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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
In the Court of Common Pleas

The Honorable Steven C. Kirven, Master-In-Equity

Case No. 2024-CP-37-00180
Appellate Case No. 2026-000793

Jill T. Evans Appellant,

v.

Wynward Pointe Owners Association, Inc. Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Master err in upholding the validity of the Covenants insofar as they attempt to regulate activities outside the borders of the Wynward Pointe Subdivision and below the “804 Line”?
 - A. Did the Master err in holding the Covenants can restrict activities of uses occurring outside the subdivision boundaries on property below the “804 Line” that is wholly owned by a third party, Duke Energy?
 - B. Did the Master err in finding Duke Energy’s regulation of Lake Keowee was not exclusive and that nothing in the Shoreline Management Guide precluded subdivisions from regulating activities below the 804 Line or finding that the Covenants do not conflict with Duke Energy’s regulatory authority?
 - C. Did the Master err in holding the parties may, as a matter of contract law, agree to Covenants that regulate activities on the adjacent Duke Energy property?
 - D. Did the Master err in finding any relevance to the fact that Crescent Resources, Inc., the declarant of the original Covenants, was at one point a wholly owned subsidiary of Duke Energy so as to suggest Duke Energy somehow authorized Crescent Resources to exercise regulatory authority over portions of Duke Energy’s property below the 804 Line?
 - E. Did the Master err in holding Respondent was entitled to a permanent injunction prohibiting Appellant from using her underwater fishing light from 11:00 p.m. until sunrise when the light is wholly located within the waters of Lake Keowee below the 804 Line?
- II. Did the Master err in holding the 2023 Amendments to the Covenants were validly adopted?
 - A. Did the Master err in finding the manner in which Respondent adopted the 2023 Amendments was valid?
 - B. Did the Master err in holding the Covenants, with regard to restrictions on use within Duke Energy’s property below the 804 Line, run with the land when the Covenants do not touch and concern the land below the 804 Line?
- III. Did the Master err in holding Appellant’s fishing light was a nuisance?
 - A. Did the Master err in finding a nuisance when the Respondent never pled a cause of action for nuisance and the issue was not “tried by consent”?

- B. Did the Master err in finding Appellant's fishing light, which was installed before adoption of the 2023 HOA Amendments, constituted a private nuisance that can be regulated by HOA Covenants and Restrictions?
- C. Did the Master err in holding Appellant's use of her fishing light (which must be used from dusk to dawn to be effective) constitutes a private nuisance to the HOA when (a) Respondent did not plead a cause of action for nuisance and (b) the allegedly affected property owners were not parties to the lawsuit?
- IV. Did the Master err in admitting the affidavit of Respondent's lawyer, Samuel F. Albergotti, and copies of covenants and regulations from various other Crescent Resource, Inc., communities, whose covenants were not at issue in this case?
- V. Did the Master err in awarding costs to Wynward Pointe Owners' Association?

STATEMENT OF THE CASE

Jill Evans (Appellant) filed suit on March 13, 2023 against Wynward Pointe Owners Association (WPOA) seeking a declaration that the POA did not have authority to restrict or regulate Appellant's use of an underwater dock light in water and over land owned and under the exclusive control of Duke Energy Corporation. (Complaint). She also sought a declaration that her use of the underwater dock fishing light was not a nuisance and did not violate the Amended and Restated Declaration of Covenants applicable to Wynward Pointe. (Complaint)

WPOA filed an answer and counterclaim for a declaration that Appellant's operation of the underwater lights between 11:00 p.m. and sunrise violated the Covenants. WPOA also sought injunctive relief. (Amended Answer of June 23, 2023).

On September 7, 2023, WPOA moved for an order of reference to the Master in Equity. (Motion of 9/7/23; Memorandum filed 3/13/24). On March 15, 2024, the Court entered a consent order of reference. (Order of 3/15/24). Following discovery and dispositive motions the Master

held a trial on October 15 through 16, 2025. The Master also did a nighttime site visit.

On March 25, 2026, the Master entered his order granting WPOA a declaration that (1) the 2023 Amendment to the Covenants was properly adopted in accordance with the Original Covenants; (2) the 2023 Amendment applies to Appellant's boat dock and Duke Energy's property adjacent to Appellant's lot, and that Amendment is valid and enforceable against Appellant; (3) Appellant's operation of the underwater fishing light during the hours of 11:00 p.m. and sunrise violates the 2023 Amendment; (4) by operating the underwater fishing light between 11:00 p.m. and sunrise Appellant is in violation of the 2023 Amendment; and (5) Appellant's operation of the fishing light between 11:00 p.m. and sunrise violates the nuisance provisions of both the Original Covenants and the 2023 Amendment. (Order, p. 29, ¶ 1). The Master ordered Appellant enjoined and restrained to comply with the 2023 Amendment which requires Appellant to turn her fishing light off between 11:00 p.m. and sunrise. (Order, p. 30, ¶ 2). The Master also awarded WPOA "taxable and allowable costs." (Order, p. 30, ¶ 3).

This appeal follows.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.*

"Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). An action to enforce restrictive covenants by means of injunctive relief, however, is an action in equity. *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 258,

628 S.E.2d 284, 286 (Ct. App. 2006); *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (stating an action to enforce restrictive covenants is equitable); *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 382–83 (Ct. App. 2004) (explaining the determination of the scope of restrictive covenants is an action in equity and will be reviewed *de novo*).

In an equitable action, this Court may find the facts in accordance with its own view of the evidence. *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015); *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011) (“We review factual findings and legal conclusions in an equitable action *de novo*.”)

The appellate Court reviews all questions of law *de novo*.” *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (“A legal question in an equity case receives review as in law.” (quoting *Sloan v. Greenville Cty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003))); *id.* (“Questions of law may be decided with no particular deference to the trial court.” (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))).

FACTS

The Parties entered into a stipulation as to a number of facts. Those stipulations will be referenced under each issue. Because of this Court’s broad scope of appellate review Appellant presents the following summary of the testimony and evidence presented below.

Brett Garrison - Brett Garrison of Duke Energy testified regarding the Shoreline Management Plan and General Shoreline Guidelines applicable to Lake Keowee. (Tr. pp. 32, 1.

19 - p. 33, l. 9; p. 37, ll. 11-13; Jt. Exh. 15). Duke Energy and Crescent Resources are separate entities. (Tr. p. 33, l. 22 - p. 36, l. 25; Pl. Exhs. 1, 2). Mr. Garrison testified he was “not aware of anything in the Shoreline Management Plan that gives away Duke Energy’s rights of management around the shoreline....” (Tr. p. 37, ll. 15-25). Mr. Garrison stated:

The Shoreline Management – Duke Energy is responsible under its federal energy regulatory license to manage the hydropower projects for managing and supervising any activities and construction that occurs inside the project boundary on federally licensed hydro project property and we have not, that I’m aware of, there’s nothing where we have given those rights away to anyone.

(Tr. P. 38, ll. 13-20). The “project boundary” refers to “the elevation contour to which Duke Energy owns above the shoreline which varies in elevation and the waters within the lake....” (R. p. 38, l. 24 - p. 39, l. 2). Water is typically below the contour line. (Tr. p. 39, ll. 3-5). Mr. Garrison agreed where a dock is floating in the water it is within the boundaries of what is managed by Duke Energy, adding the “water in Lake Keowee is within the project boundary....” (Tr. p. 39, ll. 6-12). He also agreed that a light that is weighted and sits on the lake floor “would be within the project boundary if it was on the lakebed.” (Tr. p. 39, ll. 17-23). Mr. Garrison was “not aware of anything where Duke Energy has given away any of its rights to an outside agency or personnel.” (Tr. p. 40, ll. 5-7).

Mr. Garrison testified that property owners may not place a dock on Lake Keowee without Duke Energy’s permission. (Tr. p. 40, ll. 11-18). There is a process by which they can apply for a permit to put a dock on the waters of Lake Keowee. (Tr. p. 40, l. 21 - p. 41, l. 1). Mr. Garrison stated a “pier zone” is an area a developer will note where they think the pier should be located on each lot. (Tr. p. 41, ll. 2-20). But Duke Energy would be the entity to issue a permit stating where the dock may be placed based upon Duke’s Shoreline Management Plan “and it

would be up to the individual to talk to the [POA] as far as whether that violated the pier zones or not.” (Tr. p. 40, l. 21 - p. 42, l. 4). Duke Energy tries to accommodate the pier zone designations but is not bound by them. (Tr. p. 42, ll. 10-19). If someone wants to move a dock they must seek Duke Energy’s permission if it is not within the boundaries of what was originally permitted. (Tr. p. 42, ll. 20-24).

Mr. Garrison spoke with Appellant about placing the underwater fish light on her dock on Lake Keowee. (Tr. p. 42, l. 25 - p. 43, l. 5). Nothing in the Shoreline Management Guidelines addresses whether someone who has a dock on Lake Keowee may install an underwater fishing light. (Tr. p. 43, ll. 10-15). Duke Energy does not issue a permit “specifically for foreign lights.” (Tr. p. 43, ll. 16-19).

On March 31, 2023, Appellant’s next door neighbors, Patrick and Vivian Henry, wrote to Mr. Garrison about Appellant’s fishing light. (Tr. p. 43, l. 21 - p. 44, l. 6; Pl. Exh. 4). On April 25, 2026, Mr. Garrison sent the following response:

Mr. Henry

I was going to call you, but I could not find your phone number. I did receive the letter and went out one night to inspect the light you had mentioned and I contacted the owner of the light after it was first installed and requested she tuck the light as far as possible under the dock so that it was not emitting a glare in an upward direction. When I inspected the light at night [it] illuminated the water around the dock, but did not appear to emit light directly upward. She complied with that request, as you referenced in your letter. The guidelines you referenced in your letter are preferred methods for installation of lighting on docks, but don’t necessarily address fishing lights and wildlife attractors. *In short, the Shoreline Management Guidelines do not specifically prohibit placement of a fishing light under a dock.*

(Tr. p. 44, l. 7 - p. 45, l. 15) (emphasis added).

On cross-examination, Mr. Garrison agreed he was not aware of anything in the Shoreline

Management Plan or the Shoreline Management Guidelines that prohibits a homeowners association or a developer from having restrictions that govern activities of the owners below the 804 line on Duke Energy property, including an underwater fishing light. (Tr. p. 47, ll. 9-22; p. 50, l. 19 - p. 51, l. 13; p. 51, l. 24 - p. 52, l. 7). Mr. Garrison read a provision in the Plan Index defining “pier zones” and their lack of any effect on Duke Energy’s authority over lake access. (Tr. p. 48, l. 5 - p. 49, l. 20; Def. Exh. 14-B). Mr. Garrison’s only concern was that a dock plan “meet the FERC¹ approved Shoreline Management Plan.” (Tr. p. 50, ll. 7-8).

