

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107
Lower Court Case No. 2013-CP-23-3989

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SC Court of Appeals

Woodruff Road SC, LLC, Appellant,

v.

SC Greenville Hwy 146, LLC, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. The trial court erred in finding that the drive-thru lane was a permitted use under the written and record easement agreement.
2. The easement agreement expressly limits the scope and use of the easement to two-way traffic for ingress and egress, thereby precluding use of the easement for a drive-thru lane.
3. The express terms of an easement agreement are strictly enforced, and the trial court erred in failing to enforce the easement according to the plain, ordinary, and common meaning of the terms used in the easement.
4. The trial court erroneously approved the defendant's conversion of the entire 25-foot section of the easement to the defendant's exclusive use, thereby essentially taking title to the plaintiff's land and denying the plaintiff its expressly granted right to use the easement for the ingress and egress of motor vehicle traffic.
4. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (plaintiff) or its tenants.
5. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures.
6. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement.
7. The trial court erred in focusing on the existing uses of the easement as opposed to the plaintiff's permanent right to use the easement for the ingress and egress of motor vehicle traffic.
8. In allowing the defendant to use the easement for a drive-thru, the trial court has invaded the sanctity of the public record and destroyed the protection afforded thereby to subsequent purchasers without notice.

STATEMENT OF CASE

This appeal involves the application of an express, written, and recorded easement agreement that created a mutual and permanent “right of way” for the ingress and egress of motor vehicle traffic. The trial court held that the Respondent (Defendant) could build a drive-thru service lane in the easement, even though it was designed to and in fact required traffic to stop and sit in the “right of way” easement, even though it was designed to and in fact caused traffic to stop in the easement and transact business with a tenant of Tract A while stopped in the easement, and even though it required traffic to drive on the wrong side of the ingress and egress easement. (R. 001-006). The Appellant (Plaintiff) made a timely 59(e) motion, which the trial court denied. (R. 0057-0062; 0010-0011). Plaintiff timely appealed.

STANDARD OF REVIEW

Determining the existence of an easement is a question of fact in an action at law. *Inlet Harbour v. South Carolina Dep’t of Parks, Recreation & Tourism*, 659 S.E.2d 151, 153 (S.C. 2008). Here, it is undisputed that the easement exists – it was created by a written and recorded easement agreement. (R. 0221-0232). The size and location of the easement is also undisputed, as they are established by the written easement agreement. (R. 0222, ¶ 3). It is also undisputed that the Defendants built a drive-thru lane in the easement.

The only dispute is whether the construction of a drive-thru lane in the easement is a permitted use under the easement agreement, which granted both parties a permanent right of way for the ingress and egress of vehicular traffic. Resolution of this dispute depends upon the meaning of the language used in the easement agreement. *Martin v. Bay*,

732 S.E.2d 667, 672 (S.C. App. 2012); *Binkley v. Rabon Creek Watershed Conservation Dist.*, 558 S.E.2d 902, 906-907 (S.C. App. 2001).

Here, the easement agreement is unambiguous – neither party contends otherwise, and there is no evidence of the intent of the parties that created the easement except the easement agreement. Determining the parties’ intent under an unambiguous easement agreement is a question of law for the court, which an appellate court reviews *de novo* with no deference to the trial court. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012). Resolution of this issue depends upon the plain, ordinary, and popular meaning of the terms used by the parties at the time the easement was created. *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146, 148 (S.C. App. 2003); *Binkley*, 558 S.E.2d at 906.

In short, this appeal presents the following question of law for this court: Does an express easement for a mutual and permanent right of way for the ingress and egress of vehicular traffic permit one party to build a drive-thru lane in the easement? It does not.

STATEMENT OF FACTS

The relevant facts are undisputed. Plaintiff owns Tract B in a shopping center. Defendant owns Tract A in the same shopping center.

In 1986, the former owners of Tracts A and B entered and recorded a written easement agreement (“the Easement Agreement”) that created several easements: (1) Tract A and Tract B granted each other the right to use each other’s parking areas; (2) Tract B granted Tract A the right to place an advertising sign on a specified pole for a defined time; and (3) Tract B granted Tract A certain water and sewer rights. (R. 0222-0224, ¶¶ 2, 4-7).

The Easement Agreement also created the ingress and egress easement at issue here and expressly described it as follows:

[Tract A] shall have a *right of way at all times, in common with* [Tract B] for motor vehicles to *travel onto and over* the asphalt parking area of Tract B as shown on the [attached plat] *for the purpose of ingress and egress to Tract A* from Woodruff Road (SC Hwy. 146).

(R. 0221-0222, ¶ 1) (all emphasis added). This “right of way” for ingress and egress was specifically made “[s]ubject to the limitations set forth below” (R. 0221):

The *right of way* and parking easement described [above and shown on the attached plat] shall be an easement appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on [the attached plat] shall be *25 feet along the rear property line of Tract A* and shall be *45 feet along the western most property line of Tract A*.

(R. 0222, ¶ 3) (emphasis added). The Easement Agreement later referenced this ingress and egress easement as a “permanent right of way” and as “the *right of way* hereby granted.” (R. 0223-0224, ¶¶ 5 and 7) (all emphasis added).

Exhibit “D” to the Easement Agreement depicted this easement as a hash-marked area on a plat of the property. (R. 0232). This exhibit shows that traffic would ingress to and egress from the shopping center from Woodruff Road by using the 45-foot section of the easement – the connected 25-foot section of the easement provided further ingress and egress from the 45-foot section of the easement to Tract A and Tract B. (See R. 0232; see also Pl. Exh. 10 (DVD) filed separately).¹

At the time of the Easement Agreement, there was no drive-thru service associated with Tract A or Tract B. There is no evidence that the parties to the Easement Agreement intended any “drive-thru lane” use of the easement. There is no evidence that they intended

¹ For the convenience of the Court, a copy of the DVD presented at trial is being filed separately, and is available as a “zipfile” that can be emailed to the Court if desired.

any use that, by design, would require traffic to stop in the easement. There is no evidence that they intended any use of the easement to transact business with persons while they were stopped and standing in the easement. There is no evidence that they intended any use that would require traffic to drive on the wrong side of the ingress and egress easement.

Plaintiff acquired Tract B in 2010, and its rights were specifically made subject to the terms of the recorded Easement Agreement. (R. 0237 and R. 0241, ¶ 6). Defendant acquired Tract A on June 14, 2013, and its right were also specifically made subject to the terms of the recorded Easement Agreement. (R. 0233-0234). Four days later, on June 18, 2013, Defendant entered a lease agreement with Starbuck's ("the Starbuck's Lease"). (R. 0249-0259).

The Starbuck's Lease specifically referenced the recorded Easement Agreement and made Starbuck's the "beneficiary of easement rights" granted by the Easement Agreement. (R. 0253, ¶ 1.1). The Starbuck's Lease required Defendant to provide Starbuck's with a building that had a "fully entitled drive-through" and with "the right to operate a drive-through facility." (*Id.*). It also required Defendant to build the drive-thru lane along the rear property line of Tract A, *i.e.*, within a significant portion of the 25-foot section of the ingress and egress easement. (R. 0256-0258; 0259). The deadline for delivering the leased building with an operational drive-thru and drive-thru lane was November 1, 2013. (R. 0254, ¶ 2.2).

By design, and in fact, the drive-thru lane causes cars to stop in the easement for the purpose of transacting business with a tenant of Tract A while sitting in the easement. (R. 0256-0258; 0259; Pl. Exh. 10 (DVD, filed separately)). It also causes cars to stop and sit in the easement while awaiting their turn to transact business in the easement. (*Id.*).

Finally, it also causes traffic to drive on the wrong side of the ingress and egress easement. (*Id.*).

Plaintiff objected to Defendant's announced intention to build a drive-thru lane in the easement. Defendant persisted, so Plaintiff filed the instant action and sought a temporary injunction against the construction of the drive-thru lane before the November 2013 delivery deadline in the Starbuck's Lease. (See R. 0031-0037; 0012-0030). The trial court heard and denied the motion for temporary injunction in September 2013. (R. 0007-0009). The trial court specifically held that the question of whether the drive-thru lane violated the Easement Agreement would be decided at a trial on the merits and, if Plaintiff prevailed, the trial court could provide the appropriate relief, including injunctive relief. (R. 0008-0009).

