STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON ANCHORAGE PLANTATION HOMEOWNERS ASSOCIATION, INC. Plaintiff, v. JOHN AND THEODORA WALPOLE, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C.A. No. 10-CP-10-~~0432~~ 482 **ORDER AND JUDGMENT**

This matter is before the court after trial for final disposition on the merits.

The Honorable Kristi Lee Harrington, Circuit Judge, oversaw the first three days of trial that were conducted on February 26, February 27, and June 21, 2013. Because Judge Harrington was unable to proceed in the matter due to various scheduling conflicts, the undersigned succeeded Judge Harrington and took over the matter.

After reviewing the transcripts of the proceedings before Judge Harrington and exhibits entered into evidence, I determined that the case could be completed before me under Rule 63, SCRCP, without prejudice to the parties,. At the commencement of the final hearing date on August 21, 2015, counsel for the parties agreed to my deciding the merits and handling the proceedings to conclusion.

Based on my review of the transcript and exhibits, as well as the testimony and exhibits admitted on the final hearing day of August 21, I determined it was unnecessary to recall any witness.

In this action Plaintiff, Anchorage Plantation Homeowners Association, Inc. (the "Association") seeks to have the Court invalidate an easement granted by Southern Lifestyles, VIII, LLC to Defendants, John and Theodora Walpole (the "Walpoles"), in November 2001, later amended in June 2002. The Walpoles contend that the easement, as amended, is valid and enforceable, alleging several defenses to the Complaint that seeks declaratory and injunctive relief.

Having fully considered the testimony, exhibits, and arguments of counsel, and applying the applicable law, I make the following findings of facts and conclusions of law: [1]

FINDINGS OF FACT

On July 31, 1980, the Walpoles acquired title to 1046.4 acres, more or less, known as Anchorage Plantation on Wadmalaw Island. (Plaintiff's Exhibit 1).

On or about June 23, 1997, the Walpoles recorded a plat for a portion of the Anchorage, described as "the Anchorage Plantation-Phase I," that included the first section of an entry road called Anchor Watch Drive along with the subdivision of five lots (lots 1, 2, 3, 77, and 78) at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibit 2). The plat also created a spur road near the then-terminus of Anchor Watch Drive described as Drop Anchor Lane. (Plaintiff's Exhibit 2). The roadways described on the plat comprised 8.839 acres. The plat contained the following note that was accompanied by the signature of the Walpoles:

> WE HEREBY DEDICATE THE ROADS AND DRAINAGE EASEMENTS SHOWN HEREON TO THE USE OF THE

[1] The separate headings, "Findings of Fact" and "Conclusions of Law," are not meant to be conclusive as to the nature of every determination made under the respective heading. There may be some conclusions of law in the findings of fact and vice versa.

> ANCHORAGE PLANTATION HOMEOWNERS ASSOCIATION. THE APPROVAL OF THIS PLAT IN NO WAY OBLIGATES THE COUNTY OF CHARLESTON TO ACCEPT FOR CONTINUED MAINTENANCE ANY OF THE ROADS OR EASEMENTS SHOWN ON THIS PLAT.

(Plaintiff's Exhibit 2).

On June 24, 1997, the Walpoles recorded the Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Homeowners Association (the "Original Declaration"). (Plaintiff's Exhibit 3) It was re-recorded on July 13, 1999, because the first recorded version omitted the property description that was Exhibit "A" to the original declaration. (Plaintiff's Exhibit 4). The Original Declaration defined the "Declarant" as the Walpoles.

The Original Declaration encumbered the roadways and lots described on the plat dated June 9, 1997, recorded on June 23, 1997 (Plaintiff's Exhibits 2, 3, and 4). The encumbering provision at the beginning of the original Declaration specifies as follows:

> NOW, THEREFORE, the Declarant declares that the real property described as the Properties in Article II hereof is and shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, among others, to the Covenants, Restrictions, Conditions, Easements, Charges, Assessments, affirmative obligations and liens (herein sometimes referred to as the "Covenants" or "Declaration of Covenants") hereinafter set forth.

(Plaintiff's Exhibits 3 and 4).

The Original Declaration specifically addressed easements. The Walpoles, as the Declarant, reserved a blanket easement over all of the Association's common areas for utilities in Section 8.02. The Original Declaration, however, did not include an easement or right of use in favor of the Walpoles over any of the common areas,

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although the Original Declaration did grant a right of use to Anchor Watch Drive to other individuals to access their lot.

Section 11.06 of the Original Declaration granted to "Kelly T. McKee and Gladys H. McKee, their heirs and assigns ("McKee")" a right to use Anchor Watch Drive from its intersection with Maybank Highway to the property owned by the McKees located at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibits 3 and 4, p. 15; Plaintiff's Exhibit 2, sheet 2 of 2). Section 11.06 required McKee to pay $125 per annum to the Anchorage Plantation Homeowners Association "as their share of the costs of the upkeep of the road that they are entitled to use." To comply with other terms of Section 11.06, McKee signed the Original Declaration agreeing that they, their heirs and assigns shall be responsible to pay the fee and agreeing that the obligation may be enforced the same as any fee charged to any owner in Anchorage Plantation subdivision. (Plaintiff's Exhibits 3 and 4).

On January 11, 2000, the Walpoles entered a Purchase Agreement for Real Estate with Southern Lifestyles, LLC (the "First Purchase Agreement") to sell it Phase I of the Anchorage as well as an additional 278 acres described on the Preliminary Subdivision Plat for lots 1-35, 30-50, and 52-78, known as Phase II, for $10,100,000. (Plaintiff's Exhibit 5). Phases I and II included the Walpoles' acreage fronting on Bohicket Creek intersected by Anchor Watch Drive with lots on either side of it. (Exhibit A to Plaintiff's Exhibit 5).

Pertinent to the matters at issue, Article X of the First Purchase Agreement included terms giving the Seller (the Walpoles) certain rights to use the property including the following:

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> 10.3 Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option B Property. Seller shall have the right to use any road within the Property and the Option Property for purposes of ingress and egress to properties owned or leased by Seller. . . .

(Plaintiff's Exhibit 5, p. 8)

Section 11.2 of the First Purchase Agreement provided that the agreements *made by the Seller*, i.e., the Walpoles, in the First Purchase Agreement survived the delivery of the deed and the closing. (Plaintiff's Exhibit 5, p. 8) This provision did not provide for the survival of the obligations *of the Purchaser* including those in Section 10.3.

