

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

RECORD ON APPEAL
VOLUME I

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Attorneys for Respondent

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SC Court of Appeals

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Attorneys for Respondent

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004 CP-2075

John Musick

Thomas L. Dicks & Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Thomas C. Brittain, 4614 Oleander Dr., MB, SC 29577

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Final Order previously entered.

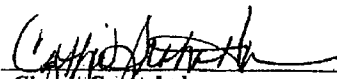
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge
Master in Equity

3073

Judge Code

July 17, 2012

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

John Musick

Plaintiff,

vs.

Thomas L. Dicks and Robert E. Dicks, Jr.

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2004-CP-26-2075

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION**

FILED
2011 JUL 18 PM 2:45
HARRIS HUGGINS-WARD
CLERK OF COURT
HARRIS COUNTY

1
CH
This Court issued a Final Order on August 9, 2011. Thereafter, the Defendants, through counsel, timely moved for reconsideration and to amend pursuant to R52(b) and 59(c), SCRPC. The Court has reviewed all submissions and finds that it properly addressed all issues and ruled on them in its final order. However, Defendants have excepted to the Court's finding and conclusion that the Dicks Property had always been one piece of property and had never been subdivided, at least until the Defendants purchased the property and began to subdivide it. The property had always been one lot, as Blocks 28 and 29. Moreover, the Court further found and concluded that the Dicks Property was sold as one lot throughout and should continue to be one lot, not subdivided.

Defendants assert in their motion for reconsideration that the 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots and that Plaintiff John Musick so admitted in his discovery responses. The 1955 Plat did show a potential subdivision of the property. According to the 1972 Order, the original "grantors", Carmen F. Ward or Gene F. Lewis, had the right to change the lot lines. Nevertheless, the property was never physically subdivided. Subsequently, the property was conveyed as one lot from Carmen Ward to the Meeses and from the Meeses to Thomas Dicks as one 2.67 acre-lot. Until Thomas Dicks conveyed the property to his brother, Robert Dicks, and himself, (i.e., the Defendants), and they began plans to subdivide it, the Court's records show that the property

contained only one tax number (TMS #186-14-05-001) as a 2.67 acre-lot. Once the Defendants physically subdivided the property into seven lots, the lots then received seven individual tax numbers.

Based upon the above,

IT IS HEREBY ORDERED, the Motion for Reconsideration and/or to Amend is denied.

AND IT IS SO ORDERED.


Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 17, 2012

2
GTH

FORM 4**STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS****JUDGMENT IN A CIVIL CASE**

CASE NO. 2004-CP-26-2075_

John Musick

Thomas L. Dicks and Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:**JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.**DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.**ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other**ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other**DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:☒ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Dated at Conway, South Carolina, this 29th day of July, 2011.


PRESIDING JUDGE

This judgment was entered on the 20th day of May 2011, and a copy mailed first class this 20th day of May, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas C. Brittain
4614 Oleander Drive
Myrtle Beach, SC 29577
ATTORNEY(S) FOR PLAINTIFFDemetri K. Koutrakos
Post Office Box 1390
Columbia, SC 29202-1390

ATTORNEY(S) FOR DEFENDANT

CLERK OF COURT
CLANIE HUGGINS-WARD
2011 AUG - 9 AM 9:14
RECEIVED

CLERK OF COURT

COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick

CASE NO.: 2004-CP-26-2075

Plaintiff,

vs.

FINAL ORDER

Thomas L. Dicks and Robert E. Dicks, Jr.

Defendants.

2011 AUG - 9 AM 9:14
CLERK OF COURT
SECURITY

On April 12, 2011, the Plaintiff, represented by Thomas C. Brittain, Esq., and the Defendants represented by Demetri K. Koutrakos, Esq., appeared before the Court and presented evidence in the above referenced matter. The Court finds as follows:

FACTS AND FINDINGS

John Musick, Plaintiff in this case, a retired United States Air Force Major, purchased his lot in Long Bay Subdivision many years ago and has lived there for thirteen (13) years.

John Musick lives directly behind the Defendants property; a pond separates the two (2) lots. The Dicks property has always been one piece of property, has never been subdivided. It has always been one lot, as Blocks 28 and 29.

In 1972, Judge WinstonVaught issued an Order and concluded in the order that the 1958 restrictions which applied to Long Bay Subdivision applied also to Blocks 28 and 29, subject only to the "Grantor's" rights to change boundary lines and building lines as to any unsold lots. Based on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced, the language "Grantor" in referring to any unsold lots is Gene F. Lewis and/or Carmen F. Ward, as Co-Executors and Co-Trustees under the Last Will and Testament of Frederick W. Lewis, and the Court so finds.

2004-CP-26-2075

On June 1, 1972, Gene F. Lewis and Carmen F. Ward, under the Last Will and Testament of Frederick W. Lewis, the successors entitled to the unsold property in Long Bay Estates, brought a declaratory judgment action against all of the lot owners in Long Bay Estates. One of the issues in the suit was to determine whether a restriction against subdividing lots applied to Blocks 28, 29, 30, 31, 32 and 33.

Judge Winston Vaught, the then Master in Equity, issued a Master's Report on November 21, 1972, ruling that based on testimony, stipulations of counsel appearing for all parties and documentary evidence, (including records of deeds and maps,) the restrictions did apply to Blocks 28, 29, 30, 31, 32 and 33, (referencing the restrictive covenants recorded in Plat Book 25 at Page 22, Horry County records).

2
CH
In the 1972 Order, under Conclusions of Law as to the Lewis Estate Lands, Judge Vaught stated that "In like manner the remaining portions of "old" Blocks 28 and 29 are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. "The restrictions uniformly used in the area and the declaration recorded in Plat Book 25 at page 22, Horry County records, reserved to the Grantor the right to change boundary lines and building lines as to any unsold lots in any event." (emphasis added)

Judge Vaught found that this stipulation and order were equitable and fair and he upheld the order and stipulation.

It is of note that these areas were indicated on the map as "residential" in the copy of the map attached to the 1972 Order.

It is the finding of the Court that Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change boundary lines or building lines, that right being reserved to the original "Grantor".

Thereafter, Blocks 28 and 29 were sold by Carmen F. Ward to Leigh Ammons Meese and David Meese on September 2, 1997 for one hundred forty five thousand (\$145,000.00) dollars, as 1 lot. (The legal description refers to 2.67 acres (more or less) depicted on that certain survey dated July 24, 1997 prepared for David Meese and Leigh A. Meese by Culler Land Surveying Co., Inc. which was recorded on September 4, 1997). The Culler survey shows 1 tract of land, not subdivided.

It is further found that Carmen F. Ward, grantor, did not subdivide Blocks 28 and 29, which was her right as set out in Judge Vaught's 1972 order.

3
QHT
Attorney James F. Dusenbury, Jr., was attorney of record representing the Meeses when Mr. and Mrs. Meese purchased Blocks 28 and 29. His testimony was that although he did not find Judge Vaught's 1972 order in the chain of title, he and the Meeses both knew there were restrictions on the Long Bay Estates property, but he was not sure if they applied to Blocks 28 and 29. However, Attorney Dusenbury testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Thomas Dicks when he first purchased the property. In fact, he had Mr. Thomas Dicks sign a stand-alone addendum when he signed the contract to purchase.

Ms. Leigh Ammons Meese, one of the owners from whom Thomas Dicks purchased Blocks 28 and 29, is a South Carolina attorney who never practiced real estate law. She testified that her father and uncle were involved in another piece of property in Long Bay Estates and had been involved in an earlier lawsuit which dealt with dividing other lots in the Long Bay Estates

subdivision. She also testified that she was vaguely aware of the 1972 order which held that the restrictions against subdividing applied to Blocks 28 and 29. She testified that she was not sure whether the property could have been subdivided, although at some point she became aware that there was an issue as to whether the property could be subdivided. She was not sure when she realized there was such an issue. Her husband, David Meese, not an attorney, testified that he was not nearly as involved with the property as was Mrs. Meese. Mr. and Mrs. Meese intended to build a house on the one lot, so whether or not it could be subdivided made very little difference to Mr. Meese. Mr. Meese did testify that at some point he believed he had an option to subdivide the two lots, however. Nevertheless, the fact that some restrictive covenants applied to Blocks 28 and 29, the property he and his wife previously owned, did sound familiar to him.

4
GHI
Defendant Thomas Dicks was aware of the real estate in Long Bay Estates because he had been a life guard in the area when he was younger and had visited his aunt and uncle who lived in the area. He also sold real estate for a local real estate company. He noticed the real estate (owned by the Meeses), found out who owned it, called Mr. and Mrs. Meese and made an offer. When Mr. Meese asked Mr. Dicks why he wanted the property, Mr. Dicks responded that he "wanted to build a house on the property to live there". Mr. Meese discussed Mr. Dicks' proposition with his wife and then called Mr. Dicks back and told him that they would sell him the property. Mr. Dicks purchased the property as one lot for one hundred seventy five thousand (\$175,000.00) dollars on May 14, 2003. His deed refers to the Culler Survey showing one lot of 2.67 acres.

Mr. Dicks stated he then discovered there was a possibility that the property could be subdivided. When he researched the issue, he never mentioned to the Meeses that he was contemplating subdividing the property. Mr. Dicks, thereafter, surveyed the property, had lot

lines drawn for seven lots, and conveyed Lots 1, 2 and 3 to his brother, Robert Dicks on May 15, 2003, for eighty seven thousand five hundred (\$87,500.00) dollars. The majority of Blocks 28 and 29 is wetlands, (See Defense Exhibit 8) which makes this division somewhat impractical.

Mr. Wayne Mumford, a member of the South Carolina and Horry County Bar Associations was the closing attorney for Mr. Thomas Dicks when he purchased the property from Mr. and Mrs. Meese in 2003. Although Mr. Mumford testified that he did not find Judge Vaught's 1972 order in the chain of title, (the order that applied the residential restrictions against subdividing to Blocks 28 and 29,) he had actual notice of the order because he had a copy of it before closing. He knew there was an issue as to whether or not the property could be subdivided and so advised his client, Mr. Dicks, although he believed there was a chance it could be subdivided. (Nevertheless, the deed that Mr. Dicks received refers to the Culler Survey, which shows only 1 lot of 2.67 acres. It does not show any subdivided property).

5
GHI
The Court had an opportunity to judge the credibility of the witnesses. The Court finds that the Messes had notice that Blocks 28 and 29 were subject to the restrictions against subdivision, or at least had knowledge that they most likely were subject to the restrictions. Leigh Meese testified that she was aware of the 1972 order, if only vaguely so. Whether the property could have been subdivided was not important to Mr. or Mrs. Meese, because they did not plan to subdivide the property, but rather intended to build a house and live there.

Mr. Thomas Dicks told them the same thing when he purchased the property. He told David Meese that he intended to purchase the property and build a house to live there.

The Court does not find that Mr. or Mrs. Meese or Mr. Thomas Dicks had any intention of subdividing the property until Mr. Thomas Dicks went to the court house, after deciding to purchase the property, and found there may be an issue concerning subdivision. The Court is

convinced that Leigh Meese was aware of the 1972 order that held Blocks 28 and 29 were subject to the restrictions against subdivision, except that the "Grantor" Carmen Ward had a right to change the lot lines.

CONCLUSIONS OF THE COURT

Based upon the forgoing, the Court finds that Mr. and Mrs. Meese were not bona fide purchasers for value without notice of the restrictions against subdividing.

The Shelter Rule does not provide Mr. Thomas Dicks or Mr. Robert Dicks any freedom to subdivide the lot.

It is indisputable that Mr. Dicks was aware of the 1972 order.

Mr. Thomas Dicks and Mr. Robert Dicks, who had notice of the 1972 order, cannot take "shelter" of Mr. and Mrs. Meese, their sellers, who were put on notice of the 1972 order. *Liberty Loan Corporation of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Court of Appeals 1984) is therefore inapplicable to the facts here.

Leigh Meese, a South Carolina attorney, testified she was vaguely aware of the 1972 order and knew at some point there was an issue regarding subdividing the property. She had notice of the order.

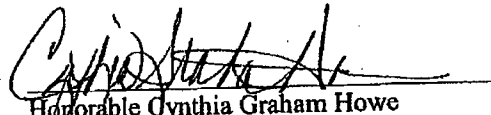
Mr. Wayne Mumford, closing attorney representing Thomas Dicks when he purchased the property from the Meeses, testified that although he did not find the 1972 order in the chain of title, he had a copy of the order prior to closing. This constitutes actual notice. Further, he advised his client that there was an issue as to subdivision of the property.

The Dickses may not use the Shelter Rule in this instance because the Meeses are not innocent purchasers, and it was never so established.

The Dickses' title is not "sanctified" under the Shelter Rule.

FURTHER, it is found that the 1972 Order applies. There was actual notice that only Carmen F. Ward or Mr. Gene F. Lewis, the "grantors", could ever change the lot lines. The property in question was sold as one lot throughout and should continue to be one lot. Based on the application of these restrictions, any sub-dividing is void; the property remains one lot.

AND IT IS SO ORDERED.


Honorable Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 29, 2011

7
6/11

The South Carolina Court of Appeals

John Musick,

Respondent,

v.

Thomas L. Dicks and Robert E. Dicks,
Jr.,

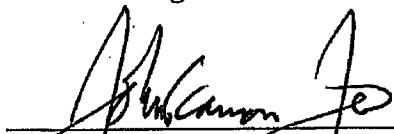
Appellants.

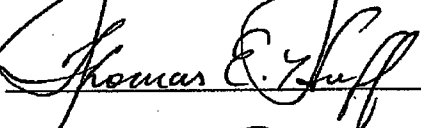
The Honorable J. Stanton Cross, Jr.
Horry County
Trial Court Case No. 2004-CP-26-02075

ORDER DENYING PETITION FOR REHEARING

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

It is, therefore, ordered that the Petition for Rehearing be denied.


C. J. Few


J. Huff


J. Geathers

Columbia, South Carolina
August 27, 2010

The South Carolina Court of Appeals

John Musick,

Respondent,

v.

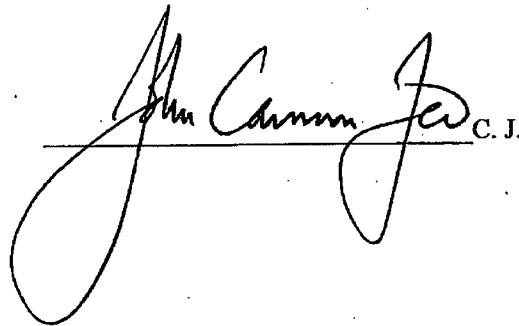
Thomas L. Dicks and Robert E. Dicks,
Jr.,

Appellants.

The Honorable J. Stanton Cross, Jr.
Horry County
Trial Court Case No. 2004-CP-26-02075

ORDER DENYING PETITION FOR REHEARING *EN BANC*

The Court of Appeals is unable to convene a quorum to consider the *en banc* request for reconsideration because several judges are recused in this matter. Accordingly, pursuant to Collins Music Co v. IGT, (S.C. Sup. Ct. Order dated January 10, 2003), the *en banc* petition is deemed denied.

 C. J.

Columbia, South Carolina
August 27, 2010

cc: Demetri K. Koutrakos, Esquire
Mary Maddison B. Langway
Thomas C. Brittain

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick,)
)
Plaintiff,)

Case No. 2004-CP-26-2075

vs.)

Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
)
Defendants.)

STIPULATION OF DISMISSAL

HORRY COUNTY
CLERK OF COURT
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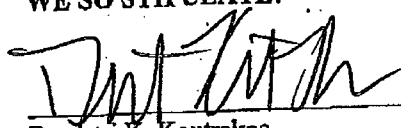
The Plaintiff John Musick and Defendants Thomas L. Dicks and Robert E. Dicks, Jr., by and through their undersigned counsel, hereby stipulate pursuant to Rule 41(a)(1), SCRPC, that any and all claims regarding the rental of property in Long Bay Subdivision asserted by Plaintiff in paragraphs 20, 21, 22, and 23(b) of its Amended Complaint dated May 26, 2005, are hereby dismissed without prejudice. No other claims or causes of action asserted in the above-captioned case are affected hereby.

WE SO STIPULATE:


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ATTORNEYS FOR PLAINTIFF

Dated: 6/5/2007

WE SO STIPULATE:


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ATTORNEYS FOR DEFENDANTS

Dated: 6/5/2007

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STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

John Musick,)

Plaintiff,)

vs.)

Thomas L. Dicks and)

Robert E. Dicks, Jr.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2004-CP-26-2075

FINAL ORDER ENDING ACTION

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HORRY COUNTY

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This matter is before the Court upon cross-motions for Summary Judgment filed by the Plaintiff John Musick and the Defendants, Thomas Dicks and Robert Dicks. The Court has carefully reviewed the motions, memoranda of counsel and numerous exhibits in this case. For the reasons set forth below, the court finds in favor of the Plaintiff and grants his Motion for Summary Judgment. Because the parties filed cross-motions for Summary Judgment, I decided and find that the Plaintiffs are entitled to the relief requested.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY:

The Long Bay Subdivision was created in the 1950's by the Lewis Family ("Grantors"). A map captioned "Long Bay Estates, a residential subdivision on the Atlantic Ocean" was prepared by T.M. Jordan and R.L. Bellamy ("1955 map"). Said map delineated the lots and blocks of said subdivision and was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. Attached to the 1955 map is a list of restrictions which state that the restrictions apply to Blocks 1 through 27 as shown on the plat. These restrictions state that no lot shall be subdivided

but that "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof."

On November 21, 1972, Winston Vaught, Master-In-Equity for Horry County, signed an Order setting forth Findings of Fact in an action filed by the Grantors against all property owners in the subdivision. Specifically, the Order stated that the restrictions apply to Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street, are subject to such residential restrictions with right to change boundary lines and building lines as to any unsold lots being reserved to the Grantor. This same issue was addressed again on March 14, 2000 in a similar case involving subdividing lots in Long Bay Estates¹ wherein this Honorable Court issued an Order incorporating the 1972 Order of Judge Vaught.

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Plaintiff owns Lot 4 of Block 24 in Long Bay Estates. On May 19, 2003, Defendants purchased a 2.67 acre parcel of land in Long Bay Estates.² Plaintiff alleges that Defendants subdivided the property in violation of the applicable covenants and restrictions which restrict Defendants from being able to subdivide their property. Specifically, the restrictions of record provide, among other things, as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina. . . .

(a) No lot shall be subdivided . . . As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

¹DeCiero, et. al. vs. Long Bay Properties, 98-CP-26-4275

²This lot is referred to as Block 28 and 29 in the previous Orders

When Defendants purchased the 2.67 acre tract of land and subdivided it into seven lots in 2003, they breached the covenants and restrictions of Long Bay Estates. Specifically, Defendants breached the "no lot shall be subdivided" restriction.

Before the Defendants purchased the 2.67 acre tract of land, Plaintiff verbally and by letters advised the Defendants of the restrictive covenants and the "no lot shall be subdivided" restriction. Plaintiff made a timely objection to Defendants' actions by protesting the breach of the restrictive covenants. However, Defendants refused to abide by the covenants and continued with subdividing the property. Defendants, knowing their violation, eventually subdivided the property and have further refused to return the property to its original condition. Plaintiff then filed this action.

II. STANDARD OF REVIEW:

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."³ In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the nonmoving party.⁴ If triable issues exist, they must be submitted to the jury.⁵

³ Rule 56(c), SCRPC

⁴ *Worsley Cos. V. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 SE2d 657, 659 (2000).

⁵ *Bray v. Marathon Corp.*, 2001 WL 1028330 (S.C. App. 2001).

III. RATIONALE FOR DECISION:

1. THE 1958 RESTRICTIVE COVENANTS APPLY TO DEFENDANTS' PROPERTY, ONLY THE GRANTOR HAD RIGHT OF REVISION AND THE GRANTOR NEVER SUBDIVIDED THE PROPERTY.

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The first issue presented is whether the 1958 Restrictive Covenants apply to the Defendants' lot. The court finds that the 1958 Restrictive Covenants apply to all the lots in the Long Bay Subdivision. Further, Judge Vaught's 1972 Order states that the Defendants' property is subject to the residential restrictions but with right of revision of the lot arrangement reserved to the grantor. Only the grantor had the right to change boundary lines and building lines as to any unsold lots in Long Bay Estates. The Defendant raises the argument that there was no evidence presented that proves "Carmen Ward or her predecessors in the Trust, owned the property from the time of creation of Long Bay Estates . . ." ⁶ There was proof that Carmen Ward or her predecessors in the Trust, owned the property from the time of creation of Long Bay Estates. In fact, Defendants' attorney himself admits this fact in the deposition of Robert DeCiero dated April 28, 2005. On page nineteen of the deposition, he stated to Mr. DeCiero, "Let me just help educate you a little bit. The significance of the two lots is because the development was established by the Lewis and the Ward family."

Furthermore, Plaintiff offered the Final Order of *DeCiero, et al. v. Long Bay Properties*, number 98-CP-26-4275, dated March 14, 2000 into evidence and it was admitted without objection. Page 5 and 6 of this Final Order brings in the 1972 action filed in this Court ⁷ in which it states, the Long Bay Estates grantors, Gene F. Lewis and Carmen F. Ward, filed suit against all

⁶ Letter dated November 7, 2006 to The Honorable J. Stanton Cross, Jr. from Demetri Koutrakos, Esq.

⁷ *Gene F. Lewis and Carmen F. Ward v. Leroy Adams, et al.*, number 37417.

individuals who owned property, at that time. The 2000 Final Order refers to the property in question as the "Lewis Estate lands". These facts establish that the Grantor, Carmen Ward or her predecessors in the Trust, owned the property from the time of the creation of Long Bay Estates until 1997. At that time, Carmen Ward sold the property to David and Leigh Meese. This Court incorporated in its 2000 Order the 1972 Order of Judge Vaught lending credence to the restrictions and their application to all the lots in Long Bay Estates, including the one that these Defendants purchased.

The Restrictive Covenants apply to all of Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street.

2. **THE DEFENDANTS ARE ON NOTICE OF THE 1958 RESTRICTIVE COVENANTS.**

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The second issue presented was whether Defendants had notice of the restrictive covenants. In South Carolina, purchasers of real property are charged with constructive notice of any restrictions properly recorded in the homeowner's chain of title. "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led]."⁸

Defendants claim that they are allowed to subdivide Blocks 28 and 29 by relying on the "shelter rule". Under the "shelter rule", a grantee from a bona fide purchaser is protected as a bona fide purchaser, even though the grantee would not otherwise qualify for this status. In order to qualify as a bona fide purchaser, it must be shown that the grantee purchased "for value,

⁸ *Lo Presti v. Burry*, 364 S.C. 271, 275, 612 S.E.2d 730, 732 (S.C. App., 2005).

without notice of defect in his title, by showing: (1) he has actually paid in full the purchase money, (2) he purchased and acquired the legal title, or the best right to it, and (3) he purchased bona fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect.”⁹

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In South Carolina, purchasers of real property are charged with constructive notice of “any restriction properly recorded in the homeowners’ chain of title” even if such restriction does not appear in that purchaser’s deed”.¹⁰ “One with knowledge of the truth or the means by which with reasonable diligence he could acquire cannot claim to have been [mis]led.”¹¹ After judgment or final order, an index by the names of defendants and a cross index by the names of plaintiffs are alphabetically arranged and kept in separate volumes with the number of enrollment of judgment.¹² “And whenever judgment against any party plaintiff or defendant has been entered the names of such party, and each of them, shall appear in the index and the name of the party plaintiff or defendant in whose favor judgment has been entered and each of them shall appear in the cross index.”¹³ By this entry a lien is created upon the real estate of the judgment debtor, and such entry is constructive notice to all persons dealing with reference to the property affected by such lien.¹⁴ The object of this statute in requiring the formulated judgment to go into the clerk’s

⁹*Spence v. Spence* (S.C. 2006) 2005 WL

¹⁰*Harbison Community Association v. Mueller*, 319 S.C. 99, 102, 459 S.E.2d 16 (1975).

¹¹*LoPresti v. Burry*, 364 S.C. 271, *275, 612 S.E.2d 730, **732 (S.C.App., 2005).

¹² South Carolina Code 1976 § 15-35-520.

¹³ *Id.*

¹⁴ *Ex Parte Graham*, 54 S.C. 163, 32 S.E. 67 (1899).

office was to give notice to the world of the lien which had been established, so that third parties might deal with the property without peril.¹⁵

Defendants claim neither they nor their grantor, the Meeses, who purchased this property in 1997, had notice of the restriction because it did not appear in their chain of title. However, the 1958 Restrictive Covenants were recorded in the office of the Horry County Clerk of Court in Plat Book 25, page 22, and the 1972 Order signed by Judge Vaught was indexed in the Horry County Court House under the Long Bay Subdivision as an entry of judgment under South Carolina Code § 15-35-520.¹⁶ Further, a copy of the 1972 Order was given to Robert Bellamy, the Defendants' surveyor, *before* the Defendants purchased the property¹⁷, and the Plaintiff advised Defendants of the restrictions. Jay Dusenbury, attorney for the Meeses, learned that the 1972 Order was mis-indexed when the Meeses bought the lot and advised the Defendants before they purchased the lot that there was a strong possibility that the restrictions applied to this lot.¹⁸ Before the Defendants purchased the 2.67 acre tract of land, Plaintiff verbally and by letters advised the Defendants of the restrictive covenants and the "no lot shall be divided" restriction.

Plaintiff made a timely objection to Defendants' actions by protesting the breach of the restrictive covenants. However, Defendants refused to abide by the covenants and continued the subdividing of the property.

¹⁵ *Hardin v. Melton*, 28 S.C. 38, 4 S.E. 805 (1888).

¹⁶ Affidavit and Deposition of Robert DeCiero, pg. 34, line 10 - pg. 35, line 15.

¹⁷ *Id.* at pg. 63, line 21 - 65, line 9.

¹⁸ Deposition of Jay Dusenbury, p.10, line 15 and p.17, lines 9-10 and p.18, line 17-22.

Accordingly, the Defendants and their grantor, the Meeses, are each charged with having both constructive and actual notice of the existence of the covenants and restrictions and their applicability to the subject property. The 1958 Restrictive Covenants appear in the chain of title, and at the very least, Defendants were under constructive notice as to the restrictions placed on their property, and should have followed due diligence in searching their title by including the name of the subdivision.

As a result, the Defendants are not entitled to protection under the "shelter rule", and are therefore restricted from subdividing Blocks 28 and 29.

3. **DEFENDANTS DO NOT HAVE THE RIGHT OF REVISION OF LOT ARRANGEMENTS.**

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The third issue presented is whether the Defendants had the right of revision of lot arrangements. The Grantor, Carmen Ward, had the sole right of revision of the lot arrangement of the subject property. The restrictions that were recorded at the Horry County Courthouse state as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina. . . .

(a) No lot shall be subdivided . . . As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

The Defendants argue that restrictions on the use of property, "are to be strictly construed, with all doubts resolved in favor of the free use of the property".¹⁹ Defendants have taken this rule of construction, and have attempted to convince the Court that it applies to the present case.

¹⁹ *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378 (1980).

under the 1972 Order. This rule of construction "is not applicable to defeat the plain and obvious purpose of the instrument."²⁰ The plain language of the 1958 Restrictive Covenants, and the conduct of the parties establish that only the Grantor, and not the Defendants, had the right of revision.

To enforce a restrictive covenant in South Carolina, a party must show that the restriction applies to the property either by the covenant's express language or by unmistakable implication.²¹ However, this rule will not be used to defeat the clear express language of the covenant.²² Only where there is language in a restrictive covenant that is equally capable of two or more constructions, will the construction be adopted which least restricts the property.²³

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The express, clear language of the covenant set forth above leaves no room for doubt as to the meaning and purpose of the instrument. The plain language and conduct of the Grantor speak louder than any order. Therefore, Defendants do not have the right of revision of lot arrangement per the express terms of the 1972 Order.

4. **THE 1955 PLAT AND THE MAP ATTACHED TO THE 1972 ORDER DO NOT INDICATE THAT LOTS 28 AND 29 ARE TO BE SUBDIVIDED.**

The fourth issue presented is whether the 1955 Plat and the map attached to the 1972 Order indicate that Blocks 28 and 29 are allowed to be subdivided. Defendants argue that the two

²⁰ *Id.* at 157-58, 263 SE2d at 381.

²¹ *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987).

²² *Id.*

²³ *O'Shea v. Lesser*, 308 S.C. 10, 416 SE2d 629 (1992).

maps portray Blocks 28 and 29 as being subdivided into seven lots. This is an incorrect presumption. The two above referenced maps indicate a proposed plan to subdivide the two Blocks. Traditionally, dotted lines on maps indicate proposed boundary lines or subdivision proposals and are not symbolic of the final decree of the Grantor.

The 1955 Plat and the map attached to the 1972 Order show Blocks 24, 25, 27, 30, 32 and 34 represented by solid lines. These lots also show the course and distance of each lot in that Block. Blocks 28, 29, 30, 31, 32 and 33 are represented by dotted lines. These Blocks do not show the course and distance of each Lot in the Blocks.

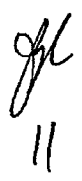
Grantor, Ms. Ward, who had the sole right to change the boundary lines and building lines as to any unsold lots under the 1972 Order, elected to create one lot on the property sold to the Meeses in 1997. The Meeses further corroborated the grantor's intent when they confirmed in their depositions taken in this case that the lot was sold to them as one lot and that they sold it to the Defendants as one lot.²⁴

The preceding facts prove that the dotted lines on the two maps indicate mere proposals to the subdivision of Blocks 28 and 29, and are not indicative of the fact that the Grantor intended the Defendants the right to subdivide their property. Furthermore, the actions of the Grantor and the Meeses indicate that the Defendants' property was intended to be one lot and not to be subdivided into seven lots.

²⁴ Deposition of Leigh Meese, pgs. 36, line 24-37, line 6) and Deposition of David Meese.

5. **THIS FINAL ORDER JUSTIFIABLY RELIES ON THE MARCH 14, 2000 ORDER SET FORTH BY THIS COURT WHICH ENCUMBERS BLOCKS 28 AND 29.**

In March of 2000, this Court ruled on *DeCiero et al. v. Long Bay Properties* in which the issue was similar to the one in the present case. Both cases concern the applicability of Restrictive Covenants to the subdivision of lots in Long Bay Estates. The 2000 Order incorporated the 1972 Order of Judge Vaught in *Lewis v. Adams, et al.*, number 37417. The Order states that the Restrictive Covenants recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958 apply to Blocks 1-27, 30, 32 and 34 "and the remaining portions of "old" Blocks 28 and 29 that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street."

The Defendants assert that the 2000 Order does not encumber the subject property. However, even though the property in dispute under the 2000 Order was in Block 11, the same Restrictive Covenants apply to the subject property in Blocks 28 and 29. The restrictions stated in both the 1972 Order and the 2000 Order apply to all property within Long Bay Estates. The plain language of the restrictions and the conduct of the parties prove that the Grantors intended the Restrictive Covenants to apply to all Blocks within Long Bay Estates including Blocks 28 and 29.

6. **THIS MOTION FOR SUMMARY JUDGMENT IS GRANTED IN LIGHT MOST FAVORABLE TO THE DEFENDANTS, AND IS SUPPORTED BY PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.**

Motion for Summary Judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁵ In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed by the court considering a motion for summary judgment in the light most favorable to the nonmoving party.²⁶ “Summary judgment is proper where plain, palpable, and undisputed facts exist on which reasonable minds cannot differ.”²⁷

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Despite the assertion by the Defendants to the contrary, this Court viewed the facts in light most favorable to the Defendants, the non-moving party. All of the evidence presented by the parties proved that there is no issue as to the fact that the Defendants are not entitled to subdivide Blocks 28 and 29. Defendants’ argument that the eight-page brief submitted by the Plaintiff prove that there are issues of fact that require a trial on the merits is displaced. This eight page brief is entitled, “Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment.” Obviously, the purpose of this memorandum is to rebut arguments made by the Defendants in their Motion for Summary Judgment. The Plaintiff’s memorandum simply confirms that there is “plain, palpable, and undisputed facts [in existence] on which reasonable minds cannot differ”²⁸ that the restrictions on record at the Horry County Courthouse apply to the Defendants’ property.

²⁵ SC R CP Rule 56©)

²⁶ *Pye v. Estate of Fox*, 369 SC 555, 633 SE2d 505 (2006).

²⁷ *Rothrock v. Copeland*, 305 S.C. 402, 409 SE2d 366 (1991).

²⁸ *Id.*

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The 1955 map delineated the lots and blocks of the Long Bay subdivision and was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. Attached to the 1955 map is a list of restrictions which state that the restrictions apply to Blocks 1 through 27 as shown on the plat. These restrictions state that no lot shall be subdivided but that "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof." On November 21, 1972, Judge Vaught signed an Order that stated the restrictions apply to Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street, are subject to such residential restrictions with right to change boundary lines and building lines as to any unsold lots being reserved to the Grantor. This same issue was addressed again on March 14, 2000 in a similar case involving subdividing lots in Long Bay Estates²⁹ wherein this Court issued an Order incorporating the 1972 Order of Judge Vaught.

These facts prove that the present issue has been litigated on two prior occasions, and that no issue of fact exists that, taken in the light most favorable to the Defendants, would reverse the language and plain meaning of the covenants attached to the 1955 map. As a result, the Plaintiff's Motion for Summary Judgment is granted.

7. **THE AFFIDAVIT OF ROBERT DECIERO IS ADMISSIBLE AS EVIDENCE AND INFERENCES DRAWN FROM IT WERE VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENDANTS.**

Defendants argue that the affidavit of Robert DeCiero is littered with hearsay statements, and therefore should not have been admitted into evidence. As this Court stated during the

²⁹*DeCiero, et. al. vs. Long Bay Properties*, 98-CP-26-4275.

Hearing on August 15, 2005, the affidavit of Mr. DeCiero was a proffered affidavit that the Plaintiff's attorneys divulged during discovery, as a result Plaintiff is allowed to admit it.³⁰ Accordingly, this Court may draw whatever conclusion it can from it. Any inferences drawn from Mr. DeCiero's affidavit were viewed in the light most favorable to the Defendants.

IV. CONCLUSIONS OF LAW:

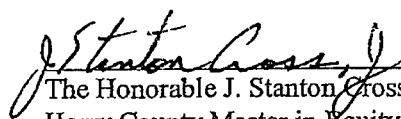
This Court makes the following conclusions of law:

1. The Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Blocks 30, 32, and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street.
2. The Defendants had both actual and constructive notice of the existence of the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court and the 1972 Order signed by Judge Vaught.
3. The 1958 Restrictive Covenants are fully enforceable against the Defendant by any or all property owners within Long Bay Estates Subdivision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Blocks 30, 32, and 34 and the

³⁰ See Transcript of *Musick v. Dicks* dated August 15, 2005 (page 37 line 21 thru page 38, line 16).

remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street. The Defendant is further Ordered to return the property back to its original condition as being one lot with only one tax map number and is prohibited from subdividing or changing the lot lines from its original condition when Defendants originally purchased the property.


The Honorable J. Stanton Cross, Jr.
Horry County Master in Equity

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March 6, 2007

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 98-CP-26-4275

ROBERT & SANDRA DeCIERO, NOEL A.)
COLANERI, EDWARD J. EDELEN, III, JAMES)
& SHARON VEST, SALEEMA S. COBB, JOHN)
& PAM PELLERITO, CHARLES & MARILYN)
RIVERS, EDDIE B. WILLIAMS, EDWARD)
FLEMING, ROYAL & MARION ALVIS, GAIL)
PERRY, JANET NEASE, RICHARD ELLIS,)
WILLIE SALEEBY, BOBBY & MILDRED)
KELLER, ROSCOE LEWIS, WILLIAM & JANET)
AUER, ALFRED TISDALE, III, JOHN)
RATHBUN, RALPH & CYNTHIA SHAMAH,)
NADINE HOLLINGER, GENE & VALERIE)
GRIFFITH, WENDY LEE, THOMAS TATUM,)
FRANCIS DUSENBERRY, JOSEPH & MARY)
JEAN DAVEY, WILLIAM & RHONDA)
HOFMANN, CESAR & MARTHA LEON,)
PATRICIA CRAWFORD, WILLIAM & RUTH)
GUYETTE, JACK & GERTRUDE ZACHARY,)
DEWEY & JUDY BALDWIN, ROBERT &)
CAROLYN JONES, JOSE & HELEN ARMONIO,)
JR., MITCHELL & ELLEN SPERLING, ROBERT)
BELL, PAUL RATHBUN, ERIC & LUCIE)
BINDLECHNER, WILLIAM & CLAIRE)
DOBINSKI, JOHN & PEGGY MUSICK, HELEN)
POLITIS, JAMES HARDEE, THOMAS TATUM,)
RICHARD & ROGER SIMPSON, RENATE)
MARTIN, LLOYD BELL, JR., JULIAN &)
JACQUELYN KOPLIN, MARVIN McHONE,)
DIANE MARTIN, JOHN & BIRDIE BASSETT,)
ALFRED & PHYLISS TOMLINSON, RONALD)
& GAIL FOX, MARY STANLEY, ASHLYN)
CANNON, and MARIPOSA LLC,)

Plaintiffs,

vs.

LONG BAY PROPERTIES, A South
Carolina General Partnership,

Defendant.

FINAL ORDER

FILED
HORRY COUNTY
COURT CLERK
JAN 14 PM 1:41
CLERK OF COURT

DATE OF HEARING:	January 28, 2000
PLAINTIFF'S ATTORNEYS:	Scott Umstead and Thomas Brittain
DEFENDANT'S ATTORNEY:	Robert M. Erwin, Jr.
COURT REPORTER:	Dru Chavis

The Plaintiffs bring this action pursuant to South Carolina Code § 15-53-10 et seq. seeking a Declaratory Judgment that the Restrictive Covenants recorded in Plat Book 25, Page 22 apply to Defendant's property and restrict the use thereof. The Defendant filed a timely Answer and the matter was referred to this Court with finality by Order of Reference dated October 1, 1999. The Plaintiffs and Defendant presented documentary evidence, but no testimony was adduced. I conclude Plaintiff's are entitled to the relief requested.

BACKGROUND

This action concerns the applicability of Restrictive Covenants to certain subdivision lots. The Plaintiffs are owners of property within Long Bay Estates subdivision in Horry County, South Carolina. Long Bay Estates was created in the 1950's and a plat delineating the lots, blocks and streets together with Restrictive Covenants as to all lots in Blocks 1 - 27 was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. The Restrictive Covenants are attached to this Final Order as Exhibit "A".

By Deed dated January 20, 1984, and recorded in Horry County Courthouse Deed Book 848, Page 714 on February 7, 1984, the Defendant, Long Bay Properties, a general partnership, purchased Lots 1 and 2 of Block 11 of the Long Bay Estates from Carmen F. Ward, as Trustee, Marion G. Whitaker, Richard C. Lewis, Jr., Raymond H. Lewis, Carol L. McKellar, and Peter S. Lewis. Defendant's property is more particularly described as follows:

All and singular that certain piece, parcel or lot of land situated, lying and being in Socastee Township, Horry County, South Carolina, and being more particularly

described as Lots one (1) and two (2) of Block eleven (11) of the Long Bay Estates subdivision near Myrtle Beach, South Carolina; said lot being shown on a map by Robert L. Bellamy & Associates Engineers & Surveyors dated August 22, 1983 with said map being recorded in Plat Book 79, Page 125 records of the Clerk of Court for Horry County.

At the time of Defendant's purchase, a plat depicting Block 11, Lots 1 and 2 was recorded in Horry County Courthouse, Plat Book 79, Page 125 and said plat is referenced in the property description above. Block 11, Lots 1 and 2 of Long Bay Estates as depicted in Plat Book 79, Page 125 is/are identical to Block 11, Lots 1 and 2 as depicted in Plat Book 25, Page 22.

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The Defendant has manifested an intention to subdivide Block 11, Lots 1 and 2 into several smaller lots. The Plaintiffs, as owners of various lots throughout Long Bay Estates subdivision seek to prevent the Defendant from subdividing Block 11, Lots 1 and 2 and contend the Restrictive Covenants recorded in Plat Book 25, Page 22 disallow the subdividing of any lot within Long Bay Estates subdivision.

The Plaintiffs rely on the following language from the Restrictive Covenants recorded in Plat Book 25, Page 22:

"No lot shall be subdivided and no building, including porches or projections of any kind, shall be erected at a distance less than 40 feet from the front line on Blocks 1 through 5 and not less than 20 feet from the front line on Blocks 6 through 27, 10 feet from any side line and 20 feet from the rear.

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

The Plaintiffs further contend only one duplex may be erected on any one lot and again rely on the Restrictive Covenants recorded in Plat Book 25, Page 22 which provides as follows:

"This property shall be used only for private residential purposes and no more than one dwelling containing not more than two apartments or living units each for the occupancy and use of not more than one family, with necessary out buildings, shall be erected thereon. No garage apartments except for the use and occupancy of

servants employed on the premises may be included in a garage building."

In its Answer, the Defendant contends the Restrictive Covenants recorded in Plat Book 25, Page 22 do not control the Defendant's use of its property.

Attached to Defendant's Deed, is a set of purported Restrictions substantially identical to those Restrictions recorded in Plat Book 25, Page 22, but containing, as well, certain key differences. The 1984 purported Restrictions do not contain the same prohibition against subdividing as is contained in those Restrictive Covenants recorded in Plat Book 25, Page 22. The 1984 purported Restrictions instead state as follows:

"This property may be subdivided, provided however each subdivided lot must have an area of not less than 9,000 square feet. Each subdivided lot shall be subject to these restrictions. No building, including porches or projections of any kind, shall be erected at a distance less than 20 feet from the front line, 10 feet from any side line, and 20 feet from the rear line thereof."

Neither party contends the Restrictive Covenants are ambiguous and this Court is, therefore, not asked to construe the Restrictive Covenants.

Thus, the Defendant contends the Restrictive Covenants recorded in Plat Book 25, Page 22 do not have application to Defendant's property and that Defendant is permitted to subdivide pursuant to the purported Restrictions attached to Defendant's Deed as quoted above.

RATIONALE FOR DECISION

A. THE 1958 RESTRICTIVE COVENANTS APPLY TO DEFENDANT'S PROPERTY

On their face, it is clear the 1958 Restrictive Covenants apply to the entire Long Bay Estates subdivision. The Restrictions state in pertinent part as follows:

"Restrictions to be imposed on the residential property in the Long Bay Estates subdivision ...

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955 ..."

Neither party claims any ambiguity exists in the stated application of the Restrictions to all of Blocks 1 through 27. Indeed, this Court agrees no ambiguity is presented; the Restrictions obviously apply to all of Blocks 1 through 27. In South Carolina 'where language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning'. Shipyards Property Owners v. Mangiaracina, 307 SC 299, 305, 414 S.E.2d 795, 801 (S.C. App. 1992); citing Blatz v. Chandler, 248 S.C. 484, 151 S.E.2d 441 (1966).

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5 Interestingly, in 1972, an action was filed in this Court by the subdivision grantors against the individuals who, at that time, owned property within Long Bay Estates subdivision. This action is styled Gene F. Lewis and Carmen F. Ward v. Leroy Adams, et al., number 37417. While neither party to this action contends the ultimate issue in the 1972 action is identical to the ultimate issue presented today, the Master's Report ending the 1972 action was offered and admitted as evidence without objection and it is instructive to the extent it deals with the applicability of the 1958 Restrictive Covenants to all of Blocks 1 through 27 in Long Bay Estates subdivision. The 1972 Master's Report states in pertinent part as follows:

"8. The Restrictions or Protective Covenants recorded along with the map in [Plat Book] 25 [Page] 22 expressly state that they are limited to Blocks 1 - 27, inclusive, and there have been no conveyances of any lots beyond Block 27 subject to such restrictions.

9. Counsel have stipulated:

That, as to the Lewis Estate lands, [they] ... are declared to be residential in character and subject to restrictions of the same general type as those stated in the Declaration recorded in Plat Book 25 at Page 22 as being applicable to Blocks 1 - 27, inclusive, ..."

As part of the Court's conclusions of law, the 1972 Master's Report states in pertinent part

as follows:

"2. The Declarations of Restrictions or Protective Covenants recorded along with the Plat in Plat Book 25 at Page 22 expressly limits those restrictions to the residential lots shown within Blocks 1 - 27, inclusive. ... The agreement of the Plaintiffs ... gives further assurance to the defendants who are owners of lots in Blocks 1 - 27, inclusive."

Thus it is clear the Restrictive Covenants apply to all of Blocks 1 - 27 Long Bay Estates subdivision, including Block 11, Lots 1 and 2. The Restrictive Covenants themselves so state and this Court finds no reason to hold otherwise.

B. THE DEFENDANT IS ON NOTICE OF THE 1958 RESTRICTIVE COVENANTS

6
In South Carolina, purchasers of real property are charged with constructive notice of "any restriction property recorded within the chain of title" even if such restriction does not appear in that purchaser's deed. Harbison Community Association v. Mueller, 319 S.C. 99, 102, 459 S.E.2d 860, 863 (1995), citing in part Carolina Land Company v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975). While the Defendant, in its Answer and at the hearing, neither admits nor denies it had actual notice of the 1958 Restrictive Covenants, the Restrictive Covenants were recorded in the Horry County Courthouse and appear in Defendant's chain of title. Accordingly, the Defendant is charged with constructive notice of these Restrictive Covenants and their applicability to the subject property.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

1. The Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1 - 27 of Long Bay Estates subdivision, including Block 11, Lots 1 and 2;
2. The Defendant was on notice, actual or constructive, of the existence of the Restrictive

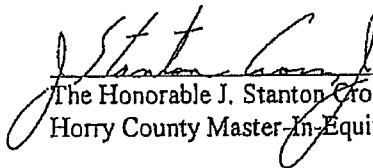
Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court;

3. The 1958 Restrictive Covenants are fully enforceable against the Defendant by any or all of the property owners within Long Bay Estates subdivision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court apply to Defendant's property (Block 11, Lots 1 and 2) and Defendant is not permitted to subdivide or change the lot lines of Block 11, Lots 1 and 2. Defendant's use of its property is controlled by the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court, in the same manner and to the same extent as all property contained in Blocks 1 through 27 as depicted in Plat Book 25, Page 22.

AND IT IS SO ORDERED.

Dated this 14 day of March, 2000.


The Honorable J. Stanton Cross, Jr.
Horry County Master-In-Equity

Conway, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS

GENE F. LEWIS and CARMEN F. WARD, as Co-Executrices and Co-Trustees
Under the Last Will and Testament of Frederick W. Lewis, Deceased,
PLAINTIFFS,

vs.

ADAMS, LEROY
BEATY, DUDLEY C.
BEEBLE, PETER and JEAN B.
BELL, LLOYD A., JR.
BELL, ROBERT B.
BERNHARD, HARRY
BESS, LOUISE L.
BISSING, PAUL G. and JOHNNIE N.
BLACKWELL, WILLIAM H.
BRANTON, JOHN A. and RUTH P.
BRANTON, NORMA M.
BROOKSHIRE, J. C.
BRYANT, PEGGY BELL
BUSTLE, JAMES A. and PHYLLIS J.
BUTLER, JAMES W. and BETTY F.
CANNON, MARION C.
CARSON, ELEANOR BELL
CASALINA CORPORATION
CHINNES, LLOYD S. and
PATRICIA P.
COOPER, SIDNEY E. and MARY E.
CRAVEN, MALCOLM H. and MARY D.
CURLEE, HENRY C. and SUE N.
DAVIS, MARY ELIZABETH T.
DUBOSE, DONALD S.
DUSENBURY, FRANCIS C.
FLOYD, ANN BUSSEY
FLOYD, CHARLES D. and CAROLYN A.
FOGLE, RUBY HARRINGTON
FREDERICK, JOHN and OLLIE H.
GARRELL, C. D., JR.
GILBERT, HARRY M.
GINDER, JOHN W. and BETTY J.
GODFREY, JANE J.
HANNA, JANESE B.
HERSHBERGER, RICHARD E. and
PAULINE P.
HINSON, ANNE McQUEEN
HOLTSCHEITER, EARL W. and
MARY LOIS M.
HOPPER, J. S. and DORIS
HYMAN, DONALD E. and MARY J.
JOHNSTON, H. DON
JOHNSTON, JERRY A.
JONES, W. E. and ANN L.
KADISON, MARY M.
KATES, GUY S., JR. and MARJORIE C.
LIDE, LANNÉAU D.
LIVINGSTON, ROGER L. and DIANA S.
LONG, JUANITA
MARTIN, DIANE S.
MULLINIX, TED
NEELY, CLYDE C. and BETTY SUE
PALMER, R. A.
PERRY, PHILLIP E.
RANKIN, DOROTHY S.
RANKIN, O. A.
RAY, ALLEN L.
ROBERTS, GERALD D.
ROLFE, IRENE A.
ROYALS, DAGGETT O. and ELEANOR D.
SADLER, BETTY D.
SIMPSON, R. W., JR. and MARY H.
SISSLER, JOSEPH E.
SOUTHERN PROPERTIES CORP., INC.
SWANSON, WILLIAM S. and FRANCES T.
TATARSKI, LOUIS and PEGGY A.
THAMES, MRS. PRESTON B., III
TODD, WILLIAM J.
UPPER, WILLIAM J.
VEREEN, ARTHUR B. and LEONA O.
WALKER, NELSON R. and SADIE M.
WALSH, JOHN J., JR.
WARD, JESSE J. and HELEN M.
WOOD, TAYLOR and JESSIE MAE
ZACHARY, JACK T. and GERTRUDE W.

individually and as representatives of all lot owners in Long Bay
Estates Section and also all other persons unknown, claiming any
right, title, estate, interest in or lien upon the real estate
described in the complaint herein,

DEFENDANTS.

MASTER'S REPORT

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PRELIMINARY NOTE: The above named defendants (other than for the defendant Norma M. Branton, who had conveyed her interest in the land formerly owned by her in Long Bay Estates Section) except for Casalina Corporation are also CROSS-DEFENDANTS on the cross-complaint of Casalina Corporation, which answered, counter-claimed against the plaintiffs and stated cause of action on cross-complaint against its co-defendants, all of which will more fully be stated in separate findings of fact as to the cross-action of Casalina Corporation.

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Pursuant to a general order of reference issued by Honorable William L. Rhodes, Jr., Presiding Judge, under date of November 9, 1972, a reference was held before me on the date of this report.

Appearances are listed separately at the conclusion of the report.

Broadly stated there are two principal issues raised by the pleadings:

The first of these has to do with the rights of the parties in an area shown as YE OLDE KING'S ROAD on the map hereinafter referred to.

The second issue is whether the entire area shown on the same map is confined to use as a restricted residential subdivision and the effect of restrictive covenants which were filed along with the map.

The plaintiffs' complaint is confined to the area shown on the map hereafter referred to (and on other maps) as being generally bounded on the northwest by U. S. Highway no. 17; on the northeast by S. C. State Forestry Commission; on the southeast by Blocks 24, 25 and 27, Long Bay Estates; and on the southwest by power line easement or property of Casalina Corporation.

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Because the plaintiffs' describe one area in their complaint, which they allege to be their property, while the defendant Casalina Corporation describes another tract in its cross-complaint, which it alleges to be its property, with the exceptions noted or referred to in its cross-complaint, I have concluded that it will be better to make separate findings of fact, conclusions of law, and recommendations as to the issues arising out of the allegations of the complaint and those arising out of the allegations of the cross-complaint.

Based on testimony taken before me, stipulations of counsel appearing, and the documentary evidence introduced, including records of deeds and maps, which will not be set out in detail in this report, I find, hold and recommend:

FINDINGS OF FACT AS TO LEWIS ESTATE LANDS
(THE PLAINTIFFS' CAUSE OF ACTION).

1. There is recorded in Plat Book 25 at page 22, Clerk's office, Horry County, a map prepared by T. M. Jordan, C. E. and R. L. Bellamy, C. E. dated May 1955, and filed on May 5, 1958. This is captioned "Long Bay Estates, a residential subdivision on the Atlantic Ocean."

Part of the legend on this map states "distances are scaled and are subject to change when field survey is completed. Blocks 1, 2 and 9 surveyed."

Attached to this map is a list of restrictions which specifically state that they are applicable only to Blocks 1 through 27 as shown on the plat and these restrictions, among other things, state "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof."

2. The lands developed by the plaintiffs and their predecessors-in-title (for convenience hereafter sometimes referred to as the Lewis Estate lands) adjoin the lands developed by the

cross-complainant Casalina Corporation, and its predecessors-in-title (hereafter sometimes for convenience designated as Casalina Corporation lands), the boundary line between the two parcels being the center line of a certain power line easement extending from U. S. Highway no. 17 to what is shown on map as "utility lot" and the said boundary line continuing on same course to the Atlantic Ocean. The Blocks 1 through 27, referred to in the restrictions or protective covenants, lie in part on the Lewis Estate lands and in part on the Casalina Corporation lands.

3. All of the property on the Lewis Estate lands' side of the common boundary line is shown on the map recorded in Plat Book 25 at page 22 as being divided into lots and blocks, including additional Blocks numbered 28, 29, 30, 31, 32 and 33 thereon, which are shown within that portion of the plaintiffs' land area described on the first page of this report.

4. On the Casalina Corporation side of the common boundary this is not the case, only a portion of that property being shown as subdivided into lots and blocks, the rest of it being undeveloped according to the map.

5. On the map in 25 at 22 there is depicted a road or way designated as "YE OLDE KING'S ROAD" located roughly parallel to U. S. Highway no. 17, and running generally across the Lewis Estate land from the boundary of the Forestry Commission property in a southwestwardly direction and extending on across the Casalina Corporation lands.

6. Other maps of Long Bay Estates do not show "YE OLDE KING'S ROAD" and instead, on the Lewis Estate side of the boundary there are two parallel roads shown, one represented as being sixty (60) feet in width lying to the northwest of Blocks 30, 32 and 34 as shown on map in Plat book 53 at page 79-A and another of fifty (50) feet in width on the southeast of those blocks. These roads run southwestwardly from Dogwood Drive to the Lewis-Casalina boundary.

7. The testimony establishes that "YE OLDE KING'S ROAD" has never been opened and that there is no road, street or way of any kind within the limits of the area shown as "YE OLDE KING'S ROAD" on the map in Plat Book 25 at page 22.

The two roads on the Lewis Estate lands referred to above have been established and opened and are shown as paved streets on the map attached to plaintiffs' complaint.

8. The restrictions or protective covenants recorded along with the map in 25-22 expressly state that they are limited to Blocks 1 - 27, inclusive, and there have been no conveyances of any lots beyond Block 27 subject to such restrictions.

9. Counsel have stipulated:

That, as to the Lewis Estate lands, Blocks 30, 32 and 34 as shown on the Bellamy map recorded in Book 53 at page 79-A are declared to be residential in character and subject to restrictions of the same general type as those stated in the declaration recorded in Plat Book 25 at page 22 as being applicable to Blocks 1 - 27, inclusive, and also that the area lying between the rear of "old" Blocks 24 and 25 and the 50-foot "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement, or for combination with abutting portions of the lots in Block 24 and 25.

That the remaining lands in the portion of the Lewis Estate property under consideration here are free of any restrictions or plan of development.

10. E. Windell McCrackin, Esquire, Attorney and Guardian ad Litem for any persons under disability, did not enter in this stipulation, but asks that the rights of any such persons be protected by the Court, in any findings of fact or conclusions of law which might be made.

11. The aforesaid stipulations are fair to all parties concerned, equitable, and are approved.

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CONCLUSIONS OF LAW AS TO THE LEWIS ESTATE LANDS

(THE PLAINTIFFS' CAUSE OF ACTION)

1. The area shown as YE OLDE KING'S ROAD within the boundaries of the Lewis Estate lands has never been dedicated or accepted as a public road or street and it is not subject to any private easement in favor of the defendants or any of them. Title to that area is vested in the plaintiffs free and clear of any right, title, estate or interest in said area by the defendants or by any other persons, except for the restriction as to use thereon in that portion of YE OLDE KING'S ROAD lying within the new Blocks numbered 30, 32 and 34, per Bellamy map of December 21, 1960, Plat Book 53, page 79-A, Clerk's office, Horry County, as to which area plaintiffs' stipulation is set out in the next numbered paragraph.

2. The declaration of restrictions or protective covenants recorded along with the plat in Plat Book 25 at page 22 expressly limits those restrictions to the residential lots shown within Blocks 1 - 27, inclusive. Such declaration negates an implicit extension of the restrictions or protective covenants outside of the specified blocks, and although defendants have alleged representations in sales of property, and have relied on the "residential subdivision" legend on the map, no proof of these allegations was offered and so I find and hold that the portion of the plaintiffs' property with which their action concerns itself is not subject to any restrictions or protective covenants beyond Block 27.

It should be pointed out, however, that this finding is modified by the agreement of the plaintiffs, submitted to this Court for approval that Blocks 30, 32 and 34 (Plat Book 53, page 79-A) should be restricted to residential purposes.

3. Blocks 30, 32 and 34 as shown on "Exhibit A" and as shown on the Bellamy map recorded in Book 53 at page 79-A are

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declared to be residential in character and subject to restrictions of the same type and character as those stated by the declaration recorded in Plat Book 25 at page 22 as being applicable to Blocks 1 - 27, inclusive.

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeastermost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declaration recorded in 25 at 22 reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

The agreement of the plaintiffs to so restrict the areas described or identified above gives further assurance to the defendants who are owners of lots in Blocks 1 - 27, inclusive. Such an agreement is equitable and should be approved.

The above areas have been indicated as "residential" and as "residential (with right of revision)" on the copy of the map attached to this report.

4. The sixty-foot PAVED STREET lying to the northwest of and abutting on Blocks 30, 32 and 34 and the fifty-foot PAVED STREET lying to the southeast of said Blocks, which streets extend in a general southwestwardly direction from Dogwood Drive are public streets.

5. The remaining lands in the portion of the Lewis Estate property under consideration here are free of any restrictions or plan of development.

6. DOGWOOD DRIVE is also a public street.

7. No costs should be taxed by or against the plaintiffs.

8. The foregoing conclusions do not in any manner affect the property which is the subject of the cross-complaint of Casalina Corporation in its area, same being separately treated in the following portion of this report.

