THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2014-002587
Common Pleas Case No. 2012-CP-6974

S. Coley Brown ..... Appellant,

v.

Spring Valley Homeowners Association, Inc. ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

Respondent submitted memoranda in support of their motions for summary judgment. (R. pp. ; Def's memo, Plf's memo, and Def's reply memo). The motions for summary judgment were heard by the Honorable Eugene C. Griffith, Jr. on November 13, 2013. By order filed April 3, 2014, Judge Griffith granted summary judgment to Respondent and denied Appellant's motion for summary judgment. (R. pp. ; April 3, 2014 Order granting summary judgment to Def.). Thereafter, Appellant filed a motion to reconsider and served a memorandum in support of the motion. (R. pp. ; Plf's motion to reconsider, Plf's memo in support of motion to reconsider). By Order filed October 6, 2014, the court denied Appellant's Motion to Reconsider. (R. pp. ; Order denying motion to reconsider). A corrected Order denying Appellant's motion to reconsider was filed on October 23, 2014. (R. pp. ; Corrected Order). Appellant thereafter served his Notice of Appeal on October 27, 2014. (R. pp. ; Notice of Appeal).

FACTS

On August 31, 2007, Appellant purchased the property located at 118 Spring Valley Road in the Spring Valley neighborhood and the deed was recorded on November 4, 2007. (R. pp. ; Appellant's Deed pp. 1-3 – Ex. A to Def's memo). Pursuant to the deed, the conveyance of the property was "subject to any restrictions, reservations, zoning ordinances or easements that may appear of record on the recorded plats or on the premises." (R. pp. ; Appellant's Deed p. 2– Ex. A to Def's memo). Thus, Appellant took the property subject to any covenants and deed restrictions of record in the chain of title.

The covenants and restrictions contained in the chain of title for Appellant's property are contained the 1979 deed from Pine Springs, Inc. to Goodwin Construction, Inc. (R. pp. ; 1979 Deed pp. 1-5 – Ex. B to Def's memo). The covenants and restrictions

provide that grantee of the property "covenants and agrees that GRANTEE will become a member of the Spring Valley Homeowners Association and will abide by its duly enacted rules, regulations and bylaws..." (R. pp. ; 1979 Deed p. 1 – Ex. B to Def's memo). Among other things, the covenants and restrictions provide for a restriction on placing "for sale" or "for rent" signs on the property. (R. pp. ; 1979 Deed p. 3 – Ex. B to Def's memo). Specifically, the restriction states:

> (11) Except as specifically provided for in this paragraph, no "SALE" or "RENT" signs or other types of advertising or billboards shall be permitted on the property hereby conveyed:
>
> > (a) Where there is a newly constructed dwelling upon a lot and there has been no previous sale of the lot with a dwelling thereon no more than two (2) "For Sale" signs only (the size and contents of which must be submitted in advance to GRANTOR, its successors or assigns for approval) may be placed upon the lot.
> >
> > (b) After the first sale of a lot with a dwelling thereon no further signs of any type shall be permitted except that in cases of hardship, subject to prior approval by Spring Valley Homeowners Association, one "For Sale" sign, not larger than 2 feet by 3 feet may be installed where there is a dwelling house for sale.
> >
> > (c) No sign shall ever be nailed or fastened to any tree at any time.

(R. pp. ; 1979 Deed p. 3 – Ex. B to Def's memo). Further, the deed provides that: "AND IT IS UNDERSTOOD AND AGREED that the said conditions, covenants and restrictions shall be appurtenant to and run with the same premises; and that in the event of the violation of any of the said conditions, covenants and restrictions, the said GRANTOR, its successors or assigns, shall have the right, jointly or severally of abatement and to enforce compliance by injunction of [sic] any other appropriate legal action." (R. pp. ; 1979 Deed p. 3 – Ex. B to Def's memo).

Pursuant to the deed covenants and restrictions, the Spring Valley HOA has duly enacted rules, regulations and bylaws. (R. pp. ; Aff. of Beth Swindler pp. 1-3 – Ex. C to Def's memo; Info. Guide pp. 1-32 – Ex. C2 to Def's memo). Article III of by Bylaws provides that one of the purposes of the Spring Valley HOA is to "enforce any and all covenants, restrictions and agreements applicable to the property within Spring Valley..." (R. pp. ; Info. Guide p. 11 – Ex. C2 to Def's memo). Article X, Section 1 of the Bylaws provides the following powers to the Spring Valley HOA Board of Directors, among other things: (1) the power to "adopt and publish rules and regulations governing the use of the common properties and facilities, and the personal conduct of the Members and their guests thereon and to establish penalties for the infractions thereof"; (2) the power to "exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership by other provision of the By-Laws or the Articles of Incorporation, including the enforcement and exercise of all conditions, covenants, restrictions and limitations contained in deeds given by Pine Springs, Inc. or Spring Valley Associates, Inc. to lots or residence in Spring Valley"; (3) the power to "adopt and publish rules and regulations governing the use and alteration of property located in Spring Valley that does not restrict deed restrictions, covenants, nor Richland County Ordinances"; and (4) the power to "adopt and publish a schedule of fines as appropriate, for violations of coven[a]nts, deed restrictions, rules and regulations and/or By-Laws of the Spring Valley Homeowners Association (SVHA) by 'owners'". (R. pp. ; Info. Guide p. 16-17 – Ex. C2 to Def's memo). Further, Article X, Section 2 of the Spring Valley HOA Bylaws provides that it is the duty of the Board of Directors to "assess and collect fines for the continuous and repeated violation(s) of covenants, deed

restrictions, rules and regulations, and/or By-Laws by owner(s) until the violation(s) is/are abated." (R. pp. ; Info. Guide p. 17 – Exhibit C2 to Def's memo). Additionally, the duly adopted rules and regulations contain a fine structure for abatement of violations of the deed restrictions, rules and regulations, which is as follows:

> a) The owner shall be informed by mail by the SVHA General Manager of any violations of the Deed Restrictions, SVHA Rules and Regulations, and Richland County Ordinances. The owner is expected to work in good faith with the General Manager to correct the violation within fifteen (15) days.
>
> b) The board has the right to fine the owner $100.00 weekly, until abatement, or the fine reaches $1,500.00 per violation per year after the fifteen (15) day written notice to correct the violation. If a property has three (3) or more occurrences of the same violation during the same calendar year, a $100.00 fine will be levied immediately upon the third occurrence and any recurrence during that year. Additionally, if the violation is not corrected within one week, then the $100.00 weekly fine schedule will be implemented until abatement or the fines reach $1,500 per year, per violation.
>
> c) With board approval, the owner may be sued to correct the violation.
>
> d) If the owner does not correct the violation, the board can elect to assess the owner based on the estimated cost to correct the violation.

(R. pp. ; Info. Guide p. 25 – Ex. C2 to Def's memo). As noted above, Appellant became a homeowner in the Spring Valley neighborhood on August 31, 2007, and thus, became a member of the Spring Valley HOA at that time. The amendment to the bylaws granting the Spring Valley HOA the authority to fine members for violations of the bylaws, rules and regulations, and covenants and restrictions was adopted November 8, 2004, thus, the Amendment was in place for over two and a half years prior to Appellant purchasing his property in Spring Valley. (R. pp. ; Aff. of Beth Swindler p. 2 – Ex. C to Def's memo). Appellant had a duty to make himself aware of all applicable covenants, restrictions, bylaws, rules and regulations prior to his purchase and had a duty to keep current on any amendments after purchase. The up to date Information Guide containing the applicable

bylaws, covenants and restrictions, rules and regulations, and fine structure has been available to all owners and prospective owners of property in the Spring Valley subdivision, and since 2010, has also been published on Respondent's website for all to read. (R. pp. ; Aff. of Beth Swindler p. 2 – Ex. C to Def's memo).

To the extent Appellant claims lack of knowledge of the Spring Valley HOA's authority to levy fines, it should be noted that such authority was amended and altered twice since Appellant purchased his property. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 11/12/07 and 11/9/10 Ann. Mtg. Mins. – Ex. C3 to Def's memo). Appellant was provided with notices of the annual meetings set for November 12, 2007 and November 9, 2010, which contained notices of proposed changes to the bylaws and the rules and regulations concerning the levying of fines, including the current and proposed rules. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 11/12/07 and 11/9/10 Ann. Mtg. Notices – Ex. C4 to Def's memo). Further, all members of the Spring Valley HOA, including Appellant, have been provided with copies of the amended Bylaws as they have been adopted. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo). Additionally, to the extent Appellant claims lack of knowledge of the deed restriction concerning "for sale" signs, it should be noted that Appellant specifically raised concerns about such restriction at the November 11, 2008, HOA Annual Meeting and again at the November 10, 2009, HOA Annual Meeting, thus he was aware of the restriction. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 11/11/08 and 11/10/09 Ann. Mtg. Mins. – Ex. C1 to Def's memo).

Despite Appellant's knowledge of the restriction on the placement of "for sale" signs and his knowledge of the Spring Valley HOA's ability to levy fines for violations

of the restriction, Appellant placed a "for sale" sign on his property. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo). He did so without bothering to seek prior approval from the Spring Valley HOA even though prior approval of a hardship request is required by the deed restriction. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo). Thus, he knowingly and willfully violated the restriction on signage. On October 4, 2011, Carl Voges, the General Manager of the HOA, advised Appellant in writing of his violation and advised that he had 15 days to remove the sign and that the fine schedule for the violation would begin to run if the sign was not removed by October 19, 2011. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 10/4/11 letter of Carl Voges –Ex. C5 to Def's memo). Nonetheless, Appellant ignored the directive of the HOA and did not remove the "for sale" sign from his property. On October, 20, 2011, Carl Voges notified Appellant in writing that the fine schedule had begun concerning his violation of the deed restriction, as the sign had not been removed as previously directed. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 10/20/11 letter of Carl Voges – Ex. C5 to Def's memo). Consequently, the HOA complied with the notice requirements contained in the fine structure prior to beginning to levy any fine against Appellant. On October 23, 2011, Appellant's counsel wrote Carl Voges contesting the fine schedule and requesting that a hardship determination be made. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 10/23/11 letter from Appellant's counsel– Ex. C5 to Def's memo). On November 7, 2013, counsel for the Spring Valley HOA advised Appellant's counsel that the HOA Board would hear him concerning his hardship request on December 8, 2011. (R. pp. ; Aff. of Beth Swindler p. 3 – Ex. C to Def's memo; 11/7/11 letter from Harry Goldberg– Ex. C5 to Def's memo). The "for sale" sign was not removed by

Appellant until late November 2011 or early December 2011 after Appellant had secured a renter for his property. (R. pp. ; Aff. of Beth Swindler p. 4–Ex. C to Def's memo).

