

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

Edward W. Miller, Circuit Court Judge

Op. No. 5312 (S.C. Ct. App. filed Apr. 15, 2015)

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

v.

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

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

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne;

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

APPENDIX

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Appellate Case No. 2013-000452

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5312
Heard November 4, 2014 – Filed April 15, 2015

AFFIRMED

William D. Herlong, of The Herlong Law Firm, LLC, of
Greenville, for Appellants.

Randall Scott Hiller, of Greenville, for Respondents.

WILLIAMS, J.: Pelham Farm, LLC; Legacy One, LLC; an unknown trustee of the revocable trust agreement established by James B. Stephens; and Jay Stephens and Mike Stephens, as co-personal representatives of the estate of James B. Stephens (collectively Appellants¹) contend the circuit court erred in finding their amendment to a restrictive covenant that governed the development of property in Greenville County, South Carolina, was invalid for lack of a majority vote. We affirm.

FACTS

In the 1960s, Richard Watson and his wife began developing their substantial landholdings that stretched from present-day I-385 up to and across the north and south side of Pelham Road in Greenville, South Carolina. Prior to this time, Watson's land was used as an orchard. Once development began, restrictions were placed on the entire property² to limit its development to single family residential use. Subsequently, a subdivision plat was recorded that created forty-seven lots in what is currently known as Watson's Orchard Subdivision.³ Thereafter, these lots were developed into upscale homes.

¹ Watson's Orchard Property Owners Association, Inc. (WOPOA) was a defendant in the declaratory judgment action but did not appeal the underlying decision.

² In January 1962, the Watsons recorded a preliminary protective covenant that applied to the property on both the north and south side of Pelham Road.

³ In September 1964, after the forty-seven lots were platted and approved, additional restrictions and protective covenants were recorded specifically for Watson's Orchard Subdivision, all of which are still in effect today.

In 1979, Watson recognized that his property south of Pelham Road could realize a greater value if developed commercially. As a result, he sold the vast majority of his property on the south side of Pelham Road to Lincoln of South Carolina, Inc. (Lincoln). Lincoln then entered into negotiations with the owners of the lots in Watson's Orchard Subdivision to obtain a release of the residential use restrictions for Watson's property south of Pelham Road. These negotiations resulted in the property owners, with the exception of J.B. Stephens, agreeing to release the restrictions in exchange for the transfer of a twenty-two acre buffer zone on the south side of Pelham Road, that was to be sold and developed as single family residential lots.

As part of the agreement, the property in the buffer zone was to be owned by Watson's Orchard Property Owners Association, Inc. (WOPOA), a for profit corporation tasked with the responsibility of developing and selling the lots within the buffer zone. The stock in WOPOA was granted to the owners of Watson's Orchard Subdivision who would ultimately benefit financially from the sale of the lots within the twenty-two acres.

In 1981, Lincoln, as the declarant, imposed the Restrictions and Covenants (1981 R&Cs), which are the subject of this action, upon the twenty-two acre buffer zone. Thereafter, Lincoln conveyed the twenty-two acre tract of land to WOPOA. Although J.B. Stephens did not have any stock in WOPOA, in exchange for his cooperation to release the residential use restrictions, Stephens purchased six acres on the south side of Pelham Road (the Property) directly across from Watson's Orchard Subdivision from WOPOA. This six-acre tract contained sufficient property to allow it to be developed into five residential lots. The successors to J.B. Stephens are the appellants in this action.

The 1981 R&Cs included a provision requiring a majority vote of the current property owners of Watson's Orchard Subdivision, as well as the owners of the lots in the buffer zone, to change or amend the 1981 R&Cs. The pertinent provision states the following:

[T]he covenants, conditions[,] and restrictions hereinafter set forth shall run with the property . . . and be binding upon all parties having any right, title or interest in the said described properties . . . until January 1, 2010[,] at which time said covenants, conditions, and restrictions shall be automatically extended for successive periods of ten (10) years each unless, *by vote of a majority of the then owners of the lots into which the property described*

above shall have been developed and in Watson's Orchard Subdivision, the within covenants, conditions[,] and restrictions are changed or amended, in whole or in part.

(emphasis added). In 2005, J.B. Stephens attempted to purchase the remainder of the property in the buffer zone owned by WOPOA for over two million dollars. The transaction was never consummated, but Respondents contend it spurred Appellants' efforts to amend the 1981 R&Cs, which prompted the present litigation.

Several months prior to the January 1, 2010 date listed in the 1981 R&Cs, Appellants attempted to amend the 1981 R&Cs to remove the residential development requirement for the property that abuts J.B. Stephens' acreage south of Pelham Road. Appellants obtained twenty-nine of fifty-four possible votes⁴ in favor of amending the 1981 R&Cs, and then filed the amended Restrictions and Covenants (2009 R&Cs) in the Greenville County Register of Deeds Office on November 9, 2009. Of the necessary twenty-nine votes, Appellants asserted they possessed five votes based on the five "lots" within the six acres purchased by J.B. Stephens in 1981.

Homeowners R.C. Frederick Hanold III, Rose Hanold, Carol Mitchell, and George Mitchell Jr., (Respondents) filed suit on September 8, 2009, seeking a declaratory judgment that the 2009 R&Cs were not validly adopted. WOPOA and Appellants answered and counterclaimed for a declaratory judgment that the 2009 R&Cs were valid. WOPOA and Appellants filed an amended answer, adding the property owners in WOPOA as third-party defendants. The property owners did not respond and default judgment was entered against them. WOPOA, Appellants, and Respondents then filed cross motions for summary judgment on April 27, 2012, and the circuit court denied both motions, finding genuine issues of material fact existed and, thus, summary judgment was inappropriate.

The circuit court received testimony and evidence from both parties on September 4 and 5, 2012, in the declaratory judgment action. In its order finding for Respondents, the circuit court concluded the Property had "not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive

⁴ Respondents contend the number of votes allotted to J.B. Stephens was directly correlated to how many favorable votes the board of WOPOA needed to remove the restrictions, citing to a document in which the board postulated different ways to count J.B. Stephens' votes to obtain a majority vote.

covenants." The circuit court concluded the plain and unambiguous language of the 1981 R&Cs required the lots be developed prior to being eligible to vote. The court cited the following in support of its conclusion: (1) Appellants failed to demonstrate a plat was ever prepared or recorded as required by Greenville County ordinance, which was a prerequisite to subdividing or offering a lot for sale; (2) the Property possessed a single tax map number, preventing it from being legally sold as five individual lots on the date of the purported amendment; and (3) the 1981 deed of sale and other supporting documents offered to demonstrate the six-acre tract was comprised of five separate lots only showed the intent of the parties to the conveyance, not the intent of Lincoln, which is paramount in interpreting a restrictive covenant. The court then ruled the amendment to the 1981 R&Cs and subsequent recording of the 2009 R&Cs were both void and of no force and effect. This appeal followed.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.*

"Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). An action to enforce restrictive covenants by means of injunctive relief, however, is an action in equity. *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). In an equitable action, we may find the facts in accordance with our own view of the evidence. *Id.* "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

In this case, Respondents requested the circuit court enjoin and restrain Appellants from using the property in any manner inconsistent with the 1981 R&Cs. The circuit court, in declaring the amendment to the 2009 R&Cs invalid, effectively enjoined Respondents from developing the property in any manner inconsistent with the 1981 R&Cs. Accordingly, this action sounds in equity, and we may review the circuit court's factual findings in accordance with our own view of the preponderance of the evidence. *See Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010).

LAW/ANALYSIS

Appellants claim the circuit court failed to consider overwhelming evidence in their favor when it declared the 1981 R&Cs were improperly amended. Specifically, Appellants contend the circuit court erred in (1) ignoring documentary evidence, lay witness testimony, and expert testimony that overwhelmingly established the Property was comprised of five lots; (2) improperly relying on state and local law when it concluded Appellants were required to record the plat of the Property as a prerequisite to subdividing the Property into lots; and (3) failing to consider the text of the 1981 R&Cs as well as the drafter's intentions when it concluded the Property was not developed into lots. We address each argument in turn.

I. Documentary Evidence & Lay and Expert Testimony

Appellants first contend the overwhelming evidence demonstrated the Property was comprised of five developed lots, thus entitling Appellants to five votes pursuant to the 1981 R&Cs. Because we hold the Property does not satisfy the plain and ordinary meaning of "lots which shall have been developed," we affirm the circuit court and find it properly declined to consider this evidence.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Hardy*, 369 S.C. at 166, 631 S.E.2d at 542 (alteration in original). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Id.* "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (internal quotation marks and citation omitted). "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect" *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (citation omitted). To that end, when the language creating restrictions on the use of property is unambiguous, the restrictions will be enforced according to their plain and obvious meaning. *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

We find the plain language of the 1981 R&Cs only afforded a property owner voting rights for developed lots. The term "developed" is not defined in the 1981 R&Cs. However, resort to its usual and customary definition leads us to the conclusion that the Property was not developed into lots as required by the 1981 R&Cs. *See Anderson v. Buonforte*, 365 S.C. 482, 490, 617 S.E.2d 750, 754 (Ct.

App. 2005) ("When a term is not defined within a contract, evidence of its usual and customary meaning is competent to aid in determining its meaning."); *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (holding when faced with an undefined term, the court must interpret the term in accord with its usual and customary meaning).

South Carolina courts have not expressly defined the term "developed" in the context of restrictive covenants pertaining to landholdings. However, cases from other jurisdictions dealing with the term "developed" in the context of land confirm that "develop" connotes conversion into an area suitable for use or sale.⁵ See *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 496 (Alaska 1991) ("In the context of raw land, the common meaning of 'developed' includes subdivided property which is ready for sale." (footnote omitted)); *Winkelman v. City of Tiburon*, 32 Cal. App. 3d 834, 843 (Ct. App. 1973) ("The term 'develop' connotes the act of converting a tract of land into an area suitable for residential or business uses."); *Prince George's Cnty. v. Equitable Trust Co.*, 408 A.2d 737, 742 (Md. Ct. Spec. App. 1979) (defining the term "develop" as "the act of converting a tract of land into an area suitable for residential or business uses" (citing Webster's New Int'l Dictionary (2d ed.1959))); *Muirhead v. Pilot Props., Inc.*, 258 So. 2d 232, 233 (Miss. 1972) (stating "[t]he term 'develop' has generally been interpreted when used in connection with real estate to mean the converting of a tract of land into an area suitable for residential or business uses"); *Sleasman v. City of Lacey*, 151 P.3d 990, 991 (Wash. 2007) (finding an ordinance requiring a permit for tree removal on "undeveloped" or "partially developed" property did not apply to the homeowners' property because under the plain meaning of the ordinance, the property was "developed" as it was a lawful building site ready for sale or use); *B & W Constr., Inc. v. City of Lacey*, 577 P.2d 583, 586 (Wash. Ct. App. 1978) (finding the platting of property on paper without further steps to develop it, such as adding sewers, streets, and utilities, was insufficient to show a lot was developed for purposes of establishing comparable value of property in an inverse condemnation case); cf. *Best Bldg. Co. v. Sikes*, 394 S.W.2d 57, 63 (Tex. App.

⁵ Respondents cite to a Greenville County ordinance as further proof that for a parcel of land to be subdivided into lots for purposes of development, there must be an intent to sell, lease, or build on the property. See Greenville County, S.C., Ordinance 4225 (Sept. 16, 2008) ("Subdivision means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, lease, or building development[. . .]").

1965) (approving the trial court's finding in a breach of contract action based in part on extrinsic evidence that the term "develop" would include the acts of subdividing a tract of land into lots, adding streets, and installing utilities).

Merriam-Webster's Dictionary defines "develop" in a land context as follows: "to convert (as raw land) into an area suitable for residential or business purposes <they [develop]ed several large tracts on the edge of town>; *also*: to alter raw land into (an area suitable for building) <the subdivisions that they [develop]ed were soon built up>." See Webster's Third New Int'l Dictionary 618 (3d ed. 1986). Although the most recent edition of Black's Law Dictionary does not define the term "develop" or "developed," it states "improved land"⁶ is "[l]and that has been developed; esp., land occupied by buildings and structures," whereas "unimproved land" is "[r]aw land that has never been developed, and usu[ally] that lacks utilities." Black's Law Dictionary 1008–09 (10th ed. 2014). Based on its plain and ordinary meaning, we find the term "developed" requires affirmative acts on the part of the owner to transfer the property from raw land to a more improved state.

