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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-40-06914
Appellate Case No.: 2022-000813

Opinion No. 6070 (S.C. Ct. App. filed July 10, 2024)

Spring Valley Interests, LLC, ... Petitioner,

v.

The Best For Last, LLC, ... Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold the Purchase Option is void under the common law rule against perpetuities?

2. Did the Court of Appeals properly determine that an implied term of reasonable time cannot be read into the Purchase Option?

STATEMENT OF THE CASE

This case arises out of a written loan agreement between Respondent The Best For Last, LLC ("TBFL") and Petitioner Spring Valley Interests, LLC[1] ("Petitioner"), through which Petitioner loaned TBFL money to assist in TBFL's acquisition of real property. As part of the loan, TBFL granted Petitioner a freely assignable and perpetual option to purchase an undivided co-tenancy interest in the property ("Purchase Option"). (R. 11, § 2). At the center of this appeal is the enforceability of the Purchase Option and, to the extent the option was ever enforceable, whether Petitioner waived its right to exercise the Purchase Option after once doing so and failing to close the transaction.

Petitioner filed this lawsuit on December 11, 2019, seeking specific performance of the Purchase Option, reformation of a mortgage, and an alternative claim for damages against TBFL. (R. 4–8). TBFL filed an answer and counterclaim for a declaratory judgment, arguing that the Purchase Option was unenforceable because it violated the common law rule against perpetuities (CLRAP). (R. 15–24). TBFL also asserted a claim for equitable estoppel, claiming Petitioner should be estopped from seeking specific performance due to Petitioner's failure to close the agreement reached by the parties following its exercise of the Purchase Option. (R. 20–22).

On April 16, 2021, TBFL moved for summary judgment on its declaratory judgment claim

[1] White Interests Limited Partnership was the original lender on the loan but assigned its interest in the purchase option to Petitioner. (R. 223:23–224:2). Lynn White is the sole owner and manager of both White Interests and Petitioner. (R. 145:6–146:18).

and arguing, in the alternative, that Petitioner waived its right to enforce the Purchase Option. (R. 53–64). On April 29, 2021, Petitioner filed a cross-motion for partial summary judgment as to its claim for specific performance of the Purchase Option. (R. 65). TBFL filed a reply in opposition to Petitioner's motion on August 19, 2021. (R. 91).

The circuit court conducted a hearing on the parties' cross-motions for summary judgment on August 26, 2021, and on September 10, 2021, it denied Petitioner's motion for summary judgment via a Form-4 Order. On May 18, 2022, the trial court granted TBFL's motion for summary judgment on the ground that the Purchase Option violated the CLRAP. (R. 1–3). Petitioner filed a Notice of Appeal on June 13, 2022. (R. 51).

The Court of Appeals held oral argument and affirmed the judgment of the circuit court. *Spring Valley Interests, LLC v. The Best for Last, LLC*, Op. No. 6070 (S.C. Ct. App. filed Jul. 10, 2024). Petitioner seeks a writ of certiorari to review that decision.

STATEMENT OF THE FACTS

The record in this case tells a simple story. TBFL and Petitioner entered into a loan agreement tied to TBFL's acquisition of real property (the "Loan Agreement"), which granted Petitioner a perpetual and freely assignable option to purchase a co-tenancy interest in the property (the "Purchase Option"). (R. 11, § 2). After Petitioner exercised the Purchase Option, the parties negotiated for weeks the terms of a mutually acceptable co-tenancy agreement, culminating in what appeared to be a finalized deal. However, on the eve of the closing, with all of the necessary documents signed and ready for recording, Petitioner decided that it wanted a bigger piece of the pie and refused to cooperate further unless TBFL agreed to various last-minute demands. TBFL refused to yield from the agreed upon terms, so Petitioner sunk the deal. Petitioner now seeks to re-exercise the Purchase Option in order to have its second bite at the apple.

I. The Purchase Option

TBFL is a South Carolina limited liability company formed in March 2017 for the sole purpose of owning, developing, and managing a self-storage facility in Columbia, South Carolina (the "Property"). (R. 152:6–153:10, 206:5-25). TBFL consists of four members, each of whom made an initial capital contribution of varying amounts totaling $275,000 towards the purchase of the Property. (R. 412–422). In order to obtain additional financing, Albert Heyward, the manager of TBFL, enlisted the help of Lynn White, the owner/manager of Petitioner's predecessor, White Interests Limited Partnership ("White Interests"). (R. 154:6-13, 155:3-11). After Lynn White agreed to invest in the venture, TBFL and White Interests hired Tim Gavigan, Esquire, a transactional attorney who had previously represented both White and Heyward in various business deals, to assist in the acquisition of the Property. (R. 144:20–145:1, 154:16-23, 207:1–209:8, 367).