9. It is recommended that as to the Lewis Estate lands a decree incorporating these findings of fact and conclusions of law be issued, and that the Court direct the recording of one of the maps showing the restricted and unrestricted portions of said Lewis Estate lands as established by the map which is attached to this report.

FINDINGS OF FACT .

LANDS OF CASALINA CORPORATION

(THE CROSS ACTION OF CASALINA CORPORATION)

1. This action was initiated by plaintiffs to obtain a decree establishing their rights and those of the defendants named in the complaint (all of whom, other than Casalina Corporation and Norma M. Branton, are also designated as cross-defendants in Casalina Corporation's pleadings and in the caption of this report), with respect to a portion of the property shown on Plat Book 25, p. 22, Office of the Clerk of Court of Horry County, identified as "LONG BAY ESTATES, A Residential Subdivision on the Atlantic Ocean, Horry County, S. C.," by T. M. Jordan, C. E., and Robt. L. Bellamy, C.E., dated May 1955 and recorded May 5, 1958. Pasted to the plat (which bears the recording stamp) is a list of restrictions expressly applicable to "all lots in Blocks 1 through 27," though there are several other blocks shown on the plat as well as a large area not subdivided on the plat, some of the latter of which is not owned by any of the parties to this action. The restrictions expressly reserve the right to the "Grantors" to change the boundary and building lines of unsold lots.

2. Plaintiffs claim title to certain blocks as successors to Nursery Realty Corporation. One of the defendants, Casalina Corporation, filed an answer (a) admitting the allegations of the complaint and joining in plaintiffs' prayer for relief; (b) alleging ownership of Blocks 19 and 20, of a part of the park between Blocks 1 and 2, of a part of the utility lot between Blocks 15 and 16, the boat and the community landings, and of the land not subdivided on the plat but which is embraced in the description set forth below; and (c) counterclaiming against plaintiffs and cross-complaining against the other defendants except Norma M. Branton

for an adjudication of the rights of the parties with respect to this property. The description referred to is derived from deeds by Harold C. and Helen S. Lewis to Hewlett W. Lewis, Pauline L. Sherman, and Roscoe V. Lewis (recorded in Deed Book 11, p. 118), by these grantees to Greenvale Hills Corporation (recorded in Deed Book 129, p. 143), and by that corporation to Casalina Corporation (recorded in Deed Book 320, p. 280), and is as follows:

All grantor's (Greenvale Hills Corporation's) right, title and interest in and to the following land, as described in deed to grantor recorded in Deed Book 129, p. 143:

All that certain tract, piece or parcel of land situate and being in Socastee Township, Horry County, being more particularly described as follows:

Beginning at a concrete monument in the southeastern edge of U. S. Highway #17 at a distance of 524 feet southwest of the center of a road leading into the Long Bay Estates Property and running thence with the edge of said highway south 46 degrees 28 minutes west 890 feet to a corner in highway right-of-way line, thence south 43 degrees 32 minutes east 2460 feet more or less to the high water mark of the Atlantic Ocean, thence with the high water mark of the Atlantic Ocean north 44 degrees 41 minutes east 996 feet to a corner in the high water mark of said ocean, thence north 46 degrees 2 minutes west 43 feet more or less to a concrete monument, thence continuing north 46 degrees 2 minutes west 2386 feet to the point of beginning at U. S. Highway #17.

The above described tract of land contains 52.9 acres.

Together with all the right, title and interest of the grantor in the strand of the Atlantic Ocean lying in front of and adjacent to said property and all the right, title and interest of the grantor to the hereinabove mentioned highway running adjacent to said property, to the center line of said highway.

Grantor's right, title, and interest being in that portion of Long Bay Estates (as shown on map recorded in Plat Book 25, p. 22) embraced within the above description, less portions thereof heretofore conveyed by grantor in deeds (listed at this point in the description in the deed by Greenvale Hills Corporation to Casalina

Corporation, each of which deeds conveyed lots in the subdivided areas shown in Plat Book 25, p. 22).

And being in particular:

Undivided portions of said land (including landings and utility lots), plus

The following lots shown in said map (Plat Book 25, p. 22) and in other maps as indicated:

(Various lots and blocks which Casalina Corporation has subsequently sold)

Block 19, Lots 1, 2 and 3

Block 20, Lots 1, 2 and 3

PLUS, all land and interests therein acquired by grantor by said deed recorded in Deed Book 129, p. 143, which may be mistakenly excepted therefrom above by reason of typographical or other error;

PLUS, all grantor's rights (including, but not limited to, reversionary rights, rights of re-entry, and rights to enforce restrictive and other covenants and conditions) contained in any conveyance heretofore made by grantor or otherwise applicable to such land and enforceable by grantor or its successors and assigns;

PLUS, the right and power to make and execute any correction deeds that might appear in the future to be appropriate with respect to any conveyance heretofore made by grantor as above listed;

PLUS, any and all other rights and interests in the land so acquired by the grantor, the same as if the grantee herein (Casalina Corporation) had been the grantee in the conveyance to the grantor.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the same premises belonging, or in any wise incident or appertaining thereto.

3. Following Casalina Corporation's answer, counterclaim, and cross-complaint, the following cross-defendants, represented by John C. Thompson, Esq., and by the law firm of Stevens & Holt, filed an answer to Casalina's cross-complaint and a cross-complaint of their own against Casalina Corporation, to which the latter duly replied (for simplicity, "cross-defendants," as used in this report, include only those designated as such in the caption of Casalina Corporation's pleadings and of this report):

Ball, Lloyd A., Jr.,	Cooper, Mary F. and Sidney E.
Bissing, Johnnie N. and Paul G.	Curlee, Henry C. and Sue N.
Butler, Betty F. and James W.	Davis, Mary Elizabeth T.
Chinnes, Lloyd S. and Patricia P.	Gilbert, Harry M.

Ginder, Betty J. and John W.
Holtzscheiter, Earl W. and Mary Lois M.
Hyman, Donald E. and Mary J.
Livingston, Diana S. and Roger L.
Perry, Phillip E.
Rolfe, Irene A.
Simpson, Mary M. and R. W., Jr.,
Southern Properties Corp., Inc.
Swanson, Frances T. and William S.
Vereen, Arthur B. and Leona O.

Walker, Nelson R. and
Sadie M.
Walsh, John J., Jr.
Ward, Helen M. and
Jesse J.
Wood, Jessie Mae and
Taylor
Zachary, Gertrude and
Jack T.

4.a. The following cross-defendants filed general denials:

Palmer, R. A., represented by Willcox, Hardee, Palmer, O'Farrell,
McLeod & Buyck, P.A.
Rankin, Dorothy S., in pro per
Rankin, O. A., in pro per

b. Prior to the institution of this action, the following
defendants conveyed Long Bay Estates lots formerly owned by them
and were therefore erroneously made parties: Leroy Adams and Norma
M. Branton. As pointed out above, Casalina Corporation did not make
Norma M. Branton a cross-defendant.

c. E. Windell McCrackin, Esq., was duly appointed
guardian ad litem for any unknown claimants who may be under age or
other legal disability and filed an answer submitting the interests
of such persons to the protection of the Court.

5. All cross-defendants except those listed in paragraphs
3 and 4 are in default, as shown by affidavit of Casalina Corpora-
tion's attorney, supported by affidavits of service and publication,
all of which are filed in the record of this case.

6. Since this report is consented to by all cross-
defendants who are not in default, except Leroy Adams and except
those unknown parties represented by said guardian ad litem, it is
unnecessary to set forth in detail the issues presented by the
pleadings. But in order to place this report in intelligible per-
spective, the contentions may be briefly stated as follows: Casalina
Corporation agrees that the restrictions contained in Plat Book 25,
p. 22, are applicable to Blocks 19 and 20 and that the park, utility
lot, and community landings mentioned in paragraph 2 are subject
to such servitudes in favor of cross-defendants and their successors

in title as exist under the law of this State in favor of purchasers of lots in platted subdivisions, but contends that it has the right to devote all the other property embraced in the foregoing description (that is, that portion of Casalina Corporation's property which is not subdivided on the plat) to any lawful use, residential (single or multiple) or commercial, and that neither plaintiffs nor any of the cross-defendants have any right or interest, by way of easement or otherwise, to or in what is shown on said plat as "Ye Olde Kings Road," which, in fact, exists only on paper--that is, on the plat. In short, Casalina Corporation contends that only Blocks 1 through 27 constitute the "residential subdivision" contemplated by said plat. On the other hand, the cross-defendants (explicitly in the pleading of those mentioned in paragraph 3, and impliedly by the general denials mentioned in paragraph 4b) claim that the Plat Book 25, p. 22, restrictions apply to all of Casalina Corporation's property embraced in said plat and that they have an easement in "Ye Olde Kings Road."

Plaintiffs and the non-defaulting cross-defendants (other than those represented by the guardian ad litem) having consented to the foregoing findings and to the following conclusions a through g adjudicating their conflicting contentions, I therefore make the following

CONCLUSIONS OF LAW AS TO CASALINA CORPORATION'S CROSS-ACTION:

- a. Casalina Corporation's cross-complaint should be dismissed as to Leroy Adams (for the reason stated in paragraph 4b).
- b. Casalina Corporation is vested of record with title to the property described in paragraph 2.
- c. Casalina Corporation's title is unaffected by the depiction on said plat of "Ye Olde Kings Road, which is hereby declared to be non-existent.
- d. Blocks 19 and 20 shall be subject to the Plat Book 25, p. 22, restrictions, subject, however, to the right reserved in

these restrictions to change building and boundary lines. The utility lot, the boat and community landings, and that portion of the park owned by Casalina Corporation are subject to such servitudes in favor of cross-defendants and their successors in title as exist under the laws of this State in favor of purchasers of lots in platted subdivisions.

e. Casalina Corporation has the right to devote its property embraced on said plat and abutting U. S. Highway 17, to a depth of 350 feet eastward from the right-of-way, to any lawful use, residential or commercial.

f. In any future sales, gifts, or leases by Casalina Corporation of any of its other property embraced on said plat, it shall restrict the same to residential use, single or multiple, but without regard to the Plat Book 25, p. 22, restrictions and with full freedom to subdivide such other property (with regard to streets, building lines, lot sizes, and water and sewer facilities) as it sees fit--subject, of course, to sovereign rights, if any, to marsh, lake, and other water bodies or courses, and to land- and/or-water use laws, ordinances, and regulations now or hereafter applicable and enforceable by governmental authorities.

g. No costs shall be taxable in favor of any party against any other party.

IT IS FURTHER FOUND AND CONCLUDED THAT

h. The interests of any unknown claimants who are under any legal disability have been adequately represented by their guardian ad litem and by the consenting cross-defendants as a class whose best interests coincide with the best interests of any such unknown claimants; the foregoing findings and conclusions are to the best interests of such possible claimants; and such provisions should be decreed to be binding on them.

It is respectfully recommended that a decree incorporating the foregoing findings and conclusions with regard to Casalina Corporation's cross-action be issued.

Winston A. Throught
Master for Horry County

Conway, S. C.

November 15, 1972.

We consent

A. B. [unclear] atty for Piffs

John E. [unclear] atty for Casalina Corporation

[unclear] atty for Wm. A. Bell Jr. et al.
(see last appearance)
K. A. Palmer Defendant in complaint.

Witness: [unclear] [unclear] [unclear] [unclear] [unclear]

By [unclear] atty for K. A. Palmer et al.
(see last appearance)

[unclear]
Clawdy R. [unclear]

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Musick,

Respondent,

v.

Thomas L. Dicks and Robert E.
Dicks, Jr.,

Appellants.

Appeal From Horry County
J. Stanton Cross, Jr., Master-In-Equity

Unpublished Opinion No. 2010-UP-351
Heard June 8, 2010 – Filed July 7, 2010

REVERSED AND REMANDED

Demetri K. Koutrakos, of Columbia, for Appellants.

George M. Hearn, Jr., and Thomas C. Brittain, of
Conway, for Respondent.

PER CURIAM: This appeal arises out of cross motions for summary judgment before the Master-In-Equity. The court granted summary judgment in favor of Respondent John Musick (Musick) and dismissed the action.

Appellants Thomas L. Dicks and Robert E. Dicks, Jr. (Appellants) argue that the court erred in granting Musick's motion, in denying their motion, and in finding that Appellants violated the restrictive covenants of the subdivision by further subdividing a 2.67 acre parcel. We reverse the grant of summary judgment and remand for a trial on the merits.

FACTS

Appellants purchased a piece of property, known as Blocks 28 and 29, situated in Long Bay Estates off of Highway 17 in Horry County. The 1955 Plat of Long Bay Estates contains the following restriction:

(a) No lot shall be subdivided and no building, including porches or projections of any kind, shall be erected at a distance less than 40 feet from the front line of Blocks One (1) through Five (5) and not less than 20 feet from the front line on Blocks Six (6) through Twenty-Seven (27), ten feet from any side line and 20 feet from the rear.

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof.

1955 Plat (emphasis in original). This restriction is also contained in a document recorded at the Register of Mesne Conveyances for Horry County in 1958 (the 1958 Restrictions). Both documents provided: "These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1-27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robt. L. Bellamy, Engineer."

In 1972, the Master-In-Equity issued a report, adopted as an order of the circuit court (the 1972 Order), regarding the rights of property owners in Long Bay Estates and the effect of the 1958 Restrictions on the property. The order provided Blocks 30, 32, and 34 were "subject to the restrictions of the same type and character as those . . . applicable to Blocks 1-27, inclusive." The order further stated:

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the

rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declaration . . . reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

In 2000, some property owners in Long Bay Estates were involved in litigation again regarding the restrictive covenants, resulting in another order interpreting the 1958 Restrictions (the DeCiero Order).

Carmen Ward conveyed the property as one lot to David W. Meese, Jr. and Leigh Ammons Meese in 1997. The Meeses conveyed Blocks 28 and 29 to Appellants in 2003.

Musick, as the owner of Lot 4 of Block 24, alleged in his complaint that he is entitled to a declaration that Appellants' attempts to subdivide Blocks 28 and 29 into seven individual lots violates the restrictive covenants applicable to all lots in Long Bay Estates. Appellants denied the allegations and counterclaimed, seeking a declaratory judgment finding that the alleged restrictions do not encumber Blocks 28 and 29.

Appellants and Musick each filed motions for summary judgment after this matter had been referred to the Master-In-Equity. Following a hearing, the court issued a "Final Order Ending Action" granting Musick's motion for summary judgment. Appellants filed a motion to reconsider. The court heard the parties' arguments on Appellants' motion to reconsider before issuing an order denying the motion. This appeal followed.

STANDARD OF REVIEW

Appellants argue the trial court failed to apply the correct standard in granting the motion for summary judgment. Musick contends that as the parties filed cross-motions for summary judgment, the hearing before the trial

court was essentially converted into a bench trial. We disagree with this contention.

When each party files a motion for summary judgment and the trial court grants one motion while denying the other, this court only reviews the grant of the motion for summary judgment, not the denial. Fuller v. Blanchard, 358 S.C. 536, 546 n.21, 595 S.E.2d 831, 836 n.21 (Ct. App. 2004). In Fuller, the case concerned cross-motions for summary judgment regarding two of Dr. Blanchard's defenses. Id. The trial court simultaneously granted Mrs. Fuller's motion for summary judgment and denied Dr. Blanchard's motion. Id. This court noted the parties had blurred the distinction between the two motions. Id. We stated:

Because the granting of a motion for summary judgment is appealable while the denial of a motion for summary judgment is not, we are addressing Dr. Blanchard's arguments to the extent he appears to challenge the circuit court's grant of summary judgment to Mrs. Fuller as an error of law based on the facts of the case, although, as stated, there has been an overlapping of these issues due to the procedural posture of the case. To the extent Dr. Blanchard appears to argue the court should have granted his motion for summary judgment, the denial of summary judgment is not properly before us and we do not address it.

Id.

Thus, we will review the grant of the motion for summary judgment applying the same standard that governs the trial court. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr.,

368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Even when there is no dispute as to the evidentiary facts, summary judgment should be denied when there is a dispute as to the conclusions or inferences that can be drawn therefrom. Wilson v. Style Crest Prods., Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

1. Appellants argue the court erred in granting summary judgment by holding the 1958 Restrictions encumber Blocks 28 and 29. We agree.

The trial court found that the 1972 Order acknowledged that the prohibition against subdivision only applied to Blocks 1-27, but the parties to the 1972 litigation "specifically agreed that the restrictions would be extended" to cover other blocks in the subdivision, including Blocks 28 and 29. In his final brief to this court, Musick agrees that "it is undisputed that the original language of the covenants stated they applied only to Blocks 1 through 27."

Restrictive covenants are contractual in nature. RV Resort & Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc., 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010). The words of restrictive covenants will be given their common, ordinary meaning attributed to them at the time of their execution. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication" Buffington v. T.O.E. Enters., 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009) (quoting Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)). "[A]ll such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Id. In determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant, courts should consider equitable doctrines. Id. at 393, 680 S.E.2d at 291. "The paramount rule of construction is to ascertain and give effect to the

intent of the parties as determined from the whole document." RV Resort, 386 S.C. at 321, 688 S.E.2d at 559 (quoting Taylor, 332 S.C. at 4, 498 S.E.2d at 863-64).

We find the 1958 Restrictions, by their express terms, do not apply to Blocks 28 and 29. Musick argues, and the trial court agreed, that the 1972 Order enlarged the 1958 Restrictions such that the restrictions are applicable to all lots in Long Bay Estates. Appellants argue the court should have construed the language in the 1972 Order in their favor when deciding this matter on Musick's motion for summary judgment. We hereby reverse the grant of summary judgment as to this issue and remand for a trial on the merits because there is a dispute as to the conclusions or inferences that may be drawn from the application of the 1972 Order to clarify the 1958 Restrictions. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); Wilson, 367 S.C. at 656, 627 S.E.2d at 735.

2. Appellants argue the court erred in granting summary judgment by finding the DeCiero Order operates to extend the prohibition against subdividing to include Blocks 28 and 29. We agree.

The trial court misquoted the DeCiero Order in its order denying the motion to reconsider as follows: "[o]n their face, it is clear the 1958 Restrictive Covenants apply to the entire Long Bay Estates subdivision." Rather, the DeCiero order states: "Thus it is clear the Restrictive Covenants apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Block 11, Lots 1 and 2." Therefore, we find it was error for the trial court to rely upon the DeCiero Order in its grant of summary judgment to find that the 1958 Restrictions apply to Blocks 28 and 29. We reverse the grant of summary judgment on this issue.

3. Appellants argue the court erred in granting summary judgment by finding that the division of Blocks 28 and 29 into seven different lots, as shown on the 1955 Plat, constituted a mere "proposed plan" to subdivide. We agree.

The 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots. The trial court concluded that the maps indicated only a proposed plan to subdivide Blocks 28 and 29 because

"[t]raditionally, dotted lines on maps indicate proposed boundary lines or subdivision proposals and are not symbolic of the final decree of the Grantor." Viewed in the light most favorable to Appellants, there is more than one reasonable inference that may be drawn from the evidence regarding whether or not the grantor intended for Blocks 28 and 29 to be subdivided into seven individual lots. Law, 368 S.C. at 434, 629 S.E.2d at 648. Therefore, we reverse the grant of summary judgment on this issue and remand for trial.

4. Appellants argue the court erred in granting summary judgment by finding that because they had actual notice of the 1972 Order and its restrictive effect on Appellants' use of the property, they could not avail themselves of the protection of the Shelter Rule. We agree.

Appellants presented evidence that the Horry County Clerk of Court indexed the 1972 Order only against the named defendants to that action. Carmen Ward, Appellants' predecessor in title, was a plaintiff and not a named defendant in the 1972 litigation. Therefore, when Appellants performed a title search for Blocks 28 and 29, the 1972 Order did not appear in their chain of title. Pursuant to Section 30-9-40 of the South Carolina Code (2007), proper indexing supplies inquiry notice of an instrument, while recordation without proper indexing supplies no notice at all. Thomas v. Thomas, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985). The failure to index a judgment as required by statute deprives it of its effectiveness as notice to subsequent purchasers. Id.

Appellants admit they had actual notice of the 1972 Order but seek the protection of their predecessors in title by arguing that the Meeses were bona fide purchasers for value without notice.

The "Shelter Rule" provides that one who is not a bona fide purchaser, but who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status. The purpose of this rule is to prevent a stagnation of property and to protect the first purchaser, who, being entitled to

hold and enjoy, must be equally entitled to sell. Otherwise, a bona fide purchaser might be prevented from selling the property for full value. . . . It is wholly immaterial of what nature the outstanding interest is, whether it is a lien or encumbrance, or a trust, or any other claim.

77 Am. Jur. 2d Vendor and Purchaser § 419 (2006). This court has recognized the Shelter Rule, holding the successor in interest of a bona fide purchaser for value stood in the same position as the bona fide purchaser even when the successor had notice of a lien. Liberty Loan Corp. of Darlington v. Mumford, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984). It explained: "[W]henever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified." Id.

The trial court found the Meeses' attorney testified in his deposition that he had advised the Meeses there was a strong possibility the restrictions applied to Blocks 28 and 29. However, Dusenbury testified that his recollection was that the restrictions were mis-indexed and that he did not pick them up in the chain of title. We find there is a question of fact as to whether the Meeses were bona fide purchasers for value without notice and hereby reverse the grant of summary judgment on this issue and remand for trial.

CONCLUSION

Accordingly, the decision of the trial court granting summary judgment is hereby

REVERSED and REMANDED.

FEW, C.J., and HUFF and GEATHERS, JJ. concur.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 04-CP-26-2075

John Musick,)
Plaintiff,)

vs.)

Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
Defendant.)

COMPLAINT
(Declaratory Judgment Action)

Plaintiffs, complaining of the defendant herein, would respectfully show this court as follows:

1. Plaintiff and Defendants are residents of the County of Horry, State of South Carolina and own property in the subdivision known as Long Bay Estates in Myrtle Beach, South Carolina. (Attached hereto and incorporated by reference is a Plat of this subdivision obtained from the Horry County Tax Map records at the Register of Deeds in Horry County.)
2. This action is brought pursuant to the Uniform Declaratory Judgment Act as set forth in S.C. Code Ann. §15-53-20 (1976, as amended).
3. Plaintiff is the owner of Lot 4 of Block 24 in Long Bay Estates and of the home on such lot at 4804 Yaupon Circle, Myrtle Beach, South Carolina, 29575.
4. On or about May 19, 2003, Defendants purchased a 2.67 acre parcel of land in Long Bay Estates which is referred to as Blocks 28 and 29. This property initially beared TMS # 186-14-05-001 according to the records at the Register of Deeds in Horry County, South Carolina.

5. All lots in Long Bay Estates are subject to a general plan of restrictions which is recorded in Plat Book 25, Page 22 and recorded May 5, 1958 at the Register of Deeds in Horry County, South Carolina.

6. The restrictions of record provide, among other things, as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina.

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robert L. Bellamy Engineer.

(a) No lot shall be subdivided . . . "

7. Further, the Honorable Winston Vaught, Master-in-Equity for Horry County, issued an Order dated November 21, 1972 specifically stating that the Restrictions mentioned above apply to all lots in Blocks 1 through 27 and to Blocks 28 and 29.

8. On March 14, 2000, the Honorable Stanton Cross issued an Order referring to and incorporating the 1972 Order of the Honorable Winston Vaught.

9. On or about May 19, 2003, defendants breached the restrictive covenant described above by subdividing the 2.67 acre tract of land into seven lots, which is in total and utter disregard and in defiance of the "no lot shall be subdivided" restriction.

10. Defendants have continued to violate the restrictions as evidenced by verbal representations, by the actual surveying and subdivision of the lots, by the clearing and removing of trees, and by plats and tax maps recently filed in the Register of Deeds in Horry County which reflect that the newly divided property bears the following TMS #s: 186-14-05-010,011,012,013,014,015,016. Defendant Robert Dicks now owns the first three lots and

Defendant Thomas Dicks now owns the last four lots according to the records in the Horry County Register of Deeds.

11. Plaintiff verbally and by letter advised the defendants of the restrictive covenants and the "no lot shall be divided" restriction. Plaintiff made a timely objection to defendants by protesting the breach of the restrictive covenants. However, defendants refused to abide by the covenants and continued with subdividing the property. Defendants, knowing of their violation, eventually subdivided the property and have further refused to return the property to its original condition.
12. Defendants, before subdividing the property, had actual notice and constructive notice of the existence of the "no lot shall be subdivided" restriction. Specifically, the restriction is contained within defendants' chain of title and recorded in numerous Orders filed in the records at the Register of Deeds in Horry County.
13. The Horry County Courts have expressly stated that this restriction is a covenant running with the land and is enforceable by any person owning land in Long Bay Estates.
14. By accepting title to their lot in Long Bay Estates, Defendants became bound and obligated to recognize and abide by the restriction prohibiting subdivision of the lots.
15. The actions by defendants are in clear violation of the above-specified covenant.
16. Plaintiff's efforts to dissuade defendants from violating the covenants, including written notice to defendants concerning the binding nature of the covenant, have been totally fruitless.
17. Defendants subdivided the lots knowing that it violates the above-mentioned restrictive covenant and with intent to accomplish such subdivision before Plaintiff can effectuate legal

action to protect plaintiff's interest.

18. In view of the actions taken as specified above, and those now being taken by defendants with respect to the specified subdividing, plaintiffs have no adequate remedy at law to prevent defendants from their continued effort to violate the restriction.
19. Plaintiffs requests that this court determine as soon as practicable that the Restrictive Covenants set forth apply to all Lots within the Long Bay Subdivision and that Defendant's actions are a violation of the restrictive covenants, in that no lot shall be divided.
20. That, on a final hearing of this proceeding, Plaintiffs requests:
 - a. A judgment of this court declaring that the subdividing of the property owned by defendants constitutes a violation of the restrictions applicable to the Lots and to Long Bay Estates subdivision as a whole;
 - b. A judgment enjoining defendants from using or permitting to be used the premises for any purpose other than as and for a private residence for the members of a single family, and specifically from using or permitting to be rented as a source of financial gain; that the injunction remain in force, and for so long thereafter as the basic restrictions applicable to the lots in the Long Bay Estates subdivision remain in force; and

- c. That Plaintiffs recover costs, and such other and further relief as the Court deems just and proper.



Thomas C. Brittain
HEARN, BRITAIN & MARTIN, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562

April 12, 2003

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick,)
Plaintiff,)

Case No. 2004-CP-26-2075

vs.)

ANSWER AND COUNTERCLAIM

Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
Defendants.)

HORRY COUNTY
04 JUN 15 AM 10:49
JEANNE J. ROBERTS
CLERK OF COURT

The Defendants, Thomas L. Dicks and Robert E. Dicks, Jr., answer the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Complaint not hereinafter specifically admitted.
2. As to the allegations of paragraph 1 of the Complaint, Defendants admit the first sentence and deny the second sentence.
3. As to the allegations of paragraph 2 of the Complaint, no response is required.
4. As to the allegations of paragraph 3 of the Complaint, Defendants are without knowledge and information sufficient to form a belief as to those allegations and, therefore, deny those allegations, demanding strict proof thereof.
5. As to the allegations of paragraph 4 of the Complaint, Defendants admit only that Defendant Thomas L. Dicks purchased real property on May 14, 2003 as described in a deed from David W. Meese, Jr. and Leigh Ammons Meese which is dated May 14, 2003 and recorded on May

19, 2003 in Deed Book 2597 at Page 0296, Horry County ROD, and that the real property conveyed thereby was described by the Horry County Tax Assessor as TMS No. 186-14-05-001. Any unanswered allegations of paragraph 4 are denied.

6. As to the allegations of paragraph 5 of the Complaint, Defendants deny the same

7. As to the allegations of paragraph 6 of the Complaint, Defendants crave reference to the alleged restrictions for the terms, import, and legal effect of the alleged restrictions. Any unanswered allegations of paragraph 6 are denied.

8. As to the allegations of paragraph 7 of the Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further show that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 7 are denied.

9. As to the allegations of paragraph 8 of the Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further allege that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 8 are denied.

10. As to the allegations of paragraph 9 of the Complaint, Defendants deny the same.

11. As to the allegations of paragraph 10 of the Complaint, Defendants admit only that Defendant Robert E. Dicks, Jr. owns three lots and Defendant Thomas L. Dicks owns four lots and that the seven lots contain the TMS numbers stated in paragraph 10. The remaining allegations of paragraph 10 are denied.

12. As to the allegations of paragraph 11 of the Complaint, Defendants admit only that they were verbally and by letter informed of Plaintiff's alleged claim of the alleged restrictive covenants and the Plaintiff's claim of the alleged "no lot shall be subdivided" restriction. Defendants specifically deny that they have subdivided any lots. The remaining allegations of paragraph 11 are denied.

13. As to the allegations of paragraphs 12, 13, 14, and 15 of the Complaint, Defendants deny the same.

14. As to the allegations of paragraph 16 of the Complaint, Defendants deny that any such alleged covenants apply to the subject property and would further deny that they have violated any alleged covenants to the extent they apply to the subject property. Any unanswered allegations of paragraph 16 are denied.

15. As to the allegations of paragraph 17 of the Complaint, Defendants deny the same.

16. As to the allegations of paragraph 18 of the Complaint, Defendants admit that the Plaintiff has no remedy at law or in equity because the Plaintiff's claim is without merit. Any unanswered allegations of paragraph 18 are denied.

17. As to the allegations of paragraph 19 and 20 of the Complaint, Defendants deny the same and would further allege that Defendants are entitled to a declaratory judgment providing that the restrictive covenants set forth in the Complaint do not apply to Defendants' property and that Defendants' have not violated any alleged restrictive covenants to the extent they apply to the subject property.

FOR A SECOND DEFENSE

18. Each and every allegation contained in the above paragraphs is re-alleged as if set forth verbatim herein.

19. The Complaint fails to state sufficient facts to constitute a cause of action and thus should be dismissed pursuant to Rule 12(b)(6), SCRPC.

FOR A THIRD DEFENSE

20. Each and every allegation contained in the above paragraphs is re-alleged as if set forth verbatim herein.

21. Defendants move to strike pursuant to Rule 12(f), SCRPC, the allegations of paragraph 20 b. of the Complaint as there is no basis provided for the relief requested therein.

FOR A FOURTH DEFENSE

22. Each and every allegation contained in the above paragraphs is re-alleged as if set forth verbatim herein.

23. To the extent that Plaintiff seeks a declaratory judgment that relates to or affects real property owned by others not parties to this action, Plaintiff has failed to join the same who are proper, necessary, and indispensable parties, namely all the owners of lots within Long Bay Estates.

24. Due to Plaintiff's failure to join proper, necessary, and indispensable parties, the Complaint should be dismissed pursuant to Rules 12(b)(7) and Rule 19, SCRPC.

FOR A FIFTH DEFENSE
AND BY WAY OF COUNTERCLAIM

25. Each and every allegation contained in the above paragraphs is re-alleged as if set forth verbatim herein.

26. No restrictive covenants apply to the subject property which affect Defendants' rights to own their property as seven lots.

27. Defendants have not subdivided any lots.

28. The order of the Honorable Winston Vaught filed November 21, 1972 is not in the defendant index of judgments under the names of the persons or entities who owned the property at issue in this litigation at the time the order was entered. The aforesaid order is not in the chain of title to the subject property. To the extent that the aforesaid order is in the chain of title to the subject property, Defendants have not violated the aforesaid order.

29. The order of the Honorable Stanton Cross dated March 14, 2000 is not in the chain of title to the subject property and does not affect the subject property.

30. Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

31. Defendants are therefore entitled to and do hereby seek from this Court an order of declaratory judgment, pursuant to South Carolina Code §§ 15-53-10, *et seq.*, and Rule 57, SCRPC, declaring that by owning the subject property as seven lots, the Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendants respectfully request that the Court issue an Order:

- A. Dismissing the Plaintiff's Complaint;
- B. Awarding Defendants any declaratory relief requested herein;
- C. Awarding Defendants the costs of this action; and

D. Awarding Defendants any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC

A handwritten signature in black ink, appearing to read "Demetri Koutrakos", is written over a horizontal line.

Demetri K. Koutrakos

1812 Lincoln Street, Suite #200

P. O. Box 1390

Columbia, SC 29202

Telephone: 803-256-2371

Facsimile: 803-256-6431

ATTORNEYS FOR DEFENDANTS

June 14, 2004

1020.276\Answer

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2004-CP-26-2075

John Musick,)
Plaintiff,)

vs.)

Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
Defendant.)

**AMENDED
COMPLAINT**
(Declaratory Judgment Action)

Plaintiffs, complaining of the defendant herein, would respectfully show this court as follows:

1. Plaintiff and Defendants are residents of the County of Horry, State of South Carolina and own property in the subdivision known as Long Bay Estates in Myrtle Beach, South Carolina. (Attached hereto and incorporated by reference is a Plat of this subdivision obtained from the Horry County Tax Map records at the Register of Deeds in Horry County.)
2. This action is brought pursuant to the Uniform Declaratory Judgment Act as set forth in S.C. Code Ann. §15-53-20 (1976, as amended).
3. Plaintiff is the owner of Lot 4 of Block 24 in Long Bay Estates and of the home on such lot at 4804 Yaupon Circle, Myrtle Beach, South Carolina, 29575.
4. On or about May 19, 2003, Defendants purchased a 2.67 acre parcel of land in Long Bay Estates which is referred to as Blocks 28 and 29. This property initially beared TMS # 186-14-05-001 according to the records at the Register of Deeds in Horry County, South Carolina.
5. All lots in Long Bay Estates are subject to a general plan of restrictions which is recorded in

Plat Book 25, Page 22 and recorded May 5, 1958 at the Register of Deeds in Horry County, South Carolina.

6. The restrictions of record provide, among other things, as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina.

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robert L. Bellamy Engineer.

(a) No lot shall be subdivided . . . "

7. Further, the Honorable Winston Vaught, Master-in-Equity for Horry County, issued an Order dated November 21, 1972 specifically stating that the Restrictions mentioned above apply to all lots in Blocks 1 through 27 and to Blocks 28 and 29.
8. On March 14, 2000, the Honorable Stanton Cross issued an Order referring to and incorporating the 1972 Order of the Honorable Winston Vaught.
9. On or about May 19, 2003, defendants breached the restrictive covenant described above by subdividing the 2.67 acre tract of land into seven lots, which is in total and utter disregard and in defiance of the "no lot shall be subdivided" restriction.
10. Defendants have continued to violate the restrictions as evidenced by verbal representations, by the actual surveying and subdivision of the lots, by the clearing and removing of trees, and by plats and tax maps recently filed in the Register of Deeds in Horry County which reflect that the newly divided property bears the following TMS #: 186-14-05-010,011,012,013,014,015,016. Defendant Robert Dicks now owns the first three lots and Defendant Thomas Dicks now owns the last four lots according to the records in the Horry

County Register of Deeds.

11. Plaintiff verbally and by letter advised the defendants of the restrictive covenants and the "no lot shall be divided" restriction. Plaintiff made a timely objection to defendants by protesting the breach of the restrictive covenants. However, defendants refused to abide by the covenants and continued with subdividing the property. Defendants, knowing of their violation, eventually subdivided the property and have further refused to return the property to its original condition.
12. Defendants, before subdividing the property, had actual notice and constructive notice of the existence of the "no lot shall be subdivided" restriction. Specifically, the restriction is contained within defendants' chain of title and recorded in numerous Orders filed in the records at the Register of Deeds in Horry County.
13. The Horry County Courts have expressly stated that this restriction is a covenant running with the land and is enforceable by any person owning land in Long Bay Estates.
14. By accepting title to their lot in Long Bay Estates, Defendants became bound and obligated to recognize and abide by the restriction prohibiting subdivision of the lots.
15. The actions by defendants are in clear violation of the above-specified covenant.
16. Plaintiff's efforts to dissuade defendants from violating the covenants, including written notice to defendants concerning the binding nature of the covenant, have been totally fruitless.
17. Defendants subdivided the lots knowing that it violates the above-mentioned restrictive covenant and with intent to accomplish such subdivision before Plaintiff can effectuate legal action to protect plaintiff's interest.
18. In view of the actions taken as specified above, and those now being taken by defendants with

respect to the specified subdividing, plaintiffs have no adequate remedy at law to prevent defendants from their continued effort to violate the restriction.

19. Plaintiff requests that this court determine as soon as practicable that the Restrictive Covenants set forth apply to all Lots within the Long Bay Subdivision and that Defendant's actions are a violation of the restrictive covenants, in that no lot shall be divided.
20. On the other substantial lots within the Long Bay Subdivision, recent owners have built large homes and are systematically renting to multi-family groups on a weekly basis in violation of the restrictive covenants set out herein.
21. Further, that those Restrictive Covenants provide as follows:

"This property shall be used only for private residential purposes and no more than one dwelling containing not more than two apartments or living units each for the occupancy and use of not more than one family, with necessary outbuildings, shall be erected thereon. No garage apartments except for the use and occupancy of servants employed on the premises may be included in a garage building."
22. That the plaintiff hereby requests that the Court inquire to this matter and apply this provision of the Restrictive Covenants to all property in question including that of the defendants, so that no multi-family weekly rentals may be allowed there.
23. That, on a final hearing of this proceeding, Plaintiffs requests:
 - a. A judgment of this court declaring that the subdividing of the property owned by defendants constitutes a violation of the restrictions applicable to the Lots and to Long Bay Estates subdivision as a whole;
 - b. A judgment enjoining defendants from using or permitting to be used the premises for any purpose other than as and for a private residence for the members of a single family, and that the injunction remain in force.

- c. That Plaintiffs recover costs, and such other and further relief as the court deems just and proper.



Thomas C. Brittain
HEARN, BRITTAIN & MARTIN, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562

March 10th, 2005
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick,)
)
Plaintiff,)
)
vs.)
)
Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
)
Defendants.)
_____)

Case No. 2004-CP-26-2075

ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM

HORRY COUNTY
CLERK OF COURT
05 JUN -6 11:10 AM
FILED

The Defendants, Thomas L. Dicks and Robert E. Dicks, Jr., answer the Plaintiff's Amended

Complaint as follows:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Amended Complaint not hereinafter specifically admitted.
2. As to the allegations of paragraph 1 of the Amended Complaint, Defendants admit the first sentence and deny the second sentence.
3. As to the allegations of paragraph 2 of the Amended Complaint, no response is required.
4. As to the allegations of paragraph 3 of the Amended Complaint, Defendants admit the same upon information and belief.
5. As to the allegations of paragraph 4 of the Amended Complaint, Defendants admit only that Defendant Thomas L. Dicks purchased real property on May 14, 2003 as described in a deed from David W. Meese, Jr. and Leigh Ammons Meese which is dated May 14, 2003 and recorded on May 19, 2003 in Deed Book 2597 at Page 0296, Horry County ROD, and that the real

property conveyed thereby was described by the Horry County Tax Assessor as TMS No. 186-14-05-001. Any unanswered allegations of paragraph 4 are denied.

6. As to the allegations of paragraph 5 of the Amended Complaint, Defendants deny the same

7. As to the allegations of paragraph 6 of the Amended Complaint, Defendants crave reference to the alleged restrictions for the terms, import, and legal effect of the alleged restrictions. Any unanswered allegations of paragraph 6 are denied.

8. As to the allegations of paragraph 7 of the Amended Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further show that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 7 are denied.

9. As to the allegations of paragraph 8 of the Amended Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further allege that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 8 are denied.

10. As to the allegations of paragraph 9 of the Amended Complaint, Defendants deny the same.

11. As to the allegations of paragraph 10 of the Amended Complaint, Defendants admit only that Defendant Robert E. Dicks, Jr. owns three lots and Defendant Thomas L. Dicks owns four lots and that the seven lots contain the TMS numbers stated in paragraph 10. The remaining allegations of paragraph 10 are denied.

12. As to the allegations of paragraph 11 of the Amended Complaint, Defendants admit only that they were verbally and by letter informed of Plaintiff's alleged claim of the alleged

restrictive covenants and the Plaintiff's claim of the alleged "no lot shall be subdivided" restriction. Defendants specifically deny that they have subdivided any lots. The remaining allegations of paragraph 11 are denied.

13. As to the allegations of paragraphs 12, 13, 14, and 15 of the Amended Complaint, Defendants deny the same.

14. As to the allegations of paragraph 16 of the Amended Complaint, Defendants deny that any such alleged covenants apply to the subject property and would further deny that they have violated any alleged covenants to the extent they apply to the subject property. Any unanswered allegations of paragraph 16 are denied.

15. As to the allegations of paragraph 17 of the Amended Complaint, Defendants deny the same.

16. As to the allegations of paragraph 18 of the Amended Complaint, Defendants admit that the Plaintiff has no remedy at law or in equity because the Plaintiff's claim is without merit. Any unanswered allegations of paragraph 18 are denied.

17. As to the allegations of paragraph 19, Defendants deny the same and would further allege that Defendants are entitled to a declaratory judgment providing that the restrictive covenants set forth in the Amended Complaint do not apply to Defendants' property and that Defendants have not violated any alleged restrictive covenants to the extent they apply to the subject property.

18. As to the allegations of paragraph 20 of the Amended Complaint, Defendants are without knowledge and information sufficient to form a belief as to those allegations and, therefore, deny those allegations, demanding strict proof thereof.

19. As to the allegations of paragraph 21 of the Amended Complaint, Defendants crave reference to the alleged restrictions for the terms, import, and legal effect of the alleged restrictions.

Any unanswered allegations of paragraph 21 are denied.

20. As to the allegations of paragraph 22 of the Amended Complaint, Defendants deny the same and would further allege that the alleged restriction says nothing about "multi-family weekly rentals."

21. As to the allegations of paragraph 23 of the Amended Complaint, Defendants deny this prayer for relief.

FOR A SECOND DEFENSE

22. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

23. The Amended Complaint fails to state sufficient facts to constitute a cause of action and thus should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

24. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

25. Plaintiff's claims are barred by the doctrines of waiver, acquiescence, release, estoppel, and laches.

FOR A FOURTH DEFENSE

26. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

27. To the extent that Plaintiff seeks a declaratory judgment that relates to or affects real property owned by others not parties to this action, Plaintiff has failed to join the same who are proper, necessary, and indispensable parties, namely all the owners of lots within Long Bay Estates.

28. Due to Plaintiff's failure to join proper, necessary, and indispensable parties, the Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and Rule 19, SCRPC.

FOR A FIFTH DEFENSE

29. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

30. There is no justiciable controversy with respect to Plaintiff's claims related to multi-family weekly renters and therefore it is not ripe for adjudication.

**FOR A SIXTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

31. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

32. No restrictive covenants apply to the subject property which affect Defendants' rights to own their property as seven lots.

33. Defendants have not subdivided any lots because the plat referred to in paragraph 5 of the Amended Complaint already had the subject property, Blocks 28 and 29, divided into seven lots and the Order of the Honorable Winston Vaught filed November 21, 1972 shows the subject property as containing seven lots and gives the Defendants the right to revise the lot lines.

34. The order of the Honorable Winston Vaught filed November 21, 1972 is not in the defendant index of judgments under the names of the persons or entities who owned the property at issue in this litigation at the time the order was entered. The aforesaid order is not in the chain of title to the subject property. To the extent that the aforesaid order is in the chain of title to the subject property, Defendants have not violated the aforesaid order.

35. The order of the Honorable Stanton Cross dated March 14, 2000 is not in the chain of title to the subject property and does not affect the subject property. To the extent the aforesaid order is in the chain of title, it does not affect or involve any issue in this case.

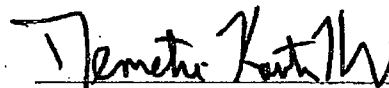
36. Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

37. Defendants are therefore entitled to and do hereby seek from this Court an order of declaratory judgment, pursuant to South Carolina Code §§ 15-53-10, *et seq.*, and Rule 57, SCRPC, declaring that by owning the subject property as seven lots, the Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, Defendants respectfully request that the Court issue an Order:

- A. Dismissing the Plaintiff's Amended Complaint;
- B. Awarding Defendants any declaratory relief requested herein;
- C. Awarding Defendants the costs of this action; and
- D. Awarding Defendants any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC



Demetri K. Koutrakos
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P. O. Box 1390
Columbia, SC 29202
Telephone: 803-256-2371
Facsimile: 803-256-6431

ATTORNEYS FOR DEFENDANTS

June 7, 2005
1020.276\Answer-AmendedComplaint

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick,)
)
Plaintiff,)
vs.)
)
Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
)
Defendants.)
_____)

Case No. 2004-CP-26-2075

**AMENDED ANSWER
AND COUNTERCLAIM**

HORRY COUNTY
CLERK OF COURT
06 MAR 22 AM 10:19

The Defendants, Thomas L. Dicks and Robert E. Dicks, Jr., answer the Plaintiff's Amended Complaint as follows:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Amended Complaint not hereinafter specifically admitted.
2. As to the allegations of paragraph 1 of the Amended Complaint, Defendants admit the first sentence and deny the second sentence.
3. As to the allegations of paragraph 2 of the Amended Complaint, no response is required.
4. As to the allegations of paragraph 3 of the Amended Complaint, Defendants admit the same upon information and belief.
5. As to the allegations of paragraph 4 of the Amended Complaint, Defendants admit only that Defendant Thomas L. Dicks purchased real property on May 14, 2003 as described in a deed from David W. Meese, Jr. and Leigh Ammons Meese which is dated May 14, 2003 and recorded on May 19, 2003 in Deed Book 2597 at Page 0296, Horry County ROD, and that the real

property conveyed thereby was described by the Horry County Tax Assessor as TMS No. 186-14-05-

001. Any unanswered allegations of paragraph 4 are denied.

6. As to the allegations of paragraph 5 of the Amended Complaint, Defendants deny the same

7. As to the allegations of paragraph 6 of the Amended Complaint, Defendants crave reference to the alleged restrictions for the terms, import, and legal effect of the alleged restrictions. Any unanswered allegations of paragraph 6 are denied.

8. As to the allegations of paragraph 7 of the Amended Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further show that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 7 are denied.

9. As to the allegations of paragraph 8 of the Amended Complaint, Defendants crave reference to the order mentioned therein for the terms, import, and legal effect of the order and would further allege that the order is not in Defendants' chain of title. Any unanswered allegations of paragraph 8 are denied.

10. As to the allegations of paragraph 9 of the Amended Complaint, Defendants deny the same.

11. As to the allegations of paragraph 10 of the Amended Complaint, Defendants admit only that Defendant Robert E. Dicks, Jr. owns three lots and Defendant Thomas L. Dicks owns four lots and that the seven lots contain the TMS numbers stated in paragraph 10. The remaining allegations of paragraph 10 are denied.

12. As to the allegations of paragraph 11 of the Amended Complaint, Defendants admit only that they were verbally and by letter informed of Plaintiff's alleged claim of the alleged

restrictive covenants and the Plaintiff's claim of the alleged "no lot shall be subdivided" restriction. Defendants specifically deny that they have subdivided any lots. The remaining allegations of paragraph 11 are denied.

13. As to the allegations of paragraphs 12, 13, 14, and 15 of the Amended Complaint, Defendants deny the same.

14. As to the allegations of paragraph 16 of the Amended Complaint, Defendants deny that any such alleged covenants apply to the subject property and would further deny that they have violated any alleged covenants to the extent they apply to the subject property. Any unanswered allegations of paragraph 16 are denied.

15. As to the allegations of paragraph 17 of the Amended Complaint, Defendants deny the same.

16. As to the allegations of paragraph 18 of the Amended Complaint, Defendants admit that the Plaintiff has no remedy at law or in equity because the Plaintiff's claim is without merit. Any unanswered allegations of paragraph 18 are denied.

17. As to the allegations of paragraph 19, Defendants deny the same and would further allege that Defendants are entitled to a declaratory judgment providing that the restrictive covenants and orders set forth in the Amended Complaint do not apply or encumber Defendants' property and that Defendants have not violated any alleged restrictive covenants to the extent they apply to the subject property.

18. As to the allegations of paragraph 20 of the Amended Complaint, Defendants are without knowledge and information sufficient to form a belief as to those allegations and, therefore, deny those allegations, demanding strict proof thereof.

19. As to the allegations of paragraph 21 of the Amended Complaint, Defendants crave

reference to the alleged restrictions for the terms, import, and legal effect of the alleged restrictions.

Any unanswered allegations of paragraph 21 are denied.

20. As to the allegations of paragraph 22 of the Amended Complaint, Defendants deny the same and would further allege that the alleged restriction says nothing about "multi-family weekly rentals."

21. As to the allegations of paragraph 23 of the Amended Complaint, Defendants deny this prayer for relief.

FOR A SECOND DEFENSE

22. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

23. The Amended Complaint fails to state sufficient facts to constitute a cause of action and thus should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

24. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

25. Plaintiff's claims are barred by the doctrines of waiver, acquiescence, release, estoppel, and laches.

FOR A FOURTH DEFENSE

26. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

27. To the extent that Plaintiff seeks a declaratory judgment that relates to or affects real property owned by others not parties to this action, Plaintiff has failed to join the same who are proper, necessary, and indispensable parties, namely all the owners of lots within Long Bay Estates.

28. Due to Plaintiff's failure to join proper, necessary, and indispensable parties, the Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and Rule 19, SCRCP.

FOR A FIFTH DEFENSE

29. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

30. There is no justiciable controversy with respect to Plaintiff's claims related to multi-family weekly renters and therefore it is not ripe for adjudication.

FOR A SIXTH DEFENSE

31. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

32. Defendants and/or their predecessors in title are bona fide purchasers for value without notice of the alleged restrictions and orders described in the Amended Complaint and thus the Defendants own the subject property free and clear of the alleged restrictions and orders and they own the subject property free and clear of the claims and assertions of the Plaintiffs.

**FOR A SEVENTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

33. Each and every allegation, denial, objection, and defense asserted in this Answer is realleged as if repeated verbatim herein.

34. No restrictive covenants apply to the subject property which affect Defendants' rights to own their property as seven lots.

35. Defendants have not subdivided any lots because the plat referred to in paragraph 5 of the Amended Complaint already had the subject property, Blocks 28 and 29, divided into seven lots and the Order of the Honorable Winston Vaught filed November 21, 1972 shows the subject

property as containing seven lots and gives the Defendants the right to revise the lot lines.

36. The order of the Honorable Winston Vaught filed November 21, 1972 is not in the defendant index of judgments under the names of the persons or entities who owned the property at issue in this litigation at the time the order was entered. The aforesaid order is not in the chain of title to the subject property. To the extent that the aforesaid order is in the chain of title to the subject property, Defendants have not violated the aforesaid order.

37. The order of the Honorable Stanton Cross dated March 14, 2000 is not in the chain of title to the subject property and does not affect the subject property. To the extent the aforesaid order is in the chain of title, it does not affect or involve any issue in this case.

38. Defendants and/or their predecessors in title are bona fide purchasers for value without notice of the alleged restrictions and orders described in the Amended Complaint and thus the Defendants own the subject property free and clear of the alleged restrictions and orders and free and clear from the claims and assertions of the Plaintiffs.

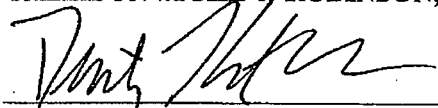
39. Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

40. Defendants are therefore entitled to and do hereby seek from this Court an order of declaratory judgment, pursuant to South Carolina Code §§ 15-53-10, *et seq.*, and Rule 57, SCRPC, declaring that the alleged restrictions do not encumber the subject property; that Defendants own the subject property free and clear of the restrictions and orders mentioned in the Amended Complaint; and, alternatively, that by owning the subject property as seven lots, the Defendants have not violated any alleged restrictions, covenants, or orders that are alleged to encumber the subject property.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, Defendants respectfully request that the Court issue an Order:

- A. Dismissing the Plaintiff's Amended Complaint;
- B. Awarding Defendants any declaratory relief requested herein;
- C. Awarding Defendants the costs of this action; and
- D. Awarding Defendants any such other relief as the Court deems just and proper.

CALLISON TIGHE & ROBINSON, LLC



Demetri K. Koutrakos
1812 Lincoln Street, Suite #200
P. O. Box 1390
Columbia, SC 29202
Telephone: 803-256-2371
Facsimile: 803-256-6431

ATTORNEYS FOR DEFENDANTS

March 21, 2006
1020.276\AmendedAnswer-AmendedComplaint

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2004-CP-26-2075

John Musick,)
Plaintiff,)

vs.)

**REPLY TO AMENDED ANSWER
AND COUNTERCLAIM**

Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
Defendant.)

The Plaintiff John Musick replies to the Amended Answer and Counterclaim as follows:

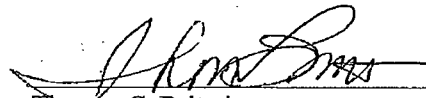
1. That the plaintiff denies each and every allegation set forth in the Amended Answer and Counterclaim.
2. That restrictive covenants do apply to the subject property.
3. Further, that the lots were never subdivided on a plat. It's been made known to the defendants through the original grantors by personal interviews granted by them to the attorney and through both actual and constructive notice.
4. Further, that the Order of the Honorable Winston Vaught is part and parcel of the title and real estate chain in connection with this property.
5. Furthermore, that the defendant had actual notice of its existence and its pertinence to the issues at hand.
6. That the Order of the Honorable Stanton Cross is also part and parcel of the real estate "chain of title" connected with the extant property, and that the defendant had actual and constructive notice of its applicability in its terms.

7. That the plaintiff denies paragraph 38. That it flies in the face of facts sworn to by others associated with the issues set forth in these documents. That there is no ownership free and clear of restrictions in the extant property.

8. That the defendants do intend to violate legal valid restrictions of which they have notice.

9. That the defendants should be denied the Order they seek from this Court based on previous Orders, actual notice, the facts and affidavits submitted hereto, the existence of the restrictive covenants all of which are part and parcel and made part and parcel of hereby.

WHEREFORE, the plaintiff prays that the admitted Answer and Counterclaim be dismissed and for attorney's fees associated with the cost of this action.



Thomas C. Brittain
HEARN, BRITTAIN & MARTIN, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: (843) 449-8562

Dated: 2/20, 2006

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

John Musick,

Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr.

Appellants.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Unpublished Opinion No. 2010-UP-351
Heard June 8, 2010 -- Filed July 7, 2010

PETITION FOR REHEARING EN BANC

Demetri K. Koutrakos, of Columbia, for Appellants

George M. Hearn, Jr. and Thomas C. Brittain, of Conway, for respondent.

NOW comes Thomas C. Brittain on behalf of John Musick and moves the Court for a rehearing of the above referenced case on the following grounds:

That with all respect, the Court erred in finding that there was an issue of fact as to whether the Meeses were bona fide purchasers for value. Under even a light most favorable to the Appellant, the Meeses would not qualify as bona fide purchasers; therefore;

the "shelter rule" would not apply and actual notice as to the Appellants would resolve all issues and finally decide the matter in accordance with the Master's ruling.

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain
Federal Bar No.: 4920
4614 Oleander Drive
Myrtle Beach, SC 29577
843.449.8562
843.497.6124 (Fax)

Myrtle Beach, SC
July 22, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick,)
Plaintiff,)

Case No. 2004-CP-26-2075

vs.)

Thomas L. Dicks and)
Robert E. Dicks,)
Defendants.)

DEFENDANTS' NOTICE OF MOTION
AND MOTION TO RECONSIDER,
ALTER, OR AMEND JUDGMENT

HORRY COUNTY
11 SEP -1 AM 10:47
KELANIE JACOBUS-WARD
CLERK OF COURT

TO: THOMAS C. BRITTAIN, ESQUIRE, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Defendants Thomas L. Dicks and Robert E. Dicks, by and through their undersigned counsel, hereby move the Court, pursuant to Rules 52(b) and 59(e), SCRCP, for an order reconsidering, altering and amending the Court's Final Order dated July 29, 2011 and filed August 9, 2011. Written notice of the entry of the Final Order was received by counsel for the Defendants on August 22, 2011.

This motion is based upon the pleadings and other matters filed in this action, the arguments of counsel, the evidence and arguments presented in conjunction with the Court's hearing on the merits, the arguments to be presented at the hearing of this motion, the rules of court, and the following:

1. The Court erred in granting Plaintiff any relief and the Court erred in failing to find that Defendants can own their property as seven lots. The Court respectfully misconstrued the order issued in 1972 ("1972 Order") in the case of *Gene F. Lewis et al. v. Leroy Adams et al.* ("1972 Case"). In so doing, the Court failed to follow the rule which requires courts to strictly construe

restrictions and covenants concerning the use of real estate and to resolve all doubts in favor of free use of property. The Court also ignored the rule which requires a party seeking to enforce a covenant or restriction to show the covenant or restriction applies either by its express language or by a plain and unmistakable implication.¹ The plain meaning of the 1972 Order and the evidence submitted show Plaintiff is not entitled to any relief and the Defendants are entitled to own their property as seven lots.

Accordingly, the Court should reconsider, alter, and amend its Final Order and deny Plaintiff any relief, award Defendants the relief sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

2. The Court erred in finding and concluding "[t]he Dicks Property has always been one piece of property, has never been subdivided. It has always been one lot, as Blocks 28 and 29" and in similarly finding, concluding, and ordering that "[t]he property in question was sold as one lot throughout and should continue to be one lot."

The 1955 Plat² clearly shows Blocks 28 and 29 as containing seven lots. Plaintiff admitted in his Answers to Defendants' First Request for Admissions, which were entered into evidence at trial without objection, that the 1955 Plat shows Blocks 28 and 29 as containing seven lots. As a result, the Court failed to give any credence to the conclusive effect of Plaintiff's Responses to Requests for Admissions, when it was required to do so. *See Scott v. Greenville Housing Auth.*, 353

¹ None of these rules or cases setting forth these rules were cited or mentioned in the Court's Final Order.

² The term "1955 Plat" refers to the plat of Long Bay drawn by Robert L. Bellamy in 1955 which was eventually recorded in the office of the Register of Deeds for Horry County on May 5, 1958 in Plat Book 25 at Page 22.

S.C. 639, 650-51, 579 S.E.2d 151, 152 (Ct. App. 2003) (any matter admitted under Rule 36 is conclusively established.).

