THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ... Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the .....Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F.

Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, ... Third-Party Defendants.

INITIAL BRIEF OF APPELLANTS

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Dated: August 12, 2013

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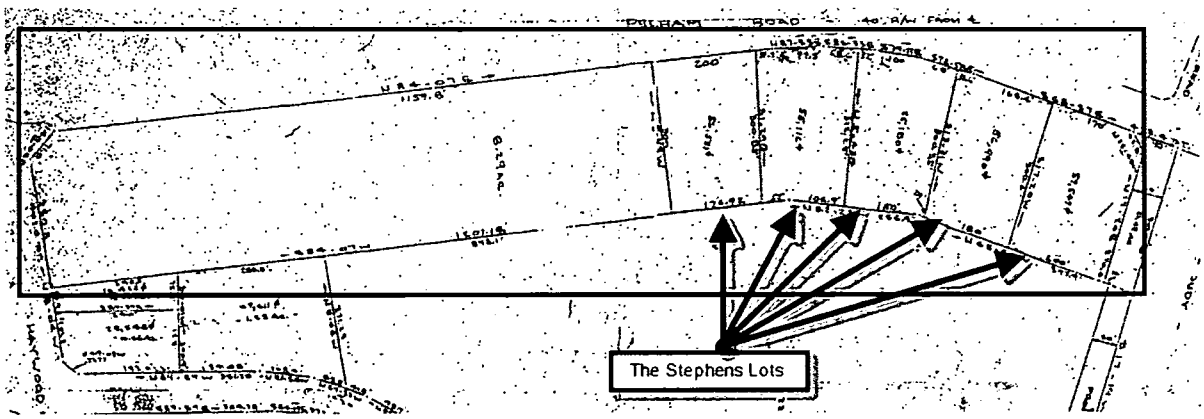
STATEMENT OF ISSUE ON APPEAL

Whether the five "Stephens Lots" at issue were, as required by the applicable restrictions and protective covenants, "lots into which the property [at issue] shall have been developed" and therefore entitled to vote on the amendment to those restrictions and protective covenants.

STATEMENT OF THE CASE

This lawsuit concerns whether an amendment to the restrictions and protective covenants ("R&Cs") for a piece of property in Greenville County was effectively adopted. That question turns on whether five "lots" within the property were in fact lots and thus entitled to vote on the amendment.

The property at issue (the "Property") is across Pelham Road from Watson's Orchard subdivision. It is just off Interstate 385 as one enters Greenville. The Property and the "lots" (referred to herein as the "Stephens Lots") can be seen within the large box in the following excerpt from the December 3, 1980 "Survey for Richard Watson":



(Def. Ex. 1 at D7 [Rec.[1] ___].)

The prior R&Cs (the "1981 R&Cs") date from 1981 and are set forth a document known as "Declaration of Restrictions and Protective Covenants." (*Id.* at

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[1] References to "Rec." are to the pages in the Record on Appeal.

D11-19 [Rec. ___].) In general, the 1981 R&Cs restrict the Property to residential development on lots in excess of 55,000 square feet.

The 1981 R&Cs specifically provided that they could be amended as of January 1, 2010, "by vote of a majority of the then owners of the **lots into which the property described above** [the Property along with another strip along Haywood Road owned by Watson's Orchard Property Owners Association, Inc.] **shall have been developed** and in Watson's Orchard Subdivision." (*Id.* at D11, emphasis added [Rec. ___].)

In the months prior to that date, Watson's Orchard Property Owners Association, Inc. ("WOPOA"), sought to obtain a majority vote in favor of the proposed amended R&Cs. After obtaining twenty-nine of fifty-four possible votes and believing it had satisfied the requirement of the 1981 R&Cs, WOPOA filed the amended R&Cs in the Greenville County Register of Deeds Office on November 9, 2009. (*Id.* at D21-D44 [Rec. ___].) A slightly corrected version was filed on December 21, 2009. (*Id.* at D46-D57 [Rec. ___].) Generally speaking, the 2010 R&Cs allow low-density development of the Property such as two-story doctors' offices. (*Id.* at D22-D23 [Rec. ___].)

The petitioners filed suit on September 8, 2009, seeking a declaratory judgment that the 2010 R&Cs had not been validly adopted. (Rec. ___.) An amended

complaint was filed on September 10, 2009. (Rec. ___.) Defendant WOPOA[2] answered on October 12, 2009 (Rec. ___.) WOPOA and Appellants filed a joint Answer and Counterclaim on November 11, 2009. (Rec. ___.) In the counterclaim, they sought a declaratory judgment that the 2010 R&Cs had been validly adopted. On June 27, 2011, Appellants and WOPOA filed an amended Answer, Counterclaim, and Third-Party Claim which brought in the property owners in Watson's Orchard subdivision as third-party defendants. (Rec. ___.) None of the third-party defendants answered and judgment by default was entered against them on February 22, 2012. (Rec. ___).

Defendants and Plaintiffs filed cross motions for summary judgment on April 27, 2012 (Rec. ___) and June 8, 2012 (Rec. _____) respectively. The court denied the motions on July 9, 2012, holding that "genuine issues of material fact exist." (Rec. ___.)

The matter was tried on September 4-5, 2012, and post-trial memoranda were submitted on September 14 by Defendants (Rec. ___) and Plaintiffs (Rec. ___). By Order dated October 19, 2012, the court held that the property referred to here as the Stephens Lots "has not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants." Accordingly, it held, the

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[2] WOPOA is not a party to the appeal.

amendment to the 1981 R&Cs was of no effect. (Order dated October 19, 2012 at 9, ¶5-6 [Rec. ___].) Appellants' motion for reconsideration was denied on January 28, 2013. (Rec. ___.) The Notice of Appeal was filed on February 25, 2013. (Rec. ___.) An amended notice, which modified the complex caption at the clerk's direction, was filed on April 1, 2013. (Rec. ___.)[3]

[3] The amended notice was itself incorrect in that it identified the third-party defendants who were in default below as respondents. At the direction of the Clerk's office, they are now identified as third-party defendants, not as respondents.

SUMMARY OF ARGUMENT

Under South Carolina law, the "settled rule" is that "restrictions as to the use of real estate be strictly constructed and all doubts be resolved in favor of free use of the property . . . ." *South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001), citing *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998). Further, "where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property." *Id.*

Applying this "settled rule" (and even without it), it is clear that the Stephens Lots were entitled to vote on the amendments to the 1981 R&Cs at issue. First, the documentary evidence is overwhelming that the Stephens Lots were in fact lots. For example, the original offer was to purchase five lots, and the acceptance was for five lots. The circuit court in a declaratory judgment action in 1980 approved the sale of the five lots. The 1981 deed issued pursuant to that order was for five lots. The plat referenced in the deed shows the five lots. The metes and bounds description in the deed gives the interior dimensions for the five lots. The tax map shows the five lots. The title opinion for the 1981 transaction was for the purchase of five lots. The index in the RMC office identified the transaction as being for five lots.