After a bench trial on the merits, the trial court held that the drive-thru lane was a permitted use under the Easement Agreement. (R. 0001-0006). This was error because, as demonstrated below, a drive-thru lane exceeds the scope of the easement granted by the Easement Agreement and is therefore not a permitted use of the easement under the express terms of the Easement Agreement.

ARGUMENT

Express easements are strictly enforced according to the plain, ordinary, and popular meaning of the terms used to create and limit the easement. Here, the Easement Agreement expressly created a mutual and permanent right of way for the ingress and egress of motor vehicle traffic. Defendant's construction of a drive-thru lane within the easement precludes any use of the easement for the egress of motor vehicle traffic. Moreover, the drive-thru requires traffic to stop in the easement and transact business with

one of Defendant's tenants while stopped in the easement. Such use is not permitted by the plain terms of the Easement Agreement, which limits the use of the easement to two-way traffic passing directly over the easement for the purpose of access, not for the purpose of transacting business while stopped in the easement. By constructing the drive-thru in the easement, Defendant has converted the easement to its exclusive use and essentially taken ownership of and title to the land in violation of Plaintiff's ownership rights and its right to use the easement for the ingress and egress of motor vehicle traffic.

I. The Easement Agreement expressly limits the scope and use of the easement to two-way traffic for ingress and egress.

The language of an express easement determines the purpose, extent, and scope of the easement. *Martin*, 732 S.E.2d at 672; *Lighthouse*, 586 S.E.2d at 148; *Binkley*, 558 S.E.2d at 906-907. That language is applied according to the terms used by the parties as understood in their "plain, ordinary, and popular sense." *Id.*

An easement is a "right of use over the property of another." BLACK'S LAW DICTIONARY 457 (5th Ed. 1979), *cited and applied in Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 154 (S.C. 2008). This right of use is "for a *specific purpose*." *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012) (emphasis added). Here, the Easement Agreement sets forth the specific purpose of the easement as being a "right of way" (R. 0221, ¶ 1), which is "a right belonging to a party *to pass over* another's land." BLACK'S, *supra* at 1191 (emphasis added). The Easement Agreement expressly describes and limits this "right of way" as being for the "ingress and egress" of motor vehicles. Ingress means the "act, or right of, entering," and egress means the "act of going out." *Id.* at 463, 703. In short, the specific purpose of the easement is for motor vehicles to enter, pass over, and exit the easement.

The plain, ordinary, and popular meaning of a right to “pass over” the land of another does not include the act of stopping in the easement to transact business while stopped in the easement. It also does not include the act of stopping in the easement and waiting in line to later stop in the easement and transact business while stopped in the easement. Thus, the easement cannot be used for a “drive-thru” lane and, therefore, the trial court erred in finding that the “drive-thru” was a permitted use under the Easement Agreement.

Moreover, the plain, ordinary, and popular meaning of ingress and egress of motor vehicle traffic is two-way traffic in the easement. Here, the drive-thru and its signage directs traffic onto the wrong side of the easement, making it impossible to use the easement for the ingress and egress of motor vehicle traffic, *i.e.*, two-way traffic. Thus, the easement cannot be used for the “drive-thru” lane and, therefore, the trial court erred in finding that the “drive-thru” was a permitted use under the Easement Agreement.

II. The express terms of an easement agreement are strictly enforced.

The terms of an express easement, including any limitations imposed thereon, are strictly enforced, even if the deviation from those terms is slight or does not impose any significant burden on the easement or the servient estate (Tract B here). *Plott v. Justin Enters.*, 649 S.E.2d 92 (S.C. App. 2007); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146 (S.C. App. 2003); *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Property Regime*, 410 S.E.2d 580 (S.C. App. 1991).

In *Plott*, the deeds in a development granted the lot owners a “perpetual, non-exclusive appendant and appurtenant easement for ingress and egress upon, over and

across” a roadway. 649 S.E.2d at 94. The defendants planted shrubs and built a wire fence along part of the roadway’s boundary, blocking access across the roadway at several points. *Id.* at 94, 97. This Court affirmed the trial court’s ruling that the fence and shrubbery had to be removed, even though the plaintiffs could cross the roadway at other points. *Id.* at 97.

In *Lighthouse*, a condominium developer (“the Developer”) conveyed existing water and sewer systems to the public service district (“the District”). The Developer also granted the District an ingress and egress easement over the condominium property to access and maintain the water and sewer systems, which included a water tower. 586 S.E.2d at 146-147. The District leased space on the water tower to a telecommunications company for the placement of antennae and related equipment, and it also leased the company the right to use the easement to access the water tower for installing and maintaining the telecommunications equipment. *Id.* at 147. This Court affirmed the trial court’s ruling that the easement was limited to its stated purpose of ingress and egress for accessing and maintaining the water and sewer system. *Id.* at 148. The easement therefore could not be used to access the water tower for the purpose of installing and maintaining telecommunications equipment, even though the ingress and egress used was identical to that used to maintain the water and sewer systems, and even though there was no evidence that such use caused any problems in the easement or imposed any additional burdens on the servient estate. *Id.*

In *Xanadu*, the grantor granted a “perpetual non-exclusive easement of ingress and egress located on a portion of [its] property” to several grantees. 410 S.E.2d at 581. The instrument specifically set forth the size and location of the easement. *Id.* One grantee planned to construct parking spaces on a portion of the easement. Another grantee objected

and brought suit for interference with its ingress and egress rights under the easement. The trial court agreed that the parking spaces would narrow the ingress and egress passage way but found the parking spaces were nevertheless not unlawful, because the ability to ingress and egress remained intact. *Id.* This Court reversed and ordered the removal of the parking spaces: (1) the easement was “specific in its terms as to the easement’s width, length, and location”; and (2) therefore, “the easement cannot be constricted to *any degree* by the placement” of the parking spaces.” *Id.*

Here, the plain language of the easement establishes that the sole purpose of the easement is to provide direct, two-way traffic access to and from Tract A and Tract B. Defendant’s construction of a drive-thru lane renders two-way traffic impossible, and it has converted the easement into a business transaction location that causes stop and go traffic in an easement intended for direct, non-stop traffic. Thus, the trial court erred in finding that the drive-thru was a permitted use under the Easement Agreement.

III. Defendant has wrongly converted the entire 25-foot section of the easement to its exclusive use, thereby essentially taking title to Plaintiff’s land and denying Plaintiff its expressly granted right to use the easement for ingress and egress.

An easement is the right to use the land of another for a specific purpose. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantee of an easement, however, cannot use the easement in a manner that deprives others of their right to use the easement for the same specific purpose. *Plott, supra; Xanadu, supra.* Moreover, the grantee of an easement does not receive any title to the land of the grantor. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantor remains the owner of the land and is free to use the land in any manner whatsoever, provided that such use does not interfere with the

grantee's right to use the easement for its stated purpose. *Hill v. Carolina Power & Light Co.*, 28 S.E.2d 545, 549 (S.C. 1943).

Here, Defendant's construction of the drive-thru lane in the easement is essentially a taking of ownership and title to Plaintiff's land, because Defendant has converted the land to its exclusive use for the exclusive benefit of one of its tenants. Thus, Defendant has exceeded the plainly stated scope of the easement granted by the Easement Agreement and wrongly asserted sole ownership rights over Plaintiff's land.

The Easement Agreement expressly stated that the right of way for the ingress and egress of vehicular traffic was a right held in common by both Tract A and Tract B. (R. 0221, ¶ 1, stating: "[Tract A] shall have a *right of way* at all times, *in common with* [Tract B]" (emphasis added)). Defendant's construction of the drive-thru lane has converted that portion of the easement to Defendant's exclusive use in clear violation of Plaintiff's expressly reserved and mutual right to use the easement for ingress and egress, and it has completely destroyed any use of the easement for the ingress and egress of motor vehicle traffic. Thus, Defendant has exceeded the plainly stated scope and purpose of the easement as set forth in the Easement Agreement.

IV. The trial court erred in failing to enforce the Easement Agreement according to its express terms.

The trial court focused on there being no interference with the business operations of the tenants of Tract B, no permanent or physical obstructions in the easement, no overburdening of the easement, and nothing that was "too far" removed the easement from its intended use:

[T]he current tenants of Tract A *have not overburdened the easement through their operations* [i.e., the drive-thru lane], because there *does not appear to be any obstructions to business operations* of the tenants of Tract

B. Prior cases that have found an easement's scope to be exceeded *all involve physical barriers or permanent structures*. In this case, the owners and tenants of Tract A have merely improved the property by leveling and paving it. There is *no physical obstruction*, such as a gate, which prevents the owners or tenants of Tract B from accessing that portion of the property in question. Furthermore, the fact that vehicles may sit idling for a period of time up to ten minutes does *not constitute such a permanent obstruction that overburdens the easement, or too far removes the easement from its intended use*.

