

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

S.C. Court of Appeals
390 SC 470, 702 S.E. 2d 378 (Ct. App. 2010)

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

v.

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

REPLY BRIEF OF PETITIONERS
ON CERTIORARI

John E. North, Jr. #06570
North & Black, PC
916 Bay Street, Suite 100
Beaufort, S.C. 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorneys for Petitioners

Other Counsel of Record:

Joel D. Bailey
P.O. Box 1437
Beaufort, S.C. 29901
(843) 525-6090
Attorney for Respondent

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ARGUMENT

I. The Respondents' Statement of the Case and Statement of Facts Should Be Disregarded.

Pursuant to Rule 208(b)(1)(C), SCACR, the Statement of the Case in a party's brief is not to contain "contested matters" and, pursuant to (b)(4) of that Rule, references to the record must be included to support all facts asserted.

The Statement of the Case presented to this Court by Respondents ("Respondents") contains numerous matters in dispute presented as "facts", without the required supporting references to the record. By way of example, the Respondents assert that "from its inception" Wright's point was to be a multi-phase, mixed use development. (Respondents' Brief, p. 2). However, the "Master Plan" on its face was created after the Lots were platted and sold to Owners and includes drawings dated in December, 2004, after the original developer had conveyed the undeveloped land to third parties. (R. p. 705 – 730; R. 711).

Further, on that Master Plan, the real estate at issue here was shown as existing, subdivided lots and described as an "Existing Neighborhood" which "shall serve as a distinct neighborhood within the overall master plan", supporting Petitioners' contentions in this litigation. (R. p. 864)

Similarly, the Respondents assert in their Statement of the Case that: "McNeal L.P. is currently engaged as the developer of Wright's Point. (Respondent's Brief, p. 4). Whether or not McNeal is the "Developer" is the issue at the crux of this litigation and is not a fact.

The Respondent's Statement of Facts is a hodgepodge of argument or contentions presented as "facts", without the required citations to the record. In the majority of instances, if there is a citation to the record, it is only to the findings of the lower court. However, in this proceeding, the appellate court makes its own findings of fact based on

the record. *Cove Homeowners Ass'n, Inc. v. Di Pietro*, 368 S. C. 254, 258, 628 S. E. 2d 284, 286 (Ct. App. 2006) *reh. denied; cert. denied*. *Seabrook Island Property Owners Association v. Marshland Trust, Inc.*, 338 S.C. 655, 661, 596 S. E. 2d 380, 383 (Ct. App. 2004). Accordingly, the lower court's findings of fact are not conclusive or binding on this Court, and its opinion cannot be relied upon as support in the record for Respondent's contentions as to the facts. *Santoro v. Schulthess*, 384 SC 250, 681 S. E. 2d 897 (Ct. App. 2009)

Respondents assert as "fact" their view of how the ultimate issues in this litigation should be resolved: 1) that the common areas and amenities were to be shared by all owners; 2) that none of the conditions requiring the Developer to divest control of the Association and its committees had occurred at the time of trial; 3) that Porter had the right to continue to control the Association and had not lost that right by conveying the property to McNeal; 5) that the Petitioners attempted a "coup" and interfered with the Developer's control, which constituted a "violation of their contractual obligations"; and 6) that the Petitioners were motivated to act by their interest in using HardiPlank as a building material. They conclude with the assertion, as fact, that the Petitioner's arguments are "spurious". None of this is a dispassionate presentation of fact properly cited to the record.¹

Although the Respondents include in their brief a "Statement of Issues on Appeal", the issues presented for this Court's decision are those framed by the Petition for Certiorari.

To the extent that the Respondents' Statement of the Case and Statement of Facts are merely argument or purported facts not cited to the record, this Court should disregard them.

¹ Respondents take no issue with Petitioners' Statement of the Facts and, accordingly, this Court is entitled to view them as true and undisputed.

² The Respondents contend that J. Bennett McNeal, personally, is a Director and he does not personally own any Lot in the Subdivision or any of the undeveloped land adjacent to the Subdivision.

