

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Charles B. Simmons, Jr, Master In Equity Judge

Case No. 2016-CP-23-05898

Joseph Edward McMullen,

Appellant,

v.


Terra Oaks Architectural  
Committee, Paola Rogers,  
Dwain Cook and John Simpson  
as putative members of the  
Terra Oaks Architectural  
Committee,

Respondent.

NOTICE OF APPEAL

Joseph Edward McMullen appeals the Order of Judgment of the Honorable Charles B. Simmons, Jr. dated February 2, 2018. A copy of said Order of Judgment is attached hereto and incorporated herewith.

February 22, 2018



Robert C. Childs, III, #1218  
Childs Law Firm LLC  
2100 Poinsett Highway, Suite D  
Greenville, SC 29609  
(864) 242-9997  
Fax (864) 242-9914  
Attorney for Appellant

J. Falkner Wilkes  
114 Whitsett Street  
Greenville, SC 29601

(864) 421-4618  
Fax (864)271-6035  
Attorney for Appellant

Other Counsel of Record:

Ralph Gleaton  
935 South Main Street  
Suite 203  
Greenville, SC 29601  
(864) 250-9780  
Attorney for Respondent

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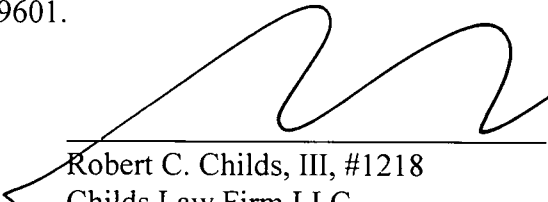
Terra Oaks Architectural  
Committee, Paola Rogers,  
Dwain Cook and John Simpson  
as putative members of the  
Terra Oaks Architectural  
Committee,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Terra Oaks Architectural Committee, Paola Rogers, Dwain Cook and John Simpson as putative members of the Terra Oaks Architectural Committee by depositing a copy of it in the United States Mail, postage prepaid, on February 22, 2018, addressed to their attorney of record, Ralph Gleaton, 935 South Main Street, Suite 203, Greenville, South Carolina 29601.

February 22, 2018



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Childs Law Firm LLC  
2100 Poinsett Highway, Suite D  
Greenville, SC 29609  
(864) 242-9997  
Fax (864) 242-9914  
Attorney for Appellant

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Greenville, SC 29601  
(864) 421-4618  
Fax (864)271-6035  
Attorney for Appellant

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Joseph Edward McMullen,  
Plaintiff,

Case No.: 2016-CP-23-05898

**ORDER OF JUDGMENT**

v.

Terra Oaks Architectural Committee, Paola  
Rogers, Dwain Cook and John Simpson as  
putative members of the Terra Oaks  
Architectural Committee,

Defendants,

This case involves Plaintiff's request for approval of the Terra Oaks Architectural Committee ("TOAC") to subdivide his property. Pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, the parties in the above-entitled case have consented to reference of this action to me to make appropriate findings of fact and conclusions of law, with authority to enter final judgment in the case.

I conducted a trial on the matter on January 10, 2018. Plaintiff was represented by Robert C. Childs, III of the Childs Law Firm, LLC and Defendants were represented by Ralph Gleaton of Gleaton Wyatt, PA. Based on the evidence presented at trial I find and conclude as follows:

Plaintiff brought this case alleging five causes of action based on Plaintiff's inability to obtain written permission to subdivide land subject to restrictive covenants. The causes of action are captioned as "Authority to Deny," "Restriction on Alienation of Property," "Restrictive Covenants Superseded by Zoning," "Erroneous Decision," and "Estoppel, Waiver, Laches." The

Honorable William H. Seals, Jr. dismissed the Plaintiff's claims for Restriction on Alienation of Property and for Estoppel, Waiver and Laches pursuant to the motion for summary judgment by Form 4 Order on May 25, 2017. Therefore those causes of action are not before this court.