On December 8, 2011, Appellant's hardship request concerning the placement of a "for sale" sign was considered by the HOA Board. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 12/8/11 Mtg. Mins.– Ex. C6 to Def's memo). At the meeting, Appellant admitted that he understood that no "for sale" signs are permitted without prior approval of the Board and that he never obtained prior approval. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 12/8/11 Mtg. Mins.– Ex. C6 to Def's memo). The HOA board sought legal advice from its counsel, Harry Goldberg of the Finkel Law Firm, concerning the authority of the HOA to levy fines. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 12/8/11 Mtg. Mins.– Ex. C6 to Def's memo). Upon advice of counsel concerning the authority of the HOA to levy fines, the Board voted at the December 8, 2011 meeting to impose/uphold a $500 fine against Appellant for his violation of the deed restriction. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 12/8/11 Mtg. Mins.– Ex. C6 to Def's memo). Appellant failed to pay the fine, therefore, the HOA Board voted at its February 23, 2012 meeting to hire the Finkel Law Firm to pursue legal action against him. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 2/23/12 Mtg. Mins.– Ex. C7 to Def's memo). The Finkel Law Firm pursued collection of the fine and filed a lien against Appellant's property. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; Lien – Ex. C9 to Def's memo). The lien was signed by the HOA President, Rodney Spivey, upon the request, direction and advice of legal counsel. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 5/24/12/12 Mtg. Mins. pp. 5-6, 6/28/12 Mtg. Mins. p. 6, 8/23/12 Mtg. Mins p. 4 – Ex. C8 to Def's memo).

The lien on Appellant's property was filed on September 13, 2012. (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; Lien – Ex. C9 to Def's memo). The lien was subsequently removed from Appellant's property by counsel for the HOA and there no longer exists any lien against Plaintiff's property by the HOA. (R. pp. ; Aff. of Beth Swindler pp. 4-5 – Ex. C to Def's memo).

ARGUMENTS

I. RESPONDENT, A PRIVATE ASSOCIATION, HAS THE POWER AND AUTHORITY TO FINE ITS MEMBERS; THE FINE IS JUDICIALLY ENFORCEABLE AND DOES NOT CONSTITUTE AND UNENFORCEABLE PENALTY; AND THE ACTIONS OF THE ASSOCIATION SHOULD NOT BE SET ASIDE ABSENT A SHOWING OF BAD FAITH OR THAT SUCH ACTION WAS ARBITRARY OR CAPRICIOUS

Appellant asserts that HOAs, including Respondent, lack the power and authority to fine their members. The South Carolina Courts have not yet directly addressed a HOA's authority and ability to fine its members, thus a novel issue has been presented under South Carolina law. The gravamen or crux of Appellant's assertion appears to rest on the contention that only governmental entities have the authority to levy fines, unless such authority is delegated to others by statute. However, as will be set forth below, this position is fundamentally flawed and contrary to established legal principles, thus Appellant's position must fail.

As an initial matter, it should be noted that Respondent is a South Carolina non-profit corporation. The Spring Valley neighborhood is what is typically known as a planned community. Respondent is not a Condominium Association and is not governed by the South Carolina Horizontal Property Act (S.C. Code Ann. §§ 27-31-10 to -440). This is conceded by Appellant in his brief. Many states appear to have adopted comprehensive legislative schemes governing the creation of and powers of HOAs in

planned communities, which are often called Planned Community Acts. However, South Carolina is not one of these states. South Carolina has no comprehensive legislative scheme governing planned communities, such as Spring Valley. Therefore, the power and authority of Respondent must be analyzed under the South Carolina Nonprofit Corporation Act and common law principles.

Despite Appellant's assertion that only a governmental entity can issue fines absent express statutory authority delegating the power to others, there appears to be wide agreement among recognized legal authorities and courts across the country, including the United States Supreme Court, that private associations may sanction members for rule violations, including the use of reasonable fines, and that courts should generally not interfere with the internal affairs of the association. American Jurisprudence, Second Edition, recognizes the right of an association to discipline members for rule violations, noting that the provisions of the association's constitution and bylaws are the measure of its authority to discipline. 6 Am. Jur. 2d Associations and Clubs § 31 (2008). With regard to the use of fines, American Jurisprudence, Second Edition specifically provides:

> An association may provide penalties by way of fines for the derelictions of its members. Such penalties must, however, be determined according to some method to which the member has agreed, at least impliedly, by joining the association, not only as to the imposition of the fine but also as to the maximum amount thereof, since a bylaw imposing an excessive fine would be set aside as unreasonable.

Id. See also, E.H. Schopler, Annotation, Unfair Or Defective Proceeding Of Labor Union In Expelling, Suspending, Or Fining Member As Ground For Judicial Interference, 21 A.L.R.2d 1397, 1401 (1955) ("A labor union, like any other association or society, has the power to establish, in its constitution or bylaws, rules which permit the taking of disciplinary measures, such as expulsion, suspension, or fines, against members who

transgress reasonable provisions contained therein."). Corpus Juris Secundum recognizes the contractual relationship between members and associations and provides:

> The liability of a member of an association for dues and assessments, and for fines and penalties, depends on his or her contract with the association as embodied in its articles of association or constitution and bylaws. Frequently, however, the contract makes the member personally liable for dues and assessments, and fines and penalties, in which event the members are obligated for their payment, and they are recoverable by action, brought by officers as trustees of the association. In imposing such dues, assessments, and penalties, the association must act within its powers. Additionally, the association must act within and according to the law of the land.

7 C.J.S. Associations §§ 14, 27, 62 (2004) (emphasis added). Further, it is well established that courts generally should not interfere with the internal affairs of associations and that decisions of the association are generally deemed conclusive without retrial by the court absent bad faith, arbitrariness, capriciousness, fraud, illegality, procedural unfairness or a violation of the organization's own rules and procedures. 6 Am. Jur. 2d Associations and Clubs §§ 27, 30, 36 (2008); 7 C.J.S. Associations §§ 16, 55 (2004) See also e.g., Finn v. Beverly Country Club, 683 N.E.2d 1191, 1193 (Ill. App. Ct. 1997); Straub v. American Bowling Congress, 353 N.W.2d 11, 13-14 (Neb. 1984); Terrell v. Palomino Horse Breeders of Am., 414 N.E.2d 332, 335 (Ind. Ct. App. 1980).

It appears that the authority of an association to fine its members and the enforceability of such fines has most frequently been litigated in the context of labor unions/labor associations. The United States Supreme Court has long deemed the relationship between labor unions and their members as contractual in nature. NLRB v. Boeing Co., 412 U.S. 67, 75-76 (1973); Scofield v. NLRB, 394 U.S. 423, 425 n.3 (1969) ("Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter

governed by local law."); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181-182 (1967); Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-619 (1958). In NLRB v. Allis-Chalmers, the United State Supreme Court was called upon to decide whether fines imposed by unions and suits brought for collection of the fines against union members who crossed the picket line during a strike constituted an unfair labor practice under section 8(b)(1)(A) of the National Labor Relations Act, which prohibits engaging in conduct to restrain or coerce employees in the exercise of their right guaranteed by §7 of the Act to refrain from concerted activities. 388 U.S. at 176. In analyzing the issue, the Court noted:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '(t)he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *.' Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore common-place and were commonplace at the time of the Taft-Hartley amendments.
>
> In addition, the judicial view current at the time § 8(b)(1)(A) was passed was that provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that 'The courts' role is but to enforce the contract.' In International Association of Machinists v. Gonzales, 356 U.S. 617, 618, 78 S.Ct. 923, 924, 2 L.Ed.2d 1018, we recognized that '(t)his contractual conception of the relation between a member and his union widely prevails in this country * * *.' Although state courts were reluctant to intervene in internal union affairs, a body of law establishing standards of fairness in the enforcement of union discipline grew up around this contract doctrine.

Id. at 181-183. The Court further noted the effect of the absence of a provision specifically providing for court enforcement of a fine in the union constitution by stating:

> [T]he potentiality of resort to courts for enforcement is implicit in any binding obligation. Surely it cannot be said that the absence of a "court enforceability" clause in a contract of sale implies that the parties do not foresee resort to the courts as a possible means of enforcement. It is also suggested that court enforcement of fines is "a rather recent innovation." Yet such enforcement was known as early as 1867.

Id. at 182 n.9. The Court then addressed the impact of a proviso to section 8(b)(1) that stated that nothing in section (8)(b)(1) shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Id. at 191. The Court then held:

> At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines themselves and expulsion for nonpayment would not be an unfair labor practice. Assuming that the proviso cannot also be read to authorize court enforcement of fines, a question we need not reach, the fact remains that to interpret the body of § 8(b)(1) to apply to the imposition and collection of fines would be to impute to Congress a concern with the permissible means of enforcement of union fines and to attribute to Congress a narrow and disre et interest in banning court enforcement of such fines. Yet there is not one word in the legislative history evidencing any such congressional concern. And, as we have pointed out, a distinction between court enforcement and expulsion would have been anomalous for several reasons. First, Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at that time. The efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled. Second, as we have noted, such a distinction would visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks.
>
> There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines.

Id. at 191-193. Ultimately, the Court held as follows:

> Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more jusitifed [sic] in light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.

Id. at 195.

In Scofield v. NLRB, the United State Supreme Court again acknowledged the contractual nature of the union-member relationship and found that a union rule forbidding crossing of a picket line during a strike that was duly adopted and "not the arbitrary fiat of a union officer" is enforceable against union members by way of a reasonable fine. Scofield, 394 U.S. at 425, n.3, 428-436.