³ The lower court's order, which the Petitioners challenge, precluded the elected directors from continuing to

II. Petitioners' Standing

Respondents attempt to portray the Petitioners as “renegade” homeowners, who are not representative of the other members of the community, is unsupported by the record and is wholly irrelevant to the issues presented in this proceeding.

The original seven Plaintiffs were unanimously authorized by 28 of the then existing 44 lot owners in the Subdivision to pursue this litigation to determine their rights under the Declaration. (R. p. 189, line 11 – R. p. 190, line 18). The fact that four of the original seven later chose not to continue to incur the expense of litigation or were intimidated by the counterclaims filed against them is completely irrelevant to the issues raised by the Petitioners.

The Respondents have cited no authority, and there is none, that deprives the Petitioners of their right to seek a remedy in this Court merely because some of the original plaintiffs are no longer participants in the litigation.

The Respondents further contend that Petitioner Corriveau is no longer a “real party in interest” based upon the sale of his residence more than ten years after this litigation was commenced. However, the Petitioners' claims do not arise only by virtue of ownership of real estate. As alleged in the Complaint (R. p. 30, ¶ 12), Petitioner Corriveau and the other Petitioners were elected by the Lot owners to serve as Directors of the Association. They were authorized by those Lot owners to bring the current action and they filed this proceeding as the duly elected Directors of the Association. While only Lot Owners can vote for Directors, the Declarations do not require that Directors of the Association be

“owners”.² There is nothing in the Declaration that disqualifies Petitioner Corriveau from acting in that capacity until his successor is duly elected.³

As a Director, Petitioner Corriveau has standing to seek the declaration of rights that he has sought on behalf of the Members of the Association. He has legal obligations to the Members of the Association that elected him as a Director to do so. He has rights and claims arising from the Respondents wrongfully exerting control of the Association for the last ten years. He has a claim for the costs and attorney fees that he has expended pursuing this matter on behalf of the Members of the Association. The suggestion that the Petitioners are not real parties in interest is without merit.

III. McNeal Acquired No Rights by Virtue of the Assignment.

Despite Respondents’ attempts to obfuscate with irrelevant facts and argument, the issue before the Court is whether the means by which McNeal L.P. purports to have succeeded to the original Developer’s rights is legally sufficient under the law and in compliance with the specific provisions of the Declaration.

Respondents have conceded that the deeds from the Anthony R. Porter (“Porter” or “Developer”) to McNeal and from the Developer’s father to McNeal, L.P. did not contain language conveying the rights of the Developer, that the Developer did not intend to relinquish those rights at that time, and that the Developer did not purport to assign such rights until he executed the Assignment of Developers Rights in 2007. (Respondents’ Brief, p. 23-24). Respondents have further conceded that the only source of McNeal’s purported rights is the Assignment. In their Brief, Respondents state that “In the present case, McNeal did not become a successor developer through the deeds from Developer; rather McNeal became

² The Respondents contend that J. Bennett McNeal, personally, is a Director and he does not personally own any Lot in the Subdivision or any of the undeveloped land adjacent to the Subdivision.

³ The lower court’s order, which the Petitioners challenge, precluded the elected directors from continuing to act on behalf of the Association, but until that order is final, the Petitioners retain that status.

successor developer through the document designated “Assignment of Developer’s Rights”. (Respondents’ Brief, p. 28).

These concessions doom the position of the Respondents in this proceeding. At the time of the Assignment, under South Carolina law, the rights reserved to the Developer in the Declaration were extinguished and could not be conveyed to McNeal by the Assignment or any other way. Further, as set forth in the following section, the Declaration provided a specific mechanism for qualifying a “Successor” to the Developer, and the Assignment did not and could not comply with those requirements.

It is undisputed that, as of December, 2003, Porter, the “Developer” defined in the Declaration, and his father, Jimmy Porter, who purported to also be a Developer, had conveyed all of their interest in the land subject to this litigation. (R. p 642; R. p. 683; R. p. 683). Those conveyances were made years prior to the attempts to “assign” their developers’ rights. (R. p. 162).