Second, the testimony confirmed that the Stephens Lots were in fact lots. Mr. Patrick Grayson, a long-time real estate attorney in Greenville, prepared the 1981 deed and testified that it was for the transfer of five lots. Mr. William Kehl, another

long-time corporate and real estate attorney in Greenville, provided a title opinion to the buyer in that transaction to the effect that the buyer was receiving good title to five lots. And Mr. Michael Stephens, the son of the purchaser (the purchaser is now deceased), confirmed that his father had offered to sell him one of the five lots.

Third, the only expert testimony in the trial confirmed that the Stephens Lots were lots. Mr. Coleman Shouse, former Executive Director of the Greenville County Planning Commission testified to this effect. Mr. Larry Estridge, another long-time real estate attorney in Greenville, testified to the same effect.

Fourth, the only argument made by the Respondents—that the five lots are not lots because the plat was not recorded—is without merit. Neither South Carolina law nor the Greenville County Subdivision Regulations make transfers pursuant to unrecorded plats unlawful or hold that such transfers are void. To the contrary, each implicitly recognizes such transfers. South Carolina case law also recognizes transfers using unrecorded plats. Cases from other jurisdictions do as well.

Fifth, the text of the 1981 R&Cs itself indicates (a) that "lots" "into which the property ... shall have been developed" are entitled to vote on the amendments (*id.* at D11, emphasis added [Rec. ___]), and (b) that a "lot" is simply a piece "cut" from the property. (*Id.* at D12, emphasis added [Rec. ___].) The documentary and testimony evidence reference above shows that the Stephens Lots easily meet these requirements.

And sixth, and perhaps most powerful, the drafter of the 1981 R&Cs, Mr. Grayson, testified directly that it was his intention that the Stephens Lots be entitled to votes under the language at issue. There was no contrary evidence as to the intent behind the document.

Based on all of the foregoing, there can be no doubt that the Stephens Lots were lots and entitled to vote on the amendments to the 1981 R&Cs, and thus that the amendment passed. For good measure, this was the opinion of Mr. Estridge.

ARGUMENT

I. THE "SETTLED RULE" IS THAT RESTRICTIONS ON REAL ESTATE ARE TO BE STRICTLY CONSTRUED AND ALL DOUBTS RESOLVED IN FAVOR OF FREE USE OF PROPERTY

In *South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001), the Supreme Court set forth the rules for interpreting restrictive covenants in this state:

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. **It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property**, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that **where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property**. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and **all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property**.

345 S.C. at 622, 550 S.E.2d at 302, emphasis added, citing *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998) (court refused to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes).

Hence, the "settled rule" is that "restrictions as to the use of real estate be strictly constructed and all doubts be resolved in favor of free use of the property."

And further, "where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property."

Applying these rules (and even without them), there is little doubt that the Stephens Lots were entitled to vote under the 1981 R&Cs on the proposed amendment.

II. THE EVIDENCE WAS OVERWHELMING THAT THE STEPHENS LOTS WERE IN FACT LOTS AND WERE VIEWED AS SUCH

A. The Documentary Evidence Showed The Stephens Lots Were Lots

1. THE STEPHENS OFFER TO BUY FIVE LOTS (1980)

James Stephens, through Pelham Properties, Inc., made a formal, written offer (the "Stephens Offer") on October 6, 1980, to purchase the five **lots** at issue "for a purchase price of Twenty One Thousand One Hundred and 00/100 ($21,100) Dollars **per lot**." (Def. Ex. 1 at D59, emphasis added [Rec. ___].) The **lots** are described in the offer as "five (5) lots as are more fully described in Exhibit 'A' annexed hereto." Exhibit A to the offer describes the property being purchased as:

> All those certain pieces, parcels or lots of land, situate, lying and being in the State of South Carolina, County of Greenville, being **identified as five (5) lots** fronting on Pelham Road, to be more fully shown on a new survey, and being described in the aggregate according to a survey entitled "Survey for Richard Watson", dated June 27, 1980, revised August 19, 1908, and August 27, 1980, prepared by Carolina Surveying Company, with the following metes and bounds, to-wit: . . . .

(*Id.* at D60, emphasis added [Rec. ___].)

2. THE ACCEPTANCE OF THE STEPHENS OFFER TO BUY FIVE LOTS (1980)

Mr. Wilkins Norwood wrote a memorandum to the property owners in Watson's Orchard describing the offer and recommending acceptance. He wrote in pertinent part:

> J. B. Stephens, a homeowner whose lot fronts on Pelham Road, does not want to participate in the corporation [WOPOA]. Instead, he is willing to buy **the five lots** most directly across from his home. He has made an offer to purchase **five minimum lots** (200 feet frontage and 55,000 sq. ft.) in front of his house for a purchase price of $105,500.00 and give up his interest in the corporation. This is a price of $21,100.00 **per lot**.
>
> When you consider that the value of a share of stock in Watson's Orchard Property Owners Association, Inc. should be worth a minimum of $7,000.00, the corporation will net around $22,500.00 per lot.
>
> If the **lots** were sold in the open market for $25,000.00 through a realtor, only $22,500.00 would be netted after commission. It is our opinion that this is a fair price for this purchase.
>
> Therefore, your committee believes the offer is fair and recommends that it be accepted.

(Def. Ex. 1 at D62, emphasis added [Rec. ___].) WOPOA accepted the offer. (*Id.* at D170-93 [Rec. ___], hereinafter the "WOPOA Acceptance.") (*See generally* testimony of Patrick Grayson, Tr. 104-05 [Rec. ___].)

3. CIRCUIT COURT APPROVAL OF THE SALE OF THE FIVE LOTS TO STEPHENS (1980)

On December 9, 1980, Judge Frank P. McGowan, Jr., issued a detailed order (Def. Ex. 1 at D75-D249 [Rec. ____]) in the declaratory judgment action (*id.* at D64-73 [Rec. ___]) brought by Mr. Grayson on behalf of Lincoln of South Carolina, Inc.