The Walpoles wanted to sell the entirety of the property in a single transaction to Southern Lifestyles, but Southern Lifestyles was unable to acquire the entire tract at one time. Instead, Southern Lifestyles agreed to purchase the waterfront acreage of Phases I and II first. Article VIII of the First Purchase Agreement granted an option to Southern Lifestyles to purchase Phase III consisting of the remaining approximately 780 acres of the interior residual land owned by the Walpoles for $3,500,000. (Plaintiffs' Exhibit 5).

On June 16, 2000, a conditional plat for the Anchorage Phase 2 was recorded in the RMC Office for Charleston County for lots 4 through 72 that also redesignated lot 77 and 78 of Phase 1 as lots 73 and 74, respectively. (Plaintiff's Exhibit 6). This conditional plat included the remainder of the future proposed Anchor Watch Drive, a dock between lots 46 and 47, and a dock and boat landing between lots 54 and 55. (Plaintiff's Exhibit 6, sheets 4 and 5). The Walpoles signed a certificate on this conditional plat that was identical to that in the 1997 plat for Phase I dedicating the roads and drainage

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easements shown on the conditional plat to the use of the Anchorage Plantation Homeowners Association. Just as with the 1997 plat for Phase I, the 2000 conditional plat that included Phase II did not reflect an easement over the roads in favor of the Walpoles or the interior property that they would continue to own.

On June 16, 2000, the Walpoles executed and recorded the First Amendment to the Original Declaration bringing the property described in the conditional plat of Phase II under the Original Declaration. (Plaintiff's Exhibit 8). As with the Original Declaration, the Declarant declares in the First Amendment that this added property "shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations and liens" of the Original Declaration. (Plaintiff's Exhibit 8).

That same day, June 16, 2000, the Walpoles conveyed legal title to Phases I and II to Southern Lifestyles VIII, LLC. (Plaintiff's Exhibit 7). The property description attached as Exhibit "A" to the deed specifically referred to "lots 4-72, a 2.289 ac. dock lot, a 2.742 ac. dock and boat landing dock lot and a .614 ac. future Anchor Line Drive, along with the property described in the 1997 final plat of Phase I." In the deed to Southern Lifestyles VIII, LLC of Phases I and II, the Walpoles did not reserve an easement or right of access across the common areas of Phases I and II. (Plaintiff's Exhibit 7).

On July 14, 2000, Anchorage Plantation Homeowners Association became a non-profit corporation. (Plaintiff's Exhibit 9).

On July 21, 2000, Southern Lifestyles VIII, LLC, recorded the Second Amendment to and Restatement of Declaration of Covenants, Conditions and

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Restrictions for the Anchorage (the "Restated Declaration"). (Plaintiff's Exhibit 10). The Restated Declaration completely replaced the Original Declaration and First Amendment. (Plaintiff's Exhibit 10, p. 1). Southern Lifestyles, VIII, LLC, as Declarant, imposed the Restated Declaration on all the property acquired by it including Anchor Watch Drive and the other common areas of the Association, by the following:

> NOW, THEREFORE, Declarant hereby declares that all of the property described in Exhibit "A" and any additional property as may be added by subsequent amendment hereto, and in accordance with the terms and conditions hereof, is subjected to this Second Amendment to and Restatement of Declaration of Covenants, Conditions and Restrictions for The Anchorage ("Declaration"); that the terms and conditions of the Walpole Declaration and the Walpole Amendment are subsumed under this Declaration and shall have no further independent force and effect; and that the property described in Exhibit "A" will be held, transferred, sold, conveyed, leased, occupied, and used subject to the following easements, restrictions, covenants, charges, liens, and conditions which are for the purpose of protecting the values and desirability of, and which will touch and concern and run with title to the real properties subjected to the Declaration and **which will be binding on all parties having any right, title, or interest in the described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns**, and will inure to the benefit of each owner thereof.
>
> (Plaintiff's Exhibit 10, pp. 1-2)(emphasis added).

I find the Restated Declaration encumbered all right, title, and interest of Southern Lifestyles VIII, LLC, in and to the real property known as Phases I and II of the Anchorage.

The Restated Declaration defines the "Common Areas" to include all real and personal property "hereafter deeded or leased to" the Association wherein the property is denominated as a common area. (Plaintiff's Exhibit 10, p. 2, Section 1.1(g)) As

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described in the further findings below, the private roads of Phases I and II, the community boat ramp, and courtesy dock were later deeded to the Association as common areas. I find they constituted common areas under the Declaration.

Further, according to the Restated Declaration's definition, "[a]ll common areas are to be devoted to and intended for the common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, **as well as third-parties with easements in and to such common areas, as herein provided**" (Plaintiff's Exhibit 10, p. 2) (emphasis added).

The Walpoles are third parties with respect to the Restated Declaration. The Restated Declaration does not grant an easement in and to the common areas to the Walpoles. Section 6.4.2 of the Restated Declaration, however, does grant a non-exclusive, appurtenant easement to McKee for the same section of Anchor Watch Drive on the same terms as in the Original Declaration. (Plaintiff's Exhibit 10, pp. 19-20). This provision specifically states that it does not provide McKee the right to use any common areas except over which McKee was granted the easement unless and until the McKees' property was added to the development and became a part of the Association as provided in Section 2.2 of the Restated Declaration. (Plaintiff's Exhibit 10, pp. 19-20).

Section 2.2 of the Restated Declaration specifies the terms and conditions for the addition of contiguous or nearly contiguous real property to the Restated Declaration by recording a supplemental declaration with respect to that land. (Plaintiff's Exhibit 10, p. 5). The interior residual acreage of the Walpoles was never added to the Association by supplemental declaration.

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Section 2.3 of the Restated Declaration sets forth the terms and conditions for the conveyances of the common areas by the Declarant to the Association specifying, among other things, that any such conveyance will be subject to "(b) the right of access of the Declarant, its successors and assigns, over and across such property...." (Plaintiff's Exhibit 10, p. 6). Section 2.3 also provides that "the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." (Plaintiff's Exhibit 10, pp. 6-7).

Article 6 of the Restated Declaration addresses "PROPERTY RIGHTS." This article does not grant any rights to the Walpoles to the common areas nor does it grant the right to the Declarant to grant an easement or right of access to the Walpoles for the common areas.

