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)

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.

PETITIONERS' REPLY BRIEF ON *CERTIORARI*

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The Petitioners, Levon Dunn and Pamela S. Dunn (the "Dunns") and Robin H. Sasser and Charles E. Sasser as Personal Representatives Estate of Helen Sasser ("Mrs. Sasser"),**1** hereby jointly respond to the Brief on Certiorari of 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").

ARGUMENT AND CITATION OF AUTHORITY

A. Only One Of Three Scenarios Is Possible

Notwithstanding the Court of Appeals' decision and AJG Holdings' position, the Dunns and Mrs. Sasser believe there are only three possible scenarios regarding the restrictions at issue – regardless of whether the restrictions are characterized as Restrictive Covenants, the Sasser Retained Rights, and/or the Developer Rights. The three scenarios and their legal effect on the parties' respective rights are described as follows:

(1) Mrs. Sasser legally preserved the restrictions and the rights to enforce and/or convey them even after 1991 when she sold the last of her property in Woodland Plantation subdivision and, therefore, Mrs. Sasser could later validly assign the restrictions to the Dunns;

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1 AJG Holdings v. Dunn, 391 S.C. 463, 706 S.E.2d 23 (Ct.App.), *opinion withdrawn from bound volume, substituted, and refilled,* 392 S.C. 160, 164, 708 S.E.2d 218, 221 (Ct.App. 2011). Mrs. Sasser passed away on 13 January 2014. 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. Sasser's' Estate. *See* Supreme Court Order issued 21 May 2014, permitting the party substation of Mrs. Sasser's Estate.

(2) Mrs. Sasser, as a matter of law, relinquished the restrictions and the rights to enforce and/convey them in 1991 when she sold the last of her property in Woodland Plantation subdivision. Moreover, since the restrictions were personal in nature to Mrs. Sasser, then those restrictions ceased to have any legal effect whatsoever and could not, thereafter, be enforced by anyone, whether Mrs. Sasser or any of the grantees of the property; or

(3) Mrs. Sasser, as a matter of law, relinquished the restrictions and the rights to enforce and/convey them in 1991 when she sold the last of her property in Woodland Plantation subdivision. Nevertheless, the grantees of the property obtained some equitable rights to enforce the restrictions since they "run with the land" and were not merely personal to Mrs. Sasser.[2]

Assuming the law[3] is in line with Scenario No. 1, there is certainly more than abundant evidence in the record which demonstrated that Mrs. Sasser specifically intended to and, in fact, did retain the developer restrictions on the property in Woodland Plantation subdivision – even after all of the property was

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[2] This last scenario was effectively the position the Court of Appeals adopted in its opinion. *See* AJG Holdings v. Dunn, 392 S.C. 160, 708 S.E.2d 218.

[3] *Other than the Court of Appeals erroneous decision herein*, the Dunns and Mrs. Sasser believe that South Carolina law is, at best, unsettled as to this issue and, in fact, depending on the interpretation of certain judicial decisions may be entirely undecided. *See generally* Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 362-363, 628 S.E.2d 902, 914 (Ct.App. 2006) (*citing* Armstrong v. Roberts, 254 Ga. 15, 15, 325 S.E.2d 769, 770 (1985)). In this vein, Professor Robert M. Wilcox opined 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 opined 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). Unfortunately, the Court of Appeals clearly ignored Professor Wilcox's well-considered and well-developed opinions.

sold. (R.p.28; R.pp.30-37; R.pp.39-40; R.p.45; R.p.97, paras. 5-7; R.p.385, line 24 – R.p.390, line 23; R.p.403, line 16 – R.p.405, line 10; R.p.406, line 20 – R.p.407, line 7; R.p.244, paras. 1-3, 8; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5).

Alternatively, also assuming the law is in line with Scenario No. 2, there was also certainly more than abundant evidence in the record demonstrating Mrs. Sasser specifically intended to and, in fact, did retain the developer restrictions on the property in Woodland Plantation subdivision – even after all of the property was sold. (R.p.28; R.pp.30-37; R.pp.39-40; R.p.45; R.p.97, paras. 5-7; R.p.385, line 24 – R.p.390, line 23; R.p.403, line 16 – R.p.405, line 10; R.p.406, line 20 – R.p.407, line 7; R.p.244, paras. 1-3, 8; R.p.282, line 25 – R.p.284, line 5; R.p.295, line 6 – R.p.296, line 5).

