IN THE STATE OF COUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court

The Honorable Carolyn C. Matthews

Trial Court Case No. 2012ALJ170542CC

Appellate Case No. 2013-002320

Dorchester County Assessor ....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of Case 1

Facts 2

Arguments

1. THE APPELLANT MISINTERPRETED TO THE RESTRICITVE COVENANTS IN DETERMINING THAT THE SUBJECT PARCELS DO NOT MEET THE STATUTORY REQUIREMENTS TO QUALIFY AS AGRICULTURAL REAL PROPERTY FOR AD VALOREM TAX PURPOSES 5

2. THE ADMINISTRATIVE LAW COURT CORRECTLY INTERPRETED THE APPLICABLE STATUTES AND CASE LAW IN DETERMINING THAT THE AGRICULTURAL USE CLASSIFICATION WOULD STILL APPLY TO THE PROPERTIES EVEN IF THEY ARE NONTIMBERLAND 11

Conclusion 13

TABLE OF AUTHORITIES

CASES

Gilstrap v. South Carolina Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992) 8

Higgins v. State, 307 S.C. 446, 415 S.E.2d 779 (1992) 8

Koeing v. South Carolina Department of Public Safety, 325 S.C. 400, 480 S.E.2d 98 (Ct. App. 1996) 8

Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) 5, 6

TNS Mills, Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) 8

STATUTES

S.C. Code Ann. §12-43-220 (2005) 9

S.C. Code Ann. §12-43-230 (2002) 8, 9

S.C. Code Ann. §12-43-232 (2005) 9, 10, 11, 12, 13

REGULATIONS

117 S.C. Code Ann. Regs. 1780.1 (2004) 9, 10

STATEMENT OF ISSUES ON APPEAL

1. **DID THE COURT ERR IN AWARDING THE AGRICULTURAL USE CLASSIFICATION TO THE SUBJECT PROPERTIES?**

STATEMENT OF THE CASE

Appellant Dorchester County Assessor originally provided notification to Respondent Middleton Place Equestrian Center, LLC of Appellant's intention to tax eleven (11) parcels belonging to Respondent at the market value rate for the tax year 2012. Respondent filed an informal appeal, utilizing the procedure provided by Appellant, requesting that the parcels maintain the previous agricultural land use classification for ad valorem taxes, which appeal was received by Appellant on April 30, 2012. R. 111-121. The Dorchester County Board of Assessment Appeals heard Respondent's appeal on October 15, 2012, and subsequently issued an Order reversing the Appellant's classification of the parcels and reinstating the agricultural use classification for the parcels for the tax year 2012. R. 26-27. Appellant filed a Petition with the South Carolina Administrative Law Court seeking a Contested Case Hearing. R. 42-43. A hearing was held on May 15, 2013, before the Honorable Carolyn C. Matthews. R. 57-110. Judge Matthews entered her Final Order and Decision, dated August 20, 2013, ruling in favor of Respondent and finding that it was entitled to the agricultural use classification for the tax year 2012. R. 14-25. Appellant filed a Motion to Alter or Amend on September 3, 2013. R. 28-41. Judge Matthews entered an Order on September 30, 2013, denying Appellant's Motion to Alter or Amend and entering an Amended Final Order and Decision, removing only from her prior Order the award of attorney's fees to Respondent. R. 1-12. Appellant filed the instant appeal.

FACTS

The Respondent is the owner of eleven (11) parcels of real property located in Dorchester County, South Carolina, which parcels constitute a small portion of an overall tract of several hundred acres owned by Middleton Place Equestrian Center, LLC. These parcels are designated TMS#s 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.

In 1970, Charles H.P. Duell ("Mr. Duell"), the principal and sole member of the Respondent LLC, inherited all of the real property that is currently part of the Respondent LLC, together with significant additional property, including the historic manor remains and gardens of what is commonly referred to as Middleton Place (the portion of the property containing the surviving south flanker of the house, now operated as the house museum, and the gardens is actually designated as the Middleton Place National Historic Landmark, while the property which includes the subject parcels is on the National Register of Historic Places). R. 80-81.

In the mid-1970s, Mr. Duell developed a master plan for the set-aside of a portion of Middleton Place to provide sufficient capital to aid in the restoration of the Middleton Place National Historic Landmark. The plan was developed with the aid of Robert Marvin and was laid out with conservation and historic preservation in mind. The initial plan called for the creation of approximately twenty-five home sites which might be sold to raise capital for restoration and improvements to the Middleton Place National Historic Landmark. R. 81.

