 remember Mr. Dorsey coming down that day at all.
7 Well, all the conversations I had from that point on
8 on site at the driveway were with Mr. Mike and he
9 came down to tell me I was trespassing and I was
10 telling him no, sir, it's my property because I'm
11 entering my property. He was taking pictures; he
12 said his attorney rightly so had advised him to take
13 pictures of everything going on. I said that's
14 perfectly fine, take whatever pictures you want. I
15 had received some feedback earlier that morning from
16 my contractors that were running the equipment that
17 several of the neighbors not only took their
18 pictures but they had been disrespectful, cussed at
19 them, flipped them off, so I asked Mr. Mike if he
20 would, you know, give feedback to the neighbors
21 that, you know, these people are just doing their
22 job, if they have an issue to come take it up with
23 me but these gentlemen are just doing their job.
24 And I told Mike, I said, you know, Mike, I'm really
25 surprised that, you know, with the conversations

1 we've had that you want to, you know, spend so much
2 time trying to fight this when it's just a driveway
3 and I said I have the right to access. And he said,
4 Rod, it's not just your driveway, we're worried
5 about what's going to go on across the street. He
6 said I don't really have a problem with your
7 driveway, I'm more concerned, we're more concerned
8 with what's going to happen across the street. They
9 didn't like it, he didn't like it; he didn't say I
10 love your driveway by any stretch but he said it's
11 more than just about your one driveway.

12 Q. All right. Well, so again with the continuing lack
13 of cooperation between the parties, why did you feel
14 justified in going ahead and actually beginning the
15 project anyway?

16 A. Because I believe I have every legal right to access
17 my property.

18 Q. All right. At that point in time you had gotten
19 advice from two attorneys that you had the right of
20 access?

21 A. Yes, sir, and I had done just like I did for several
22 years looking at this all this property back and
23 forth on this corridor. I did a lot of online
24 search too around nonexclusive easements, but I
25 relied on the feedback I got from two attorneys just

1 to validate that after they reviewed, you know, 7.9
2 in their Covenants about the landscape easement.

3 Q. So was it your intent at that point in time if you
4 had to if you could didn't ever reach an agreement
5 that you would litigate the issue?

6 A. Yes, sir, I felt I had every legal right to access
7 the property at this time.

8 Q. And so at that point in time in anticipating perhaps
9 having the issue resolved as we are now doing, would
10 it have been reasonable for you at that point to
11 just go ahead and put a driveway in from Doug
12 Hollow?

13 A. No, sir, it would've been absolutely unreasonable to
14 do that.

15 Q. All right. And why would that be?

16 A. It would cost probably as close to as much as I paid
17 for the property to put a driveway in from Doug
18 Hollow because it wouldn't be just a normal width of
19 a driveway considering the length of it and having
20 some blind curves. If you've got two people coming
21 up and down, unlike a residential driveway where you
22 can have some narrow spots, you know, because you
23 can see the other end of it leaving your house.
24 This would be an 802-foot long driveway going down
25 from the front of our building to Doug Hollow and

1 you'd have to have it wide enough for vehicles to
2 pass as far as coming and going.

3 Q. All right. And coming in from that direction would
4 also probably have taken a while, would it not?

5 A. Yes, sir, it would have taken significantly longer
6 and first and foremost to go along with the
7 testimony yesterday about the screening and the
8 trees, this driveway off Doug Hollow would cut down,
9 I mean I measured it out, 30,000 square feet of
10 trees unnecessarily along Mountain View Pointe which
11 is what the Plaintiffs don't want to have happen
12 anyway and that's why I had, you know, a follow-up
13 phone call with Mr. Mike in October to say, hey,
14 this doesn't make sense and do you realize what
15 you're asking for, does the neighborhood realize?
16 Well, we talked to some of our neighbors, I've
17 already covered that.

18 Q. Well, would it have made any sense if you were
19 intending on litigating to spend all that money
20 putting in a driveway at that point from Doug
21 Hollow?

22 A. No, sir, I mean the damage will be done, it would be
23 irreparable at that point.

24 Q. All right. So instead, what you did was basically
25 as you earlier, said you roughed in a driveway from

1 Mountain View Pointe Drive so you could go ahead and
2 start the process?

3 A. Yes, sir.

4 Q. And why were you not wanting to substantially delay
5 things as far as getting going with it?

6 A. Well, I had my building order and wanted to go ahead
7 and, you know, things needed to be prepared so when
8 that building was originally scheduled to arrive in
9 April of 2021, so we needed to have the pad, the
10 plumbing, some of the irrigation stuff around the
11 building taken care of prior to April so I needed
12 access to my property.

13 Q. Now, did you have a cost on the building or any sort
14 of, I'm not sure what your arrangement was with your
15 builder, but would delay have affected the cost of
16 the building?

17 A. It absolutely would have. Beyond the wildest
18 expectations because of Covid and everything that
19 happened for 2021, but I had a 6% delay in cost of
20 the building from the first quote I got from him
21 which was in September until the time that I pulled
22 the trigger in January for the building. And I will
23 tell you from the time in January when I ordered the
24 building until September of 2021 the price of metal
25 increased 80%; so I had waited until, I mean if we

1 were still waiting here today to do anything it
2 would be substantially higher.

3 Q. So when was the building actually finally completed?

4 A. Certificate of Occupancy was received in September
5 of this year, early September the first week of '22.

6 Q. Was that considerably longer than you expected it to
7 take?

8 A. Extremely longer than I considered it to take. We
9 ran into an eight-month delay waiting on some
10 electrical gear for the electrical power boxes and
11 it was all supply chain related issues with Covid.

12 Q. And then the litigation, of course, had already
13 begun well before the building was completed?

14 A. Yes, sir.

15 Q. And it also protracted out longer than you ever
16 anticipated?

17 A. Yes, sir, much longer.

18 Q. So once the building was completed, at the time it
19 was completed you were still having a roughed in
20 driveway that just had ---

21 A. Gravel.

22 Q. --- gravel in it, right?

23 A. Yes, sir.

24 Q. And it appears that at some point after that you
25 went ahead and finished up that driveway?

1 A. I did.

2 Q. Why did you decide to do that?

3 A. Because I believe I had every right to do it, you
4 know, to access the property and I wanted to have it
5 finished so I could use my building. The types of
6 vehicles that I drive on that driveway are not
7 conducive for rocks and gravel and I wanted to
8 finish it out. Number one, I needed to do it and
9 finish up my construction contract. I mean another
10 side benefit is the neighborhood could, in fact, see
11 what the finished project was and I actually posted
12 a two-foot by three-foot color image down on the
13 side of the street for about four to six weeks
14 halfway through the project just so they could see
15 what the finished product looked like that a
16 landscape architect had actually drawn up for us.
17 And again that was just trying to let the
18 neighborhood see, even though we weren't having
19 dialogue, because this lawsuit existed, I wanted
20 them to see what the final product would look like.

21 Q. So were you still holding out some vain hope at that
22 point in time?

23 A. Yes, sir, I thought at some point in time that, you
24 know, a third of the neighborhood or close to a
25 third of the neighborhood didn't agree with the

1 board so they got listed as defendants in this
2 lawsuit. I was hoping that there were some more
3 people in the middle that would probably look at the
4 information from the board's perspective and the
5 neighborhood's perspective and understand how strong
6 the case either is or isn't and then let them know
7 that they don't have their support for the lawsuit.
8 So I was optimistic that there would be some people
9 that spoke up to the board.

10 Q. So you seem to be saying then that you went to some
11 length to try to make the driveway attractive?

12 A. I did, yes, sir. I mean I spent over \$8,000 on
13 landscaping on trees that I've planted along the
14 driveway, some within the landscape, most on my
15 property. But there's 14 trees that are planted
16 that these trees are cryptomeria evergreens, they
17 grow two to three feet a year and they'll grow 25 to
18 30 feet high and they grow 15 to 25 feet wide, and
19 they grow two to three feet a year. And I think one
20 thing that's important to share is I think everybody
21 recognizes that landscape is normally the very last
22 part of the construction project when you build a
23 home or you build a commercial business; landscape
24 is always the last thing. I actually planted these
25 trees in the fall of 2021, a year prior to me

1 getting my Certificate of Occupancy I planted these
2 trees in advance and then some have clearly already
3 grown two and three feet.