In light of these definitions, we look at the language contained within the 1981 R&Cs. The 1981 R&Cs specifically state that the document may be amended only "by a vote of a majority of the then owners of the lots into which the property . . . shall have been developed" In drafting the 1981 R&Cs, Lincoln specifically required the lot to be developed prior to possessing a right to change the 1981 R&Cs. Appellants set forth no evidence—whether it be roads, sewer lines, water, or electricity—that they instituted any improvements on the Property in the thirty years of their ownership as contemplated by the 1981 R&Cs. We recognize Appellants possessed an easement for sewer, drainage, and utilities over the Property, but an easement, in and of itself, is not tantamount to an improvement. Further, while Appellants claim the unrecorded plat dividing the Property into five smaller lots proves the lots were developed, we find this evidence is not conclusive on whether J.B. Stephens intended to develop and sell these five lots because the plat was never recorded. See *Sleasman*, 151 P.3d at 992-93 (finding "the most obvious example of 'development' is the platting process where building lots are made ready for sale or use for future improvement"). Moreover, Lincoln chose the past tense when it included the language "have been developed," as opposed to

⁶ We are, however, aware that "developed" land is not always tantamount to "improved" land. See *Sleasman*, 151 P.3d at 993 (finding that after land is developed, it may then be improved by adding a structure to the land, and clarifying that "one cannot build or improve upon a lot unless it is developed").

"may be developed" or "will be developed." *See generally Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318, 698 S.E.2d 773, 783 (2010) (finding choice of the past tense of the verbs "rendered" and "recompensed" in a statutory scheme as evidence the acts were to have occurred in the past as opposed to prospectively). We cannot imply language into the 1981 R&Cs that is not written, even if a different interpretation would be more favorable in the present day. *See S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) ("The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." (emphasis omitted)). Even if Appellants took some prefatory steps to develop the Property into five lots, under the plain meaning of the term, we find Appellants failed to develop the lots prior to amending the 1981 R&Cs. Thus, we affirm the circuit court's finding on this issue.⁷

II. Reliance upon State and Local Law

Next, Appellants claim the circuit court and Respondents improperly cite to Section 30-5-240 of the South Carolina Code (2007) and a Greenville County ordinance for the proposition that a sale pursuant to an unrecorded plat is void or voidable. We address each argument in turn.

Section 30-5-240 states,

When real property is subdivided for the purpose of sale and is sold or offered for sale according to a plat of a survey thereof, the person first offering such property for sale *shall* file a plat or blueprint of such survey in the office of the clerk of court of the county in which such real estate is situate[d]. In the event that the owner fails to comply with the above provision he shall become liable to the purchaser or to any subsequent grantee of the

⁷ Because we find the language of the 1981 R&Cs regarding developed lots is unambiguous, we decline to consider extrinsic evidence submitted by Appellants in support of their argument that the lots were developed. *See McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity).

land, or of any portion thereof, in such sum as shall be found necessary to procure and record such plat.

(emphasis added).

The relevant portion of the Greenville County ordinance states,

The owner . . . of any land . . . who transfers, sells, or agrees to sell such land by reference to, or exhibition of, or by other use of a plat or subdivision of such land before such plat has been approved by the Planning Commission and recorded in the office of the County Register of Deeds shall forfeit and pay a penalty of \$100 for each lot so transferred, sold, or agreed or negotiated to be sold.

Greenville County, S.C., Ordinance 3870, § 1.3 (Dec. 13, 2004). Appellants submitted no proof that either Appellants or any predecessor in interest ever submitted a plat, received approval for a plat, or recorded a plat as contemplated and required by law.⁸

We find the failure to fulfill the requirements enunciated in the foregoing state and local law are evidence that J.B. Stephens did not intend to subdivide the Property for development purposes when the plat was initially prepared. Further, although Appellants' failure to abide by these rules of law would not necessarily invalidate a subsequent sale, we find it would be inequitable to permit Appellants to use an unrecorded plat as evidence that the lots were subdivided and intended for sale if the ordinance and statute require recordation as a prerequisite to sale. *See Buffington*, 383 S.C. at 393, 680 S.E.2d at 291 ("[W]hile there is no formulaic balancing test, . . . this [c]ourt has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant."). Based on the foregoing, we find the circuit court did not err in relying upon section

⁸ Appellants cite to the Greenville County tax map sheet, which reflects the Property is demarcated into five smaller lots, as evidence that the plat was at some point submitted to the authorities. However, the circuit court never noted this evidence in its order, and Appellants failed to submit further proof that the plat was submitted to the Greenville County Planning Commission for approval.

30-5-240 and a Greenville County ordinance as support for its conclusion that the Property was not developed into lots as contemplated by the 1981 R&Cs.

III. Text of the 1981 R&Cs and the Drafter's Intent

Last, Appellants contend the circuit court failed to consider the text of the 1981 R&Cs as well as the drafter's intentions when it concluded the Property was not developed into lots. We disagree.

Appellants first claim another provision within the 1981 R&Cs confirms that the lots in question were developed. Appellants cite to a sentence within the 1981 R&Cs that permits the restrictions to be enforced against "any property owner of any lot into which the property described above shall subsequently be *cut*." (emphasis added). Appellants essentially argue that a "lot" is merely property which has been "cut" from a larger parcel of land. Assuming this to be true, this reference does not require us to find the Property was developed into five lots. This provision pertains to an owner's ability to enforce the restrictive covenants against any other owner who violates the 1981 R&Cs. We find it reasonable to conclude that any owner could bring an action to enforce the 1981 R&Cs against any other owner, regardless of how many lots the owner in violation of the 1981 R&Cs possesses.

On the other hand, Lincoln specifically required the lots to be developed before an owner could vote to amend or modify the 1981 R&Cs. Further, we note that in the amendment provision within the 1981 R&Cs, Lincoln chose to afford each homeowner within Watson's Orchard Subdivision a vote based on residency within the subdivision. However, for the owners in possession of property outside the subdivision, their voting rights were not based merely on owning a "lot," but on owning a "developed lot." We find it reasonable to conclude that homeowners within the subdivision and property owners who expended financial resources to develop their lots would be most affected by any changes to the 1981 R&Cs and, thus, would be afforded the greatest voting rights.

Next, Appellants claim the circuit court ignored the testimony of Patrick Grayson, the attorney who drafted the 1981 R&Cs, regarding the meaning of "developed lots." Because the language in the 1981 R&Cs was unambiguous, we find the circuit court did not need to consider extrinsic evidence—by way of testimony or otherwise—regarding the meaning of this term. *See McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity).

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

RECEIVED

APR 30 2016

SC Court of Appeals

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

v.

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

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

v.

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

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

PETITION FOR REHEARING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Rec. 307-08.)

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

A. Paragraph 18, "To summarize, it was our conclusion in 2008 and 2009 that the Stephens Lots were lots into which the property had been developed, and that each was entitled to a vote on the amendments - on the amendment of the R&C."

Q. All right. Hold on one second. Does that correctly state your conclusion in 2008 and 2009?

A. It does.

Q. And do you still feel that way?

A. I do.

Q. All right. And read Paragraph 19.

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

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

A. It did. It does.

Q. And you still feel that way?

A. I do.

(Rec. 218-19.)

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Same objection?

MR. HILLER: Yes, sir.

THE COURT: Alright. Go ahead answer it.

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

A. Yes.

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

A. Yes.

Q. --- restrictions and covenants?

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

There was no evidence to the contrary.

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

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

A. The Documentary Evidence

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

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

Exhibit A to the offer describes the property being purchased as:

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

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

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

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

J. B. Stephens, a homeowner whose lot fronts on Pelham Road, does not want to participate in the corporation [WOPOA]. Instead, he is willing to buy the five lots most directly across from his home. He has made an offer to purchase five minimum lots (200 feet frontage and 55,000 sq. ft.) in front of his house for a purchase price of \$105,500.00 and give up his interest in the corporation. This is a price of \$21,100.00 per lot.

When you consider that the value of a share of stock in Watson's Orchard Property Owners Association, Inc. should be worth a minimum of \$7,000.00, the corporation will net around \$22,500.00 per lot.

If the lots were sold in the open market for \$25,000.00 through a realtor, only \$22,500.00 would be netted after commission. It is our opinion that this is a fair price for this purchase.

Therefore, your committee believes the offer is fair and recommends that it be accepted.

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

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

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

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

... Based upon the entire record, I hereby make the following findings and conclusions, with resulting declarations and orders thereon: ...

(18) That more than a majority of the defendants as charter member and pending stockholders in Watson's Orchard Property Owners Association, Inc., are willing to sell five (5) lots as described in the deed shown as Exhibit 14 [Def. Ex. 1 at D251 (Rec.)], for the consideration of One Hundred Five Thousand Five Hundred and 00/100 (\$105,500.00) Dollars, pursuant to the Offer shown as Exhibit 15 [Def. Ex. 1 at D59 (Rec. 370)], and that the President has authority to execute said deed within the usual and regular course of corporate business; that documentary deed stamps be paid from said consideration. ...

IT IS FURTHER ORDERED that the officer of Watson's Orchard Property Owners Association, Inc. be authorized to execute and deliver a deed conveying good fee simple title to the property shown on Exhibit 14 [Id. at D251 (Rec. 565)], upon receipt of the consideration of One Hundred Five Thousand Five Hundred and 00/100 (\$105,500.00) Dollars, less documentary deed stamps.

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

4. THE FIRST DEED REFERENCES FIVE LOTS (1981)

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

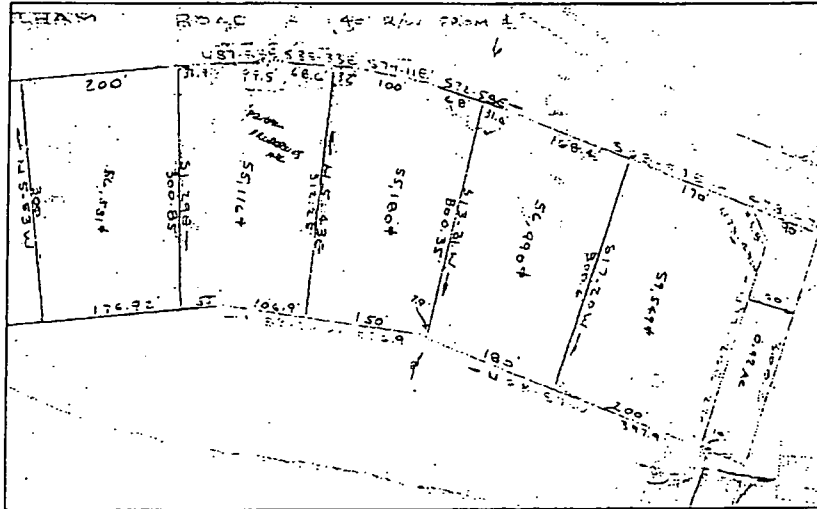
All the certain piece, parcel or tract of land situate, lying and being in the County of Greenville, State of South Carolina, containing five (5) lots as is more fully shown on a plat entitled "Survey for Richard Watson", prepared by Carolina Surveying Company, dated June 27, 1980, revised August 19, 1980, revised August 27, 1980, revised September 8, 1980, and revised December 1, 2, and 3, 1980

Subject however, to a sewer easement across the rear twenty-five (25') feet of the above lots for the purpose of installation and maintenance of a sewer line . . .

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

5. THE PLAT SHOWING THE FIVE LOTS (1980)

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



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

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

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

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

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

A. Correct.

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

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

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

A. To again a lot line.

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

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

Q. Okay, so ---

A. --- changes ---

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

A. Right.

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

A. None whatsoever.

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

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

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

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

A. No.

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

A. Absolutely not.

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

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

A. That separates those two.

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

A. Here (indicating).

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

A. Yes.

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

A. The bearing doesn't change.

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

A. Correct.

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

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

A. Right.

Q. --- for a crossline.

A. Right.

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

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

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

A. Yes.

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

A. It just, ---

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

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

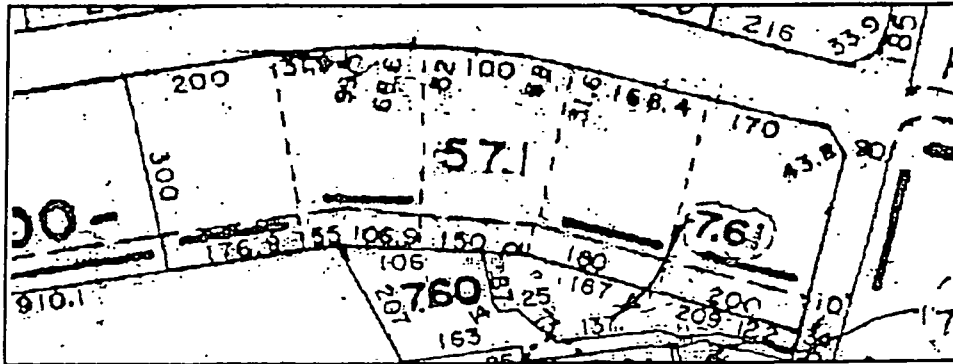
Q. And anybody who's tracing those metes and bounds from the public record would see those stop points?

