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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Opinion No. 4750
S.C. Court of Appeals, Filed October 6, 2010, Withdrawn,
Substituted and Refilled July 1, 2011

Robert L. Cullen, Andrew A. Corriveau,
and Andrea Hucks ..... .Petitioners,

v.

J. Bennett McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association,.....Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on July 1, 2011.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to find that the Developers' rights established in restrictive covenants were personal to the Developer and were extinguished when the Developer conveyed all of the land to which the covenants applied?

II. Did the Court of Appeals err when it found that a subsequent land owner could acquire, solely by assignment, the Developer's rights when those rights had already been extinguished, when the clear and unambiguous language of the Declaration requires that a successor developer be one who succeeds to the Developer's interest in the "Property", and when the assignment disclaimed the existing obligations of the original Developer?

III. Did the Court of Appeals err in finding that under the restrictive covenants, the "Subdivision" included portions of the "Property" that had not yet been subdivided into "Lots"?

IV. Did the Court of Appeals err in failing to apply the rule of law that, after the time reasonably necessary to protect its financial interest in a development, a developer has a duty to transfer control of the affairs of the Subdivision to the homeowners whose financial interests are at stake?

V. Did the Court of Appeals err when it failed to apply the basic principles of contract construction and simultaneously found the restrictive covenants to be unambiguous but affirmed the lower court's reliance on extrinsic evidence to construe and interpret them?

INTRODUCTION

This case concerns the legal ability of successive owners of undeveloped real estate to exercise the personal rights of the original developer granted in the

applicable restrictive covenants (the "Declaration") to develop and to incorporate newly created lots into an existing developed subdivision more than five years after those personal rights had been extinguished by the conveyance of the property to which the personal rights had attached. The ruling of the lower court, which was affirmed by the Court of Appeals, disregarded the precedent of this Court and the well-established rule of law on that issue. The facts relevant to a resolution of the issues presented are undisputed.

STATEMENT OF THE CASE

This action for a Declaratory Judgment was commenced on March 31, 2004, by the Petitioners (the "Homeowners"), all of whom were owners of real estate within a subdivision commonly known as Wright's Point ("Wright's Point"). (Complaint, R. p. 28)

In their Complaint, the Homeowners sought a declaratory judgment interpreting the applicable Declaration concerning whether previously undeveloped real estate could be subdivided, developed, and added to the existing subdivision and whether the "Developer", as defined in the Declaration, continued to have the right to control the Wright's Point Home Owners Association ("Association"), which owns the subdivision common areas and amenities and which is the governing body for the subdivision.

Defendant Anthony R. Porter ("Porter") is the "Developer" of Wright's Point as defined in ¶ 1.12 of the applicable Declaration.[1] At the time that the Complaint was filed, the Defendants, J. Bennett McNeal and/or B. McNeal Partnership, L.P., (jointly "McNeal"), owned the undeveloped land which was proposed to be added to the existing subdivision. Before trial, McNeal conveyed a portion of this

[1] Whether or not Jimmy W. Porter was also the "Developer" was an issue at trial in the lower court.

undeveloped land to yet another unrelated entity ("Ratcliff"), which also claimed the right to subdivide and develop its portion of the land and add it into the existing subdivision.

In their Answer, Porter and McNeal (jointly, "Respondents") denied the allegations of the Complaint and alleged that Porter was entitled to continue to control the Association and that the undeveloped land owned by McNeal and Ratcliff could be added to the subdivision. (Answer and Counterclaim, R. p. 68)

In addition, the Respondents asserted a multiple count counterclaim ("Counterclaim") against the Homeowners, alleging various tort causes of action. (Answer and Counterclaim, R. p. 68; Amended Reply, R. p. 165)

On October 26, 2007, the lower court issued its order finding generally in favor of the Respondents on all issues, but found for the Homeowners on the Counterclaim and dismissed those claims. (Order, R. pp. 1 - 26) On February 19, 2008, the Homeowners served their Notice of Appeal. On October 26, 2010, the Court of Appeals affirmed the lower court. The Homeowners filed their Petition for Rehearing, which was finally disposed of on July 1, 2011, by the issuance of a substantively identical substituted opinion and a denial of the Petition for Rehearing. *Cullen, et al v. McNeal, et al,* Opinion 4750 (S. C. Ct. App. filed July 1, 2011). Petitioners seek a Writ of Certiorari to review that decision.

