IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court

The Honorable Carolyn C. Matthews

Case No. 12-ALJ-17-0542-CC

Dorchester County Assessor ....Appellant,

v.

Middleton Place Equestrian Center, LLC ....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE COURT ERR IN AWARDING THE AGRICULTURAL USE TAX ASSESSMENT TO PROPERTIES THAT ARE DEDICATED SOLELY TO RESIDENTIAL USE BY RESTRICTIVE COVENANTS?**

STATEMENT OF THE CASE

For tax year 2012 the Dorchester County Assessor ("Assessor") denied the agricultural land use classification for ad valorem taxes on eleven (11) residential house sites within the Middleton Place Subdivision a/k/a Middleton Oaks, owned by Respondent Middleton Place Equestrian Center, LLC ("Respondent"). R. pp. 111-121. Middleton appealed the classification denial to the Dorchester County Board of Assessment Appeals who reversed the Assessor without setting forth a legal basis in its decision. R. pp. 26-27. The Assessor appealed to the South Carolina Administrative Law Court who entered its Final Order and Decision dated August 20, 2013 finding in favor of Respondent. R. pp. 14-25. Upon the Assessor's Motion to Alter or Amend, the Administrative Law Court entered its Order of September 30, 2013 denying Assessor's Motion, but simultaneously entered an Amended Final Order and Decision in which it withdrew an award of attorney's fees to Respondent. R. pp. 1-13. Dorchester County Assessor appealed to the South Carolina Court of Appeals.

FACTS

For the 2012 tax year, the Dorchester County Assessor denied the agricultural land use classification for eleven (11) residential home sites within the Middleton Place Subdivision a/k/a Middleton Oaks, owned by Respondent Middleton Place Equestrian Center, LLC, and identified as Dorchester County Tax Map Numbers 180-00-00-003, 180-00-00-005, 180-00-00-024, 180-00-00-026, 180-00-00-027, 180-00-00-028, 180-00-

00-033, 189-00-00-001, 189-00-00-004, 189-00-00-005, 189-00-00-009. R. p. 208. The Assessor denied the classification following an audit of all properties in the County consisting of less than five (5) acres that were then receiving agricultural land use classification. The Assessor found that Respondent's home sites did not meet the statutory requirements for an agricultural classification. R. pp. 123-133.

The properties in question are subject to Restrictive Covenants governing the use of Respondent's properties. R. pp. 134-207. These covenants specifically state, "All residential lots in Middleton Oaks shall be used for residential purposes exclusively." R. p. 144. (emphasis added). The Covenants define a residential lot as "any unimproved parcel of land located within the property which is intended for use as a site for a single family detached dwelling . . . as shown upon any recorded final subdivision plat of any part of the property." R. p. 137.

On a final plat dated November 20, 1990, entitled "Plat Showing the Housesites at Middleton Place" and recorded in Dorchester County Plat Book H at Page 93, Respondent's predecessor subdivided property subject to the Covenants into individual lots for residential development according to the Plat. R. p. 122. (emphasis added). Respondent or its predecessor has since sold for residential development all but nine of the properties identified on the Plat. R. 208. The nine unsold parcels constitute nine of the eleven properties in question. The other two lots subject to the current litigation are similarly subdivided as house sites from a larger tract. R. pp. 67-68. No other plat has been recorded for the subject house sites. R. p. 87.

ARGUMENT

I. BECAUSE THE SUBJECT PROPERTIES ARE LIMITED TO RESIDENTIAL USE BY RESTRICITVE COVENANTS, THEY DO NOT MEET STATUTORY REQUIREMENTS OF DEDICATION TO COMMERCIAL USE TO QUALIFY AS AGRICULTURAL REAL PROPERTY FOR AD VALOREM TAX PURPOSES.

Because the Respondent's properties are subject to restrictive covenants committing the property to solely residential use, the Administrative Law Court erred in concluding the Respondent's property qualifies for ad valorem tax assessments as agricultural real property. An agricultural use classification is granted to real property "actually used for such agricultural purposes." S.C. Code Ann. § 12-43-220(d) (2005). Agricultural real property is defined as "any tract of real property which is used to raise, harvest or store crops, feed, breed or manage livestock, or to produce plants, trees, fowl or animals useful to man, including the preparation of the products raised thereon for man's use and disposed of by marketing or other means." S.C. Code Ann. § 12-43-230(a) (2002).