In addition, the map attached to the 1972 Order shows the remaining portions of Blocks 28 and 29 as containing a total of seven lots. In fact, the Court of Appeals' Opinion in this case, reversing a prior grant of summary judgment in favor of Plaintiff, expressly holds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." As such, it has already been determined that Blocks 28 and 29 were divided into seven lots and it is the law of this case.

Moreover, the 1972 Order states the subject property is subject to residential restrictions "but with right of revision of the lot arrangement," which plainly shows the court in the 1972 Case correctly thought and concluded that the subject property does in fact contain lots, which means Blocks 28 and 29 are subdivided into lots. However, the Court here has erroneously concluded that, despite the plain language of the 1972 Order which the Court has purported to interpret and the map attached thereto, the subject property has always been one lot, as Blocks 28 and 29.

Finally, the Court seems to acknowledge that the property is or was divided into two separate blocks on the 1955 Plat, but somehow it has reached a conclusion that these two blocks not only do not contain more than one lot, but it has concluded that these two blocks have always been just one lot. In other words, the Court has apparently found two separately platted blocks on a subdivision plat constitute one lot. Respectfully, the Court's ruling does not make sense and it is in error.

Accordingly, the Court erred in finding the "Dicks property" or the subject property has always been one piece of property, has never been subdivided, and has always been one lot, as Blocks 28 and 29. The Court should reconsider, alter, and amend its Final Order as stated herein and

delete any such findings of fact or conclusions of law, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

3. The Court erred in finding and concluding that "[i]n 1972, Judge Winston Vaught issued an Order and concluded in the order that the 1958 restrictions which applied to Long Bay Subdivision applied also to Blocks 28 and 29, subject only to the 'Grantor's' rights to change boundary lines and building lines as to any unsold lots."

The 1972 Order provides as follows:

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declarations recorded in 25 at 22 reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

(emphasis added).

As is glaringly evident from the language of the 1972 Order, Judge Vaught never said that the 1958 Restrictions³ applied "subject only to 'Grantor's' rights to change boundary lines and building lines as to any unsold lots." Judge Vaught said that the remaining portions of Blocks 28 and 29 are subject to the restrictions, "but with right of revision of the lot arrangement or for combination with abutting portions of the lots in Blocks 24 and 25."

In the next sentence, Judge Vaught states what the 1958 Restrictions provide "in any event." The language in the "in any event" part of the 1972 Order was most likely added to state that the

³ The term "1958 Restrictions" refers to those restrictions that were somehow attached to the 1955 Plat. The 1958 Restrictions are not signed, dated, or acknowledged.

parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have been aware that limited rights did exist to make some alterations in this residential subdivision. However, the "in any event" part of the 1972 Order is not the operative language, but the Court in this case has mistakenly relied on the "in any event" sentence, a sentence which was unnecessary to the ruling and appears to be surplusage and dicta.

The operative language in this part of the 1972 Order is the granting of revision rights, but the revision rights are not limited to any particular party. The revision rights are not limited to the Plaintiff in the 1972 Case and not limited to the grantor, whoever that is. If the court in the 1972 Case wanted to limit the revision rights, it could have easily said so, but it did not. Instead, the Court in this case has read a provision into the 1972 Order that simply does not exist.

The Court in this case erroneously concludes that the 1972 Order provides that the 1958 Restrictions apply to Blocks 28 and 29 "subject only to the 'Grantor's' rights to change boundary lines and building lines as to any unsold lots," when the 1972 Order simply does not say that. In fact, this construction of the 1972 Order is not practical and is erroneous. The 1958 Restrictions do provide grantors, whoever they are, with rights to change boundary lines and building lines. Thus, this Court is saying that the court in the 1972 Order held the 1958 Restrictions apply subject to something that is already in the 1958 Restrictions which is a repetitive statement, but at the same time this Court ignores the operative language of the 1972 Order, which says the 1958 Restrictions apply, "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (emphasis added).

Accordingly, the Court erred in making the aforesaid findings and conclusions. The Court should reconsider, amend, and alter its Final Order as stated herein and delete any such findings of fact or conclusions of law, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

4. The Court erred in finding that “[b]ased on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced, the language ‘Grantor’ in referring to any unsold lots is Gene Lewis and/or Carmen Ward, as Co-Executors and Co-Trustee under the Last Will and Testament of Frederick W. Lewis.”

The Court does not refer to any specific evidence upon which it relies to make this finding. The Court is purporting to interpret and define the term “grantor” when that term is not defined anywhere in the 1972 Order or the 1958 Restrictions. If the Court relied upon evidence contained outside of what is in the 1972 Order, or perhaps the 1958 Restrictions, then the Court considered extrinsic evidence. It appears the Court did in fact consider some undefined extrinsic evidence insofar as the Final Order mentions that the Court considered “testimony” and “circumstances set forth throughout the hearing.”

A court will not examine extrinsic evidence to interpret a contract absent an ambiguity. *See Klutts Resort Realty Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). If the vital terms of a contract are ambiguous, then, in an effort to determine the intent of the parties, the court may consider probative, extrinsic evidence. *S.C. Dep't. of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001). It is a question of law for the court whether the language of a contract is ambiguous. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d *Contracts* § 338, at 345

(1991)). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.*

Similarly, if a "judgment is not ambiguous or uncertain, the parol evidence rule applies, and the written judgment should be accepted at its face value and without speculating as to the reasoning employed at reaching the particular result." Bradley v. Family Ford Sales, Inc., 287 S.C. 401, 403, 339 S.E.2d 122, 124 (1986).

The Court never made a determination whether the language of the 1972 Order was either clear or ambiguous, although it should have made such a decision and it was its duty to do so. In addition, the Court failed to describe the specific evidence it considered in order to reach its conclusion.

If the Court in fact considered extrinsic evidence, which it appears that it did, then the Court must have found the language to be ambiguous or capable of being construed in more than one way. If that is the case, the Court should have therefore resolved all doubts in favor of the free use of the property. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980). Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here the Plaintiff. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); *Seabrook Island Prop. Owners Assn. v. Marshland Trust, Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004).

Because the term "grantor" is nowhere defined in the 1972 Order or the 1958 Restrictions, and the Court appears to have considered undefined extrinsic evidence, then the Court must have found the language in the 1972 Order to be able to be construed in more than one way and thus ambiguous. As such, the Court should have strictly construed the ambiguity against Plaintiff and

construed the 1972 Order in favor of the free use of property, thus adopting Defendants' interpretation of the 1972 Order as set forth at trial and in this motion.

Accordingly, the Court erred in making the aforesaid findings and conclusions. The Court should reconsider, amend, and alter its Final Order as stated herein and delete any such findings of fact or conclusions of law, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

5. The Court further erred in finding that the court in the 1972 Case found that "Carmen F. Ward, grantor, did not subdivide Blocks 28 and 29, which was her right as set out in Judge Vaught's 1972 Order."

Carmen Ward had absolutely no right to subdivide the property. The Court's finding in this regard is clearly erroneous.

The 1958 Restrictions state in part as follows:

Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision Myrtle Beach, Horry County, South Carolina

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955, compiled by Robert L. Bellamy, Engn.

(a) No lot shall be subdivided and no building including porches or projections of any kind shall be erected at a distance less than 40 feet from the front line on Blocks 1 through Blocks 5 ...

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof.

(emphasis added).

Thus, under the 1958 Restrictions, the same restrictions Plaintiff is trying to enforce through the 1972 Order, no lot at all can be subdivided. No one had the right to subdivide any lot.

The 1958 restrictions do say "[a]s to all unsold lots, the grantors reserve the right to change the boundary lines and the building lines thereof." The grantors, whoever they are, as that term is not defined anywhere, could change the boundary lines. In other words, they could make lots smaller or bigger. The grantors, whoever they are, could change the building lines, the set back requirements for construction on each lot. The right of the undefined grantors to change the lines of the lots within the subject property is not the same as a right to "subdivide" any such lot, which would necessitate creating additional lots.

Thus, it is clear from the 1958 Restrictions that no one, including the grantors, whoever they are, had any right to subdivide lots, as the 1958 Restrictions specifically state "no lot shall be subdivided." Had the 1958 Restrictions intended to reserve to grantors, whoever they are, the right to subdivide, the word subdivide would have been used in that part of the 1958 Restrictions that reserved certain things to grantor, but it was not.

The 1972 Order appears to have made the 1958 Restrictions applicable to Blocks 28 and 29, "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (emphasis added).

Thus, with the two documents of record, the 1958 Restrictions and the 1972 Order, the grantors, whoever they are, had two rights: (1) change the boundary lines of the lots; and (2) change the building lines of the lots. The 1972 Order then provided two additional rights, which Defendants contend are rights they have, to "revise the lot arrangement" or combine the lots with the "abutting portions of lots in Blocks 24 and 24." As a result, there were 4 rights reserved or created pursuant to the 1958 Restrictions and the 1972 Order: (1) change the boundary lines of the lots; (2) change

the building lines; (3) revise the lot arrangement⁴; and (4) combine the lots with the abutting portions of lots in Blocks 24 and 25. That is it. There is one prohibition in the 1958 Restrictions that is applicable here- No lot shall be subdivided. Therefore, no one, including the grantors, whoever they are, had the right to subdivide the lots into smaller lots or to combine lots or to eliminate the lots as that right was never granted either under the 1958 Restrictions or the 1972 Order.

Accordingly, the Court erred in making the aforesaid findings and conclusions. The Court should reconsider, amend, and alter its Final Order as stated herein and delete any such findings of fact or conclusions of law, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

6. The Court erred in failing to find and conclude that the subject property has always been seven lots and should remain seven lots, and to the extent anyone tried to change or purported to change the subject property to be anything other than seven lots, that action was improper and void.

As mentioned above, the 1958 Restrictions, which were made applicable to the subject property by virtue of the 1972 Order with certain modifications clearly stated therein, do not allow lots to be subdivided.⁵ Neither the 1958 Restrictions nor the 1972 Order provide any rights to the grantors, whoever they are, or anyone else, the right to do away with lots or to combine⁶ or change the seven lots into one lot.

⁴ "Arrange" means "to put in proper order or into a correct or suitable sequence, relationship, or adjustment <-flowers in a vase> <-cards alphabetically>." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Thus, according to the 1972 Order, the seven lots could be re-arranged, not eliminated.

⁵ The word "subdivide" means to "divide a part into smaller parts; to separate into smaller divisions." BLACK'S LAW DICTIONARY at 1424 (6th ed. 1990)

⁶ The word "combine" means "to unite into a single number or expression." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).

In fact, any construction of the 1972 Order which provides that lots can be taken away or combined flies in the face of both the 1972 Order and the 1958 Restrictions. The 1958 Restrictions are "protective covenants" in order to preserve the residential character of the neighborhood. Likewise, the 1972 Order is replete with language which implies the parties were concerned with preserving the residential character of the neighborhood. Thus, it does not make sense that the Court in this case found that the subject property could be changed from seven lots to one large lot in the neighborhood, because most of the subdivision is divided into residential lots except for some well-defined common areas. The use of the subject property as one lot is not consistent with the rest of the neighborhood.

The Court in this case appears to have created in Carmen Ward and Gene Lewis a right that was never granted to them, or anyone else for that matter, to remove and/or combine lots. There is no such right created by either the 1958 Restrictions or the 1972 Order.

As mentioned above, the 1958 Restrictions created two rights reserved to the grantors, whoever they are: (1) change the boundary lines of the lots; and (2) change the building lines of the lots (set backs). The 1958 Restrictions expressly prohibit the subdivision of lots. As mentioned above, the 1955 Plat shows Blocks 28 and 29 as containing seven lots and the map attached to the 1972 Order shows the subject property as containing seven lots. The 1972 Order created rights to revise the lot arrangement and to combine the lots with adjoining lots. No right was ever created in any documents submitted in evidence which authorizes anyone, including the grantors, whoever they are, to take the seven lots and turn them into one.

Therefore, any finding by the Court that the subject property is anything other than seven lots is clearly erroneous and authorizes a prohibited act. In addition, the Court made a finding that

Carmen F. Ward sold the property to Leigh and David Meese as one lot and the Culler survey shows the property as one lot. However, there was no evidence submitted to show the Culler survey was anything other than a boundary survey. The Culler survey does not refer to (a) the 1972 Order; (b) the map attached to the 1972 Order which shows seven lots; or (c) the 1955 Plat which shows seven lots. There is no indication on the Culler survey that the lots were being eliminated, which is required by local ordinance. In fact, the Culler survey is in the name of the Meeses, not Ms. Ward. Certainly the Meeses had no right to change seven lots into one lot. Thus, the Court also erred in relying on the Culler survey to support its findings and conclusions.

Furthermore, the 1972 Order grants the right to combine the lots in Blocks 28 and 29 with the lots in Blocks 24 and 25. Thus, the court in the 1972 Case was aware of a right to combine, but the right to combine was very limited to one specific instance. There was no right specifically given in the 1972 Order, or any other document on the public record for that matter, which would have allowed the lots to be combined. Neither Carmen Ward, Gene Lewis, nor the grantors to the Meeses had any right to combine the lots or to alter the lots from seven lots to one lot. As a result, any purported attempt to change the lots in Blocks 28 and 29 from seven lots to one lot is null and void.

Therefore, the Court erred in failing to find that the Defendants' property could be anything other than seven lots. The Court further erred in failing to find that any purported change of the lots existing on the subject property from seven lots to one lot is or was an unauthorized and illegal act and therefore the subject property is and has always been seven lots. Furthermore, any findings in the Court's Final Order inconsistent with the foregoing are clearly erroneous.

Accordingly, the Court should reconsider, amend, and alter its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find

Defendants are entitled to own their property as seven lots.

7. The Court erred in finding and concluding that the property in question "should continue to be one lot," "the property remains one lot," and that "only Carmen F. Ward or Mr. Gene F. Lewis, the 'grantors,' could ever change the lot lines." The Court further erred in finding and concluding that "Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change the boundary lines or building lines, that right being reserved to the original 'Grantor.'" The Court further erred by failing to find that Defendants could own their property as seven lots and in failing to find Defendants hold or held the right of revision of the lot arrangement as set forth in the 1972 Order.

The 1972 Order provides that "[i]n like manner the remaining portions of 'old' Blocks 28 and 29 . . . are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (emphasis added).

The map attached to the 1972 Order shows the remaining portions of Blocks 28 and 29 as containing a total of seven lots. The 1955 Plat also shows Blocks 28 and 29 as containing seven lots and Plaintiff has so admitted. In fact, the Court of Appeals' Opinion expressly holds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Furthermore, the plat attached to the 1972 Order specifically identifies this property as "residential (with right of revision)."

The Court appears to have held that despite the fact that the 1955 Plat shows that Blocks 28 and 29 contain seven lots, despite the fact that the 1972 Order shows the property contains seven lots, despite the fact that the 1972 Order provides for right of revision of the lot arrangement, that

the recording by the Defendants of their plat of the subject property showing seven lots violates the restrictions and that the property has always been one lot, should continue to be one lot, and shall remain one lot. The Court erred in so holding.

Restrictions on the use of property "are to be strictly construed, with all doubts resolved in favor of the free use of the property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378 (1980). The burden of showing restrictive covenants run with the land is upon the party claiming the benefit of the restriction. *See Charping v. J. P. Scurry & Co.*, 296 S.C. 312, 314, 372 S.E.2d 120 (Ct. App. 1988). "[A] party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by a plain and unmistakable implication." *Edwards v. Surratt*, 228 S.C. 512, 519 (1956).

The 1972 Order expressly provides that the 1958 Restrictions apply but with right of revision of the lot arrangement. The Defendants recorded their plat which shows seven lots, which was fully approved by the appropriate Horry County officials. The 1955 Plat shows seven lots. The map attached to the 1972 Order shows seven lots (with right of revision). The Defendants exercised the right that was provided to any owner of this property as provided in the 1972 Order, to revise the lot arrangement.

The Court has apparently concluded that only the owners of the property at the time the 1972 Order was issued or the grantors, whoever they are, could revise the lot arrangement. However, that is not what the 1972 Order states. If that is what the Court or the parties meant to say in the 1972 Order, that language should have been included therein. However, there is an absence of language from the 1972 Order that would support the conclusion that the Defendants cannot own their property as seven lots.

The Court's finding in this regard is in error because the 1972 Order fails to state in plain and unmistakable language that the subject property cannot be used as seven lots. The Court's finding in this regard is also in error because the 1972 Order fails to state in plain and unmistakable language that the right of revision is limited to any particular party or person. The plain and unambiguous language of the 1972 Order does not limit to any particular party or person the right of revision of the lot arrangement, but instead the plain meaning of the language shows an intent that such right run with the title to the subject property. See *West v. Newberry Elec. Coop, Inc.*, 357 S.C. 537, 542-43, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding that owner's right to have utility company relocate power line was a real covenant that ran with the land and benefitted owner's successor in title).

Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). Where there is doubt, the doubt must be resolved in favor of the property's free use. *Id.* Where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. *Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005); see also *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ("A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.").

In construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893

94 (1987); *Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004).

Here, the 1972 Order is clear and unambiguous about one thing - that any owners of the subject property have the right to revise the lot arrangement.⁷ The Court erred in failing to find as such. Any other construction of the 1972 Order requires reading something into the 1972 Order which simply does not exist. The Court appears to have concluded and taken the unsupported position that this right of revision is exclusive to the Plaintiffs in the 1972 Case as the so-called (and undefined term) grantors. However, the 1972 Order simply does not say that.

The 1958 Restrictions state that "[a]s to all unsold lots, the grantors reserve the right to change the boundary lines and the building lines thereof." On the contrary, the 1972 Order does not say that the right of revision was reserved to the plaintiffs in that case or the so-called grantors. Instead, the 1972 Order states that the restrictions attached to the 1955 Plat apply to Blocks 28 and 29, "**but⁸ with** right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (emphasis added).

The court in 1972 obviously had before it the restrictions attached to the 1955 Plat. Instead of using the same language contained within those restrictions, the court in 1972 and the parties used different language in the 1972 Order. If the court and the parties wanted to restrict the right of revision to the Plaintiffs in that case or the so-called grantors, they would have stated that "Plaintiffs

⁷ Because the 1972 Order is clear in providing this right and the right belongs to the owners of the subject property, currently the Defendants, the Court should not have considered extrinsic evidence in interpreting the 1972 Order and it erred to the extent it did so.

⁸ The definition of the word "but," is: "except that," "on the contrary," or "with the exception of" *MERRIAM WEBSTER'S COLLEGIATE DICTIONARY* (10th ed. 1993). Therefore, the 1972 Order holds the subject property is subject to such residential restrictions "with the exception of" the right of revision of the lot arrangement.

(or the so-called grantors) reserve the right to revise the lot arrangement” However, the court and the parties chose not to use those words.

Moreover, if the court in the 1972 Case wanted the 1972 Order and the agreement contained therein to have the same exact effect of the restrictions attached to the 1955 Plat, there would be no need to add the language they added to the 1972 Order. The 1972 Order would have just said that the restrictions attached to the 1955 Plat apply to the subject property.

Instead, the Court and the parties chose to provide any owner of the subject property, “Old Blocks 28 and 29,” with right of revision of the lot arrangement in the manner they deem fit. In fact, the use of the subject property as seven lots is consistent with the overall character of the neighborhood. As shown at trial and the documents introduced into evidence, the subject property as one large lot is abnormal for this subdivision. There are no other large lots in the subdivision. There are a few common areas, but the rest of the subdivision consists of residential lots. In fact, placing a large home or a large duplex on the subject property as one lot would be entirely inconsistent with the overall plan and development of the neighborhood. The subject property remaining as seven lots is in fact consistent with the overall character and nature of the subdivision.

The 1972 Order is quite clear that any owner of the subject property has the right to revise the lot arrangement. Defendants have arranged the lots consistent with the 1955 Plat and the map attached to the 1972 Order, keeping the subject property as seven lots.

If the language of the 1972 Order is not clear that any owners of the subject property have the right to revise the lot arrangement, or the language in the 1972 Order can be read more than one way, then the language is ambiguous and should be construed in Defendants’ favor. This is because covenants that restrict the free use of property must be strictly construed against limitations upon the

property's free use and where there is doubt, the doubt must be resolved in favor of the property's free use.

Defendants owning their property as seven lots as shown on Defendants' resubdivision plat is entirely proper as the remaining portions of Blocks 28 and 29 were shown as seven lots under the 1955 Plat and shown as seven lots according to the map attached to the 1972 Order.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated above, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

8. The Court erred in finding that "[t]he majority of Blocks 28 and 29 is wetlands . . . which makes this division somewhat impractical." The Court further erred to the extent it relied upon this finding to make its decision. Whether it is practical or not for the lots to be arranged in the manner Defendants chose to arrange is of no consequence to issues before the Court. Furthermore, no testimony was presented as to whether this division is practical.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated above, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

9. The Court erred in failing to find that the terms of the 1972 Order are ambiguous. To the extent the Court disagrees with Defendants' position that the 1972 Order clearly and unambiguously creates right of revision that is or was held by Defendants, then the Court should have found the language of the 1972 Order to be ambiguous and should have construed the language in the light most favorable to the free use of the property.

Both the 1958 Restrictions and the 1972 Order use the term "grantor," although the operative language of the 1972 Order does not contain the term "grantor." As mentioned above, Defendants submit that the use of the term "grantor" in the 1972 Order was superfluous and should not affect the construction of the operative language of the 1972 Order. However, the term "grantor" is not defined anywhere in the 1972 Order or the 1958 Restrictions. That is one reason why Defendants alternatively argue the 1972 Order is ambiguous.

If the Court finds that the right of revision in the 1972 Order is not limited to any particular party or person in ownership of the subject property, then the 1972 Order can be construed in more than one way. Defendants certainly believe and submit the 1972 Order can and should be construed that the right of revision is not limited to the plaintiffs in the 1972 Order. To the extent the Court believes there is an alternative interpretation, then the language is ambiguous and should be construed in the light most favorable to the free use of property.

In fact, the purpose of restrictions on the public record is for people to know how property can and cannot be used without having to go through a day trial (and seven years of litigation) to figure out what the restrictions mean. That is why it is the Plaintiff's burden in this case to show the restrictions apply either by their express language or by a plain and unmistakable implication. The Court here relies on some undefined extrinsic evidence to define "grantor," and then uses an awkward construction of the 1972 Order to support its holding. The manner in which the Court has chosen to interpret the 1972 Order in and of itself appears to show that the 1972 Order is ambiguous. Because it appears the Court found the 1972 Order to be ambiguous, as it considered extrinsic evidence (albeit undefined extrinsic evidence), then the Court should have strictly construed the ambiguity against the Plaintiff and construed the 1972 Order in favor of the free use of property. The

Court failed to do so. The Court respectfully erred in this regard.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, and find Defendants are entitled to own their property as seven lots.

10. The Court erred in failing to find the Defendants are protected by the shelter rule.

Our courts have recognized the shelter rule, which provides that the successor in interest of a bona fide purchaser for value stands in the same position as the bona fide purchaser even when the successor had notice of a lien or other interest. See *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 140, 322 S.E.2d 17, 21 (Ct. App. 1984). Thus, "[w]henver in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified." *Id.*

The evidence submitted shows David Meese and Leigh Meese, prior owners of the subject property, purchased the property without notice of the 1972 Order. The 1972 Order was not indexed properly such that it could not be found in a title examination. Their lawyer did not find it. The evidence presented does not support a finding that the Meeses had knowledge of the 1972 Order prior to the date they purchased the subject property.

The Court should have therefore applied the shelter rule, which would preclude the 1972 Order from encumbering the subject property and in turn the 1958 Restrictions from encumbering the subject property.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in

their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

11. The Court erred in its analysis of the shelter rule by considering evidence of knowledge or notice after the Meeses purchased the subject property. Any evidence regarding what the Meeses knew, what their lawyer James F. Dusenbury, Jr. knew, or Defendants or their attorney knew after the date on which the Meeses purchased the subject property is not relevant to the Court's analysis of the shelter rule.

The Court erred in considering any evidence of notice or knowledge of the 1972 Order or any restrictions after the Meeses purchased the subject property. Any such evidence is not relevant to an analysis regarding the interpretation of the 1972 Order, the 1958 Restrictions, or under the shelter rule and determining whether the Meeses were bona fide purchasers for value without notice. *See Spence v. Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) ("A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he actually paid in full the purchase money . . . ; (2) he purchased and acquired the legal title . . . ; and (3) *he purchased bona fide*, i.e., . . . without notice of a lien or defect. The bona fide purchaser must show all three conditions - actual payment, acquiring of legal title, and bona fide purchase - occurred *before he had notice* of a title defect or other adverse claim . . . ") (emphasis added).

For example, the Court found actual notice to exist because the Defendants' closing attorney knew about the 1972 Order and the Defendants knew about it. As mentioned above, such evidence is not relevant.

Furthermore, the Court appears to have improperly relied on conversations between the Defendants and the Meeses, all of which occurred after the Meeses purchased the subject property.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

12. The Court erred in interpreting the testimony of James F. Dusenbury. Mr. Dusenbury clearly testified he knew there was a strong possibility that restrictions applied, but that was after the Meeses purchased the subject property. His title examination and review of title found that no restrictions applied. He did not discover the 1972 Order in his title examination. He issued a title policy showing that no restrictions applied and did not take exception to the 1972 Order. He did not know about the 1972 Order or any restrictions affecting the subject property or potentially affecting the subject property until after the Meeses purchased the subject property.

The Court erred in failing to make findings consistent with the above and in making any findings to the contrary.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

13. The Court erred in its findings regarding the testimony of David Meese. David Meese clearly testified he had no knowledge about any restrictions on the subject property prior to his and his wife's purchase of the subject property. He also clearly testified that at the time he purchased the subject property, he was not aware of any claims or assertions that the subject property was subject to any restrictions that would have prevented it from being subdivided.

He also clearly testified that at the time he purchased the subject property, he did not have any impressions as to whether or not subdivision was an option that was available to him and his wife and both he and his wife believed subdivision was an option. He further testified at the time he and his wife purchased the property, they did not have any notice that there were any restrictions or covenants of record that would have prevented them from using the property as more than one lot. He further testified that at the time he and his wife purchased the subject property, he did not believe there were any such restrictions. At the time of their purchase of the subject property, neither he nor his wife had any notice of any judicial orders that would have been entered that would have affected the title to the real estate they were buying.

The Court erred in failing to make findings consistent with the above and erred in making any findings to the contrary.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

14. The Court erred in its findings regarding Leigh Meese's testimony. Ms Meese clearly testified that at the time she purchased the subject property, she did not have any notice of any restrictions that would have encumbered the subject property. She looked to Mr. Dusenbury, her closing attorney, to advise her as to what encumbered the subject property. She did not recall whether she had any knowledge at the time she purchased the subject property as to whether it could not be subdivided or used as more than one lot. However, at some point she had become aware that there were issues and she did not know at what point she became aware of what questions. She further

testified that her husband had a better memory than she did.

The Court erred in finding that "it is convinced that Leigh Meese was aware of the 1972 order that held that Blocks 28 and 29 were subject to the restrictions against subdivision, except that Carmen Ward had a right to change the lot lines." There is no convincing evidence in the record to support this conclusion by the Court. To the contrary, Leigh Meese's husband did not know about the 1972 Order or any restrictions prior to the Meeses' purchase, and the Meeses' attorney did not know about the 1972 Order or any restrictions. Leigh Meese never testified she knew about the restrictions or the 1972 Order prior to purchasing the subject property. The reasonable inference is that she did not know about any restrictions or the 1972 Order prior to purchasing the subject property, and the Court erred in finding and concluding to the contrary.

The Court erred in failing to make findings consistent with the above and erred in making any findings to the contrary.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

15. The Court erred in not even mentioning the facts and circumstances surrounding the recording and indexing of the 1972 Order. The Court should have made a finding of fact based upon the expert testimony presented by Defendants that the 1972 Order was not indexed correctly and could not be found in a title examination of the subject property. The expert testimony of Lisa Cleary, an expert title abstractor, regarding the 1972 Order should have been mentioned in the Final Order.

The Court erred in failing to make findings consistent with the above.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

16. The Court's finding that neither the Meeses nor Thomas Dicks had any intention on subdividing the property is not relevant to any of the issues in this case. These findings and any similar findings are not relevant to the Court's analysis of the shelter rule and they are not relevant to the Court's interpretation of the 1972 Order or the 1958 Restrictions. To the extent that the Court relied on these findings or similar findings, the Court erred.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

17. The Court erred in setting forth its findings related to the testimony of Wayne Mumford and not setting forth the fact that Mr. Mumford testified he reviewed the issues regarding the 1972 Order and opined to Thomas Dicks that he had the right to have seven lots on the property Thomas Dicks was purchasing.

The Court erred in failing to make findings consistent with the above.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in

their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

18. To the extent the Court found that David Meese had no knowledge of the 1972 Order or any restrictions on the subject property, but Leigh Meese did, the Court erred in failing to find that the bona fides of either of them is sufficient for the purpose of the shelter rule.

For example, in a situation where one of two cotenants has knowledge of a prior judgment or monetary lien that was not recorded properly, the judgment as a matter of equity should only attach to the undivided interest of the cotenant who has actual knowledge of such, but not the other cotenant who is a bona fide purchaser for value without notice. In this case, the restrictions cannot be handled in the same manner because restrictions cannot attach only to an undivided interest in the property. As a result, only one of the two cotenants need to be bona fide. *See In re Safe Deposit & Trust Co. of Baltimore*, 94 A. 93 (Md. 1915) (the relation between tenants in common does not imply any agency, on the part of the tenant in possession for his co-tenants, as to receipt of notice of outstanding claims affecting title.); *Gray v. Caldwell*, 904 So. 2d 212 (Miss. Ct. App. 2005) (a cotenant may not act or claim in any manner so as to lessen or diminish the value or effect of the other cotenant's right, title, interest or status in land); *Beesley v. Hanish*, 521 A.2d 1235 (Md. Ct. App. 1987) (A cotenant may not prejudice the rights of the other tenants without their unanimous consent.).

In fact, it is well-settled law in this country that “[u]nder the general doctrine that a restrictive covenant will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding restrictions, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be

protected in his or her title on account of the bona fides of the vendor.” 20 AM. JUR. 2D Covenants § 257 (2008). The very purpose of the shelter rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to “receive the benefit of [their] bargain and permit [them] to market the property.” 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

As a result, under the scenario involving restrictions on property, all it takes is for one purchaser to not have notice in order to clear the property of a restriction or lien. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

The Court erred in failing to make findings and conclusions consistent with the above.

Accordingly, for the reasons set forth above, the Court should reconsider, alter, and amend its Final Order as stated herein, deny Plaintiff any relief, award Defendants the relief they sought in their counterclaim, find Defendants are entitled to own their property as seven lots, and find Defendants are protected by the shelter rule.

19. The Court erred in finding a pond separates the Plaintiff's property from the Defendants' property. A pond does not separate the two properties. The Court should alter and amend the Final Order in this regard.

CONCLUSION

For the above-mentioned reasons, the Court should reconsider, alter, and amend its Final Order as stated above, vacate its Final Order, deny Plaintiff any relief, grant Defendants relief on their counterclaim, find Defendants can own their property as seven lots, and find Defendants are protected under the shelter rule.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



Demetri K. Koutrakos
Mary Dameron Milliken
1812 Lincoln Street, Suite #200
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-404-6900
Facsimile: 803-404-6902

ATTORNEYS FOR DEFENDANTS

August 31, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075

RECEIVED
AUG 20 2012

SC Court of Appeals

John Musick, ... Respondent

v.

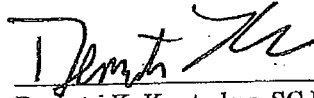
Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

NOTICE OF APPEAL

Thomas L. Dicks and Robert E. Dicks, Jr. hereby appeal the Final Order of the Honorable Cynthia Graham Howe dated July 29, 2011 and filed August 9, 2011 (attached as Exhibit A) and hereby appeal the Order Denying Defendants' Motion for Reconsideration of the Honorable Cynthia Graham Howe dated July 17, 2012 and filed July 18, 2012 (attached as Exhibit B). On August 22, 2011, Appellants received written notice of the entry of the Final Order dated July 29, 2011. On August 31, 2011, Appellants served their Notice of Motion and Motion to Reconsider, Alter, or Amend Judgment, which motion was filed September 1, 2011. On July 23, 2012, Appellants received written notice of the entry of the Order Denying Defendants' Motion for Reconsideration dated July 17, 2012.

[signature page immediately following]

CALLISON TIGHE & ROBINSON, LLC



Demetri K. Koutrakos, SC Bar No. 11318
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Columbia, SC 29202-1390
Telephone: 803-404-6900

Attorneys for Appellants

August 20, 2012

Other Counsel of Record:

Thomas C. Brittain, Esquire
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4614 Oleander Drive
Myrtle Beach, SC 29577
Telephone: 843-449-8562

Attorneys for Respondent

EXHIBIT A

FORM 4**STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS****JUDGMENT IN A CIVIL CASE**

CASE NO. 2004-CP-26-2075

John Musick

Thomas L. Dicks and Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:☐**JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.☒**DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.☐**ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other☐**ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other☐**DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:☒ See attached order. (Formal order to follow)☐ Statement of Judgment by the Court:

Dated at Conway, South Carolina, this 29th day of July, 2011.


PRESIDING JUDGEThis judgment was entered on the 20th day of May 2011, and a copy mailed first class this 20th day of May, 2011 to attorneys of record or to parties (when appearing pro se) as follows:Thomas C. Brittain
4614 Oleander Drive
Myrtle Beach, SC 29577
ATTORNEY(S) FOR PLAINTIFFDemetri K. Koutrakos
Post Office Box 1390
Columbia, SC 29202-1390

ATTORNEY(S) FOR DEFENDANT

CLERK OF COURT

FILED
COUNTY
2011 AUG -9 AM 9:14
CLERK OF COURT
CLANIE HUGHES-WARD

COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John Musick

Plaintiff,

vs.

Thomas L. Dicks and Robert E. Dicks, Jr.

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2004-CP-26-2075

FINAL ORDER

FILED
CLERK OF COURT
JUL 11 2005 - 9 AM 9:14
JUL 11 2005 - 9 AM 9:14

On April 12, 2011, the Plaintiff, represented by Thomas C. Brittain, Esq., and the Defendants represented by Demetri K. Koutrakos, Esq., appeared before the Court and presented evidence in the above referenced matter. The Court finds as follows:

FACTS AND FINDINGS

John Musick, Plaintiff in this case, a retired United States Air Force Major, purchased his lot in Long Bay Subdivision many years ago and has lived there for thirteen (13) years.

John Musick lives directly behind the Defendants property; a pond separates the two (2) lots. The Dicks property has always been one piece of property, has never been subdivided. It has always been one lot, as Blocks 28 and 29.

In 1972, Judge Winston Vaught issued an Order and concluded in the order that the 1958 restrictions which applied to Long Bay Subdivision applied also to Blocks 28 and 29, subject only to the "Grantor's" rights to change boundary lines and building lines as to any unsold lots. Based on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced, the language "Grantor" in referring to any unsold lots is Gene F. Lewis and/or Carmen F. Ward, as Co-Executors and Co-Trustees under the Last Will and Testament of Frederick W. Lewis, and the Court so finds.

2004-CP-26-2075

On June 1, 1972, Gene F. Lewis and Carmen F. Ward, under the Last Will and Testament of Frederick W. Lewis, the successors entitled to the unsold property in Long Bay Estates, brought a declaratory judgment action against all of the lot owners in Long Bay Estates. One of the issues in the suit was to determine whether a restriction against subdividing lots applied to Blocks 28, 29, 30, 31, 32 and 33.

Judge Winston Vaught, the then Master in Equity, issued a Master's Report on November 21, 1972, ruling that based on testimony, stipulations of counsel appearing for all parties and documentary evidence, (including records of deeds and maps,) the restrictions did apply to Blocks 28, 29, 30, 31, 32 and 33, (referencing the restrictive covenants recorded in Plat Book 25 at Page 22, Horry County records).

2
CH
In the 1972 Order, under Conclusions of Law as to the Lewis Estate Lands, Judge Vaught stated that "In like manner the remaining portions of "old" Blocks 28 and 29 are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. "The restrictions uniformly used in the area and the declaration recorded in Plat Book 25 at page 22, Horry County records, reserved to the Grantor the right to change boundary lines and building lines as to any unsold lots in any event." (emphasis added)

Judge Vaught found that this stipulation and order were equitable and fair and he upheld the order and stipulation.

It is of note that these areas were indicated on the map as "residential" in the copy of the map attached to the 1972 Order.

It is the finding of the Court that Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change boundary lines or building lines, that right being reserved to the original "Grantor".

Thereafter, Blocks 28 and 29 were sold by Carmen F. Ward to Leigh Ammons Meese and David Meese on September 2, 1997 for one hundred forty five thousand (\$145,000.00) dollars, as 1 lot. (The legal description refers to 2.67 acres (more or less) depicted on that certain survey dated July 24, 1997 prepared for David Meese and Leigh A. Meese by Culler Land Surveying Co., Inc. which was recorded on September 4, 1997). The Culler survey shows 1 tract of land, not subdivided.

It is further found that Carmen F. Ward, grantor, did not subdivide Blocks 28 and 29, which was her right as set out in Judge Vaught's 1972 order.

3
QW
Attorney James F. Dusenbury, Jr., was attorney of record representing the Meeses when Mr. and Mrs. Meese purchased Blocks 28 and 29. His testimony was that although he did not find Judge Vaught's 1972 order in the chain of title, he and the Meeses both knew there were restrictions on the Long Bay Estates property, but he was not sure if they applied to Blocks 28 and 29. However, Attorney Dusenbury testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Thomas Dicks when he first purchased the property. In fact, he had Mr. Thomas Dicks sign a stand-alone addendum when he signed the contract to purchase.

Ms. Leigh Ammons Meese, one of the owners from whom Thomas Dicks purchased Blocks 28 and 29, is a South Carolina attorney who never practiced real estate law. She testified that her father and uncle were involved in another piece of property in Long Bay Estates and had been involved in an earlier lawsuit which dealt with dividing other lots in the Long Bay Estates

subdivision. She also testified that she was vaguely aware of the 1972 order which held that the restrictions against subdividing applied to Blocks 28 and 29. She testified that she was not sure whether the property could have been subdivided, although at some point she became aware that there was an issue as to whether the property could be subdivided. She was not sure when she realized there was such an issue. Her husband, David Meese, not an attorney, testified that he was not nearly as involved with the property as was Mrs. Meese. Mr. and Mrs. Meese intended to build a house on the one lot, so whether or not it could be subdivided made very little difference to Mr. Meese. Mr. Meese did testify that at some point he believed he had an option to subdivide the two lots, however. Nevertheless, the fact that some restrictive covenants applied to Blocks 28 and 29, the property he and his wife previously owned, did sound familiar to him.

4
GHL
Defendant Thomas Dicks was aware of the real estate in Long Bay Estates because he had been a life guard in the area when he was younger and had visited his aunt and uncle who lived in the area. He also sold real estate for a local real estate company. He noticed the real estate (owned by the Meeses), found out who owned it, called Mr. and Mrs. Meese and made an offer. When Mr. Meese asked Mr. Dicks why he wanted the property, Mr. Dicks responded that he "wanted to build a house on the property to live there". Mr. Meese discussed Mr. Dicks' proposition with his wife and then called Mr. Dicks back and told him that they would sell him the property. Mr. Dicks purchased the property as one lot for one hundred seventy five thousand (\$175,000.00) dollars on May 14, 2003. His deed refers to the Culler Survey showing one lot of 2.67 acres.

Mr. Dicks stated he then discovered there was a possibility that the property could be subdivided. When he researched the issue, he never mentioned to the Meeses that he was contemplating subdividing the property. Mr. Dicks, thereafter, surveyed the property, had lot

lines drawn for seven lots, and conveyed Lots 1, 2 and 3 to his brother, Robert Dicks on May 15, 2003, for eighty seven thousand five hundred (\$87,500.00) dollars. The majority of Blocks 28 and 29 is wetlands, (See Defense Exhibit 8) which makes this division somewhat impractical.

Mr. Wayne Mumford, a member of the South Carolina and Horry County Bar Associations was the closing attorney for Mr. Thomas Dicks when he purchased the property from Mr. and Mrs. Meese in 2003. Although Mr. Mumford testified that he did not find Judge Vaught's 1972 order in the chain of title, (the order that applied the residential restrictions against subdividing to Blocks 28 and 29,) he had actual notice of the order because he had a copy of it before closing. He knew there was an issue as to whether or not the property could be subdivided and so advised his client, Mr. Dicks, although he believed there was a chance it could be subdivided. (Nevertheless, the deed that Mr. Dicks received refers to the Culler Survey, which shows only 1 lot of 2.67 acres. It does not show any subdivided property).

5.
GHL
The Court had an opportunity to judge the credibility of the witnesses. The Court finds that the Messes had notice that Blocks 28 and 29 were subject to the restrictions against subdivision, or at least had knowledge that they most likely were subject to the restrictions. Leigh Meese testified that she was aware of the 1972 order, if only vaguely so. Whether the property could have been subdivided was not important to Mr. or Mrs. Meese, because they did not plan to subdivide the property, but rather intended to build a house and live there.

Mr. Thomas Dicks told them the same thing when he purchased the property. He told David Meese that he intended to purchase the property and build a house to live there.

The Court does not find that Mr. or Mrs. Meese or Mr. Thomas Dicks had any intention of subdividing the property until Mr. Thomas Dicks went to the court house, after deciding to purchase the property, and found there may be an issue concerning subdivision. The Court is

convinced that Leigh Meese was aware of the 1972 order that held Blocks 28 and 29 were subject to the restrictions against subdivision, except that the "Grantor" Carmen Ward had a right to change the lot lines.

CONCLUSIONS OF THE COURT

Based upon the forgoing, the Court finds that Mr. and Mrs. Meese were not bona fide purchasers for value without notice of the restrictions against subdividing.

The Shelter Rule does not provide Mr. Thomas Dicks or Mr. Robert Dicks any freedom to subdivide the lot.

It is indisputable that Mr. Dicks was aware of the 1972 order.

Mr. Thomas Dicks and Mr. Robert Dicks, who had notice of the 1972 order, cannot take "shelter" of Mr. and Mrs. Meese, their sellers, who were put on notice of the 1972 order. *Liberty Loan Corporation of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Court of Appeals 1984) is therefore inapplicable to the facts here.

Leigh Meese, a South Carolina attorney, testified she was vaguely aware of the 1972 order and knew at some point there was an issue regarding subdividing the property. She had notice of the order.

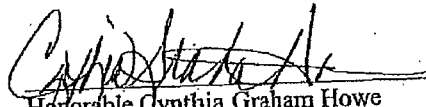
Mr. Wayne Mumford, closing attorney representing Thomas Dicks when he purchased the property from the Meeses, testified that although he did not find the 1972 order in the chain of title, he had a copy of the order prior to closing. This constitutes actual notice. Further, he advised his client that there was an issue as to subdivision of the property.

The Dickses may not use the Shelter Rule in this instance because the Meeses are not innocent purchasers, and it was never so established.

The Dickses' title is not "sanctified" under the Shelter Rule.

FURTHER, it is found that the 1972 Order applies. There was actual notice that only Carmen F. Ward or Mr. Gene F. Lewis, the "grantors", could ever change the lot lines. The property in question was sold as one lot throughout and should continue to be one lot. Based on the application of these restrictions, any sub-dividing is void; the property remains one lot.

AND IT IS SO ORDERED.


Honorable Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 29, 2011

7
CH

2004-CP-26-2075

EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004 CP-2075

John Musick

Thomas L. Dicks & Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Thomas C. Brittain, 4614 Oleander Dr., MB, SC
29577

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (form order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Final Order previously entered.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge
Master in Equity

3073

Judge Code

July 17, 2012

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows: .

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick

CASE NO.: 2004-CP-26-2075

Plaintiff,

vs.

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION**

Thomas L. Dicks and Robert E. Dicks, Jr.

Defendants.

1
9/11

This Court issued a Final Order on August 9, 2011. Thereafter, the Defendants, through counsel, timely moved for reconsideration and to amend pursuant to R52(b) and 59(e), SCRCP. The Court has reviewed all submissions and finds that it properly addressed all issues and ruled on them in its final order. However, Defendants have excepted to the Court's finding and conclusion that the Dicks Property had always been one piece of property and had never been subdivided, at least until the Defendants purchased the property and began to subdivide it. The property had always been one lot, as Blocks 28 and 29. Moreover, the Court further found and concluded that the Dicks Property was sold as one lot throughout and should continue to be one lot, not subdivided.

Defendants assert in their motion for reconsideration that the 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots and that Plaintiff John Musick so admitted in his discovery responses. The 1955 Plat did show a potential subdivision of the property. According to the 1972 Order, the original "grantors", Carmen F. Ward or Gene F. Lewis, had the right to change the lot lines. Nevertheless, the property was never physically subdivided. Subsequently, the property was conveyed as one lot from Carmen Ward to the Meeses and from the Meeses to Thomas Dicks as one 2.67 acre-lot. Until Thomas Dicks conveyed the property to his brother, Robert Dicks, and himself, (i.e., the Defendants), and they began plans to subdivide it, the Court's records show that the property

2004-CP-26-2075

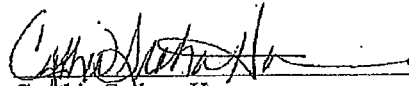
Page 1

contained only one tax number (TMS #186-14-05-001) as a 2.67 acre-lot. Once the Defendants physically subdivided the property into seven lots, the lots then received seven individual tax numbers.

Based upon the above,

IT IS HEREBY ORDERED, the Motion for Reconsideration and/or to Amend is denied.

AND IT IS SO ORDERED.


Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 17, 2012

2
CCH

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075

RECEIVED

AUG 20 2012

SC Court of Appeals

John Musick, ... Respondent

v.

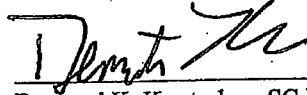
Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

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[signature page immediately following]

CALLISON TIGHE & ROBINSON, LLC



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Attorneys for Appellants

August 20, 2012

Other Counsel of Record:

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Telephone: 843-449-8562

Attorneys for Respondent

EXHIBIT A

FORM 4**STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS****JUDGMENT IN A CIVIL CASE**

CASE NO. 2004-CP-26-2075

John Musick

Thomas L. Dicks and Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

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- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at Conway, South Carolina, this 29th day of July, 2011.


 PRESIDING JUDGE

This judgment was entered on the 20th day of May 2011, and a copy mailed first class this 20th day of May, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas C. Brittain
 4614 Oleander Drive
 Myrtle Beach, SC 29577
 ATTORNEY(S) FOR PLAINTIFF

Demetri K. Koutrakos
 Post Office Box 1390
 Columbia, SC 29202-1390

ATTORNEY(S) FOR DEFENDANT

CLERK OF COURT

FILED
 CLERK OF COURT
 2011 AUG -9 AM 9:14
 CLERK OF COURT

COPY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John Musick

Plaintiff,

vs.

Thomas L. Dicks and Robert E. Dicks, Jr.

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTBENTH JUDICIAL CIRCUIT

CASE NO.: 2004-CP-26-2075

FINAL ORDER

FILED
CLERK OF COURT
2011 AUG -9 AM 9:14
CLARENCE HUGHES-WARD

On April 12, 2011, the Plaintiff, represented by Thomas C. Brittain, Esq., and the Defendants represented by Demetri K. Koutrakos, Esq., appeared before the Court and presented evidence in the above referenced matter. The Court finds as follows:

FACTS AND FINDINGS

John Musick, Plaintiff in this case, a retired United States Air Force Major, purchased his lot in Long Bay Subdivision many years ago and has lived there for thirteen (13) years.

John Musick lives directly behind the Defendants property; a pond separates the two (2) lots. The Dicks property has always been one piece of property, has never been subdivided. It has always been one lot, as Blocks 28 and 29.

In 1972, Judge Winston Vaught issued an Order and concluded in the order that the 1958 restrictions which applied to Long Bay Subdivision applied also to Blocks 28 and 29, subject only to the "Grantor's" rights to change boundary lines and building lines as to any unsold lots. Based on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced, the language "Grantor" in referring to any unsold lots is Gene F. Lewis and/or Carmen F. Ward, as Co-Executors and Co-Trustees under the Last Will and Testament of Frederick W. Lewis, and the Court so finds.

2004-CP-26-2075

On June 1, 1972, Gene F. Lewis and Carmen F. Ward, under the Last Will and Testament of Frederick W. Lewis, the successors entitled to the unsold property in Long Bay Estates, brought a declaratory judgment action against all of the lot owners in Long Bay Estates. One of the issues in the suit was to determine whether a restriction against subdividing lots applied to Blocks 28, 29, 30, 31, 32 and 33.

Judge Winston Vaught, the then Master in Equity, issued a Master's Report on November 21, 1972, ruling that based on testimony, stipulations of counsel appearing for all parties and documentary evidence, (including records of deeds and maps,) the restrictions did apply to Blocks 28, 29, 30, 31, 32 and 33, (referencing the restrictive covenants recorded in Plat Book 25 at Page 22, Horry County records).

2
gth
In the 1972 Order, under Conclusions of Law as to the Lewis Estate Lands, Judge Vaught stated that "In like manner the remaining portions of "old" Blocks 28 and 29 are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. "The restrictions uniformly used in the area and the declaration recorded in Plat Book 25 at page 22, Horry County records, reserved to the Grantor the right to change boundary lines and building lines as to any unsold lots in any event." (emphasis added)

Judge Vaught found that this stipulation and order were equitable and fair and he upheld the order and stipulation.

It is of note that these areas were indicated on the map as "residential" in the copy of the map attached to the 1972 Order.

It is the finding of the Court that Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change boundary lines or building lines, that right being reserved to the original "Grantor".

Thereafter, Blocks 28 and 29 were sold by Carmen F. Ward to Leigh Ammons Meese and David Meese on September 2, 1997 for one hundred forty five thousand (\$145,000.00) dollars, as 1 lot. (The legal description refers to 2.67 acres (more or less) depicted on that certain survey dated July 24, 1997 prepared for David Meese and Leigh A. Meese by Culler Land Surveying Co., Inc. which was recorded on September 4, 1997). The Culler survey shows 1 tract of land, not subdivided.

It is further found that Carmen F. Ward, grantor, did not subdivide Blocks 28 and 29, which was her right as set out in Judge Vaught's 1972 order.

3
CH
Attorney James F. Dusenbury, Jr., was attorney of record representing the Meeses when Mr. and Mrs. Meese purchased Blocks 28 and 29. His testimony was that although he did not find Judge Vaught's 1972 order in the chain of title, he and the Meeses both knew there were restrictions on the Long Bay Estates property, but he was not sure if they applied to Blocks 28 and 29. However, Attorney Dusenbury testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Thomas Dicks when he first purchased the property. In fact, he had Mr. Thomas Dicks sign a stand-alone addendum when he signed the contract to purchase.

Ms. Leigh Ammons Meese, one of the owners from whom Thomas Dicks purchased Blocks 28 and 29, is a South Carolina attorney who never practiced real estate law. She testified that her father and uncle were involved in another piece of property in Long Bay Estates and had been involved in an earlier lawsuit which dealt with dividing other lots in the Long Bay Estates

subdivision. She also testified that she was vaguely aware of the 1972 order which held that the restrictions against subdividing applied to Blocks 28 and 29. She testified that she was not sure whether the property could have been subdivided, although at some point she became aware that there was an issue as to whether the property could be subdivided. She was not sure when she realized there was such an issue. Her husband, David Meese, not an attorney, testified that he was not nearly as involved with the property as was Mrs. Meese. Mr. and Mrs. Meese intended to build a house on the one lot, so whether or not it could be subdivided made very little difference to Mr. Meese. Mr. Meese did testify that at some point he believed he had an option to subdivide the two lots, however. Nevertheless, the fact that some restrictive covenants applied to Blocks 28 and 29, the property he and his wife previously owned, did sound familiar to him.

4
GHI
Defendant Thomas Dicks was aware of the real estate in Long Bay Estates because he had been a life guard in the area when he was younger and had visited his aunt and uncle who lived in the area. He also sold real estate for a local real estate company. He noticed the real estate (owned by the Meeses), found out who owned it, called Mr. and Mrs. Meese and made an offer. When Mr. Meese asked Mr. Dicks why he wanted the property, Mr. Dicks responded that he "wanted to build a house on the property to live there". Mr. Meese discussed Mr. Dicks' proposition with his wife and then called Mr. Dicks back and told him that they would sell him the property. Mr. Dicks purchased the property as one lot for one hundred seventy five thousand (\$175,000.00) dollars on May 14, 2003. His deed refers to the Culler Survey showing one lot of 2.67 acres.

Mr. Dicks stated he then discovered there was a possibility that the property could be subdivided. When he researched the issue, he never mentioned to the Meeses that he was contemplating subdividing the property. Mr. Dicks, thereafter, surveyed the property, had lot

lines drawn for seven lots, and conveyed Lots 1, 2 and 3 to his brother, Robert Dicks on May 15, 2003, for eighty seven thousand five hundred (\$87,500.00) dollars. The majority of Blocks 28 and 29 is wetlands, (See Defense Exhibit 8) which makes this division somewhat impractical.

Mr. Wayne Mumford, a member of the South Carolina and Horry County Bar Associations was the closing attorney for Mr. Thomas Dicks when he purchased the property from Mr. and Mrs. Meese in 2003. Although Mr. Mumford testified that he did not find Judge Vaught's 1972 order in the chain of title, (the order that applied the residential restrictions against subdividing to Blocks 28 and 29,) he had actual notice of the order because he had a copy of it before closing. He knew there was an issue as to whether or not the property could be subdivided and so advised his client, Mr. Dicks, although he believed there was a chance it could be subdivided. (Nevertheless, the deed that Mr. Dicks received refers to the Culler Survey, which shows only 1 lot of 2.67 acres. It does not show any subdivided property).

5
GHT
The Court had an opportunity to judge the credibility of the witnesses. The Court finds that the Messes had notice that Blocks 28 and 29 were subject to the restrictions against subdivision, or at least had knowledge that they most likely were subject to the restrictions. Leigh Meese testified that she was aware of the 1972 order, if only vaguely so. Whether the property could have been subdivided was not important to Mr. or Mrs. Meese, because they did not plan to subdivide the property, but rather intended to build a house and live there.

Mr. Thomas Dicks told them the same thing when he purchased the property. He told David Meese that he intended to purchase the property and build a house to live there.

The Court does not find that Mr. or Mrs. Meese or Mr. Thomas Dicks had any intention of subdividing the property until Mr. Thomas Dicks went to the court house, after deciding to purchase the property, and found there may be an issue concerning subdivision. The Court is

convinced that Leigh Meese was aware of the 1972 order that held Blocks 28 and 29 were subject to the restrictions against subdivision, except that the "Grantor" Carmen Ward had a right to change the lot lines.

CONCLUSIONS OF THE COURT

Based upon the forgoing, the Court finds that Mr. and Mrs. Meese were not bona fide purchasers for value without notice of the restrictions against subdividing.

The Shelter Rule does not provide Mr. Thomas Dicks or Mr. Robert Dicks any freedom to subdivide the lot.

It is indisputable that Mr. Dicks was aware of the 1972 order.

Mr. Thomas Dicks and Mr. Robert Dicks, who had notice of the 1972 order, cannot take "shelter" of Mr. and Mrs. Meese, their sellers, who were put on notice of the 1972 order. *Liberty Loan Corporation of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Court of Appeals 1984) is therefore inapplicable to the facts here.

Leigh Meese, a South Carolina attorney, testified she was vaguely aware of the 1972 order and knew at some point there was an issue regarding subdividing the property. She had notice of the order.

Mr. Wayne Mumford, closing attorney representing Thomas Dicks when he purchased the property from the Meeses, testified that although he did not find the 1972 order in the chain of title, he had a copy of the order prior to closing. This constitutes actual notice. Further, he advised his client that there was an issue as to subdivision of the property.

The Dickses may not use the Shelter Rule in this instance because the Meeses are not innocent purchasers, and it was never so established.

The Dickses' title is not "sanctified" under the Shelter Rule.

FURTHER, it is found that the 1972 Order applies. There was actual notice that only Carmen F. Ward or Mr. Gene F. Lewis, the "grantors", could ever change the lot lines. The property in question was sold as one lot throughout and should continue to be one lot. Based on the application of these restrictions, any sub-dividing is void; the property remains one lot.

AND IT IS SO ORDERED.


Honorable Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 29, 2011

7
6/11

2004-CP-26-2075

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2004 CP-2075

John Musick

Thomas L. Dicks & Robert E. Dicks, Jr.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Thomas C. Brittain, 4614 Oleander Dr., MB, SC
29577

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Final Order previously entered.

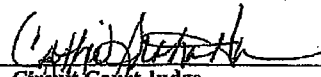
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge
Master in Equity

3073

Judge Code

July 17, 2012

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

John Musick)
Plaintiff,)

CASE NO.: 2004-CP-26-2075

vs.)
Thomas L. Dicks and Robert E. Dicks, Jr.)
Defendants.)

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION**

FILED
CLERK OF COURT
2011-18 PM 2:45
HORRY COUNTY

1/20/11
This Court issued a Final Order on August 9, 2011. Thereafter, the Defendants, through counsel, timely moved for reconsideration and to amend pursuant to R52(b) and 59(e), SCRCP. The Court has reviewed all submissions and finds that it properly addressed all issues and ruled on them in its final order. However, Defendants have excepted to the Court's finding and conclusion that the Dicks Property had always been one piece of property and had never been subdivided, at least until the Defendants purchased the property and began to subdivide it. The property had always been one lot, as Blocks 28 and 29. Moreover, the Court further found and concluded that the Dicks Property was sold as one lot throughout and should continue to be one lot, not subdivided.

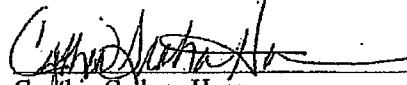
Defendants assert in their motion for reconsideration that the 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots and that Plaintiff John Musick so admitted in his discovery responses. The 1955 Plat did show a potential subdivision of the property. According to the 1972 Order, the original "grantors", Carmen F. Ward or Gene F. Lewis, had the right to change the lot lines. Nevertheless, the property was never physically subdivided. Subsequently, the property was conveyed as one lot from Carmen Ward to the Meeses and from the Meeses to Thomas Dicks as one 2.67 acre-lot. Until Thomas Dicks conveyed the property to his brother, Robert Dicks, and himself, (i.e., the Defendants), and they began plans to subdivide it, the Court's records show that the property

contained only one tax number (TMS #186-14-05-001) as a 2.67 acre-lot. Once the Defendants physically subdivided the property into seven lots, the lots then received seven individual tax numbers.