On re-direct, Mr. Garrison stated Duke Energy “did not give permission or give away our rights to manage the land within the FERC project boundary.” (Tr. p. 53, ll. 2-6). He agreed there was nothing that affirmatively says Duke Energy gave the HOA authority to restrict a uses on the lake. (Tr. p. 53, l. 23 - p. 54, l. 1). When asked that while there is not any prohibition against he POA regulating, there also is no permission granted to the HOA to do that, Mr. Garrison stated:

Both statements would be correct and I believe that there’s no statement affirmatively. There’s nothing in the guidelines that exceeds or gives away any of Duke Energy’s rights with regard to managing our requirements under our FERC license. There is also no statement in the Shoreline Management Plan that prevents an HOA from enforcing regulations [or covenants].

(Tr. p. 54, ll. 2-15). Mr. Garrison agreed that the floating portion of Appellant’s dock is on the water and therefore within Duke Energy’s project boundary and on land owned solely by Duke Energy. (Tr. p. 54, l. 19 - p. 55, l. 5).

Jill Evans (Appellant) - Appellant lives at 121 Wynward Pointe Drive in the Wynward Pointe subdivision. (Tr. p. 56, ll. 10-13; p. 58, ll. 21-23). She is an avid fisherman and wanted a home with a dock and she purchased the lot in 1999 with her husband. (Tr. p. 57, ll. 18-20; p. 59,

¹ FERC is the Federal Energy Regulatory Commission. (R. p. 366, l. 1).

ll. 12-13). She was aware of the covenants but felt there were much less restrictions in Wynward Pointe than other subdivisions in the area. (Tr. p. 59, l. 14 - p. 60, l. 9). They built a joint bulkhead with the Henrys in 2001 and then built their dock. (Tr. p. 60, ll. 12-16).

Appellant described the process they had to go through to get permission from Duke Energy to build the dock according to the pre-2014 Shoreline Management Plan. (Tr. p. 60, l. 20 - p. 61, l. 6). They adhered to the Developer's pier zone and installed a used dock. (Tr. p. 61, ll. 11-16). Her husband became ill, however, and she took care of him for nine years before he died in 2015, and she had to postpone fishing. (Tr. p. 61, ll. 20-23).

After her husband's death, she had the opportunity to move her dock to deeper water and she obtained all permits from Duke Energy and approvals from her neighbor to pivot her dock. (Tr. p. 62, ll. 15-23; p. 63, ll. 17-19). This was done in 2016 through 2017. (Tr. p. 62, ll. 22-23; p. 63, ll. 15-16). She added 22 feet of gangway and prepared it for adding electricity. (Tr. p. 62, l. 23 - p. 63, l. 14).

In 2017 she attended meetings with Keowee Anglers as well as Duke "World of Energy." (Tr. p. 63, l. 23 - p. 64, l. 1). Duke was offering to allow homeowners to participate in a habitat enhancement program for fishing on Lake Keowee, which involved getting an additional permit to install "MossBack Fish Habitats" underneath the dock. (Tr. p. 64, ll. 2-6). These fish habitats improved fishing for everyone on Lake Keowee. (Tr. p. 64, ll. 5-24). The Department of Natural Resources actually installed the fish habitats underneath Appellant's dock. (Tr. p. 65, l. 2 - p. 66, l. 22; Pl. Exh. 5).

Appellant identified photographs of her gang walk and dock. (Tr. p. 66, l. 23 - p. 69, l. 25; Pl. Exhs. 6-10). She also identified photographs of improvements to the dock, including a flood

light, plastic parts instead of metal, electrical receptacles, the 22-foot extension, and the “Wet Willie” fishing light. (Tr. p. 70, l. 14 - p. 71, l. 23; Pl. Exhs. 11-17). Appellant installed electricity and a number of safety mechanisms and alert mechanisms to avoid “water shock” or electrocution of anyone near her dock. (Tr. p. 72, ll. 1-25; p. 126, l. 1 - p. 128, l. 6). Her power bill includes electricity for the dock. (R. p. 129, l. 23 - p. 130, l. 4).

Appellant identified photos regarding the underwater light. (Tr. p. 73, l. 1 - p. 75, l. 23; Pl. Exhs. 18-A through 18-J). It is a white light bulb plugged into a socket that is attached to a five-pound weight that is on the lake bed. (Tr. p. 74, ll. 22-23; p. 75, l. 24 - p. 76, l. 10). The other end of the cord plugs into her dock. (Tr. p. 76, ll. 11-16). The weight on the bottom can be adjusted from one to three feet from the light depending on the water’s depth. (Tr. p. 74, ll. 23-25; p. 77, ll. 13-15; p. 78, l. 6 - p. 80, l. 12; Pl. Exhs. 18-A through -J). To move it she picks up the cord. (R. p. 282, ll. 8-21). The light is under the water and never breaks the surface; it remains at a depth of five to ten feet depending on location. (Tr. p. 76, l. 17 - p. 78, l. 5). The light comes on at dusk, floats freely from the weight, and goes off at dawn. (Tr. p. 75, ll. 1-2). It is part of the habitat she created off her dock to enhance fishing. (Tr. p. 75, ll. 3-7; p. 84, l. 22 - p. 85, l. 4; p. 90, l. 13 - p. 91, l. 15; p. 130, l. 8 - p. 131, l. 8; Pl. Exh. 29).

Appellant did not have permission from the HOA to place the light in the water. (Tr. p. 87, ll. 12-14) To her knowledge the Wynward Pointe Restrictive Covenants did not prohibit Appellant’s ability to install the underwater fish light at the time she installed it. (Tr. p. 87, ll. 8-11).

The manufacturer suggests the light come on at dusk each night and stay on throughout the night so the fish have a place to feed at nighttime, which is what Appellant does. (R. p. 91, ll.

16-23; p. 93, l. 6 - p. 94, l. 6; p. 133, ll. 3-16; Pl. Exh. 30). In the summertime dusk does not arrive until 9:00 or 9:30, so if she has to turn it off at 11:00 the light will not work for its intended purpose. (R. p. 91, l. 24 - p. 92, l. 24).

Appellant tried using a green light of lower wattage with the manufacturer's permission. (Tr. p. 85, l. 6 - p. 86, l. ; Pl. Exh. 26). The bulb actually shone brighter because of the nature of the color spectrum. (Tr. p. 86, ll. 7-20). She returned to the white light. (Tr. p. 86, ll. 21-24).

The Henrys' home is about a football field away from Appellant's home and up a hill. (Tr. p. 82, ll. 4-24; Pl. Exs. 22, 23). Appellant identified several photographs which depict the positioning of the homes and docks in the affected area. (Tr. p. 82, l. 24 - p. 84, l. 19; Pl. Exh. 19, 20, 21, 24). One photograph shows the Henrys' home with all of their lights on shining in Lake Keowee and they are as bright or brighter than the dock light. (Tr. p. 84, ll. 7-17; Pl. Exh. 24). She also identified a photograph depicting the fish light at daybreak. (Tr. p. 86, l. 25 - p. 87, l. 7; Pl. Exh. 20).

The light was on for only one night and the Henrys complained that it disturbed their sleep. (R. p. 87, ll. 16-18). Appellant spoke with Mr. Henry and tried to address their concerns. (R. p. 88, ll. 11-15). Appellant informed Mrs. Henry that she had installed cameras and other security devices in the dock area. (R. p. 88, l. 15 - p. 89, l. 2). Appellant asked the Henrys if she could see what the dock light looked like from their viewpoint and she asked them to join her on the dock to see the fish habitat, but they refused. (R. p. 89, ll. 5-12). Appellant then moved the light several different places, but they told her they wanted her to remove the light or turn it off at 10:00 p.m. (R. p. 89, ll. 12-18). Appellant offered them \$1,000 to have a decorator come in and install window treatments (blinds) to help them at nighttime, but Mr. Henry said he would see

her in court. (R. p. 88, l. 21 - p. 89, l. 9). Appellant disputes that the light shines in the Henrys' bedroom window. (R. p. 136, ll. 11-23).

Appellant got a call from Doug Hettinger on the 4th of July reporting that the HOA had discussed it at a breakfast meeting following a parade, and Appellant advised him she was out of town but would discuss it the next business day. (R. p. 87, ll. 18-25). Mr. Hettinger told her she could use her light only when she was fishing on her dock, and she told him she would think about it. (R. p. 88, ll. 1-3). At that time there had been no changes or amendments to the Covenants. (R. p. 88, ll. 4-7).

Appellant described the amendment process for the covenants. The 2018 change was "pretty radical." (R. p. 94, ll. 17-21). It introduced the concept of the Construction Oversight Committee and corrected a lot of boilerplate language. (R. p. 94, ll. 21-23). It was a long process performed by a committee that gave its recommendation to the Board. (R. p. 94, l. 25 - p. 95, l. 2). The Master ruled evidence about the 2018 and 2022 amendment process was irrelevant since the HOA stipulated both amendments were not valid. (R. p. 100, ll. 1-9). Appellant proffered testimony of the great lengths the HOA went to in 2018 and 2022 to demonstrate that the 2023 amendment did not go to similar lengths or follow the bylaw requirements. (R. p. 98, ll. 14-21; p. 99, ll. 14-24; p. 100, ll. 11-15).

On May 22, 2023, the HOA sent out notices by email on a Tuesday inviting homeowners to come to Keowee Key the following Thursday to a "signing meeting" and the notice did not say how they were going to conduct the meeting. (R. p. 101, ll. 3-10; p. 102, ll. 13-23; p. 103, ll. 17-23; p. 104, ll. 2-6; p. 115, l. 17 - p. 117, l. 17; p. 119, l. 1 - p. 121, l. 19; p. 132, l. 4 - p. 133, l. 2; Jt. Exh. 12). The notice said it was for "ratification or correction to the 2018 and 2022 votes to

combine them. (R. p. 102, ll. 23-25). The email contained an attachment that linked to the HOA Website to view a red-lined document but did not contain all of the changes being made. (R. p. 103, ll. 7-13; p. 121, l. 20 - p. 122, l. 9). Appellant called the Molnars, who are neighbors, and told them she was having trouble finding and reviewing the changes and they sent her the link. (R. p. 124, ll. 5-14; p. 124, l. 19 - p. 125, l. 5). The notice said the amendment was updating the voting process. (R. p. 103, ll. 1-4). The materials contained a sample ballot. (R. p. 103, ll. 21-23; p. 122, l. 10 - p. 123, l. 11). There was no way to vote “no” if you did not attend the meeting. (R. p. 101, ll. 11-12). The HOA said they would contact owners who were not at the meeting but Appellant was never contacted. (R. p. 102, ll. 10-12).

Appellant served on the HOA Board for many years so she was familiar with the HOA bylaws including the amendment provision. (R. p. 104, ll. 7-8; p. 113, ll. 8-16). The bylaws specify the HOA may call special meetings or an annual meetings. (R. p. 104, ll. 9-17). The meeting with 3-days’ notice was not an annual meeting but was called a “signing meeting.” (R. p. 104, ll. 18-23). Since it was not an “annual meeting” it was a “special meeting” which required at least 30 but no more than 60 days’ notice and a detailed description of “what you were being asked to vote on, the agenda of the meeting.” (R. p. 105, ll. 3-11). This meeting only had two or three days’ notice. (R. p. 105, ll. 12-16). To her knowledge there was no general meeting prior to the signing meeting regarding the 2023 amendments. (R. p. 105, ll. 17-20). There had been a meeting in 2022 but not in 2023. (R. p. 105, l. 21 - p. 106, l. 2). Prior to the 2022 vote the HOA had an “informational lighting” meeting. (R. p. 106, ll. 5-8). The notice in 2023 did not follow the bylaws. (R. p. 123, l. 12 - p. 124, l. 4).

