THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707
Appellate Case No. 2013-000452

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ... Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the .....Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst

H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, ... Third-Party Defendants.

PETITION FOR REHEARING

Under Rule 221(a) of the South Carolina Appellate Court Rules, Appellants petition for rehearing of the Court's opinion in *Hanold, et al. v. Watson's Orchard Property Owners Association, et al.,* Op. No. 5312 (S.C. Court of Appeals, filed April 15, 2015) (Shearouse Adv. Sh. No. 15 at 31)).

Rehearing is proper for several reasons: (1) the Court misread the key provision in the Restrictions & Covenants ("R&Cs") to require "developed lots" and not simply to require that the Property have been "developed into lots"; (2) the Court failed to follow Supreme Court precedent in *Anderson v. Buonforte*, 365 S.C. 482, 497, 617 S.E.2d 750, 758 (2005), and adopt the "equally logical" interpretation urged by Appellants since it was less restrictive; (3) the Court did not consider the evidence from

the trial itself in determining the "usual and customary" meaning of "developed"; (4) the Court's holding that the language was unambiguous is implicitly contradicted by the Court's consideration of extrinsic factors; (5) since the language was at least ambiguous, the Court should have considered the dispositive testimony of the drafter of the language; (6) since the language was at least ambiguous, the Court should have considered the overwhelming evidence that the Property at issue had been "developed into lots"; and (7) the Court should have found that S.C. Code §30-50-240 and the Greenville County Subdivision Regulations do not support the finding of the trial court but in fact support Appellants.

Rehearing and issuance of a new opinion is appropriate as a result.

I. THE COURT MISREAD THE CRITICAL LANGUAGE OF THE RESTRICTIVE COVENANT.

The Court read the restrictive covenant at issue to limit those who could vote on a change to the restrictions and covenants ("R&C"s) to those who held "developed lots."

However, the language of the R&Cs does not require "developed lots." The actual language is "by vote of a majority of the then owners of the **lots into which the property described above shall have been developed** and in Watson's Orchard Subdivision." (Def. Ex. 1 at D11 [Rec. 322], emphasis added.)

Hence, per the actual language of the R&Cs, the vote is limited to those who hold "lots into which the property . . . shall have been developed." There is no

requirement of development beyond development into a lot. Had the intention been to limit the vote to owners of "developed lots" (i.e., lots that are further developed) the provision would logically have said that, stating that the vote is "of a majority of the then owners of the ***developed lots*** and in Watson's Orchard Subdivision." That fact that it does not say that demonstrates the intention not to require more than development simply into a lot.

II. THE COURT'S READING OF THE RESTRICTIVE COVENANT IS INCORRECT BECAUSE IT IS MORE RESTRICTIVE THAN THE "EQUALLY LOGICAL" READING URGED BY APPELLANTS.

The Court's interpretation of the key language is certainly not illogical. However, Appellants' reading is at least equally logical (indeed, it is more consistent with the actual language of the R&Cs as shown above). As our Supreme Court has stated, "where two logical interpretations of the same language [of a restrictive covenant] are possible," the one that is "less restrictive" is to be adopted. *Anderson v. Buonforte*, 365 S.C. 482, 497, 617 S.E.2d 750, 758 (2005), citing *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.").

Here, because the reading urged by Appellants is "less restrictive," the Court should have adopted it.

III. THE COURT DISREGARDED THE EVIDENCE AT TRIAL WHEN IT LOOKED AT THE "USUAL AND CUSTOMARY" DEFINITION OF "DEVELOPED."

The Court did not consider the evidence at trial in determing the "usual and customary" meaning of the term "developed." The only evidence at trial was that the Property at issue had been "developed" into lots.

Mr. Coleman Shouse was formerly the Executive Director of the Greenville County Planning Commission and has worked as a developer in Greenville since then. (Tr. 185:10-21 [Rec. 281].) He was qualified as an expert in residential real estate development. (Tr. 185:22-24 [Rec. 281].) He testified that the Stephens Lots were lots because "they were deeded as lots." (Tr. 186:5-16 [Rec. 282].) His opinion was strengthened by the fact that the metes and bounds, with one exception, stopped at all of the cross-lines for the lots even when there was no change in bearing, all of which was unnecessary unless the deed was for individual lots. (Tr. 206:5-14 [Rec. 288].)

