FILE

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)

Three Runs Plantation Homeowners Association, Inc.
Plaintiff,
Vs.

Jay J. Jacobs and Judith B. Jacobs
Defendants and Third- Party Plaintiffs,
Vs.
T. R. Sales Plantation, LLC and J. Wayne Raiford
Third-Party Defendant.

CASE NO.: 11-CP-02-00548

ORDER

FILED 7/1 2013
Liz Godard
C.C.C.P.&G.S.
4:50 Kelly Hyle
DEPUTY CLERK

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 2 day of July 2013
Liz Godard
C.C.C.P. & G.S., Aiken County, S.C.
Kelly Hyle
Deputy Clerk

Hearing Dates:	August 20, 2012, October 30, 2012, October 31, 2012 and December 11, 2012
Judge:	M. Anderson Griffith
Attorneys for Plaintiff:	William Byrd Warlick and James S. Murray
Attorney for Defendants:	Clarke McCants, III

PROCEDURE

1. The Summons and Compliant were filed on March 11, 2011.
2. The defendants filed their Answer, Counterclaims and Third Party Summons and Complaint on April 29, 2011.
3. The Third Party defendants filed an Answer on May 12, 2011.
4. The Reply was filed on May 12, 2011.
5. The hearings were held on August 20, 2012, October 30, 2012, October 31, 2012 and December 11, 2012.

STATEMENT OF FACTS

Three Runs Plantation Homeowners Association, Inc. is a corporation organized and existing under the laws of South Carolina. The subdivision is located in Aiken County, South Carolina. Three Runs Plantation Homeowners Association, Inc. consists of homeowners who own property in the subdivision or use the facilities by some form of agreement.

The defendants, Jay J. Jacobs and Judith B. Jacobs, purchased lots 10 and 11 in Phase 2 of Three Runs Plantation on December 14 2007. The defendants' deed was recorded on December 17, 2007. The original Protective Covenants for Three Runs was originally recorded on November 30, 2005. The defendants were presented with a brochure for Three Runs Plantation that stated future amenities included tennis courts and a fitness center. Those amenities had not been built when the defendants purchased their lots. Although the plaintiff stated that the brochure had a disclaimer, the brochure presented to the defendants did not have the disclaimer language. The defendants and the plaintiff used the same real estate broker/agency and it appears a dual agent agreement was signed by the parties. The Contract for Purchase and Sale allowed the defendants five days to review the protective covenants of the subdivision prior to being bound by the terms of the agreement. The original language in the protective covenants refers to the original subdivision plat recorded on November 23, 2005. Numerous amendments were filed including the Fifth Amendment to the protective covenants on May 30, 2007 adding Phase 2 lots (1-60) to the Protective Covenants. This is prior to the defendants obtaining their property.

The plaintiff claims that the defendants are in violation of the protective covenants by failing to maintain their property in "clean and first class condition" which is the language used in Article III, Paragraph 12, Maintenance of Lots which states:

> All lots, including vacant lots, must be maintained in a clean and first class condition, including mowing all grass, controlling the weeds and keeping the same free from trash, debris or accumulation of other items on said lot. In the event that an owner does not maintain said owner's lot(s) in such first class condition, the Association shall be entitled to perform the necessary work to said lot to bring it up to an acceptable condition in the Association's sole discretion and any costs so incurred by the Association shall be treated as assessments in accordance with Article VI.

Pursuant to Article V, Paragraph 1 (B), until 95% of the residential lots shown on the referenced plat are sold, the Association is controlled by the developer. The protective covenants identify J. Wayne Raiford as the Developer.

The defendants filed a third party action against T. R. Sales Plantation, LLC and J. Wayne Raiford. The defendants deny the plaintiff is entitled to any requested relief and assert

mAG#2

the affirmative defenses of failure to state a cause of action, release/accord and satisfaction, waiver, estoppel and unclean hands. The defendant also requested relief pursuant to counterclaims that the plaintiff failed to comply with terms of the protective covenants and by-laws. The defendants also claimed they sustained actual damages and attorney fees as a result of the plaintiff's failure to comply with the by-laws and covenants.

The defendant's third party complaint alleges a breach of the agreement with the third party for failure to provide certain amenities that were represented when the defendants purchased their property.

The third party defendants and the plaintiff denied the allegations of the defendant third party plaintiff.

Jay J. Jacobs was the first witness called by the plaintiff. He testified that the lots were purchased in 2007 and the home was built in 2009. The defendant did not remember reviewing the protective covenants prior to purchasing the property but did not deny the language in the contract of sale signed by the defendants. The defendant agreed that he had received a letter from Mr. Raiford that their lot was not in compliance with the protective covenants on October 21, 2010. The defendant did not agree that they were in violation of the covenants. The defendant stated he believed that he can maintain the lots as long as he stays within the guidelines of the protective covenants. The defendant then received a letter from the attorney for the plaintiff dated January 26, 2011 stating that, pursuant to the language of the covenants, the Association had the sole discretion to determine what was acceptable under the protective covenants guidelines.

Daniel Willis, an appraiser testified that Three Runs Plantation's sales numbers and prices per acre (for vacant lots) were higher than those of other comparable subdivisions in Aiken County. He agreed that if the amenities that were promised were not built, owners could feel their property was worth less due the absence of those amenities.

John Garner is a marketing consultant employed by the developer. He has been marketing real estate for 44 years and began working with the developer in 2005. He worked on the brochure presented to the defendants. He believed Three Runs Plantation was to be an equestrian development but admitted that the publication, The Aiken Horse, did represent the development as equestrian and non-equestrian. By 2011, the tennis courts and fitness center were removed from the brochure. He described the existing amenities of the riding easements,

the various riding arenas, swimming pool, picnic areas and clubhouse. He testified that the fitness center was still in the plans but little interest had been shown by residents for the tennis courts.