A. Sure.

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

7. THE TAX MAP SHOWING FIVE LOTS (CURRENT)

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



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

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

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

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

9. 1981 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

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

10. THE SECOND DEED REFERENCES FIVE LOTS (1986)

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

11. 1986 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

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

12. THE STEPHENS 1988 AFFIDAVIT REFERENCES FIVE LOTS

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

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

13. 1988 LOAN WITH THE FIVE LOTS AS COLLATERAL

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

14. THE 1988 MORTGAGE REFERENCING FIVE LOTS

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

15. THE THIRD DEED REFERENCES FIVE LOTS (2003)

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

16. THE FOURTH DEED REFERENCES FIVE LOTS (2008)

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

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

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

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

1. THE TESTIMONY OF PATRICK GRAYSON

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

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

A. Yes.

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

2. THE TESTIMONY OF WILLIAM KEHL

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

3. THE TESTIMONY OF MICHAEL STEPHENS

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

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

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

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

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

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

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

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

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

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

S.C. Code §30-5-240³ does not support the decision below either. The statute does say that a person subdividing land according to a plat "shall file a plat or blueprint." However, it recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. Further, the statute conspicuously does not provide that a sale pursuant to an unrecorded plat is void or voidable. The *only* consequence of such a sale is that the grantor is responsible for the cost to "procure and record" the plat.

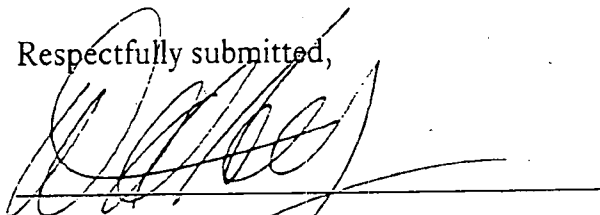
Again, as Mr. Estridge testified, transfers without recorded plats are "common," especially in 1981. (Tr. 234:21-21 [Rec. 300].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), mentioned in her testimony (by de bene esse deposition) that "most plats in Charleston County don't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

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

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. D. Herlong', is written over a horizontal line.

William D. Herlong, Esquire (SC Bar No. 14283)

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April 29, 2015

Greenville, South Carolina

The South Carolina Court of Appeals

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

v.

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

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

v.

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

September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T. Azores and Kim O. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah p. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, Third Party Defendants.

Appellate Case No. 2013-000452

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Wilson J.

John D. Feather J.

Stephen C. McDaniel J.

Columbia, South Carolina

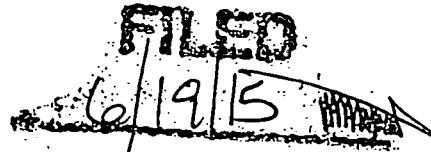
cc:

John S. Nichols, Esquire

Williams D. Herlong, Esquire

Randall Scott Hiller, Esquire

The Honorable Edward W. Miller



ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
MAR 03 2014

Edward W. Miller, Circuit Court Judge

SC Court of Appeals

Case No. 2009-CP-23-7707

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

v.

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

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

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F.

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Dated: February 27, 2014

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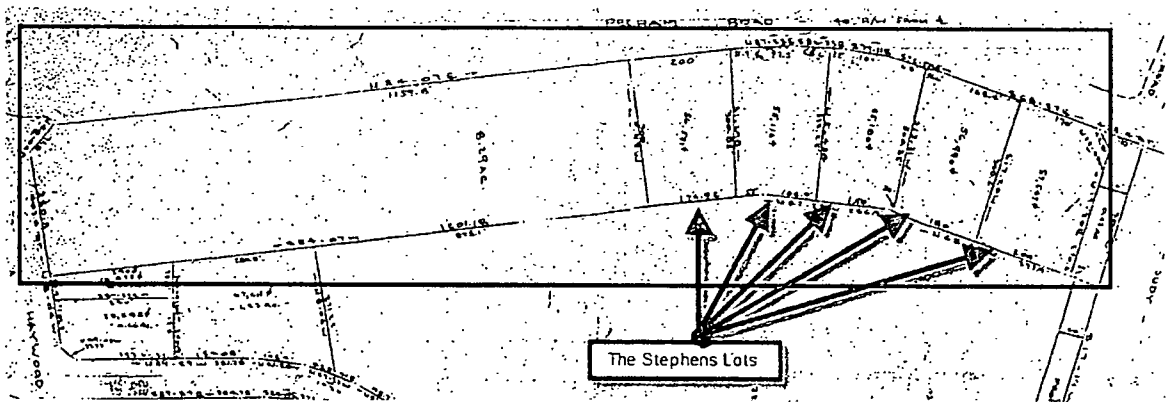
STATEMENT OF ISSUE ON APPEAL

Whether the five “Stephens Lots” at issue were, as required by the applicable restrictions and protective covenants, “lots into which the property [at issue] shall have been developed” and therefore entitled to vote on the amendment to those restrictions and protective covenants.

STATEMENT OF THE CASE

This lawsuit concerns whether an amendment to the restrictions and protective covenants (“R&Cs”) for a piece of property in Greenville County was effectively adopted. That question turns on whether five “lots” within the property were in fact lots and thus entitled to vote on the amendment.

The property at issue (the “Property”) is across Pelham Road from Watson’s Orchard subdivision. It is just off Interstate 385 as one enters Greenville. The Property and the “lots” (referred to herein as the “Stephens Lots”) can be seen within the large box in the following excerpt from the December 3, 1980 “Survey for Richard Watson”:



(Def. Ex. 1 at D7 [Rec.¹ 318].)

The prior R&Cs (the “1981 R&Cs”) date from 1981 and are set forth a document known as “Declaration of Restrictions and Protective Covenants.” (*Id.* at

¹ References to “Rec.” are to the pages in the Record on Appeal.

D11-19 [Rec. 322-30].) In general, the 1981 R&Cs restrict the Property to residential development on lots in excess of 55,000 square feet.

The 1981 R&Cs specifically provided that they could be amended as of January 1, 2010, “by vote of a majority of the then owners of the **lots into which the property described above** [the Property along with another strip along Haywood Road owned by Watson’s Orchard Property Owners Association, Inc.] **shall have been developed** and in Watson’s Orchard Subdivision.” (*Id.* at D11, emphasis added [Rec. 322].)

In the months prior to that date, Watson’s Orchard Property Owners Association, Inc. (“WOPOA”), sought to obtain a majority vote in favor of the proposed amended R&Cs. After obtaining twenty-nine of fifty-four possible votes and believing it had satisfied the requirement of the 1981 R&Cs, WOPOA filed the amended R&Cs in the Greenville County Register of Deeds Office on November 9, 2009. (*Id.* at D21-D44 [Rec. 332-55].) A slightly corrected version was filed on December 21, 2009. (*Id.* at D46-D57 [Rec. 357-68].) Generally speaking, the 2010 R&Cs allow low-density development of the Property such as two-story doctors’ offices. (*Id.* at D22-D23 [Rec. 333-34].)

The petitioners filed suit on September 8, 2009, seeking a declaratory judgment that the 2010 R&Cs had not been validly adopted. (Rec. 20-25.) An amended complaint was filed on September 10, 2009. (Rec. 25-52.) Defendant

WOPOA² answered on October 12, 2009 (Rec. 53-55.) WOPOA and Appellants filed a joint Answer and Counterclaim on November 11, 2009. (Rec. 56-103.) In the counterclaim, they sought a declaratory judgment that the 2010 R&Cs had been validly adopted. On June 27, 2011, Appellants and WOPOA filed an amended Answer, Counterclaim, and Third-Party Claim which brought in the property owners in Watson's Orchard subdivision as third-party defendants. (Rec. 107-57.) None of the third-party defendants answered and judgment by default was entered against them on February 22, 2012. (Rec. 1-4).

Defendants and Plaintiffs filed cross motions for summary judgment on April 27, 2012 (Rec. 162-71) and June 8, 2012 (Rec. 172-74) respectively. The court denied the motions on July 9, 2012, holding that "genuine issues of material fact exist." (Rec. 5-7.)

The matter was tried on September 4-5, 2012, and post-trial memoranda were submitted on September 14 by Defendants (Rec. 175-84) and Plaintiffs (Rec. 185-94). By Order dated October 19, 2012, the court held that the property referred to here as the Stephens Lots "has not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants." Accordingly, it held, the amendment to the 1981 R&Cs was of no effect. (Order dated October 19, 2012 at 9,

² WOPOA is not a party to the appeal.

¶5-6 [Rec. 17].) Appellants' motion for reconsideration was denied on January 28, 2013. (Rec. 19.) The Notice of Appeal was filed on February 25, 2013. (Rec. 195-96.) An amended notice, which modified the complex caption at the clerk's direction, was filed on April 1, 2013. (Rec. 214-15.)³

³ The amended notice was itself incorrect in that it identified the third-party defendants who were in default below as respondents. At the direction of the Clerk's office, they are now identified as third-party defendants, not as respondents.

SUMMARY OF ARGUMENT

Under South Carolina law, the “settled rule” is that “restrictions as to the use of real estate be strictly constructed and all doubts be resolved in favor of free use of the property” *South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001), citing *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998). Further, “where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property.” *Id.*

Applying this “settled rule” (and even without it), it is clear that the Stephens Lots were entitled to vote on the amendments to the 1981 R&Cs at issue. First, the documentary evidence is overwhelming that the Stephens Lots were in fact lots. For example, the original offer was to purchase five lots, and the acceptance was for five lots. The circuit court in a declaratory judgment action in 1980 approved the sale of the five lots. The 1981 deed issued pursuant to that order was for five lots. The plat referenced in the deed shows the five lots. The metes and bounds description in the deed gives the interior dimensions for the five lots. The tax map shows the five lots. The title opinion for the 1981 transaction was for the purchase of five lots. The index in the RMC office identified the transaction as being for five lots.

Second, the testimony confirmed that the Stephens Lots were in fact lots. Mr. Patrick Grayson, a long-time real estate attorney in Greenville, prepared the 1981 deed and testified that it was for the transfer of five lots. Mr. William Kehl, another

long-time corporate and real estate attorney in Greenville, provided a title opinion to the buyer in that transaction to the effect that the buyer was receiving good title to five lots. And Mr. Michael Stephens, the son of the purchaser (the purchaser is now deceased), confirmed that his father had offered to sell him one of the five lots.

Third, the only expert testimony in the trial confirmed that the Stephens Lots were lots. Mr. Coleman Shouse, former Executive Director of the Greenville County Planning Commission testified to this effect. Mr. Larry Estridge, another long-time real estate attorney in Greenville, testified to the same effect.

Fourth, the only argument made by the Respondents—that the five lots are not lots because the plat was not recorded—is without merit. Neither South Carolina law nor the Greenville County Subdivision Regulations make transfers pursuant to unrecorded plats unlawful or hold that such transfers are void. To the contrary, each implicitly recognizes such transfers. South Carolina case law also recognizes transfers using unrecorded plats. Cases from other jurisdictions do as well.

Fifth, the text of the 1981 R&Cs itself indicates (a) that “lots” “into which the property ... shall have been developed” are entitled to vote on the amendments (*id.* at D11, emphasis added [Rec. 322]), and (b) that a “lot” is simply a piece “cut” from the property. (*Id.* at D12, emphasis added [Rec. 323].) The documentary and testimony evidence reference above shows that the Stephens Lots easily meet these requirements.

And sixth, and perhaps most powerful, the drafter of the 1981 R&Cs, Mr. Grayson, testified directly that it was his intention that the Stephens Lots be entitled to votes under the language at issue. There was no contrary evidence as to the intent behind the document.

Based on all of the foregoing, there can be no doubt that the Stephens Lots were lots and entitled to vote on the amendments to the 1981 R&Cs, and thus that the amendment passed. For good measure, this was the opinion of Mr. Estridge.

ARGUMENT

I. THE “SETTLED RULE” IS THAT RESTRICTIONS ON REAL ESTATE ARE TO BE STRICTLY CONSTRUED AND ALL DOUBTS RESOLVED IN FAVOR OF FREE USE OF PROPERTY

In *South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C.

617, 550 S.E.2d 299 (2001), the Supreme Court set forth the rules for interpreting restrictive covenants in this state:

Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. **It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property**, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that **where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property**. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and **all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property**.

345 S.C. at 622, 550 S.E.2d at 302, emphasis added, citing *Taylor v. Lindsey*, 332 S.C.

1, 4-5, 498 S.E.2d 862, 863-64 (1998) (court refused to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes).