STATEMENT OF THE FACTS

1. On December 31, 1997, Porter acquired 1.7 acres of real estate described as parcels B and C in a December 17, 1997 plat (the "Boundary Survey"). (Deed, Exhibit 16, R. p. 588; Deed, Exhibit 18, R. p. 597; Plat, Exhibit 15, R. p. 584)
2. On December 31, 1997, Porter's father, Jimmy W. Porter ("Jimmy") acquired real estate described as parcel D in the Boundary Survey. (Exhibit 17, R. p. 592)

3. Pursuant to a plat, dated March 3, 1998, and recorded at book 64, page 150, ("Plat"), a portion of this land was subdivided into 44 separate lots, ("the 44 Lots"), roads, and community spaces. (Exhibit 19, R. p. 602)
4. On June 2, 1998, a "Declarations of Conditions, Restrictions and Easements for Wright's Point" ("Declaration"), dated April 24, 1998, was recorded which subjected all of the land which had been acquired by Porter and Jimmy to the Declaration. (Declaration, Exhibit 20, R. p. 603)
5. The majority of the land within parcels B and D was depicted in the Plat as "Phase II Future Development" and was not subdivided into lots. (Exhibit 19, R. p. 602).
6. In the Declaration, the official "Plat" "of Wright's Point Subdivision" ("Subdivision") was defined as the March 3, 1998, Plat. (Declaration, ¶ 1.18, Exhibit 20, R. p. 605)
7. In the Declaration, the term "Lot" was defined as the 44 Lots shown on the Plat. (Declaration, ¶ 1.13, Exhibit 20, R. p. 605)
8. The Declaration provided for the creation of the Association and conferred membership in the Association only on the owners of each of the Lots on the Plat and not on the owners of land that had not been subdivided into "Lots". (Declaration, ¶1.03, Exhibit 20, R. p. 604; Declaration, Article IV, Exhibit 20, R. p. 609)
9. The Declaration provided that the official Plat could be amended by the Developer to subdivide and add additional "Lots" to the Association and to add additional phases to the development and provided a specific mechanism for doing so. (Declaration, ¶ 1.18 and ¶ 2.03, Exhibit 20, R. p. 605)
10. On March 29, 1999, the common areas shown on the Plat were conveyed to the Association. (Porter, R. p. 332, lines 4-9; Exhibit 21, R. p. 634)
11. In April, 1999, Porter conveyed four Lots and undeveloped parcel B to J. Bennett McNeal, DBA McNeal Land Company. (Deed, Exhibit 22, R. p. 638; Deed, Exhibit 23, R. p. 642).
12. On July 16, 2002, Jimmy conveyed undeveloped parcel D to B. McNeal Partnership, L.P. (Exhibit 32, R. p. 679; Exhibit 33, R. p. 683)
13. On February 27, 2007, McNeal, the then owner of all the land other than the 44 Lots depicted on the official Plat, conveyed to Richard Ratcliff Homes, Inc.,

a portion of the property McNeal had acquired from Porter and a portion of the property McNeal had acquired from Jimmy ("Ratcliff Property"). (Exhibit 49, R. p. 748)

14. Ratcliff thereafter purported to subdivide its land into Lots pursuant to two unsigned plats, dated February 27, 2007, and February 28, 2007. (Exhibit 50, R. p. 752; Exhibit 51, R. p. 755)
15. Porter and Jimmy, on February 28, 2007, one month before the commencement of the trial in this matter, executed a document entitled "Supplemental Declaration To Declaration of Conditions, and Restrictions for Wright's Point Declaration", ("Supplemental Declaration") purporting to subdivide land, that neither had owned for five years, into "Lots" and to add those portions of the Ratcliff Property to the existing Subdivision of 44 Lots. (Exhibit 40, R. p. 699)
16. On June 12, 2007, Porter and Jimmy executed a document entitled Assignment of Developer's Rights, ("Assignment") pursuant to which the "Developer's rights", but not the Developer's obligations, were purportedly assigned to B. McNeal Partnership, L.P., including the personal rights of the original Developer provided under Articles II, VII, and XII of the Declaration. (Affidavit, Exhibit A, R. p. 162)

SUMMARY OF THE ARGUMENT

When the Court of Appeals found that McNeal, as successor, could exercise the original Developer's personal rights granted by the Declaration after the Developer had conveyed the land to which those rights applied, it failed to apply both South Carolina precedent and failed to enforce the unambiguous language of the Declaration as written.

South Carolina law characterizes rights such as those at issue as "personal" to the developer, which rights are extinguished when the developer conveys his interest in the land over which the rights were granted. In finding that McNeal

acquired those rights through the "Assignment" years after the Developer had conveyed the land to which the rights applied, the Court of Appeals failed to apply the applicable South Carolina law.

Further, in finding McNeal to be a valid "Successor Developer" based on that same Assignment, the Court of Appeals failed to apply the unambiguous language of the Declaration which requires that any successor developer must succeed to the original developer's interest *in the property*, and not merely obtain a purported assignment of rights.

