

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Cynthia Graham Howe, Master-In-Equity

Unpublished Opinion No. 2014-UP-284 (S.C. Ct. App. Filed July 9, 2014)

John Musick, ... Respondent,

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Petitioners.

**APPENDIX
VOLUME II**

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2004-CP-26-2075

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Musick,

Respondent,

v.

Thomas L. Dicks and Robert E.
Dicks, Jr.,

Appellants.

HORRY COUNTY
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CLERK OF COURT

Appeal From Horry County
J. Stanton Cross, Jr., Master-In-Equity

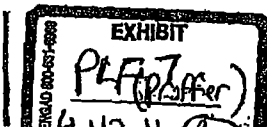
Unpublished Opinion No. 2010-UP-351
Heard June 8, 2010 – Filed July 7, 2010

REVERSED AND REMANDED

Demetri K. Koutrakos, of Columbia, for Appellants.

George M. Hearn, Jr., and Thomas C. Brittain, of
Conway, for Respondent.

PER CURIAM: This appeal arises out of cross motions for summary judgment before the Master-In-Equity. The court granted summary judgment in favor of Respondent John Musick (Musick) and dismissed the action.



Appellants Thomas L. Dicks and Robert E. Dicks, Jr. (Appellants) argue that the court erred in granting Musick's motion, in denying their motion, and in finding that Appellants violated the restrictive covenants of the subdivision by further subdividing a 2.67 acre parcel. We reverse the grant of summary judgment and remand for a trial on the merits.

FACTS

Appellants purchased a piece of property, known as Blocks 28 and 29, situated in Long Bay Estates off of Highway 17 in Horry County. The 1955 Plat of Long Bay Estates contains the following restriction:

(a) No lot shall be subdivided and no building, including porches or projections of any kind, shall be erected at a distance less than 40 feet from the front line of Blocks One (1) through Five (5) and not less than 20 feet from the front line on Blocks Six (6) through Twenty-Seven (27), ten feet from any side line and 20 feet from the rear.

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof.

1955 Plat (emphasis in original). This restriction is also contained in a document recorded at the Register of Mesne Conveyances for Horry County in 1958 (the 1958 Restrictions). Both documents provided: "These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1-27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robt. L. Bellamy, Engineer."

In 1972, the Master-In-Equity issued a report, adopted as an order of the circuit court (the 1972 Order), regarding the rights of property owners in Long Bay Estates and the effect of the 1958 Restrictions on the property. The order provided Blocks 30, 32, and 34 were "subject to the restrictions of the same type and character as those . . . applicable to Blocks 1-27, inclusive." The order further stated:

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the

rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declaration . . . reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

In 2000, some property owners in Long Bay Estates were involved in litigation again regarding the restrictive covenants, resulting in another order interpreting the 1958 Restrictions (the DeCiero Order).

Carmen Ward conveyed the property as one lot to David W. Meese, Jr. and Leigh Ammons Meese in 1997. The Meeses conveyed Blocks 28 and 29 to Appellants in 2003.

Musick, as the owner of Lot 4 of Block 24, alleged in his complaint that he is entitled to a declaration that Appellants' attempts to subdivide Blocks 28 and 29 into seven individual lots violates the restrictive covenants applicable to all lots in Long Bay Estates. Appellants denied the allegations and counterclaimed, seeking a declaratory judgment finding that the alleged restrictions do not encumber Blocks 28 and 29.

Appellants and Musick each filed motions for summary judgment after this matter had been referred to the Master-In-Equity. Following a hearing, the court issued a "Final Order Ending Action" granting Musick's motion for summary judgment. Appellants filed a motion to reconsider. The court heard the parties' arguments on Appellants' motion to reconsider before issuing an order denying the motion. This appeal followed.

STANDARD OF REVIEW

Appellants argue the trial court failed to apply the correct standard in granting the motion for summary judgment. Musick contends that as the parties filed cross-motions for summary judgment, the hearing before the trial

court was essentially converted into a bench trial. We disagree with this contention.

When each party files a motion for summary judgment and the trial court grants one motion while denying the other, this court only reviews the grant of the motion for summary judgment, not the denial. Fuller v. Blanchard, 358 S.C. 536, 546 n.21, 595 S.E.2d 831, 836 n.21 (Ct. App. 2004). In Fuller, the case concerned cross-motions for summary judgment regarding two of Dr. Blanchard's defenses. Id. The trial court simultaneously granted Mrs. Fuller's motion for summary judgment and denied Dr. Blanchard's motion. Id. This court noted the parties had blurred the distinction between the two motions. Id. We stated:

Because the granting of a motion for summary judgment is appealable while the denial of a motion for summary judgment is not, we are addressing Dr. Blanchard's arguments to the extent he appears to challenge the circuit court's grant of summary judgment to Mrs. Fuller as an error of law based on the facts of the case, although, as stated, there has been an overlapping of these issues due to the procedural posture of the case. To the extent Dr. Blanchard appears to argue the court should have granted his motion for summary judgment, the denial of summary judgment is not properly before us and we do not address it.

Id.

Thus, we will review the grant of the motion for summary judgment applying the same standard that governs the trial court. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr.,

368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Even when there is no dispute as to the evidentiary facts, summary judgment should be denied when there is a dispute as to the conclusions or inferences that can be drawn therefrom. Wilson v. Style Crest Prods., Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

1. Appellants argue the court erred in granting summary judgment by holding the 1958 Restrictions encumber Blocks 28 and 29. We agree.

The trial court found that the 1972 Order acknowledged that the prohibition against subdivision only applied to Blocks 1-27, but the parties to the 1972 litigation "specifically agreed that the restrictions would be extended" to cover other blocks in the subdivision, including Blocks 28 and 29. In his final brief to this court, Musick agrees that "it is undisputed that the original language of the covenants stated they applied only to Blocks 1 through 27."

Restrictive covenants are contractual in nature. RV Resort & Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc., 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010). The words of restrictive covenants will be given their common, ordinary meaning attributed to them at the time of their execution. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication" Buffington v. T.O.E. Enters., 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009) (quoting Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)). "[A]ll such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Id. In determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant, courts should consider equitable doctrines. Id. at 393, 680 S.E.2d at 291. "The paramount rule of construction is to ascertain and give effect to the

intent of the parties as determined from the whole document." RV Resort, 386 S.C. at 321, 688 S.E.2d at 559 (quoting Taylor, 332 S.C. at 4, 498 S.E.2d at 863-64).

We find the 1958 Restrictions, by their express terms, do not apply to Blocks 28 and 29. Musick argues, and the trial court agreed, that the 1972 Order enlarged the 1958 Restrictions such that the restrictions are applicable to all lots in Long Bay Estates. Appellants argue the court should have construed the language in the 1972 Order in their favor when deciding this matter on Musick's motion for summary judgment. We hereby reverse the grant of summary judgment as to this issue and remand for a trial on the merits because there is a dispute as to the conclusions or inferences that may be drawn from the application of the 1972 Order to clarify the 1958 Restrictions. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); Wilson, 367 S.C. at 656, 627 S.E.2d at 735.

2. Appellants argue the court erred in granting summary judgment by finding the DeCiero Order operates to extend the prohibition against subdividing to include Blocks 28 and 29. We agree.

The trial court misquoted the DeCiero Order in its order denying the motion to reconsider as follows: "[o]n their face, it is clear the 1958 Restrictive Covenants apply to the entire Long Bay Estates subdivision." Rather, the DeCiero order states: "Thus it is clear the Restrictive Covenants apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Block 11, Lots 1 and 2." Therefore, we find it was error for the trial court to rely upon the DeCiero Order in its grant of summary judgment to find that the 1958 Restrictions apply to Blocks 28 and 29. We reverse the grant of summary judgment on this issue.

3. Appellants argue the court erred in granting summary judgment by finding that the division of Blocks 28 and 29 into seven different lots, as shown on the 1955 Plat, constituted a mere "proposed plan" to subdivide. We agree.

The 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots. The trial court concluded that the maps indicated only a proposed plan to subdivide Blocks 28 and 29 because

"[t]raditionally, dotted lines on maps indicate proposed boundary lines or subdivision proposals and are not symbolic of the final decree of the Grantor." Viewed in the light most favorable to Appellants, there is more than one reasonable inference that may be drawn from the evidence regarding whether or not the grantor intended for Blocks 28 and 29 to be subdivided into seven individual lots. Law, 368 S.C. at 434, 629 S.E.2d at 648. Therefore, we reverse the grant of summary judgment on this issue and remand for trial.

4. Appellants argue the court erred in granting summary judgment by finding that because they had actual notice of the 1972 Order and its restrictive effect on Appellants' use of the property, they could not avail themselves of the protection of the Shelter Rule. We agree.

Appellants presented evidence that the Horry County Clerk of Court indexed the 1972 Order only against the named defendants to that action. Carmen Ward, Appellants' predecessor in title, was a plaintiff and not a named defendant in the 1972 litigation. Therefore, when Appellants performed a title search for Blocks 28 and 29, the 1972 Order did not appear in their chain of title. Pursuant to Section 30-9-40 of the South Carolina Code (2007), proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all. Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985). The failure to index a judgment as required by statute deprives it of its effectiveness as notice to subsequent purchasers. Id.

Appellants admit they had actual notice of the 1972 Order but seek the protection of their predecessors in title by arguing that the Meeses were bona fide purchasers for value without notice.

The "Shelter Rule" provides that one who is not a bona fide purchaser, but who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status. The purpose of this rule is to prevent a stagnation of property and to protect the first purchaser, who, being entitled to

hold and enjoy, must be equally entitled to sell. Otherwise, a bona fide purchaser might be prevented from selling the property for full value. . . . It is wholly immaterial of what nature the outstanding interest is, whether it is a lien or encumbrance, or a trust, or any other claim.

77 Am. Jur. 2d Vendor and Purchaser § 419 (2006). This court has recognized the Shelter Rule, holding the successor in interest of a bona fide purchaser for value stood in the same position as the bona fide purchaser even when the successor had notice of a lien. Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984). It explained: "[W]henever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified." Id.

The trial court found the Meeses' attorney testified in his deposition that he had advised the Meeses there was a strong possibility the restrictions applied to Blocks 28 and 29. However, Dusenbury testified that his recollection was that the restrictions were mis-indexed and that he did not pick them up in the chain of title. We find there is a question of fact as to whether the Meeses were bona fide purchasers for value without notice and hereby reverse the grant of summary judgment on this issue and remand for trial.

CONCLUSION

Accordingly, the decision of the trial court granting summary judgment is hereby

REVERSED and REMANDED.

FEW, C.J., and HUFF and GEATHERS, JJ. concur.

Sent Certified mail to David & Leigh Maese

LEGAL NOTICE

July 18, 2002

Dear property owner,

On March 14, 2000 the Honorable J. Stanton Cross, Master of Equity for Horry County ruled in favor of the plaintiffs (*numerous* Long Bay Estates Property Owners) concerning the 1958 Restrictive Covenants for Long Bay Estates and their current applicability to the properties located in our subdivision. These covenants are found in Plat Book 25, Page 22, Office of the Horry County Clerk.

Basically, the judgement makes it clear that all lots in the Long Bay Estates subdivision are subject to the 1958 restrictive covenants (*without exception*).

This decision also points to language found in the Adams case # 37417 from 1972 which makes it clear that blocks 28, 29, 30, 31, 32, and 33 are also bound by the 1958 restrictive covenants. *Enclosed please find a copy of the restrictive covenants for Long Bay Estates for your records.*

This case cost *some* of the property owners *over \$70,000.00* and was taken to protect the interests of *all* of the property owners of Long Bay Estates. The plaintiffs take this decision seriously and any attempt to violate these restrictive covenants will result in court action. *Any legal fees and costs associated with these actions would be assessed to the defendant.*

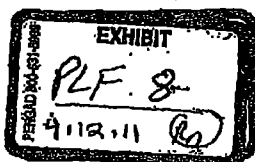
Also, any attempt to subdivide lots or breach the set back provisions of these restrictive covenants will be immediately brought before the court. It should be noted that *the set back provisions* of these covenants and all properties in Horry County begin at the property line (*not the road*). This matter was raised recently and Horry County Zoning states that *"all set back provisions begin at the owner's property line"*.

At this time I would respectfully request that you place a copy of this letter and the restrictive covenants with your deed.

This letter has been forward to all property owners, return receipt requested.

Respectfully,

Robert J. DeCiero
Robert J. DeCiero
4800 Yaupon Circle
Long Bay Estates
Myrtle Beach, SC 29575



ON FILE IN HORRY COUNTY CLERKS OFFICE
ATTACHED TO MAP IN PLAT BOOK 25, PAGE 22, RECORDED MAY 5, 1958

Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision,
Myrtle Beach, Horry County, South Carolina

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robt. L. Bellamy, Engineer.

(a) No lot shall be subdivided and no building, including porches or projections of any kind, shall be erected at a distance less than 40 feet from the front line on blocks one (1) through five (5) and not less than 20 feet from the front line on blocks six (6) through twenty-seven (27), ten feet from any side line and 20 feet from the rear.

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof.

(b) No surface toilet shall be permitted on this property, but the purchaser shall construct and install at his own expense for any residential building on the said property, a septic tank of a type and character approved by the State Board of Health. Waste water from the premises, including that from the kitchen and bath, shall not be discharged or deposited upon the surface of the premises, but shall be disposed of so as not to create a nuisance or be offensive to sanitation. All garbage cans used on the premises shall be kept concealed.

(c) An easement and right of ingress and egress is hereby reserved in, upon and across a strip of land five (5) feet wide at the rear line of this lot for water pipes and for poles, wires, cables or other lines for transmission of electric current or telephone or other public utility services. These rights may be assigned by the Grantors.

(d) This property shall be used only for private residential purposes and no more than one dwelling containing not more than two apartments or living units each for the occupancy and use of not more than one family, with necessary outbuildings, shall be erected thereon. No garage apartments except for the use and occupancy of servants employed on the premises may be included in a garage building.

Plans for any building or structures to be erected on the property shall be first approved by the Grantors, before construction is started.

(e) The property hereby conveyed shall be kept free from any nuisance or from any objectionable condition or use which the Grantors find to be offensive or dangerous to the neighborhood.

(f) It is understood and agreed that any change in sidewalk, or street or driveways into this property, which changes are desired by the purchaser, are to be made at his expense and in accordance with plans acceptable to the Grantors.

(g) No one story residence shall be erected on this lot which contains less than 1200 square feet of floor area nor a two story residence containing less than 1600 square feet of floor area excluding porches, garages and storage space. No residence building shall be built more than two stories in height.

(h) No wells for water will be permitted to be dug or driven in the property, unless water facilities prove inadequate, or any private well dug to be done only with permission of Grantors.

(i) In addition to use for private residential purposes as set forth herein, the Grantors may use, lease or convey property within the bounds of lands herein described as Blocks 1, 2, and 3 for the following purposes:

Schools, Churches, Libraries and Community Center

(j) The Grantees shall preserve as many of the existing trees as possible in order to retain the wooded character of the community.

Carmen F. Ward & Carole Ward
3243 Calle de Deborah N.W.
Albuquerque, New Mexico 87104-3001

February 22, 2006

Mr. Robert DeCiero
4800 Yaupon Circle
Long Bay Estates
Myrtle Beach, S.C. 29575

RE: Lot 4, Long Bay Estates, Sold September 3, 1997 to M/M David Meese

Dear Mr. DeCiero:

After our recent telephone conversation, we are writing you once again regarding your concern about a 1972 court decision in which Carmen Ward was a plaintiff. Carmen Ward remembers that as the plaintiff in the case she had language placed in the judgment to protect her right of revision as Grantor concerning the property in question. She agrees that there was never any intention to allow for a subsequent property owner to have the right to subdivide in violation of the Restrictive Covenants for the Long Bay Estates subdivision.

After reviewing the judgment that you forwarded to us it is quite clear that the last sentence in the first paragraph on page 7, beginning with "In like manner", is referring to Carmen Ward's right of revision, as Grantor, and no one else.

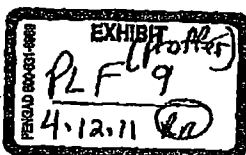
We want to reiterate that Carmen Ward, as Grantor, elected to create one lot on that property and sold the property as one lot to M/M Meese on September 3, 1997.

Once again, we hope that this letter will assist you and we hope the neighborhood is successful in upholding the covenants, deed restrictions, zoning codes and wetland provisions that are still enforceable in Long Bay Estates subdivision.

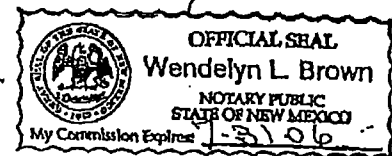
Sincerely yours,

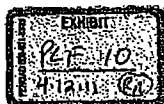
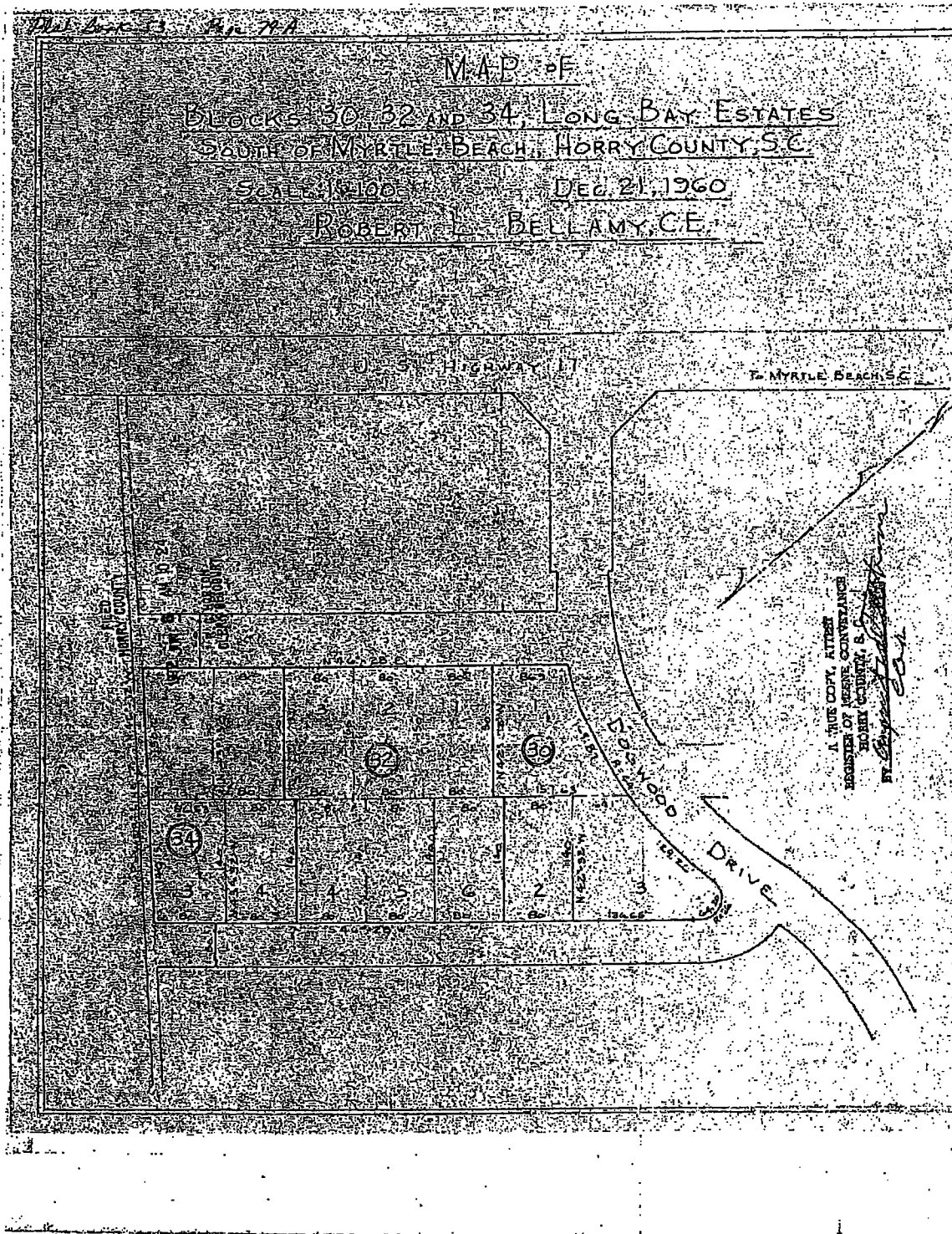
Carmen F. Ward
Carmen F. Ward
Carmen F. Ward

Carole Ward
Carole Ward
Carole Ward



Wendelyn L. Brown
March 6, 2006





FILED
Horry County

386 / 300

STATE OF SOUTH CAROLINA 1968 MAY 6 PM 2 36
COUNTY OF HORRY) CONVEYANCE OF REAL ESTATE
R. J. HARRIS
CLERK OF COURT

FREDERICK W. LEWIS, sole stockholder of Nursery Realty Corporation,
a foreign corporation, authorized to do business in the State of South
Carolina, died testate, a resident of Dade County, State of Florida,
exemplification of his will being duly filed in the Probate Court for
Horry County, South Carolina, Cabinet 1, Drawer 3, Package 46, Horry
County Probate records.

Carmen F. Ward and Gene F. Lewis, as co-executrices of the
Last Will and Testament of Frederick W. Lewis, deceased, thus succeeded
to the sole ownership of the capital stock of Nursery Realty Corporation.

Pursuant to appropriate resolutions by the Board of Directors
of the corporation, and with the unanimous consent and action of the
stockholders, voluntary dissolution of Nursery Realty Corporation, and
distribution of its assets to the stockholders in liquidation of the
corporate assets is being effected simultaneously with the execution
and delivery of this instrument, F. M. Kimmel as Vice President and
Carmen L. Ward as Secretary of Nursery Realty Corporation being authorized,
directed and empowered to execute such conveyances or transfers as may be
necessary or desirable.

KNOW ALL MEN BY THESE PRESENTS that NURSERY REALTY CORPORATION,
hereinafter called the Grantor, for and in consideration of the surrender
and cancellation of all of the outstanding shares of capital stock of
said corporation by Carmen F. Ward and Gene F. Lewis, Co-executrices of
the Last Will and Testament of Frederick W. Lewis, Deceased, has granted,
bargained, sold, transferred and released and by these presents does
grant, bargain, sell, transfer and release unto the said Carmen F. Ward
and Gene F. Lewis, as Co-executrices of the Last Will and Testament of

BY *[Signature]*
A TRUE COPY, ATTEST
REGISTER OF MEANS CONVEYANCE
HORRY COUNTY, S. C.
[Signature]

EXHIBIT
R.F. 17
4.12.11 (22)

Frederick W. Lewis, Deceased, (hereinafter called the Grantor), and to their successors and assigns:

All of the assets of any kind, whether real, personal, tangible or intangible, belonging to NURSERY REALTY CORPORATION, wherever same may be situate, and of whatever same may consist, including any easements, extraordinary rights, powers of approval reserved to Grantor in any conveyances of property, use of trade or development name or names, and any and all other assets, powers, or reservations of any kind and nature.

There is expressly included, without limiting the generality of the foregoing, the following described or identified property, situate, lying and being in Socastee Township, Horry County, South Carolina:

PARCEL OR TRACT NO. 1

Those two (2) contiguous pieces, parcels or tracts of land which were conveyed by Frederick W. Lewis to Nursery Realty Corporation by deeds of June 12, 1953 recorded June 23, 1953 in Deed Book 126 at page 1, Horry County records, and from Frederick W. Lewis to Nursery Realty Corporation dated April __, 1956, recorded April 30, 1956 in Deed Book 171 at page 637, Horry County records, reference being craved to said deeds and the record thereof for more complete and detailed description.

EXCEPTING, HOWEVER, the following parcels or lots of land, conveyed out of said tracts as shown and represented on various maps of Long Bay Estates, including map by T. M. Jordan dated September 8, 1953, with Block 9 added by R. L. Ballamy in May of 1955, recorded in Plat Book 19 at page 36; area comprising Blocks 24 and 25 mapped by R. L. Ballamy September 9, 1956, Plat Book 21, page 118; and Blocks 12, 13, 14 and 15, mapped by R. L. Ballamy April 16, 1959, Plat Book 27, page 31; and an area also shown on a map by R. L. Ballamy, C.E. recorded in Plat Book 21 at page 149, Horry County records, the parcels excepted, and the records of the deeds of conveyance thereof, being the following:

IN BLOCK TWO (2):

Lot Two (2) sold, Book 134, page 191.

Lot Four (4) sold, Book 202, page 1.

IN BLOCK NINE (9):

Lot One (1) sold, Book 157, page 295.
 Lot Two (2) sold, Book 178, page 221.
 Lot Four (4) sold, Book 165, page 225.
 Lot Five (5) sold, Book 195, page 258.

IN BLOCK TWELVE (12):

Lot Five (5) sold, Book , page

IN BLOCK THIRTEEN (13):

Lot One (1) sold, Book 232, page 7.
 Lot Two (2) sold, Book 189, page 529.
 Lot Three (3) sold, Book 210, page 230.

IN BLOCK FOURTEEN (14):

Lot One (1) sold, Book 241, page 528.
 Lot Two (2) sold, Book 233, page 182.
 Lot Three (3) sold, Book 241, page 225.

IN BLOCK FIFTEEN (15):

Lot One (1) sold, Book 228, page 41.
 Lot Two (2) sold, Book 228, page 38.
 Lot Three (3) sold, Book 240, page 529.
 Lot Four (4) sold, Book 313, page 54.

IN BLOCK TWENTY-THREE (23):

Lot Three (3) sold, Book 248, page 598.

IN BLOCK TWENTY-FOUR (24):

Lot Three (3) sold, Book 195, page 97.

IN BLOCK TWENTY-FIVE (25):

Lot One (1) sold, Book 176, page 122.

PARCEL OR TRACT NO. 8

43.65 acres, more or less, Socastee Township,
 Horry County, South Carolina, shown and represented
 on map by Robert L. Ballou, C.E. dated April 27,
 1967 and recorded in Plat Book 48 at page 54, being
 those portions of tracts 5 and 8 which were conveyed

by Frederick W. Lewis to Nursery Realty Corporation November 23, 1948 by deed recorded November 30, 1948, Deed Book 61, page 8, after conveying away certain portions of said tract, say by conveyances in the development of Myrtle Dunes, and adjoining property, see Plat Book 9, page 70, and Plat Book 11, page 42, Horry County records.

The 43.65 acres of land, as shown and represented on the cited plat, are thus described by courses and distances:

Beginning at an iron corner N on the southeastern margin of U. S. Highway no. 17 and running thence South 41° 29' East 3378.20 feet to corner, and continuing same course 411.74 feet to iron O; thence South 38° 30' West 352.55 feet to iron N; thence North 42° 05' West 432.12 feet to iron N; thence South 41° 50' West 151.5 feet to iron N; thence North 42° 16' West 3446.49 feet to iron N on the aforesaid margin of highway; and thence along the highway North 49° 30' East 527.9 feet to the beginning.

There is also included in this conveyance any rights remaining in the Grantor in any undeveloped or reserved portions of Myrtle Dunes, expressly including any rights in area between front row lots and high water mark of the Atlantic Ocean.

—c0c—

As an incident of transfer of assets the Grantor also assigns, transfers and sets over unto the Grantees that certain mortgage from Leroy R. Adams to Nursery Realty Corporation dated November __, 1967, recorded December 19, 1967, Mortgage Book 458, page 471, Horry County records.

—c0c—

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the Grantees, their successors and assigns forever.

Since this deed is being made by the Grantor in transferring all of its assets unto the Grantees, said deed is made without warranty.

304

WITNESS the execution of this instrument under the corporate seal, by action of the duly authorized officers, as of the 24th day of April, 1968.

Signed, Sealed and Delivered
in the Presence of:

Luella R. Cooper
Notary Public

NURSERY REALTY CORPORATION (SEAL)

By: F. H. Kimmel
As Vice President

By: Carmon F. Ward
As Secretary

STATE OF FLORIDA

COUNTY OF DADE

Personally appeared LUELLA R. COOPER (the

first witness) who, being sworn, says that he saw the within named Nursery Realty Corporation by F. H. Kimmel as Vice President and by Carmon F. Ward as Secretary, sign, seal and as the corporate act and deed, deliver the foregoing deed; and deponent with W. J. McLEOD, JR.

(the second witness) witnessed the execution thereof.

SWORN to before me this 24th
day of April, 1968.

Luella R. Cooper (L.S.)

Notary Public for Florida

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES FEB. 9, 1971

ACRES	FEET	INCHES	FEET	INCHES	FEET
267.77	110.47	110.47	110.47	110.47	110.47

CERTIFICATE OF APPROVAL FOR RECORDING

I hereby certify that the subdivision plat above has been found to comply with the Subdivision Regulations for Horry County, South Carolina, with the exception of such variations, if any, as the Plat and that it has been approved for recording in the office of the Clerk of Court.

DATE

CHAIRMAN PLANNING COMMISSION

CERTIFICATE OF OWNERSHIP AND DETACHMENT

I (we) hereby certify that I (we and we are) the owner(s) of the property shown and described herein and that I (we) hereby detach this plan of subdivision with my (our) true consent, releasing the subdivision building restriction thereon, and dedicating to public or private use as noted.

DATE

OWNER

OWNER

5

THIS PROPERTY IS LOCATED IN FLOOD ZONE AC (PL 14) ACCORDING TO FLOOD MAP, NO. 400020000 C, DATED 9-30-86.

REMARKS IF ANY ARE NOT SHOWN ON THIS MAP.

REF. A MAP OF UPPER LONG BAY BY ROBERT L. BELMONT & ASSOCIATES, INC. PREPARED FOR THE LENO FAMILY DATED 7-28-87 AND RECORDED BY THE CLERK OF COURT FOR HORRY COUNTY IN PLAT BOOK 108 AT PAGE 324.

REF. A MAP OF BLOCKS 24 & 25, LONG BAY ESTATES BY ROBERT L. BELMONT DATED 7-14-84 AND RECORDED BY THE CLERK OF COURT FOR HORRY COUNTY IN PLAT BOOK 21 AT PAGE 116.

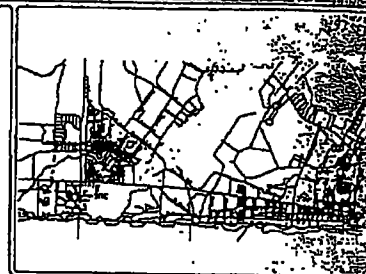
REF. A MAP OF BLOCKS 26, 28 & 34, LONG BAY ESTATES BY ROBERT L. BELMONT, C.E. DATED 12-21-80 AND RECORDED BY THE CLERK OF COURT FOR HORRY COUNTY IN PLAT BOOK 30 AT PAGE 79-A.

ME 108-14-00-001

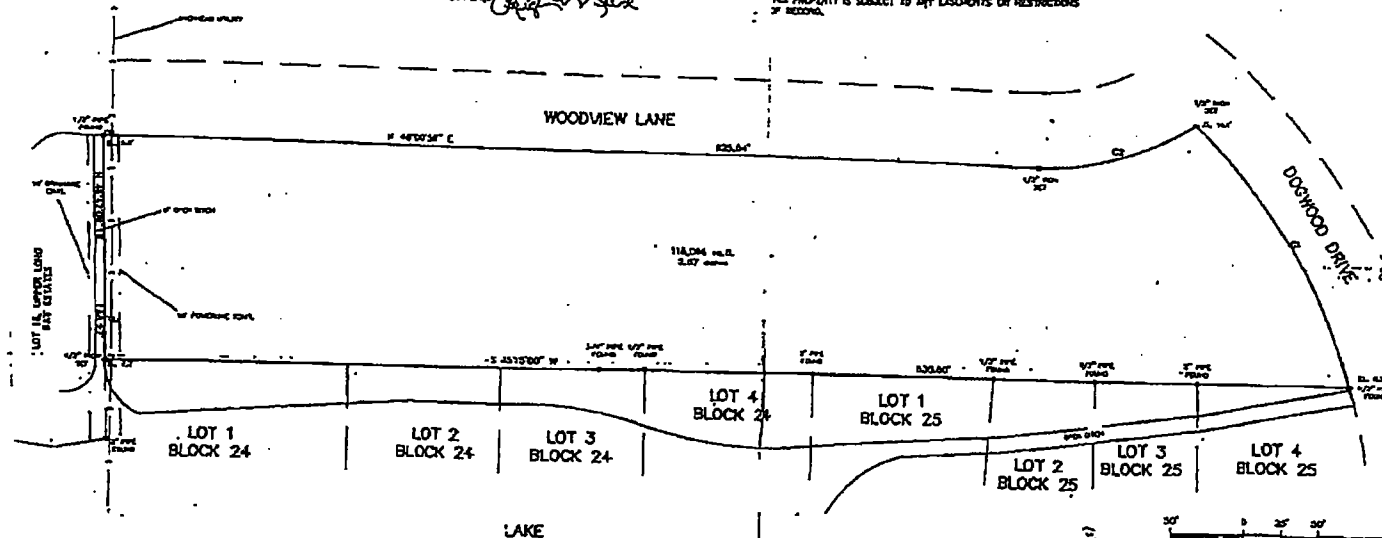
THIS PROPERTY IS ZONED R-2.

ETREACHES: 20' FRONT
15' SIDE
15' REAR

THIS PROPERTY IS SUBJECT TO ANY EASEMENTS OR RESTRICTIONS OF RECORD.



LOCATION MAP



I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, THE ORIGINAL SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE UNIFORM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS 'B' SURVEY AS PROVIDED THEREIN. ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN AS SHOWN.

Michael Collier, Jr.
MICHAEL S. COLLIER, J., P.E. No. 5210

APPROVED FOR RECORDING

[Signature]

EXHIBIT

PLF 12

12.1.1

ORIGINAL SURVEY

2.67 ACRES, LOCATED IN LONG BAY ESTATES, SOCASTEE TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA

PREPARED FOR

DAVID MEESE & LEIGH A. MEESE

CULLER LAND SURVEYING CO., INC.

(403) 253-2133
P.O. BOX 14327
SUNSHINE BEACH S.C. 29578

DATE: 7-24-87 SCALE: 1"=50' JOB: 00-29, PG. 28-29 DWS

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY.) IN THE COURT OF COMMON PLEAS

GENE F. LEWIS and CARMEN F. WARD, as Co-Executrices and Co-Trustees
Under the Last Will and Testament of Frederick W. Lewis, Decedent,

PLAINTIFFS

vs.

ADAMS, LEROY
BEATY, DUDLEY C.
BEEBLE, PETER and JEAN B.
BELL, LLOYD A., JR.
BELL, ROBERT B.
BERNHARD, HARRY
BESS, LOUISE L.
BISSING, PAUL G. and JOHNNIE N.
BLACKWELL, WILLIAM H.
BRANTON, JOHN A. and RUTH P.
BRANTON, NORMA N.
BROOKSHIRE, J. C.
BRYANT, PEGGY BELL
BUSTLE, JAMES A. and PHYLLIS J.
BUTLER, JAMES W. and BETTY F.
CANNON, MARION C.
CARSON, ELEANOR BELL
CASALINA CORPORATION
CHINNES, LLOYD S. and
PATRICIA P.
COOPER, SIDNEY E. and MARY E.
CRAVEN, MALCOLM H. and MARY D.
CURLER, HENRY C. and SUE N.
DAVIS, MARY ELIZABETH T.
DUBOSE, DONALD S.
DUSENBURY, FRANCIS C.
FLOYD, ANN BUSSEY
FLOYD, CHARLES D. and CAROLYN A.
FOGLE, RUBY HARRINGTON
FREDERICK, JOHN and OLLIE H.
GARRELL, C. D., JR.
GILBERT, HARRY M.
GINDER, JOHN W. and BETTY J.
GODFREY, JANE J.
HANNA, JANESE B.
HERSHBERGER, RICHARD E. and
PAULINE P.

HINSON, ANNE MOOREN
HOLTZSCHEITER, EARL W. and
MARY LOIS M.
HOPPER, J. S. and DORIS
HYMAN, DONALD E. and MARY J.
JOHNSTON, H. DON
JOHNSTON, JERRY A.
JONES, W. E. and ANN L.
KADISON, MARY M.
KATES, GUY S., JR. and MARJORIE C.
KIDE, LANNEAU D.
LIVINGSTON, ROGER L. and DIANA S.
LONG, JUANITA
MARTIN, DIANE S.
MULLINIX, TED
NEELY, CLYDE C. and BETTY SUE
PALMER, R. A.
PERRY, PHILLIP E.
RANKIN, DOROTHY S.
RANKIN, O. A.
RAY, ALLEN L.
ROBERTS, GERALD D.
ROLFE, IRENE A.
ROYALS, DAGGETT O. and ELEANOR D.
SADLER, BETTY D.
SIMPSON, R. W., JR. and MARY H.
SISSLER, JOSEPH E.
SOUTHERN PROPERTIES CORP., INC.
SWANSON, WILLIAM S. and FRANCES T.
TATARSKI, LOUIS and PEGGY A.
THAMES, MRS. PRESTON B., III
TODD, WILLIAM J.
UPPER, EDWARD R.
VEREEN, ARTHUR B. and LEONA
WALKER, NELSON R. and SADIE M.
WALSH, JOHN J., JR.
WARD, JESSE J. and HELEN M.
WOOD, TAYLOR and JESSIE MAE
ZACHARY, JACK T. and GERTRUDE W.

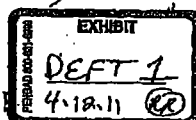
individually and as representatives of all lot owners in Long Bay
Estates Section and also all other persons unknown, claiming any
right, title, estate, interest in or lien upon the real estate
described in the complaint herein,

DEFENDANTS.

DECREE

and

37417



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) LP #23428

GENE F. LEWIS and CARMEN F. WARD, as Co-Executrices and Co-Trustees
Under the Last Will and Testament of Frederick W. Lewis, Deceased,

PLAINTIFFS

v.

Adams, Leroy
Beaty, Dudley C.
Beeble, Peter and Jean B.
Bell, Lloyd A., Jr.
Bell, Robert B.
Bernhard, Harry
Bess, Louise L.
Bissing, Paul G. & Johnnie N.
Blackwell, William H.
Branton, John A. & Ruth P.
Branton, Norma M.
Brookshire, J. C.
Bryant, Peggy Bell
Bustle, James A. and Phyllis J.
Butler, James W. & Betty D.
Cannon, Marion C.
Carson, Eleanor Bell
Casalina Corporation
Chinnes, Lloyd S. & Patricia P.
Cooper, Sidney E. and Mary F.
Craven, Malcolm H. and Mary D.
Curlee, Henry C. & Sue N.
Davis, Mary Elizabeth T.
Dubose, Donald S.
Dusenberry, Francis C.
Floyd, Ann Bussey
Floyd, Charles D. & Carolyn A.
Fogle, Ruby Harrington
Frederick, John & Ollie H.
Garrell, C. D., Jr.
Gilbert, Harry M.
Ginder, John W. & Betty J.
Godfrey, Jane J.
Hanna, Janese B.
Hershberger, Richard E. & Pauline P.
Hinson, Anne McQueen
Holtzscheiter, Earl W. & Mary Lois M.
Hopper, J. S. & Doris
Hyman, Donald E. & Mary J.

Johnston, H. Don
Johnston, Jerry A.
Jones, W. E. & Ann L.
Kadison, Mary M.
Kates, Guy S., Jr. & Marjorie C.
Lide, Lanneau D.
Livingston, Roger L. & Diana S.
Long, Juanita C.
Martin, Diane S.
Mullinix, Ted
Neely, Clyde C. & Betty Sue
Palmer, R. A.
Perry, Phillip E.
Rankin, Dorothy S.
Rankin, O. A.
Ray, Allen L.
Roberts, Gerald D.
Rolfe, Irene A.
Royals, Daggett O. & Eleanor D.
Sadler, Betty D.
Simpson, R. W., Jr. & Mary H.
Sissler, Joseph E.
Southern Properties Corp., Inc.
Swanson, William S. & Frances T.
Tatarski, Louis & Peggy A.
Thames, Mrs. Preston B., III
Todd, William J.
Upper, Edward R.
Vereen, Arthur B. & Leona O.
Walker, Nelson R. & Sadie M.
Walsh, John J., Jr.
Ward, Jesse J. & Helen M.
Wood, Taylor & Jessie Mae
Zachary, Jack T. & Gertrude W.

individually and as representatives of all lot owners in Long Bay
Estates and also all other persons unknown, claiming any right,
title, estate, interest in or lien upon the real estate described
in the complaint herein; ALSO, all other persons unknown, claiming
any right, title, estate, interest in or lien upon the real estate
described in the Answer, Counterclaim and Cross-Complaint herein-
after set out,

DEFENDANTS and, except for
Casalina Corporation and Norma M.
Branton, CROSS-DEFENDANTS.

DECREE

37417

This action by the plaintiffs above named, and the cross-action by Casalina Corporation, being in the nature of suits to quiet title involves two adjoining properties lying between U. S. Highway no. 17 and the Atlantic Ocean in Horry County, South Carolina.

Under date of November 9, 1972 a general Order of Reference was issued to the Master for Horry County who has submitted his Report dated November 15, 1972, which was filed on November 21, 1972, and according to affidavit of plaintiffs' counsel no exceptions thereto have been filed.

In reporting his findings of fact and conclusions of law the Master recommended that a Decree be issued incorporating the findings and conclusions as to the property of plaintiffs, identified in the report as LEWIS ESTATE LANDS, and that a Decree also be issued as to the lands of the cross-complainant Casalina Corporation, which property was referred to in the Master's Report as LANDS OF CASALINA CORPORATION.