Based upon the above,

IT IS HEREBY ORDERED, the Motion for Reconsideration and/or to Amend is denied.

AND IT IS SO ORDERED.


Cythia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: July 17, 2012

2
CWH

1 STATE OF SOUTH CAROLINA :
 2 : SS:
 3 COUNTY OF HORRY :
 4 IN THE COURT OF COMMON PLEAS
 5 -----

Certified
Transcript

6 -----x
 7 JOHN MUSICK, :
 8 :
 9 Plaintiff, :
 10 :
 11 -vs- : Case Number
 12 : 2004-CP-26-2075
 13 THOMAS L. DICKS and ROBERT E. DICKS, :
 14 JR., :
 15 :
 16 Defendants. :
 17 -----x

18 Transcript of Proceedings had before the
 19 Honorable Cynthia Howe, Master-In-Equity, taken by Rita
 20 Rodriguez, at the Conway County Courthouse, 1301 Second
 21 Avenue, Conway, South Carolina, on Tuesday, the 12th
 22 day of April, 2011, commencing at 10:30 a.m.

23 -----
 24
 25 Job No. CS315165

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PROCEEDINGS

THE COURT: Please be seated. I apologize. I had a pretrial conference and I had a little emergency come up.

This is the case of John Musick versus Thomas L. Dicks and Robert E. Dicks, Junior. It is civil action number 2004-CP-26-2075. This case is definitely before the Master-In-Equity. It's already been tried on Cross Motions for Summary Judgement before the Honorable Stan Cross, Junior, and appealed to the Court of Appeals and remanded. So this court definitely has jurisdiction and I will hear from you.

I understand you want to do short opening statements; is that correct?

MR. BRITTAIN: Yes, your Honor.

THE COURT: All right, Mr. Brittain.

MR. BRITTAIN: Thank you very much.

Your Honor, I represent John Musick. John Musick is not the only one here today. You see we have a lot of property owners from Long Bay subdivision.

This case involves the purchase of a lot in the subdivision in an effort by the purchaser to subdivide that lot. My client lives right

1 behind that piece of property, Mr. Musick. And
2 he, on behalf of all of these people here and
3 others, are concerned about the subdivision of
4 this lot violating applicable deed restrictions
5 that don't allow the subdivision of a lot. And
6 nobody wants seven lots and seven houses across a
7 pond from them instead of one. So that's sort of
8 the theory of what's going on.

9 We tried this case back in, I don't know,
10 Jim, what, 2004?

11 MR. KOUTRAKOS: Six or seven.

12 MR. BRITTAIN: 2005 or six before Judge
13 Cross. And it was tried, I think, looking back
14 on it, I feel responsible, I think Jim might too,
15 we tried it on Cross Motions for Summary Judgment
16 and that created a standard in front of Judge
17 Cross which was in a light most favorable to the
18 plaintiff and we prevailed.

19 Judge Cross ruled that the restrictions
20 would not allow a subdivision of this lot by Mr.
21 Dicks. That it had been one lot, it was
22 supposed to be one lot and that the only person
23 that could change it was Carmen Ward, who was the
24 grantor.

25 The Court of Appeals issued an Order that

1 we are functioning under. And they made several
2 findings that I don't think we can or should
3 litigate here. One of them is that the 1972
4 Order, which is one written by Judge Winston
5 Vaught, your predecessor's predecessor's
6 predecessor in 1972 in response to a Complaint
7 filed by Carmen Ward, who we claim is the
8 grantor, made these deed restrictions applicable
9 to old Lots 28 and 29. That's the property we
10 are talking about. And they're on this map that
11 Jim has that we are going to introduce into
12 evidence. We are going to have several maps
13 introduced into evidence.

14 But one of the things that's on those
15 restrictions is there will be no subdivision of
16 any lot and the right to change any boundary
17 lines is reserved to the grantor. So that is
18 provision A on those deed restrictions.

19 We claim that that clearly speaks at the
20 time it was issued that she or her successor,
21 predecessor-in-title, that she clearly is the
22 grantor.

23 Judge Cross in his Order indicated that it
24 had been admitted that there was no break in the
25 title as part of his finding, that she was the

1 grantor.

2 And it certainly didn't mean that anybody
3 that ever ended up buying it could ever change
4 it. Because if that was the case, there would be
5 no reason to have a restriction. And we
6 prevailed on that point.

7 Now, the Court of Appeals said that under
8 the standard that we won, that needs to be
9 litigated. So we are here, as I understand it,
10 and Mr. Koutrakos might see it different, that's
11 still an issue I believe you need to resolve.

12 I don't believe you need to resolve whether
13 the 1972 Order was in the chain of title because
14 I think the fact is that it was not. It was
15 indexed under Carmen Ward's, not indexed under
16 her name. So when people were looking, as I
17 understand it, they would not come across the
18 1972 Order.

19 Now, Bob DeCiero found it. He is not a
20 title examiner. But I still don't think it is in
21 the chain of title and the Court of Appeals said
22 so.

23 We also claim that Mr. Dicks had actual
24 Notice of the '72 Order.

25 Now, the '72 Order makes it clear, as far

1 as we've concerned, that you can't subdivide the
2 lot. It was sold as one lot to Leigh Meese, who
3 is intervening on she and her husband, she sold
4 it as one lot. And DeCiero gave the '72 Order
5 to the surveyor and he gave it to Mr. Dicks, who
6 was honest enough to admit, and Mr. Koutrakos
7 also in the Court of Appeals, that he had actual
8 Notice of the '72 Order and its contents prior to
9 purchasing the property..

10 So we argued even if it wasn't in the chain
11 of title, actual notice would constitute a
12 prohibition from any sort of subdivision of this
13 lot.

14 Now, the Court accepted the concept of the
15 Shelter Rule. The Court of Appeals said, you
16 know, we believe in the Shelter Rule. And if
17 the purchaser bought it from somebody who did not
18 know about the applicability of these
19 restrictions, that is, there could be no
20 subdivision of the lot, then they would be
21 sheltered even though they had actual knowledge.
22 Which really shocked me, I'm going to admit it to
23 you. I couldn't believe that was the case. But
24 it seems to say that.

25 So they sent the case back on the point to

1 try to find out what the intermediate owner,
2 Leigh Meese and David Meese, knew about the
3 application of these restrictions to the property
4 and the inability that she would have had to
5 subdivide the lot. So I think that's an issue to
6 be litigated.

7 Now, I intend to break it out this way.
8 We say Carmen Ward is the grantor. She brought a
9 lawsuit, a Complaint, to make clear that these
10 restrictions apply to the property in this
11 lawsuit. It became law in the 1972 Order. She
12 intended it to be this way. She was dieing. At
13 the point of death she sent a couple of notarized
14 letters that I'll be trying to introduce. Mr.
15 Koutrakos says they're inadmissible. He strongly
16 objects to their admissibility. Judge Cross did
17 not allow them in at the last case but I would
18 like to present them, proffer them, and I think I
19 have a valid theory for why they should be
20 admitted.

21 We think we can establish that Leigh Meese
22 knew this. She litigated in 2000 an opportunity
23 to subdivide other lots in the subdivision.
24 Judge Cross, the judge in that case, he issued an
25 Order in 2000 applying the restrictions

1 throughout the subdivision. She signed a
2 document agreeing that the restrictions apply to
3 these old Lots 28 and 29. She signed it. So we
4 say we can prove she knew it. That was when she
5 withdrew her appeal of Judge Cross's decision in
6 2000. Then, like I said, she sold the property
7 as one lot.

8 So we think we can establish that every
9 owner either knew it was one lot or in the early
10 days knew it and didn't want to change it, Carmen
11 Ward.

12 But Leigh Meese knew it was one lot and
13 admitted it in writing. Tom Dicks knew it was
14 one lot and couldn't be subdivided based on the
15 provision of the '72 Order.

16 Therefore, when you get to the end of the
17 case, I believe you will find that we have a
18 strange situation where every single person that
19 is on this piece of property had actual notice
20 that the restrictions prohibited the subdivision
21 of the lot. And in that situation it would make
22 no sense legally for any theory to allow the
23 subdivision.

24 Thank you.

25 THE COURT: Thank you, Mr. Brittain.

1 Mr. Koutrakos.

2 MR. KOUTRAKOS: Your Honor, may it
3 please the Court, Jim Koutrakos here on behalf of
4 Robert and Thomas Dicks.

5 I hope your Honor can see that.

6 THE COURT: It depends on what part of
7 that you want me to see.

8 MR. KOUTRAKOS: I understand.

9 Your Honor, the plaintiff, Mr. Musick, owns
10 Lot 4 Block 24 of Long Bay Estates. My clients,
11 Thomas and Robert Dicks, own property adjacent to
12 Lot 4 Block 24.

13 My clients' position is that their property
14 is seven lots and always has been seven lots.
15 The plaintiff says it's not seven lots and that's
16 generally what the issue is in this case.

17 My clients' property today is a part of
18 Blocks 28 and 29. In 1955, this map was drawn
19 of the Long Bay Estates subdivision. It was
20 recorded in -- it was drawn by Robert Bellamy.
21 It's dated May 1955. And from my understanding,
22 it was recorded in 1998 in Plat Book 25 at Page
23 22. And the plat book and page number are
24 important because you will hear that plat book
25 and page number referenced in numerous other

1 documents in this case.

2 So when this plat was recorded -- and this
3 is the only recorded plat of this nature. You
4 will hear some testimony today there is since
5 unrecorded plats but this is the recorded plat of
6 the entire subdivision. And, your Honor, it
7 shows Blocks 28 and 29 right here (indicating) as
8 containing seven lots. And a portion of that
9 property, and I'll explain to the Court in a
10 second why it's only a portion of that property,
11 a portion of that property is owned by my
12 clients, Thomas and Robert Dicks.

13 There was somehow attached to these
14 covenants, excuse me, attached to this map, a
15 piece of paper. And it's a piece of paper
16 because that's all it is. It's not signed, it's
17 not notarized, it's not witnessed, somehow this
18 document got attached to the plat. And I
19 believe, if you go down and ask somebody at the
20 Register of Deeds today to take a look at this
21 plat, this is how it will look. It will have
22 this piece of paper attached over on top of the
23 subdivision map. Which, quite frankly, is odd,
24 but that's just the way it is.

25 There are a couple of important provisions

1 in this, I guess these restrictions. The most
2 important part is that, it says, "Restrictions
3 are to be imposed on the residential property
4 Long Bay Estates."

5 Residential property. The theory is that
6 this is going to be a residential subdivision.

7 It also says, "These protective covenants
8 are recorded as blanket covenants covering all
9 lots and Blocks 1 through 27 as shown on the plat
10 of Long Bay Estates dated May 1955 compiled by
11 Robert L. Bellamy."

12 So it affirms this plat. And it's
13 referring to Blocks 1 through 27. So Blocks 1
14 through 27 are covered by the terms of this
15 document attached to the 1955 plat. Of course,
16 by it's very nature, Blocks 28 and so forth going
17 forward are not encumbered or purported to be
18 encumbered by this document attached to the plat.

19 There are two other important provisions
20 that will be issues in this case, at least what
21 plaintiff's will say are issues in this case.
22 The first provision says that "No lot shall be
23 subdivided." It says right here, "No lot shall
24 be subdivided."

25 The next provision is as to all unsold

1 lots. "The grantors," an undefined term,
2 because if you read this document it doesn't tell
3 you who the grantors are. "The grantors reserve
4 the right to change the boundary lines and the
5 building lines thereof."

6 So, what that means, the grantors, whoever
7 they were, reserve the right to change the
8 boundary lines and building lines as to unsold
9 lots. Not blocks, lots. So they can change the
10 building lines and the boundary lines of the
11 lots.

12 In 1972, Carmen Ward and Gene Lewis, who at
13 that point in time owned Blocks 28, 29, 30, 31,
14 32 and perhaps 33, filed an action, presumably,
15 what appears to be against the rest of the Long
16 Bay neighborhood, against all the other residents
17 of Long Bay Estates, and it was seeking various
18 forms of relief.

19 One form of relief is, it says here, Ye
20 Olde Kings Road. This road is north of Blocks 28
21 and 29. Well, that road was never constructed in
22 the area as shown in this plat. For some
23 reason, it was recorded, and you will see in a
24 second, I'll show you a map that's kind of an
25 overlay map, it cut off portions of Blocks 28 and

1 29.

2 So the plaintiffs in this case, Carmen Ward
3 and Gene Lewis, wanted to apply title to the
4 property. They wanted the Court to say, hey, the
5 new road is a road. The old road is no longer a
6 road and nobody has the rights to this old road
7 as shown on the plat.

8 The theory being if somebody bought a lot
9 off this plat and saw a road there, that they
10 have a right to rely that a road was going to be
11 in its place. So, in any event, that was one of
12 the issues.

13 Another issue was whether these Restrictive
14 Covenants applied to Blocks 28 through 33.

15 In 1972, that same year, in November, as
16 Mr. Brittain indicated, Judge Vaught issued an
17 Order -- excuse me, your Honor.

18 In 1972 Judge Vaught issued a Master's
19 Decree which was subsequently confirmed by a
20 circuit judge. And in that Order, the Court
21 made a couple of findings. And I want to focus
22 on a couple of the findings.

23 One of the findings I want to focus on is
24 finding of fact number 3 which appears on Page 4
25 of the Order. It says, "All of the property on

1 the Lewis Estate lands' side of the common
2 boundary line is shown on the map recorded in
3 Plat Book 25 at Page 22 as being divided into
4 lots and blocks, including additional Blocks
5 numbered 28, 29, 30, 31, 32, 33 thereon, which
6 are shown within that portion of the plaintiffs'
7 land area described on the first page of this
8 report."

9 And the reason I want the Court to focus on
10 that is so there is no dispute in this case, and
11 there was a dispute for a while, that Blocks 28
12 and 29 are seven lots. This clearly shows by
13 looking at this it's seven lots. The Master in
14 his report said, hey, 28 and 29 have lots. It
15 didn't enumerate how many lots were in there but
16 it was clear that there were lots included within
17 Blocks 28 and 29.

18 So generally what the Court did, the Court
19 then talked about a stipulation between the
20 parties. It says, "Counsel have stipulated" --

21 Let me back up a little bit. The Court
22 made a specific finding, which is kind of clear
23 to me, that the covenants only apply to Blocks 1
24 through 27 and there is no theory under which
25 those covenants attached to the map could apply

1 to any other property in the subdivision. So the
2 Court made that finding.

3 But there was an agreement of the parties.
4 It says, "Counsel have stipulated: That, as to
5 the Lewis Estate lands, Blocks 30, 32, and 34 as
6 shown on the Bellamy map are declared to be
7 residential in character and subject to
8 restrictions to the same general type as those
9 stated in the declaration recorded in Plat
10 Book 25 at Page 22 as being applicable to Blocks
11 1 through 27, inclusive, and also the area lying
12 between the rear of 'old' Blocks 24 and 25 and
13 the 50-foot paved street are subject to such
14 residential restrictions, but with right of
15 revision of the lot arrangement, or for
16 combination with abutting portions of the lots in
17 Blocks 24 and 25."

18 "That the remaining lands in the portion of
19 the Lewis Estate property under consideration
20 here are free of any restrictions or plan of
21 development."

22 So, the Court, at least in this paragraph,
23 memorializes the stipulation between the lawyers
24 that says, hey, these restrictions that are
25 attached to the map are now going to apply to

1 Blocks 28 and 29. However, "but with right of
2 revision of the lot arrangement, or for
3 combination with abutting portions of the lots in
4 Blocks 24 and 25."

5 As you recall, Mr. Dicks owns Lot 4 of
6 Block 24, I believe, and Blocks 24 and 25. So in
7 the operative language of this Order, it says
8 that the remaining portions of Blocks 20 and 29
9 this is a right of revision of the lot
10 arrangement. Lot arrangement. I already
11 discussed there are seven lots that are shown on
12 this plat. Or they could combine those lots with
13 the lots as shown in Blocks 24 and 25.

14 So, in any event, as the Court recorded
15 those through that stipulation, the Court again
16 makes a legal conclusion of law that the
17 restrictions only apply to 1 through 27. But
18 then, it should be pointed out, that this finding
19 is modified by the agreement of the plaintiffs
20 and it talks about 30, 32 and 34.

21 And what it basically says is that Blocks
22 30, 32 and 34 are subject to the restrictions
23 attached to the plat. That's what the Court
24 said. Very plain and simple. They are subject
25 to the restrictions attached to the plat.

1 However, when the Court started talking
2 about our property, it says something different.
3 And this is basically a reiteration of the
4 counsels stipulation that we talked about
5 previously. This is the point of contention in
6 this case.

7 Again, "In like manner, the remaining
8 portion of old Blocks 28 and 29, that is to say
9 the area lying between the rear of Blocks 24 and
10 25 and the southeasternmost paved street are
11 subject to such residential restrictions but with
12 right of revision of the lot arrangement or for
13 combination with abutting portions of lots in
14 Blocks 24 and 25. The restrictions uniformly
15 used in this area and the declaration recorded in
16 25 and 22 reserved to grantor the right to change
17 boundary lines and building lines as to any
18 unsold lots in any event."

19 "The agreement of the plaintiffs to so
20 restrict the areas described or identified above
21 gives further assurance to the defendants who are
22 owners of lots in Block 1 through 27, inclusive.
23 Such an agreement is equity and should be
24 approved."

25 And the Court did so.

1 The next paragraph says, "The above areas
2 have been indicated as 'residential' and as
3 'residential (with right of revision)' on the
4 copy of the map attached to this report."

5 So when it talks about residential, it
6 talks about 30, 32 and 34. When it talks about
7 residential with right of revision, it's talking
8 about Blocks 28 and 29. And this is the map
9 that's attached to the Order.

10 Now, let me clarify something, and I don't
11 know why this was done, it was done way before I
12 was practicing law, the Master would issue a
13 report and then it would be confirmed by a
14 circuit court judge.

15 So this map right here is signed. I,
16 believe this identical map is attached to the
17 Master's report, and we put it in evidence. The
18 map I'm showing you today is actually signed by
19 the presiding Judge and I assume it was the
20 circuit court Judge. It is decreed confirming
21 the Master's report. I'm not sure who it is.
22 But this would be attached to the Decree.

23 Now, this is the map to which the Order
24 refers. Here is 24 and 25. Mr. Musick owns
25 Lot 4 right here (indicating), Block 24. My

1 clients own this property right here (indicating)
2 where it says "residential with right of
3 revision."

4 You will see dotted lines here. What do
5 those dotted lines mean? Well, there is a
6 reference section on the survey. And in the
7 reference section it says Lots 28, 29, 30, 31, 32
8 and 33 as shown in Plat Book 25 at Page 22
9 represented by dotted lines. So the dotted
10 lines represent what was shown in Plat Book 25
11 and 22.

12 The other solid lines show a different
13 plat. This different plat would show how the
14 property was cut off.

15 So the fact that there are dotted lines
16 here means nothing other than it shows the
17 difference between the two different plats and
18 the way the plats were overlaid.

19 So the Court found that my clients'
20 property, Blocks 28 and 29, was residential but
21 with right of revision.

22 The Court of Appeals in its Order, we
23 argued that this shows seven lots but the Court
24 of Appeals said, hey, the map attached to the
25 1972 Order shows seven lots. That's going to be

1 disputed by the plaintiffs in this case.

2 So, in any event, Mr. Brittain was kind
3 enough to agree that this Order was not indexed
4 in our chain of title and therefore could not be
5 found.

6 Now, what happened next was in 1997 Carmen
7 Ward sold this property, where it says
8 residential with right of revision, sold it to,
9 it was her and Richard Raymond and Peter Lewis,
10 sold it to Leigh and David Meese. And that deed
11 was recorded in September of 1997.

12 In May of 2003 the Meeses conveyed this
13 same property to my client, Tom Dicks. Thomas
14 Dicks had recorded --

15 Your Honor, I said that the plat was
16 recorded in 1998. It was recorded in 1958, I
17 apologize. I'm talking about the 1955 map, your
18 Honor.

19 Your Honor, then in 2003, my client had
20 recorded this map, this survey performed by Mr.
21 Bellamy. And Mr. Bellamy showed right here,
22 this is old Blocks 28 and 29, my client has the
23 property as containing seven lots.

24 Now, the lots are reconfigured, the
25 boundary lines are changed a little due to some

1 wetlands issue. My client will testify as to why
2 that was done. But this survey was recorded
3 showing the property as seven lots. The same
4 seven lots just like the 1955 plat showed, my
5 clients' property as containing seven lots, just
6 like the map attached to the 1972 Order showed my
7 clients' property as containing seven lots.

8 That's what we argue. That's what the
9 Court of Appeals found, that the map attached to
10 the '72 Order shows seven lots.

11 So my client did something that he believed
12 is consistent and I believe is entirely
13 consistent with anything that's in the chain of
14 title or anything that's on the public record
15 whether or not it's in the chain of title.

16 Then Thomas Dicks conveyed Lots 1, 2 and 3
17 to Robert Dicks. So that's why it's both Thomas
18 Dicks and Robert Dicks as defendants in this
19 case.

20 Now, the plaintiffs filed this action, your
21 Honor, even though the 1955 map shows the
22 property as containing seven lots. The map
23 attached to the 1972 Order shows the proper as
24 containing seven lots. And the '72 Order
25 provides for right of revision.

1 The plaintiff says that my client violated
2 the restrictions by having this property as seven
3 lots. We have responded and said, hey, these
4 restrictions, number one, are not in the chain of
5 title. The '72 Order is not in the chain of
6 title. And not only that, we haven't violated
7 any restrictions at all. Seven lots, it's always
8 been seven lots.

9 So, as Mr. Brittain said, summary judgment
10 motion was heard and it went up on appeals.

11 We talked about the Shelter Rule. Mr.
12 Dicks would admit prior to closing he got a copy
13 of the 1972 Order. He looked at that order, gave
14 it to his lawyer, Wayne Mumford. Wayne Mumford
15 looked at it and said, hey, you could have seven
16 lots. He had a surveyor go out there who
17 reviewed the surveys in the chain, did not recall
18 having a problem having the survey approved for
19 recording.

20 But, in any event, we are arguing under the
21 Shelter Rule that David and Leigh Meese, who had
22 purchased the property, or at least one of them,
23 had absolutely no actual notice of the 1972
24 Order.

25 Now, lawyer Jay Dusenbury will come in and

1 testify he did a title examination. He found no
2 restrictions at all in this subject property. So
3 that's going to be an issue in this case.

4 But even if the Court somehow finds that
5 the restrictions apply, it's the plaintiff's
6 burden, it's not my burden. The plaintiff's
7 filed this action seeking injunction and seeking
8 an Order from this Court. Do you find that
9 restrictions apply to my clients' property? The
10 plaintiff has to show there are restrictions that
11 encumber my property by express terms and by
12 unmistakable implication.

13 And my argument, and I believe it's the
14 case, your Honor, is that the plaintiff cannot
15 meet its burden.

16 We talked about how everything shows the
17 property as containing seven lots. The '72
18 Order says it provides a right of revision of the
19 lot arrangement. Now, it doesn't say that right
20 of revision is limited to the plaintiff. It
21 doesn't say that. It doesn't say it's limited
22 to Carmen Ward. It doesn't say it doesn't run
23 with the land. It says there is a right of
24 revision of the lot arrangement.

25 What the plaintiffs want to read into that

1 Order is that right of revision only belonged to
2 Carmen Ward and that she somehow exercised that
3 right when she sold the property, by using a
4 boundary survey, to the Meeses. But the Order
5 simply doesn't say that.

6 If the standard is, and, your Honor, the
7 cases say the Court shall interpret the
8 Restrictive Covenants in the light most favorable
9 to the free use of property. If we have to read
10 things into this Order that are not there in
11 order for the plaintiff to prevail, that means
12 the Court must construe, that means the plaintiff
13 cannot meet it's burden of proof.

14 The plaintiff is saying only Carmen Ward
15 had the right of revision. The Order doesn't say
16 that, your Honor. The Order simply doesn't say
17 that.

18 As the Court is well aware, if there is any
19 doubt, the doubt has to be construed in the light
20 most favorable to the free use of property. If
21 there are any ambiguities, the Court has to
22 construe those ambiguities in the light most
23 favorable to the free use of property.

24 So, your Honor, it's my clients' position
25 that by recording this plat they have not

1 violated any covenants or restrictions to the
2 extent any covenants or restrictions apply in the
3 first place. We don't think the plaintiff can
4 meet its burden of showing that there is any
5 restriction out there that prevents them from
6 doing what they did. There were seven lots in
7 '55, there were seven lots in '72, it's seven
8 lots now.

9 Plaintiff himself, if he decides to
10 testify, will testify that the use of my clients'
11 property as seven lots is consistent with the
12 rest of the neighborhood. He's further testified
13 in his deposition that this property remaining as
14 one lot would be an inconsistent use.

15 Their theory that this property must remain
16 as one lot flies in the face of the theory behind
17 the 1972 Order, behind the theory of the 1955
18 restrictions, which is to have the property as a
19 residential subdivision. Instead, they want to
20 have this large abnormal almost three acre parcel
21 vacant while the rest of the property is
22 subdivided. And it doesn't make sense when
23 everybody in the neighborhood purchased off plats
24 that showed this property as containing seven
25 lots.

1 When it came time for my clients to have
2 the property as seven lots like the important
3 documents in the chain of title showed, everybody
4 objected because they didn't want something built
5 in their backyard.

6 Your Honor, I look forward to trying the
7 case today. I'm sorry I took longer than I
8 expected. That's all I have. Thank you.

9 THE COURT: Mr. Brittain, you may call
10 your witness.

11 MR. BRITTAIN: I call Mr. Musick to the
12 stand.

13 THE COURT: Mr. Musick, place your left
14 hand on the Bible and raise your right hand and
15 be sworn or affirmed by the court reporter.

16 JOHN MUSICK,
17 of lawful age, the Witness herein, being by me
18 first duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. BRITTAIN:

22 Q. Mr. Musick, tell us a little bit about yourself,
23 where are you from, what do you do for a living,
24 how long have you been living in Long Bay
25 Estates?

1 A. About 13 years. I bought the lot approximately
2 22 years ago.

3 Q. Where were you born and raised?

4 A. I was born in Norfolk, Virginia, raised in
5 Virginia Beach, Virginia.

6 Q. How did you spend most of your employed life?

7 A. As an Air Force officer.

8 Q. You retired from the United States Air Force?

9 A. Yes, sir.

10 Q. At what rank?

11 A. Major.

12 Q. You are serving as the plaintiff in this lawsuit;
13 is that correct?

14 A. That's correct.

15 Q. Now, have other people been involved in looking
16 into this matter and assisting you with the
17 research involved and financing this lawsuit?

18 A. Yes, sir.

19 Q. Approximately how many people have been involved
20 in that?

21 A. 55 to 70.

22 Q. Are they all residents of the Long Bay Estates
23 subdivision?

24 A. As far as I know, yes, sir, or they own property.

25 Q. In the Long Bay subdivision?

1 A. Yes, sir.

2 Q. Tell us why you have brought this lawsuit.

3 A. I feel like the defendants have violated the
4 covenants, that they are misrepresenting in
5 testimony what actually occurred just recently
6 with his testimony as far as the dotted lines,
7 the maps, not everything has been brought out,
8 and not having full knowledge of everything.

9 There is one person in this room that has
10 more knowledge than all of us put together and
11 that's Mr. DeCiero and I would like to defer
12 anything that I say or correct anything that I
13 say. If he says it's not the same as what I say,
14 then I submit to him.

15 Q. Let me be a little more basic than that. Where
16 do you live in relation to the property that Mr.
17 Dicks bought?

18 A. Behind his property.

19 Q. You could see his piece of property from your
20 piece of property?

21 A. Yes, I can.

22 Q. What separates the two?

23 A. A pond, if you will, or a very large ditch.

24 Q. Are you aware of this ever having been anything
25 other than one piece of property?

1 A. No.

2 Q. Now, you have been there for 13 years?

3 A. Yes, sir.

4 Q. This is the first time you have seen an effort to
5 mow it down, change it and put new lines on the
6 property?

7 A. That's correct.

8 Q. Are you aware of any previous effort to do that
9 by Carmen Ward, Leigh Meese or anyone else?

10 A. No.

11 Q. Are you aware of it ever having been attempted by
12 any purchaser of the property, any owner of the
13 property since the beginning of the subdivision?

14 A. On that one lot?

15 Q. Yes, sir.

16 A. No, sir.

17 Q. Approximately how old is the subdivision, do you
18 know?

19 A. Since 1955.

20 Q. Or before that?

21 A. Probably could have been a little before that. I
22 don't know specifically.

23 Q. So for 55 or 60 years, as far as you know, that's
24 been one piece of property, one lot?

25 A. Yes, sir.

1 Q. You have never had to contend with any other
2 person that owned it that tried to do what Mr.
3 Dicks is trying to do?

4 A. No, sir.

5 Q. Now, do you have personal knowledge of what type
6 of use Mr. Dicks plans on the property?

7 A. No, sir, I don't.

8 Q. If he put residential houses on the lots, that
9 would be the same kind of thing that's going on
10 in Long Bay subdivision, I mean, that's what you
11 have, a privately owned residence, isn't it?

12 A. That's correct.

13 Q. Your complaint has to do with the intensity of
14 the property going from one lot to seven lots?

15 A. Yes, sir.

16 Q. In other words, you would be looking out at seven
17 houses instead of one?

18 A. That's correct.

19 Q. And you object to that based on the way the
20 documents have been recorded and the information
21 obtained by the courts over the years?

22 A. Yes.

23 MR. BRITTAIN: I have no further
24 questions.

25 THE COURT: Mr. Koutrakos, you may

1 cross-examine.

2 CROSS EXAMINATION

3 BY MR. KOUTRAKOS:

4 Q. Mr. Musick, good morning.

5 A. Good morning.

6 Q. You have no personal knowledge of what -- you
7 know what the 1972 Order is; right?

8 A. Well, first of all, let me say and point out to
9 the Court and to Mr. Koutrakos that I proudly
10 served for 26 years in the Air Force and I
11 retired as a major and I prefer to be addressed
12 as such. Thank you.

13 Q. As what?

14 A. Major.

15 Q. All right, Major.

16 Do you have any personal knowledge of what
17 the parties or the Court in 1972 intended when
18 that Order was issued?

19 A. No, I don't.

20 Q. You were not even living in Horry County at that
21 time, were you?

22 A. In '72?

23 Q. Yes.

24 A. No, I was not.

25 Q. You moved to Horry County around 1980; is that

1 correct?

2 A. That's correct.

3 Q. And you did not build your house actually until
4 the late 1990s; is that correct?

5 A. That's correct.

6 Q. And you weren't a resident of the subdivision
7 until the late 1990s; is that correct?

8 A. That's correct.

9 Q. And my client purchased the property in 2003?

10 A. All right.

11 Q. I'm asking you are you aware of that?

12 A. No, I don't know when they purchased it exactly.

13 Q. You just testified when Mr. Brittain asked you
14 questions that, to your knowledge, going back to
15 being a subdivision, nobody tried to do what my
16 clients have attempted to do?

17 A. That's correct.

18 Q. You bought the property, you built on your
19 property in 1999; correct?

20 A. Correct.

21 Q. And that's when you became a full-time resident,
22 I presume, of Long Bay Estates?

23 A. Yes.

24 Q. When you purchased your property in Long Bay
25 Estates, did you place any reliance on the 1972

1 Order?

2 A. No.

3 Q. And you know what I'm talking about when I'm
4 referring to the 1972 Order?

5 A. I know what you're talking about, sir, and that's
6 only because of this case.

7 Q. But when you purchased your property, did you
8 have any reliance on what my clients' property
9 could or could not be used for?

10 A. No, not at the time.

11 Q. You did not rely on any documents when you bought
12 your property that said my clients' property can
13 be used or not used in any particular manner; is
14 that correct?

15 A. No, I didn't have any particular interest in it.

16 Q. When you purchased the property, your property,
17 you had no expectation or guarantees that my
18 clients' property would remain undeveloped; isn't
19 that correct?

20 A. Didn't even think about it.

21 Q. If my clients' property was used as seven
22 residential lots, that use would be consistent
23 with the use of the rest of the neighborhood; is
24 that correct?

25 A. I don't really think that's a good question

1 because it's one lot and can't be subdivided. If
2 he puts one house on it that would be consistent
3 with the neighborhood because you get one house,
4 one duplex on one lot.

5 Q. Major, I think it's the Judge's job to interpret
6 the --

7 A. Absolutely. I was just giving my opinion.

8 Q. My question is, if my clients' property was used
9 as seven lots, would that be consistent with the
10 rest of Long Bay Estates?

11 MR. BRITTAIN: He already answered that
12 question.

13 THE COURT: What was your question?

14 MR. KOUTRAKOS: My question was, if my
15 clients' property was used as seven residential
16 lots, would that be consistent with the rest of
17 Long Bay Estates?

18 And he disagreed with the basis of my
19 question.

20 A. I have answered the question.

21 Q. I don't think you have.

22 A. Well, I have.

23 Q. The question I have asked you is, if this
24 property was used as seven lots and seven
25 residential homes were located thereon, would

1 that use be consistent with the rest of the
2 neighborhood?

3 And you said you don't believe it's seven
4 lots.

5 A. I don't believe it's seven lots. If it remains
6 as one lot then it's consistent with the rest of
7 neighborhood because the rest of the neighborhood
8 consists of one lot each.

9 Q. Are there any lots that are 2.6 acres?

10 A. Not that I know of. My lot is just a hair short
11 of an acre.

12 Q. It's not two point --

13 A. So it's almost, I'd say maybe half the size of
14 his lot. But mine doesn't have any wetlands on
15 it. It has very little, excuse me.

16 Q. Do you recall your deposition where I asked you
17 whether the use of my clients' property as having
18 seven lots would be consistent with the
19 neighborhood and you said yes?

20 A. Yes, I did. But I was incorrect.

21 And, by the way, that was after
22 considerable badgering on your part. You kept
23 asking the question and I kept saying it couldn't
24 be answered and you kept asking so finally I
25 relented. And I regret that.

1 Q. Why are you the plaintiff in this case?

2 A. Why?

3 Q. Yes.

4 A. Because I don't believe -- I disagree with what
5 Mr. Dicks and company is trying to do, to split
6 that up. And the 2000 Order says that he can't
7 because that's brought in as 28 and 29.

8 Further, you keep talking about the dotted
9 lines. All the rest of the property in Long Bay
10 there are no dotted lines, number one.

11 Number two, if it's a lot, there is a lot
12 number there. There are no lot numbers on those
13 dotted lines, are there?

14 Q. Are you asking me questions?

15 A. Sure.

16 Q. Okay, Major.

17 Do you know the difference between
18 combining lots and subdividing lots?

19 A. Yes.

20 Q. What's the difference?

21 A. If you were to combine a lot you take two lots
22 and make it one. If you subdivide then you take
23 one lot and make it more than one.

24 Q. Would you agree with me that if Restricted
25 Covenants allow a landowner to do something that

1 that landowner should be allowed to do it?

2 A. Yes.

3 Q. Would you also agree with me that you and Mr.
4 DeCiero stand to benefit more than anybody else
5 in the neighborhood from the results of this
6 litigation because you will have a one lot
7 backyard as opposed to a seven lot backyard?

8 A. No. And the reason I say that is because of the
9 contributions that we received to defend this
10 case. It affects all of us. Every landowner in
11 there that I have contacted expects that to be
12 one lot.

13 Q. What areas of Long Bay remain undeveloped?

14 A. We have several common areas. 1, 2, 3, 4, 5
15 plus some walkovers.

16 Q. Besides the common areas and walkovers, would you
17 agree with me that the rest of Long Bay Estates
18 subdivision have not been developed?

19 A. Not totally. There are some vacant lots.

20 Q. There are some lots that have been bought and
21 sold but haven't been built upon?

22 A. That's correct.

23 Q. Other than that, other than the crossovers, other
24 than the common areas, would you agree with me,
25 besides those areas, the rest of Long Bay has

1 been developed?

2 A. Yes.

3 MR. KOUTRAKOS: Your Honor, if I could
4 have a moment.

5 THE COURT: Certainly.

6 Q. Are you familiar with what the Court held in this
7 2000 Order?

8 A. Basically, if my memory serves, that Blocks 28
9 and 29 would, the covenants would become part or
10 they would become part of that covenant.

11 Q. And that was in the year 2000?

12 A. That was the 2000 case, yes.

13 Q. No, that was 1972. In 2000 Mr. DeCiero filed an
14 action.

15 A. That's correct.

16 Q. So which are you referring to?

17 A. I'm referring to that one.

18 Q. Okay.

19 A. If I'm wrong, then Mr. DeCiero would correct me.

20 Q. So you believe that the 2000 Order affects Blocks
21 20 and 29?

22 A. Sure. I believe it's written in the Order, is it
23 not?

24 MR. KOUTRAKOS: That's all the
25 questions I have, your Honor.

1 THE COURT: Mr. Brittain, any redirect?

2 REDIRECT EXAMINATION

3 MR. BRITTAIN:

4 Q. Mr. Musick, you don't recall all of the
5 particulars of the 2000 Order, do you?

6 A. No, I don't.

7 Q. As far as you know, it was consistent with the
8 restrictions being generally applied to the
9 property in that case?

10 A. Yes.

11 Q. You're not claiming that this property was being
12 litigated at that time?

13 A. No.

14 Q. Thank you.

15 MR. BRITTAIN: No further questions.

16 THE COURT: All right, Major. You may
17 step down.

18 MR. BRITTAIN: I would like to call Mr.
19 DeCiero, please.

20 THE COURT: Mr. DeCiero, please come
21 around and place your left hand on the Bible and
22 raise your right hand and be sworn or affirmed by
23 the court reporter.

1 ROBERT DeCIERO,
2 of lawful age, the Witness herein, being by me
3 first duly sworn, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. BRITTAIN:

7 Q. Your full name, please, sir.

8 A. Robert DeCiero.

9 Q. Tell us a little about you and your background,
10 Mr. DeCiero.

11 A. I'm a retired captain from the Massachusetts
12 state police and I have a master's in criminal
13 justice.

14 Q. You married?

15 A. Yes.

16 Q. Your wife's name is Sandy?

17 A. Yes.

18 Q. How long have you been living in Horry County?

19 A. My wife -- we bought the home in 1991. My wife
20 moved in in May of '93 and I retired in November
21 of 1995.

22 Q. And that's in the Long Bay subdivision?

23 A. That's correct.

24 Q. Now, over the course of the time you have been
25 there, you have had the opportunity to

1 familiarize yourself with public records and
2 documents associated with the creation of that
3 subdivision?

4 A. Yes, I have.

5 Q. Let's talk a little bit about what your
6 activities have been and why, and kind of tell us
7 a little bit how it happened and what you have
8 done and that sort of thing so we get a little
9 bit of background on that?

10 A. Well, there have been some issues that have come
11 along, your Honor, concerning the subdivision and
12 we weren't quite sure whether properties were
13 part of the subdivision or not. So that sent me
14 over to the county to try to find the subdivision
15 map which attorney Koutrakos produced earlier.

16 There was a lot that was going to be
17 developed over there that was sitting on wetlands
18 and some of the neighbors felt that maybe that
19 lot wasn't part of the subdivision. So we needed
20 to find out whether it was or wasn't.

21 So I went over to the county and went over
22 to the microfilm and couldn't find it. So I went
23 to Mr. Dithe in the Registry of Deeds and he said
24 we'll find it one way or another. So he found it
25 and that's what you see on the display board

1 today.

2 Q. This map, and it's going to be, it's been
3 discussed by Mr. Koutrakos, it's going to be
4 introduced into evidence.

5 That's the one that has a copy of the deed
6 restrictions on the map; is that correct?

7 A. That's correct.

8 Q. Now, you, in the course of looking into this
9 matter, have come across other maps that relate
10 to this property too, have you not?

11 A. That's correct.

12 Q. Did you bring those with you?

13 A. Yes, I did.

14 Q. Let's take a look at those and let you tell us
15 where they're from, what they have done, how you
16 got them, and how they relate to this one.

17 Which one do you want to talk about first,

18 Bob?

19 A. I'm sure there will be an objection somewhere
20 along the line but I think it would help the
21 Court if we can at least put the map up on the
22 easel.

23 Q. Which one do you want?

24 A. That one would be fine.

25 MR. BRITTAIN: Let's mark this as

1 Plaintiff's Exhibit No. 1, please.

2 MR. KOUTRAKOS: I object to the
3 admissibility and discussion of an unrecorded
4 plat that Mr. DeCiero somehow found. It's not
5 relevant to the case. It's not in the chain of
6 title. It's not in the public record.

7 MR. BRITTAIN: I think it tells part of
8 the story of what's going on and the Court needs
9 to see it. That would be the issue as to its
10 weight.

11 But I think I want to proffer it to the
12 Court and decide later on whether its valuable
13 testimony.

14 THE WITNESS: We can approach it from a
15 different angle if you want, your Honor.

16 MR. BRITTAIN: We need to approach it
17 whether you are going to be able to testify about
18 it or not, that's the question.

19 THE COURT: To determine whether it's
20 admissible, let me just find out, how did Mr.
21 DeCiero find it?

22 THE WITNESS: At the Bellamy survey
23 company.

24 THE COURT: Okay. And you're objecting
25 because it's not part of the records?

1 MR. KOUTRAKOS: I'm objecting because
2 it's a Restricted Covenant case. It's not
3 recorded. It's not relevant as to what an
4 unrecorded possibly draft plat or survey that's
5 in some surveyor's office has to this case.

6 MR. BRITTAIN: We intend to introduce
7 later on the Complaint filed by Carmen Ward that
8 tends to discuss the errors that have been made
9 in connection with some of these documents. So
10 even though it's not recorded, it's illustrative
11 of that problem and part of the overall story.

12 THE COURT: I'm going to allow it. It
13 will go to the weight of it, Mr. Koutrakos. I'll
14 allow it and I'll give it the weight for whatever
15 it's worth.

16 - - - - -
17 (Thereupon, Plaintiff's Exhibit No. 1 was
18 marked and entered into evidence)

19 - - - - -
20 BY MR. BRITTAIN:
21 Q. You may want to come down and show the Court why
22 you consider this map to be significant in
23 relation to the map Mr. Koutrakos has discussed
24 in his opening statement.

25 You're referring to Plaintiff's Exhibit

1 No. 1.

2 A. Well, your Honor, I just want to state maybe it
3 will give attorney Koutrakos --

4 Q. Don't keep saying that. Just tell the story.

5 A. This is a 1955 map. The other one is a 1995 map.
6 But this map has a reconfiguration of part of the
7 Long Bay Estates subdivision. This is all part
8 of the 1972 case.

9 In the 1972 case, if attorney Koutrakos
10 reads the Complaint --

11 Q. Now, Bob, let me tell you something. You are not
12 contesting Mr. Koutrakos. I don't want to hear
13 his name come up again. You just testify.

14 A. Okay. On the 1972 case, your Honor, there is
15 language that says that the westerly portion of
16 the subdivision was never surveyed. And,
17 therefore, the map that was put up here was not a
18 fair and accurate representation of the actual
19 lot configuration in the Long Bay Estates
20 subdivision.

21 Q. Okay. Let's stop right there for a second. I'm
22 going to hand you a copy of the Complaint which
23 led to the 1972 Order.

24 MR. BRITTAIN: Jim, I gave y'all this,
25 didn't I? You have got it?

1 MR. KOUTRAKOS: I have the --

2 MR. BRITTAIN: I have got another copy
3 here.

4 MR. KOUTRAKOS: I have the Complaint.

5 MR. BRITTAIN: The Complaint and the
6 attachments.

7 MR. KOUTRAKOS: Are you handing up
8 everything involving the 1972 Order?

9 MR. BRITTAIN: Yes.

10 MR. KOUTRAKOS: The Complaint and
11 Master Decree and everything?

12 MR. BRITTAIN: Well, I haven't gotten
13 to the Order yet.

14 MR. KOUTRAKOS: Okay.

15 MR. BRITTAIN: This would be
16 Plaintiff's Exhibit No. 2.

17 - - - - -
18 (Thereupon, Plaintiff's Exhibit No. 2 was
19 marked and entered into evidence)

20 - - - - -

21 BY MR. BRITTAIN:

22 Q. Plaintiff's Exhibit No. 2 is the Complaint.

23 A. I have to get my reading glasses.

24 Q. Did you bring them?

25 A. Yes, sir.

1 Q. Now, was Carmen Ward a plaintiff in this action?

2 A. Yes, she was.

3 Q. Now, publish what part of this Complaint is
4 relevant to the testimony you're giving
5 concerning this map in 1955?

6 What page are you reading from?

7 A. I'm reading from Page D0073, paragraph 8. "That
8 an unofficial map was made under date of May 1955
9 which showed a proposed lot arrangement in Blocks
10 designated as 28, 29, 30, 31, 32, 33, all lying
11 within that portion of Long Bay Estates
12 subdivision acreage owned by the plaintiffs
13 herein; that the said map which was, through
14 inadvertence, and without authorization of the
15 plaintiffs, or their predecessor-in-title, filed
16 May 1958."

17 And it "did not embrace in the cited
18 blocks any lots which had actually been surveyed
19 and staked out on the ground, and was only a
20 tentative plan."

21 MR. KOUTRAKOS: What page are you
22 reading from?

23 MR. BRITTAIN: Page D0073.

24 Q. So this map, compared to the first map, showed
25 what as far as this piece of property is

1 concerned?

2 THE COURT: Mr. Brittain, you're saying
3 "this." You're talking about Plaintiff's 1?

4 MR. BRITTAIN: Yes, I'm sorry,
5 Plaintiff's Exhibit 1.

6 A. This map (indicating).

7 Q. Plaintiff's Exhibit 1.

8 A. Exhibit 1 is more or less a duplicate of that
9 map. Although this map shows the configuration
10 west of 1 through 27 after it had been surveyed.
11 Prior to the survey, 28 and 29 never really ever
12 existed, according to Paragraph 8. And this is
13 what it looks like today.

14 So, therefore, all the dotted lines and
15 everything else that attorney -- didn't exist.

16 Q. Where is this property on Exhibit 1?

17 A. Right here (indicating).

18 Q. And you're referring to a squiggly line right
19 below 32 and a roadway at the top or upper right
20 hand portion?

21 A. Between here and here (indicating). The squiggly
22 line is just --

23 Q. The lot would be up in there?

24 A. From the road to the back of my lot.

25 Q. But that's water right in there, that bottom

1 part?

2 A. That's correct.

3 Q. You could have a seat.

4 Let's go back to Plaintiff's Exhibit No 2,
5 which is the Complaint.

6 Talk to me about that document, what it
7 did and what it was trying to do and what its
8 terms are with respect to the deed restrictions
9 that are applicable to the property in this
10 lawsuit?

11 MR. KOUTRAKOS: You're referring to the
12 Complaint?

13 MR. BRITTAIN: Yes.

14 MR. KOUTRAKOS: Your Honor, I object to
15 Mr. DeCiero telling us what a Complaint says and
16 what it doesn't say. We all could read what it
17 says. But Mr. DeCiero interpreting to the Court
18 what a Complaint says, this is allegations of a
19 Complaint, him interpreting what he thinks it
20 means to the Court I don't think is proper
21 procedure and I think is objectionable evidence.

22 MR. BRITTAIN: Let me explain. In
23 terms of getting to where we are going on this
24 case you have to start somewhere. One of the
25 issues in this case is what the grantor intended.

1 And you heard Mr. Koutrakos' openings statement,
2 you don't know what they meant. Nobody knows
3 what they meant.

4 Well, Mr. DeCiero has been involved in that
5 process of trying to determine what Carmen Ward,
6 who was the grantor, meant. Now, part of that is
7 what she said in her Complaint, which is a public
8 record made available to the defendant. And Mr.
9 DeCiero should have an opportunity to discuss
10 what in that Complaint has led him to further
11 investigate and obtain evidence from Carmen Ward.

12 My second point, Mr. DeCiero makes a
13 disclosure to Mr. Dicks about what is intended
14 and what has occurred. Now, in order for that
15 to be accurate, I need to be allowed to elicit
16 from him how he got to the point to establish
17 that information and make it available to Mr.
18 Dicks.

19 Now what we can do is this. We can wait
20 and you could read all this. You could read it
21 all. But if I'm allowed to let him point to
22 several portions of the Complaint it will speed
23 up this process.

24 THE COURT: I think he can do that.

25 I think what Mr. Koutrakos was objecting to

1 was Mr. DeCiero interpreting those. If he could
2 just point to those and publish those portions of
3 the Complaint, and maybe I'm wrong, Mr.
4 Koutrakos, you don't object to him pointing out
5 portions of the Complaint, do you, and publish
6 those portions?

7 MR. KOUTRAKOS: He certainly can. But
8 for him to tell us what he believes the legal
9 effect of what those mean and, furthermore, for
10 him to come in and try to testify, and he will,
11 he will try to testify today what someone else
12 intended, and you will hear testimony
13 momentarily where he's going to testify --

14 THE COURT: You will object to that?

15 MR. KOUTRAKOS: And I will object to
16 that.

17 I'm not sure if Mr. Brittain or the
18 plaintiff is arguing that this language is
19 ambiguous. Because if the language is
20 unambiguous, the Court interprets the language by
21 looking at the four corners of the document. But
22 if the issue now is that it's ambiguous, I guess
23 I need to know that and I'll have all this other
24 evidence coming in.

25 MR. BRITTAIN: Are you going to make a

1 closing argument every time?

2 MR. KOUTRAKOS: No. I apologize if I
3 did.

4 MR. BRITTAIN: Good. I accept your
5 apology.

6 Like I said, we are trying to get to
7 the end of this so let's figure out how to get
8 there so we don't spend two weeks instead of two
9 days.

10 I don't know exactly how he views this
11 case. He's claiming that the language is
12 ambiguous. I don't think it is. I think it is
13 clear.

14 I'm going to make my closing statement. I
15 think it's clear. It says grantor, and she was
16 the one writing it. Any other interpretation of
17 it is disingenuous and obviously incorrect. But
18 he's making that claim. So we're trying to show
19 the Court what evidence there is in the record of
20 her intention.

21 Her Complaint, what she is seeking, is
22 certainly one of those pieces of evidence. I
23 have introduced it into evidence. And you could
24 read the whole thing.

25 What I want to ask Mr. DeCiero is, is there

1 any issue, any request of Miss Ward's in there to
2 require these deed restrictions to apply to old
3 Lots 28 and 29, the property that's the subject
4 of this action? Does she seek for that to
5 happen?

6 THE COURT: I think if he can point
7 those out in the Complaint that would be helpful.

8 BY MR. BRITTAIN:

9 A. In the judgement --

10 Q. I'm asking you about the Complaint.

11 A. Well, she signed the Complaint.

12 Q. In the Complaint is there anywhere she's asking
13 for the restrictions that we are talking about to
14 be made applicable to old Lots 28 and 29?

15 A. That's correct.

16 Q. It's in there?

17 A. It's in there.

18 Q. And you read Paragraph 8 that dealt with the map?

19 A. Correct.

20 Q. Now, I want to hand to you another public record
21 which Mr. Koutrakos has discussed in detail in
22 his opening statement which is the 1972 Master's
23 report.

24 MR. BRITTAIN: I'll mark this as
25 Plaintiff's No. 3, please, ma'am.

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(Thereupon, Plaintiff's Exhibit No. 3 was
marked and entered into evidence)

MR. BRITTAIN: You've got a copy of
this 1992 Master report, the '72 record?

MR. KOUTRAKOS: Yes.

Q. I hand you what's been marked as Plaintiff's
Exhibit No. 3.

How did you come across that particular
document? Through what process did you go
through to come across that particular document
and why?

A. Well, your Honor, when I went over to the county
looking for the subdivision map I decided to see
what else I could find out about Long Bay
Estates. So in my journey it lead me to
Frederick Lewis. And then upon his death there
is a last will and testament that gave
revisionary rights to Carmen Ward and Gene Lewis.

And then I found the map that has the
dotted lines with the Decree signed by the Judge.

So that led me over to the civil side and
over to I think it was Gene Roberts, I was able
to find the judgment on the 1972 case.

1 And that was trying to tie everything in
2 for myself so I'd be more knowledgeable about the
3 subdivision.

4 Q. Now, in this 1972 Order, is it the result of the
5 Complaint that was filed by Carmen Ward?

6 A. That's correct.

7 Q. And Judge Vaught was the Master that rendered
8 those findings?

9 A. That's correct.

10 Q. And did she obtain what she sought in the
11 Complaint with respect to the restrictions being
12 made applicable to old Lots 28 and 29?

13 A. She did.

14 Q. And number eight of those restrictions which are
15 attached to the first map we talked about,
16 prohibit the subdivision of any lots; is that
17 correct?

18 A. That's correct.

19 Q. And any change in that is reserved to --

20 A. The grantor.

21 Q. Was there any other situation where the
22 applicability of these restrictions to real
23 estate property within the Long Bay subdivision
24 was tested in court?

25 A. Yes.

1 Q. Tell me a little bit about that and how it
2 started and what was involved and who was
3 involved?

4 A. That was the case with the Ammons family with the
5 lot that was in the wetland that we needed to
6 find out if it was within the subdivision. And
7 during the course of my research I found the
8 original map and sure enough the covenants were
9 attached to it and they in fact owned Block 11,
10 Lots 1 and 2.

11 And we had the county come over and they
12 were going to assist us with the matter. And
13 attorney Trevor Thomas came over and he showed me
14 a deed for this property and they had a different
15 set of Restrictive Covenants on their property.

16 So I said, Geez, this is kind of strange.
17 I have covenants that say no lot shall be
18 subdivided and they have a deed that says their
19 lot can be subdivided.

20 And he says, I think you have a legal
21 matter that you're going to need legal
22 representation. And that's what led us to
23 the trial on the Ammons case.

24 Q. Do you know Leigh Meese?

25 A. Yes, I do.

1 Q. She was present during that trial?

2 A. Yes, she was.

3 Q. Was she present on behalf of the defendant?

4 A. Yes, she was.

5 Q. Do you know who was representing the Ammons
6 family?

7 A. Attorney Erwin.

8 Q. Where was that case tried?

9 A. At the Santee Cooper conference center because we
10 had so many people.

11 Q. And you were the plaintiff?

12 A. Yes, sir.

13 Q. Who was representing you?

14 A. Attorney Brittain.

15 Q. Who was the Judge in that case?

16 A. Judge Stan Cross.

17 Q. What were the defendants in that case attempting
18 to do, and this is other property, not the
19 subject of this action but other lots that they
20 own, what were they trying to do?

21 A. They took two lots and subdivided the two lots
22 into 13 lots and they were going to build 13
23 duplexes.

24 Q. And you filed an action to prevent that from
25 occurring?

1 A. That's correct.

2 Q. And that brought into question the issues we are
3 talking about, the 1972 Order, whether it was in
4 the chain of title, applicability of restrictions
5 et cetera; is that correct?

6 A. That's correct.

7 MR. BRITTAIN: I would like to mark
8 this as the next plaintiff's exhibit.

9 -----
10 (Thereupon, Plaintiff's Exhibit No. 4 was
11 marked and entered into evidence)

12 -----
13 Q. Let me hand you what's been marked as Plaintiff's
14 Exhibit No. 4 (handing), and ask you to look at
15 that and ask you if you're familiar with that
16 document?

17 A. Yes, I am.

18 Q. How do you understand the ruling in that case as
19 affecting where you went from there?

20 What did Judge Cross rule as far as
21 subdivision of those other lots, not these, those
22 other lots?

23 A. Judge Cross ruled that the only person who had a
24 right to subdivide was the grantor and it was
25 reserved to the grantor only.

1 Q. Who was the grantor?

2 A. Carmen Ward.

3 Q. Were the Ammons allowed to subdivide their
4 property in line with what they were attempting
5 to do?

6 A. No.

7 Q. Was that Order of Judge Cross appealed?

8 A. No. Well, it was appealed, yes.

9 Q. It was appealed. They filed an appeal; is that
10 correct?

11 A. That's correct.

12 Q. Now, at some point in time was that appeal
13 withdrawn?

14 A. Yes.

15 MR. BRITTAIN: Next Plaintiff's
16 Exhibit, please.

17 -----
18 (Thereupon, Plaintiff's Exhibit No. 5 was
19 marked and entered into evidence)

20 -----
21 Q. I'm going to hand you, Mr. DeCiero, Plaintiff's
22 Exhibit No. 5 (handing), and ask you if you
23 recognize that document?

24 A. Yes, I do.

25 Q. Do you have the original of that document?

1 A. Yes, I do.

2 Q. It's referred to as a Settlement Agreement and
3 Mutual Release; is that correct?

4 A. That's correct.

5 Q. What impact, if any, in the first or third
6 paragraph there, does that particular document
7 have in connection with the litigation involving
8 these two particular lots?

9 MR. KOUTRAKOS: Your Honor, I object.

10 The Court of Appeals found the DeCiero
11 Order had nothing to do with this property. He's
12 now introducing into evidence a Settlement
13 Agreement of that litigation which, of course,
14 has nothing to do with this particular property,
15 and he's asking the witness to opine as to what
16 it means.

17 MR. BRITTAIN: I don't really need his
18 opinion. Let me tell you why it's relevant, your
19 Honor.

20 One of the issues that the Court has asked
21 you to rule on is knowledge of the part of the
22 intermediate owner. Her name is Leigh Meese.

23 THE COURT: Yes, sir.

24 MR. BRITTAIN: She was the defendant in
25 the previous action.

1 THE COURT: Is that Long Bay
2 Properties?

3 MR. BRITTAIN: This was DeCiero versus
4 Long Bay Properties.

5 MR. KOUTRAKOS: Your Honor, she was not
6 a defendant. The Ammons family, her maiden name
7 is Ammons and the Ammons family is involved with
8 Long Bay Properties.