Thereafter, TBFL and White Interests executed a written loan agreement (the "Loan Agreement") whereby White Interests loaned TBFL $800,000.00 to assist with acquiring the Property. (R. 365-68). In exchange, TBFL granted White Interests a "freely assignable" and "perpetual option" to purchase a 74.425% undivided co-tenancy interest in the Property. (R. 365, § 2). This Purchase Option, later assigned to Petitioner, was exercisable at Petitioner's sole discretion without a time limitation. (R. 145:6-13; 365, § 2). It required that Petitioner take title subject to no liens except TBFL's first mortgage and "a mutually acceptable co-tenancy agreement." (R. 365, § 2).

Specifically, the Purchase Option provides:

> **Lender's Purchase Option.** I[n] consideration for making the Loan, the Borrower hereby grants to Lender the perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property (the **"Purchase Option"**) for a purchase price of Eight Hundred Thousand and 00/100 Dollars (the **"Purchase Price"**). The Purchase Option

> shall be exercised at the Lender's sole discretion by delivery of a written notice no later than thirty (30) days before the intended closing. The Purchase Price shall be paid in cash or immediately available funds at the Closing. The Lender shall hold take [sic] title to the co-tenancy interest subject to (i) no mortgages other than the Borrower's then outstanding first lien mortgage, and (ii) a mutually acceptable co-tenancy agreement. The Purchase Option is freely assignable by the Lender.

(R. 365, § 2).

The loan was further evidenced by a promissory note (the "Note") and secured by a second mortgage on the Property in favor of Petitioner. (R. 369-71). The Note provided that interest on the loan would be paid to Petitioner "as if [Petitioner] were an Initial Member" of TBFL and allowed TBFL to prepay the loan. (R. 369-70). The Note also provided the repayment of the loan would be triggered by the exercise of the Purchase Option, refinancing, or sale of the Property. (R. 369-70).

II. Petitioner's Exercise of the Purchase Option

In mid-2019, TBFL began exploring refinancing options for the Property's mortgage, ultimately paying a $35,000 non-refundable fee to secure a $3.1 million financing commitment. (R. 168:5-13, 219:22-25, 300:5–301:12). Days after TBFL paid the fee, Petitioner exercised the Purchase Option, setting the closing date to precede the refinancing. (R. 165:9-17, 168:2-21, 372–373).

According to Petitioner, "it was important that I exercised my purchase option before the project was refinanced because I was entitled to 70 some percent of the excess loan proceeds[,] which means my purchase option would not have cost the full $800,000. It would have been less than that." (R. 165:12-17). In other words, Petitioner wanted to make sure it held a possessory interest in the Property at the time of the refinance so that it could receive a windfall of any excess loan proceeds and offset the $800,000 it had contributed to TBFL.

III. The "Mutually Acceptable Co-Tenancy Agreement"

With a tentative closing date for the refinance set, TBFL and Petitioner began negotiating the "mutually acceptable co-tenancy agreement" contemplated by the Purchase Option. During the negotiations, TBFL took the position that the co-tenancy agreement should contain terms and conditions that reflected the economics and management structure embedded in TBFL's operating agreement. (R. 283:6–286:24, 412–23). As TBFL understood the deal, TBFL had agreed to grant Petitioner the Purchase Option for a co-tenancy interest in the Property instead of a membership interest in the LLC in order to accommodate Petitioner's desire for a future 1031 Exchange,[2] which would only be possible if Petitioner took a possessory interest in the Property. (R. 162:18-21, 273:11–274:4, 283:9–286:24, 412–23). TBFL also understood that Petitioner's interest in the Property would be the same "as if the [Petitioner] were an Initial Member" of the LLC. (R. 162:13-16, 217:15–218:1, 412–23).