Mr. Larry Estridge is a partner with the Womble Carlyle law firm, has practiced real estate law in Greenville for over 40 years, and been involved in "[m]any hundreds, maybe thousands" of real estate transactions. (Tr. 227:22-229:5 [Rec. 293-95].) He was qualified by the court as an expert in real estate law and real estate transactions. (Tr. 233:10-12 [Rec. 299].) Mr. Estridge testified that the property represented by the Stephens Lots was "developed into lots." He explained:

> A. Yes, in my opinion those five lots were developed. When the steps that are in the record had been taken, we had an owner of property being the Watson's Orchard Property Owners Association which owned the dirt, it chose to have a survey prepared drawing lot lines,

> meaning creating points that would become boundaries of five lots, it then either solicited or other - otherwise came into contact with a perspective buyer of those five lots, that buyer they agreed to a price and they agreed to a price on a per lot basis, my recollection is it was twenty-one thousand five hundred dollars ($21,500) per lot, they then between them had a - then there was a letter I believe to other people in the, in the subdivision across the street that would have to approve that sale and in that letter it was described as five lots with a purchase price of twenty-one thousand five hundred dollars ($21,500) per lot. They then had one or more attorneys involved, don't know exactly who drew the deed, but it was a deed drawn by an attorney for one of them, maybe both of them, which described the ... transaction as a conveyance from one party to a second party of five lots as shown in a survey. The buyer by paying consideration and accepting the deed and recording the deed trusted that the survey he had in his hand was the same as the survey the ... seller's talkin' about, it's identified and we do that all the time, you can identify surveys by who prepared it, its date, survey number, etc. to make sure you're looking at the same survey and paid consideration and recorded the deed, those lots were developed when that process was completed.

(Rec. 307-08.)

Mrs. Claire Manning of Chicago Title testified that her office had concluded that the Stephens lots were in fact lots and entitled to votes in connection with the effort to amend the R&Cs. As she testified:

> A. Paragraph 18, "To summarize, it was our conclusion in 2008 and 2009 that the Stephens Lots were lots into which the property had been developed, and that each was entitled to a vote on the amendments - on the amendment of the R&C."
>
> Q. All right. Hold on one second. Does that correctly state your conclusion in 2008 and 2009?
>
> A. It does.
>
> Q. And do you still feel that way?

A. I do.

Q. All right. And read Paragraph 19.

A. 19. "Based upon - based upon that opinion, we, Chicago Title, gave our commitment to issue title insurance if a majority vote was obtained for the amended R&C's with the Stephens lots having one vote each, since in that case, we believed as a factual matter and as a matter of real estate law that the R&C's would then have been validly adopted and would be in full force and effect."

Q. And does that correctly state your opinion in 2008 and '09?

A. It did. It does.

Q. And you still feel that way?

A. I do.

(Rec. 218-19.)

The Court should have considered all of this evidence in determining the "usual and customary" meaning of "developed" in the context of the R&Cs.

IV. THE COURT INCORRECTLY HELD THAT THE KEY LANGUAGE OF THE R&CS WAS UNAMBIGUOUS.

The Court held that key language of the R&Cs was unambiguous, requiring that the Property at issue be "developed lots." Another at least "equally logical" reading, as demonstrated above, is that the R&Cs require only that the Property be "developed" into lots, not that the lots have to be further developed. And, the evidence at trial, as per the testimony above, showed that the Property had in fact been "developed" into lots.

At minimum, the Court was incorrect in concluding that the language of the R&Cs is unambiguous. Does the R&C language only require development of the Property into a "lot," and nothing more, as it appears to do and Appellants argue? Or does it require, contrary to the literal reading, that the "lots" be in fact be "developed lots," as the Court held?

The Court's opinion itself demonstrates that the language is at least ambiguous. The Court looked beyond the four-corners of the R&Cs to the "usual and customary definition" of "developed." (Sherouse Adv. Sh. at 38.) If the language were clear and unambiguous, none of that would be needed.

V. THE COURT DISREGARDED THE DISPOSITIVE EVIDENCE OF THE DRAFTER OF THE R&CS.

Given the ambiguity of the language at issue, the Court should have considered the testimony of the drafter, Mr. Patrick Grayson. Mr. Grayson's testimony is, aside from the words in the document itself, the *only* evidence in the record regarding the meaning of the text in the 1981 R&Cs. He testified that his intent in drafting the document was for the word "develop" in "shall have been developed" to mean to "come into existence" or be "created." Nothing more. This came from Mr. Grayson, the drafter of the 1981 R&Cs:

> Q. Mr. Grayson, what was your intent with respect to the language and I'll just read it, "By a vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard," what was your intent with respect to that?

A. To come into existence. Develop would mean to come into existence, to be created.

(Grayson Testimony, Tr. 95:23-96:4 [Rec. 243-44].) And the **only** evidence in the record was that the Stephens Lots were intended to fall within this language. This too came from Mr. Grayson, the drafter:

Q. Back to to the restrictions that you drafted, Mr. Grayson, which were Exhibit SJ2, page D11 [Def. Ex. 1 at D11 (Rec. 322)], was it, was it your intention in connection with the drafting of the deed and the restrictions all of which, I believe all of which occurred about the same time, is that correct?

MR. HILLER: I I object, I object ---

THE COURT: Same objection?

MR. HILLER: Yes, sir.

THE COURT: Alright. Go ahead answer it.

Q. Was it your intention that the Stephens' lots would be, would qualify under that language "lots into which the property described above shall have been developed" ---

A. Yes.

Q. --- and your intention that they would have a vote with respect to the amendment of these re ---

A. Yes.

Q. --- restrictions and covenants?

(Tr. 107:25-108:16 [Rec. 255-56].)

There was no evidence to the contrary.

