

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

S.C. SUPREME COURT

APPELLATE CASE NO. 2024-001994
CIVIL ACTION NO. 2019-CP-21-40-06914

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

Spring Valley Interests, LLC,

PETITIONER,

versus

The Best for Last, LLC,

RESPONDENT.

APPENDIX VOLUME II (Pages 443-572)

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

Appellate Case No.: 2022-000813

SPRING VALLEY INTERESTS, LLC, Appellant,

v.

THE BEST FOR LAST, LLC, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- ISSUE I:** The Trial Court Erroneously Dismissed the Appellant's Complaint On Basis That the Enforcement of the Purchase Option Was Barred by the Common Law Rule Against Perpetuities Because the South Carolina Uniform Statutory Rule Against Perpetuities Superseded the Common Law Rule Against Perpetuities and The Purchase Option Was a Non-donative Transfer Not Subject Invalidation Under U.S.C. §27-6-20.
- ISSUE II:** In the Alternative that the Common Law Rule Against Perpetuities Applied to the Appellant's Purchase Option, An Implied Term That the Purchase Option Would Be Exercised Within a Reasonable Time Existed That Would Prevent The Option From Violating The Common Law Rule Against Perpetuities.
- ISSUE III:** The Appellant Did Not Waive Its Right to Exercise the Purchase Option By Negotiating With The Respondent In An Attempt To Resolve The Respondent's Refusal To Honor the Purchase Option And Waiver Would Not Be An Alternative Basis For The Circuit Court's Order Granting Summary Judgment.

STATEMENT OF THE CASE

On December 11, 2019, the Appellant commenced this action by filing a Summons and Complaint in the Richland County Court of Common Pleas naming the Respondent, The Best For Last, LLC, as the sole defendant. The Complaint sought specific performance of an Option to Purchase Property (Count II) and reformation of a related document, the Loan Agreement, Count I. (R. p. 4 Complaint) The Complaint also included a claim for damages in the alternative that the Court did not grant its request for specific performance. (R. p. 5 Complaint, p. 4)

On January 17, 2020, the Respondent answered the Complaint and in its Ninth Defense and Second Counterclaim sought a declaration pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. §15-53-10, et seq. that the Purchase Option

was void on the basis that it violates the Common Law Rule and Uniform Statutory Rule Against Perpetuities. (R. p. 15 Defendant's Answer and Counterclaims, Paras 38 - 42). The Respondent asserted as its Fifth Defense and the defense that the Appellant's claim for specific performance was barred by the doctrine of estoppel, waiver and laches. (R. p. 18 Defendant's Answer and Counterclaims Answer, page 4) The Respondent asserted other defenses and counterclaims which are not relevant to the appeal.

On March 17, 2020, the Appellant served its Reply to the Counterclaims and denied 1) that the Purchase Option violated the Rule Against Perpetuities and 2) that the Respondent was entitled to the declaration that the Purchase Option is void on the basis that it violates the Common Law Rule Against Perpetuities and/or the Uniform Statutory Rule Against Perpetuities. The Appellant's Reply asserted as its Third Further Reply and Defense that S.C. Code Ann. §27-6-80 expressly states that the Uniform Statutory Rule Against Perpetuities supersedes the Common Law Rule Against Perpetuities in an express defense to any claims by the Respondent that the Common Law Rule Against Perpetuities barred enforcement of the Purchase Option. (R. p. 44 Plaintiff's Reply to Defendant's Counterclaim, p. 4).

On April 16, 2021, the Respondent filed its Motion for Partial Summary Judgment and Memorandum in Support. The motion was based on two grounds: 1) that the Purchase Option was barred by the Common Law Rule Against Perpetuities and/or the Statutory Rule Against Perpetuities and 2) that the Appellant had waived its right to exercise the Purchase Option. (R. p. 53 Defendant The Best for Last LLC's Motion for Partial Summary

Judgment and Memorandum in Support).

On April 29, 2021, the Appellant filed its Motion for Summary Judgment seeking an order dismissing the Respondent's Counterclaims and granting specific performance of the Purchase Option. (R. p. 65 Plaintiff's Motion for Summary Judgment) The Appellant filed a Memorandum in Support of its Motion for Summary Judgment. (R. p. 67 Plaintiff's Memorandum in Support of its Motion for Summary Judgment).

On August 26, 2021, the Court heard the competing motions for summary judgment and the order being appealed was issued as a result of this hearing.

On May 18, 2022, the Court entered an order declaring that the Purchase Option violated the Common Law Rule Against Perpetuities and therefore was unenforceable and granted the Respondent's Motion for Partial Summary Judgment and dismissed the Appellants claims for declaratory relief and specific performance. (R. p. 1 Order Granting Respondent's Motion for Partial Summary Judgment). The Court's order also stated that the Appellant's Motion for Summary Judgment was denied.

On June 13, 2022, the Appellant filed its Notice of Appeal of the Circuit Court's Order Granting the Defendant's Motion for Partial Summary Judgment. (R. p. 51, Notice of Appeal)

There were no orders of the Circuit Court which may have affected the appeal, or would have shed light upon the questions involved in this appeal.

The primary remedy sought in the Appellant's Complaint was specific performance of the Option to Purchase. The Purchase Price set forth in the Option was in the original

amount of Eight Hundred Thousand Dollars and no/100s (\$800,000.00). Therefore, the amount involved in this appeal is the Purchase Price set forth in the Option, i.e., Eight Hundred Thousand Dollars and no/100s (\$800,000.00).

There have been no changes to the parties to this action.

STANDARD OF REVIEW

An appellate court reviews the granting of summary judgment under the same standard applied by the Circuit Court pursuant to Rule 56, SCRPC. *Brockbank, supra*; *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998). *Bayle v. South Carolina Dept. of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (S.C. App. 2001)

Summary Judgment is proper when there is no genuine issue of material of fact and the moving party is entitled to judgment as a matter of law. *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRPC. *See also Bruce v. Durney*, 341 S.C. 563, 534 S.E.2d 720 (Ct.App.2000) (motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issues of fact exist, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999). If triable issues exist, those issues must be submitted to the jury. *Young, supra*.

Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Vermeer, supra*. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997).

In a case in which the essential facts are largely undisputed, raises a novel question of law, the appellate court is free to decide the question of law with no particular deference to the lower court. *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 692 S.E.2d 499 (S.C. 2010).

"Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact..." *Mitchell v. City of Greenville*, 411 S.C. 632, 770 S.E.2d 391 (S.C. 2015).

STATEMENT OF FACTS

On or about May 3, 2017, the Appellant's predecessor, White Interests Limited Partnership, entered into a Loan Agreement with the Respondent, wherein White Interests Limited Partnership loaned \$800,000.00 to the Respondent. (R. p. 4 Complaint, para. 5, R.

p. 15 Answer para 5, para 29) A copy of the Loan Agreement is attached to the Complaint as Exhibit B. (R. p. 11 Complaint- Exhibit B).

The Respondent used the loan proceeds to purchase certain real property located in Columbia, South Carolina (hereinafter, the “Property”). (R. p. 18 Answer and Counterclaims, para. 29)

As part of the consideration for the loan, in the Loan Agreement, the Respondent granted White Interests a freely assignable and perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property.

The Purchase Option at issue in this case was set forth in Section 2 of the Loan Agreement which 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”⁰ 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 (1) 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. p. 4 Complaint, para 1-6. R. p. 11 Exhibit B to Complaint.) (R. p. 19-20 Answer and Counterclaim, para 39).

White Interests assigned its right to exercise the Purchase Option to the Appellant. (R. p. 6 Complaint, para 15, R. p. 19 Answer and Counterclaim, para 32).

On August 21, 2019, the Appellant sent the Respondent a letter entitled “Notice of Exercise of Option to Purchase.” The letter notified the Respondent that the Appellant was

exercising its option to purchase a 74.425% undivided co-tenancy interest in the Property. (R. p. 221 Gavigan Deposition p. 30, L.1-22).

The Respondent objected to the exercise of the option and inexplicitly demanded that Appellant exercise the option by becoming a member of Respondent. (R. p. 340-344 Bethea Deposition, P. 10, L. 6 – P. 14, L.22, R. p. 278-287 Heyward Deposition, P. 22, L. 20 - P. 23, L. 3). This demand was completely contrary to the language of the Purchase Option. Neither the Purchase Option nor the Loan Agreement make any reference to the Appellant becoming a member of Respondent as a result of the exercise of the option. Instead, the language of the Purchase Option clearly states that the option is “to purchase a 74.425% undivided co-tenancy interest in the Property...” The basis for the Respondent’s demand was that the Respondent, or its attorney, thought that the economics of the deal it had negotiated would be ridiculous unless it was folded into a membership interest, with the Appellant receiving a windfall and the Respondent receiving the corresponding detrimental consequences on the other side. (R. p. 251 Gavigan Deposition, P. 60, L. 14-16). In other words, the Respondent resisted the exercise of the Purchase Option because it thought it had negotiated a bad deal.

It is important to note that this demand for Appellant to be a member of the Respondent would translate into it receiving a 74.425% of a 50% interest instead of 74.425% of a 100% in the Property. (R. p. 352 Bethea Deposition, P. 22, L. 7 -13).

This demand that the Appellant become a member in the Respondent, instead of an owner of 74.425% co-tenancy interest in the Property caused the Appellant’s exercise of the option to fall apart. (R. p. 250 Gavigan Deposition, P. 59, L. 10 - 21).

The parties attempted to resolve the dispute generated by the Respondent's response to the exercise of the option. The parties reached a general outline of a resolution wherein the Appellant would receive a 70% co-tenancy interest in an effort to resolve the dispute. (R. p. 253-254 Gavigan, P. 62, L. 10 - P. 63, L. 13). As part of this general settlement, the parties expected to receive considerable funds from a refinance loan which would be disbursed as they agreed. The proposed disbursement of the funds was set forth in a spreadsheet. (R. p. 254-255 Gavigan deposition, P. 62, 19- P. 63, L. 3). So, while there was a general agreement outlined for a resolution of the dispute, the parties still needed to resolve the specifics of how the money would be disbursed to each party. The discussions of the disbursement of the funds included the issues of who was going to pay the attorney's fees and who was going to get reimbursed for attorneys' fees. (R. p. 255 Gavigan Deposition, P. 63, L. 4). The parties never reached a complete agreement on the issue of who was going to be paying the attorneys' fees and how much. (R. p. 255 Gavigan Deposition, P. 63, L. 8).

The attorneys for the parties drafted various documents to reflect the general plan of settlement. As they did so, they continued negotiations regarding the specific details of how the loan proceeds would be distributed as was required for a final settlement. The attorney for the Respondent eventually drafted a final version of the documents which would reflect the general agreement and delivered a copy of the same executed by his client to Gavigan, the attorney for the Appellant, conditioned on it signing the same. These documents included a co-tenancy agreement, an amendment to the loan agreement, and various other documents typical of a real estate closing. (R. p. 357 Bethea Deposition,

P. 27, L. 12). These negotiations bogged down by the Respondent's demand that some of the loan proceeds be used to pay its attorney's fees. This demand would result in a smaller amount of money going to the Appellant. In response, the Appellant demanded that loan proceeds be used to pay its expenses. The Respondent rejected this demand. Then, later the Respondent communicated that it was willing to pay said sums. However, at that time, the Appellant responded by saying no and demanded that it receive the full 74% co-tenancy interest as called for by the Loan Agreement. The Respondent refused. And as a result, the Appellant never delivered executed copies of the documents, and instead insisted on the enforcement of the Purchase Option. (R. p. 354-355 Bethea Deposition, P. 26, L. 24 - P. 27, L. 6).

ARGUMENTS

ISSUE I: The Trial Court Erroneously Dismissed the Appellant's Complaint On Basis That the Enforcement of the Purchase Option Was Barred by the Common Law Rule Against Perpetuities Because the South Carolina Uniform Statutory Rule Against Perpetuities Superseded the Common Law Rule Against Perpetuities and The Purchase Option Was a Non-donative Transfer Not Subject Invalidation Under U.S.C. §27-6-20.

The Circuit Court, in its order granting partial summary judgment, held that the Uniform Statutory Rule Against Perpetuities (hereinafter, the "USRAP") did not apply to the Purchase Option and further held that the Common Law Rule Against Perpetuities (hereinafter, the "CLRAP") applied to void the option. Therefore, the central issue in this appeal is a determination of the whether the statutory rule or the common law rule applies to the Purchase Order and the effect of the applicable rule. The analysis leads to the conclusion that the CLRAP did not apply as the USRAP replaced the common law rule.

Moreover, the USRAP applied to the Purchase Option but did not apply to invalidate or void it as the Purchase Option was exempted from the statute's invalidation section.

The analysis supporting this position is made in two prongs:

1. The first prong being that the USRAP did not invalidate the Purchase Option because although the USRAP applied, to the Purchase Option, the USRAP exempted the Purchase Option from the operation of the invalidation provision.
2. The second prong being that the CLRAP did not survive the enactment of the USRAP and therefore can not be the basis for invalidating the purchase option.

A. **The USPAP Did Not Invalidate the Purchase Option Because Although the USRAP Applied to the Purchase Option, the USRAP Exempted the Purchase Option From the Operation of the Invalidation Provision.**

1. **History of CLRAP**

The beginning of the analysis for this case is a brief and admitted cursory history of the CLRAP that lead to the efforts to create the Uniform Statutory Act to replace the common law rule. An exhaustive history of the CLRAP would be beyond the needs of this case (and the page limitation for briefs filed with this Court).

The Rule Against Perpetuities has been judicially called out as “every first-year law student's worst nightmare” *Shaver v. Clanton*, 31 Cal.Rptr.2d 595, 596, 26 Cal.App.4th 568 (Cal. App. 1994).

As one court has observed "When undertaking to construe and apply the Rule Against Perpetuities, a court will be well-advised to investigate and appreciate the history of the rule and its application." *Continental Cablevision of New England, Inc. v. United Broadcasting Co.*, 873 F.2d 717, 723 (4th Cir. 1989). The *Continental Cablevision* case

provides a very good history of the CLRAP as well as some insight into the criticism directed to it, especially as it is applied to commercial transactions. Of course, the Purchase Option, the nonvested interest in the case at hand, is a bargained for commercial transaction, not a gift or donative transfer.

The Rule Against Perpetuities had its origins in the *Duke of Norfolk's* case, 3 Ch. Cas. 1, decided in 1682. It was a judicially created rule adopted at one time by every jurisdiction in the United States. The fundamental purpose of the rule was to prohibit restraints on alienation of property which were unreasonably long or unlimited in duration. At its inception, the rule was designed to prevent a family from tying up property indefinitely by making future interests dependent on remote contingencies. *See generally, Hartnett v. Jones*, 629 P.2d 1357, 1361 (Wyo.1981). *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856-857 (Utah 1998) (Citations omitted).

The application of the *CLRAP* often lead to “...unnecessarily all embracing, intention frustrating wooden disregard of the testator's or settlor's intent ...” *Continental Cablevision supra*, 873 F.2d at 730 .

The Common Law Rule was criticized because it could operate harshly and invalidate a disposition if there were any conceivable possibility it would violate the rule, regardless of whether it was likely to do so or how reasonable the disposition appeared. *Shaver supra* 31 Cal.Rptr.2d at 598, 26 Cal.App. 4th at 574.

The Common Law Rule Against Perpetuities in South Carolina was stated as follows: 'No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest.' *Abrams v. Templeton*, 320 S.C. 325,

327, 465 S.E.2d 117, 119 (Ct.App.1995), *Accord, Webb v. Reames*, 485 S.E.2d 384, 326 S.C. 444 (S.C. App. 1997). The mere possibility that the interest may not vest within the 21 year period rendered the interest void. *Webb*, 485 S.E.2d at 385.

South Carolina adopted as its common law version of the rule, this version that was akin to a concealed bear trap with a hair trigger. It is easy for the drafter of a commercial agreement to be caught by the trap and once caught, there is no escape.

2. Criticism Regarding Application of CLRAP to Commercial Transactions

Indeed, the basic purpose of the [common law] rule was to limit family dispositions, and in that context the period of lives in being plus 21 years served as a proper measurement. Only later by an overextension of nineteenth century concepts did the courts apply the rule to commercial transactions. *Wong v. Di Grazia*, 60 Cal.2d 525, 35 Cal.Rptr. 241,246 (Cal. 1963).

Courts and commentators alike have noted that applying the CLRAP to modern commercial transactions has capricious consequences and they have sharply criticized the rule's application in the commercial setting. *Shaver, supra* 26 Cal.App 4th at 597.

"Business is an unlikely place to encounter an 'unborn widow' or a 'fertile octogenarian (the period of a life in being and 21 years thereafter has no significance in the world of commercial affairs).", *Continental Cablevision, supra*, 873 F.2d at 730. (citing *Leach, Perpetuities in a Nutshell*, 51 Harv.L.Rev. at 638).

In fashioning of the law of the Rule Against Perpetuities for commercial transactions of the kind here involved, to require a modification from the somewhat unnecessarily all embracing, intention frustrating wooden disregard of the testator's or settlor's intent which applies when land

transactions of a non-commercial kind are concerned, would appear to be appropriate. *Id.*

Moreover, application of the CLRAP to commercial transactions often lead to commercial injustices and unexpected unjust enrichment that simply do not exist in traditional donative transfers. The source of such injustices and unjust enrichment is that one of the parties to the commercial transaction, who had received consideration for the invalidated transaction, reaps the benefit of the transaction but is freed from the burden he exchanged when the transaction is voided by the application of the CLRAP. (*See concurring opinion in Continental Cablevision of New England, Inc., supra.*, which detailed the long history of struggle over this issue by Massachusetts courts that had "... repeatedly expressed their reluctance to mercilessly apply the RAP in a way that works a commercial injustice..." *Id.*, 873 F.2d at 730.)