Finally, as for Scenario No. 3 (essentially adopted by the Court of Appeals and, not unsurprisingly, continuously espoused by AJG Holdings), a review of the record shows that AJG Holdings failed to present any evidence which credibly demonstrated that Mrs. Sasser either intended to relinquish and/or waive her developer rights and/or her authority to enforce those restrictions – even after all of the property was sold in the Woodland Plantation subdivision. In fact, the record shows that the evidence was totally to the contrary. Given the facts in this case, Scenario No. 3 was not a legitimate option.

This Supreme Court should reverse the decision of the Court of Appeals in all respects and, in turn, enter judgment in their favor.

B. Mrs. Sasser Retained Her Developer Rights Or They Were Completely Extinguished For All Persons When Mrs. Sasser Sold The Last Remaining Property Parcel

1. Mrs. Sasser Retained Her Developer Rights Even After She Sold All Of Her Property In The Woodland Plantation Subdivision

Mrs. Sasser's Developer Rights, as set forth in the Restrictive Covenants, arose in the several deeds she entered into when she sold the property parcels to third-parties.[4] (R.p.27; R.pp.30-37; R.p.97, paras. 5-6; R.p.272, line 19 –

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[4] In understanding the parties' respective positions in this appeal it is necessary to set forth the nature of the Dunns' property and its location in the appropriate context for this Supreme Court. The Dunns' property is located outside the municipal limits of the Town of Georgetown and is comprised of a 13-14 acre wooded area some 12 miles northeast of Georgetown. *See gene*rally AJG Holdings v. Dunn, 382 S.C. 43, 45, 674 S.E.2d 505, 506 (Ct.App. 2009). Importantly, there ***never have been nor are there currently any restrictions*** of the Dunns' Nine Acre Tract property (http://qpublic5.qpublic.net/qpmap4/map.php?county=sc_georgetown&parcel=03-0110-011-00-00&extent=2553253+612578+2557589+614896&layers=parcels+roads+parcel_sales+streetnum) which is situated behind the Dunns' River Lots. (http://qpublic5.qpublic.net/qpmap4/map.php?county=sc_georgetown&parcel=03-0110-009-00-00&extent=2554421+613527+2557195+614199&layers=parcels+roads+parcel_sales+streetnum) (R.p.27; R.p.177, line 18 – R.p.178, line 4; R.p.277, line 24 – R.p.278, line 14; R.p.296, lines 6-22). In fact, contrary to AJG Holdings' continued assertions, the Dunns have never conducted any commercial operations on their property. In fact, they have been subject to a Temporary Injunction since 2006, preventing them from conducting commercial operations. *See* AJG Holdings v. Dunn, 382 S.C. 43, 674 S.E.2d 505. Moreover, until 2008, there was absolutely no zoning of any kind on the affected property. This is not a typical municipal residential neighborhood, where homes are situated on half-acre or less parcels, and single families reside in all the units. This is a spread-out area with homes generally reasonably far apart from each other. (R.pp.255-257). *See generally* www.google.com/maps/place/185+Frederick+Dr,+Georgetown,+SC+29440/@33.507677,-79.1747824,4727m/data=!3m1!1e3!4m2!3m1!1s0x89003a98fe760d3f:0xd68e17f40ba04ed6. The Croyles are the only Respondents who live there on a permanent

R.p.277, line 23; R.p.403, line 16 – R.p.405, line 10). Undisputedly, Mrs. Sasser sold the last remaining property she owned in 1991 through the *1991 Coleman Deed*.**5** (R.p.272, lines 19-25; R.pp.370-377; R.p.393, line 9 – R.p.402, line 21). Contrary to AJG Holdings' assertions (*Respondents' Brief on Certiorari*, pp.10-14), that final sale was subject to the Restrictive Covenants (R.p.97, paras. 1-6; R.p.274, line 10 – R.p.276, line 6; R.p.403, p.26, line 16 – R.p.405, line 10).**6**

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basis, and their home is three properties away from the Dunns. (http://qpublic5.qpublic.net/qpmap4/map.php?county=sc_georgetown&parcel=03-0110-013-04-00&extent=2554588+613093+2556318+613379&layers=parcels+roads+parcel_sales+streetnum). There is a shooting range adjacent to the Dunns' property and a 1200 acre commercial turf farm nearby. Many of the homes in the subdivision are owned by multiple families and are essentially "time share" vacation and/or weekend retreats.

5 The Restrictive Covenants were incorporated in the 1991 Coleman Deed (R.p.71, para. 2; R.p.376, para. 2) through the 1983 Holmes Deed. (R.p.244, paras. 1-3, 8).

