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September 24, 2014
VIA HAND DELIVERY

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Cullen, et al. vs. McNeal, et al.
C/A # 2004-CP-07-633
Case Tracking No. 2011-196126

Dear Mr. Shearouse:

With regard to the above-referenced matter, enclosed for filing please find an original and fourteen (14) copies of Respondents' Brief on Certiorari, together with certificate of counsel and proof of service.

I would appreciate you filing these documents in the above-referenced appeal at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P.A.

Joel D. Bailey

JDB/shb
enclosures

cc: John E. North, Esquire (w/enclosures)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge
C/A # 2004-CP-07-633

S.C. Court of Appeals
390 SC 470, 702 SE2d 378 (Ct. App. 2010)

Robert L. Cullen, Andrew A. Corriveau,
Andrea Hucks, ... Petitioners,

-vs-

J. Bennett McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc. ..... Respondents,

RESPONDENTS' BRIEF ON CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I Did the Court of Appeals err in failing to find that the Developers' rights, as established in the Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point, were personal to and exercisable only by the Developer, and were incapable of being assigned?

II. Did the Court of Appeals err when it found that a land owner other than the person(s) initially designated as "Developer" under the Wright's Point Declarations could acquire the Developer's rights under the "successor developer" language of the Declarations, even though the assignment disclaimed responsibility for the prior acts of the original Developer?

III. Did the Court of Appeals err in finding that the term "Subdivision", as used in the Declarations, was not limited to property which had already been subdivided into "Lots" as part of Phase I?

IV. Did the Court of Appeals err in failing to hold that the Developer violated a legal duty to transfer the control of the affairs of Wright's Point to the Petitioners?

V. Did the Court of Appeals err in refusing to reverse the Trial Court's decision because extrinsic evidence was admitted at the trial stage?

STATEMENT OF THE CASE

Petitioners Cullen and Hucks are property owners in Phase I of Wright's Point Plantation ("Wright's Point"), a planned mixed-use community located in the Town of Port Royal in Beaufort County, South Carolina. Petitioner Corriveau was formerly a property owner in Phase I of Wright's Point, but recently sold such property; he no longer retains a property interest in Wright's Point. Petitioner Corriveau's status throughout this case, as well as his right to membership in the Wright's Point Homeowners Association, Inc., has been dependent upon his ownership of property within Wright's Point. By transferring his interest in the only property which he owned in Wright's Point, Mr. Corriveau has removed his eligibility for membership in the said homeowners' association. Respondents assert that he is no longer entitled to any of the relief sought in this action, that he no longer has

standing to assert the claims pending in this appeal and that he is no longer a "real party in interest". This change in the status of Petitioner Corriveau is brought to the attention of this Court pursuant to SCAR 201(b) and 208(b). The Court is requested to take judicial notice of the Deed conveying Petitioner Corriveau's interest, said Deed being recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 3336 at pages 1301-1303 on July 28, 2014.

The Petitioners are part of an original group of seven property owners in Phase I of Wright's Point who initiated this litigation against Respondents. Prior to the trial in the lower court, two of the Plaintiffs, David Mandell and Michael Pearson, retained separate counsel and abandoned their claims; they were dismissed as parties to the action and are not involved in this appeal. A third owner who was named as an original Plaintiff, Jamie Bellamy, never actually participated in the action, and is not a party in the present appeal. A fourth original Plaintiff, John Caldwell, participated through the trial stage, but has elected not to be a party to this appeal. Therefore, the Petitioners comprise less than a majority of the original plaintiffs in this litigation. They comprise a significantly lesser percentage (approximately 6%) of the entirety of the 44 lots in Phase I of Wright's Point and, *a fortiori*, the membership of the Respondent Wright's Point Homeowners Association, Inc. The loss of standing by Petitioner Corriveau drops this percentage to approximately 4.5%.

From its inception, the design for Wright's Point provided for a multi-phase, mixed use development consisting of both single and multi-family residences, commercial establishments, areas for mixed uses and certain common areas and amenities. It was patterned after two similar national award-winning developments in Beaufort County.

The property identified in the Master Plan[1] as comprising Wright's Point consisted of approximately forty acres, and was initially comprised of four separate parcels, each of which was acquired separately by Respondent Anthony Porter ("Porter") and/or his father, Jimmy Porter. Subsequent to acquiring the parcels, Respondent Porter and his father subjected the four parcels to a set of restrictive covenants entitled "Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point," ("Declarations") said restrictive covenants being filed in the Office of the Register of Deeds for Beaufort County, South Carolina.

Wright's Point Homeowners Association, Inc. (hereinafter "Association") is a South Carolina nonprofit corporation established by Respondent Porter in accordance with the Declarations; according to the language of the Declarations, it was created for the purpose of "maintaining, administering and enforcing the covenants and restrictions governing the (development) and collecting and disbursing all assessments and charges necessary for such maintenance, administration and enforcement..." Respondent Porter is a real estate developer, and was involved in Wright's Point since its inception; he is shown in the Declarations, together with his father, as "Developer."

Respondent J. Bennett McNeal (hereinafter "McNeal") is also a real estate developer and has also been involved with the Wright's Point development since its inception. He and Porter were involved in other real estate developments as partners or joint venturers. McNeal originally held options to purchase the properties ultimately comprising Wright's Point, was involved in the conceptual planning for the development, and was appointed by the Developer as a Director and as President of the Association. B. McNeal Partnership L.P.,

(hereinafter "McNeal L.P.") is a South Carolina limited partnership controlled by McNeal; it has held title to various real estate located in the Wright's Point development. McNeal L.P. is currently engaged as the developer of Wright's Point.

On March 31, 2004, Petitioners and four other property owners in Phase I of Wright's Point commenced this action in the Beaufort County Court of Common Pleas. The Petitioners contended, *inter alia*, that they were entitled to control the Association, the Architectural Committee and, *a fortiori*, the development. The Respondents answered and counterclaimed. The issues came to be heard before the Honorable Carmen T. Mullen, sitting without a jury, on the 28th, 29th and 30th of March, 2007. By order dated October 26, 2007, she denied all the relief sought by Petitioners. She found that Porter had not relinquished his rights, as Developer of Wright's Point, to appoint and remove officers and directors of the Association, or members of the Architectural Committee. Judge Mullen rejected Petitioners' contention that Wright's Point was confined to the properties in Phase I, and found that the remaining land within the development could be developed as part of additional and subsequent phases. She also found that the amenities and common areas within Phase I were not limited to the owners of properties in Phase I, but were for the use and enjoyment of all property owners within Wright's Point.

On June 12, 2007, Respondent Porter and his father assigned their Developer's rights to Respondent McNeal L.P. Judge Mullen found that such assignment was properly executed in accordance with the applicable language of the covenants. Judge Mullen denied all of Petitioners' claims for injunctive relief, but granted Respondents' requests (1) for permanent injunctive relief with respect to the ability of the developer to control the

Association; (2) to recognize the right of all property owners regarding access to and use of the amenities and common areas of the development; and (3) for specific performance, requiring Petitioners "to specifically perform their contractual obligations under the Declarations, particularly with respect to recognizing and adhering to the rights of the Developer to control the Association and complete the Development." Judge Mullen also denied Petitioners' claims for attorney's fees, concluding that "they are not authorized by contract or statute."

Petitioners appealed Judge Mullen's rulings to the South Carolina Court of Appeals, which affirmed the lower court in an opinion dated October 6, 2010. Petitioners petitioned the Court of Appeals for rehearing, which that Court denied. Petitioners then applied for a Writ of Certiorari, and the matter is now before this Court.

STATEMENT OF THE FACTS

In 1997, Respondents Porter and McNeal initiated the development of Wright's Point Plantation, a planned waterfront community in the Town of Port Royal, South Carolina, by obtaining and combining various parcels of real estate. (**R.**, pp. 4 & 5, Finding of Fact 1 & 2; see also **R.**, 584-602.) Wright's Point was one of several real estate development projects in which Porter and McNeal had collaborated. (**R.**, p. 257, ll. 4-7) The evidence in the Record on Appeal, as discussed hereinafter, clearly demonstrates that both Porter and McNeal were jointly involved in the development of Wright's Point from its inception.