After the creation of the master plan, Mr. Duell established the Middleton Oaks

Property Owners Association, Inc., now known as the Middleton Place Property Owners Association, Inc. (the "POA"). In conjunction with the establishment of the POA, Mr. Duell drafted a "Declaration of Covenants and Restrictions of Charles H.P. Duell as Pertain to Middleton Oaks." R. 134-207.

The entire tract within the master plan continued to receive the agricultural use designation and, each time a house site was sold, the site was individually platted and a plat was recorded with the Dorchester County RMC office. The subject house site was then removed from the agricultural use designation and taxed at the appropriate market rate. R. 82.

In 1990, Mr. Duell was contacted by the Dorchester County Planning Board with a request that he have prepared and recorded a plat reflecting each of the individual house sites to aid in the recording of same when a house site was sold. Mr. Duell was concerned that the recording of a plat may require certain standard curb and gutter, sidewalk and roadway requirements common to traditional "subdivision" type developments and might, even more significantly, impact the agricultural use designation of the remaining portion of the property. R. 89. He brought his concerns to the attention of Dorchester County officials and sought assurance from then assessor Joe Murray that the designation would not change. R. 82. He confirmed this understanding in writing to Mr. Murray by letter dated August 11, 1993. R. 210-211. From the time of the recording of the plat until 2012 the subject property continued to receive the agricultural use designation for all of the unsold parcels. R. 83.

Both prior to and after the change requested by Dorchester County in 1990, the house sites were sold at a rate of less than one every two years on average and the last

transaction involving the sale of a house site took place in 2007; none have occurred since. Since the creation of the master plan less than twenty house sites have been sold and fewer than a dozen homes constructed. R. 82.

The remaining portion of the master plan property, including the eleven (11) parcels now sought to be taxed at the market value rate, have remained a part of the woodlands property. During this time period, dating back to when the plat was required to be recorded in 1990, the eleven parcels have been part of the timberland management plan that Mr. Duell follows throughout the National Register property as a whole, which calls for selective "improvement cutting" to harvest pines, allowing for the removal of mature pines and the improved viability of remaining hardwoods. R. 84. In 2012, approximately $40,000.00 worth of timber was cut on Mr. Duell's property within the Respondent LLC and listed on the National Register of Historic Places. R. 84. Plans were also approved for 2013 by the Architectural Review Board for Middleton Oaks Property Owners Association, Inc., in its advisory capacity to Mr. Duell as owner, for such improvement cutting to take place within the footprint of the remaining, unsold, house sites and common area, as is done periodically. R. 85. The only evidence in the record is that since 1993, when the agricultural use designation was reaffirmed, Mr. Duell has cut timber from some of the eleven parcels in question. R. 91.

Despite the fact that there has been no change in ownership and the parcels had continued to be managed in the same manner as had occurred since the establishment of the master plan in the mid-1970s, the Appellant sought to change the tax status of the subject parcels in 2012. The Administrative Law Court found that there was no basis for this change and reinstated the agricultural real property classification.

ARGUMENT

1. **THE APPELLANT MISINTERPRETED THE RESTRICITVE COVENANTS IN DETERMINING THAT THE SUBJECT PARCELS DO NOT MEET THE STATUTORY REQUIREMENTS TO QUALIFY AS AGRICULTURAL REAL PROPERTY FOR AD VALOREM TAX PURPOSES**

The Administrative Law Court correctly interpreted the clear meaning and intent of the Declaration of Covenants and Restrictions in concluding that Respondent maintains ultimate control over the subject parcels. In doing so, the Court declined to accept Appellant's incorrect interpretation, which he relied upon in determining that the Respondent's property did not qualify for the agricultural real property classification for ad valorem tax assessment. It is clear that the Court appreciated what the Appellant failed to about the unique nature of this particularly property and the rationale behind Respondent's intent for same.

In construing restrictive covenants, our courts have held that "[w]ords of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 3, 498 S.E.2d 862, 863 (1998). "'Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.*, 332 S.C. at 3, 498 S.E.2d at 863-864 (*quoting Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (1985)). "The court may not limit a restriction in a deed, nor, on the other hand, 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." *Id.*, 332 S.C. at 4, 498 S.E.2d at 864

(*quoting Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420, 424 (1950)). "It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of the property, subject, however, to the provision that this rule of strict construction should be applied so as not to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language and all restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property." *Id.*, 332 S.C. at 4, 498 S.E.2d at 864 *(citing McDonald v. Welborn*, 220 S.C. 10, 66 S.E.2d 327 (1951)).