In fact, in *Continental Cablevision*, the majority opinion, contrary to rigidly applying the CLRAP, found it a "... a simpler and fairer solution to uphold the right of first refusal for the fixed period named in the Rule Against Perpetuities, namely, twenty-one years. That is an approach much more in accord with the parties' intention and free of any complaint that it prevents vesting for an unreasonable period of time." *Id.*

An illustration of the unjust enrichment or injustice that can occur when the CLRAP is applied to void commercial transactions is the case at hand. The Purchase Option was part of the deal negotiated by the parties to the Loan Agreement. The Option had value that the Respondent traded to obtain the loan. Under the Circuit Court's order, the Appellant lost the option its successor had negotiated with Respondent as part of the Loan Agreement.

Yet, the Respondent retained all of the benefits of the Loan Agreement despite being freed from its obligation to honor the option when exercised by the Appellant. The Respondent received a windfall from the Circuit Court's application of the CLRAP to void the Option.

Indeed, the *Continental Cablevision* case is an example of a court modifying the application of the common law rule to avoid such unjust enrichment. *Continental Cablevision* lists several other situations where courts used clever logic to avoid the harsh, wooden application of the common law rule to transactions that did not seem to the family disposition transactions originally targeted by the rule. *Id.*, 873 F.2d at 724- 726.

3. South Carolina Uniform Statutory Rule Against Perpetuities

In 1987, the South Carolina Legislature enacted the Uniform Statutory Rule Against Perpetuities S.C. Code Ann. §27-6-10 (2022 Edition), et seq. The USRAP is based on the Uniform Statutory Rule Against Perpetuities promulgated by the National Conference of Commissioners on Uniform State Laws ('NCCUSL')...." Vol. 2, No. 6, Pg. 0026 (1991), What Every South Carolina Lawyer Should Know About The (Ugh!) Rule Against Perpetuities (South Carolina Lawyer (1991)).

The Uniform Law Commission “now 130 years old, promotes uniformity of law among the several states on subjects as to which uniformity is desirable and practicable. The ULC improves the law by providing states with non-partisan, carefully considered, and well drafted legislation that brings clarity and stability to critical areas of the law.” Preamble to Guide to Uniform and Model Acts, 2021-2022, Uniform Law Commission.

4. **USRAP's Contrasting Approach and Key Components**

"The South Carolina General Assembly adopted this statutory provision to avoid the remorseless application of the common law rule. The law abhors a forfeiture." *Abrams, Supra.*

Even a cursory review of key components of the USRAP reveals an approach that is radically different from that taken by the CLRAP. The main difference can be described as where the CLRAP was a bear trap with a hair trigger with no release, the USRAP is a trap intentionally designed to be harder to spring by accidental encounters and the statute drafters even provided a key to allow unlucky victims to escape the trap as discussed below. The USRAP also responded to criticism of the over reach of the CLRAP to interests and transactions not intended to be covered by the original common law rule by exempting those interests from the invalidation section of the Act.

(a) Softer Invalidation Provision

Section 27-6-20 (A) is the provision that operates to invalidate certain nonvested property interest under the USRAP. S.C. Code Ann. §27-6-20 (2022 Edition). The section invalidates such nonvested interest unless one of two conditions are met. The first, found in subsection 1, is that: "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..." S.C. Code Ann. §27-6-20 (A)(1) (2022 Edition).

The "it is certain to vest no later than twenty-one years" language under the statute is a very different approach to invalidation than that taken by the CLRAP. This approach under the USRAP seeks to avoid forfeiture. Whereas, the CLARP's "mere possibility an

interest may not vest during the twenty-one years” approach is a more aggressive approach that leads to the invalidation of more interests than would be the case under the USRAP.

But, even if the nonvested interest does not meet the terms of subsection 1, it is not invalidated if "the interest either vests or terminates within ninety years after its creation." S.C. Code Ann. §27-6-20(A)(2) (2022 Edition).

Subsection 2 has been referred to as the “wait and see” provision. *Mizell v. Greensboro Jaycees–Greensboro Junior Chamber of Commerce, Inc.*, 105 N.C.App. 284, 287, 412 S.E.2d 904, 906–907 (1992). The USRAP which, among other actions, added a 90–year “wait and see” alternative to the common law RAP. Under this section, certain nonvested property interests that violate the common law RAP can survive if the interest actually “vests or terminates within 90 years after its creation.” *Id.*

This is a contrast to the CLRAP which deemed the nonvested interest immediately void upon creation if there was any possibility that it would not vest within the 21 years plus life in being. Under the CLRAP, a person could try to exercise his interest the year after it was created, but that effort would be unsuccessful because the interest was void as of its creation due to any remote possibility that it would not vest within the time period. Under the USRAP, the nonvested interest holder has up to ninety years from the date of creation to enforce the interest and it can’t be invalidated until the expiration of the ninety years period. Again, this is a much softer, gentler approach to invalidating nonvested interest than that existing under the CLRAP. The approach reflects that the USRAP was designed is to avoid forfeitures.

(b) Reformation Provision

S.C. Code Ann. §27-6-40 entitled Reformation of Property Dispositions is the key under the USRAP that allows unwary victims of the application of the Invalidation Clause to avoid the termination of their transaction. This provision states "Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years permitted by this chapter..." for interest that are found to be invalid or subject to being found invalid under Section 27-6-20. S.C. Code Ann. §27-6-40 (2022 Edition). Again, this is a radical diversion from the CLRAP which did not provide for such reformation.

(c) Exceptions Section

As discussed above, as the CLRAP's application was expanded, criticism of such application to non-traditional family related real estate transactions grew. Application of the rule to commercial transactions generated such criticism.

The USRAP responds to the criticism by exempting some interests from the application of the Invalidation Section. Section 27-6-50 is the provision that exempts seven different categories of interest from the application of Section 27-6-20. S.C. Code Ann. §27-6-50 (2022 Edition). It is important for this analysis to note that these exempted interests are covered by the USRAP, but the USRAP, via Section 27-6-50, exempts them from Section 27-6-20, the Invalidation Section. In fact, the opening sentence of Section 27-6-50 states: "Section 27-6-20 does not apply to:" as the preamble to the list of seven exemptions.

The first category of exempted nonvested interests is non-donative interests. S.C. Code Ann. §27-6-50(1) (2022 Edition). The statute does not define “non-donative interest.” The term seems targeted to commercial transactions. Non-donative interests certainly encompasses commercial transactions.

As a California court stated: The exclusion found in this subsection of the model statute results in the exclusion of most non-donative transfers, i.e., commercial-type transactions, from the operation of the voiding section of the model act. *Shaver, supra*. 36 Cal.Rptr.2d at 598, 26 Cal.App.4th at 574. (Cal. App. 1994). (holding that the Uniform Act changed California law by explicitly excluding such commercial transactions from coverage under the rule, meaning the Invalidation Section of the California version of the USRAP, *Id*, at fn 7.) The rule is now irrelevant to such transactions. *Id*.

There does not seem to be a dispute for the purposes of this appeal that the Purchase Option would constitute a nondonative interest under the USRAP. If the Purchase Option was not a nondonative interest (or other interest exempted from invalidation under Section 27-6-20), there would be no basis for the Circuit Court’s conclusion that the USRAP did not apply, the underlying tenant to her conclusion that the CLRAP applied.

Under the South Carolina SRAP, Section 27-6-80(1) applies to commercial transactions but exempts such transactions for invalidation under Section 27-6-20.

In the case at hand, the Purchase Option was a nondonative property interest as it was a party of the Loan Agreement, a commercial transaction, negotiated by the Appellant and the Respondent. Therefore, the USRAP applied to the Purchase Option, but the option falls within the Section 27-6-50(A)(1) and is exempt from invalidation under Section 27-

6-20. This is the first point of the two-prong argument that the Circuit Court's opinion granting summary judgment was erroneous. The first prong being that the USRAP applied to the Purchase Option, but the USRAP exempted the Purchase Option from the operation of the invalidation provision and would not be grounds to void it.

B. The CLRAP Did Not Survive the Enactment of the USRAP and Therefore Can Not be the Basis for Invalidating the Purchase Option.

The completion of the first prong of the analysis is the stepping off point for the next prong in showing the error of the Circuit Court's granting of summary judgment: that is, the CLRAP did not survive the enactment of the USRAP for interests created after its effective date, and therefore it could not be the basis for invalidating the Purchase Option. It is important in the analysis to highlight the reasoning applied by the Circuit Court to reach its conclusion that the common law applied. The Circuit Court Judge expressed the reasoning in her order as follows:

The Uniform Statutory Rule Against Perpetuities (USRAP) does not apply in this case. Generally, the USRAP supersedes the common law rule against perpetuities. S.C. CODE Ann. 27-6-80 (2021). However, USRAP does not apply to nonvested property interests arising out of a donative transfer. S.C. CODE ANN. 27-6-50 (1) (2021). Here, the basis of the parties' arguments concerns-a nondonative transfer-the commercial transaction involving the purchase option. Because the USRAP does not apply to nondonative transfers, the USRAP cannot supersede or replace the common law, thus the common law is the appropriate legal standard to conclude that the purchase option is unenforceable.

The Circuit Court's establishes a two-tier system for determining if nonvested interests are voided by a rule against perpetuities. One system, the USRAP applies to all such interests other than those shielded from invalidation under its Exemption Section.

The second system, the CLRAP applies to those only those transactions that are exempted from invalidation under the USRAP's Invalidation Section by its Exemption Section.

This statement raises the issue of legislative intent: is the Circuit Court's position consistent with the intent of the legislation. That is, did the legislature intend to have a two-tiered system applicable to nonvested property interests after the effective date of the USRAP?

Or, was the legislative intent to have the one uniform statutory scheme that applied to the total universe of nonvested property interests, with a section that exempt certain interests from invalidation under the statute.

There is no South Carolina case directly on point on this issue.

The undersigned could find only one reported case dealing with the issue, *New Bar Partnership v. Martin*, 221 N.C.App. 302, 729 S.E.2d 675 (2012). *New Bar* specifically concludes that "In turn, because the USRAP specifically excludes the nondonative transfer here from its provisions, there is nothing to "supercede" the common law RAP as to New Bar's right of first refusal." *Id.*, 729 S.E.2d at 683, The Circuit Court reasoning is consistent with, if not an adoption of, the reasoning of *New Bar P'ship*.

Of course, there is a glaring fallacy in *New Bar's* logic (and that of the Circuit Court). The defect with this logic is demonstrated in the language from *New Bar* that states "because the USRAP specifically excludes the nondonative transfer from its provisions." This language is inaccurate. As demonstrated below, the USRAP does not exclude the nondonative transfer (or the other six types of exempted interests) from the coverage of the USRAP. Rather, the Act merely exempts these interests from the application of the

Invalidation Section. The two are not tantamount to the same. The logic of *New Bar* is demonstratively faulty because it incorporates language of the USRAP that applies to the commercial interest involved, the Exemption Section, to reach their conclusion that the statute excludes the interest from the USRAP. Their position that the USRAP does not apply to the nondonative interest rests upon their reference to the USRAP Exemption Section exempting the interest from invalidation. So, the *New Bar* reasoning applies the Exemption Section of the USRAP to reach its conclusion that the USRAP does not apply. The fallacy is that *New Bar* is applying the statute to the interest to say the statute does not apply.

1. Legislative Intent – One System

To answer this question of one system or two sets of rules, one must turn directly to the issue of Legislative Intent. An examination of the wording of the statute and the probable goals of the legislation, taken in the context of the history of the CLRAP, supports the position that the legislative intent was to have one uniform set of rules applicable to nonvested interests.

(a) The Wording of The USRAP Clearly Shows That the CLRAP No Longer Applies to Interest Created After the Effective Date of the Statutory Rule.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent wherever possible.' *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 37, 267 S.E.2d 424, 425 (1980); *Merchants Mutual Insurance Company v. South Carolina Second Injury Fund*, 277 S.C. 604, 291 S.E.2d 667 (1982)." *Gardner v. McDonald*, 316 S.E.2d 374, 281 S.C. 455 (S.C. 1984).

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.

Paschal v. State Election Com'n, 454 S.E.2d 890, 317 S.C. 434, 437-438 (S.C. 1994). (Citations Omitted).

All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). A statute's language must be construed in light of the intended purpose of the statute. *Id.*

The USRAP, under the title, “Effect on common law” states: “This chapter supersedes the common law rule against perpetuities.” S.C. Code Ann. §27-6-80 (2022 Edition).

Merriam-Webster defines supersede as:

1. a: to cause to be set aside;
b: to force out of use as inferior;
2. to take the place or position of; and
3. to displace in favor of another.

“Supersede.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/supersede>. Accessed 8 Oct. 2022.

“Supersede” means “to annul, make void, or repeal by taking the place of[.]” *New Bar P'ship supra*, 729 S.E.2d at 683 citing *Black's Law Dictionary* 1479 (8th ed.2004).

New Bar Partnership v. Martin, 221 N.C.App. 302, 729 S.E.2d 675 (2012)

The language of S.C. Code Ann. §27-6-80 (2022 Edition) clearly expresses the intent that the USRAP replaced the CLRAP and caused the CLRAP to be set aside. The USRAP's effect on the common law rule was not limited. This provision does not say that this chapter supersedes some, but not all of the common law. S.C. Code Ann. §27-6-80 does not say that the statutory act applies to replace the common rule but only for the interests subject to possible invalidation under Section 27-6-20 but does not replace the common law that was applicable to the transactions exempted from Section 27-6-20. The legislature could have included such wording to indicate a limited replacement of the common law rule if that were its intent. But it did not. The legislative intent was that the superseding language of §27-6-80 applied to the entire common law relating to the rule against perpetuities-and with no limitations on this effect. Simply put, the intent was that the CLRAP did not survive for interest created after the effective date of the of the USRAP.

Of course, the USRAP applies to interests created after July 1, 1987. S.C. Code Ann. §27-6-60 (2022 Edition). The Purchase Option was created on May 3, 2017. So, the USRAP applies to the Purchase Option as it was created after the effective date of the statute.

Additional evidence of the Legislative Intent that the USRAP replaced the CLRAP created after its effective date is the fact that §27-6-80 states that “[T]his chapter” supersedes the common law rule. (Emphasis added). S.C. Code Ann. §27-6-80(2022 Edition). Inherent in the Circuit Court's ruling is the finding that §27-6-80 applied to replace only the common law as to interests subject to the voiding provision found in §27-

6-20. But the language “this chapter” evidences an intent that the replacement of the common law was not limited to interests covered under §27-6-20. Rather the supersede language applies to all of the interests covered under the chapter, including the seven types of interests exempt from invalidation under Section 27-6-20. The USRAP applies to the exempted property interests even though it shields the exempted interests from invalidation.

It is no wonder that given the language of §27-6-80 that this Court has stated that “In 1987, South Carolina enacted the Uniform Rule Against Perpetuities (S.C. Code Ann. §27-6-10 et seq.) which supersedes the common law rule.” *Abrams, Supra.*, 320 S.C. 325, 465 S.E.2d 117 (S.C. App. 1995).

Further evidence that the Legislature intended the statutory rule to apply to all nonvested property interests is found in S.C. Code Ann. §27-6-60 (2022 Edition). This provision states that “(A) Except as extended by subsection (B), this chapter applies to a nonvested property interest or a power of appointment that is created on or after July 1, 1987.” S.C. Code Ann. §27-6-60 (2022 Edition). (Subsection B referred to, is subsection B of Section 27-6-60, which is the saving clause section which requires that upon petition, a court reform a disposition that violated the common law rule when created by inserting a savings clause that brings the interest within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.)

Again, the use of the language “this chapter applies to a nonvested property interest or a power of appointment that is created on or after July 1, 1987” supports the position that the USRAP set forth the rules that apply to all nonvested property interests, including

those exempted from the operation of Section 27-6-20 by the Exemptions Section. This provision does not say that the chapter applies only to some nonvested property transfers. This provision does not say that the chapter applies only to those nonvested property interests subject to invalidation under the Section 27-6-20. Of course, this language that this chapter applies to a nonvested property interest that is created on or after July 1, 1987 directly contradicts the Circuit Court's holding that the USRAP does not apply to the Purchase Option.

The very language of Section 27-6-50, the Exemption Section, that *New Bar* and the Circuit Court relies upon to reach their conclusion that the USRAP does not apply contradicts their position. As stated above Section 27-6-50 states: "Section 27-6-20 does not apply to..." and then lists the exempted interests. This section does not state that the USRAP does not apply to the exempted interests. There is no section of the USRAP that exempts its coverage to any non-vested interest created after its effective date.

(b) Purpose of USRAP Is Consistent With One System

The Circuit Court's ruling that the superseding effect of §27-6-80 was limited to interests subject to possible invalidation under §27-6-20 and that the CLRAP still applies to such other interests not subject to the Invalidation Section runs counter to the purpose of the statute which was to promote the uniform application of rules relating to perpetuities.

"In determining the legislative intent, it is proper to consider the purpose sought to be accomplished." *Arkwright Mills v. Murph*, 219 S.C. 438, 65 S.E.2d 665, 667 (S.C. 1951)

"Statutory provisions should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Ocean Winds Corp. of*

Johns Island v. Lane, 347 S.C. 416, 556 S.E.2d 377,419 (S.C. 2001), *citing Folk v. Thomas*, 344 S.C. 77, 81, 543 S.E.2d 556, 558 (2001)."

As noted above, there have been different interpretations of the common law rule against perpetuities among the various state courts.