VI. THE COURT DISREGARDED THE OVERWHELMING EVIDENCE THAT THE STEPHENS LOTS HAD BEEN "DEVELOPED INTO LOTS" AND THUS WERE ENTITLED TO VOTE.

The Court gave no credit to the overwhelming evidence that the Stephens Lots (the Property) had in fact been "developed into lots" and were viewed as five lots by the seller, the purchaser (multiple times), the attorney, the mortgage lender, and the Circuit Court in 1981.

A. The Documentary Evidence

1. THE STEPHENS OFFER TO BUY FIVE LOTS (1980)

James Stephens, through Pelham Properties, Inc., made a formal, written offer (the "Stephens Offer") on October 6, 1980, to purchase the five **lots** at issue "for a purchase price of Twenty One Thousand One Hundred and 00/100 ($21,100) Dollars **per lot**." (Def. Ex. 1 at D59, emphasis added [Rec. 370].) The **lots** are described in the offer as "five (5) lots as are more fully described in Exhibit 'A' annexed hereto." Exhibit A to the offer describes the property being purchased as:

> All those certain pieces, parcels or lots of land, situate, lying and being in the State of South Carolina, County of Greenville, being identified **as five (5) lots** fronting on Pelham Road, to be more fully shown on a new survey, and being described in the aggregate according to a survey entitled "Survey for Richard Watson", dated June 27, 1980, revised August 19, 1908, and August 27, 1980, prepared by Carolina Surveying Company, with the following metes and bounds, to-wit: . . . .

(*Id.* at D60, emphasis added [Rec. 371].)

2. THE ACCEPTANCE OF THE STEPHENS OFFER TO BUY FIVE LOTS (1980)

Mr. Wilkins Norwood wrote a memorandum to the property owners in Watson's Orchard describing the offer and recommending acceptance. He wrote in pertinent part:

> J. B. Stephens, a homeowner whose lot fronts on Pelham Road, does not want to participate in the corporation [WOPOA]. Instead, he is willing to buy the **five lots** most directly across from his home. He has made an offer to purchase **five minimum lots** (200 feet frontage and 55,000 sq. ft.) in front of his house for a purchase price of $105,500.00 and give up his interest in the corporation. This is a price of $21,100.00 **per lot**.
>
> When you consider that the value of a share of stock in Watson's Orchard Property Owners Association, Inc. should be worth a minimum of $7,000.00, the corporation will net around $22,500.00 **per lot**.
>
> If the **lots** were sold in the open market for $25,000.00 through a realtor, only $22,500.00 would be netted after commission. It is our opinion that this is a fair price for this purchase.
>
> Therefore, your committee believes the offer is fair and recommends that it be accepted.

(Def. Ex. 1 at D62, emphasis added [Rec. 373].) WOPOA accepted the offer. (*Id.* at D170-93 [Rec. 484-507], hereinafter the "WOPOA Acceptance.") (*See generally* testimony of Patrick Grayson, Tr. 104-05 [Rec. 252-53].)

3. CIRCUIT COURT APPROVAL OF THE SALE OF THE FIVE LOTS TO STEPHENS (1980)

On December 9, 1980, Judge Frank P. McGowan, Jr., issued a detailed order (Def. Ex. 1 at D75-D249 [Rec. 386-563]) in the declaratory judgment action (*id.* at D64-73 [Rec. 375-84]) brought by Mr. Grayson on behalf of Lincoln of South Carolina, Inc.

("Lincoln"). It was Lincoln which was seeking the change in the prior restrictions and covenants. The action was filed before Judge McGowan seeking approval of the 1981 R&Cs and the process by which they had been adopted. (Grayson Testimony, Tr. 81-90 [Rec. 229-38].) One of the conditions of the release of the covenants that was at issue in Judge McGowan's Order was the transfer of the five lots at issue to Mr. Stephens. (Grayson Testimony, Tr. 152:23-153:2 [Rec. 260-61].) Accordingly, Judge McGowan specifically considered and approved the planned sale of the five **lots** to Pelham Properties by WOPOA. His order read in pertinent part:

> . . . Based upon the entire record, I hereby make the following findings and conclusions, with resulting declarations and orders thereon: . . .
>
> (18) That more than a majority of the defendants as charter member and pending stockholders in Watson's Orchard Property Owners Association, Inc., are willing to sell **five (5) lots** as described in the deed shown as Exhibit 14 [Def. Ex. 1 at D251 (Rec.)], for the consideration of One Hundred Five Thousand Five Hundred and 00/100 ($105,500.00) Dollars, pursuant to the Offer shown as Exhibit 15 [Def. Ex. 1 at D59 (Rec. 370)], and that the President has authority to execute said deed within the usual and regular course of corporate business; that documentary deed stamps be paid from said consideration. . . .
>
> IT IS FURTHER ORDERED that the officer of Watson's Orchard Property Owners Association, Inc. be authorized to execute and deliver a deed conveying good fee simple title to the property shown on Exhibit 14 [Id. at D251 (Rec. 565)], upon receipt of the consideration of One Hundred Five Thousand Five Hundred and 00/100 ($105,500.00) Dollars, less documentary deed stamps.