This position was consistent with the language of the Note, which provided that "Interest shall be due and payable in the same manner as set forth in 9.1.1.1. of [TBFL's] Operating Agreement as if the [Petitioner] were an Initial Member (as defined in such Operating Agreement) and the Interest was the [Petitioner's] Preferred Return (as defined in the Operating Agreement)." (R. 163:11–164:16, 369–71). However, When TBFL communicated to Petitioner how it wanted to structure the co-tenancy agreement, Petitioner insisted that it should receive an outright co-tenancy interest in the Property, not a corresponding membership interest in the LLC. (R. 162:9-21, 175:6-12, 290:7–291:13).

Petitioner and TBFL worked together on the key terms by which Petitioner would take the

[2] 26 U.S. Code § 1031 (providing that "[n]o gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for productive use in a trade or business or for investment.").

co-tenancy interest in the Property, and ultimately the parties reached an agreement on the terms for converting the Purchase Option into a co-tenancy agreement. Per the agreement between Petitioner and TBFL, Petitioner's second mortgage would be satisfied in exchange for a conveyance of a 70% co-tenancy interest in the Property in favor of Petitioner and a cash payment from Petitioner to TBFL of approximately $141,000. (R 182:7-16, 229:20–231:13, 424–30). Following the meeting, Tim Gavigan, Petitioner's counsel, wrote to TBFL's attorney: "I'm pleased to advise that we were able to get Lynn [White] and Albert [Heyward] to come to an agreement on moving forward." (R. 229:20–231:14, 424–25).

TBFL's attorney responded: "The conveyance documents you prepared for the option exercise are acceptable once corrected for the agreed 70% interest. If you can get those cleaned up and remove the watermarks, I will get Albert and friends scheduled for execution on Thursday or Friday." (R. 236:19–237:8, 431). On September 26, 2019, Gavigan responded with the revised closing documents reflecting the agreement reached by the parties, which included a co-tenancy agreement, amendments to the Loan Agreement, form of deed, and other related documents (the "Closing Documents"). (R. 231:1-13, 238:13-23, 432). In that same email, Gavigan included an additional request that TBFL reimburse Petitioner for "additional legal fees incurred to defend [TBFL's] challenge of the option." (R. 238:5-22, 432, 434). TBFL did not immediately respond to this portion of the email.

IV. Petitioner Refuses to Close the Agreement Reached by the Parties

In reliance on Petitioner's representations that the loan would be satisfied by the conveyance of a co-tenancy interest, the cash payment, and Petitioner's second mortgage lien on the Property thereafter being released, TBFL executed the Closing Documents. That same day, TBFL, through its own counsel, tendered the executed Closing Documents to Petitioner and offered to overnight ship

the original deed executed by TBFL. (R. 241: 9-15, 435). Upon receiving the signed documents from TBFL, Petitioner also signed and executed the Closing Documents, after which Gavigan advised TBFL's attorney: "I'll send you [Petitioner's] signature pages on Monday." (R. 242:13–244:22, 437). Through phone conversations later that day, Gavigan requested that TBFL hold the original deed to the Property for recordation simultaneous with the documents to be executed and recorded by TBFL in connection with the Refinance, which was scheduled to occur the following week. (R. 24:6-15).

Over the following weekend, Gavigan sent an email to TBFL's attorney again asking about the reimbursement for $6,500 in legal fees related to the challenge of the Purchase Option. (R. 434–40). TBFL's attorney responded the following Monday, objecting to the characterization of the negotiations as a "challenge" and conveying TBFL's position that each party should be responsible for its own fees related to the conversion of the Purchase Option into the co-tenancy agreement contemplated by the Loan Agreement. (R. 436–37). However, in order to ensure that the Refinance would close and that TBFL would not forfeit its $35,000 deposit, TBFL's attorney sent Gavigan an email two hours later indicating TBFL's agreement to pay Appellant's legal fees. (R. 441).

Despite TBFL's agreement to pay the additional fees, Petitioner responded that it believed the initial refusal to pay its legal fees "opened the deal up for retrade." (R. 246:13-20, 441). Petitioner, fully aware that TBFL risked forfeiting the $35,000 refinance fee if the deal failed to close and apparently determined to exploit this vulnerability to its full potential, thereafter refused to return the executed Closing Documents to TBFL unless TBFL agreed to additional terms favorable to Petitioner. In addition to the payment of the attorney's fees, these last-minute demands included giving Petitioner a larger share of the funds from the refinance and not requiring

Petitioner to share in the payment of certain fees and expenses. (R. 247:18–248:25, 441). After TBFL rejected Petitioner's last-minute changes, Petitioner communicated that it would not participate in the closing, thereby ensuring the collapse of the refinance and TBFL's loss of the $35,000 application fee. (R. 247:18–248:25; 309:21-23, 441).

