STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Georgetown County
Honorable John M. Milling, Circuit Judge
Civil Action No.: 2006-CP-22-0914
South Carolina Court of Appeals
392 S.C. 160, 708 S.E.2d 218 (Ct.App. 2011)

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AJG Holdings, LLC; Stalvey Holdings, LLC; David Croyle; Linda Croyle; Jean C. Abbott; Linda T. Courtney; Sumter L. Langston; Diane Langston; Carl B. Singleton, Jr.; Virginia M. Owens, and Stoney Harrelson,

Respondents,

v.

Levon Dunn; Pamela S. Dunn; and Robin H. Sasser and Charles E. Sasser as Personal Representatives of the Estate of Helen Sasser,

Petitioners.

PETITONERS' BRIEF ON *CERTIORARI*

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and Estate of Helen Sasser

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. STATEMENT OF ISSUES ON CERTIORARI 1

A. The Court Of Appeals Incorrectly Concluded Mrs. Sasser Relinquished Her Developer Rights Under The Restrictive Covenants When She Sold The Last Remaining Parcel In 1991, Thereby, Ignoring Ms. Sasser's Important And Protected Property Interest In Her Retained Developer Rights? 1

B. The Court Of Appeals Failed To Determine What, If Any, Restrictive Covenants Attached To The Woodland Plantation Subdivision And Passed To The Respondents When Mrs. Sasser Sold The Last Remaining Parcel In 1991? 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF THE FACTS 4

A. Mrs. Sasser – Woodland Plantation Subdivision 4

1. The Restrictive Covenants 5

2. The 1991 Coleman Deed And The 1983 Holmes Deed 6

3. No Assignment Or Relinquishment Of Developer Rights 8

B. The Dunns' Property 9

1. Contemplated Limited Commercial Use 10

2. The Neighbors' Complaints 11

3. The *Sasser Assignment* And The *Consent Agreement* 14

IV. ARGUMENT AND CITATION OF AUTHORITY 16

Summary of the Argument 16

A. Mrs. Sasser Either Assigned Her Developer Rights To The Dunns Or Those Rights And Their Enforcement Were Extinguished By Her Final Property Sale In 1991 16

1. Mrs. Sasser Retained Her Developer Rights As Granted In The Restrictive Covenants Even After She Sold The Last Property Parcel In 1991 16

2. The Restrictive Covenants Attaching To The Woodland Plantation Subdivision Were Extinguished When Mrs. Sasser Sold The Last Remaining Parcel To A Third-Party And, Therefore, Neither Mrs. Sasser Nor Any Property Owner Retained Any Enforcement Rights 27

V. CONCLUSION 31

TABLE OF AUTHORITIES

CASE DECISIONS

AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct.App. 2009) *modified in part on other grounds*, Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) 2

AJG Holdings, LLC v. Dunn, 391 S.C. 463, 706 S.E.2d 23 (Ct.App.) *opinion withdrawn from bound volume, substituted, and refilled*, 392 S.C. 160, 708 S.E.2d 218 (Ct.App. 2011) ..... *passim*

American West Development v. City of Henderson, 111 Nev. 804, 898 P.2d 110 (1995) (*per curiam*) 22

Appel v. Presley Companies, 111 N.M. 464, 806 P.2d 1054 (1991) 20

Armstrong v. Roberts, 254 Ga. 15, 325 S.E.2d 769 (1985) 20, 21, 24

Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C., 269 Va. 315, 609 S.E.2d 49 (2005) 23

Charlotte County Park of Commerce, LLC v. Charlotte County, 927 So.2d 236 (Fla. 2nd DCA 2006) 23

Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 372 S.E.2d 120 (Ct.App. 1988) 27

Crystal Lake Condominium Association, Inc. v. New England Equity, 2002 WL 652243 (decided March 13, 2002) (Not Reported in A.2d) 19

D.R. Horton, Inc. v. Board of Supervisors for County of Warren, 285 Va. 467, 737 S.E.2d 886 (2012) 23

Erickson & Associates, Inc. v. McLerran,
123 Wash.2d 864, 872 P.2d 1090 (1994) 22

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 22

Fairways of County Lakes v. Shenandoah
Development Corp., 113 Ill.App.3d 932,
69 Ill.Dec. 680, 447 N.E.2d 1367
(Ill.App. 2 Dist.1983) 20

Farmers Elevator & Mercantile Co. v. Farm
Builders, Inc., 432 N.W.2d 864 (N.D. 1988) 7

Flamingo Ranch Estates, Inc. v. Sunshine
Ranches Homeowners, Inc.,
303 So.2d 665 (Fla. DCA 1st 1974) 20

447 Clinton Ave., LLC v. Clinton Rising, LLC,
22 Misc.3d 1104(A), 880 N.Y.S.2d 223
(Supr. Ct. 2009) (Table) (2009 WL 38039,
*7, filed 6 January 2009) 7

Gary v. American Casualty Company of Reading,
Pennsylvania,
753 F.Supp. 1547 (W.D.Okla. 1990) 7

Great American Insurance Company. v. Watts,
393 P.2d 236 (Okla. 1964) 7

Hawkins v. Greenwood Development Corp.,
328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997) 6-7

Heffner v. Litchfield Golf Company, 258 S.C. 447,
189 S.E.2d 3 (1992) 28, 29

Herr v. Pequea Township, 2000 WL 1100848
(decided July 31, 2000 (E.D.Pa. 2000)
(Not Reported in F.Supp.2d) 19

House of Lloyd, Inc. v. Director of Revenue,
824 S.W.2d 914 (Mo. 1992) (*En banc*),
overruled on other grounds,
Sipco, Inc. v. Director of Revenue,
875 S.W.2d 539 (Mo. 1994) (*En banc*) 7

In re Smith, 296 B.R. 46, 50 (Bkrtcy. M.D.Ala. 2003) 7

Johnson v. Three Bays Properties No. 2, Inc.,
159 So.2d 924 (Fla. DCA 2nd 1964) 20

JSS Realty Company, LLC v. Town of Kittery, Maine, 177 F.Supp.2d 64 (D.Me. 2001) 19

Lakemoor Community Club, Inc. v. Swanson,
24 Wash.App. 10, 600 P.2d 1022 (1979) 20

Lord v. D&J Enterprises, Inc., ___ S.C. ___,
___ S.E.2d ___ (2014)
(2014 WL 1386678, filed 9 April 2014) 21

Louthan v. King County, 94 Wash.2d 422,
617 P.2d 977 (1980) 19, 20, 23

Marathon Financial Co. v. HHC Liquidation Corp., 325 S.C. 589,
483 S.E.2d 757 (Ct.App. 1997) 24

Markey v. Wolf, 92 Md.App. 137,
607 A.2d 82 (1992) 20

McDonald v. Welborn, 220 S.C. 10,
66 S.E.2d 327, 331 (1951) 28

McLaurin v. McLaurin, 265 S.C. 149,
217 S.E.2d 41 (1975) 6

Mission Springs, Inc. v. City of Spokane,
134 Wash.2d 947, 954 P.2d 250 (1998) 23

Penn Central Transportation Co. v. New York,
438 U.S. 104 (1978) 19, 23

Pitts v. Brown, 215 S.C. 122,
54 S.E.2d 538 (1949) 28

Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583,
694 S.E.2d 15 (2010) 2

Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct.App. 2006) 16-17, 19, 20, 21, 24

Reyner v. J.B. Stephens, 289 S.C. 575, 347 S.E.2d 878 (1986) 28

Richmond v. Pennscott Builders, Inc., 43 Misc.2d 602, 251 N.Y.S.2d 845 (1964) 20

Rossman v. Seasons at Tiara Rado Associates, 943 P.2d 34 (Colo.App. 1996) 20

Samson v. City of Bainbridge Island, 683 F.Supp.2d 1164 (W.D.Wash. 2010) 22

Sanford v. Clallam County, 118 Wash.App. 1071 (Wash.App. Div. 2 2003) (Not Reported in P.3d) (2003 WL 22332992, decided 14 October 2003) 22

Schooner Harbor Ventures, Inc. v. United States, 81 Fed.Cl. 404 (Ct. Fed. Claims 2008) 19, 23

Scoville v. SpringPark Homeowner's Associates, Inc., 784 S.W.2d 498 (Tex.App. 1990) 20

Shipyard Property Owners' Association v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct.App. 1992) 27

Sipco, Inc. v. Dir. of Revenue, 875 S.W.2d 539 (Mo. 1994) (*En banc*) 7

Stanton v. Gulf Oil Corp., 232 S.C 148, 101 S.E.2d 150 (1957) 6

Town of Woodway v. Snohomish County, ___ Wash.3d ___, ___ P.3d ___ (2014) (*En banc*) (2014 WL 1419187, *3, filed 10 April 2014) 23

Vashon Island Commission for Self-Government v. Boundary Review Board, 127 Wash.2d 759, 903 P.2d 953 (1995) 22