The Act expressly stated that uniform application was one of the goals of the statute. In Section 27-6-70, under the title "Application and construction," the USRAP states "This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." S.C. Code Ann. §27-6-70 (2022 Edition). The limited replacement of the common law approach taken by the Circuit Court upends the goal of uniform application. The reason is obvious. If the limited replacement applies, each state adopting the statutory rule would have two rules against perpetuities. One rule, the statutory rule, would apply to those interests subject to invalidation under §27-6-20. The second rule, the common rule would apply to the exceptions listed in Section 27-6-50. Of course, the fact that each adopting state's common law may treat various issues differently would cause difficulty in trying to achieve the goal of uniform law applicable to the rule against perpetuities.

Uniformity of the law with respect to the subject of this chapter was the goal. The goal was not limited to uniformity of the law with respect to the unvested property interest subject to invalidation under Section 27-6-20. Again, the use of the language "subject of this chapter" supports the position that the USRAP applies to all non-vested property interests made after its effective date, whether covered by Section 27-6-20 or not. This

language supports the position that the USRAP superseding language applies to supersede the common law entirely.

Another purpose underlying the uniform statute is the desire to avoid the harsh results that occurred from the unintended violations of the complex common law rule. "The South Carolina General Assembly adopted this statutory provision to avoid the remorseless application of the common law rule. The law abhors a forfeiture." *Abrams, supra*. As noted above, the USRAP contains features, such as the "wait and see 90-year period" contained in Section 27-6-20 which are designed to avoid the remorseless application which occurred under the common law rule. The Circuit Court's limited superseding effect on the common law would result in the incongruent situation where one group of interests, those subject to invalidation under Section 27-6-20, are protected from the remorseless application of the common law rule, but the interests exempted from invalidation under Section 27-6-20 would be subject to the harsh common law. The group subject to Section 27-6-20 would not only face a less harsh invalidation rule than the other, but would enjoy the benefit of having the reformation key to escape provided under Section 27-6-40. The other group, in addition to being subject to a harsher invalidation rule would have no escape in the form of reformation. So, one would have to ask, why would the legislature intend to replace the common law for the first group of interests but not the seven interests exempted from the application of §27-6-20? Why would the legislature create such an unequal two-tier system? There does not appear to be any basis for doing so.

The obvious answer to the question is that the legislature did not intend to create such an unequal two-tier system. The USRAP completely superseded the CLRAP. There

is only one rule applicable for interests created after July 1, 1987, the effective date of the USRAP. The CLRAP does not survive to apply to interests created after the effective date.

Commentators have criticized the common law's application to commercial transactions on the grounds that the rule was designed to apply to donative transfers by family members, not commercial transactions negotiated by sophisticated businessmen. It would be especially odd that the Legislature would provide relief from the application of the common law to the types of transactions the rule was originally developed to apply to, i.e., donative transactions, but to deny this same relief to commercial transactions. Under the two-tiered system inherent in the Circuit Court's opinion, the beneficiary of a commercial interest would not be able to avail itself of the protection of the 90 years wait and see period or the savings clause provision because it would be subject to the common law. Again, why would the Legislature intend this result. This result is contrary to the purpose of the USRAP. The case at hand illustrates this incongruity. The Purchase Option was exercised well within the 90 year wait and see period. The more likely answer is that the Legislature intended there to be the one statutory system and as part of the system, the response to the criticism regarding commercial transactions was to shield them from the statute's Invalidation Section.

(C) Summary of Arguments – Issue I

In summary, the legislative intent of the USRAP was to create one uniform set of rules that apply to the entire universe of nonvested property interests created after its enactment. Under this statutory scheme, provisions were deliberately included to remove certain interests, such as commercial, non-donative interests, not from the USRAP, but

from its Invalidation Section that could potentially invalidate them. The Exemption Section, which shields the exempted interests from invalidation, is part of the statutory scheme. The language of Section 27-6-80 is clear that the USRAP superseded the common law rule entirely. This language does not say that the superseding effect of the statute was generally or in a limited manner. The purpose of the USRAP -uniform application of the law on the subject of perpetuities- is best achieved if the language of Section 27-6-80 is enforced as to the common law entirely and not limited to unvested property interests' subject invalidation under Section 27-6-20. For these reasons, the Circuit Court's conclusion that the common law against perpetuities continued to exist after the enactment of the USRAP was erroneous. Therefore, the Circuit Court's ruling that the Purchase Option was void due to the application of the Common Law Rule Against Perpetuities was erroneous and the Order Granting Partial Summary Judgment should be reversed.

ISSUE II: In the Alternative that the Common Law Rule Against Perpetuities Applied to the Appellant's Purchase Option, An Implied Term That the Purchase Option Would Be Exercised Within a Reasonable Time Existed That Would Prevent The Option From Violating The Common Law Rule Against Perpetuities.

Even though the Appellant contends that the common law was abolished and does not apply to the Purchase Option, the Appellant contends that even if the CLRAP applied, it would not automatically apply to bar the enforcement of the Purchase Option. The reason being is that the Purchase Option, a commercial transaction, would have included an implied reasonable time for performance and that time would have been within the CLRAP time limits.

The general rule that "Where a contract sets no date for performance, time is not of the essence of the contract and it must be performed within a reasonable time..." has been applied to a host of different contractual subjects. *See, Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 371 S.E.2d 532, 296 S.C. 207 (S.C. 1988).

"Where the parties to an option contract do not specify a time for performance, a reasonable time will be implied..." *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (S.C. App. 1984).

Numerous courts have used similar implied reasonable time for performance provisions to save commercial transactions from invalidation under the CLRAP.

In *Continental Cablevision*, the majority opinion, contrary to rigidly applying the CLRAP, found it a "... a simpler and fairer solution to uphold the right of first refusal for the fixed period named in the Rule Against Perpetuities, namely, twenty-one years." That is an approach much more in accord with the parties' intention and free of any complaint that it prevents vesting for an unreasonable period of time. *Continental Cablevision of New England, Inc. supra*, 873 F.2d at 730 (4th Cir. 1989).

The implied reasonable time for performance could certainly be found to be within the time to satisfy the limits of the common law rule. In *Byke Construction Co. v. Miller*, 140 Ariz. 57, 59-60, 680 P.2d 193, 195-96 the court found as a matter of law that the parties to the option contract could not have intended to leave the option to repurchase open for a period longer than then the twenty-one years plus a life in being, i.e, the time that would have subjected the option to invalidation under the CLRAP.

So, under the alternative that the CLRAP survived the enactment of the USRAP, the implied term of a reasonable time for performance would provide a date for performance that was within the CLRAP and thus prevent the Purchase Option from invalidation under the common law.

ISSUE III: The Appellant Did Not Waive Its Right to Exercise the Purchase Option By Negotiating With The Respondent In An Attempt To Resolve The Respondent's Refusal To Honor the Purchase Option And Waiver Would Not Be An Alternative Basis For The Circuit Court's Order Granting Summary Judgment.

The Respondent contended as an alternative basis for its Motion for Partial Summary Judgment that the Appellant waived its right to exercise the Purchase Option by participating in the effort to resolve the dispute created by the Respondent's initial demand that the Appellant purchased a membership interest in the Respondent in response to the Appellant's exercise of the Purchase Option. The Circuit Court did not rule on this alternative grounds for the motion for summary judgment. However, the facts of the case show that the Respondent was not entitled to summary judgment on the grounds of waiver.

The Respondent's waiver claim is a clumsy sleight of hand effort to distort the fact that the Respondent refused to honor its commitment to convey the property in response to the Appellant's notice of exercise of the option. The consummation of the exercise of the option should have been fairly simple. Respondent would accept the Appellant's tender of the purchase price and deliver a deed to the Appellant. However, that did not happen. Instead, Respondent objected to the tender. Heywood, the principal directing Respondent, simply refused to convey the co-tenancy interest because he wanted a transfer of a

membership interest in Respondent and not a transfer of a 74.425% co-tenancy interest in the real estate. Of course, the position was totally contrary to the wording of the Purchase Option itself. The Respondent's response was simply a breach of contract.

As a result, the parties attempted to work out a compromise of the Respondent's breach. The parties were close to a resolution and in fact reached a general plan for the resolution of the dispute caused by the Respondent's failure to honor the exercise of the purchase option, which included Respondent conveying a 70% co-tenancy interest to the Appellant. However, the parties were still in the process of working out the specifics of the distribution of the monies from the re-finance loan initiated by Respondent. One of the issues involved was the payment of attorney's fees. The compromise effort broke down over the issue of attorneys' fees and thus no final agreement was reached on the compromise. After, the breakdown and Respondent's continued refusal to transfer the property in response to the option, the Appellant filed this lawsuit seeking to compel performance.

In its memorandum to the Circuit Court, the Respondent argued that the Appellant waived its right to demand specific performance of the Purchase Option "[B]y exercising the option and then failing to close on the agreement reached by the parties." (R. pp. 63 Defendant The Best For Last, LLC's Motion for Partial Summary Judgment and Memorandum in Support). The simple answer to this issue is that the Respondent can not treat a failure to compromise the dispute over the Respondent's breach of the Purchase Option as a failure by the Appellant to complete the purchase of the property under the terms of the Purchase Option. The Appellant never had a chance to complete the purchase

because the Respondent refused to convey the 74.425% interest in the Property because the Respondent refused to honor the Purchase Agreement. The parties did not reach a complete agreement regarding the effort to compromise the dispute caused by the Respondent's refusal to honor the Purchase Agreement. Under these facts, there was no abandonment of the right to compel specific performance of the Purchase Option.

"Waiver, of course, involves the intentional relinquishment of a known right." *Hinds v. United Ins. Co. of America*, 248 S.C. 285, 149 S.E.2d 771, 775 (S.C. 1966).

Generally, waiver is a question for the jury. *Harvey v. Jefferson Standard Life Ins. Co.*, 165 S.C. 427, 164 S.E.6, (1932).

An action for specific performance lies in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000).

In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 628 (Ct.App.2004).

In the case at hand, the evidence shows that the Appellant met the requirements for specific performance. The response by the Respondent was to refuse to honor the option. This lead to efforts by the parties to try to negotiate a settlement of the dispute caused by the Respondent's blatant and unfounded refusal to honor the option. These efforts were not successful.

Certainly, equity does not look with favor upon the Respondent's argument that the Appellant has lost its right to purchase simply because it entered into negotiations to resolve the dispute caused by the Respondent's refusal to honor the Appellant's exercise of its Purchase Option. *See, Southern Silica Mining & Mfg. Co v. Hoefer*, 215 S.C. 480, 56 S.E.2d 321 (S.C. 1949) (Per Curium).

Therefore, the Respondent's claim that the Appellant waived its right to enforce the Purchase Options is unfounded and would not be an alternative basis for the Circuit Court's dismissal of the Appellant's claim.

CONCLUSION

The Circuit Court's order dismissing the Appellant's Complaint was based on the assumption that the common law rule against perpetuities voided the Purchase Option. However, the USRAP superseded the common law rule against perpetuities entirely after its effective date. The Circuit Court's ruling that the USRAP only partially superseded the common law rule was incorrect as was its application of the CLRAP to void the Purchase Option. After its effective date, the USRAP is the sole law on unvested property interest and perpetuities. The USRAP does not apply to void the Purchase Order. Therefore, the Circuit Court's ruling that the CLRAP voided the Purchase Option was erroneous. No other basis existed to support the Circuit Court's Order Granting Partial Summary Judgment.

The Appellant respectfully requests this Court to reverse the Circuit Court's Order Granting Partial Summary Judgment.

Dated: January 18, 2023

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served on this date by depositing a copy of same in the United States Mail, first-class, postage prepaid, addressed to the party/attorney or attorneys for said parties.

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Jan 18 2023
SC Court of Appeals

Dated: January 18, 2023

/S/ Kenneth R. Raynor

Kenneth R Raynor

RAYNOR LAW FIRM, PLLC

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

Appellate Case No.: 2022-000813

SPRING VALLEY INTERESTS, LLC, Appellant,

v.

THE BEST FOR LAST, LLC, Respondent.

APPELLANT'S CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

Dated: January 18, 2023

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Spring Valley Interests, LLC, ...Appellant,

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

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RESTATEMENT OF ISSUES ON APPEAL

Respondent would restate the issues on appeal as follows:

- I. Did the Trial Court properly grant Respondent's Motion for Partial Summary Judgment on the basis that a freely assignable and perpetual option to purchase a co-tenancy interest in property violated the Rule Against Perpetuities?**
- II. Did Appellant fail to preserve for appellate review its argument that the Purchase Option contains an implied term stating it would be exercised within a reasonable time?**

As an additional sustaining ground,

- III. Did Appellant waive its right to re-exercise the Purchase Option by exercising the option, agreeing to the terms of purchase, executing the Closing Documents, and then failing to proceed with the agreed-upon sale?**

STATEMENT OF THE CASE

This case arises out of a written loan agreement between Respondent The Best For Last, LLC ("Respondent" or "TBFL") and Appellant Spring Valley Interests, LLC¹ ("Spring Valley" or "Appellant"), through which Appellant loaned TBFL money to assist in TBFL's acquisition of real property. As part of the loan, TBFL granted Appellant a freely assignable and perpetual option to purchase an undivided co-tenancy interest in the property ("Purchase Option"). (R. pp. 4-5, para 1-10; R. p. 18, para 29, 30). At the center of this appeal is the enforceability of the Purchase Option and, to the extent the option was ever enforceable, whether Appellant waived its right to exercise the Purchase Option after once doing so and failing to close the transaction.

Appellant 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. TBFL filed an answer and counterclaim for a declaratory judgment, pursuant to S.C. Code Ann. §

¹ White Interests Limited Partnership was the original lender on the loan but assigned its interest in the purchase option to Appellant. (R. p. 151, lines 7-10). Lynn White is the sole owner and manager of both White Interests and Appellant. (R. p. 145, lines 6-13).

15-53-10, et seq., that the Purchase Option was unenforceable because it violated the common law rule against perpetuities and/or the Uniform Statutory Rule Against Perpetuities (USRAP). TBFL also asserted a claim for equitable estoppel, arguing Appellant should be estopped from seeking specific performance due to Appellant's failure to close the agreement reached by the parties following its exercise of the Purchase Option.

On April 16, 2021, TBFL moved for summary judgment on its declaratory judgment claim arguing, in part, that the rule against perpetuities barred the enforcement of the Purchase Option. Alternatively, TBFL argued Appellant waived its right to enforce the Purchase Option by exercising the option and then failing to close the transaction negotiated by the parties. On April 29, 2021, Appellant filed a cross-motion for partial summary judgment as to its claim for specific performance of the Purchase Option. TBFL filed a reply in opposition to Appellant's motion on August 19, 2021.

The trial court heard oral argument on the parties' cross-motions for summary judgment on August 26, 2021. On September 10, 2021, the trial court denied Appellant'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 common law rule against perpetuities. Appellant filed its Notice of Appeal on June 13, 2022.

STATEMENT OF THE FACTS

The record in this case tells a simple story. As explained below, TBFL and Appellant entered into a loan agreement in connection with TBFL's purchase of real property that gave Appellant a perpetual and freely assignable option to purchase a co-tenancy interest in the property. After Appellant exercised the option, the parties worked for weeks to negotiate the terms of a mutually acceptable co-tenancy agreement through which they would each share an interest in the

property. However, on the eve of the closing, with all of the necessary documents signed by the parties and awaiting recording, Appellant 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 Appellant sunk the deal. Appellant now wants 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 of 2017 for the sole purpose of owning, developing, and managing a self-storage facility in Columbia, South Carolina (the “Property”). (R. p. 152, line 6 – p. 153, line 23; R. p. 206, lines 5-9; R. p. 270, lines 12-19). 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. p. 153, lines, 1-23; R. pp. 412-423). In order to obtain additional financing, Albert Heyward, the manager of TBFL, enlisted the help of Lynn White, the owner/manager of Appellant’s predecessor, White Interests Limited Partnership (“White Interests”). (R. p. 152, line 6 – p. 153, line 10; R. p. 210, lines 1-16). 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. p. 144, line 20 – p. 145, line 1; R. p. 154, lines 12-23; R. p. 207, lines 1-16).

On May 3, 2017, TBFL and White Interests executed a written loan agreement (the “Loan Agreement”) wherein White Interests agreed to loan TBFL the sum of \$800,000.00 to assist TBFL in acquiring the Property. (R. p. 209, lines 1-9; R. pp. 365-368). As consideration for the loan, TBFL granted White Interests a “freely assignable” and “perpetual option” to purchase a 74.425% undivided co-tenancy interest in the Property (the “Purchase Option”). (R. p. 212, lines 13-19; R.

pp. 365-368). White Interests subsequently assigned its right to exercise the Purchase Option to Appellant. (R. p. 223, line 23 – p. 224, line 2). Both White Interests and Appellant are solely owned and managed by Lynn White. (R. p. 145, lines 6-13). The Purchase Option was exercisable at Appellant's sole discretion, had no time limitations, and provided that Appellant would take title to the co-tenancy interest subject to (i) no mortgages other than TBFL's then outstanding first mortgage, and (ii) "a mutually acceptable co-tenancy agreement." (R. pp. 365-368). Specifically, Section 2 of the Loan Agreement 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. pp. 365-368).

The loan set forth in the Loan Agreement is evidenced by a promissory note (the "Note") from TBFL to Appellant and is secured by a second mortgage lien on the Property in favor of Appellant (the "Mortgage"). The Note provides that interest on the loan would be paid to Appellant "as if [Appellant] were an Initial Member" of TBFL. The principal of the loan was to be paid in full upon the first to occur of the following: "(i) at the closing of the exercise of the Purchase Option provided for in the Loan Agreement of even date herewith between [TBFL] and [Plaintiff], (ii) the refinance of [TBFL's] mortgage debt, and (iii) the sale of [TBFL's] real property." The Note also stated that TBFL "shall have the right at any time or from time to time prepay this Note in whole or in part." (R. pp. 369-371).