Hence, the “settled rule” is that “restrictions as to the use of real estate be strictly constructed and all doubts be resolved in favor of free use of the property.”

And further, “where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property.”

Applying these rules (and even without them), there is little doubt that the Stephens Lots were entitled to vote under the 1981 R&Cs on the proposed amendment.

II. THE EVIDENCE WAS OVERWHELMING THAT THE STEPHENS LOTS WERE IN FACT LOTS AND WERE VIEWED AS SUCH

A. The Documentary Evidence Showed The Stephens Lots Were Lots

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

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

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

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

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

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

J. B. Stephens, a homeowner whose lot fronts on Pelham Road, does not want to participate in the corporation [WOPOA]. Instead, he is willing to buy the five lots most directly across from his home. He has made an offer to purchase five minimum lots (200 feet frontage and 55,000 sq. ft.) in front of his house for a purchase price of \$105,500.00 and give up his interest in the corporation. This is a price of \$21,100.00 per lot.

When you consider that the value of a share of stock in Watson's Orchard Property Owners Association, Inc. should be worth a minimum of \$7,000.00, the corporation will net around \$22,500.00 per lot.

If the lots were sold in the open market for \$25,000.00 through a realtor, only \$22,500.00 would be netted after commission. It is our opinion that this is a fair price for this purchase.

Therefore, your committee believes the offer is fair and recommends that it be accepted.

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

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

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

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

... Based upon the entire record, I hereby make the following findings and conclusions, with resulting declarations and orders thereon: ...

(18) That more than a majority of the defendants as charter member and pending stockholders in Watson's Orchard Property Owners Association, Inc., are willing to sell five (5) lots as described in the deed shown as Exhibit 14 [Def. Ex. 1 at D251 (Rec.)], for the consideration of One Hundred Five Thousand Five Hundred and 00/100 (\$105,500.00) Dollars, pursuant to the Offer shown as Exhibit 15 [Def. Ex. 1 at D59 (Rec. 370)], and that the President has authority to execute said deed within the usual and regular course of corporate business; that documentary deed stamps be paid from said consideration. ...

IT IS FURTHER ORDERED that the officer of Watson's Orchard Property Owners Association, Inc. be authorized to execute and deliver a deed conveying good fee simple title to the property shown on Exhibit 14 [*Id.* at D251 (Rec. 565)], upon receipt of the consideration of One Hundred Five Thousand Five Hundred and 00/100 (\$105,500.00) Dollars, less documentary deed stamps.

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

4. THE FIRST DEED REFERENCES FIVE LOTS (1981)

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

All the certain piece, parcel or tract of land situate, lying and being in the County of Greenville, State of South Carolina, containing five (5) lots as is more fully shown on a plat entitled "Survey for Richard Watson", prepared by Carolina Surveying Company, dated June 27, 1980, revised August 19, 1980, revised August 27, 1980, revised September 8, 1980, and revised December 1, 2, and 3, 1980

Subject however, to a sewer easement across the rear twenty-five (25') feet of the above lots for the purpose of installation and maintenance of a sewer line . . .

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

5. THE PLAT SHOWING THE FIVE LOTS (1980)

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

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

A. Correct.

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

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

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

A. To again a lot line.

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

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

Q. Okay, so ---

A. --- changes ---

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

A. Right.

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

A. None whatsoever.

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

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

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

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

A. No.

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

A. Absolutely not.

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

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

A. That separates those two.

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

A. Here (indicating).

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

A. Yes.

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

A. The bearing doesn't change.

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

A. Correct.

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

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

A. Right.

Q. --- for a crossline.

A. Right.

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

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

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

A. Yes.

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

A. It just, ---

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

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

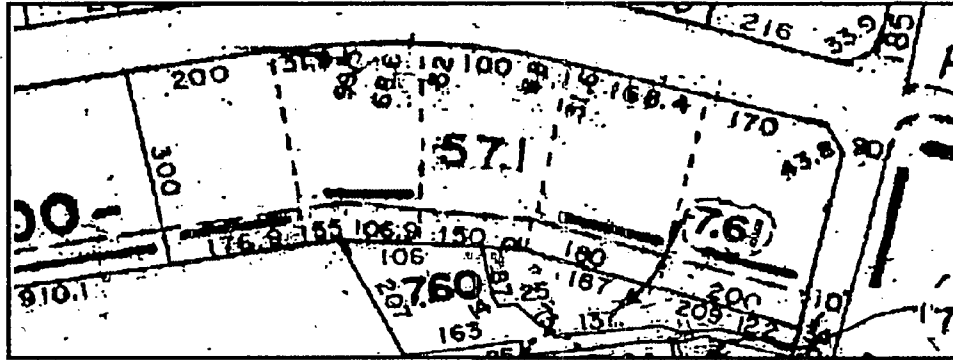
Q. And anybody who's tracing those metes and bounds from the public record would see those stop points?

A. Sure.

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

7. THE TAX MAP SHOWING FIVE LOTS (CURRENT)

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



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

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

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

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

9. 1981 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

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

10. THE SECOND DEED REFERENCES FIVE LOTS (1986)

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

11. 1986 REFERENCE IN THE RMC OFFICE TO FIVE LOTS

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

12. THE STEPHENS 1988 AFFIDAVIT REFERENCES FIVE LOTS

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

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

13. 1988 LOAN WITH THE FIVE LOTS AS COLLATERAL

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

14. THE 1988 MORTGAGE REFERENCING FIVE LOTS

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

15. THE THIRD DEED REFERENCES FIVE LOTS (2003)

On July 15, 2003, Mr. Stephens transferred the lots and various other property to a revocable trust. (Def. Ex. 1 at D266-70 [Rec. 580-84].) “Parcel Three” in that deed (the “2003 Deed”) identifies the parcel as containing “five (5) lots.” (Def. Ex. 1 at D266-67 [Rec. 580-81].) The description is the same as in the 1981 and 1986 deeds. (*See generally* Testimony of Patrick Grayson, Tr. 109:10-110:15 [Rec. 257-58].)

16. THE FOURTH DEED REFERENCES FIVE LOTS (2008)

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

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

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

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

1. THE TESTIMONY OF PATRICK GRAYSON

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

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

A. Yes.

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

2. THE TESTIMONY OF WILLIAM KEHL

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

3. THE TESTIMONY OF MICHAEL STEPHENS

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

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

C. The Expert Testimony Was That The Stephens Lots Were In Fact Lots

1. THE TESTIMONY OF COLEMAN SHOUSE

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

2. THE TESTIMONY OF LARRY ESTRIDGE

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

Mr. Estridge testified that the property represented by the Stephens Lots was “developed into lots.” He explained:

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

(Tr. 241:4-242:6 [Rec. 307-08].)⁴

* * * * *

⁴ Respondents' counsel objected to Mr. Estridge's testimony pursuant to *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). (See Tr. 238:25-240:25 [App. 304-06].) *Dawkins* holds that expert testimony is generally inadmissible on issues of law. As Appellants' counsel argued to the court, "[t]he question of whether they are lots developed into lots is a factual question first and foremost." (Tr. 237:15-16 [App. 303].) The court allowed Mr. Estridge to answer the question regarding his opinion as to whether the lots were in fact lots. In any event, "[a] trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002).

As the foregoing shows, the evidence at trial that the Stephens Lots were in fact lots was simply overwhelming.

III. RESPONDENTS' ARGUMENT THAT THE LOTS WERE NOT IN FACT LOTS IS WITHOUT MERIT.

Respondents presented only one witness at trial and his testimony made only one point—that there was no record that the Plat had been recorded⁵ and that a transfer of lots pursuant to an unrecorded plat was a violation of the Greenville County Subdivision Regulations. Based on this and their reading of S.C. Code §30-5-240, Respondents argued that the 1981 Deed (and apparently the subsequent deeds) conveying five lots was an “illegal” contract and could not have “developed” any lots as the term is used in the 1981 R&Cs. This argument is baseless.

A. Lots May Be Conveyed Pursuant To Unrecorded Plats

The case law is clear that the recording of a plat is not necessary for the conveyance of lots. As a matter of common law, the reference in the 1981 Deed (and the subsequent deeds) to the Plat incorporates the Plat into the deed. *See Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882, 883 (S.C. 1945) (“Where, as was done in this case, a deed describes the land as a certain tract or parcel as shown on a certain plat, the

⁵ There is, however, evidence that the Plat was submitted to the authorities. This is the fact that lots are shown on the tax map (Def. Ex. 5 [App. 661]) and the dimensions are exactly the same. (See discussion in Part II.A.7 at page 17 above, and compare Def. Ex. 5 [App. 661] to Def. Ex. 1 at D6 [App. 317].)

plat becomes part of the deed.”); *Chicago Title Ins. Co. v. Investguard, Ltd.*, 449 S.E.2d 681, 683 (Ga. App. 1994) (“[W]here a deed to land refers to a map or plat as a part of the description of the land conveyed, such map or plat will ordinarily be considered as incorporated in the deed itself.”)

It does not matter if the Plat is unrecorded. It is still incorporated by reference. This principle is reflected in two South Carolina cases, *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981), and *Cook v. Eller*, 298 S.C. 395, 280 S.E.2d 853 (App. 1989). In *Sims v. Tyler*, the Sims had purchased two lots from Perry in 1969 pursuant to a recorded plat. Later Perry sold one of those lots to the Tylers pursuant to an unrecorded plat. The trial court found that the Sims had not intended to purchase the second lot and reformed the deeds in the Tylers’ favor on the basis of mistake. 276 S.C. at 642, 281 S.E.2d at 230. The Supreme Court reversed, finding no evidence to support the Tylers’ contention that the Sims did not intend to purchase the second lot. 276 S.C. at 642-43, 281 S.E.2d at 230. It was not a factor that the Tylers’ purchase was pursuant to unrecorded plat. Indeed, had that been a factor, the matter could have been handled on summary judgment. The critical point is that the unrecorded plat was perfectly sufficient to reform the deed for the trial court. Likewise, it apparently would have been sufficient for the Supreme Court if the evidence had supported the finding of mistake.

In *Cook v. Eller*, the Ellers claimed title to a disputed piece of property through a deed and a recorded plat. Cook claimed title to the same property through deeds

and unrecorded plats. The trial court found that the Ellers were bona fide purchasers for value without notice of Cook's claim. As the Court of Appeals noted, the holding appeared to be premised on the plats relied on by Cook being unrecorded. 298 S.C. at 397, 280 S.E.2d at 854. The Court of Appeals affirmed the judgment for the Ellers but not because Cook's plats were unrecorded. The critical factor was that the abstracts, deeds, and unrecorded plats that supported Cook's claim were not in the record on appeal. Accordingly, the Court of Appeals could not evaluate "who ha[d] the better claim of title by virtue of their chain of title." The Court of Appeals affirmed the judgment for the Ellers because Cook "failed to meet his burden of providing this court with a record sufficient to enable us to make a proper decision." 298 S.C. at 398, 280 S.E.2d at 855. Obvious in the ruling is that if abstracts, deeds, and unrecorded plats had been in the record, the Court of Appeals could have ruled in favor of Cook.

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

by transfer of property to condemnee with reference to plat showing 70-foot right-of-way, notwithstanding that plat was unrecorded); *Reed v. Reese*, 374 A.2d 665, 669 (Pa. 1977) (plat need not be recorded to be incorporated by reference: "We expressed no requirement that the plan be recorded and we indicated that recordation was not necessary by ruling incorporation by reference makes the plot plan part of the deed."); *Oak Park Cemetery v. Donaldson*, 148 S.W.2d 994, 997 (Tex. Civ. App. 1940) ("From the issues submitted to the jury it appears that the case was tried on the theory that the sale of burial lots by the owner of a cemetery, with reference to an unrecorded plat of such cemetery, to purchasers who rely on such plat, will effect a dedication of the drives, parks, etc., shown on said plat, as well as the lots and blocks shown thereon. This principle is well established, of course, as applied to the sale of lots with reference to the plat of a townsite or addition to a city by the owner."); cf. *Nagel v. Dean*, 101 N.W. 954, 955 (Minn. 1904) ("In the absence of statutory regulation, it is clear, where a party conveys urban property in accordance with descriptions contained in an unrecorded plat, that the effect is to dedicate streets and alleys therein described to the public use."); *Bennett v. Seibert*, 35 N.E. 35, 37 (Ind. App. 1893) ("The mere act of surveying lands into lots, streets, and squares by the owner will not of itself amount to a dedication; yet a sale of lots with reference to such plat, map, or plan, whether recorded or not, will amount to an immediate and irrevocable dedication of such streets, etc., so far as the owner is concerned").