Despite their lengthy argument attempting to categorize the rights at issue as real rather than personal covenants, the Respondents’ position is that McNeal’s ability to exercise the rights of the “Developer” arise only from the purported “Assignment of Developer’s Rights”, not on his ownership of land subject to the Declaration. (Respondents’ Brief, p. 28).

Accordingly, the Respondents have tacitly admitted that the rights at issue are personal rights.

To be construed as a real covenant which runs with the land, it must “touch and concern” the land conveyed, and affect the use of the land by the *grantee* or alter the rights of the *grantee* that would otherwise flow from ownership.

Covenants which are personal and collateral to the land do not run with the land. (citation omitted). So a covenant is personal when it has no relation to the land conveyed (citation omitted) or is not connected with the title (citation omitted) and all covenants concerning lands are not real covenants.(citation omitted).

Epting v. Lexington Power Co., 177 S.C. 308, 181 S.E. 66, 71 (1935).

The Declaration, itself, characterizes the powers at issue as “rights” of the Developer: 1) the right to “modify, amend, revise and add to the Plat” (R. p. 41, ¶ 2.03; 2); the right “develop and submit additional phases to this Declaration” (R. p. 41, ¶ 2.03); 3); the right to “appoint and remove all members of the Board” of the Association and to control the Association (R. p. 47, ¶ 7.01; R. p. 59, ¶ 12.01); 4) the right to amend the Declaration (R. p. 59, ¶ 12.02; and 5); and the right to grant variances of the provisions of the Declaration (R. p. 63, ¶ 12.14).

These developers’ rights do not have any relation to the land conveyed to the Petitioners and other owners, nor do they affect title to that land conveyed. They do not affect the Petitioner’s use of their own land or alter their ownership rights. Even the Assignment under which McNeal claims rights characterizes what is conveyed as the “rights” of the Developer.

Under South Carolina law “rights” reserved to a developer are interpreted as personal to the developer and to be exercised only by him.⁴ See: *Queen’s Grant II v. Greenwood Development*,⁵ 368 S. C. 342, 826 S. E. 2d 902 (Ct. App. 2006) [grantee’s obligation to pay assessments for upkeep construed as a real covenant running with the land but developer’s right to amend covenants is a personal right extinguished when developer no longer has an interest at stake in the land.]

The seminal case on this issue is *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E. 2d 834 (1992). In that case, the owner of land who had reserved a right to approve the architectural

⁴ The most commonly discussed of these rights are the rights to amend the covenants or to waive restrictions in them.

⁵ Respondents argue that *Queens Grant* supports their position. The court in *Queens Grant* found that the right of the developer to amend the covenants was, in fact, a personal right, but that it was not extinguished because the Developer had a continuing property interest in the development. That is not the case here. In *Queens Grant*, the developer continued to own and operate all common areas, easements, and to bill each property owner its share of expenses. In this case, the Developer had conveyed all such assets to the Association and had no retained property interest other than a residence and adjacent lot, both of which were owned by a personal residence trust. Neither the Developer nor his father, Jimmy, personally had title to any land after December, 2003.

design of all buildings – a personal right – attempted to enforce this right after the owner had sold the land to which the right attached. This Court held that “the grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of the restrictive covenant.”

AJG Holdings, LLC v. Dunn, 392 S.C. 160, 708 S.E. 2d 218 (Ct. App. 2011) *Cert.*

Granted, involved the power of a developer reserved in covenants to assign the right to consent to commercial uses in a subdivision. After the developer had sold all of the land to which the covenants applied, the current owner of the land acquired an “assignment” of that right of consent and purported to allow commercial uses. Based upon *Queens Grant*, the Court held that, because the original developer no longer had any “property interest” in the subdivision, she had no rights to convey by way of assignment. “Because Sasser did not retain any property interest in the development, she did not retain developer’s rights.” *Id.* at 166, 222. The *AJG* Court further held that the result would be the same, whether the covenant at issue was real or personal. *Id.*

Under the rule of *McLeod*, *Queen’s Grant* and *AJG Holdings*, when the Developer sold the land to which the Developer’s rights attached, those rights were extinguished and McNeal L.P. took nothing by virtue of the assignment.⁶

Respondents attempt to avoid the rule of *Queens Grant* and *AJG* by asserting that, at the time of the Assignment, Porter had both a property and a meaningful financial interest in the development. (Respondents’ Brief, p. 20, p. 21, p. 22). These assertions are both disingenuous, and even if credible, do not meet the “property interest” required by *AJG*.