4 Q. Well, you could've left just a gravel driveway?

5 A. I could have, yes, sir.

6 Q. How much did you spend on your driveway altogether
7 putting it in?

8 A. The driveway at it sits today is a little over
9 \$43,000; that's the driveway, that's the
10 landscaping, that's the columns, the gates, the
11 paved area of the driveway, and the trees that were
12 planted in the landscape easement, and the mulch
13 around the area. The mulch is in the landscape
14 easement also.

15 Q. All right. So in addition then to putting in a nice
16 driveway and entrance, during the time the
17 construction was going on did you take measures to
18 try to lessen the impact of the construction on the
19 neighborhood?

20 A. I did.

21 Q. Can you just summarize that quickly?

22 A. Yeah, I'll go over it real quick. There's a handful
23 of things and I'll take great pride in it and many
24 of these people have witnessed some of these things
25 I've done. But one of the things I did was install

1 a second silt fence, a silt fence that goes around
2 the property for a normal construction site just
3 because out of respect for the landscape easement
4 and the neighborhood and the feedback I had already
5 received I put in a second silt fence of over 560
6 feet. I worked to maintain the street in front of
7 the construction site on an ongoing basis. During
8 this 18-month period there were minimal times where
9 there was either mud or gravel on the street. These
10 people saw me out there with my leaf blower; I have
11 a commercial-size leaf blower and they saw me out
12 there on a weekly basis blowing that street as they
13 would come in and out of the neighborhood. I
14 compared my entrance to some of the entrances of
15 construction within the neighborhood development
16 itself next door to our property and ours was much
17 cleaner on more than one occasion of the mud that
18 was tracked on the street from the other homes that
19 were being built inside the neighborhood. I
20 installed, I maintained a water berm all the way
21 through my construction process and installed a 60-
22 foot runout to divert more of the water off the
23 street and keeping it on my property. But these
24 people can't see it because it's kind of over the
25 hill but it's a 60-foot concrete and large stone

1 runout area. I talked about we had a delay on the
2 project. Once the building pad was up there and I
3 could move the port-a-potty from the street so these
4 people wouldn't have to see it coming in and out of
5 their parking lot, their driveway every day, I moved
6 the port-a-john up and shielded it behind trees for
7 eight months until we got to the very end of the
8 project and the driveway was being poured and it
9 came back to the street for like the final couple
10 weeks of the project before it was gone; so those
11 are just a few of the things that I did. Also
12 instead of putting grass seed down, I put sod down
13 immediately to have sod back immediately where it
14 was along in the right-of-way along the street. And
15 testimony yesterday by Mr. Dorsey was one of my
16 contractor guys did break the irrigation line that
17 was about five inches below the surface of the soil
18 up against the curb; we got that fixed within a
19 couple of days. We put in a stronger piping and
20 placed it lower, but also before our concrete was
21 poured on this driveway in the right-of-way I put
22 another two-inch sleeve underneath that driveway
23 about two months ago in July or late July when it
24 was poured in case the neighborhood or I ever want
25 to run anything under that driveway there's already

1 a two-inch sleeve underneath that driveway. So I
2 think I have been as good, if not better, than
3 probably most people that would've been in my
4 position that bought this property, so I think the
5 facts speak for themselves.

6 Q. We've talked about what's going on during the time
7 of construction and the time leading up to that; but
8 let me just take a minute now to talk to you about
9 the landscape easement itself and what was there as
10 of the time you bought the property.

11 A. Okay.

12 Q. Now, calling attention to Exhibit 1A, that's Joint
13 Exhibits 1A and 2 which are the Covenants and the
14 plat, those exhibits indicate that those documents
15 were recorded in 2002, so that means it had been
16 almost 20 years since the easement that you might
17 say became effective from the time you got there;
18 and as of the time you bought the property what did
19 the landscape easement consist of I mean in terms of
20 what was there?

21 A. Well, it was wild growth that had grown up in the
22 landscape easement, specifically the area where my
23 driveway is today there was not a single bush or
24 shrub or plant that was planted by the Homeowners
25 Association; it was all wild pines that had grown

1 up. And if you, you know, Google is your friend, if
2 you go to Google Maps and you look, you can go back
3 to 2008 and get a street view and you can go back to
4 2013 and get a street view and you can see it was
5 just wild vegetation had grown.

6 Q. Well, as it exists today then, when was that
7 landscaping done, the beds and grass and that sort
8 of thing?

9 A. The beds that neighborhood put in?

10 Q. Yeah.

11 A. I think sometime in the mid-2000s or 2010 timeframe.

12 Q. And that was before you got there?

13 A. Yeah, well before I got it, yes, sir.

14 Q. All right. And how many beds are there ---

15 A. There are four ---

16 Q. --- along the road?

17 A. There are two beds on my side of the road between my
18 driveway and the first house in the neighborhood
19 which is 400 and something feet away. All right,
20 and on the Pipers' side there are two beds that are
21 closer to Doug Hollow, not far from my driveway but
22 on the opposite side of the street.

23 Q. All right. So there were beds meaning just little
24 patches where they've planted bushes or other
25 ornamental ---

1 A. Yes, sir. They're not all perfectly, you know,
2 square around but they're oblong and they're
3 parallel to the street; but the majority of them are
4 in the right-of-way that the neighborhood has done
5 and maintained over the years.

6 Q. All right. And is there anything along both sides
7 of the road other than the natural trees and those
8 beds other than just grass?

9 A. No, sir, it's grass and those four beds and natural
10 trees.

11 Q. Now, I want to quickly run through with you some of
12 the exhibits here and we'll start with Plaintiffs'
13 Exhibits -- excuse me, Halsell Exhibit Number 1.
14 Now, what is this; did you take this photograph?

15 A. Yes, sir, I did, I took that photograph.

16 Q. Do you remember about when?

17 A. I would say mid-January.

18 Q. Of?

19 A. It was prior to January 23rd but it was benched in
20 January of 2021, so about five or six weeks after I
21 bought the property and before I started any work on
22 cutting down trees leading up to my property.

23 Q. What area does this photograph show?

24 A. That's directly where the driveway is today. That
25 stake was put up by the county for the driveway, so

1 that stake is what tells me where that piece is and
2 I took the picture so I know where it is but that
3 stake shows where the driveway is.

4 Q. Oh, you're saying the county put it up. So you got
5 a permit, an encroachment permit, from the county to
6 put the driveway in?

7 A. My builder had.

8 Q. Okay, your builder did. Now, what we're looking at
9 there can you tell us what's in the landscape
10 easement and what's not there?

11 A. Okay. The landscape easement would start where that
12 stake is because that stake should be 12 and a half
13 feet from the back side of the curb and then the
14 landscape easement would go 25 feet beyond where
15 that stake is, where you see those small pine trees;
16 and like I said, there's no other bushes or shrubs
17 or plants that I disturbed. I took out the wild
18 pine trees.

19 Q. Now, in choosing the place to put the driveway in
20 did you avoid any beds or any other landscaping?

21 A. Yes, sir, I was mindful of their beds. I put my
22 driveway, it was probably, I don't have exact, but
23 it was just probably 20 or 25 feet, at least 20
24 feet, maybe 25 feet from the bed, the first bed, on
25 my side of the street.

1 Q. All right. But again, Exhibit 1 is showing the
2 scene prior to your putting in the driveway and
3 building?

4 A. Yes, sir.

5 Q. Now, looking at that, what we're looking at in
6 Exhibit 1, would that screen your building from view
7 on the road?

8 A. No, sir, no, sir.

9 Q. Okay. So whether that's there or not ---

10 A. Because there are ---

11 Q. --- you could see the building, right?

12 A. There are other trees to the left that weren't cut
13 down or touched whatsoever and you can still see
14 parts of my building, not the whole building, but
15 you can still see parts of my building through those
16 trees as they stand today.

17 Q. Now, turn to Exhibit 2 and what is that showing?

18 A. That would've been taken probably on January 23rd or
19 24th after I had started clearing, not just through
20 the easement but up towards my building where the
21 driveway was going to go based on conversations I'd
22 had with my builder.

23 Q. Now, there had been some trees removed there, right?

24 A. Yes, sir. Some friends and neighbors helped me out
25 and we went and we cut some trees down.

1 Q. All right. And that's basically showing the same
2 areas?

3 A. Yes, sir, that's just a before and after, it's the
4 same; it's the same and that's just a before and
5 after picture of the exact same area.