("Lincoln"). It was Lincoln which was seeking the change in the prior restrictions and covenants. The action was filed before Judge McGowan seeking approval of the 1981 R&Cs and the process by which they had been adopted. (Grayson Testimony, Tr. 81-90 [Rec. ___].) One of the conditions of the release of the covenants that was at issue in Judge McGowan's Order was the transfer of the five lots at issue to Mr. Stephens. (Grayson Testimony, Tr. 152:23-153:2 [Rec. ___].) Accordingly, Judge McGowan specifically considered and approved the planned sale of the five **lots** to Pelham Properties by WOPOA. His order read in pertinent part:

> . . . Based upon the entire record, I hereby make the following findings and conclusions, with resulting declarations and orders thereon: . . .
>
> (18) That more than a majority of the defendants as charter member and pending stockholders in Watson's Orchard Property Owners Association, Inc., are willing to sell **five (5) lots** as described in the deed shown as Exhibit 14 [Def. Ex. 1 at D251 (Rec.)], for the consideration of One Hundred Five Thousand Five Hundred and 00/100 ($105,500.00) Dollars, pursuant to the Offer shown as Exhibit 15 [Def. Ex. 1 at D59 (Rec. ___)], and that the President has authority to execute said deed within the usual and regular course of corporate business; that documentary deed stamps be paid from said consideration. . . .
>
> IT IS FURTHER ORDERED that the officer of Watson's Orchard Property Owners Association, Inc. be authorized to execute and deliver a deed conveying good fee simple title to the property shown on Exhibit 14 [*Id.* at D251 (Rec. ___)], upon receipt of the consideration of One Hundred Five Thousand Five Hundred and 00/100 ($105,500.00) Dollars, less documentary deed stamps.

(Def. Ex. 1 at D80 & D82, emphasis added [Rec. ___].) (See generally testimony of Patrick Grayson, Tr. 102-104 [Rec. ___].)

4. THE FIRST DEED REFERENCES FIVE LOTS (1981)

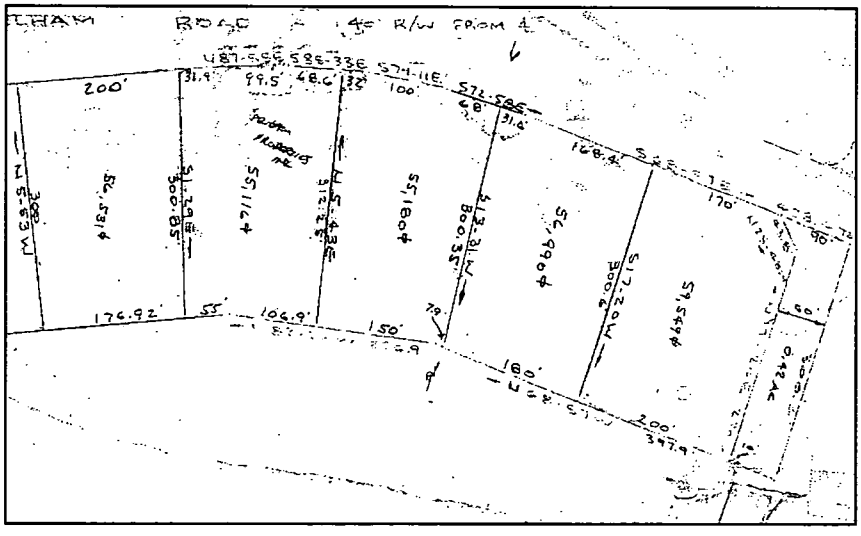
Upon receiving Judge McGowan's approval, the property along Pelham Road was transferred from Lincoln to WOPOA. (Def. Ex. 1 at D116 [Rec. ___].) Then, on January 15, 1981, as per the Stephens Offer and the WOPOA Acceptance, **five lots** out of that property were transferred from WOPOA to Pelham Properties [Mr. Stephens' entity]. (*Id.* at 251-52 [Rec. ___].) The deed (the "1981 Deed") describes the conveyance as:

> All the certain piece, parcel or tract of land situate, lying and being in the County of Greenville, State of South Carolina, **containing five (5) lots as is more fully shown on a plat entitled "Survey for Richard Watson"**, prepared by Carolina Surveying Company, dated June 27, 1980, revised August 19, 1980, revised August 27, 1980, revised September 8, 1980, and revised December 1, 2, and 3, 1980 . . . .
>
> Subject however, to a sewer easement across the rear twenty-five (25') feet **of the above lots** for the purpose of installation and maintenance of a sewer line . . .

(*Id.* at D-251, emphasis added [Rec. ___]). (See generally testimony of Patrick Grayson, Tr. 99-101.)

5. THE PLAT SHOWING THE FIVE LOTS (1980)

The plat (the "Plat") referenced in the 1981 Deed specifically identifies the five lots. (Def. Ex. 2 [Photographed/Reduced Copy at Rec. ___].) The following excerpt is the relevant portion of the Plat:



(Excerpted from Def. Ex. 1 at D6 [Rec. ___].)

6. THE METES AND BOUNDS DESCRIPTION IN THE FIRST DEED DESCRIBES FIVE LOTS (1981)

In addition to expressly referencing the five lots and the Plat, the 1981 Deed sets forth metes and bounds in a manner and level of detail that would have been unnecessary if it was other than to identify separate lots. To follow this point, it is necessary to carefully compare the metes and bounds in the 1981 Deed to those on the Plat, which was done at trial in the testimony of Mr. Coleman Shouse, the former Executive Director of the Greenville County Planning Commission.

In this exercise, it becomes almost immediately apparent that the deed's metes and bounds used "interior" dimensions for the lots and not the longer "external" dimensions. The "calls" stopped even when there was no change in direction or bearing. It made no sense to stop in such instances except to identify the cross-lines for the lots. From Mr. Shouse's testimony:

Q. If they were simply doing exterior dimensions, would they not use 397.9 to get to the next turn?
A. Correct.
Q. Alright, okay, so that's an interior 200. "Thence continuing north 86-57 west 180 feet to a point."
A. And that's interior along this (indicating) same bearing in distance.
Q. Okay, and again that goes up to the cross point on the ---
A. To again a lot line.
Q. Okay, a lot line. "Thence continuing 7.9 feet to a point."
A. That's that little angle right there (indicating) which is the break in the, in the bearing on this (indicating) line ---
Q. Okay, so ---
A. --- changes ---
Q. --- 200 and 180 and 7.9 are all on one line.
A. Right.
Q. Okay, that the call for those things there would be no reason to do those calls unless you were designating internal lots.
A. None whatsoever.

(Tr. 201:4-202:1 [Rec. ___], emphasis added.)

Q. Alright, and then running a hundred and seventy-six point nine two feet to a point.
A. Which is on the same bearing but it's a, it's a - the property line.
Q. There [would] have been no point, Mr. Shouse, to do this 55 and a hundred and ---
A. No.
Q. --- seventy-six separately if they had not intended to designate that cross point?
A. Absolutely not.

(Tr. 202:19-203:3 [Rec. ___], emphasis added.)

Q. Okay. "Running thence 300 feet to a point on the southern side of Pelham Road," so that's the the end of the ---
A. That separates those two.
Q. --- lot, okay. "Running thence with the southern side of Pelham Road 200 feet to a point."
A. Here (indicating).
Q. So that's the top of this (indicating) lot?
A. Yes.
Q. No point to stop there is there unless ---

A. The bearing doesn't change.
Q. Okay, there's no point to stop there unless it's designating a lot, correct?
A. Correct.