Section 6.2. describes the "Declarant's Reserved Rights and Easements" as "the rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). Section 6.2.5 titled "Declarant's Easements for Additional Property affirms "the Declarant's right to add Property to this Declaration pursuant to Section 2.2.1 in the rights and easements reserved in Section 6.1. hereof for the benefit of the Additional Property so added to this Declaration." (Plaintiff's Exhibit 10, p. 18).

Section 6.4 titled "Easements Over Private Roadways" contains the following specific provision describing the temporary easement of the Declarant over the private roadways during the time it owns any of the lots for sale:

> 6.5 Easements for Declarant. **During the period that Declarant owns any of the Property for sale**, Declarant will have an alienable and transferable right and easement on, over, through, under, and across the common areas for

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> the purpose of constructing improvements in and to the Lots and for installing, maintaining, repairing and replacing other improvements to the Property contemplated by this Declaration or as Declarant desires, in its sole discretion, including, without limitation, any improvements or changes permitted and described by Article 2, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event will Declarant have the obligation to do any of the foregoing.
>
> (Plaintiff's Exhibit 10, p. 20)(emphasis added).

Section 6.5.1 titled "Declarant's Easements for Any Additional Property" reserves for Declarant, and its successors, assigns, and successors-in-title, an easement of access to and use of the common areas in favor of any Additional Property when added to the Restated Declaration pursuant to Section 2.2.1. (Plaintiff's Exhibit 10, p. 20). The Walpoles' acreage was never added to the Restated Declaration pursuant to Section 2.2.1.

Section 6.7 titled "Easements for Utilities" reserves to the Declarant in the Association the right and easement, as well as the power to grant and accept easements, over the common areas for the purpose of providing utilities, according to the terms of this section. The easement in question in this case is not an easement for purposes of providing utilities.

Section 16.12 titled "Rights of Third Parties" provides, in pertinent part that "this Declaration will be filed Of Record for the benefit of Declarant, the Owners, and their Mortgagee as herein provided, and **by such recording, no adjoining property owner or third party will have any right, title or interest whatsoever in the Development, except as provided herein. . .**" (Plaintiff's Exhibit 10, p. 46)(emphasis added). Since the Restated Declaration does not provide for any right in favor of the Walpoles in any

of its other terms, this provision excludes the Walpoles, who are adjoining owners, from any rights associated with the Development that includes its common areas.

Section 15.5 of the Restated Declaration titled "Actions" specifies that the Association may not grant an easement, license, or concession through or over the common areas (except for utilities) without the approval of at least 51% of the institutional mortgagees holding first mortgages on the lots. No approval of the easement in question in this case was sought from the institutional mortgagees,

On December 15, 2000, Southern Lifestyles VIII, and the Walpoles entered a Purchase Agreement for Unimproved Real Estate (the "Second Purchase Agreement") for the approximately 780 acres of Phase III that replaced the option to purchase Phase III in the First Purchase Agreement. (Plaintiff's Exhibit 13). The Second Purchase Agreement required the closing for Phase III to occur no later than June 15, 2002. (Plaintiff's Exhibit 13, p. 4). The Second Purchase Agreement included reference to the right of access in the First Purchase Agreement: "10.13 The provisions of the [First] Agreement between the parties dated January 11, 2000 contained in Articles VI and X shall apply to this [Second] Agreement as contemplated under the [First] Agreement of January 11, 2000." (Plaintiff's Exhibit 13, p. 8).

Southern Lifestyles, VIII, LLC, intended to close on the purchase of Phase III but ran into financial difficulties. On July 5, 2001, Southern Lifestyles, VIII, LLC, granted a mortgage to the Walpoles on 23 of the lots in Phases I and II to secure amounts owed the Walpoles under the Second Agreement, as amended. (Plaintiff's Exhibit 15). Southern Lifestyles, VIII, LLC, went so far to have its engineers to prepare a subdivision and site plan for Phase III. (Defendant's Exhibit 16). Southern Lifestyles, VIII, LLC,

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intended to submit Phase III to the Restated Declaration and make it a part of the Association if it acquired Phase III. Had that occurred, the lot purchasers in Phase III would have been subject to all the terms and conditions of the Restated Declaration, including liability for assessments and being subject to rules and regulations applicable to the common areas.

Concerned that Southern Lifestyles, VIII, LLC, might not be able to close on Phase III, the Walpoles desired to obtain an easement for the benefit of their residual parcel for the use of the community boat landing and dock as well as the roads in Phases I and II, in the event the closing did not occur. To that end, Charles S. Altman, attorney for the Walpoles, wrote a letter dated October 30, 2001, to Neil C. Robinson, Jr., attorney for Southern Lifestyles, VIII, LLC.. The letter stated that the Walpoles still desired that Southern Lifestyles, VIII, LLC, acquire Phase III but that they were unwilling to continue negotiations with it and grant it concessions unless it granted the Walpoles the easement drafted by Mr. Altman.

On November 8, 2001, Southern Lifestyles, VIII, LLC, signed the Easement Agreement prepared by Mr. Altman that is at the center of this dispute. (Plaintiff's Exhibit 17). The Easement Agreement purported to grant the Walpoles, their heirs and assigns, an easement over the roads and streets of Phases I and II described as the "Burdened Property", for purposes of ingress and egress to the Walpoles' property, described as the "Benefited Property." (Plaintiff's Exhibit 17). The Easement Agreement also granted "the right for the Grantees [the Walpoles], their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened Property for the purpose of access to Bohicket Creek." (Plaintiff's Exhibit 17, p. 1).

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The Easement Agreement also specified that if the Benefited Property was subdivided and sold to third persons, each subsequent owner of a lot would be obligated to pay an annual fee "for the right to enjoy the easements granted herein" of $50 for the first year, increasing by $5 per year thereafter. (Plaintiff's Exhibit 17). The fee was to be paid to the Association. (Plaintiff's Exhibit 17). The applicable zoning allowed the subdivision of the residual property into 107 residential lots whose future purchasers would receive the benefit of the Easement Agreement.

According to its attorney, Robinson, Southern Lifestyles, VIII, LLC, recognized that questions might later be raised as to the validity of the Easement Agreement and that it might be subject to later legal challenge. Because it still intended to acquire Phase III and add it to the Association and Restated Declaration by a future supplemental declaration, Southern Lifestyles, VIII, LLC, considered that, if it closed on Phase III, it could cancel the easement by recording an easement cancellation notice as provided in the Easement Agreement. (Plaintiff's Exhibit 17, p. 2).