Village of Hobart v. Brown County, 271 Wis.2d 268, 678 N.W.2d 402 (2004) 22

West v. Mayberry Electric Co-op., 357 S.C. 537, 593 S.E.2d 500 (Ct.App. 2004) 24

West Main Associates v. City of Bellevue, 106 Wash.2d 47, 50, 720 P.2d 782 (1986) 19, 23

Weyerhaeuser v. Pierce County, 95 Wash.App. 883, 976 P.2d 1279 (Div. 2, 1999) 19, 23

Wolf Creek Ski Corp. v. Board of County Commissioners of Mineral County, 170 P.3d 821 (Colo.App. 2007) 22

Wright v. Cypress Shores Development Co., Inc., 413 So.2d 1115 (Ala. 1982) 20

STATUTES, REGULATIONS, AND COURT RULES

S.C. Code Ann. § 27-7-10 (Thomson Reuters West 2007) 6

BOOKS, TREATISES, AND LEGAL ENCYCLOPEDIAS

James A. Kushner, Subdivision Law and Growth Management, § 7.14 (2006) 22

John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Washington University Journal of Urban and Contemporary Law, 27 (Summer 1996) 22

I. STATEMENT OF THE ISSUES FOR CERTIORARI

A. The Court Of Appeals Incorrectly Concluded Mrs. Sasser Relinquished Her Developer Rights Under The Restrictive Covenants When She Sold The Last Remaining Parcel In 1991 Ignoring Ms. Sasser's Important And Protected Property Interest In Her Retained Developer Rights.

B. The Court Of Appeals Failed To Determine What, If Any, Restrictive Covenants Attached To The Woodland Plantation Subdivision And Passed To The Respondents When Mrs. Sasser Sold The Last Remaining Parcel In 1991.

II. STATEMENT OF THE CASE

In August 2006, the Respondents, AJG Holdings, LLC; Stalvey Holdings, LLC; David Croyle; Linda Croyle; Jean C. Abbott; Linda T. Courtney; Sumter L. Langston; Diane Langston; Carl B. Singleton, Jr.; Virginia M. Owens; and Stoney Harrelson (collectively "AJG Holdings"), sued the Petitioners, Levon Dunn and Pamela S. Dunn (the "Dunns"), seeking, *inter alia*, an injunction to prevent the Dunns from allegedly operating a commercial enterprise on the Dunns' property in violation of certain deed restrictions. (R.pp.20-21). The Dunns denied the material allegations (R.pp.22-23, paras. 1, 3-6) and asserted several affirmative defenses. (R.pp.23-24, paras. 7-11). AJG Holdings moved for a temporary restraining order (R.pp.50-51),[1] supporting the motion with several affidavits (R.pp.59-72), including one from H.T. Abbott, III ("Judge Abbott").[2] The Dunns opposed the TRO motion and filed counter-affidavits. (R.pp.26-29; R.pp.72A-72B).[3]

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1 AJG Holdings v. Dunn, 391 S.C. 463, 706 S.E.2d 23 (Ct.App.), *opinion withdrawn from bound volume, substituted, and refilled*, 392 S.C. 160, 164, 708 S.E.2d 218, 221 (Ct.App. 2011).

2 Judge Abbott, a former South Carolina Family Court Judge, is not "one of the plaintiffs in this action" (R.p.63, para. 1; R.p.289, line 24 - R.p.290, line 8; R.307, lines 5-15), merely "the husband of Respondent Jean Abbott . . . ." Nevertheless, Judge Abbott is and always has been the principal "mover and shaker" in promoting and furthering this litigation against the Dunns and Mrs. Sasser. (R.p.278, line 15 - R.p.279, line 5; R.p.300, line 15 - R.p.306, line 17; R.p.309, line 13 - R.p.311, line 11; R.p.326, line 22 - R.p.337, line 12; R.p.339, line 16 - R.p.340, line 16; R.p.341, line 11 - R.p.344, line 16; R.p.349, line 16 - R.p.360, line 7; R.p.364, line 19 - R.p.366, line 22).

3 The Trial Court granted the TRO. (R.pp.18-19). The Court of Appeals affirmed that decision. *See* AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221 (*citing* AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct.App. 2009), *modified in part on other grounds*, Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010)).

AJG Holdings later filed an Amended Complaint (R.pp.52-58) adding the Petitioner, the Estate of Helen Sasser ("Mrs. Sasser"), as a defendant. (R.pp.52-58).[4] AJG Holdings asserted claims against the Dunns for (a) violation of restrictive covenants (R.pp.52-53, 54, paras. 1-5, 16-18), nuisance (R.pp.52-53, 57, paras. 1-5, 38-40), and civil conspiracy. (R.pp.52-53, 57-58, paras. 1-5, 41-46).[5] AJG Holdings asserted claims against Mrs. Sasser for, among other things, slander of title (R.pp.52-53, 54-55, paras. 1-5, 19-22), breach of fiduciary duty (R.pp.52-53, 55, para. 1-5, 23-26), and civil conspiracy. (R.pp.52-53, 57-58, paras. 1-5, 41-46).[6]

The Dunns and Mrs. Sasser denied AJG Holdings' material allegations (R.pp.73-76, paras. 1, 3-4, 6-8, 11, 17-23, 25-28) and asserted several affirmative defenses. (R.pp.76-77, paras. 29-35). The Dunns counterclaimed[7] for, *inter alia*, tortuous interference with prospective business relations (R.pp.77-81, paras. 39-58, 60-61), and interference with a contractual relationship (R.pp.77-81, 82, paras. 39-58, 63-68).[8] AJG Holdings denied those allegations. (R.pp.85-87, paras. 2-11).

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4 AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221. Mrs. Sasser passed away on 13 January 2014, while this Supreme Court was still considering the Petition for Writ of Certiorari. Her Estate appears herein on her behalf, by and through Robin H. Sasser and Charles E. Sasser, the duly appointed Personal Representatives of the Estate. For ease of reference and appellate continuity, the term "Mrs. Sasser" will still be used herein when referring to the late Mrs. Sassers' Estate.

5 AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221.

6 AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221.

7 The Court of Appeals incorrectly stated both the Dunns and Ms. Sasser asserted counterclaims. AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221. The Dunns were the only parties to have asserted counterclaims against AJG Holdings. (R.pp.77-84).

8 AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221.

Both sides moved for summary judgment. (R.pp.99-104).[9] The Dunns and Ms. Sasser submitted affidavits from Mrs. Sasser (R.pp.108-109) and Robert M. Wilcox, Esquire, a real estate expert. (R.pp.105-107). The Trial Court granted ALG Holdings summary judgment (R.pp.3-16; R.pp.133A-133B; R.p.191, line 12 – R.p.197, line 7; R.p.203, lines 9-14; R.p.219, line 16 – R.p.223, line 4). After reconsideration was denied (R.pp.1-2, 134-172) the Petitioners appealed.

This Court of Appeals issued its decision on 19 January 2011, affirming the Trial Court. The Dunns and Ms. Sasser then filed their Petition for Rehearing with suggestion for Rehearing *En Banc*. On 28 February 2011, the Court of Appeals denied the Petition for Rehearing, withdrew the original decision, and substituted a refilled opinion in the case.

II. STATEMENT OF THE FACTS

A. Mrs. Sasser – Woodland Plantation Subdivision

The Dunns own approximately 13 acres of contiguous land in Georgetown County. (R.p.26; R.p293, lines 5-10). Four of their 13 acres is situated in a subdivision previously developed by Mrs. Sasser and commonly known as Woodland Plantation. (R.p.4; R.p.26; R.pp.63-64, para. 2; R.p.97, paras 1-3; R.p.267, line 17 – R.p.269, line 23; R.p.293, lines 11-16; R.p.382, line 3 – R.p.383, line 15).[10] Those four acres consist of four separate lots: Lots 7, 8, 9,

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9 AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 221.

10 Mrs. Sasser acquired her property from D.W. Green and others in 1978. (R.p.4). The property is located adjacent to the Pee Dee River. (R.p.4). This area is a remote area in Georgetown County. When the Dunns purchased their property – the area did not have any zoning.

and 10 (the "River Lots"). (R.p.26; R.p.269, lines 9-17; R.p.293, lines 11-16).**11** Mrs. Sasser owned and subdivided her property, including the River Lots, and transferred the different lots by deed to various individuals. (R.p.4; R.pp.30-37; R.p.39; R.pp.63-64, paras. 2, 4; R.p.97, paras. 1-3; R.p.267, line 17 – R.p.269, line 23; R.p.383, p.6, line 22 – R.p.385, line 13).**12**

1. The Restrictive Covenants

Each of the individual lots Mrs. Sasser transferred out to third parties was transferred subject to certain restrictive covenants (the "Restrictive Covenants") contained in each deed. (R.p.4; R.p.97, paras. 5-6; R.p.272, p.15, line 19 – R.p.277, line 23; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 14 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23).**13**

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11 AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220.