Finally, in resolving the issues presented, the Court of Appeals violated the established rules of construction that an unambiguous Declaration is to be interpreted based on the language of the Declaration itself, and not on testimony of "intent" or other evidence outside of the document itself.

ARGUMENT

I. The Court of Appeals erred in failing to find that the Developers' rights established in the Declaration were personal to the Developer and were extinguished when the Developer conveyed all of the land to which the Declaration applied.

The centerpiece of the Homeowners' argument is that, after 2002 at the latest, when the Developer[2] conveyed all of the property to which the Declaration applied to McNeal, the personal right reserved in the Declaration to develop additional Lots and add them to the Subdivision was extinguished.

The Homeowners' position on this issue is based in settled South Carolina law which, like other jurisdictions, considers the rights of a developer reserved in the applicable covenants to be personal to the developer, enforceable only by him, and extinguished upon disposition of the developer's interest in the land.

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[2] Although there was an issue at trial as to whether the term "Developer" was Anthony Porter or both Anthony Porter and Jimmy Porter, for purposes of this argument it does not matter. After 2002, neither of them had any interest in the undeveloped property.

In *Peoples Federal Savings and Loan Association of South Carolina v. Resources Planning Corporation*, 358 S. C. 460, 596 S.E. 2d 51 (2004), this Court recognized the principle that the rights reserved to the developer in a declaration are personal in nature and that only in "the unusual circumstances presented" may those rights be acquired by a successor. 358 S.C. at 479. No such unusual circumstances are presented in this case.

Rather, this case is squarely in line with the rule of law and the precedent in South Carolina articulated in *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.,* 368 S.C. 342, 628 S.E. 2d 902 (Ct. App., 2006) and reaffirmed in *AJG Holdings LLC, et al v. Dunn, et al.* 392 S.C. 160, 708 S.E. 2d. 218 (Ct. App. 2011). In those decisions, the Court of Appeals made it perfectly clear that there are five conditions that must be met for a developer to exercise rights with respect to the development and that one of those is that the developer have a "property interest".

> Focusing on the second condition of Queen's Grant, the circuit court found that because Sasser conveyed all the property she owned in the subdivision in 1991, she no longer retained a sufficient property interest in the subdivision to convey developer's rights to the Dunns.
>
> * * * * * *
>
> As Queen's Grant makes clear, the reservation itself is allowed only when the five conditions are met, and one of those conditions is that the developer possess a sufficient property interest in the development. For this condition to be a meaningful one, the property interest must necessarily be something more that a purported reservation of the developer's rights. This is so regardless of whether the restrictive Declaration runs with the land or are personal to Sasser.

AJG Holdings at 165, 166, 221, 222.

Although acknowledging that "Homeowners argue the Developers' rights were extinguished and could not be conveyed", and that the Developer had sold

the property more than five years before purporting to assign the Developer's rights, the Opinion of the Court of Appeals does not even address the rule of *Queen's Grant* or *AJG Holdings.*[3] Instead, the Court of Appeals found that, solely by virtue of the belated Assignment, McNeal became the "Successor Developer". This aspect of the Opinion is completely contrary to existing precedent which was neither discussed nor distinguished by the Court of Appeals.

It was undisputed that, after 2002, the Developer had conveyed the property to which the Declaration applied to third parties and no longer had a property interest in the undeveloped land. It was further undisputed that it was not until five years later that McNeal purported to obtain the Developer's Rights pursuant to the Assignment and that Ratcliff never had any claim, at all, to the Developer's Rights.

Under *Queen's Grant* and *AJG Holdings*, the assignment of rights by a developer who no longer has a property interest in the development is a nullity.

> Because Sasser did not retain any property interest in the development, she did not retain developer's rights. Accordingly, we affirm the trial court's grant of summary judgment with regard to Sasser's inability to assign developer's rights to the Dunns.

AJG Holdings at 166, 222.

The law in South Carolina is consistent with that of other jurisdictions that hold that a developer's rights are extinguished when the developer disposes of any interest in the property. *See: Peoples Federal Savings and Loan, supra*, citing *Board of Managers of Medinah on the Lake Homeowners Association v. Bank of Ravenswood*, 295 Ill App. 3d 131, 692 N.E. 2d 402 (1998) and the authorities cited in that case.

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[3] The *AJG* case was brought to the attention of the Court of Appeals pursuant to Rule 208(b)(7) SCACR pursuant to a letter dated January 28, 2011.

The Declaration, itself, at ¶ 2.03 (R. p. 41) provides that the "Developer" "reserves unto himself" "the right to develop and submit" additional phases to the Subdivision and "to modify, amend, revise and add to the Plat". Thus, by the specific and unambiguous language of the Declaration, the ability to subdivide the undeveloped land into Lots and to develop additional phases of the Subdivision is a "right" reserved to the Developer.