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It is, therefore, on motion of F. G. Burroughs, Attorney appearing for the plaintiffs, and on motion of John E. Willard, Attorney for the cross-complainants, ORDERED that the Report of Honorable Winston W. Vaught, as Master for Horry County, dated November 15, 1972, is confirmed, made the judgment of this Court, and in furtherance thereof, it is ORDERED, ADJUDGED AND DECREED:

AS TO LEWIS ESTATE LANDS

FIRST: That the area shown as YE OLDE KINGS ROAD within the boundaries of the Lewis Estate lands on the plat recorded in Plat Book 25 at page 22, Clerk's office for Horry County, South Carolina, has never been opened for travel; has not been used for purposes of a road or street; has never been dedicated or accepted as a public road or street; is not subject to any private easement in favor of the defendants, or any of them; and that title thereto is vested in the plaintiffs free and clear of any right, title, estate, or interest in said area by the defendants or by any other persons, subject only to the restriction as to use on those portions of the area shown as YE OLDE KINGS ROAD lying within Blocks 30, 32 and 34 covered by the next portion of this order. It appears that neither Lots 3 nor 4 of Block 27 have been sold and that they are still owned by the plaintiffs. That portion of YE OLDE KINGS ROAD lying to the northeast of Dogwood Drive and abutting on Lots 3 and 4 of Block 27 is not restricted. See the FOURTH section of this Decree below.

SECOND: That Blocks 30, 32 and 34 as shown on "Exhibit A" and as shown on the Bellamy map recorded in Book 53 at page 79-A are declared to be residential in character and subject to restrictions of the same type and character as those stated by the declaration recorded in Plat Book 25 at page 22 as being applicable to Blocks 1-27, inclusive.

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declaration recorded in 25 at 22 reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

Page Four

37417

The above areas have been indicated as "residential" and as "residential (with right of revision)" on the copy of the map attached to this Decree. Another copy of the map is being signed by me for purposes of identification and shall be recorded in a plat book in the Office of the Clerk of Court for Horry County.

THIRD: The sixty-foot PAVED STREET lying to the northwest of and abutting on Blocks 30, 32 and 34 and the fifty-foot PAVED STREET lying to the southeast of said Blocks, which streets extend in a general southwestwardly direction from Dogwood Drive are declared to be public streets and each has been designated "public street" on the copy of the attached map.

FOURTH: The remaining lands in the portion of the Lewis Estate property under consideration here are free of any restrictions or plan of development and are indicated as "unrestricted" on the attached map.

FIFTH: DOGWOOD DRIVE as shown on the attached map is a public street and has been so indicated thereon.

5
True

37417

Page Five _____

AS TO CASALINA CORPORATION

FIRST: Casalina Corporation's cross-complaint should be dismissed as to Leroy Adams (for the reason stated in the Master's Report).

SECOND: Casalina Corporation is vested of record with title to the property described below:

All grantor's (Greenvale Hills Corporation's) right, title and interest in and to the following land, as described in deed to grantor recorded in Deed Book 129, page 143:

All that certain tract, piece or parcel of land situate and being in Socastee Township, Horry County, being more particularly described as follows:

Beginning at a concrete monument in the southeastern edge of U. S. Highway #17 at a distance of 524 feet southwest of the center of a road leading into the Long Bay Estates Property and running thence with the edge of said highway South 46° 28' West 890 feet to a corner in highway right-of-way line, thence South 43° 32' East 2460 feet, more or less, to the high water mark of the Atlantic Ocean, thence with the high water mark of the Atlantic Ocean North 44° 41' East 996 feet to a corner in the high water mark of said ocean, thence North 46° 2' West 43 feet, more or less, to a concrete monument, thence continuing North 46° 2' West 2386 feet to the point of beginning at U. S. Highway #17.

The above described tract of land contains 52.9 acres.

Together with all the right, title and interest of the grantor in the strand of the Atlantic Ocean lying in front of and adjacent to said property and all the right, title and interest of the grantor to the hereinabove mentioned highway running adjacent to said property, to the center line of said highway.

Grantor's right, title and interest being in that portion of Long Bay Estates (as shown on map recorded in Plat Book 25, page 22) embraced within the above description, less portions thereof heretofore conveyed by grantor in deeds (listed at this point in the description in the deed by Greenvale Hills Corporation to Casalina Corporation, each of which deeds conveyed lots in the subdivided areas shown in Plat Book 25, page 22).

And being in particular:

Undivided portions of said land
(including landings and utility lots), plus

The following lots shown in said
map (Plat Book 25, page 22) and in other
maps as indicated:

(Various lots and blocks which
Casalina Corporation has subsequently sold)

Block 19, Lots 1, 2 and 3.

Block 20, Lots 1, 2 and 3.

PLUS, all land and interests therein
acquired by grantor by said deed recorded in
Deed Book 129, page 143, which may be mis-
takenly excepted therefrom above by reason
of typographical or other error;

PLUS, all grantor's rights (including,
but not limited to, reversionary rights, rights
of re-entry, and rights to enforce restrictive
and other covenants and conditions) contained
in any conveyance heretofore made by grantor or
otherwise applicable to such land and enforce-
able by grantor or its successors and assigns;

PLUS, the right and power to make and
execute any correction deeds that might appear
in the future to be appropriate with respect to
any conveyance heretofore made by grantor as
above listed;

PLUS, any and all other rights and
interests in the land so acquired by the
grantor, the same as if the grantee herein
(Casalina Corporation) had been the grantee
in the conveyance to the grantor.

TOGETHER with all and singular the
rights, members, hereditaments and appurte-
nances to the same premises belonging, or in
anywise incident or appertaining thereto.

THIRD: Casalina Corporation's title is unaffected by the
depiction on said plat of "Ye Olde Kings Road," which is hereby
declared to be non-existent.

FOURTH: Blocks 19 and 20 shall be subject to the Plat
Book 25, page 22, restrictions, subject, however, to the right
reserved in these restrictions to change building and boundary
lines. The utility lot, the boat and community landings, and that
portion of the park owned by Casalina Corporation are subject to
such servitudes in favor of cross-defendants and their successors

Page Seven _____

37417

in title as exist under the laws of this State in favor of purchasers of lots in platted subdivisions.

FIFTH: Casalina Corporation has the right to devote its property embraced on said plat and abutting U. S. Highway 17, to a depth of 350 feet eastward from the right-of-way, to any lawful use, residential or commercial.

SIXTH: In any future sales, gifts, or leases by Casalina Corporation of any of its other property embraced on said plat, it shall restrict the same to residential use, single or multiple, but without regard to the Plat Book 25, page 22, restrictions and with full freedom to subdivide such other property (with regard to streets, building lines, lot sizes, and water and sewer facilities) as it sees fit--subject, of course, to sovereign rights, if any, to marsh, lake, and other water bodies or courses, and to land-and/or-water use laws, ordinances, and regulations now or hereafter applicable and enforceable by governmental authorities.

8
my

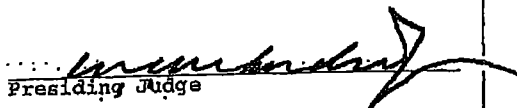
37417

Page Eight

AS TO BOTH ACTIONS

The interests of any unknown claimants who are under any legal disability have been adequately represented by their Guardian ad Litem and by the consenting cross-defendants as a class whose best interests coincide with the best interests of any such unknown claimants; the foregoing findings and conclusions are to the best interests of such possible claimants; and such provisions should be decreed to be binding on them.

No costs shall be taxed by or against any of the parties to this action.


Presiding Judge

Conway, S. C.

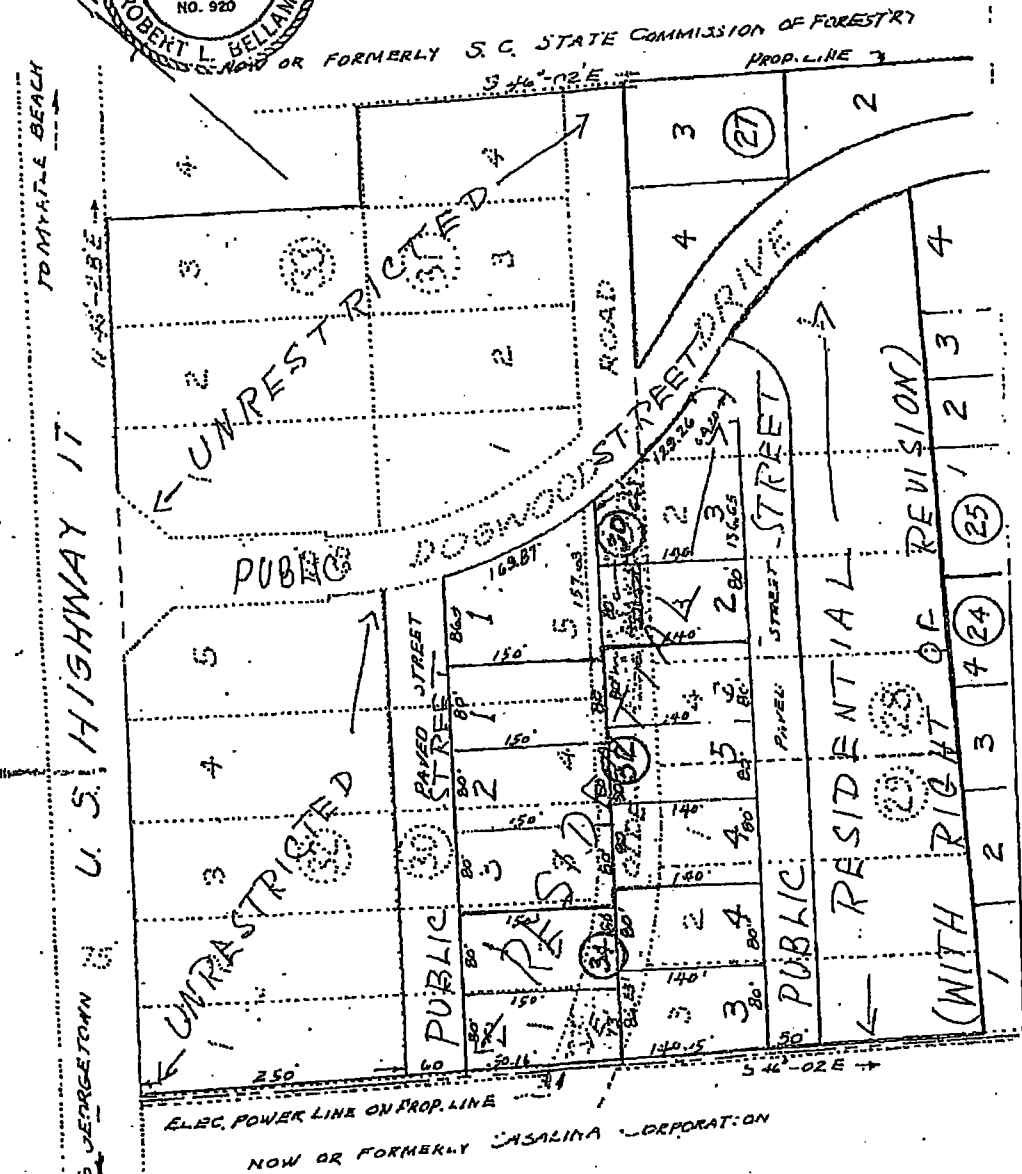
December 14 1972.



37417



EXHIBIT "A"



- ① BLOCKS 30, 32, & 34 SHOWN BY SOLID LINES FROM MAP OF DECEMBER 21, 1960.
- ② BLOCKS 28, 29, 30, 31, 32 & 33, AS SHOWN IN PLAT BOOK 25 AT PAGE 22, REPRESENTED BY DOTTED LINES.
- ③ PORTIONS OF BLOCKS 24, 25 & 27 SHOWN BY SOLID LINES.
- ④ SHADED AREA SHOWS A PORTION OF YE OLDE KINGS ROAD (OLDE HIGHWAY IN THE COMPLAINT) FROM PLAT BOOK 25 AT PAGE 22.

A COMPARATIVE LOCATION MAP OF PROPERTY
IN SOCASTEE TOWNSHIP, HORRY COUNTY, S.C.
Prepared for: LONG BAY ESTATES SUBDIVISION
Date: June 1, 1972
Scale: 1" = 125'

Copy of map attached to Decree in Lewis v. Adams.
Let this copy be recorded.

December 11, 1972

Presiding Judge

8741

Appendix 0529

Response:

Plaintiff craves reference to the 1972 Order in its entirety.

5. Admit that the "general plan or restrictions" referred to in paragraph 5 of your Complaint that you allege was recorded in Plat Book 25 at Page 22 and recorded May 5, 1958, do not state that no block shall be subdivided.

Response:

The allegations contained in Paragraph 5 of the Complaint are gleaned from all provisions of the recordings. Further, Defendants had actual notice of same.

6. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 29 contains three lots.

Response:

Admit

7. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 28 contains four lots.

Response:

Admit.

8. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Blocks 28 and 29 contain a total of seven lots.

Response:

Admit.


Thomas C. Brittain
Natasha M. Hanna
HEARN, BRITTAIN & MARTIN, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562

Dated: July 14, 2004

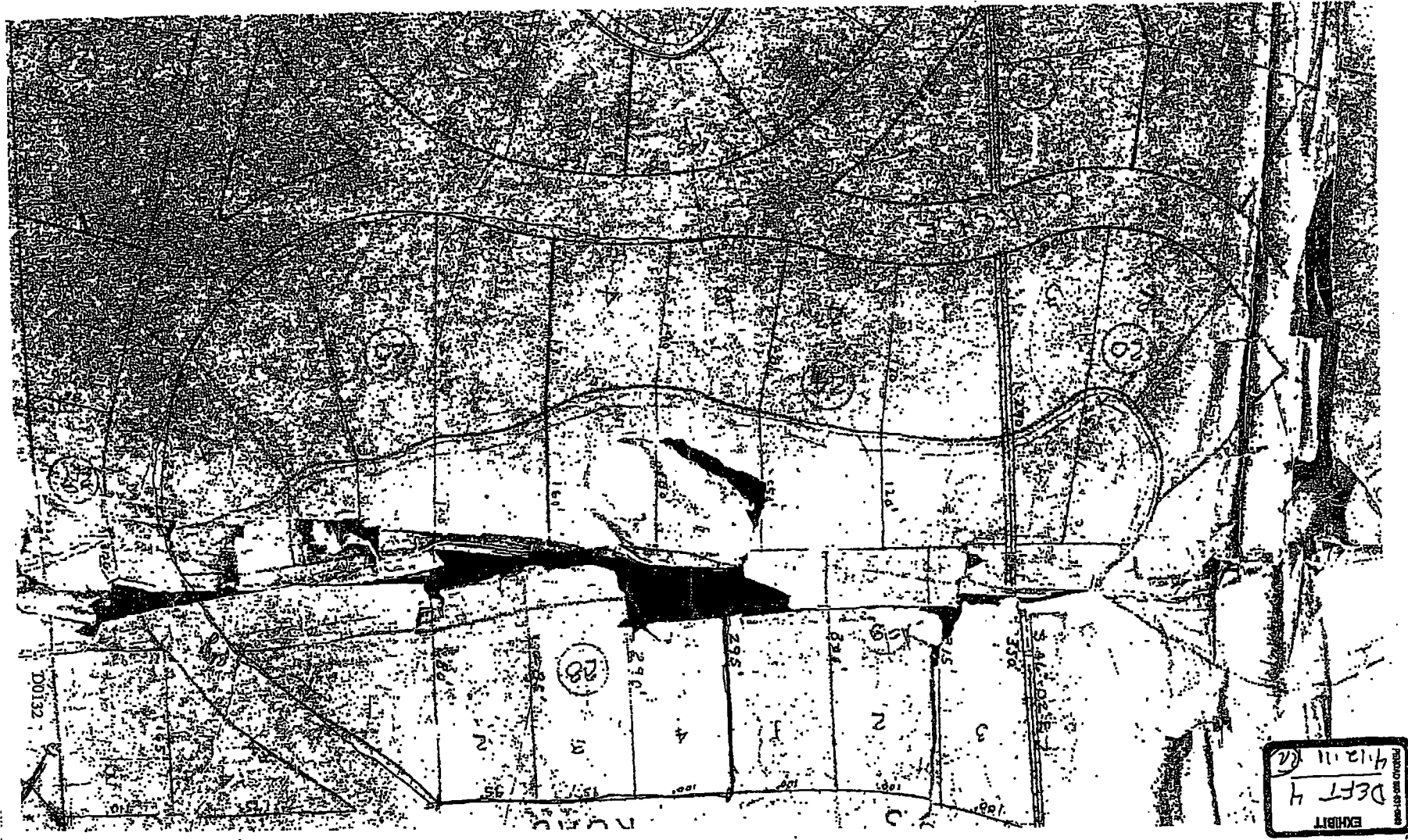


EXHIBIT
DEFT 4
4/12/11 (2)

049513

Prepared By:
Law Offices of
Dusenbury, Hendrix & Little
602 27th Avenue North
Myrtle Beach, SC 29577
(803) 448-7137

FILED
HORRY COUNTY

1997 SEP -4 AM 11:43

R.M.C.

(space above this line for Recorder's use)

STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE

COUNTY OF HORRY

(Joint Tenancy)

KNOW ALL MEN BY THESE PRESENTS, that Carmen F. Ward, Trustee, Richard C. Lewis, Jr., Raymond M. Lewis, Peter S. Lewis, Carol L. McKellar, Levin (formerly known as Carol L. McKellar) and Marion G. Whitaker, hereinafter called Grantors in consideration of One Hundred Forty-Five and no/100 (\$145,000.00) Dollars to the Grantors in hand paid at and before the sealing of these presents by the Grantees hereinafter named, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named Grantees, to wit:

DAVID W. MERSE, JR. and LEIGH AMMONS MERSE

as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever, the following described property.

ALL AND SINGULAR, that certain place, parcel or tract of land lying situate and being in Long Bay Estates, Socastee Township, Horry County, South Carolina containing 2.67 acres (more or less) as depicted on that certain survey dated July 24, 1997 prepared for David Merse and Leigh A. Merse by Culler Land Surveying Co., Inc. which was recorded on Sept 4, 1997 in the Office of the RMC for Horry County in Plat Book 149, at Page 232, reference to which is craved as forming a part of these presents.

DERIVATION: This being a portion of the property conveyed to Carmen F. Ward, Trustee, under the Last Will and Testament of Frederick W. Lewis, exemplification of which has been duly filed in the Probate Court for Horry County, SC, in Cabinet 1, Drawer 3, Package 46. Also, this being a portion of the property conveyed to Marion G. Whitaker by deed from Carmen F. Ward, Trustee, recorded August 31, 1983, in Deed Book 87, at Page 405, records of Horry County. Further, this being a portion of the property conveyed to Richard C. Lewis, Jr., Raymond M. Lewis, Carol L. McKellar and Peter S. Lewis by deed from Carmen F. Ward, Trustee, recorded August 31, 1983, in Deed Book 87, at Page 397, records of Horry County.

EXEMPT

YES

NO

STATE 377.00 COUNTY 159.50

EXHIBIT
DEFT 5
411211

BOOK 1971 PAGE 134

134

Grantees' Address: 693 Mallard Pond Road,
Murrells Inlet, SC 29576

This conveyance is made subject to all easements, rights of way, and conditions of record.

Together with all and singular the rights, hereditaments, and appurtenances to said premises belonging or in anywise incident, or appertaining to have and to hold all and singular the premises before mentioned unto the grantees as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever.

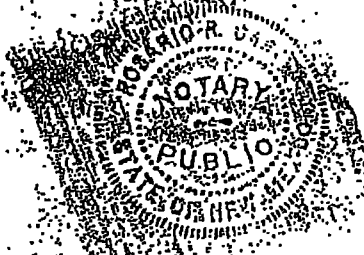
And, the Grantors do hereby bind the Grantors and the Grantors' heirs and personal representatives to warrant and forever defend all and singular said premises unto the Grantees as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever, against the grantors and the Grantors' heirs and assigns and against every person whomsoever lawfully claiming or to claim the same or any part hereof.

WITNESS the grantors' hands and seals this 2 day of September, 1997.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Casale Mary
(1st witness sign here)

Rosey B
(Notary sign here)



GRANTORS:

Carmen F. Ward, Trustee
Carmen F. Ward, Trustee

Richard C. Lewis, Jr.
Richard C. Lewis, Jr. (LS)

Raymond H. Lewis, Jr.
Raymond H. Lewis, Jr. (LS)
Richard C. Lewis, Jr., by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 390 on 8/31/93, records of Horry County

Raymond H. Lewis, Jr.
Raymond H. Lewis, Jr. (LS)
Raymond H. Lewis, Jr., by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 387 on 8/31/93, records of Horry County

Peter S. Lewis
Peter S. Lewis (LS)
Peter S. Lewis, by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 381 on 8/31/93, records of Horry County

Peter S. Lewis
Peter S. Lewis (LS)
Peter S. Lewis, by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 381 on 8/31/93, records of Horry County

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Peter S. Lewis (LS)
Peter S. Lewis, by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 381 on 8/31/93, records of Horry County

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Peter S. Lewis, by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 381 on 8/31/93, records of Horry County

Peter S. Lewis
Peter S. Lewis (LS)
Peter S. Lewis, by Carmen F. Ward, under Power of Attorney, recorded in Deed Book 817, Page 381 on 8/31/93, records of Horry County

D0159



STATE OF NEW MEXICO

COUNTY OF BERNALILLA

Carol S. McKellar, Sevier
Carol S. McKellar, Sevier (L8)
 Carol S. McKellar, Levin, (L/K/S
 Carol S. McKellar), by Carmen F.
 Ward, under Power of Attorney,
 recorded in Dead Book 817, Page 375
 on 8/31/83, records of Horry County
Marion S. Whitaker of
Carmen F. Ward (L3)
 Marion S. Whitaker, by Carmen F.
 Ward, under Power of Attorney,
 recorded in Dead Book 817, Page 394
 on 8/31/83, records of Horry County

ACKNOWLEDGEMENT
(pursuant to 8.C.F. Code Section
30-5-30(a))

COUNTY OF BERNARD, NEW MEXICO, do hereby
I, the undersigned Notary Public for New Mexico, do hereby
certify that Carmen F. Ward, Trustee, and Carmen F. Ward, attorney-
in-fact for Richard C. Lewis, Jr., Raymond H. Lewis, Peter S.
Lewis, Carol L. McKellar, Levin, formerly known as Carol L.
McKellar) and Marion G. Whitaker, personally appeared before me
this day and acknowledged the due execution of the foregoing
instrument.

Witness my hand and official seal this 2 day of
September 1927.

September 1997.
Ron A. (Seal)
 Notary Public for New Mexico

My Commission Expires: 9-16-2000

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property (2.67 acres tract) located at Long Bay Estates, Myrtle Beach, SC 29577, bearing Horry County TMS# 186-14-05-001, was transferred by Carmen E. Ward, Trustee, and Carl D. Ward, attorney-in-fact for Richard C. Lewis, Raymond H. Lewis, Peter S. Lewis, Carl D. McKillar, and Marion G. Whitaker, Grantors, to David W. Naese, Jr. and Leigh Ann McNeese, Grantees, on September 3, 1997.

The transaction was (check one):

☒ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$145,000.00.

☐ not an arm's length real property transaction and the fair market value of the property is \$ N/A.

The above transaction is not exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. seq.: Not exempt.

As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney for Grantees.

I further understand that a person required to furnish this affidavit who wilfully furnished a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Jay Dusenbury
Jay Dusenbury

SWORN to before me this
3rd day of September, 1997.

Jay Dusenbury (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/1/98

The fee is based on the real property value. Value means the realty's fair market value. In arm's length property transactions, this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgage assumed or placed on the realty as a result of the transaction). However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement, or realty before the transfer and remaining on it after the transfer.

D0161

1997 10 137

32306-113 4/20/41

Prepared By:
Law Offices of
Dusenbury & Clarkson, PA
602 27th Avenue North
Myrtle Beach, SC 29577
(843) 448-7137

REC'D
CLERK S.C.

2003 MAY 19 PM 12:41

RECORDING OF DEEDS

Grantee's Address: 3925 Little River Road #5
Myrtle Beach, SC 29577

STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE

COUNTY OF HORRY

KNOW ALL MEN BY THESE PRESENTS, that David W. Meese, Jr. and Leigh Ammons Meese, hereinafter called Grantors, in consideration of One Hundred Seventy-Five Thousand and no/100 (\$175,000.00) Dollars, to the Grantors in hand paid at and before the sealing of these presents by Thomas D. Dicks, hereinafter called Grantee, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the Grantee, the following described property:

ALL AND SINGULAR, that certain piece, parcel or tract of land lying situate and being in Long Bay Estates, Socastee Township, Horry County, South Carolina containing 2.57 acres (more or less) as depicted on that certain survey dated July 24, 1997 prepared for David Meese and Leigh A. Meese by Culler Land Surveying Co., Inc. which was recorded on September 4, 1997 in the Office of the R.O.D. for Horry County in Plat Book 149, at Page 232, reference to which is craved as forming a part of these presents. Horry Co. TMS# 186-14-05-001

DERIVATION: This being the identical property conveyed to David W. Meese, Jr. and Leigh Ammons Meese, by deed of Carmen F. Ward, Trustee, Richard C. Lewis, Jr., Raymond H. Lewis, Peter S. Lewis, Carol L. McKellar Levin, (f/k/a Carol L. McKellar) and Marion G. Whitaker, which was executed September 2, 1997 and recorded September 4, 1997 in Deed Book 1971, at Page 134, records of Horry County.

This conveyance is made subject to all easements, rights of way and conditions of record.

STATE 45500 COUNTY 192.50

EXEMPT

YES

NO

DEED
2577 0254

186-14-05-001

D0163

05/20/03 SEP

EXHIBIT
DEPT 6
4.12.11 (20)

K
296

Together with all and singular the rights, hereditaments and appurtenances to said premises belonging or in anywise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantees, as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever.

And, the Grantors do hereby bind the Grantors and the Grantors' heirs and personal representatives to warrant and forever defend all and singular said premises unto the Grantees as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever, against the grantors and the Grantors' heirs and assigns and against every person whomsoever lawfully claiming or to claim the same or any part hereof.

WITNESS the grantors' hands and seals this 14th day of May, 2003.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]
(1st witness sign here)

David W. Meese, Jr. (LS)
David W. Meese, Jr.

[Signature]
(Notary sign here)

[Signature] (LS)
Leigh Annons Meese

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

ACKNOWLEDGMENT
(pursuant to S.C. Code Section
30-5-30(c))

I, the undersigned Notary Public for South Carolina, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 14th day of May, 2003.

[Signature] (Seal)
Notary Public for South Carolina
My Commission Expires: 5/25/2005

DEED TO REAL ESTATE

2003 MAY 19 PM 12:43

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

KNOW ALL MEN BY THESE PRESENTS,
That I, Thomas L. Dicks, in the State aforesaid for and in consideration of the sum of EIGHTY
SEVEN THOUSAND FIVE HUNDRED DOLLARS and 00/100 Dollars (\$87,500.00) to me paid
by Robert E. Dicks, Jr. and Amanda Y. Dicks, 127 Green Lake Dr. Myrtle Beach, SC 29572
in the State aforesaid, (Receipt whereof is hereby acknowledged) have granted, bargained, sold and
released; and by these presents do grant, bargain, sell and release unto the said Robert E. Dicks, Jr.
and Amanda Y. Dicks, as joint tenants with the right of survivorship, and not as tenants in common,
their Heirs and Assigns the following described property to wit:

See attached "Exhibit A" for legal description.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the
said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Robert E.
Dicks, Jr. and Amanda Y. Dicks, their Heirs and Assigns forever.

And I do hereby bind myself and my Heirs and Executors and Administrators, to warrant and forever
defend all and singular the said premises unto the said Robert E. Dicks, Jr. and Amanda Y. Dicks,
their Heirs and Assigns, against me and my Heirs, and all persons whomsoever lawfully claiming,
or to claim the same or any part thereof.

WITNESS the execution hereof by grantor(s) this 15th day of May, in the year of our Lord Two
Thousand Three and in the two hundred and twenty-seventh year of the Sovereignty and
Independence of the United States of America.

[Signature]
Witness
[Signature]
Notary

Thomas L. Dicks
Thomas L. Dicks

STATE 207.50 COUNTY 96.25
EXEMPT YES ☒ NO
ASSESSOR _____

TEED
2597 0299

D0165



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

PERSONALLY appeared before me the undersigned witness who after being duly sworn says that (s)he saw the within named grantor(s) execute the foregoing instrument and that (s)he with the other signed witness witnessed the execution thereof.

SWORN to before me this
15th day of May, 2003

[Signature]
Notary Public for SC

My Commission Expires 3/14/2005

(SEAL)

[Signature]
Same witness sign again

D0166

EXHIBIT "A"

ALL AND SINGULAR, that certain piece, parcel or tract of land lying situate and being in Long Bay Estates, Socastee Township, Horry County, South Carolina consisting of Lots 1, 2 & 3 as shown on that certain survey dated April 25, 2003 prepared for Thomas L. Dicks and Robert E. Dicks, Jr. by Robert L. Bellamy & Associates, Inc. entitled "Resubdivision of Blocks 28 & 29 at Long Bay Estates Socastee Township, Horry County, South Carolina. Said plat was recorded on May 13, 2003; in the Office of the Register of Deeds for Horry County in Plat Book _____ at Page _____ reference to which is incorporated herein and made a part hereof by reference.

This conveyance is made subject to all easements, rights of way and conditions of record.

Being the same lands and premises as were conveyed to Grantor by Deed from David W. Meese, Jr. and Leigh Ammons Meese dated May 13, 2003 and recorded in Deed Book _____ at page _____ of the public records of Horry County, South Carolina.

TMS: _____

RECORDED
NEW PAGE 186-14-05-012
EXHIBIT 22: 186-14-05-001
L-2 Bk Plt at
5/24/03

D0167

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located at Lots 1, 2 & 3 Blocks 28 & 29, Long Bay Estates,, bearing HORRY County Tax Map Number _____, was transferred by Thomas L. Dicks, to Robert E. Dicks, Jr. and Amanda Y. Dicks, on 05/15/03.

The transaction was (Check One):

XX an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$87,500.00

 not an arm's length real property transaction and the fair market value of the property is \$0.00

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et seq. because the deed is N/A.

As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as grantee.