12 AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220.

13 AJG Holdings v. Dunn, 392 S.C. 160, 162-163, 708 S.E.2d 218, 220. The Restrictive Covenants provide, in relevant part, as follows:

> This conveyance is made subject to the following restrictive covenants which are deemed to run with the land and are bound on the purchasers, their heirs, and assigns:
>
> 1. At the expression "Developer" as used herein shall be construed to mean [Mrs.] Helen Sasser, her heirs and assigns;
> 2. No lot shall be used for commercial purposes without express written consent from the Developer;
> 3. No lot shall be divided or subdivided without written consent of the Developer;
>
> * * *
>
> 8. In the event of any of the above covenants shall be deemed invalid, then such invalidity shall in no way affect any of the remaining covenants.

2. The *1991 Coleman Deed* And The *1983 Holmes Deed*

In 1991, Mrs. Sasser sold the remaining property she owned in the subdivision to M. T. Coleman, Respondent Harrelson, Creole Harrelson, Respondents Croyle, Thomas C. Meyer, and Marie U. Meyer (the "*1991 Coleman Deed*")**14** (R.pp.4-5; R.p.272, lines 19-25; R.pp.372-377; R.p.393, line 9

(R.p.4; R.p.97, paras. 5-6; R.p.272, p.15, line 19 - R.p.277, line 23; R.p.282, line 25 - R.p.284, line 5; R.p.295, line 14 - R.p.296, line 5; R.p.385, line 24 - R.p.390, line 23). The fact a restriction "runs with the land" is not necessarily determinative of who may ultimately enforce the restrictions. *Cf.* Stanton v. Gulf Oil Corp., 232 S.C. 148, 101 S.E.2d 150 (1957). "Running with the land" gives notice to the public and subsequent purchasers of the existence of the restriction and may, under appropriate circumstances delineate the individuals who may enforce the restriction. Nevertheless, in cases where the seller reserves his or her rights, as in this case, the "runs with the land" language acts predominately as a notice "to the world" provision.

14 The 1991 Coleman Deed states as follows:

> It is the intent of the grantor herein to convey to the grantees all of her ownership interest of approximately 18.32 acres, being the remaining portions of the tracts heretofore conveyed to her by D. W. Green et al. by deed dated July 28, 1978[, and] recorded July 31, 1978[,] in Deed Book 160 at Page 772, Office of Clerk of Court for Georgetown County.

(R.p.5) (Emphasis in original) (R.p.71, para. 6; R.p.375, p.2). The 1991 Coleman Deed also provided:

> It is the intent of the grantor herein to convey all remaining property as contained in the deed to the grantor herein by deed of D.W. Green, et. Al. dated July 28, 2978[,] and recorded July 31, 1978[,] in Deed Book 160 at Page 772, Office of the Clerk of Court for Georgetown County.

(R.p.5) (Emphasis in original) (R.p.72, para. 3; R.pp.237-242; R.pp.372-377). Additionally, the 1991 Coleman Deed contained the standard printed clause indicating the conveyance included '*all and singular, the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging, or in anywise incident or appertaining.*' " (R.p.5; R.p.241; R.p.376, para. 2). This is standard form deed language. *See* S.C. Code Ann. § 27-7-10 (Reuters Thomson West 2007). *See* McLaurin v. McLaurin, 265 S.C. 149, 151, 217 S.E.2d 41, 42 (1975). Ms. Sasser's typewritten restrictions superseded and prevailed over the deed's standard printed language. *Cf.* Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997) ("Printed provisions of a contract should be harmonized, if possible, with handwritten ones. If there is an inconsistency between the two provisions,

– R.p.402, line 21) subject to the Restrictive Covenants. (R.p.97, paras. 1-6; R.p.274, line 10 – R.p.2769, line 6; R.p.403, line 16 – R.p.405, line 10). The most important language in the _1991 Coleman Deed_ states:

> This ***conveyance is subject*** to those restrictions of record as contained herein as well as is ***contained in the deed of Helen Sasser to Joseph Holmes*** dated March 17, 1983[,] recorded March 18, 1983[,] in Deed Book 207 at Page 758, Office of the Clerk of Court for Georgetown County.

(R.p.72; R.p.241; R.p.376, para. 2) (Emphasis added).

Notwithstanding any argument to the contrary, the _1991 Coleman Deed_ contained Mrs. Sasser's clear, unmistakable, and unequivocal reservation of her developer rights over the property. As noted in the _1991 Coleman Deed_, Ms. Sasser had previously sold certain real estate to Joseph Holmes in 1983. (R.p.72; R.p.241; R.p.376, para. 2). Ms. Sasser's deed to Mr. Holmes (the "_1983 Holmes Deed_"), specifically referenced in the _1991 Coleman Deed_, contained, among other restrictions, the following:

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however, the handwritten provision prevails."). *See generally* House of Lloyd, Inc. v. Dir. of Revenue, 824 S.W.2d 914, 924 (Mo. 1992) (*En banc*) ("When there is a conflict between the typewritten and preprinted language in a contract, the typewritten will prevail as the true intent of the parties"), *overruled on other grounds*, Sipco, Inc. v. Dir. of Revenue, 875 S.W.2d 539 (Mo. 1994) (*En banc*); 447 Clinton Ave., LLC v. Clinton Rising, LLC, 22 Misc.3d 1104(A), 880 N.Y.S.2d 223 (Supr. Ct. 2009) (Table) (2009 WL 38039, *7, filed 6 January 2009) ("[W]hen a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former will control, as it is presumed to express the latest intention of the parties'.") (Internal citation omitted); *In re* Smith, 296 B.R. 46, 50 (Bkrtcy. M.D.Ala. 2003) (". . . typewritten language applies over preprinted language."); Gary v. Amer. Cas. Co. of Reading, Pa., 753 F.Supp. 1547, 1151 n.3 (W.D.Okla. 1990) (*citing* Great American Insurance Co. v. Watts, 393 P.2d 236, 240 (Okla. 1964) (typewritten portions control over printed portions of a contract)); Farmers Elevator & Mercantile Co. v. Farm Builders, Inc., 432 N.W.2d 864, 868 (N.D. 1988) (same).

> This ***conveyance is made subject to the following restrictive covenants*** which are deemed to run with the land and are bound on the purchasers, their heirs and assigns:
>
> 1. At the expression "Developer" as used herein shall be construed to mean [Mrs.] Helen Sasser, her heirs and assigns;
> 2. No lot shall be used for commercial purposes without express written consent from the Developer;
> 3. No lot shall be divided or subdivided without written consent of the Developer;
>
> * * *
>
> 8. In the event of any of the above covenants shall be deemed invalid, then such invalidity shall in no way affect any of the remaining covenants.

(R.p.72; R.p.244, paras. 1-3, 8) (Emphasis added).

Given the fact that the *1991 Coleman Deed* specifically incorporated the restrictions contained within the *1983 Holmes Deed*, the restrictive covenants specifically set forth in the *1983 Holmes Deed* were incorporated, as a matter of law, into the *1991 Coleman Deed* just as if they had been specifically written in and/or typed out in that document provision by provision or "word for word".

3. No Assignment Or Relinquishment Of Developer Rights

At no point either before or after the 1991 sale of her remaining property in the subdivision did Mrs. Sasser ever assign or convey to a third-party (other than to the Dunns) any of her rights as the Developer of the Woodland Plantation subdivision. (R.p.28; R.p.39-40; R.p.45; R.p.97, paras. 6-7; R.p.403, line 16 – R.p.405, line 10). In fact, Mrs. Sasser stated "[i]t was never [her] intention [at the

time she sold the lots in the Woodland Plantation subdivision] to relinquish [any of the developer] authority provided [to her] by the restrictions in each deed . . . to anyone, including individual lot owners . . . ." (R.p.98, para. 8). Furthermore, AJG Holdings failed to present any evidence showing that Mrs. Sasser ever recorded either a subdivision map and/or plat for the Woodland Plantation subdivision. (R.p.97, para. 4; R.pp.63-64, paras. 1-4). Moreover, AJG Holdings also failed to present any evidence demonstrating Ms. Sasser adopted some type of formal subdivision plan and/or distributed any such plan to any of the purchasers of the individual lots. (R.p.97, para. 4; R.pp.63-64, paras. 1-4).

To the contrary, the only evidence showed Mrs. Sasser never recorded a subdivision plat and/or subdivision plan indicating the lots were to be used strictly for residential purposes, nor were the lots marketed with materials showing a plan for strictly residential homes. (R.pp.59-72). Mrs. Sasser specifically admitted she did not have any type of "grand design" and/or "master plan" for the Woodland Plantation subdivision. (R.p.97, paras. 4-7).

B. The Dunns' Property

The Dunns purchased Lots 7 and 8 from Rodney and Carolyn Causey (R.p.26; R.p.39; R.p.176, lines 9-16; R.p.294, lines 7-11) and Lots 9 and 10 from Riverside, Inc. (R.p.26; R.p.39; R.p.176, lines 9-16; R.p.294, line 12 – R.p.295, line 5).[15] These four lots (*i.e.*; the River Lots) front on the Great Pee Dee River.