⁶ Respondents cite *Harbison Community Association v. Mueller*, 319 SC 99, 459 SE 2d 860 (Ct. App. 1995) in support of their position that the rights at issue here run with the land. However, at issue in *Harbison* was the obligation to pay assessments for the upkeep of common areas and amenities. The Petitioners do not dispute that such covenants are real and run with the land. Therefore, *Harbison* is not dispositive here.

The only property interest identified by Respondents in their Brief is Porter's alleged ownership of a personal residence and adjoining lot within the subdivision. However, as the record reflects, the residence and lot purportedly owned by Porter at the time of the 2007 Assignment had actually been conveyed to an irrevocable trust 2001. (R. p. 646 – R. p. 649). Thus, at the time of the Assignment, neither Porter nor Jimmy had any "property interest" in the development.

As to Porter's alleged continued "financial interest" in the development, Respondents contend that Porter had "involvement" in planning subsequent phases of the development, and received \$10,000 as a fee for his services shortly before trial. (Respondents' Brief, p. 22).

The Respondents cite no authority for the proposition that being a "consultant" or having a financial interest in another developer's activities is "a property right" in the subdivision within the scope of AJG and *Queen's Grant*. Further, it is clear that Porter's "financial interest" in the development activities of McNeal and Ratcliff, the then owners of the undeveloped property, is illusory. Porter was not responsible for any of the expenses of subsequent development (R. p. 323, lines 17 – 21), had no equity in the future development (R. p. 324, lines 1- 13), and the \$10,000 fee paid to Porter by McNeal was for "consulting". That consulting fee was the only amount ever paid to him in the years after he sold the undeveloped land. (R. p. 327, lines 23 – R. p. 238, line 10). Porter admitted at trial that he was not an equity participant in any subsequent phase of the Subdivision and had no legal right to any of the income or profits from subsequent development. (R. p. 324, lines 1-13).

Ratcliff, who purchased part of the undeveloped land from McNeal and attempted to plat and develop it as part of the Subdivision, had no business relationship Porter, nor any business arrangements to share profits with McNeal, L.P., the purported "successor developer". (Ratcliff, R. p. 373, line 6 – p. 375, line 17). Neither Porter nor McNeal had any interest in the company owned by Ratcliff. (Ratcliff, R. p. 375, line 15 – p. 376, line 12). The expense of

subdividing and developing the undeveloped land into lots for sale was paid by Ratcliff's company. (Ratcliff, R. p. 397, lines 5 -11). All of the profits or losses that relate to the subdivision of the 20 new lots inured solely to Ratcliff, his wife, and his bank. (Ratcliff, R. p. 397, line 24 – p. 398, line 7).

Even if Porter had retained a legal right to a share in the profits of any future development, such a right is not sufficient for him to retain his developer rights after the land is conveyed to third parties. In *McLeod v. Baptist, supra*, this Court adopted the majority rule and noted that “the grantor lacks standing to enforce a covenant...when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant.” 315 S.C., at 247. Accordingly, the attempt of the Respondents to portray the Developer as having some financial interest in the future development, even if they had succeeded in doing so, would be insufficient to preserve the Developer's rights with regard to land that had been conveyed to third parties.