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

R. E. Dicks, Jr.
Robert E. Dicks, Jr.

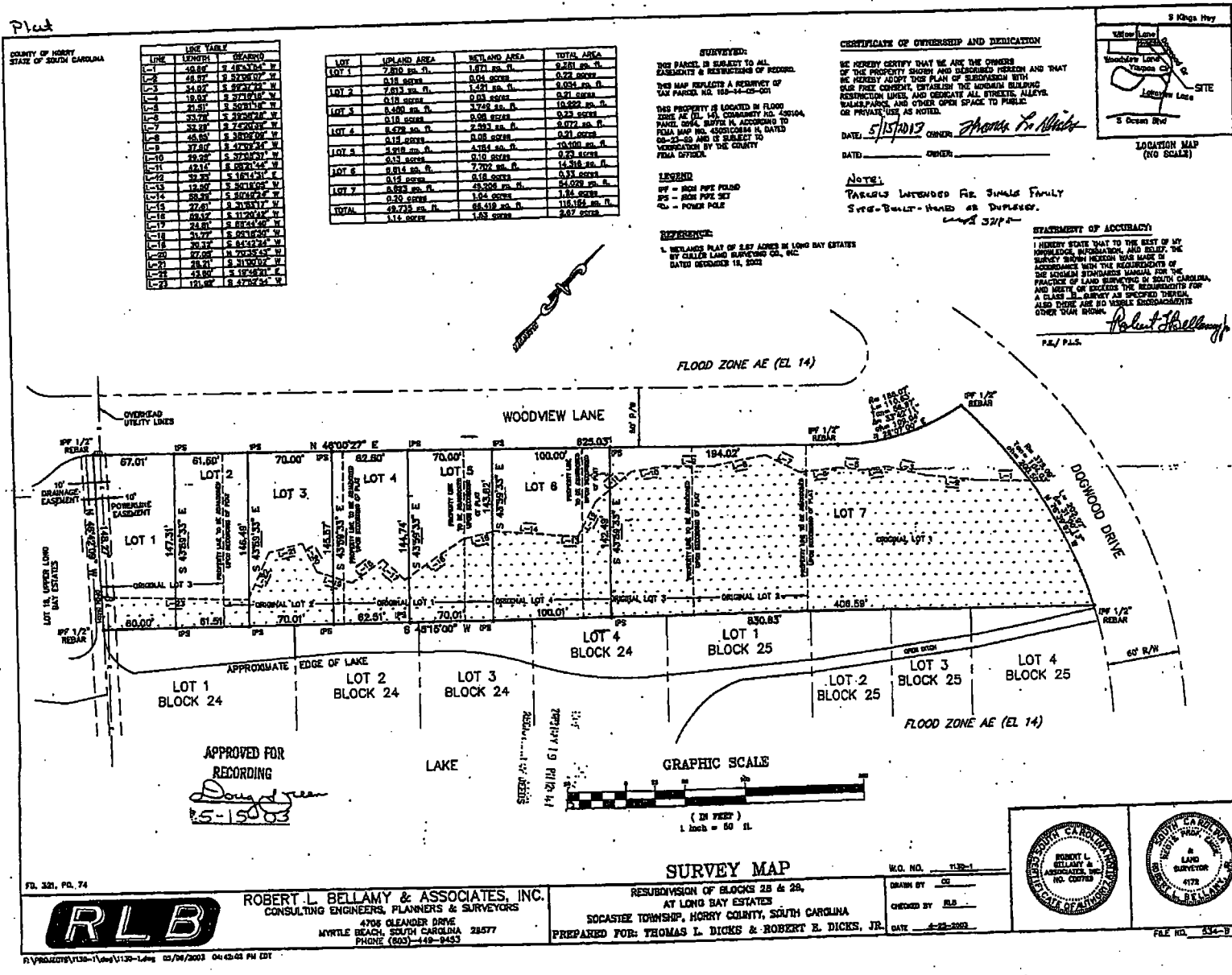
Amanda Y. Dicks
Amanda Y. Dicks

SWORN to before me this 15th
day of May, 2003

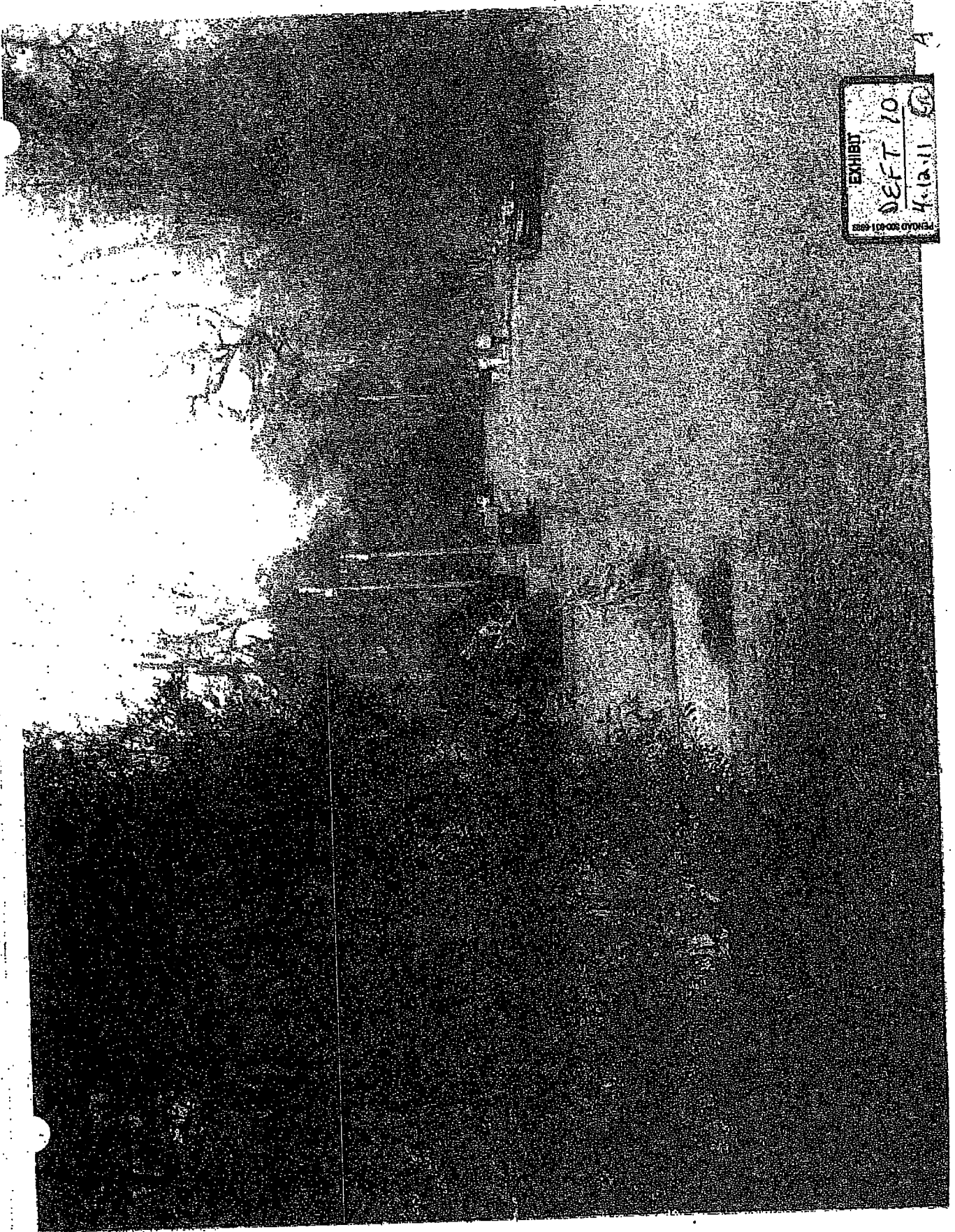
[Signature]
NOTARY PUBLIC for

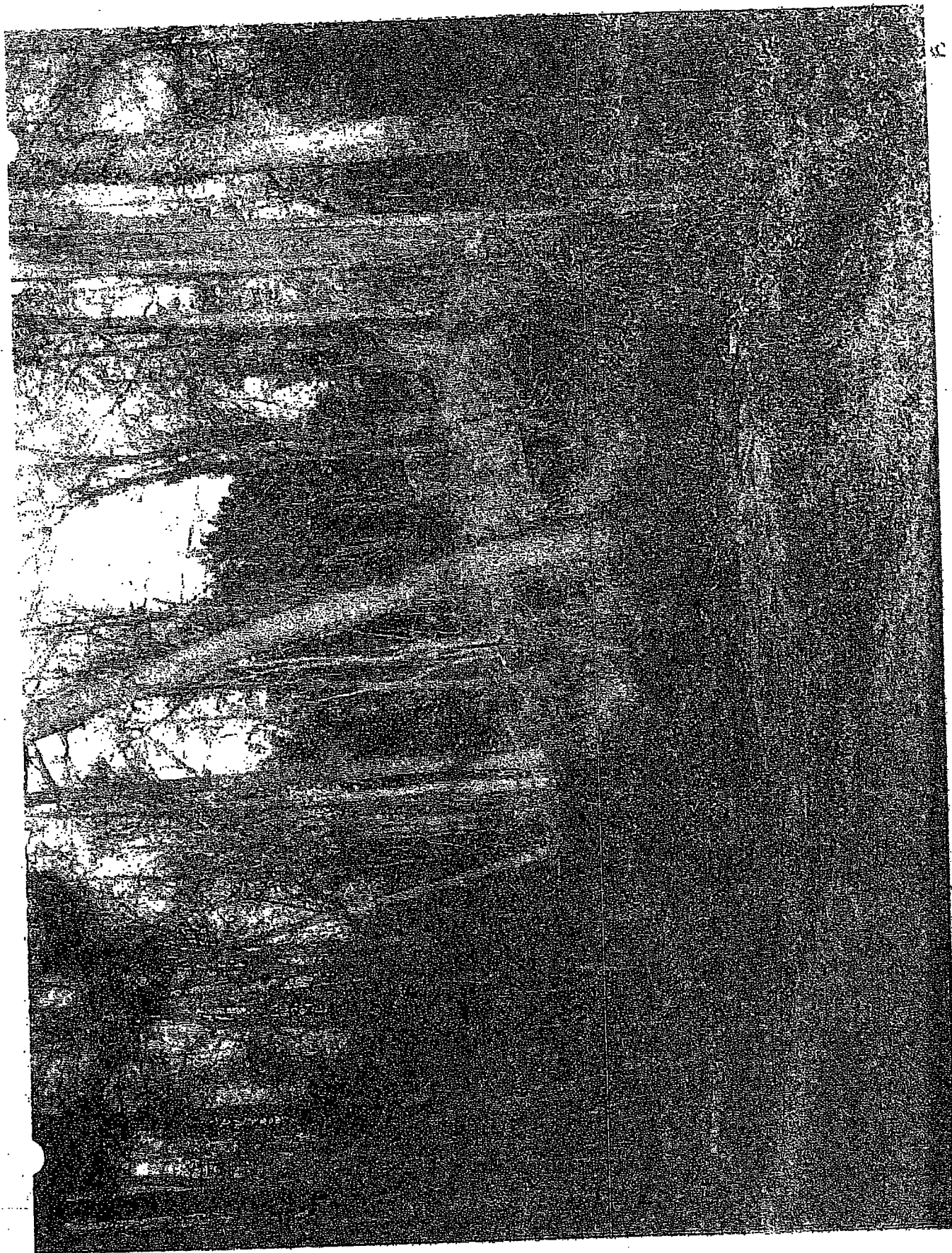
My Commission Expires: 3/14/2005

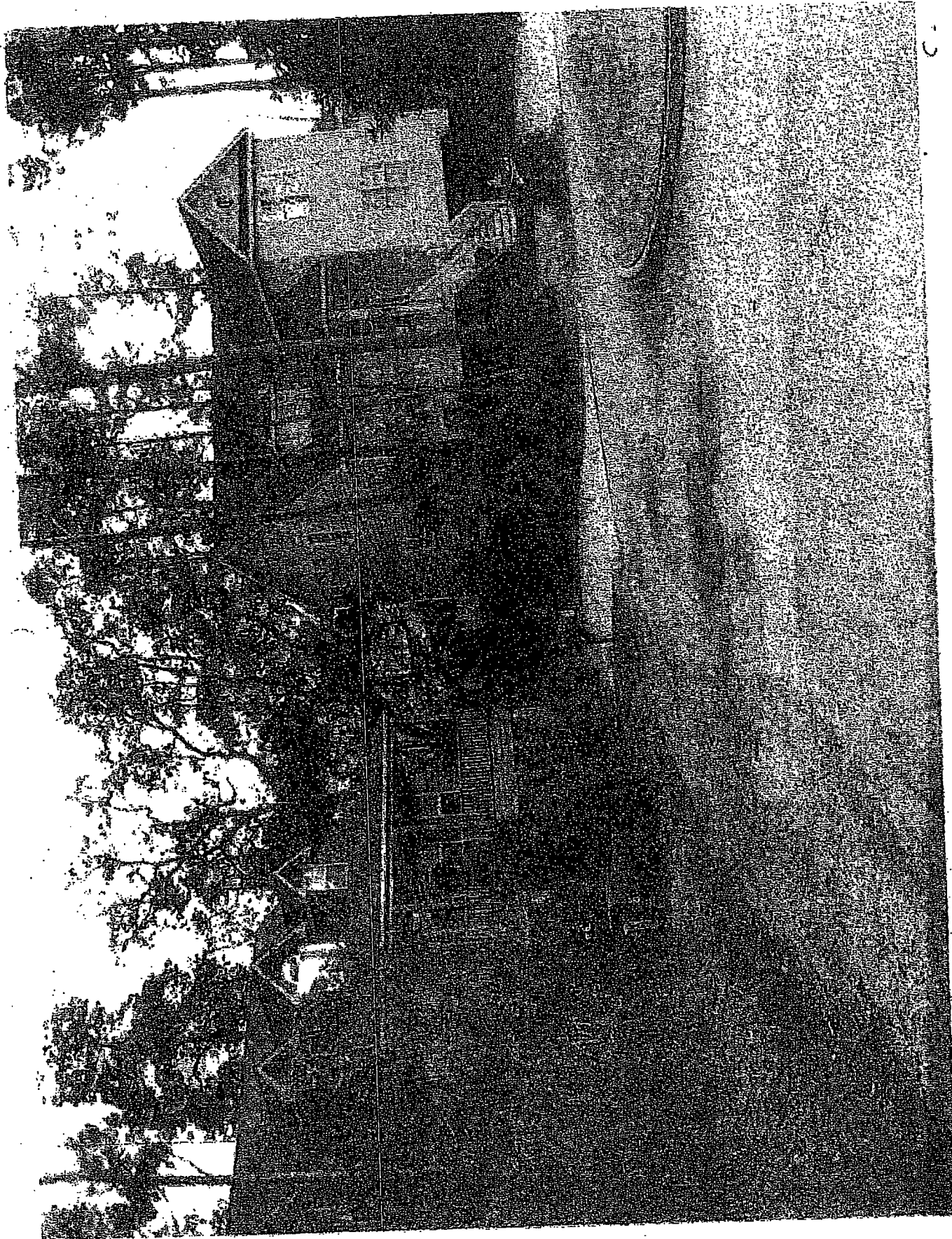
D0168

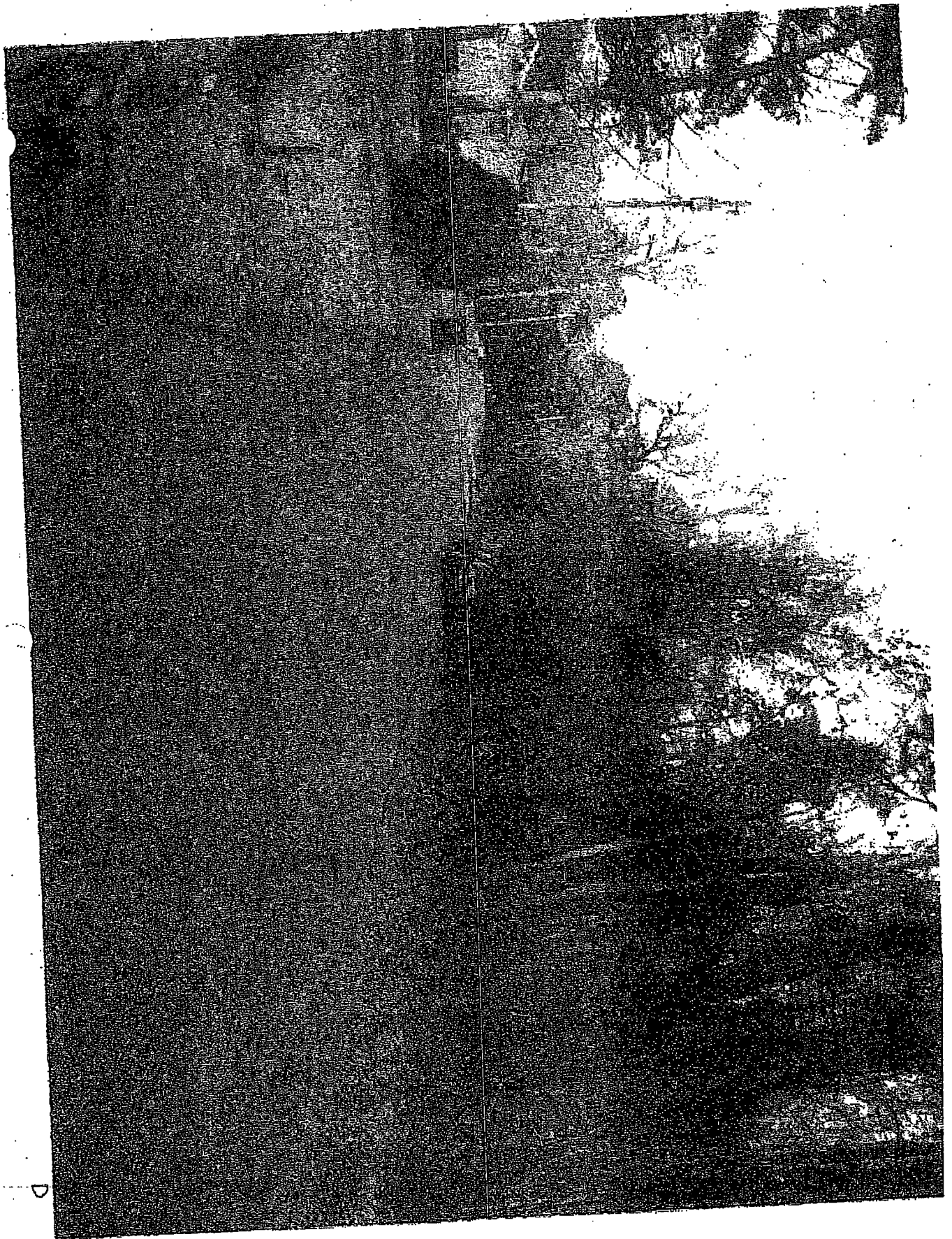


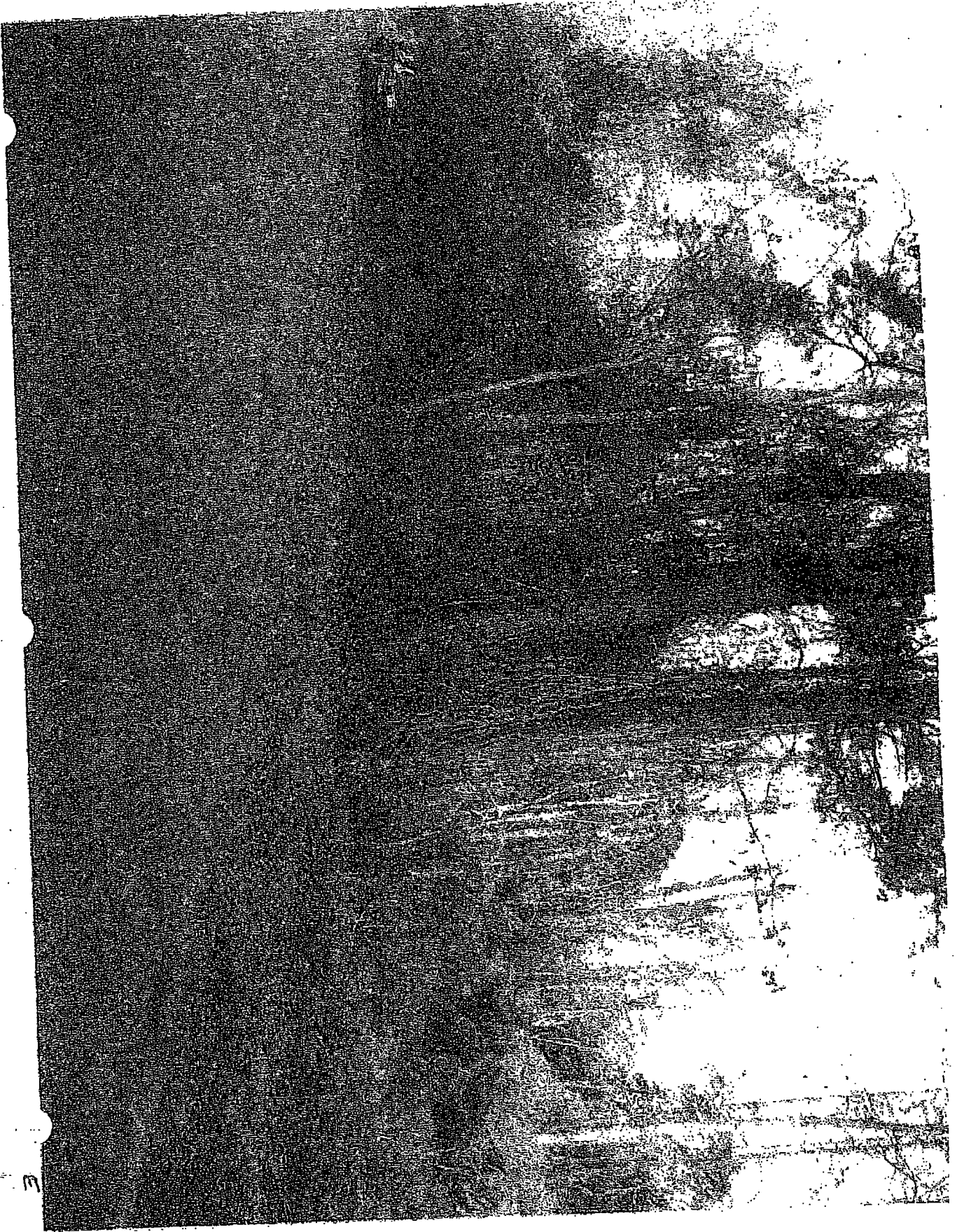


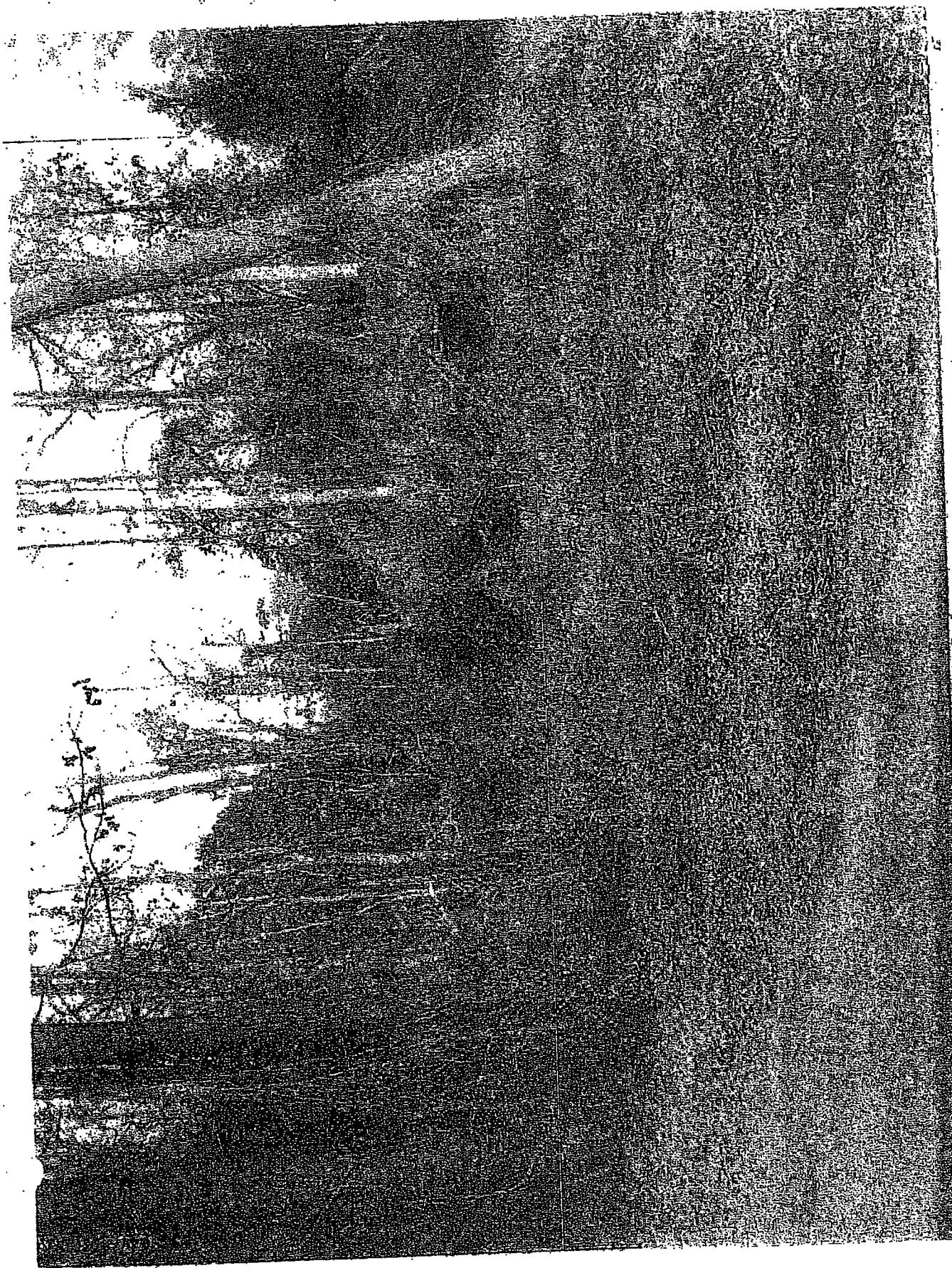


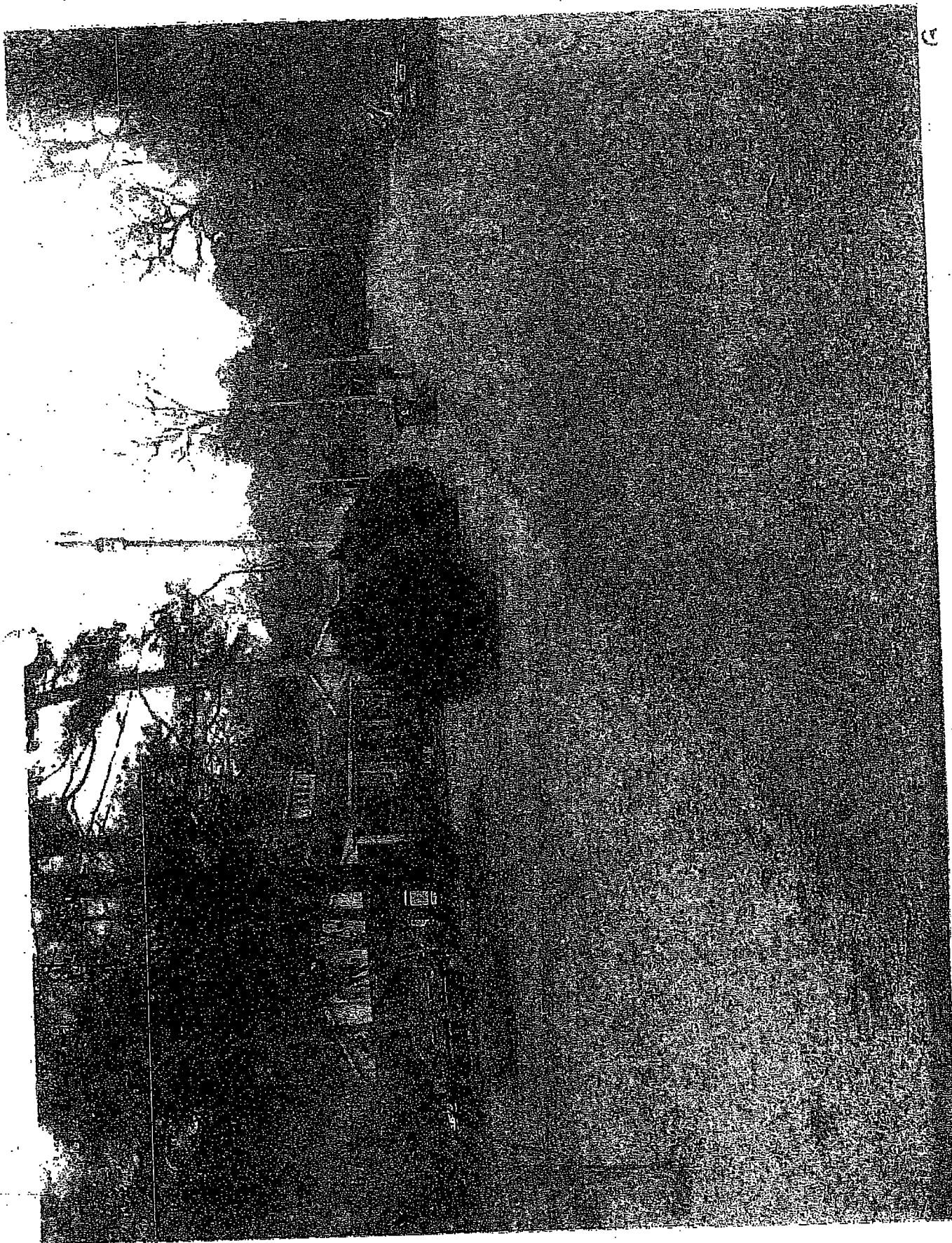


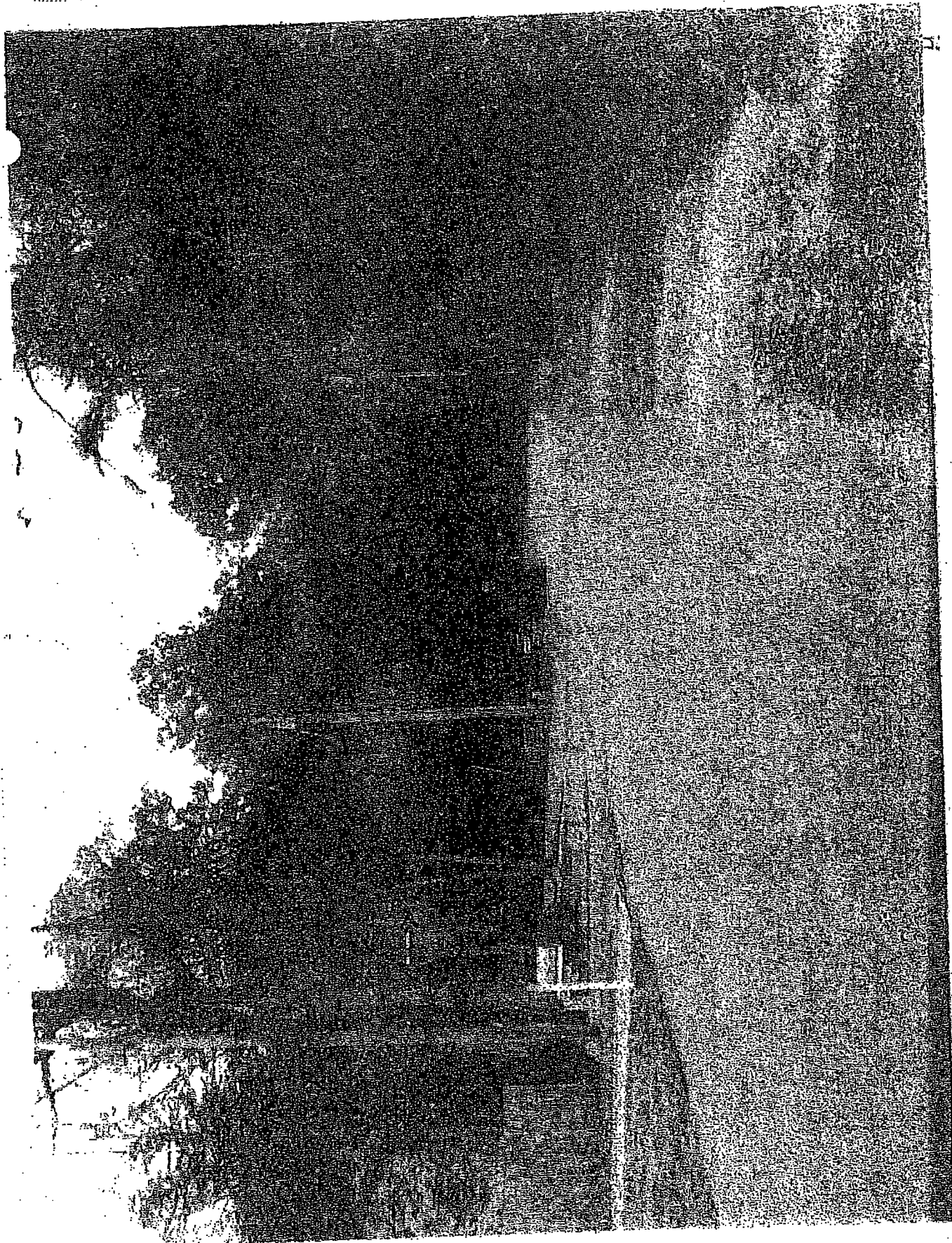


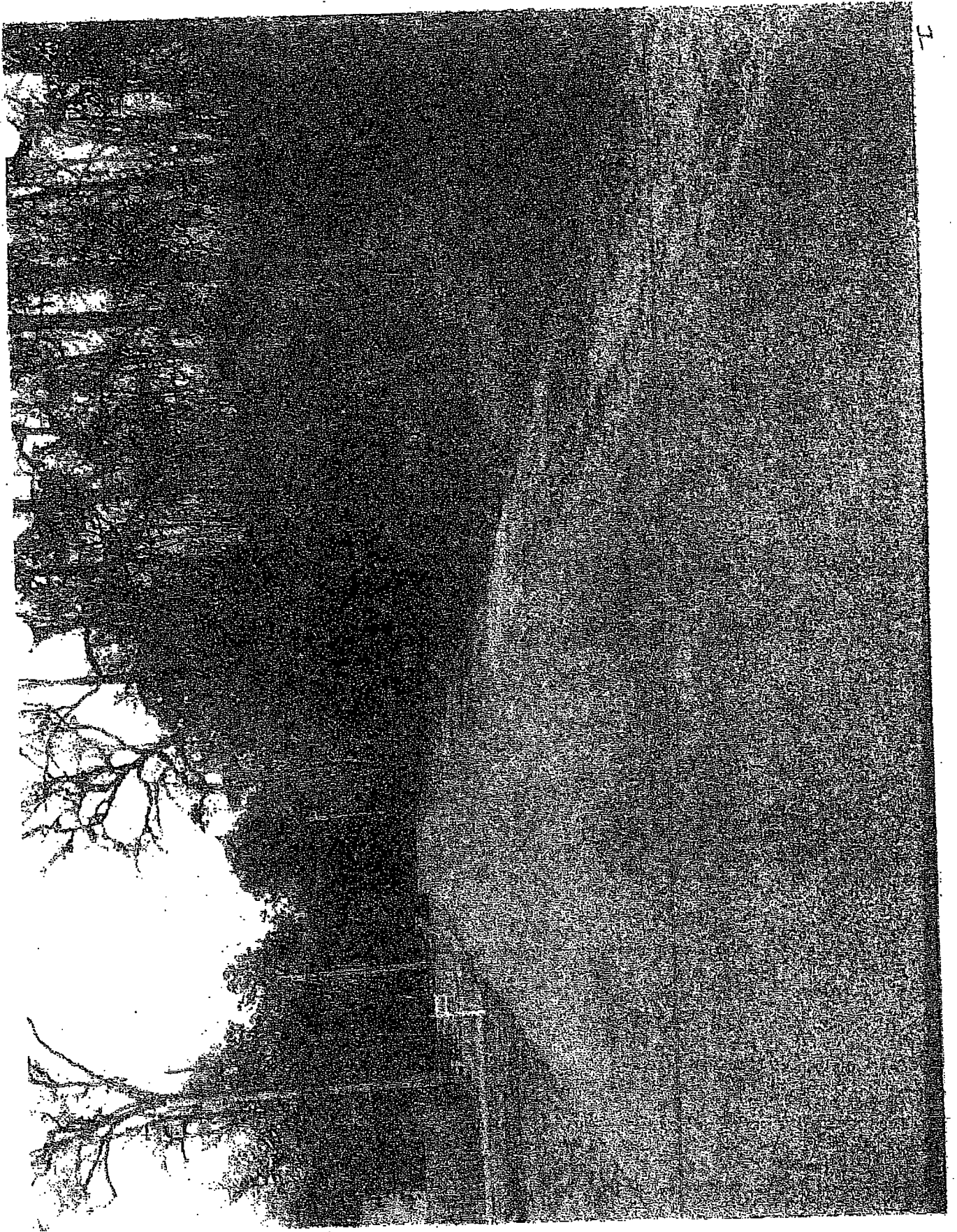


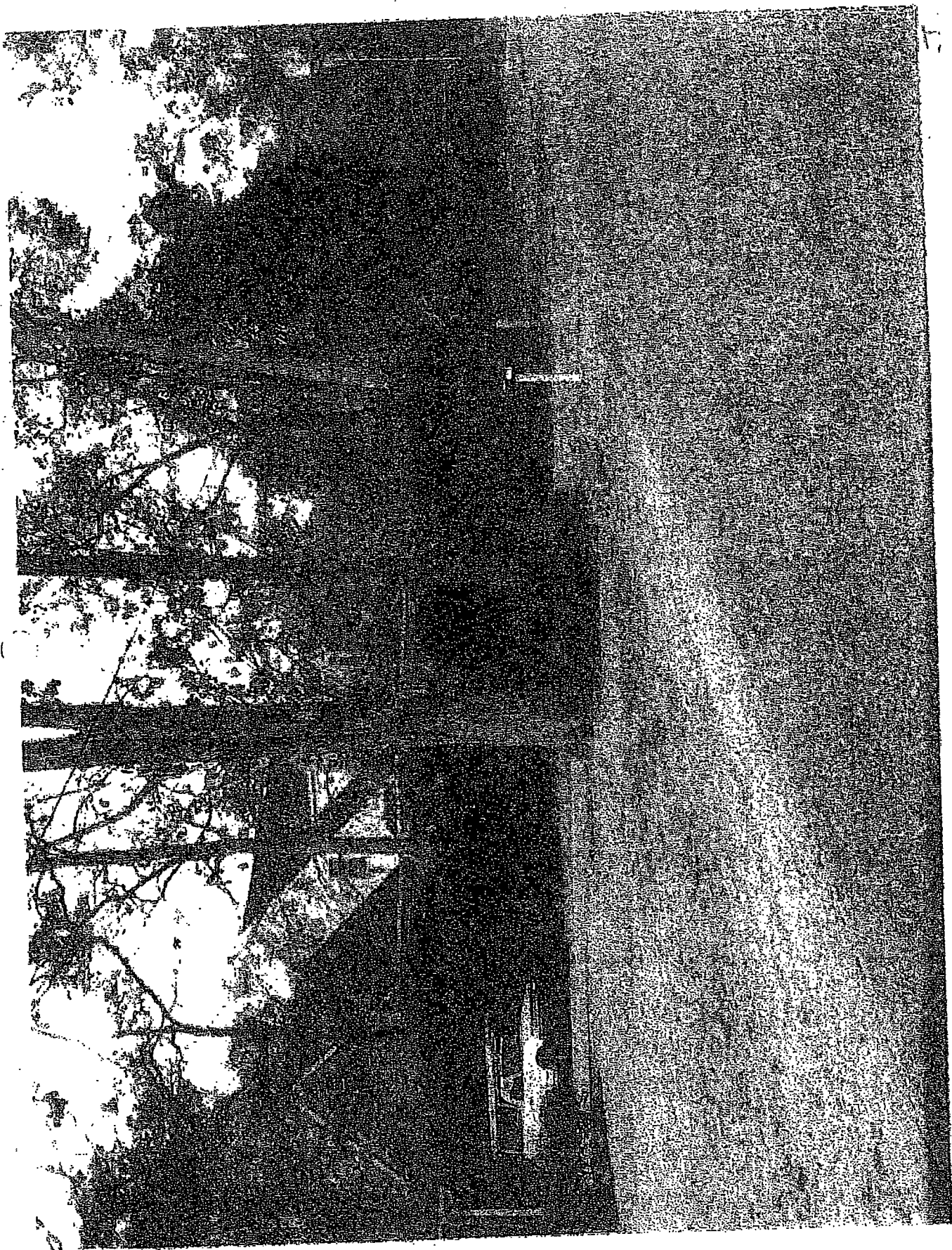


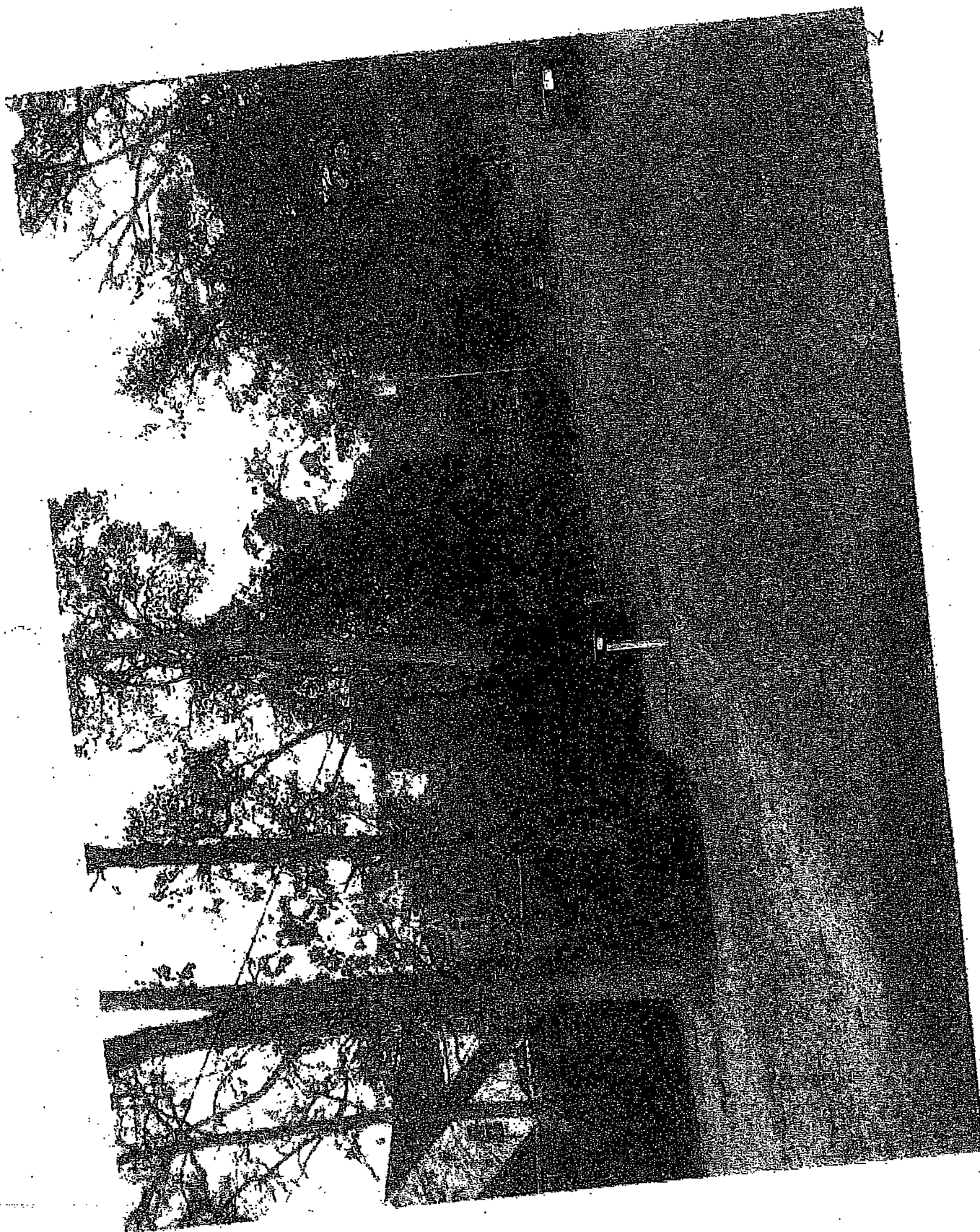


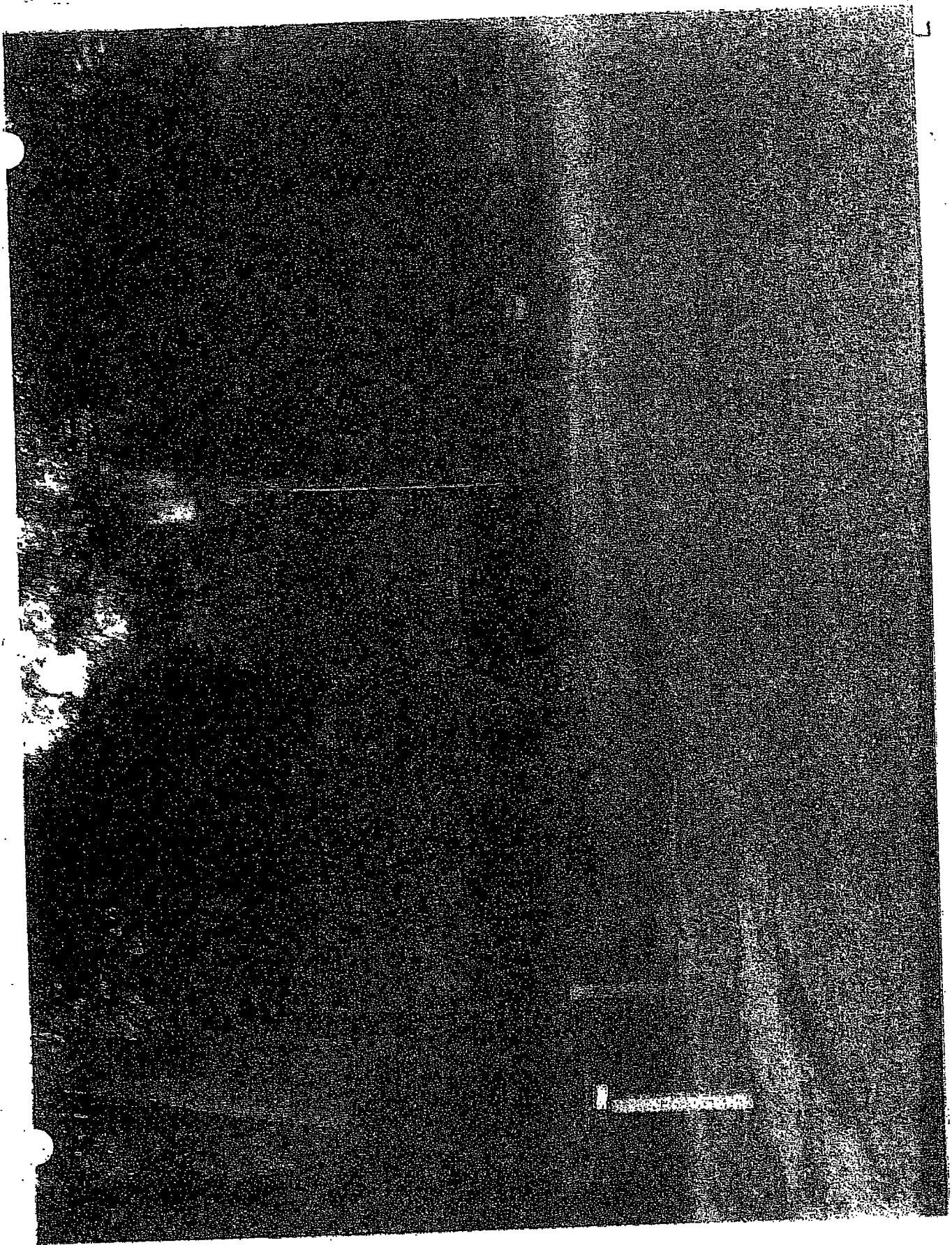


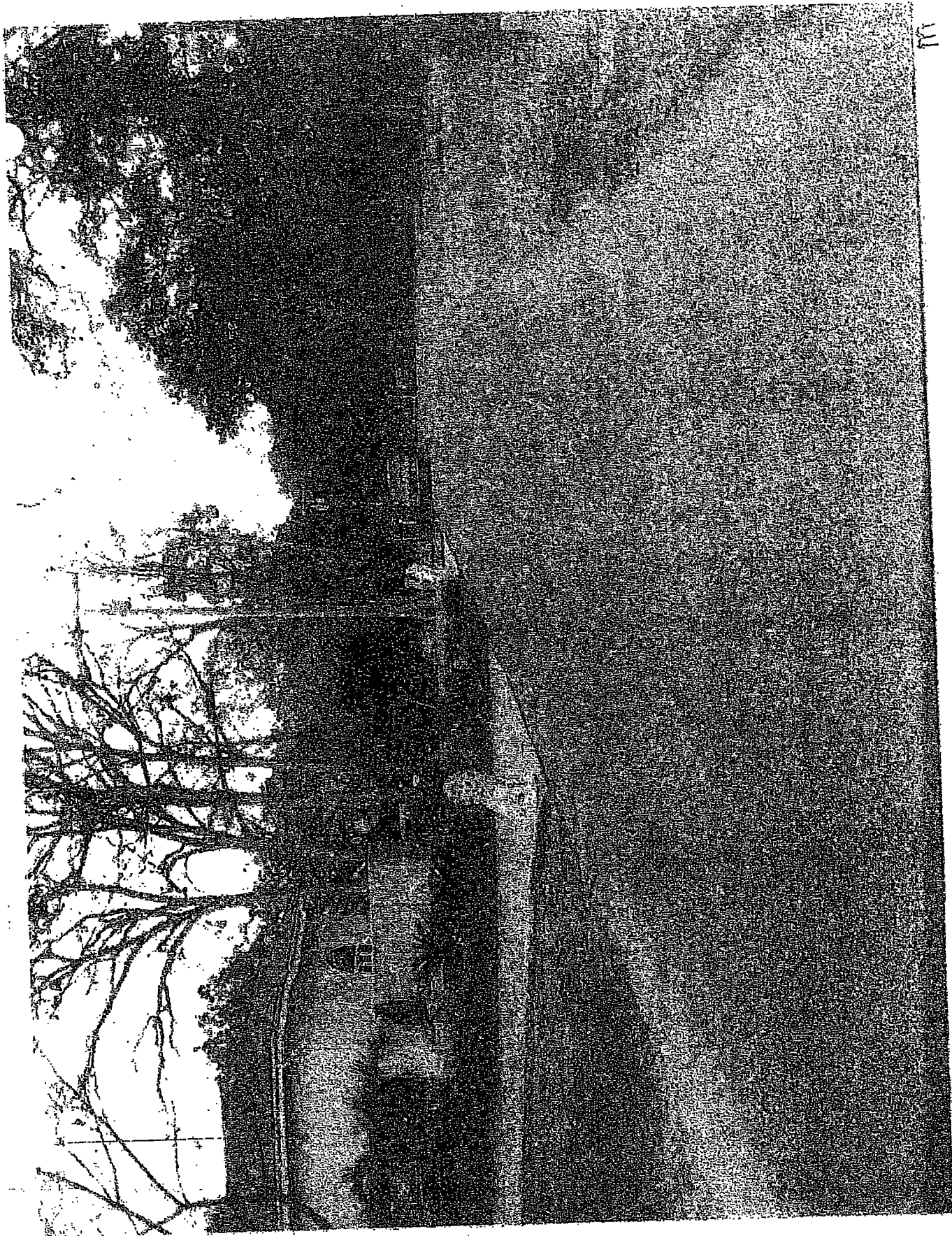


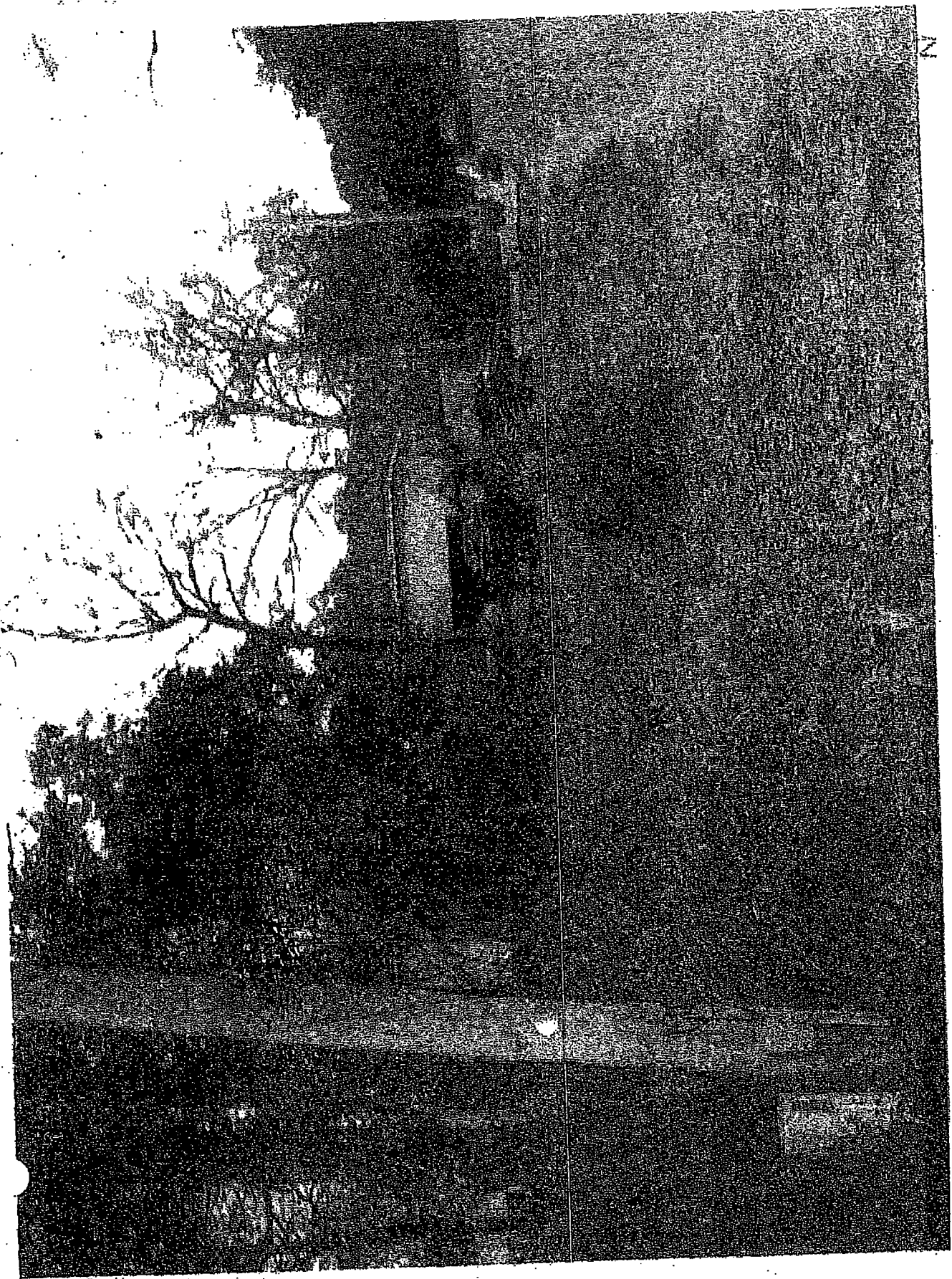




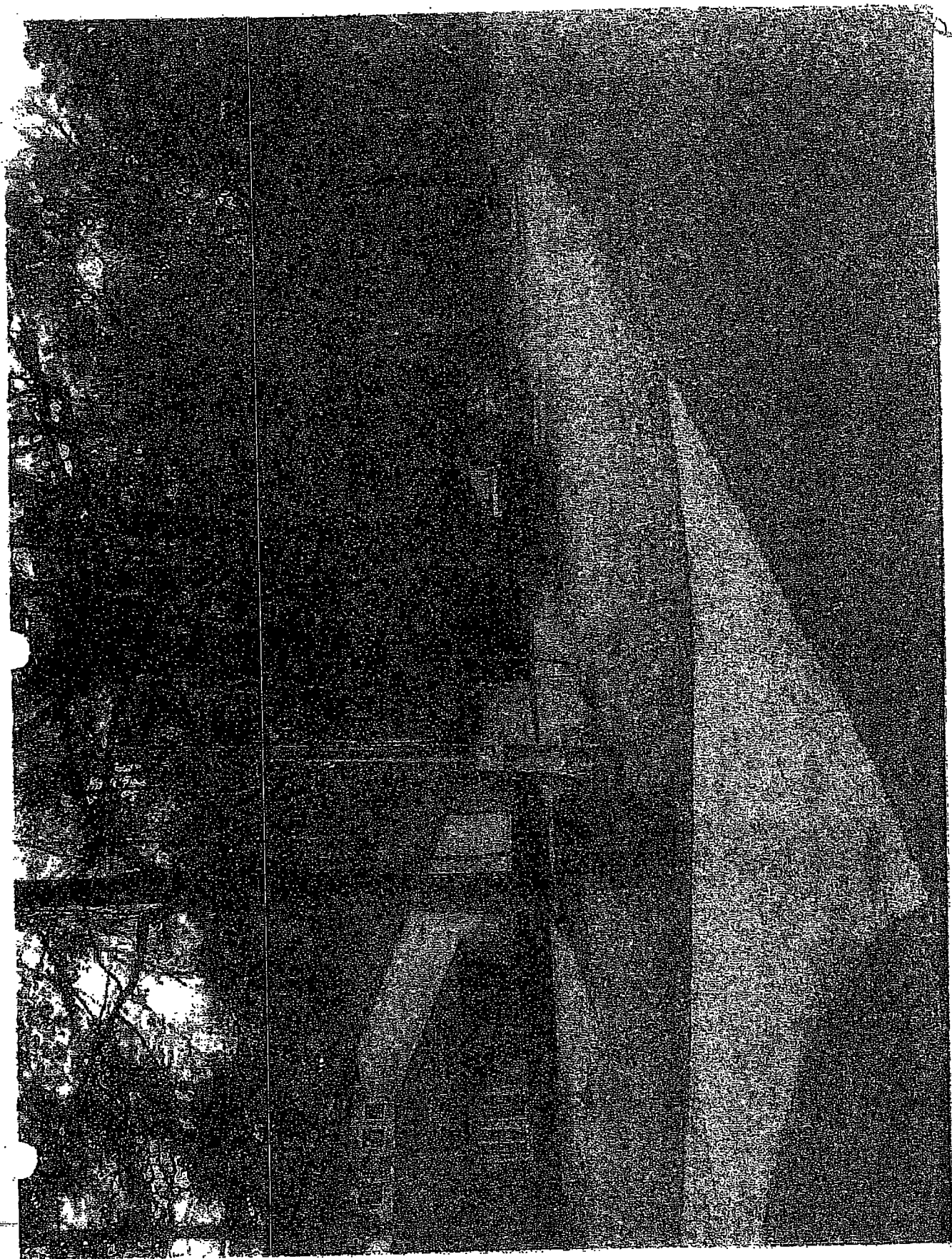


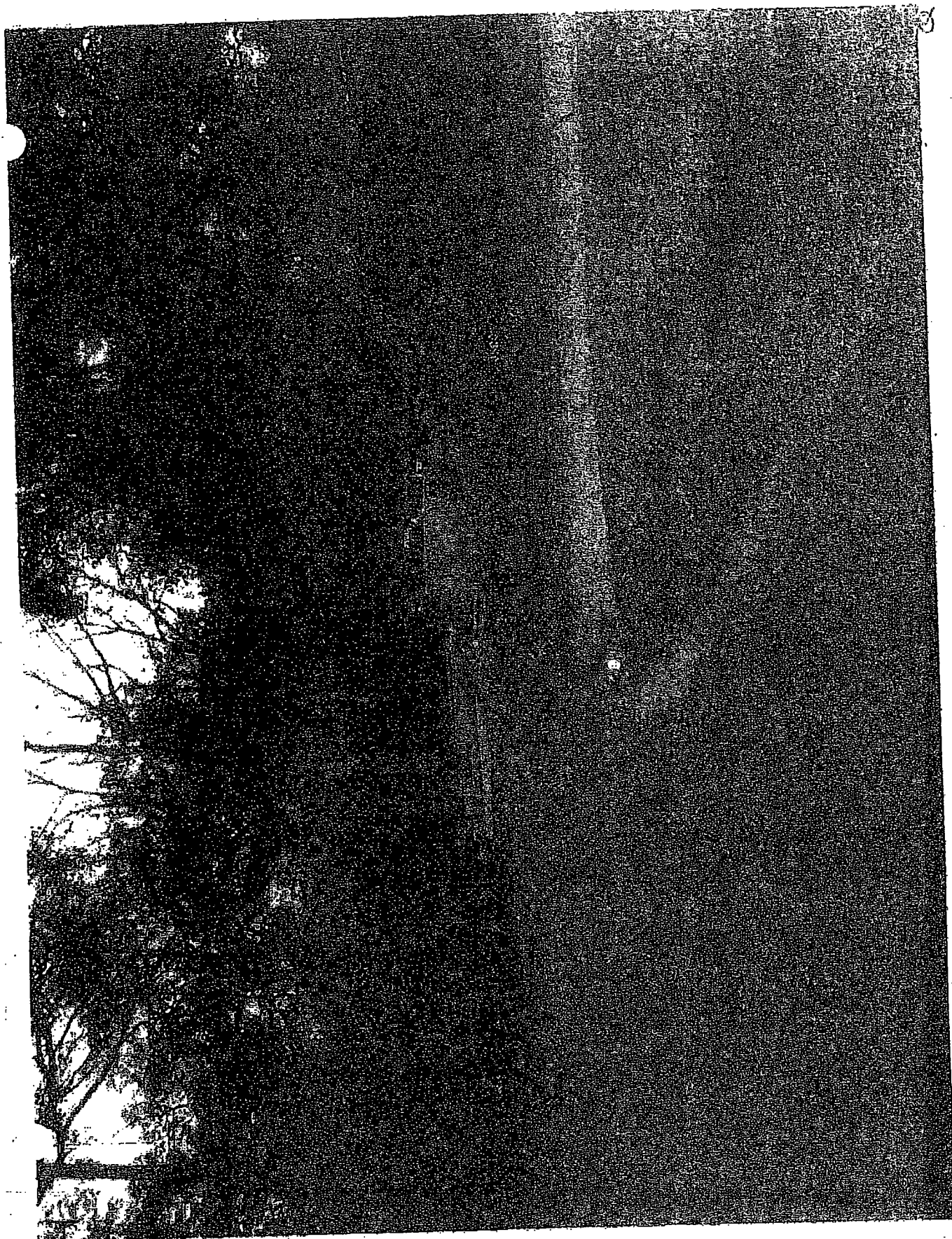












SEP. 30. 2005 2:39PM

CHICAGO

NO. 226

P. 2/3

**OWNERS FORM
TICOR TITLE INSURANCE COMPANY
1704 Main Street, 1st Floor, Columbia, SC 29201**

SCHEDULE A

OFFICE FILE NUMBER: 97-222
POLICY NUMBER: 41 8013 097 00009231
DATE OF POLICY: September 4, 1997, at 11:43 a.m.
AMOUNT OF INSURANCE: \$145,000

1. **Name of Insured:**
David W. Keese, Jr. and Leigh Annons Maesa
2. **The estate or interest in the land which is covered by this Policy is:**
Fee Simple
3. **Title to the estate or interest in the land is vested in the Insured.**
4. **The land herein described is encumbered by the following mortgage or trust deed, and assignments:**

Mortgage from David W. Maese, Jr. and Leigh Annons Maese to Carmen F. Ward, Trustee, aml, dated September 3, 1997, in the original principal amount of \$55,000, recorded on September 4, 1997, at 11:43 a.m. in Mortgage Book 2157 at Page 886, Horry County records.

5. **The land referred to in this Policy is described as follows:**

ALL AND ENTIRE, that certain piece, parcel or tract of land lying situate and being in Long Bay Estates, Seabrook Township, Horry County, South Carolina containing 2.67 acres (more or less) as depicted on that certain survey dated July 24, 1997 prepared for David Maesa and Leigh A. Maesa by Chiles Land Surveying Co., Inc. which was recorded on September 4, 1997 in the office of the HNC for Horry County in Plat Book 148, at Page 232, reference to which is craved as forming a part of these presents.
AMS# 146-14-05-001

WM



**SCHEDULE A
Owners Form
(Rev 1/89)**

This Policy valid only if Schedule B is attached.

COPY

OWNERS FORM
TICOR TITLE INSURANCE COMPANY
SCHEDULE B

Policy Number: 41 9013 097 00000231

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

General Exceptions:

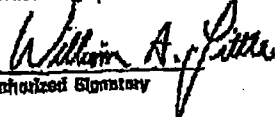
None

Special Exceptions:

- (a) Taxes and assessments for the year 1997 and all subsequent years, which are a lien, but are not yet due and payable.
- (b) ~~The deeds in the chain of title to the property described in schedule A hereof contain no restrictive covenants. Deeds purporting to convey other lots within the subdivision of which the above described property is a part, however, do contain restrictive covenants. This policy is based upon examination of title to the property herein identified, and affords no insurance as to the possible effect of restrictions which may, or may not, be applicable by reason of the general plan of development of the subdivision.~~
- (c) ~~Ten foot (10') power line easement traversing the subject property as depicted on the Cullar Land Survey Co., Inc. Survey referred to in item 3 of schedule A.~~
- (d) The mortgage referred to in item 4 of schedule A.
- (e) No insurance is afforded as to the exact amount of acreage contained in the property described herein.

WA

Countersigned


Authorized Signatory

Schedule B of this Policy consists of 1 page(s).

SCHEDULE B
Owner's Form
(Rev. 1/89)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

SELLER'S AFFIDAVIT
AND INDEMNITY

PERSONALLY appeared before me, the undersigned Sellers, who being duly sworn, depose and say on oath that the following described property is owned by Sellers to wit: Long Bay Estates (2.67 acre tract) TMS #186-14-05-001.

THAT there is no outstanding indebtedness for equipment, appliances or other fixtures attached to said property.

THAT the lines and corners of said property are clearly marked and there are no disputes concerning the location of the lines and corners.

THAT there are no pending state or federal suits or proceedings (including but not limited to Divorce), nor are there any judgements (including but not limited to Divorce), bankruptcies or executions against Sellers in any jurisdiction in the United States nor is the above described property subject to any liens or encumbrances whatsoever.

THAT there are no outstanding bills incurred for labor and materials used in making improvements or repairs on said property, or for service of architects, surveyors, or engineers incurred in connection therewith for improvements or repairs made on the above described property during the three months immediately preceding the date of closing.

THAT there are no tenancies, leases, or other occupancies upon the above described property;

THAT SELLERS know or have no reason to know of any environmental liabilities or hazardous waste liabilities affecting the Property;

THAT SELLERS have received no notice from any public authority, requiring any condemnation, improvement, alteration or change to be made in or about said Property;

FURTHER, Sellers agree to indemnify and hold the Purchaser of the above described property, Dusenbury, Hendrix & Little and TICOR harmless from all claims, demands, costs, including reasonable attorney's fees and court costs (also including reasonable attorney's fees and court costs incurred enforcing this indemnity) which Purchaser, Dusenbury, Hendrix & Little and TICOR might sustain or incur resulting from any inaccuracy in the above representations or from any claimant or lienholder whatsoever.

SWORN TO BEFORE ME THIS

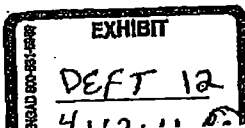
2 day of September, 1997.

Ron [Signature] (LS)
Notary Public for New Mexico
My Commission Expires: 9-16-2000

SELLERS:

(Carmen F. Ward, Marion G. Whitaker, Richard C. Lewis, Jr., Raymond H. Lewis, Carol L. McKellar Levin, Peter S. Lewis)

Carmen F. Ward, Trustee and Attorney-in-Fact for Sellers
BY: *[Signature]*
Carmen F. Ward, Trustee and Attorney-in-Fact for Sellers



1 STATE OF SOUTH CAROLINA :
 2 : SS:
 3 COUNTY OF HORRY :
 4 - - - - -
 5 IN THE COURT OF COMMON PLEAS
 6 - - - - -
 7 -----x
 8 JOHN MUSICK, :
 9 :
 10 Plaintiff, :
 11 :
 12 -vs- : Case Number
 13 : 2004-CP-26-2075
 14 THOMAS L. DICKS and ROBERT E. DICKS, :
 15 JR., :
 16 :
 17 Defendants. :
 18 -----x

19 Transcript of Proceedings had before the
 20 Honorable Cynthia Howe, Master-In-Equity, taken by Rita
 21 Rodriguez, at the Conway County Courthouse, 1301 Second
 22 Avenue, Conway, South Carolina, on Wednesday, the 13th
 23 day of April, 2011, commencing at 9:50 a.m.
 24
 25

Job No. CS315166

Veritext Corporate Services

800-567-8658

973-410-4040

1. A P P E A R A N C E S:

2. ON BEHALF OF THE PLAINTIFF:

3. THOMAS C. BRITTAIN, ESQ.
4. Brittain Law Firm
5. 4614 Oleander Drive
6. Myrtle Beach, South Carolina 29577

7. ON BEHALF OF THE DEFENDANTS:

8. DEMETRI K. KOUTRAKOS, ESQ.
9. Callison, Tighe & Robinson, LLC.
10. 1812 Lincoln Street (29201)
11. P.O. Box 1390 (29202)
12. Columbia, South Carolina

13. - - - - -
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23.
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25.

INDEX OF EXAMINATION

Page

Examination by

INDEX OF EXHIBITS

Defendants' Exhibit

Marked

13- Enlarged map of Long Bay Estates subdivision. 4

1 - - - - -
2 (Thereupon, Defendant's Exhibit
3 Number 13 was marked) .
4 - - - - -

5 THE COURT: Please be seated. Thank
6 you so much. I apologize again.

7 MR. BRITTAIN: You're the Judge.

8 THE COURT: Just as I was getting ready
9 to walk out, I had three people show up with
10 deeds. So it was either sign them then or have
11 people come in here and sign them in here.

12 Anyway, I apologize.

13 Mr. Brittain.

14 MR. BRITTAIN: Your Honor, I have the
15 burden so I think I should go last. Mr.
16 Koutrakos kept saying I have the burden. So I
17 can open and close or I could just close, either
18 one.

19 THE COURT: However way you want to do
20 it.

21 MR. KOUTRAKOS: I think he has the
22 burden and he should go first.

23 MR. BRITTAIN: No, the burden goes
24 last.

25 MR. KOUTRAKOS: Okay. I just have one

1 administrative matter.

2 This plat, this is the large plat. You
3 have the small version. This is the 1955 plat.
4 I've talked to Tommy about this. We are going to
5 introduce this as Defendant's Exhibit 13 into
6 evidence. I'll fold it off this board and give
7 it to the court reporter.

8 MR. BRITTAIN: We've agreed on all of
9 the exhibits. They are all in evidence. If we
10 didn't formally move them in, they're in.

11 MR. KOUTRAKOS: Except the proffered
12 ones.

13 MR. BRITTAIN: The proffered ones are
14 in as proffered, right.

15 THE COURT: All right. Very good.

16 MR. KOUTRAKOS: May it please the
17 Court, your Honor. As Mr. Brittain said, he's
18 right, the plaintiff has the burden of proof in
19 this case. And the burden is to show that some
20 covenants apply to my client's property. And the
21 standard is they have to apply by either their
22 expressed terms or unmistakable implication.

23 So, for the plaintiff to win in this case,
24 the Court has to find that whatever restrictions
25 the plaintiffs say apply to the property, that

1 they have to be shown expressly or by
2 unmistakable implication. That's the standard.
3 I strongly do not believe that the plaintiff can
4 meet that burden.

5 As the Court knows, covenants are strictly
6 construed against limitations of the free use of
7 property. That's the standard set forth by the
8 Appellate Court.

9 This case involves these plats of record.
10 You have seen some plats that are not of record
11 that have been introduced. I would ask that the
12 Court ignore the plats that are not of record
13 because the way you would view restrictions on
14 the public records is you have to look up the
15 public records and you have to go to a surveyor's
16 office to find whatever that is, a draft of a
17 map, who knows what it is, to determine what a
18 Restrictive Covenant means.

19 Now, as you heard yesterday, there is the
20 1955 plat. And all parties have admitted that
21 the 1955 plat shows Blocks 20 and 29 as seven
22 lots. The Court of Appeals found the Request For
23 Admission in the record and it clearly shows the
24 property is seven lots.

25 The 1972 Order has this map attached to it.

1 And here is something interesting about this map.
2 A lot has been made as to what this map says and
3 what this map doesn't say. We will argue that
4 this map shows our property, the property in
5 question, as containing seven lots. The Court of
6 Appeals found that this map shows seven lots on
7 my client's property.

8 And it's important to know that it says
9 it's a comparative locations map of property.
10 And what it means by that is, what the surveyor
11 did, he took various surveys that were of record
12 and, for lack of a better word, he overlaid them
13 on top of each other. And in order to show where
14 the different -- to show how the different plats
15 were referred to, he had some plats that were
16 shown as straight lines, and it says it right
17 here, Lots 30, 32 and 34 shown by solid lines.
18 And then he says Blocks 28 through 33 as shown,
19 Plat Book 25 of Page 22, the 1955 map,
20 represented by dotted lines.

21 So that's how he referred, that's how he
22 was able to put both maps on this comparative
23 location map on this one exhibit to the Order so
24 people could know where the information came
25 from.

1 So our position is that when this map was
2 recorded, I mean when this map was put as part of
3 the Order, parts of Blocks 20 and 29 were clearly
4 cut off but they never did away with the lots.

5 If you look at the 1972 Order, the 1972
6 Order says nothing about doing away with any lots
7 on the property. In fact, in paragraph three of
8 the Order it says, it specifically refers to
9 Blocks 28 and 29. This is Page 4 of the Order,
10 paragraph three. I think I have it here.

11 It says, "All property on the Lewis Estate
12 lands' side of the common boundary line is shown
13 on the map recorded in Plat Book 25 at Page 22 as
14 being divided into lots and blocks, including
15 additional Blocks numbered 28, 29, 30, 31, 32 and
16 33 thereon, which are shown within that portion
17 of the plaintiffs' land area described on the
18 first page of this report."

19 So, the Order acknowledges that Blocks 20
20 and 29 do in fact have lots.

21 In fact, interestingly, there is other
22 property that was involved in this litigation
23 called the Casalina Corporation property. And it
24 says, "On the Casalina Corporation side of the
25 common boundary this is not the case, only a

1 portion of that property being shown as
2 subdivided into lots and blocks, the rest of it
3 being undeveloped according to the map."

4 So if you read the Order, you would come to
5 the conclusion and, of course, the Order is what
6 we have to go by because the Order is what
7 plaintiffs say encumbers their property. And if
8 you look at this Order, it shows Blocks 20 and 29
9 as being divided into lots. The Court was
10 clearly able to distinguish between what was
11 subdivided into lots and what wasn't. It found
12 Blocks 20 and 29 to be lots.

13 Another point I want to go through, there
14 is a lot of mention made of why the Complaint was
15 filed in the first place, that the intent of the
16 plaintiff in that case was to have these
17 restrictions somehow applied to the property.
18 And I don't think that was the case. I think
19 when the Complaint was filed it was a Complaint
20 complying title.

21 And, in fact, there was a dispute and the
22 Court decided the dispute. The dispute is
23 whether the defendants in that case argued that
24 the restrictions applied to everything shown on
25 the plat even though it said that, even though

1 the restrictions said only Blocks 1 through 27.

2 And on Page 6, Paragraph 2, it says, "Such
3 declaration negates an implicit extension of the
4 restrictions or protective covenants outside of
5 the specified blocks, and although defendants
6 have alleged representations in sales of
7 property, and have relied on the 'residential
8 subdivision' legend on the map, no proof of these
9 allegations was offered and so I had find and
10 hold that the portion of the plaintiffs' property
11 with which their action concerns itself is not
12 subject to any restrictions or protective
13 covenants beyond Block 27."

14 So there was a dispute in that case and the
15 Court decided that dispute. Of course, later
16 there was an agreement of the parties and that is
17 the crux of the issue in this case. What does
18 this language mean? What does this language mean
19 right here? "In like manner, the remaining
20 portions of 'old' Blocks 28 and 29." That
21 language, you heard a lot said about that.

22 First of all, it refers to the area lying
23 between the rear of Blocks 24 and 25. Excuse me.
24 Let me back up.

25 "In like manner, the remaining portions of

1 "old" Blocks 28 and 29." That one clause would
2 indicate that the blocks were not done away with.
3 They're still there. They haven't gone away.

4 It says, "are subject to such residential
5 restrictions, but with right of revision of the
6 lot arrangement or for combination with abutting
7 portions of lots in Blocks 24 and 25."

8 By the use of the word "lot arrangement,"
9 it presupposes that there are lots there to begin
10 with.

11 It also says, "or for combination with
12 abutting portions of lots in Blocks 24 and 25."

13 The argument is that this 1972 Order
14 modified the restrictions attached to this plan.
15 The Court said, Hey, per agreement of the parties
16 ongoing, the Court is going to find that these
17 restrictions apply to Blocks 28 and 29. But, and
18 the word "but" is important because it's an
19 exception to the restrictions, "but with right of
20 revision of the lot arrangement or for
21 combination with abutting portions of lots in
22 Blocks 24 and 25." This is a right that was
23 given in the Order. A right that was given that
24 was not limited to anybody.

25 Now, the next paragraph, Mr. Brittain I'm

1 sure will argue, that "the restrictions uniformly
2 used in this area and the declaration recorded in
3 25 and 22 reserve to grantor the right to change
4 boundary lines and building lines as to any
5 unsold lots in any event."

6 What does that mean? Quite frankly, I
7 don't know. I think it's surplusage. It's
8 there. Why is it in there? Is it saying that
9 the restrictions attached to this map, well, it's
10 paraphrasing what the restrictions attached to
11 the map said. And if the Court wanted the
12 restrictions to apply, in the same manner as
13 they're written attachment to the plat, why did
14 it include that language?

15 Perhaps it included that language to say,
16 Hey, I think this agreement is fair because you
17 guys bought this property at one point in time
18 and when you bought it it showed Blocks 28 and 29
19 as containing lots and you have a right to
20 believe that there would be residential lots
21 there instead of this large acreage. And, so,
22 when you bought that property it's fair that
23 there were seven lots and it's fair now that
24 there could continue to be seven lots. So
25 you're not prejudiced by it. Perhaps that's why

1 they included that in there. I don't know.

2 But it's clear that the right of revision
3 was not limited to anybody. It was not limited
4 to the plaintiff. It runs with the land.

5 I have cited, your Honor, in my pretrial
6 brief, the case of Newbury Electric. And in that
7 case the Court said there was a right in the