As a prelude to the acquisition of the individual properties comprising Wright's Point, Respondent McNeal obtained options to purchase them from their prior owners. (**R.**, p. 5, Finding of Fact 3) Porter intended to build his permanent home on deep water lots

located in a part of the property which would ultimately be designated as "Phase I," and then develop the residual portion of the property in conjunction with McNeal. (**R.**, p. 269, l. 13 - p. 270, l. 13) Porter borrowed $750,000 from his father, Jimmy Porter, in order to purchase a portion of the property. Porter, his father and McNeal agreed that (1) Porter and his father would be listed as the developers of record, (2) Porter would construct a permanent residence on property located within the development, (3) the debt to Jimmy Porter would be reduced as the property was developed, (4) once the debt was "under control", a majority of the residual property would be deeded to McNeal, (5) Porter would continue to work on the development following such transfer and (6) the formal developer's rights would subsequently be assigned to McNeal. (**R.**, p. 5, Finding of Fact 3, p. 270, ll. 11-24; p. 271, ll. 7-12) McNeal then had a plat prepared and recorded, designating the tracts comprising Wright's Point as Parcels "A", "B", "C" and "D". (**R.,** pp. 584, 586; **App.**, p. 71)[2] Respondents also prepared a Master Plan which depicted the entire property comprised of all four parcels, and which was used to present the project to various governmental agencies for approvals required for the project. (**R.**, p. 5, Finding of Fact 5)

The conceptual design and plan for the property called for a low density, multi-phase, multi-use development which would incorporate single family homes, multi-family residential facilities, commercial establishments and certain mixed use environments into a walking community, as well as common areas and amenities to be shared by all owners. (**R.** p. 5, Findings of Fact 3, 4, & 5; see also **R.** 688-689, 705-730, **App.** 62-70 and 129-136) The initial phase of the development consisted of 44 single family residential lots, and was appropriately designated as "Phase I" on the various deeds, plats and marketing materials

for Wright's Point; Phase I consisted of portions of a 1.7 acre tract, most of Parcel "C" and portions of Parcels "B" and "D." (**R.** pp 5 & 6, Findings of Fact 4, 5, 6 & 7; see also **R.** 602, 688, **App.** 62-71, 128-36.) In order to initiate sales, property within Phase I was divided into lots and recorded on a plat, which was filed in the Office of the Register of Deeds for Beaufort County; the plat was amended from time to time, as conditions changed. These lots were assigned values and marketed for sale. (**App.**, p. 136) Restrictive covenants were prepared and filed for the development, and the Wright's Point Homeowners Association, Inc. was created by the developers as a non-profit corporation to administer the affairs of the development. (**R.** pp 6 & 7, Findings of Fact 8 & 10; see also **R.** 603-633)

Sections 7.01 and 12.01 of the Declarations of Covenants, Conditions, Restrictions and Easements for Wright's Point give the Developer the sole and exclusive right to appoint and remove all officers and members of the Board of the Association until such right is surrendered by an express amendment signed and recorded by the Developer or until the date when the last lot in Wright's Point has been conveyed to someone other than the developer or a Builder, whichever occurs first. (**R.** 603-633) The term "Builder" is specifically defined in the restrictive covenants as being "any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots." (*Id*, p. 604, § 1.05) The evidence in this case demonstrated that neither of these conditions had occurred by the time the case was tried in the lower court. (See, *e.g.*, **R.** pp. 15-17; **App.** p. 18, line 3- page 19, line 20)

Under §1.01 of the Declarations, the Developer retains the right to control membership on the Architectural Review Committee "until all improvements [are]

constructed thereon and sold to permanent residents." Furthermore, that section specifically provides that the developer's rights to control this committee do not actually terminate until "such time as all of the Lots in the Subdivision have been fully developed," at which time written notification of such fact by the Developer to the Board and all owners is required. The evidence in this case also demonstrated that none of these prerequisites had ever occurred. (See, *e.g.*, **R.** pp. 8-9, Findings of Fact #18 and **R.** pp. 17-18; **R.** p. 237, ll. 7 - 23, page 238, ll. 9-21; **App.** p. 16, ll. 5-10) Accordingly, when this action was initiated, Respondent Porter, under the express language of the Declaration, retained the right to appoint and remove officers and directors of the Association, as well as members of the Architectural Committee. He had not, as contended by Petitioners, divested himself of those rights by conveying properties outside Phase I to Respondent McNeal.

Notwithstanding these facts, the Petitioners initiated an attempted coup whereby they sought to oust the developer and take over control of the development. (**App.** p. 14, ll. 11 - 20.) They held meetings wherein they purported to elect themselves as officers of the Wright's Point Homeowners Association, Inc., as well as initiating activities on the Association's behalf, including attempting to exert control over the independent entity which the developer had retained to provide financial and managerial functions for the development. (See, *e.g.*, **R.** pp. 8 - 10, Findings of Fact #s 15, 16, 20, 22, 23, 24, 25, 26; see also **App.** pp. 32-33, 35 and **R.** pp. 485-493, 496-497 and 851-861) These meetings were specifically contested by the Respondents Porter and McNeal, but the Petitioners persisted with their attempted coup. (**R.** pp. 9-11, Findings of Fact #s 21 and 26 ; see also **App.** p. 34, **R.** pp. 594-595, 539-540, 543 (Bate Stamp pages 6198, 6199 and 6202)) These attempts

by the Petitioners to usurp the rights of the developer and the Association in this regard were unauthorized and improper and constituted a violation of their contractual obligations under the restrictive covenants.

It should be noted that Petitioners' initiation of the meetings did not occur until Respondent Porter and the Wright's Point Architectural Committee had rejected the requests of Petitioners Cullen and Corriveau to use hardi-plank siding on their homes. (**R.**, p. 8, Finding of Fact 16) It should also be noted that, following the Petitioners' attempted take-over of the Association and Architectural Committee, Petitioner Corriveau submitted a request to Petitioner Cullen - who was claiming to be "President" of the new homeowners association which they had created - asking for permission to install the hardi-plank siding which had already been denied. It should further be noted that Petitioner Cullen unilaterally granted this request, which prompted Respondents to file suit against Petitioner Corriveau for non-compliance with the Declarations and directives of the Architectural Committee. Finally, it should be noted that the present litigation was commenced by Petitioners five days following the initiation of the suit against Petitioner Corriveau. These facts were not lost on the trial judge. (**R.**, p. 11, Findings of Fact 27, 28) They were also not lost on the Court of Appeals, which specifically noted the fact that the hardi-plank issue was a primary focus of Petitioners at their meetings. (*Cullen, et al. v. McNeal, et al.* 390 SC 470, 702 SE2d 378 (Ct. App. 2010), at page 382)

In order to advance their theory that Respondent Porter had divested himself of his ability to control the development of Wright's Point, Petitioners had to make a second, and equally spurious, argument: that Wright's Point was confined solely to the property located

in Phase I. If successful, this position would accomplish at least two (2) of their ancillary goals; (1) to restrict use of and access to common amenities located within Phase I of the development solely to owners of property within that Phase, and (2) to alter and even stop the development of any future phases. In essence, they sought to limit the development to the confines of Phase I, which they viewed as an "elite" community and in which they were property owners. (**App**. p. 13, ll. 10-14.) Unfortunately for Petitioners, both the lower court and the Court of Appeals recognized the fact that Petitioners' position was contrary to the clear language of the Declarations and the evidence presented at trial. The evidence at trial clearly demonstrated, and Judge Mullen correctly found, that Wright's Point Plantation was conceived, designed and developed as a walking community whereby all property owners had equal access to all amenities and common areas, regardless of the phase of the development in which their properties were located. (**R**. pp. 8-9, 23; see also **R**. pp. 688-689, 705-730, **App**. 62-70 and 129-136) The evidence further demonstrated that the Wright's Point development was not limited to Phase I, as contended by the Petitioners, and Judge Mullen specifically permitted the Developer to "proceed with the development of additional phases of Wright's Point." (**R**. p. 23)

In light of the ongoing conduct by the Petitioners in violation of their contractual duties under the covenants, the Respondents sought legal relief including, *inter alia*, an Order from the Court which would (1) enjoin the Petitioners from taking any action reserved under the restrictive covenants to the developer, Architectural Review Committee and/or the Wright's Point Homeowners Association, Inc., and (2) require the Petitioners to specifically perform their contractual duties and obligations under the restrictive covenants relating to

the control of the Association, Architectural Review Committee and the overall development by the developer. (**App**. pp. 58-60) Judge Mullen granted the Respondents request for permanent injunctive relief and for specific performance. (**R**. p. 25)

ISSUES AND ARGUMENTS

1. **Petitioners' contentions that (a) the Developer's rights were "personal" rights which were "enforceable only by him," *i.e.*, Porter, and (b) such rights were extinguished when he conveyed title to certain properties in Wright's Point, are without merit. (Issue I)** Petitioners contend that the Developer's rights to appoint and remove officers and board members of the Association, as well as members of the Architectural Committee, were personal to and exercisable only by Respondent Porter, and that he lost such rights when he conveyed the properties outside Phase I to the Respondent McNeal L.P. This contention is not in keeping with the evidence in the Record, the language of the covenants, or the applicable law of this State, and both the trial court and the Court of Appeals properly rejected it.