(R. 0005) (emphasis added). As demonstrated below, the trial court rested its ruling on an erroneous and myopic view of the law.

A. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (Plaintiff) or its tenants.

The trial court found that the drive-thru was a permitted use, because it did not obstruct or interfere with the business operations of Plaintiff or its tenants. This is not the question. Rather, the question is whether the drive-thru is a permitted use under the plain, ordinary, and popular meaning of the terms used in the express Easement Agreement. It is not, as shown above, and the trial court therefore erred in finding the drive-thru was a permitted use. Moreover, as also shown above, the drive-thru interferes with the permanent right expressly granted and reserved to Plaintiff to use the easement for the ingress and egress of motor vehicle traffic. Thus, the drive-thru is not a permitted use.

B. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures.

The trial court found that the drive-thru was a permitted use, because Defendant did not erect any physical barriers or permanent structures in the easement. Here, again, this is not the question, and the drive-thru is not a permitted use under the plain, ordinary, and popular meaning of the terms used in the Easement Agreement.

The trial court also found that “all” cases finding that the scope of easement had been exceeded involved physical barriers or permanent structures. This analysis is wrong for two reasons.

First, the cases involving barriers and structures did not limit their holdings to barriers and structures. Rather, the focus was on the use by easement holder and how it interfered with the rights of others. The fact of interference was the key, not the manner of interference.

Second, it is untrue that “all” cases involved barriers and structures. In *Lighthouse, supra* (the water tower case), there were no physical barriers or permanent structures. In fact, the easement was being used in precisely the manner prescribed by the easement agreement. Nevertheless, this Court rightly held that the challenged use exceeded the scope of the express easement agreement. As shown above, the same is true here and, therefore, the trial court erred in finding that the drive-thru was a permitted use.

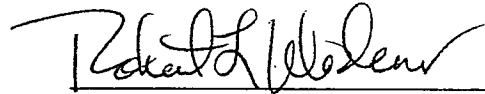
C. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement.

The trial court found that the drive-thru was a permitted use, because it did not overburden the easement and was not “too far” removed from the purpose of the Easement Agreement. This is wrong for two reasons.

First, the drive-thru completely destroys the plainly stated purpose of the easement, *i.e.*, a right of way for the ingress and egress of motor vehicle traffic. The drive-thru forces drivers onto the wrong side of the ingress and egress easement. It therefore completely destroys any egress use of the easement.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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SC Greenville Hwy 146, LLC,.....Respondent.

FINAL BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Did the Appellant properly preserve the issue of whether the Easement Agreement limits the scope and use of the easement to two-way traffic for ingress and egress?
2. Did the trial court properly interpret the scope and purpose of the easement pursuant to the Easement Agreement's express terms and correctly find that the use of the Starbucks drive-thru running over a portion of it was a permitted use?
3. Was the trial court's consideration of whether use of the Starbucks drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate's use of its land beyond the imposition allowed under the Easement Agreement appropriate?
4. Did Respondent convert and take exclusive title to a portion of the easement by the construction and use of the Starbucks drive-thru running over a part of the easement?
5. Did the trial court's ruling unlawfully impact or alter the public record?

II. STATEMENT OF THE CASE

Woodruff Road SC, LLC (*hereinafter* “Appellant” or “Woodruff”) filed a Motion for Temporary Injunction and Complaint against the Respondent, SC Greenville Hwy 146, LLC (*hereinafter* “Respondent” or “Greenville Hwy”) on July 24, 2013 alleging a cause of action for trespass and seeking an injunction. Greenville Hwy filed an Answer and Counterclaim on October 10, 2013 seeking a declaratory judgment that its tenant’s (Starbucks) construction and use of a drive-thru running in part over a right of way easement upon Appellant’s property did not exceed the scope and permissible use of it. (R. pp. 38-41). Appellant then filed an Amended Complaint on November 13, 2013 without a trespass claim and sought a declaratory judgment concerning the construction of the Easement Agreement and determination of whether Respondent’s use of that easement was permissible. (R. pp. 31-37).

A non-jury trial was held before The Honorable Letitia H. Verdin on November 4, 2014 solely on the issue of whether the construction of a paved portion of the easement, for the purpose of accessing the Starbuck’s drive-thru window, fell within the scope of the easement’s intended use. Following trial, the Court issued a December 16, 2014 Order (*hereinafter* the Order) holding that (1) the easement in question is appurtenant, and runs with the land; (2) the easement in question is designed to provide access to the businesses located on Tract A by way of ingress and egress; (3) the tenants of the Respondent, the owner of Tract A, are permitted to operate a drive-thru lane on the paved portion of the 25 ft. easement; and (4) the Respondent may not increase the use of its easement to such an extent that traffic is impeded on the 45 ft. portion. (R. p. 6). On December 29th Appellant filed a Motion to Alter or Amend the Court’s Order. (R. pp.

57-62). Respondents filed a Return to that motion soon after. (R. pp. 63-65). The circuit court denied the Motion to Alter or Amend by Order dated January 1, 2015. (R. p. 10). This appeal followed.

III. STATEMENT OF THE FACTS

This case involves two tracts of commercial property located at the intersection of I-85 and Woodruff Road in Greenville, South Carolina. Tract A is owned by the Respondent, SC Greenville Hwy 146, LLC, who currently leases its premises to three tenants: Zoe's Kitchen, Mattress King and Starbucks. Tract B is owned by the Appellant, Woodruff Road SC, LLC who currently leases its property to Trader Joe's and Academy Sports.

Respondent has an easement running with the land on Appellant's property, conveyed by virtue of a properly recorded Agreement ("Easement Agreement"). The Easement Agreement granted a right of way easement in favor and for the benefit of Respondent, as the owner of Tract A, its tenants and their business invitees, licensees and employees for the purpose of ingress and egress to their businesses. The Easement Agreement states:

Subject to the limitations set forth in paragraph 3 below, [Respondent] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B...for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof.

(R. pp. 221-22). This easement is comprised of a 45 ft. wide portion connecting directly to Woodruff Road and a 25 ft. wide portion abutting the back of Tract A. (R. pp. 231-

32). Since the easement was first recorded in 1986, both Tract A and B underwent extensive development. Appellant acquired Tract B in 2010, and its rights were specifically made subject to the terms of the recorded Easement Agreement. (R. pp. 237, 241-42, ¶ 6). Respondent acquired Tract A on June 14, 2013, and its rights were also specifically made subject to the terms of the recorded Easement Agreement. (R. pp. 233-34). Soon after acquiring Tract A, Respondent entered into a lease agreement with Starbucks. (R. pp. 249-59). The Starbucks' lease referenced the recorded Easement Agreement and made Starbucks' the "beneficiary of easement rights" granted by it. (R. p. 253, ¶ 1.1). That agreement also required Respondent to build a drive-thru lane along the rear property line of Tract A. (R. pp. 249-59). A portion of the drive-thru runs through the 25 ft. section of the easement. (R. pp. 256-58; R. pp. 245-48). In 2013 Respondents repaved the portion of the 25 ft. wide easement that lies directly adjacent to their building. (R. pp. 245-48). The newly paved area is used, in part, by business invitees to access a drive-thru window installed by Starbucks. The Starbucks' drive-thru window is located on the side of the building squarely on Tract A. (R. p. 246). The building on Tract A has rear doors in all three businesses which open to the 25 foot portion of the easement. (R. pp. 247-48).

Testimony and the evidence presented at trial demonstrated that vehicles utilizing the Starbucks drive-thru drive across the 25 ft. portion of the easement to pull in behind the building to a menu board to place their order. The menu board itself lies outside the easement. (R. pp. 95-96, lines 1-6). The customer then continues to drive across the easement and around the side of the building, exiting the easement to access the drive-thru window on Tract A. (R. pp. 245-48, Plf. Exh. 10). Vehicles sometimes queue and

idle on the newly-paved portion of the easement in the process of accessing the drive-thru window. Witnesses for both parties testified that use of the drive-thru, even throughout two busy holiday seasons, has not created any issues with Tract B tenants being able to access their property or utilize the easement. (R. pp. 82, lines 11-15; p. 90, lines 9-24; pp. 93-94; p. 96, lines 12-15; pp. 114-16; pp. 144-45; p. 166, lines 7-19; pp.172-73). Prior to Respondent's improvements to the 25 ft. portion of the easement it sat abandoned and unused by the Appellant. (R. pp. 260-61; R. p. 163, lines 21-25; p. 164, lines 12-22).