6 Q. And so your building would be sitting down on the
7 left side of that photograph?

8 A. Yeah, there's a bright spot on that page where you
9 can see the sun halfway up through that tree and my
10 building is below there. And actually this picture
11 illustrates what I was talking about a minute ago
12 with the trees that are still there and how you can
13 see through those trees right there.

14 Q. That's pretty thin.

15 A. Yes, sir.

16 Q. All right. Now, then just while we've got the
17 photographs out let's go onto Exhibit 3 and actually
18 3, 4, 5, 6 and 7, can you tell us what that shows?

19 A. Yeah. 3, 4, 5, 6 and 7 starting with picture number
20 3 is the center of the county road with the monument
21 sign to your back left looking up Mountain View
22 Pointe Drive.

23 Q. So this was basically looking from Doug Hollow?

24 A. Yeah, Doug Hollow is at your back, this is looking
25 up coming into the neighborhood. A little further

1 up the street is Exhibit 4. If you go to the end of
2 the picture in Exhibit 4 now you're looking at
3 Exhibit 5. If you go three-quarters to the end of
4 Exhibit 5 now you're standing where Exhibit 6 was
5 taken. All right, at this point you can see my
6 driveway is on the left right there. I believe it's
7 800 and something feet from Doug Hollow is where my
8 driveway starts. And then Exhibit Number 7 is
9 standing beyond my driveway looking into the
10 adjacent subdivision next door and you can see part
11 of the circle drive. You can't see the house next
12 door but you can see the circle drive of the house
13 in Exhibit 7.

14 Q. The end of the road in this picture here is
15 essentially where the subdivision starts; is that
16 right?

17 A. Yes, sir. So if you look at the very last trees on
18 the left there's a light pole there that you can't
19 see in this black and white picture and you may not
20 be able to see in the color picture, but if you look
21 at the trees as a reference point on the left-hand
22 side there's about 12, 13 feet of the curb, maybe a
23 little closer than that, that's where my property
24 line stops because it's the first lot that's
25 depicted on the chart everybody has looked at.

1 Q. All right, then let's now move on and continue
2 through. Exhibit 8 looks like it's showing a bed?

3 A. Yes, sir. So that's a picture, that's me standing
4 in my driveway and that's looking at the first
5 landscape bed that's on my side of the street and
6 you can see where I testified a minute ago, it's at
7 least 20 feet, it's like 20 to 25 feet from my
8 driveway to that bed and that's the first bed
9 maintained.

10 Q. All right. And Number 9?

11 A. It's just beyond that bed there's a small grass area
12 and then there's the second final bed that's on my
13 side of the street, for the 1125 feet on my side
14 there's two beds.

15 Q. All right, and then go to Number 10 now; what are we
16 looking at there?

17 A. Okay. Number 10 I'm standing on the Pipers' side
18 and I'm looking up toward my driveway and that's one
19 of the two landscaped beds on the Pipers' side of
20 the street is in Exhibit Number 10.

21 Q. What about 11?

22 A. 11 is the second and remaining landscaped bed that
23 the neighborhood has done on the Pipers' side.

24 Q. All right, well, let's stop there for a minute. And
25 have you undertaken to do any calculations

1 concerning the landscape easement and the portions
2 of it that have been actually, there's actually been
3 any landscaping activity in?

4 A. Yes, sir, I have.

5 Q. And looking at Exhibit 17, is that a compilation of
6 your computations?

7 A. Yes, sir, it is.

8 Q. All right. And you start from the top of that and
9 just take us through that and explain what you did
10 and what you found?

11 A. Okay. So on the side of the street that I own on
12 Mountain View Pointe Drive I own roughly 1125 feet
13 from Doug Hollow up to the first lot in the
14 neighborhood. So if you take that square footage
15 times 25 foot the width of the landscape easement is
16 28,125 square feet that the neighborhood has access
17 to maintain in the landscape easement. Bed number
18 one is approximately 42 foot by 15 foot and I can
19 tell you these weren't done by a surveyor as Mr.
20 Dorsey testified some yesterday, he did it with a
21 hard tape measure, I did the same thing, but I will
22 tell you to the best of my ability I tried to make
23 this as exact as possible and there may be two
24 inches more or two inches less here or there but
25 that's how I measured it. But the first bed is 42

1 by 15 feet, 630 square feet. 95 square feet is
2 within the easement and 535 square feet of that bed
3 or 85% of that bed is in the right-of-way. The
4 second bed on our side is 87 feet by 20 feet width.
5 It's 1740 square feet, 522 within the easement and
6 1218 feet or 70% of that bed is within the right-of-
7 way. On the Pipers' side those two beds we looked
8 I've calculated there's 1225 foot of road frontage
9 on their side, take that times 25 feet for the total
10 footprint of the landscape easement and it's 30,625
11 feet. Bed number 3 is 315 square feet, it's 100%
12 within the right-of-way. Bed number 4, just to
13 speed this up without reading every number, bed
14 number four is 584 square feet, 29 square feet is
15 within the easement and that 29 square feet within
16 the easement is about six inches of mulch that goes
17 around. As I said, these are mulch beds and there's
18 about six inches of mulch is what is not within the
19 right-of-way; so 95% of what the neighborhood
20 created and maintains today is within the right-of-
21 way. So if you look at the total footprint on the
22 side of the road that I own and the side of the road
23 that the Pipers own and you combine that together,
24 that's 58,750 square feet and the total area
25 landscaped by MVP in those flower beds is 3265

1 square feet or 6%, and 71% of the area that they
2 maintain in those beds is within the right-of-way,
3 and the total area of landscape within the landscape
4 easement is 646 square feet or 1%. So outside of
5 the grass that's on the side of the road they
6 maintain 1% of their landscape easement if you just
7 look at the facts.

8 Q. Now, let me ask you, as far as the driveway, your
9 driveway as it's installed, did you make a
10 determination of how much of the driveway itself,
11 that would be the concrete portion of the driveway,
12 how much of that is actually within the landscape
13 easement?

14 A. Yes, sir, it's roughly 30 feet by 25 feet of
15 concrete.

16 Q. So the 25 would be the width of the easement?

17 A. The easement.

18 Q. And it's approximately 30-foot width of the
19 driveway?

20 A. Yes, sir, and in some, it narrows some as it goes up
21 but stating the most would be 30 right there.

22 Q. All right. So I believe mathematically that comes
23 up to 750 square feet?

24 A. That sounds right.

25 Q. And that would be a little over 1% of the total

- 1 landscape easement?
- 2 A. Yes, sir.
- 3 Q. Now, I think between 2 and 3% of the easement area
- 4 just on your side of the road?
- 5 A. Yes, sir, on the total area of my side of the road,
- 6 the driveway is between 2 and 3%.
- 7 Q. So it's a quite small area of the landscape easement
- 8 that ---
- 9 A. Yes, sir.
- 10 Q. --- your driveway is on?
- 11 A. Correct.
- 12 Q. Now, there was testimony yesterday concerning an 80-
- 13 foot gash that your driveway created?
- 14 A. Yes, sir.
- 15 Q. If you would look at Halsell Exhibit 12.
- 16 A. Is that the picture?
- 17 Q. Yes.
- 18 A. Okay, yes, sir.
- 19 Q. All right. So would that be a picture perhaps of
- 20 what was described as an 80-foot gash in the ---
- 21 A. Yes, sir. I mean just for the record I measured to
- 22 75, so it's somewhere between 75 and 80. But I did
- 23 tape measure tree to tree and I came up with 75 but
- 24 if they say it's 80 it's 80.
- 25 Q. But the area we just referred to as far as the

1 concrete goes would be the area of concrete ---

2 A. Yes, sir.

3 Q. --- poured in the curb, ---

4 A. Yes, sir.

5 Q. --- a portion of it that's in the landscape

6 easement?

7 A. Yes, sir, I am standing in the landscape easement

8 when I took that picture.

9 Q. All right. And that's right where that tree is in

10 the ---

11 BY MR. BRANDT:

12 What number is that picture?

13 A. Exhibit 12.

14 Q. 12.

15 BY MR. BRANDT:

16 12.