First, contrary to Petitioners' contention, the evidence shows that covenants in the Declarations run with the land, and are not "personal" in the sense that they can be exercised solely by the Respondent Porter, as Developer. Covenants generally fall within two classes: (1) real covenants, which run with the land and bind subsequent purchasers thereof, and (2) personal covenants, which bind only the covenantor personally. 20 Am.Jur. 2d, *Covenants, Conditions and Restrictions*, §29. A real covenant which runs with the land is "one which relates to, touches, or concerns the land granted or demised and the occupation or enjoyment thereof." *Ibid.* "A covenant that does not run with the land is said to apply merely to the

personal use and enjoyment of the land by the grantee and not to its permanent user." *Ibid.* "For a covenant to run with the land, there must be an indication that the parties intended for the covenant to run with the land." *Harbison Community Association, Inc. v. Mueller*, 319 SC 99, 102, 459 SE2d 860 (Ct. App. 1995). In the present case, such intent is clear from the language of the covenants. Section 12.04 states, "*The provisions of this Declaration shall run with and bind title to the Property*, shall be binding and insure (sic) *to the benefit of all Owners and Mortgagees and their respective heirs, executors, legal representatives, successors and assigns...*" (Emphasis added) That section does not limit the portions of the Declarations which are intended to run with the land - it clearly includes *all* provisions, even those which might be deemed "personal" to the Developer. *Harbison* also found that the covenants in that case ran with the land because they "enhanced the value of all of the properties in the community." *Ibid.* Likewise, the first page of the covenants in this case, like Section 12.04, reflects that all of the property in Wright's Point is subject to the covenants, which "... are for the benefit of the Property and each owner thereof ... *to provide for the preservation and enhancement of the property values in Wright 's Point...*" (Emphasis added) It further provides that *all* of the property in Wright's Point, as described in Exhibit "A" to the covenants,"shall be *held, transferred, sold, mortgaged, conveyed, leased, occupied and used subject to the covenants...*" (Emphasis added) Thus, it is evident from the unambiguous language of the Declarations that the intent of the covenants in this case was that *all* of the covenants contained therein are to run with the land for the benefit of all the property within the development.

Other evidence presented to the Trial Court and Court of Appeals confirms the intent as stated in the Declarations, and clearly demonstrates that the restrictive covenants contained in the Declarations, *without exception*, run with the land and are binding on subsequent purchasers, regardless of whether the land lies within the confines of Phase I. For example, the evidence shows that Respondent McNeal acquired four lots in Phase I of Wright's Point from Respondent Porter by deed dated April 23, 1999. (**R.**, pp 638-639). The legal description to the property is contained on a separate Exhibit "A" to the deed, and specifically states that the Declarations are "hereby made applicable to and imposed upon the aforementioned lots and *shall be covenants running with the land.*" (R. p. 640, Emphasis added). The Record reveals that it was the intention of Respondent Porter to also convey to Respondent McNeal an additional portion of property in Wright's Point located outside the confines of Phase I and designated as Parcel "B". Accordingly, a subsequent deed was prepared which included Parcel "B" and which also contained the language that the Declarations were "made applicable to and imposed upon" the land being conveyed and that such Declaration "*shall be covenants running with the land.*" (**R.** pp. 642-644)

Even more damaging to Petitioners' position that some of the covenants contained in the Declarations do not run with the land is the fact that the Record in this case also includes the deeds of Petitioners wherein they acquired title to their property in Phase I of Wright's Point. This Court is directed, by example, to the deed of Petitioner Cullen which specifically states:

> This conveyance is made by the Grantor and accepted by the Grantee with the understanding and agreement that *the Declaration of Covenants, Restrictions and Easements for Wright's Point* as recorded in the Office of the Register of Deeds for Beaufort County, South Carolina ... *are hereby made applicable to and imposed upon the aforementioned lot and shall be covenants running with the land.* (Emphasis added) (**App.**, pp. 72, 73)

The legal description in the deed does not restrict which portions of the Declarations are to run with the land; accordingly, the language included in the Petitioner's own deed directly refutes the argument presented on behalf of the Petitioners in this appeal. The covenants in question clearly encumber the properties at issue and, without any stated exceptions, run with the land; therefore, they are not "personal" to the Developer. Additionally, it should be noted that this document also refutes the position of Petitioners under Question III, hereinafter discussed.[3]

Second, the Record in this case clearly shows that rights of the Developer under these covenants are clearly not limited to Porter personally, but may also be exercised by others, including his *successors, heirs or assigns*. Section 1.12 of the Declarations specifically includes "any successor-in-title or any successor-in-interest" within the definition of "Developer." The right to develop additional phases under §2.03 is given not only to the Developer, but to "his heirs and assigns" as well (a fact obscured by Petitioners, who chose to omit the "heirs and assigns" language when quoting this section).[4] The reservation of easements under §3.02 is in favor of the Developer, "his heirs and assigns." Rights as to buffer areas under §10.21 are in favor of the Developer, "his heirs and assigns," as is the right to a pedestrian easement under §10.22. The right of protection against a charge of trespass is extended beyond the Developer under §12.10 to include "successors, assigns, agents or employees." (**R.** pp. 605, 607, 623, 624 and 628) The specific rights of

appointment and removal under §§ 1.01, 7.01 and 12.01 anticipate exercise by the Association's Board once the enumerated prerequisites have occurred; the same principle is true under §12.03, whereby 2/3 of the property owners are given the right to amend the Declarations. It is clear that the Developer's rights under the Declaration are not "personal" only to Porter.

Third, Petitioners took title to their properties with notice of the provisions of the covenants, including those which give the Developer specific authority or rights. Under §12.01, "*Every grantee of any interest in the Property, by acceptance of a deed or other conveyance of such interest, agrees that Developer shall have the authority to appoint and remove directors and officers of the Association in accordance with the ... provisions of this Section ... and ... Section 7.01.*" (Emphasis added) This language is not limited to initial grantees, but applies to "*every grantee*", further indicating that the Developer's rights being attacked by Petitioners were intended to run with the land.

By taking title to their properties, Petitioners *consented* to the very conduct of which they now complain. Additionally, Petitioners took title to their properties with both actual and constructive notice of the fact that the Declarations and each provision therein was applicable to and controlling of their use of such properties. Nevertheless, they proceeded with the purchase of said properties and made no protest concerning any Declarations provisions until they did not get their way with the use of hardi-plank siding and the restricted use of amenities within Phase I. Accordingly, they have waived any right to subsequently contest such rights or, at least, are estopped from asserting such claims. Section 2.02 of the covenants is titled "Interest Subject to Plan of Development" and states,

"Every purchaser of a Lot... shall take title... thereto with notice of this Article." (**R.**, p. 607) Covenants are binding on subsequent grantees having actual or constructive notice of the covenants. *Harbison, supra,* 103; *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 370, 628 S.E.2d 902 (Ct.App. 2006). The covenants in this case were recorded in the office of the RMC for Beaufort County (**R.**, p. 603), providing constructive notice to Petitioners as purchasers. Petitioners also had actual notice of the existence of the covenants, as they were attached to their complaint and referenced in their deeds of conveyance. (**App.**, pp. 72, 80, 113)

Fourth, the cases cited by Petitioners do not stand for the propositions for which they are cited, and actually refute, rather than support, Petitioners' position; in any event, they are clearly distinguishable from, and not controlling of, the case *sub judice*. For instance, Petitioners cite *Peoples Federal Savings and Loan Ass'n v. Resources Planning Corp.*, 358 S.C. 460, 596 S.E.2d 51 (2004) and *Board of Managers of Medinah on the Lake Homeowners Ass'n v. Bank of Ravenswood*, 295 Ill. App. 3d 131, 692 N.E.2d 402 (1998) for the proposition that "South Carolina, like other jurisdictions, considers the rights of a developer reserved in the applicable covenants to be personal to the developer, enforceable only by him, and extinguished upon disposition of the developer's interest in the land." This is demonstrably false; *Peoples* made no such finding or statement, and *Ravenswood* does not involve South Carolina law at all. *Peoples* rejected the absolute prohibition argument advanced by Petitioners, and recognizes that there are, in fact, circumstances where a successor developer may exercise even "personal" rights of an original developer. The Court found that a subsequent owner of undeveloped property in Litchfield Plantation *was*

the successor developer and acquired the rights of the original developer when it bought the property in a foreclosure sale - a recognition that the original developer's rights were not extinguished upon his divestment of title to the subject property, and the antithesis of the proposition advanced by Petitioners.

The *Peoples* court specifically alluded to facts comprising the "circumstances" justifying its holding, and which are also present in this case: (1) "the Covenants ... specifically contemplated the possibility of successorship...", using the term "successor" in conjunction with the definition of developer (compare, e.g., with §1.12 "successor-in-interest" and "successor-in-title" language defining "Developer"); and (2) "animosity between the parties which may affect (subsequent owner's) ability to develop or otherwise dispose of its... property" (see, e.g., **R.**, pp. 8-12, re adversarial circumstances preceding this litigation, including a prior pending suit by the Association against Corriveau).