The parties never disputed the existence of the easement in question. Their only dispute concerned the scope of the easement and whether use of the Starbucks' drive-thru exceeded it. The parties sought a determination as to whether the construction of a paved portion of the easement, for the purpose of accessing the Starbucks drive-thru window on Tract A, fell within the scope of the easement's intended use. The trial court found that the easement was designed to provide access to the businesses located on Tract A by way of ingress and egress and Starbucks' operation of its drive-thru lane running in part over and upon the paved portion of the 25 ft. easement was a permitted use. (R. p. 6).

IV. LEGAL ARGUMENTS AND AUTHORITIES

A. Appellant failed to properly preserve its primary and overarching argument that the Easement Agreement requires two-way traffic flow

As an initial matter, Appellant raises its argument that the easement requires two-way traffic for the first time on appeal and therefore it is not properly before the Court. *State v. Sheppard*, 391 S.C. 415, 423, 706 S.E.2d 16 (2011)(Argument made for the first time on appeal is not properly preserved for appellate review.). The South Carolina Supreme Court in *I'on, LLC v. Town of Mt. Pleasant* stated the recognized preservation rule and principle underlying it that:

The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000); *see also Holy Loch Distrib., Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000)(“In order to preserve an issue for appellate review, the issue must have been raised to, and ruled upon by the trial court.”). Appellant did not raise the two-way traffic argument at trial or in its Motion to Alter or Amend the Judgment.¹ (*See R. pp. 66-194; R. pp. 57-62*). Without raising this argument to the court below and obtaining a ruling upon it, the Appellant cannot present it to this Court for review. Lacking the “two-way” traffic requirement argument, many if not all of Appellant’s arguments on appeal necessarily fail as they are reliant upon this Court’s

¹ Raising the argument for the first time in its Motion to Alter or Amend would still fail to preserve the issue for appellate review.

consideration and acceptance of it. Should the Court determine the issue is properly before it, the argument fails to undermine the trial court's holding.

B. The trial court properly interpreted the scope and purpose of the easement pursuant to the Easement Agreement's express terms and correctly found that the use of the Starbucks drive-thru running over a portion of it was a permitted use

The scope of an easement is an equitable matter in which a reviewing court may take its own view of the preponderance of the evidence. *Pendarvis v. Cook*, 391 S.C. 528, 706 S.E.2d 520 (Ct. App. 2011).² The determination of the extent of a grant of an easement is an action in equity; accordingly, the Court of Appeals may review the trial court's findings *de novo*. *Sheppard v. Justin Enter.*, 373 S.C. 518, 646 S.E.2d 177 (Ct. App. 2007). "This requirement does not, however, command [the Appellate Court] to ignore the findings of the trial judge who heard the witnesses." *Thomas v. Mitchell*, 287 S.C. 35, 38, 336 S.E.2d 154, 155 (Ct. App. 1985).

The language of an easement determines its extent. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001.). "Clear and unambiguous language in grants of easements must be construed

² There were virtually no disputed facts presented in this case. The easement in question was entered into on May 5, 1986 and was of record prior to either party taking ownership of its respective parcels. Both parties acknowledge they purchased their respective parcels subject to the easement and do not challenge its existence. The trial court correctly noted that "while the determination of the existence of an easement is a question of fact in a law action, the question of the extent of the easement is an action in equity". *Murrels Inlet Crop. v. Ward*, 378 S.C. 225, 231, 662 S.E.2d 452, 454 (Ct. App. 2008); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 532, 586 S.E.2d 146, 147 (Ct. App. 2003).

according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense.” *South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). The Court “must first decide if the language used by the grant...is plain and unambiguous and, if so, what does that language mean.” *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906-07. “It is axiomatic that the language of an express easement strictly controls the permitted uses and purposes.” *Morrow v. Dyches*, 328 S.C. 522, 531, 492 S.E.2d 420, 425 (Ct. App. 1997) (*internal citations omitted*). The character of an express easement is determined by the nature of the right and the intention of the parties creating it. *Plott v. Justin Enter.*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007). If necessary, courts may look to the demonstrated intention of the parties for further clarity as to the scope of the easement. *Lighthouse Tennis Club Vill. Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 534, 586 S.E.2d 146, 148 (Ct. App. 2003). “Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted.” *Proctor v. Steedley*, 398 S.C 561, 572, 730 S.E.2d 357, 363 (Ct. App. 2012)(*internal citations omitted*).

In this case, the Easement Agreement grants the owner of Tract A and its tenants a “right of way” easement for vehicles to travel onto and over the designated 45 ft. and 25 ft. portions of Tract B for the purpose of ingress and egress to Tract A from Woodruff Road. (R. pp. 221-22 ¶ 1, pp. 231-32). “A right of way is simply an easement across another’s land along a particular line for a particular purpose, such as for ingress and egress....” 12 S.C. JUR. EASEMENTS § 18 (June 2015). “The term ‘right of way’ is often used both to refer to the easement itself, i.e. the legal right to the use of the other’s land,

and to refer to the actual location of land which is occupied by the easement.” *Id.* The Easement Agreement states that:

Subject to the limitations set forth in paragraph 3 below, [Respondent] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B as shown on the plat attached hereto on Exhibit “C”, for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof.

(R. pp. 221-22, p. 231).

Paragraph 3 of the Easement Agreement states:

The right of way...easement described in paragraph 1...above and illustrated on Exhibit “D” as “easement” shall be appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on Exhibit “D” shall be 25 feet along the rear property line of Tract A and shall be 45 feet along the western most property line of Tract A.

(R. p. 222 ¶ 3; p. 232).

The trial court, looking to the plain and ordinary meaning of the Easement Agreement’s language, found that “the scope of the easement, as articulated in the original conveyance, is to provide a right of way for motor vehicles to travel onto or over the designated portion of Tract B, for the purpose of accessing Tract A from Woodruff Road.” (R. pp. 4-5). The express language of the Easement Agreement supports this finding, and as the lower court noted, “[i]n the realm of commercial properties, the principal [*sic*] benefit of such an easement is clearly to provide access to the business located upon the property in question.” (R. pp. 5). Thus, the trial court concluded “[t]herefore, this Court finds that the operation of a drive-through window using a portion of the easement in question falls within the scope of the easement’s intended use.” (R. p.

5). The Appellant attempts to assign error to the trial court's findings by relying upon a strained interpretation of the easement's language to impose additional conditions on its use that simply are not found in the Easement Agreement or supported by applicable authority.

Appellant contends that the terms "right of way" for "ingress and egress" of motor vehicles requires two-way traffic in the easement. (Ap. Br. at 10-11). To reach this conclusion, the Appellant extrapolates a restrictive meaning of "right of way" to only include "pass[ing] over another's land." (Ap. Br. at 10). "Pass over" it claims requires continuous movement over the easement. (Ap. Br. at 10-11). According to the Appellant, the easement must be used in a manner at all times that allows for the two-way flow of vehicular traffic across it and prohibits stopping upon it. (Ap. Br. at 10-11). Appellant fails to cite any authority in support of its position that the Easement Agreement's language has and should be interpreted to require two-way traffic flow at all times, mandates a specific direction of traffic flow, or prohibits temporarily stopping in the easement. These additional usage conditions are completely absent from Easement Agreement and cannot serve as grounds for reversing the lower court.

The Easement Agreement grants Respondent a "right of way" over and upon a portion of Tract B. (R. pp. 221-22, ¶ 1). The grant of a "right of way" does not mean constant and unfettered access and ability for two-way ingress and egress over the easement. Rather "[a] 'right of way' means what those words imply; it does not mean a way always open; it does not mean a way without any obstruction...The right reserved, is to pass and repass; and in the absence of express language, that means to pass and repass in a reasonable manner." *Ballington v. Paxton*, 327 S.C. 372, 379, 488 S.E.2d 882, 886

(Ct. App. 1997)(Court of Appeals held that locked fence, for which plaintiffs had a key, was necessary to protect the property and did not unreasonably interfere with plaintiffs' rights of access over the easement) *citing Watson v. Hoke*, 73 S.C. 361, 53 S.E. 537 (1906)(South Carolina Supreme Court held gates allowed to be constructed so long as they did not constitute an unreasonable burden on the right of way). Therefore, absent any express language indicating otherwise and in light of the understood meaning of "right of way" in an easement, the "right of way" granted in this case does not require continuous two-way traffic flow as Appellant claims. So long as each party may pass and repass in a reasonable manner the use of the Starbucks drive-thru remains in accord with the scope of this "right of way" easement. 12 S.C. JUR. EASEMENTS § 20 (June 2015) *citing Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1944)("The easement owner is limited to a use that is reasonable, necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated."). Such is the case here.

