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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

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

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

Spring Valley Interests, LLC, ... Petitioner,

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Respondent would restate the issue on appeal as follows:

I. Did the Court of Appeals correctly hold that the Purchase Option violates the common law rule against perpetuities?

As an additional sustaining ground,

II. Did Petitioner 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 Petitioner Spring Valley Interests, LLC[1] ("Spring Valley" or "Petitioner"), through which Petitioner loaned TBFL money to assist in TBFL's acquisition of real property. As part of the loan, TBFL granted Petitioner a freely assignable and perpetual option to purchase an undivided co-tenancy interest in the property ("Purchase Option") (App. pp. 0004-0005, ¶¶ 1-10; App. p. 0018, ¶¶ 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 Petitioner waived its right to exercise the Purchase Option after once doing so and failing to close the transaction.

Petitioner filed this lawsuit on December 11, 2019, seeking specific performance of the Purchase Option, reformation of a mortgage, and an alternative claim for damages against TBFL. TBFL filed an answer and counterclaim for a declaratory judgment, pursuant to S.C. Code Ann. § 15-53-10 (2005), 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

[1] White Interests Limited Partnership was the original lender on the loan but assigned its interest in the purchase option to Petitioner. (App. p. 0151, lines 7-10.) Lynn White, now deceased, was the sole owner and manager of both White Interests and Petitioner. (App. p. 0145, lines 6-13.)

("USRAP"). TBFL also asserted a claim for equitable estoppel, arguing Petitioner should be estopped from seeking specific performance due to Petitioner's failure to close the agreement reached by the parties following its exercise of the Purchase Option.

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 Petitioner 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, Petitioner 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 Petitioner'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 Petitioner's motion for summary judgment via a Form-4 Order. On May 18, 2022, the trial court granted TBFL's motion for summary judgment on the ground that the Purchase Option violated the common law rule against perpetuities. Petitioner filed its Notice of Appeal on June 13, 2022.

The record in this case tells a simple story. As explained below, TBFL and Petitioner entered into a loan agreement in connection with TBFL's purchase of real property that gave Petitioner a perpetual and freely assignable option to purchase a co-tenancy interest in the property. After Petitioner 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, Petitioner decided that it wanted a bigger piece of the pie and refused to cooperate further unless TBFL agreed to various last-minute demands. TBFL refused to

yield from the agreed upon terms, so Petitioner sank the deal. Petitioner now wants to re-exercise the Purchase Option to have its second bite at the apple.

A. The Purchase Option.

TBFL is a South Carolina limited liability company formed in March 2017 for the sole purpose of owning, developing, and managing a self-storage facility in Columbia, South Carolina (the "Property"). (App. p. 0152, line 6 – p. 0153, line 23; App. p. 0206, lines 5-9; App. p. 0270, 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. (App. p. 0153, lines, 1-23; App. pp. 0412-0423.) To obtain additional financing, Albert Heyward, the manager of TBFL, enlisted the help of Lynn White, the owner/manager of Petitioner's predecessor, White Interests Limited Partnership ("White Interests"). (App. p. 0152, line 6 – p. 0153, line 10; App. p. 0210, 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. (App. p. 0144, line 20 – p. 0145, line 1; App. p. 0154, lines 12-23; App. p. 0207, 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. (App. p. 0209, lines 1-9; App. pp. 0365-0368.) 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"). (App. p. 0212, lines 13-19; App. pp. 0365-0368.) White Interests subsequently assigned its right to exercise the Purchase Option to Petitioner. (App. p. 0223, line 23 – p. 0224, line 2.) Both White Interests and Petitioner were solely owned and managed by Lynn White. (App. p. 0145, lines 6-13.) The

Purchase Option was exercisable at Petitioner's sole discretion, had no time limitations, and provided that Petitioner 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." (App. pp. 0365-0368.) 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.

(App. pp. 0365-0368.)