The precise situation presented here was decided against the developer in *Fairways of Country Lakes Townhouse Association v. Shenandoah Development Corporation*, 113 Ill. App. 3d 932, 447 N. E. 2d 1367 (Ill. App. 1983). In that case, the original developer conveyed undeveloped property to an unrelated entity, which in turn conveyed it to the party to the litigation. Similar to the Declaration here, the restrictive covenants at issue allowed the developer to annex additional property into the development by filing a "Supplemental Declaration".

The *Fairways* court determined that the power to annex additional property into the development was personal to the original developer and that the right was extinguished when the subject property was sold.

> This Court has considered analogous provisions which provided for the unilateral modification or revocation of restrictive Declaration already imposed upon land by a developer. In those situations, we held that such reserved powers to modify or revoke restrictive Declaration contained in a deed are personal which can be exercised only by the one who imposed the restrictions, particularly where the power can be exercised without the consent of the property owners. (internal citations omitted) *In these cases it was determined that once the title to the property passed from the hands of the one holding such a reservation of rights, the power can no longer be exercised by him or any other person notwithstanding that the declaration provided that all Declarations were to run with the land.* (internal citations omitted) (emphasis supplied).
>
> We see no basis for interpreting the provisions of the Fairway Declarations differently and consider that the disputed provisions

> established a personal right to be exercised only by the original developer.
>
> * * * * *
>
> *Defendants' argument, taken to its logical conclusion would permit any number of persons who may have acquired portions of the Greens property, instead of the one corporation here, to separately choose to exercise the rights of the developer and annex his property on a piecemeal basis.* (emphasis supplied) Such an intention cannot be found with the Fairway Declarations and we may not supply it.

Fairways at 936, 937, 1370, 1371. *See, also*: *Orange Beach Marina, Inc. v. Warner*, 500 So. 2d 1068 (Ala. 1986) [purported amendment to Declaration by developer ineffective where developer had no continuing interest in the land].

In this case, McNeal and Ratcliff both own portions of the land formerly owned by the Developer and both purport to be able to exercise the Developer's personal rights reserved in the Declaration by having their land subdivided into Lots and submitted as a phase of the development. The *Fairways* scenario is precisely what has occurred in this case and, like the Declaration in *Fairways*, the Declaration does not contemplate successors, much less multiple successors, exercising the rights of the original Developer.

A Writ of Certiorari should be issued to review the Opinion of the Court of Appeals on this issue. Its Opinion is in conflict with the decision of this Court, as well as with the precedent established by the *Queen's Grant* and *AJG Holdings decisions,* and the other jurisdictions that have addressed the issue that hold that such rights are extinguished when the original developer no longer has a property interest in the land.

II. The Court of Appeals erred when it found that a subsequent land owner could acquire, solely by assignment, the Developer's rights when those rights had already been extinguished, when the clear and unambiguous language of the Declaration requires that a successor developer be one who succeeds to the Developer's interest in the "Property", and when the assignment disclaimed the existing obligations of the original Developer.

In its Opinion, the Court of Appeals bases its conclusion that McNeal is the "successor developer" with the right to develop and add additional Lots to the subdivision on the June, 2007, Assignment by Porter and Jimmy Porter of "Developer's rights" to McNeal. (R. p. 162). As set forth above, the development rights purportedly assigned to McNeal by the Porters had been extinguished years before when the Porters conveyed the land to which those rights attached. As a matter of law, in 2007, the Porters no longer had any "developer's rights" to convey to anyone.

Further, it is axiomatic that an unambiguous restrictive covenant must be interpreted strictly, as written, without reliance on extrinsic evidence. (*Koontz v.* Thomas, 333 S.C. 702, 708, 511 S. E. 2d 407, 410 (Ct. App. 1999). The Declaration unambiguously provides the mechanism for qualifying as a Successor Developer and that mechanism does not contemplate an "assignment" of "rights". The unambiguous language of ¶1.12, of the Declaration provides that, in order to act as a successor Developer, the successor must succeed to the Developer's interest in the **property,** not just the acquisition of the Developer's rights. The specific language employed in the Declaration imposes the following conditions on who can become a Successor Developer.

a. the successor Developer must succeed to "all of the Property then subject to this Declaration";

b. the instrument conveying the interest in all of the "Property" must designate any such successor as the "Developer"; and

c. the grantor of such conveyance must be the "Developer" at the time of the conveyance is made.