Mr. Garner testified that the defendant's lots were not cut in the same pattern as other lots in the subdivision. Normally, the lots/pasture areas are cut twice a year. Mr. Garner admitted that the protective covenants reference 95% of the lots being sold refer to a specific plat that is described in the original covenants. The witness also testified that Article IX provides for additional property to be added to the scheme of the development.

Laurie Garner is also involved with the marketing of the subdivision. She testified that she has received complaints about the defendants' lot. She further testified that the amenities in a subdivision can change as the subdivision develops. There were amenities such as the cabana, cross country school and a second arena that were built and never advertised in any publication. The protective covenants allow the developer to change, add or delete amenities.

The plaintiff presented numerous homeowners in the subdivision to testify about the defendant's property and the protective covenants. Laurie Ann King testified that she wanted the protective covenants enforced and that the defendant's property is not maintained in the same manner as other owners. She was not concerned with the amenities schedule or voting rights for the owners, even though she would like a fitness center. She had no interest in tennis courts.

Kari D. Schneider did not know the standards outlined in the covenants. She believed the standard should be a comparison to other owner's yards. She was not interested in any voting rights for the owners at this time, but would like the added amenities whenever the developer believes it appropriate to add those specific amenities.

Katherine Viele testified the defendants' lot was different from other lots in the subdivision. She was not familiar with the "first class condition" language in the protective covenants. She thought the protective covenants set a specific height limit for the grass. She also testified that there were other lots that she did not believe were in compliance with the grass requirements under the protective covenants. She had no complaints about the amenities and understood that those may expand depending on future sales. She was not interested in any owners having voting rights at this time.

George King believed that the defendant's property had more trees than other lots. He would like all lots to be maintained in the same manner as his lot or in a neat and attractive fashion. The witness keeps horses on his lot. The defendants do not keep horses on their lots. Mr. King believes the term "lot" is the same as "pasture". He felt the condition of the lots shown in Defendant Exhibits 6 and 7 were not acceptable or in compliance with the protective covenants.

Arthur L. Streami lives on the same street as the defendants. He reviewed the protective covenants before he purchased property in the subdivision. He felt the defendants lot had "scrap trees" growing on their lots. He believes that owners should observe the way their neighbors keep their lots in the subdivision and maintain their lot in the same fashion. He did agree that this was not the standard under the protective covenants. He believes more amenities will be added as more lots are sold.

Carl Juvrud lives on the same street as the defendants. He reviewed the protective covenants before he purchased property in the subdivision. He described the defendant's lot as a jungle. He agreed that the term "first class condition" could be interpreted differently by different individuals. He received approval from the developer to install a radio tower in his yard. An email from this witness to the developer was introduced discussing the developer cutting the defendants grass when the defendants were going out of town. The developer did not attempt to cut the defendants grass.

Rhonda LaVerghetta has lived in the subdivision since 2010. She reviewed the protective covenants prior to purchasing her lot. Her belief was that the owners were supposed to keep the lots in the same condition as it was when it was purchased. She felt the defendants maintained their lot in a different manner than allowed in the covenants. She did not use the language in the protective covenants when she testified about the defendant's lot. She testified that the defendants had small "bushy things" on the lot, had some trees growing in the riding easement area and that the owners were provided with guidelines for mowing.

Mary Guynn is an attorney with fifteen years experience. Her practice includes transactional real estate law. She drafted the protective covenants for Three Runs Plantation. She discussed the covenants being a contract between the parties. Homeowners, owners, the homeowners association or the developer may enforce the covenants. She testified that the Three Runs Plantation Subdivision covenants provide that the developer controls the

development until ninety five percent of the lots are sold. She testified that the percentage applies to all phases in the subdivision. She prepared and recorded nine amendments to the protective covenants. She testified that an examination of the title would disclose the protective covenants and the amendments. She further testified that Article II allows the developer to add land to be covered by the covenants. Article V discusses the duties of the homeowners association and states that the developer may add or delete amenities and controls the schedule for the amenities being completed.

On cross examination, she testified that she was aware that there had been attempts to settle this matter. She identified the property maintenance guidelines and testified that she felt the guidelines were enforceable against the owners. She referenced Article XI as the section that allowed the developer to change the restrictions. She testified that she did not believe the guidelines were more restrictive than the covenants.

The Guidelines are dated August 30, 2010. The cover letter states, in part, "The HOA... has decided that further explanation is needed to clearly state the required level of maintenance for all property owners..." The guidelines were to go into effect on October 1, 2010. The document states that the purpose is to clarify the, "clean and first class condition" phrase in the protective covenants. The guidelines require regular mowing and weed control. Grass and undergrowth was to be no higher than 18 inches in the pasture, paddock and wooded areas. The guidelines also discuss the intention of the HOA to enforce the guidelines. Owners were advised that the HOA would perform inspections to assure compliance with "the lot maintenance guidelines". The sample email notification letter uses the phrase "your lot(s) were found to be in violation of the lot maintenance guidelines...."

Article X of the protective covenants provides the duties of the association to add or delete amenities and schedule the amenities. Article XI provides the effective period of the covenants and when changes may be made by the developer or the owners. Article XI also provides the terms under which the developer may waive, repeal or vary the declarations if the decision does not result in the restriction being more restrictive without the prior consent of the affected owner or fifty percent of the lot owners within the subdivision.