(Def. Ex. 1 at D80 & D82, emphasis added [Rec. 391 & 393].) (See generally testimony of Patrick Grayson, Tr. 102-104 [Rec. 250-52].)

4. THE FIRST DEED REFERENCES FIVE LOTS (1981)

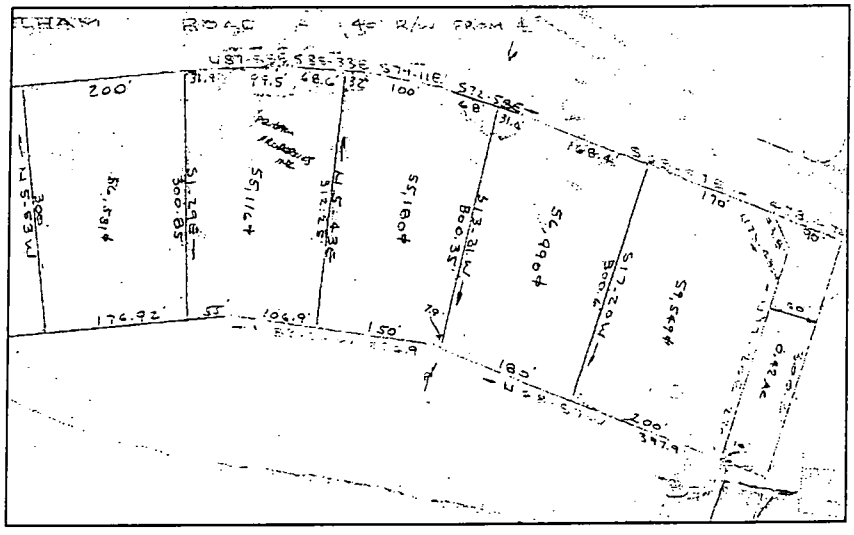
Upon receiving Judge McGowan's approval, the property along Pelham Road was transferred from Lincoln to WOPOA. (Def. Ex. 1 at D116 [Rec. 427].) Then, on January 15, 1981, as per the Stephens Offer and the WOPOA Acceptance, **five lots** out of that property were transferred from WOPOA to Pelham Properties [Mr. Stephens' entity]. (*Id.* at D251-52 [Rec. 565-66].) The deed (**the** "1981 Deed") describes the conveyance as:

> All the certain piece, parcel or tract of land situate, lying and being in the County of Greenville, State of South Carolina**, containing five (5) lots as is more fully shown on a plat** entitled "Survey for Richard Watson", prepared by Carolina Surveying Company, dated June 27, 1980, revised August 19, 1980, revised August 27, 1980, revised September 8, 1980, and revised December 1, 2, and 3, 1980 . . . .
>
> Subject however, to a sewer easement across the rear twenty-five (25') feet **of the above lots** for the purpose of installation and maintenance of a sewer line . . .

(*Id.* at D-251, emphasis added [Rec. 565]). (See generally testimony of Patrick Grayson, Tr. 99-101 [Rec. 247-49].)

5. THE PLAT SHOWING THE FIVE LOTS (1980)

The plat (the "Plat") referenced in the 1981 Deed specifically identifies the five lots. (Def. Ex. 2 [Photographed/Reduced Copy at Rec. 657].) The following excerpt is the relevant portion of the Plat:



(Excerpted from Def. Ex. 1 at D6 [Rec. 317].)

6. THE METES AND BOUNDS DESCRIPTION IN THE FIRST DEED DESCRIBES FIVE LOTS (1981)

In addition to expressly referencing the five lots and the Plat, the 1981 Deed sets forth metes and bounds in a manner and level of detail that would have been unnecessary if it was other than to identify separate lots. To follow this point, it is necessary to carefully compare the metes and bounds in the 1981 Deed to those on the Plat, which was done at trial in the testimony of Mr. Coleman Shouse, the former Executive Director of the Greenville County Planning Commission.

In this exercise, it becomes almost immediately apparent that the deed's metes and bounds used "interior" dimensions for the lots and not the longer "external" dimensions. The "calls" stopped even when there was no change in direction or bearing. It made no sense to stop in such instances except to identify the cross-lines for the lots. From Mr. Shouse's testimony:

Q. If they were simply doing exterior dimensions, would they not use 397.9 to get to the next turn?

A. Correct.

Q. Alright, okay, so that's an interior 200. "Thence continuing north 86-57 west 180 feet to a point."

A. And that's interior along this (indicating) same bearing in distance.

Q. Okay, and again that goes up to the cross point on the ---

A. To again a lot line.

Q. Okay, a lot line. "Thence continuing 7.9 feet to a point."

A. That's that little angle right there (indicating) which is the break in the, in the bearing on this (indicating) line ---

Q. Okay, so ---

A. --- changes ---

Q. --- 200 and 180 and 7.9 are all on one line.

A. Right.

Q. **Okay, that the call for those things there would be no reason to do those calls unless you were designating internal lots.**

A. **None whatsoever.**

(Tr. 201:4-202:1 [Rec. 283-84], emphasis added.)