"Property" is defined in ¶ 1.19 of the Declaration by reference to Exhibit A, on which parcels B, C, and D are described.[4] It is undisputed that the deeds conveying Parcels B and D to McNeal did not designate him as "Developer" as required by the Declaration and that McNeal could not exercise the rights of a "Successor Developer" based upon those conveyances.[5]

In its Opinion, the Court of Appeals focused on the Assignment as the source of McNeal's ability to act as "Successor Developer". However, that document is not a conveyance of the "Property" as required by the Declaration but is merely an assignment of purported "rights". In order to be a Successor Developer under the Declaration, ¶1.12 requires that the successor succeed to "all of the *Property then subject to the Declaration"* and not as the Court of Appeals found, simply succeed to purported development "rights". Under the specific and unambiguous language of the Declaration, McNeal cannot be considered a successor Developer because the deeds by which McNeal acquired the "Property" did not designate him as Successor Developer" and the Assignment was merely an assignment of purported rights and not a conveyance of an interest in the "Property" subject to the Declaration.

Equally significant, even if the Assignment was the kind of conveyance contemplated by the Declaration, on the date of the Assignment, McNeal had already further conveyed a portion of the Property to Ratcliff, who was also purporting to exercise the rights of the "developer" with respect to its portion of the

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[4] At no point was any Property released from the Covenants. This Court of Appeals suggestion that the Homeowners' argued that the Lots were not subject to the Covenants is factually incorrect.
[5] The finding of the Court of Appeals that "there was no requirement that the deeds to Parcels B and D designate McNeal as a successor developer" ignores the specific requirement of ¶1.12 of the Covenants.

Property. (R. p. 748)[6]. Under any construction of the facts, McNeal did not succeed to the Developer's interest in "all of the Property" subject to the Declaration and could not be a Successor Developer of any of the undeveloped land, and especially the undeveloped land owned by Ratcliff.[7]

The Declaration must be construed reasonably. The Declaration unambiguously allows for a successor developer, but only if the successor takes "all" of the "Property" subject to the Declaration and only if the conveyance clearly designates that person as the "successor", implying the acceptance of both the rights and the burdens of the Developer. However, the Assignment, by it terms, assigns to McNeal only the rights of the Developer and specifically disavows any responsibility for the obligations of the Developer. (R. p. 162) To sanction the grant of the Developer's rights for the benefit of two different entities, neither of which assume the obligations owed to the existing homeowners, is the utmost in unfairness and cannot be allowed to stand as a valid application of the law in this State.

The effect of the Opinion of the Court of Appeals is to also allow a unilateral change in the relationship between the Developer and the Homeowners, subjecting them to multiple "Successor Developers". The Declaration identified the Developer and the Homeowners knew when they purchased a Lot who was to be

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[6] The Homeowners further correctly pointed out that, after the original 44 Lots were all sold, no successor could succeed to "all of the Property" subject to the Declaration.

[7] The Supplemental Declaration purported to add lots to the Subdivision that were created by Ratcliff from a part of the Property conveyed to him by McNeal. It is undisputed that Ratcliff had no business relationship with Porter, personally, nor any business arrangements to share profits with McNeal, the purported "successor developer". (Ratcliff, R. p. 373, line 6 – p. 375, line17). Neither Porter nor McNeal had any interest in the company owned by Ratcliff. (Ratcliff, R. p. 375, line 15 – p. 376, line 12). The expense of subdividing and developing the undeveloped land into lots for sale was paid by Ratcliff's company. (Ratcliff, R. p. 397, lines 5 -11). All of the profits or losses that relate to the subdivision of the 20 new lots in Phase II inured solely to Ratcliff, his wife, and his bank. (Ratcliff, R. p. 397, line 24 – p. 398, line 7).

responsible for the Developer's obligations and with whom they would deal. A unilateral change in that relationship by the Developer's "Assignment", years after the Developer no longer had any financial interest in the land, essentially rewrites the contract represented by the Declaration and unfairly imposes upon the Homeowners a succession of "developers" with purported "rights", with whom they never agreed to deal. The resulting financial consequences to the Homeowners of that construction of the Declaration is unreasonable and underpins the South Carolina rule that a Developer's rights are deemed personal and extinguished when the Developer no longer has a financial interest at stake.[8]

This Court should grant Certiorari to review the Opinion of the Court of Appeals that finds that under the Declaration, McNeal is legally able to be Successor Developer and the Developer's rights can be exercised by both McNeal and Ratcliff.

III. The Court of Appeals erred in finding that under the Declaration, the "Subdivision" included portions of the "Property" that had not yet been subdivided into "Lots".