The gravamen of the Plaintiff's complaint is that the TOAC never met to discuss and make a decision on his proposal to subdivide his land and that if the TOAC did meet, it did not act timely and/or abused its discretion. As a remedy, the Plaintiff requested that this Court order approval of his request to subdivide his land because sending the matter back to the TOAC would not be a legitimate resolution because of the dysfunction of the TOAC. The gravamen of the Defendants' defense is that no action of the TOAC is necessary because Plaintiff's request was to subdivide land and not to build on land and that if action was required, it did act properly and timely.

Terra Oaks Subdivision is located in Greenville County and is subject to certain Restrictive Covenants ("Covenants"). Those covenants were introduced at trial and are a part of the record. Plaintiff, Defendant John Simpson and Defendant Paola Rogers were the members of the TOAC after December 2008. Plaintiff brought up the issue of subdivision of his property informally in May 2015 in that he briefly discussed the matter with both Ms. Rogers and Mr. Simpson and Plaintiff and Mr. Simpson walked Plaintiff's property and discussed Plaintiff's plan for an hour or more. Ms. Rogers sent an email to Plaintiff's e-mail address on May 13, 2015 saying that she and Mr. Simpson had discussed the subdivision of his property and the she and Mr. Simpson could not agree to allow the subdivision. Plaintiff did not bring up the issue again until January 8, 2016 when he sent a written proposal for the subdivision of his property by e-mail to Mr. Simpson and Ms. Rogers. This proposal did not request or demand a meeting but instead only attached his written proposal with signature blocks for the members of the TOAC to

sign the proposal. Ms. Rogers responded to the January 8, 2016 written proposal on January 21, 2106 saying again that the TOAC did not approve the subdivision of Plaintiff's property. This informal process is in keeping with the prior actions of the TOAC, on which Plaintiff was an active member. Specifically, there was a meeting regarding a fence issue in the neighborhood that was not formally notice or called. There was an issue with Ms. Rogers keeping chickens on her property that was informally handled by Plaintiff bringing the issue up with Mr. Simpson and Mr. Simpson informing Ms. Rogers that she would have to remove the chickens. Significantly, in 2009 Plaintiff had the TOAC approve of subdividing another lot in Terra Oaks lot he had purchased. Plaintiff accomplished this by, after consulting a lawyer, having a document captioned "Certification" drafted allowing the subdivision and having it signed by all members of the TOAC. Though the "Certification" recites a meeting of the TOAC, Plaintiff admits that no such meeting was called or held, only that the document was signed. Both Mr. Simpson and Ms. Rogers testified that they were unaware of the previous subdivision of land or "Certification" prior to litigation and did not sign the Certification. I make no findings or conclusions based on Ms. Rogers and Mr. Simpson's testimony regarding the validity of this particular "Certification." Taking Plaintiff's testimony as true, it is evidence that the TOAC had no formal procedure for handling matters related to subdivision of property and had acted informally in the past. Therefore I find and conclude that the informal procedure used by the TOAC in this matter is consistent with its prior practices and that the Plaintiff has failed to prove that the TOAC failed to act appropriately or timely on his request.

The Covenants, filed in August of 1980, are inartfully drafted. Section IV of the Covenants creates the TOAC. Section III Paragraph 4 of the Covenants states that "[n]o lot shall be recut without first obtaining the written permission of the Architectural Committee . . ."

However, Section IV creates the TOAC and deals with what may be built on lots in Terra Oaks. Section IV Paragraph 1. states that all members of the TOAC are a quorum and that a majority vote is required for the transaction of any business. Section IV Paragraph 2. states that “[n]o improvements or buildings shall be erected, placed or altered . . .” without prior written approval of the TOAC further stating that “building plans” and “exterior designs” must be submitted in writing to the TOAC. Further it states that if the TOAC fails to “approve or disapprove such designs and plans within fifteen (15) days” then the designs and plans are deemed approved. Restrictive covenants are contractual in nature. *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). "The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract]." *Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App.2003). "If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." *Id.* at 30-31, 586 S.E.2d at 864. Though the Covenants are inartfully drafted, reading the covenants as a whole I find and conclude that the Covenants intend to treat additional subdivision of lots differently from the erection, placement and alteration of improvements to lots. I find and conclude that in order for Plaintiff to be able to subdivide his property he must obtain written permission of the TOAC, as he did in 2008. I therefore find and conclude that Plaintiff failed to prove that the TOAC was required to act and that Defendants did prove that Plaintiff may not subdivide his property pursuant to the covenants.