Ms. Guynn also testified that the original protective covenants and five amendments had been recorded prior to the defendants purchasing the property. The first amendment dealt with setbacks and the second through the fifth amendments added additional phases to the

subdivision. Although the brochure provided to the defendants did not contain a disclaimer, the protective covenants were recorded and were included in the marketing material.

Freeman Belser is an attorney retained by the defendants to respond to the letters they received from the attorney for the developer. After reviewing the protective covenants and the guidelines, he felt the guidelines, in adding specific height requirements for the grass were more restrictive that the recorded covenants. By the language in Article XI, the guidelines would have no effect on the defendants since the guidelines were more restrictive. After some additional communication with the attorney for the developer, the defendants agreed to mow and weed their property to comply with the original covenants. The developer's attorney then advised Mr. Belser that the developer would seek to recover approximately $4,000.00 in attorney fees. Mr. Belser responded that the developer was not a prevailing party in the agreement and that his fees were only $1,000.00 for his representation. On cross examination, Mr. Belser admitted that the defendants had apparently not cut the grass within five weeks of the agreement.

Wayne Raiford is the developer of Three Runs Plantation. He has developed six other developments. He has incorporated protective covenants in all of those developments. The marketing material was prepared by the Garner Group. The Three Run Plantation contract provides five days to review the protective covenants. Mr. Raiford signed the defendant's contract of purchase and sale and the deed into the defendants. The Carolina First material was prepared by Courtney Conger and Mr. Raiford did not participate in the preparation of the material. She was an agent for the development.

He testified that decisions about the amenities are based on comments from existing owners and potential buyers. Currently the existing amenities include horse arenas, equestrian trails, cross country arena being built, a clubhouse, picnic shelter and swimming pool. Mr. Raiford testified there has not been a big demand for tennis courts. He testified that a well has been installed that is of sufficient size for the fitness center. The amenities that have been built are paid for as the facility is built. The clubhouse, arenas, pool have been deeded to the homeowners association.

Mr. Raiford testified about his attempts to have the defendants cut their grass. After a discussion in 2010, he received an email from the defendants about portions of the defendant's property being allowed to grow naturally including trees being allowed to grow. He met with

Mr. Jacobs and was not able to resolve the issue. He testified that the "scrub oaks" were not in compliance with the covenants. He did testify that if the property looked like it did prior to the time his deposition was taken, he would not have filed the action. He still did not believe it was in compliance at that time though. He believes the defendants began cutting their grass in January 2011. At some point, the defendants cut the grass between the trees that were growing, but did not cut or trim the grass around the trees. Numerous pictures were introduced as examples of the defendant's failure to comply with the covenant concerning the maintenance of the lot. These photographs were compared to other photographs to show what he believed was acceptable. Mr. Raiford believes he is the party with authority to determine what is in compliance with the covenants. He also testified about the Architectural Committee responsibility to approve plans. No plans or letter from the Architectural Committee were introduced.

On cross examination, Mr. Raiford admitted that Ms. Conger, who provided the brochure, was his agent. In fact, she was a dual agent in this case and a disclosure form appears to have been signed by the defendants about this relationship. He admitted that 95% of lots have been sold based on the original plat referenced in the covenants, but not on the additional areas added to the subdivision. His position is that until 95% of all the lots are sold, he has control of meetings being scheduled, setting agendas, the financial records, dues and the use of dues and other duties and powers outlined for the developer in the covenants and by-laws .

He admitted that the 2009 Aiken Horse publication mentioned the tennis courts and the fitness center. The information does not state that those amenities were just being considered or subject to change. There were also some signs in the subdivision that had information about tennis courts and the fitness center. At some point after the defendants purchased their property, those signs were removed or changed to delete the reference to those two amenities. He believes the restrictions give the developer that authority. The protective covenants were part of the brochure that the defendants relied on when reviewing information about the subdivision. He also emphasized that potential buyers have five days to review the covenants before they are bound by the terms of the Contract of Sale.

Mr. Raiford agreed that the money was available to build the tennis courts and fitness center when he was deposed. Further, that the marketing material can be relied on by potential

buyers and may be inconsistent with Article V of the covenants concerning the developer's authority to control what amenities will be built. He disagreed that the defendants had been damaged without those amenities. The fitness center is still expected to be built and he does not believe the value of the real estate was affected by those amenities not being built. On May 16, 2011, the developer sent a letter to property owners that discussed the amenities. The proposed amenities discussed included the tennis courts and the fitness center. Another portion of the letter discusses landscaping but does name the defendants. Mr. Raiford admitted Defendants' Exhibit 16 and 17 are brochures that describe a recreational facility with swimming pool, tennis and fitness center. Defendants' Exhibit 19 contains an advertisement for the subdivision that does not mention the fitness center or tennis courts. It also does not mention other amenities that have built in subdivision.

The plaintiff and the defendant exchanged several emails in 2010 discussing the landscaping. The developer stated that the defendants had mowed some of their lot but other areas had not been cut. The defendant's position was that they would continue to mow the front of their property, right of ways and open areas but wanted to maintain a more natural woods area on other portions of their property. Mr. Raiford felt this was just an excuse not to cut and maintain the lots. The defendants responded that they mowed 50-100 feet from the road and that they had received no complaints from neighbors.

Mr. Raiford testified there was no distinction between mowing all grass and mowing the lot. He relied on the "clean and first class condition" language in the covenants. He agreed that the covenants contain no requirements on how often to mow the grass, the types of trees that can be grown and what is the maximum height for vegetation. He testified that the Architectural Committee (ACC) does control what is approved for the lots for landscaping. There was no testimony about any particular action by the ACC in reference to the defendant's lots.