The *Bank of Ravenswood* decision, cited by the court in *Peoples,* also does not support Petitioners' argument. In that case, the Illinois Appellate Court reversed the trial judge and held that "the powers reserved by a developer 'and its successors and assigns' in restrictive covenants *can*, in appropriate circumstances, be exercised by the developer's successors" - again, the antitheses of Petitioners' argument.

Petitioners also rely upon another Illinois case, *Fairways of Country Lakes Townhouse Ass'n v. Shenandoah Development Corp.*, 113 Ill. App. 3d 932, 447 N.E.2d 1367 (1983). This case is not only *not* controlling, it is clearly distinguishable from the case *sub judice. Fairways* involved "two *separate* parcels, designated as the Fairway and the Greens." *Ibid*, 933 (emphasis added) The developer constructed townhouses on the Fairway

parcel and then recorded covenants designated as the "Fairway Declarations," which were expressly limited to "land comprising *only the Fairway portion* of the tract and *did not include the Greens*." *Ibid.* (Emphasis added) In the case *sub judice*, by contrast, the covenants clearly apply to *all four parcels in Exhibit "A"* to that document. The Fairway covenants "permitted the addition of other *property*" to the tract (*Ibid*, 934; emphasis added); in the present case, there is no annexation of additional *properties*, but rather progression to an additional *phase of development* of *existing property already subject to the covenants*. This distinction was recognized by both the trial court and the Court of Appeals. (**R.**, pp. 5, 6, 7, 19; Findings of Fact 4, 5, 8, 11; *Cullen, supra* at 386)

The original Fairway Developer sold the undeveloped Greens parcel, which were clearly not subject to the Fairway covenants, and a subsequent purchaser developed it as a *separate development,* with a *separate set of covenants* that applied *only* to the Greens tract and a *separate homeowners association*. The Greens covenants "did not ... reserve to its developer any right to annex additional property to the declaration." *Fairways, supra.* Nevertheless, the Greens tract developer "recorded a 'Supplemental Declaration' which purported to annex the Greens property to the Fairway Declarations." *Ibid.*

Under these circumstances, which do not even remotely exist in the present case, the Illinois court found that "the disputed provisions established a personal right to be exercised only by the original developer," but specifically based it on the following relevant fact: "... *at the time the Greens property was transferred to defendants, no restrictions or covenants applied to that property through operation of the Fairway Declarations*." *Ibid*, 936. That is not the case in this appeal - here, all of the properties which have been conveyed, whether

to Petitioners, Respondent McNeal or any other purchaser, were clearly subject to the Declarations. The fact that the Greens property in issue in *Fairways* was not subject to the Fairway Declarations was the controlling factor in the court's decision: "*Under these circumstances*, we cannot say that any rights or obligations under the Fairway Declarations ran with the title to the Greens Property ...*Ibid* (Emphasis added) Although Petitioners assert that "the scenario disapproved by the *Fairways* court is precisely what has occurred in this case,"[5] the assertion is not borne out by the stated facts of the respective cases.

Petitioners also erroneously argue that "McNeal, McNeal L.P. and Ratcliff all ...purport to be able to ... amend the official Plat to bring land that they own into the Subdivision,"[6]and claim that *Fairways* prevents such action. As seen, this is an erroneous assertion. Unlike *Fairways*, The Wright's Point covenants clearly run to all the property within the development as referenced on Exhibit "A" to the Declarations. There is no evidence of an attempt to add *additional properties* to the Declarations, as was the situation in *Fairways,* nor is there any evidence in the Record of any intent by Respondents to do so. The property about which Petitioners complain and which is owned by Ratcliff and/or Respondent McNeal L.P. was already part of Wright's Point and was subjected to the Declarations *ab initio*. Furthermore, when it was conveyed to Respondent McNeal L.P. by Respondent Porter, the fact that it was subject to the Declarations was reiterated in the legal description. There is no evidence that any of the Respondents have or will attempt to annex or add any property to Wright's Point; any annexation is specifically limited to certain property by the Declarations, and the property in question is already part of Wright's Point. This case is devoid of any attempt to exert any power of annexation which is "personal" to

Porter; *Fairways* is clearly distinguishable from, and certainly not controlling of, the case *sub judice*.

Petitioners further assert that "this case is squarely in line with the rule of law and the precedent articulated in *Queen's Grant II* ...(*supra*), and reaffirmed in *AJG Holdings LLC, et al. v. Dunn, et al.*, 392 SC 160, 708 SE2d 218 (Ct. App. 2011)." Again, this assertion is inaccurate or, at best, not supportive of Petitioners' position. *Queen's Grant II* involved an attempt by a successor developer to amend existing restrictive covenants. Even if, *arguendo*, such amendment right is deemed to be "personal" to the original developer, *Queen's Grant II* states that, in appropriate circumstances, a "personal" right may be assumed and asserted by a successor developer. One such circumstance is if the original developer retains an interest in the subdivision or development as a whole. As noted and later discussed herein, Respondent Porter clearly maintained both a property and financial interest in Wright's Point at the time he conveyed property to Respondent McNeal L.P., as well as when he assigned the role of Developer to McNeal L.P. The Court in *Queen's Grant II* specifically stated that it is only when a "developer is divested of *all interest in the subdivision*, [that] a reserved right ... is extinguished." 628 S.E.2d at 914.

Furthermore, the court in *Queen's Grant II* actually rejected the argument now advanced by Petitioners, *i.e.*, that a developer must own real property in order to enforce restrictions on it. In this regard, the Court specifically held, "*Greenwood Development's lack of a direct ownership interest in the property of Queen's Grant in no manner impedes its continuing rights as Declarant under the 1972 Covenants* ... As noted, Palmetto Dunes does not merely consist of a single horizontal property regime, and Queen's Grant comprises just

a small part of Palmetto Dunes." (Emphasis added) *Ibid.* The court also stated that the argument now advanced by Petitioners to the effect that the developer "cannot impose covenants/restrictions on property that it does not own... is unavailing." *Ibid.* It referred to the argument presently being advanced by Petitioners as constituting a "narrow view", "myopic", and failing to recognize the developer's responsibilities and interests in development properties beyond a single component of the development. The court found as follows: "We conclude as a matter of law that Palmetto Dunes Resort (initial developer) had an interest in the property of Palmetto Dunes when it sold its interest to Greenwood Development. Greenwood Development acquired that property interest." Thus, the interest required for a successor developer does not have to consist of legal title to the property at issue; it may take other forms, including interests which are financial or fiduciary. The Record in this case, as shown below, clearly shows that Respondent Porter maintained a property and financial interest in Wright's Point Subdivision at the time he conveyed land in Phase II and/or Phase III to Respondent McNeal.

Petitioners' reliance upon the decision in *AJG Holdings LLC*, *supra*, is also misplaced. *AJG Holdings* involved an *attempted amendment of covenants by an assignee of the developer*. In the present case, there was never an attempt by the original developer's assignee to amend the original covenants. The decision in *AJG Holdings* also demonstrates that the assignment of developer's rights was done in an attempt to circumvent the language of the original covenants in order to alter use of the assignee's property covered by the covenants, as well as to apply the covenants to the assignee's adjacent property which was not originally subject to the covenants. This is inapposite to the facts of the present case,

where the properties in question were all part of a single development and, therefore, were all subject to the original restrictive covenants at issue. Any use of the property in Phases II or III must be in accordance with the intended concept of the development as stated in the Declarations. The situation in *AJG Holdings* simply does not exist in this case.

Secondly, the decision in *AJG Holdings* clearly states that transfer of a reservation by a developer is permissible when facts show "that the developer possess(es) a sufficient property interest in the development." Petitioners, in contravention of the evidence presented to the trial court and the present Record on Appeal, maintain that Respondent Porter, upon selling the non-Phase I property, "no longer had a property interest in the undeveloped land." This contention did not prevail at either the trial court or in the Court of Appeals, both of which chose to look at the evidence and not rely upon the mere assertions of Petitioners to the contrary; the evidence clearly showed that the Respondent Porter continued to maintain a property interest in Wright's Point Subdivision, notwithstanding his transfer of title to the real estate in Phase II and Phase III. Unlike the developer in *AJG Holdings*, even though Porter conveyed title to the real estate which would be involved in subsequent phases, he continued to retain a meaningful financial and property interest in the development of the Subdivision. For example, he continued to own a residence and adjacent lot in Phase I of the development; he was significantly involved in the planning of Phase II; he was entitled to share in the profits of any sales from the future development phases; and he had actually received $10,000.00 as a developer's fee from a sale of property in Phase II shortly before the trial.[7]

Conversely, in *AJG Holdings*, there was no evidence of "any interest Sasser (the developer) retained in the property other than her purported right to amend the restrictive covenants." The two cases, therefore, are factual opposites. To reiterate the language of this Court in *AJG Holdings*, the original developer of Wright's Point retained "something more than a purported reservation of developer's rights."