9 MR. BRITTAIN: She was present on their
10 behalf throughout the trial.

11 THE COURT: So Long Bay Properties is
12 Leigh Meese?

13 MR. BRITTAIN: Yes.

14 MR. KOUTRAKOS: No, it's not.

15 MR. BRITTAIN: She sat there with Bob
16 Erwin. What I'm getting to is knowledge here.
17 I'm getting to her knowledge. That's the
18 relevance and significance of this document and
19 this testimony.

20 THE COURT: Is that Plaintiff's 5?

21 MR. BRITTAIN: Yes.

22 THE COURT: And that's the document
23 you're trying to introduce?

24 MR. BRITTAIN: Right. She signs this
25 and has it notarized with her signature and in it

1 she says, "It was stipulated by counsel and
2 ordered by the Court that the Restrictive
3 Covenants recorded in Horry County Plat Book 25
4 at Page 22 covering Blocks 1 through 27 inclusive
5 were extended to include Blocks 30, 32, 34 as
6 well as the remaining portions of old Blocks 28
7 and 29."

8 THE COURT: Yes, sir.

9 MR. BRITTAIN: So, what I'm saying is,
10 this document was signed by her and I'm
11 introducing it to show that she has knowledge.

12 THE COURT: Is Miss Meese going to
13 testify?

14 MR. BRITTAIN: Yes. But Mr. DeCiero
15 signed this document too.

16 THE COURT: All right.

17 MR. KOUTRAKOS: Your Honor, we are
18 arguing that Miss Meese had no knowledge when she
19 purchase the property in 1997. This document was
20 signed, I believe it's dated 2000. The lawsuit
21 that resulted in that settlement was filed in
22 1998. So that's why the document is not
23 relevant.

24 MR. BRITTAIN: Oh, there's a
25 distinction. If she transfers this property with

1 knowledge they have no Shelter Rule protection.
2 So it's relevant to your determination. There is
3 no question about that.

4 THE COURT: I'll allow that.

5 BY MR. BRITTAIN:

6 Q. How about publishing the third paragraph of
7 Plaintiff's Exhibit 5.

8 MR. KOUTRAKOS: Do you have an extra
9 copy of that?

10 MR. BRITTAIN: Yes, I do. That's what
11 we talked about this morning.

12 Q. Hold on a second, Bobby, I want to give a copy to
13 Mr. Koutrakos. I know you made three copies of
14 it, Bob.

15 A. It's over there.

16 Q. You might have already given them to me is what
17 I'm worried about.

18 THE COURT: If we need to make a copy,
19 we'll take a break and make a copy.

20 MR. BRITTAIN: Give me one second. I
21 know we have a copy somewhere.

22 I'm almost finished.

23 MR. KOUTRAKOS: I just can't follow
24 along with the testimony.

25 THE COURT: I understand. You need

1 one.

2 MR. BRITTAIN: Bob, why don't you come
3 down and see if you can find one.

4 We probably need to make a copy of
5 that, Judge. I think they gave them to me.
6 That's one that came -- I got that this morning
7 but I can't put my hands on it. I certainly want
8 Mr. Koutrakos to be able to follow. I don't
9 think we need to slow down, just long enough for
10 somebody to go make a couple of copies of it.

11 Q. You have got the original one, don't you?

12 A. Yes.

13 Q. Why don't you let Mr. Koutrakos follow along with
14 the original and you can follow with this one.

15 MR. BRITTAIN: Is that okay?

16 THE COURT: Did you find an extra copy?

17 MR. BRITTAIN: I have got the original
18 document.

19 THE COURT: I have someone coming to
20 make a copy.

21 BY MR. BRITTAIN:

22 Q. If you will publish, I believe it's the third
23 paragraph.

24 A. "Whereas, in Lewis, et al versus Adams, et al, it
25 was stipulated by counsel and ordered by the

1 court that the Restrictive Covenants recorded in
2 Horry County Plat Book 25 Page 22 covering Blocks
3 1 through 27 inclusive were extended to include
4 Blocks 30, 32, 34 as well as the remaining
5 portions of old Blocks 28 and 29 of Long Bay
6 Estates subdivision."

7 Q. Did Miss Meese sign this document?

8 A. Yes.

9 Q. Was her signature notarized?

10 A. She notarized it, yes..

11 MR. BRITTAIN: Your, Honor, next I
12 would like to introduce as the next plaintiff's
13 exhibit the Final Order ending the action in this
14 case, an Order by Judge Cross.

15 MR. KOUTRAKOS: Your Honor, I hate to
16 object but I don't see how Judge Cross' Order
17 that was reversed by the Court of Appeals is
18 relevant at least in the evidence part.

19 THE COURT: It's part of the record. I
20 don't know that it needs to be an exhibit but
21 it's part of the record.

22 MR. BRITTAIN: Let me, if I can, just
23 proffer the portion I wanted to bring before the
24 Court's attention at this time.

25 THE COURT: All right.

1 MR. BRITTAIN: Judge Cross says on Page
2 4 of the Order that, "The defendant raises the
3 argument that there was no evidence presented
4 that proves Carmen Ward or her predecessors in
5 the trust owned the property from the time of
6 creation of Long Bay Estates. There was proof
7 that Carmen Ward or her predecessors in the trust
8 owned the property from the time of creation of
9 Long Bay Estates. In fact, defendants' attorney
10 himself admits this fact in the deposition of
11 Robert DeCiero dated April 28, 2005."

12 So I wanted to introduce that to further
13 substantiate her status as grantor in the absence
14 of any break in the chain of title. And it's
15 already been admitted by attorney for the
16 defendant. That's why I was introducing it.

17 THE COURT: I don't know that it's
18 evidence. It's part of the record. I don't know
19 that a Judge's Order, prior Order in a case is
20 actually evidence.

21 MR. BRITTAIN: Well, it's a finding.

22 MR. KOUTRAKOS: That Order has been
23 reversed and that finding is wrong. I argued it
24 but that Order has been reversed. And I don't
25 see how what Judge Cross said about what I

1 possibly said in a deposition binds my client.

2 MR. BRITTAIN: I think it's very clear.

3 Let me just make a proffer. I proffer this and
4 the Court of Appeals Order because it clearly
5 does not reverse this portion of it. I don't
6 think there is an issue here anywhere along that
7 line. But, here again, he's made the complaint,
8 made an allegation, so Judge Cross found he
9 admitted it and I think that's valuable evidence.
10 I don't want to make him a witness in the case.
11 I'm trying to avoid putting him on the witness
12 stand. There is no reason to do that.

13 Just like in the Court of Appeals, we
14 admitted certain things, he's admitted certain
15 things.

16 THE COURT: Are you talking about
17 putting Judge Cross on the stand?

18 MR. BRITTAIN: No, Jim. Mr. Koutrakos.

19 MR. KOUTRAKOS: Essentially in that
20 Order that was reversed in full, drafted by Mr.
21 Brittain, I had asked a question in the
22 deposition, not really knowing some of the
23 background facts and asking a question, and you
24 said that I somehow by asking a question made an
25 admission on behalf of my clients by forming a

1 question or asking the question the way I did.
2 So Mr. Brittain put that in the record that Judge
3 Cross signed.

4 I could object all day long. It makes no
5 sense how I could bind my clients by asking a
6 question in a deposition. And that's what we are
7 doing here. I'll be more than happy to get on
8 the stand. I'll testify all day long.

9 THE COURT: No. No.

10 MR. BRITTAIN: Anyway, I proffer this
11 as evidence.

12 THE COURT: So proffered.

13 MR. BRITTAIN: And that would be Court
14 exhibit or whatever the next number is proffered.

15 THE COURT: It will be a Court exhibit.
16 It will have proffered.

17 MR. BRITTAIN: And I would proffer the
18 Court of Appeals Order for you to review in
19 connection with what Mr. Koutrakos claimed about
20 the language of that Order reversing that
21 finding.

22 THE COURT: I have a copy of it. Do
23 you have an extra copy?

24 I have an extra copy here, Mr. Brittain, if
25 you want to proffer that as well.

1 MR. KOUTRAKOS: Is that proffer number
2 7, your Honor?

3 THE COURT: It will be Court Exhibit
4 because we don't have any other proffers.

5 MR. KOUTRAKOS: What was the first
6 proffered exhibit?

7 THE COURT: Stan Cross' opinion.

8 MR. BRITTAIN: The opinion ending this
9 action.

10 - - - - -
11 (Thereupon, Plaintiff's Exhibit No. 6
12 was proffered into evidence)

13 - - - - -
14 (Thereupon, Plaintiff's Exhibit No. 7
15 was proffered into evidence)

16 - - - - -

17 BY MR. BRITTAIN:

18 Q. Mr. DeCiero, who owned this property at the time
19 of the 1972 Order, the property that's the
20 subject of this litigation?

21 A. Carmen Ward.

22 Q. Who purchased the property from Carmen Ward?

23 A. David and Leigh Meese.

24 Q. Who purchased the property from David and Leigh
25 Meese?

1 A. Tom Dicks.

2 Q. At the time that the restrictions were put
3 together and placed on that map and at the time
4 of the 1972 Order, who had the power to grant
5 ownership to the property in question, who was
6 the grantor at that time?

7 MR. KOUTRAKOS: Your Honor, objection.
8 Calls for a legal conclusion. Mr. DeCiero is not
9 a lawyer. He's asking the witness to opine as to
10 purely a legal conclusion and to interpret a
11 document which is your job not Mr. DeCiero's job.

12 THE COURT: Sustained.

13 Q. Who was the owner of the property when the
14 restrictions were put on the map?

15 A. Carmen Ward.

16 Q. Who was the owner of the property in 1972?

17 A. Carmen Ward.

18 Q. Who purchased it from Carmen Ward?

19 A. David and Leigh Meese.

20 Q. And that was after these restrictions were
21 brought into existence?

22 A. That's correct.

23 Q. And after the 1972 Order?

24 A. Correct.

25 Q. Now, was there any other way that Leigh Meese

1 would have known about the findings in the 2000
2 Order?

3 There has been some discussion by Mr.
4 Koutrakos that she's not Long Bay property et
5 cetera. Was there anything else that occurred
6 that would have provided her specific notice of
7 findings in the Order of 2000?

8 A. There was a legal notice that was sent to her
9 certified mail.

10 Q. Who sent that to her?

11 A. I did.

12 Q. Did you send it to anybody else in the
13 subdivision?

14 A. Every single person.

15 Q. Is there any question about the fact that you
16 sent it to her?

17 A. No.

18 Q. Any question about the fact that she received it?

19 A. No.

20 Q. How do you know she received it?

21 A. I have the return receipt.

22 Q. Where she received that notice?

23 A. That's correct.

24 MR. BRITTAIN: I'd like to mark this as
25 Plaintiff's 8.

Plaintiff's Ex
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1 A. I do.

2 Q. Did you have any contact with Carmen Ward?

3 A. Yes, I did call Albuquerque.

4 Q. She's dead now, isn't she?

5 A. She's deceased.

6 Q. Why were you trying to get in touch with Carmen
7 Ward?

8 A. I was trying to understand the language in the
9 '72 judgment and try to see if they had anything
10 to offer concerning the property in question.

11 Q. Well, it's obvious on its face, isn't it, that it
12 reserved it to the grantor?

13 A. That's correct.

14 Q. Was somebody claiming otherwise?

15 A. Yes.

16 Q. So you sought to get in touch with Miss Ward; is
17 that correct?

18 A. That is correct.

19 Q. Did you receive any letters from her as a result
20 of your efforts to contact her on this point?

21 A. I received a total of three letters from the Ward
22 family. Three notarized letters.

23 Q. Did you write these letters --

24 A. No.

25 Q. -- and send them out to them?

1 A. No.

2 Q. Let me hand you Plaintiff's Exhibit 9.

3 MR. KOUTRAKOS: Your Honor, I would
4 like to object to the introduction of any -- I
5 think the next three exhibits. This one that Mr.
6 Brittain is trying to introduce and the next two
7 letters are letters that contain hearsay.
8 They're clearly not admissible in the trial of
9 this case. They were not admissible in summary
10 judgement and certainly not admissible now.

11 THE COURT: Mr. Brittain.

12 MR. BRITTAIN: Your Honor, these
13 letters would clearly be admissible under several
14 theories but they are hearsay. There is no
15 question about that. She's a nonpresent witness
16 and these are out of court statements. But all
17 of us know that the hearsay rule has been defined
18 over the years, but the exception of the hearsay
19 rule, which are very apparent and appropriate,
20 applies in this case.

21 I don't think the Court ever has to get
22 there. We're probably going way out of bounds
23 here to prove a point that doesn't need to be
24 proved, but it has been raised that these
25 documents did not intend to reserve the right to

1 change these lots to the grantor. So these
2 letters will tell us what Miss Carmen Ward
3 intended.

4 Now, they certainly can't be offered to
5 establish the truth of the matter. But they
6 fall under the exception of her state of mind
7 which is very important in this case. What she
8 thought and what she believed has been raised as
9 an issue.

10 She was the plaintiff. We've got her
11 Complaint in evidence. She was involved in the
12 early portions of this development and was at one
13 time the owner and the grantor of these lots.
14 So her view is admissible as an exception to the
15 hearsay rule not that it is and of itself for the
16 truth of the matter serving. That's one of the
17 most accepted exceptions of the hearsay rule. In
18 fact, in criminal court it comes up in almost
19 every single case.

20 MR. KOUTRAKOS: Your Honor, these
21 letters are clearly hearsay. They're offered
22 directly for the truth of the matter inserted.
23 The state of mind exception doesn't apply.
24 She's not sworn under oath. If the testimony was
25 deemed to be important, she should have been

1 deposed and I should have had the opportunity to
2 cross-examine her. A lot of these statements are
3 self-serving. These letters are inadmissible
4 and, quite frankly, I don't think they should be
5 proffered.

6 MR. BRITTAIN: That is absurd. This is
7 important evidence in this case. You had it
8 forever. You called the woman yourself, Mr.
9 Koutrakos. She's dead. She was dieing when we
10 got the information to her. You know that. And
11 it destroys your case and it's admissible under
12 the hearsay section. Clear as day. Her state
13 of mind.

14 MR. KOUTRAKOS: Your Honor, her state
15 of mind, that exception does not apply in this
16 case.

17 MR. BRITTAIN: She's creating those
18 documents, your Honor.

19 MR. KOUTRAKOS: Your Honor, it's still
20 hearsay. Judge Cross did not admit them, and
21 they're not sworn statements. They don't come
22 into evidence.

23 MR. BRITTAIN: That's the problem. He
24 says Mr. Cross, he goes back to what Mr. Cross
25 did until I try to introduce Mr. Cross' Order and

1 then he says it's got nothing to do with
2 anything. Judge Cross said it didn't need to
3 get to this because the language was so clear.
4 But Mr. Koutrakos is changing that. He's trying
5 to come in and change the facts of the case.

6 Now what we have done in response to that
7 is go to the source, the woman who had it and
8 owned it, and got from her a notarized letter.
9 Now, it's hearsay, but it is clearly admissible
10 for the purpose to establish what was in her
11 mind. She says that in here.

12 THE COURT: I'm confused. Did she
13 draft the restrictions?

14 MR. BRITTAIN: She filed the Complaint.
15 She was the plaintiff. And she says in there
16 what she wants.

17 THE COURT: So this letter or this
18 statement that you're trying to introduce as
19 Plaintiff's No. 9 is to explain something in a
20 Complaint?

21 MR. BRITTAIN: Yes, it is to explain
22 what she intended.

23 THE COURT: In the Complaint.
24 What year was the Complaint?

25 MR. BRITTAIN: It would have been like

1 1971 or right in there. Right before the 1972
2 Order.

3 THE COURT: What do you say about
4 hearsay exception 803 number 16, statements in
5 the document in existence 20 years or more the
6 authenticity of which is established, Mr.
7 Koutrakos?

8 MR. KOUTRAKOS: Pardon me, 803-16?

9 THE COURT: Yes, sir.

10 MR. KOUTRAKOS: Let me pull it up.

11 MR. BRITTAIN: Judge, you are going to
12 have to read them before you rule on them, I
13 think.

14 MR. KOUTRAKOS: Your Honor, it's
15 statements -- are you talking about the ancient
16 document section?

17 THE COURT: Yes, sir.

18 MR. KOUTRAKOS: Your Honor, these
19 documents were, the documents he's trying to
20 introduce were created in 2006, I believe, or
21 2005. These are not ancient documents.

22 MR. BRITTAIN: These are documents that
23 reflect what her state of mind was at the time
24 she filed that Complaint and sought the relief
25 she obtained. And the only reason we are

1 introducing them is because the defendants have
2 taken the position, which I think is wrong, of
3 course, that she wasn't the grantor. That
4 anybody that ever owned the property could be the
5 grantor which would mean there would never be any
6 reason for restrictions.

7 But, since it's been raised, we are trying
8 to bring to court evidence of what was intended
9 when this language became the order of the Court.
10 And we did it in the only realistic way we could
11 do did. Obviously there are better ways to
12 introduce evidence, but it falls within the
13 exceptions of the hearsay rule.

14 THE COURT: Which exception would that
15 be?

16 MR. BRITTAIN: That would be that there
17 now has become an issue in this case raised by
18 the defendants that when these restrictions were
19 made and when Miss Ward attempted to have them
20 applied to these properties, that the issue had
21 been raised and it says reserved to the grantor.
22 But we don't know what that meant. That's
23 ambiguous. We don't know what she meant. We
24 don't know what she was asking for.

25 This answers that question as far as her

1 state of mind is concerned. And it's the only
2 evidence that we have. And I think it's
3 admissible on that point.

4 Now, like I said, it's certainly hearsay,
5 but it falls within one of the exceptions.

6 MR. KOUTRAKOS: Your Honor, if I may, I
7 can't find which exception. I'm looking at 803.
8 I don't see it.

9 MR. BRITTAIN: It's the state of mind
10 exception. The theory is --

11 MR. KOUTRAKOS: 804. I don't see it.

12 If that was the case, your Honor, we would
13 be getting letters from people on what documents
14 meant, submitting them to court and saying state
15 of mind. Sorry, Mr. Koutrakos, you didn't fly,
16 because it's my burden of proof, you didn't fly
17 out to New Mexico to take this person's
18 deposition. This goes to state of mind.

19 Furthermore, I believe in those letters she
20 is interpreting not what she wrote, she's
21 interpreting what the Court wrote in the Order.
22 She's opining as to what a Court intended in
23 drafting the Order.

24 MR. BRITTAIN: That's not true, in my
25 opinion. Carmen Ward remembers, that is, the

1 plaintiff in the case, she had language placed in
2 the judgement to protect her right of revision as
3 grantor concerning the property in question.

4 She agrees there was never any intention to allow
5 for a subsequent property owner to have the right
6 to subdivide in violation of the Restrictive
7 Covenants of the Long Bay Estates subdivision.

8 That's what she wanted. That's what she
9 intended. That's her state of mind.

10 MR. KOUTRAKOS: She also says, "After
11 reviewing the judgment that you forwarded to us
12 it is quite clear that the last sentence in the
13 first paragraph" she's referring to.

14 So she's telling us, she's telling the
15 Court what she believes a Court's Order is
16 referring to. It's hearsay. The state of mind
17 exception doesn't apply. It is an end around of
18 not having to take her deposition. I don't have
19 the opportunity to cross-examine her.

20 Mr. Brittain indicated she was elderly in
21 age. Who knows who put what in front of her to
22 sign.

23 MR. BRITTAIN: That's always the case
24 in state of mind exception admissibility, they
25 haven't been deposed. All of those issues don't

1 apply.

2 The question is, is her state of mind in
3 any way relevant and, if so, is there any
4 evidence of what her state of mind is. And that
5 can be introduced into evidence as an exception
6 to the hearsay rule.

7 THE COURT: Mr. Brittain, I can't see
8 an exception that applies here. I'm looking and
9 I can't see one. Unless you can point me to
10 one.

11 MR. BRITTAIN: Let me look. It should
12 be the state of mind of the declarant.

13 THE COURT: You're talking then
14 existing mental, emotional, physical condition?

15 MR. BRITTAIN: Yes. Let me look. Yes,
16 here it is. I actually call it state of mind
17 exception. A statement of the declarant's then
18 existing state of mind.

19 That's exactly as plain as it can be. It's
20 right there. That's the state of mind exception.
21 That's the state of her mind. She said it right
22 there in the document. It's been introduced for
23 30 years under that theory.

24 MR. KOUTRAKOS: It says, your Honor,
25 then existing state of mind. She's testifying

1 about a state of mind she had 43 years before she
2 signed that letter.

3 MR. BRITTAIN: Of course she is.

4 THE COURT: A state of the declarant's
5 then existing state of mind, emotion, sensation
6 or physical condition such as intent, plan,
7 motive or design, mental feeling, pain or bodily
8 health but not including a statement of memory or
9 belief to prove the fact remembered or believed.

10 MR. BRITTAIN: That's right. And my
11 theory is, of course, obviously, that this was
12 her then existing state of mind and is offered to
13 prove her intent not to prove a recollected
14 memory.

15 THE COURT: I have to see it. You're
16 right, I have to see it.

17 Mr. Koutrakos, have you seen this?

18 MR. KOUTRAKOS: Yes, ma'am, I have.

19 MR. BRITTAIN: Jim, the only one I'm
20 introducing is the one from February 22, 2006.

21 THE COURT: I'm going to exclude it,
22 Mr. Brittain. I think this is clearly a
23 statement of memory or belief because it says she
24 remembers. But I believe you ought to go ahead
25 and proffer it as Plaintiff's, that would be

1 Plaintiff's 9.

2 MR. BRITTAIN: Judge, I want to make
3 sure you understand my position on it. I think
4 you could offer it for that proposition. I'm not
5 offering it for that proposition because that
6 would be improper.

7 What is also contained in this letter is
8 her intent. And I offer it for the limited
9 purpose not for you to go back and decide that
10 she said that, she remembers it, therefore, that
11 issue is resolved.

12 THE COURT: Yes, sir.

13 MR. BRITTAIN: I'm offering it for you
14 to consider what her state of mind was and what
15 her intention was and for that limited purpose I
16 still believe it is clearly admissible. But I've
17 made my argument.

18 Just make that the next proffered exhibit.

19 - - - - -

20 (Thereupon, Plaintiff's Exhibit No. 9
21 was proffered into evidence)

22 - - - - -

23 BY MR. BRITTAIN:

24 Q. I think I have introduced all the documents, I
25 have tried to introduce them, that we intended to

1 introduce.

2 Are you aware of any other documents that
3 we intended to introduce in this matter?

4 A. I don't know if this nonrecorded map is going to
5 be contested but the lot arrangement to the west
6 of Lot 27, there is a recorded map that attorney
7 Koutrakos has which basically brings the
8 subdivision map into compliance.

9 In other words, that's not recorded but
10 that's more accurate than the original map.

11 And we have another map that attorney
12 Koutrakos has that shows those lot arrangements
13 on it that were recorded in, well, they are
14 surveyed in '60 and I think it was recorded
15 around '68.

16 Q. Do you have a copy of that map?

17 A. Yes.

18 Q. Let's get that map and put it into evidence.

19 MR. BRITTAIN: If you will mark it as
20 the next plaintiff's exhibit, please, ma'am.

21 - - - - -

22 (Thereupon, Plaintiff's Exhibit No. 10 was
23 marked and entered into evidence)

24 - - - - -

25 Q. Let me hand you what's been marked as Plaintiff's

1 Exhibit 10.

2 I ask you if you recognize that?

3 A. Yes, I do.

4 Q. What is that?

5 A. It's a map showing the reconfiguration of Long
6 Bay Estates.

7 Q. Was it recorded?

8 A. Yes, it was.

9 Q. How does it affect the litigation in this action
10 as far as old Lots 28 and 29 are concerned?

11 A. Basically, you could see it down below, it was
12 erased and made into one lot.

13 Q. So the dotted lines and everything from the
14 previous are no longer there?

15 A. They were nonexistent.

16 Q. In 1960, according to this map?

17 A. According to that map, correct. And if you take
18 that map and lay it against that, then you have a
19 perfect --

20 Q. Come down and show us what you are talking about
21 if you laid it up.

22 A. This map that was recorded, your Honor, if you
23 take it and put it right here, it pieces the
24 puzzle together.

25 Q. And this is a nonrecorded '55 map?

1 A. That's correct.

2 Q. Plaintiff's Exhibit 1.

3 A. But we can take this map and put it on the older
4 map. This is just for clarity purposes.

5 Q. The map, the '55 map that had the decorations on
6 there, you could do the same thing with
7 Plaintiff's Exhibit 10?

8 A. That's correct.

9 Q. And you can with the map that Mr. Koutrakos was
10 referring to in his opening statement?

11 A. That's correct.

12 MR. BRITTAIN: Your Honor, I probably
13 need, if we are going to go to cross examination,
14 I probably need about five minutes to check with
15 Mr. DeCiero and make sure I don't have any other
16 documents.

17 THE COURT: That's fine.

18 MR. BRITTAIN: Then I'm ready to go
19 after that.

20 Come down, Mr. DeCiero, and let's take five
21 minutes.

22 - - - - -
23 (Thereupon, at 12:36 p.m., a
24 five-minute recess was had)
25 - - - - -

1 MR. BRITTAIN: We have got one more
2 document we want to introduce, your Honor.

3 THE COURT: All right.

4 MR. BRITTAIN: Jim, we sent you a copy
5 of this. This is the Will of Conveyance from Mr.
6 Lewis to Carmen Ward.

7 A. He picked it up that day he went to your office.

8 MR. KOUTRAKOS: No objection.

9 - - - - -
10 (Thereupon, Plaintiff's Exhibit No. 11 was
11 marked and entered into evidence)

12 - - - - -

13 BY MR. BRITTAIN:

14 Q. Mr. DeCiero, let me hand you what's been marked
15 as Plaintiff's Exhibit 11.

16 I ask you if you recognize that document?

17 A. Yes, I do.

18 Q. How did you come by that document?

19 A. Well, when I was doing my title search I came
20 across it.

21 Q. What is that document?

22 A. It's Frederick Lewis' Last Will and Testament
23 where he granted Carmen Ward and Gene Lewis
24 co-executrix and gave them revisionary rights to
25 do whatever they wanted with the development

1 properties.

2 MR. KOUTRAKOS: Did you say revisionary
3 or reversionary?

4 MR. BRITTAIN: Let's see. It says,
5 "including any easements, reversionary rights,
6 powers of approval reserved to grantor in any
7 conveyances of property."

8 MR. KOUTRAKOS: Reversionary?

9 MR. BRITTAIN: Yes. We'll need to
10 substitute copies of that.

11 THE COURT: That's Plaintiff's 10?

12 MR. BRITTAIN: That's Plaintiff's 11.
13 Plaintiff's 10 was the 1960 map.

14 THE COURT: Okay.

15 MR. BRITTAIN: That's it. Your
16 witness.

17 CROSS EXAMINATION

18 BY MR. KOUTRAKOS:

19 Q. Good afternoon, Mr. DeCiero.

20 A. Good afternoon.

21 Q. Good to see you again.

22 A. Good to see you.

23 Q. When did you first find the 1955 map?

24 A. The one that you produced?

25 Q. What do you mean the one I produced?

- 1 A. The first map of the subdivision.
- 2 Q. The one that is actually recorded in the
- 3 courthouse and people could find it.
- 4 A. That was sometime around 1998, I'm going to say.
- 5 Q. When did you first find the 1972 Order?
- 6 A. It was during that whole process.
- 7 Q. Around 1998?
- 8 A. Whatever. Yes.
- 9 Q. You found the map first and then you found the
- 10 Order?
- 11 A. I believe the map came first, yes. Because that
- 12 map led me to other maps which led me to the
- 13 Decree which led me to Frederick Lewis and Carmen
- 14 Ward and Gene Lewis.
- 15 Q. You provided map, that Plat Book 25 of Page 22,
- 16 you provided that to your lawyer after you found
- 17 it; is that right?
- 18 A. That's correct.
- 19 Q. And that's when they filed the lawsuit against
- 20 Long Bay, the Long Bay entity, the Ammons entity
- 21 involving Blocks 11, Lots 1 and 2; correct?
- 22 A. That's correct.
- 23 Q. Did you at the same time provide your lawyers
- 24 with a copy of the Order or was it the plat first
- 25 and then you found the Order?

- 1 A. I don't remember how they ended up with it.
- 2 Q. Once you found the --
- 3 A. They were given the Order.
- 4 Q. By you?
- 5 A. Right.
- 6 Q. You provided the Order to your lawyers?
- 7 A. Yes.
- 8 Q. Your lawyers didn't find it, you're the one who
- 9 found it?
- 10 A. Yes, I found it.
- 11 Q. Did anybody else in the neighborhood know about
- 12 the Order besides you?
- 13 A. I think in my deposition I told you that maybe
- 14 Dr. Davie mentioned it to me.
- 15 Q. And that's what caused you to find it?
- 16 A. No, I found it because I was doing my own little
- 17 title search and it just took me there.
- 18 Q. Do you recall when Leigh Meese purchased the
- 19 property from Carmen Ward?
- 20 A. I believe it was in 1997.
- 21 Q. You referred to Plaintiff's Exhibit, this legal
- 22 notice, which is Plaintiff's Exhibit No. 8.
- 23 This legal notice is dated July 18, 2002;
- 24 is that correct?
- 25 A. That's correct.

1 Q. And that's the notice you testified previously
2 that you sent to everybody in the neighborhood
3 including Leigh Meese; is that correct?

4 A. That's correct.

5 Q. And this would have been after she purchased the
6 property in Long Bay Estates?

7 A. That's correct.

8 Q. Exhibit No. 5 is a Settlement Agreement. Can you
9 please tell me the date of that Settlement
10 Agreement?

11 A. No date on it.

12 Q. Do you see where there is a notary blank that
13 says 2000?

14 I'll show you.

15 A. Yes, on the last page.

16 Q. To the best of your knowledge, that document
17 would have been signed in the year 2000?

18 A. It would have. No, this?

19 Q. Yes.

20 A. No. No. I know for a fact that there were
21 negotiations going back and forth for a couple of
22 years on this map.

23 Q. When did you think that document would have been
24 signed?

25 A. It probably would have been several years later

1 because this came into my possession and the
2 legal notice went out at approximately the same
3 time.

4 Q. So it would have been signed after 2000?

5 A. That's correct.

6 Q. And it would have been signed, in fact, for
7 certain -- I'm showing you Plaintiff's Exhibit
8 No. 4.

9 That's the case that you and everybody
10 else in the neighborhood filed against Long Bay
11 Properties?

12 A. Right.

13 Q. That Order was issued by Judge Cross on
14 March 14th of 2000?

15 A. That's correct.

16 Q. And both the legal notice, which is Plaintiff's
17 8, and the Settlement Agreement, which is
18 Plaintiff's 5, all would have come after the date
19 of this Final Order?

20 A. That's correct. Definitely.

21 Q. All those dates are after the date Leigh Meese
22 and David Meese purchased the property in Long
23 Bay Estates; is that correct?

24 A. To the best of my knowledge.

25 Q. I'm showing you Plaintiff's Exhibit No. 4. This

1 is the DeCiero Order.

2 Can you show me where in that Order, like
3 you previously testified, that Carmen Ward had
4 only the right to revise?

5 MR. BRITTAIN: Your Honor, I object.
6 He objected to us, to Mr. DeCiero going through
7 the Order and reading portions of it. I don't
8 think it's fair for him to ask him to find
9 something in a five- or six-page Order by sitting
10 in the witness stand.

11 MR. KOUTRAKOS: Your Honor, the only
12 reason why I'm asking is because Mr. DeCiero said
13 that that Order said that Carmen Ward only had
14 the right to revise which is inaccurate. It's
15 not true.

16 MR. BRITTAIN: Objection. He's
17 commenting on evidence.

18 MR. KOUTRAKOS: If he read something
19 from the Order, I wouldn't be asking a question
20 about it. But he said something in his direct
21 that I think, from reading the Order, is
22 incorrect, and I want to ask him to show us where
23 in the Order it says what he previously
24 testified is.

25 THE COURT: Okay.

1 A. Basically the Order says no lot shall be divided.
2 So through my title search and through my --

3 Q. I didn't ask you that. I said where in the
4 Order.

5 MR. BRITTAIN: Objection. Let him
6 answer the question, please.

7 MR. KOUTRAKOS: He's editorializing.
8 All I'm asking is where in the Order does it say
9 what he previously testified 20 minutes ago he
10 said it says.

11 MR. BRITTAIN: Excuse me, your Honor.
12 He's trying to read from Page 3 where it answers
13 Mr. Koutrakos' question. He started reading "No
14 lot should be subdivided." And it goes down to
15 say the grantors reserve the right.

16 THE WITNESS: You want me to read it?

17 THE COURT: Yes, sir. And if you would
18 point out for the court reporter where you're
19 reading from.

20 A. I'm reading from Page 3 right underneath where it
21 says Book 25, Page 22.

22 "No lot shall be subdivided and no
23 building, including porches or projections of any
24 kind, shall be erected at a distance less than
25 40 feet from the front line on Blocks 1 through 5

1 and not less than 20 feet from the front line on
2 Blocks 6 through 27, 10 feet from any side line
3 and 20 feet from the rear."

4 "As to all unsold lots, the grantors
5 reserve the right to change the boundary lines
6 and the building lines thereof."

7 Q. And that's where you're relying upon to say that
8 Carmen Ward had the right to subdivide?

9 A. I'm relying on that based on what was just
10 introduced, that she had a reversionary right
11 from the grantor, Frederick Lewis, who instituted
12 the restrictions on the map.

13 Q. So you're basing your previous testimony not only
14 on this Order but some other documents not
15 mentioned in the order?

16 A. Yes.

17 Q. Okay. Because I wasn't clear on your direct.
18 Thank you.

19 Plaintiff's Exhibit No. 10, this is a map
20 of Blocks 30, 32, 34 of Long Bay Estates.

21 Can you show me where my client's property
22 is located on this map?

23 A. Right there (indicating).

24 Q. Is that property surveyed on that map?

25 A. Is that property surveyed?

1 Q. Yes.

2 A. I have no idea.

3 Q. It only says survey of map of Blocks 30, 32 and
4 34; is that correct?

5 A. That's what it says.

6 Q. Do you see anywhere on this map where it purports
7 to survey Blocks 28 and 29?

8 A. The grantor had the right to do whatever she
9 wanted. No, I don't see it.

10 Q. The grantor had the right to do anything she
11 wanted?

12 A. That's correct.

13 Q. So Carmen Ward could have taken Block 11 and
14 subdivided it into 20 lots?

15 A. If she had wanted to prior to the sale to the
16 Ammons family, yes.

17 Q. So she could have also taken my client's property
18 and subdivided it into 20 lots too; correct?

19 A. And sold it to them if she wanted to.

20 Q. I didn't know that was your position. Okay.

21 So Carmen Ward had this absolute right to
22 change, to make it 20 or 30 lots?

23 A. She was the grantor.

24 Q. So in the '72 Order, there was an agreement of
25 the parties reached and the parties allowed this

1 Order to be entered.

2 Do you think it was the party's intent
3 that Carmen Ward could have done anything she
4 wanted with the property?

5 A. What are you talking about "the party's intent"?

6 Q. On the 1972 Order.

7 A. You mean you want to know what the Order was
8 about?

9 Q. You're saying that Carmen Ward had the right to
10 do whatever she wanted. What is your support for
11 what you're saying?

12 A. All the properties west of 1 through 27 were
13 owned by Carmen Ward and Gene Lewis. And some of
14 them may have been surveyed and some of the
15 properties may not have been surveyed but they
16 had the right to change the configurations of the
17 map at that time.

18 Q. And that's your interpretation of these
19 restrictions right here?

20 A. It's not my interpretation. That's what it says.

21 Q. It says "no lot shall be subdivided." I'm
22 asking, do you agree it says, "No lot shall be
23 subdivided"?

24 A. Underneath that --

25 Q. I'm asking a question. Do you agree that it

1 says, "No lot shall be subdivided?"

2 MR. BRITTAIN: Excuse me, Your Honor,
3 he won't let him explain his answer.

4 MR. KOUTRAKOS: He's purposely ignoring
5 my question, your Honor.

6 THE COURT: Wait. Wait. Get your
7 objection on the record, Mr. Brittain.

8 MR. BRITTAIN: Mr. Koutrakos is going
9 over and asking him about one phrase. Mr.
10 DeCiero has admitted that phrase is there and
11 then in explaining his answer refers to the
12 sentence that trails that phrase. That's a
13 proper answer. He should be allowed to do that.

14 THE COURT: Well, he can, and then Mr.
15 Koutrakos may ask him the next question.

16 BY MR. KOUTRAKOS:

17 Q. Do you see where the 1955 restrictions attached
18 to this plat says that "No lot shall be
19 subdivided"?

20 Do you agree with me it says that?

21 A. It says that.

22 Q. And do you also agree with me it says, "As to all
23 unsold lots, the grantors reserve the right to
24 change the boundary lines and building lines
25 thereof"?

- 1 A. That's right. That's what I said earlier.
- 2 Q. Where do you see where the grantor reserved the
- 3 right to subdivide?
- 4 A. It's right there. She has the right to change
- 5 boundary lines. She can do whatever she wants.
- 6 Q. Okay.
- 7 A. She obviously did whatever she wanted. She
- 8 created that map that was introduced here with
- 9 all these lots on it.
- 10 Q. On 30, 32 and 34?
- 11 A. Sure. Somebody created them.
- 12 Q. And this was, of course -- the restrictions don't
- 13 apply to 30, 32 and 34; correct?
- 14 A. They do by the judgment in 1972.
- 15 Q. But this plat was recorded in 1960; is that
- 16 correct?
- 17 A. I don't believe it was recorded in 1960.
- 18 Q. It says --
- 19 A. Up top.
- 20 Q. I'm sorry?
- 21 A. Over here.
- 22 Q. 1972. I see that.
- 23 But you see where it's dated December
- 24 21 --
- 25 A. That's when they drew it up. They may have

1 surveyed it. Look, none of these properties were
2 sold. They did whatever they wanted in 1960.
3 And then when it became an issue they recorded it
4 along with the 1972 decision.

5 Q. So this plat was created in 1960 and you believe
6 it was created for Carmen Ward; correct?

7 A. Correct.

8 Q. And she waited until 1972 to record it?

9 A. She was the grantor.

10 Q. She could do whatever she wanted?

11 A. That's correct.

12 Q. Now, Plaintiff's No. 11, you testified that
13 that's a will.

14 It's not really a will, it's a deed, isn't
15 it?

16 A. It's a Conveyance of Real Estate. But in the
17 language it --

18 Q. But it's not a will, it's a deed; correct?

19 A. Right. Well, I'd have to read the whole thing
20 because it says, "Frederick Lewis, deceased, thus
21 succeeded to the sole ownership of the capital."

22 So, whatever you want to call it.

23 Q. And it was not revisionary rights, it's
24 reversionary rights; correct?

25 A. I didn't say that. I'd have to read the word.

1 Q. I just want to be clear. It says reversionary
2 not revisionary; is that correct?

3 A. Reversionary rights, that's what it says.

4 Q. Do you have a copy of the Complaint? Let's see,
5 Exhibit 2.

6 A. That's it.

7 Q. I'm not clear as to what Exhibit No. 2 is.

8 MR. BRITTAIN: I just put everything in
9 because that was all attached to the Complaint.
10 I don't really care about putting all of it in.
11 It's in evidence, I mean; so --

12 MR. KOUTRAKOS: It's not in evidence.
13 Exhibit No. 2 is the Complaint.

14 MR. BRITTAIN: It is in evidence. I
15 have introduced it all in evidence as Plaintiff's
16 Exhibit No. 2.

17 MR. KOUTRAKOS: As the Complaint. And
18 I said I have the Complaint. And I'm looking at
19 30, 40 documents here that I didn't know that you
20 introduced.

21 MR. BRITTAIN: I gave you a copy of it.

22 MR. KOUTRAKOS: You said the Complaint.

23 MR. BRITTAIN: You said you had it all.

24 MR. KOUTRAKOS: Your Honor, he
25 introduced a Complaint into evidence and told me

1 it was the Complaint. I said I have the
2 Complaint. I read the Complaint 1000 times.

3 Let me finish.

4 He introduced this into evidence. None of
5 this was attached to the Complaint. This was
6 stuff produced in discovery. He's introduced
7 into evidence every document produced in this
8 case. And I, of course, sitting there, I didn't
9 bother to look at it because he said he's
10 introducing the Complaint.

11 THE COURT: Why don't we go through it
12 at lunch.

13 MR. BRITTAIN: I thought you knew that
14 was the document. Here is how I sent it to you,
15 Jim. Just like that (indicating). All that
16 stuff attached to it.

17 MR. KOUTRAKOS: I was looking at the
18 Complaint. I was assuming you were pulling the
19 Complaint out and introducing it into evidence.
20 Meanwhile, you have documents here that, I mean,
21 I know what they are but --

22 MR. BRITTAIN: Well, if you have an
23 objection to them, we'll take them out and argue
24 about them one by one.

25 MR. KOUTRAKOS: I didn't think they

1 were in evidence.

2 MR. BRITTAIN: Well, I'm putting them
3 in evidence.

4 MR. KOUTARKOS: I'm sorry that I didn't
5 double check a document that he said was the
6 Complaint.

7 THE COURT: When we take a lunch break,
8 we'll take a little bit more time and you could
9 go through them, Mr. Koutrakos. And if it's not
10 the Complaint, then you can go through those and
11 you can pull them out. And if they're not the
12 Complaint, then you have an objection to those.

13 MR. KOUTRAKOS: I have a list, Exhibit
14 No. 6, Complaint.

15 THE COURT: That's what I have down
16 too.

17 MR. KOUTRAKOS: I don't have 60 or 70
18 other documents.

19 THE COURT: And I don't know what those
20 others are because I haven't looked at them.

21 MR. KOUTRAKOS: So what do I do now?
22 Do I have an obligation to look at every
23 document? I thought he was --

24 MR. BRITTAIN: Why don't we take a
25 break right now and you can take a look at all of

1 them.

2 MR. KOUTRAKOS: It's not my burden to
3 prove his case. Now I have to go and object to
4 60 documents.

5 MR. BRITTAIN: Well, what do you want
6 to do, Mr. Koutrakos?

7 MR. KOUTRAKOS: I don't know.

8 MR. BRITTAIN: I'm trying to suggest a
9 solution.

10 THE COURT: My solution is when we take
11 a break at lunch go through Plaintiff's 2, which
12 is the Complaint. At least that's the only thick
13 document. The others are maps and surveys and
14 that kind of thing. But the one you have looked
15 at now is Plaintiff's 2, which was put in as a
16 Complaint. Go through that one when we take a
17 break at lunch.

18 MR. BRITTAIN: We said earlier, you
19 told me this, you had no objection to any
20 recorded document. These are documents in this
21 case that have been recorded as part of the
22 record. Now, you have told me that point blank,
23 Jim.

24 MR. KOUTRAKOS: I understand that. But
25 you admitted into evidence an exhibit called the

1 Complaint. I did not know that, and I haven't
2 looked at every document. There might be
3 recorded documents. Now I have to go through and
4 look at these documents that you said was the
5 Complaint, that I have listed down as the
6 Complaint. The Judge has it listed down as a
7 Complaint. And now I have to check to see what
8 documents that were not introduced through
9 testimony. They were just basically shoved into
10 evidence.

11 THE COURT: You may not have an
12 objection once you look at them if they were all
13 recorded documents. Then you just need to go
14 through your notes and put down what they are.
15 But I will give you extra time at lunch to go
16 through them and see what they were.

17 MR. KOUTRAKOS: Okay.

18 BY MR. KOUTRAKOS:

19 Q. Can you show me in the Complaint, which is
20 Plaintiff's --

21 THE COURT: That's 2, Plaintiff's 2.

22 Q. Have you taken apart all the pages of Plaintiff's
23 2?

24 A. No.

25 Q. Can you show me in the Complaint, which is

1 Plaintiff's Exhibit No. 2, where it says that
2 Carmen Ward and the other plaintiff wanted Blocks
3 20 and 29 to be subject to the restrictions
4 located on the map in Plat Book 25, Page 22?

5 A. In the Complaint or in the Order?

6 Q. In the Complaint.

7 A. I never saw that Complaint until St. Patrick's
8 Day of this year.

9 Well, you asked me a question. I'm giving
10 you an honest answer.

11 Q. You previously testified, 25 minutes ago, in the
12 Complaint the Wards wanted to say that the
13 restrictions applied to the property.

14 A. When I was over at the Brittain Law Firm on St.
15 Patrick's Day putting a packet together for you I
16 saw the Complaint. I had never seen it before
17 and I decided to read it. And when I read it, I
18 came to Page 3 and I saw that important language
19 in there and I said, This is very interesting.

20 I didn't digest and tear this whole
21 Complaint apart like with what you're dealing
22 with right now. I saw that one part that I
23 thought was very, very important and I said, We
24 need to send this to him. And you obtained it.

25 The thing that you are asking me was in

1 the final judgment that I had control of since
2 1998. That's all I had when I was doing my
3 title search is I had a final judgment. I didn't
4 have this packet. And in that final judgment it
5 talked about rights of revision as to the unsold
6 lots over there.

7 Q. First of all, you see where it says D and there
8 are numbers on the bottom.

9 Do you know what that means?

10 A. They're just numbered. The pages are all
11 numbered.

12 Q. Do you know who numbered those?

13 A. I have no idea.

14 Q. I did. I'm the one that gave them to you lawyer,
15 first of all.

16 Second of all, you previously testified,
17 unless I'm hearing things differently, when Mr.
18 Brittain asked you, you said in the Complaint
19 they wanted the rest of the neighborhood to say,
20 Hey, I want to restrict my property. So I'm
21 suing you to restrict my property.

22 My question is, where in the Complaint
23 does it say that? Because I can't find it and I
24 want you to show where in the Complaint it says
25 that.

1 A. I'm going to try to answer that question.

2 THE COURT: And it's perfectly okay to
3 say I don't know. But if you do know, you need
4 to state that.

5 A. I have no idea where it is in this Complaint.
6 Everything that he and I talked about were from a
7 document that he subpoenaed me for that I sent to
8 him back in 2006.

9 THE COURT: And you're referring to
10 what document, Mr. DeCiero?

11 THE WITNESS: I believe it was the
12 Final Order on the 1972 case.

13 MR. KOUTRAKOS: Your Honor, here is
14 another thing, and I don't mean to be nick picky.

15 THE COURT: Yes, sir.

16 MR. KOUTRAKOS: And I don't think I am.
17 But Plaintiff's Exhibit No. 3 is the Master's
18 report and I have the Master's report. I have
19 1000 copies of it. I reviewed it 1000 times.
20 And what we have into evidence is a Master's
21 report with a letter from Tommy Brittain, from
22 Scott Umstead to Bob DeCiero. I don't know
23 whether that letter is in evidence or not. I
24 didn't know I had to review every piece of paper.

25 MR. BRITTAIN: It's the cover letter.

1 Take it off. It doesn't make a difference.

2 MR. KOUTRAKOS: I'll do that.

3 BY MR. BRITTAIN:

4 Q. So you can't show me or you don't know where in
5 that Order it says that the plaintiff, that
6 Carmen Ward was suing the rest of the
7 neighborhood to say, Hey, I want my property
8 restricted?

9 MR. BRITTAIN: I thought he was asking
10 about the Complaint.

11 MR. KOUTRAKOS: I'm sorry, I meant the
12 Complaint.

13 A. In the Complaint I can't answer but the Order I
14 can answer.

15 Q. As far as you know, you have no knowledge of any
16 such language contained in the Complaint?

17 A. It may be in there, I have no idea.

18 Q. Let's talk about the Order. In the Order -- I'm
19 not going to ask you about the Order. The Order
20 speaks for itself.

21 You live in Block, is it Block 24?

22 No, it's Block 25; correct?

23 A. I live two houses to the right of John Musick.

24 Q. And do you know whether that's Block 25?

25 A. Right now, no.

1 Q. And you purchased your property in 1991?

2 A. That's correct.

3 Q. At the time you purchased your property, you had
4 covenants attached to your deed; is that right?

5 A. There were covenants and restrictions that were
6 gone over with me by the attorney.

7 Q. Were they similar to what's attached to the 1955
8 plat?

9 A. Identical.

10 Q. At the time you purchased your property, you did
11 not have knowledge of the 1972 Order?

12 A. No.

13 Q. Did you rely on any document in the public record
14 which would say or which would concern any use of
15 my client's property?

16 A. Not concerning your client's property.

17 Q. The answer is, no, you didn't rely on anything in
18 the public record?

19 A. Not when I purchased my property.

20 Q. You were very truthful in your deposition. I
21 asked you if my client's property was used as
22 seven lots, seven residential lots, that you
23 believe that use would be consistent with the
24 rest of Long Bay; is that correct?

25 A. I said if there were seven lots there, if there

1 were seven lots there and if they had seven homes
2 on the lots it would be, yes. But not with one
3 lot.

4 Q. Right, if --

5 A. If Carmen Ward had subdivided it into seven lots
6 and sold it to Tom Dicks or sold it to David and
7 Leigh Meese, and David and Leigh Meese put seven
8 homes on there, we wouldn't be here today. But
9 Carmen Ward sold that as one lot to David and
10 Leigh Meese and Tom Dicks bought it as one lot.
11 And that's why we are here today.

12 Q. Assuming there was no issue as to the subdivision
13 of lots, my client owning his property as seven
14 lots or selling it as seven lots and seven
15 residential structures being put there, would
16 that use be consistent with the overall use of
17 the Long Bay subdivision?

18 A. Not necessarily.

19 Q. How so?

20 A. For one reason, most of it is wetland, as you're
21 aware.

22 Two, the lot configuration would be such
23 that the houses would be jammed up against the
24 street and the backyard would be up against
25 wetland.

1 Three, the elevation there is about 8 or
2 9 feet and the homes across the street are
3 sitting at ground level because they were built
4 prior to hurricane Hugo and the elevation
5 requirements today. So now you adversely effect
6 the character of the neighborhood because you put
7 in seven homes up on pilings. And we are dealing
8 with Surfside Beach and Long Bay Estates.

9 Q. Do you recall testifying at your deposition that
10 you agreed with me that my client's property
11 being used as seven lots would be consistent use
12 with the rest of the subdivision?

13 A. I probably made that statement.

14 Q. But now you have changed that statement?

15 A. I have corrected it.

16 Q. You recall you were put under oath in your
17 deposition just like you were put under oath
18 today?

19 A. Yes.

20 Q. Who was representing the Meeses in the -- not the
21 Meeses -- Long Bay, the Long Bay property entity,
22 the Long Bay Properties entity in that
23 litigation?

24 A. I was the lead plaintiff.

25 Q. I'm asking who was representing the defendant?

1 A. Attorney Bob Erwin.

2 Q. Is it your understanding that Bob Erwin knew
3 about the 1972 Order at the time y'all filed a
4 Complaint?

5 A. I have no idea.

6 Q. You don't recall?

7 A. He didn't even know there were restrictions on
8 this property. He had a different set of
9 Restrictive Covenants.

10 Q. Who is "he"?

11 A. The Ammons family.

12 Q. So the Ammons family didn't know there were any
13 restrictions on the property?

14 A. That's what they argued.

15 Q. Did they argue anything with respect to the 1972
16 Order, to your recollection?

17 A. It wouldn't have pertained to them so I don't
18 think they would have argued anything concerning
19 that.

20 Q. You mentioned something about the 1972 Order
21 saying something about reserving to grantors.

22 A. We had gone over that over and over again on the
23 deposition, correct.

24 Q. Pardon, on the deposition?

25 A. Concerning the language in the Order.

1 Q. I'm asking if we went over it today?

2 A. Not today.

3 Q. This is a new thing?

4 A. No, we haven't gone over it.

5 Q. The 1972 Order you said reserves the right to
6 Carmen Ward or you might have referred to her as
7 grantor; is that right?

8 A. No, that's not what I said.

9 Q. What did you say?

10 A. You would have to pull it up on your page there
11 and I'll read it to you.

12 Q. Okay. Is that the page you want to look at?

13 A. I think the correct response would be is that
14 what you want me to read.

15 It says, "In like manner, the remaining
16 portions of old Blocks 28 and 29, that is to say
17 the area lying between the rear of Blocks 24 and
18 25 and the southeasternmost paved street are
19 subject to such residential restrictions, but
20 with right of revision of the lot arrangement or
21 for combination with abutting portions of lots in
22 Blocks 24 and 25. The restrictions uniformly
23 used in this area and the declaration recorded in
24 25 and 22 reserve to grantor the right to change
25 the boundary lines and building lines as to any

1 unsold lots in any event."

2 The question that we went back and forth
3 with was it's my belief that they feel that they
4 have the right to subdivide. My feeling is that
5 the second sentence clarifies the first because
6 Carmen Ward was the plaintiff on the case and she
7 wanted to make sure she didn't lose any rights
8 when she created Lots 22, 28 and 30 to be
9 uniformly bound by the covenants. So she put a
10 sentence in there that says she had those rights
11 in any event.

12 Q. Didn't you just tell me that under Plat Book 25,
13 Page 22, the grantor could do whatever she
14 wanted? You did, didn't you?

15 A. The Court Order was on Lot 1 through 27.

16 Q. And the Court in this case said we are going to
17 have those restrictions apply to 28 and 29?

18 A. The Court didn't say that, she said that.

19 Q. Okay. Well, show me where she said that?

20 A. It was through stipulations. She was the
21 plaintiff in this case.

22 Q. Did she sign the '72 Order?

23 A. No, she didn't sign the '72 Order, no. What she
24 did, she filed a suit against the subdivision
25 because she wanted to sell the properties out on

1 the highway as commercial. The people in the
2 subdivision felt that all of the properties,
3 including the highway, were part of the
4 subdivision.

5 She said no way. Only 1 through 27 is
6 part of the subdivision. Anything west of 27
7 aren't bound by any covenants. She said, If I
8 want, I can sell my property out on the highway
9 as commercial.

10 But she stipulated and said, But I
11 understand the people in the neighborhood and I
12 believe that the rest of the blocks, meaning from
13 Willow Lane back, should be bound by the same
14 covenants as 1 through 27. And she inserted that
15 through the Court to bind the subdivision with
16 those covenants. But she reserved the right to
17 do what she wanted on 28 and 29 or whatever you
18 want to call the lot.

19 Q. Where does it say that she reserved the right in
20 the language?

21 A. It says, "The restrictions uniformly used in this
22 area and the declaration recorded in 25 at 22
23 reserved to grantor the right to change the
24 boundary lines and building lines as to any
25 unsold lots in any event."

1 Q. Aren't you reading something in the Order that's
2 just not there?

3 A. I'm just reading what I read.

4 Q. You're reading something in the Order that's not
5 there. You cannot say anywhere in the Order
6 where the Court says that the grantor reserves
7 the right, can you?

8 A. Where did she --

9 Q. I'm asking you a question and I'm getting
10 questions back.

11 MR. BRITTAIN: Wait a minute. I have
12 seen badgering in 30 years -- I object to the
13 form of the question. He's badgering the
14 witness, asking him over and over something that
15 is clear from the record that she was the
16 grantor, and he's answered it and answered it.
17 And if he's going to do it he ought to pose a
18 position and let Mr. DeCiero say yes or no and
19 explain his answer.

20 MR. KOUTRAKOS: Your Honor, he has made
21 representations on direct as to what these
22 documents said. Made broad statements as to what
23 these documents said. And the language is just
24 not included in there. And I'm asking him
25 questions to show me where the language is

1 included in there.

2 He has sued my clients. The neighborhood
3 has sued my clients. He hasn't been able to use
4 his property for eight years.

5 MR. BRITTAIN: Your Honor, this isn't
6 proper.

7 MR. KOUTRAKOS: I'm entitled to test
8 the theory of the case where they're saying there
9 is language included in that paragraph and it's
10 just not there.

11 THE COURT: You asked him and he read
12 it and he said the grantor. He read it. And he
13 answered it.

14 MR. KOUTRAKOS: Okay. I'll move on.

15 THE COURT: Thank you.

16 BY MR. KOUTRAKOS:

17 Q. Would you agree with me that the 1955 plat showed
18 Blocks 28 and 29 as contained in the seven lots?

19 A. Prior to the '72 case, the map that was recorded
20 inadvertently contained Blocks 28 and 29.

21 Q. Inadvertently. That's your opinion?

22 A. No, that's not my opinion.

23 MR. KOUTRAKOS: Your Honor, may I have
24 a moment?

25 THE COURT: Certainly.

1 Q. Do you know what it means to combine lots?

2 A. To combine a lot?

3 Q. Or combine lots, more than one lot or combination
4 of lots.

5 A. There isn't anything that says someone can't take
6 several lots that they own and combine them
7 underneath the tax map number in our subdivision.

8 In other words, if you bought four lots
9 and built one home and recorded it and had it
10 recorded so that they were separate lots listed
11 underneath the tax map number, then you could go
12 back and do something to it. And I had an
13 example of that. We have one of our neighbors
14 that has done that.

15 MR. KOUTRAKOS: Your Honor, I don't
16 believe I have any further questions but I
17 haven't viewed all the documents that apparently
18 have been introduced.

19 MR. BRITTAIN: I thought about that
20 more and I have been looking through there.
21 What I believe these are are documents associated
22 with the subdivision that have been recorded.
23 Some we have introduced separately. I'll be
24 happy to go through that with Mr. Koutrakos at
25 lunch and try to solve that problem. I thought

1 any document under these lines were not a problem
2 but I don't know how many of these we need to get
3 in.

4 THE COURT: I think Mr. Koutrakos'
5 issue is that he just didn't know that there were
6 more documents than the Complaint and I think
7 that could be solved at lunch.

8 MR. BRITTAIN: Sure. The only thing I
9 was asking about was the Complaint.

10 THE COURT: Yes, sir.

11 MR. BRITTAIN: But if I mislead there I
12 apologize.

13 Now, I want to move to reintroduce my
14 Carmen Ward letter based on the questioning of
15 Mr. Koutrakos to Bob DeCiero.

16 He asked him several questions and one of
17 them was specifically what he, Bob DeCiero,
18 thought Carmen Ward intended. He was asking him
19 questions rapidly, but that was one of the things
20 Mr. Koutrakos asked. And, of course, the court
21 reporter can play that back for you later. What
22 that creates is an additional theory of
23 admissibility.