In discussing the “property interest” necessary for a developer to retain personal rights, the *AJG* Court noted:

Appellants are unable to point to any interest Sasser retained in the property other than her purported right to amend the restrictive covenants. Their argument is a circular one: Sasser has a sufficient property interest in the development to allow her to reserve developer's rights because she reserved to herself developer's rights. As Queen's Grant makes clear, the reservation itself is allowed only when the five conditions are met, and one of those conditions is that the developer possesses *a sufficient property interest in the development*. For this condition to be a meaningful one, the property interest must necessarily be something more than a purported reservation of developer's rights. (Emphasis supplied)

Id. at 166, 222

Precedent requires that, in order to retain his personal rights reserved in the relevant covenants, a developer must have a continuing interest in the “property”. Porter had no interest in the land at the time he executed the Assignment of Developers' Rights. Accordingly, just as

in *AJG*, the rights he purported to assign had been extinguished years earlier and McNeal received nothing as the result of the Assignment.

Respondents' argument that developer's rights are separable from the property to which they apply and that Porter intended to retain them, and thus still possessed them in 2007 (Respondents' Brief, p. 23), is completely contrary to South Carolina law. In *AJG Holdings*, the Court characterized the argument that the developer had a continuing property right because she retained her development rights as "circular" and unavailing. All South Carolina law on the point makes it clear that, without an interest in the real estate to which the rights apply, a developer cannot exercise those rights.

Respondents further argue that, because the Declaration states that all covenants run with the land and that the deeds received by Petitioners further incorporated the Declaration, that no further inquiry is required. First, whether the covenants do or do not run with the land is question of interpretation for the Court. The language of the Declaration does not change their legal character. Second, while the Petitioners certainly took their home sites subject to the Declaration, they did not thereby consent to Respondents' asserted interpretation of them.

Respondents' attempts to distinguish the *Peoples Federal, Bank of Ravenswood*, and *Fairways* decisions are similarly unavailing. The common thread, whatever the outcome of these cases, is acceptance of the well recognized principle, as applied in *Baptiste, Queens Grant*, and *AJG Holdings*, that a developer loses personal rights upon disposition of the real property to which those rights apply.

IV.

The Assignment Did Not Comply with the Requirements of the Declaration to Qualify a Successor Developer.

Not only did Porter have no "developer's rights" to convey to McNeal, but the Assignment was further ineffective to empower McNeal as a successor developer because it did not comply with the specific provisions of the Declaration.

The Declaration provides a specific means by which a “successor” may become the “Developer” as defined therein. Under ¶1.12 of the Declaration (R. p. 39), the “Developer” is either Anthony R. Porter or his “successor in interest or “successor in title” to “all of the Property then subject to this Declaration and provided in the instrument of conveyance” to any successor “expressively” (sic) designates any such successor as “Developer”. Respondents have conceded that the rights at issue were derived from the Assignment, and not the deeds from the Porters to McNeal and to McNeal, L.P.

As previously argued in more detail on page 14 of Petitioners’ Brief, the unambiguous language of ¶1.12, of the Declaration (R. p. 605) provides that, in order to act as a Successor Developer, the successor must succeed to the **Developer’s interest in all of the Property** subject to the Declaration. The Declaration does not allow a successor developer to act as such only based upon the purported acquisition of the developer’s rights. The specific language employed in the Declaration imposes three conditions on who can become a Successor Developer.

- a. the successor Developer must succeed to “all of the Property then subject to this Declaration”;
- b. the instrument conveying the interest in all of the “Property” must designate any such successor as the “Developer”; and
- c. the grantor of such conveyance must be the “Developer” at the time of the conveyance is made.

“Property” is defined in ¶ 1.19 of the Declaration by reference to Exhibit A, on which both the 44 developed Lots and the undeveloped land are described. (R. p. 605).⁷

It is undisputed that the deeds conveying Parcels B and D to McNeal and McNeal L.P. did not designate either grantee as “Developer” as required by the Declaration. It is further

⁷ At no point was any Property released from the Declaration. The Respondents’ suggestion at page 28 and 29 of their Brief that the Petitioners argued that the Lots were not subject to the Declaration is absolutely false. Respondents agree that the Declaration applies to both the 44 Lots and to the undeveloped land conveyed to McNeal and rely upon its provisions as support for their positions.

undisputed that the Assignment did not purport to convey the “property” subject to the Declaration, but only the “rights” of the Developer. (R. p. 162)

Under the specific and unambiguous language of the Declaration, McNeal L.P. cannot be a Successor Developer because none of the three conditions established in the Declaration were met. The deeds by which McNeal L.P. acquired the “Property” did not designate it as Successor Developer”, the grantor of Parcel “B” was McNeal, personally, who conveyed to McNeal, L.P., and not the Developer, and the Assignment was merely an assignment of purported rights, which had long been extinguished and was not a conveyance of all of the “Property” subject to the Declaration.