In NLRB v. Boeing Company, the United States Supreme Court again had occasion to address labor union fines in relation to the National Labor Relations Act. 412 U.S. 67. The questioned presented was whether the NLRB was required by the National Labor Relations Act to inquire into the reasonableness of a disciplinary fine issued by a union. Id. at 68. In Boeing, union members were fined under the union constitution for crossing the picket lines during a strike. Id. at 68-70. In addressing the issue presented, the Court noted that it had previously held in NLRB v. Allis-Chalmers Mfg. Co. that § 8(b)(1)(A) was not intended to give the NLRB the "power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws." Id. at 71. The Court again noted that court enforcement of union fines has been known since at least 1867. Id. at 75. The Court also reaffirmed the contractual relationship between

unions and their members and stated: "The relationship between a member and his union is generally viewed as contractual in nature, and the local law of contracts or voluntary associations usually governs the enforcement of this relationship." Id. at 75-76 (internal citations omitted). The Court then held that the issue of whether disciplinary fines are reasonable is a matter to be decided by the state courts and not the NLRB. Id. at 74-78.

State courts across the nation have been more than willing to uphold the contractual authority of labor unions to issue fines authorized by union constitutions and bylaws for violations of the unions' constitutions and bylaws, including court enforcement of the fines imposed by the unions. In Communications Workers of America Local 7400 v. Abrahamson, the Supreme Court of Nebraska addressed the power and authority of a labor union to levy and collect fines authorized by the union constitution for violations of the constitution when union members crossed the picket lines during a strike. Communications Workers of Am. Local 7400 v. Abrahamson, 422 N.W.2d 547 (Neb. 1988). In Abrahamson, the union fined members, as authorized by the union constitution, and then sought judicial enforcement of the fines even though the union constitution did not specifically provide for court enforcement. Id. at 549-551. The court cited NLRB v. Allis-Chalmers Mfg. Co. and NLRB v. Boeing Co. (discussed supra), among other authorities, in finding a contractual relationship between unions and their members and allowing court enforcement of fines based on general breach of contract principles, even in the absence of any specific court enforcement provision in the union constitution. Id. at 551-553. The members also asserted that the fines constituted unenforceable contractual penalties rather than liquidated damages. Id. at 553. Appellant in the instant action has made the same argument. In addressing the argument, the

Nebraska Supreme Court began by noting that under NLRB v. Boeing Co. (discussed supra), the reasonableness of a fine is a matter for the state courts to determine if judicial enforcement of the fine is sought by the union. Id. Citing numerous authorities, the Nebraska Supreme Court found that reasonable fines are liquidated damages enforceable by the courts; however, unreasonable fines may be considered unenforceable penalties. Id. at 553-554. The court went on to find the fines reasonable and upheld their enforcement. Id. at 554-556. In so holding, the Nebraska Supreme Court stated:

> The appellants assert that the fines must be set aside, as they do not bear a reasonable relationship to the actual damages suffered by the union as a result of the appellants' returning to work. However, the actual damages to the union are impossible to ascertain. It is just such a situation that liquidated damages are intended to cover. As the court held in UAW, Local 283 v. Scofield, 50 Wis.2d 117, 134, 183 N.W.2d 103, 112 (1971), "It is obvious that the measure of damages is difficult to ascertain, however real the damage is to the union which seeks to protect its members from the damages of [unfair labor practices].... This is precisely the type of situation where liquidated damages, if reasonable, are appropriate." That the fines may indeed have had a punitive effect in no way lessens their effect in deterring future strikebreakers and in impressing upon union members the importance of solidarity. The amount of the fines assessed was based on a reasonable calculation and should be upheld.

Id. at 554. The Nebraska Supreme Court also addressed the union members' contention that they were never given copies of the union constitution and were unaware of its provisions. Id. Appellant in the case at hand has made a similar argument. Nonetheless, the Nebraska Supreme Court found such an argument unavailing given that the union constitution was available to any member who requested it. Id. at 555-556. In the case at hand, as set forth above, the deed restrictions, bylaws, rules and regulations, and fine structure have always been available, therefore, Appellant's same contention is similarly unavailing. It should be noted that the Supreme Court of Nebraska has also recognized

that the contractual nature of the relationship between associations and their members extends outside the realm of labor unions to other associations as well and also has recognized the doctrine of non-interference. Straub v. American Bowling Congress, 353 N.W.2d 11 (Neb. 1984).[1]

The Wisconsin Supreme Court has also upheld a labor union's ability to fine and the court enforceability of such fines based on general contract principles. Local 248 UAW v. Natzke, 153 N.W.2d 602 (Wis. 1967); United Auto., Aircraft and Agric. Implement Workers of Am., UAW, AFL-CIO, Local 283 v. Scofield, 183 N.W.2d 103 (Wis. 1971). In Natzke, the Wisconsin Supreme Court noted that it "has consistently held that a union's constitution and by-laws constitute a contract between the union and its members, which contract may be enforced in state courts. Natzke, 153 N.W.2d at 608 (emphasis added). The Natzke court went on to find that when the member was fined by the union, "a binding obligation in the form of a debt was created which was subject to collection by court action" and allowed court enforcement of the fine even though the union contract did not specifically provide for court enforcement and only specified remedies of expulsion or suspension for non-payment. Id. at 608-610. Subsequently, in Scofield, the Wisconsin Supreme Court upheld the principles enunciated in Natzke. Scofield, 183 N.W.2d 103. In Scofield, the Wisconsin Supreme Court noted that in Natzke it "permitted the recovery of the fine under ordinary principles of contract law."

[1] The court in Straub dealt with a member's challenge to a decision made by the American Bowling Congress to deny recognition of the member's bowing achievement. Id. at 12. In analyzing the challenge, the court held that "[t]he management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association." Id. (emphasis added). The court also affirmed that the power of the courts to review the actions of voluntary associations is limited to determining whether "there are inconsistencies between and association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public policy or law." Id. at 13-14.

Id. at 108. The Scofield court similarly found that ordinary contract law was the law to be applied to the union's action seeking to enforce its fine against its member. Id. at 110. The Scofield court began by noting that "[t]he liability of a member of an association for fines levied by the association depends upon the contract of the member with the association as embodied in the bylaws and articles of the association." Id. The court found that resolutions passed by the union also constitute part of the contract between unions and their members in addition to the bylaws and constitution. Id. at 112. The court further upheld the Natzke court's ruling that under basic contract principles, a fine can be collected through court action even though not specifically provided for in the contract, noting that even though parties may specify a remedy for a breach of their contract, such a specification does not exclude other legally recognized remedies. Id. at 111. In Scofield, the member also sought to challenge the fine on the grounds that it constituted and unenforceable contractual penalty. Id. at 112. In rejecting this contention, the court held:

> The argument unrealistically assumes the equivalency of an ordinary commercial contract and the union membership contract. We recognized in Local 248, U.A.W. v. Wisconsin Employment Relations Board (1960), 11 Wis.2d 277, 288, 105 N.W.2d 271, 276, that the levying of a fine was not merely the collection of damages, but was related to the power of a labor organization 'to enforce solidarity among its members.' It is obvious that the measure of damages is difficult to ascertain, however, real the damage is to the union which seeks to protect its members from the damages of 'unlimited piecework pay systems.' Scofield v. N.L.R.B., Supra, 394 U.S., page 431, 89 S.Ct. 1154, 22 L.Ed.2d 385. This is precisely the type of situation where liquidated damages, if reasonable, are appropriate. The liquidated damages, or fine, in the sum of $100 appear reasonable in view of the dangers foreseen by the United States Supreme Court and in the absence of compelling reasons to the contrary.

Id.

New Jersey courts are also in accord. In North Jersey Newspaper Guild Local No. 173 v. Rakos, the Superior Court of New Jersey, Appellate Division, addressed a situation where a union member was fined and expelled from the union for crossing a picket line. N. New Jersey Newspaper Guild v. Rakos, 264 A.2d 453, 454-455 (N.J. Super. Ct. App. Div. 1970). When the union member failed to pay the fine, the union filed suit to have it reduced to judgment and the union member challenged the propriety of the fine. Id. at 455-456. In analyzing the matter, the court began by noting:

> It would appear clear that, in general, a labor union may discipline one of its members for violation of its rules; that such discipline may take the form of a fine, and that such fine, when reasonable and levied in accordance with due process, may be collected in an action at law in the state courts.

Id. at 456. The court affirmed that the relationship between a union and its members is contractual, such contract consisting of the union's constitution as well as rules, directives and regulations adopted pursuant thereto. Id. at 457-458. The court also affirmed that a "union may fine or expel a member to enforce compliance with its constitution and rules." Id. at 458. The court further found that by acceptance of membership in the union, the union member consented to be bound by its rules and subject to its discipline. Id. Nonetheless, the union member attempted to avoid the fine by arguing that the fine could not be enforced against him because he had resigned from the union after the violation. Id. at 458-459. The court disagreed that the union member could "wipe the slate clean" and avoid discipline for a violation already committed by thereafter resigning from the union, finding that the resignation operated prospectively and could not cancel out what had happened before. Id. Specifically, the court held:

> Since defendant's contractual consent to be bound by the rules of the Guild and subject to its discipline was extant at the time he crossed the

> picket line and continued to work, the rights and obligations existing between him and the union continued enforceable, notwithstanding the later termination of his contractual obligation.

Id. at 459. The court ultimately found that the amount of the fine issued was not unreasonable and upheld the enforcement of the fine by way of a judgment, noting that one of the purposes of the fine was to serve as a deterrent to others. Id. at 460-461.

In Walsh v. Communications Workers of America, Local 2336, the Court of Appeals of Maryland (highest court of Maryland) also addressed the validity and enforceability of union-imposed fines. Walsh v. Communications Workers of Am., Local 2336, 271 A.2d 148 (Md. 1970). In Walsh, the union filed suit to enforce the fine it issued against a union member for working during a strike, after the union member failed to pay the fine. Id. at 149. The court noted the contractual nature of the union-member relationship and acknowledged the ability of a union to fine its members. Id. at 149-151. The court also noted that its review of union decisions is limited, stating that if "union remedies are proper and have been exhausted, courts will grant relief only from union sanctions that are fraudulent, unreasonable, illegal or arbitrary." Id. at 150. The court further noted the rule that:

> [W]hen the tribunals of an organization, incorporated or unincorporated, have power to decide a disputed question their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and the courts cannot be invoked to review their decisions or questions coming properly before them, except in cases of fraud-which would include action unsupported by facts or otherwise arbitrary.