Further, Plaintiff's request for relief from this Court is that it grant the proposal to subdivide his property that he submitted to Mr. Simpson and Ms. Rogers on January 8, 2016. That proposal was admitted into evidence. Plaintiff testified that no other written proposal was

ever submitted to the TOAC. That proposal, in addition to allowing for one of the lots he owns in Terra Oaks to be subdivided, also states that another lot he owns in Terra Oaks “is not subject to the covenants of Terra Oaks Subdivision” proposing to attach new covenants to that lot that would not allow mobile homes or “any commercial activity.” The Covenants require a “vote of the majority of the then owners of the lots and tracts affected” to modify or change the Covenants. I therefore find and conclude that the TOAC did not have authority to grant the Plaintiff’s proposal. I further find and conclude that no testimony or evidence for modifying the Covenants was presented at trial and that this Court does not have authority to modify or change the Covenants. Therefore I find and conclude that Plaintiff has failed to request relief that this Court may grant.

No testimony or evidence was presented regarding Plaintiff’s cause of action regarding zoning and therefore no evidence of the Covenants being superseded by zoning. However had any such testimony been presented, “when restrictive covenants and zoning ordinances are in conflict, the more restrictive of the two prevails.” *Byrd v. City of North Augusta*, 261 S.C. 591, 201 S.E.2d 744 (1974). A zoning law cannot constitutionally relieve land within the district covered by it from lawful restrictions affecting its use, imposed by covenants. *Inabinet v. Boone*, 262 S.C. 81, 202 S.E.2d 643 (1974). I therefore find and conclude that Plaintiff failed to prove that the Covenants have been superseded by zoning.

Regarding Plaintiff’s cause of action for Restriction on Alienation of Property, Plaintiff did present testimony and evidence that he contracted to sell his lot as subdivided after the May 13, 2015 email from Ms. Rogers stating that she and Mr. Simpson would not agree to subdivide his lot. The testimony is further that the contract failed because Plaintiff was not allowed to subdivide his lot. However, Plaintiff failed to present testimony or evidence that shows that

Defendants have in any way restricted him from selling his property. Not all restrictions on the alienation of property are invalid, only unreasonable restrictions are. "Under South Carolina common law, any *unreasonable* limitation upon the power of alienation is against public policy and must be construed as having no force and effect." *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984). Only "[a]n *absolute* restraint upon the free and unlimited power of alienation, annexed to a grant or devise in fee simple is void." *Id.* I therefore find and conclude that Plaintiff failed to prove that Defendants unreasonably restricted the alienation of his property.

Based on the above findings of fact and conclusions of law this Court finds in favor of the Defendants and against the Plaintiff on all causes of action before this Court.

NOW THEREFORE IT IS ORDERED that the Plaintiff's Complaint be dismissed.

AND IT IS SO ORDERED!

JUDGE'S ELECTRONIC SIGNATURE TO FOLLOW



Greenville Common Pleas

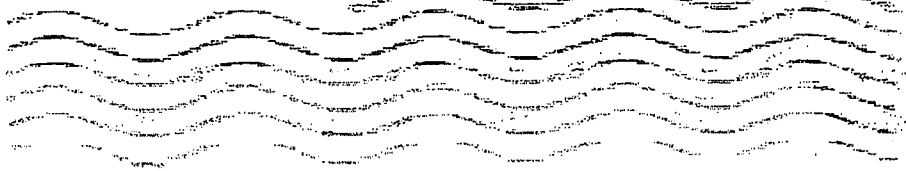
**Case Caption:** Joseph Edward McMullen vs. Terra Oaks Architectural Committee ,  
defendant, et al  
**Case Number:** 2016CP2305898  
**Type:** Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Greenville 29609 2995

POSTAGE WILL BE PAID BY ADDRESSEE



Childs Law Firm, LLC  
2100 Pinsett Highway  
Suite D  
Greenville, SC 29609

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211