6 The Restrictive Covenants (i.e.; Developer Rights, Sasser Retained Rights) provided, in pertinent 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;
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> * * *
>
> 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.

Mrs. Sasser specifically had her Developer Rights "run with the land"[7] in order that all subsequent purchasers ***would actually know*** or, at least, ***be deemed to know*** as a matter of record,[8] that she was retaining certain rights as the "Developer" of the Woodland Plantation subdivision. Notwithstanding the clear record of such retained rights, the Court of Appeals ignored Mrs. Sasser's specific restrictions and, as AGJ Holdings had presumed, concluded those rights were not Mrs. Sasser's, but solely AJG Holding's to enforce. The "chain-of-title", however, fails to support AJG Holdings' position.

Furthermore, also contrary to AJG Holdings' assertions (*Respondents' Brief*, pp.10-14), neither before nor after the 1991 property transfer, did Mrs. Sasser either assign or convey away her Developer Rights.[9] (R.p.28; R.p.39-40;

(Emphasis added). (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).

[7] The fact a restriction "runs with the land" is not necessarily determinative of who may enforce the restrictions. "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.

[8] *See generally* Spence v. Spence, 368 S.C. 106, 118-121, 628 S.E.2d 869, 875-877 (2006). *See also* Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975) (the law imputes to a purchaser notice of recitals in any properly recorded instrument forming a link in the chain of title to the property to be acquired).

[9] Mrs. Sasser, ultimately, did transfer her Developer Rights to the Dunns in 2006, when she signed the Sasser Assignment. (R.pp.39-40; 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). Mrs. Sasser stated "[i]t was never [her] intention 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).

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). In this vein, AJG Holdings has consistently failed to address the proposition that when they purchased their various properties the Restrictive Covenants (*i.e.*; Developer Rights, *Sasser Retained Rights*) were incorporated in the deeds, either directly or through reference in the deed to a prior deed.**10** For example, while the 1991 Coleman Deed did not specifically recite the Restrictive Covenants verbatim, it clearly alluded to them (R.p.72, para. 2; R.p.376, para. 2) through its reference to the 1983 Holmes Deed.**11** (R.p.244, paras. 1-3, 8).**12**

Additionally, as noted before, several other jurisdictions acknowledge that an individual's and/or company's "development rights" constitute both a recognized and protected/protectable. property right.**13** Mrs. Sasser clearly

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10 Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (the law imputes to a purchaser notice of recitals in any properly recorded instrument forming a link in the chain of title to the property to be acquired).

11 The 1991 Coleman Deed specifically stated "[t]his conveyance is subject to those restrictions of record as contained herein as well as [are] 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, para. 2). This notification appears in the 1991 Coleman Deed in Deed Book 441, at Page 18. (R.p.72, para. 2).

12 The 1983 Holmes Deed spells out the Restrictive Covenants verbatim. (R.p.244, paras. 1-3, 8). Consequently, when Mrs. Sasser sold the individual lots they were all 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.385, line 24 - R.p.390, line 23).

13 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 (1980). *See* 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,

intended to and did retain the Developer Rights to herself as evidenced by the very language of the deeds. (R.p.28; R.pp.39-40; 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). Mrs. Sasser could hardly have done more to place subsequent purchasers on notice. Her rights should and must be protected, notwithstanding the Court of Appeals' decision to the contrary.

The Respondents referenced the *1991 Coleman Deed* (*Respondents Brief*, pp.10-14), and have argued that the Dunns' and Mrs. Sasser's "assertion that the *[1991] Coleman [D]eed]* contained a clear reservation of [Mrs. Sasser's] developer rights . . .[wa]s absurd." (*Respondents' Brief*, p.10).**14** Nevertheless, both the Court of Appeals and AJG Holdings inexplicably ignored the *1991 Coleman Deed*'s specific reference in Deed Book 441, at Page 18 to the *1983*

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* 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). See also generally Penn Central Trans. v. New York, 438 U.S. 104, *rehearing denied*, 439 U.S. 883 (1978); D.R. Horton, Inc. v. Bd. of Sup'rs for County of Warren, 285 Va. 467, 471, 737 S.E.2d 886, 888-889 (2012).

14 While AJG Holdings asserts the Dunns' and Mrs. Sasser's position was absurd (Respondents Brief, p.10), they completely ignore the language admittedly contained in the 1991 Coleman Deed which specifically provided "[t]his ***conveyance is subject to those restrictions of record contained herein as well as is contained in the [1983 Holmes Deed]***." (R.pp.244) (Emphasis added). If a "catch-22" exists, it is with the Respondents' position.