17 A. So I'm standing in the landscape easement and that's

18 where one of the multiple evergreens that I

19 mentioned earlier are planted along with some

20 landscaping stones and there's also a crepe myrtle

21 tree planted and another small Asian bush that's in

22 the landscape easement on the opposite site that's

23 been mulched around that's within the landscape

24 easement.

25 Q. Are you referring to the ones just beyond the gate?

- 1 A. No, sir, I'm talking about the ones that are on the
2 other side of the driveway from where this picture
3 is taken.
- 4 Q. Okay. And are those, is the one in the foreground
5 one of the cryptomerias you were talking about?
- 6 A. Yes, sir, it is.
- 7 Q. And what about the ones over on the other side we're
8 looking at?
- 9 A. They are, also. There's a total of 14 trees that
10 were planted. There's 10 of those cryptomerias;
11 eight of them are on the side of where you're
12 looking here up towards my building. There's also a
13 deodar cedar and a redwood dawn tree planted, as
14 well as a maple tree is that tallest tree that you
15 see right there just to the left of the gate in the
16 picture before the tall pines.
- 17 Q. Okay. Now, on the right side of that building
18 beyond the gate I believe we see a building, the
19 outline of building; is that correct?
- 20 A. That is correct, yes, sir.
- 21 Q. Now, once these trees grow up it's going to pretty
22 well shield a good bit of that, will it not?
- 23 A. Yes, sir.
- 24 Q. Now, I noticed too that the building is set back
25 from the driveway entrance?

- 1 A. Yes, sir.
- 2 Q. Was that done intentionally?
- 3 A. It was, I set the building the same as I told the
4 neighborhood in my letter of November 2020, I'm
5 placing my building as far back away from Mountain
6 View Pointe over close to the property line on the
7 back of my property because I didn't want it to be
8 on display any more than they wanted to see it; I
9 wanted it be over there out of sight and that's why
10 I planted those trees also.
- 11 Q. But you didn't choose to put the driveway entrance
12 right square beside the building where you would
13 just look right straight down the driveway and be
14 looking at the side of the building?
- 15 A. No, sir. And in the spirit of preservation, having
16 the driveway some 800 feet off of Doug Hollow, I
17 mean that's the least amount of change for the first
18 800 feet when you drive into the neighborhood and
19 then you have my driveway and then 400 feet later
20 you have the first driveway of the house which for
21 the record is a few feet wider than my driveway is.
- 22 Q. All right. Now, having gone through all that let me
23 ask you this question. Do you believe that the
24 driveway as constructed is the most reasonable and
25 practical way for you to have access to your

1 property?

2 A. Absolutely not.

3 Q. And for the reasons you have stated do you believe
4 that access from Doug Hollow is not a reasonable
5 alternative if it were to be determined that you
6 cannot have access from Mountain View Pointe Drive
7 as the Plaintiffs are requesting?

8 A. No, I do not.

9 Q. Now, again before we leave this issue of the
10 alternate, potential alternate access from Doug
11 Hollow, there was some testimony by various other
12 witnesses concerning that route and you've already I
13 think to some degree gone into that; but do you
14 have any additional response to the testimony
15 yesterday concerning the availability or suitability
16 of a driveway coming up Doug Hollow?

17 A. No, sir. I mean I think the only thing I would add
18 is that, you know, screening was a theme that I
19 heard yesterday in the testimony where they, you
20 know, wanted to preserve the landscape for
21 screening, not just for my side but for Mr. Piper's
22 side of the street also and how, you know, taking
23 down those trees and destroying those trees took
24 away their opportunity to have screening there. But
25 my building has been up and erected since September

1 of 2021 and although when you drive into this
2 neighborhood and when you drive into the subdivision
3 you have to turn around and not watch where you're
4 going if you see my building on your way into the
5 neighborhood. You can definitely see the building
6 on the way out of the neighborhood on one part of
7 the street.

8 Q. You can see it from the driveway?

9 A. You can see the end of the building through the
10 driveway and you can't see all of it; you can just
11 see, you can see less than what you can see in this
12 picture right here because this picture is taken
13 some 25 feet or so off the street. When you're 25
14 feet or over in your car you can't see as much of
15 that. One gentleman testified yesterday that my
16 building has a white door on it. That door was
17 painted black in February of 2021, so eight months
18 ago that building was painted, that door was painted
19 black and his testimony was that there was a white
20 door and it bothers him. So I think either it
21 doesn't bother him that much or maybe these trees
22 have grown and already shielded some it because he
23 testified we have a white door on our building and
24 that's not been the case since February of 2021.

25 Q. Well, by the way, did you make any other

1 modifications to the building itself to try to
2 improve appearance as far as the portion that can be
3 seen?

4 A. Yes, sir, I have a porch, I have a 12-foot extended
5 porch that's got stonework, it's got five cedar
6 posts, it's got rock columns on the bases of those
7 posts, so it's got a stone fascia, but they can't,
8 the neighborhood can't see it, the neighbors can't
9 see it because it's shielded from where the building
10 is located. So I mean it's two-folded, it's to give
11 me privacy where I can sit on my porch and I won't
12 see anything, but yet they can't see a lot of that
13 until the wintertime happens and the leaves come off
14 the trees. When the leaves comes off the trees
15 they'll be able to see some of that.

16 Q. All right, let me ask you this. Has anyone ever
17 mistaken your building for a Walmart?

18 A. No, sir, but I have had several people outside the
19 neighborhood stop and ask if it was the amenity area
20 for the neighborhood and if it was, you know, part
21 of the neighborhood, if it's a clubhouse for the
22 neighborhood.

23 Q. But you've actually had people ask whether or think
24 it's part of the neighborhood?

25 A. Yes, sir, yes, sir.

1 Q. All right, I believe, Rod, that is all I have for
2 you. I'm going to hand you over to cross
3 examination.

4 BY THE COURT:

5 All right, I'm going to let Mr. McDuff ask him, if
6 he has any question of this witness first?

7 BY MR. MCDUFF:

8 I do not have any questions of Mr. Halsell.

9 BY THE COURT:

10 All right, hold on now, hold that thought and we're
11 going to take about a 10-minute break and be back at
12 11:45.

13 (OFF THE RECORD)

14 BY THE COURT:

15 All right, Mr. Halsell, of course, you're still
16 under oath and now we're going to, you can stay
17 seated, we're going to go cross examination by Mr.
18 Brandt.

19 BY MR. HALSELL:

20 Yes, sir.

21 CROSS EXAMINATION BY MR. BRANDT?

22 Q. Mr. Halsell, do you understand that this case is
23 about the legal rights of the respective party?

24 A. Yes, sir.

25 Q. Would you agree that whether or not two parties have

1 an issue and one wants one thing and one wants the
2 other, then it doesn't matter whether they refuse it
3 even if you make what you consider a reasonable
4 offer to settle the case; it doesn't have anything
5 to do with that, does it?

6 A. That both parties can agree to disagree is what
7 you're saying?

8 Q. Yes.

9 A. Okay, yes, sir.

10 Q. And in this case that's what we have?

11 A. Yes, sir.

12 Q. Have you ever read the CCRs of Mountain View Pointe
13 Subdivision?

14 A. I have read a fair amount; I will not say that I've
15 read from the very beginning to the very end. I
16 have read all the ones that would pertain to the
17 nonexclusive landscape easement and the sign
18 monument that's on my property; I have read those
19 countless time.

20 Q. Okay. You are very articulate and you express
21 yourself well; you probably should have been a
22 lawyer.

23 A. No. Well, I appreciate that; thank you, though.

24 Q. But anyway, you're not a lawyer?

25 BY THE COURT:

1 That might disqualify him.

2 BY MR. BRANDT:

3 Do what?

4 BY THE COURT:

5 It might disqualify him being a lawyer.

6 A. Yeah, this is my first and only time to ever go
7 through something like this and I certainly hope
8 it's the last.

9 Q. Truth and voracity is an issue. Well, anyway, you
10 don't have any legal training?

11 A. No, sir.

12 Q. So you asked lawyers for opinions as to what your
13 rights were?

14 A. Yes, sir.

15 Q. And what I glean that you took that, what Ann
16 Sullivan told you, and put your own interpretation
17 on what you could do with your property?