8 chain of title to have a power company move some
9 power lines. And the Court found that that right
10 or that benefit ran with the chain of title.

11 The same kind of thing that we have here.
12 This right would run with the land and it's
13 something that my client possesses.

14 Now, if we have to look at unrecorded
15 plats, if we have to look at what Carmen Ward did
16 in another case that doesn't affect this
17 property, if we have to cobble together, like the
18 plaintiffs tried to do, information to try to
19 figure out what the plaintiff intended in that
20 case, then I would argue that this land would be
21 ambiguous.

22 My first argument is crystal clear. This
23 right runs with the land. It's something that
24 the people in the chain of title relied upon,
25 lawyers relied upon, and this Order would have to

1. be considered.

2. But, if you have to cobble together all
3. this information to figure out what the language
4. means, then the language is ambiguous. There is
5. doubt as to the language and that language would
6. have to be construed in the light most favorable
7. to the free use of property.

8. And your Honor is familiar with the cases.
9. We have cited them in our pretrial brief.
10. Ambiguities are strictly construed against
11. parties seeking to enforce covenants. If the
12. language at issue could be construed more than
13. one way, the Court must construe it in my
14. clients' favor.

15. Now, let's talk about what happened. When
16. Carmen Ward sold the property to my clients, she
17. sold it by reference to this map which is in
18. evidence, and it's called Original Survey of 2.67
19. acres. So Mr. Culler, who prepared the survey,
20. perhaps thought this property had never been
21. surveyed before. It looks to me to be a
22. boundary survey. It doesn't reference that it's
23. a lot, that it's one lot that's been identified,
24. it doesn't say that the property is only being
25. sold as one lot. The deed to the Wards, from

1 the Wards, from Miss Ward to the Meeses, doesn't
2 restrict it to only being one lot.

3 There is nothing -- if Miss Ward wanted to
4 sell it as one lot, she could have. She could
5 have put something in the deed that said this
6 property could only be used as one lot. That
7 could have easily been done. That wasn't done.

8 Another thing interesting, of course, is
9 that this plat is not made out to Carmen Ward.
10 It's made out to David and Leigh Meese. Mr. And
11 Mrs. Meese had the right to revise the lot
12 arrangement. They're the ones who did the
13 subdividing. Is that proper? I don't know. I
14 think the right runs with the land.

15 In any event, the restrictions do not
16 provide for any right of combination. If there
17 were seven lots there, there is no right to
18 combine the lots. There is a right -- of
19 course, the restrictions attached to the plat say
20 nothing about combination, you cannot subdivide.

21 And the grantor, again, who is the grantor?
22 I don't know. It's an undefined term. No one
23 knows who the grantor is. On the four corners of
24 this document, I don't know who the grantor is.

25 In the 1972 Order, it paraphrases the

1 language of the 1955 Covenants and it says
2 grantor. What does that mean? Undefined term.
3 We don't know what that means.

4 But, in any event, going back to my point,
5 as to any unsold lots, the grantors reserve the
6 right to change the boundary lines and building
7 lines thereof. So they can change the boundary
8 lines of unsold lots. It doesn't mean to do away
9 with the lots. It can change the building lines
10 of lots. To me, that means setbacks. That
11 means setbacks. As to construction, setbacks is
12 where the building can be put on a particular
13 lot. Those are the two rights the grantor,
14 whoever that was, had a right to do. It did not
15 have a right to combine the lots.

16 So to the extent Carmen Ward exercised her
17 right of revision, which, by the way, even if she
18 did, would still run with the land, but even if
19 she exercised her right of revision to make the
20 property one lot, that's a void act. That act
21 can't be done. It's not authorized by the 1972
22 Order. It's not authorized by the restrictions
23 attached to the 1955 plat. It did away, the
24 argument is, it did away with lots when they had
25 no authority to do so. The authority was to

1 change right of revision of the lot arrangement.
2 To change the way the lots were arranged.

3 And if you look at the word arrange, you
4 are changing the order in which things are
5 placed. When we rearrange these two pads here,
6 I'm moving them around but they still exist. If
7 I take them away I'm not rearranging them, I'm
8 taking something away. It's kind of elementary,
9 your Honor, but we have to somehow figure out how
10 this language should be interpreted. And if I'm
11 throwing out definitions, it's because I want to
12 provide the Court assistance on how we should
13 interpret this.

14 My point, your Honor, is that Carmen Ward
15 or anybody had no right to do away with these
16 lots.

17 The 1972 Order, the purpose of it and the
18 purpose of the 1955 plat was to show that this
19 was a residential subdivision. People bought
20 lots relying on this plat. The '72 Order made
21 the covenants apply as provides by the '72 Order
22 to Blocks 22 and 29. To say that the intent was
23 for Carmen Ward to do anything that she wanted,
24 there is some testimony Carmen Ward could have
25 done anything. For example, in the DeCiero case,

1 a case that doesn't affect this property, it's
2 not in the chain of title of this property,
3 Carmen Ward sold property to the Long Bay
4 Properties, the Ammons entity. And in that deed,
5 she basically gave them the right by changing the
6 restrictions to say this property could be
7 subdivided. Of course, which would be in
8 violation of no lot shall be subdivided.

9 And litigation was filed over that and said
10 that she didn't have that right. She didn't have
11 the right to combine the lots either and that's
12 what was attempted to be done. So we think
13 that's a void act.

14 Also, I want the Court to take notice of
15 the Horry County Land Development Regulations
16 which talk about combination of lots. And it
17 says when you combine lots you have got to show
18 the old lots on the subdivision survey and show
19 them on a survey and show which lots have been
20 taken away.

21 For example, when you look at the survey
22 that my clients had prepared by Mr. Bellamy in
23 2003, you will see that it shows property lines
24 to be abandoned, presumably because that is
25 what's required by the code. In the Meese plat,

1 that was never done. No lots were abandoned. It
2 didn't comply with the zoning regulation.

3 So I would like to ask the Court to take
4 judicial notice of Horry County Land Regulation
5 4.6 regarding combination of lots. If I could
6 hand it up to the Court. That's the only copy I
7 have, I'm sorry (handing).

8 And the question becomes is Carmen Ward
9 really the grantor? I'm not quite sure she is
10 the grantor. And I would argue that she wasn't
11 the grantor.

12 If you look at the language of the 1972
13 Order, paragraph two, it says, "The lands
14 developed by the plaintiffs and their
15 predecessors-in-title." And there was a deed
16 that was introduced into evidence which was a
17 deed conveying property. There was a Nursery
18 Realty Corporation conveying property from Mr.
19 Lewis and somehow it wound up in Carmen Ward's
20 name as trustee. So we would argue that Carmen
21 Ward is not the grantor, whatever that means, to
22 begin with.

23 There were arguments made yesterday about
24 what the Complaint said in the 1972 case. I
25 think I already mentioned this but I think when a

1 lawyer or anybody looking at the chain of title,
2 it's not what the parties allege, it's what the
3 Court rules. And I don't think any deference
4 should be paid to what the plaintiff alleged when
5 the final determination of the Court is contained
6 actually within the final Order issued.

7 Also, I want to talk about, your Honor, the
8 Shelter Rule. You heard testimony yesterday
9 from Jay Dusenbury. Jay Dusenbury represented
10 the Meeses. He was crystal clear that he didn't
11 have any notice. His job was to check title. He
12 checked title. Everybody, I think, who checked
13 title, with the exception of Mr. DeCiero, did not
14 find the 1972 Order.

15 David Meese testified very clearly that
16 both he and his wife had no knowledge. He
17 testified that he had no knowledge of the 1972
18 Order, no knowledge of any restrictions.

19 Leigh Meese was not as clear. She
20 testified that she could not come into court and
21 say that she had notice of the 1972 Order at the
22 time she purchased the property. Now, she did
23 also testify that she did have notice at some
24 point but she couldn't recall exactly when. I
25 think the reasonable inference to be made is that

1 she did not have notice.

2 The 1972 Order came to light in the DeCiero
3 litigation. That was filed in 1998. Our closing
4 took place in 1997. Her husband didn't know.
5 Her husband says she didn't know. The closing
6 attorney didn't know. So I think the reasonable
7 inference is she didn't know. I think the Court
8 can make that reasonable inference.

9 In any event, clearly David Meese is a bona
10 fide purchaser for value. Our argument is we
11 bought from two bona fide purchasers for value.
12 In the event the Court finds that Leigh Meese is
13 not one, we certainly bought from one bona fide
14 purchaser for value and that is David Meese.

15 So what does that mean? Think about it in
16 the context of if I buy a piece of property with
17 a tenant in common. We both have an undivided
18 half interest in the property. I have some
19 notice of, say, monetary judgment on the property
20 and the cotenant doesn't, about to be cotenant
21 doesn't. We buy the property and there is
22 judgements out there.

23 I think the fair thing to say is that the
24 cotenant, post cotenant, who is now cotenant, who
25 knew about this issue would be subject to that

1 judgement, and the cotenant wouldn't be. That's
2 the fair thing to do. Because the cotenant who
3 didn't have any knowledge bought the property
4 without knowledge and his undivided half interest
5 should be protected.

6 Taking that concept and trying to put it in
7 this case is difficult because we are talking
8 about expectations of buyers. We have an
9 expectation of a buyer who is going to buy the
10 property and has no notice of any restrictions.
11 You can't say the restrictions apply to an
12 undivided half interest because the restrictions
13 would apply to the whole.

14 So I think if the Court looks at the clear
15 testimony of Mr. Dusenbury, the clear testimony
16 of Mr. Meese, somewhat clear, in some aspects,
17 testimony of Leigh Meese, that she couldn't
18 testify that she had notice at the time she
19 purchased the property of the restrictions of the
20 '72 Order, I think the conclusion should be that
21 they're all bona fide purchasers for value.

22 And we can step into their shoes under the
23 Shelter Rule, as the Court of Appeals recognized,
24 "we," meaning my clients, can step into the shoes
25 of David and Leigh Meese.

1 You heard a lot of testimony yesterday
2 about what David Meese or Leigh Meese or Jay
3 Dusenbury knew in 2000, 1999, 2001, 2002, 2003.
4 That's irrelevant to the analysis. The relevant
5 time period is when they purchased the property
6 in 1997. That doctrine was recognized by the
7 Court of Appeals, it was recognized by other
8 cases the Court of Appeals relied upon. And, so,
9 we believe, under the Shelter Rule, that our
10 clients, my clients, are bona fide purchasers for
11 value who owned the property free and clear of
12 the restrictions.

13 If I could have a moment with my client,
14 your Honor.

15 Your Honor, one point is perhaps you could
16 get a dozen lawyers or 50 lawyers and 50 judges
17 to look at the language of the 1972 Order and
18 perhaps you will get a difference of opinion.
19 You will have some judges and some lawyers saying
20 it's one thing and other judges and lawyers
21 saying it's another. That is evidence, your
22 Honor, that that language is absolutely
23 ambiguous. And our alternative argument is that
24 it is ambiguous. Who knows what it means.

25 When you have to piece together all this

1 off record information to try to figure out what
2 it means, that means that that language by its
3 very nature is ambiguous. If it's ambiguous,
4 it's not there by plain and unmistakable terms.
5 and it should be construed in the light most
6 favorable to the free use of the property.

7 I'll be more than happy to answer any
8 questions that you have later on. Thank you.

9 MR. BRITTAIN: May it please the Court.

10 THE COURT: Certainly.

11 MR. BRITTAIN: Your Honor, I think
12 several things have happened in connection with
13 the presentation of evidence that have changed
14 the nature of the case. I have been kind of
15 surprised by the way they turned out.

16 I don't think it matters any more that the
17 '72 Order wasn't in the chain of title. We
18 certainly conceded that in the beginning of this
19 case and it is true.

20 Not only do we have now from the testimony
21 of Mr. Mumford that Mr. Dicks had the '72 Order,
22 he had it. The lawyer had the '72 Order. So
23 what difference does it make whether it was in
24 the chain of title or not? Because the lawyer
25 handling the case had the Order before this title

1 was written based on Mr. Dicks' testimony and Mr.
2 Mumford's testimony.

3 So the original finding that the '72 Order
4 was not in the chain of title no longer has any
5 significance for this case. And we get that from
6 Mr. Dicks' testimony, which the Court of Appeals
7 never had, and Mr. Mumford's testimony. He had
8 in his hands the '72 Order.

9 Now, one of the linchpins for the reverse
10 and remand in this case was the fact that it was
11 not in the chain of title. But what the Court of
12 Appeals never knew was the lawyer had it anyway.
13 So let's take a look at the '72 Order.

14 And I agree with one thing that Mr.
15 Koutrakos said, lawyers can stand up here and
16 argue all day long and 12 of them argue different
17 things.

18 Let's go to the common sense approach to
19 the '72 Order which we brought you as much
20 evidence as we could, both of us. Let's read the
21 portions of the Complaint that matter. This
22 Court is very involved in real estate and knows
23 how these things happen.

24 Mr. Mumford admitted the '72 Order made
25 those restrictions applicable to the property

1 that the Dicks purchased. No question about it.
2 And he had it.

3 So let's go take a look at those
4 restrictions. Those restrictions limit the
5 subdivision of lots without question. And
6 they're made applicable by the '72 Order.
7 That's why it was such a big deal that it wasn't
8 in the chain of title. But guess what? He had
9 it. In fact, that's even better than it being
10 in the chain of title because a person couldn't
11 miss it in the chain of title. But we know for a
12 fact he had it and read it.

13 We also know that part of the litigation
14 surrounding the '72 Order was that map was
15 inadvertent and improper. That's before the
16 Court. That's evidence in this courtroom without
17 objection. That map has been disputed. And
18 their lawyer said it didn't make any sense
19 because those dotted lines would create lots that
20 couldn't be lots. They were at best proposals.

21 Now, not only do we have all these legal
22 arguments, let's take a look at what actually
23 happened. The property was sold as one lot by
24 Carmen Ward. The property was sold as one lot by
25 the Meeses. And one survey was given to Mr.

1 Dicks as he purchased the property from the
2 Meeses. He didn't get any of this stuff
3 (indicating). He had to go find that with his
4 digging.

5 Now, he got a survey attached to the
6 Meeses' deed that had it as one lot. He was
7 going to build a house and live there on one lot.
8 He paid \$175,000 for the piece of property. As
9 Mr. Robert Dicks says, real estate was good at
10 the time. The Meeses paid 145,000 for it. Now,
11 come on. Who is kidding who? He's turned the
12 lots into \$25,000 a piece. Let's don't kid each
13 other. The operative document here is the deed
14 he got with the survey on it which showed one
15 lot, which is what the Meeses had.

16 But let's talk about inferences from what
17 she testified to. We keep talking 2000, 2000,
18 2000. Mr. Koutrakos is right on point. Wait a
19 minute, the lawsuit, the DeCiero lawsuit was
20 filed in 1998. Now that gets pretty close to
21 1997. And you know how lawsuits are. We are
22 talking reasonable inferences. There is usually
23 a lot of hobnobbing and conversation, talk is
24 going on before we end up in a lawsuit. That's
25 why Leigh Meese got up here and told the truth.

1 Hey, there were issues. I knew there were
2 issues. But to tell you exactly when I knew
3 them, I can't tell you.

4 Now, let's talk about burden of proof on
5 the Shelter Rule. We have got actual knowledge
6 without question. Now, who is going to be able,
7 who has the duty under the Shelter Rule to take
8 advantage of what -- let's all face it, we all
9 cringe a little at the injustice of the rule.
10 That is, if applied this way, I knew I couldn't
11 do it. Now I know they claim they could anyway.
12 I understand that and I don't want to denigrate
13 that part of their argument. They claim that the
14 '72 doesn't stop it. I think that's an absurd
15 argument because the grantor, if you are going to
16 let anybody be the grantor then you wouldn't have
17 any restrictions. You have got to read that
18 document at the time it was created and she was
19 the grantor. All those arguments to me don't
20 make any sense. But if you're going to avail
21 yourself under this law that rankles us all a
22 little bit, that is, I knew I couldn't do it but
23 the person in front of me didn't know it so I'm
24 going to do it anyway.