(Tr. 203:4-17 [Rec. ___], emphasis added.)

Q. Okay, so again no point to have the 68 feet unless you were stopping ---
A. Right.
Q. --- for a crossline.
A. Right.

(Tr. 204:6-20 [Rec. ___], emphasis added.)

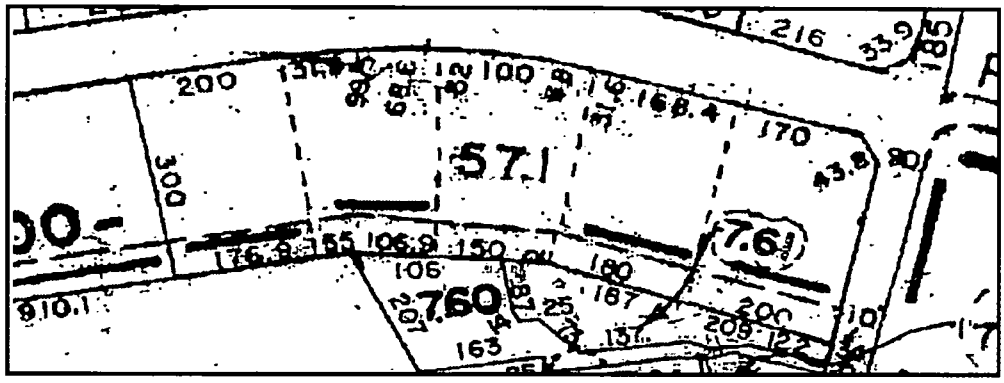
Hence, even the prose description of the property in the 1981 Deed makes plain that the 1981 Deed was conveying five lots. For Mr. Shouse, this yet another factor showing that the 1981 Deed was conveying five lots:

Q. Okay. So, Mr. Shouse, is it fair to say that with I think one exception the calls all do stop at the crosslines?
A. Yes.
Q. Does that get to -- does that give you any, uh, does that strengthen your position or does it have any impact at all on your your position that these are in fact ---
A. It just, ---
Q. --- lots as designated by the deed?
A. --- it it just affirms that they were in t -- they are lots, they were intended to be lots, they are lots.
Q. And anybody who's tracing those metes and bounds from the public record would see those stop points?
A. Sure.

(Tr. 206:5-17 [Rec. ___], emphasis added.)

7. THE TAX MAP SHOWING FIVE LOTS (CURRENT)

The tax map for the Property also shows the five lots:



(Excerpted from Def. Ex. 5 (also Def. Ex. 3) [Rec. ___ & ___].)

From the fact that the lot dimensions on the tax map (across the top, left to right, 200, 31.9, 99.5, 68.6, 32, 100, 68, 31.6, 168.4, 170, and 43.8, and across the bottom, left to right, 176.9, 55, 106.9, 150, 180, and 200) are identical to those on the Plat (excerpt at *supra* page 14, full Plat at Def. Ex. 2 [Rec. ___]), it is clear that the Plat was submitted to the authorities.

8. THE TITLE OPINION OF THE WYCHE LAW FIRM THAT FIVE LOTS HAD BEEN PURCHASED (1981)

The Wyche Law Firm issued a title opinion to Mr. Stephens that he had (through Pelham Properties, Inc.) purchased five lots and had good title to them. The opinion letter (Def. Ex. 6 [Rec. ____]) expressly describes the deed as being for "**five lots along Pelham Road**." (Emphasis added.)

9. 1981 Reference In The RMC Office To Five Lots

The 1981 Deed was recorded in the Greenville County R.M.C. office. (Def. Ex. 1 at D260 [Rec. ___].) The RMC Index describes the transaction as for "**5 lots** Pelham Rd." (*Id.*, emphasis added.) (*See generally* Testimony of Patrick Grayson, Tr. 106:20-107:24 [Rec. ___].)

10. The Second Deed References Five Lots (1986)

The five lots were transferred on August 22, 1986, from Pelham Properties, Inc. to Mr. Stephens himself. This deed (the "1986 Deed") refers to "five (5) lots" in the same manner as the 1981 Deed. (Def. Ex. 1 at D262 [Rec. ____].) It also incorporates the Plat by reference. (*Id.*) In addition, it uses the same metes and bounds description as the 1981 Deed which, as noted regarding the 1981 Deed above, has "calls" that are unnecessary except to identify individual lots. (*Id.*) (*See generally* Testimony of Patrick Grayson, Tr. 108:16-109:9 [Rec. ___].)

11. 1986 Reference In The RMC Office To Five Lots

The 1986 Deed was recorded in RMC Deed Book 1274 at page 237. The Index describes the transaction as for "**5 Lots** Cnr Pelham & Proposed Rd . . . ." (Def. Ex. 1 at D264, emphasis added [Rec. ___].)

12. The Stephens 1988 Affidavit References Five Lots

In 1988, in an affidavit submitted as part of an application for a $500,000 loan for which the Stephens Lots were to be collateral, Mr. Stephens described the

property as "5 lots, Pelham Road." (Def. Ex. 7 at WO003160 [Rec. ___].) (See generally Kehl Testimony, Tr. 167:6-25 [Rec. ___].)

13. 1988 LOAN WITH THE FIVE LOTS AS COLLATERAL

Mr. Stephens received the $500,000 loan from South Carolina National Bank in 1988. The loan documents describe the property as "containing five (5) lots as is more fully described in [the Plat]." (Def. Ex. 7 at WO003164 [Rec. ___].) The loan documents and the mortgage were conveyed to Mr. Stephens by his attorney's paralegal by letter dated March 16, 1988. The "RE" line for the letter is "Loan on 5 lots, Pelham Road from SCN." (Def. Ex. 7 at WO003161 [Rec. ___].) See generally Kehl Testimony, Tr. 168:1-169:7 [Rec. ___].)

14. THE 1988 MORTGAGE REFERENCING FIVE LOTS

The mortgage for the $500,000 loan was recorded on March 16, 1988. The property subject to the mortgage is described as "containing five (5) lots as is more fully shown on [the Plat]," as in the 1981 and the 1986 deeds. (Def. Ex. 8 [Rec. ___].) (See generally Kehl Testimony, Tr. 169:8-25 [Rec. ___].)

15. THE THIRD DEED REFERENCES FIVE LOTS (2003)

On July 15, 2003, Mr. Stephens transferred the lots and various other property to a revocable trust. (Def. Ex. 1 at D266-70 [Rec. ___].) "Parcel Three" in that deed (the "2003 Deed") identifies the parcel as containing "five (5) lots." (Def. Ex. 1 at D266-67 [Rec. ___].) The description is the same as in the 1981 and 1986 deeds. (*See generally* Testimony of Patrick Grayson, Tr. 109:10-110:15 [Rec. ____].)