On May 31, 2023, Appellant sent an email to members of the neighborhood. (R. p. 133, l.

22 - p. 134, l. 7; Def. Exh. 5). She pointed out all of the proposed changes from the 2022 to the 2023 amendments. (R. p. 134, l. 15 - p. 136, l. 4).

Appellant testified nothing in the 1998 Covenants said anything about lighting and she felt the 2023 changes regarding lighting and nuisance were targeting her. (R. p. 125, l. 6-25). Appellant did not attend the meeting or contact anyone after receiving the email because she believed it could not pass; she did not know they would let the vote take place over six weeks. (R. p. 106, ll. 9-18; p. 124, ll. 15-18). The HOA board members continued to walk house to house and solicit votes but did not approach every house in the neighborhood. (R. p. 106, l. 19 - p. 107, l. 1).

Appellant identified the original 1998 Declarations. (R. p. 107, ll. 2-5; Jt. Exh. 1). This was the Covenant that applied when she purchased her home. (R. p. 107, l. 6 - p. 108, l. 10). Those bylaws authorize the creation of the HOA. (R. p. 108, ll. 11-21; p. 109, ll. 11-18; p. 110, l. 10 - p. 113, l. 7). The HOA bylaws required Appellant to get a permit from Duke Energy and to place her dock where Duke told her to place it, although they did contain "pier zones." (R. p. 114, ll. 2-9). The bylaws contained a number of restrictions related to owning a dock, all applied below the "804 line." (R. p. 114, l. 13 - p. 115, l. 9). also authorized amendments "for the property, Lot 18, not the waters of Lake Keowee." (R. p. 113, ll. 17-22). She has not asked the Construction Oversight Committee for approval of her light because "[i]t wasn't necessary." (R. p. 136, ll. 5-10).

Kenny Gordon - Mr. Gordon worked for Duke Energy for 42 years. (R. p. 161, ll. 23-24). He is a licensed builder and master electrician. (R. p. 162, ll. 3-9). His current employer wires two docks per week or about 100 docks per year. (R. p. 162, ll. 13-16). Most of their work

is on Lake Keowee. (R. p. 162, ll. 20-23).

Mr. Gordon inspected Appellant's dock. (R. p. 162, ll. 10-12; p. 162, l. 24 - p. 163, l. 2). He performed all of the safety work on the electrical aspects of the dock. (R. p. 163, l. 4 - p. 168, l. 8; Pl. Exhs. 31, 32). Mr. Gordon also visited the Henrys' home with counsel at night to look through their window at Appellant's fish light and measured the light at .003 lumens, describing it as "very dim" and "almost undetectable." (R. p. 168, l. 14 - p. 169, l. 1; p. 170, ll. 5-10; p. 170, l. 11 - p. 171, l. 3; p. 172, ll. 10-16). By comparison, the lighting in the courtroom measured 450 lumens. (R. p. 169, ll. 3-25). The average home has about 200 lumens and walking lights have about 10 lumens. (R. p. 170, ll. 1-4). The light is below the surface and has a glow but it is not like having a flood light pointed up. (R. p. 171, l. 7 - p. 172, l. 3). He agreed the light is visible from the Henrys' bedroom window, adding "you can see all of the lights." (R. p. 173, ll. 2-6).

William Wood - Mr. Wood is a fishery biologist for DNR. (R. p. 174, l. 21 - p. 175, l. 10). He is familiar with the fisheries regulations on Lake Keowee. (R. p. 175, ll. 11-14). DNR does not have any regulations prohibiting the use of underwater lights on Lake Keowee. (R. p. 176, ll. 11-19).

Mr. Wood and other DNR employees deployed the MossBack Fish Habitats at Lake Keowee, including Appellant's dock. (R. p. 175, l. 15 - p. 176, l. 7; Pl. Exh. 5). The fishing lights attract small microorganisms that attract small fish and then bigger fish. (R. p. 177, ll. 2-7; p. 178, ll. 4-22). The longer the light is on the better. (R. p. 177, l. 14 - p. 178, l. 1).

Ray Felton - Mr. Felton is the Park Manager at the Sadlers Creek State Park on Lake Hartwell in Anderson, South Carolina, and is a park ranger with the South Carolina Park Service. (R. p. 180, ll. 4-25). Mr. Felton also has a photography business called Natural Raised Media.

(R. p. 180, ll. 12-13; p. 181, ll. 1-20). He has knowledge of how cameras work versus the cameras in a cell phone. (R. p. 181, l. 21 - p. 182, l. 24).

Mr. Felton took photos for Appellant and was present and took photos when the parties and lawyers went to the Henry's home. (R. p. 183, l. 23 - p. 184, l. 25). The night was clear. (R. p. 195, ll. 9-16). He identified 10 photographs he took that night that fairly and accurately depict what the naked eye would have seen that night. (R. p. 185, l. 4 - p. 190, l. 9; p. 197, ll. 12-16; p. 205, l. 13 - p. 206, l. 1; p. 207, l. 7 - p. 211, l. 19; p. 212, l. 16 - p. 213, l. 3; p. 214, l. 11 - p. 215, l. 10; Pl. Exhs. 33-42). Mr. Felton also looked at a photograph the HOA proffered that allegedly showed glare. (R. p. 190, l. 10 - p. 191, l. 9; Def. Exh. 8-B). Mr. Felton saw no glare the night he was in the Henrys' bedroom. (R. p. 191, ll. 10-16). He zoomed in and said the fish light was not shining into the Henrys' bedroom. (R. p. 197, ll. 1-11; Pl. Exh. 39). When viewing it from the bedroom it is a small dot of light. (R. p. 213, ll. 15-19).

Mr. Felton also took some drone photos of Appellant's dock and the surrounding area in the evening. (R. p. 198, l. 4 - p. 199, l. 4; p. 199, ll. 18-23; Pl. Exhs. 43 - A through G). The photos demonstrate the distance from the docks to the houses. (R. p. 200, l. 12 - 202, l. 19; Pl. Exhs. 43-A through G).

David Cromer - Mr. Cromer lives at 100 Wynward Pointe Drive. (R. p. 234, ll. 14-25, 24-25). He can see Appellant's fish light from his home. (R. p. 235, ll. 3-5). He also has a fish light just off the front of his dock although it was broken at the time of trial. (R. p. 235, l. 6 - p. 236, l. 11). He has never had any neighbor complain. (R. p. 236, ll. 12-18). No one has ever told him it affected the marketability of his property. (R. p. 235, ll. 19-25). No neighbor has told him they could not sell their home because he has an underwater fish light. (R. p. 235, ll. 1-6).

Mr. Cromer described the 2023 amendment process. He recalled getting an email announcing a meeting with very short timing. (R. p. 237, ll. 14-18). The email stated the 2018 and 2022 amendments were done improperly and there would be a revote on them. (R. p. 237, ll. 18-21; p. 238, l. 5 - p. 240, l. 7; Jt. Exh. 12). He was not aware that there was anything else being considered and he did not read the proposed changes. (R. p. 241, l. 22 - p. 243, l. 4; p. 246, ll. 19-22). It is not normal for the HOA to call or have a meeting with only three days' notice. (R. p. 240, ll. 8-21). The notice said the HOA would reach out later if he could not come to the meeting but no one did. (R. p. 243, ll. 9-21; p. 243, ll. 5-10).

Alex Welisevich - Mr. Welisevich and his wife, Jacki Molinar, live at 121 Wynward Pointe Drive. (R. p. 250, ll. 16-17; p. 273, l. 24 - p. 274, l. 1). They are good friends with Appellant. (R. p. 274, ll. 2-3).

He described the 2018 and 2022 amendment processes and a letter he and his wife wrote to Mr. Hettinger expressing their concerns. (R. p. 252, l. 2 - p. 254, l. 14; p. 255, l. 3 - 257, l. 6; Pl. Exh. 44). They followed up with an email exchange with Mr. Hettinger. (R. p. 257, l. 22 - p. 258, l. 8; p. 259, l. 8 - 260, l. 10; p. 266, l. 9 - p. 270, l. 12; p. 277, ll. 3-14; Pl. Exh. 45). They also sent an email to other homeowners to encourage them not to go to the meeting since there was not a vote but a signing. (R. p. 266, l. 12 - p. 269, l. 24). Neither Mr. Welisevich nor Ms. Molnar attended the meeting. (R. p. 280, ll. 10-12).

Mr. Welisevich recalled getting the notice of the 2023 amendments and felt it was difficult to access the attachments and links. (R. p. 261, l. 17 - p. 263, l. 15; p. 274, ll. 8-21; p. 275, l. 13 - p. 276, l. 5; Jt. Exh. 2). He believed this was part of a concerted effort to stop fishing lights. (R. p. 264, ll. 6-24). It was not normal to get only 3 days' notice for a meeting. (R. p. 265,

ll. 12-15).

Mr. Welisevich stated that he could not see Appellant's fishing light from his home and it did not bother him. (R. p. 264, l. 25 - p. 265, l. 4). He also cannot see it from his next door neighbor's home. (R. p. 265, ll. 5-7). He agreed there were plenty of homes in the neighborhood that were not affected by Appellant's fishing light at all. (R. p. 265, ll. 8-11). He has seen the fishing light and described it as a soothing glow, similar to a pool light. (R. p. 270, ll. 13-21). There is no light fixture or bulb that points directly at someone's home. (R. p. 270, l. 22 - p. 271, l. 6). He estimated Appellant's fishing light is about 100 yards from the Henrys' home. (R. p. 272, ll. 1-17).

The parties jointly moved "the site" into evidence for the Master to go to the Henrys' home and see the lighting for himself. (R. p. 192, l. 7 - p. 195, l. 7; p. 195, l. 18 - p. 196, l. 22). The parties agreed there are 117 homeowners in the HOA. (R. p. 285, ll. 5-22).

Patti Cason - Ms. Cason is a real estate agent who lives in Wynward Pointe. (R. p. 142, ll. 5-8). She was qualified as an expert in real estate marketing and sales. (R. p. 145, ll. 10-13). She discussed with the Henrys the market value of their home in the fall of 2022. (R. p. 145, ll. 17-25). She told the Henrys that Appellant's fishing light was a nuisance that would impact their ability to sell their home. (R. p. 146, ll. 1-9; p. 149, ll. 7-14). She was not familiar with how many other docks had lights on Lake Keowee and had not done any market analysis on any other house. (R. p. 153, l. 8 - p. 155, l. 7).

Ms. Cason agreed that even under the 2023 amendments the fishing light can be on until 11:00 p.m. (R. p. 155, l. 23 - p. 157, l. 16). She added that nothing can be done about the Greenville Water System lights that can be seen from the Henrys' bedroom. (R. p. 157, l. 17 - p.

158, l. 8).