B. The Greenville County Subdivision Regulations Do Not Support Respondents Argument But Instead Define “Lot” In A Manner That Covers The Stephens Lots And Recognize Transfers Pursuant To Unrecorded Plats

Respondents’ argument based on the Greenville County Subdivision Regulations (the “Regulations,” [Rec. 593-656]) is off-base. In fact, this document explicitly defines a “lot” in a manner that makes clear that the Stephens Lots qualify. The definition is: “Lot – A portion of a subdivision or other parcel of land having a minimum of twenty (20) feet frontage on a public street and intended for transfer of ownership or for building purposes.” (Def. Ex. 1 at D-286 [Rec. 600].) The Stephens Lots indisputably meet this definition.

Respondents overlook that inconvenient fact and point to Section 1.4 of the Regulations which relates to the filing of plats for the sale of lots for a subdivision (more than two lots). Section 1.4 reads:

The owner or agent of the owner of any land located within the jurisdiction of the Planning Commission as described herein who transfers or sells or agrees to sell such land by reference to or exhibition of or by other use of a plat of subdivision of such land before such plat has been approved by the Planning Commission and recorded in the office of the County Register of Mesne Conveyance shall forfeit and pay a penalty of one hundred dollars for each lot so transferred or sold or agreed or negotiated to be sold. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from such penalties. The county may enjoin such transfer or sale or agreement by action for injunction or may recover the penalty by civil action.

(Greenville County Subdivision Regulations, §1.4 (1979), at Def. Ex. 1 at D-288-89, emphasis added [Rec. 602-03].)

However, Section 1.4, on its face, does not forbid the sale of lots pursuant to an unrecorded plat. It simply provides for a penalty of \$100 for each lot "sold" without the plat being recorded. The key is the word "sold" and the fact that it is in the past tense. The sale is not "void" or even "voidable." The County "may" sue to enjoin the sale but even that is not mandatory. Once the sale has occurred, the only consequence is a possible \$100 per lot penalty. The Regulation provided no authority for un-doing the sale. This is a matter of pure statutory construction.

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

The testimony at trial was that, especially during the period of the 1981 Deed, it was not uncommon for lots to be transferred pursuant to an unrecorded plat. Mr. Estridge, who, as noted above, was qualified as an expert in real estate law and real estate transactions, testified that "it is a fairly common practice for people to sell and

to otherwise transfer property with reference to a plat which is not recorded for a variety of reasons,” and “certainly [was] in 1981.” (Tr. 234:22-235:1 [Rec. 300-01].) This was “very common,” he said, for “transactions among related parties such as ... a family company or family partnerships or family LLCs or family trusts.” He said it is also “very common among related companies.” (Tr. 235:2-235:15 [Rec. 301].)

Respondents introduced no evidence to the contrary.

Notwithstanding such transfers being common, Respondents’ counsel suggested that there was something illegal or nefarious here. But that argument bears no weight. Apart from the fact that the deeds themselves plainly reference five lots, and apart from the fact that the tax map plainly shows the five lots, the process of submitting the plat (a summary version of it) to the Planning Commission was purely an administrative matter. Mr. Shouse, the former Executive Director of the Planning Commission and longtime developer, testified that the portion of the Plat relating to the Stephens Lots met the requirements for a “summary plat” under the Regulations. Further, he testified that, if that portion had been submitted as a summary plat, it would have been approved because the staff merely “checks off” that a summary plat meets the requirements and, if it does, stamps it. That is all there is to it. It does not go through an approval process with the Planning Commission. (Tr. 177:12-180:14 [Rec. 273-76].) There was no evidence to the contrary. Hence, there was nothing illegal or nefarious. No skullduggery. There was simply a failure to meet an administrative requirement.

C. S.C. Code §30-5-240 Also Does Not Support Respondents But Instead Recognizes Transfers Pursuant To Unrecorded Plats

The other basis for the Respondents' argument that the transfer of the five lots was illegal is S.C. Code §30-5-240. This statute reads:

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

The statute, like Regulation 1.4, does not support Respondents' argument. The statute does say that a person subdividing land according to a plat "shall file a plat or blueprint." However, it recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. Further, the statute conspicuously does not provide that a sale pursuant to an unrecorded plat is void or voidable. The *only* consequence of such a sale is that the grantor is responsible for the cost to "procure and record" the plat.

Again, as Mr. Estridge testified, transfers without recorded plats are "common," especially in 1981. (Tr. 234:21-235:1 [Rec. 300-301].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), mentioned in her testimony (by de bene esse deposition) that "most plats in Charleston County don't

get recorded.” She said the “lawyers just refer to the plats, but they don’t record them. It’s just custom there.” (Manning Dep. 5-6 & 35:8-11 [Rec. 216-17 & 220].)⁶

D. The Concept of Record Notice Does Not Apply Here

The trial court premised its decision largely on the fact that South Carolina is a “record notice” state. (Order dated October 19, 2012 at 3 [Rec. 11].) During the trial itself the court appeared to find that issue dispositive. (Tr. 70:11-71:4 [Rec. 226-27].) And in directing Respondents’ counsel to prepare a proposed order, the court asked for “particular emphasis on the fact that South Carolina is a record notice state and that there was no evidence presented that the applicable regulations were complied with or that the plats in question were recorded.” (Email from Court, Sept 21, 2012, 11:10 A.M. [Rec. 693].)

The Order does not explain how “record notice” applies here. It simply states: “South Carolina has been a record notice state since at least 1839. Title 30 of the *South Carolina Code of Laws* is entirely devoted to public records and recordation of documents with Chapter 7 thereof specifically stating that recordation is essential to validity. This state maintains facilities in every County solely for the purpose of the

⁶ Mrs. Manning’s office concluded that the Stephens lots were in fact lots and entitled to votes in connection with the effort to amend the R&Cs. As a result, Chicago Title gave a commitment to issue title insurance if a majority vote was obtained for the amended R&C’s with the Stephens Lots having one vote each, since in they felt then that the amended R&C’s would have been validly adopted and would be in full force and effect. (Manning Dep. at 20:21-21:6 [Rec. 218-19].)

recording of documents affecting real estate.” (Order dated October 19, 2012 at 3 [Rec. 11].)

In fact, the concept of “record notice” has no bearing here. As already noted, if it were dispositive that a plat was not recorded, the trial court in *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981), could not have found for the Tylers; indeed, the Sims would have been entitled to summary judgment. Further, the Supreme Court would not have needed to even consider whether there was sufficient evidence of mistake. The only issue would have been the Tylers’ failure to have a recorded plat. Likewise, in *Cook v. Eller*, 298 S.C. 395, 280 S.E.2d 853 (App. 1989), it would not have been a case of balancing the evidence since the plats relating to Mr. Cook’s claim were unrecorded. That fact would have been dispositive. There would be no evidence on Cook’s side to balance.

And as shown by the testimony of Mr. Estridge (*supra* pages 29-30) and Mrs. Manning (*supra* pages 31-32), transferring property in South Carolina without recording the plat is common.

IV. THE TEXT OF THE 1981 R&CS SHOWS THE STEPHENS LOTS WERE “LOTS” UNDER IT AND ENTITLED TO VOTE ON THE AMENDMENT

A. The Text Of the 1981 R&Cs Indicates That A Lot Is Simply A Portion Into Which Property Is “Cut”

The pertinent language in the 1981 R&Cs states that they could be amended as of January 1, 2010, “by vote of a majority of the then owners of the lots into which the property described above [the Property along with another strip along Haywood

Road owned by defendant WOPOA] **shall have been developed** and in Watson's Orchard Subdivision." (Def. Ex. 1 at D11, emphasis added [Rec. 322].) Hence, the issue was whether the Stephens Lots qualified as "lots into which the property ... shall have been developed."

As shown by the overwhelming evidence discussed above, the Stephens Lots unquestionably were lots. Respondents introduced no evidence to the contrary. They relied entirely on the fact that the Plat had not been recorded and their argument that that made the transfers of lots illegal. As shown above, that argument has no merit.

The question, then, is whether somehow, even though the Stephens Lots are lots, they do not qualify under the language above as "lots into which the property ... shall have been developed." Is something more required? The second page of the document puts this argument to rest. There it is stated that the restrictions can be enforced against "any property owner of any lot *into which the property described above shall subsequently be cut.*" (*Id.* at D12, emphasis added [Rec. 323].) Hence, a "lot" is simply a section which is "cut" from the property. There is no further requirement.

B. The Person Who Drafted The 1981 R&Cs Testified That The Intent Was For The Stephens Lots To Be Considered Lots And To Have A Vote On The Amendment To The R&Cs.

Aside from the words in the document itself, the *only* evidence in the record regarding the meaning of the text in the 1981 R&Cs was the testimony of the drafter, Mr. Grayson. He testified that his intent in drafting the document was for the word "develop" in "shall have been developed" to mean to "come into existence" or be

"created." Nothing more. This came from Mr. Grayson, the drafter of the 1981

R&Cs:

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

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

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

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

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

THE COURT: Same objection?

MR. HILLER: Yes, sir.

THE COURT: Alright. Go ahead answer it.

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

A. Yes.

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

A. Yes.

Q. --- restrictions and covenants?

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

There was no evidence to the contrary of any sort.

C. The Expert Testimony of Mr. Estridge That The Stephens Lots Were Lots And Entitled To Vote On the Amendment To The 1981 R&Cs

While it is probably unnecessary in light of all the evidence above, Mr. Estridge, having been qualified as an expert in real estate law and transactions, also rendered an opinion on the issue of whether the Stephens Lots were "developed" as specified under the 1981 R&Cs. His testimony on point has already been quoted in Part II.C.2 at page 22 above. He restated his opinion on cross-examination more succinctly:

A. My opinion is that these were lots developed by the time the deed was recorded.

Q. By and between the grantor and the grantee.

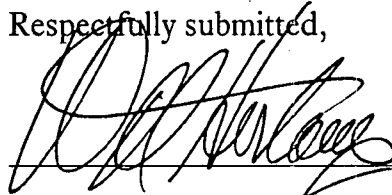
A. Before the deed was recorded the lots referred to in the deed had been developed, that's my opinion.

(Tr. 251:22-252:1 [Rec. 309-10].)

CONCLUSION

Because the evidence was overwhelming that the Stephens Lots were in fact lots and there was no evidence to the contrary, because Respondents arguments that the lots are not lots because the Plat was unrecorded is contrary to South Carolina law, and because the 1981 R&Cs provide that lots are simply section into which property is "cut," the Stephens Lots were entitled to vote on the amendment to the 1981 R&Cs. Accordingly, Appellants respectfully request that this Court reverse the judgment of the trial court.

Respectfully submitted,



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February 27, 2014

Greenville, South Carolina

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED

FEB 28 2014

SC Court of Appeals

Case No. 2009-CP-23-7707

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

v.

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

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

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and

William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T. Azores and Kim O. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herman,.....Third Party Defendants.

FINAL BRIEF OF RESPONDENTS

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INITIAL BRIEF OF RESPONDENTS

STATEMENT OF CASE

This action was commenced on September 8, 2009, wherein Respondents sought a declaratory judgment that certain restrictive covenants prepared and filed by Appellants had not been validly adopted and were void and of no force and effect. An amended complaint was filed on September 10, 2009. The Defendant, Watson's Orchard Property Owners Association, Inc. (hereinafter WOPOA) answered on October 12, 2009. WOPOA and Appellants filed a joint answer and counterclaim on November 11, 2009. In the counterclaim they sought a declaratory judgment that the 2010 covenants had been validly adopted. On June 27, 2011 Appellants and WOPOA filed an amended answer, counterclaim and third party claim which brought in the property owners in Watson's Orchard Subdivision as third party defendants. None of the third party defendants answered and judgment by default was entered against them on February 22, 2012.

The matter was tried on September 4 and 5 of 2012 and post trial memoranda were submitted on September 14 by Appellant and Respondent. By Order dated October 19, 2012 the Court held, among other things, the amendment filed by the Appellants was not validly adopted and was of no force and effect. Appellants' subsequent motion for reconsideration was denied on January 28, 2013. This appeal timely followed.

STATEMENT OF FACTS

The issue in this case is whether the amended restrictions and covenants prepared, executed and recorded by the original Defendants were done in accordance with the requirements set forth in the original.

This saga began on January 20, 1962 when Richard F. Watson and Evelyn P. Watson recorded "Preliminary Restrictions and Protective Covenants applicable to certain property on both sides of Pelham Road". (R. Pg. 404) Ultimately, 47 lots were platted and approved by the Greenville County Planning Commission on Plat entitled "Watson Orchard" recorded

in Plat Book 000 Page 99. (R. Pg. 396) Additional "Restrictions and Protective Covenants applicable to certain property on the North side of Pelham Road" were recorded on September 22, 1964. (R. Pg. 412) These restrictions are still in effect for Watson's Orchard Subdivision.