On June 13, 2002, Southern Lifestyles, VIII, LLC and the Walpoles entered an Amended Easement Agreement that was essentially the same with only one or two changes. The Amended Easement Agreement capped at $100 fee per lot that started at $50. (Plaintiff's Exhibit 18).

The court takes judicial notice of the deeds of conveyance recorded in the RMC office at the time Southern Lifestyles VIII, LLC, and the Walpoles entered the Easement Agreement. A court is entitled to take judicial notice of deeds of record even though not introduced into evidence. Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989). In Wiseman the Ohio

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appellate court rejected an appeal challenging the trial court's taking judicial notice of a deed of record after the close of the evidence, reasoning as follows:

> The question posed by this assignment of error, however, is whether the court erred by taking judicial notice of the Neal-Ironton deed. Appellant contends judicial notice of the Neal-Ironton deed constituted judicial notice of an "adjudicated fact." Appellant also contends the court erred by taking judicial notice after "all proceedings had stopped." Appellant further contends the Neal-Ironton deed is not part of the record.
>
> We find the Neal-Ironton deed to be a proper subject of judicial notice.
>
> Evid.R. 201(B) permits courts to take judicial notice of facts which are not subject to reasonable dispute and which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Appellant cites no authority which would prevent the court from taking judicial notice after a hearing or trial. Quite to the contrary, Evid.R. 201(F) permits courts to take judicial notice "at any stage of the proceeding." With regard to appellant's contention that the Neal-Ironton deed is not part of the record, we note appellant cites no authority which would require a court taking judicial notice of a deed to make that deed part of the court record.

Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989).

The same reasoning would apply under South Carolina's parallel rule of evidence, Rule 201, SCRE, "Judicial Notice of Adjudicative Facts." Other courts have reached the same result as Wiseman. See, Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 265, 129 Cal. Rptr. 3d 467, 476 (Cal. App. 1st Dist. 2011) ("[C]ourts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged... Taken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the document, ..."); Pratt v. Kelly, 585 F.2d 692, 696 (4th Cir. 1978)(court may take judicial notice of deed).

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The deeds recorded in the RMC Office for Charleston County show that between the time it acquired Phases I and II on June 16, 2000, and its execution of the Easement Agreement on November 8, 2001, Southern Lifestyles, VIII, LLC sold and conveyed title to over 50 of the 74 lots in Phases I and II. This number is consistent with the mortgage granted by Southern Lifestyles VIII, LLC, to the Walpoles on July 5, 2001, that was secured by only 23 of the 74 original lots. (Plaintiff's Exhibit 15). Three of these deeds to third-parties who purchased before the Easement Agreement were admitted into evidence. (Plaintiff's Exhs. 11, 12, and 16). One of those persons who purchased a lot before the purported easement was executed was Steve Brostoff, current president of the Association, who testified at trial. (Plaintiff's Exhibit 16).

Attorney Elizabeth W. Settle, whom the court qualified as an expert in real estate development matters, testified the Easement Agreement would not appear in the chain of title for the lots purchased by persons before the purported easement was recorded. (Trial Tr. 02/26-27/13, pp. 51-52). She also rendered her opinion that Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement based on the terms and conditions of the Declaration that encumbered the common areas as well as the other real property comprising Phases I and II of the Anchorage. (Trial Tr. 02/26-27-13, pp. 66-67 ??)

Robinson, who represented Southern Lifestyles, VIII, LLC, whose testimony was offered as a fact witness rather than an expert witness, testified he believed Southern Lifestyles, VIII, LLC had the authority to execute the easement in its capacity as owner, as opposed to its capacity as Declarant. But, as noted, his state of mind was not

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offered as an expert opinion. The Walpoles did not present expert testimony to rebut Settle's opinion.

Robinson admitted that the typical real estate practice would have been for the Walpoles to reserve an easement in favor of the owners of Phase III in their deed of Phases I and II if they wanted to preserve a right of access or use to the land conveyed. The Walpoles did not reserve any rights to the common areas in Phases I and II in the deed of conveyance to Southern Lifestyles, VIII, LLC. (Plaintiff's Exhibit 7). Robinson acknowledged there was no express provision in the Restated Declaration authorizing the Declarant to grant an easement of this nature to a third person for use of the common areas.

On January 13, 2003, Southern Lifestyles, VIII, LLC, deeded Anchor Watch Drive and the other roads within Phases I and II of the Anchorage to the Association as common properties. (Plaintiff's Exhibit 20). On July 29, 2003 Southern Lifestyles, VIII, LLC, deeded the community boat landing dock and land for the amenity center to the Association. (Plaintiff's Exhibit 22).

In 2004 attorney Thomas L. Harper, Jr., representing the Association, wrote attorney Gerald M. Finkel, attorney for the Walpoles, concerning the Easement Agreement. Harper asserted that the easement was not authorized under the Declaration and legally invalid. Finkel asserted that the easement was valid. (See Defendants' Exhibits 1-4).

In January 2005 the Walpoles obtained approval from Charleston County to subdivide the 780 acres into six large lots. (Plaintiff's Exhibit 33 and 34). Harper sent a letter dated March 7, 2005, to the Charleston County Planning Director opposing the

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subdivision to the extent the Walpoles relied on the Easement Agreement for the right to use Anchor Watch Drive and any other streets within the Association. (Defendants' Exhibit 15).

On February 10, 2005, the Walpoles recorded the subdivision plat for their 780 interior acres dividing them into six large lots. Plaintiff's Exhibit 34. Although the Walpoles contend that their access to lots numbered 5 and 6 is through the cul de sac at the far end of Anchor Watch Drive, the plat indicates that the access to these two lots is through a private 50' ingress and egress across the Walpoles' property called Salt Bottom Way. Plaintiff's Exhibit 34, Sheet 9 of 9.

Further, no issue has been joined as to whether the Walpoles have an easement of necessity across Anchor Watch Drive to either of these two lots or Lot 1 on the 2005 plat (on the south side of Anchor Watch Drive). The Walpoles have not pleaded an affirmative cause of action for a determination of an easement of necessity and did not allege an easement of necessity as an affirmative defense. Answer of Walpoles filed April 27, 2010. Rule 8(c) of the South Carolina Rules of Civil Procedure requires a defendant to affirmatively set forth in addition to the listed defenses "any other matter constituting an avoidance or affirmative defense." Generally, the failure to plead an affirmative defense constitutes a waiver of that defense. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010).

The Walpoles have not sold any of the six lots that now constitute the residual interior acreage. There was no proof of any third person relying on the purported easement, as amended.