Mike Roach - Mr. Roach is licensed in real estate sales with Top Gun Realty. (R. p. 219, l. 22 - p. 220, l. 9). He has sold thousands of properties on Lake Keowee over 36 years. (R. p. 220, ll. 10-13; p. 220, l. 25 - p. 221, l. 3). He is also trained in and done market analysis evaluations. (R. p. 220, l. 14 - p. 221, l. 22). The Master qualified him as an expert in market analysis. (R. p. 222, ll. 3-4). Mr. Roach opined that the presence of Appellant's fish light would not adversely affect the Henrys' property. (R. p. 222, l. 19 - p. 226, l. 14; p. 228, ll. 6-7; p. 230, ll. 15-17; p. 231, ll. 20-25).

Vivian Henry - Ms. Henry lives next door to Appellant. (R. p. 291, ll. 20-21; p. 292, ll. 18-25). Mr. Henry was deceased at the time of trial but he had been a retired in-house counsel. (R. p. 347, ll. 5-19). She relied upon him to make decisions on legal matters. (R. p. 348, ll. 1-4). She was not aware that prior to the 2023 Amendments there was no covenant that prevented Appellant from using the fish light as she used it. (R. p. 336, l. 22 - p. 337, l. 25). Mr. Garrison of Duke Energy wrote to her and her husband that Duke did not have any restrictions or regulations regarding fishing lights in its Shoreline Management Plan. (R. p. 338, l. 17 - p. 340, line 4).

One day Ms. Henry saw workers on the shoreline near Appellant's dock and considered calling Appellant but did not do so. (R. p. 300, ll. 9-14). Her rooms do not have curtains because that would interfere with the view during daytime and at night, and the view is why they bought the lot. (R. p. 304, l. 22 - p. 305, 25; p. 317, l. 8 - 319, l. 13).

Ms. Henry stated, "[a]nd shortly after that, the light was on and it was very, very bright. And I don't know what to tell you, but it's been on since that time, but I'm not exactly sure when it was installed." (R. p. 300, ll. 14-18). She claimed it disturbed her ability to sleep. (R. p. 300, l.

21 - p. 301, l. 24). She agreed she sleeps with her eyes closed but she also does not want to try any kind of sleep mask. (R. p. 330, ll. 16-25; p. 333, ll. 14-23). While she does not wear her glasses when she sleeps the light emits a glow and does not need “fine tuning of sight.” (R. p. 341, l. 14 - p. 342, l. 10).

Ms. Henry described it as “glowing.” (R. p. 301, l. 24). The brightness of the glow depends on the position of the light. (R. p. 301, ll. 9-18; p. 303, ll. 1-7; p. 307, l. 7 - p. 310, l. 10; Def. Exh.s 8-A, 8-B). The light stays on all night long every night. (R. p. 310, l. 21 - p. 311, l. 8). She thought the light was green and was surprised to learn it is a white halogen bulb. (R. p. 332, l. 9 - p. 335, l. 12).

Ms. Henry claimed the light got in her eyes while she was in her bed and also shone on the far wall of the room. (R. p. 306, l. 22 - p. 307, l. 6; p. 310, l. 12-18). There has also been an increase in fishing boats in the area. (R. p. 311, l. 9 - p. 313, l. 2). She considered the fish light to be a nuisance and “an unreasonable detriment to [her] enjoyment of [her] property.” (R. p. 303, ll. 8-11; p. 314, l. 22 - p. 315, l. 25).

Ms. Henry saw Mr. Hettinger at a 4th of July parade and asked if anything could be done about the light including a requirement that lights be turned off at 10:00 p.m. (R. p. 303, ll. 12-19; p. 313, l. 20 - p. 314, l. 7). Members of the HOA Board come to her home at night to see the situation for themselves. (R. p. 314, ll. 8-21).

Ms. Henry did not speak with Appellant because she “didn’t want to make it an issue” and thought they “could get together and talk about it civilly.” (R. p. 303, ll. 20-24). Ms. Henry called Appellant to discuss it but never got a call back. (R. p. 304, ll. 2-7).

The only time Appellant came into Ms. Henry’s home to see the light was when the

lawyers and photographers were there. (R. p. 304, ll. 8-21). Appellant offered \$1,000 to buy the Henrys some curtains but since their home is three stories that amount would not “take care of that.” (R. p. 306, ll. 1-9). Even so, she bought the home for the view and does not want to put up curtains. (R. p. 306, ll. 10-21; p. 329, l. 12 - p. 330, l. 21). Ms. Henry was unaware if Appellant spoke with Mr. Henry about how the light might be affecting their home. (R. p. 329, ll. 1-8).

Ms. Henry agreed that before Appellant placed the fish light there were other lights visible from her bedroom that belonged to Greenville Water System. (R. p. 320, l. 11 - p. 321, l. 19). She also agreed the fish light is not aimed at her window and does not shine in her window; it is submerged and illuminates the water. (R. p. 325, l. 16 - p. 326, l. 20). She can see moonlight in her living room, which also has windows in the front of the home. (R. p. 329, l. 23 - p. 330, l. 14).

Ms. Henry also agreed that she has blinds over a window in a first floor bedroom because there is a hot tub and the blinds prevent anyone in the hot tub from looking into the room. (R. p. 328, ll. 4-13). She has the blinds on the window to make privacy for that room. (R. p. 328, ll. 14-18). She also has blinds on the windows in a first floor office/study because that room faces west and gets a lot of afternoon sun. (R. p. 340, l. 5 - p. 341, l. 13).

Ms. Henry could not explain how the HOA could prevent fishermen from using any portion of the lake, even near docks, at night. (R. p. 343, l. 4 - p. 346, l. 1).

Michelle Henry Barton - Ms. Barton is the Henrys’ daughter. (R. p. 349, ll. 11-13). She has been to their home “a good bit.” (R. p. 349, ll. 24-25). She saw the fish light at night and described it as a green glowing light and “something to behold.” (R. p. 351, ll. 1-22). She opined that it was a nuisance. (R. p. 353, l. 12 - p. 354, l. 8).

Kathleen Henry - Ms. Henry is also the Henrys' daughter. (R. p. 356, ll. 6-8). She has seen the fish light near Appellant's dock. (R. p. 357, ll. 4-5). She also opined that the fishing light was a nuisance. (R. p. 357, l. 9 - p. 359, l. 12).

Dale Wilde - Ms. Wilde served on the Board of Directors for the Friends of Lake Keowee Society ("FOLKS"). (R. p. 362, ll. 3-9). FOLKS promoted the MossBack fishing program. (R. p. 362, ll. 23-25; Def. Exh. 21). Appellant was a volunteer who helped assemble to fish habitats. (R. p. 365, ll. 17-19). The MossBack habitats do not need fish lights but she agreed they are beneficial. (R. p. 366, ll. 9-11; p. 374, ll. 14-21). She identified a photograph Appellant submitted for a contest and won another MossBack habitat. (R. p. 367, l. 1 - p. 368, l. 2; p. 373, ll. 6-19; Def. Exh. 22). Ms. Wilde agreed that SCDNR publishes a list of places where fishermen can go to fish over habitats. (R. p. 375, l. 3 - p. 376, l. 1). She added "[e]very dock is a fish habitat basically" and fishermen fish under docks all the time. (R. p. 376, l. 8-17).

Samantha Holt - Ms. Holt is on the HOA's Board and is the secretary of the HOA. (R. p. 378, ll. 1-7). She identified the email she sent to all homeowners on May 22, 2023. (R. p. 378, l. 11 - p. 379, l. 19; p. 380, ll. 17-23; p. 383, ll. 18-20; Def. Exh. 16). She identified a redlined copy of the proposed amendment that was posted on the HOA's website. (R. p. 379, l. 20 - p. 380, l. 7; Def. Exh. 4). She also identified an email she sent to all homeowners on June 26, 2023 that outlines the final total of the votes on the 2023 Amendment. (R. p. 382, l. 2 - p. 383, l. 3; Def. Exh. 6). The 2023 Amendment was initiated by the HOA Board. (R. p. 383, l. 21 - p. 384, l. 10).

Ms. Holt stated that the Board discussed the 2023 Amendment at the 2023 annual meeting in March or April 2023. (R. p. 384, l. 15 - p. 385, l. 10). Prior to the May 2023 email the homeowners had not seen the proposed amendments. (R. p. 385, ll. 11-18). She was aware that

some owners were having trouble accessing the redline version of the changes. (R. p. 386, ll. 3-16). There was no “read receipt” on the email and no way to tell who received it. (R. p. 386, l. 17 - p. 387, l. 23).

Mr. Hettinger wrote the May 2023 email and Ms. Holt sent it out. (R. p. 388, ll. 3-10). The email announced a “signing meeting.” (R. p. 388, ll. 13-22). She agreed the bylaws provide only for two types of meetings: annual meetings and special meetings. (R. p. 389, ll. 1-9). The May 25, 2023, meeting was not an “annual meeting” and the only type of meeting it could be is a “special meeting.” (R. p. 389, l. 13 - p. 390, l. 23).

Ms. Holt agreed the bylaws required written notice to members by US Mail who refuse electronic notification “not less than 30 days nor more than 60 days before the date of such meeting...” (R. p. 390, l. 25 - p. 391, l. 13). The May 2023 email only gave 3 days’ notice, not the 30 days required by the bylaws. (R. p. 391, l. 14 - p. 392, l. 8).

Pat Speake - Mr. Speake is on the HOA Board and serves as the treasurer. (R. p. 393, ll. 14-18). He was familiar with the covenants including the reference to the 804 line. (R. p. 407, l. 4 - p. 408, l. 1; Pl. Exh. 46).

The Board received complaints from the Henrys and others. (R. p. 393, l. 21 - p. 394, l. 3). As a result Board members went to the Henrys’ home at night and Mr. Speake opined that it was an unreasonable interference with the rights of enjoyment of the neighbors. (R. p. 394, l. 7 - p. 395, l. 9; p. 399, l. 23 - p. 400, l. 12; p. 402, ll. 18-24). He took photos with his iPhone of what he saw that night. (R. p. 396, l. 1 - p. 398, l. 1). He acknowledged he has never been out on Appellant’s dock and seen the fishing light. (R. p. 402, l. 25 - p. 403, l. 4).

The Board then decided to seek an amendment to the Covenants and proposed the 2022

Amendment. (R. p. 398, ll. 5-7). At the time Appellant installed her underwater fishing light nothing in the covenants prohibited or restricted it. (R. p. 404, l. 22 - p. 405, l. 2). The purpose of the 2022 Amendment was primarily to deal with Appellant's fishing light and to redefine "nuisance" to include underwater fishing lights. (R. p. 401, l. 14 - p. 402, l. 6; p. 404, ll. 8-21). They did not know that they were not adopting the amendment correctly based on advice of counsel. (R. p. 398, ll. 19-24). Mr. Speake identified the May 22, 2023 email and acknowledged he received it. (R. p. 399, ll. 1-14; Def. Exh. 15).

Mr. Speake was aware there are 117 lots in Wynward Pointe but he did not know how many lots are affected by Appellant's fishing light. (R. p. 400, l. 18 - p. 401, l. 7). He knew that all of the lots were not affected. (R. p. 401, ll. 8-13). He also knew that nothing in the covenants and restrictions guaranteed complete darkness to an owner in their home at night. (R. p. 403, l. 20 - p. 404, l. 5).