II. Appellant's Exercise of the Purchase Option.

Starting in the summer of 2019, TBFL began exploring options for refinancing the first mortgage lien encumbering the Property (the “Refinance”). On August 16, 2019, TBFL paid a \$35,000 non-refundable application fee to secure a financing commitment of \$3,100,000.00 from C-III Commercial Mortgage (the “Refinance Lender”). (R. p. 219, lines 21-25; R. p. 300, line 12 – p. 301, line 12). However, on August 21, 2019, upon learning that TBFL had tendered the \$35,000 non-refundable application fee to the Refinance Lender, Appellant sent TBFL a letter stating it was exercising the Purchase Option. (R. p. 165, lines 9-17; R. p. 168, lines 2-21; R. pp. 372-373). The notice stated that the closing of the Purchase Option was “to occur at the earlier of (i) twenty-nine (29) days from the date of this Notice, or (ii) one (1) day immediately preceding a refinance of [TBFL’s] existing outstanding mortgage indebtedness.” (R. pp. 372-373).

According to Appellant, “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. p. 165, lines 12-17). In other words, Appellant 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 in late September 2019, TBFL and Appellant 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. p. 283, line 9 – p. 286, line 19; R. pp. 412-423). As TBFL understood the deal, TBFL had agreed to grant Appellant the Purchase Option for a co-tenancy interest in the Property instead of a membership interest in the LLC in order to accommodate Appellant's desire for a future 1031 Exchange,² which would only be possible if Appellant took a possessory interest in the Property. (R. p. 162, lines 18-21; R. p. 273, line 11 – p. 274, line 4; R. p. 283, line 9 – p. 286, line 19; R. pp. 412-423). TBFL also understood that Appellant's interest in the Property would be the same "as if the [Appellant] were an Initial Member" of the LLC. (R. pp. 412-423).

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 [Appellant] were an Initial Member (as defined in such Operating Agreement) and the Interest was the [Appellant's] Preferred Return (as defined in the Operating Agreement)." (R. p. 163, line 11 – p. 164, line 16; R. pp. 369-371). However, When TBFL communicated to Appellant how it wanted to structure the co-tenancy agreement, Appellant insisted that it should receive an outright co-tenancy interest in the Property, not a corresponding membership interest in the LLC. (R. p. 162, lines 9-21; R. p. 175, lines 6-12; R. p. 290, line 7 – p. 291, line 13).

On September 12, 2019, Appellant, now represented by Timothy Gavigan, Esquire, sent TBFL an email containing a first draft of the transaction documents. (R. p. 223, lines 5-15; R. pp. 374-411). Thereafter, between September 13 and 18, 2019, Appellant and TBFL worked together on the key terms by which Appellant would take the co-tenancy interest in the Property. On September 19, 2019, the parties met at the office of Tim Gavigan, where they reached an agreement

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.").

on the terms for converting the Purchase Option into a co-tenancy agreement. Per the agreement between Appellant and TBFL, Appellant's second mortgage would be satisfied in exchange for a conveyance of a 70% co-tenancy interest in the Property in favor of Appellant and a cash payment from Appellant to TBFL of approximately \$141,000. (R p. 182, lines 7-16; R. p. 229, line 20 – p. 231, line 14; R. pp. 424-430). Following the meeting, Tim Gavigan 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. p. 229, line 20 – p. 231, line 14; R. pp. 424-425).

On September 25, 2019, TBFL's attorney wrote to Tim Gavigan in response to the original September 12, 2019 email: "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. p. 236, line 19 – p. 237, line 8; R. p. 431). On September 26, 2019, Gavigan responded with the revised closing documents reflecting the agreement reached by the parties during the September 19, 2019 meeting, which included a co-tenancy agreement, amendments to the Loan Agreement, form of deed, and other related documents (the "Closing Documents"). (R. p. 231, lines 1-13; R. p. 238, lines 13-23; R. p. 432). In that same email, Gavigan included an additional request that TBFL reimburse Appellant for "additional legal fees incurred to defend [TBFL's] challenge of the option." (R. p. 238, lines 5-9; R. p. 432). TBFL did not immediately respond to this portion of the email.

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

In reliance on Appellant's representations that the loan would be satisfied by the conveyance of a co-tenancy interest, the cash payment, and Appellant's second mortgage lien on the Property thereafter being released, TBFL executed the Closing Documents on Friday, September 27, 2019.

That same day, TBFL, through its own counsel, tendered the executed Closing Documents to Appellant and offered to overnight ship the original deed executed by TBFL. (R. p. 241, lines 8-15; R. p. 435). Upon receiving the signed documents from TBFL, Appellant also signed and executed the Closing Documents, after which Gavigan advised TBFL's attorney: "I'll send you [Appellant's] signature pages on Monday." (R. p. 242, line 10 – p. 243, line 10; R. pp. 435-436). 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 on October 2, 2019. (R. p. 241, lines 5-25).

Over the following weekend, Tim 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. pp. 439-440). TBFL's attorney responded the following Monday, September 30, 2019, 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. pp. 439-442). 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. pp. 441-442).

Despite TBFL's agreement to pay the additional fees, Appellant responded that it believed the initial refusal to pay its legal fees "opened the deal up for retrade." (R. p. 246, lines 13-20; R. pp. 441-442). Appellant, 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 TBLF agreed to

additional terms favorable to Appellant. In addition to the payment of the attorney's fees, these last-minute demands included giving Appellant a larger share of the funds from the Refinance and not requiring Appellant to share in the payment of certain fees and expenses. (R. p. 247, line 18 – p. 248, line 25; R. p. 441). After TBFL rejected Appellant's last minute changes, Appellant 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. p. 247, line 18 – p. 248, line 25; R. p. 309, lines 21-23; R. p. 441).

STANDARD OF REVIEW

In reviewing an order granting summary judgment, the appellate court applies the same standard as the lower court under Rule 56(c) of the *South Carolina Rules of Civil Procedure*. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRPC*; *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008); *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct. App. 2004). However, “[o]nce the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleading. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.*

Appellate courts may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. *See* Rule 220, SCACR; *see also I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED TBFL'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PURCHASE OPTION VIOLATES THE RULE AGAINST PERPETUITIES.

A. The Purchase Option is Unenforceable Under the Common Law Rule Against Perpetuities.

At common law, the rule against perpetuities limited 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 common law rule against perpetuities was born out of the idea 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.”)).

As set forth above, the Purchase Option gave Plaintiff 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.” The Purchase Option constitutes a contingent, nonvested preemptive right to purchase an interest in the Property at any point in the future. *Love v. Love*, 208 S.C. 363, 374, 38 S.E.2d 231, 236 (1946) (“It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote.”). The Purchase

Option is likewise not conditioned on an event certain to occur in the future. *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 is one that might not vest either within a life in being at the time of the creation of the interest or until later than twenty-one years thereafter, the Purchase Option violates the common law rule against perpetuities and is therefore void from its creation.

B. The Trial Court Correctly Held that the USRAP Does Not Apply to the Purchase Option.

While it appears undisputed that the Purchase Option violates the common law rule against perpetuities, the crux of Appellant's argument is that the Purchase Option is nevertheless encompassed by the Uniform Statutory Rule Against Perpetuities (USRAP) because it supersedes the common law rule.

The USRAP 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 (1991). Subsection (2) of § 27-6-20 added a 90-year “wait and see” period to transactions that would otherwise violate the common law rule against perpetuities. S.C. Code Ann. § 27-6-20(A)(2). Under this section, certain nonvested property interests that would violate the common law rule can survive if the interest actually “vests or terminates within 90 years after its creation.” *Id.*

In addition to the “wait-and-see” provision in the USRAP allowing for an instrument to actually vest or terminate after 90 years, the statute provides that certain “nondonative” transfers – which generally encompass commercial transactions – are excluded from operation of the USRAP. See S.C. Code Ann. § 27-6-50(1) (stating that the rule “does not apply to . . . a nonvested

property interest . . . arising out of a nondonative transfer”). The implication of this exception is that commercial transactions, such as the one entered into between TBFL and Appellant, are never subject to the USRAP.

In its order granting TBFL’s motion for summary judgment, the trial court agreed that the USRAP “supersedes” the common law rule against perpetuities. However, because the USRAP does not apply to nondonative transfers, the trial court held that there was nothing to supersede, or with which to replace, the common law rule. Accordingly, the trial court determined that the common law rule remained in effect with respect to commercial transactions. (R. pp. 1-3).

i. The application of the common law rule against perpetuities to commercial transactions is consistent with the policy of preventing unreasonable restraints on alienation.

This Court should affirm the trial court’s holding. No South Carolina court has interpreted the USRAP to mean that the rule against perpetuities is never, under any circumstances, applicable to commercial transactions. Appellant’s brief nevertheless wholeheartedly endorses this reading. In doing so, Appellant argues that the common law rule’s application to commercial settings invariably leads to harsh results incongruent with what some commentators cite as the original intent of the rule, *i.e.*, preventing family dispositions which were unreasonably long or unlimited in duration. (Brief of Appellant, pp. 12-14).

Notwithstanding the fact that *any* restraint on the alienation of land is generally viewed disfavorably regardless of its purpose, Appellant’s argument holds that commercial transactions, as opposed to conveyances involving family members, are unlikely to encounter the same issues that often restricted the free alienability of property, *e.g.*, the “fertile octogenarian” and the “unborn widow.” (Brief of Appellant, p. 12). Proponents of this idea, including Appellant, also argue that parties to a commercial transaction are typically sophisticated actors who do not need the

protection of the common law rule and who are instead more likely to weaponize the rule in order to avoid a bad deal, thereby resulting in commercial inequities and unjust enrichment. (Brief of Appellant, pp. 12-13). Using the case at hand as an example, Appellant argues that the trial court's order resulted in a "windfall" to TBFL by giving TBFL the benefit of Appellant's loan payment while depriving Appellant of the benefit of the Purchase Option. (Brief of Appellant, pp. 13-14).

Contrary to Appellant's assertion, the same policy concerns with respect to the free alienation of property are just as likely to be implicated in the commercial setting as they are in domestic situations. The key difference is that parties in a commercial transaction should actually be in a better position to avoid the consequences of the common law rule against perpetuities by drafting the instrument in such a manner that the rule would not be implicated in the first place. Here, it is noteworthy that Appellant's Purchase Option was not actually tied to, or extinguished by, the payoff of the loan itself. One of the primary benefits that TBFL conferred on Appellant in exchange for the loan were the interest payments Appellant received on the principal. However, unlike a mortgage which can be satisfied upon a payoff, the Purchase Option could have remained effective in perpetuity, even after TBFL had paid off the loan in full and satisfied the second Mortgage on the Property.

Case law around the country is relatively consistent that the three most important factors involved in determining the validity of a pre-emptive right under the common law rule concerning restraints on alienation are "(1) the purpose of the preemption, (2) its duration, and (3) the method of determining the price to be paid." 40 A.L.R. 3d 920 (Originally published in 1971); *RTS Landfill, Inc. v. Appalachian Waste Systems, LLC Inc.*, 267 Ga. App. 56, 598 S.E.2d 798, 802 (2004) ("[I]n determining the validity of a preemptive right, a court must take into consideration its duration, price, and the purpose for which it was imposed."). Courts generally hold that a

repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint; however, “the situation changes substantially when the price is fixed in the option. It is the generally accepted rule that a fixed price repurchase option of unlimited duration, independent of the lease, is an unreasonable restraint.” *Iglehart v. Phillips*, 383 So. 2d 610, 615 (Fla. 1980) (citing *Missouri State Highway Comm. v. Stone*, 311 S.W. 2d 588 (Mo. App. 1958)).

As set forth above, the Purchase Option is unreasonable on its face. The Purchase Option was neither recorded nor otherwise present in the Property’s chain of title. This would have allowed Appellant to lie in wait for years after the loan was paid off and the second Mortgage was satisfied, or even after the Property had been sold to a bona fide purchaser, only to arise out of the blue and exercise the option. There is also little incentive for TBFL, as the holder of the possessory interest, to contribute towards the improvement of the Property when Appellant, as the holder of the Perpetual Option, can swoop in at any moment to reap the benefits of the investment while incurring little to none of the costs, just as it attempted to do here. These factors – the lack of notice of servitude to potential purchasers and the disincentive to current owners to invest – as well as the unlimited duration of time in which Appellant could exercise the Purchase Option at a fixed price, are all key indicators that the Purchase Option constitutes an unreasonable restraint on alienation of property that is disfavored under the law.

Furthermore, TBFL did not receive a “windfall” from the trial court declaring the Purchase Option void. TBFL has never taken the position that it does not have to repay Appellant the \$800,000, plus interest, under the terms of the Loan Agreement and, in fact, TBFL has continued to make those payments during the pendency of this action. What Appellant’s exercise of the Purchase Option does illustrate is the degree to which a perpetual option in gross can deter a party with a possessory interest in land from investing resources into improving its property. *See*

Thomas F. Bergin & Paul G. Haskell, *Preface To Estates And Future Interests*, 207 (2d ed. 1984). (“[T]he option in gross tends to discourage the development of land by the holder of the possessory interest, whereas the option held by one who is also lessee tends to encourage the development of the land by the lessee-optionee.”). There is little incentive for the holder of a possessory interest to contribute towards the development or improvement of its property when the holder of a perpetual option can swoop in at any moment to reap the benefits of the investment while incurring none of the costs.³ Indeed, that is precisely what Appellant intended to do when it exercised the option.

In short, the application of the common law rule against perpetuities to commercial transactions is entirely consistent with South Carolina’s and other states’ longstanding policy “that nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use.” *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917 (citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005)). As the North Carolina Supreme Court observed in *Pinehurst v. Regional Inv. of Moore, Inc.*, “[i]f a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes.” 330 N.C. 725, 728-29, 412 S.E.2d 645, 646-47 (1992). Here, the alienability of title to the Property was fettered for longer and in a manner far beyond that allowed by the rule.⁴

³ See, e.g., *Rich, Rich & Nance v. Carolina Const. Corp.*, 558 S.E.2d 77 (N.C. 2002) (stating that a preemptive right may be a direct restraint on the alienability of property, barred by the rule against perpetuities, in that it has the potential to deter would-be buyers by creating uncertainty and unwillingness to invest time and energy into purchasing the burdened property);

⁴ 61 Am. Jur. 2d *Perpetuities, Etc.* § 8 (“The rule against perpetuities is a rule of law, and not simply a rule of construction, and its purpose is not to determine intent but to prevent illegality, and when the rule is applied, it defeats intent. The rule against perpetuities is a positive mandate of law to be applied irrespective of the intent of the grantor. Since the purpose of rule is the furtherance of a social policy, that is, the free and ready transfer of property, a court's object in applying the rule to void an interest is to defeat, rather

ii. The trial court's order is consistent with the plain language of the USRAP.

The common law rule against perpetuities does not contain any general exclusions for “nondonative” transfers, and in that regard the common law rule differs from the USRAP. Section 27-6-80 of the South Carolina Code provides that the USRAP “supersedes the common law rule against perpetuities.” The word “supersede” means “to annul, make void, or repeal by taking the place of[.]” *Black's Law Dictionary* 1479 (8th ed. 2004). On the other hand, the word “abolish” means “to annul, eliminate or destroy[.]” *Id.* Had the General Assembly wanted to “abolish” the entirety of the common law rule against perpetuities by passing the USRAP, it would have done so. Instead, the specific use of the word “supersede” only means that the USRAP replaced the common law rule with the statutory provisions regarding the types of transfers to which the USRAP applies, but left the common law in place as to the types of transfers to which it does not. Because the USRAP explicitly excludes nondonative transfers from its ambit, there is nothing to “supersede,” or with which to replace the common law.

While no South Carolina case has squarely decided the issue of whether the adoption of the USRAP means that commercial transactions can never violate the rule against perpetuities, our Supreme Court in *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.* had the opportunity to apply the USRAP to a right of first refusal in a commercial transaction but expressly declined to do so. 368 S.C. at 370, 628 S.E.2d at 917 (“We decline to resolve this issue because there is no justiciable controversy surrounding the right of first refusal provision.”).

The only other noteworthy case in South Carolina decided after the enactment of the USRAP is *Webb v. Reames*, in which this Court reversed a trial court order to hold that a contingent, nonvested right of first refusal to purchase real estate at a price of \$64 violated the rule

than carry out, the parties' intent; in other words, the parties' intent must be deemed subordinate to the policy goals sought to be achieved by preventing impermissible restraints upon the transferability of property.”).

against perpetuities. 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997). In reversing the trial court, this Court noted that the pre-emptive right amounted to a “contingent, nonvested interest in that the grantee or the grantee’s heirs might never choose to sell the property. It is an interest not conditioned on any event certain to occur.” *Id.* at 446.

The case at hand is no different. The Purchase Option is unquestionably a nonvested, contingent interest that Appellant was free to assign or exercise in perpetuity at its leisure. *Id.* (“The right represented an attempt by the grantor Blease to reserve to the [sic] himself his heirs, and assigns a perpetual option to purchase the property described at the price of \$64. Because the right or interest was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void.”). This Court should follow the precedent established in *Webb* and affirm the trial court’s ruling.

Courts in other jurisdictions have likewise expressly declined to read the USRAP as excluding all nondonative transfers from operation of the rule against perpetuities, instead finding that the common law rule remains in effect for certain nondonative, commercial transfers. In response, Appellant argues that the cases which have held that the USRAP does not entirely displace the common law rule with respect to commercial transactions are either anomalies or were wrongly decided.