Petitioners' reliance on the case of *Highlands Property Owners Association, Inc. v. Shumaker Land LLC*, 724 S.E.2d 685 (SC App 2012), is also misplaced. In *Highlands*, one J. Allen Shumaker ("Shumaker"), as president of Highlands Development Limited Partnership ("HDLP"), executed restrictive covenants relating to Highlands, a residential real estate development. The restrictive covenants listed HDLP as "Declarant" and developer, but included any successor in interest within the definition of "Declarant", *provided the instrument of conveyance expressly provided for the transfer of the developer's rights to the successor.* 724 S.E.2d at 688. Thereafter, *as part of the dissolution of the partnership*, HDLP conveyed 7 lots in the development to Shumaker in his individual capacity, but the deeds to the lots did not reference any rights of HDLP as "Declarant", nor did they purport to transfer any of those rights to Shumaker. *Ibid.* The *Shumaker* court specifically held that the failure to include the language required by the covenants in the deed prevented Shumaker from acquiring, *under the deed*, the rights of HDLP as "Declarant": "Because the deed does not expressly convey the Declarant's rights to Shumaker upon taking title to the seven lots, Shumaker does not qualify as a Declarant ..." *Ibid.* The deeds from Respondent Porter to Respondent McNeal likewise did not contain language conveying rights of the Developer, but that is *because the Developer was not attempting to relinquish those rights at the time*

of the conveyances. To the contrary, the Record clearly shows that Respondent Porter intended to retain and continue to exercise such rights after the sale of the said properties to Respondent McNeal, and did so until he subsequently executed a separate assignment of such rights.

In *Shumaker*, immediately upon receiving the 7 lots from HDLP, Shumaker transferred title to said lots to his LLC, Shumaker Land LLC ("LLC"). The court noted that the deeds from Shumaker to LLC also failed to contain language relating to transfer of Declarant rights but that, in any event, since the deeds from HDLC to Shumaker did not comply with the language requirements of the covenants and did not transfer any rights as Declarant to Shumaker, his subsequent transfer of the lots to LLC likewise could not confer any Declarant rights upon LLC. *Ibid*, pp. 687, 688. He simply could not convey rights which he had not acquired.

It must be noted at this point that the 7 lots conveyed to Shumaker by HDLP "represented all of HDLP's remaining interest in the development." *Ibid.* As noted above, that is not the situation in the case *sub judice*, as Respondent Porter retained a property, fiduciary and financial interest in the continuing development of Wright's Point Subdivision following the transfer of properties to Respondent McNeal. In *Shumaker*, however, the Declarant HDLP did *not* retain any continuing interest in the development. Nevertheless, after transferring all of its interest to Shumaker, HDLP subsequently attempted to transfer Declarant rights to LLC by way of an assignment. The *Shumaker* court noted that this was done 14 months after the homeowners association filed a lien against LLC for its failure to pay assessments due on the 7 lots. In any event, the *Shumaker* court determined that the

Assignment was invalid because, having already transferred *all* its interest in the development through the 7 deeds to Shumaker, HDLC no longer had any Declarant rights to assign: "At the time it executed the Assignment to Shumaker LLC, HDLP no longer retained any rights, title or interest in the seven lots as the limited partnership already transferred its interest in the property..." *Ibid*, pp. 688, 689.

It is not surprising that Petitioners now seek to place themselves in the same factual situation as that presented in *Shumaker*; the problem is that it is an attempt to fit a square peg into a round hole. Unlike *Shumaker*, when Respondent Porter transferred title to properties in Wright's Point to Respondent McNeal/McNeal L.P., he neither intended nor attempted to also transfer his rights as Developer. Additionally, the transfers did not represent all of Porter's interests in the Subdivision or its continuing development.

The transfer of Developer rights in the case *sub judice* occurred later, in 2007, when Respondent Porter, as official "Developer" of Wright's Point, assigned such rights to Respondent McNeal L.P. The assignment, unlike the assignment in *Shumaker*, complied with the requirements of the applicable restrictive covenants, specifically §1.12 of the Declarations. (**R.**, pp. 23, 24, 162, 163, 605) The Declarations, in §1.12, provide for transfer of the Developer's rights to a successor in one of two ways: *either by deed as a successor in title, or other conveyance as a successor in interest*. Respondents chose the latter method in the case *sub judice*. At the time of the transfer, the Record shows that "Developer" Porter retained a significant interest in Wright's Point, as he owned a home in Phase I which the evidence showed was valued in excess of $3,000,000 (**R.**, p. 259), as well as the right to continued involvement and remunerations in subsequent phases of development, as

previously set forth above. It should also be noted that Respondent Porter testified at the trial, *in response to questions by Petitioners' counsel*, to the nature of the interest which he held after conveying the non-Phase I property to Respondent McNeal L.P. His testimony revealed, *inter alia*:

> "[T]he deed transferred ... title to Bennett [McNeal] but we maintained our agreement to do business ..." (**R.**, p. 283, ll. 15-17)
>
> "I deeded the property to Bennett, but I maintained absolute interest in it." (**R.**, p. 283, ll. 19-20)
>
> "[A]s we moved forward with the future developments ... he gave me oversight on properties that were deeded to him because I had such a major investment ..." (**R.**, p. 283, ll. 21-24)
>
> "[W]e, ..., were to participate in the future profits of the development." (**R.**, p. 285, ll. 19-21)
>
> "I maintain an interest in the residual property as a lot owner ... [E]ven if Bennett held title to the residual land, I maintained an interest in the residual land and I am a lot owner." (**R.**, p. 294, ll. 4-8)
>
> "[When] I deeded property to Bennett it was with the full understanding that the property was subject to the covenants, and that I would remain the developer on that property even though I didn't hold title to it." (**R.**, p. 298, ll. 20-24)

Under the authorities cited by Petitioners, such a retained interest negates the premise which they have advanced, and the assignment, as recognized by both the lower court and the Court of Appeals, was valid. Those decisions should be affirmed by this Court.

2. **Petitioners' contentions that Respondent McNeal L.P. is not a legitimate successor developer of Wright's Point, are also without merit. (Issues I & II)** Petitioners next contend that the Court of Appeals erred in affirming the ruling of the trial court that Respondent McNeal L.P. is a legitimate successor developer of Wright's Point. They assert

that (1) the developer's rights had been extinguished prior to the assignment and were incapable of being conveyed, (2) the Developer's rights had to be transferred by deed because §1.12 references the term "Property" and this term is limited to real property; (3) the 2007 assignment of Developer's rights is not a conveyance of "property" as required by §1.12; (4) a portion of the property transferred from Respondent Porter to Respondent McNeal L.P. had been transferred by McNeal L.P. to another entity ("Ratcliff") before the assignment so that the assignment would not cover the Ratcliff property; and (5) the assignment fails because it conveyed only the rights of the original developer, not the obligations. The issue of the extinguishment of the Developer's rights has been dealt with in the prior issue above. The other assertions, which were rejected by the Court of Appeals, are hereinafter discussed.

On June 12, 2007, the Wright's Point Developer rights were assigned to McNeal L.P. (**R.**, p. 162.) The assignment is provided for under §1.12 of the covenants. The trial judge found that the assignment was valid and found that it was "done properly, and was executed in accordance with the applicable language of the covenants." (**R.**, p. 24.) The Court of Appeals agreed and affirmed this finding; as mentioned in the preceding argument, and as hereinafter discussed, these rulings are confirmed by the controlling provisions of the covenants and the evidence in the case.

Petitioners' contend that McNeal L.P. cannot be a successor developer because "none of the *deeds* which conveyed parcels B and D... contained any designation that the grantee was deemed the successor developer." (Emphasis added) Both the trial court and the Court of Appeals recognized that this contention distorts the language of §1.12, which specifically

provides that Porter's successor may be *either* "any successor-in-title *or* any successor-in-interest." While a successor-in-title would derive authority through a deed, a successor-in-interest may derive authority through another "instrument of conveyance", which term is specifically used in §1.12. In the present case, McNeal L.P. did not become successor developer through the deeds from Developer; rather McNeal L.P. b ecame successor developer through the document designated "Assignment of Developer's Rights." The only issue is whether or not the assignment document comports with the other requirements of §1.12 that McNeal L.P. be "designated as the 'Developer'... by the grantor of such conveyance" and that such grantor "shall be the 'Developer'... at the time of such conveyance." As previously discussed, an examination of the assignment document shows that these conditions were, in fact, met, and the trial court and Court of Appeals so held.