The purpose of the Declaration of Covenants and Restrictions is to govern the use and restriction of the house sites once they are sold to individual owners. R. 88. The Declaration of Covenants and Restrictions reserves to Mr. Duell the sole and exclusive final authority as to all determinations related to said use and restriction, though he may appoint an Architectural Review Board to advise him in the process. R. 86. The reservation is clearly contained in the language pertaining to the appointment and authority of Architectural Review Board. R. 134-207.

The Appellant relied on language in the Declaration of Covenants and Restrictions as his basis for determining that the agricultural use classification is not appropriate for the subject parcels. Specifically, Appellant focused on language which he believes would prevent Respondent from cutting trees on the subject parcels, to wit: "No trees, bushes, or underbrush of any kind may be removed without the written approval of the Architectural Review Board." R. 134-207. However, Appellant failed to give credence to the plain language in the Declaration of Covenants and Restrictions, which grants to the owner the sole and exclusive power to "appoint an Architectural Review Board to counsel him; but

ultimate authority for the decisions of the Architectural Review Board shall in all cases rest with the Owner, his heirs and assigns." R. 134-207.

Appellant, by his own admission, made certain assumptions in his interpretation of the Declaration of Covenants and Restrictions. Specifically, he testified that "[i]f you go to buy – if you pay a huge amount of money for a lot in a subdivision, I don't think you want to wake up the next – one morning and there's a logging crew next door to you cutting all of the trees off the adjacent lot. And so that's where I think any – the restrictions – the restrictive covenants prohibit you from doing that." R. 70. There is no evidence in the record to suggest that Mr. Duell has engaged in or anticipates engaging in such practice. In fact, it is antithetical to the type of conservation and land use practices Mr. Duell has clearly demonstrated in his forty-three years of ownership and stewardship of this property. Furthermore, nothing in the statutory language pertaining to agricultural use suggest that such wholesale timbering practices are required to meet the definition.

Appellant made further assumptions about the rationale for the provisions in the Declaration of Covenants and Restrictions, but failed to apprehend and appreciate the unique nature and character of this property. Appellant has read and seeks to interpret the Declaration of Covenants and Restrictions in the context of a traditional subdivision, whereas that is clearly not present in the instant case. In his testimony, he cited his reliance on similar Covenants and Restrictions pertaining to a more traditional subdivision development in Dorchester County, Boyle Plantation, to further bolster his position. R. 66, 70. The reliance upon Boyle Plantation for comparison is misplaced in the instant case.

Given that the Declaration of Covenants and Restrictions do not proscribe Respondent's selective cutting and appropriate management of the land, and the

uncontroverted testimony in the record is that Respondent has previously and continues to selectively timber these parcels and other portions of the property owned by Respondent, one must next look to the applicable statutory provisions for determination of the agricultural use classification.

A court construing a statute must first seek to ascertain and effectuate legislative Intent. *Koenig v. South Carolina Dep't of Public Safety*, 325 S.C. 400, 480 S.E.2d 98, 99 (Ct. App. 1996). The cardinal rule of statutory construction is to give words used in the statute their plain and ordinary meaning without resort to subtle or forced construction. *Id.* The language must be read to harmonize its subject matter with its general purpose. *Id.* "In construing statutory language, the statute must read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction." *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). However, our courts have held that statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design and policy of lawmakers. *TNS Mills, Inc. v. South Carolina Department of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998). *Gilstrap v. South Carolina Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992).

S.C. Code Ann. §12-43-230(a) provides in pertinent part: "For the purposes of this article, unless otherwise required by the context, the words 'agricultural real property' shall mean 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. It includes but is not limited to such real property used for agriculture, grazing,

horticulture, forestry, dairying and mariculture. In the event at least fifty percent of a real property tract shall qualify as "agricultural real property", the entire tract shall be so classified, provided no other business for profit is being operated thereon."

S.C. Code Ann. §12-43-230(a) also 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. In accordance with the referenced requirement, Regulation 117-1780.1 was promulgated.

The Regulation provides that "Agricultural Real Property, as that term is used in 12-43-220(d), 12-43-230, and 12-43-232 of the South Carolina Code of Laws means a tract of real property which is used for agricultural purposes. Real property must meet the requirements for agricultural real property of Code Sections 12-43-220(d), 12-43-230 and 12-43-232 in order to be classified as agricultural real property. Additionally, the term Agricultural Real Property shall not include any property used as the residence of the owner or others. In no event shall real property be classified as agricultural real property when such property is not used for bona fide agricultural purposes. Real property is not used for agricultural purposes unless the owner or lessee thereof has, in good faith, committed the property to that use. Real property which is ostensibly used for agricultural purposes, but which is in reality used for other purposes, is not agricultural real property. The agricultural use of the property must be genuine in nature as opposed to sham or deception. The following factors shall be considered by county assessors in determining whether the tract in question is bona fide agricultural real property: (These factors are not, however, meant to be exclusive and all relevant facts must be considered.) 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, however, the fact that the tract may have been purchased for investment purposes does not disqualify it if actually used for agricultural purposes. In cases in which the real property is committed to more than one use, one use being agricultural use and the other use or uses being unrelated to agriculture the agricultural activity use must comprise the most significant use of the property in order for it to be classified as agricultural real property."