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The Walpoles did not offer any proof as to the method or rationale, if any, for setting the initial fee for each future lot at $50, increasing annually to no more than $100. Billy Walpole, the Guardian ad Litem for Defendant John Walpole, testified that he had no knowledge of the basis for setting the fee at this figure. Unlike the provision in the Restated Declaration granting the McKee access, the terms of the purported easement do not grant to the Association the right to collect the fee in the same manner as an assessment due the Association from one of its members.

The current annual assessment for each of the 74 lots and Phases I and II of the Anchorage is $1,400. (Trial Tr. 06/21/13, pp. 8, 11-12). Approximately $343 of this assessment is budgeted to road repair and maintenance. (Trial Tr. 06/21/13, p.8).

The Association spent over $400,000 building the outdoor picnic area and men's and women's bathrooms located at the community boat landing and dock, which the members describes as their amenity center, (Trial Tr. 02/26-27/13, pp. 139-140). There are a dozen parking spaces for cars with trailers to launch and retrieve boats. (Trial Tr. 02/26-27/13, pp. 119-120).

Brostoff testified to the Association's extensive concerns about the purported easement if the 107 lots are subdivided on the residual property owned by the Walpoles as allowed under Charleston County zoning. These concerns included the following: that the fee to be paid is far below a fair proportionate share to repair and maintain the roads, boat landing, and community dock (Trial Tr. 02/26-27/13, pp. 116-119); that there is insufficient parking for the anticipated cars and boat trailers from the owners of the 107 lots (Trial Tr. 02/26-27/13, pp. 119-120); that there is insufficient fresh water capacity at the community boat landing if the number of boats were considerably

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increased (Trial Tr. 02/26-27/13, pp. 119-121); that the Association has no means to enforce collection or to deny access to a property owner who did not pay the fee (Trial Tr. 02/26-27/13, p. 145); privacy and security concerns if the Association has to provide an access code to the entrance security gate to all the lot owners in the residual property (Trial Tr. 02/26-27/13, p. 124); the high costs of maintaining the automatic access gate which would have to be funded entirely by the members of the Association, not by the outside property owners (Trial Tr. 02/26-27/13, pp. 113, 141); that the outside owners, not being members of the Association, would not be bound by the rules and regulations of the Association governing the use of an access to the community boat landing and dock (Trial Tr. 02/26-27/13, pp. 123-125); and that the large trucks associated with the construction of houses on the interior lots would cause significant wear and tear on Anchor Watch Drive accelerating its deterioration and need for repair. (Trial Tr. 02/26-27/13, p. 123).

The Board of Directors of the Association authorized the bringing of the within action against the Walpoles. The Board has provided reports on the status of this litigation to the members at their annual meeting. (Trial Tr. 02/26-27/13, pp. 125, 153-156,157-161). 75% of the members did not formally approve the litigation by vote or referendum.

CONCLUSIONS OF LAW

The Complaint alleges separate causes of action seeking declaratory and injunctive relief. The Association does not seek damages. The primary relief sought is the invalidation of the easement, as amended.

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"The character of an action as legal or equitable depends on the relief sought." Cedar Cove Homeowners Association, Inc. v. Dipietro, 268 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." Insurance Financials Services, Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "Normally an action to quiet title to property is an action in equity. Clark v. Hargrave, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996).

The threshold question is whether or not Southern Lifestyles, VIII, LLC, had the legal authority to grant the easement to the Walpoles. At the time Southern Lifestyles, VIII, LLC, and the Walpoles executed the Easement Agreement and Amended Easement Agreement, the Restated Declaration encumbered the common areas. According to the Restated Declaration's terms, all land acquired by Southern Lifestyles, VIII, LLC, including the common areas, was subject to the terms and conditions of the Restated Declaration, as were any conveyances by Southern Lifestyles, VIII, LLC.

The easement, as amended, is a purported conveyance of an interest in real property. Even though Southern Lifestyles, VIII, LLC, had yet to convey legal title to the common areas in question to the Association at the time it purported to grant the easement and amended easement to the Walpoles, their fee title interest was subject to the terms and conditions of the Restated Declaration. It is not a question of which entity held legal title to the common areas in question at the time the easement and amended easement were executed. Rather, the controlling consideration is whether the property, including the common areas, was encumbered by the Restated Declaration, which they were.

Restrictive covenants such as those in the Restated Declaration are contractual in nature and bind the parties thereto in the same manner as would any other contract. Queens Grant, II Horizontal Property Regime vs. Greenwood Development Corporation, 368 S.C. 242, 361, 628 S.E.2d 902, 913 (Ct. App. 206). Hence, Southern Lifestyles, VIII, LLC, was bound by the terms and conditions of the Restated Declaration just as the persons taking title to lots within the Association were. Restrictive covenants, including those created by Restated Declaration, "will be enforced unless they are indefinite or contravene public policy." Ibid. A developer may generally reserve in the restrictive covenants the right to take certain actions; if those actions are taken, they must be exercised in a reasonable manner in strict compliance with the procedures set forth in the declaration of covenants. Id (In context of specific right reserved in Declaration to developer to amend the Declaration of Covenants).

Here, the pertinent provisions of the Restated Declaration are clear and unambiguous. The Restated Declaration does not empower the Declarant to grant an easement to an outside property owner to use the common areas except as specifically stated in the Restated Declaration. Section 6 of the Restated Declaration (Plaintiff's Exhibit 10) specifically enumerates the various "PROPERTY RIGHTS" in Phases 1 and 2. As found above, none of the property rights reserved to the Declarant in the Restated Declaration includes the right to grant a perpetual easement to a third person to use the common areas. Robinson acknowledged this omission.

"The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d

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578 (S.C. 2000). The failure of the Declaration to instill such a right in the Declarant legally implies that it was excluded.

If under the terms of the Restated Declaration, Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement, then the easement is of no legal effect. "No person can convey an interest which the grantor does not have in the land described in the deed, even though the terms of the deed may purport to do so." Cummings v. Varn, 413 S.E.2d 829, 832 (1992).