One such case is that of *New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012).⁵ In *New Bar*, the North Carolina Court of Appeals was tasked with determining

⁵ See also *Malad, Inc. v. Miller*, 219 Ariz. 368, 373, 199 P.3d 623, 628 (Ct. App. 2008) (“We agree with the Millers that the USRAP does not apply here. Arizona Revised Statutes § 14–2904 specifies that Arizona’s version of the USRAP does not apply to a “nondonative transfer,” except in certain enumerated circumstances, none of which apply here. The contract between Maxus and Malad did not involve a donative transfer, so the USRAP does not apply. The controlling law here is the common law rule against perpetuities codified in A.R.S. § 33–261 (2007)”; 70 C.J.S. Perpetuities § 50 (“The Uniform Statutory

whether a lessee's right of first refusal violated the common law rule against perpetuities following the enactment of the USRAP. Applying the same logic as the trial court did in granting TBFL's motion for summary judgment in the present case, the North Carolina Court of Appeals held that the explicit exclusion of nonvested property rights arising out of commercial transactions from the USRAP meant that there was nothing with which the USRAP could supersede the common law rule. Because the statute could not replace something to which it does not apply, the common law rule was left intact for the nondonative transfers excluded from the USRAP. *Id.* at 312, 729 S.E.2d at 683 ("Thus, we conclude that the USRAP did not replace the common law [rule against perpetuities] as to preemptive rights arising from nondonative transfers such as that at issue here").

Appellant contends the North Carolina Court of Appeals' logic suffers from a glaring fallacy. That is, the statutory provision that identifies the exceptions to the USRAP does not exclude nondonative transfers from the operation of the USRAP in its entirety. Rather, that provision – appropriately titled "Exceptions to rule" – only excludes nondonative transfers from application of what Appellant defines as the "Invalidation Section." (Brief of Appellant, pp. 20-21). Under South Carolina's version of the USRAP, the "Invalidation Section" is codified in S.C. Code Ann. § 27-6-20. That section, however, is quite literally the "rule" that forms the core of the Uniform Statutory *Rule* Against Perpetuities and upon which the remaining sections in that Chapter are based.

Appellant also argues that it was logically inconsistent for the court in *New Bar* and the trial court in this case to apply the provision in the USRAP that says the USRAP does not apply to nondonative transfers to reach the conclusion that the USRAP does not apply to nondonative

Rule against Perpetuities does not replace the common law rule against perpetuities as to preemptive rights arising from nondonative transfers such as commercial leases, and it does not apply to the future interest created before its effective date in the state.").

transfers. This argument defies common sense. Acknowledging that an exception to a rule means that the rule does not apply to the thing being excepted is not logically inconsistent. Furthermore, the holding in *New Bar* that Appellant maligns was reaffirmed in a subsequent case involving the same issues. *Khwaja v. Khan*, 239 N.C. App. 87, 90, 767 S.E.2d 901, 903 (2015) (“[B]ased on our holding in *New Bar Partnership v. Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012), we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.”).

Here, the trial court held that the Purchase Option, which on its face reserved to Appellant a “freely assignable,” “perpetual option” to purchase the Property at a fixed price, was void on the basis that it violates the rule against perpetuities. Because the USRAP does not apply to the nondonative transfer at issue in this case, this Court should affirm the order of the trial court.

II. APPELLANT FAILED TO PRESERVE FOR APPEAL ITS ARGUMENT THAT THE PURCHASE OPTION CONTAINS AN IMPLIED TERM THAT IT WOULD BE EXERCISED WITHIN A REASONABLE TIME.

Appellant argues, in the alternative, that to the extent the common law rule against perpetuities does apply to commercial transactions, it would not automatically bar enforcement of the Purchase Option due to the existence of an implied term that the option would be exercised within a reasonable time. This argument has not been adequately preserved for appellate review.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). “Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. at 372, 628 S.E.2d at 919. “The rationale for the rule is that until the trial court considers the matter and

makes a ruling, an appellate court is unable to find error.” *Id.* at 372-373. “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Id.* at 373.

To preserve an issue for appeal, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised 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). Even under a generous reading of the hearing transcript and Appellant’s motion, this argument fails both prongs (1) and (4). Namely, assuming *arguendo* that the issue was adequately raised by the Appellant, the trial court never ruled on the issue, and Appellant failed to file a motion under Rule 59(e), SCRPC to allow the trial court the opportunity to do so. *Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) (“An 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.”). With respect to the fourth prong, the issue was never raised with sufficient specificity to allow the trial court the opportunity to rule on the issue. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (“[T]he issue 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.”).

Because Appellant’s second issue on appeal was not adequately raised to or ruled upon by the trial court, or argued with sufficient specificity to allow the trial court the opportunity to rule on the issue, this argument is not preserved for appellate review and the order of the trial court should be affirmed.

III. AS AN ADDITIONAL SUSTAINING GROUND, APPELLANT WAIVED ITS RIGHT TO RE-EXERCISE THE PURCHASE OPTION AFTER EXERCISING THE OPTION, AGREEING TO THE TERMS OF PURCHASE, EXECUTING THE CLOSING DOCUMENTS, AND THEN FAILING TO PROCEED WITH THE AGREED UPON SALE.

Appellant's failure to close the Purchase Option and proceed with the purchase of an interest in the Property under the terms agreed to and after executing the Closing Documents constitutes a waiver of Appellant's right to enforce the option. Appellant describes this argument as a "clumsy sleight of hand to distort the fact that [TBFL] refused to honor its commitment to convey the property in response to Appellant's notice of exercise of the option." (Brief of Appellant, p. 31). While TBFL certainly takes issue with Appellant's characterization of TBFL's recitation of the facts as being deceitful, it will let the record speak for itself rather than respond in kind.

What the record will show is that upon learning that TBFL paid a \$35,000 nonrefundable application fee for the Refinance, Appellant immediately exercised the Purchase Option. (R. p. 165, lines 9-17; R. p. 168, lines 2-21; R. pp. 372-373). In its brief, Appellant writes that the "consummation of the exercise of the option should have been fairly simple, Respondent would accept the Appellant's tender of the purchase price and deliver a deed to the Appellant." (Brief of Appellant, p. 31). However, the reality of the transaction was nowhere near as simplistic as Appellant would have this Court believe.

In reality, the parties had to consider the tax consequences of the transfer, how the transfer would work within the structure of the business they were operating, how expenses would be allocated, the distribution of the proceeds from the Refinance, and the fact that in order for Appellant to take a co-tenancy interest in the Property, there needed to be a "mutually acceptable co-tenancy agreement." (R. p. 355, line 10 – p. 357, line 4). Those were the types of details not provided for in

the Loan Agreement that still needed to be worked out following the exercise of the Purchase Option. As astute a businessman as Mr. White claims to be, Appellant cannot seriously contend that taking a possessory interest in an active commercial property while in the midst of a multimillion dollar refinance would be as simple as exchanging duffel bags of cash and signing a deed.

TBFL does not dispute that it had a different understanding than Appellant as to how the deal was to be structured, but what is not in dispute is that despite any initial differences, the parties reached an agreement as to the fundamental terms of the transaction following weeks of extensive negotiations. As of September 30, 2019, two days prior to the October 2, 2019 closing of the Refinance, both Appellant and TBFL had *signed* their respective counterparts of the Closing Documents. (R. p. 242, line 17 – p. 243, line 12). TBFL acceded to Appellant’s final demand for \$6,500 in attorney’s fees in order to ensure the deal was finalized prior to the Refinance closing. At that moment, the parties had reached an agreement as to the fundamental terms by which Appellant would take an interest in the Property, and TBFL had expressed a clear intent and willingness to move forward and to take any action necessary to finalize the deal. (R. p. 241, lines 22-25). Appellant responded by attempting to unilaterally insert self-serving terms into the transaction, knowing that TBFL’s two choices were to acquiesce or forfeit the Refinance application fee.

Appellant’s action for specific performance of the Purchase Option rests in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). By exercising the option and then failing to close the agreement reached by the parties, Appellant has abandoned any right to demand specific performance of the Purchase Option. *See 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.”); *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381

(1995). Accordingly, Appellant's forfeiture of his rights under the Purchase Option precludes Plaintiff's claim of specific performance. *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967) ("He who seeks equity must do equity."). Appellant is not entitled to a second bite at the apple.

CONCLUSION

For the foregoing reasons, the trial court's order granting TBFL's motion for summary judgment should be affirmed. In finding that the Purchase Option violated the common law rule against perpetuities, the trial court did not overlook or misapprehend any issues of fact or law and did not err in applying the summary judgment standard pursuant to Rule 56(c), SCRPC.

TBFL respectfully requests that this Court affirm the trial court's order on appeal.

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CERTIFICATE OF SERVICE

I certify that I have served **Respondent's Final Brief** on Appellant by sending a copy of said documents to Appellant's counsel via email on January 24, 2023, as follows:

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Luke M. Allen

January 24, 2023.



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

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Appellate Case No.: 2022-000813

Spring Valley Interests, LLC, ...Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Jan 18 2023

SC Court of Appeals

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STATEMENT OF ISSUES IN REPLY

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- ISSUE III:** Even With The Arguments Advanced By The Respondent, At Best There Exists An Issue Of Fact Exist As To The Alternative Ground For Summary Judgment And Therefore Summary Judgment Would Not Be Appropriate Based On This Ground.

ARGUMENT

- ISSUE I:** The Trial Court's Improperly Granted Summary Judgment Because It Applied The Common Law Rule Against Perpetuities That Had Been Superseded By The Statutory Rule.

After devoting a long essay on how the Option to Purchase would be void under the Common Law, in Section I (b) (ii) of its Brief, the Respondent takes up the threshold issue of whether the USRAP replaced the Common Law Rule Against Perpetuities after its enactment so that the only rule against perpetuities in effect in South Carolina is the USRAP.

The Respondent's brief gives scant attention to what is the main issue in this case.

The Respondent's starting point on this issue acknowledges that the Legislature's use of the word supersedes is equivalent to mean "to annual," "make void," or "repeal by taking the place of" *citing* Black's Law Dictionary 1479 (8th ed. 2004). This is exactly what the Legislature meant to do by enacting the SCUSRAP. It made void and repealed the common law rule by having the statutory rule take its place. This is exactly the language

one would use in connection with enacting legislation to replace an existing common law rule.

The Respondent tries to limit the effect of the voiding and replacement effect of the USRAP by suggesting that the voiding and replacement of the common law was partial, not complete. However, the Respondent failed to identify any language in the statute that limited its superseding effect. It is illogical to recognize that the General Assembly's use of the word supersedes means to replace and void by taking the place of and yet try to insert limits on that effect without any language to support that limitation.

Of course, that is what the Trial Court did as well following *New Bar Partnership v Martin*, 221 N.C. App. 302, 729 S.E.2d 675 (2012).

The Respondent's Brief suggests that Courts in other jurisdictions have likewise expressly declined to read the USRAP as replacing the common law rule based on the nondonative exclusion from the statute. But, as explained below, the Appellee actually cites no case law in support of this bold assertion other than *New Bar*.

In addition to *New Bar*, the Respondent's Brief cited two cases in support of this statement. One case was *Khwaja v Khan*, 239 N.C. App. 87, 90, 767 S.E.2d 901, 903 (2015) which applied the rule stated in *New Bar* to another commercial lease. Specifically, the Court in *Khwaja* held that it was compelled to rule based on the ruling in *New Bar*.

The fact that *Khwaja* followed that *New Bar* holding was not necessarily an endorsement of the latter's logic. The reason is simple. Under North Carolina laws of jurisprudence, one panel of the Court of Appeals may not overrule another panel of the Court of Appeals. *O'Connor v. Zelinske*, 668 S.E.2d 615, 193 N.C. App. 683 (N.C. App.

2008) (Court of Appeals applied rule even after noting its disfavor and that of other panels with holding it upheld). "...one panel of this Court is bound by the prior decision of another panel addressing the same issue, although in a different case, absent modification by our Supreme Court,..." *State v. Adams*, 513 S.E.2d 588, 621, 132 N.C. App. 819 (N.C. App. 1999).

So, the fact that the Court of Appeals panel in *Khwaja* applied the *New Bar* holding as it was compelled to do, does not mean that it necessarily agreed with the reasoning of that court.

However, we do know that Justice Bryant, did have reservations concerning the *New Bar* holding because he expressed those concerns in his concurring opinion in *Khwaja* stating:

I also write separately to express my concern that we should proceed with caution in applying the common law RAP to non-donative transfers, commonly known as commercial leases. When our legislature specifically excluded these types of commercial transactions from the statutory RAP, it reflected an intent that the common law rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements. Clearly, the legislature was making a distinction between donative transfers and commercial transactions. However, as noted in *New Bar P'ship*, "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the common law RAP". *New Bar P'ship*, 221 N.C.App. at 313, 729 S.E.2d at 684 (citation omitted) (holding the right of first refusal violated the common law RAP and, thus, was void). Because the lease in the instant case contained a section that made the preemptive rights under the lease "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties[.]" it went beyond the period of the common law RAP, and therefore, based on our case law, is void and unenforceable.

Because the instant case cannot be distinguished from *New Bar*, I concur in the result reached by the majority.

Khwaja, 239 N.C.App. at, 93, 767 S.E.2d at 905. (Citations and internal quotations omitted.)

The Appellee also cited the case of *Malad, Inc. v Miller*, 219 Ariz. 368, 373, 199 P.3d 623, 628 (Ct. App. 2008) in support of its position that other states have held that the common law survives the enactment of the USRAP. *Citing Malad* to support this position is misleading. The reason being is that Arizona adopted a unique version of the USRAP that is very different from the USRAP adopted by South Carolina. The significant difference for the analysis of this case is that the Arizona statutory scheme applicable to the rule against perpetuities does not purport to supersede the common law. Instead, the Arizona statutory scheme expressly states that the common law applies in addition to the statutory scheme.

Arizona has two statutes relating to the rule against perpetuities. One is the statute that the *Malad* court referenced in its opinion as the Arizona version of the Uniform Statutory Rule Against Perpetuities, A.R.S. §§ 14-2901 through -2907 (2005).

There are significant differences between the Arizona USRAP and the version of the Act adopted by South Carolina. For example, the “wait and see” provision is 500 years under the Arizona Statute. A.R.S. § 14-2901 (B) (2), (E).

The difference between the SCSRAP and the Arizona statutes most significant to the analysis in the case at hand is found in the section on the statutory rule’s effect on the common law rule. The Arizona SRAP section entitled “Rule against perpetuities: supersession” reads as follows: "This article applies notwithstanding common law rules against perpetuities or section 33-261." A.R.S. § 14-2906

Obviously, the Arizona statute does not say that the statutory rule supersedes the common law.

Moreover, A.R.S. § 33-261, the statute referred to in 14-2906, specifically provides that “The common law rule known as the rule against perpetuities shall hereafter be applicable to all property of every kind and nature and estates and other interests therein, whether personal, real or mixed, legal or equitable by way of trust or otherwise.” A.R.S. § 33-261 Rule against perpetuities (Arizona Revised Statutes (2022 Edition))

The Arizona SRAP, read in conjunction with A.R.S. § 33-261 clearly set forth a scheme where both the statutory rule and the common law rule exists after the enactment of the statutory rule.

So, a case like *Malad* applying the Arizona version of the USRAP can not be legitimately cited in support of an argument that Section 27-6-80 of the SCUSRAP failed to replace the common law rule. Equating the two statutory schemes is like equating apples to oranges. The South Carolina statute says the statutory rule supersedes the common law. The Arizona statute does not contain any language regarding superseding effect and cites to the Arizona statutory adaptation of the common law.

So, as stated in the Appellant’s Brief, there really is only one court decision, *New Bar*, that has addressed in detail the issue before the Court: and that issue is did the common law rule against perpetuities survive the enactment of Section 27-6-80 of the SCUSRAP which states that the statutory rule supersedes the common law. And, at least one Justice of the North Carolina Court of Appeals has expressed concern for the reasoning of *New Bar*. Thus, there is no case law from other jurisdictions to support the Trial Court’s

ruling in the case at hand other than *New Bar*. As stated in the Appellant's Brief, the Trial Court appears to have adopted the logic of *New Bar* in granting summary judgment in this case. This Court is not bound to follow *New Bar* and should freely reject the reasoning of the same if it finds such reasoning insufficient.

ISSUE II: The Appellant Preserved For Appeal Its Argument That The Purchase Option Contains An Implied Term That It Would Be Exercised Within A Reasonable Time.

The Respondent has asserted as its Issue II that the Appellant did not preserve its argument that in the event the common law rule against perpetuities did survive the enactment of the USRAP, the common law rule would not void the Purchase Option because it contained an implied covenant that the option would be exercised in a reasonable time.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Scdot v. First Carolina Corp. of S.C.*, 641 S.E.2d 903, 372 S.C. 295 (S.C. 2007).

Scdot v. First Carolina Corp gives insight into the sufficiency of the Appellant's preservation of the issue of the implied reasonable time element in the option. On appeal, the *SCDOT* argued that the use of a special verdict form by the trial court was unduly suggestive or misleading as to the appraisal method to be used by the jury in calculating just compensation. At trial, when the trial court proposed the use of a special verdict form the Department objected to the verdict form by stating that "it emphasizes damages by its

bifurcated nature and the Department doesn't believe that the landowner has proven its damages to the standards required by the law in this case." The court overruled *SCDOT's* objection.

On appeal the Department argued that although it did not use those exact words, it nonetheless objected to the use of the special verdict form on the basis that it emphasized the appraisal method advocated by First Carolina.

The Supreme Court held that although *SCDOT* did not phrase its objection in the exact terms used in the issues on appeal, *SCDOT's* objection on the basis that the verdict form "emphasizes damages by its bifurcated nature" provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue.

Scdot v. First Carolina Corp. of S.C., 641 S.E.2d at 907.