24 Number one, Mr. Koutrakos, as we said,
25 opened the door for that piece of evidence by his

1 questioning in that area.

2 Number 2, this witness's state of mind and
3 how he formed his state of mind is a part of the
4 record and part of the testimony and he should be
5 allowed to refer to what he learned from Carmen
6 Ward about what she intended. This would be
7 witness's state of mind of.

8 So we have two theories. Carmen Ward's
9 state of mind and, now, based on these questions,
10 Bob DeCiero's state of mind in trying to answer
11 the questions that Mr. Koutrakos put to him about
12 Carmen Ward's efforts, intentions, what she could
13 and couldn't do and what she intended to do.

14 MR. KOUTRAKOS: Your Honor, I was cross
15 examining on questions that he had asked on what
16 he believed Carmen Ward intended by looking at
17 the Order and I was trying to clarify what was
18 said in the Complaint and what was said in the
19 Order. I was asking him to refer to those
20 documents to explain, because he previously
21 testified that I think she could do whatever she
22 wanted. When she sued everybody she wanted the
23 Restrictive Covenants to apply. And, therefore,
24 as he said, they could do whatever they wanted
25 with the property.

1 So I was asking him where he could find
2 those statements in the documents. That's all I
3 was doing. I didn't open any door and those
4 documents are inadmissible, your Honor.

5 MR. BRITTAIN: "What do you think she
6 intended," he asked. And I think that gives us
7 another theory for admissibility.

8 THE COURT: I'm still going to deny
9 that. Even if he did ask questions about her
10 intent it still doesn't give an independent
11 admissibility as to a hearsay document. At
12 least that's my ruling.

13 Do you have any redirect, Mr. Brittain, as
14 to Mr. DeCiero?

15 MR. BRITTAIN: No.

16 MR. KOUTRAKOS: Your Honor, I want to
17 reserve the right -- do I get to ask him
18 questions on these documents?

19 MR. BRITTAIN: Sure. Anything is fair.
20 I have no problem.

21 MR. KOUTRAKOS: I probably won't, your
22 Honor. I just don't want to be foreclosed to the
23 opportunity if there is something here I should
24 ask him about.

25 MR. BRITTAIN: If we end up with a

1 disagreement, I want to put him back on for the
2 limited purpose of trying to introduce the
3 documents.

4 THE COURT: You may step down for now
5 but you will still be under oath just in case
6 they want to ask any questions on those
7 documents, Mr. DeCiero. So you will not be able
8 to talk with Mr. Brittain during lunch except as
9 to your golf game or baseball, those kinds of
10 things.

11 Let's take about an hour. How much time do
12 you need to go over those documents, do you
13 think? Let's take an hour for lunch and then
14 some extra time for y'all to go over the
15 documents.

16 MR. BRITTAIN: Let me ask you this
17 question.

18 THE COURT: Yes, sir.

19 MR. BRITTAIN: In going over
20 Plaintiff's Exhibit No. 2, I need to be talking
21 to Mr. DeCiero about excluding some of these.

22 THE COURT: Do you have any objection
23 as to that, Mr. Koutrakos?

24 MR. KOUTRAKOS: No, your Honor, I
25 don't.

1 THE COURT: Very well then. Let's take
2 about an hour. Do you need 15 minutes or
3 30 minutes, Mr. Koutrakos?

4 MR. KOUTRAKOS: I think it will take me
5 ten minutes after I realize what's in here. In
6 looking through it nothing sticks out. But I
7 could be wrong.

8 MR. BRITTAIN: I think ten minutes.

9 THE JUDGE: Let's be back at 2:45.

10 MR. BRITTAIN: One other issue. We had
11 talked about Leigh Meese and Jay Dusenbury and
12 those. Do you think we can finish this
13 afternoon?

14 MR. KOUTRAKOS: I don't know. If we
15 come back at 2:45 that would leave me with five
16 witnesses.

17 THE COURT: I'll stay as long as you
18 need to as long as the court reporter can stay.

19 MR. KOUTRAKOS: I don't have a problem
20 with that. That's fine.

21 THE COURT: I'll take a shorter lunch.

22 MR. BRITTAIN: I think so. I don't
23 think we need a longer lunch.

24 MR. KOUTRAKOS: If we're willing to say
25 to finish this up until 6:00, 6:30.

1 THE COURT: That's fine. I'll stay.

2 MR. KOUTRAKOS: Then I think I might be
3 able to get this done. I'm not making any
4 promises.

5 THE COURT: Then you want to come back
6 at 2:30?

7 MR. KOUTRAKOS: 2:30 is fine with me.

8 THE COURT: Very good. Let's come back
9 at 2:30.

10 - - - - -
11 (Thereupon, at 1:30 p.m., a luncheon
12 recess was had)

13 - - - - -
14 (Thereupon, at 2:38 p.m., the trial resumed,
15 with all parties present)

16 - - - - -
17 (Thereupon, Defendants' Exhibit Nos.
18 1 through 10 were marked)

19 - - - - -
20 THE COURT: Please be seated.

21 Y'all need some more time?

22 MR. BRITTAIN: No, ma'am.

23 Judge, as soon as you left I excluded all
24 these other documents. I told Mr. Koutrakos that
25 I had thought they were all part of the original

1 Complaint and he was getting ready to introduce a
2 bunch of them himself. But we didn't need them.

3 THE COURT: Yes, sir.

4 MR. BRITTAIN: We kept the Complaint
5 with the verification page before signing,
6 Exhibit A and B, and the court reporter, Mr.
7 Koutrakos and I redacted Plaintiff's Exhibit No.
8 2.

9 Now, I move to introduce all the evidence I
10 submitted, I think I did at the time. I think
11 there are three that have been proffered and not
12 been admitted into evidence by the Court. I
13 believe all the other documents have been
14 admitted into evidence. Plaintiff's 1 through
15 11. And three of those are proffered that have
16 not been accepted.

17 THE COURT: Did y'all have time to eat
18 at all?

19 MR. BRITTAIN: Sure. That took us five
20 minutes.

21 THE COURT: Very good.

22 MR. BRITTAIN: What we're going to do,
23 we are going to let Mr. Koutrakos go forward.
24 He's going to call Miss Meese and Mr. Dusenbury
25 as part of his case to speed things along.

1 THE COURT: Okay. Very good.

2 MR. KOUTRAKOS: Have you rested now?

3 MR. BRITTAIN: Yes.

4 THE COURT: Now, have you rested or are
5 you going to call the other witnesses out of
6 order?

7 MR. BRITTAIN: If he was not going to
8 call them, I would go forward. We think it might
9 happen faster if he does it this way.

10 MR. KOUTRAKOS: I'm calling the
11 witnesses he was intending to call. They should
12 be here.

13 MR. BRITTAIN: I think Leigh is here.
14 Mr. Dusenbury is here.

15 THE COURT: All right. Very good.

16 MR. KOUTRAKOS: Your Honor, at this
17 time, I'd like to move for involuntary nonsuit.
18 I think it's the plaintiff's burden in this case
19 to show that a restriction applied to the
20 property that was the plain intention with clear
21 and unmistakable implication. There is nothing
22 that the plaintiff has put forward in this case
23 to show that there are any covenants that are
24 either expressed or have, as the Court uses the
25 language, your Honor, expressed terms or

1 unmistakable implication.

2 There were seven lots, and I have been
3 through this numerous times, but there were seven
4 lots in 1955, there were seven lots in 1972,
5 there are seven lots today.

6 Now, what the plaintiff is saying happened
7 is that Carmen Ward sold the property as one lot
8 to the Meeses. There is nothing in the chain of
9 title or any of the restrictions that are
10 allegedly tied to this property that give her a
11 right to combine the lots into one.

12 So what they're saying Carmen Ward did was
13 that even though the Court in the 1972 Order
14 shows this map that says 20 and 29 contain seven
15 lots, your Honor, that is this right here. The
16 Court of Appeals found in its Order that this map
17 right here shows that Blocks 20 and 29 contain
18 seven lots.

19 The restrictions attached to the 1955 plat
20 say that no lot shall be subdivided. That means
21 Carmen Ward can't subdivide a lot. Nobody can
22 subdivide a lot. The only thing that was
23 provided for is as to all unsold lots. Lots.
24 The grantor is reserved to change the boundary
25 lines of the lots and the building lines of the

1 lots. I'm throwing "of the lots" in there
2 because I think that was a plain intention of
3 this provision as to unsold lots.

4 So you're looking at the 1955 plat. It
5 shows seven lots. You're looking at the plat
6 attached to the 1972 Order. It shows seven lots.
7 What they're saying is Carmen Ward, who is
8 somehow the grantor, this undefined term on the
9 document which is the map, this document attached
10 to the 1955 map, that only she had the right to
11 do that.

12 Our position is what she did, if their
13 argument is she sold the property as one lot,
14 that is a void act. That act is not authorized
15 by these covenants at all. There is nothing
16 here that says she can combine the lots. If she
17 combined these seven lots into one lot she
18 couldn't do it. She didn't have the authority.

19 Now, if you look at the language of the
20 1972 Order, she had the right to revise the lot
21 arrangement. She could have rearranged the lot.
22 I could take these exhibits and I could rearrange
23 them. If I take them away, I'm doing more than
24 rearrange them. The Court didn't say she had a
25 right to combine the lots. But that's what the

1 plaintiffs are saying she did. She combined them
2 from seven lots to one lot. She couldn't do
3 that. That's something she couldn't do. So the
4 property has always remained as seven lots.

5 So then my clients come along in 2003 after
6 being provided with this Order that says "but
7 with right of revision." It doesn't say Carmen
8 Ward has the right of revision. It doesn't say
9 only plaintiff has the right of revision. It
10 just doesn't say that.

11 Now, there is some language here the
12 restrictions uniformly used in this area and the
13 declarations recorded in 25 and 22 reserve to the
14 grantor, undefined term in the Order, and
15 restrictions, the right to change the boundary
16 lines and building lines as to any unsold lots in
17 any event.

18 Well, it doesn't say here that this right
19 of revision remains with only the plaintiff in
20 that case. It's not limited whatsoever. It
21 says that the '55 plat restrictions apply.

22 Here are the '55 restrictions. If, as the
23 plaintiff's argument is, that the plaintiff could
24 do whatever she wanted, why add all this
25 different language in there? Why add it there?

1 If the plaintiff under the '55 covenants could do
2 what she wanted, why would you add that language?

3 It talks about lot arrangement. There is
4 nothing that I could find that gives her the
5 authority to combine lots. So the property has
6 always been seven lots. Anything else done is
7 an act that's not authorized by the covenants.

8 The parties in this case have, the
9 plaintiff has argued that, hey, we're trying to
10 force the covenants. We are trying to force
11 people to do what they should do. Well, under
12 the covenants Carmen Ward didn't have the right
13 to combine all the lots into one. There is
14 nothing that I could find that could say that she
15 could do that.

16 Again, looking at this language, there is
17 nothing here that says only Carmen Ward had the
18 right. If the Court meant that, it should have
19 put that in there and they didn't.

20 In buying real estate, everybody relies on
21 the public records, and that's why the language
22 says, and I wrote it down here so I wouldn't
23 forget it like I typically do, "express terms or
24 unmistakable implication." That's what the case
25 law says. The covenant must say by express terms

1 or unmistakably implication.

2 I cannot find anywhere here where it
3 plainly and unmistakably says that the plaintiffs
4 in that case only had the right of revision. It
5 didn't say but with right of revision limited to
6 the plaintiff. It doesn't say that. It doesn't
7 say right of revision limited to Carmen Ward. It
8 just doesn't say that.

9 So when my clients bought this piece of
10 property and they see the 1955 plat and they
11 think it's seven lots and then they get this
12 Order, that would buttress their right to have
13 the property as seven lots.

14 And so it's the plaintiffs burden to show
15 that a Restrictive Covenant applies and that we
16 violated it.

17 We'll argue, and you will hear a lot of
18 factual testimony here today whether the
19 Restrictive Covenants apply in the first place
20 and whether the '72 Order applies. But even if
21 they do apply, this language provides my client
22 the right to do what it did. And not only that,
23 it did not provide Carmen Ward with any right to
24 combine the lots.

25 So seven lots in '55. A Court of Appeals

1 found, I'm going to introduce, the Court of
2 Appeals found that the 1955 plat, in their
3 Request for Admission, I don't think there is any
4 dispute, the '55 map shows seven lots. The Court
5 of Appeals found that the '72 Order shows the
6 property as seven lots.

7 Plaintiffs argue Carmen Ward sold the
8 property as one lot and she could do whatever she
9 wanted. Well, that's not the case. There is
10 nothing in here that allowed her to combine the
11 lots.

12 So what my clients did is consistent with
13 all the other plats, with the plats of record
14 actually showing lots, as they should, it's seven
15 lots.

16 And so I don't think the plaintiff has met
17 its burden. As you know, we have been struggling
18 with this case for a long time and no Judge has
19 interpreted this language. I think the
20 plaintiff cannot meet its burden of showing that
21 these covenants apply in expressed terms or
22 unmistakable implication. Because when you're
23 buying and selling real property, if you want a
24 restriction you better be sure that the
25 restriction is clear so people buying property

1 know their rights and so that people in the
2 neighborhood know their rights.

3 The fact that the '72 Order was to preserve
4 the residential integrity of the property,
5 combining all those lots into one flies in the
6 face of the general intent of the '72 Order.

7 We are saying, hey, here is the '72 Order.
8 Here are the lots in the subdivision. Let's go
9 ahead and give Carmen Ward the right to do
10 whatever she wanted. Well, that's not true. It
11 says the right to revise the lot arrangement. So
12 it presupposes that the lots are already there in
13 the first place. So what she did or what they
14 say she did in taking seven lots and turning it
15 into one lot is a void act. The property has
16 always been seven lots. What my clients did was
17 highly authorized.

18 THE COURT: I understand. I just don't
19 want you to go into a closing argument at this
20 point.

21 MR. KOUTRAKOS: That's the basis, your
22 Honor, for my motion for involuntary nonsuit.
23 And under the rules you can weigh the evidence
24 and do all that and rule on involuntary nonsuit.

25 THE COURT: I understand. But based on

1 the fact that Mr. Brittain was thinking about
2 calling Miss Meese himself, but apparently you're
3 going to call her in your case, and I think he
4 had thought about calling her as well, I'm going
5 to deny your motion for nonsuit and allow you to
6 go forward with your case at this point.

7 I respectfully deny your motion for nonsuit
8 and allow you to go forward with your case.

9 MR. KOUTRAKOS: Your Honor, Mr.
10 Brittain and I talked during the break and we
11 have premarked numerous exhibits so we can make
12 your life a little bit easier today, and I'm
13 going to mark as Defendants' Exhibit No. 1, your
14 Honor, the Decree. The Decree in 1972.

15 THE COURT: Yes, sir.

16 MR. KOUTRAKOS: The Master's report is
17 put into evidence. The Complaint is put into
18 evidence. I just wanted to put into evidence the
19 Decree of the circuit court judge in full which
20 reiterates and adopts the holdings of the Master
21 and attaches the plat that I have been showing
22 everybody here.

23 So that's Defendants' Exhibit No. 1, which
24 I'd like to offer into evidence at this time.

25 MR. BRITTAIN: Your Honor, I don't have

1 any objections to any of the documents. None.

2 THE COURT: Very good.

3 MR. KOUTRAKOS: Defendants' No. 2 are
4 Plaintiff's Responses to Defendants' Requests for
5 Admissions. And in 6, 7 and 8 the plaintiffs
6 admit that Blocks 28 and 29 contain a total of
7 seven lots according to the 1955 plat. So
8 that's Defendants' Exhibit No. 2.

9 Defendants' Exhibit No. 3 is a reduced
10 version of that very big plat. That big plat has
11 to be made part of this record somehow.

12 MR. BRITTAIN: Your Honor, I don't have
13 objection. Just put them in.

14 MR. KOUTRAKOS: I'm just telling her
15 what we are doing.

16 Exhibit No. 4 is a blown up version of a
17 plat with Blocks 20 and 29.

18 Defendants' 5 is a deed from Carmen
19 Ward and others to David Meese and Leigh Meese.

20 Exhibit 6 is a deed from David Meese and
21 Leigh Meese to Thomas Dicks.

22 Exhibit No. 7 is the deed from Thomas Dicks
23 to Robert and Amanda Dicks of three of the seven
24 lots.

25 Exhibit No. 8 is the Dicks plat showing

1 the property of seven lots, the same document I
2 have been showing everybody today.

3 Defendants' Exhibit 9 is a GIS aerial
4 photo.

5 And Defendants' 10 is just some
6 pictures of the property.

7 THE COURT: Okay.

8 - - - - -

9 (Thereupon, Defendants' Exhibit Nos. 1
10 through 10 were entered into evidence)

11 - - - - -

12 MR. KOUTRAKOS: At this time, defendant
13 would like to call Thomas Dicks to the stand.

14 THE COURT: Mr. Dicks, if you will come
15 around, please, sir.

16 Place your left hand on the red Bible and
17 raise your right hand and be sworn or affirmed by
18 the court reporter.

19 THOMAS L. DICKS,
20 of lawful age, the Witness herein, being by me
21 first duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. KOUTRAKOS:

25 Q. Mr. Dicks, can you state your name for the

1 record.

2 A. Thomas L. Dicks.

3 Q. Where do you reside?

4 A. In Myrtle Beach on Little River Road.

5 Q. What do you do for a living?

6 A. I have had two careers all my adult life,
7 antiques and fine art dealer, and also different
8 aspects of real estate.

9 Q. You have been named as a defendant in this case
10 over a property that you own in Long Bay Estates.
11 Can you just tell me generally, just describe
12 generally Long Bay Estates?

13 A. Well, I first became aware of Long Bay Estates in
14 1969. I was a lifeguard in Myrtle Beach. And my
15 uncle and aunt and cousin were renting a brick
16 house on the oceanfront, a one-story brick house.
17 It's still there, to my knowledge. They were
18 renting by the week and they invited me over to
19 see them and I went to see them. That was my
20 first experience, awareness of Long Bay Estates.

21 I came back numerous times that summer and
22 walked on the beach to the pier at the state
23 park, to the south and back.

24 Long Bay Estates is at least as old as
25 1955 or '58, according to the plat. It has a

1 lot of nice houses. I have shown houses in Long
2 Bay Estates in the early '80s when I was selling
3 real estate for Booe Realty.

4 Booe Realty had a vacation rental on the
5 second row at Long Bay Estates and it was owned
6 by, one of the owners was Mr. Melker. And they
7 wanted to sell that property and my brother
8 Robert and I were selling real estate at Booe
9 Realty so we listed that property for sale. So I
10 was showing property in Long Bay Estates then
11 including that duplex.

12 Q. When did you first become interested in the
13 property that is the subject of this case?

14 A. At the time we sold the duplex I met Mr. Melker,
15 who is in the courtroom today, and we became
16 friends. We became very interested in buying
17 other property in Long Bay Estates because we
18 liked it so much.

19 Q. What year was that?

20 A. That was in '82 to '83.

21 Q. Sir, were you interested in buying this property
22 in '82 and '83?

23 A. After I sold the duplex we did look around at all
24 the property in Long Bay Estates from that point
25 on. At one time we went to see Luke Ward, who

1 was, he owned Ward Realty, and he had knowledge
2 of all the pieces of property. He seemed to have
3 all the knowledge about the property that Carmen
4 Ward had inherited because he worked closely with
5 her. He was married to her at one time.

6 MR. BRITTAIN: Excuse me. I object to
7 what Luke Ward says. He is not here. That will
8 be hearsay.

9 THE COURT: Sustained.

10 Q. Go ahead.

11 A. I went to Luke Ward and I was informed that --

12 MR. BRITTAIN: Objection. The same
13 thing, what Luke Ward informed him. I object.
14 Hearsay.

15 THE COURT: Sustained.

16 A. I became aware that the property was for sale,
17 the 2.67 acres, around that time. So, let's see,
18 at that time Steve and I contacted or found out
19 about the water and sewer availability and there
20 was none available on that street. I don't
21 remember the exact date but there was a time when
22 there was a sign on the upper Long Bay Estates,
23 the road wasn't open to upper Long Bay Estates,
24 but it looked like -- somehow we knew they were
25 building a lift station. So we said, well, we

1 are going to keep an eye on it if it ever has
2 water and sewer on it.

3 Q. Was there ever a point in time that you became
4 more interested in the property?

5 A. Yes. Around 2002 Steve called me one day and we
6 were talking and he said, Why don't you check on
7 that property, that large acreage in Long Bay
8 Estates. Of course that was the property that I
9 eventually bought. And that's when I became
10 interested in buying it.

11 Q. Tell me the process that led you into entering
12 into a contract with the Meeses?

13 A. So Steve said, Why don't you check on it. I
14 looked up the owners at the time. It was Leigh
15 and David Meese. I found their phone number and
16 I called them at home. I basically always spoke
17 to David Meese, to my knowledge, on the phone.

18 I think the first time we spoke he said,
19 you know, it's kind of odd that you called
20 because we bought it to build a house but we
21 bought in the neighborhood and we are not going
22 to be able to sub so we had talked about selling
23 it. And now you called. So let me ask my wife
24 and I will get back to you.

25 So in a day or two he called and said,

1 Yes, we decided we would like to sell.

2 Oh, I'm leaving something out. Either the
3 first day or the second day he said, What did you
4 want to do with the property?

5 I said, Well, I love Long Bay Estates and
6 I would like to build a house and live there.
7 Which I still would like to do.

8 So Mr. Meese came back and told me that he
9 wanted \$175,000 for the property, that he had
10 paid \$145,000, and I said okay.

11 So from there I made an offer to that
12 affect, to that purchase price. I met David
13 Meese at kind of a new office they had remodeled
14 behind the Sea Mist and I gave him a contract and
15 we talked.

16 At one of those first meetings I did meet
17 Leigh Meese but it seemed like it was just a few
18 minutes, to my memory, you know. But basically I
19 dealt with David.

20 I had some terms in there and one of the
21 terms was amount of time after the contract was
22 signed to have due diligence on the property to
23 find out all the utilities available and whatever
24 I could find out about it. So he came back with
25 an offer that he had drawn up or they had drawn

1 up, essentially the same, but some offer they had
2 drawn up. It looked essentially the same so I
3 signed it.

4 So, at that point, it was under contract
5 and then I started my due diligence.

6 Q. Tell the Court what type of due diligence you did
7 prior to purchasing the property?

8 A. One of the first things I did was to go to the, I
9 think it was the old courthouse. Wherever the
10 property records were at that time. Here in this
11 complex. The old courthouse or that building. I
12 inquired about the property and inquired about
13 the zoning and planning to see what I could look
14 up, like my own little title search, what I could
15 find.

16 I went to the plat book and it was listed
17 in the deed or something. And I looked in that
18 plat book and there was no map there. There was
19 no plat there. So I asked some employees there
20 and they said you need to talk to Mr. Augustus
21 Dithe.

22 So he came up and led me back to his
23 office. It was full of papers on his desk and he
24 reached over and found a plat and he said, Here
25 it is. It's come into pieces. And that's why I

1 have it here. We are somehow trying to get a
2 copy made so it won't get destroyed.

3 So that's when he looked at it and I
4 showed him the property that I was interested in.
5 And he said --

6 MR. BRITTAIN: Objection, your Honor.
7 I object to what he said. That would be hearsay,
8 an out of court statement.

9 THE COURT: Sustained.

10 A. I went to the courthouse and found out that it
11 was seven lots from the map. And I also found
12 out that to eliminate lots there had to be on the
13 plat --

14 MR. BRITTAIN: Objection. This is
15 essentially getting around the hearsay. He's
16 saying I found out. It implies somebody told him
17 that. He is not a lawyer. I don't believe he
18 would be allowed to testify to what he's found
19 out.

20 MR. KOUTRAKOS: It's not really to the
21 truth of what is being said. It's what was in
22 his mind when he purchased the property.

23 MR. BRITTAIN: I like that theory. If
24 you apply it to Carmen Ward's testimony, I'll
25 agree with you.

1 MR. KOUTRAKOS: This is him buying the
2 property. It's contemporaneous with when he
3 bought the property and what he was told and what
4 he should do.

5 THE COURT: Overruled.

6 BY MR. KOUTRAKOS:

7 Q. Go ahead.

8 A. I found out unless I could find a plat that
9 showed those lot lines and a note that said these
10 lot lines have been abandoned or deleted, that
11 those lots still remained.

12 At that time, I went to, I asked around
13 for a good attorney in real estate and a friend
14 of mine, Adolf Bell, who is a colleague in the
15 commercial real estate business, recommended
16 Wayne Mumford.

17 I went to Mr. Mumford and showed him the
18 contract and I said, I found out that there is
19 potentially seven lots here. There are seven
20 lots on this registered copy that I got at the
21 courthouse of the recorded '55 plat that you have
22 as your exhibit. And I want you to do a
23 particular, you know, more than just a title
24 search, a routine title search for a house
25 purchase, I want you to do a thorough title

1 search to see if there are any problems in the
2 title search to prevent me from using the
3 property for seven lots, including looking for a
4 plat. The fact about the information I found, if
5 the lot lines were deleted.

6 He said, okay, he would do that. Then
7 somewhere in a point of time after that I went to
8 see Bob Bellamy, who had done work for me before,
9 he's a surveyor and engineer. And I showed him
10 the property. We sat in a conference room at a
11 big table and I left a copy of that plat with
12 him, the '55 recorded plat.

13 So things were going along and I get a
14 call a few days later it seemed like, from Mr.
15 Bellamy. He said a man came in on a different
16 matter. He saw the map and he said that property
17 can't be subdivided, it's all wetlands, and I
18 have a paper on it.

19 So Mr. Bellamy said that this man came and
20 brought him a paper. So Mr. Bellamy said, I'm
21 calling you, you could come pick up the paper.
22 It's meant for you.

23 So I came in and picked up the paper. I
24 looked it over, I read it over. I went directly
25 and gave it to Wayne Mumford at his office two

1 doors down. And I said, Here is a paper. It
2 seems to pertain to this property. It mentions
3 it. Did you find it in the title search?

4 No, he did not.

5 I said, Well, here it is, you know. Can
6 you tell me what this is? So he did.

7 Q. The document you're talking about is the 1972
8 Order that we have been referring to?

9 A. It was the '1972 Order.

10 Q. Would it be, just for clarification, would it be
11 what is marked as Plaintiff's Exhibit No. 3?

12 A. It appears to be the same Order and it has this
13 language on Page 7 that I noted that talked about
14 this property. I mean, I can't say every page
15 is exactly the same but it appears to be.

16 Q. Did you, in your own mind, come to any
17 conclusions as to what that document meant with
18 respect to your due diligence in preparing to
19 purchase the property?

20 A. In my mind, from the knowledge I had, I thought
21 it was seven lots and there was no problem but I
22 deferred to legal counsel.

23 Q. Were you given legal advice as to the legal
24 effect of that document?

25 A. Yes, Mr. Mumford gave me the advice that he

1 didn't see any problem in this Order that would
2 prevent me from having seven lots there.

3 Q. Did you rely on that advice in going forward with
4 the closing?

5 A. Definitely. I wouldn't have gone forward without
6 that advice.

7 Q. Presumably Mr. Mumford performed a title
8 examination?

9 A. Yes, he did.

10 Q. Did he tell you what the results of his title
11 examination were?

12 MR. BRITAIN: I object. I think he's
13 got Mr. Mumford as a witness. He's been allowed
14 to testify to a lot of hearsay. This is patent
15 hearsay.

16 THE COURT: Did you say you wouldn't
17 have bought this property unless it had seven
18 lots on it, is that what you just said?

19 THE WITNESS: Well, I wouldn't have
20 gone forward to put it in the seven lots without
21 that. But, yes, I did say that, yes, ma'am.

22 THE COURT: All right. Thank you.

23 THE WITNESS: If I may correct that. I
24 wouldn't have gone forward with the seven lot
25 plan that I went forward with.

1 THE COURT: Thank you.

2 THE WITNESS: I may have still bought
3 the property, but that was more accurate.

4 Q. Tell me what happened at closing, anything
5 typical or atypical?

6 Anything atypical happen at closing?

7 A. No, the closing seemed to go off fine, without
8 incident.

9 Q. How much did you pay for this property?

10 A. \$175,000.

11 Q. I'm showing you what's been already introduced
12 into evidence as Defendants' Exhibit No. 6
13 (handing).

14 Is that a copy of the deed that conveyed
15 to you the property that's involved in this case?

16 A. Yes, it appears to be the deed, a copy of the
17 deed.

18 Q. It shows how much consideration you paid for the
19 property; correct?

20 A. Yes, sir.

21 Q. Did you ever tell the Meeses that you were going
22 to use this property as seven lots?

23 A. I never mentioned it to them.

24 Q. Why not?

25 A. There were a few reasons. One, I have a general

1 rule of business. I like to not discuss my
2 business with anyone, including sellers.

3 Two, I wasn't sure what I was going to do
4 exactly until I found out, after I had advice
5 that it was seven lots. I didn't mention it. I
6 just don't ordinarily talk about anything I find
7 out.

8 Q. After the closing, Mr. Bellamy, the surveyor, Mr.
9 Bellamy did some work for you; is that correct?

10 A. Yes, that's correct.

11 Q. That's the survey that's been introduced into
12 evidence, and we actually talked about it today,
13 which would be Defendants' Exhibit No. 8; is that
14 correct?

15 A. Yes, that's right.

16 Q. And can you tell the Court whether or not you
17 were aware at the time you purchased the property
18 there were wetlands?

19 A. I was definitely aware of the wetlands. The
20 Meeses informed me there were wetlands. They had
21 two delineations done. They gave me those at
22 some point in time. That's what I discussed
23 with Mr. Bellamy, the surveyor. And we had a map
24 that showed the wetlands.

25 And we also found on the property a

1 drainage ditch that was going through the middle
2 of the lot as they were configured.

3 So we discussed him moving the lot lines
4 to accommodate, to move that, to move a boundary
5 line where that ditch was, drainage ditch, so it
6 wouldn't cut through the middle of that lot.

7 Q. Can you show the Court what you mean by drainage
8 ditch?

9 A. Somewhere in the middle of the property there was
10 a drainage ditch going through there. Like a
11 ditch.

12 Q. Defendants' Exhibit No. 8, which is the same
13 thing as the survey prepared by Mr. Bellamy,
14 would that have been something you showed to your
15 attorney?

16 A. Oh, yes, definitely I showed him that before
17 closing.

18 Q. Would that have been something that you would
19 have asked him to review?

20 A. Yes.

21 Q. Can you explain to me why some of these lots, the
22 boundary lines of the lots have been changed?

23 A. Well, basically to accommodate the wetlands to
24 get buildable lots where there was buildable
25 space. So they were reconfigured over in this

1 direction where there was more uplands available
2 to build on.

3 Q. At one point in time after closing were you ever
4 contacted by anybody representing the plaintiff?

5 A. Yes, I got a letter from Mr. Brittain. I got
6 several letters from Mr. Brittain.

7 Q. Did you respond to those letters?

8 A. I did not respond.

9 Q. Why didn't you respond to those letters?

10 A. In those letters he said that I was breaking
11 Restrictive Covenants, I was in violation of
12 Restrictive Covenants, that he represented a
13 client that was a neighbor of the property, and
14 he asked me to come in.

15 Why I didn't respond, number one, I knew
16 of Mr. Brittain's fine reputation as a lawyer.
17 I'm not a lawyer. I felt to go to his office
18 would be an uneven field for me to go there and
19 talk, discuss anything like that.

20 Number two, it was my belief after paying
21 a lot of money for legal advice that I had broken
22 no restrictions.

23 Q. At one point in time after you purchased the
24 property, did you ever have the opportunity to
25 try to clear parts of the property?

1 A. Yes, I did find a man who was recommended to me
2 who had a lot of experience clearing land and he
3 was available. He told me when he was available.
4 It was on a weekend. He recommended the weekend
5 was good because you get an extra day with the
6 bulldozer when you rent it like Sunday. So I
7 think on one Friday we began clearing the
8 uplands.

9 I instructed him to, I showed him the map
10 and I said be sure and stay 50 feet off of these
11 flags that mark the wetlands. This is very
12 important.

13 Q. When you're saying "this map," you're referring
14 to --

15 A. This map that shows the wetlands.

16 Q. Defendants' Exhibit No. 8?

17 A. Yes.

18 Q. Did he follow your instructions?

19 A. Well, he did a remarkable job. It was very
20 thick, overgrown shrubs and trees. Later I
21 found out, it came to my notice that a small
22 part, I would say under 50 square feet, he got
23 into the wetlands over on the south side of the
24 property near the power line easement.

25 Q. What lot would that be?

1 A. It would be in the area of lot 1, maybe lot 2,
2 I'm not sure. The wetlands, the Army Corps of
3 Engineers and the people that handled the
4 wetlands, they contacted me and said to stop and
5 they came out. They sent me a letter that showed
6 that it came to their attention that I was in
7 participation of clearing the wetlands. They
8 asked me to stop and I met with them later on.
9 As I remember, I was fined and, you know,
10 reprimanded.

11 Q. Was it your intent to clear wetland?

12 A. No, it was my intent to just clear the upland so
13 somebody, an interested party could walk on the
14 land if they wanted to buy.

15 Q. Mr. Dicks, in buying this property, can you
16 explain to me or let the Court know your level of
17 comfort in the due diligence you had performed
18 prior to purchasing the property?

19 A. Well, taken all together with Mr. Mumford and
20 what I found out at the courthouse and the title
21 search and the fact that this is a re-subdivision
22 of seven lots as it's titled here, we moved the
23 lot lines, I just thought everything was fine
24 because that was my advice. My comfort level
25 was good. Everything was approved. I had a

1 highly recommended real estate lawyer.

2 Q. The survey has an approved stamp. Is that
3 something that you would have gotten somebody to
4 approve or something that the surveyor would have
5 gotten somebody to approve?

6 A. I went and took it after Mr. Bellamy approved it,
7 and that's the process you have to do before you
8 have it recorded. And we did the necessary
9 things that they told us to do.

10 Q. What were your plans, prior to the time this
11 lawsuit was filed, what were your plans with
12 respect to the seven lots?

13 A. Well, my plans were to sell one lot, maybe two
14 lots, and to pay off my brother, who was helping
15 me finance the property in the beginning, and to
16 pay off the bank loan that I got on part of the
17 property. And then from there I was going to
18 see, you know, what to do then.

19 And along the way I had discussions with
20 Steve, my friend and partner, and we talked
21 about, you know, participating in the
22 construction of houses there. I sought, I guess
23 you would call it a development loan, from
24 Coastal Federal. I pursued that for some months.

25 Q. I don't believe we mentioned this but I want to

1 cover it with you.

2 After closing, did you convey some of the
3 property to your brother?

4 A. Yes, right after the closing. Almost
5 simultaneous. Part of the agreement I had with
6 my brother for him to finance out the property
7 was he wanted it put in his name rather than have
8 a mortgage involved, have it in my name rather
9 than have the mortgage involved. I agreed to
10 that.

11 Q. Which lots did you convey to your brother?

12 A. Lots 1, 2 and 3.

13 Q. Is Defendants' Exhibit No. 7 the deed through
14 which that was accomplished?

15 A. Yes, it appears to be that deed. It has all the
16 right details on the front page.

17 Q. Having been an owner, having been interested in
18 Long Bay for a long time, can you tell me whether
19 or not you believe that using your property as
20 seven lots would be consistent or inconsistent
21 with the rest of Long Bay?

22 A. When I looked at the property back then and any
23 time since then, on the other side of Woodview
24 Lane there are seven or eight houses. I was
25 proposing to put seven houses on the other side

1 in generally the same amount of space.

2 In Long Bay Estates there is a few vacant
3 lots. I would say that 95 or even 100 percent of
4 the lots are one acre or less. Certainly I saw
5 no lot 2.67 acres or two acres or three acres.
6 There is one area across the street where a
7 doctor bought several lots and built a house on
8 those several lots.

9 Q. I'm showing you what's been marked as Defendants'
10 Exhibit No. 10 (handing). It's numerous
11 pictures of the property.

12 They're all lettered at the bottom A, B, C
13 and D in certain areas. This Defendants' 10
14 exhibit number A, would that -- this road that's
15 to the right part of the picture, what road is
16 that?

17 A. Woodview Lane.

18 Q. The property to the right, next to this black
19 car, which happens to be mine, which property is
20 that?

21 A. That's the property my brother and I purchased.

22 Q. That's the property involved in this case?

23 A. Yes, on the right side.

24 Q. To the left part of the picture, what's over
25 there?

1 A. Well, you see driveways of those seven houses on
2 those. You don't see that many driveways. But
3 let me say whoever took that picture was standing
4 at the, what would that be? The south end of
5 that property. South end of Woodview Lane before
6 you get into upper Long Bay near the overhead
7 power line looking this way, back towards the
8 state park.

9 Q. It would be by Lot 1?

10 A. The first picture. Somewhere in that area
11 looking that way with the property on the right
12 and the houses on the left.

13 Q. If you look at picture D, that's kind of a
14 picture of the same area; correct?

15 A. That's what I'm trying to describe, yes.

16 MR. KOUTRAKOS: Your Honor, I think I'm
17 done. If you could just give me a moment.

18 THE COURT: Okay.

19 Q. A couple more questions, Mr. Dicks.

20 Are their houses in Long Bay that have, I
21 don't know if I'm using the right terminology,
22 stilts, they're built up high?

23 A. Yes, I have seen a number of houses in Long Bay
24 built with pilings or stilts or wood or concrete,
25 made out of wood or concrete. I understand they

1 have to be above the, something about the flood
2 level.

3 Q. How about with respect to your property, would
4 those houses need to be on stilts or a raised
5 foundation?

6 A. My understanding is they have to be raised on
7 some kind of piling. And you could have
8 breakaway walls or something.

9 Q. Excuse me. I really don't understand what that
10 means. Raised foundation and stilts, was there
11 a difference between the two?

12 A. I'm sorry, what's the question?

13 Q. Is there a difference between houses that have a
14 raised foundation and houses that are on stilts
15 or in your mind is there a difference?

16 A. Yes, there is a bit of a difference.

17 Q. So the question I have to you is, do you know
18 whether there would be any requirement or need to
19 have any houses built on your property to be
20 built on stilts?

21 A. On the property we purchased I found out that
22 they have to be built up in some manner because
23 of the flood level. And then down in upper Long
24 Bay there are houses on that same side of the
25 road that are done that way.

1 I don't know the difference between -- I
2 guess pilings are a form of raised foundation.
3 But you could have different kinds of raised
4 foundation, you know, with underpinning of brick
5 or block or stucco.

6 Q. In buying your property, can you tell the Court
7 whether or not you had any knowledge or notice
8 that you could not use the property as seven
9 lots?

10 A. Well, I had no knowledge that there was anything
11 in the record that was found. And what I got
12 through the surveyor of the '72 Order that
13 prevented me from having set up in lots, I was
14 confident I wasn't breaking any rules with the
15 county or the neighborhood from my advice. I had
16 an agreement from my lawyer and the title
17 company.

18 MR. KOUTRAKOS: I have no further
19 questions.

20 CROSS EXAMINATION

21 BY MR. BRITTAIN:

22 Q. Mr. Dicks, you were forthright I think in saying
23 that without question you received notice of the
24 contents of the 1972 Order before you ever bought
25 this tract of land; isn't that correct?

1 A. Yes, sir.

2 Q. You bought the tract of land as one tract; didn't
3 you?

4 A. I bought it as seven lots.

5 Q. So it already had been surveyed and staked off by
6 the Ammons and they sold it to you as seven lots?

7 A. I didn't say that. I said I bought it as seven
8 lots according to the survey of the 1955 recorded
9 plat.

10 Q. Did you see the 1960 map in your title search?

11 A. If you show it to me it might refresh my memory.

12 Q. Let's see if I can find it.

13 That's the 1960 map (handing). I don't
14 know if you saw it or didn't see it. Mr.
15 Bellamy did that one. That would have been Bob
16 Bellamy's father probably.

17 A. Okay. The first time I remember seeing this was
18 a couple of days ago or a day ago. No, last
19 week when Jim came I saw this.

20 Q. You relied on your lawyers to do the title
21 search; right?

22 A. Yes, sir.

23 Q. You knew there was an issue here, didn't you?

24 A. This is a survey of Blocks 30, 32 and 34. It has
25 nothing to do with the survey of my property.

1 Q. What's that down there?

2 A. This is not a survey, it's just part of a
3 boundary line. It doesn't even close. It's
4 obvious to me what that survey is by the title.

5 Q. You knew there was an issue about whether or not
6 you could end up with seven lots on there, at
7 least based on what Bob DeCiero told Mr. Bellamy?

8 You knew there was an issue, that's why
9 you went to the lawyer and made him look very
10 carefully and give you an opinion, because it had
11 been there for all those years and there weren't
12 any divisions that were staked out that you ended
13 up doing. So you knew this was an issue, didn't
14 you?

15 A. If you call an issue an opinion by Mr. DeCiero;
16 yes, he had an opinion about it. But I got
17 legal advice.

18 Q. Let me ask you this. You say Long Bay
19 subdivision is a great subdivision, right? You
20 spoke about how nice it was, you liked it since
21 1982; is that true?

22 A. I liked it since 1969. It's very unique. I like
23 the way the entrance is one way in and one way
24 out. I have been there on July the fourth and
25 there is hardly any traffic.

1 Q. And those lots in there are valuable, aren't
2 they?

3 A. They're worth what a buyer and seller will agree
4 to sell them for.

5 Q. But you think of it as a great subdivision so,
6 generally speaking, it would generally follow
7 that they're valuable pieces of property if
8 people like the subdivision?

9 A. I think Long Bay Estates is a great subdivision,
10 yes, sir.

11 Is that your question?

12 Q. Let me ask you this. How much per lot would you
13 net, out of your \$175,000 purchase price, on
14 those seven lots that you bought?

15 How much would you have netted out of your
16 \$175,000 purchase price on seven lots in Long Bay
17 in 2002?

18 I can add that up pretty quick, can you?

19 A. How much did I have in the property --

20 Q. If you take \$175,000, that's what you paid, isn't
21 it?

22 A. That's what I paid to the Meeses.

23 Q. Did you pay any money to anybody else for that
24 property?

25 A. I had expenses associated with closing.

1 Q. That happens in every purchase; right?

2 A. But it wasn't 10 or \$12,000 like I paid. Every
3 purchase -- I've paid \$350 for a closing.

4 Q. I'll let you explain later on but let's get back
5 to my question.

6 If you take the purchase price, that was
7 \$175,000; is that right?

8 A. That's correct.

9 Q. And if you split that up into seven lots and
10 divide seven into \$175,000, how much is that per
11 lot that you have invested based on the purchase
12 price of \$175,000?

13 A. Let me think. Seven into 175. Is that 25,000?

14 Q. Yes, sir, I believe it's 25,000.

15 A. I think it's 25,000 just doing math in my head.

16 Q. I'll put it to you.

17 A. Right. Seven times two, that would be 175.

18 Q. I'll put it to you. That doesn't make any sense
19 in the real estate world that somebody, that
20 would put you on notice right there that you're
21 getting too good a deal to be able to split that
22 piece of property up into seven lots and only
23 have \$25,000 a piece in the seven lots that you
24 were left with?

25 A. That put me on notice that it was a good buy.

1 And I have done it in the past and I made more
2 money than that on real estate. Because I pride
3 myself in my ability to find good things.
4 Because I dig deeper than everybody assumes. I
5 dig and that's how I do it. I go and find out.
6 I don't rely on opinions. I go and find out.

7 Q. And you agree with me it took some digging, it
8 took some digging to get to the point where you
9 could claim you could put seven lots on this
10 piece of property?

11 A. It took one day to go to the courthouse and I
12 found out it was seven lots.

13 Q. Let me ask you this. Did Mr. Dusenbury ever
14 mention to you as part of the transaction that
15 these restrictions could apply to Lots 28 and 29,
16 did you ever hear that from him?

17 A. I never spoke to Mr. Dusenbury about this
18 property.

19 Q. So the only person you heard it from was Bellamy
20 and DeCiero?

21 A. No, my attorney was Mr. Mumford.

22 Q. Bob Bellamy told you somebody had left documents
23 for you that indicated you couldn't subdivide
24 that property; is that correct?

25 A. He said a man came in and left this paper and

1 it's for the person that was involved in the
2 property with the map on the table.

3 Q. In fact, your lawyer admitted that you had actual
4 notice of the 1972 Order before you bought the
5 property. Any question about that?

6 A. I was given that notice, the '72 Order, through
7 Mr. Bellamy.

8 Q. So you agree with me on that?

9 A. Yes, sir.

10 Q. And there is no question but what the '72 Order
11 states that the restrictions applied to Lots 28
12 and 29?

13 I know you have got other arguments but
14 isn't that what the 1972 Order says?

15 A. Could you repeat the question, please.

16 Q. The restrictions that we have been talking about
17 applied to Lots 28 and 29, which is the property
18 you purchased; correct?

19 A. I would say that there is language in the '72
20 Order referring to the property.

21 Q. Okay. When that Order was signed, who was the
22 owner of that property, the property that you now
23 own, if you know?

24 Do you know who owned the property when
25 the 1972 Order was signed?

- 1 A. What I have knowledge of is that Mr. Hewlett
- 2 Lewis formed a corporation, something about a
- 3 nursery.
- 4 Q. Right.
- 5 A. He owned the whole thing. He died. There were
- 6 people that inherited it and Carmen Ward was one
- 7 of the inheritors and she was also representing
- 8 other people.
- 9 Q. Now, you would agree with me that in 1972, that
- 10 date of '72, you could not possibly have been the
- 11 grantor on this piece of property at that time
- 12 because you hadn't even thought about buying a
- 13 piece of property at Long Bay at the time; isn't
- 14 that correct?
- 15 A. I could not have been the grantor in Long Bay
- 16 Estates at that time.
- 17 Q. And you couldn't have been the grantor in 2000
- 18 because you didn't own a piece of property in
- 19 Long Bay Estates in 2000, did you?
- 20 A. I learned in real estate school when I became a
- 21 broker that a grantor is one that has property
- 22 and sells it.
- 23 Q. But what I'm saying is, during the 2000
- 24 proceeding and the 1972 proceeding, you weren't
- 25 involved in those; true?

1 A. I didn't own property in Long Bay Estates during
2 that time.

3 Q. Thank you very much.

4 And you said that you know that Miss Ward
5 inherited the property?

6 A. At some point in time. I don't know the date.

7 Q. Whether you found the 1972 Order or not doesn't
8 really matter because you admitted that you
9 actually ended up having it in your possession
10 before you bought it?

11 A. Yes, I got it before I bought it.

12 Q. Would you agree with me that if the '72 Order
13 prevents you from subdividing that property, now
14 that's a hypothetical I'm putting to you, it may
15 not be true, that's for the Court to decide.

16 For the purposes of this question I'm
17 saying, if that Order prevents you from
18 subdividing the property, would you be willing to
19 live by the terms of that Order or would you rely
20 on the fact that even though you knew it wasn't
21 in the chain of title so it shouldn't apply to
22 you, that's the question I'm asking you?

23 A. My understanding of your question is I knew about
24 the Order. I knew after talking to Mr. DeCiero
25 and reading his deposition, he agreed, like I

1 did, that this case has to do with interpreting
2 the language, basically that one paragraph in the
3 '72 Order. We couldn't agree on it so he said
4 he's going to have to bring suit to let a judge
5 decide. As far as that goes, there is that.

6 Then as far as the Shelter Rule goes, the
7 Appellate Court has recognized it. I understand
8 it to be state law. It's used a lot.

9 As far as purchasers, David and Leigh
10 Meese and that group that bought it, if they had
11 no knowledge then it doesn't apply. So I
12 wouldn't abide for it. If that's the Shelter
13 Rule to be in effect, I wouldn't go by what the
14 '72 Order says because it would be invalid.

15 Q. I think you're answering my question. Some
16 people would take the attitude, Hey, look, I
17 don't care what the Shelter Rule says. If I
18 knew that the Order prevented it, I wouldn't do
19 it. I wouldn't take advantage of a legal
20 technicality to build seven houses in my new
21 neighbors neighborhood. I wouldn't do that.

22 So what I'm asking you is, and I'm not
23 saying you have to do it. You certainly don't
24 have to. You could easily say, No, I want to
25 take advantage of any legal theory I have.

1 So what I'm asking you is, are you relying
2 on the Shelter Rule, to the extent it applies
3 here, to protect you and allow you to put those
4 seven lots up there?

5 A. Yes, to the extent that's part of our case. I
6 think it's a very valid case.

7 In my mind, I'm doing nothing to harm the
8 neighborhood. When I put in beautiful projects,
9 beautiful houses, new houses, it regenerates old
10 neighborhoods. It brings everybody's property
11 values up. In my mind, I'm not doing anything to
12 damage anybody.

13 Q. Does anybody that lives in a neighborhood that
14 has a piece of property across from them that for
15 50 or 60 years has been sitting there, all of a
16 sudden wants seven houses put up there, you would
17 agree with me, wouldn't you, the density of the
18 neighborhood like that is one of the things that
19 the current neighbors don't want; isn't that
20 true?

21 MR. KOUTRAKOS: I object to Mr. Dicks
22 testifying what other people might think.

23 MR. BRITTAIN: He's just testified they
24 like it. It improves the neighborhood. I'm
25 asking him about the density. That's a

1 legitimate issue as far as the neighbors are
2 concerned.

3 A. To answer your question, the density is equal to
4 what the density that exists there. So I don't
5 see any damage. If there were a lot of
6 apartments there that would be different. If
7 there were a lot of -- but if there are seven or
8 eight houses across the street, there are seven
9 houses on that side of the street, it's the same
10 up that old road, I don't see any problem. I
11 just see advantage that you're putting in new
12 construction, new houses. And appraisers have
13 told me that brings up values.

14 Q. Well, you're putting in -- let's talk about it
15 just a minute.

16 You're putting in seven houses on
17 2.6 acres, I think is what the tract was, wasn't
18 it?

19 A. 2.67 acres.

20 Q. But you would agree with me a lot of that you
21 can't even use; right?

22 A. Yes.

23 Q. You can't use it because it's wetlands.

24 A. Right.

25 Q. So if you just talked about most of the lots in

1 Long Bay being an acre or thereabouts, well, I'll
2 just do the math for you. Seven lots in a
3 portion of 2.67 acres and an acre a lot.

4 A. I said no greater than an acre not that they're
5 all an acre.

6 Q. When you start squeezing seven lots in less than
7 2.6 acres, you, sir, are increasing the density
8 of the neighborhood of the Long Bay subdivision
9 and you might as well admit it?

10 A. I admit that the developer on the 1955 plat put
11 seven lots there. That's what I admit. That was
12 his idea. It was never mine.

13 Q. But have you been in the courtroom and seen where
14 Carmen Ward said that was an inadvertent,
15 improper map and she withdraw it as the grantor?
16 That's right here in this record.

17 A. Carmen Ward did not say that. There is a letter
18 that's been --

19 Q. Hold on. I'm not talking about that letter.
20 Let's look at the Complaint that she signed.
21 It's Plaintiff's Exhibit No. 2.

22 First let me say this. You and I haven't
23 met much but I like you and we know each other
24 and Robert Dicks and everybody over there, so I'm
25 not trying to be mean to you.

1 A. I understand.

2 Q. We have got a history.

3 A. I have no problems with your questions.

4 Q. I consider your family as friends.

5 A. I have no problem with your questions.

6 Q. I'm going to hand to you Plaintiff's Exhibit No.
7 2 (handing), which is a copy of the Complaint and
8 it has a verification on here by Carmen Ward.

9 Carmen Ward is one of the people we have
10 been talking about that had an interest in the
11 property.

12 Okay?

13 A. Yes.

14 Q. Now, I'm directing you to Paragraph 8 on page
15 D0073.

16 A. Yes.

17 Q. I'm going to look at it with you.

18 A. May I say that this is the first day I have ever
19 seen that. I haven't read the whole document.
20 It would be taken out of context. I haven't had
21 a chance to even read it.

22 Q. And that's fair. We can sit here and let you
23 read it. I'm just going to refer you to this
24 particular paragraph and then if you want to come
25 back later, however you want to handle it, that's

1 fine.

2 Let's read it together. "That an
3 unofficial map was made under date of May 1955
4 which showed a proposed lot arrangement in blocks
5 designated as 28, 29, 30, 31, 32 and 33, all
6 lying within that portion of Long Bay Estates
7 subdivision acreage owned by the plaintiffs
8 herein; that the said map which was, through
9 inadvertence, and without authorization of the
10 plaintiffs, or their predecessor-in-title, filed
11 May 5, 1958, in Plat Book 25 at Page 22, did not
12 embrace in the cited blocks any lots which had
13 actually been surveyed and staked out on the
14 ground, and was only a tentative plan to such
15 area."

16 Now, I'll give you a chance to read
17 anything you want to, but my point is, at least
18 there is in this record evidence that -- I'm
19 sorry.

20 A. First of all, I'm a little bit confused about
21 which is the unofficial map.

22 Q. Everybody has to make up their own mind about it
23 but it's obvious to me it's the one that has been
24 recorded.

25 A. The same date, May '55?

1 Q. Yes.

2 A. How about these other maps that you introduced or
3 tried to introduced, are they May '55?

4 Q. That's where we go back and try to come up with a
5 later map. We think that challenges your map
6 that you have been relying on.

7 A. But it doesn't say anything about Lots 1 through
8 27 which is on that map that's recorded.

9 Q. It talks about Lots 1 through 27 somewhere else.

10 A. I'm confused. I can't say for sure what map that
11 is. It could very well be that one. It may very
12 well be another map. I'd have to read and study
13 it. I'd prefer to get legal advice about it.

14 Q. In your search you found seven tax numbers,
15 didn't you, on these seven lots, seven tax map
16 numbers?

17 You have seven lots, you have seven tax
18 map numbers?

19 A. I found one tax map number.

20 Q. Wait a minute. Hold on. Regarding this piece
21 of property you found one tax map number?

22 A. Yes. I learned at the courthouse it doesn't
23 matter what the tax record says, what it goes by
24 is what's recorded on the map.

25 Q. Look here, if --

1 A. Like Mr. DeCiero testified, there is a procedure
2 where if you want to save money on your taxes you
3 could go to the tax office and say treat this as
4 one area.

5 Q. Well, we all know if there were seven lots there
6 Horry County would be getting taxes paid on seven
7 lots.

8 You don't disagree with that, do you?

9 A. That's in direct contradiction to the recorded
10 record and also to the rules and regulations in
11 Horry County subdivision.

12 Q. You have got a document that shows me seven
13 separate tax numbers when you bought it or you
14 have got a document that shows me one?

15 A. I don't have either because it was irrelevant I
16 found out at the courthouse.

17 Q. There was the one document you say had one tax
18 number on it; isn't that right?

19 A. To my memory, that's what I found. Mr. Augustus
20 Dithe, I learned from different people at the
21 courthouse that that has nothing to do with what
22 lots were there.

23 Q. Here is my point. Mr. DeCiero's conversations
24 with you, that was just an opinion you said;
25 right? He didn't put you on notice?

- 1 A. I know he is not an attorney and that was his
2 opinion, yes.
- 3 Q. You read the '72 Order?
- 4 A. Yes, I did.
- 5 Q. That didn't put you on notice to any issue?
- 6 A. It put me on notice to think about what it said
7 and to verify what I thought about my legal
8 advice.
- 9 Q. So it made you start looking and thinking about
10 it, you admit that?
- 11 A. Yes, to make sure there is no problem in that
12 Order.
- 13 Q. The fact that you were going to buy this property
14 for \$175,000, turn it into seven lots and only
15 have \$25,000 a piece in those lots in this
16 subdivision, that didn't put you on notice that
17 something wasn't right?
- 18 A. You know, I see no crime in America to making a
19 lot of money. I think attorneys make a lot of
20 money. I mean, is that what we are discussing,
21 if it's wrong to make a lot of money?
- 22 Q. No, what I'm discussing with you -- of course
23 not. My view on this is that some deals are too
24 good to be true.
- 25 A. Oh, okay. But I have had those deals. Some are

1 but some prove to be true and I have experienced
2 that.

3 I bought a property in Chapel Hill, eight
4 acres, for \$35,000. I bought the neighboring
5 eight acres for \$25,000. I sold it all out after
6 three or four years of dividing it for \$380,000.
7 Was that too good to be true? No. It was
8 because I dug further than anybody else into the
9 legal records.

10 Q. You dug in there. You find a theory to turn a
11 purchase --

12 A. To find legal documentation not a theory.

13 Q. I accept your version of it. I accept your
14 version of what you did and how you did it.

15 What I want you to admit to me is that you
16 had the sense to realize this was an excellent
17 deal and there were other indications that people
18 involved thought it shouldn't be subdivided. And
19 you took that and turned it over to your lawyer
20 and as part of the process said, look, there are
21 questions here. Get in there and make sure.
22 Dig. Dig.

23 A. I agree that I knew Mr. DeCiero was the one that
24 brought the '72 Order to Mr. Bellamy's office.
25 I knew his opinion. But what I heard about his

1 opinion, it was all wetlands and it couldn't be
2 built on.

3 I did all my due diligence. I went to
4 those wetlands offices. I showed them the
5 delineation that I had which, by the way, shows a
6 lot more buildable property than the one he
7 refers to, the past delineation. And they
8 assured me I was well in keeping with any lots
9 here. That I would not be on the lot line, on
10 the wetland at all.

11 I have no intention of doing anything
12 wrong on the wetlands. So as far as I knew about
13 Mr. DeCiero, it was about the wetlands.

14 Q. Are you saying that Mr. DeCiero never offered to
15 give you the judgements from 1972 and 2000 of
16 this Court that made these restrictions pertain
17 to properties in the Long Bay subdivision?

18 You said you got the '72 Order?

19 A. I got the '72 Order.

20 Q. Who did you get that from?

21 A. I got it from Mr. Bellamy.

22 Q. Where did he get it from?

23 A. My understanding it was from Mr. DeCiero.

24 Q. And that didn't deal with wetlands, that dealt
25 with restrictions?

1 A. It dealt with language in that one paragraph that
 2 Mr. DeCiero, when we had a meeting in his
 3 deposition, he agrees with me that it had to be
 4 interpreted. That it was, you know, he thought
 5 it would be interpreted one way, me and my
 6 lawyers thought it would be interpreted another
 7 way. So, therefore, he felt obliged to go to a
 8 judge and ask the judge to decide.