If a declarant could validate actions and transactions that are contrary to the terms of a declaration by contending such actions and transactions were in its capacity as owner rather than declarant, a developer could entirely defeat the purpose of the declaration simply by asserting that a prohibited action was done in its capacity as owner. Such alleged authority in the capacity of the owner rather than as declarant would entitle the owner/declarant to circumvent the restrictions in the declaration that are matters of record and relied upon by the members of an association in purchasing their properties Here, Southern Lifestyles, VIII, LLC, sold as many as 50 lots before entering and recording the Easement Agreement. Neither the Restated Declaration in this case nor the law makes this distinction. The commitments of Southern Lifestyles, VIII, LLC, as Declarant in the Declaration would become meaningless if this were the case. Moreover, Southern Lifestyles, VIII, LLC specifically stated in the recitals that it purchased Phases I and II and was proceeding with the Declaration "as the owner of the Walpole property, which is more fully described in Exhibit "A". (Plaintiff's Exhibit 10, p. 1).

In Raman Chandler Properties, L.C. vs. Caldwell's Creek Homeowners Association, Inc., 178 S.W.3d 384 (Ct. Tex. 2005), a homeowners' association brought suit against a developer seeking a determination that a declaration of restrictive covenants did not authorize the declarant-developer to grant an access easement over the plaintiff association's common areas in favor of the property owners in a new adjoining development. Just as in this case, the defendant in Raman Chandler Properties, L.C. asserted that the developer had the right to grant the easement because it still held legal title to the common areas when it granted the easement. The court rejected this argument:

> Under these facts, the actual legal ownership of the common areas is irrelevant. The primary issue is whether the Developer, in 1999, retained the right to unilaterally amend the plat or create and burden the common area for the benefit of a different association by granting it an easement. The answer is "No." Restrictive covenants that run with the land such as these generally burden and govern all lots with in the subdivision to which they were intended to apply. . . Thus, **only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the Covenants could it have had the right to create such an easement for the benefit of some entity or owner other than the Association and its lot owners.** . . .Additionally, regardless of ownership, the lots comprising the common areas were and are subject to the Restrictive Covenants created by the original dedication and restrictions as well as any amendments to them. Once an Association shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of such covenants and restrictions.

178 S.W.3d 393-394 (emphasis added(.

As previously found, the Restated Declaration's definition of common areas includes those parcels within the development intended for the common use of the

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owners even though legal title will be conveyed to the Association sometime in the future. (Plaintiff's Exhibit 10, Section 1.1.(g), p. 2).

I find and conclude that the Restated Declaration did not reserve to the Declarant the right to grant the easement in question. The easement is outside the authority reserved to the Declarant in the Declaration. Further, the members of the Association purchasing lots before the easement was granted had no notice that the Declarant might grant such an easement since the Restated Declaration did not vest the Declarant with such authority. The purchasers of the 50 or so lots would not have had record notice of the Easement Agreement since it was executed after title was conveyed for their lots. As such, the Easement Agreement falls outside the chain of title for the subsequent purchasers of those lots who would not have record notice of the purported easement.

Further, as shown by the testimony about the expenses associated with the repair and maintenance of the common areas in question, the amount of the fee is grossly out of proportion to the actual expenses. The Walpoles offered no proof explaining how the $50 annual fee (subject to an annual adjustment and $100 cap) was determined or that this amount was fair and reasonable. McKee, who only uses one short section of Anchor Watch Drive and has no access to any of the Association's other common areas, pays $125 per year. The Walpoles have suggested to the Court that it could adjust the fee. Not only has no claim been asserted to reform the instrument but the threshold question is whether the easement is valid and enforceable in the first instance regardless of the reasonableness of the fee to be paid by the owners of the future lots.

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The Walpoles rely, in part, on Section 2.3 of the Restated Declaration. This section governs conveyance of the common areas and does not authorize the Declarant to grant the easement at issue. This section specifies that conveyances of the common areas by the Declarant to the Association are subject to, among other things, the restrictive covenants of record at the time of conveyance and the "right of access of the Declarant, its successors and assigns over and across such property. . . ."

A right of access is not an easement. A right of access is in the nature of a license by which an owner allows another to come onto land for a specific purpose, unlike an easement which is a grant of an interest in real property that burdens the servient estate for the benefit of the dominant estate. 25 Am. Jur. 2d, Easements and Licenses Section 2. Additionally, the Restated Declaration specifically distinguishes between rights and easement by recognizing they are different. Section 6.2.2 refers to the "rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). The Declarant's easement over the roadways that are common areas are specifically for the purpose of constructing and maintaining, repairing and replacing improvements to the property, as set forth in Section 6.5. (Plaintiff's Exhibit 10, p. 20).

For the same reasons, the Purchaser's right of access in the First and Second Purchase Agreements that were unrecorded and have terminated is also not an easement. Moreover, the survival provision of these two agreements provides that only the rights of the Purchaser survive termination or closing. They did not provide for the survival of any rights of the Seller.

Once Southern Lifestyles, VIII, LLC, sold the lots and transferred the common areas to the Association, it no longer had an interest in the Phases 1 and 2. A grantor who no longer has an interest in the real property subject to a restriction in its favor lacks standing to enforce the restriction. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993); AJG Holdings, LLC v. Dunn, 410 S.C. 346, 347, 764 S.E.2d 912, 912 (S.C. 2014). Similarly, once it relinquished all interest in Phases 1 and 2, any alleged easement granted to Southern Lifestyles VIII, LLC, to the common areas could no longer be enforced. To the extent that Southern Lifestyles, LLC, conveyed its interests in the easements in its favor under the Restated Declaration, those easements expired years ago, in 2003, when it no longer had an interest in the real property comprising Phases 1 and 2 and control of the Association was turned over to the members.

The Restated Declaration sets forth the limited easements granted to the Declarant. To the extent Southern Lifestyles VIII, LLC, as Declarant held these easements, its attempted transfer of its non-exclusive easement rights to a third party whose use would increase the burden on the servient estate is also invalid under the law governing easements. In Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012), our Court of Appeals invalidated a purported transfer of an access easement by the owner of the dominant estate. The Court of Appeals recited numerous legal principles governing easements that are applicable to this case:

> **"[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.**". . . "As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominate estate to other parcels owned by him, whether adjoining or distinct tracts, to

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> which the easement is not appurtenant." . . . **"If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement.". . . Enlarging an easement to include adjoining tracts increases the burden... A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached.** In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. **The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication.**

736 S.E.2d 881-883 (Internal citations omitted)(emphasis added).

Further, any right of access or alleged easement of Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2. It was not a right of Southern Lifestyles, VIII, LLC, that it could transfer to anyone. Under the fundamental legal principles governing easements, Southern Lifestyles, VIII, LLC, could not extend its purported easement to include the more than 700 interior acres owned by the Walpoles that have never been incorporated into the Association. Any easement held by Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2, and was not appurtenant to the Walpoles's interior acreage. For this additional reason, the purported easement granted to the Walpoles is invalid and unenforceable.