16. THE FOURTH DEED REFERENCES FIVE LOTS (2008)

On April 15, 2008, Mr. Stephens transferred a one percent interest in the **five lots** from his revocable trust to Pelham Farm, LLC, Legacy One, LLC, and SESP LLC, the Appellants here. (Def. Ex. 1 at D272-74 [Rec. ___].) This deed (the "2008 Deed"), like the previous ones, described the property as "containing five (5) lots as is more fully shown in the 'Survey for Richard Watson' [the Plat]." (*Id.* at D272 [Rec. ___].) (*See generally* Testimony of Patrick Grayson, Tr. 110:16-25 [Rec. ___].)

17. THE 2008 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

The 2008 Deed was filed in the Register of Deeds Office in Book 2320 at page 1674-76. The Index describes the five lots: "INT **5 LTS** PELHAM ROAD." (Def. Ex. 1 at D276, emphasis added [Rec. ___]. (*See generally* Testimony of Patrick Grayson, Tr. 111:1-111:7 [Rec. ___].)

B. The Testimonial Evidence Was That The Stephens Lots Were Lots

1. THE TESTIMONY OF PATRICK GRAYSON

Patrick Grayson, who has practiced predominantly real estate law in Greenville since 1958 (Tr. 80:5-19 [Rec. ___]), prepared the 1981 Deed (Tr. 100:1-100:8 [Rec. ___].). He testified that it conveyed five lots to Pelham Properties.

> Q. Alright. And does this deed as you prepared it convey five lots from Watson's Orchard Property Owners Association to Pelham Properties?
> A. Yes.

(Tr. 100:9-12 [Rec. ___].)

2. THE TESTIMONY OF WILLIAM KEHL

Mr. Kehl, another experienced corporate and real estate attorney in Greenville(Tr. 161:12-19 [Rec. ___]), testified that he had issued the title opinion referenced above to the effect that Mr. Stephens had obtained good title to the five lots at issue. (Tr. 161:20-162:6 [Rec. ___].) He also went through his file and identified all the myriad instances where the transaction was referenced as being for five lots. (Tr. 170:1-171:6 [Rec. ___]); see Def. Ex. 7 at WO003150, -3154, -3156, -3179 & -3182 [Rec. _____].)

3. THE TESTIMONY OF MICHAEL STEPHENS

Mr. Michael Stephens is the son of Jim Stephens. (Tr. 223:13-18 [Rec. ___]). He testified that when he moved back to Greenville from Baton Rouge he considered purchasing one of the lots from his father. His father showed him the five lots, and he

looked at the Plat. Ultimately, he did not purchase one as he bought something on the other side of town. (Stephens Testimony, Tr. 224:19-226:24 [Rec. ___].)

C. The Expert Testimony Was That The Stephens Lots Were In Fact Lots

1. THE TESTIMONY OF COLEMAN SHOUSE

Mr. Shouse, as noted above, was formerly the Executive Director of the Greenville County Planning Commission and has worked as a developer in Greenville since then. (Tr. 185:10-21[Rec.___].) He was qualified as an expert in residential real estate development. (Tr. 185:22-24 [Rec. ___].) He testified that the Stephens Lots were lots because "they were deeded as lots." (Tr. 186:5-16 [Rec. ____].) His opinion was strengthened by the fact that the metes and bounds, with one exception, stopped at all of the cross-lines for the lots even when there was no change in bearing, all of which was unnecessary unless the deed was for individual lots. (Tr. 206:5-14 [Rec. ___].)_

2. THE TESTIMONY OF LARRY ESTRIDGE

Mr. Larry Estridge was also called as an expert. He is a partner with the Womble Carlyle law firm, has practiced real estate law in Greenville for over 40 years, and been involved in "[m]any hundreds, maybe thousands" of real estate transactions. (Tr. 227:22-229:5 [Rec. ___].) He was qualified by the court as an expert in real estate law and real estate transactions. (Tr. 233:10-12 [Rec. ___].)

Mr. Estridge testified that the property represented by the Stephens Lots was "developed into lots." He explained:

A. Yes, in my opinion those five lots were developed. When the steps that are in the record had been taken, we had an owner of property being the Watson's Orchard Property Owners Association which owned the dirt, it chose to have a survey prepared drawing lot lines, meaning creating points that would become boundaries of five lots, it then either solicited or other - otherwise came into contact with a perspective buyer of those five lots, that buyer they agreed to a price and they agreed to a price on a per lot basis, my recollection is it was twenty-one thousand five hundred dollars ($21,500) per lot, they then between them had a - then there was a letter I believe to other people in the, in the subdivision across the street that would have to approve that sale and in that letter it was described as five lots with a purchase price of twenty-one thousand five hundred dollars ($21,500) per lot. They then had one or more attorneys involved, don't know exactly who drew the deed, but it was a deed drawn by an attorney for one of them, maybe both of them, which described the ... transaction as a conveyance from one party to a second party of five lots as shown in a survey. The buyer by paying consideration and accepting the deed and recording the deed trusted that the survey he had in his hand was the same as the survey the ... seller's talkin' about, it's identified and we do that all the time, you can identify surveys by who prepared it, its date, survey number, etc. to make sure you're looking at the same survey and paid consideration and recorded the deed, those lots were developed when that process was completed.

(Tr. 241:4-242:6 [Rec. ___].)[4]

* * * * *

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[4] Respondents' counsel objected to Mr. Estridge's testimony pursuant to *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). (See Tr. 238:25-240:25 [App. ___].) *Dawkins* holds that expert testimony is generally inadmissible on issues of law. As Appellants' counsel argued to the court, "[t]he question of whether they are lots developed into lots is a factual question first and foremost." (Tr. 237:15-16 [App. ___].) The court allowed Mr. Estridge to answer the question regarding his opinion as to whether the lots were in fact lots. In any event, "[a] trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002).

As the foregoing shows, the evidence at trial that the Stephens Lots were in fact lots was simply overwhelming.

III. RESPONDENTS' ARGUMENT THAT THE LOTS WERE NOT IN FACT LOTS IS WITHOUT MERIT.

Respondents presented only one witness at trial and his testimony made only one point—that there was no record that the Plat had been recorded[5] and that a transfer of lots pursuant to an unrecorded plat was a violation of the Greenville County Subdivision Regulations. Based on this and their reading of S.C. Code §30-5-240, Respondents argued that the 1981 Deed (and apparently the subsequent deeds) conveying five lots was an "illegal" contract and could not have "developed" any lots as the term is used in the 1981 R&Cs. This argument is baseless.