Highlands Property Owners Association, Inc. v. Shumaker Land, LLC, 397 SC 432, 724 S. E. 2d 685 (Ct. App. 2012), is directly on point. In that case, the Court made it clear that a subsequent taker of property is not a “successor developer” when the conveyance by which he succeeds is not in compliance with requirements of the applicable covenants. In *Highlands*, the applicable covenants required that a successor developer take his interest pursuant to an instrument that “expressly provides” that the developer’s rights are conveyed. The deeds by which the purported successor obtained the property did not include that language. The Court held that because the deeds did not “expressly convey the Declarant’s rights” to the successor as required by the covenants, the purported success could not exercise them.

Further, as in this case, the purported successor attempted to cure this defect through a belated “assignment” of rights. The Court held: ...”at the time it executed the Assignment to Shumaker LLC, HDLP no longer retained any rights, title, or interest to the seen lot as the limited partnership already transferred its interest in the property to Shumaker on July 28, 2006. As a result, HDLP’s subsequent attempt to execute the August 28, 2008 Assignment is invalid”. *Id.* at 438, 688, 689.

Under any construction of the facts, McNeal L.P. did not succeed to the Developer's interest in "all of the Property" subject to the Declaration and could not be a Successor Developer of any of the undeveloped land pursuant to the explicit requirements of the Declaration.

**V.
The Declarations Apply to All Phases of the Subdivision.**

At page 28 and 29 of their brief, Respondents suggest that the Petitioners contend that the Declaration does not apply to land outside of Phase I. That argument completely mischaracterizes Petitioners' position.

To make it perfectly clear, the Petitioners agree that the Declaration applies to all of the Property defined in the Declaration. Petitioners rely on the language of the Declaration and applicable law in support of their positions. Petitioners' argument is that because the term "Property" included both the developed and undeveloped portions of the land, any successor developer was required to succeed "to all of the Property then subject to this Declaration". (R. p. 39, ¶ 1.12). Because some of the Property (lots in Phase 1) had been subdivided and sold, it was a legal impossibility to have another person or entity "succeed to all of the Property then subject to the Declaration". In addition, because only the Developer had the personal right to take some undeveloped portion of the Property and subdivide it into Lots, once all of the undeveloped property was conveyed to third parties without meeting the requirements of the Declaration and without simultaneously conveying the Developer's personal rights, those rights were extinguished as to the land conveyed. The Developer simply cannot separate ownership of the land from the corresponding personal rights to control that land. To find otherwise opens the door to multiple purported developers attempting to exercise the rights of the original developer.

Finally, as previously set forth in their Brief, Petitioners do not believe that it is their burden to “prove” that allowing a subsequent developer to assume only the rights and not the obligations of its predecessor is unreasonable. The language of the Declaration providing for successor developers contemplates stepping into the shoes of the Developer under certain circumstances, not allowing rights and liabilities to be carved up piecemeal, leaving the property owners “holding the bag”.

VI.

No Additional Lots Have Been Developed and Submitted to the Subdivision and There is No Successor Developer with the Power to Do So.

It is further undisputed that the original Developer did not amend, modify or add to the existing Plat of 44 Lots or in any other way comply with ¶ 2.03 and 2.04 of the Declaration prior to the time that the undeveloped property was sold to McNeal and then subsequently transferred, in part, to Ratcliff. Because the Developer and McNeal did not comply with the requirements of the Declaration, McNeal L.P. is not a “successor developer” under ¶ 1.12. Because he acquired no rights by virtue of the Assignment, McNeal is legally incapable of exercising the Developer’s rights. Once the land was conveyed without the simultaneous assignment of Developer rights that strictly complied with the requirements of the Declaration, McNeal, L.P. cannot be a successor Developer or acquire the rights of the Developer.