As previously found and concluded, Southern Lifestyles VIII, LLC, did not have an easement for the general use of the common areas for an indefinite time. Its easements were limited to specific purposes incident to the development of Phases 1 and 2 for the period of that development. But, if its rights to the use of the common

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areas were unrestricted and tantamount to an easement, which they were not, its purported non-exclusive grant of its easement to the Walpoles is unenforceable and invalid under the principles stated by the court in Rhett.

The Court also finds and concludes that the purported easement granted by Southern Lifestyles VIII, LLC, to the Walpoles would materially and unfairly increase the burden on the servient estate. The easement purports to grant the right to use the Association's roads, boat landing, and community dock to as many as 107 lot owners and their guests, more than doubling the burden on these common areas of the Association. As the testimony indicated, these owners would be paying only a fraction of the cost of repairing and maintaining those common areas.

In South Carolina developers have a fiduciary duty to turn over common areas in good repair or provide the association with sufficient funds to make needed repairs to bring them to good condition. Concerned Dunes West Residents v Georgia-Pacific, 349. S.C. 251, 562 S.E.2d 633 (2002). While the case at hand involves common areas that the developer turned over with legal burdens rather than physical burdens, the same principles appear to apply.

"After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty . . . any contract or lease that is not bona fide, or was unconscionable to the members other than the developer at the time it was entered into, under the circumstances then prevailing." Restatement (Third) of Property (Servitudes) § 6.19 (2000). "The developer's duty to turn over control can be thwarted if the developer obligates the association to long-term arrangements that effectively deprive the owners of control of the common property." Id.at Comment d. I

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find and conclude that the Easement Agreement, as amended, if enforced would be unconscionable to the 74 members of the Association based on the Court's previous findings concerning the burdens the Easement Agreement, as amended, places on the members of the Association and the common areas. Southern Lifestyles, VIII, LLC granted the purported easement under duress to keep alive their opportunity to acquire Phase III.

The dedications of the roads in Phases 1 and 2 to the Association at the time of recording of the plats also restricted the right of the owner to control their use thereafter. As held in Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 560, 431 S.E.2d 573, 575 (S.C. 1993), "[t]here is no essential difference between a dedication and a grant. Grady v. City of Greenville, 129 S.C. 89, 95, 123 S.E. 494, 497 (1924). It is clear then, that while a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public." 431 S.E.2d 575. Once the roads, including Anchor Watch Drive, were dedicated to the Association, the owner of them -- first the Walpoles and then Southern Lifestyles VIII, LLC – no longer retained discretion to alter or control future use of the roads except pursuant to the terms of the Original Declaration and later Restated Declaration. The fact that Southern Lifestyles had no yet conveyed legal title to the roads to the Association at the time it purported to grant the easement to the Walpoles is of no significance since the roads had previously been dedicated to the Association.

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The Walpoles assert a number of defenses. The two main defenses are that the Association lacks standing or authority to bring the suit and that the Association's claims are barred by the statute of limitations.

The Walpoles base their lack of standing defense on the following provision in the Restated Declaration that refers to the necessity of a vote of the membership before certain litigation may be initiated:

> 14.4 Litigation. No judicial or administrative proceeding, including any mandatory procedure under Section 14.3 above, with an amount in controversy exceeding $25,000.00, will be commenced or prosecuted by the Association unless approved by 75% or more of the of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting. This Section will not apply, however, to (a) actions brought by the Association to enforce the provisions of this Declaration (including, without limitations, the foreclosure of liens); (b) the imposition and collection of Assessments; (c) proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; or (e) actions brought by the Association to enforce written contracts with its suppliers and service providers.

Plaintiff's Exhibit 10, Restated Declaration, pp. 38-39.

The Association established, and I find, that the board approved this litigation and that the members have been kept abreast of it. The Association did not establish that 75% of the members approved the suit by referendum or vote at a duly authorized meeting. However, that omission does not mean the Association has no standing or authority to bring this action.

As stated in the terms of Section 14.4, its 75% vote requirement does not apply to litigation where the amount in controversy does not exceed $25,000. Here, the Association is not seeking damages of any amount. The relief sought is declaratory and injunctive. Hence, the conditions of Section 14.4 do not apply.

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Even if Section 14.4 were considered applicable, its terms exclude "(a) actions brought by the Association to enforce the provisions of this Declaration...." In this action the Association seeks to enforce the provisions of the Restated Declaration that, among other things, did not authorize the Declarant to grant the easement in question to the Walpoles and that reserves the common areas to "common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third parties with easements in and to such Common Areas, as herein provided." Plaintiff's Exhibit 10, Restated Declaration, p. 2. No vote of the members was required.

Section 11.2.2 (g) of the Restated Declaration specifically authorizes the Association: "To take any and all actions necessary to enforce these and all covenants and restrictions affecting the Property and to perform any of the functions or services delegated to the Association in any covenants or restrictions applicable to the Property..." Plaintiff's Exhibit 10, Restated Declaration, p. 29.

I find and conclude the Association has standing and authority to bring this action.

The Court also notes that the Walpoles are third parties for purposes of the Restated Declaration and, as such, lack standing under both the controlling statutes and case law to assert that the initiation of the suit is *ultra vires* under the provisions of the Restated Declaration.

S.C. Code Section 33-31-304 provides, in pertinent part, as follows:

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not

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acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

S.C. Code Ann. § 33-31-304

The Walpoles do not come within the limited category of persons described in section 33-31-304(b) who may challenge the authority of the Association to bring this action.

This statute is in keeping with legal precedent that an outsider has no standing to challenge whether an adverse party was authorized to bring an action under its governance documents. DeBorde v. St. Michael & All Angels Episcopal Church, 272 S.C. 490, 501, 252 S.E.2d 876, 881 (1979) ("Petitioners contend that this grant is not broad enough to permit respondent's operation of a cemetery for the benefit of its parishioners. The simple answers to this contention are twofold: (1) this issue was not raised by the complaint; and, (2) **even had it been, petitioners, not being members of the Parish, have no standing to raise it.**" (emphasis added)). The Walpoles, not being members of the Association, have no standing to assert that the maintenance of this proceeding is not authorized under the provisions of the Restated Declaration. Indeed, the Restated Declaration expressly denies them standing. As previously found and discussed, section 16.12 of the Restated Declaration excludes the Walpoles from enforcing any provisions of the Restated Declaration: "...**no adjoining property owner or third party will have any right, title or interest whatsoever** in the Development, except as provided herein, or in the operation or continuation thereof **or in the enforcement of any of the provisions hereof,** ..." Plaintiff's Exhibit 10, Section 16.12, p. 46.