A. Lots May Be Conveyed Pursuant To Unrecorded Plats

The case law is clear that the recording of a plat is not necessary for the conveyance of lots. As a matter of common law, the reference in the 1981 Deed (and the subsequent deeds) to the Plat incorporates the Plat into the deed. *See Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882, 883 (S.C. 1945) ("Where, as was done in this case, a deed describes the land as a certain tract or parcel as shown on a certain plat, the

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[5] There is, however, evidence that the Plat was submitted to the authorities. This is the fact that lots are shown on the tax map (Def. Ex. 5 [App. ___]) and the dimensions are exactly the same. (See discussion in Part II.A.7 at page 17 above, and compare Def. Ex. 5 [App. ___] to Def. Ex. 1 at D6 [App. ___].)

plat becomes part of the deed."); *Chicago Title Ins. Co. v. Investguard, Ltd.*, 449 S.E.2d 681, 683 (Ga. App. 1994) ("[W]here a deed to land refers to a map or plat as a part of the description of the land conveyed, such map or plat will ordinarily be considered as incorporated in the deed itself.")

It does not matter if the Plat is unrecorded. It is still incorporated by reference. This principle is reflected in two South Carolina cases, *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981), and *Cook v. Eller*, 298 S.C. 395, 280 S.E.2d 853 (App. 1989). In *Sims v. Tyler*, the Sims had purchased two lots from Perry in 1969 pursuant to a recorded plat. Later Perry sold one of those lots to the Tylers pursuant to an unrecorded plat. The trial court found that the Sims had not intended to purchase the second lot and reformed the deeds in the Tylers' favor on the basis of mistake. 276 S.C. at 642, 281 S.E.2d at 230. The Supreme Court reversed, finding no evidence to support the Tylers' contention that the Sims did not intend to purchase the second lot. 276 S.C. at 642-43, 281 S.E.2d at 230. It was not a factor that the Tylers' purchase was pursuant to unrecorded plat. Indeed, had that been a factor, the matter could have been handled on summary judgment. The critical point is that the unrecorded plat was perfectly sufficient to reform the deed for the trial court. Likewise, it apparently would have been sufficient for the Supreme Court if the evidence had supported the finding of mistake.

In *Cook v. Eller*, the Ellers claimed title to a disputed piece of property through a deed and a recorded plat. Cook claimed title to the same property through deeds

and unrecorded plats. The trial court found that the Ellers were bona fide purchasers for value without notice of Cook's claim. As the Court of Appeals noted, the holding appeared to be premised on the plats relied on by Cook being unrecorded. 298 S.C. at 397, 280 S.E.2d at 854. The Court of Appeals affirmed the judgment for the Ellers but not because Cook's plats were unrecorded. The critical factor was that the abstracts, deeds, and unrecorded plats that supported Cook's claim were not in the record on appeal. Accordingly, the Court of Appeals could not evaluate "who ha[d] the better claim of title by virtue of their chain of title." The Court of Appeals affirmed the judgment for the Ellers because Cook "failed to meet his burden of providing this court with a record sufficient to enable us to make a proper decision." 298 S.C. at 398, 280 S.E.2d at 855. Obvious in the ruling is that if abstracts, deeds, and unrecorded plats had been in the record, the Court of Appeals could have ruled in favor of Cook.

The principle that an unrecorded plat is effective is confirmed in numerous cases from other jurisdictions. *E.g.*, *Chicago Title Ins. Co. v. Investguard, Ltd.*, 449 S.E.2d 681, 683 (Ga. App. 1994) ("the description of the property indicated on the unrecorded plat prepared by Byron Farmer thus became part of the deed to secure debt Jennings executed in favor of Miller. We agree with the trial court that this incorporated plat established an easement across the second tract of land."); *Department of Transp. v. Ladson Investments*, 282 S.E.2d 171 (Ga. App. 1981) (holding that undisputed evidence demanded finding that express dedication had been made

by transfer of property to condemnee with reference to plat showing 70-foot right-of-way, notwithstanding that plat was unrecorded); *Reed v. Reese*, 374 A.2d 665, 669 (Pa. 1977) (plat need not be recorded to be incorporated by reference: "We expressed no requirement that the plan be recorded and we indicated that recordation was not necessary by ruling incorporation by reference makes the plot plan part of the deed."); *Oak Park Cemetery v. Donaldson*, 148 S.W.2d 994, 997 (Tex. Civ. App. 1940) ("From the issues submitted to the jury it appears that the case was tried on the theory that the sale of burial lots by the owner of a cemetery, with reference to an unrecorded plat of such cemetery, to purchasers who rely on such plat, will effect a dedication of the drives, parks, etc., shown on said plat, as well as the lots and blocks shown thereon. This principle is well established, of course, as applied to the sale of lots with reference to the plat of a townsite or addition to a city by the owner."); *cf. Nagel v. Dean*, 101 N.W. 954, 955 (Minn. 1904) ("In the absence of statutory regulation, it is clear, where a party conveys urban property in accordance with descriptions contained in an unrecorded plat, that the effect is to dedicate streets and alleys therein described to the public use."); *Bennett v. Seibert*, 35 N.E. 35, 37 (Ind. App. 1893) ("The mere act of surveying lands into lots, streets, and squares by the owner will not of itself amount to a dedication; yet a sale of lots with reference to such plat, map, or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets, etc., so far as the owner is concerned").

B. The Greenville County Subdivision Regulations Do Not Support Respondents Argument But Instead Define "Lot" In A Manner That Covers The Stephens Lots And Recognize Transfers Pursuant To Unrecorded Plats

Respondents' argument based on the Greenville County Subdivision Regulations (the "Regulations," [Rec. ____]) is off-base. In fact, this document explicitly defines a "lot" in a manner that makes clear that the Stephens Lots qualify. The definition is: "Lot - A portion of a subdivision or other parcel of land having a minimum of twenty (20) feet frontage on a public street and intended for transfer of ownership or for building purposes." (Def. Ex. 1 at D-286 [Rec. ____].) The Stephens Lots indisputably meet this definition.

Respondents overlook that inconvenient fact and point to Section 1.4 of the Regulations which relates to the filing of plats for the sale of lots for a subdivision (more than two lots). Section 1.4 reads:

> The owner or agent of the owner of any land located within the jurisdiction of the Planning Commission as described herein **who transfers or sells or agrees to sell such land by reference to or exhibition of or by other use of a plat of subdivision of such land before such plat has been approved by the Planning Commission and recorded** in the office of the County Register of Mesne Conveyance **shall forfeit and pay a penalty of one hundred dollars for each lot so transferred or sold or agreed or negotiated to be sold**. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from such penalties. **The county may enjoin such transfer or sale or agreement by action for injunction or may recover the penalty by civil action**.

(Greenville County Subdivision Regulations, §1.4 (1979), at Def. Ex. 1 at D-288-89, emphasis added [Rec. ___].)