Id. at 150-151 (quoting Martin v. United Slate, Tile, Composition Roofers, 77 A.2d 136, 141 (Md. 1950)). In Walsh, the union member also asserted that the union's only remedy when he did not pay the fine was to suspend him or expel him, but the court disagreed and upheld judicial collection of the fine. Id. at 151. The court also rejected the union

member's argument that the fine was an unenforceable penalty. Id. The court found that to be judicially collectible, the fine must be reasonable, analogizing a reasonable fine to liquidated damages and an unreasonable fine to a penalty. Id. The court then upheld judicial enforcement of the fine imposed. Id.

The California courts have recognized the foregoing principles as well. Jost v. Communications Workers of Am., Local 9408, 91 Cal. Rptr. 722 (Cal. App. Dep't Super. Ct. 1970); Posner v. Utility Workers Union of Am., 121 Cal. Rprt. 423 (Cal. Ct. App. 1975). In Jost, the court acknowledged the contractual relationship between unions and their members and quoted the Supreme Court of Washington with approval:

> 'The constitution of a labor organization and the rules adopted pursuant thereto form a contract between the association, on the one hand, and its members, on the other. Cox v. United Brotherhood of Carpenters and Joiners of America, 190 Wash. 511, 69 P.2d 148.
>
> 'Undoubtedly, a union member just as a member of any other voluntary association consents to be bound by union rules and to be disciplined for infractions thereof. But the mode of discipline prescribed by the union's organic law must be followed.

Jost, 91 Cal. Rptr. at 723-724 (quoting United Glass Workers Local No. 188 v. Seitz, 399 P.2d 74, 75 (Wash. 1965)) (emphasis added). The court then held:

> We conclude that the plaintiff as a member of the defendant union was bound by the terms of its constitution; that a fine for violating a specific provision of the constitution was lawfully imposed after a fair hearing; that, although the California courts have not previously been called upon to pass on the question, it is settled law in this country that such a fine becomes a debt enforceable by the courts in an amount that is not unreasonably large.

Id. at 725 (emphasis added). See also, Posner, 121 Cal. Rptr. at 425 ("A labor union may impose reasonable monetary fines to compel participation in a lawful strike, and the courts will enforce these fines if they were authorized by the union constitution or rules

and if the affected members' due process rights have been safeguarded.") (emphasis added).

Further, the Supreme Court of Oklahoma, has recognized that a "union which imposes a reasonable fine upon a member in accordance with the provisions of its constitution and by-laws, and due process, is entitled to court enforcement of the fine." Communication Workers of Am., AFL-CIO, Local 6003 v. Jackson, 516 P.2d 529, 532 (Okla. 1973). Further, in Jackson, it was recognized that a post-conduct resignation will not deprive the union of its right to assess and enforce the fine. Id. Further, the Supreme Court of Oklahoma has recognized the limited scope of review of disciplinary measures taken by a union against its members. Taxicab Drivers' Local Union No. 889 v. Pittman, 322 P.2d 153 (Okla. 1957). Specifically, the Pittman court stated:

> Without doubt, an organization such as this defendant has authority to establish rules which permit disciplinary measures against members who violate their reasonable provisions. Dangel & Shriber, Labor Unions, Sec. 171. For this reason courts will not interfere with the internal discipline of such associations except where the conduct for which discipline is attempted is not or cannot reasonably be made a punishable offense, or where the procedure taken to punish is so lacking in fairness as to render the decision void. The plaintiff maintains that the last exception is applicable in this case. Generally, the public courts look with favor on the settlement of such controversies within the affected organization, and trials of charges within such organizations do not have to conform to the same rigid standards as are required in the public courts. If the procedure adopted or required by the rules of the association conforms to the basic notions of justice which all recognize as essential to a fair trial, the result will not be disturbed so long as the conviction has some support in the evidence offered. In other words, if the organization does not act arbitrarily or in bad faith and conforms to its reasonable rules and modes of procedure, giving the accused a reasonable opportunity to defend himself, its internal discipline must be observed by those who voluntarily assented thereto when becoming members of the association. See Annotation 21 A.L.R.2d 1397.

Id. at 156. See also, Oklahoma Secondary Sch. Activities Ass'n v. Midget, 505 P.2d 175, 177-179 (Okla. 1972) (applying the rule of judicial non-interference to decision of high school athletic association).

Although the right of a private association or organization to levy and collect fines appears to be most commonly litigated in the context of labor unions, it is well recognized that such right is vested in all other private associations as well. See 6 Am. Jur. 2d Associations and Clubs § 31 (2008); 7 C.J.S. Associations § 62 (2004); Multiple Listing Service of Jackson, Inc. v. Century 21 Cantrell Real Estate, Inc., 390 So.2d 982 (Miss. 1980). See also, Nelson v. Associated Branch Pilots of Port of Lake Charles, 44 So.2d 357 (La. Ct. App. 1950) (upholding fine of pilot association against member); Jackson v. S. Livestock Exchange, 68 N.W. 1051 (Neb. 1896) (upholding fine of livestock association); Louisiana High Sch. Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968) (noting in passing that athletic association has power to punish member school by fines). For example, in Multiple Listing Service of Jackson, Inc. v. Century 21 Cantrell Real Estate, Inc., the Supreme Court of Mississippi addressed the authority to fine in the context of non-profit professional associations. Multiple Listing Service of Jackson, Inc., 390 So.2d 982. The court began by noting the court's limited scope of review of disciplinary proceedings of associations:

> The authorities are in general agreement that judicial review of disciplinary proceedings of a voluntary association should be limited to determining only whether the member disciplined received procedural due process as required by the Fourteenth Amendment to the United States Constitution, and whether the association has conducted its inquiry in accordance with its own rules of procedure. The writer of an exhaustive article involving judicial review of the actions of private associations stated:

> Where an association has conducted its inquiry in accordance with its own rules of procedure and in conformity with the minimum standards externally imposed to produce a rational and valid result, there is a strong presumption that its determination is a proper one. The interest in finality in the adjudication of disputes and the deference due the autonomy of the association and the competence of its tribunal argue against a broad scope of judicial inquiry. If a court, on consideration of the evidence adduced before the association tribunal, is convinced that the facts upon which the group's action is based could reasonably have been found by a body acting in good faith, it probably should refuse to overturn an otherwise proper proceeding. 76 Harv.L.Rev. 983 at 1037 (1963).
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> In Lowery v. International Brotherhood of Boiler Makers, Inc., 241 Miss. 458, 130 So.2d 831 (1961), this Court cited with approval the general rule, as follows:
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> The authorities seem to hold fairly uniformly that the courts will not intervene except for fraud perpetrated upon a member, or lack of jurisdiction. 'It is well established that courts will not interfere with the internal affairs of voluntary associations, except in such cases as fraud or lack of jurisdiction. * * * The decisions of the tribunals of an association with respect to its internal affairs will, in the absence of mistake, fraud, collusion, or arbitrariness, be accepted by the courts as conclusive. Moreover, it is held that the courts will not undertake to inquire into the regularity of the procedure adopted and pursued by such tribunals in reaching their conclusions.' 4 Am.Jur. 466, Associations and Clubs, Sec. 17. (130 So.2d at 836).

Id. at 983-984. The court further held that a "private association has the right to set its own goals and standards as long as they are not against the public policy of the State." Id. at 984. The court also held that it was highly desirable that private organizations have the right to discipline members for violations of standards contained in the organization's constitution, bylaws, rules and regulations. Id. at 986 (emphasis added). Ultimately, the court upheld the right of a private organization to fine its members, but found that before a fine can be imposed, there must be a schedule of maximum fines that can be imposed to prevent abuse of authority by the association in arbitrarily prescribing fines for individual offenses as it saw fit. Id. Therefore, the court found that a "fixed, reasonable fine, in the

nature of liquidated damages" would be sustained, but an arbitrary fine would not be enforced. Id.

Based on all of the foregoing, it is patently clear that private, non-governmental entities may fine their members based on basic accepted contract principles without the need for any express statutory authority and that the power to fine is not solely limited to governmental entities. In fact, one does not have to think too hard to find examples of non-governmental organizations and associations issuing fines based on such accepted principles. For example, employers have traditionally fined employees by docking pay for certain company policy violations. Further, professional and amateur sports organizations routinely fine athletes or teams for violations of league policies. One does not have to think too hard to find examples of when the NFL, MLB, NHL, NBA, NCAA or NASCAR have issued fines and sanctions to the athletes or sports teams they govern. Hotels fine guests for violations of hotel rules, such as the no smoking policy or the pet policy. Daycare providers assess charges to parents who fail to pick up their children on time, which are fines. The list could go on and on. To rule that a homeowners' association cannot issue fines would mean that none of the above-referenced entities could continue to issue fines and such a ruling would have wide reaching effects. Such a ruling would significantly impair such entities' ability to govern and regulate their members and enforce their rules, which would have a detrimental impact on business and society as a whole.

As set forth above, the principle that private, non-governmental entities may fine their members based on basic accepted contract principles has been recognized by legal treatises, case law from around the country, and by the United States Supreme Court

itself. Thus, the gravamen or crux of Appellant's position – that only governmental entities can issue fines absent a delegation of that power to others by statute – is fundamentally flawed and contrary to established law; therefore, it cannot be sustained. For that reason, Appellant's assertion that a HOA cannot issue fines because it is not a governmental entity and has not been expressly delegated the power to fine by statute must necessarily fail.