V. Underlying Lawsuit

Petitioner filed this lawsuit seeking, in part, specific performance of the Purchase Option. TBFL counterclaimed for declaratory judgment, asserting the Purchase Option was unenforceable under the CLRAP. TBFL also claimed equitable estoppel, arguing Petitioner's failure to close the negotiated transaction barred its request for specific performance.

Both parties filed motions for summary judgment, with TBFL arguing the Purchase Option was invalid or, alternatively, that Petitioner waived its right to enforce it. After a hearing, the circuit court denied Petitioner's motion and granted TBFL's motion, finding the Purchase Option violated the rule against perpetuities. Petitioner appealed, arguing the circuit court erred because the CLRAP has been preempted by the South Carolina Uniform Statutory Rule Against Perpetuities, S.C. Code Ann. § 27-6-10, *et seq.* ("SCUSRAP"). The Court of Appeals affirmed the circuit court's ruling that the Purchase Option was void under the common law rule against perpetuities and further rejected Petitioner's argument that an implied term of a reasonable time exists in the contract to prevent the Purchase Option from violating the CLRAP. Petitioner now petitions this Court to review that decision.

ARGUMENT

In its Petition, Petitioner argues: (1) the Purchase Option is not subject to any rule against perpetuities; and (2) even if the CLRAP applies, the Court should salvage the Purchase Option by implying a reasonable period of time for the duration of the option. The Court of Appeals'

interpretation of the SCUSRAP and application of the CLRAP is sound, well-reasoned, and consistent with established principles of statutory construction. Additionally, the Court of Appeals correctly held that the Purchase Option cannot be salvaged through the implication of a "reasonable time" term, even if this issue was preserved for review, which it is not. Accordingly, this Court should deny the Petition for Certiorari.

I. The Court of Appeals Correctly Held the Purchase Option is Void Under the Common Law Rule Against Perpetuities.

A. The Purchase Option violates the CLRAP.

At common law, the rule against perpetuities prohibits the remote vesting of contingent interests by providing that any interest is valid only if it is certain to vest, if ever, within the lifetime of a person living at creation of the interest, plus twenty-one years. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 369-70, 628 S.E.2d 902, 917 (Ct. App. 2006). The CLRAP reflects the longstanding policy that "[n]onvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Id*. at 70 (citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005) ("The rule against perpetuities is an ancient, but still vital, rule of property law intended to enhance the marketability of property interests by limiting the remoteness of vesting.")).

The Purchase Option at issue granted Petitioner a "freely assignable," "perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property for a purchase price of Eight Hundred Thousand and 00/100 Dollars." (R. 365, § 2). Such an option constitutes a contingent, nonvested, preemptive right to purchase an interest in the Property at any point in the future. South Carolina law makes clear that any interest conditioned on an event that could possibly occur beyond the limits of the rule is void. *Love v. Love*, 208 S.C. 363, 374, 38 S.E.2d 231, 236 (1946). Similarly, the Purchase Option is not tethered to an event certain to occur, rendering it invalid under the rule.

Webb v. Reames, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997) (holding that a contingent, nonvested interest not conditioned on an event certain to occur violated the rule against perpetuities). Because the Purchase Option could fail to vest within a life in being plus twenty-one years, it violates the CLRAP and is therefore void ab initio.

B. The plain language of the SCUSRAP excludes nondonative transfers from its scope, leaving the CLRAP intact for such transactions.

While it appears undisputed that the Purchase Option violates the CLRAP, Petitioner argues the SCUSRAP supersedes the common law and saves the Purchase Option. The SCUSRAP codified the common law rule by providing that a nonvested property interest is invalid unless "(1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) the interest either vests or terminates within ninety years after its creation." S.C. Code Ann. § 27-6-20. Subsection (2) of § 27-6-20 introduced a "wait and see" provision, under which nonvested property interests that would otherwise violate the rule may survive if they actually vest within ninety years of their creation. S.C. Code Ann. § 27-6-20(A)(2). However, the SCUSRAP explicitly excludes "nondonative" transfers—which generally encompass commercial transactions—from its application. *See* S.C. Code Ann. § 27-6-50(1) (stating that "[s]ection 27-6-20 does not apply to . . . a nonvested property interest . . . arising out of a nondonative transfer"). Moreover, section 27-6-80 of the SCUSRAP provides that "[t]his chapter supersedes the common law rule against perpetuities."

