

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Master-in-Equity

Maite Murphy, Master-in-Equity

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Case No. 2009-CP-18-3315

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Larry E. Kinard,

Appellant,

v.

Douglas S. Richardson and Julie D. Richardson,

Respondents.

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REPLY BRIEF OF APPELLANT

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JUL 05 2013

SC Court of Appeals

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## **Argument in Reply**

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

### **I. Commercial lease and admissions contrary to residential use**

How do Respondents reply to the gravamen of Appellant's appeal, that the commercial leasing of the entirety of Tract "B" for horse grazing, riding and customer parking violates the the requirement that "lots are known and designated and shall be used as single-family residential building lots"? While acknowledging that they "leased Tract B," with income and expenses being "run through" their "business" Greener Pastures LLC, they seek to tuck the LLC's business into the covenant horse-allowance word "keep" (Brief of Respondents Pg. 7), while all but ignoring the residential use requirement.

Despite having admitted at trial to having leased one hundred percent of Tract B for grazing (R. p. 255, line 15-21), and to not using it for residential purposes (R. p. 309, lines 15-17), Respondents' brief nakedly asserts that they: "continue to live on the property" (Brief of Respondents Pg. 18); "reside on the property comprising the original Tract L" (Id.); and that they use it as a "side yard" (Brief of Respondents Pg 19-20 and 22).

Respondent's four references to tax benefits do not alter what their brief fails to

once mention, the customer and horse consequences their commercial leases have inflicted upon their neighbor across the street.

Nor do diversions such as three times referencing Kinard's settlement with the Nguyens (Brief of Respondents Pgs. 2, 7 and 25), whose land was granted agricultural rights in 1992 (R. pp. 396-397) and is clearly not part of Senrab Farms subdivision, explain customer vehicles parking upon Richardsons' Tract "B" (R. p. 256, lines 6-14, and Pl's Ex. 19, 20 and 21 at R. pp. 372-373). Nor does labeling Kinard's use of his consolidated side lot (R. p. 135, lines 7-11, and R. p. 143, lines 9-23) as "agricultural purposes" (Brief of Respondents Pg. 5) un-consolidate the lot, generate any customer traffic, or make it any less of a yard than any residential yard upon which fruit trees grow.

Respondents rely upon South Carolina Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2<sup>nd</sup> 299 (2001) in asserting that as with the word "remain," that the phrase "residential building lots" becomes clear when that particular covenant, or the covenants in their entirety, are construed as a whole. Appellant agrees.

Both the phrase "lots are known and designated and shall be used as single-family residential building lots," and the nature of covenants when taken as a whole, are highly protective of the residential character and quality of life within Senrab Farms subdivision (see Pl's. Ex.2 references at R. pp. 326-336 to "shall be," "single-family," "residential," "dwellings," "completed within nine (9) months after" commencing construction, "side yard," "porches," "no noxious or offensive activity shall be carried on

upon any lot," requirement to maintain the "front yard" in a clean and groomed condition," and a shared "subdivision" "Road Maintenance Assessment").

By Respondents' logic, because the original covenants do not forbid leasing, and covenant paragraph 13(f) allows in-ground pools, that they are entitled to build an in-ground pool on Tract B, and then to lease it to a single individual, who may then charge the general public to swim in it.

The Court in South Carolina Department of Natural Resources held that a new use restriction, a municipal use fee, did not violate the original covenant's restriction that the boat landing must "remain" available to the public. Id., 345 S.C. 623-624, 550 S.E.2<sup>nd</sup> at 302-303 (2001). Here, Kinard simply seeks enforcement of an unambiguous covenant requiring that lot use within Senrab Farms subdivision "remain" residential, that its residential character not be permanently destroyed.

## **II. Respondents' Amended Answer neither contested covenant applicability nor Appellant's standing**

In apparent support of their failure to affirmatively plead lack of privity or standing, Respondents twice assert that their Amended Answer both expressly "denied the applicability of the Covenants and Restrictions to their property, and contested Appellant's ability to enforce" them (Brief of Respondents Pg. 2 & Pg. 14). These unqualified assertions are not supported by the pleadings or references cited.

Cited Amended Complaint allegation 20 identified and asserted application of both the original and amended restrictions to Tract L (R. pp. 33-91, at p. 38). In

response, Amended Answer paragraph 14 admits the authenticity of both sets of restrictions, while only denying any allegations “that deviate” from them or “contrary to the clear language of those documents” (Amended Answer, R. pp. 102-111, at p. 104).

Cited Amended Complaint allegation 113 relates only to the sub-issue of the number of horses permitted by the covenants on Tract B after subdivision (R. pp. 33-91, at p. 56). Even there, Respondents' denial was rooted in the assertion that “Paragraph 113 calls for a legal conclusion to which Defendants Richardson are not required to respond but to the extent they are, Defendants deny the same and demand strict proof” (Amended Answer, R. pp. 102-111, at p. 110).

### **III. Respondents' extremely broad reading of summary judgment order**

Respondents' brief seven times raises Judge Dixon's summary judgment order in asserting that it determined everything from the master's reasoning (Brief of Respondents Pg 8), to ruling that the amendment “was a valid restriction” (Brief of Respondents Pg 10), to ruling that the amendment “was original in that it did not change an existing restriction” (Brief of Respondents Pg 16).

Clearly, the focus of Judge Dixon's summary judgment order was that restrictive covenants, including these, run with the land, even after subdivision of original Tract L. While expressly asked to rule on the validity of the amendments in light of the recently discovered fact that the Barnes owned none of then restricted lots at the time of amendment, Judge Dixon declined to do so. Whether it was because the alleged invalidity had not been pled is unclear. Nor did he rule upon the operation or effect of

any specific restriction. Instead, he expressly reserved for trial resolution of conflicts between the covenants.

At trial, Kinard moved to conform the pleadings to the evidence in "that the amended covenants, themselves, didn't have the required votes to amend" (R. p. 265, line 9 – p. 171. line 7). Richardson's counsel's response to the motion was that "we don't object to his amending the pleadings ..." "We have no objection to that motion" (R. p. 267, lines 9-19). Unlike the summary judgment judge, the master expressly ruled that the Barnes "could not amend the original Restrictive Covenants that apply to the original six (6) lots: (Order, R. pp. 3-9, at p. 5, last ¶).

### CONCLUSION

Respectfully, this Court should reverse the judgment of the Master-in-Equity, declare Defendants in breach, balance the equities and enjoin the violations.

Respectfully submitted,

June 21, 2013

  
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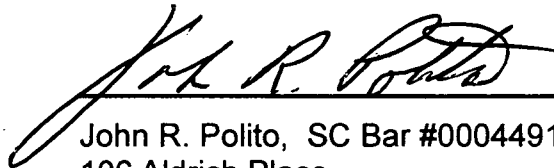
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**CERTIFICATE OF COUNSEL**  
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After having incorrectly served and filed Reply Briefs having red covers instead of gray, the undersigned certifies that the corrected Reply Brief of Appellant complies with the requirements of Rule 211(b), SCACR.



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July 2nd, 2013



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**PROOF OF SERVICE**

Appellant mistakenly attached red instead of a gray cover to his Reply Brief, which was served upon Respondents by U.S. Mail on June 14, 2013. I hereby certify that I have this 2nd day of July, 2013 corrected this error by serving a copy of the Reply Brief of Appellant having a gray cover upon Respondents Douglas S. Richardson and Julie D. Richardson by depositing the same in the United States Mail, postage prepaid, addressed to Respondents' attorney of record at the following address:

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July 2nd, 2013

  
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