Holmes Deed. (R.p.244, para. 2). The restrictions were "of record" as they were within the "chain of title" for all of the Respondents and, therefore, the property of AJG Holdings was and still remains encumbered by those restrictions. AJG Holdings knew or reasonably should have known what rights they were purchasing from Mrs. Sasser. If they were mistaken in their belief, that mistake does not create rights in them which never existed in the first place. There is not presently nor has there ever been any "catch-22" as far as either the Dunns or Mrs. Sasser are concerned.**15**

Mrs. Sasser had a protectable and definitive property interest in the Woodland Plantation subdivision through the Sasser Retained Rights, Developer Rights, and/or Restrictive Covenants she retained in the 1983 Holmes Deed. Furthermore, Mrs. Sasser retained the right to either waive or enforce her Developer Rights. (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). She also retained the right to ***assign*** those rights to third-parties, such as the Dunns. (R.p.97, paras. 5-6; R.p.282, line 25 – R.p.287, line 5; R.p.295, line 6 – R.p.296, line 5; R.p.385, line 24 – R.p.390). Even though Mrs. Sasser had sold

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15 AJG Holdings attempts to "explain away" this established legal precedent by analogizing it to a scene from Joseph Heller's 1951 classic, *Catch-22* in which the medical officer postulates as to whether another characters is crazy. (Respondents' Brief, pp.9-10, n.1). Orr, roommate of the book's protagonist, Yossarian, is a combat flyer. He apparently is terrified of flying due to all of the close calls he has experienced. Orr cannot be grounded unless he shows he's insane, but the medical doctor, Dr. "Doc" Danneka, refuses to certify Orr's insanity based on Orr's refusal to fly as Dr. Danneka notes that someone who does not want to voluntarily fly into combat certainly is not crazy. *See* Joseph Heller, Catch-22 (The Folio Society 1951). This analogy is, at best, perplexing.

all of her real property in 1991, she still had the ability to waive or enforce her Developer Rights (*i.e.*; the Restrictive Covenants, *Sasser Retained Rights*) since she had retained those valuable property rights to herself in the deeds to subsequent purchasers.

The Court of Appeals incorrectly and improperly affirmed the Circuit Court's grant of summary judgment to AJG Holdings. This Supreme Court should and 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. Mrs. Sasser's Developer Rights Were Extinguished When She Sold All Of Her Property In The Woodland Plantation Subdivision

It is axiomatic that restrictive covenants cannot be enforced by subsequent purchasers of other lots from a developer *unless* the developer intended for the benefit of the restriction to run with the lots subsequently sold.[16] Furthermore,

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[16] Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 314-315, 372 S.E.2d 120, 121-122 (Ct.App. 1988). On the other hand, "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." 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). Consequently, there must be proof of a general development plan or scheme of improvement. AJG Holding did not present any evidence demonstrating Mrs. Sasser recorded a subdivision plat and/or 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). Mrs.

when a developer sells property without a general development scheme or does not express a specific intention other persons may enforce the restrictive covenant, then the covenant is a personal covenant between the restricted owner and the grantor and can only be enforced by the grantor.[17]

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 the River Lots or, for that matter, against any other property owner in the Woodland Plantation subdivision.

The Court of Appeals incorrectly and improperly affirmed the Circuit Court's grant of summary judgment to AJG Holdings. This Supreme Court should and, indeed, 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.

Sasser stated she did not have any type of "grand design" and/or "master plan" for Woodland Plantation. (R.p.97, paras. 4-7; R.p.107, para. F).

[17] *See* Reyner v. J.B. Stephens, 289 S.C. 575, 578, 347 S.E.2d 878, 880. *See also generally* Shipyard Property Owners' Association v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct.App. 1992). Even though the Restrictive Covenants were uniform in nature and placed in various deeds to adjacent parcels by a common grantor does not demonstrate the existence of a common or general scheme. Heffner v. Litchfield Golf Company, 258 S.C. 447, 450-451, 189 S.E.2d 3, 4-5 (1992).

C. The Dunns And Mrs. Sasser Properly Raised The Issue Of What Rights Were Transferred From Mrs. Sasser To The Respondents When Mrs. Sasser Sold All Of Her Property In The Woodland Plantation Subdivision

AJG Holdings argues that the Dunns and Mrs. Sasser "ma[d]e the curious argument that the Court of [Appeals] should have taken 'the logical next step and set forth what rights, if any, actually transferred from Mrs. Sasser to the Respondents.' " (*Respondents' Brief*, p.15).[18] Interestingly, however, the only fact which is "curious" is that AJG Holdings finds this inquiry to somehow be curious. It would seem logical that the Respondents would, in fact, want to know what rights, if any there were, they actually obtained from Mrs. Sasser when she sold them their respective properties. Apparently that is not the case.