The loan set forth in the Loan Agreement is evidenced by a promissory note (the "Note") from TBFL to Petitioner and is secured by a second mortgage lien on the Property in favor of Petitioner (the "Mortgage"). The Note provides that interest on the loan would be paid to Petitioner "as if [Petitioner] 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." (App. pp. 0369-0371.)

B. Petitioner'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"). (App. p. 0219, lines 21-25; App. p. 0300, line 12 – p. 0301, line 12.) However, on August 21, 2019, upon learning that TBFL had tendered the $35,000 non-refundable application fee to the Refinance Lender, Petitioner sent TBFL a letter stating it was exercising the Purchase Option. (App. p. 0165, lines 9-17; App. p. 0168, lines 2-21; App. pp. 0372-0373.) 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." (App. pp. 0372-0373.)

According to Petitioner, "it was important that I exercised my purchase option before the project was refinanced because I was entitled to 70 some percent of the excess loan proceeds[,] which means my purchase option would not have cost the full $800,000. It would have been less than that." (App. p. 0165, lines 12-17.) In other words, Petitioner wanted to make sure it held a possessory interest in the Property at the time of the Refinance so that it could receive a windfall of any excess loan proceeds and offset the $800,000 it had contributed to TBFL.

C. The "Mutually Acceptable Co-Tenancy Agreement."

With a tentative closing date for the Refinance set in late September 2019, TBFL and Petitioner began negotiating the "mutually acceptable co-tenancy agreement" contemplated by the Purchase Option. During the negotiations, TBFL took the position that the co-tenancy agreement should contain terms and conditions that reflected the economics and management structure embedded in TBFL's operating agreement. (App. p. 0283, line 9 – p. 0286, line 19; App. pp. 0412-0423.) As TBFL understood the deal, TBFL had agreed to grant Petitioner the Purchase Option for a co-tenancy interest in the Property instead of a membership interest in the LLC to

accommodate Petitioner's desire for a future 1031 Exchange,[2] which would only be possible if Petitioner took a possessory interest in the Property. (App. p. 0162, lines 18-21; App. p. 0273, line 11 – p. 0274, line 4; App. p. 0283, line 9 – p. 0286, line 19; App. pp. 0412-0423.) TBFL also understood that Petitioner's interest in the Property would be the same "as if the [Petitioner] were an Initial Member" of the LLC. (App. pp. 0412-0423.)

This position was consistent with the language of the Note, which provided that "Interest shall be due and payable in the same manner as set forth in 9.1.1.1. of [TBFL's] Operating Agreement as if the [Petitioner] were an Initial Member (as defined in such Operating Agreement) and the Interest was the [Petitioner's] Preferred Return (as defined in the Operating Agreement)." (App. p. 0163, line 11 – p. 0164, line 16; App. pp. 0369-0371.) However, when TBFL communicated to Petitioner how it wanted to structure the co-tenancy agreement, Petitioner insisted that it should receive an outright co-tenancy interest in the Property, not a corresponding membership interest in the LLC. (App. p. 0162, lines 9-21; App. p. 0175, lines 6-12; App. p. 0290, line 7 – p. 0291, line 13.)

On September 12, 2019, Petitioner, represented by Timothy Gavigan, Esquire, sent TBFL an email containing a first draft of the transaction documents. (App. p. 0223, lines 5-15; App. pp. 0374-0411.) Thereafter, between September 13 and 18, 2019, Petitioner and TBFL worked together on the key terms by which Petitioner would take the co-tenancy interest in the Property. On September 19, 2019, the parties met at Gavigan's office, where they reached an agreement on the terms for converting the Purchase Option into a co-tenancy agreement. Per the agreement between Petitioner and TBFL, Petitioner's second mortgage would be satisfied in exchange for a

[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.").

conveyance of a 70% co-tenancy interest in the Property in favor of Petitioner and a cash payment from Petitioner to TBFL of approximately $141,000. (App. p. 0182, lines 7-16; App. p. 0229, line 20 – p. 0231, line 14; App. pp. 0424-0430.) 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." (App. p. 0229, line 20 – p. 0231, line 14; App. pp. 0424-0425.)