Mr. Speake agreed the Covenants applied only to property within the subdivision covered by the plat. (R. p. 405, l. 4 - p. 406, l. 23; p. 412, ll. 2-3; Pl. Exh. 46).

Doug Hettinger - Mr. Hettinger is the President of the HOA. (R. p. 415, ll. 16-18). He identified an aerial photograph of Appellant's home and the Henrys' home. (R. p. 437, l. 20 - p. 438, l. 10; Def. Exh. 3). Mr. Hettinger took several photographs of Appellant's fishing light using scuba gear. (R. p. 439, l. 6 - p. 440, l. 6; Def. Exhs. 9-A through 9-E). The light is attached to the weight and floats about 3 feet from the lake bed. (R. p. 440, l. 9 - p. 441, l. 3). The light cord runs back to the dock where it is strapped to a post with zip ties and into a control box. (R. p. 441, l. 9 - p. 442, l. 9).

Mr. Hettinger received the first complaint regarding the fishing light in July 2022. (R. p.

422, ll. 10-17). All of the Board members and some spouses went to the Henrys' home at night to see the fishing light for themselves. (R. p. 422, ll. 18-23). Mr. Hettinger opined that "it was shocking and I think it's a matter of where you're positioned when you see the light." (R. p. 422, l. 24 - p. 423, l. 3). He also opined that the light was a nuisance and affected property values. (R. p. 442, l. 10 - p. 445, l. 7; p. 450, ll. 14-22).

Mr. Hettinger discussed the adoption of the 2018 and 2022 amendments. (R. p. 416, l. 6 - p. 419, l. 10). The 2022 amendment was an attempt to deal with Appellant's fishing light. (R. p. 418, ll. 1-23; p. 446, l. 21 - 447, l. 7). Appellant then threatened to sue the HOA so they consulted counsel, who reviewed the documents and determined there were substantial questions regarding the validity of the 2018 and 2022 amendments. (R. p. 419, l. 11 - p. 420, l. 16). Neither of the 2018 nor the 2022 amendments were properly adopted. (R. p. 420, 6-16). Homeowners had to present a driver's license and sign a statement before two witnesses and a notary. (R. p. 420, l. 19 - p. 421, l. 12). Neither of the prior amendments followed that process. (R. p. 421, ll. 13-18).

The Board decided to seek a new amendment and sent out a notice to the POA membership explaining the problems with the prior amendments as well as redlined changes that were available for review on the website; however, the redline changes did not show the 2018 or 2022 redline amendments from the 1998 version. (R. p. 428, l. 1 - p. 429, l. 16; p. 430, ll. 15-18; p. 453, l. 16 - p. 455, l. 14; Jt. Exh. 12). Some members had difficulty accessing the redlined document so they requested a hard copy which the Board sent to them by email or delivered to them. (R. p. 432, l. 12 - p. 436, l. 9; Def. Exhs. 19, 20). Some of the signatures were gathered after the May 25, 2023 "signing meeting." (R. p. 436, l. 15 - p. 437, l. 2).

Mr. Hettinger said the May 2023 “signing meeting” was not a “special meeting” or an “annual meeting.” (R. p. 422, ll. 1-9; p. 429, l. 17 - p. 430, l. 14).). Mr. Hettinger was at the meeting and answered questions as couples came in. (R. p. 430, l. 22 - p. 431, l. 9). One change permitted owners to vote on amendments by mail-in ballot. (R. p. 431, l. 9 - p. 432, l. 11).

Mr. Hettinger believes the 1998 Covenants gave the HOA the right to regulate docks even though they are below the 804 line, which is the boundary of the property, although he is unaware of any document granting that authority. (R. p. 447, l. 8 - p.449, l. 9). He opined that Appellant was in violation of the covenants by keeping her fishing light on between 11:00 p.m. and dawn. (R. p. 445, ll. 8-13).

Samer Joudeah - Mr. Joudeah lives in Seneca and his home on Lake Keowee is a second home. (R. p. 457, ll. 12-18). His lake home is two doors down from Appellant’s home on the other side of the Henrys’ home. (R. p. 458, ll. 2-8). Dr. Joudeah complained to Mr. Hettinger about Appellant’s fish light being on all night. (R. p. 458, l. 18 - p. 459, l. 2; p. 462, ll. 6-25). He described it as a “light illusion” that affects the serenity of the lake and attracts unknown people in boats. (R. p. 459, ll. 5-11). He opined that the fishing light adversely affected his enjoyment of his property and is a nuisance. (R. p. 459, l. 23 - p. 461, l. 21).

The parties submitted their pre-trial briefs for the record in lieu of closing arguments. (R. p. 467, l. 21 - p. 468, l. 23; Plaintiff’s Pretrial Brief).

The Master found “the lot itself is within the subdivision property and that’s bordered by the 804 line, the property boundary line.” (R. p. 410, ll. 14-17). The Master stated there was “not any question [the pier zone is] not in that property.” (R. p. 410, ll. 24-25). The HOA’s counsel agreed the boundary of the lot is the 804 line” but “then there’s provisions in the covenants that

seek to regulate below the 804 line.” (R. p. 411, ll. 9-15).

The Master identified the issues as: (1) whether the HOA can regulate beyond the 804 line? (R. p. 469, ll. 5-8); (2) if not, then does the fishing light constitute a nuisance? (R. p. 469, ll. 9-11); (3) If the answer to the first question is “yes,” then were the 2023 Amendments properly enacted? (R. p. 469, ll. 12-18); (4) If the Amendments were validly enacted, then what is the extent and scope of that regulation or restriction, that is, whether there is a violation? (R. p. 469, ll. 18-25). *See also* general discussion R. pp. 470-474.

ARGUMENTS

I. THE MASTER ERRED IN HOLDING A SUBDIVISION’S COVENANTS COULD REGULATE ACTIVITIES OUTSIDE THE SUBDIVISION’S BOUNDARIES

The Master erroneously upheld the Covenants insofar as they attempt to regulate activities outside the subdivision’s physical boundaries. This Court should reverse.

Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. *Taylor*, 332 S.C. at 4, 498 S.E.2d at 864. Where the language of a restrictive covenant is equally capable of two or more constructions, that construction will be adopted which least restricts the property.” *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157–58, 263 S.E.2d 378, 381 (1980).

Restrictive covenants are agreements “to do, or refrain from doing, certain things with respect to real property.” *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct.

App. 2014), citing *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). Therefore, covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract. *Kinard v. Richardson; Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974) (restrictive covenants are contractual in nature). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. *Kinard v. Richardson*. Restrictive covenants differ from contracts, however, in that they run with the land, meaning that they are enforceable by and against later grantees. *Kinard v. Richardson; Queen's Grant II Horiz. Prop. Regime v. Greenwood Dev. Corp.*

“Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution.” *Taylor v. Lindsey*, at 4, 498 S.E.2d at 863. “[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” *Id.* at 4, 498 S.E.2d at 863–64 (quotation marks omitted). When “the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning.” *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). “A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.” *Taylor*, 332 S.C. at 5, 498 S.E.2d at 864; *Davey v. Artistic Builders, Inc.*, 263 S.C. 431, 211 S.E.2d 235 (1975). However, this rule of strict construction ““should not be applied so as to defeat the plain and obvious purpose of the instrument.”” *McClellanville*, 345 S.C. at 622, 550 S.E.2d at 302 (quoting *Taylor*, 332 S.C. at 4–5, 498 S.E.2d at 863–64).

A. The Master Erred in Holding the Covenants Can Restrict Activities or Uses Occurring Outside the Subdivision Boundaries on Property below the “804 Line” That Is Wholly Owned by a Third Party, Duke Energy

The Master rejected Appellant’s argument that the 2023 Amendments, even if validly adopted, cannot lawfully regulate activities or uses occurring below the 804 Line, which is outside the Subdivision’s boundaries. This was error as a matter of law.

A homeowner’s association’s authority is bounded by its governing documents and the physical limits of the community. *See Baumann v. Long Cove Club Owners Ass’n, Inc.*, 380 S.C. 131, 137-138, 668 S.E.2d 420, 424 (Ct. App. 2008) (confirming that a homeowners association can only exercise the powers granted to it by law and its governing documents). Further, if a homeowners association takes action that its governing documents do not empower it to take, such action is void and cannot be enforced. *Id.* (confirming that acts that are beyond the scope of the association’s powers as defined in its governing documents are *ultra vires*).

The original Restrictive Covenants provided they may be imposed only on:

the property shown on [any pertinent maps as recorded in the Office of the Register of Deeds for Oconee County], the Lots, Common Areas, and Private Roads, together with any leasehold interest or easement that the [WPOA] has or acquires in any property adjacent to the Subdivision.

(Original Protective Covenant, p. 4). Thus, the restrictions by their terms were applicable only to the lots in Wynward Pointe Subdivision as shown on the maps and plats of record. There is no language that attempts to make property below the 804 Line subject to the restrictions, nor could there be. Property that is not within the acreage covered by the restriction is not subject to the covenant’s terms. *Davey v. Artistic Builders, Inc.*, 263 S.C. 431, 211 S.E.2d 235 (1975). *Cf.*

Fowler v. Netzow, 645 S.E.2d 230 (N.C. App. 2007)² (affirming trial court's holding that regardless of the parties' intent, the express language of restrictions applied only to the "subject property" and did not pertain to land outside the subdivision lots, including property belonging to Duke Energy; the Court stated "[t]he strip of land owned by Duke Energy cannot be a part of the subject property if it adjoins the subject property").

In this case it is undisputed that the original Covenants (and all other valid amendments) apply only to the subdivision property down to the 804 Line, and not below it. The Master relied upon a case from Missouri and a New York case and refused to follow *Davey* and the North Carolina case, *Fowler*. (Order, pp. 15-17). This Court should reverse.

In the Missouri case, *Wheelock v. Gibson*, 744 S.W.2d 464 (Mo. Ct. App. 1987), the contention was that an agreement among several landowners regarding the placement of docks on the adjacent lake did not run with the land and was therefore not enforceable. The Missouri Court of Appeals disagreed, finding sufficient consideration for the joint agreement and that the intent was for it to run with the land. The Court observed:

The 1967 agreement does recite that its covenants are to run with the land, which are to benefit and burden the lands of the parties, which were to be conveyed, descend, devised or alienated subject to the terms of the agreement. Although definitely bearing upon the intention of the parties, that recitation is not necessary to cause the covenants to run with the land. *Kerrick v. Schoenberg*, 328 S.W.2d 595, 601[7, 8] (Mo. 1959). In *Hall v. American Oil Company*, 504 S.W.2d 313, 317[6, 7] (Mo. App. 1973), it was said, "* * * [I]f the restrictive covenant is ultimately determined to be valid, it is inconsequential whether it is denominated real or personal. If it is a valid real restrictive covenant, it would run with the land and thus bind plaintiffs. If it is to be designated a personal covenant,

² *Fowler* is an unpublished opinion. However, North Carolina permits citation to an unpublished opinion where the party believes the opinion has precedential value to a material issue in the case and there are no published opinions that would serve as well. N.C. R. App. P. 30(e)(3).

it would likewise bind plaintiffs, since by its recordation plaintiffs are presumed to have constructive notice of its existence and would be bound thereby; * * *.” [Here appellants admitted to actual knowledge of the 1967 agreement.] *See also Cook v. Tide Water Associated Oil Company*, 281 S.W.2d 415, 418–419 (Mo. App.1955), discussing covenants running with the land, and saying, “* * * [T]he fact that a restriction is not created by deed but rests on contract does not affect the right to enforce it as a covenant running with the land.” *It is not of consequence that the agreement had nothing to do with the development of the lake, or that the owner of the lake was not a party. The agreement had to do with the ownership and use of (sic) its parties use of boat docks in connection with the enjoyment of their lake front properties.* The restriction had nothing to do with preserving the Wheelocks’ railway dock, although an interference with its use might be actionable. Point II is overruled.