Q. Alright, and then running a hundred and seventy-six point nine two feet to a point.

A. Which is on the same bearing but it's a, it's a - the property line.

Q. There [would] have been no point, Mr. Shouse, to do this 55 and a hundred and ---

A. No.

Q. --- seventy-six separately if they had not intended to designate that cross point?

A. Absolutely not.

(Tr. 202:19-203:3 [Rec. 284-85], emphasis added.)

Q. Okay. "Running thence 300 feet to a point on the southern side of Pelham Road," so that's the the end of the ---

A. That separates those two.

Q. --- lot, okay. "Running thence with the southern side of Pelham Road 200 feet to a point."

A. Here (indicating).

Q. So that's the top of this (indicating) lot?

A. Yes.

Q. No point to stop there is there unless ---

A. The bearing doesn't change.

Q. Okay, there's no point to stop there unless it's designating a lot, correct?

A. Correct.

(Tr. 203:4-17 [Rec. 285], emphasis added.)

Q. Okay, so again no point to have the 68 feet unless you were stopping ---

A. Right.

Q. --- for a crossline.

A. Right.

(Tr. 204:6-20 [Rec. 286], emphasis added.)

Hence, even the prose description of the property in the 1981 Deed makes plain that the 1981 Deed was conveying five lots. For Mr. Shouse, this yet another factor showing that the 1981 Deed was conveying five lots:

Q. Okay. So, Mr. Shouse, is it fair to say that with I think one exception the calls all do stop at the crosslines?

A. Yes.

Q. Does that get to -- does that give you any, uh, does that strengthen your position or does it have any impact at all on your your position that these are in fact ---

A. It just, ---

Q. --- lots as designated by the deed?

A. --- it it just affirms that they were in t -- they are lots, they were intended to be lots, they are lots.

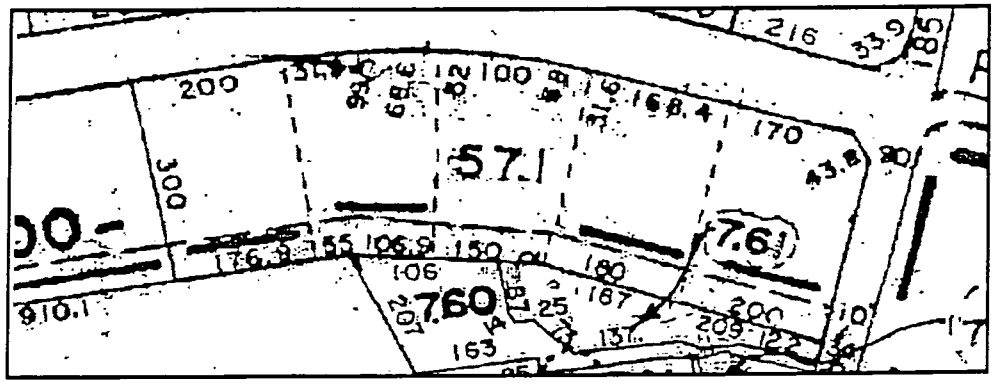
Q. And anybody who's tracing those metes and bounds from the public record would see those stop points?

A. Sure.

(Tr. 206:5-17 [Rec. 288], emphasis added.)

7. THE TAX MAP SHOWING FIVE LOTS (CURRENT)

The tax map for the Property also shows the five lots:



(Excerpted from Def. Ex. 5 (also Def. Ex. 3) [Rec. 661 (Rec. 658-60].)

From the fact that the lot dimensions on the tax map (across the top, left to right, 200, 31.9, 99.5, 68.6, 32, 100, 68, 31.6, 168.4, 170, and 43.8, and across the bottom, left to right, 176.9, 55, 106.9, 150, 180, and 200) are identical to those on the Plat (excerpt at *supra* page 14 [Rec. 317], full Plat at Def. Ex. 2 [Rec. 657]), it is clear that the Plat was submitted to the authorities.

8. THE TITLE OPINION OF THE WYCHE LAW FIRM THAT FIVE LOTS HAD BEEN PURCHASED (1981)

The Wyche Law Firm issued a title opinion to Mr. Stephens that he had (through Pelham Properties, Inc.) purchased five lots and had good title to them. The opinion letter (Def. Ex. 6 [Rec. 662-63]) expressly describes the deed as being for "**five lots along Pelham Road**." (Emphasis added.)

9. 1981 Reference In The RMC Office To Five Lots

The 1981 Deed was recorded in the Greenville County R.M.C. office. (Def. Ex. 1 at D260 [Rec. 574].) The RMC Index describes the transaction as for "**5 lots** Pelham Rd." (*Id.*, emphasis added.) (*See generally* Testimony of Patrick Grayson, Tr. 106:20-107:24 [Rec. 254-55].)