Testimony at trial indisputably established that the right of way to pass and repass in a reasonable manner for either party, including tenants of Tract B, has not been disrupted or usurped by use of the Starbucks drive-thru. (R. p. 94, lines 11-25; p. 116, lines 3-10; p. 144, lines 23-25 - p. 145, lines 1-15.). In fact one of Appellant's witnesses conceded that there is no obstruction or prohibition on vehicles traveling both ways across the 25 ft. easement. (R. p. 94, lines 11-25). Lacking any hindrance to Tract B tenants' use of the easement, much less an unreasonable one, operation of the Starbucks drive-thru running over a portion of the easement falls within the permissible scope and use of it.

The Appellant contends that the Easement Agreement's language limits the right of way for the specific purpose of "ingress and egress" of motor vehicles and that the qualifying language "ingress and egress of motor vehicle traffic" means and requires continuous two-way traffic in the easement. (App. Br. at 11). It also claims this language establishes and requires a certain directional flow of traffic over the easement. (App. Br. at 10). The plain language of the easement does not establish these additional conditions.

"Ingress" is defined as "the act of entering, or the right or ability to enter or access." BLACK'S LAW DICTIONARY 9th Ed. (2009). "Egress" is "the act of going out or leaving, or the right or ability to leave, or a way of exit." *Id.* The easement provides a right of way "for ingress and egress to Tract A from Woodruff Road." (R. pp. 221-22, ¶ 1). It does not state "*simultaneous* ingress and egress" or designate any particular direction for traffic flow. Acceptance of Appellant's position would require imposition of these additional restrictions absent language in the Easement Agreement to support them. Courts strictly interpret the terms of easements as they are restrictive covenants upon the use of land. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 269, 628 S.E.2d 284, 291-92 (Ct. App. 2006) ("Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use."). The law requires strict construction and adherence to unambiguous terms of an easement, and therefore it follows that it would not condone imposing additional conditions that are absent from the language of the grant.

Appellant relying on "right of way" being restricted to "passing over" contends, again without citation to supporting authority, that the "plain, ordinary, and popular

meaning of a right to 'pass over' the land of another does not include the act of stopping in the easement to transact business while stopped in the easement." (Ap. Br. at 11). First, Starbucks patrons temporarily stop in the easement to place their orders at the menu board which is located outside of the easement on Respondent's property. (R. p. 95, lines 1-6). Secondly, the plain and ordinary meaning of "pass over" does not preclude stopping or require continuous movement. In fact, Appellant's own witness acknowledged at trial that this phantom prohibition on stopping in the easement does not exist. (See R. p. 95, lines 7-14).³ Allowing vehicles to temporarily stop in either portion of the easement in the act of accessing the property is rightfully allowed under the terms of the easement. Thus, Appellant's argument that cars temporarily stopped in the easement exceeds its permissible scope and use necessarily fails.

As noted above an easement granting a "right-of-way" does not mandate continuous and unfettered movement across the easement. (See *supra* pp. 10-11). As long as Starbucks patrons use of the drive-thru does not unreasonably obstruct or hinder Tract B tenants from using the easement, such usage remains within the permissible scope of the grant. Due to the very nature of the possible "obstruction" in this case -- occupied cars in a drive-thru -- it cannot be said these temporarily present and readily moveable objects are unreasonable barriers or obstacles preventing Tract B tenants' use of the easement. *Contra Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92, 94 (Ct.

³ Q: And even when people were accessing your property through the 45-foot easement, they can stop if they wanted to and decide which shop they would like to go to?

A: Yes.

Q: There is nothing that prohibits them from doing that, is there?

A: No.

App. 2007)(Planted shrubs and fence blocking portions of an access easement as stationary objects ordered removed.). Witnesses for both parties acknowledged cars waiting in the drive-thru have not caused any obstruction or hindrance to Tract B tenants' use of the easement. (*See e.g.* R. pp. 93-94).

Acceptance of Appellant's position would require imposing additional terms and conditions upon the easement's use which are not contained in the language of the grant or in accord with the plain and ordinary meaning, use, and understanding of its terms. Therefore, the trial court properly found that the construction and use of the Starbucks drive-thru fell within the scope of the easement.

The trial court also properly found use of the drive-thru served the express purpose of the easement. (R. p. 5). The clearly stated purpose of the easement is to allow the fee owner of Tract A [Respondent] "and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees" to utilize the easement in order to access the property from Woodruff Road. (R. pp. 221-22, ¶1). These parties are the expressly intended beneficiaries of the easement – "Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any party thereof." (R. pp. 221-22, ¶1). The trial court properly found that the use of the Starbucks drive-thru was in accord with the stated purpose of the easement because it is utilized by a tenant of Tract A's business invitees (Starbucks patrons) to access the property for the benefit of that business. (R. p. 5). Appellant argues the Starbucks drive-thru goes beyond the easement's stated purpose and therefore the trial court erred in finding it constituted a permissible use. (App. Br. at 11-13). Specifically, Appellant contends that "the plain language of the easement establishes that the sole purpose of the easement is to provide

direct, two-way access to and from Tract A and Tract B” and because operation of the drive-thru “renders two-way traffic impossible” it is not a permissible use. (App. Br. at 13).

First and foremost, this conclusion is contradicted by the language of the easement which plainly states the purpose of it is to allow the owner of Tract A, its tenants and their business invitees to access Tract A from Woodruff Road. (R. pp. 221-22, ¶ 1). As argued at length above, the “two-way traffic” condition Appellant is attempting to impose upon the easement’s use is unsupported by the plain and ordinary meaning of its terms. Furthermore, evidence presented at trial established that use of the drive-thru did not render two-way traffic impossible as Appellant claims. (R. p. 94, lines 11-25).

Appellants cite to several cases in support of its position that the drive-thru is not a use provided for under the terms of the easement. (Ap. Br. at 11-13). Each of the cases cited is distinguishable from the one at hand and cannot serve as a basis for reversing the trial court.

First, in *Plott v. Justin Enterprises* deeds in a development granted the lot owners “a perpetual, non-exclusive appurtenant and appurtenant easement for ingress and egress upon, over and across” a roadway. 374 S.C. 504, 649 S.E.2d 92, 94 (Ct. App. 2007). Defendants in that case planted shrubs and constructed a wire fence blocking access across the roadway at several points. This Court affirmed the lower court’s order requiring defendants remove the shrubs and fence even though the plaintiffs could still cross the roadway at other points. *Id.* The Court in *Plott* found that the placement of shrubbery and a fence interfered with the use and enjoyment of the easement. *Id.*

In *Plott*, defendants blocked a portion of the easement with permanent, non-moveable obstructions thereby permanently constricting its prescribed scope. Here there has been no placement of permanent structures or obstacles in the easement. In fact, Respondents actually improved the easement by revamping it so that it could be utilized to access Tract A as intended. (R. p. 94, lines 3-5; p. 141, line 25 – p. 42, lines 1-5). An occupied vehicle presumably in gear is a temporarily present and readily moveable object that does not permanently and impermissibly constrain the easement as the plants and fence in *Plott*. Furthermore, Appellant’s witness recognized that use of the drive-thru did not prevent or prohibit Tract B tenants from utilizing the 25 ft. portion of the easement. (R. p. 94, lines 3-25; p. 115, lines 24-25 – p. 116, lines 1-10).

Second, in *Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, the grantor conveyed a “perpetual non-exclusive easement of ingress and egress located on a portion of [its] property” to several grantees. 306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991). One grantee objected to another’s plan to construct parking spaces on a portion of the easement. *Id.* This Court reversed the lower court and ordered removal of the parking spaces because the easement was “specific in its terms as to the easement’s width, length and location” and therefore it “cannot be constricted to any degree by the placement of parking spaces.” 306 S.C. at 172.