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[15] AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220. Riverside was owned by Mr. Dunn and, contrary to the Court of Appeals' opinion, AJG Holdings v. Dunn, 392 S.C. 160, 166 n.2, 708 S.E.2d 218, 222 n.2.; the Dunns obtained Lot 9 directly from Ms. Sasser.

(R.p.26). The remaining nine acres abuts Plantersville Road (the "Nine Acre Tract") (R.p.277, line 24 – R.p.278, line 4) and adjoins the River Lots at both the north and west property lines. (R.p.26; R.p.293, line 23 – R.p.294, line 6).[16]

Among others (R.p.268, line 17 – R.p.269, line 7), Respondent Abbott owns a lot (R.p.64, para.5; R.p.268, lines 2-6), Respondents David and Lynda Croyle own Lots 5 and 6 (R.p.39; R.p.59; R.p.267, lines 21–25), Respondent Lynda T. Courtney and her husband own a lot. (R.p.61, para. 1; R.p.268, lines 8-16).[17]

1. <u>Contemplated Limited Commercial Use</u>

In 2005, the Dunns, admittedly unaware of the non-commercial use deed restrictions affecting the River Lots,[18] contemplated using their property for possible commercial purposes. (R.p.6; R.p.27; R.p.175, line 21 – R.p.176, line 4; R.p.297, lines 2-12).[19] They ***<u>planned</u>*** to offer the property for various social

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16 There have never been any restrictions affecting the commercial use of the Nine Acre Tract which adjoins the River Lots. (R.p.27; R.p.277, line 24 - R.p.278, line 14; R.p.296, lines 6-22). <u>AJG Holdings v. Dunn</u>, 392 S.C. 160, 163, 708 S.E.2d 218, 220. AJG Holdings conceded this point. (R.p.177, line 18 - R.p.178, line 4). *See also* <u>AJG Holdings v. Dunn</u>, 392 S.C. 160, 164, 708 S.E.2d 218, 220 (noting that AJG Holdings wanted to "amend the restrictive covenants so that the covenants would [also] govern the Dunns' nine acres bordering the [Woodland Plantation] subdivision.").

17 Lynda Courtney's husband - Dr. L. Bradford Courtney - passed away on 11 January 2013. *See* <u>http://www.goldfinchfuneralhome.com/obituaries/Lollice-Courtney/#!/Obituary</u> (Last viewed on 9 May 2014).

18 There were no commercial restrictions on the Nine Acre Tract which adjoined the River Lots. (R.p.28; R.p.277, line 24 - R.p.278, line 14; R.p.296, lines 6-22). <u>AJG Holdings v. Dunn</u>, 392 S.C. 160, 163, 708 S.E.2d 218, 220. AJG Holdings has never asserted any such non-commercial use restrictions attach to the Nine Acre Tract. (R.p.177, line 21 - R.p.178, line 4). <u>AJG Holdings v. Dunn</u>, 392 S.C. 160, 164, 708 S.E.2d 218, 220.

19 While somewhat disputed (R.p.60, paras. 5-7; R.p.61, paras. 2-4; R.p.64-66, paras. 6, 10-11; R.p.177, lines 8-20), the Dunns never conducted any commercial activity on the River Lots at any time either before or after they learned of the restrictions prohibiting such commercial use. (R.p.28). Admittedly, in order to put their business

events such as weddings and wedding receptions and, in addition, they also contemplated opening a small "bed and breakfast" facility. (R.p.27; R.p.176, lines 1-4; R.p.297, line 13 – R.p.298, line 4).[20]

2. **The Neighbors' Complaints**

In early 2006, the Dunns' neighbors began complaining to them about the Dunns' proposed commercial use of the River Lots. (R.p.27; R.pp.64-65, para. 6; R.p.312, line 16 – R.p.313, line 4). On 28 February 2006, Judge Abbott, for himself and others, wrote the Dunns complaining of the proposed commercial use and advising the Dunns of the Restrictive Covenants. (R.p.27; R.p.38; R.p.301, line 4 – R.p.304, line 14).[21] Faced with their neighbors' complaints, the

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plan into fruition, the Dunns advertised the property in various publications and on an internet website as "Dunn Acres Plantation". (R.p.27; R.pp.64-65, para. 6; R.p.297, line 13 - R.p.298, line 25). They offered Dunn Acres Plantation to the public as a venue for weddings, receptions, and/or overnight lodging. (R.p.27; R.pp.64-65, para. 6; R.p.297, line 13 - R.p.298, line 25). This Court of Appeals impliedly agreed there was no active commercial activity noting "the Dunns . . . ***planned*** to operate a bed and breakfast on their property", AJG Holdings v. Dunn, 392 S.C. 160, 162-163, 708 S.E.2d 218, 220. (Emphasis added); and "the Dunns renovat[ed] . . . an existing house (the guest house) on Lots 7 and 8 ***in preparation of*** opening a bed and breakfast inn and wedding venue." AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220. (Emphasis added).

20 The Dunns renovated a house which they had moved onto Lot 7 and ultimately wanted to use it as a guest house and a "bed and breakfast" facility. (R.p.27; R.p.299, lines 1-20). The Georgetown County Building Department approved all of the Dunns' construction activities involving the renovation and repair of the old house they moved onto Lot No. 7. (R.p.27; R.p.299, line 21 - p.43, line 14). In fact, Georgetown County building officials and/or inspectors regularly visited and inspected the renovation project and, once completed, granted the Dunns a Certificate of Occupancy for the residential structure they planned to use as a bed and breakfast. (R.p.27).

21 AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220. The only Respondents who maintain a permanent residence in the Woodland Plantation subdivision are David Croyle and Linda Croyle. None of the Respondents permanently live here. The "residences" are mostly cabins and small houses used for occasional hunting and/or fishing weekends. Several of the properties in the subdivision are owned by numerous and unrelated entities. The respondents, AJG Holdings, LLC, and Stalvey Holdings, LLC, together own one house. The Respondent, Stoney Harrelson,

Dunns investigated the deed restrictions and, for the first time, recognized there were covenants/restrictions prohibiting commercial activity on the River Lots. (R.p.27).[22]

Undisputedly, Mrs. Sasser previously sold all the property in the Woodland Plantation subdivision to third-parties. (R.p.28; R.p.97, paras. 1-6; R.p.274, line 10 – R.p.276, line 6). Nevertheless, it cannot be reasonably disputed that, in the deeds to the various lots, ***Mrs. Sasser specifically reserved certain rights, authorities, and powers to herself, her heirs, and assigns to control the ultimate development of the property*** (the "*Sasser Retained Rights*"). (R.p.28; R.pp.30-37; R.pp.39-40; R.pp.45-46; R.p.97, paras. 6-7; R.p.407, lines 2-7).

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owns a small cabin with an individual not a party to this litigation. Judge Abbott's wife, Jeannie Abbott, owns a cabin adjacent to the Dunns' property, but they visit the subdivision only occasionally. Most of the properties are approximately one acre in size. (R.p.69). Each of the Respondents, since they were subject to the Restrictive Covenants (R.p.28; R.pp.30-37; R.pp.39-40; R.pp.45-46; R.p.97, paras. 6-7; R.p.407, lines 2-7), bought their property with the knowledge that Mrs. Sasser could, at any time and at her sole discretion, have permitted the construction and operation of (1) a Bait Shop, (2) a river kayaking adventure, (3) a hotel and/or motel, or (4) any other type of business which could have produced an income due to its location adjacent to and/or on the river.

22 The relevant deed restrictions were, admittedly, referenced in their deed when the Dunn's purchased lots 7 and 8 from the Causeys in 2003. (R.p.26; R.p.30; R.p.31; R.p.39; R.p.176, lines 9-16; R.p.294, lines 7-11). After Judge Abbott and their other neighbors began complaining, the Dunns approached Mrs. Sasser about obtaining "written permission" to possibly operate a "bed and breakfast" on the property. In approaching Mrs. Sasser, the Dunns necessarily relied on the restrictive language in the deed recorded in the Georgetown County Courthouse as impetus to do so. There was no ambiguity in the deed's restrictive language (R.p.30; R.p.31) and, moreover, absolutely nothing to indicate that she was no longer the "Developer" of the Woodland Plantation subdivision or that the subdivision's "property owners" had unilaterally assumed the role of the "developer". In contacting Mrs. Sasser and reaching certain accommodations with her, the Dunns were only following the legal documents as they were recorded. (R.p.30; R.p.31). In fact, other deeds executed since 1991, contained the same language. Furthermore, Mrs. Sasser was adamant that she still held the position as the Developer of the Woodland Plantation subdivision. (R.p.392, line 4 - R.p.393, line 8; R.p.403, line 11 - R.p.405, line 4; R.p.406, line 21 - R.p.407, line 7).