Ratcliff, who at the time of trial owned some of the undeveloped property and platted it himself into purported Lots, even though only the Developer can create additional Lots, specifically disclaims the status of Developer (Respondents’ Brief p. 30) and thus clearly has no right to “develop and submit” additional phases.

In their Brief at page 35, Respondents state that the “Plat” was amended to add 20 Lots in Phase II. However, they fail to note for the Court that that plat did not amend the official Plat, as defined by the Declaration, and was filed by Ratcliff, who has no authority under the Declaration to do so. (R. p. 747) They further disingenuously state that the amendment

procedure designed to bring new Members into the Association had already been begun at the time of trial. (Respondents' Brief, p. 36) However, the Exhibit to which they refer in support of this statement is a Supplemental Declaration, signed by Porter and Jimmy, in February, 2007, immediately before trial, purporting to subject the Ratcliff property that they did not own to the Declaration. (R. p. 697) Not only had the Porters sold all the remaining undeveloped land subject to the Declaration long before, the Supplemental Declaration is not the process prescribed by the Declarations to add Lots to the Subdivision.

In their argument, the Respondents continuously blur the distinction between property subject to the Declarations and how undeveloped property, which may be subject to the Declaration, can be "developed and submitted" as an additional phase of the Subdivision. If all of the undeveloped property were "already" a part of the subdivision, the language of ¶ 2.03 would be superfluous.

It is undisputed that, at the commencement of the trial of this case, only the property in Phase I of the development had been platted into Lots. The remaining property subject to the Declarations was undeveloped. The Declaration provides that the Subdivision is described by the "Plat" as amended from time to time. (R. p. 39, ¶ 1.18) The original Plat of the Subdivision depicted the 44 Lots of Phase I. The Developer never amended the Plat to add additional Lots or phases to the Subdivision. (R. p. 289: 1-17). Once the Developer conveyed the undeveloped land to third parties, his personal right to amend the Plat and to add Lots to the Subdivision was lost, both because the Developer failed to follow the strict limitations of the Declaration with regard to creating a Successor Developer and because the attempt to do so occurred five years after the Developer had conveyed his property interest in the undeveloped land. (R. p. 41, ¶ 2.03 and 2.04).

Accordingly, the Subdivision consists of simply the original 44 Lots. McNeal, L.P. is free to develop the undeveloped land that it owns, but it cannot have that land added to the

Subdivision so that the future owners of the undeveloped land can use the amenities of the Subdivision that have been maintained at the expense of the owners of Lots in Phase I for more than ten years.

Because no one could exercise the rights of the Developer after the undeveloped land was sold, no further lots can be “developed and submitted” to the subdivision.

VII. The Owners of the Existing Subdivision are Entitled to Their Own Governance.

As previously argued, at the time of trial, the original Developer did not have title to any of the land in the existing 44 lots subdivision and the adjacent, undeveloped property had been sold to others. Despite Respondents’ position otherwise, Porter had no property interest and no financial interest in the remaining land after 2003.

As has further been established, there is no person or entity that can become a “successor developer” as described by the Declaration, nor did Porter have any rights to assign with respect to the subdivision and McNeal derived no rights from such an Assignment.

Accordingly, the rule of the Restatement requiring a relinquishment of control by a developer when the developer has no further financial interests at stake is applicable here. As a result of the lower court’s ruling, the Lot Owners have been subject to the control of McNeal with respect to all aspects of their separate neighborhood when neither Porter, McNeal, nor Ratcliff have any financial interest at stake in the existing 44 Lot Subdivision and when all of the financial consequences of the decisions made affect only them. The Restatement rule is reasonable and applicable under the facts of this case. The Lot owners should be entitled to elect their own representatives and participate in the management of the neighborhood.

VIII. The Invited Error Doctrine Has No Application to the Issues Presented.

Respondents argue at page 38 of their Brief that the invited error doctrine precludes analysis of whether or not the lower court erred when it considered extrinsic evidence in

construing the Declaration, and whether or not the Court of Appeals incorrectly affirmed the decision.