18 A. I took what she told me, yes, sir.

19 Q. Now, when she said access did she talk to you at all
20 about what kind of access, by foot or by an ATV?

21 A. We primarily talked about a driveway, sir.

22 Q. Okay. And so she said, yeah, you can go out there
23 and put in the driveway across it?

24 A. Yeah, sure, she did. She said I have the right to
25 put the driveway across it.

1 Q. And what did she tell you about the rights of my
2 client if you put that driveway there?

3 A. She said there are shared rights with the landscape
4 easement. She said the Covenants for this
5 neighborhood are not very well-written and that she
6 wanted to confer with her boss. It turned out that
7 he actually had input, Michael Smith I believe was
8 his name, and after talking with Michael Smith I
9 could tell there was a conflict with what she was
10 telling me. So that's why after the property was
11 closed I went and saw a different attorney and I
12 sought out Mr. Bill Hood.

13 Q. Okay. And I understand that you've been acting on
14 your attorney's advice?

15 A. Yes, sir.

16 Q. And certainly you did that?

17 A. And what I was able to read online as I testified
18 earlier about nonexclusive easements.

19 Q. Well, do you believe that what Ann Sullivan told
20 you, that the Property Owners Association could go
21 out there and tear up your driveway tomorrow and
22 plant trees?

23 A. She never said it the way you just mentioned it
24 right there.

25 Q. Is that a fair interpretation of the way I just said

1 it; is that a fair interpretation of what she told
2 you?

3 A. She made the comment that the neighborhood could
4 come along and plant a tree in the middle of your
5 driveway.

6 Q. Well, if you've got concrete then it's going to be
7 kind of hard to do that in the easement area now
8 unless they take up your driveway?

9 A. That would be correct.

10 Q. And so the POA had planted some trees, had
11 maintained the easement and had 25 feet off that
12 road right-of-way, don't they?

13 A. I don't believe that to be accurate, sir. You said
14 they planted the trees?

15 Q. Well, they let it grow up ---

16 A. I have no knowledge of them planting those trees.

17 Q. Well, natural vegetation can be landscape too if
18 it's part of the plan to leave the natural places
19 and then to put ornamental trees and shrubs, you
20 agree, and you can blend it together and that's all
21 landscape?

22 A. Okay.

23 Q. So if they wanted to leave the trees in their
24 landscaping easement as part of their landscape plan
25 do they have, in your mind do they have the right to

1 do that?

2 A. They don't have the right to block me from accessing
3 my property, no, sir. So if that means I have to
4 take some trees, some trees came down. But based on
5 everything that I was told and I've learned from
6 this situation they don't have ---

7 Q. But that is -- I'm not trying to cut you off, go
8 ahead.

9 A. They don't have the right to block me from accessing
10 my property as a landowner of that property.

11 Q. And nobody has ever tried to keep you off that
12 property by accessing it by foot?

13 A. I was told I was trespassing on February the 7th of
14 2021, yes, sir, by the board President.

15 Q. By not merely crossing it or being physically there
16 you accessing your property; it was about what you
17 were doing to destroy a big swatch of their
18 easement, isn't it?

19 A. After we were doing it he told me I was trespassing.

20 Q. Yeah. And that related not to you walking up
21 through there and getting to your property; it
22 merely had to do with the driveway, that was the
23 interference that they were objecting to, wasn't it?

24 A. Yes, sir.

25 Q. Now, as I have gleaned from your testimony you admit

1 that you knew that the easement was there?

2 A. Yes, sir.

3 Q. You knew the dimensions of the easement?

4 A. Yes, sir.

5 Q. You knew the -- and I mean and those not only were
6 dimensions like 25 by 25 or whatever, it gave the
7 dimension from Mountain View Pointe entranceway up
8 there when you get to the residential area all the
9 way down to Doug Hollow Road; there's no question
10 about that?

11 A. No, sir.

12 Q. And those dimensions and it was located in terms of
13 relationship to the road and your property?

14 A. Correct.

15 Q. For that full length. So we've got width and
16 location firmly established; it's not something
17 that's ambiguous?

18 A. No, sir.

19 Q. And when we get to the easement it's for a
20 particular purpose too, isn't it? There's a well-
21 defined purpose for that easement?

22 A. The shared easement, the nonexclusive easement, yes,
23 sir.

24 Q. Yeah. And what in your mind does the Property
25 Owners Association have a right to do within that

1 easement?

2 A. They can maintain it if they choose to do that.

3 Q. And plant other things and change landscaping?

4 A. Yes, sir.

5 Q. And ---

6 A. Well, as I've testified earlier what I did did not
7 disturb anything the neighborhood had done.

8 Q. Well, whether you disturbed anything that the
9 neighborhood planted or put in there, they still had
10 the right to choose what kind of vegetation was in
11 that right-of-way, correct?

12 A. Yes, sir.

13 Q. And nobody -- have you ever before this happened and
14 you disturbed it with your driveway, did you ever
15 have occasion to go down there and plant any, put in
16 any plants in the easement?

17 A. Before I bought the property, no.

18 Q. Yeah. And did anybody ever talk to you about -- you
19 realize when we talk about servient estate and
20 dominant estate, you understand those concepts now
21 throughout this litigation?

22 A. Go ahead and explain so I make sure I understand
23 your question very accurately.

24 Q. All right. A servient estate is you; a dominant
25 estate is the holder of the easements or easement.

1 A. Right.

2 Q. Has anybody ever told you that the servient estate
3 can't destroy the meaning and purpose and use of the
4 servient estate's right?

5 A. No, sir, they had told me just the reverse of that,
6 that the dominant cannot block me from accessing my
7 property.

8 Q. But you have access even without the driveway.
9 Nobody has ever tried to stop you from walking
10 around on the easement or ---

11 A. Well, just for the record I think we can probably
12 save ourselves some time, when we say "access" we
13 need to just to refer to it as a driveway because
14 I'm not going to just park my car on the street,
15 which they don't like by the way, and I very rarely
16 do it now I'm complete with construction. But I'm
17 not just going to park in the street and go walk
18 across the landscape easement and I've never seen
19 any of these men or women do that either, so just
20 access is a driveway.

21 Q. And the driveway, you've given good measurements,
22 close measurements and certainly I personally can't
23 disagree with those about the easement and the
24 square footage and all that stuff, but it's a fairly
25 large area?

- 1 A. The driveway?
- 2 Q. Yes. No, the easement area which you cleared for
- 3 that?
- 4 A. Oh, the 75 feet side to side?
- 5 Q. Yeah. And you cut it, that swatch across there was
- 6 75 feet?
- 7 A. Yes, sir.
- 8 Q. Within the easement area?
- 9 A. Yes, sir.
- 10 Q. And you got concrete poured on all of it or ---
- 11 A. No, sir, about a third of it.
- 12 Q. Yeah. But you cut the banks back within that
- 13 easement; you removed dirt?
- 14 A. Yes, sir.
- 15 Q. And there was kind of a berm, there was a little
- 16 hill and you cut that down and put the driveway in?
- 17 A. It came down the side and then it came through the
- 18 side right there, yes, sir.
- 19 Q. And did you ever talk to them, the property owners,
- 20 about you wanted to put a 25-foot wide driveway in
- 21 there?
- 22 A. Yes, sir.
- 23 Q. And initially you indicated that you were only going
- 24 to disturb 25 feet of their right-of-way or
- 25 easement?

1 A. This was prior to me meeting with my contractor or
2 any site work taking place and I was talking, you
3 know, in generalities we're going to have a 25-foot
4 driveway which is basically what I've done. But
5 when you construct just like when you do anything
6 you disturb stuff around it to make what you need
7 and to have proper water flow and so forth, runoff.

8 Q. And when you applied for your DOT permit to access
9 off of Doug Hollow you represented to them it would
10 be a 25-foot wide cut?

11 A. I believe that's accurate, yes, sir.

12 Q. And your complaint was, with us, is that if I have
13 to do what DOT told me that I could do, access my
14 property with vehicular traffic, and I had to build
15 that, it was just a difference in the land. That's
16 a big difference; what's the total length of your
17 driveway now?

18 A. I haven't measured. I would say from the street up
19 to my building probably 200, I'd say it's close to
20 200. Because the other way was going to be 802 so
21 that's the extra 600 I spoke to earlier. But the
22 majority, you do realize that once you go past the
23 number 36 or 37 out of that 200 feet, that's all on
24 my property so we're really not talking about that.
25 We're just talking about the landscape easement,

1 right?