The lower court was asked to determine whether the undeveloped property was or was not part of the "Subdivision" as that term was used in the Declaration. The result of that analysis is the determination of whether owners of lots ultimately created from the undeveloped property are entitled to become Members of the Association and thereby entitled to use (and required to pay for) the amenities, particularly the waterfront amenities, that the Association owned. The resolution of this issue requires a careful analysis of the Declaration, which must be strictly

[8] The Court of Appeals' finding that the Homeowners have not "proved" that a successor developer can take the rights of a developer and disclaim its responsibilities is erroneous. That issue is one of law and not fact, and successor developers have been held liable for their predecessor's obligations. *See*: *Concerned Dunes W. Residents v. Georgia-Pacific Corp.*, 349 S.C. 251 (S.C. 2002).

construed. Because the Court of Appeals found the Declaration to be unambiguous, its the analysis in reviewing the lower court's Order should have been confined to the Declaration, itself, without resort to extrinsic evidence.

However, instead of analyzing the language of the Declaration, the Court of Appeals, merely affirmed the lower court's conclusion that the "property" was "already" a part of the "Subdivision". That conclusion not only begs the question presented, but is based upon the same extrinsic evidence improperly considered by the lower court to construe an unambiguous Declaration and is wholly inconsistent with the provisions of the Declaration which provide a specific mechanism for adding lots to the existing Subdivision.

The critical issue was not whether the undeveloped land was subject to the Declaration, which it definitely was, but whether the undeveloped land that had not yet been subdivided into Lots was a part of the "Subdivision" as that term was defined in the Declaration.

The lower court's Order[9], affirmed by the Court of Appeals, summarily concluded:

> "Wright's Point development is not confined to the properties within Phase I. I find that the development consists of the four parcels [B, C, D, and 1.7 acres] described in Exhibit "A" attached to the [Declaration] previously described herein."

(R.p.19).

The lower court apparently reasoned that, if the undeveloped land was subject to the Declaration, described on the official Plat as "Future Development",

[9] Without any reference to the applicable provisions of the Declaration, or identifying any ambiguity in it, the lower court relied upon the testimony of Porter and McNeal, that "Wrights Point was conceived, designed and developed as a "walking community" whereby property owners have access to all amenities and designated common areas, regardless of which phase of the development their properties may be located." (R. p. 23).

and depicted on the "Master Plan", then no further analysis was required to conclude that it was part of the Subdivision. That conclusion disregards the specific language of the Declaration.

The Declaration is clear that the "Wright's Point Subdivision" is described by the official "Plat", as amended from time to time. (¶ 1.18, Exhibit 20, R. p. 605) Only "Members" of the Association were permitted to have access to and enjoyment of the property and amenities owned by the Association. (R. p. 42). Membership in the Association is conferred only upon an "Owner". (R. p.43). The Declaration defines "Owner" as one with fee simple title to a "Lot". (R. p. 39). A "Lot" is defined as one of the lots shown on the official Plat. (R. p.39). The "Subdivision" is **not** all the property subject to the Declaration but **only** that part which had been subdivided into "Lots" on the official "Plat".

It is undisputed by Respondents that, until one month before trial, the Subdivision, as defined in the Declaration, consisted **only** of the 44 Lots as shown on the official Plat, as defined in the Declaration. (R. p. 607; R. p. 286, lines 8-24). However, pursuant to the Declaration, the Developer had the right "to develop and submit additional phases ....." to the Subdivision by taking certain specified steps outlined in the Declaration. (R. p. 41).

Consistent with these provisions of the Declaration, the Developer testified that, until a month before trial when the official Plat was purportedly amended, "the only owners within the development were the owners of the forty-four lots depicted on this official plat". (R. p. 294, lines 18-21). The Developer agreed that the owners of the remainder of the real estate subjected to the Declaration, undeveloped parcels B and D, depicted on the official Plat as "Phase II" and "Future Development", were not Members of the Association. (R. p. 291, line 16 – 292, line 4).

Accordingly, Developer, agreed both: (1) that the "Subdivision" was limited at any given point in time to the land that had been subdivided into Lots as shown on the official Plat and (2) that the only persons who were Members of the Association and entitled to use the amenities of the Association were the Owners of the Lots depicted on the official Plat.

Under the Declaration, **only** the "Developer" has the "right" to amend the official Plat and to "develop and submit additional phases" so as to create Lots in the Subdivision in addition to the 44 existing Lots. (R. p. 41). As previously set forth, when the Porters divested themselves of the undeveloped land, the Developer's personal "right" granted by the Declaration to "develop and submit" additional phases to the Subdivision was extinguished. Accordingly as of 2002, the right to amend the official Plat to add additional "Lots" and expand the number of "Members" in the Subdivision was extinguished and no future owner of the undeveloped land could create and incorporate additional Lots into the Subdivision.