However, Section 1.4, on its face, does not forbid the sale of lots pursuant to an unrecorded plat. It simply provides for a penalty of $100 for each lot "sold" without the plat being recorded. The key is the word "sold" and the fact that it is in the past tense. The sale is not "void" or even "voidable." The County "may" sue to enjoin the sale but even that is not mandatory. Once the sale has occurred, the only consequence is a possible $100 per lot penalty. The Regulation provided no authority for un-doing the sale. This is a matter of pure statutory construction.

Notably, Greenville County has never sued to enjoin such a sale and has never assessed the penalty. (Tr. 38:23-39:14 [Rec. ___].) Moreover, the County has never taken the position that a transfer that does not comply with Section 1.4 is not in fact a transfer. (Tr. 39:15-19 [Rec. ___].) Indeed, John Owings, an employee of the Greenville County Planning Department and the only witness called by Respondents, testified that even today if a transfer came in that did not comply with Section 1.4 he would simply call the person and tell them to correct it. (Tr. 39:20-26 [Rec. ___].) The recording requirement, Mr. Owings testified, was simply "an administrative act," and the whole process "an administrative process." (Tr. 47:21 & 57:20-58:3 [Rec. ___].)

The testimony at trial was that, especially during the period of the 1981 Deed, it was not uncommon for lots to be transferred pursuant to an unrecorded plat. Mr. Estridge, who, as noted above, was qualified as an expert in real estate law and real estate transactions, testified that "it is a fairly common practice for people to sell and

to otherwise transfer property with reference to a plat which is not recorded for a variety of reasons," and "certainly [was] in 1981." (Tr. 234:22-235:1 [Rec. ___].) This was "very common," he said, for "transactions among related parties such as ... a family company or family partnerships or family LLCs or family trusts." He said it is also "very common among related companies." (Tr. 235:2-235:15 [Rec. ___].)

Respondents introduced no evidence to the contrary.

Notwithstanding such transfers being common, Respondents' counsel suggested that there was something illegal or nefarious here. But that argument bears no weight. Apart from the fact that the deeds themselves plainly reference five lots, and apart from the fact that the tax map plainly shows the five lots, the process of submitting the plat (a summary version of it) to the Planning Commission was purely an administrative matter. Mr. Shouse, the former Executive Director of the Planning Commission and longtime developer, testified that the portion of the Plat relating to the Stephens Lots met the requirements for a "summary plat" under the Regulations. Further, he testified that, if that portion had been submitted as a summary plat, it would have been approved because the staff merely "checks off" that a summary plat meets the requirements and, if it does, stamps it. That is all there is to it. It does not go through an approval process with the Planning Commission. (Tr. 177:12-180:14 [Rec. ____.].) There was no evidence to the contrary. Hence, there was nothing illegal or nefarious. No skullduggery. There was simply a failure to meet an administrative requirement.

C. S.C. Code §30-5-240 Also Does Not Support Respondents But Instead Recognizes Transfers Pursuant To Unrecorded Plats

The other basis for the Respondents' argument that the transfer of the five lots was illegal is S.C. Code §30-5-240. This statute reads:

> When real property is subdivided for the purpose of **sale and is sold** or offered for sale according to a plat of a survey thereof, the person first offering such property for sale shall file a plat or blueprint of such survey in the office of the clerk of court of the county in which such real estate is situate. **In the event that the owner fails to comply with the above provision he shall become liable to the purchaser or to any subsequent grantee of the land, or of any portion thereof, in such sum as shall be found necessary to procure and record such plat.** Such sum shall be recovered by any such grantee provided he be interested as owner of all or a portion of the subdivided property at the time of the institution of the action for the enforcement of the liability hereby created.

The statute, like Regulation 1.4, does not support Respondents' argument. The statute does say that a person subdividing land according to a plat "shall file a plat or blueprint." However, it recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. Further, the statute conspicuously does not provide that a sale pursuant to an unrecorded plat is void or voidable. The *only* consequence of such a sale is that the grantor is responsible for the cost to "procure and record" the plat.

Again, as Mr. Estridge testified, transfers without recorded plats are "common," especially in 1981. (Tr. 234:21-21 [Rec. ___].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), mentioned in her testimony (by de bene esse deposition) that "most plats in Charleston County don't

get recorded." She said the "lawyers just refer to the plats, but they don't record them. It's just custom there." (Manning Dep. 5-6 & 35:8-11 [Rec. ___].)[6]

D. The Concept of Record Notice Does Not Apply Here

The trial court premised its decision largely on the fact that South Carolina is a "record notice" state. (Order dated October 19, 2012 at 3 [Rec. ___].) During the trial itself the court appeared to find that issue dispositive. (Tr. 70:11-71:4 [Rec. ___].) And in directing Respondents' counsel to prepare a proposed order, the court asked for "particular emphasis on the fact that South Carolina is a record notice state and that there was no evidence presented that the applicable regulations were complied with or that the plats in question were recorded." (Email from Court, Sept 21, 2012, 11:10 A.M. [Rec. ___].)

The Order does not explain how "record notice" applies here. It simply states: "South Carolina has been a record notice state since at least 1839. Title 30 of the *South Carolina Code of Laws* is entirely devoted to public records and recordation of documents with Chapter 7 thereof specifically stating that recordation is essential to validity. This state maintains facilities in every County solely for the purpose of the

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[6] Mrs. Manning's office concluded that the Stephens lots were in fact lots and entitled to votes in connection with the effort to amend the R&Cs. As a result, Chicago Title gave a commitment to issue title insurance if a majority vote was obtained for the amended R&C's with the Stephens Lots having one vote each, since in they felt then that the amended R&C's would have been validly adopted and would be in full force and effect. (Manning Dep. at 20:21-21:6 [Rec. ___].)

recordation of documents affecting real estate." (Order dated October 19, 2012 at 3 [Rec. ___].)

In fact, the concept of "record notice" has no bearing here. As already noted, if it were dispositive that a plat was not recorded, the trial court in *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981), could not have found for the Tylers; indeed, the Sims would have been entitled to summary judgment. Further, the Supreme Court would not have needed to even consider whether there was sufficient evidence of mistake. The only issue would have been the Tylers' failure to have a recorded plat. Likewise, in *Cook v. Eller*, 298 S.C. 395, 280 S.E.2d 853 (App. 1989), it would not have been a case of balancing the evidence since the plats relating to Mr. Cook's claim were unrecorded. That fact would have been dispositive. There would been no evidence on Cook's side to balance.

And as shown by the testimony of Mr. Estridge (*supra* pages 29-30) and Mrs. Manning (*supra* pages 31-32), transferring property in South Carolina without recording the plat is common.