The use of the term "Property" in §1.12 does not, as Petitioners contend, limit the method of conveyance of Developer's rights to a deed. When read in conjunction with the rest of the Declaration, it is clear that the use of the term "Property" was to insure that all of the property of the Subdivision remained subject to the Declarations and the overall development theme, even (and perhaps especially) in the event of a successor developer. "Property" is defined under §1.19 as the land described in Exhibit "A". Petitioners contend that after Parcel C was subdivided to create Phase I, and the Lots therein were conveyed to subsequent owners, it was impossible for McNeal or any other person to succeed to 'all of the property' then subject to the covenants. In essence, they argue that (1) once property within each Phase is subdivided, platted and/or sold, it is no longer within the description of Exhibit "A" and (2) only the land within Phase I is included in Wright's Point, so any

residual property outside Phase I is not subject to the Declarations and cannot be controlled by an assignment of Developer rights. This is a complete distortion of the plain language of the Declarations in general, and of §1.12 in particular. Nowhere in that section, or anywhere else in the Declarations, does it indicate that property described in Exhibit "A" is not subject to the Declarations once it has been subdivided, platted or sold to subsequent owners. In fact, the covenants expressly provide otherwise. See, *e.g.*, §3.01 (lots subject to the covenants when "conveyed, transferred and encumbered") and §12.04 (declarations "run with and bind title to the Property" and are "binding upon ... all owners ... their heirs... successors and assigns.") This argument of Petitioners was recognized by the Court of Appeals for the red herring that it is, and was summarily - and properly - rejected. (*Cullen, supra*, at 387) The decision of the Court of Appeals in this regard should be affirmed.

Petitioners also erroneously contend (1) that properties within the Subdivision which were conveyed to Ratcliff by McNeal L.P. prior to the 2007 assignment were not "subject to the Declaration", at least at the time of the assignment, (2) that Ratcliff is "purporting to exercise the rights of the 'Developer' with respect to its portion of the Property, and (3) that McNeal L.P. could therefore not exercise Developer rights to such property. None of these assertions is supported by the evidence in the Record.

The evidence in the Record on this issue is very clear and directly refutes the contentions of Petitioners. Respondents agreed that the development of Phase II would commence with the construction of several private residences, and that Ratcliff, a builder with whom they had worked on other developments, would construct them. The residences were to be constructed primarily on the portion of Wright's Point identified as Parcel "D"

on Exhibit "A" to the Declarations; McNeal L.P. had acquired this property in 2002 from Porter's father, Jimmy Porter. (**R.**, p. 303, ll. 5-17; pp. 679-681) In June of 2005, McNeal and Ratcliff were negotiating for Ratcliff to purchase the land needed for the construction, and platted approximately 20 residential lots for the initial construction effort. (**R.**, pp. 757-761) The legal description makes it clear that the lots were part of Wright's Point, and were subject to the recorded Declarations. (**R.**, pp. 748-751, 762) Indeed, Ratcliff testified, again *in response to questioning from Petitioners' counsel*, that the newly platted additional lots were always considered to be part of Wright's Point and subject to the Declarations:

> Q. Is it your contention that the filing of this plat makes these twenty lots part of the Wright's Point Subdivision?
>
> A. Does it make them? No. *They always were part of Wright's Point Subdivision...* Wright's Point... is made up of a multitude of parcels. And this is one of those... (**R.**, p. 405, ll. 4-11) (Emphasis added)
>
> Q. ...[I]n order to impose covenants on your land...
>
> A. *... they were already subject to that. That's all part of Wright's Point.* It's already subject to that." (**R.**, p. 406, ll. 22-23, p. 407, ll. 4-6) (Emphasis added)

The evidence in the Record is equally clear that Ratcliff never claimed, intended or attempted to assert the Developer's rights concerning these lots; the assertion or implication that he did so to the exclusion of Respondents is simply unfounded. Official records from the Town of Port Royal confirm that Respondent Porter continued to be involved in the development of Phase II, with Ratcliff listed only as a "contact" source for Porter in documents generated in 2006. (**R.**, pp. 735, 736, 740). As noted above, after deeding non-Phase I property to McNeal L.P., Porter still remained involved in both the planning and profits of Phase II; the same is true for McNeal.[8] The Record is devoid of any indication that

Respondents ever intended or attempted to confer any Developers' rights on Ratcliff. Again, Ratcliff's lack of status as Developer for any portion of Wright's Point was clearly demonstrated by his own testimony *as elicited by counsel for Petitioners*:

> Q. Would you agree that you're not the developer of Wright's Point Plantation?
>
> A. Absolutely not.
>
> Q. And do you agree that you do not contend that you are any sort of successor developer?
>
> A. That's whoever Mr. Porter assigns.
>
> Q. And he has not assigned you as a successor developer, has he?
>
> A. No, sir.
>
> Q. Can we agree that you have not succeeded to all of the land in Wright's Point Plantation that is the subject of the covenants?
>
> A. Sure we agree. I only bought that right there (indicating 20 lot plat)...
>
> THE COURT: He has already testified twice to that. He said he's not the developer, it was not given to him. (**R.**, p. 401, ll. 9-17; p. 403, ll. 18-21; p. 404, ll. 3-5)

Obviously, Petitioners' contention that Ratcliff was acting as Developer of any portion of Wright's Point Subdivision is refuted by the evidence in the record, including evidence specifically elicited by their counsel.

Finally, with respect to the Petitioners' contention that the assignment was invalid because it excluded prior obligations of the Developer, the Court of Appeals properly noted that Petitioners "have failed to prove that a successor developer cannot assume the rights of Developer and also disclaim liability for actions of the Developer prior to the assignment of rights." *Cullen, supra*, at 387. Petitioners argue that the Declarations *imply* a successor

developer's "acceptance of both the rights and burdens of the Developer;" they argue that the assignment is "unfair" to homeowners because it permits a unilateral change in the identity of "Developer." Unfortunately for Petitioners, the unilateral change is specifically sanctioned by the Declarations under the "successor developer" language previously discussed. The Record is devoid of any evidence submitted to the trial court by Petitioners to support their theory in this regard. Accordingly, the Court of Appeals was entirely correct; Petitioners have failed to prove that a successor developer cannot assume the rights of Developer and also disclaim liability for actions of the Developer prior to the assignment of rights.

Petitioners argue, however, that they were not required to prove their contention, maintaining that the issue is one of law and not fact, citing *Concerned Dunes West Residents, Inc., vs. Georgia-Pacific Corporation*, 349 SC 251, 562 SE2d 633 (2002). An examination of that case, however, reveals that it does not support Petitioners' contention. Concerned Dunes dealt with the fiduciary duty owed by a developer to homeowners with respect to common areas or amenities conveyed to the homeowners by the developer. There is no contention or proof in the record in this case that Respondents violated any such fiduciary duty. The issue of "rights and obligations" relative to the assignment in this case is between the original Developer and the designated successor Developer. There is nothing in the assignment which eliminates any of the original Developer's responsibilities or obligations to homeowners under the Declarations; the assignment simply relieves the successor developer from such prior obligations. Any obligations or responsibilities to the homeowners from the Developer which existed prior to the assignment remained following

the assignment. There was no change in responsibility, as this remained with the original Developer. The position advanced by Petitioners that they are somehow harmed by the Developer's retention of his obligations is simply without merit.

3. **Petitioners' contentions that the Court of Appeals erred in finding that Wright's Point was not limited to the property in Phase I are also without merit.**

(Issue III) Petitioners contend that Wright's Point is limited under the covenants to the 44 lots in Phase I. Their purpose is to restrict the amenities in Phase I to their sole use, so that owners of properties in subsequent phases would be barred from use of such amenities. Petitioners argue that only the Developer can submit additional phases for development and reiterate their contention that the original Developer's rights were extinguished and that no successor Developer can be established. These arguments have already been addressed above. Both the lower court and the Court of Appeals rejected this narrow view as being at odds with the covenants, when read as a whole. As hereinafter discussed, the rejection of Petitioners' arguments was correct, both under the facts presented and the existing law of this State.

The title of the covenants states that they are "for Wright's Point;" the term "Subdivision" is defined in §1.21, which states that it "shall mean and refer to Wright's Point." The first page of the covenants states that "*all of the real property described in Exhibit 'A' is and shall be ... subject to the covenants...*" Exhibit "A" includes four separate pieces or tracts of land: three tracts identified as Parcels B, C, and D on the Plat recorded in Plat Book 64, at Page 98, and an additional 1.7 acre parcel. The covenants refer to a "Community-Wide Standard" and defines that term as "... the standard prevailing throughout

the *Property* ..." (§1.10) The term "Property" is then defined as "... that tract or parcel of land described in Exhibit A attached hereto and by reference made a part hereof." (§1.19) It is obvious, therefore, that the boundaries of the Wright's Point Subdivision are not limited to the confines of Phase I, and the rulings of the trial court and the Court of Appeals represent a proper interpretation of these sections.