25 Now, the theory there is, hey, we want the

1 free exchange of property. We don't want to be
2 going back in title blah, blah, blah. But I say
3 this, and I believe there are cases decided in
4 that area, and there aren't that many of them,
5 all stand for this proposition. Buddy, your
6 purchaser better have known nothing. He better
7 be clean as a whistle because you're getting
8 ready to step in their shoes.

9 Now, that's where they have the burden..
10 They have got to show that the bona fides and
11 original purchasers were there, not me. Because
12 I have got the actual knowledge over here. So
13 they're trying to undo that fact.

14 Now, here is the thing. And I read it to
15 him and he admitted it and I could read it to you
16 again, but you're so beautiful you wrote it down.
17 There is no question about this. Jay Dusenbury
18 testified that he told the Meeses, David and
19 Leigh Meese, that it didn't appear in the chain
20 of title but there was, quote, "a strong
21 possibility," that those restrictions affected
22 the property they were buying. Now that turns
23 him into something other than a bona fide
24 purchaser for value, as far as I'm concerned.

25 In fact, he testified that they made that

1 information available to Mr. Dicks. Now, not
2 only do they do that, they give him a survey they
3 requested that it turns up being one lot in the
4 deed that they give him.

5 And if you're going to prove bona fide
6 purchaser for value and step in their shoes,
7 don't tell me that Mr. Meese, who couldn't
8 remember this and couldn't remember that and
9 doesn't really recall, you know, and Mrs. Meese,
10 I'm not sure, I know there was an issue, and we
11 have got the lawsuit being filed and her purchase
12 right in there at the same time. Her lawyer
13 testified he told them there was a strong
14 possibility they're not bona fide purchasers.
15 That's their best argument, in my opinion. It
16 shocks me that our law would allow a shelter like
17 this. But Mr. Koutrakos has educated me on that
18 point and so has the Court of Appeals.

19 But I think it came back let's look and see
20 if we're really dealing with totally unaware
21 purchasers, purchasers that are pure as the
22 driven snow, got no reason to think or look or
23 make any kind of decision or wonder and look.
24 They haven't proved that part. There are too
25 many issues.

1 Her own lawyer said he told her it was a
2 strong possibility. She can't tell you when she
3 knew it. She does tell you she knows there was
4 an issue and she was involved with all this
5 litigation.

6 So our position is that when you review all
7 of our 12 exhibits, and when you zero in on the
8 deed that the Meeses gave Mr. Dicks, when you
9 consider the responsibility to prove bona fide
10 purchaser for value and where that comes, you
11 will be led to the decision.

12 And I'll say this, the Court of Appeals has
13 never had the benefit of the information you have
14 got. That's what they wanted. They wanted this
15 to come back. They wanted to hear Mr. DeCiero
16 testify, they wanted to hear Mr. Dicks testify,
17 find out what this is. And when we have flushed
18 this out, I'll tell you this, Carmen Ward, it's
19 clear, was a grantor. Carmen Ward wanted to
20 preserve this part in its natural state. And I
21 say that, some evidence I can't comment on, I
22 comment on paragraph 8, I comment on her
23 concessions in the '72 Order, I comment on her
24 selling it as one lot, I comment on the Meeses
25 selling it as one lot, I comment on her rejection

1 of that map, I comment on the survey that was
2 attached to the property that was transferred to
3 Mr. Dicks, I comment on the fact that he said, "I
4 dig. I dig. I go back and look. I go back and
5 look." What we are doing is trying to go back
6 and reconstitute what is plain language.

7 What is that plain language? Nobody can
8 change what was intended to be one big lot except
9 me. And if I don't change it, once I sell it, it
10 could never be changed that way again.

11 We feel like when you consider all of the
12 evidence, that you will rule that Mr. Dicks
13 cannot subdivide that property into seven lots,
14 I think he said some of them will be as little as
15 a quarter of an acre, and destroy the density of
16 the Long Bay subdivision.

17 Thank you very much.

18 THE COURT: I want to ask you one
19 question, Mr. Koutrakos.

20 MR. KOUTRAKOS: Yes.

21 THE COURT: On this document you wanted
22 me to take judicial notice of, the section you
23 wanted me to take judicial notice of was not
24 adopted until December 17, 2002.

25 When did your clients purchase this

1 property?

2 MR. KOUTRAKOS: They purchased it in
3 2003. Now, I could try to get the older
4 regulations. I tried. If you want older
5 regulations that are in place --

6 THE COURT: No, that's okay. I just
7 wanted to make sure it was before your clients
8 purchased the property. Thank you very much.

9 Anything further?

10 MR. BRITTAIN: No, ma'am. Thank you
11 very much.

12 MR. KOUTRAKOS: No. Thank you, your
13 Honor.

14 THE COURT: Thank you very much. We're
15 adjourned.

16 I think I have e-mails for both of you.

17 MR. BRITTAIN: If not, I'm
18 tommy@brittainlawfirm.com.

19 MR. KOUTRAKOS: Your Honor, if I may
20 real quick. This whole burden of proof issue of
21 what I can say and what he can say, I have a
22 counterclaim and I have the burden of proof on
23 the Shelter Rule, I should have the last word on
24 the Shelter Rule.

25 MR. BRITTAIN: No way, your Honor.

1 I've got the overall burden of proof. He made an
2 argument, I made an argument and that stuff was
3 said. I'm not going to sit here and let him make
4 another argument.

5 MR. KOUTRAKOS: I just want to respond
6 to his point.

7 MR. BRITTAIN: No, sir.

8 MR. KOUTRAKOS: I'm just
9 suggesting that -- I'm not familiar with the
10 rule. If he has the burden of proof I go first,
11 he goes second. But if I have the burden of
12 proof, I can't go second? The first thing he
13 said is he has the burden of proof.

14 MR. BRITTAIN: I have the overall
15 burden of proof.

16 MR. KOUTRAKOS: I'm just making that
17 point.

18 MR. BRITTAIN: You made a good
19 argument.

20 THE COURT: You certainly did. In a
21 closing argument regardless, in a trial, I mean,
22 you have got to have a closing point at some
23 point.

24 MR. KOUTRAKOS: Sure. That's right.
25 Thank you very much.

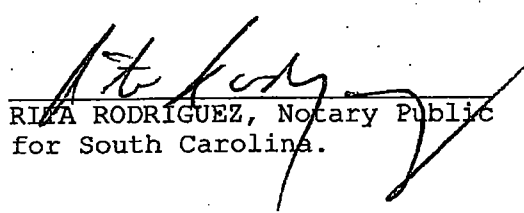
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THE COURT: Thank you very much. We
are adjourned.

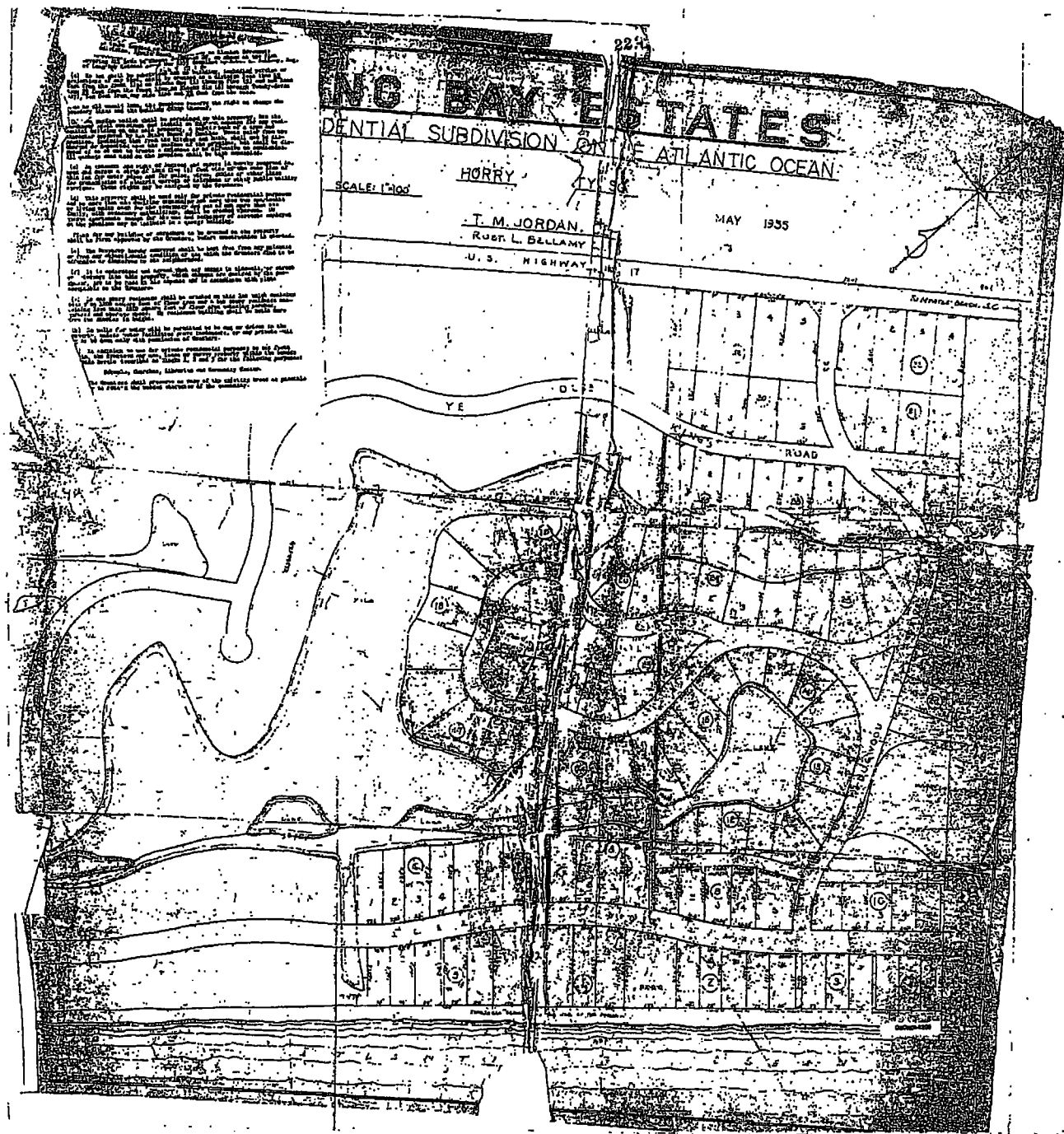
(Time noted: 10:32 a.m.)

1 STATE OF SOUTH CAROLINA :
2 COUNTY OF GEORGETOWN : SS: CERTIFICATE
3
4

5 I, RITA RODRIGUEZ, a Notary Public for
6 South Carolina, do hereby certify that the
7 foregoing transcript is a true and correct
8 transcript of the proceedings had before
9 Judge Cynthia Howe, Master-In-Equity, for
10 Horry County, South Carolina, at the Conway
11 County Courthouse, 1301 Second Avenue, Conway,
12 South Carolina, on Wednesday, the 13th day of
13 April, 2011.
14

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16 
17 RITA RODRIGUEZ, Notary Public
18 for South Carolina.

19 My Commission expires October 4, 2015.
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ING BAY ESTATES
CONFIDENTIAL SUBDIVISION OF THE ATLANTIC OCEAN
HARRY
T. M. JORDAN
RUST L. BELLAMY
U.S. HIGHWAY
MAY 1935
SCALE: 1"=100'

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal contains all material designated to be included by any of the parties and not any other material. I further certify that the documents included in the Record on Appeal are in compliance with the August 13, 2007 Order of the South Carolina Supreme Court.



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April 29, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
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John Musick, ... Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Master err in holding that only the "Grantor" had the right to change lot lines pursuant to the 1972 Order when the plain language of the 1972 Order does not limit this right of revision to any particular party?
- II. Did the Master err in holding that Carmen F. Ward and Gene F. Lewis were the "Grantors" contemplated in the 1972 Order when that term is not defined in the 1972 Order or elsewhere and when the Master instead appears to have considered the 1972 Order ambiguous, and relied upon extrinsic evidence, but thereafter failed to construe the 1972 Order in favor of the free use of property?
- III. To the extent that the Master found the Dicks did not hold the right of lot revisions, did the Master err in failing to find and hold that the 1972 Order was ambiguous and in therefore construing the language of the 1972 Order in favor of the free use of property?
- IV. Did the Master err in holding that the property in question had always been sold as one lot when two prior recorded plats show the property as seven lots, which fact was admitted by Respondent and similarly held by this Court of Appeals and is now the law of this case?
- V. Did the Master err in finding that Carmen F. Ward had the right to subdivide the property pursuant to the 1972 Order when the 1972 Order provided no such right and the restrictions made applicable to the property pursuant to the 1972 Order specifically provide that "no lot shall be subdivided"?
- VI. Did the Master err in relying on the fact that certain portions of the property may be wetlands and seeking to determine whether the lot arrangement chosen by the Dicks is "practical" when no testimony was presented as to this issue and when the "practicality" of the Dicks' chosen arrangement has no bearing on the right of the Dicks to arrange their lots as they wish?
- VII. Did the Master err in holding that the subject property should continue to be one lot and in failing to find the Dicks could own their property as seven lots as shown on their 2003 Plat when the property had always been seven lots and the Dicks had the right to revise the arrangement of the seven lots pursuant to the 1972 Order?
- VIII. Did the Master err in failing to find that the Shelter Rule protects the Dicks and allows them to hold title unencumbered by the restrictions imposed by the 1972 Order when the 1972 Order was admittedly not properly recorded and the Dicks' predecessors in title both purchased the property without knowledge of the 1972 Order?

STATEMENT OF THE CASE

Respondent John Musick ("Respondent" or "Musick") instituted this action by filing his Complaint on April 12, 2004 in the Court of Common Pleas for the Fifteenth Judicial Circuit, and his Amended Complaint on May 26, 2005. (R. pp. 67-71, 78-82). Respondent alleged that although the 1955 Plat (defined below) shows that Blocks 28 and 29 contain seven lots and although the 1972 Order (defined below) provides for right of revision of the lot arrangement for these seven lots and the arrangement thereof, that the recording by the Appellants, Thomas L. Dicks and Robert E. Dicks, Jr. ("Appellants" or the "Dicks"), of a plat showing the property as containing seven lots violated the terms of the 1972 Order.¹ (R. pp. 78-82). Musick requested that the lower court issue an order declaring the lot arrangement evidenced by the 2003 Plat (defined below) "constitutes a violation of the restrictions applicable to the [Subject Property] and to Long Bay Estates Subdivision as a whole." (R. p. 81).

The Dicks answered the Complaint and subsequently the Amended Complaint and asserted certain counterclaims against Musick alleging that no restrictive covenants apply to the Subject Property which affect the Dicks' right to own their Property as seven lots, and the Dicks requested a declaratory judgment stating they have not violated any restrictions, covenants, and orders that are alleged to encumber the Subject Property. (R. pp. 72-77, 89-95).

¹ Although the Amended Complaint filed by Musick in this action asserted certain claims against the Dicks based on issues related to the potential future use of the Subject Property as rental property, all of these claims have now been dismissed upon the agreement of the parties and as evidenced by the Stipulation of Dismissal which was filed in this matter on June 12, 2007.

The Dicks and Musick each filed Motions for summary judgment and the Honorable J. Stanton Cross, Jr., as Master-in-Equity for Horry County, held a hearing on these motions on August 16, 2006 and issued his Final Order Ending Action ("Order Granting Summary Judgment"), dated March 6, 2007 and filed on March 7, 2007, wherein he granted Musick's Motion for Summary Judgment. (R. pp. 21-35).

The Dicks appealed the Order Granting Summary Judgment and the Court of Appeals, after reviewing the briefs of both parties and hearing oral arguments on the issues presented, issued its Opinion (the "2010 Opinion") reversing the grant of summary judgment by Judge Cross and remanding the case for a trial on the merits. (R. pp. 59-66). Musick filed a petition for rehearing regarding this 2010 Opinion, which was denied, and Musick failed to pursue any appeal of the 2010 Opinion (or any portion thereof) or the Order Denying Musick's Petition for Rehearing.² (R. pp. 98-99, 18-19.)

Upon remand, the trial was held on April 12, 2011 which culminated in an Order issued by The Honorable Cynthia Graham Howe, as Master-in-Equity for Horry County (the "Master"), dated July 29, 2011 and filed on August 9, 2011 (the "Order") which found in favor of Musick, the particulars of which are more particularly discussed below. (R. pp. 10-17). The Dicks filed their Motion to Reconsider, Alter or Amend the Judgment on September 11, 2011, which Motion was denied by the Master's Order Denying Defendants' Motion for Reconsideration filed on July 18, 2012. (R. pp. 100-143, 6-9). The Dicks timely filed their Notice of Appeal of the Order and the Order Denying Motion for Reconsideration on August 20, 2012. (R. pp. 144-159).

² As will be discussed below, the 2010 Opinion finds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots." (R. p. 64). This finding was not appealed by Musick and therefore has become the law of this case.

STATEMENT OF THE FACTS

The Dicks and Musick each own certain real property within the Long Bay Estates subdivision in Myrtle Beach, Horry County, South Carolina. The Dicks own seven lots located within Blocks 28 and 29 of the aforementioned subdivision (the "Property" or "Subject Property") which are described with more particularity hereinbelow. (R. pp. 79-80, 536-537, 538-541). Musick is the owner of Lot 4 of Block 24 within the subdivision. (R. p. 78). In 1955, Robert L. Bellamy drew a plat of the subdivision (the "1955 Plat"), which was eventually recorded in the office of the Register of Deeds for Horry County on May 5, 1958 in Plat Book 25 at Page 22. (R. p. 530). The Subject Property is shown on the 1955 Plat as comprising seven individual lots within Blocks 28 and 29. Id.

Certain alleged restrictions were somehow attached to and recorded with the 1955 Plat despite the fact that these alleged restrictions are not signed, dated or acknowledged (the "1958 Restrictions"). Id. The 1958 Restrictions provide, in pertinent part, as follows:

Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision Myrtle Beach, Horry County, South Carolina.

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robert L. Bellamy, Engn.

Id. Under the above-quoted provision of the 1958 Restrictions, the 1958 Restrictions only apply to Blocks 1 through 27 of the subdivision, and not to the Subject Property which comprises Blocks 28 and 29.

On June 1, 1972, Gene F. Lewis and Carmen F. Ward ("Gene Lewis" and "Carmen Ward"), alleging ownership of Blocks 28-33 of Long Bay Estates, filed an

action against Leroy Adams and numerous other owners of property in Long Bay Estates seeking, among other things, to quiet title to certain portions of said plaintiffs' property over which the 1955 Plat shows a road to be constructed, said road having never been constructed. (R. pp. 455-470). In connection with this action, an order was issued by the Honorable Winston Vaught, which was filed on November 21, 1972 (the "1972 Order"). Id. In the 1972 Order, the court concluded that the alleged 1958 Restrictions, by their express terms, apply only to Blocks 1 through 27, and that the property owned by the plaintiffs in that action - including Blocks 28 and 29 - is not subject to the 1958 Restrictions. (R. p. 460). In so holding, the court stated:

The declaration of restrictions or protective covenants recorded along with the plat in Plat Book 25 at page 22 expressly limits those restrictions to the residential lots shown within Blocks 1-27, inclusive. Such declaration negates an implicit extension of the restrictions or protective covenants outside of the specified blocks, and . . . I find and hold that the portion of the plaintiffs' property with which their actions concerns itself is not subject to any restrictions or protective covenants beyond Block 27.

Id. (emphasis added).

However, in connection with the above-referenced action, the parties apparently agreed to place certain restrictions upon Blocks 28 and 29, separate and apart from the 1958 Restrictions. (R. p. 461). The 1972 Order created these restrictions upon Blocks 28 and 29 by providing as follows:

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25.

Id. (emphasis added).

The 1972 Order further explains that the above areas have been indicated as "residential" and as "residential (with right of revision)" on the copy of the map attached thereto. Id. On the map attached to the 1972 Order, the Subject Property, which consists of the seven lots making up the remaining portions of Blocks 28 and 29, is clearly identified as "residential (with right of revision)." (R. p. 470).

The 1972 Order was indexed in the Clerk of Court's office under the name of Leroy Adams, but was not indexed as a judgment against the names of the plaintiffs in that case - Gene Lewis and Carmen Ward - as required by Section 15-35-520 of the South Carolina Code. (R. p. 167, lines 12-18, p. 182, lines 2-5); S.C. CODE ANN. § 15-35-520 (2005). Because the plaintiffs in the case out of which the 1972 Order arose were the record owners of the subject property, the 1972 Order was not indexed in the chain of title to the property that was the subject of that action, a portion of said property now being owned by the Dicks and identified herein as the Subject Property. Thus, the 1972 Order was not discoverable during a routine title examination of the Subject Property and did not operate to provide constructive or inquiry notice to third parties of its terms. (R. p. 360, lines 20-24, p. 380, line 16 - p. 381, line 5, p. 404, lines 11-22). This fact is acknowledged and admitted by all parties to this litigation. (R. p. 167, lines 12-18, p. 182, lines 2-5).

Following the execution and (improper) filing of the 1972 Order, David W. and Leigh Ammons Meese (collectively, the "Meeses") purchased the Subject Property from Carmen Ward and others. The Subject Property consists of the remaining portions of Blocks 28 and 29, as evidenced by that certain deed to the Meeses for the Subject Property, which was recorded on September 4, 1997 in Book 1971 at Page 134 in the

office of the Register of Deeds for Horry County (the "Meese Deed"). (R. pp. 532-535). At the time of the conveyance of the Subject Property to the Meeses as described above, it has not been proven that the Meeses had actual knowledge of the 1972 Order or the 1972 Restrictions contained therein. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8, p. 396, line 21 – p. 397, line 3). In fact, it is undeniable that David Meese did not have actual knowledge of the 1972 Order. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

The Subject Property was then conveyed by the Meeses to Thomas L. Dicks, as evidenced by that certain deed from the Meeses to Thomas L. Dicks recorded on May 19, 2003 in Book 2597 at Page 296 in the office of the Register of Deeds for Horry County. (R. pp. 536-537). On that same day, Thomas L. Dicks conveyed Lots 1, 2 and 3 of the Subject Property (as shown on the 2003 Plat defined below) to Robert E. Dicks, Jr. by deed recorded on May 19, 2003 in Book 2597 at Page 299 in the office of the Register of Deeds for Horry County. (R. pp. 538-541).

In accordance with and in reliance upon the language of the 1972 Order stating Blocks 28 and 29, which include the Subject Property, are subject to the residential restrictions established by the 1972 Order "but with right of revision of the lot arrangement," the Dicks caused to be prepared and recorded a plat which was approved for recording and recorded on May 19, 2003 in the office of the Register of Deeds for Horry County in Plat Book 189 at Page 237 (the "2003 Plat"). (R. p. 542). The 2003 Plat, like the 1955 Plat, shows Blocks 28 and 29 containing a total of seven lots. It is this 2003 Plat that Musick challenges.

Both Musick and Robert DeCiero, a neighboring landowner (who testified on Musick's behalf), testified that the Subject Property being used as seven lots is consistent with the overall character of the neighborhood. (R. p. 273, line 20 – p. 274, line 2, p. 319, line 23 – p. 320, line 1, p. 320, lines 3-4, p. 334, lines 3-4). Other than the common area and except for one large lot in Long Bay, this property remaining as one large lot would be abnormal for this subdivision. (R. pp. 530, 470).

STANDARD OF REVIEW

Musick seeks in his Amended Complaint a declaratory judgment and injunctive relief relating to the Dicks' alleged violation of certain restrictions relating to their Property. (R. pp. 81-82). "Declaratory judgments in and of themselves are neither legal nor equitable" and, therefore, the applicable standard of review for a declaratory judgment action is determined by the nature of the underlying issue. Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "Actions for injunctive relief are equitable in nature." Id. Likewise, "[a]n action to enforce restrictive covenants by injunction is in equity." Cedar Cove Homeowners Assoc. v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006) (on the other hand, an action for breach of restrictive covenants where damages are sought is an action at law). Accordingly, Musick's action to enforce the alleged restrictive covenants through injunction is one in equity. "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." Wiedemann, 344 S.C. at 236, 542 S.E.2d at 753; see also Cedar Cove, 368 S.C. at 258, 628 S.E.2d at 286. Therefore, this Court is not bound by the findings of

fact of the Master and is entitled to, and should, review the record and make findings of fact in accordance with its own view of the evidence.

ARGUMENTS

I. THE MASTER ERRED IN HOLDING THAT ONLY THE "GRANTORS" HAD THE RIGHT TO CHANGE THE LOT LINES.

The Master expressly found in her Order that the 1972 Order applied the 1958 Restrictions to Blocks 28 and 29 "subject only to the 'Grantor's' rights to change the boundary lines and building lines as to any unsold lots." (R. p. 11). This finding is in clear error. In reaching this conclusion the Master relied solely upon the language of the 1972 Order, which language provides as follows:

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declarations recorded in 25 at 22 reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

(R. p. 461) (emphasis added).

As is glaringly evident from the language of the 1972 Order, Judge Vaught never said that the 1958 Restrictions applied "subject only to 'Grantor's' rights to change boundary lines and building lines as to any unsold lots." Judge Vaught said that the remaining portions of Blocks 28 and 29 are subject to the restrictions, "but with right of revision of the lot arrangement or for combination with abutting portions of the lots in Blocks 24 and 25." (R. p. 461).

In the next sentence, Judge Vaught states what the 1958 Restrictions provide "in any event." Id. The language in the "in any event" part of the 1972 Order was most likely

added to state that the parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have known that limited rights existed to make some alterations in this residential subdivision. However, the "in any event" part of the 1972 Order is not the operative language, but the Master in this case has mistakenly relied on the "in any event" sentence, a sentence unnecessary to the ruling which appears to be surplusage and dicta.

The operative language in this part of the 1972 Order is the granting of revision rights, but the revision rights, according to the plain language of the 1972 Order, are not limited to any particular party. (R. p. 461). The revision rights are not limited to the Plaintiff in the 1972 Case and not limited to the Grantor, whoever that is. If the court in the 1972 Case wanted to limit the revision rights, it could have easily said so, but it did not. Instead, the Master in this case has read a provision into the 1972 Order that simply does not exist.

The Master's construction of the 1972 Order is not practical and is erroneous. The 1958 Restrictions do provide Grantors, whoever they are, with rights to change boundary lines and building lines. Thus, the Master's interpretation is that the court in the 1972 Order held the 1958 Restrictions apply subject to something that is already in the 1958 Restrictions which is a repetitive statement, but at the same time the Master ignores the operative language of the 1972 Order, which says the 1958 Restrictions apply, "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. p. 461) (emphasis added).

Restrictive Covenants, such as those contained in the 1972 Order, are contractual in nature, and therefore "the language used in the restrictive covenant is to be construed

according to its plain and ordinary meaning.” Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). Furthermore, in light of the fact that restrictions on the use of property are historically disfavored, restrictive covenants are to be “strictly construed” and all doubts as to the proper construction of restrictive covenants must be resolved in favor of free use of the property. Id.; see also Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The reasoning behind these long applied and well recognized rules of construction is, again, the historical disfavor of restrictive covenants in South Carolina and the belief within this State that “the best interests of society are advanced by the free and unrestricted use of land.” Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988).

The “plain language” of the 1972 Order simply states the Subject Property is subject to residential restrictions “*but*³ with right of revision of the lot arrangement.” (R. p. 461) (emphasis added). The 1958 Restrictions, on the other hand, state that “the *Grantors* reserve the right to change the boundary lines” (R. p. 530) (emphasis added). In claiming the Dicks do not have the right of revision of the lot arrangement regarding the Subject Property, Musick requests this Court read into the restrictions contained in the 1972 Order, which are clear and unambiguous and do not restrict the right of revision of the lot arrangement to any particular party, the limitation on this right that was included in the 1958 Restrictions. This interpretation and broadening of the

³ The Definition of the word “but,” as provided in the American Heritage Dictionary of the English Language, is: “[o]n the contrary,” “[c]ontrary to expectation” or “except that.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 260 (3d. ed. 1992). Therefore, the 1972 Order holds the Subject Property is subject to such residential restrictions “except that” - or except for - with right of revision of the lot arrangement.

1972 Order, however, is simply not within the bounds of this Court to consider, and should not have been undertaken by the Master.

The restrictions contained in the 1972 Order, like any other restrictions affecting real property, were agreed upon and negotiated between the parties thereto and are thus contractual in nature. See S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding that restrictive covenants are contractual in nature). Any such restriction upon real property shall not "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. (emphasis added).

In the present situation, if the parties intended to restrict the right of revision of the lot arrangement to the so-called "Grantor," or to any other particular party, the parties would have done so – much as they did in the 1958 Restrictions. See Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) (analyzing a situation similar to the one at hand and holding that if the parties had wanted to restrict the property at issue in that case in a particular way, they would have done so by including such language in the restrictions themselves). The fact that the parties did not so limit the right of revision of lot arrangement in the 1972 Order simply shows that the parties did not intend the right to be so limited. Instead, the right of revision of the lot arrangement, having not been reserved to any particular party, was intended to and should be construed to run with the title to the Subject Property. See West v. Newberry Elec. Coop, Inc., 357 S.C. 537, 542-43, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding that owner's right to have utility company

relocate power line was a real covenant that ran with the land and benefitted owner's successor in title).

In finding that the right of revision of the lot arrangement was only in favor of some unidentified "Grantor," the Master failed to apply the rule of construction that "restriction[s] on the use of property must be created in express terms or by plain and unmistakable implication, . . . and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property" and the Master failed to interpret the "plain language" of the 1972 Order which did not restrict the right of revision of the lot arrangement to any particular party. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Dicks respectfully request that the Master's Order in this regard, and her Order Denying Motion for Reconsideration, be reversed and vacated, and this Court find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

II. THE MASTER ERRED IN HOLDING THAT CARMEN F. WARD AND GENE F. LEWIS WERE THE "GRANTORS" CONTEMPLATED IN THE 1972 ORDER.

The Master further erred in finding that "the language 'Grantor' in referring to any unsold lots is Gene Lewis and/or Carmen Ward, as Co-Executors and Co-Trustee under the Last Will and Testament of Frederick W. Lewis." (R. p. 11).

The Master purports to interpret and define the term "Grantor" when that term is not defined anywhere in the 1972 Order or the 1958 Restrictions. The Master does not refer to any specific language or evidence whatsoever upon which she relied in making

this finding.⁴ If the Master relied upon evidence contained outside of what is in the 1972 Order, or perhaps the 1958 Restrictions, then the Master considered extrinsic evidence. It appears the Master did in fact consider some undefined extrinsic evidence insofar as the Order mentions that she considered "testimony" and "circumstances set forth throughout the hearing." (R. p. 11).

A court will not examine extrinsic evidence to interpret a contract absent an ambiguity. Klutts Resort Realty Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). If the vital terms of a contract are ambiguous, then, in an effort to determine the intent of the parties, the court may consider probative, extrinsic evidence. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001). It is a question of law for the court whether the language of a contract is ambiguous. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id.

Similarly, if a "judgment is not ambiguous or uncertain, the parol evidence rule applies, and the written judgment should be accepted at its face value and without speculating as to the reasoning employed at reaching the particular result." Bradley v. Family Ford Sales, Inc., 287 S.C. 401, 403, 339 S.E.2d 122, 124 (1986).

The Master never made a determination whether the language of the 1972 Order was either clear or ambiguous, although she should have made such a decision and it was

⁴ The Court states in its Order that this holding is "[b]ased on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced," though no particular evidence or testimony is mentioned. (R. p. 11).

her duty to do so. In addition, the Master failed to describe the specific evidence she considered in reaching her conclusion.

If the Master in fact considered extrinsic evidence, which it appears that she did, then the Master must have found the language to be ambiguous or capable of being construed in more than one way. If that is the case, the Master should have therefore resolved all doubts in favor of the free use of the property. Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980). Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here Musick. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assn. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). And, where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

Because the term "Grantor" is nowhere defined in the 1972 Order or the 1958 Restrictions, and the Master appears to have considered undefined extrinsic evidence, then the Master must have found the language in the 1972 Order to be able to be construed in more than one way and thus ambiguous. As such, the Master should have strictly construed the ambiguity against Musick and construed the 1972 Order in favor of the free use of property, thus adopting the Dicks' interpretation of the 1972 Order which does not limit the reservation of the right of revision of lot arrangement to any particular "Grantor" and which allows the Dicks to own the Subject Property as seven lots. Accordingly, the Master's Order in this regard, and her Order Denying Motion for

Reconsideration, should be reversed and vacated, and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

III. THE MASTER ERRED IN FAILING TO FIND THAT THE 1972 ORDER WAS AMBIGUOUS (TO THE EXTENT THAT THE MASTER FOUND THAT THE DICKS DID NOT HOLD THE RIGHT OF LOT REVISION) AND IN THEREFORE CONSTRUING THE LANGUAGE OF THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY.

The Master erred in failing to find the terms of the 1972 Order are ambiguous. To the extent the Master disagrees with the Dicks' position that the 1972 Order creates a right of revision that is or was held by the Dicks, then the Master should have found the language of the 1972 Order to be ambiguous and construed the language in the light most favorable to the free use of the property.

The Dicks assert and maintain the 1972 Order is *not* ambiguous and that according to the plain language of the 1972 Order the right of revision of the lot arrangement is not reserved to any particular party, but is a right that runs with title to the affected property. See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) ("the language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution"). However, to the extent the Master disagrees with the Dicks' interpretation of the 1972 Order, the Master was bound to find the 1972 Order is ambiguous and therefore construe the language in favor of the free use of the property. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980) (ambiguities must be resolved in favor of the free use of property).

The fact that the Court looked to extrinsic evidence (though unidentified) in interpreting the relevant provisions of the 1972 Order shows that the Court at that point in

its analysis considered the 1972 Order to be ambiguous.⁵ Extrinsic evidence may only be considered when the language itself is found ambiguous. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) ("*Once the court decides the language is ambiguous*, evidence may be admitted to show the intent of the parties. . . . The determination of the parties' intent is then a question of fact. . . . On the other hand, the construction of a clear and unambiguous deed is a question of law for the court.") (emphasis added); see also Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("*Once the court decides that the language is ambiguous*, evidence may be admitted to show the intent of the parties.") (emphasis added). Similarly, if a "judgment is not ambiguous or uncertain, the parol evidence rule applies, and the written judgment should be accepted at its face value and without speculating as to the reasoning employed at reaching the particular result." Bradley v. Family Ford Sales, Inc., 287 S.C. 401, 403, 339 S.E.2d 122, 124 (1986). Taken alone, the fact that the Court looked to (some unidentified) extrinsic evidence in construing the language of the 1972 Order shows that the Court found the relevant language of the 1972 Order ambiguous.

Although both the 1958 Restrictions and the 1972 Order use the term "Grantor," the operative language of the 1972 Order does not contain the term "Grantor." The Dicks submit the use of the term Grantor in the 1972 Order was superfluous and should not affect the construction of the operative language of the 1972 Order. However, the term

⁵ The Court states in its Order that this holding is "[b]ased on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced," though no particular evidence or testimony is mentioned. (R. p. 11).

"Grantor" is not defined anywhere in the 1972 Order or the 1958 Restrictions. Thus, the Master's application of the undefined term "Grantor" to the operative language of the 1972 Order (though the Dicks submit any such application is misplaced) would necessarily result in ambiguity. See Hawkins, 328 S.C. at 592, 493 S.E.2d at 878-79) ("A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation") (quoting 17A AM. JUR. 2D *Contracts* § 338, at 345 (1991)). Again, where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

The Master in her Order relies on some undefined extrinsic evidence to define "Grantor," and then uses an awkward construction of the 1972 Order to support her holding. This manner in which the Master interpreted the 1972 Order in and of itself appears to show that the Master believed the 1972 Order to be ambiguous. In light of this perceived ambiguity the Master was bound to resolve all doubts in favor of the free use of the property. Hamilton, 274 S.C. at 157, 263 S.E.2d at 382. Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here Musick. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Ass'n. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). The Master failed in all respects to strictly construe the ambiguity in the 1972 Order against Musick and to construe the (apparently ambiguous) 1972 Order in favor of the free use of property. The Master respectfully erred in this regard and the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find

the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

IV. THE MASTER ERRED IN HOLDING THAT THE PROPERTY IN QUESTION HAD ALWAYS BEEN SOLD AS ONE LOT.

The Master erred in finding and concluding "[t]he Dicks Property has always been one piece of property, has never been subdivided. It has always been one lot, as Blocks 28 and 29" and in similarly finding, concluding and ordering that "[t]he property in question was sold as one lot throughout and should continue to be one lot." (R. pp. 11, 17). In actuality, the Subject Property was divided into seven lots on the 1955 Plat and the map attached to the 1972 Order and the Dicks' revision of this lot arrangement also results in the Subject Property being divided into a total of seven lots. The subdivision of the Subject Property that is now in dispute involves nothing more than a revision of the lot lines of these same seven lots – in accordance with those rights established and agreed upon in the 1972 Order.

A. The 1955 Plat and the map attached to the 1972 Order both show the property as containing seven lots, and Musick admitted that the Property consisted of seven lots.

The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530).⁶ In addition, the map attached to the 1972 Order shows the remaining portions of Blocks 28 and 29 as containing a total of seven lots. (R. p. 470). In fact, Musick admitted in his Answers to Defendants' First Request for Admissions, which were entered into

⁶ The Dicks sought legal counsel for the purpose of confirming that, based on the 1955 Plat, the Dicks could own the Subject Property as seven lots. (R. p. 310, line 13 – p. 311, line 6). The Dicks' counsel confirmed the Dicks' understanding that they could own the Subject Property as seven lots, and the Dicks relied on this advice in making the decision to purchase the Subject Property. *Id.* The Dicks would not have purchased the Subject Property without knowing they could own it as seven lots. *Id.*

evidence without objection, that the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). Musick specifically admitted as follows:

6. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 29 contains three lots.

Response:

Admit

7. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 28 contains four lots.

Response:

Admit

8. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Blocks 28 and 29 contain a total of seven lots.

Response:

Admit

Id. The Court, however, failed to give any credence not only to the 1955 Plat itself, but moreover to the conclusive effect of Plaintiff's Responses to Requests for Admissions, when it was required to do so. See Scott v. Greenville Housing Auth., 353 S.C. 639, 650-51, 579 S.E.2d 151, 152 (Ct. App. 2003) (any matter admitted under Rule 36 is conclusively established.).

Moreover, the 1972 Order states the Subject Property is subject to residential restrictions "but with right of revision of the lot arrangement," which plainly shows the court in the 1972 case correctly thought and concluded that the Subject Property does in fact contain lots, which means Blocks 28 and 29 are subdivided into lots. (R. p. 461). However, the Master in this case has erroneously concluded that, despite the plain language of the 1972 Order and the map attached thereto, the Subject Property has always been one lot, as Blocks 28 and 29.

Finally, the Master seems to acknowledge the property is or was divided into two separate blocks on the 1955 Plat, but somehow has reached a conclusion that these two

blocks not only do not contain more than one lot, but that these two blocks have always been just one lot. In other words, the Master has apparently found two separately platted blocks on a subdivision plat constitute one lot. Respectfully, the Master's ruling does not make sense and it is in error.

B. The Court of Appeals previously held that the 1955 Plat and the map attached to the 1972 Order show the Subject Property divided into seven lots, and this is the law of the case.

The Court of Appeals' prior Opinion in this case (the "2010 Opinion"), reversing an earlier grant of summary judgment in favor of Plaintiff, expressly holds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). As such, it has already been determined that Blocks 28 and 29 were divided into seven lots and that is the law of this case.

It is well settled law that an un-appealed final ruling on the merits becomes the law of the case. King v. James, 388 S.C. 16, 25, 694 S.E.2d 35, 40 (Ct. App. 2010) (noting that "neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements" and holding that "[t]herefore, this ruling is the law of the case.") (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) for the proposition that "an unappealed ruling, *right or wrong*, becomes the law of the case.") (emphasis added).

This is true on remand to the trial level as well as upon further appellate review. In Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) ("Charleston Lumber II"), our Supreme Court considered whether failing to

appeal a final order rendered certain findings to be the law of the case. In the prior proceedings ("Charleston Lumber I"), the Court of Appeals reversed the trial court's order granting summary judgment to the plaintiff and instead held the defendant was entitled to recover lost employee time as damages on his fraud counterclaim. Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). The Court of Appeals remanded the matter to the trial court for a determination of the extent of the damages. Id. The plaintiff did not seek further appellate review of Charleston Lumber I. Charleston Lumber II at 174, 525 S.E.2d at 871.

On remand, the plaintiff moved again for summary judgment on the fraud counterclaim, and the trial court again granted the plaintiff summary judgment. Id. The defendant appealed (Charleston Lumber II), arguing that the ruling permitting it damages for fraud in Charleston Lumber I was binding on the trial court. Id. This Supreme Court held that the ruling in question in Charleston Lumber I was "adverse to Charleston Lumber" and "[a]ccordingly, it was incumbent upon Charleston Lumber to seek rehearing and/or petition [the Supreme Court] for a writ of certiorari or be bound by Charleston Lumber I as the law of the case." Id. at 174-75, 525 S.E.2d at 871 (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unappealed ruling is the law of the case)).

In fact, the established law of the case rule applies even if the holding reached in the un-appealed order, which has consequently become the law of the case, was wrong. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "*right or wrong*, is the law of this case and requires affirmance") (emphasis added). This is certainly a persuasive aspect of the law of the case rule –

particularly considering the law of this case as established in the 2010 Opinion regarding the existence of the Property as seven lots is correct and consistent not only with the 1955 Plat and the Plat attached to the 1972 Order, but also with the unequivocal admissions of Musick.

The Court of Appeals' 2010 Opinion in this case found that "the 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots." Musick did not appeal this 2010 Opinion. This finding is now the law of this case and the Master was bound thereby. Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). Counsel for Musick admits that "[t]he Court of Appeals issued an Order that we are functioning under. And they made several findings that I don't think we *can* or should litigate here." (R. p. 165, line 25 – p. 166, line 3) (emphasis added).