Nonetheless, Appellant cites several cases and legal authorities for the proposition that a homeowners association cannot levy fines absent specific statutory authorization to do so. However, the vast majority of authorities cited by Appellant deal with condominium associations and other statutorily controlled associations, and are inapposite to the case at hand:

- Unit Owners Ass'n of BuildAmerica-1 v. Gillmam,, 292 S.E.2d 378 (Va. 1982) – condominium established under the Virginia Condominium Act
- Holbert v. Great Gorge Village South Condominium Council, Inc., 656 A.2d 1315 (N.J. Super. Ct. 1994) – New Jersey Condominium Act
- Elbadramany v. Oceans Seven Condominium Ass'n, 461 So.2d 1001 (Fla. Dist. Ct. App. 1984) – Florida Condominium Act
- Stewart v. Kopp, 454 S.E.2d 672 (N.C. Ct. App. 1995) – North Carolina Condominium Act
- Vernon Manor Coop. Apartments, Section I v. Salatino, 178 N.Y.S.2d 895 (N.Y. App. Div. 1958) – New York Cooperative Corporations law
- Nev. Rev. Statues § 116.310305 – Nevada Uniform Common-Interest Ownership Act, governing condominiums
- Fla. Stat. ch. 718.303(3) – Florida Condominium Act
- Ga. Code Ann. § 85-1613e – no longer exists, but appears to have been a part of the former Georgia Condominium Act
- N.C.G.S. § 47F-1-102 – North Carolina Planned Community Act
- S.C. Code Ann. §§ 27-31-10 to -440 – South Carolina Horizontal Property Act, governing South Carolina condominiums
- Douglas Scott MacGregor, Condominium Law in South Carolina (3d ed. 2013) – apparently interpreting the South Carolina Horizontal Property Act

The Respondent in this case is not a Condominium Association or any other form of statutorily regulated homeowners' association, such as one subject to a Planned

Community Act. As noted above, South Carolina, unlike some other states, does not have any comprehensive statutory or regulatory scheme applicable to HOAs in planned communities. Condominium Associations and other statutory regulated homeowners' associations are not one and the same with HOAs for planned communities, as Respondent suggests by lumping them together. Rather, they are distinctly different entities that are created differently and are governed by separate rules. Condominium associations and other HOAs governed by comprehensive regulatory schemes are created by and governed by statute, thus their powers and authority must derive from statute. Consequently, to the extent that the above-authorities are cited by Appellant for the proposition that statutory authority is required to issue a fine, that is simply an acknowledgement that entities whose authority derives from statute and whose powers are defined by statute, must act within the statutory authority conveyed by the applicable Condominium Act or governing statutory scheme.

As noted above and conceded by Appellant, the Respondent is not a condominium association and is not governed by the South Carolina Horizontal Property Act. There is no statute or statutory scheme in South Carolina that specifically governs the creation of and powers of HOAs in planned communities. Consequently, HOAs for planned communities in South Carolina are not creatures of statute and their powers do not derive from statute like condominium associations or other statutorily controlled HOAs. Rather, the powers of a HOA for a planned community in South Carolina derive from the deed covenants and restrictions and the bylaws, and are governed primarily by common law, like labor unions and other types of associations, as set forth above. Consequently, HOAs for planned communities in South Carolina do not require specific

statutory authority to act and they are not constrained to act in the absence of statutory authority like may be the case for a condominium association or other statutorily controlled HOAs. Consequently, any citation to condominium association law or a Planned Community Act is misplaced and without merit.

Since many states appear to have adopted comprehensive legislative schemes governing the creation of and powers of HOAs in planned communities, case law directly on point relating specifically to the power of a non-statutorily controlled HOA, like exists in South Carolina, to fine is somewhat limited. Nonetheless, Poris v. Lake Holiday Property Owners Association, decided by the Illinois Supreme Court, is directly on point. Poris v. Lake Holiday Prop. Owners Ass'n, 983 N.E.2d 993 (Ill. 2013). It appears as though Illinois, like South Carolina, does not have any Planned Community Act or other comprehensive legislative scheme applicable to HOAs for planned communities. In Poris, it was noted that the Lake Holiday Property Owners Association was established as an Illinois nonprofit corporation and governed Lake Holiday, a community consisting of 2,000 single family lots. Id. at 996. The bylaws of the association provided that:

> The Board of Directors shall adopt such rules and regulations to the use of association property as they may deem reasonably necessary for the best interests of the association and its members. They may also in order to better effectuate said rules and regulations, adopt reasonable sanctions for non-compliance therewith.

Id. Pursuant to the bylaws, the HOA adopted rules and regulations, including a speed limit on the roads within the neighborhood. Id. The rules and regulations contained an enforcement provision noting that the board of directors was empowered to impose sanctions for violations of the rules and regulations, including the issuance of fines. Id.at 997. The rules and regulations set a fine schedule for speeding violations: (1) $50 for 1-

10 mph over the speed limit, (2) $100 for 11-15 mph over the speed limit, and (3) $200 for 16 mph or more over the posted speed limit. Id. at 996. The Board also established a private security department to, in part, enforce the speed limit. Id. at 997. The private security department officers only issued citations for violations of the Association's rules and regulations and did not issue citations for violations of the Illinois Motor Vehicle Code. Id. at 997-998. There were no consequences for receiving a citation as a result of violating the Association's traffic rules, other than receipt of a fine or warning from the Association. Id. at 998. If an Association member's guest was stopped for speeding, the Association member was responsible for the citation. Id. The security department had no authority to issue a citation to a member of the public who was neither an Association member nor a guest of a member. Id. Mr. Poris, a member of the Association, was pulled over by the security department and was issued a fine for speeding. Id. Thereafter, Mr. Poris brought suit challenging the ability of the security department to pull him over and detain him and also challenging the ability of the Association to fine him, among other things. Id. at 999. Much like the case at hand, Mr. Poris asserted that the Association was "unlawfully exercising police powers that it had not been granted, and was unlawfully empowering its employees with police powers that they did not have" and contended that only the Illinois legislature had the authority to create a private or public police department. Id. at 1000-1001. The court disagreed and stated:

> Plaintiff and the appellate court err in viewing this issue as one involving private citizens improperly attempting to assert police powers. The appellate court overlooked the fact that the Lake Holiday security officers only stop and detain drivers for violating Association rules occurring on private Association property, and citations are only issued to Association members. The appellate court failed to consider the Association's enforcement of its rules and regulations in the context of its authority as a voluntary association to enact and enforce those rules and regulations.

> As defendants and the *amicus* argue, with regard to voluntary associations, this court has long held that:
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> "In churches, lodges, labor unions, and other like voluntary associations, each person on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. [Citation.] Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government." *Engel v. Walsh*, 258 Ill. 98, 103, 101 N.E. 222 (1913).
>
> Thus, courts generally will not interfere with the internal affairs of a voluntary association absent mistake, fraud, collusion or arbitrariness. *Finn v. Beverly Country Club*, 289 Ill.App.3d 565, 568, 225 Ill.Dec. 528, 683 N.E.2d 1191 (1997).

Id. at 1001. Because it was not argued that the Association and its security department failed to act consistently with its bylaws, rules, and regulations in stopping Mr. Poris for speeding, the court found that the trial court properly declined to interfere with the internal affairs of the Association. Id. Nonetheless, Mr. Poris also argued that the Association exceeded the legislative powers granted to nonprofit corporations by enacting and enforcing its traffic rules. Id. The court noted that the nonprofit corporation act provides that each corporation shall "'have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed.'" Id. (quoting 805 ILCS 105/103.10(r) (West 2008)). The court noted that the articles of incorporation state, among other things, that the "Association was organized to construct and maintain roadways and do all things reasonable necessary therefore." Id. at 1001-1002. It was also noted that the bylaws of the Association authorized the board to "'adopt such rules and regulations relating to the use of association property as they may deem reasonably necessary for the best interest of the association and its members'" and

authorized the board to adopt reasonable sanctions for noncompliance with the rules and regulations. Id at 1002. Therefore, the court held that the "Association was not unlawfully exercising police powers that it did not possess, but rather was acting within its authority as a voluntary association to adopt and enforce its own rules and regulations." Id. (emphasis added). The court also stated that "[w]e can discern no logic in allowing a private homeowners association to construct and maintain private roadways, but not allowing the association to implement and enforce traffic laws on those roadways." Id. at 1003.

Though an unpublished opinion, Crouse v. Lake Camelot Property Owner's Association was cited in Appellant's brief, therefore, it will be briefly mentioned here. Crouse v. Lake Camelot Prop. Owner's Ass'n, 362 N.W.2d 446 (Wis. Ct. App. 1984). Like South Carolina, it appears that Wisconsin also does not have any Planned Community Act or comprehensive legislative scheme applicable to HOAs governing planned communities. In Crouse, the HOA was organized as a nonstock, nonprofit corporation, much like Respondent in the case at hand. Id. The restrictive covenants allowed the Association to place restrictions on camping and camping equipment, and the bylaws of the Association authorized the board of directors to adopt rules and regulations and to establish penalties for infractions thereof. Id. The board adopted a per diem fine system to enforce a camping regulation enacted by the board. Id. Citing a labor union case, the court noted that the Association's power to fine members "depends on the contract between the association and the members as embodied in the bylaws and articles." Id. (emphasis added). The court then found authority to fine in the bylaws of

the Association, which granted the board the power establish penalties for infractions of the rules and regulations. Id.

Further, in Crouch v. Bent Tree Community Inc., the Georgia Court of Appeals upheld fines for a violation of a restrictive covenant regarding the wrongful storage of a boat, noting that the covenants and restrictions stated that every property owner "shall comply with the Declaration and rules and regulations of [Bent Tree] adopted pursuant thereto, and any lack of compliance shall entitle [Bent Tree] ... to take action to enforce the terms of the Declaration or [the] rules and regulations." Crouch v. Bent Tree Community Inc., 713 S.E.2d 402, 404-06 (Ga. Ct. App. 2011). Admittedly, Georgia does have a Property Owners' Association Act[2] that does provide an optional comprehensive scheme regulating HOAs, and the Act does provide for the levying of fines by a HOA. Ga. Code Ann. § 44-3-223. However, that Act was adopted in 1994 and does not automatically apply to all HOAs for planned communities, whether created before or after the effective date of the Act. Ga. Code Ann. §§ 44-3-222, -235. Rather, for the Act to apply, the declaration of covenants and restrictions or a properly adopted amendment thereto must state an affirmative election to be governed by the Act; otherwise, the Act is inapplicable. Id. According to information publicly available through the Georgia Secretary of State's website and also the Articles of Incorporation published on the Bent Tree Community Inc.'s website,[3] it appears that Bent Tree Community, Inc. was incorporated in 1983, which was prior to the adoption of the Property Owners' Association Act. Further, the Bent Tree Community publishes its Declaration of

[2] Ga. Code Ann. § 44-3-220 to -235.
[3] http://www.bent-tree.com/document_main.asp

Covenants, Conditions, and Restrictions on its website.[4] A review of the Declaration published on the Bent Tree Community's website suggests that the Declaration was never amended to affirmatively elect to be governed by the Act. The fact that the Georgia Court of Appeals never referenced the Property Owners' Association Act in the Crouch decision, coupled with information publicly available about the Bent Tree Community, seems to suggest that the Property Owners' Association Act was inapplicable to the Bent Tree Community, although it is admittedly not one hundred percent clear.