In 1980, Lincoln of S.C., Inc. acquired all, or substantially all, of Watson's property on the south side of Pelham Road and endeavored to remove the restrictive covenants from that property to allow commercial development. (R. Pg. 378) In an effort to induce the lot owners in Watson's Orchard Subdivision to consent to the release of the restrictions Lincoln ultimately negotiated the payment of \$50,000.00 in cash, conveyed a parcel of approximately 14.7 acres fronting on the southern side of Pelham Road as a Buffer zone and purchased an additional tract from a third party containing approximately 8 acres fronting on the eastern side of Haywood Road. (R. Pg. 379) The Haywood tract was acquired to provide a Buffer on both major roads. Restrictions were also imposed on the use of the Buffer zone and Haywood tract as well as some restrictions on the commercial use of the property being released. (R. Pg. 444-451) These negotiations were memorialized in an Agreement to Release of Restrictions prepared by Lincoln and executed by the then property owners. Subsequent to the execution of the Agreement to Release of Restrictions an action was brought in common pleas court and an Order entered accomplishing the provisions set forth in the agreement with the exception that a portion of the Buffer zone containing approximately 6.2 acres was agreed to be sold to J.B. Stephens after consummation of the transaction between Lincoln and the homeowners. (R. Pg. 391)

Immediately subsequent to the issuance of the Order of Judge McGowan, Lincoln imposed the restrictive covenants at issue on the Buffer zone and the Haywood property then conveyed the premises to Watson Orchard Property Owners Association, Inc. (hereinafter WOPOA). (R. Pg. 431) Stock was then issued from the corporation to all of the lot owners with the exception of J.B. Stephens. (R. Pg. 423-425) The restrictive covenants that were recorded affect only the Buffer zone and the Haywood Road property and do not affect or modify the existing covenants that were applicable, and are still applicable, to the Watson Orchard Subdivision. (R. Pg. 452)

Immediately after the conveyance by Lincoln to WOPOA, WOPOA sold a portion of the Buffer zone to J.B. Stephens for \$105,000.00. (R. Pg. 565) The net effect to the then homeowners in Watson Orchard Subdivision was that they each received \$3,000.00 in cash and vicariously owned property having a present value of at least \$211,000.00 in 1981 dollars if sold as residential lots as the restrictions required. (R. Pg. 373)

Although apparently some effort initially was made by the corporation to abide by its stated purpose in the Articles of Incorporation (R. Pg. 729), between 1984 and 2005 it does not appear the corporation was in any way active as there is a dearth of corporate records for that time period. It wasn't until 2005 that J.B. Stephens made an offer in excess of two million dollars for the WOPOA property, as restricted, that kindled the greed and selfishness which led to the actions necessitating this litigation (R. Pg. 698-699). Although that transaction was never reduced to contract, or consummated, it was then that WOPOA obviously realized that the interest of the shareholders and the interest of the property owners were rapidly diverging. WOPOA acknowledged that they now comprised less than one third of the current owners of homes in the subdivision and with visions of a substantial windfall above and beyond that originally intended, it could only be obtained by removing the covenants and restrictions from the Buffer zone (R. Pg. 710-711). Although living next door to commercial offices was unacceptable when the shareholders of WOPOA owned the homes in 1981, it apparently is perfectly acceptable now that they most do not.

Ralph Aiken, President of WOPOA undertook to appoint a committee, led by him, to explore all possible methods of removing the restrictions of single family use only from the Buffer zone (R. Pg. 700).

Throughout the subsequent process of attempting to remove the covenants the Defendants adopted whatever view they deemed expedient as to the number of votes entitled to participate (R. Pg. 778). When J.B. Stephens was not on their side he had one vote. Sometimes they believed 47 votes were appropriate, sometimes 56 votes and sometimes 64 votes (R. Pg. 707-708). Votes necessary were directly a function of how many favorable votes they had, or what they thought they could get away with, not what the document required.

They hired attorneys, including Mr. Grayson (R. Pg. 747) who filed an affidavit in this action, to give them an opinion as to how many votes were necessary. Despite Mr. Grayson's now affidavit, in 2008 he didn't seem to know how many votes were needed as he sent a packet of documents to a title insurance company for an opinion (R. Pg. 695-696). Ultimately, even the improperly recorded covenants still reflect the Defendants' lack of consensus on the proper method to tally the appropriate votes (R. Pg. 148).

SUMMARY OF ARGUMENT

Plaintiffs' position is simple and concise, the Defendants lacked a majority vote as required under the Covenants.

The Covenants are somewhat unique in that in order to amend or modify the Covenants the vote is required of the owners of the lots of an adjoining subdivision (which is not subject to the Covenants) in addition to the owner of the lots of the property which is subject to the Covenants. The language to that effect, and which is ultimately determinative of the issue presented, is found in the second paragraph:

"....and shall inure to the benefit of each owner thereof and all owners of property in Watson Orchard Subdivision as shown on Plat recorded in the RMC Office for Greenville County in Plat Book 000, Page 99, and the lot in Plat Book 4-C Page 133, hereinafter referred to as "Watson's Orchard Subdivision", until January 1, 2010 at which time said covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years each unless, by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision, (Emphasis added)

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract" Gilbert v. Miller, 586 S.C.2nd 861 (Ct. App. 2003). "If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement" *id* at 30-31 586 S.C.2nd at 864. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary and popular sense" *id*, 586 S.C.2nd at 864. "Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract" Penton v. J.F. Cleckley & Co., 486 S.C.2nd 742 (1997).

"Words of restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution" Taylor v. Lindsey, 332 S.C.1, 498 S.C.2nd 862 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document" (emphasis added) Taylor v. Lindsey (infra).

When "the language imposing restrictions upon use of property is unambiguous, the restrictions will be enforced according to their obvious meaning", Shipyard Property Owners Association v. Mangiaracina, 307 S.C. 299, 414 S.C. 2nd 705 (Ct.App. 1992). It is the Plaintiffs' contention that the 1981 covenants and restrictions, interpreted from the four corners of the document, is unambiguous and when read in their plain, ordinary and popular meaning invalidate the votes cast by the defendants in this action.

The covenants themselves, other than the provision allowing enforcement and voting by property not subject to the covenants, were not atypical of residential covenants and restrictions utilized in that time frame. They restrict the property to single family residential use, prohibit certain nuisance and noxious activities, establish an architectural committee for control of the type and character of homes to be built thereon, regulate mailboxes and establish certain minimum lot sizes and building sizes that the property may be developed.

Subsequent to the imposition of the covenants by Lincoln of South Carolina, Inc., it conveyed the premises burdened by the restrictive covenants to Watson's Orchard Property Owner's Association, Inc., a corporation formed for the purpose stated in its articles of incorporation to "...engage in the business of selling and developing approximately 22.12 acres of residential real estate..." (emphasis added). Immediately after acquiring title, the property association conveyed a tract of land to the predecessor in title of the Appellants. At the time of the attempt to remove the covenants from the premises the evidence reflects that the property now consists of three tracts of land with three separate and distinct tax map identification numbers and that none of the tracts have ever applied for, been approved for or recorded a subdivision plat, nor have any homes been constructed thereon.

Within the "four corners" of the document at issue there is no definition of the term "lot" or the term "developed", nor is one necessary. Each has a plain ordinary meaning and

must be reviewed, taken and understood in their plain, ordinary and popular sense.

The inclusion of clear and unambiguous language in the paragraph establishing the criteria for amendment which states "...by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision..." means expressly that, "lots" that "have been developed" and is dispositive of this issue. To construe it in any other way would be to eliminate the language from the covenants entirely. If it meant the tracts were to have 15 votes then it would have said that. If it meant the tracts were to have the number of votes that it could be developed into, then it would have said that. If it was not mandatory that the lots have actually been developed it would have said "may" rather than shall. It did neither, instead it specifically inserted language that under any other interpretation would be superfluous, unnecessary and inapposite to what it does say. No machinations are needed to read it to -say in order to vote the "lot" shall have been "developed".

The plain, ordinary and popular sense use of these same words are contained within numerous cases, statutes and ordinances in effect at the time of its creation.

"Lot" is defined by the Greenville County Subdivision Ordinance that was in effect at the time of the creation of the covenants as "A portion of a subdivision or other parcel of land having a minimum of 20 feet frontage on, or approved access to, a public street and intended for transfer of ownership or for building purposes" (emphasis added). Although the word "developed" is not specifically defined in the Subdivision Ordinance, the plain and ordinary use of the term in relation to real property is expressed within the very definition giving rise to the ordinance itself. "Subdivision-means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, legacy, or building development." Black's Law Dictionary defines "lot" as "a share; one of several parcels into which property is divided" and it defines "develop" "to bring, or attempt to bring, to a state of fruition; continue the work in hand, as in operating under an oil and gas lease, in a manner that would discover oil, if it existed, and promote its production". The plain and ordinary use of the phrase "develop" is also contained in numerous statutes but perhaps most clearly used in it's ordinary sense by the following:

SECTION 12-43-224. Assessment of undeveloped acreage subdivided into lots. Notwithstanding the requirement that real property is required by law to be appraised at fair market value for ad valorem tax purposes, when undeveloped acreage is surveyed into subdivision lots and the conditional or final plat is recorded with the appropriate county official, the county assessor shall appraise each lot as an individual property and then discount his gross actual market value estimate of the developer's lot holdings under the following conditions..."

Of course, the plain ordinary meaning of develop in the context of real estate needs no definition by statute, ordinance or case law. That common knowledge is expressed exactly as 99.99% of everyday people understand it in the section set forth above.

The uncontradicted evidence was that nothing, not one thing, was done in the thirty years the Appellants have owned this property to change its character. No subdivision plat has been prepared, no subdivision plat has been presented to the Greenville County Planning Commission, no improvements of roads, sewers, water or electricity have been installed, no building permits have been issued, or buildings constructed. To the contrary the property has laid untouched the entire existence of these covenants and restrictions. The Appellants, who have reaped the benefit for thirty years of paying less real property taxes on undeveloped tracts of land, now wish this court to anoint their property as "developed lots" just long enough for them to be able to vote not to have to use them as lots. To accept that contention by the Appellants, the court would have to construe the intent of the covenants as being to exist for a period of thirty years and then simply expire. Such an interpretation would essentially ignore every single word contained within the covenants.

South Carolina law requires the recordation of a plat whenever property is subdivided for the purpose of sale or offering of sale, Section 30-5-240 South Carolina Code of Laws, and the Greenville County Subdivision Ordinance prohibits the subdividing or offering for sale of property unless a subdivision plat is approved by the Greenville County Planning Commission and recorded. The ordinance and statute were in existence at the time of the creation, of the covenants. In order for any "lot" to have been "developed" compliance with those laws was necessary, essential and obviously contemplated. No such compliance ever

occurred. There is not now, nor has there ever been, a subdivision plat submitted to or approved by the Greenville County Planning Commission or any subdivision plat ever recorded.

Further evidence of the intent of the parties is contained within the document itself. The paragraph immediately following the paragraph defining a majority for the purposes of amendment defines persons entitled to enforce the covenants and states, "if the undersigned, its successors or assigns, or any property owner of any lot into which the property described above shall subsequently be cut should violate or attempt to violate..." (emphasis added). Article I, subparagraph (11) states "nothing herein contained shall be construed to prohibit the use of more than one lot or portions of one and more lots as a single residential building site, provided that said lot would otherwise meet the requirements as to size, frontage, set back line and directional facing of said building as determined by the architectural committee". Article II, subparagraph (2) sets forth the frontage and lot size restrictions that the tracts may be minimally developed into.

The Declarant was not a party to this litigation. The only intent to be garnered in the construction of the agreement is that of the Declarant from the agreement itself absent an ambiguity. No action performed by the Defendants or the Plaintiffs, prior, or subsequent, to the recording of the declaration has any relevance to the interpretation of the document.

Appellant's entire case, in a nutshell, relies upon the phrase, "containing 5 lots" in a deed from the defendant, Watson's Orchard Property Owners Association, Inc. to the other defendants. This deed, if admissible at all, is relevant only to the issue as to whether the Stephen's property had been "developed" into "lots".