2 Q. Yes, in comparison the landscape easement But what
3 I'm saying is you were representing to the property
4 owners that you would make a 25-foot driveway across
5 their easement?

6 A. Yes, sir.

7 Q. But when you did it without their permission you
8 made a cut of almost 75 feet?

9 A. 75 feet, yes, sir.

10 Q. So would you agree that what you have done has
11 effectively reduced their easement?

12 A. I would not.

13 Q. Why?

14 A. Because it's under 3% of the land that I own on
15 Mountain View Pointe Drive that I've used to put my
16 driveway in, so I've effectively used like 2.6% of
17 my land to put a driveway in.

18 Q. Well, whether there was one foot or 25 feet or 75
19 feet you reduced an easement by what, 50 feet? 75
20 feet you cut across and now it's impossible for the
21 property owners to go out there and do any kind of
22 landscaping within that area?

23 A. No, sir, it's not.

24 Q. On the sides they can go back and dress it up?

25 A. Yes, sir, that takes it back down to 25 feet and

1 I've actually landscaped the 25 feet on both sides
2 of the driveway with the trees that I testified to
3 earlier.

4 Q. Yes. But how long would it take those trees and
5 whatever you put out there to get back to a
6 reasonable comparison with what was there before?

7 A. I'll probably say five to seven years tops and it
8 will be back to screening more than what was there
9 before because in Exhibit 1 you can see well beyond
10 the landscape easement.

11 Q. Yes, sir. And do you think that their concern about
12 screening whatever goes on those lots outside the
13 easement is a valid consideration?

14 A. I think it is.

15 Q. And that up through there with that easement, what
16 I'm asking you is they had a right to initially go
17 in there and plan that easement and put vegetation
18 and landscape that 75 by 25 space, a 75 feet area?

19 A. But they could still do 50 of that 75-foot space
20 today if they chose to do that.

21 Q. But you have effectively then prevented them from
22 exercising their right or duty to maintain that
23 right-of-way with landscaping? You've taken that
24 away from them with your driveway, haven't you?

25 A. Only on the 25-foot piece.

1 Q. Okay, that's only there?

2 A. Of concrete, yes, sir.

3 Q. So by 25 feet you have shrunk their easement; you've
4 changed the dimensions on it, the effective use of
5 that for their sake?

6 A. I don't understand how it changed the dimensions; a
7 measurement is a measurement.

8 Q. Because they can't landscape concrete. So now they
9 have 25 feet less than they had before, correct?

10 A. Correct.

11 Q. And I understand you don't think that number is all
12 that much in comparison ---

13 A. Yeah, I don't feel that that's, I want my testimony
14 as that I don't feel that's unreasonable whatsoever,
15 I don't feel that's very unreasonable at all.

16 Q. But we're here to determine whether that is an
17 unreasonable or unlawful obstruction of the right-
18 of-way, correct?

19 A. Yes, sir.

20 Q. And again, the easement is specifically located by
21 length, width and purpose, it's clearly defined in
22 the CCR, which you haven't read the CCRs or their
23 purpose, have you?

24 A. Which part of the CCR specifically?

25 Q. The purpose section, there's one in there, yeah,

1 that states the purpose why Crescent is creating it?

2 A. If it's on the front page I know I read that one,
3 but as I stated before I specifically read the areas
4 numerous times on the nonexclusive easement and the
5 sign monument easement.

6 Q. Now, you'd admit too that you had access off Doug
7 Hollow but you're complaining, well, that's going to
8 be more expensive and you had a bunch of letters in
9 there that's in evidence where you're trying to
10 convince my client that your plan is better than
11 their plan?

12 A. One is really unreasonable and then you can also say
13 there's somewhat of a safety factor in there to a
14 degree coming down that hill.

15 Q. Well, it didn't keep the highway department from
16 issuing you an encroachment permit, did it?

17 A. No, sir, but now that, you know, we've come this far
18 in court I want to make sure the highway department
19 would understand that, you know, the embankment
20 there is probably 12 to 14 feet. I know testimony
21 yesterday said it was six feet; it's ever bit of
22 double six feet.

23 Q. But you put with your, I think with your easement or
24 the permit you provided them pictures, didn't you?

25 A. No, sir, that was all online. The pictures were for

1 court. I didn't do pictures for encroachment. I
2 don't recall doing any pictures.

3 Q. Well, it's in the encroachment permit ---

4 A. Well, the DOT permit. I think the pictures you may
5 see are pictures that the State put in there of the
6 highway going up and down. As I testified earlier,
7 she wanted to make sure you could see 300 and some
8 odd feet both directions. I think she went onto
9 Google Maps and she took those photos and she put
10 those photos with the permit I think.

11 (OFF RECORD DISCUSSION LOOKING FOR EXHIBITS)

12 Q. But you say that the highway department had pictures
13 in there, correct?

14 A. Yes, sir, this is what this is right here. See
15 where it's got Google on the right for Google Maps.
16 She never asked me for pictures. She went on
17 Google. Again, I'm getting repetitive but they
18 wanted to make sure that there was a straight line
19 of sight 300 and something feet and that there
20 wasn't another driveway within 20 or 25 feet.

21 Q. Yep. And there's a drawing in here evidently; did
22 you do that?

23 A. No, sir. See, this is printed on the bottom of the
24 paper, this is out of South Carolina DOT book from
25 2008.

- 1 Q. And how about these pictures, is that their
2 configurations, too?
- 3 A. Yes, sir.
- 4 Q. So all you had when you went down and gave it to
5 them ---
- 6 A. It was all online.
- 7 Q. All online?
- 8 A. Yes, sir.
- 9 Q. And it consisted of three pages?
- 10 A. Yes, sir.
- 11 Q. I think these first three pages is where these
12 drawings started?
- 13 A. No. Here's something, I did submit that.
- 14 Q. You submitted Parcel A?
- 15 A. Parcel A, yes, sir.
- 16 Q. Okay. And that's basically the plat?
- 17 A. Yeah, she wanted me to signify where the driveway
18 would come in for this permit so.
- 19 Q. Yeah. And that's ---
- 20 A. That's what those two are.
- 21 Q. You were going to put it here?
- 22 A. Yes, sir, that's the most realistic place to come in
23 off the embankment out there.
- 24 Q. This is the most convenient?
- 25 A. No, sir, I think if you talk to anybody doing any

1 kind of site or dirt work, you would disturb way
2 more dirt over here and have a much steeper
3 driveway.

4 Q. Well, I understand that it's more convenient to do
5 it over here than to do it over here in this corner
6 of your property ---

7 A. No, sir.

8 Q. --- because you want to preserve it?

9 A. No, sir, it has nothing to do with preserving it;
10 it's based on the topography. There's a 75-foot
11 elevation change from there to the parking lot of my
12 building.

13 Q. I don't doubt that, it's kind of hilly out there.

14 A. I know it was testified yesterday by somebody who's
15 built 40 to 50 houses that it's a flat piece of
16 ground and it's far from a flat piece of ground.

17 Q. Well, I disagree with you and, of course, the record
18 of the court will show it's my understanding what he
19 said was this levels out and the topography there is
20 the way it was when you bought the property?

21 A. Okay. We'll let the court records show.

22 Q. What you did, you knew when you bought the property
23 of the elevation down there?

24 A. I did, yes, sir.

25 Q. And you knew at that time that you didn't have

1 permission to access off of Mountain View Pointe
2 Drive?

3 A. I knew at that time I did not need permission to
4 access off of Mountain View Pointe Drive when I
5 bought the property.

6 Q. Well, you say you didn't need it?

7 A. Yes, sir, based on legal counsel and based on
8 everything I had read online as I testified earlier
9 that on a nonexclusive landscape easement the party
10 who benefits from that easement is not permitted to
11 exclude individuals, including the owner, from
12 accessing his or her property.

13 Q. Your rights, you knew that there was a problem and
14 you were concerned about accessing off of Doug
15 Hollow to start with, didn't you?

16 A. When you say problem accessing off Doug Hollow, what
17 are you referring to?

18 Q. I'm talking about needing permission to cross the
19 right-of-way you were concerned about all the way
20 through this thing?

21 A. Not on Doug Hollow, sir, but on Mountain View
22 Pointe, yes.

23 Q. Well, Mountain View Pointe. But you were never,
24 even when you bought the property, concerned about
25 accessing off of Doug Hollow?