The Court of Appeals correctly observed that this statutory framework raises a critical question: if nondonative transfers are excluded from the SCUSRAP, does the statute abrogate the common law rule in this context? The Court of Appeals held that it does not. As statutes in derogation of the common law must be strictly construed, the Court found no clear legislative intent to abolish the CLRAP for nondonative transfers. *See Doe v. Marion*, 361 S.C. 463, 473, 605

S.E.2d 556, 561 (Ct. App. 2004). Since an alternative interpretation that preserves the CLRAP for nondonative transfers is reasonable, the Court of Appeals reasonably concluded that the SCUSRAP does not abrogate the common law rule in this context.

Petitioner contends the Court of Appeals "misapprehend[ed] and misinterpret[ed] the plain, unambiguous language of the SCUSRAP and defeat[ed] the clear intent expressed by the General Assembly." Pet. Cert. 6. In support of its argument, Petitioner improperly relies on extrinsic sources—such as the preamble of the bill proposing the SCUSRAP, unadopted commentary to the Uniform Act, and inapposite case law from other jurisdictions. *Id.* at 8-12. However, under South Carolina law, courts are bound to apply the plain meaning of clear and unambiguous statutes without resorting to extrinsic interpretation. *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 196, 906 S.E.2d 345, 360–61 (2024) ("When the text is not ambiguous, then what the General Assembly said in the text is what the General Assembly meant and intended. In the face of a plain text, extraneous sources—such as legislative history—are of no value in the search for meaning. Using them would be like consulting an unreliable map after one has already arrived at his destination. At best, they represent unenacted legislative intent."); *see also Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998).

The SCUSRAP's plain language explicitly excludes nondonative transfers from its scope, *see* S.C. Code Ann. § 27-6-50, leaving the common law rule intact for such transactions. *See Coakley v. Tidewater Const. Corp.*, 194 S.C. 284, 9 S.E.2d 724, 726 (1940) (citing *Nuckolls v. Great Atlantic & Pacific Tea Company*, 192 S.C. 156, 5 S.E.2d 862 (1939)) ("[R]ules of the common law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language."); *see also Singleton v. State*, 313 S.C. 75, 83, 437 S.E.2d 53, 58 (1993) ("The common law remains in full force and effect in South Carolina unless changed by clear and

unambiguous legislative enactment."); *cf. Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) ("Only where the U.C.C. is incomplete does the common law provide applicable rules."). It is undisputed that the Purchase Option involves a nondonative transfer, meaning the SCUSRAP does not apply, and the CLRAP governs.

C. Petitioner's extrinsic interpretation of the SCUSRAP fails.

TBFL maintains that the plain language of the statute governs and that the Court need not resort to extrinsic tools of statutory interpretation. However, even if the Court considers the extrinsic arguments raised in the Petition, those arguments fail.

First, Petitioner cites to the preamble of the bill proposing the enactment of the SCUSRAP. Pet. Cet. 8. The preamble states that this is a "Bill to amend Title 27, Code of Laws of South Carolina, 1976, relating to property and conveyances, by adding Chapter 6 so as to abolish the common law rule against perpetuities and replace it with a statutory rule against perpetuities . . . ." 1987 Act No. 12, § 1. Petitioner places much emphasis on the use of the word "abolish" to argue the General Assembly clearly intended to "abolish" the CLRAP. Pet. Cert. 8-9. However, the General Assembly elected not to use the word "abolish" in the text of the statute, instead stating that "[t]his chapter *supersedes* the common law rule against perpetuities." S.C. Code Ann. § 27-6-80 (emphasis added).

Moreover, the General Assembly indicated in the Bill that, to the extent the statute "abolishes" the common law rule, it intends to "replace it with a statutory rule against perpetuities." 1987 Act No. 12, § 1. Because the statutory rule expressly excludes nondonative transfers from its scope, the CLRAP was not replaced for such transfers. This demonstrates the General Assembly did not intend to abolish the CLRAP in situations where the statutory rule does not apply.

Second, Petitioner invokes comments to the Uniform Statutory Rule Against Perpetuities drafted by the National Conference of Commissioners on Uniform State Laws to speculate on the South Carolina General Assembly's unexpressed intent. *See* Pet. Cert. 10-11. Had the General Assembly intended to adopt this commentary, it could have done so explicitly. It did not.