Petitioners' contention that Wright's Point is limited only to the land in Phase I is completely inconsistent with the intent of the covenants, when read in their entirety. The land in Phase I was merely a part of the overall property. The orders of the trial court and Court of Appeals also reference the Master Plan for Wright's Point as supporting their conclusions. (**App**. p. 128.) According to the evidence presented, this plan represented the initial concept for the development, and was the basis for initial approvals by governmental entities. Respondents also prepared a charrette and other marketing materials which represent Wright's Point as consisting of the land depicted on Exhibit "A" to the covenants. (**R**., p. 688; **App**., p. 129). The lower court rulings are also supported by the Plat filed in Book 64, at Page 150, (**R**., p. 602) which is referenced in §1.18 of the covenants. This document is designated, "Plat Showing Wright's Point Phase I" and specifically shows areas delineated for "future development" as part of "Phase II." These areas are readily seen as being part of those shown on the aforesaid Master Plan and charrette, as well as other promotional materials. Furthermore, the plat recorded in Plat Book 64, at Page 98, referenced in Exhibit "A" of the covenants, clearly includes both Phase I and the Phase II "future development" areas depicted on the plat filed in Book 64, Page 150. (**R**., p. 584) Petitioners' argument that additional development would amount to an impermissible

annexation of land into Wright's Point, as well as their argument of non-compliance with §2.03 of the covenants, were properly rejected by the trial court and the Court of Appeals; each determined that §2.03 refers to *development of additional phases* rather than *annexation of additional land or properties*. The prior court rulings are consistent with the language of §2.03, and amply supported by the evidence.

All of the property at issue was obtained by Developer from Lewis H. Wright, *et al.* and Mary P. Logan, as required by §2.03. (**R.**, pp. 588, 592, 597). Section 2.03 simply provides a mechanism whereby the Developer or his assigns can develop supplemental phases, which would necessarily include subdivision of the existing parcels into additional individual lots, which would then also become subject to the covenants. This is in keeping with the plain language of the covenants. In §2.03, "Developer reserves the right to modify, amend, revise and add to the Plat... including, without limitation, the locations and dimensions of the Lots..." Obviously, if the term "Lots" is forever limited to Phase I, as Petitioners contend, this provision would not have been included. Furthermore, §1.13 defines "Lots" as those "shown on the Plat *as may be amended from time to time*." It further states that owners of units on "any multi-family lot shall be considered as an individual lot owner." Under §2.01, "all Lots within the Subdivision" are restricted to single family, multi-family, commercial and mixed uses. Phase I is limited to single family residences; multi-family dwellings could therefore only be erected in a subsequent phase. Also, §1.18 specifically provides that the Plat "may be amended from time to time." The evidence shows that the Plat was, in fact, amended on various occasions. The latest amendments were to delineate 20 additional lots in Phase II. (**R.**, pp. 747, 752, 755). Members of the

Association are limited to Owners of Lots under §1.16. The amendment procedure is designed to bring new members into the Association as future phases are developed and additional lots are delineated and sold. The evidence shows that this process had already taken place at the time of the trial. (**R.**, p. 697-703; **R.**, p. 294, l. 17 - p. 295, l. 13)

The argument that Wright's Point Subdivision is limited solely to the properties included within Phase I is completely inconsistent with an examination of the covenants as a whole and was properly rejected by both the trial court and the Court of Appeals.

4. **Petitioners' contention that the Court of Appeals erred in failing to find that the original Developer of Wright's Point had a duty to transfer control of the development to the individual homeowners in Phase I is also without merit. (Issue IV)** Petitioners contend that the Court of Appeals erred in failing to address their argument that the Developer was obligated to turn over his right to control the affairs of the Subdivision to the property owners of Wright's Point. Petitioners' position is not well taken; it presupposes a "duty" which was not involved in the present case, and erroneously takes as a given that the law of this State conforms to the statements made by Petitioners.

First, the argument ignores the fact that Respondent Porter had created a homeowners association for the purpose of controlling the development once it had been completed. As discussed above, the evidence before the lower courts was abundantly clear that only one phase of the development had been substantially completed and that additional phases of development remained. Control of the Association was retained by the Developer until the development had been completed and marketed to the extent necessary to protect the Developer's investment; this right of retention is specifically recognized under §6.19 (2) of

the Restatement (Third) of Property; Servitude (2005), cited by Petitioners. The Restatement acknowledges that the duty to relinquish control does not arise until "after the time reasonably necessary (for the developer) to protect its interests in completing and marketing the project." There is no date certain for this to happen, and each case must be viewed under its own facts and circumstances in order to determine when such duty arises.

Under §§7.01 and 12.01 of the covenants, that duty did not arise with respect to Porter's right to appoint Association officers or board members until he either surrendered his rights by an express amendment to the covenants or at such time as the last lot in the subdivision had been conveyed to a person other than the developer or a builder. These provisions were examined in detail by both the trial court and the Court of Appeals, both of which correctly determined that neither of the conditions precedent had occurred. Likewise, there was no duty by the developer to turn over his right to appoint members of the architectural committee until all improvements had been constructed and sold to permanent residents. See Declarations, §1.01. Again, this was also examined in detail by the trial court and Court of Appeals, which both found that these conditions precedent had not occurred.

Petitioners again cite *Queens Grant II* as support for their position, along with Alabama and Nebraska cases, none of which are controlling in - and are clearly factually distinguishable from - this case.[9] These cases actually confirm the position of the Respondents: it is entirely permissible for a developer to continue to control a development after transfer of property within the development, and even rights deemed "personal" to him may be asserted after such transfer if the developer retains an interest in the development. As noted above, Respondent Porter clearly had such an interest at the time he transferred properties to Respondent McNeal L.P.

5. **Petitioners' contention that the Court of Appeals erred in permitting the consideration of extrinsic evidence to interpret the applicable covenants is also without merit. (Issue V)** The issues that are the subject of this appeal were before Judge Mullen in the form of a declaratory judgment action. Not only was she asked to interpret applicable portions of the covenants, she was also required to determine the respective rights and responsibilities of the parties. Petitioners have erroneously accused the trial judge of resorting to extrinsic evidence in order to *interpre*t the covenants; however, her Order indicates that her review of the evidence was done either (1) after she had interpreted the applicable provision of the covenants, in order to determine the resulting effect upon the respective rights or duties of the parties, or (2) by way of support or confirmation of her interpretation. This was found to be the case by the Court of Appeals and the decision is a correct one. *Cullen, supra* at 384.

For example, Judge Mullen expressly found that the "language of §§ 7.01 and 12.01 of the restrictive covenants ... is clear and unambiguous." (**R.**, p. 17) She then determined from the express language of §§ 7.01 and 12.01 that there are two instances in which the Developer could be divested of his exclusive power to appoint or remove officers and board members, and proceeded to examine the evidence in order to determine whether or not either of these prerequisites had occurred. Having determined that the evidence failed to prove the occurrence of either prerequisite, she correctly concluded that the Developer had not been divested of his exclusive power to make such appointments or removals. In reaching this decision, her consideration of evidentiary matters outside the confines of the restrictive covenants themselves was not only proper, it was necessary in order to rule on the issues before her.

It is also evident from her Order that Judge Mullen continuously employed this procedure of first looking to the express language and the clear meaning of the specific sections of the covenants, and then examining the evidence presented in order to determine the rights of the parties under the covenants. For example, she recited the language of §1.01 and determined that, from the evidence, the prerequisites of that section for loss of control by the Developer had not been met. **(R.**, p. 18) In reaching her decision concerning the use of the amenities and the ability to develop additional phases in the development, she recited *verbatim* the language of §§1.12 and 2.03, and stated that her finding was "based upon an examination of the restrictive covenants in their entirety." **(R.** p. 22) As to the assignment of developer rights, she quoted §1.12 of the covenants, examined the assignment document and determined that "... the assignment of Developer rights ... was done properly, and was executed in accordance with the applicable language of the covenants." **(R.**, p. 24) Her approach was correct under the law of this State and the Court of Appeals so found. See, e.g., *Gamble et al v. Gamble*, 288 S.C. 210, 215341 S.E.2d 147 (Ct.App. 1986) ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties (which) ... must, in the first instance, be derived from the language of the contract ...); *Ecclesiastes Production Ministries v. Outparcel Associates, L.L.C.,* 374 S.C. at 498, 649 S.E.2d at 502 ("... documents will be interpreted to give effect to all of their provisions.")