Even if that right had not been extinguished, the evidence established that there has been no compliance with the explicit provisions of the Declaration for adding Lots to the Subdivision. The specific terms of the Declaration provide that the undeveloped land could be brought into the Subdivision and the Owners of those newly created lots become Members of the Association only through compliance with the "develop and submit" language of the Declaration.

In ¶2.03 of the Declaration, the Developer reserved the right to "develop and submit additional phases" from "the property which Developer has acquired from Lewis H. Wright et al and/or Mary P. Logan...". If undeveloped parcels B and

D were *already* a part of the Subdivision, there would have been no reason for the inclusion of this "develop and submit" language in ¶2.03 of the Declaration.

The language used in the Declaration clearly contemplates that if phases in addition to the 44 Lots are to be "submitted", they must first be "developed" [10] and then the inclusion documented by:

> . . .filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development.

(R. p. 41).

There was no evidence that any "plat signed by the Developer", other than the original one showing the 44 Lots, had ever been filed. In fact, the only amended plat filed concerning the undeveloped land was fled by Richard Ratcliff, who purchased the land from McNeal and who was not and has never contended to be the "Developer" as defined in the Declaration. (R. p. 289, line 1-17)[11].

The unambiguous provisions of the Declaration allowed the "Developer", and not some third party, to develop and submit additional Lots to the Subdivision and provided the mechanism by which it could be accomplished. The evidence demonstrated that there was no compliance with the specific requirements of the Declaration to add additional Lots to the existing Subdivision.

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[10] "Development" contemplates the platting of lots and installation of the infrastructure necessary to support a residential or commercial community not merely ownership of raw land.

[11] Neither Porter, the original Developer, nor McNeal, the purported successor developer, had any interest in the 20 lots in Phase II that the Ratcliff purported to "develop and submit". Ratcliff was not the Developer or a successor developer, and thus had no right under the Covenants to "develop and submit" additional "Lots" to the development or to make the owners of such lots "Members" of the Association. Porter testified that he had no responsibility for any of the expenses of Phase II and no legal right to the income or profits of Phase II (Porter, R. p. 323, lines17 - 21; Porter, R. p. 324, lines 7 - 13).

The Homeowners respectfully request that the Court issue a Writ of Certiorari to review the Court of Appeals Opinion that the undeveloped property was already part of the Subdivision as defined in the Declaration.

IV. The Court of Appeals erred in failing to apply the rule of law that, after the time reasonably necessary to protect its financial interest in a development, a developer has a duty to transfer control of the affairs of the Subdivision to the homeowners whose financial interests are at stake.

The Court of Appeals failed to properly address the Homeowners' argument that when the Developer no longer had any financial interest in the subdivision, his right to control the affairs of the subdivision and the Association that owns the common areas terminates in favor of the property owners. By 2002, neither of the Porters, the purported original developers, personally had any financial interest in the either the 44 Lots already platted or the undeveloped property which had been conveyed to McNeal by that time. When a developer is no longer at risk, financially, he must surrender control to the owners, who then have the financial risk associated with the ownership of property.

> (2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

Restatement (Third) of Property: Servitudes, § 6.19 (2005).

The principle that a developer's rights terminate when he no longer has a financial interest in the development has been recognized in South Carolina and other jurisdictions in a variety of contexts. *See: Queen's Grant II Horizontal Property Regime v. Greenwood Development* Corp., 368 SC 342, 362-363, 628 SE 2d 902, 914 (Ct. App. 2006) [when a subdivision developer is divested of all interest in the subdivision, a reserved right to amend restrictive covenants is

extinguished]; *Orange Beach Marina, Inc. v. Warner*, 500 So. 2d 1068 (Ala. 1986) [purported amendment to covenants by developer ineffective where developer had no continuing interest in the land]. *Smith v. First Savings of Louisiana, FSA*, 575 So. 2d 1033 (Ala. 1991) [when developer divested himself of any remaining proprietary or pecuniary interest in the development, homeowners allowed to amend covenants and remove him as the sole member of the architectural control committee]; *Beaver Lake Ass'n. v. Beaver Lake Corp.*, 264 N.W. 2d 871 (Neb. 1978) [by-law provision allowing the developer to assert control of association board of directors nullified after developer divested itself of unsold lots].

In its Opinion, the Court of Appeals allowed continuing control of both the Association, which owned and was responsible for maintaining all of the common areas in the 44 Lot development, as well as the architectural review board in the subdivision, by a Developer who personally had no financial interest in any property within that subdivision and by a purported successor developer who had no financial interest in the Subdivision, had not validly acquired any of the Developer's rights, and specifically disclaimed any responsibility to the owners of the 44 Lots for the existing obligations of the original Developer. In reaching its conclusion, the Court of Appeals did not even address the rule of the Restatement or any of the authorities cited above. Because the Opinion sanctions a breach of the duty to turn over control and conflicts with the applicable precedent, the Homeowners respectfully request that the Court issue its Writ of Certiorari to review the Opinion in that regard.