While AJG Holdings and Judge Abbott have strenuously disputed the legal "validity" of the *Sasser Retained Rights* and, in turn, the Court of Appeals found there were no "retained rights",**23** the evidence showed Judge Abbott, himself, previously approached Mrs. Sasser's relative, Phillip Sasser, seeking to acquire (*i.e.*; purchase), via a signed written instrument, Mrs. Sasser's "development rights" in the Woodland Plantation subdivision. (R.p.346, line 9 – R.p.347, line 25). Judge Abbott, however, could not recall when the approach was made, except to it being after 1991 (R.p.346, lines 9-25; R.p.347, lines 4-6)**24** or to whom he proposed the development rights be assigned. (R.p.348, p.91, lines 1-3). This contact and proffered contractual agreement, of course, begs the question that if Judge Abbott and AJG Holdings really and truly believed Mrs. Sasser had not retained any of her "developer" rights when she sold the last parcel in 1991, then why did Judge Abbot make such a concerted effort to purchase some ostensibly "non-existent", "unenforceable", and "worthless" property rights? This is particularly true given the fact that, by this time, Mrs. Sasser had sold all of the her lots in the subdivision. Consequently, if you subscribe to AJG Holdings' position (and that of the Court of Appeals), Mrs. Sasser no longer had any property rights to sell or otherwise transfer after executing the *1991 Coleman Deed*. So – why did Judge Abbott make the effort? Apparently, simply a riddle, wrapped in a mystery, inside an enigma.

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23 AJG Holdings v. Dunn, 392 S.C. 160, 165-166, 708 S.E.2d 218, 221-222.

24 Mrs. Sasser sold that last of her property in the Woodland Plantation subdivision in 1991, to M. T. Coleman, Respondent Harrelson, Creole Harrelson, Respondents Croyle, Thomas C. Meyer, and Marie U. Meyer through the 1991 Coleman Deed. (R.pp.4-5; R.p.272, lines 19-25; R.pp.372-377; R.p.393, line 9 - R.p.402, line 21).

3. The *Sasser Assignment* And The *Consent Agreement*

After their neighbors began complaining, the Dunns went to Mrs. Sasser to discuss the restrictions and see if any relief was available. (R.p.28). The Dunns and Mrs. Sasser ultimately negotiated a written agreement, entitled *Assignment and Indemnification Agreement*,[25] through which Mrs. Sasser, for valuable consideration,[26] granted and conveyed to the Dunns all of the *Sasser Retained Rights* she held as the Developer of the Woodland Plantation subdivision (the "*Sasser Assignment*"). (R.pp.5-6; R.p.28; R.pp.39-44; R.p.404, line 16 – R.p.406; R.p.406, line 20 – R.p.407, line 1). The duly recorded *Sasser Assignment* specifically provided:

> Assignor [Mrs. Sasser] hereby assigns to Assignee [the Dunns], absolutely and not as security for the performance of any obligation, all of [Mrs. Sasser's] right and interest as Developer [of the Woodland Plantation subdivision] under the Deeds [transferring the property to third-parties], and hereby delegates to the [the Dunns] all of [Mrs. Sasser's] duties under the Deeds.

(R.p.40; R.p.124).

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25 The Trial Court noted Mrs. Sasser "[i]nterestingly . . . include[d] in the [Sasser] [A]ssignment an indemnification and hold harmless provision." (R.p.9). The Trial Court apparently assumed the existence of this indemnification and hold harmless provision somehow indicated Mrs. Sasser's belief that she did not have anything to assign to the Dunns. To the contrary, Mrs. Sasser prudently included the provision as she knew AJG Holdings had already sued the Dunns and would most certainly sue her at some point.

26 The Dunns paid Mrs. Sasser $15,000.00 for the Sasser Retained Rights. (R.pp.40-41, para. 3; R.p.405, lines 11-12).

Once the Dunns had the *Sasser Assignment* in hand and recorded, they, now as the assignee Developers of the Woodland Plantation subdivision,**27** entered into an agreement entitled "Consent To Covenants And Restrictions" (the "*Consent Agreement*") dated 6 September 2006. (R.p.6; R.pp.28-29, R.pp.45-49). The duly recorded *Consent Agreement* removed certain sections of the Restrictive Covenants applicable to the River Lots which had prohibited the commercial use of the property, as well as, prohibited further division and/or subdivision of those lots.**28**

Assuming, *arguendo*, the validity of the *Sasser Retained Rights*, Judge Abbott conceded, Mrs. Sasser has the right and authority to transfer and/or assign her rights as Developer of the Woodland Plantation subdivision to the Dunns. (R.p.288, p.31, line 23 – R.p.289, line 5). Moreover, Judge Abbott conceded that, assuming the same facts and assuming Mrs. Sasser transferred the *Sasser Retained Rights* to the Dunns, then the Dunns admittedly had the legal authority to change the Restrictive Covenants. (R.p.290, line 9 – R.p.291, line 11).

Pursuant to the *Sasser Assignment* and the *Consent Agreement*, none of the Dunns' property was restricted, as of September 2006, to non-commercial use or further property subdivision.

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27 The deeds from Mrs. Sasser to third-parties designated the "Developer" of the Woodland Plantation subdivision as Mrs. Sasser, her heirs, or her assigns. (R.pp.30-37; R.p.39; R.p.45).

28 The applicable restrictions were set out as Restrictions Two and Three of Mrs. Sasser's deeds to third parties. (R.pp.28-29; R.pp.30-37; R.pp.45-49).

IV. ARGUMENT AND CITATION OF AUTHORITY

Summary Of The Argument

The Court of Appeals incorrectly affirmed AJG Holdings' summary judgment. When Mrs. Sasser sold her final tract in 1991, only one of two scenarios could have reasonably occurred. Either Mrs. Sasser retained her developer rights via the Restrictive Covenants and legally assigned those rights to the Dunns or Mrs. Sasser's final property sale dissolved all developer rights for her and all property owners and no one had the right to enforce the restrictions.

While the Court of Appeals concluded Ms. Sasser did not retain any developer rights once she had sold the last of her property, the Court of Appeals failed to address what rights if any, were transferred to the Respondents when they purchased their lots in the subdivision. Instead, the Court of Appeals assumed certain rights had transferred even though the evidence demonstrated absolutely to the contrary.

A. Mrs. Sasser Either Assigned Her Developer Rights To The Dunns Or Those Rights And Their Enforcement Were Extinguished By Her Final Property Sale In 1991

1. Mrs. Sasser Retained Her Developer Rights As Granted In The Restrictive Covenants Even After She Sold The Last Property Parcel In 1991

The Restrictive Covenants encumbering the property in Woodland Plantation subdivision were created by the various deeds transferring property from Mrs. Sasser out to third-parties. (R.p.27; R.pp.30-37; R.p.97, paras. 5-6; R.p.272, line 19 – R.p.277, line 23; R.p.393, line 16 – R.p.405, line 10).**29** Mrs.

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29 Under South Carolina law, "[t]here are several ways in which restrictive covenants may be created [and] [t]he most common means are: (1) by deed; (2) by

Sasser did not create the Restrictive Covenants through either a declaration of covenants or by implication due to some "general plan or scheme of development". In South Carolina, '[r]estrictive covenants will be enforced unless they are indefinite or contravene public policy."[30] There is ***no evidence*** Mrs. Sasser ever recorded a subdivision plat and/or subdivision plan showing the lots were to be used strictly for residential purposes, nor were the lots marketed with materials showing a plan for strictly residential homes. (R.pp.59-72). Furthermore, Mrs. Sasser stated ***she did not have*** any type of "grand design" and/or "master plan" for Woodland Plantation. (R.p.97, paras. 4-7).

As already noted, Mrs. Sasser sold the remaining property she owned in the Woodland Plantation subdivision in 1991 via the *1991 Coleman Deed*. (R.p.272, p.15, lines 19-25; R.pp.372-377; R.p.393, line 9 – R.p.405, line 21).[31] It is undisputed that at no point either before or after the 1991 property transfer, until she signed the *Sasser Assignment* in 2006, did Mrs. Sasser either assign or otherwise convey to a third-party ***any*** of her retained rights as the Developer of the Woodland Plantation subdivision. (R.p.28; R.pp.39-34; R.p.45; R.p.97, paras. 6-7; R.p.403, line 16 – R.p.405, line 10; R.p.406, line 20 – R.p.407, line 7).

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declaration; and (3) by implication from a general plan or scheme of development." *See generally* Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct.App. 2006). *See also* Kinard v. Richardson, 407 S.C. 247, 259, 754 S.E.2d 888, 893 (Ct.App. 2014).

30 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362, 628 S.E.2d 902, 913.

31 The sale was subject to the Restrictive Covenants (R.p.97, paras. 1-6; R.p.273, p.17, line 10 - R.p.275, line 6; R.p.403, line 16 - R.p.405, line 10) which had been incorporated in the 1991 Coleman Deed (R.p.72; R.p.241; R.p.376) through the 1983 Holmes Deed. (R.p.71; R.p.240; R.pp.243-245; R.p.375).