Finally, in Zerquera v. Centennial Homeowners' Association, Inc., the Florida Court of Appeals upheld fines against homeowners for violating restrictive covenants. Zerquera v. Centennial Homeowners' Association, Inc., 721 So.2d, 751 (Fla. Dist. Ct. App. 1998). Florida does have a comprehensive legislative scheme governing homeowners' associations that appears to have been adopted in 1992 and does authorize HOAs to issue fines. Fl. Stat. Ch. 720.301-.407. However, it is unclear whether this statutory scheme was applicable to the homeowners' association in Zerquerna, as the Court did not reference any statutes for the authority to fine or the maximum allowable fine, but rather looked to the restrictive covenants relating to the authority to fine and the maximum allowable fine. Zequerna, 721 So.2d at 752-753; Fl. Stat. Ch. 720.305(2) (setting forth maximum allowable fines).

Turning to the case at hand, South Carolina jurisprudence has long recognized that restrictive covenants are contractual in nature. See, Seabrook Island Property Owners' Ass'n v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005) Restrictive covenants are considered voluntary contracts between the parties. See, Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). Since

[4] http://www.bent-tree.com/document_main.asp

they are contractual in nature, they "bind the parties thereto in the same manner as would any other contract." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 682 S.E.2d 902, 913 (Ct. App. 2006). Thus, the relationship between homeowners and a HOA in South Carolina is contractual in nature, like other association-member relationships, as set forth above. Consequently, based on the authorities cited above, Respondent, like other voluntary associations, has the power and authority to fine based on the contractual relationship. In fact, the South Carolina courts have implicitly recognized fines issued by HOAs. See Seabrook Island Property Owners' Ass'n, 365 S.C. at 239, 616 S.E.2d at 434 (citing to trial court's order referencing provision in the covenants authorizing sanctions for violations when searching for basis for the recovery of attorney's fees); Rawlinson Road Homeowners Association v. Jackson, 395 S.C. 25, 716 S.E.2d 337 (Ct. App. 2011) (recognizing that HOA had issued fine to a homeowner); River Hills Prop. Owners Ass'n v. Amato, 326 S.C. 255, 259, 487 S.E.2d 179, 180 (1997) (noting that the homeowners association had issued a fine). Further, while not binding on this court, it should be noted that the Attorney General's office has also long taken the position that the issuance of fines by HOAs in South Carolina is a private contractual matter. See Ops. S.C. Atty. Gen. August 30, 2001; September 28, 2004; January 5, 2005; July 11, 2007; February 5, 2008; June 2, 2010; and March 21, 2012. Consequently, the issuance of fines by HOAs in South Carolina has been a long-standing accepted practice and custom.

In addition to the foregoing, it should also be noted that the issuance of a fine also falls within the broad powers granted to nonprofit corporations in South Carolina. Pursuant to the South Carolina Nonprofit Corporation Act, the corporation shall adopt

bylaws and the "bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation." S.C. Code Ann. § 33-31-206. Further, the South Carolina Nonprofit Corporation Act grants the following powers to a nonprofit corporation, among other things:

> Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
> ...
> (3) to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation;
> ...
> (10) to conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this State;
> ...
> (15) to impose dues, assessments, and admission and transfer fees upon its members;
> ...
> (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

S.C. Code Ann. § 33-31-302. The imposition of fines is necessary and convenient to further the activities and affairs of the corporation, relates to regulating and managing the affairs of the corporation, and is not inconsistent with law, as set forth above. Additionally, the imposition of a fine is akin to dues or assessments. Thus, although specific statutory authority is not required for Respondent to levy a fine, the South Carolina Nonprofit Corporation Act nonetheless provides statutory authority in any event.

As set forth above in the recitation of the facts, Respondent complied with all procedural and notice requirements of the covenants, bylaws, rules and regulations, and

fine structure with regard to the issuance of the fine. Additionally, Respondent has a published schedule of maximum fines, which alleviates any concerns of arbitrarily prescribed fines. (R. pp. ; Information Guide p. 25 – Exhibit C2 to Def's memo in support of MSJ). Further, as set forth above, Appellant was afforded a hearing before the Board upon his request to consider his hardship request and the issuance of the fine. Consequently, Appellant has been provided with notice and an opportunity to be heard. Thus, he has been afforded due process. Therefore, the fine must be upheld and enforced against Appellant. Further, given the absence of any bad faith, violations of the Respondent's own rules and procedures, arbitrariness, or capriciousness by Respondent, the court should refrain from interfering with Respondent's internal affairs and decisions under the principles of non-interference enunciated above. Therefore, the Court should not second guess the Board's decision to deny the hardship request and uphold the fine. Such abstention is also consistent with the Business Judgment Rule in South Carolina. "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." Baumann v. Long Cove Club Owners Assn'n, 380 S.C. 131, 138, 668 S.E.2d 420 (Ct. App. 2008) (quoting Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993)).

Appellant attempts to distinguish HOAs from other types of associations by arguing that in other types of associations members can either pay the fine or leave the organization to escape the fine, suggesting that fines by an association are not court enforceable. However, this argument is unavailing, as numerous authorities (cited

above)[5] have upheld court enforceability of association fines and have specifically found that a member may not escape liability for payment of a fine by subsequently leaving the organization, given that the contractual obligation arose prior to the termination of the relationship.

Despite the common law and statutory authority for Respondent to issue fines, Appellant further asserts that the issuance of fines by Respondent and HOAs in general violates public policy. Appellant's position that the issuance of fines by a HOA is a violation of public policy appears to be primarily predicated on his same assertion that only a governmental entity can issue fines. However, since this assertion cannot be sustained, as set forth above, Appellant's public policy argument must also necessarily fail. In fact, as set forth above, courts from other jurisdictions have consistently upheld the ability to fine by various associations, thus implicitly holding that fines are allowable as a matter of public policy. One court even went as far as to specifically state that it is "highly desirable" that private organizations have the right to discipline members for rule violations. Multiple Listing Service of Jackson, 390 So.2d at 986. Further, as noted herein and mentioned in Appellant's brief, some states have adopted comprehensive legislative schemes governing homeowners associations. Such legislative schemes retain

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[5] See e.g., Abrahamson, 422 N.W.2d at 547 (upholding court enforceability of fine); Natzke, 153 N.W.2d 602 (upholding court enforceability of fine); Scofield, 183 N.W.2d 103 (upholding court enforceability of fine); Walsh, 271 A.2d 148 (upholding court enforceability of fine); Rakos, 264 A.2d at 458-461 (upholding court enforceability of fine and finding that member could not "wipe the slate clean" by subsequently resigning from the organization, finding that the resignation operated prospectively and could not cancel out what had happened before while the contractual relationship was in force); Jost, 91 Cal. Rptr. 722 (upholding court enforceability of fine); Posner, 121 Cal. Rprt. 423 (upholding court enforceability of fine); Jackson, 516 P.2d at 532 (upholding court enforceability of fine and recognizing that a post-conduct resignation from the organization will not deprive the organization of its right to assess and enforce the fine.); 7 C.J.S. Associations §§ 14, 27, 62 (2004). See also, Allis-Chalmers, 388 U.S. at 182 n.9 (noting long history of court enforcement of fines and that potentiality of resort to court for enforcement is implicit in any binding obligation).

and codify the common law authority to fine. See e.g., Fl. Stat. Ch. 720.305; Ga. Code Ann. § 44-3-223; N.C. Gen. Stat. § 47F-3-102. The fact that these legislative schemes codify the power to fine rather than expressly prohibit it is a clear expression that it is desirable public policy for HOAs to be able to levy fines.

In fact, it would create undesirable public policy if HOAs were prohibited from issuing fines to enforce their rules and restrictions. The only other option would be for the HOA to file a legal action against a member seeking injunctive relief every time there is a violation. This method of enforcement would often allow intentional violators to escape without suffering any consequences by remedying the violation shortly before any request for an injunction can be heard, thus eliminating any effective deterrent to violations. Further, the HOA would have to hire an attorney to pursue every violation. Ultimately, the cost to the HOA and violating homeowner would greatly exceed the cost of any fine imposed, as the homeowner would have legal fees, may be subject to attorney's fees being awarded to the HOA, and would still have to pay any potential award of damages. For example, in Seabrook Island Property Owners' Association v. Berger, the South Carolina Court of Appeals upheld an award of $39,194.08 in attorney's fees to the HOA in an action for injunctive relief against a homeowner for violations of the restrictive covenants. Seabrook Island Property Owners' Ass'n, 365 S.C. 234, 616 S.E.2d 431. Even if attorney's fees were not awarded to the HOA, the HOA would still have incurred the legal expenses and those legal costs would ultimately have to be passed on to the homeowners in the form of higher dues and assessments. Consequently, if a HOA is found to not have authority to issue fines to enforce its covenants and restrictions, ultimately it will be the homeowners that suffer. These are the same

homeowners who voted to grant the authority to the Board to issue fines to maintain the common scheme of their neighborhood. Further, if a legal action had to be filed for every violation of the rules and restrictions, it would open a whole new floodgate of lawsuits, placing an undue burden and stain on our judicial system.