Nevertheless, the Dunns and Mrs. Sasser want to know and, contrary to AJG Holdings' position (*Respondents' Brief*, pp.16-17), this Supreme Court can and should delineate what rights passed from Mrs. Sasser to the Respondents – if any rights did, in fact, pass. Should this this Supreme Court conclude the Court of Appeals correctly determined that Mrs. Sasser's Developer Rights ended when she

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[18] AJG Holdings also asserts that this Supreme Court is not permitted to address this issue as it "in not properly before this [Supreme] Court at this time . . . (Respondents' Brief, p.16). This position is meritless. The Dunns and Mrs. Sasser raised this issue in their Petition for Rehearing (Appendix, p.33), as well as in their Petition for Writ of Certiorari (pg. 21). The Court of Appeals refused to address the issue in its denial of the Petition for Rehearing. (Appendix, pp.39-40). The Dunns and Mrs. Sasser raised this issue on appeal at the first opportunity to do as it did not became an issue until the Court of Appeals issued its withdrawn opinion. Thereafter, the Dunns and Mrs. Sasser requested the Court of Appeals to issue a decision thereon which did not occur. This issue is properly before this Supreme Court.

sold the last of her property in the Woodland Plantation subdivision, the Dunns and Mrs. Sasser believe that those rights would have ended for all persons involved herein – to include both Mrs. Sasser and the Respondents.

The evidence, through the various deeds containing the Restrictive Covenants, shows 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 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). Nevertheless, Professor Wilcox 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).

AJG Holdings asserts that neither Mrs. Sasser's affidavit nor her deposition testimony nor Professor Wilcox's affidavit would "be admissible at trial because the deeds in question clearly show on their face that the covenants run with the land." (*Respondents' Brief*, p.16). AJG Holdings then cites two cases as support for that

position.[19] While both *Gardner* and *K&A Acquisition Grp.* stand for the proposition that the grantor's intent should generally be seen within the "four corners" of the deed, they also hold that when that is not necessarily possible then it is permissible to venture beyond the "four corners" to explain and/or correct the deed.[20]

Even though the Dunns and Mrs. Sasser believed (and still believe today) that the deeds from Mrs. Sasser to the various Respondents clearly and unambiguously set out Mrs. Sasser's Developer Rights and her retention of those rights after sale, the Circuit Court and the Court of Appeals found to the contrary. Consequently, both the Circuit Court and the Court of Appeals should not have ignored Mrs. Sasser's affidavit and deposition testimony regarding her intent or Professor Wilcox's affidavit addressing the effect of the various scenarios. This evidence, by necessity, was presented to explain and/or correct the deeds from Mrs. Sasser to the Respondents. Such evidence is permitted under South Carolina law.

This Supreme Court may and should address this issue of which rights, if any, passed from Mrs. Sasser to the Respondents once Mrs. Sasser sold the last of her property in the Woodland Plantation subdivision. A determination of that issue could end this litigation.

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[19] *See* Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987); K&A Acquisition Grp., LLC v. Island Point, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009).

[20] *See* K&A Acquisition Grp., LLC v. Island Point, LLC, 383 S.C. 563, 565, 682 S.E.2d 252, 262 (*quoting* Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392) (" '"The intention of the grantor must be found within the four corners of the deed [and] [w]hen intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it. [Consequently, the] instrument is not thereby varied or contradicted but is explained or corrected.' ").

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioners, Levon Dunn, Pamela S. Dunn, and Robin H. Sasser and Charles E. Sasser as Personal Representatives Estate of Helen Sasser, respectfully request this Supreme Court to reverse the Court of Appeals' decision in all respects and, in turn, remand this matter back to the Circuit Court with directions to enter summary judgment to the Dunns and Mrs. Sasser in order to finally resolve this dispute.

Respectfully submitted:

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Charleston, South Carolina
22 July 2014

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)

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 the
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I, Stephen P. Groves, Sr., Esquire, hereby certify that on 22 July 2014, I served two copies of the ***Appellants' Reply Brief on Certiorari*** submitted by the Petitioners, Levon Dunn, Pamela S. Dunn, and Robin H. Sasser and Charles E. Sasser as Personal Representatives Estate of Helen Sasser, on the following counsel via the United States Mail, postage pre-paid, and addressed as follows:

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