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." (App. p. 0236, line 19 – p. 0237, line 8; App. p. 0431.) 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"). (App. p. 0231, lines 1-13; App. p. 0238, lines 13-23; App. p. 0432.) In that same email, Gavigan included an additional request that TBFL reimburse Petitioner for "additional legal fees incurred to defend [TBFL's] challenge of the option." (App. p. 0238, lines 5-9; App. p. 0432.) TBFL did not immediately respond to this portion of the email.

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

In reliance on Petitioner's representations that the loan would be satisfied by the conveyance of a co-tenancy interest, the cash payment, and Petitioner's second mortgage lien on the Property thereafter being released, TBFL executed the Closing Documents on Friday, September 27, 2019. That same day, TBFL, through its own counsel, tendered the executed Closing Documents to

Petitioner and offered to overnight ship the original deed executed by TBFL. (App. p. 0241, lines 8-15; App. p. 0435.) Upon receiving the signed documents from TBFL, Petitioner also signed and executed the Closing Documents, after which Gavigan advised TBFL's attorney: "I'll send you [Petitioner's] signature pages on Monday." (App. p. 0242, line 10 – p. 0243, line 10; App. pp. 0435-0436.) 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. (App. p. 0241, 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." (App. pp. 0439-0440.) 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. (App. pp. 0439-0442.) However, 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 Petitioner's legal fees. (App. pp. 0441-0442.)

Despite TBFL's agreement to pay the additional fees, Petitioner responded that it believed the initial refusal to pay its legal fees "opened the deal up for retrade." (App. p. 0246, lines 13-20; App. pp. 0441-0442.) Petitioner, fully aware that TBFL risked forfeiting the $35,000 Refinance fee if the deal failed to close and apparently determined to exploit this vulnerability to its full potential, thereafter refused to return the executed Closing Documents to TBFL unless TBLF agreed to additional terms favorable to Petitioner. In addition to the payment of the attorney's fees,

these last-minute demands included giving Petitioner a larger share of the funds from the Refinance and not requiring Petitioner to share in the payment of certain fees and expenses. (App. p. 0247, line 18 – p. 0248, line 25; App. p. 0441.) After TBFL rejected Petitioner's last-minute changes, Petitioner communicated that it would not participate in the closing, thereby ensuring the collapse of the Refinance and TBFL's loss of the $35,000 application fee. (App. p. 0247, line 18 – p. 0248, line 25; App. p. 0309, lines 21-23; App. p. 0441.)

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), *SCRCP*; *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 COURT OF APPEALS PROPERLY DETERMINED THAT THE SOUTH CAROLINA UNIFORM STATUTORY RULE AGAINST PERPETUITIES PRESERVES THE COMMON LAW AND THEREFORE THE NONDONATIVE PURCHASE OPTION IS VOID AND UNENFORCEABLE.

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 369 (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 Court of Appeals Correctly Held that the SCUSRAP Preserves the Common Law Rule Against Perpetuities.

While it is undisputed that the Purchase Option violates the common law rule against perpetuities, Petitioner argues that the common law is no longer in effect and the Purchase Option is subject only to the South Carolina Uniform Statutory Rule Against Perpetuities ("SCUSRAP").

The SCUSRAP codified the common law rule against perpetuities 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 (2007, as amended). Subsection (2) of 27-6-20 added a 360-year "wait-and-see" period to transactions that would otherwise violate the common law rule against perpetuities.[3] S.C. Code Ann. § 29-6-20(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 three hundred sixty years after its creation." *Id.*

[3] Prior to the May 8, 2025, amendment, the wait-and-see period was 90 years.

In addition to the "wait and see" provision in the SCUSRAP allowing for an interest to actually vest or terminate after 360 years, the statute provides that certain "nondonative" transfers, which generally encompass commercial transactions, are excluded from the operation of the SCUSRAP. *See* S.C. Code Ann. § 27-6-50(1) (2007) (stating 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 Petitioner, are never subject to this statute.