10. The Second Deed References Five Lots (1986)

The five lots were transferred on August 22, 1986, from Pelham Properties, Inc. to Mr. Stephens himself. This deed (the "1986 Deed") refers to "five (5) lots" in the same manner as the 1981 Deed. (Def. Ex. 1 at D262 [Rec. 576].) It also incorporates the Plat by reference. (*Id.*) In addition, it uses the same metes and bounds description as the 1981 Deed which, as noted regarding the 1981 Deed above, has "calls" that are unnecessary except to identify individual lots. (*Id.*) (*See generally* Testimony of Patrick Grayson, Tr. 108:16-109:9 [Rec. 256-57].)

11. 1986 Reference In The RMC Office To Five Lots

The 1986 Deed was recorded in RMC Deed Book 1274 at page 237. The Index describes the transaction as for "**5 Lots** Cnr Pelham & Proposed Rd . . . ." (Def. Ex. 1 at D264, emphasis added [Rec. 578].)

12. The Stephens 1988 Affidavit References Five Lots

In 1988, in an affidavit submitted as part of an application for a $500,000 loan for which the Stephens Lots were to be collateral, Mr. Stephens described the property

as "5 lots, Pelham Road." (Def. Ex. 7 at WO003160 [Rec. 673].) (See generally Kehl Testimony, Tr. 167:6-25 [Rec. 268].)

13. 1988 LOAN WITH THE FIVE LOTS AS COLLATERAL

Mr. Stephens received the $500,000 loan from South Carolina National Bank in 1988. The loan documents describe the property as "containing five (5) lots as is more fully described in [the Plat]." (Def. Ex. 7 at WO003164 [Rec. 677].) The loan documents and the mortgage were conveyed to Mr. Stephens by his attorney's paralegal by letter dated March 16, 1988. The "RE" line for the letter is "Loan on 5 lots, Pelham Road from SCN." (Def. Ex. 7 at WO003161 [Rec. 674].) See generally Kehl Testimony, Tr. 168:1-169:7 [Rec. 269-70].)

14. THE 1988 MORTGAGE REFERENCING FIVE LOTS

The mortgage for the $500,000 loan was recorded on March 16, 1988. The property subject to the mortgage is described as "containing five (5) lots as is more fully shown on [the Plat]," as in the 1981 and the 1986 deeds. (Def. Ex. 8 [Rec. 686-89].) (See generally Kehl Testimony, Tr. 169:8-25 [Rec. 270].)

15. THE THIRD DEED REFERENCES FIVE LOTS (2003)

On July 15, 2003, Mr. Stephens transferred the lots and various other property to a revocable trust. (Def. Ex. 1 at D266-70 [Rec. 580-84].) "Parcel Three" in that deed (the "2003 Deed") identifies the parcel as containing "five (5) lots." (Def. Ex. 1 at D266-67 [Rec. 580-81].) The description is the same as in the 1981 and 1986 deeds. (*See generally* Testimony of Patrick Grayson, Tr. 109:10-110:15 [Rec. 557-58].)

16. THE FOURTH DEED REFERENCES FIVE LOTS (2008)

On April 15, 2008, Mr. Stephens transferred a one percent interest in the five lots from his revocable trust to Pelham Farm, LLC, Legacy One, LLC, and SESP LLC, the Appellants here. (Def. Ex. 1 at D272-74 [Rec. 586-88].) This deed (the "2008 Deed"), like the previous ones, described the property as "containing five (5) lots as is more fully shown in the 'Survey for Richard Watson' [the Plat]." (*Id.* at D272 [Rec. 586].) (*See generally* Testimony of Patrick Grayson, Tr. 110:16-25 [Rec. 258].)

17. THE 2008 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

The 2008 Deed was filed in the Register of Deeds Office in Book 2320 at page 1674-76. The Index describes the five lots: "INT **5 LTS** PELHAM ROAD." (Def. Ex. 1 at D276, emphasis added [Rec. 590]. (*See generally* Testimony of Patrick Grayson, Tr. 111:1-111:7 [Rec. 259].)

B. The Testimonial Evidence Was That The Stephens Lots Were Lots

1. THE TESTIMONY OF PATRICK GRAYSON

Patrick Grayson, who has practiced predominantly real estate law in Greenville since 1958 (Tr. 80:5-19 [Rec. 228]), prepared the 1981 Deed (Tr. 100:1-100:8 [Rec. 248].). He testified that it conveyed five lots to Pelham Properties.

> Q. Alright. And does this deed as you prepared it convey five lots from Watson's Orchard Property Owners Association to Pelham Properties?
>
> A. Yes.

(Tr. 100:9-12 [Rec. 248].)

2. THE TESTIMONY OF WILLIAM KEHL

Mr. Kehl, another experienced corporate and real estate attorney in Greenville (Tr. 161:12-19 [Rec. 262]), testified that he had issued the title opinion referenced above to the effect that Mr. Stephens had obtained good title to the five lots at issue. (Tr. 161:20-162:6 [Rec. 262-63].) He also went through his file and identified all the myriad instances where the transaction was referenced as being for five lots. (Tr. 170:1-171:6 [Rec. 271-72]); see Def. Ex. 7 at WO003150, -3154, -3156, -3179 & -3182 [Rec. 666, 667, 669, 682 & 685].)