9 Q. The two of you as good men had an honest
 10 exchange?

11 A. We did.

12 Q. He asked you --

13 A. I think we had a good meeting. Mr. Melker
 14 invited, through Mr. Melker, he was the go
 15 between. Mr. Melker and I went over and we had a
 16 nice visit with Mr. DeCiero and his wife.

17 Q. And he offered to give you the judgments and you
 18 admitted to him you already got them?

19 A. I already had the '72 judgment.

20 Q. And we agree to disagree; right?

21 A. Right.

22 Q. My point is, wouldn't you agree with me that with
 23 all of these things that we are talking about.

24 A. Yes.

25 Q. The good value that you're getting if this works

1 out, the '72 Order, Mr. DeCiero's opinion, even
2 though he is not a lawyer, one tax map number,
3 there are reasons for you to understand that this
4 could end up being an issue that the Court would
5 have to interpret, no question about it, is
6 there?

7 A. I definitely found out when I got your letter
8 after I bought it.

9 Q. I understand that. And I hope it didn't upset
10 you.

11 A. I'm sorry I didn't respond but I was afraid of
12 you.

13 Q. You shouldn't be. And we're doing what that
14 ended up leading us to.

15 But my point is, honestly speaking about
16 it and not trying to protect our various
17 positions, this was always an issue, you admit
18 that?

19 A. It's an issue. And then when I got the legal
20 advice I thought it was a nonissue. It was an
21 issue in that it was a difference of opinion.

22 Q. Thank you, Mr. Dicks.

23 A. Thank you.

24 MR. BRITAIN: No further questions.

25 THE COURT: Wait just a minute. Mr.

1 Koutrakos.

2 REDIRECT EXAMINATION

3 BY MR. KOUTRAKOS:

4 Q. Mr. Dicks.

5 A. Yes.

6 Q. You reviewed the 1972 Order prior to closing on
7 the property; correct?

8 A. Yes, I did.

9 Q. You obtained advice of counsel?

10 A. Yes, I did.

11 Q. Was that advice consistent with your own
12 interpretation?

13 A. Yes, it was.

14 Q. Has your interpretation changed any since you
15 bought the property?

16 A. No, it hasn't changed any.

17 Q. Was the meeting that you had with Mr. DeCiero,
18 was that before or after you purchased the
19 property?

20 A. That was after we purchased, I think.

21 Q. You're not sure?

22 A. I'm pretty sure that would have been after.

23 MR. BRITTAIN: It was after.

24 Q. With respect to the size of the lots, is that
25 something that the folks in Horry County or the

1 city, I guess Horry County zoning folks, would
2 have had to approve?

3 A. Yes. They have lot size requirements. They
4 have their own setbacks that vary a little bit
5 from any setbacks that are written down like we
6 discussed. Whether there are restrictions or not
7 I don't know. And they also, you know, it's how
8 much frontage.

9 And I complied with all that. Doug Green,
10 he's a member of the planning and zoning, he
11 reviewed it. I have a letter here.

12 MR. BRITTAIN: Objection to what
13 anybody else said. No hard feelings. I object.
14 That is hearsay. They could bring the zoning
15 people in here if they want to bring them in
16 here.

17 THE COURT: Sustained.

18 Q. This plat was approved by the county, wasn't it?

19 A. Yes. And as to this note here --

20 MR. BRITTAIN: Again, your Honor,
21 objection. Unless they have got something from
22 the county approving.

23 MR. KOUTRAKOS: I have got a stamp
24 right here.

25 THE COURT: It's not approved until

1 somebody starts building.

2 THE WITNESS: They're accepted as lots.
3 Parcels intended for single-family site built.

4 MR. BRITTAIN: If you have got it on
5 documents, that's fine, but Mr. Dicks can't
6 testify to what this said.

7 THE WITNESS: I'm testifying to what's
8 on this.

9 THE COURT: Wait. Just a minute.

10 MR. KOUTRAKOS: I'll withdraw the
11 question and ask him a new question.

12 THE COURT: Thank you.

13 BY MR. KOUTRAKOS:

14 Q. Is there anything in the document that would
15 show, any information provided on the document by
16 the county with respect to the size of the lots
17 and the use of the lots?

18 A. I think I testified before Mr. Bellamy gave me
19 this completed re-subdivision and he said take it
20 over to Horry County to get them to approve it.
21 I went over there and they put a note in here
22 about the lots and stamped it approved for
23 recording.

24 Q. Can you read to the Court what this note says?

25 A. It says, "Note: Parcels intended for

1 single-family site built homes or duplexes."

2 Q. Who signed that?

3 A. It looks like W.B. and a number.

4 Q. Do you know who that is?

5 A. I don't remember. But I remember approved for
6 recording. I remember Doug Green stamped it. I
7 did my job. I got the job done.

8 MR. KOUTRAKOS: That's all the
9 questions we have. Thank you.

10 MR. BRITTAIN: I have more.

11 CROSS EXAMINATION

12 BY MR. BRITTAIN:

13 Q. You said it was a re-subdivision. Is that the
14 phrase you used?

15 A. That's the phrase that Mr. Bellamy said it was
16 because the lot lines were being moved.

17 Q. It's a re-subdivision; right?

18 A. Yes. It was already a subdivision.

19 Q. Well, you have got re in there; right,
20 re-subdivision?

21 A. Yes, because the lot lines were moved. It was
22 already a subdivision of seven lots. So he was
23 re-subdividing it by revising the lines.

24 Q. This was referred to as an intended, what you
25 intended to do?

1 A. What's that? Which one, certificate of
2 ownership?

3 Q. No, no, what you intended to do with the
4 property. You intended to use them as
5 single-family.

6 A. That's what they said that they were good for.
7 In other words, in wasn't good for apartments,
8 anything more than duplexes.

9 Q. That was your intention; right?

10 A. My intention was to follow the law.

11 Q. Well, you could follow the law if you get to put
12 seven lots on it?

13 A. Well, what is your question? Was it my intention
14 to have seven houses because of this note or are
15 you talking about these other issues about --

16 Q. No, I'm talking about the county referred to it
17 as intended placement of houses. You haven't
18 built a single house on it because we fought you
19 on it?

20 A. Right.

21 Q. So there haven't been any setbacks established?

22 A. No, there haven't.

23 MR. BRITTAIN: No further questions.

24 THE COURT: Mr. Dicks, I have two
25 questions. Maybe just one.

1 THE WITNESS: Yes.

2 THE COURT: Let me go back up here. I
3 may have misunderstood you and I just want to
4 clarify this because sometimes I write down
5 things wrong and I may have gotten the chronology
6 incorrect.

7 I thought you said that when you were
8 trying to describe how you went about buying this
9 property that someone showed you this real estate
10 and that you found the lot that you wanted in
11 Long Bay and that you found out the Meeses owned
12 it and that you called and spoke with David
13 Meese, you made an offer on it, and that you told
14 them you wanted to build a house on it to live
15 in; is that correct?

16 And that later you went to the courthouse
17 and found out there were seven lots there?

18 THE WITNESS: Basically you have it
19 right. It's a little bit out of order.

20 THE COURT: No, that's what you told
21 me; is that correct?

22 THE WITNESS: It's a little bit out of
23 order.

24 THE COURT: Wait a minute. Is that
25 correct, that you first found the lot, you went

1 to the Meeses, you found the Meeses owned it, you
2 called David Meese, you made an offer on it, they
3 asked you what you wanted to do with the lot, you
4 told him that you wanted to build a house and
5 live on the lot, and that afterwards you went to
6 the courthouse and found out there were seven
7 lots; is that correct?

8 THE WITNESS: The facts are basically
9 correct. But I found the property, you know, not
10 from the Meeses but way back in years past. And
11 I didn't make an offer first, he said the price
12 he wanted.

13 THE COURT: So it was a surprise to
14 you -- you wanted to build a house on that
15 property and live on it. It was a surprise to
16 you that there were seven lots there?

17 THE WITNESS: It was a surprise when I
18 went to the courthouse and he said you
19 have seven, I found out there were seven lots.
20 That was a surprise.

21 THE COURT: Thank you.

22 THE WITNESS: I didn't have any
23 expectations one way or the other. I just knew
24 it was a big piece of property.

25 THE COURT: But you were going to build

1 one house on it and live on it?

2 THE WITNESS: I didn't say anything
3 about limiting it to one house. I said I would
4 like to build a house and live there. I still
5 do. I have been prevented to do anything with
6 this property. I still do if I'm able to.

7 But I didn't say I only want to build a
8 house. I didn't say I want to build one house.
9 I don't speak like that. I said I'd like to
10 build a house like they did.

11 THE COURT: But it was a surprise to
12 you when you found out there were seven lots on
13 that property because you assumed it was one lot?

14 THE WITNESS: I was surprised when he
15 told me that.

16 THE COURT: You did assume it was one
17 lot, didn't you?

18 THE WITNESS: I didn't assume anything
19 because that's how I am. I don't go by anything
20 I hear, I go by going to records. I found out in
21 real estate, I learned the first thing, there is
22 nothing verbal worth anything in real estate.
23 It's all about what's written down.

24 THE COURT: Let me ask you, Mr. Dicks,
25 what did you assume?

1 THE WITNESS: I really assumed there
2 would be lots because it was so big. And I was
3 surprised to found that there were seven lots
4 there.

5 THE COURT: You assumed it would be
6 more than one but less than seven, is that what
7 you're telling me?

8 THE WITNESS: Yes.

9 If I may add, there is a deposition of the
10 seller, Mr. Meese, that he thought there were two
11 lots.

12 THE COURT: He thought there were two
13 lots?

14 THE WITNESS: Enough room to have two
15 houses he thought.

16 THE COURT: Thank you, sir.

17 Any followup to my questions?

18 MR. KOUTRAKOS: Possibly, your Honor.

19 THE WITNESS: May I say something?

20 THE COURT: Just one moment.

21 THE WITNESS: Explanation of your
22 question.

23 MR. KOUTRAKOS: I have just a couple
24 followups to your questions to clarify a couple
25 of things.

REDIRECT EXAMINATION

BY MR. KOUTRAKOS:

Q. When you went to buy this property, could you tell the Court whether or not you had thoughts of subdividing it?

A. You know, I just didn't know at all what was there. I knew there were lots, that that was a sizeable piece of property. There are eight houses on the other side.

I didn't know what it said written down. I really had no expectations. I heard what he said but in my dealings I don't take that.

As far as what I told him about building a house, let me explain it like this. If I'm out buying a painting and I recognize the artist by the style, I don't tell the seller what I'm going to do with it. Nothing in business obligates a buyer to say what they're going to do with the property.

I had no expectations until I went to the courthouse, that's the first thing I did, to gather information of what actually was there.

But I assumed it could very well be seven or eight lots from across the street and from all the other lots on that plat which were smaller

1 than one acre. A lot of them are a quarter acre.
2 There is a half an acre. So I didn't know.

3 Q. Is that why you performed your due diligence
4 going into closing?

5 A. Definitely. It's a routine thing that I do. I
6 was taught by, I worked under Adolf Bell and he
7 taught me to do that on all properties, to have
8 the time for due diligence. You put it under
9 contract because you don't want to do a lot of
10 work when you don't even know if you can buy.
11 And you allow for three to six months, maybe more
12 if it's commercial property, to do your due
13 diligence and find out exactly what you could do
14 with the property.

15 MR. KOUTRAKOS: Thank you.

16 MR. BRITTAIN: Just a couple of
17 questions, your Honor.

18 RECROSS EXAMINATION

19 BY MR. BRITTAIN:

20 Q. You don't plan to put one house on that lot now,
21 do you?

22 A. Depends on what's decided in the Court.

23 Q. But what you want to do is put seven houses up
24 there, right?

25 A. I want to follow what the Court says to do.

1 Q. I appreciate that. But you're asking to be
2 allowed to put seven?

3 A. Yes, I believe seven is good for the
4 neighborhood.

5 Q. But you admit discussing it with the Meeses and
6 saying you wanted to build a house there and live
7 and you said not one but you did say a house
8 there and live?

9 A. I would like to build a house there and live,
10 yes.

11 Q. The date on this survey, though, is when?

12 A. It says April 25, 2003.

13 Q. And that's way before you bought the property;
14 right?

15 A. That's the date that Mr. Bellamy put on there.

16 Q. But, I mean, you got that information from Mr.
17 Bellamy; didn't you?

18 A. Which information?

19 Q. The information that you're putting up there as
20 your evidence that you could put seven lots up
21 here, that information came to you in April;
22 right?

23 A. I started talking to the Meeses in the fall of
24 2002 about the property. I'm not sure of the
25 contract date. It was during the time of due

1 diligence.

2 Q. The date on that is in April prior to the
3 purchase; right?

4 A. During the due diligence time. Because I know I
5 paid, I engaged Mr. Bellamy and I paid him around
6 five or \$6000 for his services and I wouldn't
7 have done that without having the property under
8 contract.

9 Q. So you had a contract but you didn't have it
10 closed by the time he did this; is that correct?

11 A. I had a contract, like I testified, and then I
12 had a period of due diligence before I closed.

13 Q. Thank you.

14 MR. BRITTAIN: No further questions.

15 MR. KOUTRAKOS: I just have one quick
16 question just for clarification.

17 REDIRECT EXAMINATION

18 BY MR. KOUTRAKOS:

19 Q. By due diligence you mean you have the right to
20 take a look at the property, touch, feel it, and
21 if you don't like it, pull out of the contract,
22 is that what you mean?

23 A. Yes. And to find out what utilities are there,
24 what it cost to put the water and sewer there,
25 what the tack on fees are, what could be put on

1 there with the wetlands. I had to investigate
2 the wetlands because this is the first time I
3 encountered a property with wetlands. Whatever
4 comes up with each property whether it's a house
5 or land.

6 It's just called due diligence which means
7 you do your homework. You find out about the
8 property.

9 Q. But it gave you a right to back out if you didn't
10 like something about the property?

11 A. Right.

12 MR. KOUTRAKOS: No further questions.

13 THE COURT: Does anyone else have a
14 question of Mr. Dicks?

15 Mr. Dicks, I know you are happy to know you
16 may step down.

17 THE WITNESS: Thank you.

18 THE COURT: Mr. Koutrakos, call your
19 next witness.

20 MR. KOUTRAKOS: Yes, your Honor. I
21 would like to call Mr. Jay Dusenbury.

22 THE COURT: Mr. Dusenbury, please place
23 your left hand on the Bible and raise your right
24 hand and be sworn or affirmed by the court
25 reporter.

1 JAMES H. DUSENBURY, Jr.,
2 of lawful age, the Witness herein, being by me
3 first duly sworn, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. KOUTRAKOS:

7 Q. Mr. Dusenbury, can you state your name for the
8 record.

9 A. James H. Dusenbury, Junior.

10 Q. You go by Jay?

11 A. I go by Jay.

12 Q. Jay, what do you do for a living?

13 A. I'm an attorney.

14 Q. What area of the law is your practice focused on?

15 A. Primarily real estate.

16 Q. Transactional work?

17 A. Yes.

18 Q. No litigation, no fun stuff like this?

19 A. Not at all.

20 Q. Are you familiar with the property involved in
21 this case?

22 A. Roughly, yes.

23 Q. You represented David and Leigh Meese with
24 respect to their purchase of the property
25 involved in this case?

1 A. Correct.

2 Q. Do you recall when that was?

3 A. Sometime in '97, I believe.

4 Q. Here is Defendants' Exhibit No. 5. Use that to
5 refresh your recollection for a moment.

6 A. It looks like September 2, 1997.

7 Q. Tell me what your responsibilities were as the
8 Meeses attorney with respect to that transaction?

9 A. The responsibilities in representing them?

10 Q. Yes, just generally. How about with respect to
11 title?

12 A. Well, certainly to search the title, conduct a
13 title search and make sure that there are no
14 adverse matters that would negatively affect
15 their ownership.

16 Q. With respect to your title search, could you tell
17 the Court what your title examination found?

18 A. Are you asking me specifically did it find the
19 Order?

20 Q. Did your title search, your title examination,
21 find what we referred to here today as the 1972
22 Order?

23 A. To the best of my recollection, no, we did not
24 find it.

25 Q. And you know what we're talking about when we say

1 the 1972 Order? That would be Plaintiff's No. 3.

2 The Order issued in 1972 in the case of
3 Ward v Lewis, is that the --

4 A. Is that the Order I was referring to?

5 Q. Yes.

6 A. Yes.

7 Q. Did you find any Restrictive Covenants that would
8 have applied to the subject property?

9 A. To the best of my recollection, no, we did not.

10 Q. I'm showing you what is a -- first of all, you're
11 a title insurance agent; is that right?

12 A. Correct.

13 Q. And your office, in conjunction with real estate
14 closings, would issue title insurance policies to
15 clients that purchase properties?

16 A. Yes, routinely.

17 MR. KOUTRAKOS: I'm showing you -- mark
18 this as Plaintiff's 11, please.

19 - - - - -
20 (Thereupon, Defendants' Exhibit No. 11 was
21 marked and entered into evidence)

22 - - - - -
23 Q. I'm showing you what's been marked as Defendants'
24 Exhibit No. 11 (handing).

25 Are you familiar with that document?

1 A. I am.

2 Q. That would be the guts of an owners title
3 insurance policy. Do you understand what I'm
4 saying?

5 A. Correct.

6 Q. And the guts, we don't have the policy, the front
7 page and all the terms.

8 A. What we call the jacket is not included.

9 Q. Explain to me what the guts of the policy are?

10 A. It essentially lays out the limitation on the
11 coverage the title company will afford.

12 Q. If you had found the 1972 Order in your title
13 examination, it would have been included in that
14 exception to the policy; is that right?

15 A. That certainly stands to reason.

16 Q. And if you had found any Restrictive Covenants,
17 would they also have been included in the
18 exception?

19 A. That stands to reason.

20 Q. So it's safe to say that any opinion of title
21 that you would have given to the Meeses would
22 have been consistent with the policy you issued
23 them?

24 A. You're asking if I had issued a right of title
25 opinion?

1 Q. Yes.

2 A. Well, theoretically, yes. But generally speaking
3 in right of title opinions we take a little bit
4 more what we call shotgun language. Now, had we
5 found it, again, I don't think we missed it, I
6 just want to be clear, it is my understanding the
7 Order was misindexed. We didn't just flat miss
8 it.

9 Theoretically, yes, we would have laid it
10 out as an exception, but we also take some
11 general language saying any restrictions of
12 record. In a title opinion we do not give the
13 same level of coverage that a title company would
14 grant.

15 Q. With respect to what you would have found in the
16 public records, it would have been consistent
17 with the exceptions that are listed in the title
18 policy that you're looking at which is Exhibit
19 No. 11?

20 A. Yes, that follows.

21 Q. Can you tell me whether the Meeses relied on you
22 to provide to them your opinion of title with
23 respect to the subject property?

24 A. Well, I think that would be better directed to
25 them but I can only assume the answer to that is

1 yes.

2 Q. Do you have any independent knowledge of whether
3 David and/or Leigh Meese knew at the time they
4 purchased the property that there were
5 Restrictive Covenants or the property was
6 encumbered by the 1972 Order?

7 A. I'm sorry, repeat the question.

8 Q. Do you have any knowledge that at the time David
9 and Leigh Meese purchased the property that they
10 would have knowledge of any restrictions on the
11 property?

12 A. To the best of my recollection, no, I did not
13 have such knowledge.

14 Q. After the closing your company issued a title
15 insurance policy; is that right, and that's the
16 one we are looking at?

17 A. Yes, based on a commitment that was issued prior
18 to closing.

19 Q. Normally during closing are there documents that
20 the seller signs that are associated with title
21 insurance?

22 A. Correct, yes.

23 Q. What is that document called?

24 A. It goes by many different names. Often times we
25 call it an owner's affidavit or seller's

1 affidavit, I believe is the one you're alluding
2 to.

3 Q. Did you receive an affidavit with respect to this
4 closing?

5 A. Yes.

6 MR. BRITTAIN: I have seen that. I
7 think you already marked that.

8 MR. KOUTRAKOS: I don't think I marked
9 this.

10 Mark this, please.

11 - - - - -
12 (Thereupon, Defendants' Exhibit No. 12 was
13 marked and entered into evidence)

14 - - - - -
15 Q. Is Defendants' No. 12 a document that your office
16 maintains in the normal course of business?

17 A. We do not use this particular document much
18 anymore. We use one very similar to it. Really
19 one that's issued by the title companies
20 themselves. But back in '97 we did use this
21 document. It's very similar.

22 Q. What is the purpose of the document?

23 A. The purpose of the document is -- I don't know
24 that there is any singular answer there but it
25 essentially is to gain any affirmative knowledge

1 that a seller may have as to any encumbrances or
2 limitations or any matters that can negatively
3 affect the title.

4 Q. In the document that was actually used with
5 respect to this closing, the exhibit you're
6 looking at in front of you, were any
7 representations made as to whether any judgments
8 applied to the property?

9 A. Yes.

10 Q. What were the representations?

11 A. There were none. In all fairness, as a
12 clarification, and I don't want to muddy the
13 waters here, I would assume that myself, in all
14 honesty, and Carmen Ward et al, were thinking in
15 terms of monetary judgments.

16 Q. How about with respect to encumbrances?

17 A. They represent there are none.

18 Q. So it's safe to say that closing this transaction
19 for the Meeses, from the documents before you,
20 that you concluded that there were no
21 restrictions on the property in the 1972 Order,
22 you just didn't know about it to include it in
23 the restrictions?

24 A. To the best of my recollection that is true.

25 Q. And to the best of your recollection and

1 knowledge, we are looking at the title policy
2 that you issued in writing, Defendant's No. 11,
3 that showed no exceptions with respect to
4 restrictions; correct?

5 A. That's correct.

6 Q. That's all I have. Thank you, Mr. Dusenbury.

7 THE COURT: Any cross examination, Mr.
8 Brittain?

9 MR. BRITTAIN: Thank you, Judge.

10 CROSS EXAMINATION

11 BY MR. BRITTAIN:

12 Q. Mr. Dusenbury, you have been in here for a while
13 so you kind of know where everybody is heading
14 with this.

15 Let me ask you, you probably remember
16 having to give a deposition on this earlier?

17 A. Yes, sir.

18 Q. Isn't it a fact that you have testified that you
19 and the Meeses both knew there were restrictions
20 that applied to Long Bay subdivision, you did not
21 know whether or not they applied to these lots
22 but you both knew, you and the Meeses, that there
23 was a strong possibility that they applied to
24 this tract?

25 A. Correct, yes, sir.

1 Q. So, in other words, we are talking about chain of
2 title over here but we are also talking about, as
3 a lawyer, hey, there are restrictions out there
4 and let me tell you about it. They may apply to
5 this piece of property that you're buying?

6 A. Yes, sir, and that's the reason we actually
7 incorporated into the contract that these are out
8 there. These particular restrictions may well
9 apply. We actually, as I recall, did a stand
10 alone addendum to the sales contract to give
11 notice of them.

12 Q. You told them that it was a strong possibility
13 that those restrictions applied to this tract; to
14 this correct?

15 A. Again, to the best of my recollection.

16 Q. And you also conveyed that piece of information
17 to Thomas Dicks; didn't you?

18 A. No, sir, I don't believe I would have had any
19 direct contact that I recall because he was
20 represented by Mr. Mumford.

21 Now, we would have done it indirectly via
22 the contract. Maybe that's what I was alluding
23 to.

24 Q. Let me just ask you, because you know more about
25 this real estate than I do, so you feel free to

1 answer. But I'm going to hand you what is a copy
2 of your deposition, Wednesday, May 17, 2006. It
3 was very short, 1:25 to 1:43.

4 I'm referring you to Page 17. It's in one
5 of those small ones right here (indicating).
6 Line 5.

7 "And do you believe that your clients,
8 David Meese and Leigh Meese, had knowledge that
9 covenants and restrictions did exist on Long Bay
10 Estates?"

11 Of course that's a broad question.

12 Your answer: "They as well as I certainly
13 knew that there were restrictions. Now, again,
14 what the affect of those restrictions and which
15 tracts and blocks they were applicable to we were
16 not certain of. But we certainly knew that it
17 was a strong possibility that they applied to
18 this tract, yes."

19 Right?

20 A. Yes, sir.

21 Q. And the "we" would be you and the Meeses?

22 A. Yes, sir.

23 Q. Next question. "Okay. And did you convey that
24 to Thomas Dicks when he purchased the property?"

25 Your answer: "Yes."

- 1 So you did convey that or at least you
- 2 testified to that under this deposition?
- 3 A. But, again, I think the intent there was "we,"
- 4 meaning myself representing the Meeses via the
- 5 contract, made it known to him prior to closing
- 6 that these restrictions were out there. I don't
- 7 think I had any direct conversation. If I
- 8 alluded to that, that was a mistake.
- 9 Q. But that information, when you were asked if it
- 10 was made available to Thomas Dicks, the answer
- 11 back then was yes?
- 12 A. Yes, sir.
- 13 Q. And it was made available to him, it might not
- 14 have been orally by you, but it was made
- 15 available to him?
- 16 A. Oh, clearly. He signed a stand alone addendum
- 17 acknowledging there existence.
- 18 Q. And these title insurance policies, and Mr. Dicks
- 19 bought a tight insurance, I mean the Meeses had
- 20 title insurance; right?
- 21 A. Yes, sir.
- 22 Q. And Mr. Dicks ended up with title insurance, did
- 23 he not?
- 24 A. I would assume he did.
- 25 Q. Well, these title insurance policies maintain,

1 all of them, that actual notice of a problem with
2 the title defeats the obligation of the title
3 insurance company to defend the title; isn't that
4 correct?

5 A. That is my understanding.

6 Q. Thank you.

7 MR. BRITTAIN: No further questions.

8 THE COURT: Mr. Koutrakos.

9 REDIRECT EXAMINATION

10 BY MR. KOUTRAKOS:

11 Q. When you had this conversation in your deposition
12 about the strong possibility that the
13 restrictions applied, that was after your clients
14 purchased the property; correct?

15 A. The depositions -- I'm sorry, I didn't follow the
16 question. I apologize.

17 Q. I don't blame you. Mr. Brittain asked you a
18 question and he said you testified at your 17
19 minute deposition that you knew there was a
20 strong possibility that these restrictions
21 applied to the property?

22 A. Yes.

23 Q. And you knew there was a strong possibility that
24 they applied to this tract but your knowledge was
25 not acquired until after the Meeses purchased the

1 property; is that correct?

2 A. To the best of my recollection, that is correct.

3 Q. You had not had that knowledge before; correct?

4 A. Correct.

5 Q. And looking at his deposition, the questions I
6 was asking you, I believe it was me. Maybe it
7 was Miss Hanna.

8 This was the question. "Now, let me fast
9 forward and refer you to Plaintiff's Exhibit No.
10 1, which is a facsimile cover sheet from Leigh
11 Meese to you dated October 24, 2001."

12 "That is obviously before Leigh Meese and
13 David Meese sold the property to Thomas Dicks,
14 would you agree?"

15 "Yes, ma'am."

16 "So you did have any knowledge about
17 covenants and restrictions that were in existence
18 on Long Bay Estates prior to Thomas Dicks'
19 purchasing this property?"

20 "Yes."

21 "And you believe that your clients, David
22 Meese and Leigh Meese, had knowledge that
23 covenants and restrictions did exist on Long Bay
24 Estates?"

25 Answer: "They, as well as I, assume they

1 knew there were restrictions."

2 You were referring, in that conversation
3 in the deposition, to a time period of after the
4 date the Meeses purchased the property; correct?

5 A. Again, I think that's correct. Now, again, I
6 would have to read the full account there.

7 But I didn't understand, I still don't
8 understand if you guys were asking Long Bay
9 itself, did it have a master set of restrictions
10 and then we were trying to narrow whether or not
11 they apply to this particular tract. So I don't
12 know if we're confusing what I was saying there
13 or what I was being asked.

14 Q. What were you saying there?

15 A. I don't recall. I would have to read it in its
16 entirety.

17 Q. Well, it's your testimony today that the Meeses
18 had, at one point in time, knowledge that there
19 was a strong possibility that the covenants
20 applied to this particular tract; is that
21 correct?

22 A. Correct.

23 Q. And is it your testimony today that that
24 knowledge would have been acquired after they
25 purchased the property?

1 A. To the best of my recollection, yes.

2 Q. Thank you.

3 RECROSS EXAMINATION

4 BY MR. BRITTAIN:

5 Q. Let me just go on a little bit on that. You
6 represented them when they were buying the
7 property; right?

8 A. Yes, sir.

9 Q. So when you're having conversations with them
10 about possible problems, I know it wasn't in the
11 chain of title, but doesn't it make sense that
12 when you are having conversations with them about
13 possible problems, hey, look, there are
14 restrictions out there. I don't find them in the
15 chain of title. It doesn't make sense that you
16 would wait until after they buy it to tell them
17 that there are strong possibilities that they
18 would apply to the property.

19 It looks to me like that would be
20 something that you would be discussing
21 contemporaneous when closing the purchase for
22 them, wouldn't it?

23 A. If I followed the question, yes, sir.

24 Q. Thank you.

25 MR. BRITTAIN: No further questions.

1 THE COURT: Anything further?

2 REDIRECT EXAMINATION

3 BY MR. KOUTRAKOS:

4 Q. If that was something that you had knowledge of,
5 you would have included it as an exception in
6 your policy; is that correct?

7 A. That is correct.

8 Q. And you had a general exception in your policy
9 which was general exception B, special exception
10 B.

11 Can you take a look at that for a moment
12 and explain to the Court what you meant by
13 special exception B?

14 A. Sure. When you have a subdivision such as this
15 or any subdivision, I should say, it's pretty
16 unusual to have a piece that's carved out that
17 the restrictions do not apply to. So of course
18 that always makes us a little bit nervous and we
19 want to think about this thing.

20 And there is a line of thought in the real
21 estate law about an overarching scheme to a
22 subdivision. So we include this exception to
23 make sure people understand they can't go in
24 there and put a gas station because there is an
25 overarching scheme to the subdivision.

1 Q. So that exception was put in the policy for the
2 purpose of saying, hey, there are other
3 restrictions, other parts of this subdivision,
4 but there is nothing we could find on this
5 particular tract but we're going to take
6 exception in case somebody makes a claim that
7 they somehow apply to your property?

8 A. Correct.

9 Q. But in your chain of title you found nothing; is
10 that correct?

11 A. To the best of my recollection, that's correct.

12 Q. And if you had actual notice of something, you
13 would have put it as an exception to your policy,
14 wouldn't you?

15 A. That stands to reason.

16 Q. Otherwise you wouldn't have been doing your job
17 as a title insurance agent?

18 A. That is a fair statement.

19 Q. If you had discussions with Leigh Meese saying,
20 hey, there is a big problem here, you would have
21 put an exception in there or called your title
22 insurance company and said, hey, listen, there is
23 a problem and none of that took place in this
24 case, did it?

25 A. No, it did not.

1 Q. Thank you.

2 RECROSS EXAMINATION

3 BY MR. BRITTAIN:

4 Q. You stand by your testimony throughout, do you
5 not, Mr. Dusenbury?

6 A. Yes, sir, to my recollection of it, certainly.

7 Q. Thank you, very much.

8 MR. BRITTAIN: No further questions.

9 THE COURT: You may step down, Mr.

10 Dusenbury. Thank you.

11 Let's take a short break.

12 - - - - -
13 (Thereupon, at 4:30 p.m., a
14 twelve-minute recess was had)

15 - - - - -
16 THE COURT: Please be seated.

17 - - - - -
18 (At this time, Plaintiff's attorney and Defendant's
19 attorney confer with Judge Howe)

20 - - - - -
21 MR. BRITTAIN: In order to save time
22 and two witnesses --

23 MR. KOUTRAKOS: One probably.

24 MR. BRITTAIN: You are going to call
25 the other one?

1 Let's just save ten minutes then. Why
2 don't you just put her up.

3 MR. KOUTRAKOS: The defendant would
4 like to call Lisa Cleary to the stand.

5 THE COURT: Miss Cleary, come around,
6 please.

7 MR. BRITTAIN: Your Honor, Mr.
8 Koutrakos and I have agreed should I choose to
9 find another witness to challenge Miss Cleary's
10 testimony I have 30 days from today's date to do
11 so and make a submission.

12 THE COURT: Thank you.

13 If you will place your left hand on the red
14 Bible and raise your right hand and be sworn or
15 affirmed by the court reporter.

16 LISA CLEARY,
17 of lawful age, the Witness herein, being by me
18 first duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. KOUTRAKOS:

22 Q. Good afternoon, Miss Cleary. State your name for
23 the record, please.

24 A. Lisa Cleary.

25 Q. What do you do for a living?

1 A. I'm a paralegal. I'm an independent abstracting
2 company.

3 Q. So you contract real estate companies?

4 A. Yes.

5 MR. BRITTAIN: Your Honor, I think
6 she's an expert abstractor and should be allowed
7 to testify accordingly.

8 THE COURT: I so find.

9 Q. I asked you to perform an assignment in this
10 particular case; is that right?

11 A. Yes.

12 Q. What did I ask you to do?

13 A. Pull a search on a piece of property.

14 Q. What piece of property is that?

15 A. The property in question. The property out at
16 Long Bay.

17 Q. That's the property owned by my clients, Thomas
18 and Robert Dicks?

19 A. Yes.

20 Q. And it's this property that's shown on this
21 survey right here?

22 A. Yes, sir.

23 Q. This is the survey prepared for my client by Mr.
24 Bellamy?

25 A. Yes.

1 Q. What were the results of your title search?

2 A. The results were I found no restrictions except
3 for the ones attached to the plat which excluded
4 the property.

5 Q. Are you familiar with what we talked about today,
6 the 1972 Order?

7 A. Yes, sir. You asked me to go get a copy of it.

8 Q. When you went to go get a copy of it, was it
9 there?

10 A. It was in the index as far as under the plaintiff
11 but there was no judgment. The file was missing
12 from the courthouse.

13 Q. So if you wanted to go today and try to find the
14 actual judgment, it's just not there?

15 A. No.

16 Q. So is it your opinion as an expert real estate
17 abstractor that had you been examining title for
18 this particular piece of property, you would have
19 reported no restrictions and you would not have
20 reported the 1972 Order?

21 A. No, sir.

22 Q. And that is to a degree of abstracting certainty?

23 A. Yes. Basically we have a standard that we have
24 to do for insurance. We have to check everybody
25 from the date of deed in to the recorded date

1 out, ten years judgements from today's date
2 backwards.

3 Q. In this particular case I asked you to go as far
4 back as possible for judgments?

5 A. Yes, you did.

6 Q. That's all I have. Thank you.

7 CROSS EXAMINATION

8 BY MR. BRITTAIN:

9 Q. Miss Cleary, have you ever checked titles out
10 there in Long Bay before?

11 A. Yes, sir.

12 Q. How long have you been doing that?

13 A. Since 1981.

14 Q. Isn't it one of those subdivisions that has kind
15 of gained some infamous notoriety over the years
16 as far as abstracts are concerned?

17 A. Basically, yes.

18 Q. I mean, there is no question about the way it was
19 originally done. It's so far back that there has
20 always been some issues and problems concerning
21 titles, everybody checks them pretty carefully
22 out there; is that that true?

23 A. Basically we check every title carefully.

24 Q. Sure. Some of them, newer subdivisions, PUDs,
25 there aren't many issues involved in some of the

1 more recent ones as there are some of the older
2 ones, would you agree with that?

3 A. Yes.

4 Q. Now, if during the course of your examination you
5 received information that the purchaser, because
6 part of what you're doing is a service basis for
7 a title insurance policy; isn't that correct?

8 A. Basically I just get a request from different
9 attorneys and I basically search the piece of
10 property on which they request me to do.

11 Q. But isn't that used often for them to render an
12 opinion that the title is good and then there is
13 title insurance paid for that?

14 A. Yes.

15 Q. Now, in the course of doing the examination you
16 learned outside of the chain of title that the
17 purchaser had actual notice of a document of this
18 nature, would you make a note of that in your
19 title opinion?

20 A. I can't do a title opinion. I'm not an --

21 Q. Would you give that information to the lawyer?

22 A. Yes, if I was aware of anything.

23 Q. Thank you very much.

24 MR. BRITTAIN: No further questions.

25 MR. KOUTRAKOS: I have no questions.

1 Thank you.

2 THE COURT: Miss Cleary, you may step
3 down. Thank you very much.

4 MR. KOUTRAKOS: Your Honor, if I may, I
5 would like to call David Meese.

6 THE COURT: David Meese, if you will
7 come around, sir, and place your left hand on the
8 red Bible, raise your right hand and be sworn or
9 affirmed by the court reporter.

10 DAVID W. MEESE, JR.,
11 of lawful age, the Witness herein, being by me
12 first duly sworn, was examined and testified as
13 follows:

14 DIRECT EXAMINATION

15 BY MR. KOUTRAKOS:

16 Q. Mr. Meese, can you state your name for the
17 record.

18 A. David W. Meese, Junior.

19 Q. You are familiar with property at Long Bay
20 Estates that both you and your wife purchased
21 from Carmen Ward?

22 A. Yes.

23 Q. How would you describe that property generally?

24 A. As 2.67 acres right across Woodview Lane from
25 seven houses.

1 Q. You purchased that property in 1997?

2 A. Right.

3 Q. I'm showing you what's been marked as Defendants'
4 Exhibit No. 5. That's the deed to both you and
5 your wife.

6 Are you familiar with that deed at all?

7 A. It certainly looks like the one.

8 Q. Did you rely on your attorney to tell you what
9 the status of title was to the property that you
10 were buying?

11 A. I don't recall that but I'm sure we would have.

12 Q. Would you have expected him to tell you if there
13 were any issues with the property?

14 A. It stands to reason that we would, yes.

15 Q. At the time you purchased the property, were you
16 aware of any claims or assertions that the
17 property was subject to any restrictions that
18 would have prevented it from being subdivided?

19 A. No, I'm not.

20 Q. At the time you purchased the property, did you
21 have any impressions as to whether or not
22 subdivision was an option that was available to
23 you and your wife?

24 A. That wasn't our intention but we did believe that
25 it was an option.

1 Q. At the time you purchased this property, did you
2 and your wife have any knowledge of any
3 restrictions on the property?

4 A. By restrictions do you mean subdivision?

5 Q. Just Restrictive Covenants that prevented you
6 from doing certain things to the property?

7 A. Some Restrictive Covenants sound familiar but I
8 don't remember the details.

9 Q. Did you have any knowledge of any restrictions on
10 the property that would prevent you from
11 subdividing the property or owning it as more
12 than one lot?

13 A. Repeat the question, please.

14 Q. At the time you and your wife purchased the
15 property, did y'all have any notice that there
16 were any restrictions or covenants of record that
17 would have prevented you from using the property
18 as more than one lot?

19 A. I did not believe there were any restrictions to
20 our knowledge and belief.

21 Q. Did you and your wife have any notice of any
22 judicial orders that would have been entered that
23 would have affected the title to the real estate
24 you were buying?

25 A. None that I recall.

1 Q. Are you familiar with this 1972 Order that people
2 talked about recently and we talked about in your
3 deposition?

4 A. I can't really say that I am other than having
5 heard of it.

6 Q. To the best of your recollection, you would not
7 have had knowledge of an Order issued in 1972 at
8 the time you and your wife purchased the
9 property?

10 A. I don't remember such a thing from the purchase,
11 no.

12 Q. Do you recall how much you paid for the property?

13 A. \$145,000.

14 Q. And that's the amount that is stated on the deed
15 which is Defendants' Exhibit No. 5?

16 A. Yes, sir.

17 Q. And you believe that was good consideration you
18 were paying in exchange for getting title to the
19 property?

20 A. Correct.

21 Q. When you received that deed, were you expecting
22 to receive title free and clear of all liens,
23 claims and encumbrances?

24 A. Yes, sir.

25 Q. You had no knowledge of any restrictions on the

1 property; correct?

2 A. Restrictions in terms of subdivision?

3 Q. Yes.

4 A. I was not aware of any such restrictions for
5 subdivision.

6 Q. Or restrictions that would have allowed you to
7 own the properties as more than one lot?

8 A. Right.

9 Q. Do you know whether your wife had any knowledge
10 of any restrictions on the property?

11 MR. BRITTAIN: Objection, your Honor.
12 She's here to testify.

13 THE COURT: Sustained.

14 Q. Mr. Meese, that is all the questions I have.
15 Thank you, sir.

16 A. Thank you.

17 THE COURT: Mr. Brittain, any cross?

18 CROSS EXAMINATION

19 BY MR. BRITTAIN:

20 Q. Miss Meese, how are you doing this afternoon?

21 A. Good afternoon.

22 Q. Good afternoon, sir.

23 Correct me if I'm wrong on this. It's my
24 experience Leigh, your wife, who is a very fine
25 person, by the way, is a lawyer; isn't that

1 correct?

2 A. Correct.

3 Q. And is it fair to say that she was more involved
4 in some of these issues than you were as far as
5 the 2000 lawsuit over the other lots in Long Bay
6 or were you pretty much involved in all this just
7 like she was?

8 A. Some of those things she did have more
9 involvement in than I did.

10 Q. Do you remember signing a document, I think it's
11 Plaintiff's 10.

12 Let me show you this. And it may take you
13 to minute or two to look at this. This is
14 Plaintiff's Exhibit No. 5. It's already in
15 evidence. It's called Settlement Agreement and
16 Mutual Release.

17 I'm going to take you to the back of this
18 and ask you if you recognize that as your wife's
19 signature?

20 A. I do.

21 Q. Do you recall ever seeing this document yourself?
22 Let me hand it to you so you can take a good look
23 at it.

24 What it claims to be is an effort to
25 resolve the other property, not the one we are in

1 here about today but the other property that the
2 Ammons family owned. And Leigh was kind of there
3 for the trial, the 2000 trial.

4 A. Right. Yes, I believe I have seen this before.

5 Q. I refer you to the third paragraph here where it
6 indicates that, "It was stipulated by counsel and
7 ordered by the Court that the Restrictive
8 Covenants recorded in Horry County Plat Book 25
9 at Page 22 covering Blocks 1 through 27 inclusive
10 were extended to include Blocks 30, 32 and 34 as
11 well as remaining portions of old Blocks 28 and
12 29 of Long Bay Estates subdivision."

13 So as of that time, Leigh would have
14 certainly known that 28 and 29 were also
15 included?

16 A. What's 28 and 29?

17 Q. Let's assume for this question that this is the
18 property we are talking about now.

19 A. Okay.

20 Q. Do you remember any of that or is that something
21 you really don't remember?

22 A. I wasn't very involved in that. I vaguely
23 remember it.

24 Q. Now, did Mr. Dusenbury, he's the one that closed
25 this particular lot for y'all; isn't that

1 correct?

2 A. That's correct.

3 Q. And he gave you a title opinion that said there
4 were no problems and he testified to that. But
5 he also testified that he told you that there was
6 a strong possibility that the restrictions out
7 there would apply to the property you were
8 purchasing.

9 Now, do you recall that?

10 A. Not very clearly. We intended, as you know, to
11 build a house there and that was it. So we
12 weren't, while we believed that it was
13 subdividable, it wasn't our focus or intention to
14 do so.

15 Q. You had a survey done by Culler Land Surveying
16 Company, Inc on this property somewhere along the
17 line, didn't you?

18 A. I believe so.

19 Q. I haven't marked this yet. Let me hand you --

20 MR. BRITTAIN: Let me mark it for
21 identification. It will be plaintiff's next
22 number for ID.

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24 (Thereupon, Plaintiff's Exhibit

25 No. 12 was marked)

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Q. Let me hand you this and ask you if you can recognize that?

It looks like, down in here it says David Meese and Leigh Meese, Culler Land Surveying Company.

A. Right.

Q. And that's the 2.67 acres?

A. Right.

Q. And that's something you hired somebody to do; isn't that correct?

A. Yes.

Q. And that document has this piece of property that you own as one lot, doesn't it?

A. As one parcel.

Q. Yes, as one parcel. But there is no question about that being -- you remember Culler Land Surveying Company doing that and that's your name up there?

A. That's correct.

MR. BRITTAIN: I move to introduce this document.

THE COURT: Any objections?

MR. KOUTRAKOS: No objections.

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(Thereupon, Plaintiff's Exhibit No. 12
was entered into evidence)

MR. KOUTRAKOS: Is that number 12?

MR. BRITTAIN: 12.

THE COURT: Mr. Brittain, is that
recorded?

MR. BRITTAIN: No. Let me tell you
what I think this is.

THE COURT: Well, there is a Culler
plat that is actually referenced in the Meeses
deed and I wondered if that's the one.

Do you have their deed right there?

MR. BRITTAIN: Yes. Let me look.

THE COURT: It's on the first page.

MR. BRITTAIN: Yes, it is recorded.

THE COURT: Look on the first page of
the deed.

MR. BRITTAIN: Let's see, David and
Leigh Meese. September 4th. I believe that's
it.

THE COURT: Thank you.

MR. BRITTAIN: No further questions.

THE COURT: Mr. Koutrakos.

REDIRECT EXAMINATION

BY MR. KOUTRAKOS:

Q. Mr. Brittain asked you about Exhibit No. 5, this Settlement Agreement and Mutual Release. You would have signed that after the date you purchased the property; is that right?

A. Yes, sir.

Q. And it would have been sometime in the year 2000 or after 2000?

The document is not really dated but would it be after 2000?

A. Is certainly looks like it would be 2000.

Q. At the time you sold the property to the Dicks, did you believe the property could be subdivided?

A. Yes, we did. The best I can recall.

Q. That's all I have. Thank you.

THE COURT: Anything else?

MR. BRITTAIN: No further questions.

Thank you, Mr. Meese.

THE COURT: Mr. Meese, you may step down. Thank you.

MR. KOUTRAKOS: Your Honor, at this time, I would like to call Leigh Meese.

THE COURT: Miss Meese, if you would come around, please, and place your left hand on

1 the Bible and raise your right hand and be sworn
2 or affirmed by the court reporter.

3 LEIGH MEESE,
4 of lawful age, the Witness herein, being by me
5 first duly sworn, was examined and testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. KOUTRAKOS:

9 Q. Good afternoon, Miss Meese.

10 A. Good afternoon.

11 Q. You have been in the courtroom for a little while
12 today, haven't you?

13 A. Yes, I have.

14 Q. I appreciate it.

15 And you have heard a lot of testimony
16 about this case today; is that right?

17 A. Yes.

18 Q. So when I'm talking about the property that's
19 involved in this case, you know what I'm talking
20 about; correct?

21 A. Right.

22 Q. You might want to speak up.

23 A. Yes. Thank you.

24 Q. You know the property I'm talking about in this
25 case; correct?

1 A. Yes, I do.

2 Q. And this is property that you purchased from
3 Carmen Ward and some other folks; is that right?

4 A. I'm not sure who all the grantors would have been
5 but Carmen Ward sounds familiar.

6 Q. I'm showing you Defendants' Exhibit No. 5, and
7 that's a deed to you from a bunch of grantors
8 including Carmen Ward.

9 Does that refresh your recollection?

10 A. I'm sure those grantors are correct.

11 Q. Do you recall the date that you purchased the
12 property?

13 A. I would not have been able to tell you exactly
14 the date but I assume the date reflected on the
15 deed is accurate.

16 Q. The date of recording is September 4, 1997.

17 A. That's what this document reflects.

18 Q. I'm going to ask you a series of questions today
19 that are going to be focused around what you knew
20 in September of 1997.

21 In September of 1997, you had hired an
22 attorney to represent both you and your husband
23 in buying this particular piece of property; is
24 that right?

25 A. To assist with the closing, yes.

1 Q. Not only assist with the closing but you weren't
2 going down to the courthouse and checking title,
3 were you?

4 A. No, Jay handled the closing.

5 Q. It's my understanding Jay is a real estate
6 specialist and a very good real estate attorney,
7 is that why you used him?

8 A. Yes, he's our real estate attorney.

9 Q. Were you looked to him to advise you as to what
10 encumbered the property?

11 A. Yes, I was looking for his representation in the
12 purchase, yes.

13 Q. And, by the way, all of us know this but just to
14 make the record clear, you are a lawyer; correct?

15 A. I'm on inactive status.

16 Q. We actually went to law school together for a
17 little while?

18 A. Yes. I'm not practicing and I never practiced
19 real estate law.

20 Q. Understood.

21 At the time you purchased the property,
22 can you tell me today whether you had any notice
23 of any restrictions that would have encumbered
24 the property?

25 A. I did not. At some point obviously I became

1 aware of, you know, of a number of potential
2 restrictions on the property. I don't know at
3 what point I became aware of those restrictions.
4 Q. Some testimony was put into evidence today about
5 the Settlement Agreement and Mutual Release
6 (handling).

7 Do you recall this document?

8 A. No, honestly I don't.

9 Q. It is my understanding, and let's back up and
10 establish some things that we have all heard
11 today.

12 At one point in time Mr. DeCiero, who is
13 in the courtroom today, had filed an action
14 against Long Bay Properties. And Long Bay
15 Properties is an entity that is, members of the
16 entity are members of your family; is that right?

17 A. Right. Not myself.

18 Q. Not yourself. And the name of the entity is Long
19 Bay Properties, that's the general partnership.

20 Who of your family would be partners in
21 that partnership?

22 A. That would be my late father and my uncle.

23 Q. At one point in time they were sued by Mr.
24 DeCiero.

25 Do you recall that?

1 A. Yes.

2 Q. It involved another piece of property in Long Bay
3 not this particular piece of property?

4 A. That's right.

5 Q. Plaintiff's Exhibit No. 5 is a Settlement
6 Agreement and Mutual Release. That document
7 would have been wrapping up whatever settlement,
8 whatever resolution y'all reached in that
9 litigation?

10 A. They reached.

11 Q. They reached, not you?

12 A. Yes.

13 Q. That would have been, from what I could tell from
14 looking at that document, that would have been
15 after the year 2000?

16 A. I couldn't tell you what date that would have
17 been but --

18 Q. If you look at that document, you signed that
19 document?

20 A. Right.

21 Q. You've at least witnessed that document?

22 A. Right, as a witness.

23 Q. And none of this is dated, and don't ask me why,
24 but it says 2000.

25 Would you presume that you would have

1 signed it in the year 2000 or after?

2 A. That would be a reasonable inference.

3 Q. And you didn't know about the DeCiero litigation
4 until it was filed?

5 A. The litigation, obviously, we wouldn't have known
6 about until the litigation existed with the
7 filing. But the issues that resulted in the
8 litigation I may have been aware of significantly
9 prior to the filing of the lawsuit, I just don't
10 know.

11 In fact, I assume that I would have been
12 aware of the general issues sometime prior to the
13 filing of the lawsuit.

14 Q. Because there would have been some discussions
15 prelitigation?

16 A. I assume so.

17 Q. You're familiar with this 1972 Order?

18 A. Vaguely, yes.

19 Q. Vaguely familiar. And that 1972 Order was
20 actually mentioned in this Final Order that was
21 issued in DeCiero versus Long Bay Properties.
22 This Final Order, which is Plaintiff's Exhibit
23 No. 4, was entered March 14, 2000.

24 Are you familiar with this Order?

25 A. I'm really not. Not currently certainly. I may

1 have been at the time but I couldn't tell you
2 what the provisions are today.

3 Q. When you purchased your property in September of
4 1997, was it your expectation that you were going
5 to receive title free and clear of all liens,
6 claims and encumbrances?

7 A. We would have gotten whatever title we could
8 purchase from the grantors. I can't
9 characterize -- that's not within my area of
10 expertise.

11 Q. You would have spent the same amount on a bad
12 title?

13 A. I'm sorry.

14 Q. If the title had been horrible, if there was
15 something severely wrong with the title, you
16 wouldn't have forked out that much money, would
17 you?

18 A. I guess at this point I would say I believe the
19 tile was sufficient to accomplish what we
20 intended which was to build a house on it and
21 live there.

22 Q. Did you have any knowledge at the time you
23 purchased the property that it could not be
24 subdivided or used as more than one lot?

25 A. I just don't know. At some point in my adulthood

1 I had become aware that there were issues and I
2 don't know at what point I became aware of what
3 questions.

4 Q. You just honestly don't recall if it was before
5 or after?

6 A. I don't. I can't come up with a timetable of
7 when I became aware of what issues as it relates
8 to our acquisition of the property.

9 Q. Does your husband have a better memory than you
10 do, generally?

11 A. Arguably, yes.

12 Q. Do you recall having any conversations with Wayne
13 Mumford?

14 A. I don't.

15 Q. Have you ever talked to Wayne Mumford before?

16 A. I may have. I can't recall.

17 Q. Do you recall having any conversations with him
18 in relation to the sale of your property to
19 Thomas Dicks?

20 A. I can't remember having done so. I can't say
21 that I didn't but I don't remember having those.

22 Q. You had the property surveyed at the time you
23 purchased the property?

24 A. I couldn't tell you whether we did or not. I
25 know we had the property surveyed at some point

1 to identify the wetlands areas so we could see
2 where an appropriate house site would be.

3 Q. Would you have been the one who ordered that
4 survey?

5 A. I don't know whether David or I would have done
6 that.

7 MR. KOUTRAKOS: Your Honor, if I could
8 just have one moment.

9 THE COURT: Certainly.

10 Q. Miss Meese, I appreciate your time. Thank you so
11 much. Answer any question Mr. Brittain may
12 have.

13 THE COURT: Mr. Brittain.

14 CROSS EXAMINATION

15 BY MR. BRITTAIN:

16 Q. What I understand is you honestly just can't
17 really remember?

18 A. I remember there were issues with the property.
19 I can't place my awareness of those issues with
20 respect to our acquisition and sale of the
21 property.

22 Q. I appreciate that.

23 MR. BRITTAIN: No further questions.

24 THE COURT: Thank you very much. Miss
25 Meese, you may step down.

1 MR. KOUTRAKOS: At this point, your
2 Honor, I'd like to call Patrick Wayne Mumford as
3 a witness.

4 THE COURT: Mr. Mumford, come around,
5 please, sir.

6 Place your left hand on the Bible and raise
7 your right hand.

8 PATRICK WAYNE MUMFORD,
9 of lawful age, the Witness herein, being by me
10 first duly sworn, was examined and testified as
11 follows:

12 DIRECT EXAMINATION

13 BY MR. KOUTRAKOS:

14 Q. Good afternoon, Mr. Mumford.

15 A. Good afternoon.

16 Q. You're an attorney; is that right?

17 A. Yes.

18 Q. How long have you been an attorney?

19 A. Since 1973.

20 Q. And are you with a law firm?

21 A. Yes.

22 Q. What's the name of your law firm?

23 A. McCutchen, Mumford, Vaught, O'Dea & Geddie.

24 Q. Is there any particular area of law that you
25 focus on?

1 A. Primarily real estate, both commercial and
2 residential, and timeshare.

3 Q. Do you recall representing Thomas and Robert
4 Dicks with respect to a real estate transaction
5 regarding property in Long Bay Estates?

6 A. Yes.

7 Q. And that transaction occurred in 2003?

8 A. Well, truthfully, I didn't recall when it
9 occurred but I believe I was informed just
10 recently that it was 2003, yes.

11 Q. Did you perform a title examination with respect
12 to the property?

13 A. Yes.

14 Q. What did your title examination reveal?

15 A. It revealed that there were no restrictions
16 applying to this property.

17 Q. This would have been a title examination that you
18 would have been performed in conjunction with
19 your representation of the Dicks when they
20 purchased the property from Leigh and David
21 Meese; is that right?

22 A. Correct.

23 And, by the way, before we go any further,
24 I really do need to get the attorney/client
25 privilege waived, if I might, for the record.

1 MR. KOUTRAKOS: Your Honor, Mr. Mumford
2 is concerned about my clients waiving the
3 attorney/compliant privilege. As counsel for the
4 defendants, I'll assert that waiver. Perhaps you
5 want to hear my clients say it.

6 MR. THOMAS DICKS: I waive the rights
7 for privilege.

8 THE COURT: Very good.

9 THE WITNESS: Thank you.

10 BY MR. KOUTRAKOS:

11 A. In answer to your question, in the ordinary
12 course, and I don't recall with any specificity
13 because I don't have any knowledge of this case
14 since the time of this closing until about a
15 month ago or so, and I really don't remember, but
16 in the normal course of events, Mr. Dicks would
17 come to our office, he would have given us a copy
18 of the contract to purchase property, and we
19 would have opened a file and ordered a title
20 search. So that's what we did.

21 So when I looked at the file I found the
22 title search and it did not reveal any
23 restrictions affecting the use of this property.

24 Q. You understand we are talking about the
25 restrictions attached to the 1955 plat?

1 A. Yes, indeed.

2 Q. We are talking about an Order that's issued in
3 1992?

4 A. Correct.

5 Q. Did any of those restrictions show up in your
6 title work?

7 A. No.

8 Q. Was there a point in time where you were notified
9 of this 1972 Order?

10 And you know what I'm talking about when I
11 say the 1972 Order; is that right?

12 A. I'm sorry.

13 Q. You know what I'm talking about when I refer to
14 the 1972 Order?

15 A. Yes. Somewhere in the process it was brought to
16 my attention, and I don't recall when in the
17 process it was, but it was brought to my
18 attention that plat which clearly indicated that
19 it was applicable only to lots that didn't
20 include our two, and then that Order.

21 Q. Do you recall whether Mr. Dicks provided that to
22 you?

23 A. He probably did but that's conjecture on my part.
24 At some point he came into my possession.

25 MR. BRITTAIN: If he's guessing, I

1 object to the answer.

2 Q. Have you reviewed your file or any documents you
3 may have had with respect to this closing?

4 A. There is a copy of that have Order in my file.

5 Q. Have you had a chance to review your file to
6 refresh your recollection?

7 A. Yes, I have.

8 Q. At a point in time, did you give an opinion to
9 Thomas Dicks as to what the affect of that 1972
10 Order was?

11 A. Well, what I informed him, and that was after
12 research on our part and discussion with the
13 title company, was that we were of the opinion
14 that he had the right to have seven lots on this
15 property that he was purchasing.