744 S.W.2d at 466-467 (emphasis added). The Master focused upon the italicized language and described it as a “holding” of the case (Order, p. 15), but this language was merely an observation by the Court that was not responsive to any issues raised by the parties in *Wheelock*. It is, therefore, *dictum* since it was not necessary to the decision in the case. *See, e.g., Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (“Judicial dicta is ‘not essential to the decision.’ Dicta or, as it is also known, dictum ‘is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court’s decision.’”) (citing Black’s Law Dictionary and C.J.S.). *Wheelock* had not been cited anywhere for this passing statement or for the proposition that a homeowners’ association may enact covenants to regulate uses outside the physical boundaries of the property.

The Master also relied upon *Ford v. Rifenburg*, 94 A.D.3d 1285, 942 N.Y.S.2d 285 (3d Dept. 2012)(slip op. 02746). (Order, pp. 15-16). *Ford*, however, also does not control. *Ford* involved access to, and use of, the adjacent lake, which the New York court held was inherent in riparian right to access. The covenant restricted placement of a dock to create a 15-foot buffer

with neighboring property. The court noted “Defendants acknowledge that they hold this right by virtue of their status as riparian owners of upland lots.” *Ford*, slip at 2, 94 A.D.3d at 1286,

The issue in this case, however, did not involve the riparian right of access as an incident of ownership. Appellant’s dock was fully in compliance with the restrictions on dock placement. *Ford*, then, is inapposite. Furthermore, *Ford* did not cite to any authority to support its view insofar as it may be construed to permit a homeowners’ association to regulate activities that have nothing to do with riparian right of access to adjoining water. Finally, *Ford* has not been cited anywhere for the proposition that a restrictive covenant may regulate activities beyond the geographical reach of a covenant whether based upon riparian rights or otherwise. The Master erred in relying upon *Ford* to justify holding the WPOA’s attempt to regulate Appellant’s underwater fishing light was valid.

The Master further found importance in the fact that the underwater fishing light was connected to the electrical service on Appellant’s lot, and this meant that the dock and fishing light “constitute an extension of [Appellant’s] ‘lot’ sufficient to enforce the nuisance provisions of the Original Covenants for this purpose.” (Order, p. 16). The Master again relied upon the New York case of *Ford v. Rifenburg* and its “riparian right of access” rule. (Order, p. 16). This was a gross overreading of *Ford* and does not support holding WPOA may extend its covenants beyond the geographical limits and below the 804 Line.

This Court should reverse the Master’s order and hold that insofar as WPOA attempts to regulate Appellant’s use of the underwater fishing light (with permission from the lake’s owner, Duke Energy), that attempt is invalid.

B. The Master Erred in Finding Duke Energy's Regulation of Lake Keowee Was Not Exclusive and That Nothing in the Shoreline Management Guide Precluded Subdivisions from Regulating Activities below the 804 Line or Finding That the Covenants Do Not Conflict with Duke Energy's Regulatory Authority

The Master found Duke Energy's regulation of Lake Keowee was not exclusive and nothing in the Shoreline Management Guide (SMG) and the Shoreline Management Plan (SMP) precluded the Subdivision from regulating activities below the 804 Line. (Order, p. 17). This was a gross overreading of the SMP and amounts to error.

To begin with, the Master found the SMP "expressly acknowledges that shoreline developers may regulate areas below the 804 Line." (Order, p. 17). The Master based this finding on the SMG's description of "pier zones" as "planning tools created by developers to determine where water-based facilities may be constructed." (Order, p. 17). The Order then acknowledges the "SMP states that these zones are frequently incorporated into subdivision covenants; that they do not overrule Duke's own regulatory criteria; that Duke does not enforce them; and that the existence of a pier zone does not guarantee approval of lake access." (Order, p. 17). The Court then concluded that the "SMP therefore contemplates and affirms a role for developers – such as Crescent Resources – in regulating structures and activities in this area." That conclusion, however, does not flow from Duke Energy's recognition that developers may use "pier zones" - the SMP itself (that pier zones do not override Duke Energy's own regulatory criteria) belie that conclusion.

The Master further held "[n]othing in the SMP or in Duke's [SMG] precludes subdivisions from regulating activities below the 804 Line." (Order, p. 17). But as Mr. Garrison testified, property owners may not place a dock on Lake Keowee without Duke Energy's

permission. (Tr. p. 40, ll. 11-18). There is a process by which they can apply for a permit to put a dock on the waters of Lake Keowee. (Tr. p. 40, l. 21 - p. 41, l. 1). Mr. Garrison stated a “pier zone” is an area a developer will note where they think the pier should be located on each lot. (Tr. p. 41, ll. 2-20). But Duke Energy would be the entity to issue a permit stating where the dock may be placed based upon Duke’s Shoreline Management Plan “and it would be up to the individual to talk to the [POA] as far as whether that violated the pier zones or not.” (Tr. p. 40, l. 21 - p. 42, l. 4). Duke Energy tries to accommodate the pier zone designations but is not bound by them. (Tr. p. 42, ll. 10-19). If someone wants to move a dock they must seek Duke Energy’s permission if it is not within the boundaries of what was originally permitted. (Tr. p. 42, ll. 20-24). This testimony undermines the Master’s finding.

The Master also refers to the Affidavit respondent’s counsel submitted, over Appellant’s objection (discussed below), and observed “[were Appellant’s] position correct, these long-standing and widespread restrictions would likewise be invalid. They are not.” (Order, p.17). Respectfully, just because finding attempted regulation unlawful will invalidate other unlawful attempts at regulation by others, without any citation to authority, is no reason to ignore that covenants cannot drift past the geographical border of the subdivision. *Davey v. Artistic Builders, Inc.*, 263 S.C. 431, 211 S.E.2d 235 (1975). *Cf. Fowler v. Netzow*, 645 S.E.2d 230 (N.C. App. 2007). *See, also, Baumann v. Long Cove Club Owners Ass’n, Inc.*, 380 S.C. 131, 137-138, 668 S.E.2d 420, 424 (Ct. App. 2008) (confirming that a homeowners association can only exercise the powers granted to it by law and its governing documents).

Next, the Master next stated, without citation to authority:

The historical development of Lake Keowee reflects that regulation of

shorefront activities below the 804 Line would occur through coordinated structure involving both Duke Energy and shoreline developers such as Crescent Resources. The interplay between Duke's SMP and the subdivision covenants demonstrates that regulation of docks, piers, and related exterior lighting and other improvements was contemplated by both entities. The regulation of underwater fishing lights falls within the scope of this anticipated regulatory framework.

(Order, p. 18, ¶ B). Once again, this finding misreads the SMP and ignores Mr. Garrison's testimony that nothing in the SMP "gives away Duke Energy's rights of management around the shoreline...." (Tr. p. 37, ll. 15-25; p. 54, ll. 2-15). Under its federal energy regulatory license, Duke Energy is responsible to manage the hydropower projects and for managing and supervising any activities and construction that occurs inside the project boundary on federally licensed hydro project property. (Tr. p. 38, ll. 13-20). The federal energy regulatory license gives Duke Energy exclusive authority to regulate activities below the 804 line, and therefore the Court's holding that such authority is not exclusive is error. (Tr. p. 54, ll. 2-15).

Simply because Duke Energy acknowledged that developers such as WPOA would regulate *to* the 804 Line does not support finding consent to permit WPOA to regulate activities on Duke Energy's property *below* the 804 Line. *Davey; Nelson; Baughman*. Mr. Garrison's testimony belies this finding. This Court should reject the Master's analysis and reverse this finding.

C. The Master erred in holding the parties may, as a matter of contract law, agree to Covenants that regulate activities on the adjacent Duke Energy property

The Master erroneously held the parties could agree, as a matter of contract law, to permit the Subdivision to regulate activities below the 804 Line. The Master held Appellant, "as the owner of Lot 18, is contractually bound by the covenants which regulate her activities on the

adjacent Duke property.” (Order, p. 18, ¶ C). This ruling was error.

As discussed above, the original covenants WPOA adopted were limited to the subdivision’s boundaries. (Original Covenants, p. 4). Insofar as the 2023 Amendment attempts to regulate beyond those geographical boundaries of the subdivision, or below the 804 Line, they are not valid. *Davey; Nelson; Baughman*.

The Court should reverse the Master’s holding that Appellant contracted to permit WPOA to regulate her activities on adjacent property and below the 804 Line.

D. The Master Erred in Finding Any Relevance to the Fact That Crescent Resources, Inc., the Declarant of the Original Covenants, Was at One Point a Wholly Owned Subsidiary of Duke Energy So as to Suggest Duke Energy Somehow Authorized Crescent Resources to Exercise Regulatory Authority over Portions of Duke Energy’s Property below the 804 Line

The Master found “Crescent Resources, Inc. is commonly known to have been a wholly owned subsidiary of Duke Energy, which has at all relevant times owned and controlled Lake Keowee. I take judicial notice of that fact.” (Order, p. 8, ¶ 34). The Master relied upon that “historical fact” to support finding WPOA may regulate activities below the 804 Line and onto Duke Energy’s property (*i.e.*, outside the geographical boundaries of the subdivision). (Order, p. 18). This was error.

First, whether Crescent was wholly owned by Duke Energy is not the type of fact that is subject to judicial notice. Rule 201(b), SCRE (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). There was no evidence presented on this “fact” or evidence to support the Master’s observation of what was “commonly known” or “capable of

accurate and ready determination” regarding the prior relationship, if any, between Duke Energy and Crescent Resources. Appellant submitted business filings from the Secretary of State’s office demonstrating these entities were separate and distinct and were not the same. (Tr. p. 34, Exh. 1)

Furthermore, even if that prior relationship existed, it proves nothing regarding whether Duke Energy agreed to permit Crescent and its successors to regulate activities outside of the geographical boundaries of the subdivision and below the 804 Line. That is governed by the language of the covenants and the case law. *Davey; Nelson; Baughman*. Further, Mr. Garrison’s testimony belies this finding.

The Court should reject the Master’s assertion of judicial notice of this “fact” or that it supports expanding the reach of the covenants beyond the boundaries of the subdivision.