In weighing the factors that "shall be considered by county assessors in determining whether the tract in question is bona fide agricultural real property," the Petitioner, by his own admission, placed great weight and emphasis on the Declaration of Covenants and Restrictions. Specifically, Petitioner focused on language which he believed to proscribe the removal of timber from the subject Parcels owned by Respondent.

Because the Petitioner seeks to treat the subject parcels each separately, resulting in each being less than five acres, reference must be made to S.C. Code Ann. §12-43-232(1)(a): "If the 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." In the instant matter, Respondent owns contiguous tracts of timberland which greatly exceed the minimum requirements set forth in the statute and are managed in the same manner as the subject parcels. Respondent also owns contiguous tracts of nontimberland real property whereupon the equestrian center and other agricultural operations are situated.

Respondent has been the sole and exclusive owner of the subject parcels since Mr. Duell inherited them in 1970. The parcels in aggregate far exceed the minimum of five acres required by §12-43-232(1)(a) of the South Carolina Code of Laws, and, despite the requirement from Dorchester County in 1990 that each be separately platted, Mr. Duell has continued to treat each as part of the greater whole, which acreage vastly exceeds the requirement, and has continued to manage them as he has all of the other property owned by him at Middleton Place.

The vast majority of the real property (significantly more than fifty percent) owned by the Respondent LLC continues to qualify as agricultural real property and no other business for profit is being operated on that property.

2. THE ADMINISTRATIVE LAW COURT CORRECTLY INTERPRETED THE APPLICABLE STATUTES AND CASE LAW IN DETERMINING THAT THE AGRICULTURAL USE CLASSIFICATION WOULD STILL APPLY TO THE PROPERTIES EVEN IF THEY ARE NONTIMBERLAND

Though it is not necessary to reach this issue to affirm the finding of the Administrative Law Court, Respondent addresses the issue nonetheless as it has been raised by Appellant in his brief. The Administrative Law Court correctly determined that the

agricultural use classification would still apply to the subject parcels even if the Court were to determine they are nontimberland as defined by the statute.

Respondent's subject parcels would continue to qualify as agricultural real property for the tax year 2012, even if full deference were to be given to Appellant's interpretation of the Declaration of Covenants and Restrictions as well as his assumptions as to the use of the subject parcels, reference is made to S.C. Code Ann. §12-43-232(2) and S.C. Code Ann. §12-43-232(3)(e) for support for the contention that the designation would still apply to these parcels even if they were determined to be nontimberland. 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." 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 until 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." Each exception would apply to Respondent's parcels were they not timberland tracts.

Appellant has incorrectly asserted that this provision would not apply, based upon his wholly unsupported determination that the parcels have been "divided and platted for strictly residential use and are no longer individually owned by Charles Duell, but by an LLC." (Appellant's Initial Brief, pg.11). In fact, the uncontroverted evidence is that the purported subdivision and platting of the parcels was done at the behest of the Dorchester County Planning Board and not due to any desire or intent on the part of Respondent to create a subdivision, with the traditional requirements and restrictions one might attribute to that type of development. R. 82, 89. It is also undisputed that Middleton Equestrian Center, LLC is a sole member limited liability company and Mr. Duell is the sole member. Thus, though Appellant would have this Court believe that there has not been continuous ownership of this property by the current owner or an immediate family member at least ten years, ending January 1, 1994, there has actually been continuous ownership by one individual, Mr. Duell, since 1970, and continuous ownership by an immediate family member of Mr. Duell going back many, many years before.

CONCLUSION

For the reasons set forth herein, the Amended Final Order and Decision of the Administrative Law Court, dated September 30, 2013, should respectfully be affirmed.

Respectfully submitted,

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August 14, 2014

Charleston, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief complies with Rule 211(b)(1) and (2) of the SCACR.

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CERTIFICATE OF SERVICE

I, Thomas B. Pritchard, certify that I have served the Respondent's Final Reply Brief by depositing a copy of same in the United States Mail, postage prepaid, On August 15, 2014, addressed to Appellant's attorneys of record, Andrew T. Shepherd and Katherine H. Hyland, Hart Hyland Shepherd, LLC, 207 East 1st North Street, Summerville, SC 29483.

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