In August 2010, the owners received a set of guidelines from the developer. According to the developer, the guideline of 18 inches for a height requirement is not more restrictive than "clean and first class condition". He does not believe the guidelines amended the covenants.

Mr. Raiford felt there was an agreement that the defendants would cut their grass. This was not done by the defendants, Mr. Raiford did not feel the agreement meant that he had prevailed in the matter. The developer reviewed numerous photographs testifying that some

met the standard of clean and first class condition while others did not. He testified that the horse manure spread on the riding trail was not a violation based on his review of the photograph. The covenants do address this condition and it was not clear why this is not a violation. He felt the radio tower was not a violation since the developer approved the installation through the covenant procedure. Horse trailers parked in view of the road were felt to be in compliance by the witness. Article III, Paragraph 5 allows trailers to be kept on a lot if they are not unsightly and parked in the rear yard not visible from the street. Mr. Raiford felt the covenant language only addresses those vehicles parked in an "unsightly manner". However, the covenants clearly state that trailers will be parked in the rear yard and not visible from the street. The spreading of the manure appeared to only occur once and the extent of the parking trailers in other areas was difficult to determine.

Following the completion of the plaintiff's case in chief, the defendant's motions for a directed verdict on the attorney fee, cost and other matters were denied.

The defense called Mr. and Mrs. Branchato who reside in Three Runs Plantation subdivision. They have lived in the subdivision for approximately six years. Both testified that the amenities advertised include the tennis court and the fitness center. Mr. Branchato felt those amenities would add value to his property. Both discussed $1,500.00 per year in homeowner's dues and would like to have some voting rights. Both felt that the defendants kept their property clean and that it was in clean and first class condition.

Mr. Jacobs testified that the defendants used Courtney Conger as their realtor. She provided the brochure to the defendants that did not have all of the disclaimer information. The Jacobs purchased two lots in 2007 for $280,000.00. The home was completed in 2009 for $800,000.00 to $850,000.00. They moved to Aiken in 2009. The agent assured them that the tennis courts and fitness center would be built. Those amenities were selling points to the defendants. Mr. Jacobs believes those amenities would increase the value of his property and increase his enjoyment of living in the subdivision.

Mr. Jacobs does not believe there has been uniform enforcement of the protective covenants. In his opinion, they are the only owners being sued by the developer for alleged violations even though other violations have occurred. He believed there have been violations in the signage requirements, failure to complete construction of a home within one year, owners living in a trailer, unpainted fences (eventually painted on outside but not on the inside

of the fence), parking trailers in areas not allowed under the restrictions, allowing a fence to built in an easement, allowing a radio tower to be installed, use of amenities by nonresidents including one party who has a horse training school adjacent to Three Runs subdivision and manure on the riding trails. Article V, Paragraph 3 allows the developer, as long as he owns common areas and land on which amenities are situated, to allow non-lot owners to become members of the Association. Mr. Jacobs believes his past experience as an officer/treasurer of a homeowners association and his business experience would be an asset if the owners were allowed to participate in the decisions for the subdivision. On cross examination, Mr. Jacobs agreed that the real estate has lost value due to the economy. He reviewed photographs and testified about the discussions he had with Mr. Raiford. Mr. Jacobs testified that he never intended to have pasture land since his lots are non-equestrian and owners have different opinions as to what first class and clean condition means in the protective covenants.

Judy Jacobs testified that she would use both the tennis courts and the fitness center and the amenities would increase the value of their property. She testified that they were told those amenities would be completed soon when they purchased the real estate. She further testified that they cut their grass three to four times per year. There was one period of time when the grass was not cut for six months. She also feels that Mr. Raiford does not enforce the same grass cutting requirements on other owners. She testified that the Jacobs did not change the property after the two lots were purchased.

She provided details through photographs identifying various oak trees on the property and that she would hand weed those areas and wished to have those natural trees grow on the property. She admitted that there were one or two small trees in the riding easement on their property. She agreed that the developer had built other amenities that were not advertised, that the brochure did contain a copy of the protective covenants and that the covenants allowed the developer to change the amenities. She also felt that owners should have voting rights.

The defendants presented Edward Girardeau as an expert real estate appraiser. He was admitted as an expert without objection. He testified that the current real estate market was responsible for ninety percent of the loss of real estate value for the defendants. The remaining ten percent was caused by the failure of the developer to complete the fitness center and tennis courts. He believed to ten percent loss would equal a loss in value of $27,900.00. This was based on comparisons with other subdivisions non-equestrian amenities. On cross examination,

he admitted that there was no information in the professional guidelines he was asked about that discussed making deductions based on amenities. Also, his appraisal did not specifically mention the amenities that had been built.

The plaintiff called Mr. Willis and Mr. Garner as rebuttal witnesses. Mr. Willis testified about Three Runs Plantation maintaining its value and the number of lots sold as opposed to other subdivisions. He believed any reduction in market value was related to the economic conditions. He did admit that he had not performed an appraisal and had no opinion of the defendant's property.

John Garner testified that he did not, from a marketing standpoint, recommend building the tennis courts or the fitness center at this time. He did admit that the subdivision had been advertised as an equestrian and non-equestrian subdivision.

CONCLUSIONS OF LAW

The defendants signed the contract to purchase the real estate on October 25, 2007. The Carolina Company was identified in the agreement as a duel agent and referenced the South Carolina Disclosure Form. The contract also provides five days for the defendants to review and approve the Three Runs Plantation Subdivision Covenants. Unless the seller was notified within the five day period, the covenants were considered acceptable to the defendants.