Appellant further asserts that a fine issued by a homeowners association constitutes an unenforceable penalty. As set forth above, numerous other courts have considered this very same argument in the context of fines by various types of associations. The decisions and authorities cited supra have uniformly treated reasonable fines as being akin to liquidated damages and unreasonable fines to unenforceable penalties. Therefore, as long as the fine is reasonable, it is enforceable. The fine schedule for Spring Valley provides for a fine of $100 per week, not to exceed $1500 per year. (R. pp. ; Info. Guide p. 25 – Ex. C2 to Def's memo). This amounts to approximately $14.29 per day that a violation persists. Appellant was fined $500 for his continued violation in accordance with the established fine schedule. Such a fine is reasonable and is proportionate to any harm resulting from the violation. If the HOA had to file an injunction for every violation as Appellant suggests, the HOA would incur significant attorney's fees for each violation. The costs to the HOA of filing and prosecuting an injunction, and the costs of enforcing such an injunction would far exceed the fines authorized by the HOA Bylaws. The costs to the homeowner in defending such and injunction likely would be significantly higher than any fine that could be imposed by the HOA. Thus, the fine structure is reasonable and not disproportionate to the potential damage resulting from any violation, especially in light of the knowing and intentional nature of Appellant's violation. Further, as recognized in the authorities cited

above, it is often difficult to ascertain the damages to an association for rule violations and such a situation is precisely the type of situation where reasonable liquidated damages are appropriate, especially given the association's interest in maintaining solidarity among its members and preserving the common scheme of the neighborhood. See Scofield, 183 N.W.2d at 112; Abrahamson, 422 N.W.2d at 554. Therefore, the fine should be upheld as reasonable absent any compelling reason to the contrary, which Appellant has failed to present. Further, as set forth supra, pursuant to the South Carolina Nonprofit Corporation Act, a nonprofit corporation also has statutory authority to levy fines in addition to its contractual authority. Consequently, given that Respondent also has statutory authority to issue a fine, the fine does not constitute an unenforceable penalty for that reason as well. See Spratt v. Henderson Mill Condominium Ass'n, Inc., 481 S.E.2d 879, 881-82 (Ga. Ct. App. 1997) (fines authorized by statute are neither a liquidated damages award nor an unenforceable penalty).

II. THE BUSINESS JUDGMENT RULE APPLIES TO THE ASSOCIATION AS WELL AS INDIVIDUAL DIRECTORS AND RESPONDENT'S BUSINESS JUDGMENT RULE DEFENSE DOES NOT FAIL AS A MATTER OF LAW

Appellant asserts that Respondent's Business Judgment Rule defense fails as a matter of law. This issue has not specifically been raised in Appellant's Statement of Issues on Appeal, therefore, it should not be considered pursuant to Rule 208(b)(1)(B), SCACR and should be deemed to be waived. To the extent the issue is considered, it appears that Appellant's argument is twofold. Appellant first asserts that the Business Judgment Rule only applies to individual directors and, second, asserts that the Business Judgment Rule is inapplicable because the acts of Respondent are *ultra vires.*

As to Appellant's first contention, the South Carolina Courts have in fact applied the business judgment rule to the HOA entity in actions arising out of a decision made or action taken by the HOA by and through the board of directors. See Baumann v. Long Cove Club Owners Assn'n, 380 S.C. 131, 138, 668 S.E.2d 420 (Ct. App. 2008) (applying business judgment rule the Association, who was the named defendant); Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987), aff'd 294 S.C. 86, 362 S.E.2d 874 (1987) (applying the business judgment rule to the Association). Such application of the Business Judgment Rule to the association is consistent with and supported by the doctrine of non-interference with the internal affairs and decisions of associations by the courts as set forth above.

Appellant's second assertion – that the Business Judgment Rule is inapplicable on the grounds that the issuance of the fine is *ultra vires* – is again premised on Appellant's assertion that Respondent lacks the power and authority to fine. As set forth above, Respondent does have the power and authority to fine pursuant to common law contract principles and under the South Carolina Nonprofit Corporation Act, therefore, the act of fining was an *intra vires* act and not an *ultra vires* act. Consequently, the Business Judgment Rule would be applicable to Respondent. Given that the actions of Respondent were based on longstanding custom in South Carolina and the advice of legal counsel,[6] and given Appellant's failure to demonstrate any bad faith, dishonesty, or incompetence on the part of Respondent, the Circuit Court did not err in applying the Business Judgment Rule to Respondent. Further, the South Carolina courts have never struck down the practice of issuing fines, nor has there been any other South Carolina legal

[6] (R. pp. ; Aff. of Beth Swindler p. 4 – Ex. C to Def's memo; 12/8/11 Mtg. Mins.– Ex. C6 to Def's memo; 5/24/12/12 Mtg. Mins. pp. 5-6, 6/28/12 Mtg. Mins. p. 6, 8/23/12 Mtg. Mins. p. 4 – Ex. C8 to Def's memo)

authority casting any doubt on such a practice. Consequently, to the extent that this Court were to rule that HOAs lack the authority or power to issue fines, it may create liability where there was previously none. Thus, any such ruling should have prospective effect only. See, Toth v. Square D Co., 298 S.C.6, 8, 377 S.E.2d 584, 585 (1989) (prospective application of judicial decisions is required when liability is created where formerly none existed).

III. RESPONDENT'S GOVERNING DOCUMENTS PROPERLY AUTHORIZE THE ISSUANCE OF FINES

Appellant next asserts that the restrictive covenants in his deed do not provide Respondent with the authority to fine, therefore, Respondent is not empowered to issue fines even if fines were allowable in this State. This issue has not specifically been raised in Appellant's Statement of Issues on Appeal, therefore, it should not be considered pursuant to Rule 208(b)(1)(B), SCACR and should be deemed to be waived. To the extent the issue is considered, it should be noted that Appellant cites the case of Rawlinson Road Homeowners Association v. Jackson, 295 S.C. 25, 716 S.E.2d 337 (Ct. App. 2011) for the proposition that rules adopted by a HOA cannot exceed the scope of what is permitted by the restrictive covenants. However, the court in Rawlinson Road never made any ruling on that issue and citation to Rawlinson Road for such a proposition is misplaced. The Rawlinson Road case involved an appeal from the ruling of the master in equity concerning a homeowner storing a boat on his lot. Id. at 27, 716 S.E.2d at 339. This Court, in its recitation of the procedural and factual history, noted that the master in equity found that the restrictive covenants for the HOA only empowered the association to adopt rules and regulations concerning common areas, thus the association did not have authority pursuant to the restrictive covenants to adopt rules and regulations

concerning an individual lot. Id. at 27-33, 716 S.E.2d at 339-41. However, that specific ruling was apparently never appealed and this Court never addressed that issue in the appeal. Thus, such a ruling by a master in equity is neither binding nor persuasive authority on this Court. Rather, in Rawlinson Road, this Court simply ruled that the HOA failed to file any responsive affidavits and otherwise failed to properly come forward with any evidence to oppose plaintiff's motion for summary judgment, as required by Rule 56, SCRCP. Id. at 33-34, 716 S.E.2d at 341-42.[7] Again, the court never addressed the master in equity's ruling concerning the scope of the covenants and rules; therefore, reliance on Rawlinson Road is misplaced.

Even if Rawlinson Road could be cited for the proposition that a HOA's rules cannot exceed the scope of what is permitted in the covenants, the bylaws as well as the rules and regulations in this case do not exceed the scope of the covenants. In this case, the covenants do not limit the authority of Respondent to issue bylaws, rules and regulations only to common areas. Rather, the applicable covenants state that Appellant shall abide by the duly enacted rules, regulations and bylaws of the association. (R. pp. ; 1979 Deed p. 1 – Ex. B to Def's memo). Consequently, the covenants in this case do not contain any restriction on the scope of the bylaws, as was apparently the case in Rawlinson Road. Further, Respondent's actions in levying and enforcing the fine fall within the broad authority granted by the deed to enforce compliance with the restrictions by "any other appropriate legal action."[8] Further, as set forth by numerous authorities

[7] The court also addressed whether the proper standard was applied in considering a request for injunctive relief and whether the master in equity erred by excluding certain testimony. Id. at 35-38, 716 S.E.2d at 343-344.

[8] (R. pp. ; 1979 Deed p. 3 – Exhibit B to Def's memo in support of MSJ).

cited above[9], the bylaws and duly adopted rules also constitute part of the contractual relationship between associations and their members, thus the contractual relationship is not limited to the restrictive covenants.

For the foregoing reasons, Respondent requests that this Court find that Respondent's governing documents properly authorize the issuance of fines.

IV. THE DEED RESTRICTION REGARDING "FOR SALE" SIGNS DOES NOT VIOLATE PUBLIC POLICY AS AN UNREASONABLE RESTRAINT ON ALIENATION

Appellant next asserts that the deed restriction pertaining to "for sale" signs constitutes and unreasonable restraint on the alienation of property and is thus void as a violation of public policy.

"A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose" and the rule of strict construction "will not be used to defeat the clear express language of the covenant." Sea Pines Plantation Co., 294 S.C. at 270, 363 S.E.2d at 894. Furthermore, "[c]ourts shall enforce such covenants unless they are indefinite or contravene public policy." Id. Here, the restrictive covenant is clear and unambiguous. Further, the restriction on the placement of "for sale" signs is not a restraint on the alienation of property, let alone an "unreasonable" one, thus it does not violate public policy. As noted in the affidavit of Beth Swindler, thousands of properties have been sold in the Spring Valley subdivision even though the "for sale" sign restriction has been

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[9] Straub, 353 N.W.2d at 12 (association's constitution and bylaws constitute contract between association and members); Scofield, 183 N.W.2d 103 (resolutions passed by union constitute part of the contract between unions and their members in addition to the bylaws and constitution); Natzke, 153 N.W.2d at 608 (union's constitution and bylaws constitute contract between union and members); Rakos, 264 A.2d 453, 457-458 (contract between union and its members consists of the union's constitution as well as rules, directives and regulations adopted pursuant thereto); Jost, 91 Cal. Rptr. at 723-724 (acknowledging constitution of a labor union and the rules adopted pursuant thereto form a contract between the association).

in place since 1979. (R. pp. ; Aff. of Beth Swindler pp. 1-2 – Ex. C to Def's memo). Appellant likely purchased his property in Spring Valley without seeing a "for sale" sign on the property. Appellant can engage the services of a real estate agent to sell his property. He could also place an advertisement in the newspaper or any other print source or advertise his property online. There are a myriad of ways that Appellant may market his property. The fact is that homeowners continue to sell homes in Spring Valley every month. The simple fact that Appellant cannot display a "for sale" sign does not prevent him from selling or otherwise transferring title to his property. Appellant has not cited any case law or other legal authority holding that a restriction on the use of "for sale" signs constitutes an unreasonable restraint on the alienation of property. In fact, at least one other jurisdiction has considered this precise issue and found exactly the opposite. Godley Park Homeowners Ass'n, Inc. v. Bowen, 649 S.E.2d 308, 310-11 (Ga. Ct. App. 2007) (restrictive covenant prohibiting the placement of "for sale" sign did not constitute unenforceable restraint on the alienation of property).