Section 12-43-230(a) requires the South Carolina Department of Revenue to promulgate a regulation designed to provide a more detailed definition of "agricultural real property" and to exclude from the use assessment any real property not used for a bona fide agricultural purpose. Accordingly, S.C. Code Ann. Regs. 117-1780.1 (2004) was promulgated, which states, "[r]eal property must meet the requirements of 12-43-220(d), 12-43-230 and 12-43-232 in order to be classified as agricultural real property." In addition, "[i]n no event shall real property be classified as agricultural real property when such property is not used for <u>bona fide agricultural purposes.</u> <u>Real property is not used for agricultural purposes unless the owner or lessee thereof has, in good faith,</u>

committed the property to that use." *Id.* (emphasis added). The regulation specifically excludes vacant land (like Respondent's), which is lying dormant, from the definition. *Id.*

S.C. Code Ann. Regs. 117.1780.1 (2004) further provides that while no single factor is controlling in determining if real property is used for a bona fide agricultural purpose, consideration may be given to the following factors:

(1) The nature of the terrain,
(2) The density of the marketable product (timber, etc.) on the land,
(3) The past usage of the land,
(4) The economic merchantability of the agricultural product,
(5) The use or not of recognized care, cultivation, harvesting and like practices applicable to the product involved, and any implemented plans thereof,
(6) The business or occupation of the landowner or lessee.

Furthermore, S.C. Code Ann. § 12-43-232(1)(a) (2005) states:

> If a tract is used to grow timber, the tract must be five acres or more. Tracts of timberland of less than five acres which are contiguous to or are under the same management system as a tract of timberland which meets the minimum acreage requirement are treated as part of the qualifying tract. Tracts of timberland of less than five acres are eligible to be agricultural real property when they are owned in combination with other tracts of nontimberland agricultural real property that qualify as agricultural real property. For the purposes of this item, tracts of timberland must be devoted actively to growing trees for *commercial* use." (emphasis added).

Respondent's parcels are less than five acres, but Respondent argues the parcels in question are under the same timber management system as its qualifying tracts of more than ten acres. Respondent's argument and the Order of the Administrative Law Court disregards the Restrictive Covenants that inhibit an agricultural use classification.

Respondent's properties are subject to Restrictive Covenants recorded in Dorchester County Deed Book 398 at Page 265. R. pp. 134-207. These covenants specifically state, "All residential lots in Middleton Oaks shall be used for residential

purposes exclusively." R. p. 144. (emphasis added). Included in the residential lot definition are restrictions on commercial activities. The Covenants define a residential lot as "any unimproved parcel of land located within the property which is intended for use as a site for a single family detached dwelling . . . as shown upon any recorded final subdivision plat of any part of the property." R. p. 137. The Covenants run with the land. R. p. 136. Additionally, the Covenants in Book 398, Page 272 state "[n]o trees, bushes, or underbrush of any kind may be removed without the written approval of the Agricultural Review Board." R. p. 151.

On a final plat dated November 20, 1990, entitled "Plat Showing the Housesites at Middleton Place" and recorded in Dorchester County Plat Book H at Page 93, Respondent's predecessor subdivided property subject to the Covenants into individual lots with the clearly intended use of those lots for residential development according to the Plat. R. p. 122. Respondent or its predecessor has since sold for residential development all but nine of the properties identified on the Plat. R. p. 216. The nine unsold parcels constitute nine of the eleven properties in question. The other two lots subject to the current litigation are similarly subdivided as house sites from a larger tract. R. pp. 67-68.

In the case of Respondent's property, the subdivision of the property into house sites for residential development restricts the use of those parcels under the Covenants to residential uses only. By statutory definition, to be agricultural property, Respondent's property must be real property that is "used to raise, harvest or store . . . timber . . . for man's use and disposed of by marketing or other means." S.C. Code Ann. § 12-43-230(a). There is no evidence in the record to indicate that the property in question is used for such purpose or was under a timber management plan. Likewise, no exception to the

residential use restriction exists within the Covenants to authorize timbering for the commercial purposes contemplated by applicable statute.