The “invited error doctrine” precludes later objection to the admissibility of evidence that was not objected to at the time. The Petitioners are not objecting to the admissibility of evidence, but to the improper manner in which that evidence was used by the lower court.

The fact that Petitioners called the Developer as a witness does not mean that the Developer’s testimony could properly be used to interpret unambiguous covenants. It certainly does not change the rules of contract construction that require that the rights of the parties under the Declaration to be determined on the face of the Declaration itself unless that document is ambiguous, and if so, any doubts resolved in favor of the Petitioners and other property owners. “The subjective intentions of [the developer] in transferring the properties . . . are not relevant.” *Highlands* at 436, 688.

The “invited error doctrine” has no relevance to whether or not the trial court improperly considered extrinsic evidence, failed to accord the Petitioners and other property owners the presumptions to which they were entitled in the case of ambiguity, or to otherwise fail to properly apply the rules of construction applicable to the Declaration.

CONCLUSION

McNeal relies solely on the 2007 Assignment of Developer’s Rights as the basis for his ability to exercise the rights reserved in the Declaration to add Lots to the Subdivision and to control the Association which owns the common areas and amenities in the Subdivision. Under South Carolina law, it is clear that the Developer’s rights that McNeal desires to exercise were personal to the original Developer and were extinguished when the Developer no longer had a “property interest” in the undeveloped land.

As of 2003, the original Developer had conveyed all of the Lots in the subdivision, and had conveyed all of the adjacent undeveloped land, thereby unquestionably divesting himself of any “property interest” in the Subdivision. It was not until 2007 that the purported Assignment of Developer’s Rights was executed in favor of McNeal, long after those rights had been extinguished. In addition, McNeal assumed only the rights of the original Developer, but disclaimed existing obligations. At that time, it was factually impossible for McNeal to comply with the Declaration’s requirement that a successor developer succeed to “all of the Property” subject to the Declaration because not only were the Lots owned by others, but even a portion of the undeveloped land subject to the Declaration was owned not by McNeal, the purported successor, but by Ratcliff.

The Respondents’ attempts to back and fill this void by conjuring up a \$10,000 “consulting” fee and an amorphous and undocumented arrangement for Porter to receive something from McNeal’s development activities, even though no subsequent payment was ever made. That is not the “property right” in the development required by *Baptiste*, *Queen’s Grant*, and *AJG Holdings* to avoid the consequences of Porter’s sale of all of the property to which his Developer’s rights attached.

Under both South Carolina law and the unambiguous language of the Declaration, McNeal is not the “successor developer” and cannot exercise any of the Developer’s rights. When the trial court found otherwise and the Court of Appeals affirmed, both tribunals failed to properly apply South Carolina law and the provisions of the Declaration.

Although the Respondents suggest that a reversal would be unjust to McNeal, Petitioners suggest that it is just the opposite. Without regard to the outcome of this litigation, McNeal L.P. has what it always had, and that is land available for development. What it will not have is the ability to enhance the value of its land at the expense of the

Petitioners and the other owners of Lots and Members of the Association, nor the right to control their destiny.

Petitioners respectfully request that this Court review the Opinion of the Court of Appeals and reverse its decision as contrary to South Carolina law and the provisions of the Declaration. Petitioners renew the prayer of the Petitioners' Brief on Certiorari.

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

John E. North, Jr.

John E. North, Jr. #06570
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorneys for Petitioners

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge
Civil Action No.: 2004-CP-07-633
390 S.C. 470, 702 S.E. 2d 378 (Ct. App. 2010)

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

v.

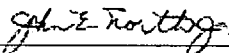
J. Bennett McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association,.....Respondents.

PROOF OF SERVICE

I hereby certify that on the 6th day of October, 2014, Petitioners served a copy of the Petitioners' Reply Brief on Certiorari via United States Mail, first class, postage prepaid, addressed as follows:

Joel D. Bailey
PO Box 1437
Beaufort, SC 29901

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



John E. North, Jr., Bar No. 06570
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Petitioners