This ruling is consistent with the general rule that "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. " *Walterboro Cmty. Hosp. Inc. D/B/A Colleton Med. Ctr. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (S.C. App. 2011), *see* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 58 (2d ed. 2002).

Comparing *Scdot v. First Carolina Corp* to the case at hand supports the finding that the Appellant preserved for appeal the issue of whether the option contained an implied condition that it be exercised in a reasonable time that would avoid the application of the common law rule against perpetuities. In the arguments to the Court at the hearing on the Respondent's Motion for Partial Summary Judgment, counsel stated to the Court that:

And you know, one think too, I, I talked about the, you know, the rules for commercial transactions are different. One of the differences of the, one of the differences of the –including these estate kind of, kind of transfers that a commercial transfer – courts, including courts in South Carolina where no date is stated in a commercial transfer for something to be accomplished, courts routinely apply a reasonable date. And so that in and of itself is a kind of illustration of why commercial cases were excluded, but that would apply in this case.

(R. p. 114).

So, while counsel's argument before the trial court on the implied reasonable time issue may have been inartful, it was sufficient to put the Trial Court on notice of the argument that the implied reasonable time provision would prevent the application of the common law rule to void the Purchase Option.

The Trial Court's granting of the Respondent's Motion for Partial Summary Judgment constituted a ruling on the argument regarding the implied reasonable time provision prevented the application of the common law to void the Option to Purchase.

ISSUE III: Even With The Arguments Advanced By The Respondent, At Best There Exists An Issue Of Fact Exist As To The Alternative Ground For Summary Judgment And Therefore Summary Judgment Would Not Be Appropriate Based On This Ground.

The Respondent's Brief gives a long narrative as an alternative ground for its motion for partial summary judgment to support its claim that the Appellant waived its right to exercise the option. Under this narrative, the Respondent claims that the Appellant gave its notice to exercise the option and the parties engaged in negotiating a co-tenancy agreement that was a condition precedent to the exercise of the option. Then, as the Respondent's story goes, the Appellant failed to proceed with the agreed upon sale.

However, this narrative is contradicted by critical facts that the Respondent ignores.

The first fact that the Respondent ignores or glosses over is simply this. When the Appellant gave notice of its exercise of the Option to Purchase, the Respondent demanded that the Appellant receive a membership interest in TBFL instead of a 74.425% co-tenancy interest in the Property. (R. p. 250 Gavigan Deposition, P. 59, L. 10).

There was nothing in the option to purchase that said the exercise of the option would somehow be tied to eventually being converted to a membership interest as opposed to a co-tenancy interest. (R. p. 250 Gavigan, P. 59, l. 22 to P. 60, l. 3).

This demand was a breach of contract because there was nothing in the Loan Document, nor the Purchase Agreement that supported this demand.

As part of its narrative, the Respondent cites to Exhibit 5 from the Gavigan deposition. R. p. 412 Gavigan Exhibit 5 was in an email from Rob Bethea, the attorney for the Respondent, in which Bethea was citing reasons for the position that the Respondent was demanding that the Appellant receive a membership in TBFL instead of a 74.425% co-tenancy interest in the Property. But, these reasons were not supported by the language of the Purchase Option which clearly stated that the option was for a 74.425% co-tenancy interest in the Property.

This breach of contract is evidenced by the deposition testimony of Bethea wherein he admits that the Respondent would never be willing to convey the 74.425% co-tenancy interest to the Appellant. (R. p. 343 Bethea Deposition, P. 13, l. 5).

Moreover, this demand had significant financial implications for the Appellant and the Respondent. In response to the exercise of the option, The Best For Last demanded that the White Interest be made a member of The Best For Last for a simple reason: it was

better economically for the Respondent but to the Appellant's harm. (R. p. 251-252 Gavigan Deposition, P. 60, L. 25, - P. 62, l. 2). As Bethea testified, had the Appellant agreed to the Respondent's demand, it would have received a 74.425 percent of 50 percent interest instead of 74.425 percent of 1000 percent interest. (R. p. 349-352 Bethea Deposition, P. 19, l. 3 to P. 22, l. 13). And he acknowledged that this was the basis of the dispute between the parties. *Id.*

This demand for the ownership interest to be in the form of a reduced membership interest was the reason there was a dispute between the parties over the exercise of the option. (R. p. 250 Gavigan Deposition, P. 59, L. 10).

That lead to the effort to discuss conveying a 70 percent interest as a possible compromise of the Respondent's demand. (R. p. 252 Gavigan Deposition, P. 62, l. 3-l. 16). Ultimately, that compromise was not consummated because of the parties' disagreement over the attorneys' fee issue. (R. p. 253 Gavigan Deposition, P. 63, l. 8).

So, at best there is a disputed question of material fact on the issue of whether the Appellant waived its right to exercise the option. The Respondent's version of the case omits the facts relating to its demand that the Appellant receive a membership interest in the company instead of the co-tenancy interest in the Property. But, the evidence supports the Appellant's position that it never had a chance to consummate the option because the Respondent breached the contract, i.e., the Option by making the demand to substitute the interest in the company for the co-tenancy interest in the Property. At the summary judgment stage of litigation, 'the judge does not weigh conflicting evidence with respect to

a disputed material fact..." *L & W Wholesale, Inc. v. Gore*, 407 S.E.2d 658, 305 S.C. 250 (S.C. App. 1991).

Under the facts viewed in the light most favorable to the non-moving party, the Appellant's exercise of its option was met with a demand by the Respondent that rejected the option. This response was a breach of the contract. Therefore, under this evidence, the Appellant never had a chance to agree to terms of a purchase under its exercise of the option. A material fact exists as to the issue of whether the Appellant ever agreed to the terms flowing from the exercise of its Option to Purchase. Therefore, there is an issue of fact regarding whether the Appellant waived its right to Exercise the Option which precludes summary judgment on this issue.

CONCLUSION

For the reasons stated above and in the Appellant's Brief, the Appellant prays the Court to reverse the Trial Court's granting of partial summary judgment in favor of the Respondent.

Dated: January 18, 2023

RAYNOR LAW FIRM, PLLC

/s/ Kenneth R. Raynor

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Jan 18 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

Appellate Case No.: 2022-000813

SPRING VALLEY INTERESTS, LLC, Appellant,

v.

THE BEST FOR LAST, LLC, Respondent.

APPELLANT'S CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

Dated: January 18, 2023

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914

Appellate Case No.: 2022-000813

SPRING VALLEY INTERESTS, LLC, Appellant,

v.

THE BEST FOR LAST, LLC, Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief on The Best for Last, LLC by depositing a copy of it in the United States Mail, postage prepaid, on January 18, 2023, addressed to its attorneys, Kirby Shealy, III and Luke M. Allen, Adams and Reese, LLP, 1221 Main Street, Suite 1200, Columbia, South Carolina 29201.

Dated: January 18, 2023

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Spring Valley Interests, LLC, Appellant,

v.

The Best for Last, LLC, Respondent.

Appellate Case No. 2022-000813

Appeal From Richland County
Jocelyn Newman, Circuit Court Judge

Opinion No. 6070
Heard May 15, 2024 – Filed July 10, 2024

AFFIRMED

Kenneth Ray Raynor, of Raynor Law Firm, PLLC, of
Charlotte, North Carolina, for Appellant.

Kirby Darr Shealy, III, of Adams and Reese LLP, and
Luke M. Allen, both of Columbia, for Respondent.

KONDUROS, J.: Spring Valley Interests, LLC (Spring Valley) appeals the circuit court's order finding void a contractual purchase option (Purchase Option) for a portion of property owned by The Best for Last, LLC (Best). The circuit court found the Purchase Option was void pursuant to the common law Rule Against Perpetuities (CLRAP). Spring Valley argues this was error because the CLRAP has been preempted by the South Carolina Uniform Rule Against Perpetuities (SCURAP), which would provide protection to Spring Valley under the facts of this case. We affirm.

FACTS/PROCEDURAL BACKGROUND

On or about May 3, 2017, Spring Valley's predecessor, White Interests Limited Partnership (White), entered into an agreement (Loan Agreement) with Best, wherein White loaned \$800,000 to Best. Best used the loan proceeds to purchase certain real property located in Columbia (the Property). As part of the consideration for the loan, Best granted White a freely assignable and perpetual option to purchase a 74.425% undivided co-tenancy interest in the Property. The Purchase Option, set forth in Section 2 of the Loan Agreement, specifically 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 (1) 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.

White assigned its right to exercise the Purchase Option to Spring Valley.

On August 21, 2019, Spring Valley sent Best a letter entitled "Notice of Exercise of Option to Purchase." The letter notified Best that Spring Valley was exercising its option to purchase a 74.425% undivided co-tenancy interest in the Property. Best objected to the exercise of the option and insisted that Spring Valley exercise the option by becoming a member of Best. The parties engaged in negotiations and nearly came to an agreement but for Spring Valley's insistence on certain attorney's fees.

Spring Valley filed a complaint seeking specific enforcement of the Purchase Option and reformation of the Loan Agreement. Best filed an answer asserting defenses including that the Purchase Option was void because it violated the

CLRAP. Best eventually filed a motion for summary judgment as to the specific performance claim, which the circuit court granted based on the following:

The Uniform Statutory Rule Against Perpetuities (USRAP) does not apply in this case. Generally, the USRAP supersedes the common law rule against perpetuities. S.C. Code Ann. [§] 27-6-80 [(2007)]. However, USRAP does not apply to nonvested property interests arising out of a [non]donative transfer. S.C. Code Ann. [§] 27-6-50(1) [(2007)]. Here, the basis of the parties' arguments concerns—a nondonative transfer—the commercial transaction involving the purchase option. Because USRAP does not apply to nondonative transfers, the USRAP cannot supersede or replace the common law, thus the common law is the appropriate legal standard to conclude that the purchase option is unenforceable.

This appeal followed.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008). "A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 109-10, 662 S.E.2d at 41 (citing Rule 56(c), SCRCF). "Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Id.* at 110, 662 S.E.2d at 41.

LAW/ANALYSIS

I. Preemption of the CLRAP by the SCURAP

Spring Valley maintains because the CLRAP was preempted by the SCURAP, the circuit court erred in concluding the CLRAP¹ prevented the Purchase Option from being enforceable. We disagree.

Section 27-6-20(A) of the South Carolina Code (2007), provides: "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." However, section 27-6-50 of the South Carolina Code (2007 & Supp. 2023) exempts certain property interests from that provision. It states "[s]ection 27-6-20 does not apply to (1) a nonvested property interest or a power of appointment arising out of a nondonative² transfer" Two other sections comment on the scope of the SCURAP. Section 27-6-60(A) of the South Carolina Code (2007) provides: "[T]his chapter applies to a nonvested property interest or a power of appointment that is created on or after July 1, 1987." Section 27-6-80 instructs that "[t]his chapter supersedes the common law rule against perpetuities."

Spring Valley argues section 27-6-50, which makes section 27-6-20 inapplicable to nondonative transfers, combined with section 27-6-80, superseding the common law, removes nondonative transfers completely from any application of the RAP—either the statutory iteration or at common law. With regard to section 27-6-20, subsection (A)(1) is simply a restatement of the CLRAP. Subsection (A)(2) provides for a ninety-year wait-and-see period that would likely save otherwise violative transfers. Therefore, subsection (A)(1) cannot doom the commercial transfer in this case, but subsection (A)(2) cannot save it or provide a mechanism to delay a declaration of the transfer as void. The conundrum then is how does section 27-6-80 affect transfers to which the statutorily stated SCURAP and wait-and-see provision do not apply.

Supersede is defined in Black's Law Dictionary as "obliterate, set aside, annul, replace, . . . [t]o set aside." *Supersede*, *Black's Law Dictionary* (6th ed. 1990). "A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent." *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004). Therefore, a statute is not to be construed in derogation of

¹ The CLRAP mandates that any interest not certain to vest within a life in being plus 21 years is void. *Black v. Gettys*, 238 S.C. 167, 176, 119 S.E.2d 660, 664 (1961).

² The parties do not dispute that this case involves a nondonative transfer.

common law rights if another interpretation is reasonable. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992). In this case, subsection 27-6-20(A)(1), containing the statutory expression of the RAP, does not apply to nondonative transfers. Therefore, it cannot supersede or replace the CLRAP with regard to nondonative transfers, which are expressly excluded.

Faced with the identical question, the North Carolina Court of Appeals has addressed this issue applying its prior version of the URAP that mirrored our own. In *New Bar Partnership v. Martin*, the court concluded the following: (1) the USRAP does not apply to nondonative transfers; (2) commercial transactions such as the commercial lease in that case are nondonative transfers; and (3) the CLRAP applies when the USRAP does not and therefore applies to commercial transactions. 729 S.E.2d 675, 683 (N.C. Ct. App. 2012). While North Carolina law is not controlling, our courts have found it persuasive, particularly when considering comparable statutes. *See Parrott v. Barfield Used Parts*, 206 S.C. 381, 396, 34 S.E.2d 802, 804 (1945) ("[W]hile of course not binding upon this [c]ourt, [the North Carolina case] is highly persuasive, because it relates to practically the same question now under consideration, and the North Carolina Act is substantially the same as ours as to the particular sections involved . . .").³

We recognize that North Carolina, in 2022, revised its version of the USRAP to state the legislation "abolished" the CLRAP. *See* N.C. Gen. Stat. § 41-6.5(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."). Nevertheless, *New Bar* has not been overruled by an appellate court. Furthermore, while most of the states that have adopted the USRAP seem to conclude its adoption removed commercial transactions from the purview of both the CLRAP and the USRAP, South Carolina was the first state to adopt the USRAP in 1987. *See* John A. Borron, Jr., 3 Simes and Smith, *The Law of Future Interests*, § 1451 (3d ed. 2002) ("South Carolina was the first state to adopt the Uniform Act."). Consequently, we cannot say with certainty that the "abolishment" of the CLRAP was our legislature's intent at the time. Unlike North Carolina, South Carolina did not pass any companion statutes regarding commercial transfers that would have moderated the effects of the abolition of the CLRAP. *See* N.C. Gen. Stat. Ann. § 41-29 (1995) ("An option in gross with respect to an interest in land or a

³ This quoted language is from the circuit court's order, which was reported with the supreme court's opinion and cited with approval. *See Parrott*, 206 S.C. at 402, 34 S.E.2d at 806.

preemptive right in the nature of a right of first refusal in gross with respect to an interest in land becomes invalid if it is not actually exercised within 30 years after its creation."); *see also* N.C. Gen. Stat. Ann. § 41-30 (1995) ("A lease to commence at a time certain or upon the occurrence or nonoccurrence of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution. For purposes of this section, the term 'lease' does not include an oil, gas, or mineral lease."). These statutes would have prevented many commercial transactions from falling into a RAP vacuum if the CLRAP did not apply.

Moreover, the complete abolition of the CLRAP without some provision for limitations in commercial transactions risks putting two legal principles at odds—freedom to contract and restrictions on alienability. Generally, parties are free to contract for terms upon which they agree subject to reasonable regulations to protect an overriding public interest. *S.C. Dep't of Consumer Affs. v. Rent-A-Ctr., Inc.*, 345 S.C. 251, 255, 547 S.E.2d 881, 883 (Ct. App. 2001). One such parameter is prohibiting the enforcement of unreasonable restrictions on alienation of real property. *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984) ("Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect.").⁴ Consequently, because we can construe the SCURAP in a manner that preserves the common law, we affirm the circuit court's ruling finding the purchase option void under the CLRAP.

II. Implied Term of a Reasonable Time

Spring Valley next contends an implied term exists in the contract that the Purchase Option would be exercised within a reasonable time to prevent the Purchase Option from violating the CLRAP. We disagree.

⁴ While a claim for unreasonable restriction examined under the auspices of the Restatement provides a vehicle to call commercial transfers into question, in the absence of clear intent from the legislature, we are inclined to construe the USRAP in a way that preserves the common law. *See* Restatement (Third) of Property (Servitudes) § 3.4 (2000) ("Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.")

Initially, whether this contention is preserved for appellate review is questionable. In its reply brief, Spring Valley points to the following argument it made before the circuit court to demonstrate it preserved this issue:

[O]ne thing, too; I, I talked about the, you know, the rules for commercial transactions are different. One of the differences of the, one of the differences of the -- including these estate kind of, kind of transfers that a commercial transfer -- courts, including courts in South Carolina where no date is stated in a commercial transfer for something to be accomplished, courts routinely apply a reasonable date. And so that in and of itself is a kind of illustration of why commercial cases were excluded, but that would apply in this case.

The circuit court's order does not mention any implied or reasonable term in the contract. Even if the argument was sufficiently raised to the circuit court, Spring Valley did not seek a ruling on this point and argues on appeal the court's order implicitly rejected this argument. Therefore, the preservation of this argument is suspect. See *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) ("To successfully preserve an issue for appellate review, the issue must be: '(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity.'" (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))). However, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part)).

On the merits, Spring Valley's argument is unavailing. In *Clarke v. Fine Housing, Inc.*, 438 S.C. 174, 882 S.E.2d 763 (2023), our supreme court rejected the notion that an implied "reasonable time" served to insulate a right of first refusal from a reasonableness examination under the Restatement.

Clarke's . . . suggestion that the law implies a "reasonable time" within which he could exercise the Right [of first refusal is] without merit. . . .

. . . Clarke misses the point of the Restatement approach by arguing a court can simply imply a reasonable time requirement in which a right of first refusal must be exercised. The whole point of the Restatement is to predetermine a limited time within which a right of first refusal must be exercised to protect the owner's power of alienation.

A judicially implied "reasonable time" requirement would do little to protect the owner's power of alienation. Lengthy litigation over what is or is not a reasonable time under the facts of any given case will necessarily restrain alienation.