E. The Master Erred in Holding Respondent Was Entitled to a Permanent Injunction Prohibiting Appellant from Using Her Underwater Fishing Light from 11:00 P.M. until Sunrise When the Light Is Wholly Located Within the Waters of Lake Keowee below the 804 Line

The Master entered a permanent injunction requiring Appellant to comply with the provisions of the 2023 Amendment based upon the Master’s ruling that the Amendment applies to Appellant’s dock and the area around it (*i.e.*, below the 804 Line and beyond the geographical borders of the subdivision), including the requirement that Appellant turn her underwater fishing light off between 11:00 p.m. and sunrise. (Order, p. 30, ¶ 2). The Court should reverse this decision and hold the 2023 Amendment, if validly adopted, cannot regulate activities on property that is below the 804 Line and wholly located within the waters of Lake Keowee.

The basis for the injunction was the Master’s finding that Appellant’s underwater fishing light constituted a nuisance within the meaning of the 2023 Amended Covenants. Because the

2023 Amendments are not valid, this finding is also invalid and should be reversed. Appellant incorporates and adopts by reference the arguments in Part III, below. Rule 208(b)(6), SCACR.

II. THE MASTER ERRED IN HOLDING THE 2023 AMENDMENTS TO THE SUBDIVISION COVENANTS WERE VALIDLY ADOPTED

A. The Master Erred in Finding the Manner in Which Respondent Adopted the 2023 Amendments Was Valid

The Master concluded the 2023 Amendment was valid and reasonable. This Court should reverse.

The Original Protective Covenants contain the following amendment provision:

Article 11. Section 3. Amendment. The covenants, conditions, and restrictions of this Declaration may be amended at any time and from time to time by an agreement signed by Owners holding a majority of votes appurtenant to the Lots which are then subject to this Declaration; provided however, that such amendment must be consented to by Declarant so long as Declarant is the Owner of any Lot in the Subdivision or of any Additional Property. Any such amendment shall not become effective until the instrument evidencing such change has been filed of record.

(Trial Fact Stipulation No. 9).

The parties stipulated that the 2023 Amendment drafted and proposed by WPOA was distributed to all Lot Owners in Wynward Pointe via e-mail dated May 22, 2023. The May 22 Email included a copy of the proposed 2023 Amendment, and an example signature page. (Trial Fact Stipulation No. 14). The May 22 Email stated:

Dear Wynward Pointe Neighbor,

Greetings, we hope this email finds you and your family well, and looking forward to another beautiful summer season on Lake Keowee.

As discussed at our recent Annual meeting, we want to provide an update on the

lawsuit our Association received in March from a Wynward Pointe neighbor.

To respond to the lawsuit we hired Mr. Sam Albergotti, a very experienced attorney in HOA matters on Lake Keowee. During a legal review it was determined that the voting process performed to approve our current 2018 protective covenants was incorrectly performed with less than 50% approval of the Association property owners. This issue was caused by a misinterpretation of our voting rules, and an honest mistake by our prior 2018 Board members. It was also determined that the 2022 amendment may not have been properly adopted.

To resolve these issues the current Board has drafted a proposed Amended and Restated Covenants, Conditions and Restrictions for the subdivision ("Protective Covenants"), consolidating our original Protective Covenants with amendments to date, including the 2018 and 2022 amendments.

The proposed amendment will amend the subdivision's existing covenants as follows:

- Consolidate our original Protective Covenants with amendments to date, including the 2018 and 2022 amendments.
- Clarify and revise the lighting requirements for Docks, Piers and Boat Houses (Article 7, Section 22).
- Modernize the method of amending our Protective Covenants for the future (Article 11, Section 4), to provide amendment by membership vote, rather than the current onerous requirement of obtaining physical signatures from a majority of lot owners, with 2 witnesses and notarization required for recording in the Oconee County Register of Deeds. This amendment method is generally in line with that used by other modern subdivisions in our area. It also makes the method of amendment of our Protective Covenants consistent with the method already in place for the amendment of our Bylaws.

A copy of our proposed Amended and Restated Protective Covenants are attached for your review. We have posted a "red-line" copy of the revisions on our website. The red-line attempts to compare the 2018 Amended and Restated Declaration with the one the Board now asks you to adopt, with additions underlined, and deletions shown in strike-through text.

To facilitate the covenant approval process we will have a signing meeting this Thursday, May 25th from 7:00-9:00 PM at the Keowee Key Event Center. Please stop by any time during this 2 hour period to sign the form for your lot (see

attached example). Board members will also be available to answer any questions you may have.

Physical signatures from each lot owner (for example, both husband and wife if the lot is owned by a married couple), will be required to complete the form for your lot(s). Each owner must also bring a Driver's License or approved ID for this process.

If you are unable to attend the signing meeting on Thursday, a Board member will reach out to you directly to determine a convenient time or method to complete the approval process.

Thank you in advance for your help and support, and for making Wynward Pointe a great place to live.

Wynward Pointe Board of Directors

(Trial Fact Stipulation No. 15). The parties also stipulated that:

- a) At the time of the Amendment, there were 117 Lots in the Subdivision;
- b) The relevant amendment provision for any amendment to the Protective Covenants (the "Amendment Provision") was contained in Article 11, Section 3 of the Original Protective Covenants;
- c) Pursuant to the Amendment Provision, any amendment to the Protective Covenants required the signatures of the owners of at least 59 of the Lots in the Subdivision; i.e. a majority.
- d) The Board obtained the signatures of the owners of less than 59 of the Lots in the Subdivision at the "signing meeting" on May 25, 2023.
- e) The Board obtained the signatures of 67 of the Lots in the Subdivision either at the signing meeting or over the next several weeks, and prior to the recording of the 2023 Amendment. The recorded 2023 Amendment was signed by the owners of 67 of the Lots in the Subdivision.

(Trial Fact Stipulation No. 16).

The Association was bound to follow the South Carolina's Nonprofit Corporation Act of 1994, S.C. Code Ann § 33-31-101 *et seq.* ("Act") when it attempted to amend the Original Protective Covenants in 2023. The Act includes two significant mandates. The first is in the

section of the Act that governs the notice that the Association was required to give the Members of the special meeting the Association planned to hold for the purpose of adopting the 2023 Amendment. The Act provides “notice is fair and reasonable,” if it “notifies its members of the place, date, and time of each annual, regular, and special meeting of members no fewer than ten or if notice is mailed by other than first class or registered mail, thirty, nor more than sixty days before the meeting date.” S.C. Code Ann. § 33-31-101(c)(1). The second is in the section of the Act that required the Association to provide a “members list.” The Act directs that after an association fixes a record date for a notice of a meeting, the association “shall prepare an alphabetical list of the names of all its members who are entitled” to be notified of the meeting; “shall list the members by classification of membership;” show “the address and number of votes” each member is entitled to at the meeting; and make the list of members “available for inspection...for the purpose of communication...concerning the meeting beginning the day after notice is given of the meeting for which the list was prepared and continuing through the meeting.” S.C. Code Ann. § 33-31-720(a), (b).

The Association’s Bylaws provide that “written notice of a meeting of members shall be given by, or at the direction of, the Secretary or person authorized to call the meeting, by e-mailing (or mailing a copy of such notice, postage prepaid to those homeowners who decline Electronic Notification), not less than thirty (30) days nor more than sixty (60) days before the date of such meeting to each Member entitled to vote thereat, addressed to the Member’s address last appearing on the books of the Association, or supplied by such Member to the Association for the purpose of notice.” (Bylaws, Article 3, Section 4).

As noted above, the Original Protective Covenants allows for amendments to its

covenants, conditions, and restrictions, but only if there is “an agreement signed by Owners holding a majority of votes appurtenant to the Lots which are then subject to this Declaration.” (Original Protective Covenants, pp. 27-28).

In its haste in 2023 to amend the 1998 Declaration, the Association failed to comply with all these required steps. First, the e-mail the Association sent on May 22, 2025, notifying the members that a special meeting of the membership would be held three (3) days later, on May 25, violated the notice requirement in both the Act and the Association’s Bylaws, respectively. Second, the Association did not provide the member list the Act requires. This omission, together with the scant notice the Association gave its Members, denied the Members a reasonable opportunity to thoroughly review, to understand, and discuss the proposed amendments among themselves.

Third, the Association did not obtain an “agreement signed by the Members” that the provision in the Original Protective Covenants requires for the adoption of an amendment. The page any one Member signed at or after the May 25 meeting did not show whether that Member agreed with any of the proposed amendments or not. The Association could and should have supplied the Members with a page that enabled him/her to vote “for” or “against” the proposed amendments, as it previously did in 2022. *Cf. Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 369, 147 S.E.2d 481, 485 (1966) (allowing evidence of prior dealings to fill in a gap where no provision of a written contract touched on the manner by which the parties were to proceed with respect to an important subject).

Further, the Association’s reworking of the signed pages was arguably tantamount to slip sheeting, and its process of collecting additional pages over a period of several weeks fails to

qualify under the Original Protective Covenant's requirement for an "agreement signed by Owners holding a majority of [the eligible] votes" was actually secured.

Lastly, the utter lack of understanding that some Members displayed with respect to the proposed change to the voting requirements for adoption of an amendment cast doubt on whether they did, indeed, assent to the 2023 Amendment, which is essential for the formation of a binding agreement. *See Anderson Mem'l Hosp., Inc. v. Hagen*, 313 S.C. 497, 498 n. 1, 443 S.E.2d 399, 400 n. 1 (Ct. App. 1994) ("Mutual assent to all essential terms of the agreement is necessary to the formation of a contract.").

As a result of these deficiencies, the 2023 Amendment was rendered invalid and unenforceable such that WPOA may not impose upon Appellant any of its terms that would have restricted, or otherwise regulated the Appellant's use of her underwater fishing light.

B. The Master Erred in Holding the Covenants, with Regard to Restrictions on Use Within Duke Energy's Property below the 804 Line, Run with the Land When the Covenants Do Not Touch and Concern the Land below the 804 Line

The Master erroneously found, insofar as the Covenants attempt to regulate property below the 804 Line, the Covenants "run with the land." This was error.

"A restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting party intended that it run with the land, and the covenant touches and concerns the land." *West v. Newberry Elec. Co-op.*, 357 S.C. 537, 542, 593 S.E.2d 500, 503 (Ct. App. 2004) (citing *Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct. App. 1997)). To establish the restriction "touches and concerns" the land, a party seeking to enforce a covenant must show it applies to the property either by its express language

or by a plain and unmistakable implication. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987). South Carolina courts have long held that it is “an essential quality of a real covenant that it relate to the realty, having for its object something annexed to, or inherent in, or connected with land or other real property.” *Epling v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935); *Morse v. Garner*, 32 S.C.L. (1 Strob.) 514 (1847).

Here, the Covenants do not apply to the property below the 804 Line, nor could they, since that property is owned by Duke Energy, who has not ceded any authority to regulate activities over Lake Keowee to anyone. Accordingly, the Master erred in finding the 2023 Amendments, insofar as they attempt to regulate activities below the 804 Line, “run with the land” and are enforceable against Appellant for her use of the underwater fishing light.

This Court should reverse this finding.