In fact, Mrs. Sasser specifically stated "[i]t was ***never [her] intention*** [at the time she sold the lots in the Woodland Plantation subdivision] ***to relinquish*** [any of the developer] ***authority*** provided [to her] by the restrictions in each deed . . . to anyone, including [the] ***individual lot owners*** . . . ." (R.p.98, para. 8) (Emphasis added).**32**

As the Court of Appeals recognized,**33** when Mrs. Sasser sold the individual lots in the Woodland Plantation Subdivision to third-parties, the various lots were all made specifically subject to the Restrictive Covenants. (R.p.97, paras. 5-6; R.p.272, line 19 – R.p.277, line 23; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 14 – R.p.296, line 5; R.p.R.p.385, line 24 – R.p.390, line 23). Those important limitations, conditions, and restrictions provided, in relevant part, as follows:

> This conveyance is made subject to the following restrictive covenants which are deemed to run with the land and are bound on the purchasers, their heirs and assigns:
>
> 1. At the expression "Developer" as used herein shall be construed to mean [Mrs.] Helen Sasser, her heirs and assigns;
> 2. No lot shall be used for commercial purposes without express written consent from the Developer;
>
> * * *
>
> 8. In the event of any of the above covenants shall be deemed invalid, then such invalidity shall in no way affect any of the remaining covenants.

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32 There is no subdivision map and/or plat for Woodland Plantation. (R.p.63-64, paras. 1-4; R.p.97, para. 4). There is no type of formal subdivision plan. (R.p.63-64, paras. 1-4; R.p.97, paras. 4-6).

33 AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220.

(R.pp.30-37; R.p.41; R.p.45; R.p.97, paras. 5-6; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23). As noted, those restrictions specifically designated Mrs. Sasser as the Woodland Plantation subdivision's "developer" and provided, among other things, the lots could not be used for commercial purposes unless she gave express written consent. (R.pp.30-37; R.p.41; R.p.45; R.p.97, paras. 5-6; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23).**34** Furthermore, such "development rights" are a recognized and protected property right.**35**

In *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*,**36** the Court of Appeals recognized that "a developer may generally reserve to himself the right to amend restrictive covenants in his sole discretion, and may do so without the consent of the grantee, so long as he exercises that right in a

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34 AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220.

35 *See e.g.*: Louthan v. King County, 94 Wash.2d 422, 428, 617 P.2d 977 (1980); JSS Realty Co., LLC v. Town of Kittery, Maine, 177 F.Supp.2d 64, 70 (D.Me. 2001) (development rights in property constitutes a protectable property interest); Herr v. Pequea Twshp., 2000 WL 1100848 *7, decided July 31, 2000 (E.D.Pa. 2000) (Not Reported in F.Supp.2d); Penn Central Trans. Co. v. N.Y., 438 U.S. 104 (1978). *See also* Crystal Lake Condominium Assoc., Inc. v. New England Equity, 2002 WL 652243, decided March 13, 2002) (Not Reported in A.2d) (a developer's loss of its development rights in property constitutes a loss of a property interest).. *See generally* West Main Associates v. City of Bellevue, 106 Wash.2d 47, 50, 720 P.2d 782 (1986); Schooner Harbor Ventures, Inc. v. United States, 81 Fed.Cl. 404, 413-414 (Ct. Fed. Claims 2008); Weyerhaeuser v. Pierce County, 95 Wash.App. 883, 891, 976 P.2d 1279, 1284 (Div. 2, 1999) (". . . development rights are valuable and protected property interests.").

36 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902. Axiomatically, the Court of Appeals relied primarily on this case to decide this matter. AJG Holdings v. Dunn, 392 S.C. 160, 165-166, 708 S.E.2d 218, 221-222.

reasonable manner."[37] On the other hand, when "a subdivision developer is divested of all [his] interest in the subdivision, [the developer's] reserved right to amend restrictive covenants is extinguished."[38]

In reaching this conclusion, the Court of Appeals relied on the Georgia Supreme Court's 1985 decision in *Armstrong v. Roberts*,[39] where the Georgia Court stated:

> So long as the developer owns an interest in the subdivision being developed his own economic interest will tend to cause him to exercise a right to waive restrictions in a manner which takes into account harm done to other lots in the subdivision. There is some economic restraint against arbitrary waiver. After the developer has divested himself of all interest in the subdivision this economic restraint is lacking. We adopt the New York and Illinois rule. A

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37 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (*citing* Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So.2d 665, 666 (Fla. DCA 1st 1974) (*citing* Johnson v. Three Bays Properties No. 2, Inc., 159 So.2d 924, 925 n. 1 (Fla. DCA 2nd 1964)), *cited with approval in* Wright v. Cypress Shores Dev. Co., Inc., 413 So.2d 1115, 1123-1124 (Ala. 1982); Rossman v. Seasons at Tiara Rado Assocs., 943 P.2d 34, 37 (Colo.App. 1996); Markey v. Wolf, 92 Md.App. 137, 607 A.2d 82, 94 (1992); Appel v. Presley Cos., 111 N.M. 464, 806 P.2d 1054, 1056 (1991); Scoville v. SpringPark Homeowner's Assocs., Inc., 784 S.W.2d 498, 509 n. 7 (Tex.App. 1990); Lakemoor Community Club, Inc. v. Swanson, 24 Wash.App. 10, 600 P.2d 1022, 1025 (1979)).

38 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362-363, 628 S.E.2d 902, 914 (*citing* Armstrong v. Roberts, 254 Ga. 15, 15, 325 S.E.2d 769, 770 (1985)).

39 Armstrong v. Roberts, 254 Ga. 15, 325 S.E.2d 769. The Georgia Supreme Court adopted legal reasoning from decisions emanating out of New York and Illinois. *See* Armstrong v. Roberts, 254 Ga. 15, 15, 325 S.E.2d 769, 770 (*citing* Richmond v. Pennscott Builders, Inc., 43 Misc.2d 602, 251 N.Y.S.2d 845 (1964); Fairways of County Lakes v. Shenandoah Dev. Corp., 113 Ill.App.3d 932, 69 Ill.Dec. 680, 447 N.E.2d 1367 (Ill.App. 2 Dist.1983)).

> developer of a subdivision who reserved the authority to waive restrictions in covenants running with the land no longer possesses that authority after divesting himself of his interest in the subdivision.**40**

Like Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp. and, by implication, *Armstrong v. Roberts*, AJG Holdings asked the Court of Appeals to "follow the rule that a developer of a subdivision who reserves authority respecting restrictive covenants running with the land loses that authority when he divests himself of his interest in the subdivision."**41** Conversely, herein, "[t]his [covenant extinguishment] rule has no application here, [since, at the relevant time, Mrs. Sasser] maintain[ed] a ***substantial interest*** in [the Woodland Plantation subdivision]."**42** The *Sasser Retained Rights* were protectable rights in real property. Contrary to AJG Holdings' "narrow [myopic] view . . . [which completely] fail[ed] to recognize [Mrs. Sasser's retained her developer] interest in [Woodland Plantation] and [her] corresponding [ability] to [enforce the covenants and enter into the *Sasser Assignment*]."**43**

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40 Armstrong v. Roberts, 254 Ga. 15, 16, 325 S.E.2d 769, 770.

41 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 364, 628 S.E.2d 902, 914 (*citing* Armstrong v. Roberts, 254 Ga. 15, 15, 325 S.E.2d 769, 770).

42 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 364, 628 S.E.2d 902, 914 (Emphasis added).

43 Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 364, 628 S.E.2d 902, 914. As an aside, the Court of Appeals decided Queen's Grant II on 10 April 2006, well after all of the relevant deeds and plats herein had been produced, executed and recorded. (R.pp.30-337; R.pp.237-257). Since Queen's Grant II created a new right in the Respondents to enforce the Restrictive Covenants where no such right existed previously, the decision should be applied prospectively and, in turn, not apply to the Dunns' property purchase or their desire to possibly operate a "bed and breakfast" facility. *See* Lord v. D&J Enterprises, Inc., ___ S.C. ___, ___, ___ S.E.2d ___, ___ (2014) (2014 WL 1386678, *4, filed 9 April 2014) (Citations omitted). This

In its affirmance, the Court of Appeals apparently chose to adopt a very restrictive and limited view of the types of circumstances, conditions, and/or situations which might give rise to a party having a "protectable property interest" in a real estate subdivision.[44] Stated otherwise, the Court of Appeals has "defined" what a "protectable property interest" is not, but has failed to say what it is. Furthermore, in doing so, the Court of Appeals has completely ignored the principal, acknowledged in a number of different jurisdictions, that "development rights" ***constitute an important, recognized, and protectable property right***.[45]

interpretation would be consistent with Judge Abbott's attempt, through Mrs. Sasser's relative, Phillip Sasser, to acquire (*i.e.;* purchase), via a signed written instrument, Mrs. Sasser's "development rights" in the Woodland Plantation subdivision. (R.p.346, line 9 - R.p.347, line 25). Judge Abbott obviously thought Mrs. Sasser's "developer rights" had significant value such that he wanted to divest Mrs. Sasser of those rights.