C. The property lines shown on the 1955 Plat and the map attached to the 1972 Order are actual property lines as opposed to an indication of a "potential subdivision" as held by the Master.

The 1955 Plat and the map attached to the 1972 Order showed the Subject Property as being divided into seven lots. This is clear upon a review of each of these plats. (R. pp. 530, 470). This was expressly admitted by Musick. (R. p. 529). This was held by the Court of Appeals in its 2010 Opinion. (R. p. 59). The 1972 Order even treats the Property as being already divided into separate lots. (R. pp. 455-470). Despite the foregoing, however, the Master concluded in her Order Denying Defendants' Motion for Reconsideration that the lines showing the subdivision of the Subject Property into seven lots on the prior plats indicated a mere "potential subdivision" of the Subject Property. (R. p. 8). This is simply not the case.

The 1955 Plat shows the Subject Property as being divided into seven lots, with the division being clearly shown by solid lines. (R. p. 530). Thereafter, the 1972 Order, which shows the seven lots as dotted lines, expressly and clearly establishes that the reason such dotted lines are used is only for the purpose of indicating that, as opposed to other lot lines shown on said map, the lot lines shown within the Subject Property were taken directly from the 1955 Plat - which 1955 Plat in fact does show the subdivision in solid lines. (R. p. 470). In other words, the dotted lines were used in the map attached to the 1972 Order only to differentiate, for the purposes of that map, certain Blocks that are depicted on the map as they were shown on the 1955 Plat, from other Blocks depicted on the map as they were shown on some other plat (from December 21, 1960). *Id.* This map, which was attached to the 1972 Order, clearly states that "Blocks 30, 32 & 34 [are] shown by solid lines from map of December 21, 1960" and "Blocks 28, 29, 30, 31, 32 & 33, as shown in Plat Book 25 at Page 22 [are] represented by dotted lines." *Id.* In any event, "[t]he general rule is that where the lines of senior and junior surveys conflict, the lines of the senior survey control." Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Accordingly, the solid lines shown on the 1955 Survey control.

Despite the foregoing language which was clearly incorporated on the face of the map attached to the 1972 Order, and despite the fact that the Subject Property is subdivided into seven lots by *solid* lines as shown on the 1955 Plat, as admitted by Musick and as previously held by this Court in its 2010 Order, which is now the law of this case, the Master held that the dotted lines shown on the map attached to the 1972

Order only indicated a "potential subdivision" of the Subject Property. This conclusion is obviously erroneous and a misinterpretation of the actual facts before the Court.

D. The Master erred in relying upon the fact that at some point the Subject Property was identified as only one tax map number by the Horry County Tax Assessor's office.

The fact that the Subject Property may have previously been identified by the Horry County Tax Assessor's office by only one tax map number simply has no bearing on the issue at hand. No evidence has been presented as to what information the Tax Assessor's office relied upon in creating its tax maps. It may be that the Tax Assessor's office erroneously relied upon the Culler Survey (which was only a boundary survey) without also looking to the 1955 Plat and therefore reflected the Subject Property as one lot without showing the lot lines established by the 1955 Plat. Again, no evidence was presented as to any of these issues other than the fact that at one point in time the seven lots comprising the Subject Property were identified by the Horry County Tax Assessor under one tax map number. This fact, however, particularly when unsupported by any additional evidence or information, is simply insufficient to support the Master's finding that the Subject Property has always been one lot.

In fact, Robert DeCiero, Musick's own witness, testified as follows:

A: There isn't anything that says someone can't take several lots that they own and combine them underneath the tax map number in our subdivision. In other words, if you bought four lots and built one home and recorded it and had it recorded so that they were separate lots listed underneath the tax map number, then you could go back and do something to it. And I had an example of that. We have one of our neighbors that has done that.

(R. p. 282, lines 5-14). Courts have even recognized that "having separate tax parcel numbers and being separately taxed is not relevant in determining whether or not two properties have merged." In re Moyer, 978 A.2d 405 (Pa. Commw. Ct. 2009). Again,

the fact that the seven lots comprising the Subject Property were at some point in time identified by the Horry County Tax Assessor under one single tax map number is of no effect whatsoever, and no supporting evidence has been presented on this issue.

Based upon the foregoing, the Master erred in holding the Subject Property had always been one lot, and the Master's Order in this regard, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

V. THE MASTER ERRED IN FINDING THAT CARMEN WARD HAD A RIGHT TO SUBDIVIDE THE SUBJECT PROPERTY.

The Court further erred in finding that "Carmen F. Ward, grantor, did not subdivide Blocks 28 and 29, which was her right as set out in Judge Vaught's 1972 Order." (R. p. 13).

Carmen Ward had absolutely no right to subdivide the property. The Master's finding in this regard is clearly erroneous.

The 1958 Restrictions state in part as follows:

Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision Myrtle Beach, Horry County, South Carolina

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robert L. Bellamy, Engn.

(a) No lot shall be subdivided and no building including porches or projections of any kind shall be erected at a distance less than 40 feet from the front line on Blocks 1 through Blocks 5 . . .

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof.

(R. p. 530) (emphasis added).

Thus, under the 1958 Restrictions, the same restrictions Plaintiff is trying to enforce through the 1972 Order, no lot at all can be subdivided. *Id.* No one had the right to subdivide any lot. *Id.*

The 1958 Restrictions do say "[a]s to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof." *Id.* The Grantors, whoever they are, as that term is not defined anywhere, could change the boundary lines. In other words, they could make lots smaller or bigger. The Grantors, whoever they are, could change the building lines, the set-back requirements for construction on each lot. The right of the undefined Grantors to change the lines of the lots within the Subject Property is not the same as a right to "subdivide" any such lot, which would necessitate creating additional lots. As aptly described by Musick at trial, "[i]f you *subdivide* then you take one lot and make it more than one." (R. p. 198, lines 17-23) (emphasis added).

Thus, it is clear from the 1958 Restrictions that no one, including the Grantors, whoever they are, had any right to subdivide lots, as the 1958 Restrictions specifically state "no lot shall be subdivided." *Id.* Had the 1958 Restrictions intended to reserve to Grantors, whoever they are, the right to *subdivide*, the word "subdivide" would have been used in that part of the 1958 Restrictions that reserved certain things to Grantor, but it was not. *Id.*

The 1972 Order appears to have made the 1958 Restrictions applicable to Blocks 28 and 29, "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. p. 461) (emphasis added).

Thus, with the two documents of record, the 1958 Restrictions and the 1972 Order, the Grantors, whoever they are, had two rights: (1) change the boundary lines of the lots; and (2) change the building lines of the lots. The 1972 Order then provided two additional rights, which the Dicks contend are rights they have, to "revise the lot arrangement" or combine the lots with the "abutting portions of lots in Blocks 24 and 24." Id. As a result, there were 4 rights reserved or created pursuant to the 1958 Restrictions and the 1972 Order: (1) change the boundary lines of the lots; (2) change the building lines; (3) revise the lot arrangement⁷; and (4) combine the lots with the abutting portions of lots in Blocks 24 and 25. That is it. One prohibition in the 1958 Restrictions is applicable here – "No lot shall be subdivided." (R. p. 530). Therefore, no one, including the Grantors, whoever they are, had the right to subdivide the lots into smaller lots or to combine lots or to eliminate the lots as that right was never granted either under the 1958 Restrictions or the 1972 Order. The Master erred in finding and holding that Carmen Ward has any right to subdivide the Subject Property and the Master's Order in this regard, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

⁷ "Arrange" means "to put in proper order or into a correct or suitable sequence, relationship, or adjustment <~flowers in a vase> <~cards alphabetically>." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Thus, according to the 1972 Order, the seven lots could be re-arranged, not eliminated.

VI. THE MASTER ERRED IN RELYING IN ANY WAY ON THE FACT THAT CERTAIN PORTIONS OF THE SUBJECT PROPERTY MAY BE WETLANDS, AND IN ATTEMPTING TO EVALUATE AND RELY UPON HER OPINION OF WHETHER THE DICKS' LOT ARRANGEMENT WAS "PRACTICAL"

The Master erred in finding "[t]he majority of Blocks 28 and 29 is wetlands . . . which makes this division somewhat impractical." (R. p. 15). The Master further erred to the extent she relied upon this finding to make her decision. Whether it is practical or not for the lots to be arranged in the manner the Dicks chose to arrange them is of no consequence to issues before the Master. Furthermore, no testimony was presented as to whether this lot arrangement is practical or, moreover, what impact the "practicality" of the Dicks' lot arrangement has on the Dicks' right to so arrange the lots. The Dicks submit that no such relation exists between their right to revision of the lot arrangement and the resulting "practicality" of their chosen arrangement. The 2003 Plat was approved by the applicable authorities for recording and nothing more should be required with respect to their chosen arrangement. (R. p. 542).

Accordingly, to the extent that the Master's Order is based upon any issues relating to wetlands within the Subject Property, or whether or not the Dicks' chosen lot arrangement is "practical," the Master's Order, and her Order Denying Motion for Reconsideration, must be reversed and vacated and this Court should find that the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

VII. THE MASTER ERRED IN HOLDING THAT THE PROPERTY IN QUESTION SHOULD CONTINUE TO BE ONE LOT AND IN FAILING TO FIND THAT THE DICKS COULD OWN THEIR PROPERTY AS SEVEN LOTS AS SHOWN ON THE 2003 PLAT.

The Master respectfully misconstrued the 1972 Order by failing to follow the rule which requires courts to strictly construe restrictions and covenants concerning the use of

real estate and to resolve all doubts in favor of free use of the property. Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). The Master also ignored the rule which requires a party seeking to enforce a covenant or restriction to show the covenant or restriction applies either by its express language or by a plain and unmistakable implication.⁸ Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The plain meaning of the 1972 Order and the evidence submitted show Musick is not entitled to any relief and in fact show that the Dicks are entitled to own the Subject Property as seven lots as shown on the 2003 Plat.

A. The Master erred in failing to find and conclude that the Subject Property has always been seven lots and should remain seven lots, and to the extent anyone tried or purported to change the Subject Property to be anything other than seven lots, that action was improper and void.

As mentioned above, the 1958 Restrictions, which were made applicable to the Subject Property by virtue of the 1972 Order with certain modifications clearly stated therein, do not allow lots to be subdivided but instead expressly provide that "no lot shall be subdivided." (R. p. 530). Neither the 1958 Restrictions nor the 1972 Order provide the Grantors, whoever they are, or anyone else, the right to do away with lots or to combine the seven lots into one lot. (R. pp. 530, 455-470).

Any construction of the 1972 Order which provides that lots can be taken away or combined flies in the face of both the 1972 Order and the 1958 Restrictions. The 1958 Restrictions are "protective covenants" in order to preserve the residential character of the neighborhood. (R. p. 530). Likewise, the 1972 Order is replete with language which implies the parties were concerned with preserving the residential character of the

⁸ None of these rules or cases setting forth these rules were cited or mentioned in the Court's Order.

neighborhood. (R. pp. 455-470). Thus, it does not make sense that the Master in this case found that the Subject Property could be changed from seven lots to one large lot in the neighborhood, because most of the subdivision is divided into residential lots except for some well-defined common areas.

Using the Subject Property as one lot is not consistent with the rest of the neighborhood. In fact, across the street from the Subject Property there are seven or eight houses in generally the same amount of space as the Subject Property, entirely consistent with the lot configuration of the Subject Property as shown on the Dicks' 2003 Plat. (R. p. 319, line 23 – p. 320, line 1). The Subject Property consists of 2.67 acres and the testimony at trial was that “95 or even 100 percent of lots are one acre or less” and the “density [of the seven lots on the 2003 Plat] is equal to what the density that exists there [in the neighborhood].” (R. p. 320, lines 3-4, p. 334, lines 3-4). Photographs were introduced showing the location of houses on lots in other portions of the neighborhood consistent with typical residential developments on relatively small lots – certainly lots of far less than 2.67 acres each. (R. p. 320, line 9 – p. 321, line 5, pp. 544-560). P. Wayne Mumford, Esq., who represented the Dicks in their purchase of the Subject Property, testified that upon his review of the 1955 Plat “it was obvious that this was a residential community. And when I saw the manner and methodology on which those lots were entered, it seemed to me that what Mr. Dicks was attempting to do was to continue the scheme of development by having seven lots on that property.” (R. p. 410, lines 3-10).

The Master appears to have created in Carmen Ward and Gene Lewis a right never granted to them, or anyone else for that matter, to remove and/or combine lots. There is no such right created by either the 1958 Restrictions or the 1972 Order.

As mentioned above, the 1958 Restrictions created two rights reserved to the Grantors, whoever they are: (1) change the boundary lines of the lots; and (2) change the building lines of the lots (set-backs). (R. p. 530). The 1958 Restrictions expressly prohibit the subdivision of lots. Id. As also mentioned above, the 1955 Plat shows the Subject Property as containing seven lots and the map attached to the 1972 Order shows the Subject Property as containing seven lots. (R. pp. 530, 455-470). The 1972 Order created rights to revise the lot arrangement and to combine the lots with adjoining lots. (R. p. 461). No right was ever created in any documents submitted in evidence which authorizes anyone, including the Grantors, whoever they are, to take the seven lots and turn them into one. Therefore, any finding by the Master that the Subject Property is anything other than seven lots is clearly erroneous and authorizes a prohibited act.

In addition, the Master made a finding that Carmen F. Ward sold the Subject Property to Leigh and David Meese as one lot and that the survey referenced in the deed from Carmen Ward to the Meeses (the "Culler Survey") shows the Subject Property as one lot. (R. p. 13). However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks' closing attorney) testified it is customary that old lot lines would be indicated on a survey and that the Culler Survey, which did not show these old lot lines, "didn't appear to be anything but a boundary survey and [he] took it as such." (R. p. 422, lines 20-22, p. 423, lines 12-15). The Culler Survey does not refer to (a) the 1972 Order; (b) the map attached to the 1972 Order which shows seven lots; or (c) the 1955 Plat which shows seven lots. (R. p. 517). There is no indication on the Culler Survey that the existing seven lots were being eliminated, which is required by local ordinance. (R. p. 517, p.

308, lines 8-11). In fact, the Culler Survey is in the name of the Meeses, not Ms. Ward. (R. p. 517). Certainly the Meeses had no right to change seven lots into one lot.

Moreover, in light of the general rule that lines shown on a senior survey control over lines shown on a junior surveys if conflict occurs between the two, the lot lines shown on the 1955 Plat must be controlling if any asserted discrepancy arises between the 1955 Plat and the Culler Survey, which is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore, even if the Court found the Culler survey was more than just a boundary survey, the lot lines as clearly shown, in solid lines, on the 1955 Plat would have to control. Id.

Thus, the Master also erred in relying on the Culler survey to support her findings and conclusions.

Based upon the foregoing, the Master erred in failing to find that the Subject Property could be anything other than seven lots. The Master further erred in failing to find that any purported change of the lots existing on the Subject Property from seven lots to one lot is or was an unauthorized and illegal act and that therefore the Subject Property is and has always been seven lots. Any findings in the Master's Order inconsistent with the foregoing are clearly erroneous.

- B. The Master erred in failing to find that the Dicks hold or held the right of revision of the lot arrangement as set forth in the 1972 Order and therefore are entitled to arrange the seven lots comprising the Subject Property as shown on the 2003 Plat.

The 1972 Order expressly provides that the 1958 Restrictions apply but with right of revision of the lot arrangement. (R. pp. 455-470). The Dicks recorded their 2003 Plat

which shows seven lots, which was fully approved by the appropriate Horry County officials. (R. p. 542). The 1955 Plat showed seven lots, the map attached to the 1972 Order shows seven lots (with right of revision). (R. pp. 530, 470). The Dicks exercised the right that was provided to any owner of the Subject Property as provided in the 1972 Order, to revise the lot arrangement.

The Master has apparently concluded that only the owners of the Subject Property at the time the 1972 Order was issued or the "Grantors," whoever they are, could revise the lot arrangement. (R. p. 13). However, that is not what the 1972 Order states and as set forth in great detail above, the Master erred in so restricting the right of revision of the lot lines to these unidentified "Grantors." Moreover, and also as discussed above, the Master erred in holding that the "Grantors" who did, according to the Master, hold the right of revision of the lot lines were Gene Lewis and Carmen Ward.

As previously noted, the Master's finding in this regard is in error because the 1972 Order fails to state in plain and unmistakable language that the right of revision is limited to any particular party or person. (R. p. 461). The plain language of the 1972 Order does not limit to any particular party or person the right of revision of the lot arrangement, but instead the plain meaning of the language shows an intent that such right run with the title to the Subject Property. See West v. Newberry Elec. Coop. Inc., 357 S.C. 537, 542-43, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding that owner's right to have utility company relocate power line was a real covenant that ran with the land and benefitted owner's successor in title).

Again, covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Hyer v. McRee, 306 S.C. 210, 212, 410

S.E.2d 604, 605 (Ct. App. 1991). Where there is doubt, the doubt must be resolved in favor of the property's free use. Id. Where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005); see also Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property."). In construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 94 (1987); Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004).

Here, the 1972 Order is clear and unambiguous about one thing - that any owners of the Subject Property have the right to revise the lot arrangement. (R. pp. 455-470). Any other construction of the 1972 Order requires reading something into the 1972 Order which simply does not exist. The Master appears to have concluded and taken the unsupported position that this right of revision is exclusive to the plaintiffs in the 1972 Case as the so-called (and undefined) "Grantors." (R. p. 17). However, the 1972 Order simply does not say that.

The 1958 Restrictions state that "[a]s to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof." (R. p. 530). On the contrary, the 1972 Order does not say that the right of revision was reserved to the plaintiffs in that case or any so-called "Grantors." Instead, the 1972 Order states that the

restrictions attached to the 1955 Plat apply to Blocks 28 and 29, "but⁹ with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. pp. 455-470) (emphasis added).

The court in 1972 obviously had before it the restrictions attached to the 1955 Plat. Instead of using the same language contained within those restrictions, the court in 1972 and the parties used different language in the 1972 Order. If the court and the parties wanted to restrict the right of revision to the plaintiffs in that case or any so-called "Grantors," they would have stated that "Plaintiffs (or the so-called Grantors) reserve the right to revise the lot arrangement." However, the court and the parties chose not to use those words. (R. pp. 455-470). Moreover, if the Court wanted the 1972 Order and the agreement contained therein to have the same exact effect of the restrictions attached to the 1955 Plat, there would be no need to add the language they added to the 1972 Order. The 1972 Order would have just said that the restrictions attached to the 1955 Plat apply to the Subject Property.

Instead, the Court and the parties chose to provide any owner of the Subject Property, "Old Blocks 28 and 29," with right of revision of the lot arrangement in the manner they deem fit. The 1972 Order is quite clear that any owner of the Subject Property has the right to revise the lot arrangement. Defendants have arranged the lots consistent with the 1955 Plat and the map attached to the 1972 Order, keeping the Subject Property as seven lots. This is clearly authorized pursuant to the 1972 Order, and the Master should have so held.

⁹ The definition of the word "but," is: "except that," "on the contrary," or "with the exception of." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Therefore, the 1972 Order holds the subject property is subject to such residential restrictions "with the exception of" the right of revision of the lot arrangement.

If the language of the 1972 Order is not clear that any owners of the Subject Property have the right to revise the lot arrangement, or the language in the 1972 Order can be read more than one way, then the language is ambiguous and should be construed in the Dicks' favor and in favor of the free use of the property. This is because covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use and where there is doubt, the doubt must be resolved in favor of the property's free use. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006); Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007).

Accordingly, the Dicks owning their property as seven lots as shown on their 2003 Plat is entirely proper as the Subject Property was shown as seven lots on the 1955 Plat and shown as seven lots according to the map attached to the 1972 Order, and the right of revision of the lot arrangement was not reserved to any particular party but instead was intended to, and according to the 1972 Order does, run with the title to the Subject Property.

In accordance with the foregoing, the Master clearly erred in holding the Subject Property should continue to be one lot and in failing to find that the Dicks could own the Subject Property as seven lots as shown on the 2003 Plat. Therefore, the Master's Order and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

VIII. THE MASTER ERRED IN FAILING TO FIND THAT THE SHELTER RULE PROTECTS THE DICKS AND ALLOWS THEM TO HOLD TITLE TO THE SUBJECT PROPERTY UNENCUMBERED BY THE RESTRICTIONS ESTABLISHED IN THE 1972 ORDER.

The Master erred in holding that "[t]he Shelter Rule does not provide Mr. Thomas Dicks or Mr. Robert Dicks any freedom to subdivide the lot," that "[t]he Dickses may not use the Shelter Rule in this instance because the Meeses are not innocent purchasers" and that "[t]he Dickses' title is not 'sanctified' under the Shelter Rule." (R. p. 16). As discussed in greater detail below, these findings and holdings are not consistent with the testimony presented at trial, nor with the law of this State.

Under this well-established rule, commonly known as the "Shelter Rule," a purchaser with notice of an unrecorded title or claim will be protected if his grantor was an innocent purchaser. See 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 77-78 (3d. 2003); Liberty Loan Corp. of Darlington, S.C. v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified."). With respect to the Shelter Rule and its application, our Supreme Court has stated as follows:

The governing law has been established by many decisions; among them are; Fretwell v. Neal, 11 Rich.Eq. 559, 572, "the well-recognized doctrine of equity being that wherever, in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified"; Foster v. Bailey, 82 S.C. 378, 382, 64 S.E. 423, 424, "The case illustrates the danger of negligence in complying with the recording statute"; Southern Railway v. Carroll, 86 S.C. 56, 67 S.E. 4; and McCandless v. Klauber, 158 S.C. 32, 155 S.E. 141. The rule is well stated in 77 C.J.S. Sales § 296 d, p. 1110, as follows:

After property has passed into the hands of a bona fide purchaser, *every subsequent purchaser* stands in the shoes of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, *irrespective of notice*, unless such purchaser was a former purchaser, with notice,

of the same property prior to its sale to the bona fide purchaser.

Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255, 258 (1957) (emphasis added).

As one commentator has stated:

In accordance with the general rule that a remote purchaser of real estate whose purchase does not fulfill all the requisites for protection due a bona fide purchaser may nevertheless be accorded protection because of a purchase from one who is entitled to such protection, if one is entitled to protection as a bona fide purchaser, such person may convey a good title to a subsequent purchaser irrespective of the latter's notice of an outstanding equity or unrecorded interest; in other words, a purchaser with notice from a bona fide purchaser without notice succeeds to the rights of the latter.

77 AM. JUR. 2d. Vendor & Purchaser § 423 (2007) (emphasis added).

The purpose of the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

As noted above, and as acknowledged and admitted by all parties, the 1972 Order was not indexed properly so as to comply with Section 15-35-520 of the Code, and therefore could not operate to provide notice to third parties of any matters contained therein. (R. p. 167, lines 12-18, p. 182, lines 2-5, p. 360, lines 20-24, p. 380, line 16 – p. 381; line 5, p. 404, lines 11-22); S.C. CODE ANN. § 15-35-520 (2005). Therefore, the Meeses clearly took title to the Subject Property without constructive or inquiry notice of any matters contained in the 1972 Order. In addition, the testimony establishes that the

Meeses took title to the Subject Property with no actual notice of the 1972 Order, and the Master erred in interpreting the testimony otherwise.

The Dicks, in turn, purchased the Subject Property from the Meeses. Because the Dicks purchased the Subject Property from the Meeses, who were bona fide purchasers for value without notice, the Dicks are entitled to step into the shoes of the Meeses, regardless of any notice that the Dicks may have had regarding the 1972 Order or any other restrictions. Thus, the Dicks are to be afforded the same protections that the Meeses had and the Master erred in holding the Dicks are not entitled to such protection.

A. The Court erred in its analysis of the Shelter Rule by considering evidence of knowledge or notice after the Meese's purchased the Subject Property. Any such knowledge is irrelevant.

The Court erred in considering any evidence of notice or knowledge of the 1972 Order or any restrictions created thereby which was acquired after the Meeses purchased the Subject Property. Any such evidence is not relevant to an analysis regarding whether the Meeses were bona fide purchasers for value without notice for purposes of the Shelter Rule. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) ("A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he actually paid in full the purchase money . . . ; (2) he purchased and acquired the legal title . . . ; and (3) *he purchased bona fide*, i.e., . . . without notice of a lien or defect. The bona fide purchaser must show all three conditions - actual payment, acquiring of legal title, and bona fide purchase - occurred *before he had notice* of a title defect or other adverse claim . . .") (emphasis added); see also S.C. Tax Comm'n v. Belk, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976) ("A person may not invoke the doctrine of innocent purchaser for value unless he establishes

'(1) [t]hat the purchase money was actually paid *before* notice of outstanding incumbrances or equities . . . ; (2) that he has purchased and acquired the legal title, or the best right to it, *before* notice of outstanding incumbrances or equities; and (3) that he *purchased bona fide* without notice.") (emphasis added) (quoting Jones v. Eichholz, 212 S.C. 411, 422, 48 S.E.2d 21, 26 (1948).

The Master found actual notice to exist because the Dicks' closing attorney knew about the 1972 Order and the Dicks knew about it. (R. pp. 13, 15). The Master appears to have improperly relied on conversations between the Dicks and the Meeses, all of which occurred after the Meeses purchased the Subject Property. (R. pp. 14-15). All of these factors are absolutely irrelevant to application of the Shelter Rule. Whether or not the Dicks, or their attorney, had any actual or other notice of the 1972 Order has no impact whatsoever on the Shelter Rule analysis, as the only knowledge which has any impact on the Shelter Rule application is the knowledge of the Meeses *at the time of their purchase* of the Subject Property. Id. Any knowledge of the Meeses - or any other party for that matter - *after* the moment of the Meeses purchase of the Subject Property is wholly irrelevant and should not have been considered, and certainly not relied upon, by the Master.

B. The Master erred in interpreting the testimony of James F. Dusenbury.

Mr. Dusenbury testified he knew there was a strong possibility that restrictions applied, but that was *after* the Meeses purchased the Subject Property. His title examination and review of title revealed no restrictions, including those within the 1972 Order, applicable to the Subject Property. (R. p. 361, lines 7-9). He issued a title policy showing that no restrictions applied and did not take exception to the 1972 Order. (R. p.

366, line 25 – p. 367, line 5). Mr. Dusenbury's testimony as to his knowledge of the 1972 Order at the time of the Meeses' purchase was actually as follows:

Q: Do you have any knowledge at the time David and Leigh Meese purchased the property that they would have knowledge of any restrictions on the property?

A: To the best of my recollection, no, I did not have such knowledge.

Q: And you knew there was a strong possibility that they applied to this tract but your knowledge was not acquired until after the Meeses purchased the property; is that correct?

A: To the best of my recollection, that is correct.

Q: You had not had that knowledge before; correct?

A: Correct.

(R. p. 364, lines 8-13, p. 371, line 23 – p. 372, line 4).

Despite the foregoing unequivocal testimony the Master held in her Order that "Attorney Jay Dusenbury testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Thomas Dicks when he first purchased the property." (R. p. 13). In reality, however, the knowledge of Mr. Dusenbury relating to the 1972 Order's application to the Subject Property was not acquired until *after* the Meese's purchase; and, again, any knowledge of the Dicks regarding the 1972 Order is simply irrelevant for purposes of the Shelter Rule.

The Master erred in her interpretation of, and reliance upon, the testimony of Mr. Dusenbury in finding the Shelter Rule inapplicable to this case.

C. The Master erred in her findings regarding the testimony of David Meese.

David Meese clearly testified he had no knowledge about any restrictions on the Subject Property, and in particular any judgments or restrictions that would prevent his owning the Subject Property as seven lots, prior to he and his wife's purchase of the Subject Property. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386,

line 25 – p. 387, line 8). Mr. Meese testified, verbatim, as follows:

Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?

A: No, I'm not.

Q: At the time you and your wife purchased the property, did y'all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?

A: I did not believe there were any restrictions to our knowledge and belief.

Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?

A: None that I recall.

Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?

A: I don't remember such a thing from the purchase, no.

Q: You had no knowledge of any restrictions on the property; correct?

A: Restrictions in terms of subdivision?

Q: Yes.

A: I was not aware of any such restrictions for subdivision.

Id.

Despite the foregoing unequivocal testimony from Mr. Meese that he purchased the Subject Property without knowledge of the 1972 Order, the Master held the Dicks were not entitled to the protections of the Shelter Rule because "the Meeses had notice that Blocks 28 and 29 were subject to the restrictions. . . ." (R. p. 15). Respectfully, the Master has disregarded, or at the very least misinterpreted, the testimony of Mr. Meese and this finding and holding cannot be sustained.

D. The Master erred in interpreting Leigh Meese's testimony.

Likewise, the Master held that Leigh Meese "had notice of the order." (R. p. 16).

However, Leigh Meese testified as follows:

Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?

A: I did not. At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don't know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Despite the foregoing testimony, the Master held that "she was convinced" that Leigh Meese had notice of the 1972 Order at the time of her purchase. (R. pp. 15-16). The Master's conclusion in this regard is expressly based on the fact that "Leigh Meese, a South Carolina attorney, testified she was *vaguely* aware of the 1972 order and knew *at some point* there was an issue regarding subdividing the property." Id. (emphasis added). This conclusion by the Master is not supported by any evidence in the record and simply cannot be sustained. Leigh Meese expressly stated that although she may have become aware of the restrictions *at some point*, she was not aware of the restrictions at the time of her purchase. (R. p. 396, line 21 – p. 397, line 3). Any knowledge of Leigh Meese at any time after her purchase of the Subject Property is, again, absolutely irrelevant. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006).

E. To the extent the Master found that David Meese had no knowledge of the 1972 Order or any restrictions on the Subject Property, but Leigh Meese did, the Master erred in failing to find that the bona fides of either of them is sufficient for the purpose of the Shelter Rule.

Despite the foregoing testimony of Leigh Meese at trial, in the event that the Master still felt "convinced" that Leigh Meese was aware of the 1972 Order at the time of

her purchase of the Subject Property, the Master erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was not sufficient for purposes of the Shelter Rule.

This is similar to a situation where one of two cotenants has knowledge of a prior judgment or monetary lien that was not recorded properly, in which case the judgment as a matter of equity should only attach to the undivided interest of one cotenant, but not the other who is a bona fide purchaser for value without notice. In this case, however, the restrictions cannot be handled in the same manner because restrictions cannot attach only to an undivided interest in the property. As a result, only one of the two cotenants need to be bona fide in order for the Shelter Rule to apply. See In re Safe Deposit & Trust Co. of Baltimore, 94 A. 93 (Md. 1915) (the relation between tenants in common does not imply any agency, on the part of the tenant in possession for his co-tenants, as to receipt of notice of outstanding claims affecting title.); Gray v. Caldwell, 904 So. 2d 212 (Miss. Ct. App. 2005) (a cotenant may not act or claim in any manner to lessen or diminish the value or effect of the other cotenant's right, title, interest or status in land); Beesley v. Hanish, 521 A.2d 1235 (Md. Ct. App. 1987) (A cotenant may not prejudice the rights of the other tenants without their unanimous consent.).

Again, it is well-settled law in this country that "[u]nder the general doctrine that a restrictive covenant will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding restrictions, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be protected in his or her title on account of the bona fides of the vendor." 20 AM. JUR. 2D *Covenants* § 257 (2008). The very purpose of

the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

As a result, under the scenario involving restrictions on property, all it takes is for one purchaser to not have notice in order to clear the property of that restriction. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

To the extent that the Master somehow construed the testimony in such a way that she believed Leigh Meese to have had notice of the 1972 Order at the time of the purchase of the Subject Property by the Meeses, the Master erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice was sufficient to afford them both the benefit of the protection of the Shelter Rule.

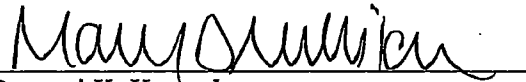
The Master erred in failing to find the Dicks are protected by the Shelter Rule and therefore not subject to the restrictions established in the 1972 Order. The Master's Order and her Order Denying Motion for Reconsideration should be reversed and vacated and this Court should find the Dicks are protected by the Shelter Rule, not bound by the restrictions set forth in the 1972 Order, and entitled to own the Subject Property as seven lots as shown on the 2003 Plat.

CONCLUSION

For all of the reasons set forth above, the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



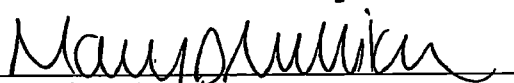
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I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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May 16, 2013

1020.276\2012Appeal\FinalBrief

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent,

vs.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent John Musick instituted this action in Horry County on April 12, 2004 against Appellants, Thomas Dicks and Robert Dicks, asserting that a re-subdivision plat recorded by Appellants which purported to subdivide their lot into seven lots violated restrictive covenants governing Long Bay Estates. Appellants answered and counterclaimed, denying the applicability of restrictive covenants to the subject property and seeking a declaratory judgment that they had not violated any restrictions, covenants, or orders encumbering the property. Cross-motions for summary judgment were heard by the Honorable J. Stanton Cross, Jr., Master-in-Equity for Horry County, on August 16, 2006. By Order dated March 6, 2007, Judge Cross granted Respondent's motion for summary judgment, finding that restrictive covenants applied to Appellants' property and that, therefore, Appellants were required to return the property to its original condition as one lot and were prohibited from subdividing the property.

Appellants' post-trial motion to alter or amend the final order was denied by order dated July 19, 2007. Appellants filed notice of appeal on September 6, 2007.

The Court of Appeals heard the case and remanded it for a full hearing, over-ruling the decision by Master-in-Equity, Judge Cross, finding that in the light most favorably to Dicks, the case should be tried.

In April, 2011, the trial was held and all evidence from both parties was heard and entered into the record. Significantly, Appellant's own lawyer and expert testified that he had found the covenants and was aware that the property was one lot as did the previous owners, as did Attorney Dusenbury as well as Attorney Mumford, all who were fully aware of the circumstances. Thereafter, Judge Howe ruled at the fourth hearing concerning these restrictive covenants that they were valid. Therefore, Judge Winston Vaught, in 1972, Judge Stan Cross in 1998, Judge Stan

Cross in 2004 and Judge Cynthia Graham Howe in 2011 have all held that the 1958 Restrictive Covenants are valid and applicable to Appellants' lots.

Appellants filed their Notice (of intent) To Appeal on August 20, 2012.

COUNTER STATEMENT OF THE ISSUE PRESENTED ON APPEAL

- I. THE MASTER CORRECTLY HELD THAT THE 1958 RESTRICTIVE COVENANTS APPLY TO APPELLANTS' PROPERTY AND THAT APPELLANTS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE 1958 RESTRICTIVE COVENANTS.

- II. THE MASTER CORRECTLY HELD THAT THE SHELTER RULE DOES NOT PROVIDE APPELLANTS ANY FREEDOM TO SUBDIVIDE THEIR LOTS, BECAUSE APPELLANTS, NOR THEIR PREDECESSOR IN TITLE QUALIFY AS "BONA FIDE PURCHASERS FOR VALUE."

STATEMENT OF THE FACTS

This is a dispute about whether restrictive covenants apply to a piece of property owned by Thomas L. Dicks and Robert E. Dicks, Jr. (collectively Appellants) in Long Bay Estates Subdivision in Myrtle Beach, South Carolina. The subdivision was created in the 1950's by the Lewis Family. (R. p. 600 and separately filed map) Attached to the 1955 map of the subdivision recorded at the Horry County Courthouse on May 5, 1958 in Plat Book 25, Page 22, is a list of restrictions which, by their terms, apply to Blocks 1 through 27 as shown on the plat. (R. p. 600 and separately filed map) The restriction pertinent to this litigation states that no lot shall be subdivided but that "as to all unsold lots, the Grantor reserves the right to change the boundary lines and building lines thereof." (R. p. 600 and separately filed map) Thereafter, in two separate lawsuits, one in 1972 commenced by the Grantors against all property owners in the subdivision, and the other in 2007, orders were issued which stated that the restrictions applied to Blocks 1-27, 30, 32, 34, and the remaining portions of "old" Blocks 28 and 29. (R. p. 22 and p. 48) According to the Amended Complaint filed by Respondent, John Musick¹ on May 31, 2005, Thomas Dicks purchased a 2.67 acre parcel of property in Long Bay Estates on May 19, 2003, and, in contravention of the restrictive covenants, subdivided the parcel into seven lots, with Thomas Dicks owning four of the lots and Robert Dicks owning three of the lots. Appellants answered and counterclaimed, admitting that Robert Dicks owns three lots and Thomas Dicks owns four lots, asserting their property was not encumbered by any restrictive covenants, and seeking a

¹ Musick owns Lot 4 of Block 24 in Long Bay Estates Subdivision. (R. p. 22 and p. 78)

declaratory judgment that by owning the subject property as seven lots, Appellants had not violated any alleged restrictions, covenants, or orders that allegedly encumbered the property. Further, Appellants alleged that neither the order issued by the Honorable Winston Vaught in 1972 nor the order issued by the Honorable Stanton Cross in 2000 were in the Appellants' chain of title and therefore, does not impact this litigation.

This matter was referred to the Honorable J. Stanton Cross, Jr., Master-in-Equity for Horry County. Cross-motions for summary judgment were filed, and by Order dated March 6, 2007, Judge Cross granted summary judgment in favor of Respondent holding that: (1) the 1958 Restrictive Covenants apply to the subject property and only the Grantor had the right of revision to subdivide the property; (2) Appellants were on notice, both actual and constructive, of the 1958 Restrictive Covenants; (3) Appellants did not have the right to subdivide the property and there is no indication the property was subdivided by the Grantor; and, (4) the 1958 Restrictive Covenants are fully enforceable against Appellants by any or all property owners within Long Bay Estates Subdivision. (R. pp. 21-35) By Order dated July 19, 2007, Judge Cross denied Appellants' post trial motions. An appeal followed.

The Court of Appeals heard the case and remanded it for a full hearing, over-ruling the decision by Master-in-Equity, Judge Cross, finding that in the light most favorably to Dicks, the case should be tried. (R. pp. 59-66)

In April, 2011, the trial was held and all evidence from both parties was heard and entered into the record. Significantly, Appellant's own lawyer and expert testified that he had found the covenants and was aware that the property was one lot as did the previous owners, as did Attorney Dusenbury as well as Attorney Mumford, all who were fully aware of the circumstances. Thereafter, Judge Howe ruled at the fourth hearing concerning these restrictive covenants that they

were valid. (R. pp. 10-17) As such, Judge Winston Vaught, in 1972, Judge Stan Cross in 1998, Judge Stan Cross in 2004 and Judge Cynthia Graham Howe in 2011, have all held that the restrictive covenants are valid and applicable to Appellants' lots.

ARGUMENT

There are really only two issues in this case and they are: (1) whether the Master correctly ruled in favor of the Respondents in finding that the 1958 Restrictive Covenants apply to the lots owned by Appellants, and (2) whether the Master correctly ruled that the Shelter Rule is not applicable in this situation because neither the Appellants nor the previous lot owners qualify as *bona fide* purchasers for value. Appellants have set forth eight issues in their brief, many of which are confusing and do not focus on the true issues on appeal. However, for purposes of clarity, Respondent has chosen to re-frame the issues and arguments in its brief, while first addressing each of Appellant's eight issues, in a very brief manner.

RESPONSE TO APPELLANTS ARGUMENTS:

1. The Master did not err in holding that only the Grantors had the right to change the lot lines. The Master Howe expressly found in her Order that the 1972 Order issued by Judge Winston Vaught applied. (R. pp. 10-17) Her decision was based on the circumstances set forth at the hearing, the Order issued by Judge Vaught, testimony at the hearing, and all documents introduced at the hearing. Moreover, it is imperative to note that the original restrictions stated that, "No lot shall be subdivided...and as to all unsold lots, the Grantor reserves the right to change the boundary lines and the building lines thereof." (R. p. 600 and separately filed map) It is undisputed that these restrictions applied to Blocks 1 through 27 and that the restrictions meant that they could not subdivide those lots. Judge Vaught's Order in 1972 simply clarified, based on the litigation, that the restrictions also applied to the remaining portions of "old" Blocks 28 and 29, which included the parcel owned by Appellants. (R. p. 49) Therefore, the Master found that Judge Vincent's Order was clear and specific, that the original restrictions, which prohibit subdivision of the lots, apply to Appellant's lots as well. Judge Vaught's order is clear and

unambiguous that only the Grantor retained the right to change the boundary lines and building line...and only as to any unsold lots. (R. p. 49) As such, the Master did not err in holding that only the Grantors had the right to change the lot lines.

2. The Master did no err in holding that Carmen F. Ward and Gene F. Lewis were the "Grantors" contemplated in the 1972 Order. There has never been an issue raised by either Counsel as to who the Grantor's were. It has been assumed by all parties and counsel throughout the numerous years of litigation that the 1972 Order refers to Carmen F. Ward and Gene F. Lewis as the original "Grantors". It doesn't make sense that any other person could be considered the "Grantor" as used in the 1972 Order. Master Howe used her common sense and her understanding of the plain meaning of the Order to determine that the only possible persons who could be the "Grantors" are Carmen F. Ward and Gene F. Lewis. Carmen F. Ward and Gene F. Lewis are the only persons who owned the subject property from the time of the creation of Long Bay Estates until 1997 when Carmen Ward sold a parcel to David and Leigh Ammons Meese. Therefore, there isn't any other person who could be considered a "Grantor", since in 1972, when the Order was issued, no one else owned a lot at Long Bay. As such, the Master did not err in holding that Carmen F. Ward and Gene F. Lewis were the "Grantors" contemplated in the 1972 Order.