The original protective covenants for Three Runs Plantation were recorded in the Aiken County RMC Office on November 30, 2005. Prior to the defendants purchasing their lots on December 14, 2007, five amendments to the protective covenants had been recorded. These included the developer adding additional property to be subject to the protective covenants. The Fifth Amendment to the Protective Covenants of Three Runs Plantation added lots 1-60, Phase 2 to the subdivision. The defendants purchased lots 10 and 11 in Phase 2.

"Protective covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985); Seabrook Island Property Owner's Ass'n v. Berger, 365 S.C. 234, 616 S.E. 431 (Ct. App. 2005). Historically, courts do not favor protective covenants based on the belief that society's best interest encourage unrestricted use of land. Edwards v. Surratt, 228 S.C. 894, 90 S.E.2d 906 (1956), Sea Pines Plantation Company v. Wells, 294 S.C. 266, 363 S.E.2d 891 (S.C. 1987). Although protective covenants are strictly interpreted and any doubts or ambiguities are resolved in favor of free use of the land, the covenant will be enforced if it expresses the party's

intent or purpose. The party seeking to enforce the protective covenant must show the restriction applies by the express language of the covenant or by plain and unmistakable implication. Id.

The plaintiff believes that the defendants have failed to maintain their property pursuant to the covenants. Article II, Paragraph 1 is entitled Architectural Control Committee and provides that, "Plans and specifications for all proposed improvements and landscaping upon lots must be submitted in writing to the ACC, which is hereby vested with full power and authority to approve or disapprove the same in whole or part, or require the modification of the same as it may, in its discretion deem proper. No construction, landscaping or erection of any improvements of any kind may be undertaken without its prior written approval." It also provides that plans may be refused for any reason, including aesthetic reasons. Landscape is defined as "to modify or ornament by altering the plant cover" www.merriam-webster.com.

Article II, Paragraph 2 is entitled Preservation of Trees and Vegetation. The language discusses the procedure for removing or trimming existing vegetation and trees. This particular section does not discuss the procedure for an owner to choose which trees will be allowed to grow and mature. One of the alleged violations complained of by the plaintiff was that the defendants allowed "scrub oaks" to grow on their lots. Scrub oak is defined as "any of the various chiefly American oaks of small size and usually shrubby habit." www.merriam-webster.com.

As previously discussed, Article III, Paragraph 12 requires all lots, including vacant lots, must be maintained in a clean and first class condition, including mowing all grass, controlling the weeds...

The issue of voting rights is provided for in Article V of the protective covenants. Class A members are entitled to have voting rights. This group is limited to the Developer. This section also references the developers right to add additional real estate through Article IX of the covenants. The remaining owners are Class B members who own residential lots in Three Runs until the developer has conveyed 95 percent of the residential lots. There is language in Article V that refers to a particular plat that contains lots 1-22 of phase one. There are areas marked for future development on the plat. The developer exercised those rights and added other real estate, including the defendants lots through amendments recorded in Aiken County. The defendants argue that the owners should have voting rights after 95 percent of the 22 lots have sold. It does not appear to be disputed that 95 percent of those lots have been sold. However, 95 percent of the

additional real estate added through the recorded amendments has not been sold. The plaintiff's position is that Article IX allows the addition of the real estate and the developer took the appropriate steps to add those phases and lots to the development.

Article V, Paragraph 5 reserves to the developer the right to make changes to the amenities, add or delete amenities as the developer believes is appropriate and at his sole discretion. Also, the developer specifically states that he makes no representations as to the type of amenities to be constructed or any completion date. There was testimony that the developer still has plans to build the fitness center but has no current plans for the tennis courts.

Article VII of the covenants provides for the remedies for violations of the covenants. In particular, Article VII states, "In the event of a violation or breach of any of the declarations and restrictions contained herein by any owner, or agent of such owner, the owners of the lot in Three Runs or the Association or the ACC or any of them jointly or severally shall have the right to proceed at law or in equity to compel the compliance with the terms hereof or to prevent the violation." The same provision allows the prevailing party shall to recover attorney fees and cost in an amount to be determined by the court hearing any such action.

PLAINTIFFS CLAIM

Maintenance of Defendant's Lots

The complaint in this action alleged that the defendants were in violation of Article III, Paragraph 12 of the protective covenants.

The defendants had notice of the existence of the protective covenants. The court must determine if the defendants use of their property violates the protective covenants and if the balance of equities favors enforcement of the covenant.

The plaintiff believes that the defendants have failed to keep the grass cut, control weeds and allowed certain trees to grow on the lots. The language in the protective covenants specifically includes the phrase, "mowing all grass, controlling weeds..." The issue with the grass appears to be the grass in the pasture area. The photographs of the area around the defendant's home shows landscaped property and a nice lawn. The issue concerns the areas that would normally be the pasture area of the defendant's lots. The developer, other witnesses and some of the exhibits established that those areas on other lots are cut at least two times per year. The photographs of the defendant's lot do show the grass growing that was higher than grass in photographs of other lots in the subdivision. The defendants do not maintain an equestrian lot.

The photographs introduced by the defendants appear to show lots with grass of a similar height to the defendants. At some point, the defendants cut the grass between the trees that were growing but did not cut or trim the grass around the trees. Numerous pictures were introduced by the plaintiff as examples of the defendants failure to comply with the covenant concerning the maintenance of the lot. These photographs were compared to other photographs to show what he believed was acceptable. Mr. Raiford believes he is the party with authority to determine what is in compliance with the covenants. He also testified about the Architectural Committee responsibility to approve plans.