Turning to the statute of limitations, the Walpoles assert that this action is time barred because as early as March 18, 2004, a lawyer for the Association was on notice

of the easement and asserted it was ineffective for being in violation of the provisions of the Restated Declaration. (Defendant's Exhibit 3, Letter of Harper dated March 18, 2004). The Walpoles assert the Association should have brought this lawsuit within the three year statute of limitations set forth in section 15-3-530 of the South Carolina Code, applicable to "Actions *Other* Than for the Recovery of Real Property." (emphasis added). By its terms, this particular statute of limitations does not apply.

This action falls under the provisions of S. C. Code §15-67-10 entitled "Recovery of Real Property" that provides as follows:

> Any person in possession of real property, by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property may bring an action against any person who claims or who may or could claim an estate or interest therein or a lien thereon adverse to him for the purpose of determining such adverse claim and the rights of the parties, respectively."

S.C. Code §15-67-10.

The statute of limitations for the "recovery of real property" is ten years. Section 15-3-340 of the South Carolina Code, applicable to "Actions for Recovery of Real Property," requires simply that a party seeking to bring an action for the recovery of real property bring suit within 10 years of his possession of such property: "No action for the recovery of real property . . . may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question *within ten years before the commencement of the action*." (emphasis added). This action is timely since the Association is still in possession of, and holds title, to the Association's common areas.

The Court further notes that because this is an action in equity the statute of limitations does not apply. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855

(2005); Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (S.C. Ct. App. 2009). Instead, any question as to the timeliness of the bringing of the action must be assessed under the doctrine of laches.

As explained by our Supreme Court, "[l]aches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of [the] facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43, (2011). In Robinson our Supreme Court found laches where the plaintiff had waited more than sixty years to challenge a conveyance in 1946, the property had been transferred through probate, and other irreversible actions had occurred.

Here the Walpoles did not establish that failure to bring the suit before January 20, 2010, caused injury, prejudice, or disadvantage to them. The Walpoles have been on notice since 2004 that the Association asserted the purported easement was ineffective. There was no proof the Walpoles had conveyed lots to third persons nor that any third person has relied on the purported easement. I find and conclude the Walpoles did not establish the basis for the defense of laches by the preponderance of the evidence.

Moving to the other defenses, the Walpoles assert that the Association's acceptance of the conveyance of the deeds to the common areas from Southern Lifestyles VIII, LLC, subject to matters of record somehow bars their claims. The

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Walpoles overlook that under the terms of the Restated Declaration the Association was required to accept the deeds to the common areas: "In consideration of the benefits accruing to the Association and to the Members under this Declaration and in consideration of the covenants and agreements of the Declarant hereunder, the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." Plaintiff's Exhibit 10, Restated Declaration, Section 2.3, pp. 6-7. The Association's failure to object to the deed to the common areas does not constitute consent or ratification of any act of Southern Lifestyles VIII, LLC, as Declarant.

I have considered the remaining affirmative defenses alleged in the Walpoles' Answer and, without separately enumerating them, find and conclude that they are either not legal defenses to the claims asserted by the Association or that the Walpoles did not establish such defenses by the preponderance of the evidence.

"The remedy of injunction rests in the sound discretion of the trial court" and "depends upon the equities between the parties." Gibbs v. Kimbrell, 311 S.C. 261, 270, 428 S.E.2d 725, 730-31 (Ct. App. 1993). The Court finds and concludes that the remedy of injunction through a recorded cancellation of the Easement Agreement and Amended Easement Agreement further the interests of equity and is necessary to correct the matters of record and protect the Association and its members who are purchasers of the lots in Phases I and II.

Based on the foregoing, the Court declares that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are void *ab initio*

and of no legal effect. The Court further enters a permanent injunction invalidating the purported easements and ordering that this invalidation and cancellation be made a matter of public record in the RMC Office for Charleston County.

IT IS THEREFORE ORDERED AND DECREED that a declaratory judgment be entered for the Plaintiff adjudicating that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are invalid, void *ab initio,* and of no legal effect.

IT IS FURTHER ORDERED that the register of deeds is ordered to record and index in the RMC office for Charleston County the Cancellation of Easement Agreement and Amended Easement Agreement appended to this Order and Judgment.

AND IT IS SO ORDERED.

R. Markley Dennis, Jr.
Circuit Judge

October 29, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	**COURT ORDERED**
	)	**CANCELLATION OF EASEMENT**
COUNTY OF CHARLESTON	)	**AGREEMENT**

WHEREAS, Southern Lifestyles, VIII, LLC as Grantor, entered into an Easement Agreement with John B. Walpole and Theodora W. Walpole as Grantees that is recorded in the RMC office for Charleston County at Book K 387, p. 751; and

WHEREAS, these same parties entered an Amended Easement Agreement recorded in the RMC office for Charleston County at Book K 409, p. 481; and

WHEREAS, in the Easement Agreement, as amended, the Grantor purported to grant certain rights to the Grantees over the Burdened Property described in Exhibit "A" to the Easement Agreement and Amended Easement Agreement; and,

WHEREAS, the Anchorage Plantation Homeowners Association brought an action in the Court of Common Pleas for Charleston County, Civil Action No. 2010-CP-10-482 seeking, among other things, a determination that the Easement Agreement and Amended Easement Agreement are invalid; and

WHEREAS, the Circuit Court entered an order and judgment dated October 29th, 2015, copy attached hereto, declaring that the Easement Agreement and Amended Easement Agreement are invalid *ab initio* and of no effect and that this invalidation be made a matter of public record in the RMC office for Charleston County.

NOW, THEREFORE, in accordance with the Order and judgment entered by this Court on October 29th, 2015, the Easement Agreement between Southern Lifestyles VIII, LLC, as Grantor, and John B. Walpole and Theodora W. Walpole as Grantees, recorded at Book K 387, p. 781 in the RMC office for Charleston County and the Amended Agreement between these same parties recorded at Book K 409, p, 481, in

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the RMC office for Charleston County are both declared and adjudged to be void *ab initio*, cancelled, and of no further force and effect.

R. Markey Dennis, Jr.
Circuit Judge

10/29/2015