While the Order of the Administrative Law Court states that $40,000 of timber was cut on the property, implying that the subject home sites appearing on the final subdivision plat are actively being timbered, the finding and conclusion are contrary to the facts in evidence. R. p. 4. Respondent specifically testified that $40,000 worth of timber was cut on land other than the subject home sites. R. 84-85. The only trees Respondent testified to cutting upon the subject property were trees affected by rot or at risk for lightening strikes. R. 84. Respondent testified that the overall scheme and the plan of development of Respondent's property is preservation and conservation. R. p. 87. Aside from this testimony, there is no evidence in the record to indicate a timber management plan to which Respondent's parcels are subject, and no such plan was provided to the Assessor indicative of timbering for commercial use. R. p. 69. Without an active timberland management plan or even proof that there are bona fide agricultural purposes for the house sites—which are explicitly dedicated solely to <u>residential</u> use by the Covenants—the applicable statute simply does not allow Respondent's property to be classified as agricultural real property.

The findings and conclusions of the Administrative Law Court that the Respondent has authority under the Covenants to remove trees and therefor qualifies to receive the agricultural use tax rate is not based upon a full reading of the entire Covenants governing the use of the property. R. pp.1-12. If the Covenants are given a full reading, and if the entire body of evidence before the trial court is considered, the decision in this case does not rest upon the single provision in the Covenants relied upon by the trial court regarding the limitation on removal of vegetation from the properties

and the interpretation of who may conduct such removal. Rather, the decision hinges on the properties' dedicated use as set forth by the controlling Plat and the plain language of the use restrictions within the Covenants. Because S.C. Code Ann. § 12-43-232(l)(a) mandates that tracts of timberland must be devoted actively to growing trees for commercial use, the properties' use as defined by the Covenants is the key component in the analysis, and must be addressed by the Court.

"The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time the restriction was written." *Taylor v. Lindsey,* 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1994) (citations and quotations omitted). By finding and concluding the Middleton properties qualified for agricultural use classification without addressing the properties' clearly covenanted residential "use" requirement and the restrictions imposed thereby, the trial court impermissibly limited the restriction on commercial activity upon the subject property. The Covenant limiting the removal of vegetation must be read in the greater context of the properties' permissible use under the Covenants, because it is the dedicated use of the property that controls the application of the law—not the identity of who has permission to cut vegetation. Even assuming arguendo that Respondent (as the Architectural Review Board under the Covenants) can unilaterally remove vegetation from the properties, that fact alone does not mean the parcels should qualify for agricultural use classification under applicable statute.

The Covenants are clear on their face that Respondent's house sites—as platted—are dedicated solely for residential use and are plainly prohibited from the commercial

dedication necessary to qualify the parcels for the bona fide agricultural uses contemplated by the language of the controlling statute and regulations. Regardless of whether Respondent has authority to remove vegetation without approval of an Architectural Review Board or otherwise intended a different application when the properties were platted and subjected to the Covenants, the Covenants simply do not allow the properties to qualify as agricultural real property under statute. Although the Respondent argues that he had an agreement with Dorchester County that would assure the agricultural use assessment at the time he platted the parcels in question, there is no evidence in the record aside from a letter from the Respondent allegedly mailed to the County at the time of the platting. R. pp. 75-76.; R. pp. 210-211.

"Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language in a restrictive covenant shall be construed according to the plain and ordinary meaning attributed to it at the time of execution. *Seabrook Is. Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004). "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 the property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citation omitted). The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) (citations and quotations omitted). The properties in question are restricted to residential use, and despite any

alleged agreement between Dorchester County and the Respondent, the laws granting an agricultural use assessment do not apply to the subject properties under the facts.