The complaint did not contain any allegation that the Architectural Control Committee refused any plan submitted or alleged that the owners failed to submit any plan. There were no objections to the testimony about the ACC. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings," Rule 15, SCRCP.

Due to the nature of this claim, it is difficult to determine when there is noncompliance with the protective covenant since the photographs show the grass at different stages of growth and height. Also, the developer did testify that he would not have filed a lawsuit if the defendant's property like it did prior to his deposition being taken. The same issues apply to the trees or "scrub oaks" (depending on who is viewing the photographs and testifying) in regards to comparing the defendant's lots with other lots shown in various photographs. The courts in South Carolina have addressed the issue of vague or ambiguous covenants. Article II, Paragraph 1 of the protective covenants states that the "ACC shall have the right to refuse to approve any building specifications, site plans, or grading plans which are not suitable or desirable in its sole opinion for any reason, including purely aesthetic reasons." The same paragraph advises owners that no landscaping may be undertaken without prior written approval. The initial ACC is listed as J. Wayne Raiford, Tanya Cooper and Linda Raiford.

This claim of the ACC, as opposed to the Association, must be supported with the plaintiff establishing that the defendants were found to be in violation of the actions required by the ACC. The plaintiff provided no exhibits or testimony concerning any specific violation found by the ACC. While the plaintiff is correct that the ACC has authority to refuse matters based on aesthetic reasons, evidence was not presented that the ACC took any action in this case. The

defendant's home was completed in 2009. The issue in this case concerns whether the defendants have failed to maintain their lot in a clean and first class condition.

In Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (S.C. App. 1985) the Architectural Review Board reviewed all plans for construction in the subdivision. The board had authority to not approve a plan submitted for "purely aesthetic reasons". In that case, the Court recognized that the "paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Palmetto Dunes Resort v. Brown, citing Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974). An examination of the entire document in this case shows that the intent was to allow the Association and/or the Developer to have authority to determine what meets the "clean and first class condition" is when reviewing property. The second sentence of Article III, Paragraph 12 is, "In the event that an owner does not maintain said owner's lot(s) in such first class condition, the Association shall be entitled to perform the necessary work to said lot to bring it up to an acceptable condition **in the Association's sole discretion** (emphasis added) and any costs so incurred by the Association shall be treated as assessments in accordance with Article VI." The Bylaws provide the same voting rights as the protective covenants. Bylaw Five states that the initial Board of Directors of the Association will consist of a single director, J. Wayne Raiford until Class B members get voting rights. The defendants agreed to these terms when they purchased their lots in Three Runs Plantation.

The defendants believe the term "clean and first class condition" is vague or ambiguous. In Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (S.C. App. 1985), the Court of Appeals found that the term "aesthetic considerations" was not ambiguous. In that case, the covenants were not ambiguous in leaving the decision and determination as to what the term aesthetic considerations meant to Palmetto Dunes.

In the present case, the term "clean and first class condition" must be considered by reviewing the entire scope of the protective covenants. That shows that there is no ambiguity since the Developer, clearly has the authority to determine what complies with that standard. The Developer/Association must still exercise that judgment in a reasonable and good faith manner.

There was no evidence submitted to establish any trash or debris on the defendant's property. As stated earlier, photographs of the area around the home show the property to be

clean and well maintained. The plaintiffs' claims of a violation of the protective covenants concern the height of the grass in the open area of the lots and the trees growing on the defendant's property. There was evidence of other owners being notified that the grass needed to be cut on their lots. Several emails were introduced that indicated the grass would be cut or that the owner authorized the Association to cut the grass for a fee on those lots. The protective covenants specifically state that "clean and first class condition" includes mowing all grass and controlling the weeds. The decision of what is an acceptable condition when considering grass height and weeds are reserved to the Association under the same protective covenant. There was an issue raised about the guidelines created by the association in regards to the height of the grass and whether the guidelines were more restrictive. Based on the authority of the protective covenants, the Association does not require any guidelines. The Association has the authority to determine what meets the requirements of the protective covenants based on a review of the entire document as long as it exercises those decisions in a reasonable and good faith manner. The condition of the grass has been addressed with other owners and there was no evidence that any owners, after being notified or after the biannual cuttings did not comply with the decision of the Association. Based on the evidence submitted, the Association has applied the requirement of mowing all the grass and controlling the weeds in a reasonable and good faith manner. Therefore, the defendants, through their acceptance and agreement to abide by the protective covenants when they purchased the property and the reasonable and good faith effort of the Association to enforce this requirement will have to maintain the grass in a manner consistent with other owners who are in compliance with the protective covenants. In reaching this decision, the court would note that many of the photographs support the defendants position that they have cut their grass and do appear to be, at certain times, in compliance with the protective covenant.

The other issue is the growth of the trees on portions of the defendant's property. One issue was that there are trees growing in the riding easement on their property. Article IV, Reservations of Easements, provides for the use of the equestrian/pedestrian easements in the subdivision. It requires owners to keep the easement open and accessible for the full width of the easement. Based on that language, the trees should be removed from the equestrian/pedestrian easement.

The testimony on the remaining trees are not specifically covered in the protective covenants. The covenants discuss the procedure for removing trees. The covenants do not have a specific reference to an owner deciding which trees will be allowed to grow. Article II, Paragraph 2 states that "living trees, shrubs and other vegetation contribute to the aesthetic value of the lots in Three Runs..." Further, "Clear cutting for a view is not allowed and the subtle beauty of a view through the trees is encourages." Defendant's Exhibits 52-59 show various trees on the defendant's property that they wish to keep. Although it is difficult to determine the boundaries of the defendant's lot, there appears to be numerous developed trees on the lots.