1 A. Concerned about it, no; I was making sure I had
2 access in case -- Mr. Hood and I met a week after I
3 applied for the South Carolina DOT encroachment
4 permit, that was my fallback in case I found out
5 different information from Mr. Hood than I had heard
6 from the first attorney in being able to rightfully
7 access my property off of the public road.

8 Q. But when you closed on that property on the 2nd of
9 December ---

10 A. Yes, sir.

11 Q. --- you knew that the property owners, the majority
12 of the property owners in Mountain View Pointe,
13 objected to giving/granting you permission to put a
14 driveway across their easement; you knew that?

15 A. I knew they didn't like it, but I knew they didn't
16 have a legal right to stop me from doing it.

17 Q. And you knew and you went back to the Pipers and you
18 when you closed on the property you got a \$50,000
19 reduction because you thought you might have to do
20 it off of Doug Hollow, didn't you?

21 A. I'd say that's incorrect. The price did change by
22 \$50,000, but part of the reason for the price change
23 is supporting exactly what we're doing here today
24 because we thought this might go this far, so that's
25 where a good chunk of that change has gone.

1 Q. But you went ahead with it anyway. Why didn't you
2 just come to court and get a declaratory judgment
3 before you did all this to define your rights so
4 you'd know what you can do and cannot do?

5 A. Well, at that point in time I didn't know we were
6 going to go to court.

7 Q. Okay. But you bought -- when did you enter, when
8 did you decide, I'll put it this way, when did you
9 decide that you were going to buy the property and
10 try to push across the Mountain View Pointe
11 Subdivision landscape easement; when did you decide
12 it didn't matter whether you had their permission or
13 not you were going to do it?

14 A. Okay, well, you're kind of mixing two thoughts there
15 so let me answer both of them.

16 Q. Okay.

17 A. I decided to buy the property in October, that's
18 when Mr. Piper and I, we came up to a sales
19 agreement and I still had time to do my due
20 diligence, so that's -- because technically you say
21 I decided to buy it when I signed the sales
22 agreement, so that's when I made that decision. In
23 January, after having consultation from a second
24 attorney, from Mr. Hood, we decided to rough in the
25 driveway, so that's when I decided to do that. Now,

1 later through construction I was still hopeful, even
2 though I had reached out to Mr. Hood, I was still
3 hopeful and optimistic that something would be
4 worked out with the neighborhood where we could all
5 get along for many, many years because I'm not going
6 anywhere and they're not going anywhere and we might
7 as well get along and be good neighbors. However,
8 as litigation continued and the neighborhood didn't
9 want to support anything going on on that property,
10 it was very apparent that I'm just going to have to
11 take the legal path and I went based on my legal
12 feedback and decided to finish out the driveway.

13 Q. Well, if the POA came out there and dug up your
14 concrete today and planted plants would you be
15 happy?

16 A. No, sir.

17 Q. Do you think they have a right to do that?

18 A. I'll just state that they haven't done anything on
19 that property for 20 years and it is a shared, it is
20 a shared piece of property and I've acknowledged
21 that all the way along. However, less than 3% of my
22 property that I'm utilizing through there is not an
23 unrealistic expectation for somebody to access their
24 property.

25 Q. But you've taken out now 75 feet of the growth that

1 was in that right-of-way, haven't you, landscaping
2 and plants you've taken out? Now, you've put them
3 back, some of them back, and that you can still go
4 in there and they can replant on each side of your
5 driveway?

6 A. Yeah, I would be very open to any conversation the
7 neighborhood wanted to have, if they wanted to come
8 and plant something back or even ask me to do
9 something different. But they have not reached out
10 to me one time in well over a year to ask me to do
11 something one way or the other regarding
12 landscaping.

13 Q. If the court rules against you in this case, do you
14 agree you will have to remove your driveway and
15 restore the area to a landscape ---

16 A. Yes, sir, my attorney and I had that conversation
17 before I finished the driveway out that, you know,
18 if for some reason, you know, something else was
19 discovered that we haven't been able to discover yet
20 and if we have to restore it, then I would restore
21 it.

22 Q. Okay. What do you think that would cost you if you
23 had to do that?

24 A. Probably between 20 and \$40,000. I haven't --
25 that's, you know, I don't know, I haven't gotten

1 bids or anything from folks.

2 Q. I understand.

3 A. But if I were to come off Doug Hollow I'll have
4 plenty of free dirt.

5 Q. But the biggest cost would be removing the concrete,
6 wouldn't it, the biggest singular item?

7 A. But it wouldn't be, it's not a big piece of
8 concrete.

9 Q. So I understand that, but you've got to move that
10 and then you've got to put the topsoil back in there
11 and then prepare it ---

12 A. Yeah, they could ---

13 Q. --- for growth to do that?

14 A. It's a small job compared to a lot of landscapers.

15 Q. I think you stated that you spent on constructing
16 the driveway \$43,000?

17 A. Yes, sir.

18 Q. How much did the concrete portion cost you?

19 A. The concrete paving was 20,829 and the concrete
20 curbing was \$4200, so if you add those two together
21 that would be the concrete.

22 Q. And to restore it, all that from the right-of-way
23 through to the portion down at the street, again
24 it's \$2,200 to restore that part but that's highway
25 right-of-way on the curb?

1 A. Yes, sir.

2 Q. Okay. How much do you think it would cost to
3 rebuild that berm?

4 A. Not much. It wasn't that the berm that's -- it
5 wasn't that large of a berm.

6 Q. How much do you think that revegetating the area
7 within the right-of-way would cost, re-landscaping?

8 A. Between 10 and \$15,000 as far as the trees go.

9 Q. How many trees were removed from the right-of-way
10 area?

11 A. Zero.

12 Q. You didn't have any pine trees within the easement
13 area?

14 A. That were within -- you asked how many were in the
15 right-of-way and I answered that question.

16 Q. All right. How about within the easement?

17 A. I never counted them. They looked like easily, you
18 know, 35 or 40, 45. Some of these pine trees were,
19 you know, maybe four or five inches in diameter,
20 some are, you know, two or three inches in diameter
21 and if you look at Exhibits 1 and 2 you can see
22 that.

23 Q. How tall?

24 A. Six or eight feet up to 20, 25 feet maybe. Some of
25 these taller ones in these pictures are actually not

1 on the landscape easement, they're in the background
2 that's actually on my property.

3 Q. Well, I realize that, but's it's kind of hard to
4 screen them out when we took the pictures. But
5 would you agree that what we're looking at in the
6 pictures would be representative of, if we could put
7 it back exactly like it was or almost like it was,
8 nothing is perfect, but if you had to put that back
9 that's representative of the kind of trees and the
10 size of the trees though?

11 A. If I had to put it back, I'd put it back better than
12 it was.

13 Q. I understand. But we're talking about trying to
14 replicate as best we can what was already there
15 before they were cut?

16 A. Yes, sir. As I said before, probably somewhere
17 between 20 and \$40,000 would take care of all of it.

18 Q. And you say the largest trees removed, the diameter
19 of the largest trees removed was five inches?

20 A. I mean on average most of them were about this big
21 around. I mean a lot of them were smaller than
22 that. I used ---

23 Q. Were any larger?

24 A. No, sir, we didn't have any large mature real
25 hardwoods; these were all wild pine that had been

1 growing up.

2 Q. When you said five inches in diameter you said on
3 average, so some were bigger, some were less?

4 A. The average of the largest tree was five inches, so
5 I mean you can actually -- you know, most of them
6 were not, they were not mature and we can see by the
7 pictures, they weren't mature pines. Basically if
8 you look at Exhibit Number 2 to the left, you see
9 those tall skinny things right there? That's why
10 I'm saying those are maybe five inches at the base
11 but as soon as you get a couple of feet off the
12 ground, you know, it's three or four inches; it's a
13 pine tree.

14 Q. But you said it's an average, so we had some larger
15 and some smaller?

16 A. On average the largest pine trees at the base were
17 probably five inches or so.

18 Q. Okay. That's just ---

19 A. The larger ones, yes, sir, the large ones. Excuse
20 me, I didn't make that clear enough.

21 Q. Did you ever consider selling any of your property
22 for other people putting other buildings in there?

23 A. No, sir, not at this time I haven't.

24 Q. Did you ever have a conversation with Dorsey, Mr.
25 Dorsey, about limiting your property to just one; in

1 essence, not selling it, you keeping it, did you

2 ever have a conversation with him about that?