Pursuant to the authority cited herein, to qualify for agricultural use classification, there must be a bona fide dedication of the subject properties to the growing and harvesting of timber for commercial use. However, the plain language of the Covenants and the evidence in this case indicate the Respondent's bona fide commitment of the subject properties to a residential use that restricts the commercial intent required by statute. The Final Order and Decision of the Administrative Law Court constitutes an error at law and is contrary to the facts and evidence in record. Accordingly, the same should be reversed.

II. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT AN AGRICULTURAL USE CLASSIFICATION WOULD APPLY TO THE PROPERTIES EVEN IF THEY ARE NOT TIMBERLAND.

The Administrative Law Court erred in finding and concluding that pursuant to S.C. Code Ann. §12-43-232(2) and S.C. Code Ann. §12-43-232(3)(e) an agricultural use classification would still apply to the parcels even if they were determined to be non-timberland. S.C. Code Ann. §12-43-232(2) states: "For tracts not used to grow timber as provided in item (1) of this section, the tract must be ten acres or more. Nontimberland tracts of less than ten acres which are contiguous to other such tracts which, when added together, meet the minimum acreage requirement, are treated as a qualifying tract. For purposes of this item (2) only, contiguous tracts include tracts with identical owners of record separated by a dedicated highway, street or road or separated by any other public way." The record contains no evidence that Respondent has utilized or attempted to treat the properties at issue as anything other than timberland. There is no evidence that the

tracts, whether contiguous or not, have any bona fide agricultural use contemplated under applicable law. Even if the instant statutory exception were applicable, there is insufficient evidence to warrant a finding that all of the platted properties would meet the contiguity requirements of the statute. Furthermore, the finding and conclusion is unsupported by an analysis of the effect of the Covenants upon the requisite bona fide commitment to agricultural uses of the property.

Furthermore, S.C. Code Ann §12-43-232(3)(e) states: "A nontimberland tract that does not meet the acreage or income requirements of this section to be classified as agricultural real property must nevertheless be classified as agricultural real property if the current owner or an immediate family member of the current owner has owned the property for at least the ten years ending January 1, 1994, and the property is classified as agricultural real property for property tax year 1994. The property must continue to be classified as agricultural real property until the property is applied to some other use or util the property is transferred to other than an immediate family member, whichever occurs first. For purposes of this subitem, "immediate family" is a person related to the current owner within the third degree of consanguinity or affinity and a trust all of whose noncontingent beneficiaries are related to the grantor of the trust within the third degree of consanguinity or affinity." The exemption of § 12-43-232(3)(e) is only applicable until "the property is applied to some other use or until the property is transferred to other than an immediate family member, whichever applies first." As the properties have been divided and platted for strictly residential use and are no longer individually owned by Charles Duell, but by an LLC, this exemption does not apply. Furthermore, the exemption only applies to a "nontimberland" parcel.

The findings and conclusions as to the applicability of §§ 12-43-232(2), (3) to the subject property constitute reversible error.

CONCLUSION

For the reasons set forth herein, the Final Order and Decision of the Administrative Law Court should, respectfully, be reversed.

Respectfully submitted,

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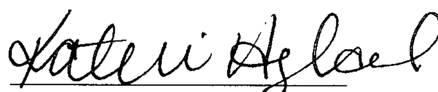
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b)(1) and (2), SCACR.



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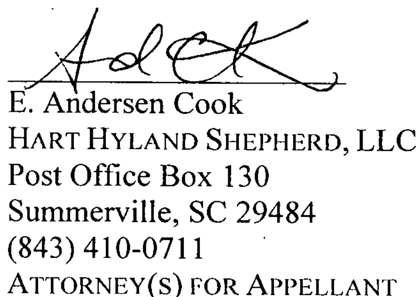
CERTIFICATE OF SERVICE

I, E. Andersen Cook, an employee of Hart Hyland Shepherd, LLC, certify that I have served the following documents on the Respondents:

- Appellant's Final Brief;
- Final Reply Brief; and
- Record on Appeal, not including the two oversized exhibits filed separately, which are already in the possession of the Respondents;

by depositing a copy of each in the United States Mail, postage prepaid, on July 21, 2014, addressed to their attorney of record, Thomas Pritchard, Pritchard Law Group, 129 Broad St., Charleston, South Carolina 29401.



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