Third, Petitioner contends that other jurisdictions adopting the Uniform Statutory Rule Against Perpetuities have concluded that "nondonative transfers are excepted *from any rule against perpetuities*." *Id.* at 11 (emphasis added). In support of this sweeping statement, Petitioner cites only two cases from other jurisdictions: New Jersey and California. *Id.* at 11-12. These cases, however, are outliers and contradict the majority rule, which holds that "[t]he Uniform Statutory Rule [A]gainst Perpetuities does not replace the common law rule against perpetuities as to preemptive rights arising from nondonative transfers . . . ." 70 C.J.S. Perpetuities § 50.

New Jersey was recognized in *American Jurisprudence* as the one state where the enactment of the Uniform Statutory Rule Against Perpetuities has abolished the common law outright. *See* 61 Am. Jur. 2d *Perpetuities, Etc.* § 12 (citing *Juliano & Sons Enters., Inc. v. Chevron*, U.S.A., Inc., 250 N.J. Super. 148, 593 A.2d 814 (App. Div. 1991)). California, by contrast, eschewed the rule against perpetuities in commercial contexts long before adopting the Uniform Statutory Rule Against Perpetuities. *See Wong v. Di Grazia*, 60 Cal. 2d 525, 533, 386 P.2d 817, 823 (1963). South Carolina, however, maintains a strong public policy against restraints on the free alienability of property. *See Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987) ("The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land."); *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917 ("Nonvested property interests tend to restrain the free alienability of property and interfere with

its beneficial use.").

Instead of adopting the radical approaches taken by New Jersey or California, South Carolina's Court of Appeals followed persuasive authority from North Carolina. In *New Bar Partnership v. Martin*, 729 S.E.2d 675 (N.C. Ct. App. 2012), the North Carolina Court of Appeals interpreted a prior version of the state's Uniform Statutory Rule Against Perpetuities closely parallelling the SCUSRAP. The *New Bar* court held that because the Uniform Statutory Rule does not apply to nondonative transfers, and the CLRAP applies when the statute does not, the CLRAP governs those transfers. *Id.* at 683. While the North Carolina General Assembly later amended its statute to explicitly abolish the CLRAP (using the word "abolish"), *New Bar* remains controlling law under the earlier version of the statute. *See* N.C. Gen. Stat. § 41-6.4(c)(2022) ("This section clarifies the intent of the General Assembly to abolish the common-law rule against perpetuities when it enacted Chapter 190 of the 1995 Session Laws, which enacted the Uniform Statutory Rule Against Perpetuities.").

If South Carolina's General Assembly intends to abolish the CLRAP entirely, it is within its legislative authority to do so. That decision, however, lies with the legislature, not the judiciary. *See Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 628–29, 207 S.E.2d 75, 78 (1974) ("The construction of a statute is a judicial function and responsibility. Subject to constitutional limitations, the legislature has plenary power to amend a statute.").

Accordingly, the Court of Appeals correctly ruled that the CLRAP is not preempted by the SCUSRAP for nondonative transfers. The Purchase Option was therefore void under the CLRAP. Petitioner's arguments provide no basis for disturbing the Court of Appeals' well-reasoned decision.

II. The Court of Appeals Properly Determined That an Implied Term of Reasonable Time Cannot Be Read into the Purchase Option.

Petitioner maintains that nondonative transfers are not subject to any rule against perpetuities. Pet. Cert. 13. Under this logic, options to purchase real property could persist indefinitely, disrupting the alienability of property and interfering with its beneficial use—an outcome inconsistent with South Carolina's public policy. *See Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917. Such an absurd result cannot reflect the Legislature's intent when enacting the SCUSRAP. Alternatively, Petitioner argues that the Court should imply a reasonable time for the duration of the option to save the Purchase Option from violating the CLRAP. Pet. Cert. 13.

A. Petitioner's argument to imply a reasonable time is not preserved.

As an initial matter, this argument is not preserved for appellate review, as it was neither addressed by the trial court nor raised in a motion to alter or amend. To preserve an issue for appeal, a party must demonstrate that the issue was: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) presented to the trial court with sufficient specificity. *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011) (quoting *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007)). Even under a generous reading of the hearing transcript and Petitioner's motion before the circuit court, this argument fails both the first and fourth prongs.