3. THE TESTIMONY OF MICHAEL STEPHENS

Mr. Michael Stephens is the son of Jim Stephens. (Tr. 223:13-18 [Rec. 289]). He testified that when he moved back to Greenville from Baton Rouge he considered purchasing one of the lots from his father. His father showed him the five lots, and he

looked at the Plat. Ultimately, he did not purchase one as he bought something on the other side of town. (Stephens Testimony, Tr. 224:19-226:24 [Rec. 290-92].)

VII. THE COURT INCORRECTLY HELD THAT THE CIRCUIT COURT DID NOT ERR IN RELYING ON S.C. CODE §30-50-240 AND GREENVILLE COUNTY SUBDIVISION REGULATIONS TO SUPPORT ITS CONCLUSION

Under South Carolina law, the recording of a plat is not necessary for the conveyance of lots.[1] It does not matter if the Plat is unrecorded. It is still incorporated by reference. *See Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981) (irrelevant that purchase was pursuant to an unrecorded plat); *Cook v. Eller*, 298 S.C. 395, 280 S.E.2d 853 (App. 1989) (abstracts, deeds, and unrecorded plats that supported Cook's claim were not in the record on appeal but if had been could have supported the trial court's decision).[2]

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[1] As a matter of common law, the reference in the 1981 Deed (and the subsequent deeds) to the Plat incorporates the Plat into the deed. *See Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882, 883 (S.C. 1945) ("Where, as was done in this case, a deed describes the land as a certain tract or parcel as shown on a certain plat, the plat becomes part of the deed."); *Chicago Title Ins. Co. v. Investguard, Ltd.*, 449 S.E.2d 681, 683 (Ga. App. 1994) ("[W]here a deed to land refers to a map or plat as a part of the description of the land conveyed, such map or plat will ordinarily be considered as incorporated in the deed itself.")

[2] The principle that an unrecorded plat is effective is confirmed in numerous cases from other jurisdictions. *E.g., Chicago Title Ins. Co. v. Investguard, Ltd.*, 449 S.E.2d 681, 683 (Ga. App. 1994) ("the description of the property indicated on the unrecorded plat prepared by Byron Farmer thus became part of the deed to secure debt Jennings executed in favor of Miller. We agree with the trial court that this incorporated plat established an easement across the second tract of land."); *Department of Transp. v. Ladson Investments*, 282 S.E.2d 171 (Ga. App. 1981) (holding that undisputed evidence demanded finding that express dedication had been made by transfer of property to condemnee with reference to plat showing 70-foot right-

As to the Greenville County Subdivision Regulations (the "Regulations," [Rec. 593-656]), these actually defines a "lot" in a manner that makes clear that the Stephens Lots qualify. The definition is: "Lot - A portion of a subdivision or other parcel of land having a minimum of twenty (20) feet frontage on a public street and intended for transfer of ownership or for building purposes." (Def. Ex. 1 at D-286 [Rec. 600].) The Stephens Lots indisputably meet this definition. Section 1.4 of the Regulations further recognizes a sale without a previously recorded plat. It does so by providing for a penalty of "one hundred dollars for each lot so transferred or sold or agreed or negotiated to be sold" and by providing that the County can sue to enjoin such a sale if it so desires. (Greenville County Subdivision Regulations, §1.4 (1979), at Def. Ex. 1 at D-288-89, emphasis added [Rec. 602-03].) Notably, Greenville County has never sued

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of-way, notwithstanding that plat was unrecorded); *Reed v. Reese*, 374 A.2d 665, 669 (Pa. 1977) (plat need not be recorded to be incorporated by reference: "We expressed no requirement that the plan be recorded and we indicated that recordation was not necessary by ruling incorporation by reference makes the plot plan part of the deed."); *Oak Park Cemetery v. Donaldson*, 148 S.W.2d 994, 997 (Tex. Civ. App. 1940) ("From the issues submitted to the jury it appears that the case was tried on the theory that the sale of burial lots by the owner of a cemetery, with reference to an unrecorded plat of such cemetery, to purchasers who rely on such plat, will effect a dedication of the drives, parks, etc., shown on said plat, as well as the lots and blocks shown thereon. This principle is well established, of course, as applied to the sale of lots with reference to the plat of a townsite or addition to a city by the owner."); *cf. Nagel v. Dean*, 101 N.W. 954, 955 (Minn. 1904) ("In the absence of statutory regulation, it is clear, where a party conveys urban property in accordance with descriptions contained in an unrecorded plat, that the effect is to dedicate streets and alleys therein described to the public use."); *Bennett v. Seibert*, 35 N.E. 35, 37 (Ind. App. 1893) ("The mere act of surveying lands into lots, streets, and squares by the owner will not of itself amount to a dedication; yet a sale of lots with reference to such plat, map, or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets, etc., so far as the owner is concerned").

to enjoin such a sale and has never assessed the penalty. (Tr. 38:23-39:14 [Rec. 221-22].) Moreover, the County has never taken the position that a transfer that does not comply with Section 1.4 is not in fact a transfer. (Tr. 39:15-19 [Rec. 222].) Indeed, John Owings, an employee of the Greenville County Planning Department and the only witness called by Respondents, testified that even today if a transfer came in that did not comply with Section 1.4 he would simply call the person and tell them to correct it. (Tr. 39:20-26 [Rec. 222].) The recording requirement, Mr. Owings testified, was simply "an administrative act," and the whole process "an administrative process." (Tr. 47:21 & 57:20-58:3 [Rec. 223-25].)