Id. at 186-87, 882 S.E.2d at 769-70. For the same reasons, implying a reasonable time in a purchase option subject to the CLRAP undercuts the point of preserving an owner's power of alienation. Consequently, we reject Spring Valley's contention.

III. Waiver—Additional Sustaining Ground

Finally, Best argues as an additional sustaining ground that Spring Valley waived its right to exercise the Purchase Option by negotiating with them to reach a satisfactory resolution outside the basic parameters of the Purchase Option. Because we find the Purchase Option is void, we decline to consider the issue of waiver. *See Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

Based on all of the foregoing, the order of the circuit court is

AFFIRMED.

WILLIAMS, C.J., and VINSON, J., concur.

Aug 09 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2022-000813
CIVIL ACTION NO. 2019-CP-21-40-06914

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

Spring Valley Interests, LLC,

APPELLANT,

versus

The Best for Last, LLC,

RESPONDENT.

PETITION FOR REHEARING

The Appellant, Spring Valley Interests, LLC (“Spring Valley”), respectfully petitions the Court for a rehearing of its Opinion No. 6070 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

Procedural and Factual Background

The appeal in this matter stems from Spring Valley’s action to enforce a contractual purchase option (the “Purchase Option”) contained in a loan agreement between Spring Valley’s predecessor and Respondent The Best for Last, LLC (“Best”) in which Spring Valley’s predecessor loaned \$800,000.00 to Best for the purchase of certain real property.

After both parties moved for summary judgment on the enforceability of the Purchase Option, the circuit court denied Spring Valley's motion for summary judgment and granted Best's motion for partial summary judgment and dismissed Spring Valley's claims for declaratory relief and specific performance. In so ruling, the circuit court found the Purchase Option was void pursuant to the common law rule against perpetuities. The circuit court further ruled that South Carolina's Uniform Statutory Rule Against Perpetuities ("SCUSRAP") did not supersede or replace the common law as to nondonative transfers, such as the Purchase Option, and thus the provisions of the SCUSRAP did not protect the enforceability of the Purchase Option.

Spring Valley appealed the circuit court's grant of summary judgment to this Court. This Court heard the matter on May 15, 2024. On July 10, 2024, this Court issued its Opinion affirming the circuit court's ruling that the Purchase Option was void under the common law rule against perpetuities and not saved by the provisions of the SCUSRAP. This Court further held that an implied term of a reasonable time did not exist in the Purchase Option to prevent the Purchase Option from violating the common law rule against perpetuities. Spring Valley now petitions this Court for a rehearing of its holdings for the reasons set forth herein.

Argument

I. The Purchase Option is enforceable and not subject to any rule against perpetuities under the express language of the South Carolina Uniform Statutory Rule Against Perpetuities.

In 1987, the General Assembly enacted the SCUSRAP, S.C. CODE ANN. §§ 27-6-10 *et al.*, based upon the Uniform Statutory Rule Against Perpetuities promulgated by the National Conference of Commissioners on Uniform State Laws. See UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1 *et al.*; see also *Abrams v. Templeton*, 320 S.C. 325, 327 n.3, 465 S.E.2d 117, 119 n.3 (Ct. App. 1995). The SCUSRAP provides a comprehensive statutory scheme regarding the validity of nonvested property interests and powers of appointment.

The SCUSRAP is contained in Chapter 6 of Title 27 (Property and Conveyances) of the South Carolina Code. Chapter 6 of Title 27 is cited as the “Uniform Statutory Rule Against Perpetuities.” S.C. CODE ANN. § 27-6-10. The SCUSRAP applies to nonvested property interests created on or after July 1, 1987. S.C. CODE ANN. § 27-6-60.

Section 27-6-20 of Chapter 6 provides the general rule with respect to the enforceability of nonvested property interests. Under Section 27-6-20(A), 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 [commonly known as the “wait and see” provision].

§ 27-6-20(A).

The General Assembly chose to exempt seven categories of interests from the vesting time period requirements of Section 27-6-20. Relevant to this appeal, Section 27-

6-50 states:

Section 27-6-20 does not apply to:

(1) a nonvested property interest or a power or appointment arising out of a nondonative transfer[.]

§ 27-6-50. The parties do not dispute that the Purchase Option constitutes a nondonative transfer.

The SCUSRAP further provides “[t]his chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among the states construing it.” S.C. CODE ANN. § 27-6-70.

Finally, the SCUSRAP mandates “[t]his chapter [referring to Chapter 6 of Title 27 of the South Carolina Code] supersedes the common law rule against perpetuities.” S.C. CODE ANN. § 27-6-80. It is the operation of this section of the SCUSRAP in conjunction with Section 27-6-50 that forms the basis for the primary dispute in this appeal.

The circuit court and this Court interpreted Section 27-6-50, which sets forth exceptions to the vesting requirements of Section 27-6-20, as meaning that the seven categories of interests, including nondonative transfers, were exempt entirely from the statutory scheme created in the SCUSRAP. Based upon this erroneous conclusion, the courts then determined that because the SCUSRAP did not apply to nondonative transfers, the SCUSRAP did not supersede or replace the common law rule against perpetuities as to nondonative transfers and the common law thus invalidated the Purchase Option.

Respectfully, Spring Valley submits this construction of the SCUSRAP misapprehends and misinterprets the plain, unambiguous language of the SCUSRAP and defeats the clear intent expressed by the General Assembly. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey,

341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. . . . What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Hodges, 341 S.C. at 85, 533 S.E.2d at 581 (citations omitted).

The SCUSRAP was drafted to embody the entire law on the rule against perpetuities. To effectuate this intent, the General Assembly stated in Section 27-6-80: “This chapter supersedes the common law rule against perpetuities.” “This chapter” refers to the entire Chapter 6 of Title 27 of the South Carolina Code, meaning that each provision in the chapter now “obliterates” and “replaces” the common law rule against perpetuities. See Opinion No. 6070 dated July 10, 2024 (observing the term “supersede” is defined in Black's Law Dictionary as “obliterate, set aside, annul, *replace*, ... [t]o set aside.” *Supersede*, *Black's Law Dictionary* (6th ed. 1990)).

The intent to completely replace the common law rule against perpetuities with a comprehensive statutory scheme was also expressed in the preamble of the bill introduced proposing the enactment of the SCUSRAP: “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 which adopts provisions which prevent the defeat of the transferor's intent.”

1987 Act No. 12, § 1 (emphasis added). The purpose of the bill could not be any clearer – the General Assembly expressly stated it intended to “abolish” the common law rule against perpetuities.

There is no more common law rule against perpetuities in existence in South Carolina with respect to interests created after July 1, 1987. The validity or invalidity of an interest must be determined pursuant to the provisions of the SCUSRAP. Had the General Assembly intended any common law regarding the rule against perpetuities to remain, it could have done so as it has done in other statutes. See S.C. CODE ANN. § 16-17-50 (“The provisions of this article are cumulative and shall not be construed as repealing any existing statute or the common law of this State with respect to the subject matter of any of the provisions hereof.”); S.C. CODE ANN. § 40-57-350(M) (“The provisions of this section which are inconsistent with applicable principles of common law supersede the common law, and the common law may be used to aid in interpreting or clarifying the duties described in this section.”). Instead, in the SCUSRAP, the General Assembly used absolute language that the common law was superseded by its enactment.

Second, Section 27-6-50 of the SCUSRAP does not state that the seven categories of interests, including nondonative transfers, are exempted from Chapter 6 such that the SCUSRAP does not apply. Instead, Section 27-6-50 expressly states “Section 27-6-20 does not apply to” the seven categories of interests listed. Section 27-6-20 is the statutory provision of the SCUSRAP that sets forth the required vesting time periods for a nonvested interest to remain valid. The General Assembly, by exempting certain categories of interests from the vesting requirements of Section 27-6-20, has made the determination that these interests, including nondonative transfers, are not subject to any vesting time

requirements and remain valid without any regard to vesting requirements.

The intent of the General Assembly to remove these seven categories of interests from vesting time requirements is further expressed by its inclusion of a catch-all provision which states Section 27-6-20 does not apply to “(7) a property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities” In Section 27-6-50, the General Assembly intended to remove certain interests from the time requirements of Section 27-6-20, and to ensure that it did not omit any interest, it included this catch-all provision to ensure that any interests which were not previously subject to the common law would also not be subject to the vesting requirements under the SCUSRAP. It is clear under the language of Section 27-6-50 that the General Assembly intended every interest listed in this section not be subject to the requirements of Section 27-6-20 for validity and that these interests would remain valid under the SCUSRAP irrespective of any failure to vest within a certain time period.

This construction is consistent with the intent behind the Uniform Statutory Rule Against Perpetuities drafted by the National Conference of Commissioners on Uniform State Laws upon which South Carolina’s statute is based. The comments to Section 4 of the Uniform Statutory Rule Against Perpetuities, which is titled “Exclusions from Statutory Rule Against Perpetuities” and mirrors Section 27-6-50 of the South Carolina Code, are instructive. Significantly, the comments to Section 4 describe its purpose as follows:

Section 4 lists seven exclusions from the Statutory Rule Against Perpetuities (Statutory Rule). Some are declaratory of existing law; others are contrary to existing law. Since the Common-law Rule Against Perpetuities is superseded by this Act . . . , **a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.**

EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES., UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4, cmt.

The comments to Section 4 of the Uniform Statutory Rule further expound upon the rationale for excluding nondonative transfers from the time constraints of the rule against perpetuities. As explained in the comments, “[i]n line with long-standing scholarly commentary, subsection (1) [of Section 4 of the Uniform Statutory Rule] excludes . . . nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule--a life in being plus 21 years--is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.”

Id.

The comments recognize that excluding nondonative transfers from the common law rule against perpetuities is contrary to existing common law, which generally applies to nondonative transfers. The Uniform Statutory Rule was drafted to change the application of the common law rule to nondonative transfers due to the inappropriateness of using the period of a life in being plus 21 years to cases of commercial transactions. Id.; see also Wong v. Di Grazia, 60 Cal. 2d 525, 533, 386 P.2d 817 (1963) (“Since the rule against perpetuities was born in a society which extolled the tight ownership of inherited real property, it does not facilely operate as to commercial agreements in today's dynamic

economy. The period of lives in being and 21 years, which works admirably with regard to gift transactions for family purposes, has no significance in the world of commercial affairs.”) (internal citation omitted).

Other jurisdictions which have adopted the Uniform Statutory Rule have concluded, in accord with the commentary above, that under the Uniform Statutory Rule, nondonative transfers are excepted from any rule against perpetuities. In Juliano & Sons Enters., Inc. v. Chevron, U.S.A., Inc., 593 A.2d 814, 817-18 (N.J. Super. Ct., App. Div. 1991), the court held that New Jersey’s enactment of the Uniform Statutory Rule Against Perpetuities abolished common law such that a right of first refusal was no longer subject to the common law rule against perpetuities. The court determined that the new statute “embodie[d] the entire law of the State of New Jersey, as of its effective date, with respect to the rule against perpetuities and because nondonative transfers, like the first right of refusal at issue, were excepted from the statutory rule, nondonative transfers were not subject to any rule against perpetuities. Id.

In Shaver v. Clanton, 26 Cal. App. 4th 568, 31 Cal. Rptr. 2d 595 (1994), the court likewise held that commercial transactions, such as options, rights of first refusal, and commercial leases, were no longer subject to the rule against perpetuities following California’s adoption of the Uniform Statutory Rule. The court observed that until the adoption of the Uniform Statutory Rule, California common law applied the rule against perpetuities to commercial transactions. The Uniform Statutory Rule, however, changed California’s common law rule against perpetuities by “explicitly excluding such commercial transactions from coverage under the rule.” The court further stated: “The rule is now irrelevant to such transactions: [i]t makes no sense to apply a rule based upon

family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties.” Id. at 574 (internal citation omitted).

Therefore, for the reasons set forth above, Spring Valley submits this Court misapprehended the express intent and purpose of the SCUSRAP. Under the provisions of the SCUSRAP, nondonative transfers, such as the Purchase Option at issue in this appeal, are not subject to any vesting requirements, whether common law, statutory, or otherwise. The Purchase Option is accordingly valid and enforceable and does not violate the common law against perpetuities which no longer is the law of South Carolina.

II. In the alternative, if the common law rule against perpetuities applies to the Purchase Option, an implied term that the Purchase Option would be exercised within a reasonable amount of time operates to prevent the Purchase Option from violating the common law rule against perpetuities.

While Spring Valley maintains that the common law rule against perpetuities does not void the Purchase Option as set forth above in Section I. hereof, in the alternative, an implied period of reasonable time for the duration of the option prevents it from violating the common law rule against perpetuities. See King v. Oxford, 282 S.C. 307, 316, 318 S.E.2d 125, 130 (Ct. App. 1984) (“The failure of the parties to express a date certain by which the option to lease must be exercised is not fatal. Where the parties to an option contract do not specify a time for performance, a reasonable time will be implied.”).

The issue is preserved for appellate review because Spring Valley raised the issue of an implied term of a reasonable time in its Memorandum in Support of its Motion for Summary Judgment [R.pp. 77-78] and in the hearing before the circuit court. [R.pp. 114, 11. 13-23.] The circuit court rejected this argument in denying Spring Valley’s motion for summary judgment and granting Best’s partial motion for summary judgment. [R.p. 2.]

This Court relied upon the Supreme Court’s decision in Clarke v. Fine Housing,

Inc., 438 S.C. 174, 882 S.E.2d 763 (2023) in concluding that an implied reasonable term for the duration of the Purchase Option could not be read into the option. The Clarke decision does not override the long-standing rule that a reasonable time will be implied in an option contract if the option does not specify a time for performance.

Clarke involved an action for the specific performance of a right of first refusal which gave the plaintiff the right of first refusal regarding the purchase of certain real property if the defendant/owner chose to sell it. Id. at 179, 882 S.E.2d at 766. In assessing whether the right of first refusal unreasonably restrained alienation, the court looked at certain factors listed in RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 (Am. L. Inst. 2000), cmt. f. These factors include (1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right. Id. at 180-81, 882 S.E.2d at 766-67.

In particular, the Supreme Court analyzed whether the plaintiff's right of first refusal contained any procedures for governing the exercise of the right with an emphasis on whether the right included any time limit within which it could be exercised after the owner decided to sell the property. The Supreme Court determined there were no procedures at all delineating the procedural requirements which the plaintiff in Clarke had to follow to exercise the right of first refusal, including the period of time after the owner decided to sell to any third party buyer for the plaintiff to exercise the right. Id. at 185, 882 S.E.2d at 769.

Citing the Restatement, the court observed: "Lack of clarity may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation. Lengthy periods for exercise of rights of first refusal will also substantially affect

alienability of the property.” The Supreme Court held that when an owner of property decides to sell and a right of first refusal is triggered, there must be procedures in place regarding the exercise of the right to protect the owner’s power of alienation. Otherwise, the owner could receive an offer to purchase its property, but if the holder of the right of first refusal has no time limit to exercise the right, the property will be tied up by the right of first refusal and frustrate the desire of the owner and potential buyer to enter into a real estate transaction Id. at 185-87, 882 S.E.2d at 769-70; see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 (Am. L. Inst. 2000), cmt. f. (emphasizing need for time limit to exercise right of first refusal, noting “[p]otential buyers will be deterred by the possibility that they may not know for a lengthy period of time whether they will obtain the property or be obligated to pay the price”).

The Purchase Option here does not lack procedures after the option is exercised. Instead, the issue is rather the duration of the existence of the option. The Restatement, upon which the Supreme Court relied upon in Clarke, specifically notes “[i]f the duration [of the option] is not specified, an option terminates after a reasonable time” RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 (Am. L. Inst. 2000), cmt. e.

A right of first refusal which has no time limit for the right to be exercised after the owner has decided to sell its property or after the owner receives an offer from a third party buyer is different than an option which lacks a specific time for its termination. With a right of first refusal, the owner of the property is specifically desiring to sell the property, but cannot because of a right of first refusal which lacks any time limit in which the holder of the right must then exercise it once it is triggered. In that circumstance, there is a lack of guidance to all parties which unreasonably frustrates the ability of the owner to sell to the

potential buyer.

An option to purchase property – which is not contingent upon the immediate desire of the owner to sell or the receipt by the owner of a third party buyer offer to purchase - will only last, under the law, for a reasonable amount of time and then it terminates. Here, the Purchase Option was exercised only a little over two years after the option was created. The exercise of the Purchase Option in this case occurred within a reasonable amount of time.

The Clarke case, which examined the validity of a different type of restraint, did not overrule the law that a reasonable period of time can be read into an option contract. Therefore, the Court also misapprehended that, if the common law against perpetuities applies, the Purchase Option is nevertheless enforceable because an implied term of a reasonable time protects the option.

III. Best is not entitled to summary judgment as a matter of law as to whether Spring Valley waived its right to exercise the Purchase Option.

Neither the circuit court nor this Court issued any ruling on whether Spring Valley waived its right to exercise the Purchase Option. Spring Valley, out of an abundance of caution, nevertheless refers the Court to its arguments as to waiver to preserve the issue as may be necessary and stands by its position that Best is not entitled to summary judgment on the issue of waiver and whether or not a waiver has occurred in a given factual setting is a question of fact for the finder of fact. Bishop v. Benson, 297 S.C. 14, 18, 374 S.E.2d 517, 518 (Ct. App. 1988).

CONCLUSION

For the reasons set forth herein, Appellant Spring Valley respectfully requests that the Court grant its Petition for Rehearing, withdraw the Opinion of the Court, reverse the circuit court's grant of summary judgment to Best, and hold that the Purchase Option is enforceable for the reasons set forth herein.