3. The Master properly held that the language of the 1972 Order was clear and unambiguous. The 1972 Order, when read in conjunction with the original restrictions, which is imperative since the 1972 Order extends the original restrictions to additional lots, is clear that only the Grantors were given the right of revision. The original 1958 Restrictive Covenants state in relevant part: "[A]s to all unsold lots, the Grantor reserves the right to change the boundary lines and building lines thereof." (R. p. 600 and separately filed map) The first Finding of Fact in the

1972 Order acknowledges that: "The restrictions expressly reserve the right to the Grantors to change the boundary and building lines of unsold lots." The pertinent language in the 1972 Order is: "In like manner the remaining portions of 'old' Blocks 28 and 29 . . . are subject to such residential restrictions, but with right of revision of the lot arrangement." Further, the Order states: "The restrictions uniformly used in this area . . . reserved to Grantor the right to change boundary lines and building lines as to any unsold lot in any event." (R. p. 49)

In light of this clear expression of intent, the Master held that only the Grantors had the right of revision of the lot arrangement. This is the only reasonable interpretation of the language used in both the 1958 Restrictive Covenants and the 1972 Order, and there is no evidence to suggest otherwise. Appellants' attempt to utilize the principle that any ambiguity in restrictive covenants should be construed in favor of the unrestricted use of land is a perversion of that rule.

Respondent acknowledges that restrictive covenants are subject to the rules of contract construction, and that any doubt or ambiguity in the covenants is to be resolved in favor of the free and unrestricted use of land. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987); Hyer v. McRee, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). Nevertheless, the Master did not find the covenants at issue ambiguous; therefore, the principle of construction argued by Appellants is inapplicable. The Master correctly held that the language in the 1972 Order concerning the right of revision applied solely to the Grantors and not the Appellants.

4. The Master correctly held that the subject property in questions had always been sold as one lot. Respondent's argument is misleading under this circumstance. It is clear from the testimony that the Meeses bought the property as one lot. (R. p. 391, Lines 13-20) It is also clear that they sold it as one lot. (R. p. 427, lines 11-24) Other than the original Grantor, Carmen

F. Ward, no one else has ever sold or owned the property, except the Meeses. Therefore, since Carmen Ward sold it as one lot, and the Meeses sold it as one lot, it is an undisputed fact that the property in question had always been sold as one lot. Moreover, Appellants' argument as to the unpublished opinion of the Court of Appeals is over-reaching. The Court of Appeals did not make any findings of fact in its' opinion; it simply reversed and remanded for a full hearing, finding that it was error for the lower court to grant summary judgment because there did exist an issue of fact as to the intent to subdivide. (R. pp. 59-66) Master Howe heard the testimony of all parties and witnesses, along with the arguments of counsel and reviewed all exhibits, and determined that the property in question had always been sold as one lot. This is an undisputed fact in the transcript.

5. The Master did not err in finding that Carmen Ward had a right to subdivide the subject property. It is clear from the original Restrictive Covenants and the 1972 Order, that the original Grantors had the right to alter the lot lines. However, this argument is not relevant and makes no difference in terms of whether or not Appellants have a right to subdivide their lots.

6. The Master had a right to consider all circumstances and evidence that was properly brought before her at the hearing. Counsel for Appellants did not object to the introduction of information concerning the wetlands, therefore Respondents assert that this particular issue is not preserved for the Court's review. Conley v. Rowe, 280, S.C 338, 312 S.E.2d 720 (Ct. App) 1984. (Where putative father failed to object to admissibility of blood test results at trial, he would not be heard to complain on appeal about the trial judge's consideration of that evidence in reaching a decision). Moreover, Appellants introduced exhibits concerning the wetlands issue as part of the presentation of their case. Certainly Appellants are not contending that the Master erred in considering their own evidence!

7. The Master was correct in holding that the property in question was one lot, had always been one lot and therefore should remain one lot. This issue has already been addressed somewhat in issue number four; however, it is clear from the testimony that the lot had always been sold as one lot. This is to preserve the residential nature of the neighborhood, as set forth by the original owners and Grantors. Furthermore, Appellant testified that it was his intention when he purchased the lot to use it as one lot and build a home on it. (R. p. 305, lines 5-7) It was only thereafter, when he had gotten a good price on the lot that he tried to divide it into seven lots and destroy the residential nature of the neighborhood. (R. p. 326, line 12-p. 327, line 25)

8. The Master correctly ruled that based on the testimony presented at the hearing the documents presented, including previous orders and the original restrictions, that Appellants had actual notice, in more than one instance as to the fact that the subject property was one lot, and that it could not be subdivided. Appellants' own real estate lawyer, Mr. Wayne Mumford, testified that he had a copy of the 1972 Order (R. p. 247, lines 8-20) as did Appellant prior to the closing of his lot. (R. p. 323, line 22-p. 324, line 1) The Meeses never considered sub-dividing the property; had owned it as one lot; bought it as one lot; and never had any intention of doing anything else with the lot. (R. p. 390, lines 9-14) Appellant's erroneously focus on the Shelter Rule. The Shelter Rule is not applicable to an action to enforce restrictive covenants, and Appellants have not provided the Court with any case law suggesting otherwise. The so called "Shelter Rule" has been applied where a *bona fide* purchaser for value obtains property without notice of an unrecorded mortgage or lien and thereafter conveys the property to another. Cases have held in that situation; that the good title acquired by the *bona fide* purchaser can be passed on to a subsequent purchaser. Nothing in the Shelter Rule mentions restrictive covenants, and it is simply not applicable to restrictive covenants.

Moreover, there is a long line of authority which holds that a covenant is enforceable against a subsequent Grantee, even if not in the Grantee's deed, if the Grantee has actual or constructive notice of the covenants. (This point will be addressed in greater detail in Respondent's argument section). It is clear from the transcript that both the Meeses and Appellants had knowledge of the Restrictive Covenants. As such, the Master did not err in failing to apply the Shelter Rule.

ARGUMENT

I. THE MASTER CORRECTLY HELD THAT THE 1958 RESTRICTIVE COVENANTS APPLY TO APPELLANTS' PROPERTY AND THAT APPELLANTS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE 1958 RESTRICTIVE COVENANTS.

Appellants' argument that the Restrictive Covenants do not apply to the subject property by their express terms is an attempt at obfuscation and borders on the disingenuous. The pertinent restriction attached to the 1955 map of Long Bay Estates Subdivision, created by the Lewis Family (Grantors) states: "No lot shall be subdivided As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof." (R. p. 600 and separately filed map) It is clear and unambiguous that the restriction prohibits subdividing any lots, except for those that are unsold, and if a lot is unsold, only the Grantor, who are Carmen F. Ward and Gene F. Lewis, have the right to change the boundary lines or building lines thereof. It is undisputed that the original language of the covenants stated they applied only to Blocks 1 through 27. Thereafter, in litigation commenced by the Grantors against all the property owners, an order signed by then Master Winston Vaught, clarified the scope of the restrictions and stated they applied to Blocks 1 - 27, 30, 32, and 34, and the remaining portions of "old" Blocks 28 and 29, which included Appellants' parcel. (R. pp. 48-49) This identical issue was addressed in a second lawsuit which culminated in an order issued by the present Master Stan Cross, which incorporated the 1972 Order of Judge Vaught. (R. p. 22)

Respondent has never taken the position that the 1958 Restrictive Covenants specifically included Appellants' property, but rather has consistently argued that the subsequent litigation,

which culminated in an agreement between the Grantors and all property owners as expressed in the 1972 Order, clarified the extent of the original restrictions, stating that the remaining portions of "old" Blocks 28 and 29, which includes Appellants' 2.67 acre tract, are subject to the restrictions. After a full hearing, Master Howe ruled, "It is the finding of the Court that Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change the boundary lines or building lines, that right being reserved to the original "Grantor". (R. p. 13) The order is clear and unambiguous on its face that only the "Grantors" had the right to change the boundary lines, and they did not exercise this right. **In fact, as Master Howe** found, the lot was owned and sold as one lot with one building consistently, until Appellants purchased the lot and learned they might be able to get a good price on subdividing and selling off seven lots instead on one. (R. pp. 14-15) Moreover, Jay Dusenbury, the attorney of record representing the Meeses (previous owners to Appellants) testified that although he did not find the 1972 Vaught Order in the chain of title, he and the Meeses both knew there were restrictions on the Long Bay Estates property. (R. p. 369, lines 7-22) He further testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Appellant at the time he purchased the property. (R. p. 369, line 12-p. 370, line 12) He further testified that in fact at the time Appellants signed the contract to purchase the property from the Meese's Appellants signed a stand-alone document stating that the restrictions could apply. (R. p. 370, lines 13-17) As such, it is clear that both the Meeses and the Appellants had actual or constructive knowledge of the restrictions.

It is important to note that the Master's finding that the 1958 Restrictive Covenants apply to all the lots in the Long Bay Estates Subdivision was not issued in isolation; rather, this was the fourth time the Horry County Court System had dealt with the question of the applicability of the

covenants. In ruling that the restriction against the subdivision of lots applied to Appellants' property, the Master relied on not only the language of the original Restrictive Covenants, but also on the three ensuing court orders. Judge Cross also found that the Grantors, which included Carmen F. Ward and Gene F. Lewis, owned the subject property from the time of the creation of Long Bay Estates until 1997 when Carmen Ward sold the parcel to Appellants' predecessors in title, David and Leigh Ammons Meese. (R. p. 25) Now, Master Howe has also found that the Grantors which included Carmen F. Ward and Gene F. Lewis, owned the property from the time of creation of Long Bay Estates until 1997 when Carmen F. Ward sold the parcel to Appellant's predecessors in titled, David and Leigh Ammons Meese.

Accordingly, the subject parcel was bound by the restriction against subdividing, not only as originally contained in the Restrictive Covenants, but as agreed upon and explained by the two lawsuits wherein both the Grantors and Appellants' predecessors in title were parties. If Appellants' argument was accepted, Appellants would be treated differently from all other persons similarly situated in that they would not be bound by the original restriction against subdividing despite the fact their predecessors in title received the property directly from the Grantors, who were parties to the earlier litigation. The Master thus, correctly and consistently, ruled that Appellants' property is bound by the 1958 Restrictive Covenants.

II. THE MASTER CORRECTLY HELD THAT THE SHELTER RULE DOES NOT PROVIDE APPELLANTS ANY FREEDOM TO SUBDIVIDE THEIR LOTS, BECAUSE APPELLANTS, NOR THEIR PREDECESSOR IN TITLE QUALIFY AS "BONA FIDE PURCHASERS FOR VALUE"

That Master Howe found that based on her opportunity to judge the credibility of the witnesses, and all testimony presented, that the Meeses had notice that Blocks 28 and 29 were subject to the restrictions against subdivision, or at least had knowledge that they most likely were subject to the restrictions. Ms. Meese testified that she was aware of the 1972 order, if only vaguely so. (R. p. 399, lines 17-23) However, she mentioned subdividing was not important to her because she only intended to purchase the property to build a house on it and live there. (R. p. 390, lines 9-14) Therefore, Ms. Meese had no intention of subdividing the property when she purchased it. Likewise, Appellant did not have any intentions of subdividing the property when he purchased it. The Meeses' attorney, Jay Dusenbury, learned that the 1972 Order was mis-indexed when the Meeses bought the lot and advised Appellants at the time they purchased the lot that there was a strong possibility that the restrictions applied to the lot. (R. p. 369, lines 7-22)

Moreover, Appellant's real estate closing attorney Wayne Mumford, testified that even though he was not able to locate the 1972 Order in the chain of title, he had a copy of it prior to closing. (R. p. 323, line 22- p. 324, line 1) This constitutes actual notice. Further, he advised his client that there was an issue as to subdivision of the property. Thus, the Master found that Appellants had both constructive notice of the applicability of the Restrictive Covenants through the 1972 Order as well as actual notice of the restrictions. Indeed, counsel for Appellants at the hearing before the Master conceded his clients had actual notice of the restrictive covenants. (R.

p. 13) Nevertheless, Appellants seek to escape the effect of their actual notice by arguing their lack of constructive notice and asserting they are protected under the "Shelter Rule". Respondent asserts this rule is not applicable to an action to enforce restrictive covenants and, even assuming it does apply to such an action, it is inapplicable on the facts of this particular case.

The so-called "Shelter Rule" has been applied in situations where a *bona fide* purchaser for value obtains property without notice of an unrecorded mortgage or other lien and thereafter conveys the property to another. Cases have held that the good title acquired by the *bona fide* purchaser for value can be passed on to the subsequent purchaser, even if he had notice of the defect. Foster v. Bailey, 82 S.C. 378, 382, 64 S.E. 423, 424 (1909) (Whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified.) Goodwin v. Harrison, 231 S.C. 243, 258, 98 S.E.2d 255, 258 (1957) (Where a motor company acquired title to a vehicle without actual notice of a prior unrecorded mortgage, it became owner of the vehicle free of the lien of the mortgage and subsequent purchasers succeeded to its rights); Liberty Loan Corporation of Darlington v. Mumford, 283 S.C. 134, 140, 322 S.E.2d 17 (Ct. App. 1984) (Where a lien was not properly indexed at the time of its purchase by a *bona fide* purchaser for value, its successors in interest stood in the shoes of the *bona fide* purchaser for value even if they had notice of the lien). None of the cases employing this rule deals with restrictive covenants, and Respondent asserts it is inapplicable to the case at hand. Appellants have not cited any case law wherein the "Shelter Rule" is applied to restrictive covenants. It is clear from the authorities appellants have cited, that the "Shelter Rule" protects the passing of "good title". As such, the "Shelter Rule" is not applicable to restrictive covenants. Indeed, the rule would seem to have no application to restrictive covenants given the line of authority which holds that a covenant is enforceable against a subsequent grantee, even if not in the grantee's deed,

if the grantee has actual or constructive notice of the covenant. See Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 370, 626 S.E.2d 902, 918 (Ct. App. 2006); 20 Am.Jur. (2d), Covenants, Conditions and Restrictions §26 (1965). Thus, Appellants' counsel's admission that his clients had actual notice of the restriction against subdivision should end the matter, and Appellants' argument that the Master erred in holding they were on notice of either the 1958 Restrictions or the 1972 Order should be dismissed as manifestly without merit.

However, even assuming without deciding that the "Shelter Rule" does apply to restrictive covenants in contravention to the authority cited above, it would not provide protection to Appellants because the Meeses were not *bona fide* purchasers for value without notice. The Master found that the Meeses had both actual and constructive notice of the existence and applicability of the restrictive covenants to the subject property. (R. pp. 15- 16) At the very least, they had constructive notice, thus defeating any protection Appellants could claim under the shelter rule.

Leigh Ammons Meese, an attorney herself, testified that she had no recollection of any discussions or concern about restrictions on the property at the time of its purchase in 1977. (R. p. 400, line 22-p. 401, line 8) At best, Ms. Meese's testimony regarding her knowledge of the restrictive covenants at the time of purchase was equivocal: "I don't know what point I became aware of what questions." (R. p. 401, lines 1-3) This statement alone should be sufficient to deprive her of *bona fide* purchaser without notice status, a prerequisite for application of the "Shelter Rule".

Even if Ms. Meese did not have actual notice of the restrictions at the time of purchase, she

certainly became very well acquainted with them thereafter, particularly once the 2000 litigation started, which involved her family, and she made no effort to attempt to claim *bona fide* purchaser without notice status and avail herself of subdividing the property. It is clear that she and her husband purchased the 2.67 acre parcel as a single lot and they sold it as a single lot to Appellant.

David Meese, a CPA, likewise was unsure what he knew about possible restrictions on the property at the time of its purchase, primarily because any restrictions were irrelevant since his intent was to build a single family home on it. (R. p. 390, lines 3-14) He also conceded that he had received a copy of the Covenants and Restrictions at the time he purchased the 2.67 acre tract, thus confirming he had actual notice of the restrictions. Accordingly, Master Howe was correct in finding that Appellants' predecessors in title, Leigh and David Meese, had both actual and constructive notice of the restrictive covenants. Thus, the "Shelter Rule", even if it were applicable, affords no protection to Appellants because the Meeses do not qualify as *bona fide* purchasers for value without notice.

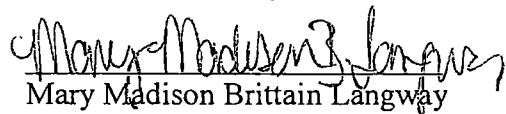
CONCLUSION

The Master's decision finding in favor of Respondent and to uphold the applicability of the restrictive covenants which govern Long Bay Estates Subdivision should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

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ARGUMENT

I. THE MASTER ERRED IN HOLDING THE RIGHT OF REVISION OF LOT ARRANGEMENT WAS RESTRICTED TO SOME UNIDENTIFIED "GRANTORS" AND THAT THE "GRANTORS" ENTITLED TO EXERCISE THIS RIGHT WERE GENE LEWIS AND CARMEN WARD, AND MUSICK HAS PRESENTED NO SUBSTANTIVE ARGUMENT OR AUTHORITY TO THE CONTRARY.

The 1972 Order states the 1958 Restrictions apply to the Subject Property "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. p. 461). According to the plain language of the 1972 Order, the right of revision of the lot arrangement established in the 1972 Order is not restricted to any particular party, much less to some unidentified "Grantor."¹ It is this plain meaning of the language of the 1972 Order which must be honored and adhered to. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (a restriction upon real property shall not "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.").

Musick's only argument in response to the fact that the plain language of the 1972 Order by its terms does not limit the right of lot revision to any particular party, and the only support given for his contention that the right of revision of lot arrangement was restricted to some unidentified "Grantor," is the unsupported and conclusory statement

¹ In a sentence following the grant of rights in question, Judge Vaught states, almost as an afterthought, the 1958 Restrictions as well as other restrictions used in the area provide "to grantor" the right to change certain boundary lines "in any event." *Id.* This "in any event" language appears to have been added almost as an aside and to state that the parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have known that certain rights did exist to make alterations in this residential subdivision. Musick's argument is grounded almost exclusively in this "in any event" sentence - a sentence unnecessary to Judge Vaught's ruling which appears to be surplusage and dicta.

that the 1972 Order is "clear and unambiguous that only the Grantor retained the right to change the boundary lines and building line [sic]" It is unclear, however, how the 1972 Order could *unambiguously*² restrict these rights to the "Grantor" when the word "Grantor" is not even mentioned in the operative provision of the 1972 Order. Aside from this one conclusory and patently erroneous statement, Musick presents no evidentiary or legal support whatsoever³ challenging the fact that the Master erred in holding the right of revision of lot arrangement within the Subject Property (being made applicable to the Subject Property pursuant to the 1972 Order) was limited to this unidentified "Grantor."

Likewise, Musick presents no substantiated response to the Dicks' assertion the Master erred in finding "the language 'Grantor'" refers to "Gene Lewis and/or Carmen Ward" At the outset, "the language 'Grantor'" to which the Master refers is presumably the reference to the word "Grantor" contained within the "in any event" sentence of the 1972 Order, which sentence follows the grant of rights in question and, as discussed above, appears to have been included by Judge Vaught as dicta simply justifying his grant of the right of lot revision specifically established in the 1972 Order – but not altering or modifying the right of lot revision which he unequivocally and unambiguously established in the preceding portion of the 1972 Order. The word "Grantor" is not used anywhere in the operative provision of the 1972 Order effecting the grant of rights now in issue. The word "Grantor" is not defined anywhere in the 1972

² To the extent the operative language of the 1972 Order could be considered ambiguous (as the operative provision of the 1972 Order certainly could not *unambiguously* grant rights to an unidentified "Grantor" without mentioning the word "Grantor"), the language in question should have been interpreted in the manner that least restricts the Subject Property, with any ambiguities being strictly construed against the party seeking to enforce it. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); *Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

³ Musick makes no reference whatsoever to any portion of the Record nor citation to any case law in his responsive argument on this issue.

Order, or in the 1958 Restrictions for that matter. Despite the foregoing, Musick asserts as his only argument supporting the Master's finding that the right of revision established in the 1972 Order was actually to be restricted to certain "Grantors" identified as Gene Lewis and Carmen Ward, that "Master Howe used her common sense" in reaching this conclusion, and Musick thereafter refers to (unsubstantiated) circumstances outside of the four corners of the 1972 Order relating to the historic ownership of the Subject Property in further support of this co-called "common sense" interpretation.⁴ The fact that Musick himself has had to point to extrinsic evidence (outside the four corners of the 1972 Order) in order to support the interpretation of the 1972 Order adopted by the Master (and urged by Musick) is telling. Even Musick cannot justify the Master's interpretation of the 1972 Order without looking to extrinsic evidence, and it is undisputed that extrinsic evidence should not be examined absent an ambiguity, and ambiguity requires a construction against the party seeking enforcement and which least restricts the property. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

Musick has failed to offer any viable argument supporting the Master's finding that the right of lot revision, as established pursuant to the 1972 Order, was restricted to certain "Grantors" and that those "Grantors" were Gene Lewis and Carmen Ward. Musick does not offer any evidentiary or legal support for such a finding. The Master undoubtedly erred in this respect.

⁴ Musick again does not make any reference to any portion of the Record or any other evidence before this Court in support of these factual allegations.

II. MUSICK ADMITS THE MASTER'S INTERPRETATION OF THE 1972 ORDER REQUIRES EXAMINATION OF EXTRINSIC EVIDENCE AND THE MASTER THEREFORE ERRED IN EITHER FAILING TO FIND THE 1972 ORDER UNAMBIGUOUS AND APPLYING THE PLAIN LANGUAGE OF THE 1972 ORDER OR IN FAILING TO NOTE ANY PERCEIVED AMBIGUITIES AND APPLYING THE APPROPRIATE RULES OF INTERPRETATION RELATING TO PERCEIVED AMBIGUITIES.

Musick argues the language of the 1972 Order is clear and unambiguous in its grant of rights to some particular "Grantor" wholly unidentified therein, and therefore believes the Master should be upheld in finding the 1972 Order unambiguous on this point. While the Dicks do believe the 1972 Order to be clear and unambiguous, the clear and unambiguous language of the 1972 Order actually and indisputably does not restrict the right of lot revision to any particular party. Musick again asserts that "when read in conjunction with the original restrictions" it "is clear that only the Grantors were given the right of revision." However, reading the 1972 Order "in conjunction with" the 1958 Restrictions necessarily requires consideration of matters outside the four corners of the 1972 Order. Musick further relies upon the purported "intent" of Judge Vaught in issuing the 1972 Order. This consideration of extrinsic evidence should have only occurred in the event the 1972 Order was found ambiguous, and then the ambiguities must have been resolved in the manner that least restricts the property, and the restriction must be strictly construed against the party seeking to enforce it. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("*Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties.*") (emphasis added); see also, e.g., Sea Pines Plantation Co. at 270, 363 S.E.2d at 893-94; Anderson at 495, 617 S.E.2d at 757. Musick admits the Master's interpretation of the 1972 Order cannot be reached without consideration of the 1958 Restrictions and perhaps

other extrinsic evidence. The only way the Master's conclusion can be upheld is if the 1972 Order is found ambiguous; justifying the examination of extrinsic evidence. However, if the 1972 Order is ambiguous then the Master was bound to construe the language in favor of the free use of the property.

In sum, if the 1972 Order is not ambiguous, then, according to its plain language, the right of revision of lot arrangement is not restricted to any particular party (and therefore runs with the land). See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (language of restrictive covenant must be construed according to its plain and ordinary meaning). If, however, the 1972 Order is ambiguous, then all ambiguities and doubts should have been construed in favor of the free use of the property. Anderson at 495, 617 S.E.2d at 757. As shown (and even explicitly stated) by the Master and as confirmed by Musick throughout his Brief, the Master's interpretation of the 1972 Order requires consideration of extrinsic evidence. The Master therefore erred either in a) failing to find the 1972 Order unambiguous and honoring the plain language contained therein or b) failing to acknowledge any perceived ambiguities in the 1972 Order when turning to extrinsic evidence for interpretation and then failing to apply the appropriate rules of construction relating to any of these perceived ambiguities.

III. THE SUBJECT PROPERTY HAS ALWAYS BEEN SEVEN LOTS; MUSICK'S RELIANCE ON THE CULLER SURVEY TO DEFEAT THIS PROPOSITION IS MISPLACED.

Contrary to the questionable assertions of Musick in his Brief, the Master absolutely erred in holding the Subject Property has always been one lot. The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530). The map attached to the 1972 Order itself shows the remaining portions of Blocks 28 and 29 as containing

seven lots.⁵ (R. p. 470). Musick himself admitted in his Answers to Defendants' First Requests for Admissions (entered into evidence without objection) that the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). The 1972 Order specifically states that the Subject Property is subject to residential restrictions "but with right of revision of the lot arrangement" – clearly the court in the 1972 case (correctly) believed the Subject Property in fact contained lots. (R. p. 461). The Court of Appeals' prior Opinion in this case (the "2010 Opinion") expressly holds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). This holding is now the law of this case.⁶ ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) ("an unappealed ruling, right or wrong, becomes the law of the case"). Despite this overwhelming evidence, Musick's admission and the binding law of the case established in the 2010 Opinion, the Master held the Subject Property has always been one lot.

Musick's only argument in support of the Master's finding that the Subject Property has always been one lot is that the survey referenced in the deed from Carmen

⁵ The lot lines shown on the plat attached to the 1972 Order are shown as dotted lines only to indicate that (as opposed to other lot lines shown on this map), the lot lines shown within the Subject Property were taken from the 1955 Plat. The 1955 Plat, of course, shows these lot lines as solid lines. Musick has not challenged this fact in his Brief.

⁶ An extensive analysis of the application of the law of the case doctrine is set forth by the Dicks in their Brief. Musick claims the law of the case principles are "over-reaching" based apparently on the fact that the 2010 Opinion was unpublished (as is often the case with opinions establishing the law of the case moving forward) and also some claim that the 2010 Opinion did not make any findings of fact but simply reversed and remanded. In actuality, the 2010 Opinion is nine pages long and includes factual findings along with a detailed statement of the applicable law and analysis. Id. Musick has not offered any justifiable reason why the law of the case doctrine is inapplicable to this case, and has cited no legal authority or precedent whatsoever as to why the law of the case doctrine should not be duly applied in this instance.

Ward to the Meeses (the "Culler Survey") shows the Subject Property as one lot.⁷ However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks' closing attorney) testified it is customary that old lot lines would be indicated on a survey and the Culler Survey, which did not show these old lot lines, "didn't appear to be anything but a boundary survey and [he] took it as such." (R. p. 422, lines 20-22, p. 264, lines 12-15). The Culler Survey does not refer to the 1972 Order, the map attached to the 1972 Order which shows seven lots, or the 1955 Plat which shows seven lots. Id. There is no indication on the Culler Survey that the existing seven lots were being eliminated, which is required by local ordinance. (Id.; R. p. 308, lines 8-11). Furthermore, as set forth in detail in the Dicks' Brief, Carmen Ward did not even have the right to combine the seven lots into one. Neither the 1958 Restrictions nor the 1972 Order provide anyone (the Grantors, whoever they are, or any other party) the right to do away with lots or to combine the seven lots into one lot, and Musick has not challenged this fact in his Brief. (R. pp. 530, 600, 454-470).

In addition, the general rule remains that lines shown on a senior survey control over lines shown on a junior survey if conflict occurs between the two. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore,

⁷ Musick asserts later in his Brief, in further arguing that the Subject Property has always been one lot, that this was "to preserve the residential character of the neighborhood." This assertion by Musick is supported by no reference to the Record whatsoever. On the contrary, and as the Dicks have previously pointed out, both Musick himself and Robert DeCiero, a neighboring landowner (who testified on Musick's behalf), testified that the Subject Property being used as seven lots is consistent with the overall character of the neighborhood. (R. p. 273, line 20 - p. 274, line 3, p. 197, lines 9-11). Other than the common area and except for one large lot in Long Bay, this property remaining as one large lot would be abnormal for this subdivision. (Id.; R. p. 319, line 23 - p. 320, line 1, p. 320, lines 3-4, p. 334, lines 3-4, 461, 530).

the lot lines shown on the 1955 Plat control in the event of any asserted discrepancy between the 1955 Plat and the Culler Survey (which as noted above is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats).

Despite the foregoing, Musick references testimony identifying and relating to the Culler Survey and concludes that based thereon "it is an undisputed fact" the Meeses bought and sold the Subject Property as one lot and the Subject Property had always been one lot. Musick's reliance upon the Culler Survey is misplaced, and Musick's conclusion in this regard directly contradicts all the evidence before this Court including the 1955 Plat, the 1972 Order and attached map, the 2010 Opinion of this Court now constituting the law of this case, and Musick's own express admissions.

IV. MUSICK MISINTERPRETS THE DICKS' ARGUMENT RELATING TO WETLANDS; THE MASTER ERRED IN RELYING ON HER OPINION OF WHETHER THE DICKS' CHOSEN LOT ARRANGEMENT IS "PRACTICAL" WHICH IS IRRELEVANT TO THE ISSUES OF THIS CASE.

Musick interprets the Dicks' argument on the wetlands issue as one of admissibility of evidence relating to wetlands. This is simply not the case. Without addressing the admissibility of any of evidence relating to wetlands that may be in the Record, the Dicks illustrate in their Brief the error of the Master in relying on the location of claimed wetlands within the Subject Property in an attempt to evaluate the "practicality" of the Dicks' chosen lot arrangement. There is no relation between the Dicks' right of revision of lot arrangement within the Subject Property and the resulting "practicality" of their chosen arrangement, which is clearly a matter within their own

discretion (subject to any applicable governmental regulations.)⁸ This principle is firmly established by the Dicks in their Brief, and aside from Musick's argument as to the admissibility of evidence relating to wetlands, which is not responsive to the Dicks' argument on this issue, Musick does not challenge or refute the Dicks' position that the Master erred in considering the "practicality" of their chosen lot arrangement.

V. MUSICK MISINTERPRETS THE NOTICE REQUIREMENTS AND PROPER APPLICATION OF THE SHELTER RULE; THE MEESES ACQUIRED THE SUBJECT PROPERTY WITHOUT NOTICE OF THE 1958 RESTRICTIONS OR 1972 ORDER AND THE DICKS ARE THEREFORE ENTITLED TO PROTECTION UNDER THE SHELTER RULE.

Musick's misinterpretation of the notice requirements of the Shelter Rule is immediately apparent based on the continued reliance by Musick in his Brief on the purported knowledge of the Meeses *after* their acquisition of the Subject Property and *any* knowledge of the Dicks (whether before or after their purchase) – all of which is absolutely irrelevant for protection under the Shelter Rule. In fact, the only knowledge that has any relevance whatsoever to the application of the Shelter Rule is the knowledge of *the Meeses (not the Dicks) at the time of their purchase of the Subject Property (not after)*.

Our Supreme Court has quoted the following with approval as it relates to the Shelter Rule:

After property has passed into the hands of a bona fide purchaser, *every subsequent purchaser* stands in the shoes of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, *irrespective of notice* . . .

Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255, 258 (1957) (emphasis added). The purpose of the Shelter Rule is not only to protect bona fide purchasers for value without

⁸ The Dicks' 2003 Plat was approved by all applicable authorities for recording. (R. p. 542).

notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

Accordingly, the Meeses only had to *purchase* the Subject Property without actual notice of the purported restrictions in order for the Dicks to be entitled to protection under the Shelter Rule. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) ("A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he actually paid in full the purchase money . . . ; (2) he purchased and acquired the legal title . . . ; and (3) *he purchased bona fide*, i.e., . . . without notice of a lien or defect. The bona fide purchaser must show all three conditions - actual payment, acquiring of legal title, and bona fide purchase - occurred *before he had notice* of a title defect or other adverse claim . . .") (emphasis added). Therefore, any actual notice which Musick claims the Meeses may have acquired after they purchased the Subject Property is simply irrelevant. See Knox v. Gruhlkey, 192 S.W. 334, 337 (Tex. Civ. App. 1917) ("notice after the purchase cannot act retroactively, so as to defeat an already vested title acquired by a bona fide purchaser").

Likewise, any actual or constructive notice of the Dicks of the purported restrictions is irrelevant for purposes of application of the Shelter Rule. The Shelter Rule, by definition, applies regardless of any notice on the part of the Dicks with respect to the restrictions contained in the 1972 Order. 77 AM. JUR. 2D *Vendor & Purchaser* § 423.

(2007) (specifically stating that "if one is entitled to protection as a bona fide purchaser, such person may convey a good title to a subsequent purchaser irrespective of the latter's notice of an outstanding equity or unrecorded interest; in other words, a purchaser with notice from a bona fide purchaser without notice succeeds to the rights of the latter").

Regarding the notice of the Meeses at the time of their purchase, Musick expressly admits in his Brief that "Leigh Ammons Meese, an attorney herself, testified that she had no recollection of any discussions or concern about restrictions on the property at the time of its purchase." No other evidence or testimony whatsoever is referenced by Musick in his Brief establishing any notice of Mrs. Meese *at the time of her purchase of the Subject Property*.⁹ Leigh Meese unequivocally testified as follows with respect to her knowledge at the time of the purchase:

Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?

A: I did not. At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don't know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Similarly, the only evidence or testimony relied upon by Musick relating to the claimed knowledge of Mr. Meese prior to his purchase of the Subject Property is some confusing testimony as to whether Mr. Meese could recall what his attorney might have told him about possible title matters relating to the property, although his attorney inarguably gave him a title opinion not mentioning these restrictions. (R. p. 390, lines 3-14). This testimony is confusing at best and certainly does not contradict the clear and unequivocal testimony of Mr. Meese at trial which repeatedly and unequivocally

⁹ All references by Musick to knowledge of Mrs. Meese after her acquisition of the property, through subsequent lawsuits, etc. are, again, inapplicable.

confirms he had no knowledge of the restrictions at the time of his purchase.¹⁰ (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

Musick makes some allegation in his brief that Mr. Meese conceded receiving a copy of certain “Covenants and Restrictions at the time he purchased the 2.67 acre tract.” This statement is not supported by any reference to the Record whatsoever and there is no mention in Mr. Meese’s testimony of his receipt of any supposed “Covenants and Restrictions” before his purchase. It is impossible to discern from the statement in Musick’s Brief even what is meant by this reference to “Covenants and Restrictions” and certainly hard to imagine how this statement could be true as nothing of this nature has ever been asserted at any time since this case began in 2004. To the extent that Mr. Meese could have actually testified he received any such “Covenants and Restrictions” prior to his purchase, which he specifically did not, the “Covenants and Restrictions” he received must have been the 1958 Restrictions, which 1958 Restrictions, again, according

¹⁰ Mr. Meese testified, verbatim, as follows:

Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?

A: No, I’m not.

Q: At the time you and your wife purchased the property, did y’all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?

A: I did not believe there were any restrictions to our knowledge and belief.

Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?

A: None that I recall.

Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?

A: I don’t remember such a thing from the purchase, no.

Q: You had no knowledge of any restrictions on the property; correct?

A: Restrictions in terms of subdivision?

Q: Yes.

A: I was not aware of any such restrictions for subdivision.

(R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

to their express terms, do not encumber the Subject Property.

In addition, Musick shockingly asserts that the Master found the Meeses had constructive notice of the 1972 Order thus defeating the protection afforded the Dicks under the Shelter Rule. This assertion is blatantly incorrect as no such statement was made by the Master anywhere in her Order. In fact, the 1972 Order was not discoverable during a routine title examination of the Subject Property and did not operate to provide constructive or inquiry notice to third parties of its terms.¹¹ (R. p. 360, lines 20-24, p. 380, line 16 – p. 381, line 5, p. 404, lines 11-22). **This fact has been acknowledged and admitted by all parties to this litigation.** (R. p. 167, lines 12-18, p. 182, lines 2-5). The fact that Musick now attempts to assert otherwise (though offering no evidence whatsoever in support of this position) is disingenuous to say the least.

VI. THE SHELTER RULE IS APPLICABLE TO ACTIONS TO ENFORCE RESTRICTIVE COVENANTS; MUSICK'S ARGUMENT TO THE CONTRARY IS MISPLACED.

Musick asserts the Shelter Rule for some reason does not apply to protect a purchaser (from a bona fide purchaser for value without notice) from restrictive covenants affecting or allegedly encumbering the property purchased. This argument, which is centered around Musick's belief that the Shelter Rule does not apply with respect to restrictive covenants but only with respect to mortgages or liens, is unfounded, not supported by South Carolina law, and is completely without merit.

¹¹ The 1972 Order was indexed in the Clerk of Court's office under the name of Leroy Adams, but was not indexed as a judgment against the names of the plaintiffs in that case - Gene Lewis and Carmen Ward - as required by Section 15-35-520 of the South Carolina Code. (R. p. 167, lines 12-18, p. 182, lines 2-5); S.C. CODE ANN. § 15-35-520 (2005). Because the plaintiffs in the case out of which the 1972 Order arose were the record owners of the Subject Property, the 1972 Order was not indexed in the chain of title to the Subject Property.

It is well-settled law in this country that "[u]nder the general doctrine that a *restrictive covenant* will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding *restrictions*, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be protected in his or her title on account of the bona fides of the vendor." 20 AM. JUR. 2D Covenants § 257 (2008) (emphasis added); see also Reiner v. Danial, 259 Cal. Rptr. 570 (Cal. Ct. App. 1989) (specifically holding that one who purchases property from a bona fide purchaser for value without notice of certain restrictions affecting the property is entitled to receive the same protections against the restrictions affecting the property as were afforded to his seller in accordance with seller's status as a bona fide purchaser for value without notice). Clearly, it has never been the intention of the courts to arbitrarily limit the application of the Shelter Rule to only situations involving mortgages and liens. In fact, the very purpose of the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

In support of his argument that the Shelter Rule does not apply with respect to restrictive covenants, Musick relies solely upon the case of Harbison Community Assoc.,

Inc. v. Mueller, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995).¹² The Harbison case, however, has absolutely nothing to do with the Shelter Rule. Musick is correct that the Harbison case states that a covenant is enforceable against a subsequent grantee even if not in the grantee's deed. This is absolutely true. The Harbison case, however, does not relate in any way to or even mention the application of the Shelter Rule. Id. The Harbison case does not involve a bona fide purchaser for value – and the protection of a bona fide purchase for value is the sole purpose of the Shelter Rule. Id. In fact, the Harbison case involves properly recorded covenants (constructive notice to all parties), and the deed to the grantor of the party seeking to avoid the restrictive covenants specifically mentions the covenants in question. Id. Of course the grantee in that case is bound by the properly recorded restrictive covenants (of which every owner in the chain of title was absolutely aware) whether or not the covenants were specifically mentioned in his deed. This case obviously has no application to the Shelter Rule doctrine, and Musick's assertion that the Shelter Rule does not apply to restrictive covenants is simply without merit.

VII. MUSICK'S REPEATED REFERENCES TO FOUR OTHER ORDERS WHICH HAVE SUPPOSEDLY ADDRESSED THE APPLICABILITY OF THE 1958 RESTRICTIONS TO THE SUBJECT PROPERTY IS MISLEADING AS ONE OF THE REFERENCED ORDERS IS THE 1972 ORDER, TWO ARE PRIOR ORDERS IN THIS VERY CASE (INCLUDING THE ORDER SUBJECT TO THIS APPEAL AND A PRIOR ORDER GRANTING SUMMARY JUDGMENT), AND THE FOURTH IS THE DECIERO ORDER WHICH DOES NOT RELATE TO THE SUBJECT PROPERTY OR THE APPLICABLE PROVISIONS OF THE 1972 ORDER IN ANY WAY.

¹² Musick also cites to Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C.342, 628 S.E.2d 902 (Ct. App. 2006), which case also has nothing to do with the Shelter Rule and simply cites to Harbison for the same principle discussed above.

Musick makes various statements throughout his Brief that the application of the 1958 Restrictions, made applicable to the Subject Property through (and pursuant to the terms of) the 1972 Order, is an issue that has been heard and ruled upon in four prior actions. These statements are misleading to say the least. At the outset, Musick claims these other lawsuits have established that the Subject Property is bound by the 1958 Restrictions. There is no dispute that the 1958 Restrictions do not encumber the Subject Property according to their terms. (R. p. 530). The 1958 Restrictions are only made applicable to the Subject Property by and pursuant to the 1972 Order which specifically provides that the Subject Property shall be encumbered by the 1958 Restrictions "*but with right of revision of the lot arrangement . . .*" (R. p. 461) (emphasis added). The Subject Property has always consisted of seven lots and all the Dicks have ever sought is to revise the arrangement of these seven lots as they are clearly entitled pursuant to the 1972 Order.

The four orders relied upon by Musick in an attempt to convince this Court that the issues of this case have been previously addressed are as follows:

- The 1972 Order. Musick has included the 1972 Order itself in its list of cases which it claims have consistently held the 1958 Restrictions applicable to the Subject Property. The 1972 Order, of course, specifically stated that the 1958 Restrictions were applicable to the Subject Property "*but with right of revision of the lot arrangement . . .*" It is the language of this 1972 Order which has been at issue throughout this litigation. It is unclear how Musick could claim the issues presented in this appeal were

addressed in the 1972 Order when the language and application of the 1972 Order to the Subject Property is what is now in issue.

- The Final Order Ending Action issued *in this case* by the Honorable J. Stanton Cross, Jr., as Master-in-Equity for Horry County on March 6, 2007, wherein Musick's Motion for Summary Judgment was granted. (R. pp. 21-35). Musick relies upon the prior Order granting summary judgment in this very case, which was reversed on appeal, as one of the four cases which he asserts has previously addressed and ruled on the issues presented herein. It is interesting that Musick claims the prior Order granting summary judgment in this case, which has been reversed, should have some binding effect on this appeal, but Musick does *not* believe this Court of Appeals' 2010 Opinion (reversing the Order granting summary judgment) is the law of the case in this action.
- The 2011 Order of Judge Howe *which is the subject of this appeal*. Musick includes the very Order which is now under appeal as one of the four cases it claims has already ruled on the issues of this case.
- The Order issued by The Honorable J. Stanton Cross, Jr. in March 2000 in connection with the case captioned DeCiero, et. al. v. Long Bay Properties, identified as case number 98-CP-26-4275 (the "DeCiero Order"). (R. pp. 471-477). The DeCiero Order, however, does not affect or concern the Subject Property, but instead analyzes the application of the 1958 Restrictions and the 1972 Order to Block 11, Lots 1 and 2 of the Long Bay Estates subdivision – which Block was clearly subject to the

1958 Restrictions according to their terms.¹³ Id. The DeCiero Order simply confirms the 1958 Restrictions do, by their terms, apply to Block 11, and cites the portion of the 1972 Order confirming the 1958 Restrictions apply to Blocks 1-27. Id. Nothing in the DeCiero Order even mentions any property located outside of Blocks 1-27 which could be subject to the 1958 Restrictions, and certainly nothing in the DeCiero Order addresses the provision of the 1972 Order which subjects the Subject Property to the 1958 Restrictions "but with right of revision of the lot arrangement" The reliance upon the DeCiero Order by Musick is wholly misplaced.