IV. THE TEXT OF THE 1981 R&CS SHOWS THE STEPHENS LOTS WERE "LOTS" UNDER IT AND ENTITLED TO VOTE ON THE AMENDMENT

A. The Text Of the 1981 R&Cs Indicates That A Lot Is Simply A Portion Into Which Property Is "Cut"

The pertinent language in the 1981 R&Cs states that they could be amended as of January 1, 2010, "by vote of a majority of the then owners of the **lots into which the property described above** [the Property along with another strip along Haywood

Road owned by defendant WOPOA] **shall have been developed** and in Watson's Orchard Subdivision." (Def. Ex. 1 at D11, emphasis added [Rec. ___].) Hence, the issue was whether the Stephens Lots qualified as "lots into which the property ... shall have been developed."

As shown by the overwhelming evidence discussed above, the Stephens Lots unquestionably were lots. Respondents introduced no evidence to the contrary. They relied entirely on the fact that the Plat had not been recorded and their argument that that made the transfers of lots illegal. As shown above, that argument has no merit.

The question, then, is whether somehow, even though the Stephens Lots are lots, they do not qualify under the language above as "lots into which the property ... shall have been developed." Is something more required? The second page of the document puts this argument to rest. There it is stated that the restrictions can be enforced against "any property owner of any lot *into which the property described above shall subsequently be cut.*" (*Id.* at D12, emphasis added [Rec. ___].) Hence, a "lot" is simply a section which is "cut" from the property. There is no further requirement.

B. The Person Who Drafted The 1981 R&Cs Testified That The Intent Was For The Stephens Lots To Be Considered Lots And To Have A Vote On The Amendment To The R&Cs.

Aside from the words in the document itself, the ***only*** evidence in the record regarding the meaning of the text in the 1981 R&Cs was the testimony of the drafter, Mr. Grayson. He testified that his intent in drafting the document was for the word "develop" in "shall have been developed" to mean to "come into existence" or be

"created." Nothing more. This came from Mr. Grayson, the drafter of the 1981 R&Cs:

> Q. Mr. Grayson, what was your intent with respect to the language and I'll just read it, "By a vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard," what was your intent with respect to that?
>
> A. To come into existence. Develop would mean to come into existence, to be created.

(Grayson Testimony, Tr. 95:23-96:4.) And the **only** evidence in the record was that the Stephens Lots were intended to fall within this language. This too came from Mr. Grayson, the drafter:

> Q. Back to to the restrictions that you drafted, Mr. Grayson, which were Exhibit SJ2, page D11 [Def. Ex. 1 at D11 (Rec. __)], was it, was it your intention in connection with the drafting of the deed and the restrictions all of which, I believe all of which occurred about the same time, is that correct?
> MR. HILLER: I I object, I object ---
> THE COURT: Same objection?
> MR. HILLER: Yes, sir.
> THE COURT: Alright. Go ahead answer it.
> Q. Was it your intention that the Stephens' lots would be, would qualify under that language "lots into which the property described above shall have been developed" ---
> A. Yes.
> Q. --- and your intention that they would have a vote with respect to the amendment of these re ---
> A. Yes.
> Q. --- restrictions and covenants?

(Tr. 107:25-108:16 [Rec. __].)

There was no evidence to the contrary of any sort.

C. The Expert Testimony of Mr. Estridge That The Stephens Lots Were Lots And Entitled To Vote On the Amendment To The 1981 R&Cs

While it is probably unnecessary in light of all the evidence above, Mr. Estridge, having been qualified as an expert in real estate law and transactions, also rendered an opinion on the issue of whether the Stephens Lots were "developed" as specified under the 1981 R&Cs. His testimony on point has already been quoted in Part II.C.2 at page 22 above. He restated his opinion on cross-examination more succinctly:

> A. My opinion is that these were lots developed by the time the deed was recorded.
> Q. By and between the grantor and the grantee.
> A. Before the deed was recorded the lots referred to in the deed had been developed, that's my opinion.

(Tr. 251:22-252:1 [Rec. ___].)

CONCLUSION

Because the evidence was overwhelming that the Stephens Lots were in fact lots and there was no evidence to the contrary, because Respondents arguments that the lots are not lots because the Plat was unrecorded is contrary to South Carolina law, and because the 1981 R&Cs provide that lots are simply section into which property is "cut," the Stephens Lots were entitled to vote on the amendment to the 1981 R&Cs. Accordingly, Appellants respectfully request that this Court reverse the judgment of the trial court.

Respectfully submitted,

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Attorneys for the Petitioner

August 12, 2013

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ...Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ... Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the ..... Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as

Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman,.....Respondents.

APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellants designate the following matter to be included in the Record on Appeal in this case for the purposes of their Initial Brief.

1. Declaratory Judgment Complaint - C/A No. 2009-CP-23-7707 - dated September 8, 2009.
2. 1st Amended Declaratory Judgment Complaint - C/A No. 2009-CP-23-7707 - dated September 10, 2009.
3. Answer of Watson's Orchard Property Owners Association, Inc. to Complaint dated October 12, 2009.

4. Defendants' Answer and Counterclaim (Counter Defendant Class Action) dated November 11, 2009.
5. Defendants' Amended Answer, Counterclaim, and Third-Party Claim dated June 27, 2011.
6. Order for Entry of Default against Third Party Defendants dated February 22, 2012.
7. Defendants' Motion for Summary Judgment and Supporting Memorandum dated April 27, 2012.
8. Plaintiffs Motion for Summary Judgment dated June 8, 2012.
9. Judgment in a Civil Case denying the Motions dated July 9, 2012.
10. Defendants' Post Trial Brief dated September 14, 2012.
11. Plaintiffs' Post-Trial Brief dated September 14, 2012.
12. Judgment in a Civil Case dated October 19, 2012
13. Judgment in a Civil Case denying motion for reconsideration dated January 28, 2013.
14. Notice of Appeal dated February 25, 2013.
15. Amended Notice of Appeal dated April 1, 2013.
16. Defendants' Exhibit 1 - Documents in Support of Defendants' Motion for Summary Judgment.
17. Defendants' Exhibit 2 - Photographed/Reduced copy of Survey for Richard Watson with last change date of December 3, 1980.
18. Defendants' Exhibit 3
19. Defendants' Exhibit 5
20. Defendants' Exhibit 6
21. Defendants' Exhibit 7
22. Defendants' Exhibit 8

23. Transcript of Trial: 38-39, 47, 57-58, 70-71, 80-111, 152-153, 161-171, 177-186, 201-206, 223-242, and 251-252.

24. De bene esse deposition of Claire Manning: 5-6 & 20-21 & 35.

25. E-mail from Judge Miller to Hiller and Herlong dated September 21, 2012.

I certify that this Designation contains no matter which is irrelevant to this Appeal.

Respectfully submitted,

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August 12, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ...Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ... Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the ..... Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as

Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman,.....Respondents.

PROOF OF SERVICE

I hereby certify that I have served the INITIAL BRIEF OF APPELLANTS and APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL on respondents by depositing a copy of each in the United States Mail, postage paid, addressed to their attorney of record, Randall S. Hiller, P.O. Box 1716, Greenville, SC 29602 on August 12, 2013.

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