V. The Court of Appeals erred when it failed to apply the basic principles of contract construction and simultaneously found the Declaration to be unambiguous but affirmed the lower court's reliance on extrinsic evidence to construe and interpret them.

In its Opinion, the Court of Appeals found that the lower court "properly interpreted the Declarations in accordance with the rules of construction" and determined that it was unambiguous[12]. The Court of Appeals then found that "While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties."

With all due respect to the Court of Appeals, that aspect of its Opinion is nonsensical. The rights of the parties stem from the Declaration. Those rights, in an unambiguous document, are determined from the document itself, and not from extrinsic evidence. The consideration of extrinsic evidence was error and this Court of Appeals should have rejected the lower court's reliance upon such evidence.

The assertion by the Court of Appeals in its Opinion that the lower court did not use extrinsic evidence "to ascertain the intention of the parties" is plainly wrong. On the issue of who was the "Developer", the lower court relied upon the testimony of Anthony Porter as to his intent, as well as on the "Supplemental Declaration", which was signed by the Developer years after conveying the land and which purported to modify covenants on land that the Developer did not own. (R. p. 21, 22). After first finding that the lower court had construed the Declaration as unambiguous, the Court of Appeals then affirmed the conclusion of the lower court with respect to the definition of "Developer" on the basis of evidence wholly

[12] At no point in its Order did the circuit court actually make any finding with respect to the threshold inquiry of whether the Declaration, or any aspect of it, was or was not ambiguous. The Court of Appeals supplies that omission and finds "where the language of the contracts was clear and unambiguous" that the circuit court must have considered the Declaration unambiguous. The position of the Respondents also was that the Declaration was unambiguous. (Respondents/Appellants Final Brief, p. 17).

extrinsic to the Declaration. As recited by the Court of Appeals, the lower court relied upon the testimony of Anthony Porter that it was his "intention" that Jimmy Porter be included within the definition of "Developer".

Under Article 1, ¶ 1.12, the definition of Developer is set forth:

> "Developer" *shall mean and refer to (a) Anthony R. Porter.....*

(R. p. 39)

No extrinsic evidence could be considered to vary or contradict this clear definition and nothing within the non-operative sections of the Declaration can change that definition. The Court of Appeals erred when it affirmed the lower court that found otherwise.

The lower court also relied upon the testimony of Anthony Porter with respect to his intent on the issue of control of the Association, rather than confining its analysis to the provisions of the Declaration itself. (R. p. 15, 16). The lower court relied upon "documentary and testimonial evidence" to resolve the issue of whether, under the Declaration, additional lots could be annexed to the existing subdivision, rather than limiting the analysis to the purportedly unambiguous Declaration. (R. p. 19). Rather than interpreting the Declaration with respect to who were "Members" of the "Association" and thus entitled to the use of amenities owned by the Association, even though the Declaration is clear on that point, the lower court relied upon the testimony of Porter and McNeal as to their "intention". (R. p. 23).

There is no legal difference between using extrinsic evidence to determine the rights of the parties pursuant to the Declaration and using such evidence to determine intent. Any use of extrinsic evidence to interpret rights under an unambiguous Declaration violates the rules of construction and is error.

Since the Court of Appeals found the Declaration unambiguous, it cannot affirm the lower court's construction of it based on extrinsic evidence. *South Carolina Department of Natural Resources v. Town of McClellanville*, 345 S. C. 617, 623, 550 S. E. 2d 299, 302-303 (2001).

The Homeowners respectfully request that the Court grant a Writ of Certiorari to properly apply the rules of construction required by this Court's precedent, to construe the Declaration on its face, without reference to extrinsic evidence, and to construe any ambiguity in favor of the Homeowners in accordance with this Court's rules of construction.

CONCLUSION

The Opinion of the Court of Appeals conflicts with the precedent of this Court and with the well established rule of law that, after the "Developer" conveyed his interest in the property to which the Declaration applied, the personal rights reserved to the Developer in the Declaration were extinguished and could no longer be exercised by any subsequent owner of the land. Despite the finding that the Declaration was unambiguous, the Court of Appeals approved the reliance of the lower court on clearly extrinsic evidence in deciding the issues presented to it and ignored the clear language of the Declaration that should have protected the Homeowners from dealing with a succession of developers claiming the rights, but not the obligations, of the original Developer.

For all of the reasons set forth herein, the Petitioners respectfully request that this Court issue a Writ of Certiorari to review the issues presented herein, and, upon review, reverse the Opinion of the Court of Appeals and the Order of the lower court as to those issues.

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