In affirming the trial court's decision, the Court of Appeals agreed that the SCUSRAP "supersedes" the common law rule against perpetuities; however, the court determined that because the SCUSRAP's statutory expression of the rule against perpetuities excludes nondonative transfers from its application, there is nothing to supersede or replace the common law rule. *Spring Valley Ints., LLC v. Best for Last, LLC.,* 444 S.C. 281, 287, 907 S.E.2d 124, 127 (Ct. App. 2024). Therefore, the Court of Appeals determined the Purchase Option void under the common law rule against perpetuities. *Id.*

i. Rules of Statutory Construction and the Plain Language of the SCUSRAP Preserve the Common Law Rule Against Perpetuities.

To comply with rules of statutory interpretation and effectuate the intent of the General Assembly, this Court should affirm the Court of Appeals' holding. "[A]ny 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, if two interpretations exist, the one that preserves common law must prevail. *See id; see also Hoogenboom v. City of Beaufort,* 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992).

Section 27-6-80 of the SCUSRAP states that the statute "supersedes the common law rule against perpetuities." S.C. Code Ann. § 27-6-80 (2007). 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.* If the General Assembly had wanted to abolish the common law rule against perpetuities through the SCUSRAP, it would have done so as it has done in other statutes. *See* S.C. Code Ann. § 39-3-510 (stating that "all asserted common-law rights… by any person are abrogated and expressly repealed."). Rather, by adding this provision to the SCUSRAP, the General Assembly intended for the SCUSRAP to replace or substitute the common law as to everything not expressly excluded. *See New Bar Partnership v. Martin,* 221 N.C. App. 302, 312, 729 S.E.2d 675, 683 (2012). Because the SCUSRAP expressly excludes nondonative transfers, there is nothing with which to "supersede" or replace the common law.

Nonetheless, Petitioner asks this Court to hold that the SCUSRAP does not apply to nondonative transfers and abolishes the common law rule in its entirety. (Petitioner's Br. p. 8.) In doing so, Petitioner disregards the fact the statute states *only* that Section 27-6-20*,* the statutory recitation of the rule against perpetuities*,* does not apply to nondonative transfers. *See* S.C. Code Ann. § 27-6-20 ("Section 27-6-20 does not apply to: (1) a nonvested property interest… arising out of a nondonative transfer"). Despite the Petitioner's insistence on following the clear language of the statute, it asks this Court to read into the statute that *no* rule against perpetuities applies to nondonative transfers, statutory or otherwise. The language of the statute reveals a different reality: that nondonative transfers are exempt solely from the SCUSRAP's rule against perpetuities provision.

While no previous South Carolina case, aside from the Court of Appeals' decision in this case, has squarely decided the issue of whether the adoption of the SCUSRAP means that commercial transactions can never violate the rule against perpetuities, this Court had the opportunity to apply the SCUSRAP to a right of first refusal in a commercial transaction but expressly declined to do so in *Queen's Grant II,.* 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 SCUSRAP is *Webb v. Reames,* in which the Court of Appeals 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 against perpetuities. 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997). The 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 an event certain to occur." *Id.* at 446. The transfer at issue here is no different. The Purchase Option is unquestionably a nonvested contingent interest that Petitioner was free to assign or exercise in perpetuity at its leisure. *Id.* This Court should adopt *Webb's* reasoning and affirm the Court of Appeals' holding.

Courts in other jurisdictions have declined to read the USRAP as excluding all nondonative transfers from the operation of any rule against perpetuities, instead finding that the common law remains in effect for certain nondonative, commercial transfers. In *Malad, Inc. v. Miller,* the Arizona Court of Appeals determined that the common law rule against perpetuities applied to nondonative transfers, recognizing that the common law rule controls where the USRAP does not apply. 219 Ariz. 368, 373, 199 P.3d 623, 628 (Ariz. 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)").