Consequently, Respondent respectfully requests that this Court uphold the Circuit Court's ruling that the restriction on the placement of "for sale" signs does not constitute an unenforceable restraint on the alienation of property.

V. RESPONDENT DID NOT WRONGFULLY RECORD AN UNFOUNDED CLAIM ON APPELLANT'S PROPERTY, THEREFORE, THE CIRCUIT COURT DID NO ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S SLANDER OF TITLE CLAIM

Appellant next asserts that the Circuit Court erred in granting summary judgment to Respondent on his slander of title claim. Appellant's slander of title claim is premised on his assertion that the documents governing the relationship between Appellant and Respondent do not provide authority to file a lien to enforce/collect a fine. As set forth

above, the covenants and restrictions, bylaws, fine structure, and rules and regulations give Respondent broad authority, including, but not limited to:

- The right to *enforce* compliance by injunction or *any other appropriate legal action.* (R. pp. ; 1979 Deed p. 3 – Ex. B to Def's memo).
- The power to *enforce* and exercise all conditions, covenants, restrictions and limitations contained in the deeds. (R. pp. ; Info. Guide p. 16–Ex. C2 to Def's memo).
- The power to adopt and publish a schedule of fines for violations of covenants, deed restrictions, rules and regulations and/or By-Laws of the Spring Valley Homeowners Association. (R. pp. ; Info. Guide p. 17 – Ex. C2 to Def's memo).
- The power and duty to *assess and collect* fines for the continuous and repeated violation(s) of covenants, deed restrictions, rules and regulations, and/or By-Laws by owner(s) until the violation(s) is/are abated. (R. pp. ; Info. Guide p. 17 – Ex. C2 to Def's memo).

Further, some of the stated purposes of the Spring Valley HOA are to "enforce any and all covenants, restrictions and agreements applicable to the property within Spring Valley..." and "to do any and all other things that in the opinion of the Board of Directors will promote the common benefit and enjoyment of the residents and owners within Spring Valley." (R. pp. ; Info. Guide p. 11 – Ex. C2 to Def's memo).

The filing of the lien was within the broad enforcement authority granted to Respondent, including the broad authority to assess and *collect* fines. Further, the filing of the lien is in accord with the stated purposes of the Spring Valley HOA. Therefore, the lien was not wrongly filed and the Circuit Court did not err in granting summary judgment to Respondent. Further, as set forth above, the lien was executed and filed

upon the advice and direction of legal counsel for Respondent, thus Respondent would be protected by the Business Judgement Rule and the ruling of the Circuit Court should be upheld for that reason as well.

VI. RESPONDENT'S ACTIONS IN ENFORCING THE RESTRICTIVE COVENANTS DO NOT CONSTITUTE TRADE OR COMMERCE, THEREFORE, THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S UNFAIR TRADE PRACTICES CLAIM

Finally, Appellant asserts that the Circuit Court erred in granting summary judgment to Respondent on his Unfair Trade Practices claim. The Circuit Court granted summary judgment to Respondent for three reasons: (1) since Respondent had the legal power and authority to fine and the procedures in the governing documents were followed, Appellant failed to come forward with any evidence of any unfair trade practices; (2) the actions of Respondent in enforcing the covenants and restrictions were not in the conduct of any trade or commerce; and (3) Respondent's conduct did not have in impact upon the public interest. These three grounds will be addressed in turn.

Under the Unfair Trade Practices Act, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. S.C. Code Ann. § 39-5-20. Therefore, in order to prevail on an Unfair Trade Practices claim, Appellant would have to demonstrate unfair methods of competition or unfair or deceptive acts or practices in the conduct of trade or commerce. As set forth above, Respondent had legal and contractual authority for its actions and followed all of the procedures set forth in the applicable bylaws, rules and regulations, restrictive covenants and the fine structure. Appellant failed come forward with any evidence of any unfair methods of competition or any unfair or deceptive acts or practices in the

conduct of any trade or commerce. Therefore, the circuit court did not err in granting summary judgment to Appellant for that reason.

Next, Appellant essentially asserts that because Respondent may theoretically be engaging in trade or commerce in some of its actions or functions, such as the maintenance of common elements, that all of its actions, even those not constituting trade or commerce, fall within the scope of the Unfair Trade Practices Act (UTPA). Therefore, Appellant asserts that the Circuit Court erred in granting summary judgment to Respondent on his UTPA claim on the ground that the alleged conduct did not constitute "trade or commerce". However, Appellant's argument misinterprets the scope of the UTPA. In order to prove a violation of the UPTA, the allegedly unfair or deceptive acts or practices must occur "in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20; Foggie v. CSX Transportation, Inc., 313 S.C. 98, 104, 431 S.E.2d 587, 591 (1993); Moore v. Williamsburg Regional Hosp., 560 F.3d 166, 178 (4th Cir. 2009). Trade or Commerce is defined by the Act as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10. The acts of the HOA in enforcing the covenants and restrictions were not in the conduct of any trade or commerce because the Respondent was not selling or distributing any services or property to Appellant by those acts. Whether the Respondent may theoretically be involved in trade or commerce in some of its other functions, such as maintaining common elements, is irrelevant, as the UTPA is inapplicable unless the specific allegedly unfair or deceptive acts are in the conduct of

"trade or commerce". The test is whether the specific alleged acts are in the conduct or "trade or commerce", not whether the person or entity has ever engaged in "trade or commerce" at any point by any of its actions or functions. This is clearly borne out by Foggie v. CSX Transportation and Moore v. Williamsburg Regional Hospital. In Foggie, Supreme Court of South Carolina held that a railroad company's removal and subsequent refusal to reinstall a railroad crossing was not the conduct of trade or commerce, thus the railroad company should have been granted a directed verdict on the UTPA claim. Foggie, 313 S.C. at 104, 431 S.E.2d at 591. Clearly, a railroad company would be engaged in "trade or commerce" in some of its actions, such as transporting goods for compensation. However, the specific acts of removing and refusing to reinstall a railroad crossing did not constitute "trade or commerce", thus the UPTA was inapplicable even though the railroad may be engaging in trade or commerce through some of its other actions. In Moore, the Fourth Circuit Court of Appeals found that a hospital's peer review of a doctor is not action taken in the conduct of trade or commerce. See Moore, 560 F.3d at 199. Again, clearly a hospital would be engaging in "trade or commerce" though many of its functions, such as treating patients for compensation. However, the specific act of peer review of a doctor was not in the conduct of "trade or commerce" therefore, the UTPA was inapplicable to claims arising out of the peer review. Because Appellant's allegations of unfair and deceptive acts relate to Respondent's actions in enforcing the restrictive covenants, which are not in the conduct of "trade or commerce", the UTPA is inapplicable and the Circuit Court's grant of summary judgment should be upheld.

Finally, in order to have a valid claim under the UTPA, Appellant must show that the Respondent's conduct had an impact upon the public interest, as the "act is not available to redress a private wrong where the public interest is unaffected." Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 457, 478, 351 S.E.2d 347, 350 (Ct. App. 1986). In this case, Appellant has failed to show any impact on the public interest. Rather, Appellant knowingly violated the HOA rules and is seeking redress for a fine issued to him. This is simply an attempt to redress an alleged private wrong and has no impact on the public interest. Consequently, the UTPA is inapplicable to Appellant's claims for this reason as well.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court uphold the Circuit Court's order granting summary judgment to Respondent.

Respectfully submitted,

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June 29, 2015

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2014-002587
Common Pleas Case Nos. 2012-CP-6974 & 2014-CP-40-3960 (restored)

S. Coley Brown.....Appellant,

v.

Spring Valley Homeowners Association, Inc.....Respondent.

PROOF OF SERVICE

I certify that I served the Respondent's Initial Brief and Respondent's Designation of Matter To Be Included In the Record On Appeal by depositing a copy of the same on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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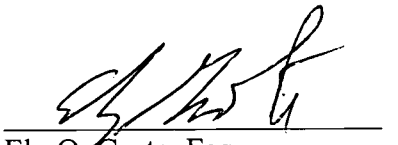

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June 29, 2015

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
P.O. Box 11629
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Re: *S. Coley Brown v. Spring Valley Homeowners' Association, Inc.*
Appellate Case No.: 2014-002587
Claim No.: 6139PE019484

Dear Ms. Kitchings:

Enclosed for filing please find an original and one copy of an Initial Brief of Respondent and Respondent's Designation of Matter to be included in the Record of Appeal, together with Proof of Service. Kindly file these documents and provide me a file-stamped copy back to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of this Initial Brief of Respondent and Respondent's Designation of Matter upon all counsel of record. Should you have any questions or concerns, please do not hesitate to contact me. With warmest personal regards, I am

Sincerely yours,

Ely O. Grote

EOG/af
Enclosures
cc: Andrew S. Radeker, Esq. (w/Encl.)
Charles A. Krawczyk, Esq. (w/Encl.)
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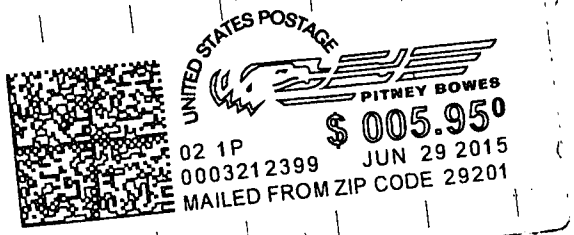

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