Starbucks patrons’ use of the drive-thru does not constrict the easement as did construction of parking spaces in *Xanadu*. Unoccupied parked cars sitting within an easement are not readily moveable objects and therefore constrict, albeit for a temporary period of time, the usage of it. More importantly, dedicating a portion of an access easement for ingress and egress to parking spaces goes beyond the specific rights granted

by the easement and fails to serve the express purpose of it. In the case at hand, Respondent's tenant is using the easement for the express purpose articulated in the grant – for business invitees to access Tract A from Woodruff Road for the benefit of Starbucks as a Tract A tenant.

Finally, this Court's ruling in *Lighthouse* is readily distinguishable from to the present case. 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003). In *Lighthouse*, a developer granted the Public Service District an ingress and egress easement over its property for the purpose of accessing and maintaining the water and sewer systems, including a water tower and related equipment located on the District's adjoining property. This adjoining property was landlocked by Lighthouse's property and therefore only accessible via the easement. The granting document provided the District with an easement over Lighthouse's "open area[s], driveways, and parking lots...to service the said water and sewer lines and ingress and egress to all adjacent pump stations, wells, tanks, sites, etc." *Id.* at 531. Nearly 20 years later, the District began leasing space on its water tower to a telecommunications company (Telecom) for the installation of antennae, support equipment and emergency power generation. *Id.* at 532. To install and maintain the telecommunications equipment the District leased Telecom the use of the easement, permitting Telecom to travel over Lighthouse's property. *Id.* The Court found that the easement's use was limited to operating, maintaining, and servicing Lighthouse's water and sewer systems per its express terms. *Id.* at 534. Therefore, the Court concluded that Telecom's use of the easement to erect and maintain telecommunications equipment did not serve the stated purpose and constituted an impermissible use. *Id.*

In this case the expressly stated purpose of the easement is to provide Respondent, its tenants and their business invitees, a means to access Tract A from Woodruff Road “for the benefit of the [Respondent], any tenant, or licensee of Tract A.” (R. pp. 221-22, ¶ 1). Use of the Starbucks drive-thru serves this very purpose. On the contrary, Telecom’s use of the easement in *Lighthouse* served an entirely different purpose than the narrow one stated in the easement agreement and therefore fell outside the realm of permissible use.

Thus, none of the cases cited by the Appellant support a finding that use of the Starbucks’ drive through exceeds the scope and purpose of the easement. Starbucks patrons’ use of the drive-thru does not permanently or unreasonably restrict or constrict the easement. Nor does it serve a purpose entirely different from the one expressly stated in the Easement Agreement. Therefore, the trial court properly found that “the operation of a drive-through window using a portion of the easement in question falls within the scope of the easement’s intended use.” (R. p. 5).

C. The trial court’s consideration of whether use of the drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate’s use of its land beyond the imposition allowed under the Easement Agreement was appropriate

The Appellant takes issue with the trial court’s considerations of whether the drive-thru overburdens, obstructs or otherwise interferes with Tract B tenants’ use of the easement or its property beyond the imposition allowed under the terms of the Easement Agreement. (Ap. Br. at 14-18). It claims that the trial court’s ruling inappropriately relied upon these considerations rather than the express terms of the Easement Agreement. (Ap. Br. at 14-18). To make this line of argument appear credible Appellant isolates each of these factors, claims enforcement of the easement does not depend upon

that particular one and concludes the trial court failed to enforce the easement according to its express terms. (App. Br. at 14-18). Tellingly, Appellant's brief fails to cite to portions of the Order in which the trial court apparently relied on each of these considerations individually to find the drive-thru was a permitted use. Appellant's attempt to divide and conquer fails for multiple reasons.

First and foremost, the trial court relied upon the Easement Agreement's language to find that use of the drive-thru was in accord with the scope and purpose of the easement. The Order clearly states that:

This court further finds that the scope of the easement, *as articulated in the original conveyance*, is to provide a right of way for motor vehicles to travel onto or over the designated portion of Tract B, for the purpose of accessing Tract A from Woodruff Road. The *granting document explicitly states*, "[s]aid right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof. (Pl. Ex. 1, ¶ 1).

The easement was created for the purpose of enabling the owners and tenants of Tract A to access the property. The representation of the easement in County records and on plats further enables the public, as business invitees, to use the easement to access the businesses located on Tract A. *Therefore, this Court finds that the operation of a drive-thru window using a portion of the easement in question falls within the scope of the easement's intended use.*

(R. pp. 4-5)(*emphasis added*). The clear language of the Order fatally undermines the entire premise of Appellant's argument in this regard. The lower court's findings quoted above were made before it considered potential overburdening, obstruction or interference. (*See* R. pp. 4-5). Simply put, the trial court relied upon the language of the Easement Agreement, not its evaluation of potential overburdening, obstruction or interference, to find operation of the Starbucks drive-thru was in accord with the scope and purpose of the easement.

Agreement's terms control the determination of its scope and purpose. However, considerations of increased burdens, obstruction and interference with the servient estates' usage of the easement serves to further protect that landowner's rights and inform a court's determination of whether a particular use runs afoul of the easement in question. It is perplexing that the owner of the servient estate would take issue with consideration of these factors as they ensure protection of its rights. Regardless, the lower court's brief consideration of obstruction, interference and overburdening were appropriate in this case and do not warrant reversal.

D. Respondent's did not convert and take exclusive title to a portion of the easement by its construction and use of the Starbucks drive-thru

Appellant claims Respondent's wrongfully converted a portion of the 25 ft. easement to its exclusive use by the construction and utilization of the drive-thru. (Ap. Br. at 13-14). For this argument to succeed there would have to be some evidence of Appellant's exclusion or inability to use the easement or its property as a result of the drive-thru. No such evidence was presented at trial or cited on brief.

In fact, the undisputed testimony and evidence presented to the trial court established that Appellant's tenants would have no reason to utilize the 25 ft. strip of the easement. (R. p. 91, lines 11-18). More to the point, testimony of Appellant's witnesses established that the drive-thru has not prevented their tenants from utilizing its land as claimed. Levi Johnson, the former Property Manager of Woodruff Road SC, LLC, testified:

Q: The 25-foot strip is paved now where before it was grass, isn't that true?

A: That is correct.

Q: Has any of your owners or invitees been denied the right to use that?

A: To use the paved area?

Q: Yes.

A: No.

Q: But there is no prohibition for anybody to go that way. There is plenty of room, isn't that true?

A: Yes.

(R. p. 94, lines 3-10, 22-25).

Q: Nobody has complained about the use of the drive-thru impeding access to your property.

A: Correct.

(R. p. 96, lines 12-15).

Pat Kelly, an employee of Kimco Realty of which Woodruff Road SC, LLC is a subsidiary testified:

Q: If their trucks wanted to go 25 feet behind this building, they could not do it?

A: No, they would want to have the right to do it.

Q: Has anybody stopped them from doing it?

A: Not that I am aware of.

Q: Is there any barrier that prevents them from doing that?

A: Probably not for a truck, no.

Q: For anything. Anybody can go through the easement, can they not?

A: Sure, yes.

(R. p. 115, lines 24-25 – p. 116, lines 1-10).

Therefore, it cannot be said that the construction and use of the drive-thru converted a portion of the 25 ft. easement to Respondent's exclusive use when Appellant's own

witnesses flatly conceded that their tenants have not used the easement, have no reason to do so, and most importantly, have not been denied the right or ability to use the easement.

E. The trial court's decision did not "unlawfully impact or alter the public record"

The lower court's ruling in this case did not "unlawfully impact" or alter the public record as Appellant claims. (Ap. Br. at 18-19). Rather, the trial judge interpreted the scope, purpose, and meaning of the easement filed in the public record. This claim of error is nothing more than a red herring, and an attempt to bypass substantive challenges to the Order by invoking fear that the lower court overstepped boundaries of judicial power and distorted the public record. That said, the trial court's order did not unlawfully alter or distort the easement, and therefore the public record, but rather it provided further clarity as to the scope and permissible use of it. Respondent contends, to the extent the lower court's ruling impacted the public record, it enhanced it.⁴

V. Conclusion

First, Appellant raises its primary argument that the Easement Agreement requires two-way traffic for first time on appeal and therefore failed to properly preserve it for review. Without this argument Appellant's opposition and claims of error based upon it necessarily fail.