3 A. I did.

4 Q. Did you tell him that you would not agree not to

5 sell the property and have others come in there and

6 put buildings in there because that would devalue

7 your property, didn't you?

8 A. Say that again because I think you're ---

9 Q. Well, tell us about the conversation.

10 A. I've had multiple conversations with him, so let me

11 ---

12 Q. Well, what I'm talking about is the one where you

13 talked to him and you said no, you do not agree to

14 not put something else in there?

15 A. Well, early on before a lawsuit was filed what I had

16 shared with the board, which would be Mr. Dorsey

17 also, was that my wife and I would agree to one

18 driveway.

19 Q. One driveway?

20 A. Yes, sir, but that was prior to the lawsuit, that we

21 would be willing to, you know, just have one

22 driveway through our property. Subsequent, we've

23 had other conversations. If you go back to April

24 this year, on the afternoon of April the 7th of this

25 year Mr. Dorsey and I had a telephone conversation

1 and he was telling me that, and here again a second
2 MVP President told me, Rod, don't have a problem
3 with your driveway, we have a concern with what's
4 going to happen across the street. Mr. Dorsey told
5 me if you go talk to the Pipers and you get the
6 Pipers to agree to one driveway, then I think we can
7 sit down and work this out. Because I told him we
8 were all retired successful business people, that we
9 should be able to work this out without having to go
10 to court and do what we're doing today. He was open
11 to that dialogue and in that conversation I don't
12 recall having, I don't recall at that time telling
13 him I would just do one driveway. Now, in June of
14 this year and he and Ms. McCaw approached my wife
15 and I in a conversation, a meeting we had to try to
16 avoid being here today, and they said they would be
17 okay with one driveway but if we ever put another
18 building on that property, I'm trying to answer your
19 question about how do we get to another building on
20 the property, if we ever put another vehicle on that
21 property you have to access it from this driveway
22 and you can't have another one off MVP.

23 Q. And you told him that would ---

24 A. And I wasn't, I wasn't susceptible to it at that
25 time because the way the topography is there if I

1 were, if I were to ever want to sell or decide to
2 build my permanent home or something or, you know,
3 somebody else owned the property down there, I
4 wouldn't want somebody else, like you wouldn't want
5 somebody else coming through your own driveway to go
6 to their house every day.

7 Q. Well, if you split off, you've got room there that
8 you could sell a couple of lots off big enough for
9 people to build on?

10 A. Yes, sir, but they would -- at that point in time
11 when I was trying to, you know, talk with the
12 neighborhood and come to an agreement to avoid the
13 tit-for-tat that was discussed earlier we were in
14 agreement just to have one neighborhood or one
15 driveway off of Mountain View.

16 Q. Well, you would not agree to merely keep that
17 property if you sold at all to restrict it to your
18 one driveway?

19 A. No, I wouldn't want -- if I sold that two to two and
20 half acres on the lower part of my property?

21 Q. Yes, sir.

22 A. Well, this is all hypothetical, but I doubt I'm ever
23 going to sell that. We can't predict the future,
24 but like the 300 feet or so that I have between me
25 and the neighborhood, I like having that buffer to

1 Doug Hollow, too. So I don't want neighbors right
2 there on top of me. Do you follow what I'm saying?
3 So it's not likely that I'm going to sell that and
4 divide that lot up and have other people right
5 there.

6 Q. Didn't you tell him that if I agree to not sell it
7 or one driveway only, if you restricted it to one
8 driveway only and you sold to someone else, it would
9 devalue your property?

10 A. If somebody had to come off Doug Hollow because
11 again you or me or most people in here wouldn't want
12 somebody else driving through your driveway on your
13 property to get to their house, so if they had to
14 come up Doug Hollow it would devalue the property if
15 somebody is going to have to, they're going to lose
16 more land because the footprint shrinks when you go
17 up a 12 to 14-foot embankment.

18 Q. Did you ever tell Mr. Dorsey that if you decided to
19 sell that property that you could take another
20 driveway across the monument area?

21 A. No, sir. He and I had a conversation standing
22 behind the monument sign looking down at Doug Hollow
23 later in the month when I bought the property
24 because we were talking about the irrigation and the
25 power controls that are on my property that were

1 beyond on the easement yesterday, and I told him the
2 driveway would have to come up here and it would cut
3 into the back of it and his words were, you know, he
4 told me, you can't cut into the back side of the
5 sign easement and I said well, the driveway would
6 start right here which is like back behind the 75
7 foot of the drive easement when he and I were both
8 standing there. And I'm glad you brought up the
9 sign easement too because in June when I was at Ms.
10 Roberta's house talking to she and Jim I offered to
11 give the neighborhood the land back where the
12 monument sign is. Because for the record I don't, I
13 don't think it's right for me to own the land that
14 the neighborhood sign sits on; it does nothing for
15 me. It's just part of the, I think the developer
16 screwed this whole thing up from the very beginning
17 so ---

18 Q. Now, wait a minute, which sign are you talking
19 about?

20 A. Their sign, the monument sign, the nice monument
21 sign that is ---

22 Q. That says Mountain View Pointe?

23 A. Yes, sir, I own the dirt and I pay the taxes on that
24 land.

25 Q. Subject to an easement?

1 A. And that doesn't, that doesn't make sense. So I
2 offered to give them that land back. Ms. Roberta
3 laughed and said why would we want that because then
4 we're going to have to pay taxes on it. But I just
5 want the court to understand and know that was
6 probably the last time I had a gesture towards the
7 board of MVP to try to do something to give it back
8 to them and they, you know, kind of laughed at me
9 and that was it.

10 Q. Well, what I'm saying is where that monument sign is
11 you recognize that Mountain View Pointe POA has an
12 easement there?

13 A. Yes, sir, I always have.

14 Q. You own, you own the property that had an easement?

15 A. Yes, sir.

16 Q. But their electrical system that feeds the lights or
17 whatever is located in that box located on your
18 property?

19 A. Yes, sir.

20 Q. Okay. How far off the easement is that?

21 A. I would say 15, 20, 25 feet; I haven't measured.
22 It's not just a foot or two. I mean and Mr. Mike
23 and Mr. Jim are the ones that pointed it out to me
24 and they acknowledged that, hey, this is well beyond
25 the easement, this is on, you know, outside the

1 easement on your property over there.

2 Q. Okay. Now, I think on April the 7th was the date
3 that we had the summary judgment hearing?

4 A. Yes, sir.

5 Q. And there was some conversations after that?

6 A. Yes, sir.

7 Q. But then you had already in December of what, 2000 -
8 --

9 A. 2020 when I bought the property?

10 Q. In 2020 when you closed the deal, then you already
11 had had your building ordered, you had it scheduled
12 for delivery and you had not bought the property at
13 that time; you had signed a contract but you never
14 had closed on it?

15 A. That's all inaccurate, sir. When I bought the
16 property I had not ordered the building. I closed
17 on the property on December the 2nd, 2020 which I
18 stated earlier. My building was ordered in early
19 January of 2021. I signed a contract in February of
20 2021 about six weeks after closing with my general
21 contractor. He took me for my word and ordered the
22 building and started the work before I had signed
23 the contract with him.

24 Q. The certification that you signed at your attorney's
25 office when you closed it, you assured him that you

1 had basically read all the easements and recognized
2 the easements basically, didn't you?

3 A. Yes, sir.

4 Q. Okay. Nothing further.

5 BY THE COURT:

6 Any redirect?

7 BY MR. HOOD:

8 I just have one question, Your Honor.

9 BY THE COURT:

10 Just one?

11 BY MR. HOOD:

12 Just one I promise.

13 BY THE COURT:

14 I'm going to hold you to your count.

15 REDIRECT EXAMINATION BY MR. HOOD:

16 Q. Rod, do you believe that you as the owner of the
17 property have a right to landscape within the
18 landscape easement that is specifically described in
19 a nonexclusive landscape easement?

20 A. I believe I do.

21 Q. All right, thank you. Nothing further.

22 BY THE COURT:

23 All right. Mr. Halsell, you can step down.

24 BY MR. HALSELL:

25 Thank you, sir.