44 Clearly, the Court of Appeals' "definition" of such a "protectable property interest" does not include a person's and/or entity's "developer rights".

45 Sanford v. Clallam County, 118 Wash.App. 1071 (Wash.App. Div. 2 2003) (Not Reported in P.3d) (2003 WL 22332992, *2 decided October 14, 2003) (*citing* Louthan v. King County, 94 Wash.2d 422, 428, 617 P.2d 977. *See also generally* Samson v. City of Bainbridge Island, 683 F.Supp.2d 1164, 1168 (W.D.Wash. 2010) (". . . development rights are valuable and protectable property rights.") (*citing* Vashon Island Comm. for Self-Government v. Boundary Review Board, 127 Wash.2d 759, 768, 903 P.2d 953 (1995); Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)); Erickson & Associates, Inc. v. McLerran, 123 Wash.2d 864, 870, 872 P.2d 1090, 1091 (1994) (same); Charlotte County Park of Commerce, LLC v. Charlotte County, 927 So.2d 236 (Fla. 2nd DCA 2006) (discussing Florida statutory claim for governmental burdening of developer rights); Wolf Creek Ski Corp. v. Board of County Com'rs of Mineral County, 170 P.3d 821, 827 (Colo.App. 2007) (*citing* James A. Kushner, Subdivision Law and Growth Management, § 7.14 (2006)) (recognizing the existence of protectable development rights)); Village of Hobart v. Brown County, 271 Wis.2d 268, 678 N.W.2d 402 (2004) (same); American West Development v. City of Henderson, 111 Nev. 804, 898 P.2d 110 (1995) (*per curiam*) (same). *See also generally* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U.J. Urb. & Contemp. Law, 27, 31 (Summer 1996).

For example, the Washington Supreme Court, in Louthan v. King County,[46] noted that "[a]lthough [they are] less than a fee interest, development rights are beyond question a valuable right in property."[47] The Virginia Supreme Court, in D.R. Horton, Inc. v. Bd. of Sup'rs for County of Warren,[48] noted that that " ' [d]evelopment rights are property rights' protected under Virginia law."[49]

Mrs. Sasser had a clear protectable property interest in the Woodland Plantation subdivision due to the *Sasser Retained Rights*. Moreover, under the *Sasser Retained Rights*, Mrs. Sasser specifically retained the right to either waive or enforce the Restrictive Covenants on property in the odland Plantation subdivision. (R.pp.30-37; R.p.40; R.p.45; R.p.97, paras. 5-6; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23). Equally importantly, Mrs. Sasser also retained the right to ***assign*** those development rights to third-parties, such as the Dunns. (R.p.97, paras. 5-6; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23).

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46 Louthan v. King County, 94 Wash.2d 422, 617 P.2d 977 (1980).

47 Louthan v. King County, 94 Wash.2d 422, 428, 617 P.2d 977, 981 (*citing* Penn Central Trans. v. New York, 438 U.S. 104, *rehearing denied*, 439 U.S. 883 (1978)). *See also* Town of Woodway v. Snohomish County, ___ Wash.3d ___, ___ ___ P.3d ___, ___ (2014) (*En banc*) (2014 WL 1419187, *3, filed 10 April 2014) (Washington . . . recognize[s] that development rights are valuable property interests.").

48 D.R. Horton, Inc. v. Bd. of Sup'rs for County of Warren, 285 Va. 467, 737 S.E.2d 886 (2012).

49 D.R. Horton, Inc. v. Bd. of Sup'rs for County of Warren, 285 Va. 467, 471, 737 S.E.2d 886, 888-889 (*quoting* Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C., 269 Va. 315, 331, 609 S.E.2d 49, 57 (2005)). *See* Mission Springs, Inc. v. City of Spokane, 134 Wash.2d 947, 954 P.2d 250, 257 (1998). *See generally* West Main Associates v. City of Bellevue, 106 Wash.2d 47, 50, 720 P.2d 782; Schooner Harbor Ventures, Inc. v. U.S., 81 Fed.Cl. 404, 413-414 (Ct. Fed. Claims 2008); Weyerhaeuser v. Pierce County, 95 Wash.App. 883, 891, 976 P.2d 1279, 1284 (Div. 2, 1999).

Consequently, even though Mrs. Sasser had sold all of her real property in Woodland Plantation subdivision in 1991, under *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.* and *Armstrong v. Roberts*, she still had the ability in 2006 to either waive or enforce the Restrictive Covenants since Mrs. Sasser had retained to herself (in the various deeds) the valuable property interests of the ""development rights" over the property.**50**

Much like Judge Abbott's unsuccessful post-1991, attempt, the Respondents could have sought to purchase Mrs. Sasser's "developer rights" when they purchased their individual lots. The deeds they received all reserved to Mrs. Sasser those rights and the Respondents are deemed to know the contents of their deeds. When the Respondents bought their respective lots they bought the property subject to the *Sasser Retained Rights*. The fact the Respondents may have misinterpreted the deeds or overlooked Mrs. Sasser's restrictions does not diminish the validity of the *Sasser Retained Rights*.

Robert M. Wilcox, Esquire ("Professor Wilcox"), a tenured law professor at the University of South Carolina School of Law, opined that Mrs. Sasser's assignment of her Developer Rights to the Dunns, via the *Sasser Assignment*, would transfer her "right to waive enforcement [of the Restrictive Covenants to the Dunns and] would have given the Dunns the right to waive enforcement of the [Restrictive Covenants] on [the River Lots]." (R.p.107, para. G). Furthermore,

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50 In this State, " '[a] restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land.' " West v. Mayberry Electric Co-op., 357 S.C. 537, 593 S.E.2d 500 (Ct.App. 2004) (*quoting* Marathon Financial Co. v. HHC Liquidation Corp., 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct.App. 1997) (Citations omitted)).

Professor Wilcox opined that, as a result of the existence and enforceability of the *Sasser Assignment*, no "new right [could] have vested in the other landowners allowing them to enforce the [Restrictive Covenants] against the Dunns." (R.p.107, para. G).

Importantly, "by retaining the exclusive right to waive enforcement of the [Restrictive Covenants], [Mrs.] Sasser indicated in the [various] deed[s] her intention that only she, *or* ***those to whom she assigned the power to grant a waiver***, could determine whether [or not] to enforce the [Restrictive Covenants]." (R.p.107, para. F) (Emphasis added). There was "no scheme with mutually intended rights [ever] intended [when Ms. Sasser sold the individual lots in the subdivision]." (R.p.107, para. F). Professor Wilcox opined "that [the] other purchasers of adjacent lots [(*i.e.*: the Respondents)] from [Mrs.] Sasser ***acquired no right*** by [either] law or equity, at the time of their purchase, to enforce the [Restrictive Covenants] imposed upon [the River Lots] owned by the [Dunns]." (R.p.107, para. F) (Emphasis added).

On the other hand, once the Dunns obtained Mrs. Sasser's developer rights via the *Sasser Assignment*, they were entirely free to either enforce or decline to enforce any of the Restrictive Covenants on the River Lots. The Dunns fully and completely now hold the "Developer's" power to waive or enforce the Restrictive Covenants and may use it as they see fit. In fact, pursuant to the *Consent Agreement*, they have validly removed the second and third components of the Restrictive Covenants applicable to the River Lots, namely the restrictions against commercial use and the further division and/or subdivision of the property.

(R.pp.28-29; R.pp.45-49; R.pp.129-133). Additionally, the fact the Dunns exercised their legal rights under the *Sasser Assignment* and the *Consent Agreement* to modify the Restrictive Covenants on the River Lots does not create and/or vest any new rights in AJG Holdings, *etc.* which would allow those parties to enforce the Restrictive Covenants on the River Lots. (R.p.107, para. F).

Mrs. Sasser validly retained certain development rights in the subdivision when she sold the property in 1991 (R.p.28; R.pp.39-40; R.p.45; R.pp.97-98, paras. 6-8; R.p.403, line 16 – R.p.405, line 10). She also specifically reserved the right to transfer the *Sasser Retained Rights* to a third party. (R.p.28; R.pp.39-40; R.p.45; R.pp.97-98, paras. 6-8; R.p.403, line 16 – R.p.405, line 10). Mrs. Sasser transferred the *Sasser Retained Rights* to the Dunns (R.pp.40-41, para. 3; R.pp.124-125, para. 3; R.p.405, lines 11-12) who then, as the property's Developer, properly and legally removed the restrictions against commercial use and property subdivision from the River Lots. (R.pp.28-29; R.pp.30-37; R.pp.45-49; R.pp.112-113; R.pp.114-121; R.pp.129-133).

Both the Dunns and Mrs. Sasser acted properly in this matter and should have been granted summary judgment as a matter of law. The Circuit Court incorrectly and improperly granted summary judgment to AJG Holdings. This Supreme Court must reverse that decision in all respects. Alternatively, given the essentially undisputed facts and the law applicable to this matter, this Supreme Court should remand this matter back to the Circuit Court with directions for the Circuit Court to enter summary judgment in favor of the Dunns and Mrs. Sasser.