Respectfully submitted,

/s Carmen V. Ganjehsani
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**ATTORNEYS FOR APPELLANT
SPRING VALLEY INTEREST, LLC**

August 9, 2024.

Aug 09 2024

SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Spring Valley Interests, LLC, do hereby certify that I have this date served the foregoing Petition for Rehearing, dated August 9, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent e-mail is attached to this Certificate of Service.

/s Carmen V. Ganjehsani
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Dated: August 9, 2024.

From: [Carmen Ganjehsani](#)
To: kirby.shealy@arlaw.com; luke.allen@llr.sc.gov
Cc: [Kenneth Raynor](#)
Subject: Appellate Case No. 2022-000813 Spring Valley Interests, LLC v. The Best for Last, LLC
Date: Friday, August 9, 2024 12:29:56 PM
Attachments: [2022-000813 Spring Valley v. Best \(Petition for Rehearing\) \(3471108\).pdf](#)

Pursuant to the Supreme Court's Order dated April 24, 2024, please find served upon you the Petition for Rehearing in the above-referenced appeal on behalf of the Appellant Spring Valley Interests, LLC.

Thank you,
Carmen Ganjehsani

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August 9, 2024

Filed via e-mail (ctappfilings@sccourts.org) and hand delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

Aug 09 2024

SC Court of Appeals

Re: Spring Valley Interests, LLC v. The Best for Last, LLC
Appellate Case No. 2022-000813
RPR File No.: 010467-00001

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing on behalf of Appellant Spring Valley Interests, LLC in the above-referenced case, along with our Certificate of Service. We are also filing this Petition electronically with the Court of Appeals via e-mail at ctappfilings@sccourts.org pursuant to Section (b)(2) of the Supreme Court's April 24, 2024 Order.

Also enclosed is our firm's check in the amount of \$50.00 for the filing fee in this matter.

We have served this Petition for Rehearing on counsel for Respondent upon their primary email addresses listed in the Attorney Information System.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

/s Carmen V. Ganjehsani

Carmen V. Ganjehsani

Encs.

cc: Kenneth Ray Raynor (ken@raynorlawfirm.com)
Kirby Darr Shealy, III (kirby.shealy@arlaw.com)
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Sep 13 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-4006914
Appellate Case No.: 2022-000813

Spring Valley Interests, LLC, ...Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

As ordered by this Court in its letter of September 3, 2024, Respondent The Best for Last, LLC (“Respondent” or “TBFL”) respectfully submits this Return to the Petition for Rehearing filed by Appellant Spring Calley Interests, LLC (“Appellant” or “Spring Valley”). The Court correctly affirmed the circuit court’s ruling that the parties’ contract purchase option (“Purchase Option”) was void pursuant to the common law Rule Against Perpetuities (“CLRAP”).

ARGUMENT

In its Petition, Spring Valley 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. Spring Valley’s

Petition merely reiterates arguments already addressed by the Court, without offering any new basis for reconsideration. The Petition also fails to demonstrate with particularity the points supposedly overlooked or misapprehended by the Court. Accordingly, the Petition for Rehearing should be denied.

I. THE PURCHASE OPTION IS VOID UNDER THE CLRAP

In its Petition, Spring Valley contends this Court “misapprehend[ed] and misinterpret[ed] the plain, unambiguous language of the [South Carolina Uniform Rule Against Perpetuities (“SCURAP”)] and defeats the clear intent expressed by the General Assembly.” Pet. Reh’g 4. In support of its argument, Spring Valley improperly relies on extrinsic sources—such as the preamble of the bill proposing the SCURAP, unadopted commentary to the Uniform Act, and inapposite case law from other jurisdictions. *Id.* at 5-9. However, the language of the SCURAP is clear, and as Spring Valley itself concedes, plain and unambiguous. *Id.* at 4. Therefore, statutory interpretation encouraged by Spring Valley in its Petition is neither necessary or appropriate.

Under South Carolina law, courts apply the plain meaning of clear statutes without resorting to extrinsic interpretation. “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998)). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* (citing *In re Vincent J.*, 333 S.C. at 233, 509 S.E.2d at 262).

Here, the SCURAP is explicit: it exempts certain types of transfers, including nondonative transfers, from its application. S.C. Code Ann. § 27-6-50. It is undisputed that the Purchase Option involves a nondonative transfer, meaning the SCURAP does not apply, and the CLRAP

governs. The Legislature's specific intent to except nondonative transfers is clear and unambiguous from the plain language of the statute. This clear language leaves no room for Spring Valley's argument that the General Assembly intended to abolish the CLRAP entirely, and it is wrong to delve into extrinsic evidence, such as scholarly commentary and other states' cases, to argue something different from the Legislature's clearly expressed intent.

Contrary to Spring Valley's argument, the statute does not replace the common law in every instance, particularly where nondonative transfers are concerned. As the common law is not displaced by doubtful implication, the Purchase Option remains subject to the CLRAP. 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.").

South Carolina CLRAP does not exclude nondonative transfers from its application. "The common law rule is as follows: 'No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest.'" *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 370 n.18, 628 S.E.2d 902, 918 n.18 (Ct. App. 2006) (quoting *Abrams v. Templeton*, 320 S.C. 325, 327, 465 S.E.2d 117, 119 (Ct.App.1995)). The infinite nature of the Purchase Option clearly violates this rule and thus violates well-established public policy in South Carolina. See *S. Bank & Tr. Co. v. Brown*, 271

S.C. 260, 265, 246 S.E.2d 598, 600 (1978) (“A violation of the rule against perpetuities would of course, violate public policy and defeat intent.”); *Webb v. Reames*, 485 S.E.2d 384, 326 S.C. 444 (Ct. App. 1997) (finding a right of first refusal that was a preemptive right violated the rule against perpetuities and was therefore void). Therefore, the Court rightly concluded that the Purchase Option is void under the CLRAP.

While TBFL maintains it is not the Court’s place to resort to statutory interpretation beyond that expressed in the plain language of the statute, even if the Court were to entertain the extrinsic arguments raised in Spring Valley’s Petition, those arguments fail. First, Spring Valley cites to the preamble of the bill introduced proposing the enactment of the SCURAP. Pet. Reh’g 5. 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. Spring Valley places much emphasis on the use of the word “abolish” to argue the General Assembly clearly intended to “abolish” the CLRAP. Pet. Reh’g 5-6. 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. 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 against perpetuities does not apply to nondonative transfers, the common law rule was not replaced by it, again showing the General Assembly did not intend to abolish the common law rule in situations where the statute would not operate to replace it.

Next, Spring Valley discusses comments to the Uniform Statutory Rule Against Perpetuities drafted by the National Conference of Commissioners on Uniform State Laws to

further argue the unexpressed intent of the South Carolina General Assembly. Had the General Assembly desired to adopt the commentary expressed by the National Conference of Commissioners, it could have easily done so. It did not.

Finally, Spring Valley suggests that other jurisdictions that have adopted the Uniform Statutory Rule have concluded that “nondonative transfers are excepted *from any rule against perpetuities*.” Pet. Reh’g 9 (emphasis added). In support of this sweeping statement, Spring Valley cites to only two cases from other jurisdictions: New Jersey and California. However, these cases are contrary to the majority rule: “The Uniform Statutory Rule against 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)).

Likewise, long before the adoption of the Uniform Statutory Rule Against Perpetuities, California took the radical approach of categorically stating that the rule against perpetuities has no significance in the world of commercial affairs. *Wong v. Di Grazia*, 60 Cal. 2d 525, 533, 386 P.2d 817, 823 (1963). Unlike California, South Carolina maintains a strong public policy against restraints on the free alienability of property. *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.”); “Nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use.” *Queen's Grant II Horizontal Prop.*

Regime, 368 S.C. at 369, 628 S.E.2d at 917.

This Court correctly ruled that the CLRAP was not preempted by the SCURAP as to nondonative transfers. Accordingly, the Purchase Option was void pursuant to the CLRAP. Nothing raised in Spring Valley's Petition for Rehearing merits reconsideration of the Court's well-reasoned opinion.

II. AN IMPLIED TERM DOES NOT SAVE THE PURCHASE OPTION

Spring Valley maintains that nondonative transfers are not subject to any Rule Against Perpetuities. Pet. Reh'g 10. Based on this logic, options to purchase real property can continue indefinitely and freely disrupt the alienability of property and interfere with its beneficial use. *See Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 369, 628 S.E.2d at 917. Such a result cannot be what the Legislature intended when it enacted the SCURAP. In the alternative, Spring Valley argues that the Court should imply a reasonable time for the duration of the option to save the Purchase Option from violating the CLRAP.

First, 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. It is fundamental that "[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). This Court should not save Spring Valley from a problem of its own making and overrule a trial court on a matter not properly brought before it.

Second, even if the issue were properly before the Court, the imposition of a reasonable time term contradicts the very purpose of the CLRAP, which demands certainty in vesting, and is contrary to South Carolina common law. Imposing a flexible reasonable time standard introduces uncertainty, contrary to the very purpose of the CLRAP. This Court correctly rejected Spring

Valley's argument to imply a reasonable time term.

Moreover, the Purchase Option itself expressly grants a “perpetual option,” *Spring Valley Ints., LLC v. Best for Last, LLC*, No. 2022-000813, 2024 WL 3351146, at *1 (S.C. Ct. App. July 10, 2024), demonstrating the parties' intent to create an option of indefinite duration. There is no evidence the parties intended to imply a reasonable time limit. The Court should not rewrite the agreement by implying a term that the parties did not negotiate or intend.¹

Lastly, Spring Valley fails to state with particularity the points overlooked or misapprehended by the Court on this issue. The Court's opinion reaches the correct result on this issue and is well reasoned and supported by South Carolina law.

III. SPRING VALLEY WAIVED ANY RIGHT UNDER THE PURCHASE OPTION

As an alternate sustaining ground, TBFL maintains that Spring Valley waived its right to re-exercise the purchase option after exercising the option, agreeing to the terms of purchase, executing the closing documents, and then failing to proceed with the agreed-upon sale. Spring Valley provides no new argument or law to contest a finding of waiver, and this remains a valid basis to affirm the circuit court's ruling.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Brief of Respondent, which

¹ 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., 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.”).

are incorporated herein, this Court should deny the Petition for Rehearing.

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September 13, 2024.

CERTIFICATE OF SERVICE

I certify that I have served **Respondent's Return to Petition for Rehearing** on Appellant by sending a copy of said documents to Appellant's counsel via email on September 13, 2024, as follows:

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September 13, 2024.

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOCELYN NEWMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2022-000813
CIVIL ACTION NO. 2019-CP-21-40-06914

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

Spring Valley Interests, LLC,

APPELLANT,

versus

The Best for Last, LLC,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR REHEARING

The Appellant, Spring Valley Interests, LLC (“Spring Valley”), hereby files its Reply to Respondent The Best for Last, LLC’s (“Best”) Return to the Petition for Rehearing and states as follows:

- I. The Purchase Option is enforceable and not subject to any rule against perpetuities under the express language of the South Carolina Uniform Statutory Rule Against Perpetuities.**

Spring Valley agrees with Best that the language of the South Carolina Uniform Statutory Rule Against Perpetuities (“SCUSRAP”) is “plain and unambiguous and conveys a clear and definite meaning” and that the courts must give effect to what the General

Assembly has stated in the text of the statute. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted).

As fully explained in the Petition for Rehearing, the General Assembly drafted the SCUSRAP to encompass the entirety of the law on the rule against perpetuities as shown by its explicit statement in S.C. CODE ANN. § 27-6-80: “This chapter supersedes the common law rule against perpetuities.” While the common law is not to be changed by “doubtful implication,” it can be overturned by “clear and unambiguous language.” Coakley v. Tidewater Const. Corp., 194 S.C. 284, 9 S.E.2d 724, 726 (1940) (citation omitted). And here, in Section 27-6-80 of the SCUSRAP, the General Assembly used clear and unambiguous language to express its intent that the common law no longer exists as to the rule against perpetuities and is instead replaced by Chapter 6 of Title 27 of the South Carolina Code. The SCUSRAP provides a complete scheme with respect to the rule against perpetuities. See 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.”).

Furthermore, as also fully explained in the Petition for Rehearing, the plain text of Section 27-6-50 makes clear that the seven categories of interests, including nondonative transfers, are not exempt from the entire Chapter 6, but only from Section 27-6-20. This Section 27-6-20 sets forth the required vesting time periods for a nonvested interest to remain valid, and the General Assembly, by expressly exempting nondonative transfers as well as certain other interests from Section 27-6-20, has made the determination that these interests are not subject to any vesting time requirements and remain valid without any regard to vesting requirements.

The General Assembly did not say that these interests are exempt from the entire Chapter 6 – only the particular rule set forth in Section 27-6-20. These seven exempted interests, including nondonative transfers, are still covered under the complete statutory scheme which now supersedes the common law. Under the plain language used by the General Assembly, there is only one interpretation: (1) the SCUSRAP has superseded the common law rule against perpetuities such that the common law no longer exists and validity of property interests are now determined by Chapter 6 of Title 27 of the South Carolina Code; (2) Section 27-6-20 sets forth the vesting requirements; and (3) Section 27-6-50 provides that there are seven categories of interests, including nondonative transfers, which remain valid without regard to the vesting requirements of Section 27-6-20. Therefore, the Purchase Option at issue in this case is valid under the provisions of the SCUSRAP.

Spring Valley agrees this Court need not go beyond the plain language of the SCUSRAP to reach the above conclusion. Spring Valley merely pointed this Court to case law from other jurisdictions to show that other courts have interpreted similarly plain language in the manner as urged by Spring Valley. Spring Valley respectfully asks this Court to give effect to the unambiguous language of the SCUSRAP to find the Purchase Option valid and enforceable.

II. In the alternative, if the common law rule against perpetuities applies to the Purchase Option, an implied term that the Purchase Option would be exercised within a reasonable amount of time operates to prevent the Purchase Option from violating the common law rule against perpetuities.

Spring Valley continues to maintain that the common law rule against perpetuities does not void the Purchase Option as set forth above in Section I. hereof, but does submit to this Court in the alternative that an implied period of reasonable time for the duration of

the option can be supplied to prevent the option from violating the common law rule against perpetuities. Best argues that imposing a reasonable time would be contrary to the common law rule against perpetuities, but the common law has long allowed a reasonable time to be implied for the exercise of an option. See King v. Oxford, 282 S.C. 307, 316, 318 S.E.2d 125, 130 (Ct. App. 1984) (“The failure of the parties to express a date certain by which the option to lease must be exercised is not fatal. Where the parties to an option contract do not specify a time for performance, a reasonable time will be implied.”); see also Lindler v. Adcock, 250 S.C. 383, 386, 158 S.E.2d 192, 194 (1967) (“[T]he option must be exercised in a reasonable time if no time is specified.”)¹.

¹ Best points out that in Juliano & Sons Enters., Inc. v. Chevron, U.S.A., Inc., 593 A.2d 814, 817-18 (N.J. Super. Ct., App. Div. 1991), a case relied upon by Spring Valley, a right of first refusal could not be saved under New Jersey Law by implication of a reasonable time. But in Juliano & Sons Enters., Inc., the court did find that the right of first refusal, a nondonative commercial transaction, was not subject to the common law rule against perpetuities and was valid under the Uniform Statutory Rule Against Perpetuities. There, as here, it was not even necessary to reach the issue of an implied reasonable time because the transaction was clearly valid under the statutory scheme.

CONCLUSION

For all reasons set forth herein and in the previously submitted Petition for Rehearing, Appellant Spring Valley respectfully requests that the Court grant its Petition for Rehearing, withdraw the Opinion of the Court, reverse the circuit court's grant of summary judgment to Best, and hold that the Purchase Option is enforceable for the reasons set forth in Spring Valley's submissions to this Court.

Respectfully submitted,

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September 20, 2024.

Sep 20 2024

CERTIFICATE OF SERVICE

SC Court of Appeals

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Spring Valley Interests, LLC, do hereby certify that I have this date served the foregoing Reply to the Return to the Petition for Rehearing, dated September 20, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent e-mail is attached to this Certificate of Service.

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Dated: September 20, 2024.

From: [Carmen Ganjehsani](#)
To: kirby.shealy@arlaw.com; luke.allen@llr.sc.gov
Cc: [Kenneth Raynor](#)
Subject: Appellate Case No. 2022-000813 Spring Valley Interests, LLC v. The Best for Last, LLC
Date: Friday, September 20, 2024 1:16:08 PM
Attachments: [2022-000813 Spring Valley v. Best \(Reply to Rtn to Pet for Rehearing\) \(3508089\).pdf](#)

Pursuant to the Supreme Court's Order dated April 24, 2024, please find served upon you the Reply to the Return to the Petition for Rehearing in the above-referenced appeal on behalf of the Appellant Spring Valley Interests, LLC.

Thank you,
Carmen Ganjehsani

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The South Carolina Court of Appeals

Spring Valley Interests, LLC, Appellant,

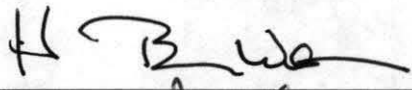
v.

The Best for Last, LLC, Respondent.

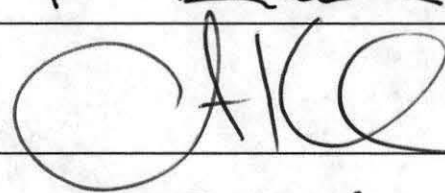
Appellate Case No. 2022-000813

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:
Kenneth Ray Raynor, Esquire
Kirby Darr Shealy, III, Esquire
Luke M. Allen, Esquire
Carmen Vaughn Ganjehsani, Esquire
The Honorable Jocelyn Newman

FILED
Oct 25 2024