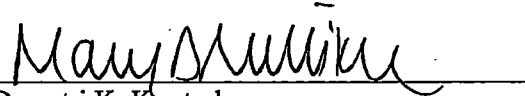
¹³ The DeCiero Order plainly states that the "Restrictive Covenants apply to all of Blocks 1-27 Long Bay Estates subdivision, including Block 11, Lots 1 and 2." (R. p. 476).

CONCLUSION

For all of the reasons set forth above and in the Dicks' Brief, the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

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ATTORNEYS FOR APPELLANTS

May 16, 2013

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Musick, Respondent,

v.

Thomas L. Dicks and Robert E. Dicks, Jr., Appellants.

Appellate Case No. 2012-212773

Appeal From Horry County
Cynthia Graham Howe, Master-in-Equity

Unpublished Opinion No. 2014-UP-284
Heard December 11, 2013 – Filed July 9, 2014

AFFIRMED

Demetri K. Koutrakos and Mary Dameron Milliken, of
Callison Tighe & Robinson, LLC, of Columbia, for
Appellants.

Thomas C. Brittain and Mary Madison B. Langway, of
The Brittain Law Firm, P.A., of Myrtle Beach, for
Respondent.

PER CURIAM: Thomas and Robert Dicks appeal the order of the master-in-equity holding they cannot subdivide their property in Long Bay Estates (Property). We affirm.

(1) We find the master did not err in construing the 1972 Order to find only the "Grantors" had a right to revise lot lines and Carmen F. Ward and Gene F. Lewis were the "Grantors" contemplated in the 1972 Order. *See City of N. Myrtle Beach v. E. Cherry Grove Realty Co.*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety."); *RV Resort & Yacht Club Owners Ass'n, v. BillyBob's Marina, Inc.*, 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010) (stating the paramount rule of construction of a restrictive covenant is to ascertain and give effect to the intent of the parties as determined from the whole document); *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009) ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property."). We believe the 1972 Order was ambiguous as to who would be considered the Grantor and therefore the master did not err in considering extrinsic evidence. The 1958 Restrictions for Long Bay Estates did not define the term "Grantor." Nursery Realty Corporation owned the Long Bay Estates property at that time of the creation of the 1958 Restrictions and thus was the "Grantor." In 1968, Nursery Realty Corporation transferred ownership of the remaining property in Long Bay Estates to Ward and Lewis along with "assets, powers, or reservations of any kind and nature" reserved to Nursery Realty Corporation. Accordingly, Ward and Lewis took on the role of Grantor under the 1958 Restrictions and were the "Grantor[s]" referred to in the 1972 Order. The 1972 Order was the result of a settlement agreement in an action brought by Ward and Lewis to clarify their rights in Long Bay Estates. Considering the complaint in the action and the entire 1972 Order, we find the circuit court in that action intended to expand the 1958 Restrictions to the Property, including the Grantor's right to revise lot arrangement prior to the sale of the Property.

(2) We find no merit to the Dicks' argument that if the 1972 Order is ambiguous, it should be construed in favor of the free use of property. *See Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) ("[T]he rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants.").

(3) We find no merit to the Dicks' argument that the master erred in holding the Property had always been sold as one lot. Even if a prior plat showed the Property divided into seven lots, Ward had the right to revise the lot arrangement of the Property, which she did by selling the property to David and Leigh Meese as one lot. The Meeses sold the Property to Thomas Dicks as one lot. The lot had a single tax number. The Property was never sold as more than one lot until Thomas Dicks conveyed to his brother Robert Dicks three lots as shown on a survey he had prepared for the "Resubdivision" of the Property.

(4) We find no merit to the Dicks' assertion this court's statement in the prior opinion, *Musick v. Dicks*, Op. No. 2010-UP-351 (S.C. Ct. App. filed July 7, 2010), concerning the 1955 Plat and a map attached to the 1972 Order showing Blocks 28 and 29 divided into seven different lots was a finding of fact and now is the law of the case. This statement was merely a description of the plat and map and not a legal conclusion.

(5) We find no merit to the Dicks' argument the master erred in finding that Ward had a right to subdivide the Property. They assert: "No one had the right to subdivide any lot." The master actually held: "It is further found Carmen F. Ward, grantor, did *not* subdivide Blocks 28 and 29, which was her right as set out in [the 1972 Order]." (Emphasis added). Subdivide means "To divide a part into smaller parts; to separate into smaller divisions." *Black's Law Dictionary* 1424 (6th ed. 1990). Ward did not divide any lot. Instead, she changed boundary lines to combine the lots of Blocks 28 and 29 into one lot, which she had the right to do pursuant to the 1972 Order.

(6) We find no reversible error in the master's statement that "[t]he majority of Blocks 28 and 29 is wetlands, . . . which makes [the Dicks' proposed division] somewhat impractical." This statement had no bearing on the master's ruling that only Ward and Lewis could revise the lot lines. See *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

(7) We find the master did not err in finding the Dicks were not protected by the Shelter Rule because the Meeses had constructive notice of the restrictions. See *Spence v. Spence*, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) ("Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious

and prudent purchaser would have revealed."); *Stephens v. Hendricks*, 226 S.C. 79, 91, 83 S.E.2d 634, 640 (1954) ("A plea of bona fide purchaser for value, without notice, is an affirmative defense and must be [pleaded] and proved by the party thereon relying."). The Meeses' closing attorney testified that the Meeses had knowledge at some point that there was a strong possibility that the restrictive covenants applied to the Property. On re-cross examination, he admitted this would have been something he discussed with them contemporaneously with the closing rather than after they bought the Property. David Meese acknowledged that at the time he purchased the property, he was aware there were restrictive covenants, but he did not remember the details. Although Leigh Meese initially testified that at the time of their closing, she did not have notice of any restrictions that would have encumbered the Property, she subsequently testified "I remember there were issues with the property. I can't place my awareness of those issues with respect to our acquisition and sale of the property." The Meeses had notice of the existence of restrictive covenants that encumbered Long Bay Estates and there was a "strong possibility" that the restrictions might apply to the Property. This awareness of the existence of restrictive covenants provided them with notice of all of the restrictions, including the restriction against subdivision.

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

RECEIVED

JUL 23 2014

SC Court of Appeals

John Musick, ...Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ...Appellants.

PETITION FOR REHEARING

Appellants, Thomas L. Dicks and Robert E. Dicks, Jr. (the "Dicks"), by and through their undersigned counsel and pursuant to Rule 221(a), SCACR hereby move and petition the Court reconsider and rehear the within appeal and the Court's opinion entered July 9, 2014 as Opinion Number 2014-UP-284 (the "Opinion"). This Petition is based on the grounds that the Court overlooked or misapprehended certain matters set forth herein. Based on the reasons set forth below, the Dicks respectfully request the Court grant this Petition for Rehearing, vacate the Opinion, and reverse the Master's orders.

In its Opinion, the Court overlooked or misapprehended the following matters:

ARGUMENT

- I. **IN HOLDING ONLY THE "GRANTORS" OR WARD AND LEWIS HAD THE RIGHT TO CHANGE THE LOT LINES OR REVISE THE LOT ARRANGEMENT WITHIN THE PROPERTY, IN FAILING TO FIND THE DICKS PROPERLY OWN THE PROPERTY AS SEVEN LOTS, AND IN FAILING TO FIND THE DICKS HAD THE RIGHT TO REVISE THE LOT ARRANGMENT, THE COURT FAILED TO PROPERLY APPLY AND INTERPRET THE PLAIN LANGUAGE OF THE 1972 ORDER AS REQUIRED, AND ALSO, TO THE EXTENT THE COURT FOUND THE 1972 ORDER AMBIGUOUS, IT FAILED TO CONSTRUE THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY.**

The 1972 Order states the 1958 Restrictions apply to the Property "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. p. 461) (emphasis added). According to the plain language of the 1972 Order, the right of revision of the lot arrangement established in the 1972 Order is not restricted to any particular party, much less to some unidentified "Grantor."¹ The revision rights are not limited to the Plaintiffs in the 1972 Case, not limited to the "Grantor," and not limited to Ward or Lewis. If the parties and the court in the 1972 Case wanted to limit the revision rights to a particular party, they could have easily done so, but they did not. Instead, the Master in this case, and now this Court, have read a provision into the 1972 Order that simply does not exist.

The plain meaning of the language of the 1972 Order must be honored and adhered to. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (a restriction upon real property shall not "be enlarged or extended by construction or implication beyond the clear meaning of its terms *even to accomplish what it may be thought the*

¹ In a sentence following the grant of rights in question, Judge Vaught states, almost as an afterthought, the 1958 Restrictions as well as other restrictions used in the area provide "to grantor" the right to change certain boundary lines "in any event." *Id.* This "in any event" language appears to have been added almost as an aside and to state that the parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have known that certain rights did exist to make alterations in this residential subdivision. Musick's argument is grounded almost exclusively in this "in any event" sentence - a sentence unnecessary to Judge Vaught's ruling which appears to be surplusage and dicta.

parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.”) (emphasis added). Restrictive covenants, such as those contained in the 1972 Order, are contractual in nature, and therefore “the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning.” Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). Furthermore, because restrictions on the use of property are historically disfavored, restrictive covenants are to be “strictly construed” and all doubts as to the proper construction of restrictive covenants must be resolved in favor of free use of the property. Id.; see also Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Although this principle was acknowledged by the Court in its Opinion, it was not properly applied.

Here, if the parties intended to restrict the right of revision of the lot arrangement to the so-called “Grantor,” or to any other particular party, the parties would have done so much as they did with respect to other matters in the 1958 Restrictions. See Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) (analyzing a situation similar to the one at hand and holding that if the parties had wanted to restrict the property at issue in that case in a particular way, they would have done so by including such language in the restrictions themselves). The fact that the parties did not so limit the right of revision of lot arrangement in the 1972 Order simply shows the parties did not intend the right to be so limited. Instead, the right of revision of the lot arrangement, having not been reserved to any particular party, was intended to and should be construed to run with the title to the Property and held by the Dicks. See West v. Newberry Elec. Coop. Inc., 357 S.C. 537, 542-43, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding that owner’s right to have utility company relocate power line was a real covenant that ran with the land and benefitted owners successor in title).

The "plain language" of the 1972 Order simply states the Property is subject to residential restrictions "*but with right of revision of the lot arrangement.*" (R. p. 461) (emphasis added). In finding the right of revision of the lot arrangement was only in favor of some unidentified "Grantor" or Lewis and Ward, this Court has failed to apply the rule of construction that "restriction[s] on the use of property must be created in express terms or by plain and unmistakable implication, . . . and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property" and the Court failed to interpret the "plain language" of the 1972 Order which did not restrict the right of revision of the lot arrangement to any particular party. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980).

Instead of applying the plain language of the restrictions contained in the 1972 Order (which do not limit the right of revision to any particular party), the Court looked to other documents such as the 1958 Restrictions (which by their terms do not even apply to the Property) to come to some conclusion (which is still not supported by the documentation of record) that the right of revision should be limited to some particular "Grantor" or Lewis and Ward. It is simply too much to require every potential purchaser of real property to go to the great lengths the Court has gone to (including examination of record documents which are by their terms inapplicable to the Property) in order to determine the meaning of restrictions potentially affecting the property. It is for this reason that the "plain and ordinary" meaning of restrictions on real property is to be applied, and the Court failed to adhere to and apply the plain and ordinary meaning of the 1972 Order.

Instead of reviewing the plain and ordinary meaning of the 1972 Order's operative provision, this Court found the court in the 1972 Action "intended to expand the 1958 Restrictions to the Property, including the Grantor's right to revise lot arrangement prior to the

sale of the Property.” The 1958 Restrictions, however, do not grant anyone the right to revise the lot arrangement. The 1958 Restrictions only provide a right to change the boundary lines and change the building lines of unsold lots. The Court has confused the rights created in the 1958 Restrictions, limited to a specific party, with the right to revise lot arrangement in the 1972 Order, which is not limited to any party and is not limited to unsold lots. This Court erred in this regard.

The Court failed to properly interpret and apply the plain language of the 1972 Order, as it was required to do under the appropriate interpretive standards applicable to restrictive covenants. The plain meaning of the 1972 Order is quite clear that any owner of the Property has the right to revise the lot arrangement and such right is not limited to unsold lots. The Dicks have arranged the lots consistent with the 1955 Plat and the map attached to the 1972 Order, keeping the Property as seven lots. This is clearly authorized by the 1972 Order, and the Master and this Court should have so held. The evidence submitted shows Musick is not entitled to any relief and in fact shows the Dicks are entitled to own the Property as seven lots. The Dicks respectfully submit the Court overlooked and misapprehended the record and the law in this regard.

II. THE COURT ERRED IN HOLDING CARMEN WARD AND GENE LEWIS WERE THE “GRANTORS” PURPORTEDLY REFERRED TO IN THE 1972 ORDER, AND IN FAILING TO CONSTRUE THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY, AND AGAINST THE PARTY SEEKING ENFORCEMENT.

The Court apparently has held that the right of revision of lot arrangement granted under the 1972 Order was, in fact, reserved to some particular “Grantor” (despite the fact that no language to that effect was actually included in the operative provision of the 1972 Order). Presumably since the 1972 Order contains no actual mention of the word “Grantor” much less

the identity of any such purported "Grantor," the Court found the 1972 Order ambiguous as to who the purported "Grantor" was thereunder.

In the event of ambiguity, which this Court expressly found, the Court should have resolved all doubts in favor of the free use of the property. Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980). Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here Musick. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assn. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). And, where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

As justification for the failure to properly construe the 1972 Order in favor of the free use of the Property, the Court relies upon the case of Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006) which states that this rule of construction should not be used to "defeat the plain and obvious purpose of the restrictive covenants." Opinion ¶ 2. However, as is set forth in greater detail above, the "plain and obvious" meaning and purpose of the 1972 Order is that the right of revision of lot arrangement is not reserved to any particular party. Again, no mention of the word "Grantor" is made in the operative provision of the 1972 Order which creates the restrictions applicable to the Property. The "plain and obvious" meaning of the restrictions imposed pursuant to the 1972 Order must necessarily be determined upon examination of the language of the 1972 Order itself; resort to interpretation of various other documents, such as the 1958 Restrictions, which are not in themselves applicable to the Property, by definition goes beyond the "plain and obvious" meaning of the 1972 Order itself. Hence, the only possible

"plain and obvious" meaning or construction of the restrictions established in the 1972 Order is that the right of revision of lot arrangement is not limited to any particular party.

This Court found the 1972 Order is ambiguous as it relates to the identity of the purported "Grantor" thereunder, but this Court did not make it clear whether the 1972 Order's operative provision relating to the revision of lot arrangement is ambiguous. This Court never squarely addressed this issue. The Dicks assert it is plain and obvious they have the right to revise the lot arrangement, as the 1972 Order does not limit this right to any party, but to the extent the Court found the Dicks do not have this right, which it presumably did, the 1972 Order's operative provision is ambiguous. To the extent the Court impliedly found the operative language is not ambiguous and only some specific, yet unidentified "Grantor" had that right, it was in error. To the extent this Court found the operative language is also ambiguous, which the Dicks maintain no such conclusion was reached, then the operative language should have been construed in the light most favorable to the free use of property and, as such, the Dicks' interpretation of the 1972 Order's operative language should have been adopted.

The Court should have strictly construed the ambiguity against Musick and construed the 1972 Order in favor of the free use of property, thus adopting the Dicks' interpretation of the 1972 Order which does not limit the reservation of the right of revision of lot arrangement to any particular party and which allows the Dicks to own the Property as seven lots. The Dicks respectfully submit the Court overlooked and misapprehended the record and the law in this regard.

III. THE COURT ERRED IN FAILING TO FIND THE PROPERTY AS SHOWN ON THE 1955 PLAT CONSISTS OF SEVEN LOTS, AND IN HOLDING THAT EVEN IF THE PROPERTY HAD CONSISTED OF SEVEN LOTS, WARD HAD THE RIGHT TO ELIMINATE AND COMBINE THOSE LOTS INTO ONE.

- A. The 1955 Plat and the map attached to the 1972 Order both show the Property as containing seven lots, Musick admitted that the Property consisted of seven lots, and this Court previously found the Property to consist of seven lots.

The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530). In addition, the map attached to the 1972 Order shows the remaining portions of Blocks 28 and 29 as containing a total of seven lots. (R. p. 470). Musick admits the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). This Court's prior Opinion in this case also expressly held that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Musick v. Dicks, Op. No. 2010-UP-351 (S.C. Ct. App. 2010). Despite all of the foregoing, the Court seems to have held the Property has always been one lot, as opposed to seven.

The only justification given by the Court for this holding that the Property has always been one lot, as opposed to seven, is that it had a single tax map number.² However, the fact that the Property may have previously been identified by the Horry County Tax Assessor's office by only one tax map number simply has no bearing on the issue at hand. No evidence is before this

² The only other possible justification for this holding, which was not mentioned by the Court but was relied upon by the Master below, is the argument that the lines showing the subdivision of the Subject Property into seven lots on the prior plats indicated a mere "potential subdivision" of the Subject Property. (R. p. 8). This is simply not the case. The 1955 Plat shows the Property as being divided into seven lots, with the division being clearly shown by solid lines. (R. p. 530). Thereafter, the 1972 Order, which shows the seven lots as dotted lines, expressly and clearly establishes that the reason such dotted lines are used is only for the purpose of indicating that, as opposed to other lot lines shown on said map, the lot lines shown within the Property were taken directly from the 1955 Plat - which 1955 Plat in fact does show the subdivision in solid lines. (R. p. 470). In addition, the 1972 Order recognizes there existed lots within the Property by using the term "lot arrangement" and recognizing the Property is part of two blocks.

Court as to what information the Tax Assessor's office relied upon in creating its tax maps. The Tax Assessor's office may have erroneously relied upon the Culler Survey (which was only a boundary survey) without also looking to the 1955 Plat and therefore reflected the Property as one lot without showing the lot lines established by the 1955 Plat.

The reality is simply that no evidence was presented as to this issue other than the fact that at one point in time the seven lots comprising the Property were identified by the Horry County Tax Assessor under one tax map number. Courts have specifically recognized that "having separate tax parcel numbers and being separately taxed is not relevant in determining whether or not two properties have merged." *In re Moyer*, 978 A.2d 405 (Pa. Commw. Ct. 2009). The fact that the seven lots comprising the Property were at some point in time identified by the Horry County Tax Assessor under one single tax map number is insufficient to support the Court's conclusion that the property has always been one lot, and was not properly relied upon by the Court in reaching this conclusion.

The Dicks respectfully submit the Court overlooked and misapprehended the fact that both the 1955 Plat and the map attached to the 1972 Order clearly show the Property as containing seven lots, that Musick admitted the Property contained seven lots, and that this Court previously held the Property consisted of seven lots, and instead summarily finding the Property consisted of and had always been sold as one lot.

B. The Court erred in holding Carmen Ward had any right to change the lot arrangement so as to combine the seven lots comprising the Property into one lot, and that Carmen Ward effectively conveyed the Property to the Meeses as one lot.

This Court found Carmen Ward had the right to, and in fact did, "change[] boundary lines to combine the lots of Blocks 28 and 29 into one lot." Opinion ¶ 5. The Court states this right

was by virtue of the 1972 Order. Id. This finding, however, is in error, as no such right existed either pursuant to the 1972 Order or the 1958 Restrictions.

The 1958 Restrictions created two rights reserved to the Grantors thereunder: (1) change the boundary lines of the lots; and (2) change the building lines of the lots (set-backs). (R. p. 530). The 1958 Restrictions expressly prohibit the subdivision of lots. Id. The 1955 Plat shows the Property as containing seven lots and the map attached to the 1972 Order shows the Property as containing seven lots. (R. pp. 530, 455-470). The 1972 Order created rights to revise the lot arrangement of those seven lots and to combine the lots with adjoining lots within Blocks 24 and 25. (R. p. 461). No right was ever created in any documents submitted in evidence which authorizes anyone, including the Grantors and Lewis and Ward, to take the seven lots and turn them into one. The changing of the boundary lines³ of lots (as stated in the 1958 Restrictions) is simply not equivalent to revising the lot arrangement⁴ (as stated in the 1972 Order). No evidence, facts, or law support this Court's conclusion in that regard. Therefore, any finding that the Property is anything other than seven lots, or was ever combined into or conveyed as anything other than seven lots, is erroneous and authorizes a prohibited act.⁵

Any construction of the 1972 Order which provides that lots can be taken away or combined is contrary to both the 1972 Order and the 1958 Restrictions. The 1958 Restrictions

³ Revising the boundary lines simply means changing the boundary lines of existing lots, not taking them away and eliminating them. The act of revising boundary lines of lots simply does not include combining lots.

⁴ "Arrange" means "to put in proper order or into a correct or suitable sequence, relationship, or adjustment <~flowers in a vase> <~cards alphabetically>." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Thus, according to the 1972 Order, the seven lots could be re-arranged, not eliminated.

⁵ The 1972 Order does mention the word "combination" in the operative provision, but that was with respect to the combination of the existing lots in Blocks 28 and 29 with lots in Blocks 24 and 25. The court in the 1972 case therefore understood the right of combination, and provided that right with respect to one limited instance. The 1972 Order failed to give the right to combine the lots in Blocks 28 and 29 into one lot, a right the Court found Ward had even though the court in the 1972 Case clearly understood the right of combination and explicitly chose not to provide an unrestricted right of combination.

are "protective covenants" in order to preserve the residential character of the neighborhood. (R. p. 530). Likewise, the 1972 Order is replete with language which implies the parties were concerned with preserving the residential character of the neighborhood. (R. pp. 455-470). Thus, this Court's holding that the Property could be changed from seven lots to one large lot in the neighborhood is inconsistent, and does not make sense considering the scheme of the neighborhood, since most of the subdivision is divided into residential lots except for some well-defined common areas.

The Court in its Opinion has created in Ward and Lewis a right never granted to them, or anyone else for that matter, to remove and/or combine lots. There is no such right created by either the 1958 Restrictions or the 1972 Order, and the Court overlooked and misapprehended the record and the law and erred in this regard.

In addition, the Court found Carmen Ward sold the Subject Property to Leigh and David Meese as one lot. Although no specific evidence in the Record is cited for this conclusion, the Court's conclusion is presumably based on the fact that the survey referenced in the deed from Carmen Ward to the Meeses (the "Culler Survey") shows the Property as one lot.⁶ (R. p. 13). However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks' closing attorney) testified it is customary old lot lines would be indicated on a survey and the Culler Survey, which did not show these old lot lines, "didn't appear to be anything but a boundary survey and [he] took it as such." (R. p. 422, lines 20-22, p. 423, lines 12-15). The Culler Survey does not refer to (a) the 1972 Order; (b) the map attached to the 1972 Order which shows seven lots; or (c) the 1955 Plat which shows seven lots. (R. p. 517). There is no indication on the Culler Survey that the

⁶ The Court's finding in this regard may also be based upon the claim that the Property had a single parcel number; however, as set forth more fully above, the Dicks respectfully submit that any reliance on a tax parcel identification number for the purposes set forth herein is misplaced.

existing seven lots were being eliminated, which is required by local ordinance. (R. p. 517, p. 308, lines 8-11). In fact, the Culler Survey is in the name of the Meeses, not Ms. Ward. (R. p. 517). Certainly the Meeses had no right to change seven lots into one lot.

Moreover, in light of the general rule that lines shown on a senior survey control over lines shown on a junior survey if conflict occurs between the two, the lot lines shown on the 1955 Plat must be controlling if any asserted discrepancy arises between the 1955 Plat and the Culler Survey, which is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore, even if the Court found the Culler survey was more than just a boundary survey, the lot lines as clearly shown, in solid lines, on the 1955 Plat would have to control. Id.

Based upon the foregoing, the Dicks submit that the Court overlooked and misapprehended the record and the law by failing to find that any purported change of the lots existing on the Property from seven lots to one lot is or was an unauthorized and illegal act, and that therefore the Property is and has always been seven lots.

IV. SHELTER RULE

The Court found the Meeses had constructive notice of the restrictions contained in the 1972 Order and the Dicks are therefore not protected by the Shelter Rule. In reaching this conclusion the Dicks respectfully submit the Court overlooked and misapprehended the testimony of James Dusenbury, the Meeses' closing attorney, as well as the testimony of the Meeses. The Court further erred in failing to find that, despite any purported notice of Leigh Meese (which the Dicks urge did not exist until after the Meeses' purchased the Property), the

clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was sufficient to afford protection to both of the Meeses under the Shelter Rule.

A. The Court overlooked and misapprehended the testimony of James Dusenbury, the Meeses' closing attorney, who unequivocally testified to having no knowledge or notice of any restrictions on the Property prior to or contemporaneously with the Meeses' purchase of the Property.

In holding the Meeses had constructive notice of the restrictions contained in the 1972 Order at the time of their purchase of the Property, the Court relied upon a purported admission by James H. Dusenbury, Jr., the Meeses' closing attorney, that he *would have* discussed restrictions affecting the Property with the Meeses at the time of their closing. The Dicks submit that Dusenbury's testimony has been misinterpreted by the Court.

In fact, Mr. Dusenbury testified he knew there was a strong possibility that restrictions applied, but that was *after* the Meeses purchased the Property. His title examination and review of title revealed no restrictions, including those within the 1972 Order, applicable to the Property. (R. p. 361, lines 7-9). He issued a title policy showing no restrictions applied and did not take exception to the 1972 Order. (R. p. 366, line 25 – p. 367, line 5). Mr. Dusenbury's testimony as to his knowledge of the 1972 Order at the time of the Meeses' purchase was actually as follows:

Q: Do you have any knowledge at the time David and Leigh Meese purchased the property that they would have knowledge of any restrictions on the property?

A: To the best of my recollection, no, I did not have such knowledge.

....

Q: And you knew there was a strong possibility that they applied to this tract but your knowledge was not acquired until after the Meeses purchased the property; is that correct?

A: To the best of my recollection, that is correct.

Q: You had not had that knowledge before; correct?

A: Correct.

(R. p. 364, lines 8-13, p. 371, line 23 – p. 372, line 4).

Despite the foregoing unequivocal testimony by Dusenbury that he did not have any knowledge of any restrictions on the Property, not even that there was a strong possibility any restrictions applied to the Property, the Court instead relied upon, and the Dicks submit overlooked and misapprehended, the following testimony by Dusenbury which was made on re-cross examination in response to a purely hypothetical scenario proposed by counsel for Musick:

Q: So when you're having conversations with them about possible problems, I know it wasn't in the chain of title, but doesn't it make sense that when you are having conversations with them about possible problems, hey, look, there are restrictions out there. I don't find them in the chain of title. It doesn't make sense that you would wait until after they buy it to tell them that there are strong possibilities that they would apply to the property.

It looks to me like that would be something you would be discussing contemporaneous when closing the purchase for them, wouldn't it?

A.: If I followed the question, yes, sir.

(R. p. 374, lines 9 – 23).

The above testimony simply addresses things Dusenbury typically *would have* discussed with his clients at the time of closing. This testimony does not indicate in any way or by any stretch that Dusenbury actually did discuss the 1972 Order or 1958 Restrictions with the Meeses at the time of their purchase of the Property. In fact, as previously stated and evident by the title commitment and policy issued by Dusenbury in connection with the transaction, Dusenbury himself did not have any knowledge that the restrictions in the 1972 Order affected the Property until *after* the Meeses' acquisition of the Property. The Dicks respectfully submit that the Court overlooked and misapprehended the record and erred in disregarding the clear and unequivocal testimony of Dusenbury above (that he had no knowledge of any restrictions on the Property at the time of the Meeses' purchase of the Property) and instead construing his testimony on re-cross (as to things he normally *would do*, with no particular application to or reference to this case or Property in particular) to surmise that Dusenbury and the Meeses somehow had

knowledge or notice of the restrictions contained in the 1972 Order at the time of their purchase of the Property. This is simply not the case.

B. The Court overlooked and misapprehended the testimony of David Meese who testified unequivocally that he had no knowledge of the 1972 Order or any restrictions relating thereto until after his purchase of the Property.

David Meese testified he had no knowledge about any restrictions on the Property, and in particular any judgments or restrictions that would prevent his owning the Property as seven lots, prior to his and his wife's purchase of the Property. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8). Mr. Meese testified, verbatim, as follows:

Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?

A: No, I'm not.

Q: At the time you and your wife purchased the property, did y'all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?

A: I did not believe there were any restrictions to our knowledge and belief.

Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?

A: None that I recall.

Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?

A: I don't remember such a thing from the purchase, no.

Q: You had no knowledge of any restrictions on the property; correct?

A: Restrictions in terms of subdivision?

Q: Yes.

A: I was not aware of any such restrictions for subdivision.

Id.

Despite the foregoing unequivocal testimony from David Meese that he purchased the Property without knowledge of the 1972 Order, the Court held "David Meese acknowledged that

at the time he purchased the property, he was aware there were restrictive covenants, but he did not remember the details.” Opinion ¶ 7. Respectfully, the Court overlooked and misapprehended the testimony of David Meese in this regard and in finding that David Meese had constructive notice of the 1972 Order *at the time of his purchase of the Property*.

C. The Court further overlooked and misapprehended Leigh Meese’s testimony.

Likewise, the Court held that Leigh Meese had sufficient notice of the existence of the restrictive covenants, at the time of her purchase of the Property, to put her on constructive notice of the 1972 Order and restrictions contained therein. In reaching this conclusion the Court relied solely on the following testimony of Leigh Meese: “I remember there were issues with the property. I can’t place my awareness of those issues with respect to our acquisition and sale of the property.” Opinion ¶ 7. At the same time, the Court entirely disregards the testimony of Leigh Meese stating without hesitation that *at the time of her purchase of the Property* she did not have any notice of the restrictions:

- Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?
- A: I did not. At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don’t know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Leigh Meese expressly stated that, although she may have become aware of the restrictions *at some point*, she was *not* aware of the restrictions at the time of her purchase. (R. p. 396, line 21 – p. 397, line 3). Any knowledge of Leigh Meese at any time after her purchase of the Property is, again, absolutely irrelevant. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). Respectfully, the Court overlooked and misapprehended Leigh Meese’s

testimony and erred in its holding that Leigh Meese had constructive notice of the 1972 Order *at the time of her purchase of the Property.*

- D. The Court overlooked and misapprehended the law and the record and erred in determining the Meeses had constructive and/or inquiry notice of the restrictions because the evidence the Court relies upon to reach that conclusion, to the extent it would have prompted an investigation or further inquiry, the investigation or further inquiry would have simply confirmed no restrictions apply to the Property.

The court cites Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) for the proposition that “[c]onstructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed.” Opinion ¶ 7.

The Court then found “[t]he Meeses had notice of the existence of restrictive covenants that encumbered Long Bay Estates and there was a ‘strong possibility’ that the restrictions might apply to the Property. This awareness of the existence of restrictive covenants provided them with notice of all of the restrictions, including the restriction against subdivision.” Id.

In Spence, the court focused in part on what a further investigation would have revealed. It stated specifically that “[t]he question in this instance is whether the deeds and plats on record at the date of the conveyance from Owner 3 to Owner 4 imposed on Owner 4 a duty to inquire further about potential title defects or adverse claims. In other words, did the public record raise a ‘red flag’ requiring further inquiry by Owner 4?” The court in Spence specifically found that certain facts alleged would not “prompt a reasonable purchaser to conduct further inquiry after examining this public record.”

Since the 1972 Order is not indexed correctly, and would not have been found in any title examination, which facts are not disputed, the only matter that would be found on the public records is anything else appearing in the chain of title. Of course, the 1958 Restrictions do not appear in the chain of title as they state they do not expressly encumber the Property.

If in fact the Meeses wanted to check to see if there were any restrictions in the subdivision as they wondered why there were no restrictions that encumbered the Property, perhaps sending up a "red flag," Dusenbury would have asked his abstractor to find restrictions in the subdivision. Had he done so, he would have found the 1958 Restrictions, which expressly do not encumber the Property. The so-called further inquiry and investigation as a result of a possible "red flag" would have not led to anything at all, except a conclusion that restrictions in the subdivision expressly did not encumber the property. Once having conclusive evidence on the public records that restrictive covenants do not in fact encumber the Property, there would be absolutely no need to engage in a further investigation or inquiry, regardless of whether the matters were on the public record or outside the public record.

In other words, the inquiry and investigation that would have resulted would have not led to the discovery of restrictive covenants. Instead, the inquiry would have led to the conclusion that no restrictive covenants applied at all to the Property. See City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 509, 32 S.E.2d 777, 782 (1945) ("[I]f there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose."); 58 AM. JUR. 2D *Notice* § 15 ("Although one who has notice of facts sufficient to put him or her on inquiry is deemed to have notice of all facts that a reasonable inquiry would disclose, this rule does not impute notice of every conceivable fact, however remote, that could be learned from inquiry. It imputes notice of

only those facts that are naturally and reasonably connected with the fact known and to which the known fact can be said to furnish a clue.”); 66 C.J.S. *Notice* § 12 (“The omission of the person to make inquiry cannot be material where such inquiry would not have led to a knowledge of the fact with the notice of which it is sought to charge him or her. If such a person’s conduct would have been the same whether or not he or she had made inquiry, the person’s omission cannot be a reason for charging him or her with notice.”).

In that regard, the Court overlooked and misapprehended the record and the law in finding the Meeses had constructive notice of the restrictions and in finding the Dicks are not protected by the Shelter Rule.

- E. To the extent the Court determined only one of David or Leigh Meese had no knowledge of the 1972 Order or any restrictions on the Property, the Court erred in failing to find the bona fides of either of them is sufficient for the purpose of the Shelter Rule.

Despite the foregoing testimony of Leigh Meese at trial, in the event that the Court remained unclear as to whether Leigh Meese was aware of the 1972 Order at the time of her purchase of the Property, the Court erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was not sufficient for purposes of the Shelter Rule.

This is similar to a situation where one of two cotenants has knowledge of a prior judgment or monetary lien that was not recorded properly, in which case the judgment as a matter of equity should only attach to the undivided interest of one cotenant, but not the other who is a bona fide purchaser for value without notice. In this case, however, the restrictions cannot be handled in the same manner because restrictions cannot attach only to an undivided interest in the property. As a result, only one of the two cotenants need to be bona fide in order for the Shelter Rule to apply. See In re Safe Deposit & Trust Co. of Baltimore, 94 A. 93 (Md.

1915) (the relation between tenants in common does not imply any agency, on the part of the tenant in possession for his co-tenants, as to receipt of notice of outstanding claims affecting title.); Gray v. Caldwell, 904 So. 2d 212 (Miss. Ct. App. 2005) (a cotenant may not act or claim in any manner to lessen or diminish the value or effect of the other cotenant's right, title, interest or status in land); Beesley v. Hanish, 521 A.2d 1235 (Md. Ct. App. 1987) (A cotenant may not prejudice the rights of the other tenants without their unanimous consent.).

Again, it is well-settled law in this country that “[u]nder the general doctrine that a restrictive covenant will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding restrictions, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be protected in his or her title on account of the bona fides of the vendor.” 20 AM. JUR. 2D *Covenants* § 257 (2008). The very purpose of the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to “receive the benefit of [their] bargain and permit [them] to market the property.” 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

As a result, under the scenario involving restrictions on property, all it takes is for one purchaser to not have notice in order to clear the property of that restriction. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

To the extent that the Court somehow construed the testimony in such a way that it believed Leigh Meese to have had notice of the 1972 Order at the time of the purchase of the Property by the Meeses, the Court erred in failing to find that the clear status of David Meese as

a bona fide purchaser for value without notice was sufficient to afford them both the protection of the Shelter Rule.

In sum, and in light of all of the foregoing testimony, the Dicks respectfully submit the Court overlooked and misapprehended the record and the law in finding the Meeses had constructive notice of the 1972 Order *at the time of their purchase of the Property* and in failing to find the Dicks are protected by the Shelter Rule, and therefore not subject to the 1972 Order.

CONCLUSION

The Dicks respectfully submit that the Court overlooked or misapprehended the above-described matters and, therefore, the Dicks respectfully request this Petition for Rehearing be granted, the Court's Opinion be vacated, and the Master's order be reversed.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

July 23, 2014

1020.2762012Appeal\Petition

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 23 2014

APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent

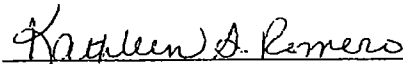
v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served the foregoing **Petition for Rehearing** upon Respondent's counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

Thomas C. Brittain, Esquire
The Brittain Law Firm, PA
4614 Oleander Drive
Myrtle Beach, SC 29577


KATHLEEN S. ROMERO

July 23, 2014

1020.276\2012Appeal\COS-Petition

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Case No.: 2004-CP-2075
Appellate Case No.: 2012-212773

John Musick, ...Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ...Appellants.

PETITION IN OPPOSITION OF REHEARING

Respondent, John Musick, by and through his undersigned counsel, hereby opposes Appellant's Petition for Rehearing in this matter. This opposition is based on the grounds that the Court's findings were proper and must be affirmed. Based on the reasons set forth below, Respondent respectfully requests that the Court deny Appellant's Petition for Rehearing and in doing so affirm the Opinion Number 2014-UP-284 (hereinafter the "Opinion") and the Master's orders.

In its most recent Opinion, the Court most accurately and sufficiently determined all issues of fact. Neither oversight nor misapprehension occurred in its conclusion. It is apparent that all necessary and appropriate avenues of legal remedies have been exhausted to the fullest extent of the law.

Respondent John Musick instituted this action in Horry County on April 12, 2004 against Appellants, Thomas Dicks and Robert Dicks, asserting that a re-subdivision plat recorded by Appellants which purported to subdivide their lot into seven lots violated restrictive covenants governing Long Bay Estates.

Appellant answered and counterclaimed by denying the applicability of restrictive covenants to the subject property and sought a declaratory judgment that they had not violated restrictions, covenants, or orders encumbering the property. Cross-motions for summary judgment were heard by the Honorable J. Stanton Cross, Jr., Master-in-Equity for Horry County, on August 16, 2006. By Order dated March 6, 2007, Judge Cross granted Respondent's motion for summary judgment, finding that the restrictive covenants applied to Appellants' property and that, therefore, Appellants were required to return the property to its original condition as one lot and were prohibited from subdividing the property.

Appellants' post-trial motion to alter or amend the final order was denied by order dated July 19, 2007. Appellants filed notice of appeal on September 6, 2007.

The Court of Appeals heard the case and remanded it for a full hearing, over-ruling the decision by Master-in-Equity, Judge Cross, finding that in the light most favorable to the Dicks, the case should be tried.

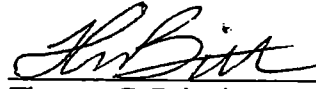
In April 2011, the trial was held and all evidence from both parties was presented and entered into the record. Significantly, the Appellant's counsel and expert testified that he had found the covenants and was aware that the property was one lot as did the previous owners, as did Attorney Dusenbury, as well as Attorney Mumford, all who were fully aware of the circumstances. Thereafter, Judge Howe ruled at the fourth hearing concerning these restrictive covenants that they were valid.

In sum: Judge Winston Vaught in 1972, Judge Stan Cross in 1998, Judge Stan Cross in 2004, Judge Cynthia Graham Howe in 2011, and the Court of Appeals in 2014 have all consistently held that the 1958 Restrictive Covenants are valid and applicable to Appellants' lots.

CONCLUSION

WHEREFORE, the Respondent respectfully requests the Court to affirm the in favor of the Respondent.

Respectfully submitted,


Thomas C. Brittain


Mary Madison Brittain Langway

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Myrtle Beach, SC
August 8, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick,.....Respondent,

v.

Thomas L. Dicks and Robert E. Dicks, Jr.,.....Appellants.

CERTIFICATE OF MAILING

Allison L. Lazar certifies that she is an employee of The Brittain Law Firm, P.A., attorneys for the Respondent and that she has placed in the U.S. mail the documents listed below in the above entitled action to the addressees below on August 8, 2014.

DOCUMENTS: Petition in Opposition of Rehearing

ADDRESSEE: Demetri K. Koutrakos, Esquire
 Callison Tighe & Robinson, LLC
 P. O. Box 1390
 Columbia, South Carolina 29202


Allison L. Lazar

The South Carolina Court of Appeals

John Musick, Respondent,

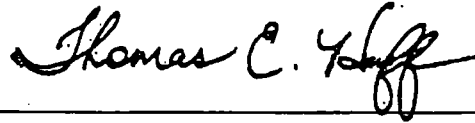
v.

Thomas L. Dicks and Robert E. Dicks, Jr., Appellants.

Appellate Case No. 2012-212773

ORDER

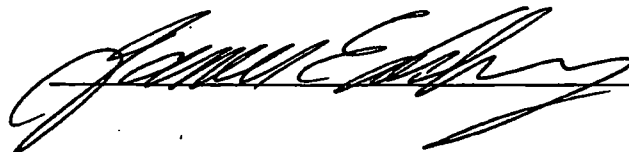
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Thomas C. Brittain, Esquire
Demetri K. Koutrakos, Esquire
Mary Dameron Milliken, Esquire
Mary Madison B Langway, Esquire
The Honorable Cynthia Graham Howe

FILED

8/25/14

Appendix 0736