2. **The Restrictive Covenants Attaching To The Woodland Plantation Subdivision Were Extinguished When Mrs. Sasser Sold All Of The Property And, Therefore, Neither Mrs. Sasser Nor Any Subsequent Property Owner Retained Any Enforcement Rights**

Once determining Ms. Sasser did not retain any rights, the Court of Appeals declined to reach the issue of who might be able to enforce the Restrictive Covenants on the basis to do so would equate to reviewing the unreviewable – the denial of summary judgment.**51** The Court of Appeals did not, however, take the logical next step and set forth what rights, if any, actually transferred from Ms. Sasser to the Respondents given (a) the fact the Court of Appeals found Ms. Sasser did not retain any rights to herself and (b) all of the evidence showed she did not intend to transfer any restrictive developer rights when she sold the property. This issue was not part of the denied summary judgment motion and, therefore, ripe for decision. In fact, had the Court of Appeals determined no rights transferred since they were extinguished at the time when Ms. Sasser sold the last of her property, it is very likely this case would be finally resolved in all respects. Stated otherwise, regardless of the ability of any party to enforce any alleged rights, if none passed in the first instance, then enforcement is ultimately a non-issue.

As this Supreme Court is aware, the benefit of a restriction imposed upon a lot by a developer, such as Mrs. Sasser, cannot be enforced at law by later purchasers of other lots from the developer, such as AJG Holdings, *unless* the developer ***intended*** for the benefit to run with the lots subsequently sold.**52**

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51 AJG Holdings v. Dunn, 392 S.C. 160, 166-167, 708 S.E.2d 218, 222.

52 Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 314-315, 372 S.E.2d 120, 121-122 (Ct.App. 1988).

Furthermore, "where the owner of a tract of land subdivides it and sells the distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created."**53** Nevertheless, when the developer, at the time of the various property sales, does not have such a general development scheme or fails to express a specific intention that other persons should be able to enforce the benefit of a restrictive covenant, then the covenant at issue is merely a personal covenant between the restricted owner and the grantor and is enforceable only be the grantor.**54**

Additionally, the mere fact the restrictive covenants at issue were uniform in nature and placed in various deeds to adjacent parcels by a common grantor is not determinative of the existence of a common or general scheme.**55** This is

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53 McDonald v. Welborn, 220 S.C. 10, 18, 66 S.E.2d 327, 331 (1951) (*citing* Pitts v. Brown, 215 S.C. 122, 54 S.E.2d 538 (1949); 26 C.J.S., Deeds, § 167 (West 1948)). *See also* Reyner v. J.B. Stephens, 289 S.C. 575, 578, 347 S.E.2d 878, 880 (1986).

54 *See* Reyner v. J.B. Stephens, 289 S.C. 575, 578, 347 S.E.2d 878, 880. *See also generally* Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct.App. 1992).

55 Heffner v. Litchfield Golf Co., 258 S.C. 447, 450-451, 189 S.E.2d 3, 4-5 (1992). It is undisputed that there were no commercial restrictions on the Nine Acre Tract which adjoined the River Lots. (R.p.28; R.p.277, line 24 - R.p.278, line 14; R.p.296, lines 6-22). AJG Holdings v. Dunn, 392 S.C. 160, 163, 708 S.E.2d 218, 220. AJG Holdings has never asserted any such non-commercial use restrictions attach to the Nine Acre Tract. (R.p.177, line 21 - R.p.178, line 4). AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 220. In fact, the Court of Appeals acknowledged that AJG Holdings wanted to "amend the restrictive covenants so that the covenants would [also] govern the Dunns' nine acres bordering the [Woodland Plantation] subdivision." *See* AJG Holdings v. Dunn, 392 S.C. 160, 164, 708 S.E.2d 218, 220. To the extent that any restrictions may have applied to the Nine-Acre Tract, who would had the authority to enforce those

particularly true when, like here, there is overwhelming ***evidence*** the grantor (i.e.; Ms. Sasser) ***did not intend***, at the time of the grant, to authorize mutuality of enforcement.**56** The only evidence is that Mrs. Sasser specifically intended to retain her rights as the developer of the Woodland Plantation subdivision. (R.p.97, paras. 5-6; R.p.272, p.15, line 19 – R.p.277, line 23; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 14 – R.p.296, line 5; R.p.385, line 24 – R.p.390, line 23).

According to the various deeds containing the Restrictive Covenants, Mrs. Sasser personally retained the sole rights to waive one or more of the Restrictive Covenants. (R.pp.97-98, paras. 1-8; R.p.406, line 20 – R.p.407, line 7). Professor Wilcox opined Mrs. Sasser's "retention of sole authority to waive enforcement [of the Restrictive Covenants] [wa]s consistent with [her] intent to create a personal covenant, rather than to create an enforceable benefit that r[an] with the land [she] later sold . . . to [AJG Holdings, *etc.*]. (R.p.106, para. C). Mrs. Sasser herself stated "[i]t was never [her] intention to relinquish [her] authority provided by the restrictions in each deed in which they were contained to anyone, including individual lot owners, until [she] entered into the [*Sasser Assignment*] agreement to do so with the Dunns in 2006." (R.p.98, para. 8).

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restrictions other than Mrs. Sasser. Furthermore, as for the Restrictive Covenants which the Court of Appeals found applicable on the River Lots, are they enforced by (1) a majority vote even though several of the homes have many owners, (2) by majority vote of one house – one vote, or (3) by majority vote of one vote per one acre? The Restrictive Covenants fail to provide any indication or direction as to the applicable enforcement procedure.

56 Heffner v. Litchfield Golf Co., 258 S.C. 447, 451, 189 S.E.2d 3, 5.

Professor Wilcox stated it was "undecided under South Carolina law whether Mrs. Sasser retained any continuing right, after she sold her last interest in the property, to waive or enforce the [Restrictive Covenants] on the lots she had sold. (R.p.107, para. G). Consequently, he further noted that "if [Mrs.] Sasser's right to waive or enforce the [Restrictive Covenants] ended upon the sale of her last lot, then . . . the restrictions on the Dunns' land would have become ***unenforceable by any person at that time***." (R.p.107, para. G) (Emphasis added).

The Restrictive Covenants were personal covenants on the Woodland Plantation subdivision property enforceable only by Mrs. Sasser and, therefore, once she sold all of her property in Woodland Plantation the Restrictive Covenants ceased to exist because they could not be enforced by anyone except her. Therefore, neither AJG Holdings nor any of the other Respondents nor any of the present landowners have any right to enforce the Restrictive Covenants against the Dunns and upon the River Lots.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioners, Levon Dunn, Pamela S. Dunn, and Helen Sasser, respectfully request this Supreme Court to reverse the decision of the Court of Appeals in all respects and, in turn, enter judgment in their favor.

Respectfully submitted:

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By:____________________________

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Charleston, South Carolina
9 May 2014

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STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Georgetown County
Honorable John M. Milling, Circuit Judge
Civil Action No.: 2006-CP-22-0914
South Carolina Court Of Appeals
Opinion No. 4779

AJG Holdings, LLC; Stalvey Holdings, LLC; David Croyle; Linda Croyle; Jean C. Abbott; Linda T. Courtney; Sumter L. Langston; Diane Langston; Carl B. Singleton, Jr.; Virginia M. Owens, and Stoney Harrelson,

Respondents,

v.

Levon Dunn; Pamela S. Dunn; and Robin H. Sasser and Charles E. Sasser as Personal Representatives of the Estate of Helen Sasser,

Petitioners.

PROOF OF SERVICE
for
PETITIONERS BRIEF ON *CERTIORARI*

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I, Stephen P. Groves, Sr., Esquire, hereby certify that on 9 May 2014, I served one copy of the ***Petitioners Brief on Certiorari*** submitted by the Petitioners, Levon Dunn, Pamela S. Dunn, and Helen Sasser, on counsel for the Respondents via the United States Mail, postage pre-paid, and addressed as follows:

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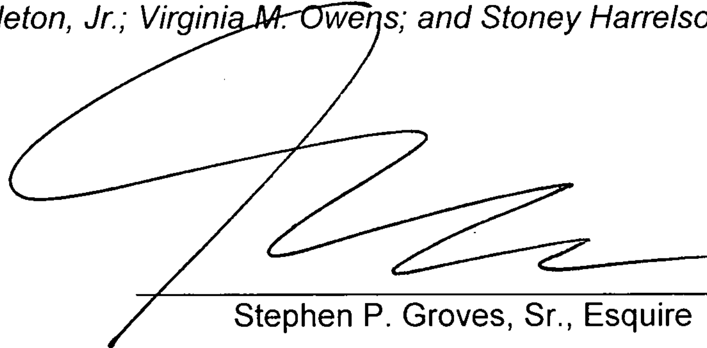

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

9 May March 2014

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