While the deed does state that it is conveying property "containing five lots" the legal description of the deed is a metes and bounds boundary description of a tract containing approximately 6.5 acres. It does not and could not "create" 5 lots, that would have required an approved and recorded subdivision plat. What it does mean, giving the word "containing" its plain ordinary meaning (to hold or contain within its volume or area), is that the tract conveyed contained a sufficient volume of land to allow it to be developed into 5 lots under the existing covenants and restrictions. The effect of the transfer was no greater than that

which occurred when the property association acquired title to its tract. There were now two tracts of land rather than one, each of which could be developed into lots but never were. (It was lawful in 1981 to subdivide a tract into parcels of at least 5 acres without approval of the Planning Commission).

Defendants' "expert" witnesses were anything but. To a person they avoided the word developed and rather than opine on the "plain, ordinary and popular meaning of the phrase, obfuscated, convoluted and unsupported "opinions" that somehow that was an acceptable subdivision under the terms of the Covenants. Having heard the testimony I am still unclear on what basis they arrived at their conclusions but am certain it was not by giving the terms their plain, ordinary and popular meaning. The probable reason our courts do not allow a grantor to testify to what he "meant" to say was demonstrated by the testimony of the drafter of the Covenants. To testify that the word used should be given the definition of a word that was not used is completely adverse to the criteria for construing a document. Testimony that good title could be conveyed based solely on reference to an unrecorded plat is even more ludicrous. See Section 30-5-250 (S.C. Code of Laws.) That would be especially true in the case at hand as it was uncontroverted that the plat referenced in the deed could never be recorded.

Likewise, reliance upon repetitions of an incorrect statement can't ever make the original statement correct. If I tell someone I have a cat when I actually have a dog, no matter how many people they repeat it to or how many times it gets written down, I still have a dog.

A final impediment to the Defendants' reliance upon the single phrase contained within the prefatory portion of the deed description is that allowing the deed to constitute a subdivision would constitute the enforcement of an illegal contract. "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract", Jackson v. Bi-Lo Stores, Inc, 437 S.C.2nd 168 (Ct. App. 1993). "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the

contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decision", Beach Co. v. Twillman, Ltd., 566 S.C.2d 863 (Ct. App. 2002). It is a well-settled principle of contract law that "a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice." McConnell v. Kitchens, 20 S.C. 430, 43738 (1884); *see also* Pendarvis v. Berry, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) *See also* Cent. States Health & Life Co. of Omaha v. Miracle Hills Ltd. P'ship., 456 N.W.2d 474 (Neb. 1990) (holding that when a lease restricts the use of a premises to a single purpose that is prohibited by zoning regulations, that lease is unenforceable and relieves the parties of all obligations thereunder). As such, the parties must be left as the court found them. *See* 17A C.J.S. *Contracts* § 362 (2011) ("As a general rule, both at law and in equity, a court will not aid either party to an illegal contract... but leaves the parties where it finds them."). Atlantic Coast Builders v Lewis, Opinion 27044 (2012). ("Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.") Pendarvis v. Berry, 52 S.C.2nd 705 (1949). (quoting Gilliland v. Phillips, 1 S.C. 152 (1869).

Defendants' alleged "subdivision" of the tract into "lots" by virtue of a deed is undeniably violative of public policy and statutory law and therefore cannot be a basis, under any circumstances, for its claim of five votes.

The covenants clearly and unambiguously impose a condition precedent on the subject property which must be complied with before that property is entitled to a vote. The condition is that only those "lots which shall have been developed" are entitled to vote. No lots have been developed under any possible interpretation of the plain ordinary meaning of that phrase nor as required by both state and county law and Plaintiffs are entitled to a declaration that the votes cast by the owners of those properties are invalid as a matter of law.

ARGUMENT

I. The "settled rule" is that restrictive covenants will be given the common, ordinary meaning attributed to them at the time of their execution.

“Words of restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution” Taylor v. Lindsey. “Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document” Taylor v. Lindsey.

When “the language imposing restrictions upon use of properties unambiguous, the restrictions would be enforced according to their obvious meaning” Shipyard Property Owners Association v. Mangiaracina.

II. The factual determinations made by the trial court are not subject to review.

Although Appellants seek to reargue all of the factual contentions raised at trial throughout the remaining body of their brief from Argument II through its conclusion, such argument is beyond the standard of review of this Court.

“Restrictive covenants are construed like contracts and may give rise to actions for breach of contract.” Queen’s Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361 S.E. 2nd 902, 913 (Ct.App.2006). “An action to construe a contract is an action at law reviewable under an ‘any evidence’ standard.” Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 343 S.C. 335, 339, 540 S.E.2nd 843, 845 (2001). “On appeal of an action at law tried without a jury this court’s review is limited to correction of errors at law.” Epworth Children’s Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2nd 710, 714 (2005). “The trial court’s findings are equivalent to a jury’s findings in a law action.” King v. PYA Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2nd 885, 888 (1995). “Questions regarding credibility and the weight of the evidence are exclusively for the trial court.” Sheek v. Crimestoppers Alarm Systems, 297 S.C. 375, 377, 377 S.E.2nd 132, 133 (Ct.App.1989). “We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary.” *Id.*

Even were that not the case Appellants’ entire argument continues to revolve around whether the subject property was considered “lots”. No where to be found in Appellants’ argument is how that word relates to the four corners of the restrictive covenants. Most specifically, how that word relates to the phrase, which is essential to interpretation of the

document, "it shall have been developed".

The following "facts" are uncontroverted anywhere in the record.

1. The grantor of the deed to the Appellant was not the Declarant of the restrictive covenants. (R. App. Pg. 140 Lns. 3-18)
2. Nothing contained within that deed can vary, modify or otherwise provide any basis for interpreting the declaration of covenants and restrictions.
3. In the thirty years subsequent to the issuance of that deed, no subdivision plat has ever been recorded. (R. App. Pg. 28 Lns. 11-22)
4. It would be unlawful to convey more than one portion of the Appellants' property without the filing of an approved subdivision plat. (R. App. Pg. 29 Ln. 20 to Pg. 30 Ln. 14)
5. Only one building permit could be issued on the Appellants' property. (R. App. Pg. 56 Lns. 4-8)
6. Only one curb cut and one water meter could be obtained for the Appellants' property. (R. App. Pg. 6 Ln. 6 to Pg. 69 Ln. 11)
7. The property has been assessed and paid taxes for thirty years on the basis that it is a single piece of property.
8. The attorney who handled the transaction of the original acquisition of the property in 1981 testified, "No, um, Jim was acquiring a piece of property that was, uh, described by metes and bounds, uh, I understand that if un—at least by today's standards would have to have recorded the plat but it was not considered necessary by me at that time."...

Q. Okay, did you convey that to him that he would have to subdivide the property and record a plat if he wanted to sell any of these lots?

A. No, that really wasn't, uh, discussed. He had no interest in anything other than utilizing those five lots as a buffer for his property.

Q. Yeah, he was simply buying that property so no one could build across the street from him to block his view.

A. I think that is what he wanted to do. (R. App. Pg. 163 Lns. 11-21)

The Appellant ignores all of these “facts”. It’s sole argument is based upon the phrase “containing five lots” contained in a deed from one of the Defendants to the other Defendant and its subsequent replication in numerous self serving deeds thereafter occasionally supplemented by the “well it may be against the law but it is not one that anybody really enforces.”

“Shall have been developed” has a very plain and ordinary meaning but it is most certainly not doing absolutely nothing for thirty years. Even absent county ordinances and state laws governing the development of real estate it is beyond comprehension that any rational person would construe doing nothing as satisfying that provision.

Appellants claim that the evidence was “overwhelming” is both baseless and not the standard of review, just as their evidence was, and completely ignores the restrictive covenants that the Court was asked to interpret. Although Appellants cite some seventeen reasons that the original purchaser may have considered the property capable of being developed into five lots, the simple fact remains that nor of it was ever accomplished. The attorney who handled the acquisition of the property, as set forth hereinabove, testified that he never intended to develop or subdivide it into five lots and certainly the covenants gave him that option.

III. The testimonial evidence is irrelevant and inadmissible.

As Appellants correctly point out in a footnote to their brief regarding the testimony of the purported “expert” witnesses, “[a] Trial Court’s ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion.” Mizell v. Glover, 351 S.C. 392, 570 S.C.2nd 176, (2002). The trial court after hearing the testimony in its order determined that the expert opinions were not admissible. Thus the testimony of Mr. Grayson, Mr. Shouse and Mr. Estridge was properly discarded by the trial court as expert opinion and any “factual” testimony provided was irrelevant to the issue presented. Dawkins v. Fields, 354 S.C. 58, 580 S.C.2nd 433 (2003).

Particularly, Mr. Grayson’s effort to testify as to the intent of the parties was clearly

inadmissible for numerous reasons. Firstly, no *parol* evidence is admissible at all unless the trial judge rules that the document is ambiguous. Here the trial court ruled that the covenants and restrictions were unambiguous. Even had the court ruled the covenants ambiguous then it must be determined whether the intention of the parties cannot be ascertained from the four corners of the document. If not, then and only then, would *parol* evidence be admissible. Necessarily, that *parol* evidence would have to come from the parties, not from a scrivener hired thirty years earlier to prepare a document and now hired by the Appellants to attempt to circumvent it.

IV. Appellants argument that the property is lots is without merit.

Appellants' entire argument under their paragraph III mistakes the law and argues that breaking the law just a little bit is okay. More importantly it continues to completely ignore what the covenants say. They do not say "could be developed", "may be developed" or "we meant to develop them". It says lots that "shall have been developed".

The issue is not whether lots may be conveyed pursuant to unrecorded plats nor is it whether you can get away with violating the county subdivision ordinance nor how easy it would have been to comply with the subdivision ordinance. The issue is whether the plain ordinary meaning of the words 'shall have been developed' into lots is to be defined by what has happened rather than what could have happened. Shall have been developed is to be defined from the four corners of the covenants and restrictions. The sole purpose of this property was that it be developed as a residential buffer to induce the existing Watson Orchard Property Owners to agree to commercial development, but not adjoining their residential subdivision. It is unimaginable that at the time these restrictions were placed upon this property that the Declarant or the owners of homes in the subdivision could have remotely contemplated that this property would lie fallow for thirty years and then be "subdivided" so that it could vote to avoid the originally intended purpose.

The simple fact remains that if this property had been subdivided into lots and a subdivision plat had been filed and recorded, thereby enabling these lots to be sold individually, building permits and curb cuts obtained for each, and then actually sold, this litigation and this appeal would never have been necessary. The exercise of "discovering" that these were really

intended to be five separate developed lots for which real estate taxes should have been paid for the past thirty years would not now be necessary. Indeed, had the Appellants actually recorded the subdivision plat and sold the lots they would not now be required to rely on what some employee wrote in the index at the Register of Mesne Conveyance office thirty years ago as "evidence" that this property is actually multiple "lots".

V. The text of the 1981 R and C clearly show the Appellants' property had not been developed.

Here the Appellants do in fact actually state that the case turns upon whether the property shall have been developed and then summarily say that it has.

Appellants also completely misrepresent the position taken by Respondent. The testimony and evidence related to the legality of the sale of the property as anything less than a single parcel is evidence that they were not developed. State and county law required recordation of plats in order to develop the property. State tax laws treat subdivided property different from unsubdivided property. Appellants were more than willing to pay less real property taxes on this lot for thirty years without pointing out to the tax assessor all of the "evidence" they had that their property should be assessed as five separate lots. The lack of doing what the law requires done is overwhelming evidence that the "lots" were not "developed" as required and intended by the covenants.

To claim that the portion of the covenants which state "into which the property described above shall subsequently be cut" is dispositive, ignores the remaining covenants and reality. However, even if you were to accept the Appellants' position, the property was cut, but only into two parts and thus the Appellants are still left with but one vote.

Perhaps the most perverse argument made by the Appellants is based upon the testimony they solicited from numerous witnesses as to the perfunctory process of preparing, gaining approval and recording a plat subdividing their property so that it could be taxed as five separate parcels and immediately sold as such. Appellants would have you suspend logic long enough to believe that not doing something so simple and easy is somehow evidence that it was done. To the contrary, a rational person would construe that testimony as evidence of the exact contrary intention. Not doing something that could easily be done is

just further proof that there was no intention to do it.

A single tax bill for thirty years, no plat ever recorded, no right to build and the express testimony of the original purchaser's personal attorney that there was never any intention to file a subdivision plat is much more than the "any evidence" standard required to affirm the trial court's decision.

ADDITIONAL SUPPORTING GROUND TO AFFIRM

The appeal is moot as any relief that could be awarded by reversal to the Appellant would be superfluous. The original Defendant, Watson's Orchard Property Owners Association, Inc., has not appealed the order of the trial court. Accordingly, any findings in the order as to that Defendant are the law of the case.

The trial court specifically found, "that the property owned by the Defendant, Watson's Orchard Property Owners Association, Inc. . . . has not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants.