Moreover, in *New Bar Partnership v. Martin,* the North Carolina Court of Appeals determined that the exclusion of commercial transactions from the USRAP meant that there was nothing with which the USRAP could supersede the common law. 221 N.C. App. at 312, 729 S.E.2d at 683. The court in *New Bar* rejected the argument that the "USRAP *replaced* the common law RAP as to donative transfers, but *abolished* the common law RAP as to nondonative transfers." *Id.* at 312, 729 S.E.2d at 683.

The Court of Appeals relied heavily on *New Bar* in concluding that the common law rule against perpetuities applied to the Purchase Option. *See Spring Valley,* 444 S.C. at 287, 907 S.E.2d at 127. Petitioner argues that both the Court of Appeals in this case and the court in *New Bar* suffer from the same flawed reasoning. (Petitioner's Br. p. 13.) Petitioner claims that the *New Bar* court fundamentally misconstrued the statute in determining that nondonative transfers are exempt from the entire statute, rather than just the provision regarding vesting requirements. (Petitioner's Br. p. 13.) Assuming *arguendo* this is true, nothing about this line of reasoning affects the outcome of either case or amounts to a "fundamental error and belief" as Petitioner asserts. Even if nondonative transfers are exempt only from the provision regarding vesting requirements (in this case, Section 27-6-20), that provision is the entire *rule* forming the statutory *rule against perpetuities,* upon which all remaining sections of the chapter are based. *See* S.C. Code Ann. § 27-6-10 (2007) et seq. Therefore, regardless of whether nondonative transfers are

exempt from the entire chapter or just the section regarding vesting requirements, the effect remains the same: nondonative transfers are exempt from the statutory provision codifying the rule against perpetuities, leaving nothing to supersede the common law.

To further its assertion that *New Bar* was decided in a vacuum and public policy supports excluding commercial transfers from any North Carolina rule against perpetuities, Petitioner points to two North Carolina cases. (Petitioner's Br. p. 13-14; Petitioner's Br. p. 14 n.1.) Petitioner first directs this Court to an excerpt from a case decided ten years prior to *New Bar,* stating that commercial-type transfers were intended to be excluded from the statute for policy reasons. (Petitioner's Br. p. 14 (quoting *Rich, Rich & Nance v. Carolina Constr. Corp.*, 558 S.E.2d 77, 79-80 (N.C. 2002)). Despite this opinion, *New Bar* was still decided and has not been overruled. Further, Petitioner cites a 2015 concurring opinion from *Khwaja v. Khan* questioning the holding of *New Bar* as it relates to the North Carolina legislature's intent. 239 N.C. App. 87, 92, 797 S.E.2d 901, 905 (N.C. Ct. App. 2015). However, the legislature's intent is no longer at issue in North Carolina, as the statute was amended to say "abolish" rather than "supersede" in 2022. *Spring Valley,* 444 S.C. at 288, 907 S.E.2d at 127. A case predating *New Bar* and a concurring opinion speculating as to the legislature's since-clarified intent are no longer relevant here, nor do they have any bearing on South Carolina and the intent of our General Assembly. As noted by the Court of Appeals, South Carolina was the first state to adopt the USRAP in 1987. *Id.* Therefore, commentary as to the intent of other state legislatures has no bearing on the South Carolina legislature's intent when it adopted the statute. Despite other states removing nondonative transfers from the application of any rule against perpetuities, it cannot be said that this was the South Carolina legislature's intent in 1987.

Moreover, Petitioner's assertion that the General Assembly would have explicitly preserved the common law rule had it intended to do so falls short when considering that South Carolina was the first state to adopt the USRAP. *Id*. Even if South Carolina's original intent in enacting the SCUSRAP was for the statute to supplement the common law, as the first state to adopt the USRAP, there would be no way for the General Assembly to know that other states would eventually construe the word "supersede" to mean a complete abolition of the common law. Without knowledge of the current landscape, the General Assembly's failure to expressly preserve the common law cannot be construed as a decision to abolish it.

ii. The General Assembly's Choice Not to Amend the Language of the Statute Indicates Its Clear Intent for the Statute to Preserve the Common Law Rule.