Even assuming, *arguendo*, that the issue was adequately raised by Petitioner, the circuit court never ruled on it. Moreover, Petitioner failed to raise the issue in a Rule 59(e), SCRCP, motion to give the circuit court an opportunity to address the matter. As South Carolina law makes clear, "[a]n issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." *Doe v. Roe*, 369

S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006).

Additionally, the issue was not presented to the circuit court with sufficient specificity to satisfy the fourth prong. To preserve an issue for review, it must be "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Petitioner's vague or generalized references to the issue failed to meet this standard, leaving the circuit court without a meaningful opportunity to rule.

This Court, like the Court of Appeals, should not save Petitioner from a problem of its own making and overrule the circuit court on a matter not properly brought before it.

B. Implying a reasonable time is inconsistent with the purpose of the CLRAP and contradicts the terms of the Agreement.

Even if this argument were properly preserved, the imposition of a reasonable time term contradicts the very purpose of the CLRAP, which demands certainty in vesting. The CLRAP ensures predictability by invalidating interests that fail to vest within its strict parameters. A flexible "reasonable time" standard would undermine this certainty and inject unpredictability into property transactions. South Carolina law does not support such a deviation from established principles. The Court of Appeals correctly rejected Petitioner's argument to imply a reasonable time term.

Moreover, the Purchase Option expressly provides for a "perpetual option." This unambiguous language reflects the parties' intent to create an option of indefinite duration. There is no evidence to suggest that the parties intended to impose a reasonable time limit. The Court should not rewrite the agreement by implying a term that the parties did not negotiate or intend.[3]

[3] Ironically, the New Jersey case that Spring Valley urges this Court to follow finds the agreement at issue there similarly could not be saved by a reasonable time limit. *See Juliano & Sons Enters.*,

For these reasons, the Court should reject Petitioner's arguments. The Court of Appeals' opinion is well-reasoned, supported by South Carolina law, and reached the correct result.

III. As an Alternate Sustaining Ground, Petitioner Waived Any Right Under the Purchase Option.

Petitioner's failure to proceed with the sale after exercising the Purchase Option, agreeing to terms, and executing the Closing Documents constitutes a waiver of its right to enforce the option. The record shows that after TBFL paid a $35,000 nonrefundable application fee, Petitioner exercised the Purchase Option. However, rather than proceed, Petitioner introduced new terms, knowing TBFL's only choice was to accept or forfeit the refinance fee.

The transaction was not simple; it involved complex negotiations over tax consequences, business structure, expenses, and a co-tenancy agreement. (R. 355:10–357:4, 242:17–243:10). Despite these challenges and the parties' differences in understanding, the parties reached an agreement on the fundamental terms, and the Closing Documents were signed before the refinance closing. (R. 355:10–357:4, 242:17–243:10). Petitioner's failure to close after these agreements amounted to abandonment of its rights under the Purchase Option.

Petitioner's action for specific performance of the Purchase Option rests in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000) (citing *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964)). By exercising the option and then failing to close the agreement

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Inc., 250 N.J. Super. at 153, 593 A.2d at 816–17 ("We recognize that the contract in this case, negotiated at arms length with the assistance of competent counsel, may well have contained clear manifestations of the parties' intent and provides rights and obligations for the parties' 'successors and assigns.' Further, the agreement provides that the right may be exercised whenever Gulf received a bona fide offer for the property 'at any time hereafter.' Thus, the agreement cannot be 'saved' in the traditional way by construction of a 'reasonable' time limit as a matter of fact or law. However, if the agreement is not subject to the rule against perpetuities, the parties' intent and expectations can be effectuated without being declared void and unenforceable as a matter of law.").

reached by the parties, Petitioner abandoned any right to demand specific performance of the Purchase Option, barring its claim. *S. Silica Min. & Mfg. Co. v. Hoefer*, 215 S.C. 480, 496, 56 S.E.2d 321, 327 (1949) ("A right once abandoned may not be revived without the consent of both parties." (citation omitted)). Petitioner cannot now demand specific performance after abandoning the transaction. *Norton v. Matthews*, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967) ("He who seeks equity must do equity.").

Therefore, Petitioner's waiver of its rights under the Purchase Option precludes its claim for specific performance and provides an alternative ground to affirm the circuit's ruling.

CONCLUSION

The Court of Appeals' decision correctly applied South Carolina law in concluding that the Purchase Option is void under the CLRAP. There is no error of law or misinterpretation warranting this Court's review. Accordingly, TBFL respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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