The testimony at trial was that, especially during the period of the 1981 Deed, it was not uncommon for lots to be transferred pursuant to an unrecorded plat. Mr. Estridge, who, as noted above, was qualified as an expert in real estate law and real estate transactions, testified that "it is a fairly common practice for people to sell and to otherwise transfer property with reference to a plat which is not recorded for a variety of reasons," and "certainly [was] in 1981." (Tr. 234:22-235:1 [Rec. 300-01].) This was "very common," he said, for "transactions among related parties such as ... a family company or family partnerships or family LLCs or family trusts." He said it is also "very common among related companies." (Tr. 235:2-235:15 [Rec. 301].)

S.C. Code §30-5-240[3] does not support the decision below either. The statute does say that a person subdividing land according to a plat "shall file a plat or blueprint." However, it recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. Further, the statute conspicuously does not provide that a sale pursuant to an unrecorded plat is void or voidable. The *only* consequence of such a sale is that the grantor is responsible for the cost to "procure and record" the plat.

Again, as Mr. Estridge testified, transfers without recorded plats are "common," especially in 1981. (Tr. 234:21-21 [Rec. 300].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), mentioned in her testimony (by de bene esse deposition) that "most plats in Charleston County don't get recorded." She said the "lawyers just refer to the plats, but they don't record them. It's just custom there." (Manning Dep. 5-6 & 35:8-11 [Rec. 216-17 & 220].)

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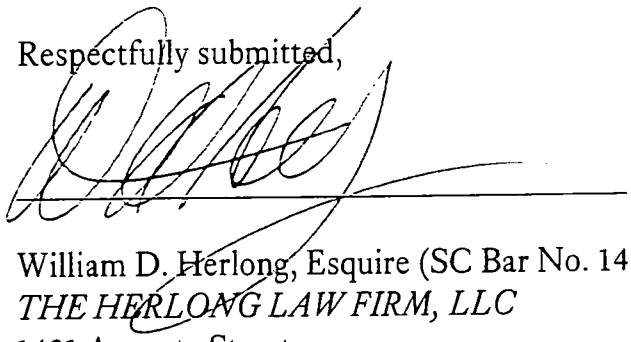
[3] "When real property is subdivided for the purpose of sale and is sold or offered for sale according to a plat of a survey thereof, the person first offering such property for sale shall file a plat or blueprint of such survey in the office of the clerk of court of the county in which such real estate is situate. In the event that the owner fails to comply with the above provision he shall become liable to the purchaser or to any subsequent grantee of the land, or of any portion thereof, in such sum as shall be found necessary to procure and record such plat. Such sum shall be recovered by any such grantee provided he be interested as owner of all or a portion of the subdivided property at the time of the institution of the action for the enforcement of the liability hereby created."

CONCLUSION

For the foregoing reasons, rehearing and/or issuance of a new opinion is warranted.

Respectfully submitted,



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Attorney for Appellant/Petitioner

April 29, 2015

Greenville, South Carolina

CONCLUSION

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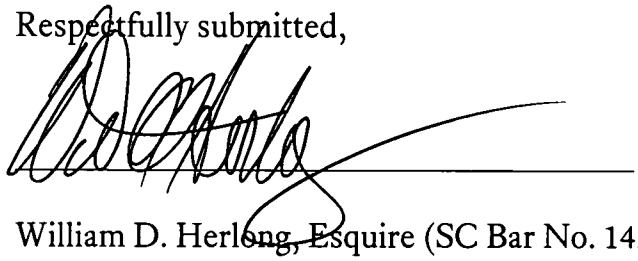

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Attorney for Appellant/Petitioner

April 29, 2015

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707
Appellate Case No. 2013-000452

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ... Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the .....Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl

L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, ... Third-Party Defendants.

PROOF OF SERVICE
Petition for Rehearing

I hereby certify that I have served the Petition for Rehearing on respondents by by hand by delivering a copy to the office of their attorney of record, Randall S. Hiller, 850-B Wade Hampton Boulevard, Greenville, SC 29609 on April 29, 2015.

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April 29, 2015

BY FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Hanold *et al.* v. Watson's Orchard Property Owners Association, Inc., *et al.*, Appellate Case No. 2013-000452

Dear Ms. Kitchings:

Enclosed please find the Appellant's Petition for Rehearing (six copies) and a check for $25.00. If you have any questions please give me a call.

Thank you.

Very truly yours,

William D. Herlong

enclosures
cc: Randall Hiller