In 2022, North Carolina amended its USRAP to state that the statute "abolishes" rather than "supersedes" the common law, indicating its intent for its USRAP to be the state's sole embodiment of the rule against perpetuities. *See id.; see also* N.C. Gen. Stat. Ann. § 41-6.5. Petitioner spends considerable time discussing the importance of effectuating the intent of the South Carolina General Assembly when interpreting the SCUSRAP. (Petitioner's Br. p. 7-10.) According to Petitioner, the intention of the General Assembly in enacting the SCUSRAP was for the statutory scheme to abolish the common law rule against perpetuities. (Petitioner's Br. p. 7.) However, notwithstanding an opportunity to clarify the statute's meaning after the recent Court of Appeals decision in this case, the General Assembly blatantly chose not to. On May 8, 2025, the General Assembly revised the SCUSRAP, changing the "wait-and-see" period from 90 to 360 years. *See* S.C. Code Ann. § 27-6-20 (2007) (amended 2025). Despite revisiting this Chapter and amending the "wait-and-see" provision, the General Assembly left untouched Section 27-6-80: the section outlining the effect on common law. *See* S.C. Code Ann. § 27-6-10 et seq., as amended May 8, 2025. Even in light of the Court of Appeals' interpretation of this

section in July 2024, the General Assembly left the language the same, evidencing its agreement with the court's holding. Unlike after *New Bar,* where the North Carolina legislature amended its statute to clarify its intent after the North Carolina Court of Appeals' decision[4], the South Carolina General Assembly evidently saw no need to amend its statute to clarify or effectuate a contrary intent. If the Court of Appeals truly "misapprehends and misinterprets the plain, unambiguous language of the SCUSRAP and defeats the clear intent expressed by the General Assembly" as Petitioner asserts, the General Assembly surely would have amended the language when it revisited the statute. (Petitioner's Br. p. 7.) Rather, the General Assembly has impliedly expressed its intent to let the interpretation of the Court of Appeals govern the SCUSRAP's effect on the common law.

c. The Application of the Rule Against Perpetuities is Consistent With Public Policy.

Petitioner argues the exclusion of nondonative transfers from any vesting time constraints under any rule against perpetuities is consistent with the rationale of the rule. (Petitioner's Br. p. 7.) TBFL disagrees.

Excluding nondonative transfers from the purview of any rule against perpetuities, statutory or otherwise, is contrary to the purpose and rationale of the rule. The application of the common law rule against perpetuities is entirely consistent with South Carolina's and other states' longstanding policy regarding the alienation of property: "[n]onvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Queen's Grant II,* 368 S.C. at 369, 628 S.E.2d at 917 (citing Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 6 (2005)).

[4] "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." N.C. Gen. Stat. Ann. § 41-6.5.

Notwithstanding the fact that *any* restraint on the alienability of land is generally viewed disfavorably regardless of its purpose, Petitioner argues that nondonative transfers should be entirely exempt from any vesting requirements because the Rule Against Perpetuities is "a wholly inappropriate instrument of social policy to use as a control over such arrangements." (Petitioner's Br. p. 11.) Contrary to Petitioner'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 to avoid violating the rule in the first place. Here, it is noteworthy that the 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 Petitioner in exchange for the loan was the interest payments Petitioner received. However, unlike a mortgage which can be satisfied upon a payoff, the Purchase Option could have remained effective in perpetuity.

As stated in the comments to Section 1 of the Uniform Statutory Rule, the "Statutory Rule preserves the Common-law Rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or *other property arrangements…*" Statutory Rule Against Perpetuities, Unif. Statutory Rule Against Perpetuities § 1 (emphasis added). Applying the rule against perpetuities to commercial transactions is consistent with the goal of preventing property from being tied up in potentially perpetual arrangements. For instance, it aids in preserving the alienation of property and its circulation within the market. *Barry v. Newton*, 131 Colo. 106, 115 (1954) ("The rule is founded on the public policy of preventing the marketability of property over long periods of time by indirect restraints upon its alienation"); *see also Rucker v. DeLay,* 295 Kan. 826, 830, 289 P.3d 1166, 1169-70 (2012) ("The

rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarding at common law as a public evil.")