Furthermore, Respondents assert, pursuant to SCAR 208(b)(2) and 220(c), that the decision of the trial court and the Court of Appeals relating to this issue should also be affirmed based on the following grounds which appear in the Record. First, virtually all of

the evidence which Petitioners now contend was erroneously considered by the trial judge as being extrinsic was, in fact, evidence which was actually introduced into the case and presented to the trial judge *by Petitioners themselves.*[10] Their argument involves an incredibly contradictory approach - they introduced evidence during (and even after) the trial for the trial judge to consider, and they now object that the trial judge actually considered the evidence they presented to her. Having introduced the very evidence which they now complain about, Petitioners have waived their right to voice such complaints or, alternatively, should be estopped from making such complaints a basis for a writ of *certiorari.*

Secondly, as to any evidence proffered by Respondents, Petitioners did not object to such evidence,[11] and cannot now complain of its admission or to its consideration by the trial judge. "Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal." *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct.App. 2004), see also *McKissick v. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67 (Ct.App. 1996) ("Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.")

This rule also applies when the evidence is proffered by an appellant and/or his counsel, rather than the opposing party. See *Holroyd, supra*, where (as here) the appellant not only failed to object to the evidence proffered by the opposing party, he actually introduced testimonial evidence himself on the same issue; the Court of Appeals held that such conduct constituted a waiver of the right to argue the issue on appeal. In its opinion, the Court of Appeals in *Holroyd* specifically stated:

> ... Requa ... did not object when the evidence was actually introduced during the trial. In fact, the evidence that Requa complains about in this appeal was also elicited from his own testimony ... [This] ... constitutes a waiver of the right to have the issue considered on appeal.

This principle, generally known as the "invited error doctrine,"[12] is viewed in some states as being founded upon the estoppel doctrine rather than the waiver doctrine. (See, e.g., *Norgart v. Upjohn Co.* 21 Cal.4th 383, 403 (1999)) Regardless of its legal underpinnings, however, it is clear that the "invited error" doctrine has long been recognized in South Carolina. For example, in *State v. Goodwin,* 250 S.C. 403, 406, 158 S.E.2d 195 (1967), this Court held:

> [C]ounsel ... elicited the testimony now complained of on cross-examination... The defendant is in no position to complain now of the admission of testimony which was elicited by ... his own attorney.

See also, *State v. Washington,* 315 S.C. 108, 109, 432 S.E.2d 448 (1993) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel."); *Cook v. Federal Insurance Company et al.*, 263 S.C. 575, 211 S.E.2d 881 (1975) (Finding that party was a nonresident upheld where "the evidence of non-residency was supplied by [party] himself.") Our appellate courts have recognized the proposition that, where a litigant essentially gets what he asks for at trial, he cannot later complain for having gotten it. See, *e.g., McKissick, supra*, p. 350 ("Accordingly, Cleckley got what it asked for at trial and cannot now be heard to complain.") This Court should not permit Petitioners to introduce evidence at trial for consideration by the trial judge and then complain in this appeal that the trial judge actually considered that evidence, or that the Court of Appeals affirmed her decision in that regard.

CONCLUSION

The issues stated by the Petitioners were correctly decided by both the trial court and the Court of Appeals. Furthermore, the positions advocated by the Petitioners are not in keeping with the evidence presented to the trial court, with the Record on Appeal or with the existing law of this State. Respondents have invested considerable sums of money in the development of Wright's Point and the defense of this litigation, and have been unable to complete the development in light of the Petitioners' claims that they are entitled to control it. The conduct of Petitioners has also been detrimental to the overwhelming majority of property owners in Wright's Point, who have seen their development stopped due to the litigation filed by Petitioners, and their property values correspondingly diminished.

Finally, as an additional sustaining ground in accordance with SCAR 208(b)(2) and 220(c), Respondents direct this Court's attention to their prior position in the lower courts that the Petitioners lacked standing to bring their claims, which Petitioners contend are derivative in nature. Specifically, Respondents maintain that Petitioners have failed to meet the requirements of SCRCP 23 concerning derivative actions. Respondents direct this Court to their arguments in this regard as set forth on pages 42-49 of Respondents' Final Brief on behalf of Respondents/Appellants in the Court of Appeals, and incorporate such arguments by reference as a part of this Return.

SIGNATURE ON NEXT PAGE

Respectfully submitted,

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September 24, 2014

Endnotes

1. The Record on Appeal includes a reduced image of the original Master Plan (**App.**, p. 128); the reduced image, unfortunately, is blurred and may not be legible. Accordingly, the Court is also directed to the large original which was entered into evidence by the lower court as Defendants' Exhibit 17.

2. Subsequent to the submission of the Record on Appeal in the Court of Appeals, it was discovered that various documents and exhibits had been omitted; accordingly, an Appendix to the Record was filed and is designated herein as "App".

3. Attached to and recorded with the deed of property in Phase I to Petitioner Cullen is a plat of the property being conveyed which was prepared for him and his wife. The plat specifically states that the property is part of "Wright's Point Subdivision, as shown on a plat ... recorded in ... Plat Book 69, Page 122." That earlier plat is part of the Record (**R.**, p. 850). It shows not only the lots located in Phase I, but also the undeveloped portions of the Subdivision which are identified as "Phase II" and "Future Development."

4. See Petitioners' Brief on Certiorari, p. 9.

5. *Ibid,* p. 13.

6. *Ibid.*

7. **R.**, p. 255, ll. 14-23; p. 271, ll. 10-12; p. 280, ll. 7-11; p. 281, ll. 10-15; p. 283, ll. 14-20; p. 285, ll. 16-21; p. 294, ll. 4-8; p. 298, ll. 20-24; p. 319, ll. 8-20; p. 324, ll. 2-6; p. 327, l.11 - p. 328, l.5; p. 353, l. 16 - p. 354, l.1; p. 387, ll. 12-24; p. 392, ll. 16-24; p. 393, ll. 12-23; p. 394, ll. 13-23; p. 415, ll. 15-18; p. 423, ll. 12-22; p. 425, ll. 1-17; p. 429, ll.2-4; p. 460, ll. 12-19; Def. Tr. Ex. 20; p. 888.

8. See, e.g., **R.**, p. 738; p. 401, ll. 20-22; p. 415, ll. 15-18; p. 418, ll. 7,8.

9. For example, *Orange Beach Marina, Inc. v. Warner,* 500 So. 2d 1068 (Ala. 1986), cited by Petitioners, involved an attempted amendment to covenants by a developer with no continuing interest in the development; these elements are not present in the case *sub judice*. *Smith v. First Savings of Louisiana FSA,* 575 So. 2d 1033 (Ala. 1991), also cited by Petitioners, involved a developer who had divested himself of all interests - proprietary and pecuniary - in the development; as discussed, that is contrary to the developer in Wright's Point. In *Beaver Lake Ass'n v. Beaver Lake Corp.* 264 NW2d 871 (Neb. 1978), also cited by Petitioners, the developer transferred all his property interests in the development to his mortgagee in lieu of foreclosure and then attempted to use his power to control the Association to further its own interests, which were in conflict with those of the other owners - clearly facts not present in the case *sub judice*.

10. Petitioners introduced 70 exhibits for consideration by the trial judge (72 were initially proffered, but 2 of these, Exs. 58 and 59, were withdrawn). Their counsel moved at the conclusion of the trial that "...all of the plaintiffs' exhibits that have been marked are received in evidence." (**App**. 20, ll. 18-21.) These exhibits were in addition to the testimony they elicited from 9 witnesses they called to the stand. Furthermore, more than 3 months following the trial, they asked the trial judge to consider the post-trial assignment of Developer's rights as "newly discovered evidence."

11. At the conclusion of their case, Respondents' counsel offered into evidence the exhibits previously marked for identification only. The trial judge then asked counsel for Petitioners if he had any objection and he replied, "No, Your Honor." (**R.**, p. 467, ll. 4 - 11.)

12. See, *e.g.*, 5 Am.Jur.2d, *Appeal and Error*, §713 ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court ... to commit."), §717 ("A party may not complain on appeal about the improper admission of evidence which he himself has introduced or elicited...")

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IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge
C/A # 2004-CP-07-633

S.C. Court of Appeals
390 SC 470, 702 SE2d 378 (Ct. App. 2010)

Robert L. Cullen, Andrew A. Corriveau,
Andrea Hucks, ... Petitioners,

-vs-

J. Bennett McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc. ..... Respondents,

CERTIFICATE OF COUNSEL

I certify that the Respondents' Brief on Certiorari complies with SCACR 211.

September 24, 2014

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PROOF OF SERVICE

I certify that I have served the **Respondents' Brief on Certiorari**, by depositing three (3) copies in the United States Mail, postage prepaid, on September 24, 2014, addressed to the attorneys of record for the Appellants, John E. North, Jr., 916 Bay Street, Suite 100, Beaufort, South Carolina 29902.

September 24, 2014

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