⁴ On a practical level Appellant's institution and pursuit of this appeal seems nonsensical. Appellant's sought a declaration from the court as to whether the construction and use of the drive-thru violated the terms of the easement. The Appellant was clear that its motivation for filing this action was its concern/belief that allowing the drive-thru could result in Tract B tenants claiming their lease agreements, which were entered subject to the easement, were breached and vacate the property. (R. p. 121). The trial court found that construction and operation of the Starbucks drive-thru was a permitted use under the terms of the easement. Therefore, the Tract B tenants would have no grounds for claiming breach of their lease agreements entered into subject to the easement.

Secondly, the trial court relied upon the clear and unambiguous terms of the Easement Agreement to properly conclude that the construction and use of the Starbucks drive-thru was a permitted use. The plain and ordinary meaning of the easement's terms allow for the use of the drive-thru. The Easement Agreement gives Tract A tenants and their business invitees a right of way for ingress and egress in order to access the property for the benefit of those tenants. Therefore, Starbucks patrons' use of the drive-thru was rightfully found to be in accord with the scope and purpose of the easement pursuant to its express terms.

Third, the trial court's consideration of whether use of the drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate's use of its land beyond the imposition allowed under the Easement Agreement was appropriate under the circumstances. The lower court relied upon the Easement Agreement's terms to determine its scope and purpose. It then properly considered whether that use overburdened, obstructed or interfered with Tract B tenants' use of the easement beyond the imposition allowed under the grant. This evaluation served to protect both parties' respective property rights and cannot act as the basis for reversal.

In addition, Respondent did not convert and take exclusive title to a portion of the easement by its construction and use of the Starbucks drive-thru as Appellant claims. There was no evidence presented at trial of Appellant's exclusion or inability to use the easement. In fact, the testimony showed that no such hindrances have occurred. Therefore Appellant's claim of unlawful conversion fails.

Finally, the lower court's ruling did not unlawfully alter the public record. Both parties sought a judicial determination of the scope and purpose of the easement and

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In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107
Lower Court Case No. 2013-CP-23-3989

Woodruff Road SC, LLC,.....Appellant,

v.

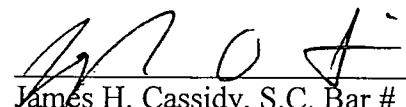
SC Greenville Hwy 146, LLC,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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September 25, 2015
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**THE STATE OF SOUTH CAROLINA
In The Court Of Appeals**

APPEAL FROM GREENVILLE COUNTY

**Court of Common Pleas
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Woodruff Road SC, LLC,.....Appellant,

v.

SC Greenville Hwy 146, LLC,.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S FINAL BRIEF was served upon all counsel of record in the above-referenced action this 25th day of September, 2015, by depositing same in the United States Mail, sufficient postage affixed thereon, and addressed as follows:

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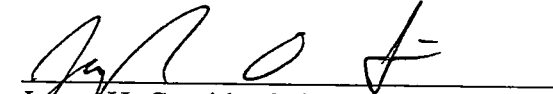
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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Woodruff Road SC, LLC,Appellant,

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REPLY ARGUMENT

I. Plaintiff's "two-way traffic" arguments are preserved for review by this Court, and Defendant's argument to the contrary is frivolous.

Defendant argues that Plaintiff's "two-way traffic" argument is not preserved for appeal, because it was not raised at trial. (Init. Resp. Br. 6-7). This argument is frivolous.

First and foremost, the easement at issue here is a 25-foot wide right of way "for *motor vehicles to travel onto and over* the asphalt parking area of Tract B . . . for the purpose of ingress and egress." (R. 0221-0222, ¶ 1) (all emphasis added). By definition, therefore, the easement is for two-way traffic. It is impossible to achieve safe or reasonable ingress and egress of motor vehicles over a 25-foot wide right of way in a commercial parking lot without two-way traffic. In short, the express language of the easement raises the issue of two-way traffic, and Defendant's error preservation argument is therefore frivolous. A review of the trial proceedings further demonstrates this frivolousness.

Throughout the trial, the attorneys and witnesses for both parties repeatedly referred to the easement as being for the "ingress and egress" of motor vehicles and vehicular traffic. (*E.g.*, R. 0076; 0079; 0086-0087; 0089; 0092; 0093; 0103; 0114; 0115; 0134; 0140; 0142-0145; 0149; 0152-0155; 0177-0184; 0200-0201; 0210; see also R. 50, 52, 53). Moreover, and also throughout the trial, the attorneys and witnesses for both parties addressed the issue of vehicles in the drive-thru lane going against "the flow of traffic." (*E.g.*, R. 0081; 0092; 0132; 0145; 0183; 0184). More specifically, the attorneys and witnesses for both parties addressed the issue of vehicles using the easement to travel in the opposite direction of the drive-thru traffic. (Tr. R. 0103; 0129; 0131-0132; 0133). Indeed, Defendant's counsel argued against the need for two-way traffic (R. 0208-0209) after Defendant's

principal witness (Bill Runge) admitted that Plaintiff could pave the easement and create lanes for standard two-way traffic. (R. 0143; 0149).

Finally, Defendant's counsel and principal witness (Runge) suggested that vehicles could travel in the opposite direction by simply driving on the other side of the easement. (R. 0094; 0131-0132; 0142). They apparently believe that, despite the American Revolution in the 18th Century, this tiny piece of South Carolina remains part of the British Empire. Plaintiff's witness (Johnson) rejected this notion, testifying that the drive-thru resulted in the easement being "changed to a *one-way*." (R. 0094) (all emphasis added).

On appeal, Defendant relies on this "one-way" testimony to argue: "[E]vidence presented at trial established that use of the drive-thru did not render two-way traffic impossible as Appellant claims." (Init. Resp. Br. at 15; see also *id.* at 11, relying on same testimony to argue "there is no obstruction or prohibition of vehicles travelling both ways across the 25 ft. easement"). It is the height of analytical hypocrisy to argue that the two-way traffic issue was not raised at trial but then argue that trial evidence showed that two-way traffic was possible, albeit by travelling on the wrong side of the road. And here again, Defendant ignores what every elementary school student in America knows – we won the American Revolution and nothing in South Carolina remains part of the British Empire.

In short, the issue of two-way traffic was raised throughout the trial – indeed, it was a pervasive issue. The trial court clearly ruled against the Plaintiff when it permitted the continued use of the drive-thru. Were one to assume the trial court did not rule on this issue, it is nevertheless preserved for appeal, because Plaintiff again raised the issue in its motion to alter or amend. (R. 0058; 0060; 0061). Accordingly, Defendant's error preservation argument is frivolous.

II. Defendant's argument on the meaning of the easement's terms turns the law on its head and is manifestly without merit.

In its Argument (B), Defendant argues that the drive-thru is a permissible use, because nothing in the easement's language precludes that use. (Init. Resp. Br. 7-18). This argument ignores the controlling inquiry here, which is a question of law subject to *de novo* review by this Court,¹ *i.e.*, whether the "plain, ordinary, and popular" meaning of the easement's terms permits the construction of a drive-thru lane in the easement such that it precludes the use of the easement for two-way traffic and converts the easement into a stop-and-go business transaction location for the sole benefit of Defendant.² Although Defendant pays lip-service to this controlling principle of law by acknowledging it in its brief, Defendant ignores it by arguing that the drive-thru is a permitted use unless specifically excluded by the easement agreement. (Init. Resp. Br. at 7-8)

Despite the 12-page length of Defendant's argument, it boils down to a simple and erroneous assertion: The drive-thru's preclusion of two-way traffic and its conversion of the easement into a "stop-and-go business location" is permissible unless specifically precluded by the language of the easement. This argument turns the law on its head.

The "plain, ordinary, and popular" meaning of a right of way for the ingress and egress of motor vehicles is the right to pass over and through the property in both directions. It does not encompass driving on the wrong side of the road. It also does not encompass

¹ In making this argument, Defendant correctly asserts that the scope of an easement is generally a matter in equity such that an appellate court can take its own view of the evidence but also admits that "[t]here were virtually no disputed facts presented in this case." (Init. Resp. Br. at 7 & n.2). No relevant fact is in dispute. The only question is the meaning of the easement's unambiguous terms, which is a *de novo* question of law for this Court for which no deference is given to the trial court's ruling. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012); see also "Standard of Review" section of Plaintiff's Brief of Appellant.

² In its brief, Defendant appears to view Plaintiff's "two-way traffic" and "stop-and-go business transaction location" arguments as inextricably intertwined. They are not. Each argument stands alone. Even if "stop-and-go" use of the easement is permitted, it cannot interfere with two-way traffic. And even if two-way traffic is not required, the easement cannot be used as a "stop-and-go" business transaction location.

using the easement as a business transaction location that requires vehicles to stop in the easement to review the pre-order menu and then stop in the easement again to place an order after pulling up to the speaker at the order menu. Contrary to Defendant's argument, any such use would have to be specifically included in the easement, not specifically excluded by it.