Pursuant to the amendment to exhibit "D" to Amended and Restated Declaration of Restrictions of Protective Covenants filed by the Appellants in the ROD Office for Greenville County the non-appealing Defendant cast, either, two votes or ten votes in the election resulting in vote totals of either twenty nine out of fifty four or thirty seven out of sixty two if the corporation was entitled to ten votes. Since the un-appealed law of the case as to the votes cast by WOPOA is that they were entitled to zero votes then, at best, there would have been twenty seven out of fifty four votes, an insufficient number to amend the original declaration.

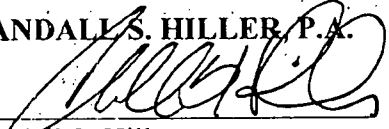
CONCLUSION

Every year for thirty years the Appellant, upon opening his tax bill, was reminded that the public records for the County of Greenville reflected this property as consisting of one lot. Not one time during those thirty years did the Appellant take his deeds, his grantor indexes and Mr. Grayson down to the assessor's office to correct that misconception. Never during that time did the Appellant take that "evidence" to the Planning Commission or the ROD Office to insure that the public records accurately reflected the subdivision of this property into five individual lots. The only person in the State of South Carolina who now

claims they knew and intended that this property be five lots, and could have done something about it, did nothing. Nothing, that is, until faced with the realization that a majority of the homeowners in Watson Orchard Subdivision were most decidedly not going to vote to remove the restrictions from this property. Then, and only then, when having five votes became essential, the Appellant, for the first time during his ownership, sought to claim otherwise.

The trial court heard the evidence and made findings of fact for which there is evidence to support within the record. Based upon those facts the trial court interpreted the covenants and restrictions as being unambiguous and gave the words therein their plain, ordinary meaning as the court was required to do. In doing so the court found that the phrase "shall have been developed" required doing something and at a minimum required placing the property into a condition whereby it could legally be built upon and sold. The failure of the Appellants to do anything was found to be fatal by the trial court and the decision should be affirmed.

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ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

MAR 03 2014

SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

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

v.

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

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

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F.

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

FINAL REPLY OF APPELLANTS

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Dated: February 27, 2014

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ARGUMENT

I. THIS MATTER IS EQUITABLE - RESPONDENTS ARE INCORRECT AS TO THE STANDARD OF REVIEW

The Respondents argue that this matter was tried non-jury but “at law.” That is incorrect. Appellants’ principle claim in this action was for injunctive relief. The prayer for relief in both the initial and the amended complaints concludes: “FURTHER, that this Court enjoin and restrain the Watson’s Orchard Property Owners Association, Inc. from using the property for any uses which are more intensive than the current uses within the Watson’s Orchard Subdivision together with costs and any other relief this Court deems just and proper.” (Declaratory Judgment Complaint, filed Sept. 8, 2009, at 6 [Rec. 25]; (1st Amended) Declaratory Judgment Complaint (Sept. 10, 2009), at 6 [Rec. 31].) And, as Appellants’ motion for transfer to the non-jury docket, stated:

An action to enforce restrictive covenants by injunction is in equity. *Cedar Cove Homeowners Ass’n, Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284, 286 (App. 2006):

The character of an action as legal or equitable depends on the relief sought. Compare *O’Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law, because relief sought was general damages for loss of view and invasion of privacy) and *Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) (“**An action to enforce restrictive covenants by injunction is in equity.**”); see also *S.C. Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (**holding an action to enforce restrictive covenants by injunction is an equitable action**). Because the Association’s action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence. *Brenco v.*

S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).

See also *Matsell v. Crowfield Plantation Community Services Ass'n, Inc.*, 393 S.C. 65, 710 S.E.2d 90, 93-94 (S.C. App. 2011) (“An action seeking an injunction to enforce restrictive covenants sounds in equity.”).

As an action in equity, plaintiffs are not entitled to a jury trial. *Verenes v. Alvano*, 387 S.C. 11, 690 S.E.2d 771, 773 (2010): “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” Citing *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240, 242 (S.C. 1997).

(Defendants’ Motion To Transfer To Non-Jury Docket, March 22, 2012 [Rec. 159-61], emphasis added.)

In any event, as this Court has made clear, the interpretation of a deed and allied documents is an equitable matter:

The parties disagree on our scope of review. This case began as an equitable mortgage foreclosure action. **It is beyond question, however, that the disposition of this case depends largely on the interpretation of the master deed and allied documents. The interpretation of a deed is an equitable matter.** *Wayburn v. Smith*, 263 S.C. 518, 211 S.E.2d 560 (1975), citing *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420 (1969); *Wolf v. Hayes*, 161 S.C. 293, 159 S.E. 620 (1931). **In any event, because the predominate issues involved in this appeal are equitable, we review the evidence to determine the facts in accordance with our view of the preponderance of the evidence.** *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 425 S.E.2d 764 (App.1993).

Heritage Federal Sav. and Loan v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (App. 1995) (emphasis added).

Hence, this Court is entitled to “review the evidence to determine the facts in accordance with [its] view of the preponderance of the evidence.” *Id.* In such a

review, as demonstrated in Appellants' Final Brief, it is clear that the Stephens Lots were lots and entitled to vote on the amendments to the 1981 R&Cs, and thus that the judgment below should be reversed.

II. RESPONDENTS CANNOT DISPUTE THAT THE "SETTLED RULE" IN SOUTH CAROLINA IS THAT RESTRICTIONS AS TO THE USE OF REAL ESTATE ARE TO BE STRICTLY CONSTRUED AND ALL DOUBTS RESOLVED AGAINST THEM

Respondents do not and cannot challenge the rules set forth by the Supreme Court for the interpretation of restrictive covenants:

It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

345 S.C. at 622, 550 S.E.2d at 302, emphasis added, citing *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998) (court refused to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes).

Under this "settled rule" (and even without it), as demonstrated in Appellants' Final Brief, there is little doubt that the Stephens Lots were entitled to vote under the 1981 R&Cs on the proposed amendment.

III. RESPONDENTS HAVE NO ANSWER TO THE OVERWHELMING EVIDENCE THAT THE STEPHENS LOTS WERE IN FACT LOTS

Respondents have no answer to the overwhelming evidence that the Stephens Lots were in fact lots. To list just a few of the facts showing the Stephens Lots were lots:

- The original offer was to purchase five lots, and the acceptance was for five lots. (Appellants' Final Brief at 10-11.)
- The circuit court in a declaratory judgment action in 1980 approved the sale of the five lots. (*Id.* at 11-12.)
- The 1981 deed issued pursuant to that order was for five lots. (*Id.* at 13.)
- The plat referenced in the deed shows the five lots. (*Id.* at 13-14.)
- The metes and bounds description in the deed gives the interior dimensions for the five lots. (*Id.* at 14-16.)
- The tax map shows the five lots. (*Id.* at 17.)
- The title opinion for the 1981 transaction was for the purchase of five lots. (*Id.*)
- The index in the RMC office identified the transaction as being for five lots. (*Id.* at 18.)
- Patrick Grayson, the attorney who prepared the 1981 deed, testified that it was for the transfer of five lots. (*Id.* at 21.)
- William Kehl, the attorney who provided a title opinion to the buyer, testified that it was for five lots. (*Id.*)
- Mr. Michael Stephens, the son of the purchaser (the purchaser is now deceased), confirmed that his father had offered to sell him one of the five lots. (*Id.* at 21-22.)
- Coleman Shouse, former Executive Director of the Greenville County Planning Commission testified as an expert that the Stephens Lots were lots. (*Id.* at 22.)
- Larry Estridge, another long-time real estate attorney in Greenville, also testified as an expert to the same effect. (*Id.* at 22-23.)¹

¹ There are numerous other factors demonstrating that the Stephens Lots were in fact lots. (See Appellants' Final Brief at 18-21.)

Appellants offered no evidence to the contrary of the foregoing. None at all.

IV. RESPONDENTS' SUGGESTION THAT THE STEPHENS LOTS HAVE TO BE MORE THAN JUST LOTS IS WITHOUT ANY BASIS

Respondents apparently implicitly concede that the Stephens Lots were in fact lots as they now attempt to argue that they had to be "developed" beyond being just "lots." However, the language of the 1981 R&Cs is unmistakable on this point. The pertinent language is **"lots into which the property described above shall have been developed"** (Def. Ex. 1 at D11, emphasis added [Rec. 322].)

The obvious meaning of this is that the "development" required is "development" into "lots." There is nothing in the language of the 1981 R&Cs to suggest any further requirement. This is made even more clear by language on the second page of the 1981 R&Cs where it is stated that the restrictions can be enforced against **"any property owner of any lot into which the property described above shall subsequently be cut."** (*Id.* at D12, emphasis added [Rec. 323].) The property did not need to be developed except into lots. And a lot is simply a portion into which the property has been "cut."

V. MISCELLANEOUS POINTS

1. Respondents assert repeatedly without any citation to the record or authority that a lower tax was paid on the Stephens Lots because they were taxed as one unit and not as separate lots. (Respondents' Final Brief at 10, 15 & 17-18.) There

is no support for this in the record, and it is contrary to the information provided to counsel for Appellants. If this is an important fact, the matter should be remanded to receive evidence on this point.

2. The Watson's Orchard subdivision did not "adjoin" the Property as stated by Respondents. (Respondents' Final Brief at 7.) It is across Pelham Road from the subdivision. As the photograph of the area in the record (Plaintiffs' Ex. 4 [Rec. 690]) shows, Pelham Road is at least four lanes wide (plus turning lane). (See Plaintiffs' Ex. 6 [Rec. 691]; Def. Ex. 3 [Rec. 658-60]; Def. Ex. 5 [Rec. 661].) Hence, the issue in this case is not, as Respondents' state, about homeowners "living next door to commercial offices." (Respondents Final Brief at 6.) Regardless of the outcome of this case, homeowners in Watson's Orchard subdivision would not be "living next door to commercial offices."²

3. Respondents assert that it would be an illegal contract if the deeds at issue had in fact conveyed five lots. The statutes and regulation referred to by Respondents do not in any manner begin to make the conveyance of lots by such a deed "illegal." As demonstrated in Appellants' Final Brief with careful citations to the record and the law, (a) it is perfectly lawful to convey lots by reference to an

² It should also be noted that the "offices" permitted by the new R&Cs would only be low-density offices such as two-story doctors' offices. (Def. Ex. 1 at D22-D23 [Rec. 333-34].)

unrecorded plat (Appellants' Final Brief at 24-27); (b) the Greenville County Subdivision Regulations³ do not make the transfer unlawful but, to the contrary, recognize such a transfer by not providing that such a transfer is void or voidable (*id.* at 28-30) but simply subject to a small penalty; and (c) S.C. Code § 30-5-240 also does not make the transfer unlawful but, again, recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. (Appellants' Final Brief at 31-32.) Proving the point, the evidence in the record demonstrated that lots have routinely been conveyed in this manner in South Carolina. (See Appellants' Final Brief at 31 & n. 6.⁴)

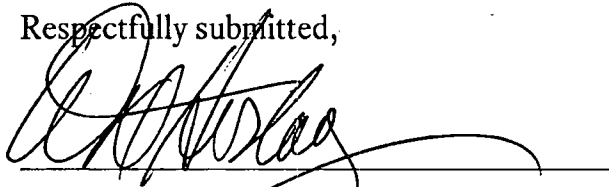
³ Greenville County Subdivision Regulations, §1.4 (1979) (Def. Ex. 1 at D-288-89 [Rec. 602-03].)

⁴ Mr. Estridge testified that transfers without recorded plats were "common" in 1981. (Tr. 234:21-21 [Rec. 300].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), testified that "most plats in Charleston County don't get recorded." She said the "lawyers just refer to the plats, but they don't record them. It's just custom there." (Manning Dep. 5-6 & 35:8-11 [Rec. 216-17 & 220].) In connection with their decision on whether to provide a title insurance commitment, Mrs. Manning's office concluded that the Stephens lots were in fact lots and entitled to votes in connection with the effort to amend the R&Cs. As a result, Chicago Title gave a commitment to issue title insurance if a majority vote was obtained for the amended R&C's with the Stephens Lots having one vote each. (Manning Dep. at 20:21-21:6 [Rec. 218-19].)

CONCLUSION

The evidence was overwhelming that the Stephens Lots were in fact lots and there was no evidence to the contrary. Respondents' arguments that the lots are not lots because the Plat was unrecorded is contrary to South Carolina law. Because the 1981 R&Cs provide that lots are simply section into which property is "cut," the Stephens Lots were entitled to vote on the amendment to the 1981 R&Cs. Appellants respectfully request that this Court reverse the judgment of the trial court.

Respectfully submitted,



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