Moreover, abolishing the common law and wholly exempting nondonative transfers from the SCUSRAP would create a "RAP vacuum," as described by the Court of Appeals. *See Spring Valley,* 444 S.C. at 288, 907 S.E. 2d at 127. Petitioner asserts that the SCUSRAP was created to "embody the entire law on the rule against perpetuities," so exceptions to the statute are exempt from any and all vesting requirements. (Petitioner's Br. p. 7.) If this were the case, South Carolina would have no way to prevent unreasonable restraints on commercial properties. As noted by the Court of Appeals, unlike North Carolina, South Carolina has not passed any companion statutes that would mitigate the effects of creating a "RAP vacuum."[5] *Spring Valley,* 444 S.C. at 288, 907 S.E. 2d at 127. Without a provision limiting restraints on nondonative transfers, parties in South Carolina could restrain commercial properties in perpetuity with no consequence.

Therefore, the application of the common law to nondonative transfers is consistent with the rationale underlying the rule against perpetuities and would prevent the undesirable result of

[5] "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 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 nonoccurence 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." *Spring Valley,* 444 S.C. at 288, 907 S.E. 2d at 127.

a "RAP vacuum." 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 a 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).

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

Petitioner 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. (Petitioner's Br. p. 15-18.) This argument has not been adequately preserved for appellate review.

Petitioner asserts that because it raised the issue in its Memorandum in Support of its Motion for Summary Judgment and in a hearing before the circuit court, the issue is preserved for appellate review. (Petitioner's Br. p. 15.) "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 479 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,* 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 372-73, 628 S.E.2d at 919. "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, 328 S.E.2d at 919.

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 Petitioner's motion, its argument on appeal fails both prongs (1) and (4). Namely, assuming that the issue was adequately raised by the Petitioner, the trial court never ruled on the issue, and Petitioner failed to file a motion under Rule 59(e), SCRCP 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."). As noted by the Court of Appeals, the issue never appeared in the circuit court's order, nor did Spring Valley expressly seek a ruling on the issue. *Spring Valley,* 444 S.C. at 289, 907 S.E. 2d at 128.

Because Petitioner's second issue on appeal was not adequately raised to or ruled upon by the trial court, argued with sufficient specificity to allow the trial court the opportunity to rule on the issue, and Petitioner never sought a ruling on the issue, this argument is not preserved for appellate review and the Court of Appeals' opinion should be affirmed.

Even in the case that Petitioner's argument for an implied reasonable time was preserved, the argument still falls short. Petitioner argues that the Court of Appeals' reliance on *Clarke v.*

Fine Housing, Inc. was misplaced because there are sufficient differences between the right of first refusal in that case and the Purchase Option at issue here. 438 S.C. 174, 882 S.E.2d 763 (2023).

In *Clarke v. Fine Housing, Inc.,* this Court held that a right of first refusal was an unreasonable restraint on alienation and a reasonable time could not be implied to save it. *Id.* at 187, 882 S.E.2d at 770. Specifically, a lease agreement between the petitioner and the appellant included a right of first refusal provision; however, the right provided no procedures governing its exercise or the time limits in which it could be exercised. *Id.* at 179, 882 S.E.2d at 766. Despite the lack of time limits, the petitioner argued the right had sufficient procedures and was not an unreasonable restraint on alienation because "the law implies that it is to be done within a reasonable time." *Id.* at 186, 882 S.E.2d at 769. This Court reasoned that implying a reasonable time requirement would undermine the purpose of the Restatement to "predetermine a limited time within which a right of first refusal must be exercised to protect the owner's power of alienation" and "would do little to protect the owner's power of alienation." *Id.* at 187, 882 S.E.2d at 770. Accordingly, this Court refused to imply a reasonable time and held the right to be an unreasonable restraint on alienation. *Id.*

In this case, Petitioner asserts that although the *Clarke* decision determined that an implied reasonable time could not be read into the right of first refusal, this Court should read an implied reasonable time into the Purchase Option. Petitioner claims that "[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 specific time for its termination."