Defendant complains that Plaintiff cites no authority for its arguments on the meaning of "right of way." (Init. Resp. Br. 10-11). No citation of authority is needed, because Plaintiff relies on the "plain, ordinary, and popular" meaning of that term. Moreover, Plaintiff cited the 5th Edition of BLACK'S LAW DICTIONARY for the "plain, ordinary, and popular" meaning of "right of way." (Final App. Br. 6-7). This is the same authority cited by the Supreme Court for the definition of "easement" in *Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 154 (S.C. 2008). Finally, the authorities cited by Defendant disprove its argument rather than support it.

First, Defendant cites *Ballington v. Paxton*, 488 S.E.2d 882 (S.C. App. 1997) for the proposition that a right of way is the right "to pass and repass in a reasonable manner." This proves too much. "Pass and repass," by definition, means going in and out, *i.e.*, two-way traffic. Thus, Defendant cannot interfere with the two-way traffic use of the easement here, and it would manifestly not be "reasonable" to achieve two-way traffic by requiring traffic to travel on the wrong side of the road in a commercial parking lot. Moreover, even a cursory reading of *Ballington* shows that it does not support Defendant's position.

In *Ballington*, there was a dispute between family members over the use of a private right of way in gross over a dirt road in the country used to access a swimming pond. The owner of the servient estate built a fence and gate in response to repeated and ongoing use

of the road by trespassers and vandals, including vandalism by some of the grantees' children and their friends. This Court emphasized that, under these circumstances, the erection of the gate and fence was permissible, because it did not unreasonably interfere with the right to use a dirt road in the country to access a swimming pond, and it reasonably protected the grantor's right to protect her property from trespassers and vandals.

Here, the easement is a commercial easement for traffic in a commercial parking lot. Directing traffic onto the wrong side of the road simply is not and can never be reasonable under these circumstances, particularly when other access is available by turning directly from the 45-foot easement into the parking lot of Defendant's tract. Moreover, converting a commercial right of way into a "stop-and-go" business location for the servient estate is not permitted under the plain language of the easement. Such might be convenient or desirable for Defendant's tenant (Starbucks), but it is not necessary – customers can turn directly into Starbuck's parking lot from the 45-foot easement and thereby gain access for transacting business with Starbucks.

Second, Defendant cites *Watson v. Hoke*, 53 S.E. 537 (S.C. 1906), which is of the same ilk as *Ballington*. It involved a dispute over the erection of fencing along a private easement over farm land in the country. The Supreme Court found this was reasonably necessary to protect the farm use of the servient estate while not unreasonably interfering with the access granted to the dominant estate. This case has no bearing on the present case involving a commercial right of way for two-way traffic in a commercial parking lot.

Third, Defendant cites *Hill v. Carolina Power & Light Co.*, 28 S.E.2d 545 (S.C. 1944) for the proposition that an easement owner's use of an easement (Defendant here) is limited to a use that is reasonable and as little burdensome to the servient estate as possible.

This again proves too much. It is not reasonable to direct traffic onto the wrong side of the road in a commercial parking lot or to use the easement for transacting business when such access is otherwise available. And these uses are not “as little burdensome” as possible to Plaintiff’s right to use the easement for two-way traffic in a commercial parking lot.

In short, the “plain, ordinary, and popular” meaning of the ingress and egress right of way granted by the easement does not permit the drive-thru built by the Defendant. To avoid this, Defendant asks this Court to turn the law on its head and require the specific exclusion of a use that would preclude the two-way traffic contemplated by the easement and convert the right of passage into a right of using the easement as a “stop-and-go” business transaction location for the sole benefit of Defendant’s tenant (Starbucks). Such uses are not within the meaning of the easement’s language and, therefore, any right to so use the easement must be specifically included in it, not specifically excluded from it.

III. The trial court failed to enforce the Easement Agreement according to its express terms.

As set forth in Argument IV of the Brief of Appellant, the trial court failed to enforce the Easement Agreement according to its express terms and instead focused on there being no interference with the business operations of the tenants of Tract B, no permanent or physical obstructions in the easement, no overburdening of the easement, and nothing that was “too far” removed the easement from its intended use. (Final App. Br. at 10-15). In its Argument C, Defendant attempts to defend the trial court’s erroneous analytical framework. (Init. Resp. Br. 18-21). This defense fails for several reasons.

First, Defendant argues that the trial court expressly relied on the terms of the Easement Agreement to reach its conclusion. While it is true that the trial court cited to

(Init. Resp. Br. at 22-23). Defendant thereby invites this Court to make the same fundamental error made by the trial court, *i.e.*, to focus on Plaintiff's existing use or non-use of the easement rather than the expressly granted permanent right to use the easement. This Court should decline this invitation and reverse the trial court's acceptance of it.

It is true that Plaintiff and its tenants do not currently use the easement and currently have no essential need to use the easement for its intended purpose of two-way traffic, but that is not the question here. The Easement Agreement expressly granted Plaintiff the permanent right to use the easement as a right of way for the ingress and egress of motor vehicle traffic, *i.e.*, two-way traffic. (R. 0221, ¶ 1; see also R. 0222, ¶ 3 and R. 0224, ¶ 7). As shown earlier, the drive-thru precludes the exercise of this right, and it also results in Defendant converting the easement to its exclusive use to the exclusion of Plaintiff. Even though Plaintiff does not presently use the easement, it cannot idly stand by and permit these violations of the easement, lest it be subjected to some claim of adverse possession, waiver, abandonment, or the like in the future when it needs or desires to use the easement for its expressly stated purposes.

Moreover, this is a commercial property that will be changed and reconfigured in the future such that Plaintiff or subsequent purchasers will need or desire to use the easement for its expressly stated purposes.⁴ The presence of the drive-thru and its resulting interference with the purpose of the easement and Plaintiff's ownership rights will limit the flexibility in different future uses and configurations of Plaintiff's commercial property

⁴ At the time of the creation of the easement, different buildings and tenants occupied Plaintiff's tract and Defendant's tract. (R. 0122-0123; 0157-0160; 0162; 0176). It is the very nature of commercial property that such changes will also be made in the future.

and thereby devalue Plaintiff's commercial property. (R. 0074-0075; 0096-0097; 0108; 0115-0116; 0182- 0183; 0202- 0204; 0212; 0216-0217; 0218).

In a related argument, Defendant contends that Plaintiff's reason for filing this lawsuit was a concern that its tenants would view the drive-thru as a breach of their lease agreements and result in claims being made against Plaintiff. (Init. Resp. Br. 23 n.4). It is true that this was "one of [Plaintiff's] concerns" (R. 0091), but Plaintiff was "more concerned" with the negative impact on flexibility in the future use and reconfigurations of the commercial property, as well as the marketability and value of the property. (R. 0115-0116; see also R. 0074-0075; 0096-0097; 0108; 0182-0183; 0202-0204; 0212; 0216-0217; 0218). For these reasons, Plaintiff cannot now allow the drive-thru to exist and operate, even if there is no current problem, because it cannot run the risk that allowing the drive-thru now would result in a claim for adverse possession, waiver, abandonment or the like that would prevent Plaintiff or its purchasers from using the easement for its express purposes in the future.

V. The trial court has invaded the sanctity of the public record and destroyed the protection intended by the public record.

As set forth in Argument IV(E) of the Brief of Appellant, the trial court invaded the sanctity of the public record and destroyed the intended protection of subsequent purchasers without notice. (Final App. Br. at 14-15). Rather than address the specifics of Plaintiff's argument, Defendant dismisses it as a "red herring" and summarily asserts that the trial court's order "enhances" the public record.

Accepting Defendant's argument and the trial court's ruling will jeopardize the property rights purchased and sold throughout South Carolina, because the language used in the present easement is commonly used to create easements for the ingress and egress

of motor vehicle traffic throughout the state. Those easements can now be converted from two-way traffic to one-way traffic without notice to anyone, and they can likewise be converted to uses that essentially take rights mutually held by multiple parties and limit that right to a single party to the exclusion of all others. This is not and should not become the law in South Carolina.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Appellant, the appealed order should be reversed and the case remanded for the entry of judgment in favor of Plaintiff.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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