There was no expert testimony to identify "scrub oaks". It does appear that the defendants have a large number of small growth trees. However, photographs show similar trees or scrub oaks in Defendant's Exhibits 37-40 and others in Defendant's Exhibits 22-36.

Having already found that the Association has the sole discretion to determine what is an acceptable condition, the Association still has to exercise its judgment reasonably and in good faith. As stated above, other lots appear to have similar conditions in regards to tree growth on lots. This may not apply to most of the lots but, unlike the height of the grass, there was no testimony of the Developer or Association contacting any other owners about tree growth.

Based on the evidence, the plaintiff has not shown why defendants should not be able to maintain small trees that will grow into a mature tree. No evidence was submitted of any plans submitted to the ACC that were not approved. The ACC is not a party to this action, but even with that testimony, no evidence was presented that the ACC has advised the defendants of any issue with the tree growth on the defendant's property. The defendants will be responsible for cutting the grass and controlling the weeds around any trees. The Association has the responsibility to exercise any judgment reasonably and in good faith and in a uniform manner among the owners in regards to trees that owners are allowed to have. The Court cannot determine what is or may become a full growth tree and what is a scrub oak. Based on the evidence submitted, the defendants are allowed to keep any full growth trees subject to the requirements of keeping weeds under control and the grass cut as outlined in this order.

The decision is based on the testimony and exhibits presented at the hearings. The Association may under its authority decide that owners need to remove scrub oaks or shrubs that will not develop into a mature tree, but that decision must be the same for all owners and not just

enforced against these defendants. Any action that requires these defendants to remove these items from their property must also be enforced against other lot owners in the subdivision.

DEFENDANTS AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND THIRD PARTY CLAIMS

Breach of Contract

The defendants believe that the developer represented that the tennis courts and the fitness center would be built. These amenities were listed in marketing material presented to the defendants by the real estate agent, listed in some local publications and signs were posted in the subdivision. Although the marketing material contained a disclaimer, the one presented to the defendants did not contain the disclaimer. The testimony and material presented establish that the subdivision was marketed as an equestrian and non-equestrian subdivision.

The covenants reserve the right to the developer to add or delete amenities and state that no completion date is specified. The defendants argue that the developer's representations and failure to build the amenities for over seven years are a breach of the agreement between the parties. It is important in this analysis to review the notice the defendants had of the protective covenants. The marketing material also contained the protective covenants including the language about the developer's rights with respect to the amenities. In addition to that disclosure, the covenants and numerous amendments were recorded and in the chain of title for the defendants. Despite the covenants in the marketing material and the recorded documents, the defendants testified that they did not believe they reviewed the protective covenants prior to the real estate closing. While the defendants may argue they did not have had actual notice based on a review of the deed and the testimony, they should have been aware of the protective covenants by the language in the Contract for Purchase and Sale and the recorded documents. Actual notice has been defined as a person knowing of the existence of the particular facts or" is conscious of having the means of knowing it, even though such means may not be employed by him." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998). The defendants clearly had notice in both the marketing material they rely on in their breach of contract claim and in the purchase agreement. Constructive Notice is "notice imputed to the person whose knowledge of facts is sufficient to put him on inquiry: if these facts were pursued with due diligence, they would lead to other undisclosed facts." Id., Anderson v. Buonforte, 365

S.C. 482, 617 S.E.2d 750 (S.C. App. 2005). If the restriction is properly recorded in the chain of title, the homeowner had constructive notice. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (S.C. App. 2005) (quoting from Harbison Comm. Ass'n, Inc. v. Mueller, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995)). In this case, the defendants, at a minimum, had constructive notice of the protective covenants and Article V. Therefore, they had knowledge of the authority of the developer to not build those amenities or to delay building those amenities prior to purchasing the property. The defendants accepted those terms when they did not object or decide within the five day period allowed in the purchase agreement to void the agreement. In regards to the amenities, the defendants have failed, by a preponderance of the evidence, to establish a claim for breach of contract.

Voting Rights Claim

The Protective Covenants of Three Runs Plantation describes the developer as the owner of property that references a plat of lots 1-10 and 15-22 on a 2005 plat. The plat does have references to areas for future development.

The original protective covenants for Three Runs Plantation were recorded in the Aiken County RMC Office on November 30, 2005. Prior to the defendants purchasing their lots on December 14, 2007, five amendments to the protective covenants had been recorded. These included the developer adding additional property to be subject to the protective covenants. The Fifth Amendment to the Protective Covenants of Three Runs Plantation added lots 1-60, Phase 2 to the subdivision. The defendants purchased lots 10 and 11 in Phase 2.

Article IX Paragraph 1 of the Protective Covenants allows the developer to add contiguous real estate to the scheme of the development. This includes language allowing the developer to extend the declarations to the property added to the development. The defendant's lots and other additional property were added to the development through various amendments signed by the developer and recorded in the Aiken County RMC Office. The language in the recorded amendments reference the recording of the original covenants and the right of the developer to make additional property subject to the covenants. The fifth amendment added lots 1-60 in Phase 2 of Three Runs Plantation.

In Cullen v. McNeal, 390 S.C. 470, 702S.E.2d 378 (S.C. App. 2010), the owners in Phase 1 of the subdivision believed that the developer did not have authority to annex real estate into the development or allow those owners to use the common areas in Phase 1 of the subdivision.