However, for the same reasons a reasonable time could not be implied in *Clarke*, it cannot be implied here. Whether the interest is a right of first refusal without a time limit or an option lacking a specific time for its termination, the underlying issue is still the restraint on alienation. The policy reasons underscoring both the common law rule against unreasonable restraint on alienability and the rule against perpetuities are the same: protecting the alienability of property. *Iglehart v. Phillips,* 383 So.2d 610, 613 (1980) ("[Both rules] came into existence to facilitate the marketability and continued utilization of property. In simple terms, their purpose is to ensure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time.").

Just as "[l]engthy periods of exercise of rights of first refusal… substantially affect alienability of the property," permitting a perpetual option substantially restrains the owner's power on alienation. *Clarke,* 438 S.C. at 185, 882 S.E.2d at 769. In this case, for instance, Respondent's power of alienation is hindered because the Petitioner could lie in wait for years until after the property had been sold to a bona fide purchaser, only to arise out of the blue and exercise the option. Moreover, implying a reasonable time requirement to the Purchase Option could lead to "lengthy litigation over what is or is not a reasonable time," further restraining alienation. *Id.* Ultimately, as noted by the Court of Appeals, "implying a reasonable time in a purchase option subject to the CLRAP undercuts the point of preserving an owner's power of alienation." *Spring Valley,* 444 S.C. at 290, 907 S.E.2d at 129.

III. AS AN ADDITIONAL SUSTAINING GROUND, PETITIONER 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.

Petitioner'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 Petitioner's right to enforce the option.

Upon learning TBFL paid a $35,000 nonrefundable application fee for the Refinance, Petitioner immediately exercised the Purchase Option. (App. p. 0168, lines 7-11.) While Petitioner previously asserted that the "exercise of the option should have been fairly simple," the reality of the transaction was nowhere near as simplistic as Petitioner would have this Court believe. (App. p. 0480.)

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 Petitioner to take a co-tenancy interest in the Property, there needed to be a "mutually acceptable co-tenancy agreement." 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 claimed to be, Petitioner 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 Petitioner 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 Petitioner and TBFL had *signed* their respective counterparts of the Closing Documents. (App. p. 0242, line 17 – p. 0243, line 12.) TBFL acceded to Petitioner's final demand for $6,500 in attorney's fees 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 Petitioner 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. (App. p. 0241, lines 22-25.) Petitioner 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.

Petitioner'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, Petitioner 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."); *see also Faulkner v. Millar,* 319 S.C. 216, 221, 460 S.E.2d 378, 381 (1995). Accordingly, Petitioner's forfeiture of his rights under the Purchase Option forecloses its claim for specific performance. *Norton v. Matthews,* 249 S.C. 71, 152 S.E.2d 680 (1967) ("He who seeks equity must do equity."). Petitioner is not entitled to a second bite of the apple.

Furthermore, after Petitioner exercised the Purchase Option, it ceased to exist. "The acceptance of the option creates a bilateral contract between the giver and the holder of the

option, binding both parties thereto." *Lindler v. Adcock,* 250 S.C. 383, 387, 158 S.E.2d 192, 194 (1967). "[O]nce an option is exercised, the *option itself ceases to exist* and an enforceable bilateral contract is formed." *Jarecki v. Shung Moo Louie,* 95 N.Y.2d 665, 668, 745 N.E.2d 1006, 1008 (2001) (emphasis added). In this case, when Petitioner exercised the Purchase Option, a fully formed bilateral contract was formed. At that point, the option ceased to exist. Therefore, because the option no longer exists, Petitioner's right to re-exercise the option is extinguished.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be affirmed. In finding that the Purchase Option violated the common law rule against perpetuities, the Court of Appeals did not misapprehend any issues of fact or law and did not err in affirming the trial court's order granting summary judgment pursuant to Rule 56(c), SCRCP.

TBFL respectfully requests that this Court affirm the Court of Appeals' decision.

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