III. THE MASTER ERRED IN HOLDING APPELLANT’S UNDERWATER FISHING LIGHT WAS A NUISANCE

A. The Master erred in finding Appellant’s fishing light, which was installed before adoption of the 2023 HOA Amendments, constituted a private nuisance that can be regulated by HOA Covenants and Restrictions

The Master concluded Appellant’s use of the underwater fishing light constituted a “nuisance” under the 2023 Amendment as well as the Original Covenants. (Order, pp. 26-27). The Court should reverse.

Article 7, Section 18 of the Original Protective Covenants defines “Nuisances” as follows:

Section 18. Nuisances. No noxious or offensive trade or activity shall be carried *on or upon any Lot* or in any residential dwelling or outbuilding, nor shall

anything be done *thereon* which may be or become an annoyance or nuisance to the neighborhood. No substance, thing or material shall be kept *upon any Lot* that will emit foul or obnoxious odors, or that will cause any noise that will or might disturb the peace and quiet of the occupants of surrounding property. No animals, livestock or poultry of any kind shall be raised, bred, or kept *on any Lot* or in any residential dwelling or outbuilding with the exception of dogs, cats, or other household pets, which may be kept or maintained provided they are not kept, bred, or maintained for commercial purposes. The number of household pets kept or maintained, per Lot, shall not exceed three (3) in number except for newborn offspring of such household pets which are under nine (9) months in age.

(Id., p. 18) (emphasis added). Thus, for an activity to meet this definition it must occur “on or upon any Lot,” not on property adjacent to the lot.

The 2023 Amendment redefined “Nuisance” in Article 7, Section 18 to cover “external lighting,” and provides:

All external lighting must be off after 11:00 PM until the following sunrise.
Exceptions are:

1. Normal home doorway, walkway and driveway lighting to provide safe passage and a warm welcome to guests.
2. Home security and safety lighting (“Security Lighting”) of no more intensity than necessary to provide security and safe passage.
3. Low voltage, low lumen intensity landscape accent lighting, which fixtures shall not exceed approximately 18 inches in height.

Any lighting not meeting the above requirements must be submitted to the Construction Oversight Committee (COC) for approval as described in Article 7, Section 21 prior to nighttime use between 11:00 PM and sunrise. Noncompliance will be subject to the fine process as provided in Article 11, Section 2.

(2023 Amendment pp. 21-22). Second, the 2023 Amendment added a restriction on “Dock Lighting” to Article 7, Section 22, which states:

Dock Lighting

1. All dock lighting must have either low-pressure sodium lamps, or low-wattage

incandescent lamps, or low wattage LED lighting.

2. All dock lighting must be well-shielded, and must be installed in such a manner that light is not emitted above the lowest part of the fixture.
 3. All dock lighting must be turned off when the dock is not in use. Accordingly, all dock lighting must have time and/or motion sensors which turn off the dock lighting when the dock is not in use.
 4. Dock lights must not be of such intensity as to shine light into the interior of residences on adjoining Lots or other Lots in the Subdivision.
 5. All dock lighting and any underwater lighting must be turned off between the hours of 11:00 p.m. and sunrise. Noncompliance will be subject to the fine process as provided in Article 11, Section 2. The Board may approve an exception for the use of Security Lighting between the hours of 11:00 p.m. and sunrise, for Security Lighting which meets the requirements of Article 7, Section 18, and otherwise complies with this Section 22.
 6. All dock lighting and any underwater lighting must meet the requirements of this Section 22 and be approved by the Construction Oversight Committee (COC) before installation and/or use.
 7. The Board shall have the authority to grant variances to permit dock lighting and/or underwater lighting which is of a different type than that specified in Subparagraph 1 above, provided the other requirements of this Rule are met; provided that no variance shall be granted which would allow external light
- Amended and Restated Declaration of Wynward Pointe.

(*Id.*, p. 29).

The Master again found that the dock and fishing light, though located on Duke Energy's property, "constitute an extension of [Appellant's] "lot" sufficient to enforce the nuisance provisions of the Original Covenants for this purpose." (Order, p. 27). This was error, and amount to permitting the WPOA to regulate beyond its borders and below the 804 Line. *Davey; Nelson; Baughman*.

The Master then relied upon *O'Cain v. O'Cain*, 322 S.C. 551, 473 S.E.2d 460 (Ct. App.

1996) for a general definition of “nuisance,” and found the determination of whether Appellant’s underwater fishing light constitutes a nuisance “come down to one of reasonableness, and requires a balancing between the right to conduct the activity and the harm or interference to the property owner.” (Order, p. 27). The Court concluded the neighbors “avoid[ing] sleep interference and preservation of night-time view is more important” than Appellant’s “desire to maintain the underwater fishing light near her dock for her purposes of building fish habitat and attracting fish.” (Order, p. 28). This Court should reverse.

In *O’Cain*, the Court stated:

In resolving issues relating to a private nuisance, we must deal with the conflicting interests of land owners. To establish the line beyond which one’s exercise of his property rights becomes a legal infringement upon the property rights of another requires a delicate balancing of the correlative rights of the parties; the right of one generally to make such lawful use of his property as he may desire and the right of the other to be protected in the reasonable enjoyment of his property.

O’Cain, at 560, 473 S.E.2d at 465. A landowner must demonstrate that the other party “unreasonably interfered with his ownership of possession of land.” *Shaw v. Coleman*, 373 S.C. 485, 496, 645 S.E.2d 252, 258 (Ct. App. 2007).

The evidence does not support finding an unreasonable intrusion into Mrs. Henry’s bedroom. Even the Master noted that on his site visit he observed the underwater fishing light did not create “a blindingly bright light.” Appellant offered to provide blinds for the Henrys to use when they sleep, and Mrs. Henry admitted she has blinds in other parts of her home. The evidence demonstrated the amount of lumens the fishing light casts into the nonparty landowners’ bedroom registered at .003 lumens, which was “very dim” and “almost undetectable.” (R. p. 168, l. 14 - p. 169, l. 1; p. 170, ll. 5-10; p. 170, l. 11 - p. 171, l. 3; p. 172, ll.

10-16).

Respondent put forth testimony to support a claim the fishing light affected property values. However, the fact that an activity may affect the value of neighboring property does not support granting injunctive relief. *Charleston Devel. Co., LLC v. Alami*, 433 S.C. 533, 860 S.E.2d 687 (Ct. App. 2021). The Master gave little to no consideration that the Evans purchased the lot because of Appellant loves to fish or the mere installation of blinds (that Appellant offered to pay for) for use while they slept would have completely mitigated the Henrys' issue.

At bottom, the equities in this case did not favor Mrs. Henry, but in fact favored Appellant. This Court should reverse.

B. The Master erred in holding Appellant's use of her fishing light (which must be used from dusk to dawn to be effective) constitutes a private nuisance to the HOA when (a) Respondent did not plead a cause of action for nuisance and (b) the allegedly affected property owners were not parties to the lawsuit

Finally, the Master erred in finding the issue of private nuisance was "before the court" because Appellant asked the court to determine that her use of the underwater fishing light was not a nuisance and/or violation of the Amended and Restated Declaration of Covenants...." (Order, p. 26); Complaint p. 8, ¶ 1(c)). This Court should reverse.

Appellant's allegation was that, strictly construed, the language of the 2023 Amendment could not prevent her use of the underwater fishing light under either the "nuisance" provision or the the "lighting" provision. It did not seek a finding that Mrs. Henry could not establish a private nuisance so as to support injunctive relief.

Where an issue is not pled the Court will not find the issue was tried by consent where the evidence is relevant to an issue that is already in the case. *Sunvillas Homeowners Ass'n, Inc. v.*

Square D Co., 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990). Here, Appellant's pleading and the evidence in the case was relevant to the issue of whether her use of the underwater fishing light was a violation of the express provisions of the 2023 Amendment.

Accordingly, the Court should reverse the Master's determination that the issue of Mrs. Henry's private nuisance claim was before the court.

IV. THE MASTER ERRED IN ADMITTING RESPONDENT'S COUNSEL'S AFFIDAVIT

WPOA's Counsel offered his affidavit regarding covenants and restrictions in other subdivisions. Appellant objected based upon timeliness and relevancy, but the Master admitted the affidavit. (R. p. 287, l. 15 - p. 289, l. 21; p. 465, l. 15 - p. 467, l. 3; Def. Exh. 18). This was error.

First, this matter was set for trial and all discovery was completed and dispositive motions had been completed.

Second, what other subdivisions adopted as Covenants was not relevant to the issues in this case, namely, whether WPOA could regulate below the 804 Line, whether WPOA's adoption of the 2023 Amendments was valid and according to the Bylaws, whether the issue of nuisance was properly before the Master, or whether Appellant's underwater fishing light constituted a nuisance.

Third, the affidavit itself was not admissible. It was hearsay (Rule 801(c)), SCRE, it was not admissible as such (Rule 802, SCRE), it did not meet any exceptions to the Rule (Rule 803 and 804, SCRE), and it lacked an appropriate foundation for admissibility (Rule 901(a), SCRE). *Cf.* Rule 3.7, RPC, Rule 407, SCACR (prohibiting a lawyer from acting as an advocate and a

witness on contested issues or issues not related to the value of legal services).

Fourth, even if Crescent entered covenants permitting other subdivisions to regulate below the 804 Line, that grant would be void for the same reasons as the Master's finding in this case: Crescent did not have the authority to impose restrictions on the use of property owned by a third party that is outside the subdivision's boundaries. *Davey; Nelson; Baughman*.

The Court should reverse the admission of Counsel's Affidavit and attachments.

V. Did the Master Err in Ordering Costs to Wynward Pointe Owners' Association

The Master ruled WPOA "shall be awarded its taxable costs herein." (Order, p. 30, ¶ 3). This issue remains open as WPOA did not put forth any evidence supporting the award of costs, nor has the Master entered the award. The Master apparently contemplated an additional hearing before entering the order but the Master did not address the amount of costs to be awarded. This may affect the finality of the judgment for purposes of this appeal. As a general rule, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); *Bolding v. Bolding*, 283 S.C. 501, 323 S.E.2d 535 (Ct. App. 1984). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005). The Court may wish to address the finality of the order on appeal.

Appellant challenges this mandate, however, since this issue is tied to the results in this case. *See*, Rule 54(d), SCRPC ("costs shall be allowed as of course to the prevailing party unless the court otherwise directs"); *Brockington v. Pee Dee Mental Health Center*, 315 S.C. 214, 433 S.E.2d 16 (Ct. App. 1993) (reversing award of costs in favor of respondent where Court reversed

judgment in respondent's favor); *Hyer v. McRee*, 306 S.C. 210, 410 S.E.2d 604 (Ct. App. 1991) (reversing award of costs where Court of Appeals reversed special referee's decision on the merits).

The Court should reverse the Master's decision that WPOA be awarded its costs.

CONCLUSION

For the reasons stated, this Court should take its own view of the evidence and reverse the Master's order which permitted Respondent to regulate Appellant's activities outside the boundaries of the subdivision. The Court also should reverse the Master's findings that (1) the 2023 Amendments were validly adopted, (2) Appellant's activities constituted a nuisance, (3) the equity favored nonparty landowners over Appellant's rights, and (4) the admission of Respondent's Counsel's affidavit.

Respectfully submitted,

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