They also believed that the developer did not have the right to add the additional real estate to the declarations for the subdivision. The plat referenced in that case had the Phase 1 lots and other areas marked as "Phase II" and "Future Development". The Court found that "an examination of the Declarations in their entirety reveals Wright's Point includes the undeveloped land labeled Phase II and Future Development. Based on those facts and a review of the declarations, the Court ruled that Wright's Point was not confined to the properties in Phase I.

In this case, the defendants believe they are entitled to voting rights when 95% of the lots shown on the plat are sold. The plaintiff argues that the protective covenants allow the developer to add additional property that is adjacent to Phase I to the subdivision and that 95% of all the lots in the subdivision must be sold before the owners have voting rights. The plat referenced in the protective covenants does have areas marked "Future Development" in addition to the lots shown on the plat. In reading the protective covenants in their entirety, it seems clear that the plat referenced included any future development in Three Runs Plantation. The protective covenants provide for the expansion of the subdivision and that the additional phases and lots will be subject to protective covenants. Based on the testimony, exhibits and the recorded documents, the defendants are not entitled to voting rights at this time.

The defendants also believe the plaintiff has failed to enforce other provisions of the protective covenants and have suffered damages as a result of this action. Two of the complaints concerned an owner placing a radio tower antenna in his yard. The protective covenants allow the developer to grant a variance and that was done in this case. The defendants also raised an issue with a non-owner using the arena and trails and having riding students use those arenas. As stated earlier, the covenants provide for a procedure to allow non-member owners. Based on the testimony, the action is allowed under the protective covenants.

The complaint of horse manure on the riding easement does appear to be a violation of the protective covenants. Also, the photographs showing trailers visible from the road are in violation of the covenants based on the language of the covenants. However, the Court could not determine the extent of those violations and does not find that defendant's established any damages based on the evidence presented.

The defendants did present testimony that the failure to have the tennis courts and fitness center lowered the value of their property. Based on the fact that all parties acknowledged that economic conditions did lower the value on all real estate in the area and that the defendants

expert could not sufficiently quantify how that figure of damages was determined, the Court finds that the defendants failed to establish any damages.

The defendants also alleged several affirmative defendants. The Court finds that the complaint had sufficient facts pled to constitute a cause of action the defendants failed to establish any defense for release/accord and satisfaction. Based on the language of the protective covenants discussed above and that the evidence presented, the Court does not find that the defendant established they are entitled to any relief under the affirmative defenses of estoppel or waiver.

Waiver is a voluntary or intentional abandonment of a known right. Strickland v. Strickland, 364 S. C. 76, 650 S. E. 2d 465 (2007). Although there were isolated instances shown by the defendants of the plaintiff failing to enforce some of the protective covenants, those incidents do not establish the affirmative defense of waiver.

The defendants have alleged the affirmative defense of estoppel. The defendants testified that they relied on the representation of the tennis courts and fitness center being built in the future. As discussed above, the defendants in this case had notice of the protective covenants through the recorded documents and the published literature. The Court does not find any concealment of the authority of the developer to change or delay the amenities.

The defendants also allege that the plaintiff is barred from any recovery based on the doctrine of unclean hands. Assuming this affirmative defense is in regards to the plaintiff representing that tennis courts and a fitness center would be built, the Court has ruled that the protective covenants allow the developer to change and/or delay the amenities to be built and that the defendants had at least constructive notice of the protective covenants. Therefore, the defendants are not entitled to relief under this affirmative defense.

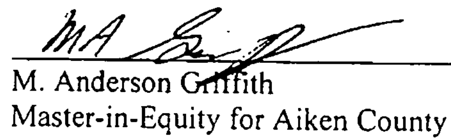
Attorney Fees

Attorney fees are not recoverable unless authorized by contract or statute. Seabrook Island Property Owners Assoc. v. Berger, 365 S.C. 234, 616 S.E. 2d 431 (S.C. App. 2005). The protective covenants are based on contract principles. Seabrook Island Property Owner's Association v. Pelzer, 292 S. C. 343, 356 S.E. 2d 411 (Ct. Appl. 1987). The six factors to be considered are: 1) nature and difficulty of the legal services ordered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily

charged in the area for similar services; and 6) beneficial results obtained. Blumberg v. Nealco, Inc., 310 S. C. 492, 427 S.E. 2d 659 (1993).

The attorneys in this case have agreed to submit their fees for this action. The parties have already agreed that the hourly fee was reasonable. The Court will schedule a supplemental hearing to review the attorney fees and allow any arguments by counsel as discussed at the trial.

July 1, 2013



M. Anderson Griffith
Master-in-Equity for Aiken County

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP0200548

Three Runs Plantation Homeowners Association, Inc	Jay J Jacobs Judith B Jacobs T R Sales Plantation LLC J Wayne Raiford
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case. ORDER

Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Three Runs Plantation Homeowners Association, Inc.	Jay J. Jacobs, Judith B. Jacobs,	N/A
Jay J. Jacobs and Judith B. Jacobs	T. R. Sales Plantation, LLC and J. Wayne Raiford	N/A

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

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

MA [signature]
M. Anderson Griffith, Master-in-Equity

3076
Judge Code

7/1/2013
Date

FILED 7/1 2013
[signature]
C.C.C.P.&G.S.
4:50

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on 07/01/2013, and a copy mailed first class or placed in the appropriate attorney's box on:, to attorneys of record or to parties (when appearing pro se) as follows:

Master

James Samuel Murray PO Box 1495 Augusta, GA 309031495

Clarke W. McCants III PO Box 2881 Aiken, SC 298022881

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by Kitty Coyle

Court Reporter

Liz Godard - Clerk of Court

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

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