16 Q. And you relayed that advice to Mr. Dicks?

17 A. Yes, I did.

18 Q. Did you have any discussions with Leigh Meese?

19 A. Yes, I did. I called her. I was obviously in
20 the courtroom when she said she didn't recall the
21 call but I did call her. I don't know at what
22 point in time I talked with her but I did call
23 her and asked her --

24 MR. BRITTAIN: I object to what she
25 tells him because that would be hearsay.

1 A. The impression I had following my conversation
2 with her was one in which there was no notion on
3 her part to engage in anything other than --

4 MR. BRITTAIN: Excuse me. Here again,
5 that's just a way of getting around the hearsay.
6 Objection. That's an inadmissible statement.

7 THE COURT: Sustained.

8 MR. BRITTAIN: She was here to testify.

9 Q. Did you have any conversations with Mr. Brittain
10 about this case?

11 A. Yes, I did.

12 Q. What were those conversations?

13 A. I don't recall the point in time in which it was
14 brought to my attention that Mr. Brittain had an
15 objection to this transaction but I did call him
16 because I have been doing this for a long time
17 and I have never seen any real feature in
18 litigation particularly, with all due respect to
19 you litigators, and I felt that I was trying to
20 understand, from an academic point of view, what
21 exactly was the basis of the objection.

22 So I did talk to him. I don't recall,
23 and he can answer that for himself, I don't
24 recall if it was once or twice or whatever but we
25 did speak by phone.

1 Q. What was the purpose of your conversation?

2 A. To try to determine what was the basis of his
3 objection to what I understood was a community
4 opposition to Mr. Dicks having seven lots there.

5 Q. Did he give you a basis of that theory of why he
6 could have seven lots there?

7 MR. BRITTAIN: Your Honor, I don't
8 believe this is appropriate testimony from this
9 witness. It sounds to me like he's trying to
10 elicit some sort of settlement negotiation
11 between the parties and it's improper.

12 I don't even recall the consideration and I
13 don't want to be a witness in the case.

14 MR. KOUTRAKOS: There haven't been any
15 settlement negotiations as far as I know.

16 THE COURT: I'm not sure it's proper to
17 be talking about telephone conversations between
18 plaintiff's counsel and the witness. That sounds
19 where this testimony is going. So I'm going to
20 sustain that objection.

21 BY MR. KOUTRAKOS:

22 Q. What was the basis of your opinion that Mr. Dicks
23 could use this property as seven lots?

24 A. Well, Mr. Dusenbury earlier testified about what
25 is called a general scheme of development of a

1 community. And when I saw that plat, what is
2 that 22, 25?

3 Q. Plat Book 25, Page 22.

4 A. 25, 22. When I saw that, I mean, it was obvious
5 that this was a residential community. And when
6 I saw the manner and methodology on which those
7 lots were entered, it seemed to me that what Mr.
8 Dicks was attempting to do was to continue the
9 scheme of development by having seven lots on
10 that property.

11 So, I mean, the general scheme and
12 development was consistent with that plat.
13 Although that plat clearly said it did not apply.

14 Q. The restrictions did not apply?

15 A. The restrictions did not apply.

16 Q. Did you have a chance to review this document,
17 this is an exhibit to the 1972 Order (handing).

18 Did you review that document in
19 formulating your opinion?

20 A. Yes, I did.

21 Q. What was your conclusion?

22 A. Obviously there were lines drawn that indicated
23 those were supposed to be the lot lines. There
24 were lines drawn on these two Blocks.

25 Q. Did you think that the Dicks using the property

1 as seven lots would have been consistent with the
2 manner in which the property had been surveyed in
3 years past?

4 A. Yes, I did.

5 MR. KOUTRAKOS: Your Honor, if I could
6 have a moment.

7 THE COURT: Certainly.

8 Q. In reviewing this map, do you recall seeing --
9 you see these dotted lines? Do you know what
10 these dotted lines represent?

11 THE WITNESS: May I go over there and
12 look?

13 Q. Sure.

14 THE COURT: Sure.

15 MR. KOUTRAKOS: I didn't mean to answer
16 for you, your Honor.

17 A. What was the question now?

18 Q. Do you understand why some of these lots were
19 dotted and others were solid?

20 A. Well, my understanding is that the solid lines
21 were the lines that were locked in place. And
22 the dotted line were the nature of proposed
23 lines.

24 Q. Blocks 28, 29, 30, 31, 32 and 33 as shown in Plat
25 Book 25 and 22 represented by dotted lines. Was

1 it your understanding what the person was doing
2 here was overlaying certain plats so the Court
3 could see what property was affected?

4 A. I would assume that to be the case.

5 MR. BRITTAIN: Here again, your Honor,
6 that's a leading question and Mr. Mumford is
7 assuming. That's not a proper piece of
8 evidence. That's an assumption.

9 THE COURT: Is that an assumption, Mr.
10 Mumford?

11 THE WITNESS: Yes, ma'am.

12 THE COURT: We'll strike that then.

13 MR. KOUTRAKOS: That's all the
14 questions I have.

15 THE COURT: Mr. Brittain, cross.

16 CROSS EXAMINATION

17 BY MR. BRITTAIN:

18 Q. Mr. Mumford, these dotted lines, I don't know if
19 you want to come back down. You're probably like
20 me, you can't see.

21 A. That's a conspiracy as you get older.

22 Q. Come over here. Let's take a look at it
23 together.

24 I think you testified that there are
25 certain lines that are locked lines and these

1 other lines are proposed lines, I think you said?

2 A. Correct.

3 Q. And obviously that's true because if these lines
4 meant lots then some of them would run all the
5 way back through two or three lots worth of, went
6 this way (indicating)?

7 A. I have no argument with what you are saying.

8 Q. So that is a significant telling point about what
9 these dotted lines are because of the way they
10 run across, proposals?

11 A. It is a proposal but it's also consistent with
12 this '72 Order that talks about the grantor's
13 right to alter these proposed lot lines.

14 Q. Right. No question. I have got no problem with
15 that.

16 Do you have, as you sit here today, I
17 appreciate the fact, I think you have been very
18 careful, as you should be, do you have a present
19 recollection of all of these things you're
20 testifying to or have you gone back as best you
21 can and tried to refresh your memory based on
22 your file?

23 A. I have just, I suppose in the last couple of
24 weeks, gone back and pulled the file from
25 storage, looked at the material, tried to refresh

1 my mind as to what took place seven years ago.

2 Q. And you said you did a title search. Do you mean
3 that somebody else did a title search under your
4 supervision or that you actually did the title
5 search?

6 A. Our in-house abstractor did the work.

7 Q. So, in other words, you didn't go and look for
8 these things in the records and the microfiche
9 and all that?

10 A. Me, personally, no. Our procedure is to, at
11 that time, we were using in-house abstractors.
12 And a lady named Yvette Moore, who was our
13 in-house abstractor, she prepared an abstracting
14 report which she then gave to us, which we then
15 reviewed to determine what we believed, if
16 anything, affected the nature of the title.

17 Q. I got you. But just to be clear about it.
18 Someone else went and actually did the title
19 search?

20 A. That's correct.

21 Q. You took those notes, reviewed them, and ended up
22 rendered a title opinion; is that correct?

23 A. That's correct.

24 Q. Do you know what --

25 A. I didn't write a written title opinion. I mean,

1 I don't have a six-page form that says attorney's
2 opinion of title.

3 Q. Let me show you Plaintiff's Exhibit No. 12 and
4 ask you if you could figure out what that is from
5 looking at it?

6 A. Sure.

7 Q. And if that showed up in your file.

8 A. This showed up because -- I don't know if this is
9 the one. I think this is the one. But,
10 anyway --

11 THE COURT: For the record, could you
12 say what you're talking about?

13 MR. BRITTAIN: Plaintiff's Exhibit No.
14 12. That's the plat attached to the Meese
15 purchase.

16 THE COURT: Yes, sir.

17 A. This was brought to my attention and I looked at
18 this and this was just, it was really odd because
19 it didn't say boundary survey, it didn't say
20 combination survey, it didn't say anything except
21 just original survey of 2.67 acres.

22 And, I mean, gosh, there is nothing on
23 here that says lot lines being abandoned. There
24 is nothing on here about proposed lot lines.
25 Nothing.

1 Q. It's just one big lot on there, isn't it?

2 A. The implication is that this is a combination of
3 property. That's only an implication.

4 Q. Did you see that in the original title work that
5 was handed to you?

6 A. I don't think so. Maybe I did but I don't think
7 so.

8 Q. Because if you did, wouldn't it have made you
9 wonder about this document and this one being
10 something different?

11 A. That's probably why I called Miss Meese. At
12 some point I called her.

13 Q. You called her but she couldn't remember it?

14 A. I don't recall, well, I think I have been
15 informed I can't discuss the conversation.

16 Q. Now, did you, as part of your review of this,
17 take a look at the Complaint?

18 You talked about looking at the '72 Order.

19 A. Yes, but I didn't see the Complaint. I just saw
20 the Order.

21 Q. This is a Complaint that, and you know how that
22 works, served as the basis for the '72 Order.

23 A. I never saw that.

24 Q. You never saw that?

25 A. No.

1 Q. Let me show you a portion of it here and I will
2 let you look. It's introduced into evidence.

3 This is the Complaint (handing). See
4 here, Lewis and Carmen Ward. And these are all
5 the people in the subdivision.

6 A. Right.

7 Q. It's got two exhibits and it's got a verification
8 back here of Carmen Ward. I just want to ask you
9 about one particular paragraph of it on Page 73.

10 A. Of the Complaint?

11 Q. Yes. And I know this would not be in the chain
12 of title.

13 A. Right.

14 Q. That's not where I'm headed.

15 Here again, remember, this is Miss Ward
16 who owned the property at the time. I want to
17 ask you to read paragraph number eight there.

18 A. You want me to read it into the record?

19 Q. Yes. Or you could just read it to yourself. Why
20 don't you read it to yourself and I will ask you
21 some questions about it. It's already been read
22 into the record.

23 A. Okay.

24 Q. Now, my question is, you do this for a living.
25 That request by the plaintiff stated certain

1 things that they were seeking in connection with
2 the Order that came out in 1972.

3 You would agree with that, wouldn't you?

4 A. All I can say is that you have just shown me a
5 Complaint that makes allegations. That doesn't
6 make it a fact.

7 Q. Let me give you a hypothetical.

8 A. I just live by Orders. What the judge finds. I
9 don't care what people allege.

10 Q. Let me give a hypothetical.

11 A. All right.

12 Q. If the plaintiff is requesting certain maps that
13 have been filed be recalled based on inadvertence
14 or nothing that was proper there, and the Court
15 enters an Order accepting those propositions.

16 Remember, this is not in the chain of
17 title because you never saw this Complaint;
18 right?

19 A. No.

20 Q. You never saw it?

21 A. Never saw it.

22 Q. And you never said, Hey, what led to this '72
23 Order? I need to see the Complaint. That didn't
24 cross your mind. You were looking at the 1972
25 Order.

1 A. I saw the Order.

2 Q. How about actual notice. Let's say that Mr.
3 Dicks comes in and says, Look, I only paid
4 \$175,000 for the property. If I make seven lots,
5 I only have \$25,000 each in those lots at Long
6 Bay subdivision. Mr. DeCiero claims that there
7 is a problem subdividing the lots. Somebody
8 gave me a 1972 Order that's got some language in
9 it.

10 And assume with me for a minute that the
11 Court up there or this Court determines that Mr.
12 Dicks had actual notice of a problem with this
13 property.

14 Would he have an obligation to make that
15 information known to his title insurance company?

16 MR. KOUTRAKOS: Your Honor, I object.
17 He's asking for a legal conclusion as to what an
18 obligation of a party to a real estate
19 transaction is.

20 MR. BRITTAIN: It's his lawyer. He is
21 an expert.

22 MR. KOUTRAKOS: He's not asking him a
23 fact he knew at the time of closing. He's asking
24 about an obligation in a hypothetical scenario
25 about a party to a transaction. I've already

1 identified him as an expert attorney.

2 MR. BRITTAIN: If you want me to go
3 through the process of qualifying him as an
4 expert. He's the closest thing to an expert
5 there is in the world when it comes to real
6 estate and everybody in Horry County knows it.

7 So I move him as an expert witness on all
8 issues concerning title insurance and title real
9 estate. It's a perfect question. It's a
10 hypothetical question.

11 MR. KOUTRAKOS: Jay Dusenbury already
12 testified to it.

13 I'm not sure where this is going but if you
14 want to identify him as an expert witness at the
15 time of trial, a fact witness as an expert
16 witness, I don't know if I deem that appropriate.
17 So I would generally object to that.

18 THE COURT: I'm not sure it's
19 appropriate to qualify him as an expert. I know
20 he is an expert.

21 MR. KOUTRAKOS: He's certainly an
22 expert in what he does and I agree to that. But
23 he's not here for expert testimony.

24 MR. BRITTAIN: The question doesn't
25 require expertise. It doesn't require an expert

1 opinion. I mean, he is one if we want to go
2 through that process.

3 If whether or not a person that has actual
4 notice has an obligation to inform the title
5 insurance company?

6 THE COURT: You can probably get around
7 it and say, Mr. Mumford, if you had had actual
8 notice, would you have provided it to your
9 client?

10 BY MR. BRITTAIN:

11 Q. Yes, to the title insurance company.

12 A. If I had had actual notice of some question
13 regarding the title, I would have notified the
14 title company.

15 Q. In fact, you did consult the title company on
16 this issue?

17 A. That is correct.

18 Q. Thank you.

19 MR. BRITTAIN: No further questions.

20 REDIRECT EXAMINATION

21 BY MR. KOUTRAKOS:

22 Q. Mr. Mumford, you consulted with the title
23 insurance company and both you and the title
24 insurance company came to a consensus; is that
25 right?

1 MR. BRITTAIN: Object to what the title
2 insurance company came to.

3 MR. KOUTRAKOS: I think you opened the
4 door there. I think I could drive through it
5 like a train. You opened the door. I mean, I
6 could say --

7 Q. Anyway, regardless.. You made a recommendation
8 and you gave an opinion as to whether or not the
9 property could be subdivided; is that right?

10 A. Yes, I did render an opinion that this property
11 could be, was in fact seven lots.

12 Q. Plaintiff's Exhibit No. 12, when Mr. Brittain was
13 asking you questions, you said something about
14 you finding it odd that lot lines weren't
15 abandoned or you said something to that effect.

16 A. In all my time of practicing real estate, I am
17 accustomed, even with proposed lines, to see them
18 appear on a boundary survey. And this was very,
19 very unusual. And the suggestion or, at least
20 in my mind, that didn't appear to be a
21 combination, that didn't appear to be anything
22 but a boundary survey and I took it as such.

23 Q. What was your understanding of what the 1955 plat
24 showed with respect to my clients' property?

25 A. That those restrictions didn't apply. But the

1 idea was to remain consistent with the general
2 plan of development, the scheme and develop. The
3 scheme and orderly development plan was to
4 continue this whole generally shaped size lots
5 onto these two blocks.

6 Q. How many lots --

7 A. From here, as I recall, seven or eight appeared
8 on each of these blocks.

9 Q. Is that why you say you're wondering why old lot
10 lines weren't shown on Plaintiff's Exhibit No.
11 12?

12 A. Yes. Again, it is customary that these matters
13 be indicated on a survey. There is nothing on
14 that survey to indicate that anything in
15 particular had changed. This is just a boundary.

16 MR. KOUTRAKOS: Your Honor, give me a
17 minute.

18 A. Mr. Koutrakos, if it's possible, there was one
19 other matter that just slipped my mind.

20 When I talked about the consistent
21 development, there were seven lots on this
22 proposed, on this 25, 22, there were seven lots
23 drawn there. And what he was talking about was
24 seven lots. I didn't see anything, again, that
25 was inconsistent as far as the neighborhood was

1 concerned with the change in the plan of
2 development. Same number lots.

3 What I saw was obviously a slight change
4 in the lines of the lots but not anything
5 different from what already had been, the idea of
6 the original developer, apparently.

7 Q. So you had viewed the seven lots shown in the
8 1955 plat and thought it would continue to be
9 seven lots, was that the basis of your opinion?

10 A. Correct.

11 Q. How about what this map attached to the Order
12 said?

13 A. Well, it still said it was unrestricted.

14 Q. According to the map attached to the Order, how
15 many lots do you believe this shows Blocks 28 and
16 29 as containing?

17 MR. BRITTAIN: Your Honor, we have
18 already objected to that map and introduced
19 evidence to refute the map. I don't know why he
20 continues to ask him questions about the map.
21 And he's asked him ten times the same question.

22 THE COURT: If he says any more than
23 seven I'm going to be mighty surprised.

24 A. Seven.

25 MR. KOUTRAKOS: And, your Honor, what

1 I'm referring to, just so you know, this is the
2 map attached to the Order, the 1972 Order.

3 MR. BRITAIN: Well, you don't have a
4 recorded. I don't know which one you're talking
5 about.

6 MR. KOUTRAKOS: I apologize for that.
7 Q. I'm showing you Defendants' Exhibit No. 1, and
8 this is the Decree in the case of Lewis versus
9 Adams. What we have referred to as the 1972
10 Order.

11 MR. KOUTRAKOS: And I would represent
12 to the Court that Exhibit A is the same as this
13 blowup. And I didn't mean to make any
14 representation otherwise. The blowup to
15 Exhibit A to the Decree.

16 Q. And the question I asked you with respect to the
17 map is how many lots do you believe were shown in
18 Blocks 28 and 29 of Exhibit A to the Order?

19 A. Seven.

20 MR. KOUTRAKOS: Thank you.

21 RECROSS EXAMINATION

22 BY MR. BRITAIN:

23 Q. They were shown by what? Were they shown by a
24 dotted line?

25 A. Dotted lines, yes.

1 Q. They were shown by dotted lines?

2 A. Correct.

3 Q. And you referred to those as proposed lines
4 earlier?

5 A. Correct..

6 Q. No question that the 1972 Order took these
7 restrictions and made them applicable to Lots 28
8 and 29?

9 A. Correct.

10 MR. BRITTAIN: No further questions.

11 THE COURT: When did you give a title
12 opinion? Did you give a title opinion?

13 THE WITNESS: No, your Honor.

14 THE COURT: When did you get involved
15 because I'm confused as to that?

16 THE WITNESS: Mr. Dicks came to our
17 office and requested us to do a title search on
18 his property, gave us a copy of his contract, we
19 did all those things. And at some point in this
20 process after, I guess, our title work was
21 completed, it was brought to my attention about
22 this '72 Order.

23 THE COURT: Was this when he was
24 selling it to somebody?

25 THE WITNESS: When he was buying this

1 property from the Meeses, he brought the contract
2 of the Meeses to us and it said a 2.67 acre
3 tract. We did a title search, and we turned up no
4 restrictions.

5 And his question to us was, Can I make this
6 seven lots? And that's where we got into all
7 these other things.

8 THE COURT: But you didn't prepare the
9 deed at that point?

10 THE WITNESS: No.

11 THE COURT: Because the deed, when Mr.
12 Dicks bought the property, still refers back to
13 that same Culler survey that is still showing,
14 just shows the 2.67 acres not subdivided?

15 THE WITNESS: That is correct, your
16 Honor.

17 THE COURT: And I assume, since you
18 were involved, that you looked at this deed?

19 THE WITNESS: I did, your Honor.

20 THE COURT: Okay. And it does not show
21 any subdivided real estate. It shows 2.67 acres
22 and it shows the Culler Land Surveying plat
23 that's only 2.67 acres?

24 THE WITNESS: That's correct.

25 THE COURT: And that's Plaintiff's

1 Exhibit No. 12, which goes back to this old
2 Culler survey which is 1997 with one TMS number.

3 Any other questions in followup?

4 MR. BRITTAIN: None from the plaintiff.

5 THE COURT: Thank you. You may step
6 down.

7 MR. KOUTRAKOS: Thank you.

8 THE WITNESS: Thank you, your Honor.

9 MR. KOUTRAKOS: Your Honor, at this
10 time, I'd like to call Robert Dicks.

11 THE COURT: All right, Mr. Dicks. Come
12 on around to your right and place your left hand
13 on the Bible and raise your right hand and be
14 sworn or affirmed by the court reporter.

15 ROBERT DICKS,
16 of lawful age, the Witness herein, being by me
17 first duly sworn, was examined and testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. KOUTRAKOS:

21 Q. Mr. Dicks, state your name for the record,
22 please.

23 A. Robert Dicks.

24 Q. You're Thomas Dicks' brother?

25 A. Correct.

1 Q. What do you do for a living?

2 A. I'm a real estate agent.

3 Q. Where is your office located?

4 A. 1025 North Kings Highway in Myrtle Beach.

5 Q. You and your wife own some of the property
6 involved in this litigation?

7 A. That's correct.

8 Q. What do you and your wife own?

9 A. Lots 1, 2 and 3.

10 Q. What involvement did you have in -- who conveyed
11 you that property?

12 A. My brother, Tom.

13 Q. What involvement did you have in that property?

14 A. My brother approached me about a possible loan to
15 him about property that he wanted to purchase.
16 We talked about it, he made me a proposal, and my
17 wife and I agreed.

18 Q. What involvement did you have in any of the due
19 diligence that was performed?

20 A. Very little, if any.

21 Q. At the time your brother purchased the property,
22 did you go over any due diligence that he
23 performed with him?

24 A. He went over some of the information he learned
25 about the property.

1 Q. Were you happy with the due diligence that your
2 brother performed in regards to purchasing this
3 property?

4 A. I have a great deal of trust in my brother.
5 He's ten years my elder. When I graduated from
6 college I moved to Myrtle Beach. He was selling
7 real estate at the time and we became partners
8 selling real estate as a living. During that
9 time I learned that he was diligent at what he
10 did for transactions, representation for his
11 client or our clients. He showed a great deal of
12 knowledge and expertise on matters pertaining to
13 real estate. So there was some trust there.

14 We had a little bit of extra money, real
15 estate was selling good. I was still involved in
16 selling real estate. It was quite busy at the
17 time, so I saw it as a good investment.

18 Q. At the time you purchased the property or were
19 involved in your brother's purchase of the
20 property, did you have any level of comfort as to
21 whether the property could be used as seven lots?

22 A. I did.

23 Q. What was the basis of that?

24 A. Again, his expertise and his knowledge and also
25 that he shared with me his due diligence in terms

1 of Mr. Mumford. And I was aware of Mr. Mumford.
2 I had had transactions with him with other
3 clients and knew his expertise in real estate.
4 So I felt comfortable that any advice that he had
5 given Tom would be relatively accurate.

6 Q. Is there anything you would like to add with
7 respect to your involvement in this real estate
8 transaction?

9 A. No.

10 Q. Thank you.

11 THE COURT: Mr. Brittain, cross.

12 CROSS EXAMINATION

13 BY MR. BRITTAIN:

14 Q. Mr. Dicks, basically the information you got came
15 from your brother?

16 A. Correct.

17 Q. Thank you.

18 MR. BRITTAIN: No further questions.

19 THE COURT: You may step down, sir.

20 THE WITNESS: Thank you.

21 MR. KOUTRAKOS: Your Honor, I think I'm
22 done. I just want to make sure that we have in
23 evidence the big map. We have reduced versions
24 that are difficult to read. But I guess I could
25 just take, if Tommy doesn't mind, when we're

1 done, this map that's attached to this board and
2 name it, we'll do my last exhibit as that. But
3 that is the clearest copy I have.

4 THE COURT: Y'all need to get together
5 and make sure you have all the exhibits you need.

6 MR. BRITTAIN: Do you feel like coming
7 back and arguing in the morning or what do you
8 want to do?

9 MR. KOUTRAKOS: I'm game.

10 THE COURT: However you want to do it
11 is fine with me.

12 MR. BRITTAIN: Rather than try to push
13 on and argue tonight, I think we ought to come
14 back.

15 THE COURT: Mr. Koutrakos, you came the
16 longest distance.

17 MR. KOUTRAKOS: Well, I had planned to,
18 I mean, if we were done for the day I'd go home,
19 but I anticipated being here another day so it
20 doesn't bother me one way or the other.

21 THE COURT: I have tomorrow reserved
22 for y'all so it's up to y'all.

23 MR. KOUTRAKOS: I guess we could go
24 over those issues of administrative matters with
25 respect to documents at that point in time. I

1 guess you want legal arguments from us as a
2 closing?

3 THE COURT: A short closing. Legal
4 arguments and a summation would assist me.

5 MR. BRITTAIN: And everything you
6 talked about is all in evidence. I don't have a
7 problem. It's just a matter of getting it
8 marked.

9 MR. KOUTRAKOS: Like this big map, I
10 think needs to be put in. It's very difficult to
11 read some of the reduced versions we have in the
12 records.

13 THE COURT: You may leave anything in
14 here tonight that you want to. You're certainly
15 welcome to take anything as well. I'll make sure
16 the deputies lock the courtroom tonight. And you
17 may get in here as early as 8:00 or 8:15 in the
18 morning. But you don't have to come until 9:30.

19 MR. KOUTRAKOS: If you want to start at
20 9:30 that's fine with me.

21 MR. BRITTAIN: Any way you want to mark
22 them is fine with me.

23 MR. KOUTRAKOS: I want to make sure I
24 called all my witnesses. It's been a long day.
25 So tomorrow we'll take care of the administrative

1 matters and give some brief arguments.

2 THE COURT: I have a pretrial brief
3 from you. Of course you're certainly welcome to
4 supplement that if you want to.

5 Thank you very much. We are adjourned for
6 the day.

7 - - - - -

8 (Time noted: 6:08 p.m.)

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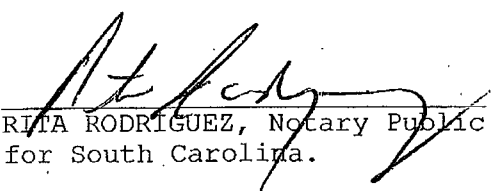
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1 STATE OF SOUTH CAROLINA :
2 COUNTY OF GEORGETOWN : SS: CERTIFICATE

3 - - - - -
4
5 I, RITA RODRIGUEZ, a Notary Public for
6 South Carolina, do hereby certify that the
7 foregoing transcript is a true and correct
8 transcript of the proceedings had before
9 Judge Cynthia Howe, Master-In-Equity, for
10 Horry County, South Carolina, at the Conway
11 County Courthouse, 1301 Second Avenue, Conway,
12 South Carolina, on Tuesday, the 12th day of
13 April, 2011.

14
15
16 
17 RITA RODRIGUEZ, Notary Public
18 for South Carolina.

19 My Commission expires October 4, 2015.
20 - - - - -
21
22
23
24
25

LONG BAY ESTATES

A RESIDENTIAL SUBDIVISION ON THE ATLANTIC OCEAN

HORRY COUNTY, S.C.

MAY 1955

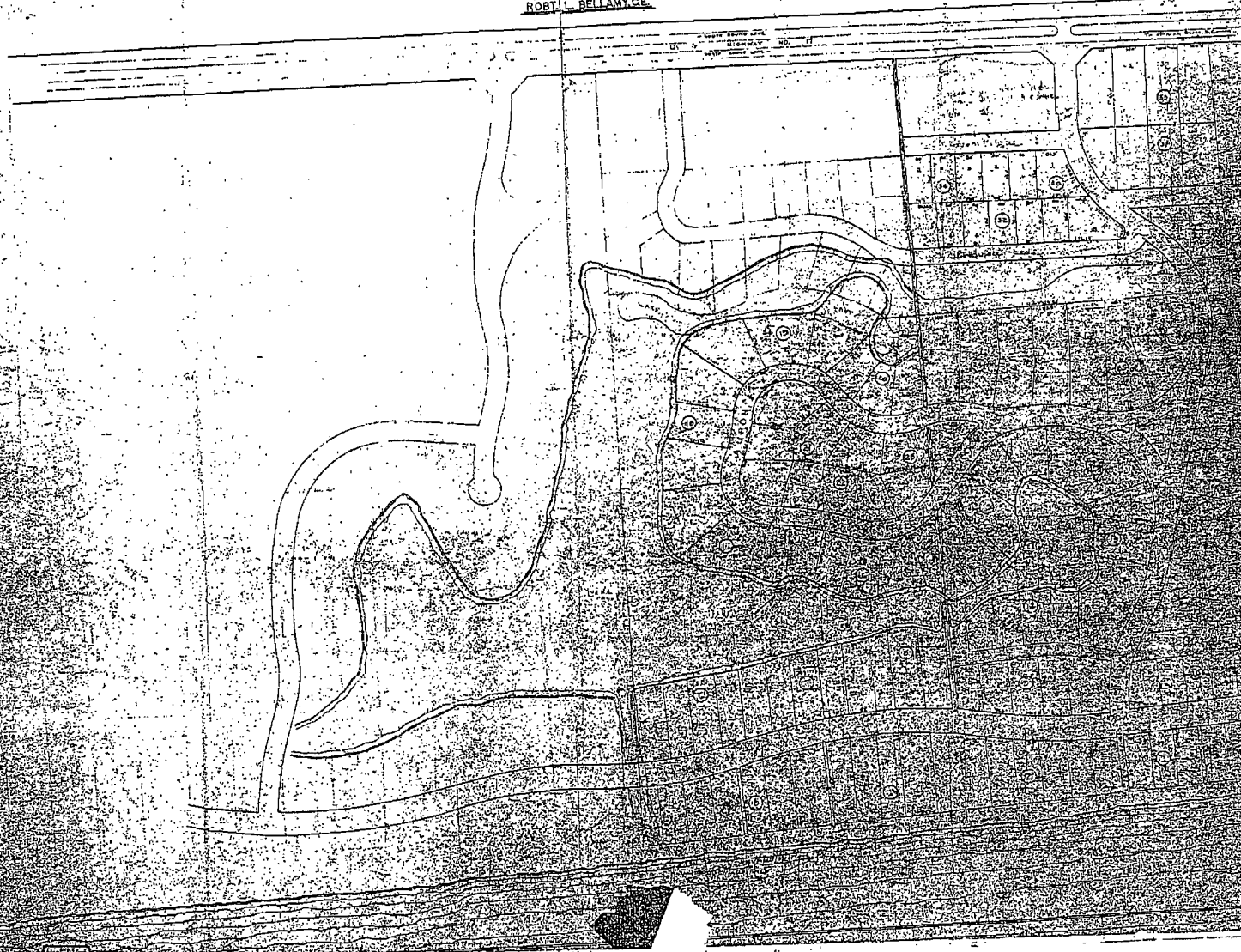
SCALE: 1"=100'

T. M. JORDAN, C.E.
ROBT. L. BELLAMY, C.E.

NOT RECORDED
10/14



Long Bay
63/65



FILED
HORRY COUNTY

STATE OF SOUTH CAROLINA) 1972 JUN 1 AM 9 31
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS

GENE F. LEWIS and CARMEN F. WARD, as Co-Executrices and Co-Trustees
Under the Last Will and Testament of Frederick W. Lewis, Deceased,

PLAINTIFFS,

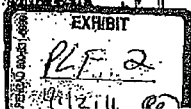
vs.

ADAMS, LEROY
BEATY, DUDLEY C.
BEEBLE, PETER and JEAN B.
BELL, LLOYD A., JR.
BELL, ROBERT B.
BERNHARD, HARRY
BESS, LOUISE L.
BISSING, PAUL G. and JOHNNIE N.
BLACKWELL, WILLIAM H.
BRANTON, JOHN A. and RUTH P.
BRANTON, NORMA M.
BROOKSHIRE, J. C.
BRYANT, PEGGY BELL
BUSTLE, JAMES A. and PHYLLIS J.
BUTLER, JAMES WE. and BETTY F.
CANNON, MARTON C.
CARON, ELEANOR BELL
CASALINA CORPORATION
CHINNES, LLOYD S. and PATRICIA P.
COOPER, SIDNEY E. and MARY F.
CRAVEN, MALCOLM H. and MARY D.
CURLEE, HENRY C. and SUE N.
DAVIS, MARY ELIZABETH T.
DUBOSE, DONALD S.
DUSENBERRY, FRANCIS C.
FLOYD, ANN BUSSEY
FLOYD, CHARLES D. and CAROLYN A.
FOGLE, RUBY HARRINGTON
FREDERICK, JOHN and OLLIE H.
GARRELL, C. D., JR.
GILBERT, HARRY M.
GINDER, JOHN W. and BETTY J.
GODFREY, JANE J.
HANNA, JANESE B.
HERSHBERGER, RICHARD E. and PAULINE P.
HINSON, ANNE MCQUEEN
HOLTZSCHEITER, EARL W. and MARY LOIS M.
HOPPER, J. S. and DORIS
HYMAN, DONALD E. and MARY J.
JOHNSTON, H. DON
JOHNSTON, JERRY A.
JONES, W. E. and ANN L.
KADISON, MARY M.
KATES, GUY S., JR. and MARJORIE C.
LIDE, LANNEAU D.
LIVINGSTON, ROGER L. and DIANA S.
LONG, JUANITA C.
SADLER, BETTY D. and DIANE S. MARTIN
MULLINIX, TED
NEELY, CLYDE C. and BETTY SUE

PALMER, R. A.
PERRY, PHILLIP E.
RANKIN, DOROTHY S.
RANKIN, O. A.
RAY, ALLEN L.
ROBERTS, GERALD D.
ROLFE, IRENE A.
ROYALS, DAGGETT O. and
ELEANOR D.
SIMPSON, R. W., JR. and
MARY H.
SISSLER, JOSEPH E.
SOUTHERN PROPERTIES CORP.,
INC.
SWANSON, WILLIAM S. and
FRANCES T.
TATARSKI, LOUIS and
PEGGY A.
THAMES, MRS. PRESTON B., III
TODD, WILLIAM J.
UPPER, EDWARD R.
VEREEN, ARTHUR B. and
LEONA O.
WALKER, NELSON R. and
SADIE M.
WALSH, JOHN J., JR.
WARD, JESSE J. and HELEN M.
WOOD, TAYLOR and JESSIE MAE
ZACHARY, JACK T. and
GERTRUDE W.,

individually and as representatives of all lot owners in Long Bay
Estates Section and also all other persons unknown, claiming any
right, title, estate, interest in or lien upon the real estate des-
cribed in the complaint herein,

DEFENDANTS.



37417

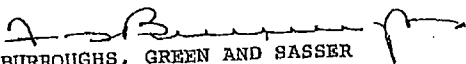
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NOTICE OF PENDENCY OF ACTION
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TO WHOM IT MAY CONCERN:

TAKE NOTICE That an action by the plaintiffs above named against the defendants above named has been filed and is pending in the Court of Common Pleas for Horry County, South Carolina, to obtain a declaratory judgment and to quiet title to areas shown as Blocks Twenty-eight (28), Twenty-nine (29), Thirty (30), Thirty-one (31), Thirty-two (32) and Thirty-three (33) and portions of Ye Olde Kings Highway as shown on a certain map of LONG BAY ESTATES recorded in Plat Book 25 at page 22, Clerk's office, Horry County, S. C.

Conway, S. C.
May 30, 1972


BURROUGHS, GREEN AND SASSER
Attorneys for Plaintiffs

11 37417

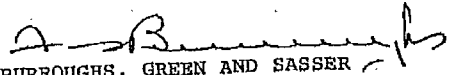
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SUMMONS
-----oOo-----

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their offices at Conway, South Carolina, within twenty days after the service thereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in this complaint.

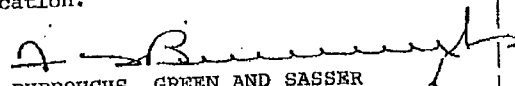
Conway, S. C.
May 30, 1972


BURROUGHS, GREEN AND SASSER
Attorneys for Plaintiffs.

-----oOo-----
TO ALL NON-RESIDENT DEFENDANTS, TO PERSONS UNKNOWN AS REFERRED TO IN THE CAPTION OF THIS CAUSE, AND TO DEFENDANTS WHOSE ADDRESSES CANNOT BE DETERMINED:

TAKE NOTICE THAT the summons in this action, of which the foregoing is a true copy, together with the complaint and the order nisi appointing Guardian ad Litem, have been filed in the office of Clerk of Court for Horry County, South Carolina, together with affidavit and order of publication.

Conway, S. C.
June 1, 1972


BURROUGHS, GREEN AND SASSER
Attorneys for Plaintiffs.

ATTEST:

R. G. HORTON
Clerk of Court
(SEAL)

37417

D0069

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

GENE F. LEWIS et al, etc.,

Plaintiffs,

vs.

LEROY ADAMS et al,

Defendants.

AFFIDAVIT

PERSONALLY appeared F. G. Burroughs who, being sworn, says that he is attorney for the plaintiffs in the above entitled cause, which is an action brought for purposes of declaratory judgment and quieting title to property; that the action is brought against certain individuals and further names them as representatives of a class. Additionally, the suit is brought against persons unknown, which might include among the defendants one or more individuals suffering under some form of legal disability and that in the event there should be any such defendant or defendants a guardian ad litem should be appointed to represent them in this action.

Deponent further believes that E. Windell McCrackin, Attorney at Law, Myrtle Beach, S. C., is a suitable and proper person to act as guardian ad litem and attorney for any such persons.

SWORN to before me this 30th

day of May, 1972.

Betty Duke Allen
Betty Duke Allen (I.S.)

Notary Public for South Carolina

My Commission Expires Nov. 3, 1977.

F. G. Burroughs
F. G. Burroughs

37417

D0070

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

GENE F. LEWIS et al, etc.,

Plaintiffs,

vs.

LEROY ADAMS et al,

Defendants.

AFFIDAVIT

PERSONALLY appeared F. G. Burroughs who, being sworn, says that the foregoing action involves persons unknown and also may include among the defendants non-residents of this State, or persons whose address is unknown to deponent. Order of publication of summons, lis pendens and order nisi appointing guardian ad litem is respectfully requested.

SWORN to before me this 30th

day of May, 1972.

F. G. Burroughs
F. G. Burroughs

Betty Duke Allen
Betty Duke Allen (L.S.)

Notary Public for South Carolina

My Commission Expires Nov. 3, 1977.

ORDER

On reading the foregoing affidavit, it is ORDERED that the summons, lis pendens, and order nisi appointing guardian ad litem be published in The Sun-News, or any other newspaper published in Horry County for three (3) successive weeks; and it is further ORDERED that in the case of non-resident defendants, copies of these papers be mailed to them at their last known address or addresses; or that personal service may be made upon them.

R. G. Horton
R. G. HORTON
Clerk of Court

Conway, S. C.
June 1, 1972.

D0071

-----OOO-----
COMPLAINT
-----OOO-----

Plaintiffs complaining of the defendants allege:

1. That the plaintiffs are the owners of the lands hereinafter referred to and described with more particularity in this complaint, and that the real estate as to which this action is brought is located in Horry County, South Carolina.

2. That the various defendants named herein are, on information and belief, owners of lots in Long Bay Estates Subdivision, Socastee Township, Horry County, South Carolina, and within Blocks One (1) through Twenty-seven (27), inclusive, as shown on various maps of Long Bay Estates Subdivision under which lots were deeded to the defendants, or to their predecessors in title. The named defendants are made parties to this action individually, and as representatives of a class constituting lot owners in Long Bay Estates Subdivision, or having an interest in or lien upon property therein, and there may be persons unknown who claim some right, title, estate, interest in or lien upon the real estate in the said subdivision.

Attached hereto as Exhibit B is a list of the named defendants and their respective properties as taken from records in office of the Auditor for Horry County.

3. That some of the named defendants, or some persons unknown, may be minors, or under some legal disability.

4. That the acreage from which Long Bay Estates Subdivision was developed was formerly owned in part by Nursery Realty Corporation and in part by Greenvale Hills Corporation, the dividing line between the two properties being generally in the area of the power line as shown on some maps of the subdivision area to extend from U. S. Highway 17 to Ocean Boulevard, with the Nursery Realty Corporation lands lying to the northeast thereof, and the Greenvale Hills Corporation lying to the southwest thereof.

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D0072

5. That the plaintiffs are successors in title to the unsold portions of the property formerly owned by Nursery Realty Corporation.

6. That plaintiffs are informed and believe that Casalina Corporation is the successor in title to the unsold portions of the area formerly owned by Greenvale Hills Corporation.

7. That as the developers opened portions of Long Bay Estates Subdivision lots were surveyed, staked out, and maps of various blocks, or combinations of blocks were made, filed for record and deeds were made thereunder.

8. That an unofficial map was made under date of May 1955 which showed a proposed lot arrangement in Blocks designated as Twenty-eight (28), Twenty-nine (29), Thirty (30), Thirty-one (31), Thirty-two (32) and Thirty-three (33), all lying within that portion of Long Bay Estates Subdivision acreage owned by the plaintiffs herein; that the said map which was, through inadvertence, and without authorization of the plaintiffs, or their predecessor in title, filed May 5, 1958, in Plat Book 25 at page 22, did not embrace in the cited blocks any lots which had actually been surveyed and staked out on the ground, and was only a tentative plan as to such area.

9. That, among other things, the map recorded in Plat Book 25 at page 22 showed an area designated as YE OLDE KINGS HIGHWAY extending from Dogwood Drive in a general southwestwardly direction through the property now or formerly of Casalina Corporation and connecting with U. S. Highway no. 17.

10. That no road was ever opened at this location, none has ever existed thereat, and there has never been any dedication or the creation of any private easement upon, over or across the area so designated.

11. That instead of YE OLDE KINGS HIGHWAY two other streets were opened, leading westwardly toward the property of Casalina Corporation, one of these being a street to the south

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D0073

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of Blocks Thirty (30), Thirty-two (32) and Thirty-four (34) as shown on the map hereinafter referred to, and the other being a street lying to the north of said blocks, which streets have actually been laid out and opened.

12. That attached hereto and by reference made a part of this complaint is a map by R. L. Bellamy, C. E., marked "Exhibit A" which shows by broken lines or shading the areas represented as Blocks Twenty-eight (28) Thirty-three (33), inclusive, on the map recorded in Plat Book 25 at page 22, and that portion of the area designated as YE OLDE KINGS HIGHWAY which was never opened.

That the said map, Exhibit A, further shows the location of the two roads actually opened and running westwardly or southwardly from Dogwood Drive to the Casalina Corporation property line, as well as the official survey and subdivision of Blocks Thirty (30), Thirty-two (32) and Thirty-four (34).

That no official map has been made for the areas shown on Plat Book 25 at page 22 as comprising Blocks Thirty-one (31), Thirty-two (32) and Thirty-three (33).

13. That there is attached to the plat recorded in Plat Book 25 at page 22 a typewritten set of restrictions, being generally of a type and character used in conveyances of lots in Long Bay Estates Subdivision, under official maps, but said declaration of restrictions, according to the expressed terms thereof, applied only to Blocks One (1) through Twenty-seven (27), inclusive, hence were not intended to affect any of the remaining portion of the Long Bay Estates Subdivision which is now owned by plaintiffs.

14. That plaintiffs have been informed that the appearance of the map in Plat Book 25 at page 22 may constitute a cloud on the title of these plaintiffs to that portion of their property shown on said map as being traversed by YE OLDE KINGS HIGHWAY southwestwardly from Dogwood Drive and to proposed area and use plans of

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D0074

plaintiffs as to that portion of their property bounded generally to the northwest by U. S. Highway 17; to the northeast by property now or formerly of S. C. State Commission of Forestry; to the southeast by Blocks Twenty-four (24), Twenty-five (25) and Twenty-seven (27); and to the southwest by power line easement area or property of Casalina Corporation.

15. That, among other things, plaintiffs have caused to be subdivided, staked out, and proposed to offer for sale as residential property the areas indicated as Blocks Thirty (30), Thirty-two (32) and Thirty-four (34) in heavy lines on Exhibit A; and that there are no official plans for development and use requirements in the remaining portions of plaintiffs' property which were within the area shown as Blocks Twenty-eight (28)-Thirty-three (33), inclusive, on the map in Plat Book 25 at page 22.

16. That plaintiffs allege there has never been any opening of the portion of YE OLDE KINGS HIGHWAY extending southwestwardly from Dogwood Drive as shown on the map recorded in Plat Book 25 at page 22; that no road or way exists at such location; that there has never been any dedication, easement or acceptance of said area as a public way or street; and that adequate streets or ways have been provided in lieu thereof as shown on Exhibit A.

17. That plaintiffs bring this action for purposes of quieting title to the area aforesaid, to-wit: Bounded generally to the northwestward by U. S. Highway 17; to the northeastward by S. C. State Commission of Forestry; to the southeastward by Blocks Twenty-four (24), Twenty-five (25) and Twenty-seven (27) on the map in Plat Book 25 at page 22; and southwestwardly by power line easement or property now or formerly of Casalina Corporation, in the following particulars and respects, to-wit:

(a) That the area shown as YE OLDE KINGS HIGHWAY leading southwestwardly from Dogwood Drive to property line of Casalina Corporation is not any public way, street or area and that none

37 17

D0075

of the defendants or any other persons have any interest in or claim to same by way of private easement or otherwise.

(b) That the area shown as Blocks Thirty (30), Thirty-two (32) and Thirty-four (34), in heavy lines, on Exhibit A hereto attached is the official subdivision of that area bounded generally to the northeast by Dogwood Drive; to the northwest and southeast by unnamed streets; and to the southwest by power line easement or property of Casalina Corporation, same to be used for purposes of residential subdivision in general keeping with the development of Blocks One (1) through Twenty-seven (27), Long Bay Estates.

(c) That the area lying northwest of Blocks Twenty-four (24) and Twenty-five (25) of Long Bay Estates Subdivision, being bounded generally on the northwest by unnamed street; northeast by Dogwood Drive; southeast by Blocks Twenty-four (24) and Twenty-five (25); and southwest by power line easement or property now or formerly of Casalina Corporation is reserved for further development.

(d) That the area shown or designated on the map in Plat Book 25 at page 22 as having been embraced within Blocks Thirty-one (31), Thirty-two (32) and Thirty-three (33) thereon is also reserved for future development and subdivision or resubdivision, and that same is not affected by the declaration of restrictions which was attached to Plat Book 25 at page 22, which declaration related only to Blocks One (1)-Twenty-seven (27), inclusive, and that the area shown on the map in Plat Book 25 at page 22 as being Blocks Thirty-one (31), Thirty-two (32) and Thirty-three (33) may be subdivided and used for residential or commercial purposes, or combinations thereof.

18. That while plaintiffs allege that none of the defendants have any right, title, interest in, lien or claim upon the area bounded by U. S. Highway 17, by S. C. State Commission of Forestry, by Blocks Twenty-four (24), Twenty-five (25) and Twenty-seven (27), and by power line right-of-way or Casalina Corporation,

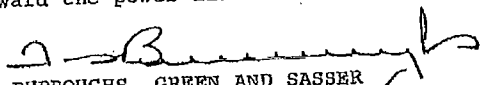
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D0076

they bring this action to remove any possible cloud on title to said area caused by the aforesaid recording in Plat Book 25 at page 22, and unless their right to such relief is opposed by one or more of the defendants they waive any costs as to any of the defendants who do not oppose their right to the relief sought herein.

WHEREFORE PLAINTIFFS PRAY that this Court may issue its declaratory judgment that the plaintiffs are seized and possessed of the area generally bounded on the northwest by U. S. Highway 17; on the northeast by S. C. State Forestry Commission; on the southeast by Blocks Twenty-four (24), Twenty-five (25) and Twenty-seven (27); and on the southwest by power line easement or property of Casalina Corporation, now or formerly, and that the defendants have no right, title, interest, estate or claim therein except as to that portion of Dogwood Drive which crosses the area and leads from U. S. Highway 17 so as to provide access to the areas within Blocks One (1) - Twenty-seven (27), inclusive, and as to the two roads or streets which have been opened leading from Dogwood Drive in a southwestwardly direction toward the power line easement.

Conway, S. C.
May 30, 1972.


BURROUGHS, GREEN AND SASSER
Attorneys for Plaintiffs

37417

D0077

STATE OF FLORIDA

COUNTY OF DADE

PERSONALLY appeared CARMEN F. WARD who, being sworn, says that she is one of the plaintiffs above named and in their behalf, in their official capacities, makes this verification: That the allegations of the complaint are true, except any such matters as are alleged on information and belief, and as to those deponent believes same true.

SWORN to before me this 1st

Carmen F. Ward

day of June, 1972.

Carmen F. Ward

F. H. Kimmel (L.S.)
Notary Public for Florida
My Commission Expires:

This instrument prepared by
W. J. McLEOD, JR., ATTORNEY
117 Aragon Ave., Coral Gables, Florida 33134.
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES FEB. 13, 1975
GENERAL INSURANCE UNDERWRITERS, INC.

37417

D0078

ORDER NISI APPOINTING GUARDIAN AD LITEM

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On reading the pleadings in this cause and affidavit of plaintiffs' attorney, it is ORDERED that E. Windell McCrackin be, and he hereby is, appointed as Guardian ad Litem for any defendants in this action who may be suffering under any form of legal disability. Notice is hereby given to any person under legal disability who may be a defendant in this cause, and to the person or persons having custody of any such individuals, that unless you apply for and obtain the appointment of a Guardian ad Litem to represent such defendants within twenty days after service of copy of this order upon you, exclusive of the day of service, then the above named E. Windell McCrackin shall be authorized to appear and act in behalf of you in this cause.

R. G. Horton
R. G. HORTON
Clerk of Court

(S E A L)

Conway, S. C.

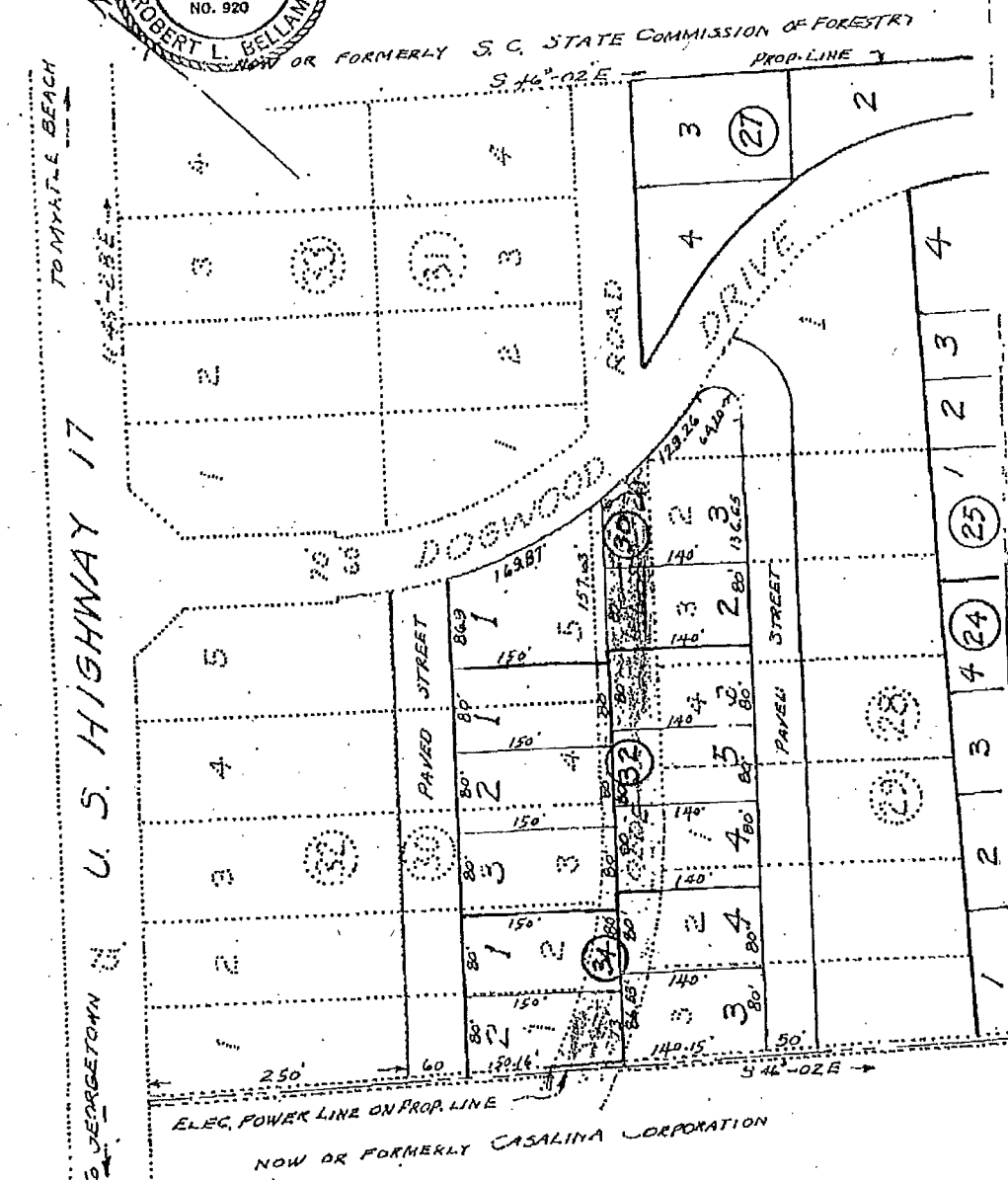
June 1, 1972.

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EXHIBIT "A"



- ① BLOCKS 30, 32, & 34 SHOWN BY SOLID LINES FROM MAP OF DECEMBER 21, 1960.
- ② BLOCKS 28, 29, 30, 31, 32 & 33. AS SHOWN IN PLAT BOOK 25 AT PAGE 22 REPRESENTED BY DOTTED LINES.
- ③ PORTIONS OF BLOCKS 24, 25 & 27 SHOWN BY SOLID LINES.
- ④ SHADED AREA SHOWS A PORTION OF YE OLDE KINGS ROAD (OLDE HIGHWAY IN THE COMPLAINT) FROM PLAT BOOK 25 AT PAGE 22.

A COMPARATIVE LOCATION MAP OF PROPERTY
 IN SOCASTEE TOWNSHIP, HORRY COUNTY, S.C.
 Prepared for: LONG BAY ESTATES SUBDIVISION
 Scale: 1"=125'
 Date: June 1, 1972
 Robert L. Bellamy

D0080

EXHIBIT B

<u>Name</u>	<u>Lot</u>	<u>Block</u>
LeRoy Adams	2	9
Dudley C. Beaty	2	7
Peter & Jean B. Beeble	1	22
Lloyd A. Bell, Jr.	2	13
Robert B. Bell	2	13
Harry Bernhard	1	27
Louise L. Bess	4	9
Paul G. & Johnnie N. Bissing	1	21
William H. Blackwell	1	26
John A. & Ruth P. Branton	1	14
	2	14
	3	15
Norma M. Branton	4	15
J. C. Brookshire	2	1
Peggy Bell Bryant	2	13
James A. & Phyllis J. Bustle	1	7
James W. & Betty F. Butler	3	9
Marion C. Cannon	2	8
	5	9
Eleanor Bell Carson	2	13
Casalina Corporation	Acreage	
Lloyd S. & Patricia P. Chinnes	3	16
Sidney E. & Mary F. Cooper	2	17
Malcolm H. & Mary D. Craven	1	5-A
	3	6
	2	26
	3	26
Henry C. & Sue N. Curlee, Jr.	1	5
Mary Elizabeth T. Davis	4	21
Donald S. DuBose	3	5-A
Francis C. Dusenberry	1	8
Ann Bussey Floyd	2	12
Charles D. & Carolyn A. Floyd	5	12
Ruby Harrington Fogle	4	6
John & Ollie H. Frederick	3	13

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D0081

<u>Name</u>	<u>Lot</u>	<u>Block</u>
C. D. Garrell, Jr.	4	17
	2	22
Harry M. Gilbert, et al.	2	18
John W. & Betty J. Ginder	2	21
Mrs. Jane J. Godfrey	1	2
Mrs. Janese B. Hanna	1	23
	2	23
	3	23
Richard E. & Pauline P. Hershberger	2	9
Anne McQueen Hinson	1	15
Earl W. & Mary Lois M. Holtzscheiter	1	16
J. S. & Doris Hopper	5	1
Donald E. & Mary J. Hyman	1	18
H. Don Johnston	4	7
	4	8
Jerry A. Johnston	3	8
W. E. & Ann L. Jones	3	7
Mary M. Kadison	3	10
Guy S., Jr. & Marjorie C. Kates	3	14
Lanneau D. Lide	2	5
	3	5
Roger L. & Diana S. Livingston	1	13
Juanita C. Long	4	5
Betty D. Sadler & Diane S. Martin	4	12
Ted Mullinix, et al.	3	18
Clyde C. & Betty Sue Neely	1	12
Mr. R. A. Palmer	4	2
Phillip E. Perry	4	22
Dorothy S. Rankin	5	2
O. A. Rankin	2	5-A
Allen L. Ray	4	1
Gerald D. Roberts	4	10
Irene A. Rolfe	2	6
Daggett O. & Eleanor D. Royals	3	2

D0082

<u>Name</u>	<u>Lot</u>	<u>Block</u>
R. W. Simpson, Jr. & Mary H.	2	15
Joseph E. Sissler	3	1
Southern Properties Corp., Inc.	1	17
Wm. S. & Frances T. Swanson	3	17
Louis & Peggy A. Tatarski	1	9
Mrs. Preston B. Thames, III	2	2
Wm. J. Todd	3	21
Edward R. Upper	3	12
Arthur B. & Leona O. Vereen	1	6
Nelson R. & Sadie M. Walker	1	10
	2	10
John J. Walsh, Jr., et al.	1	25
Jesse J. & Helen M. Ward	2	16
Taylor & Jessie Mae Wood	3	24
Jack T. & Gertrude W. Zachary	3	22

37417

D0083

23428

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS

NOV 21 1972

HORRY COUNTY

GENE F. LEWIS and CARMEN F. WARD,
as Co-executrices and Co-Trustees
Under the Last Will and Testament
of Frederick W. Lewis, Deceased,

Plaintiffs,

vs.

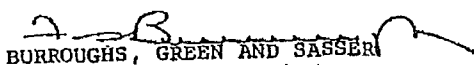
ADAMS, LEROY et al,

Defendants.

NOTICE OF FILING OF
MASTER'S REPORT

NOTICE IS HEREBY GIVEN that the Master's Report in the
above cause was filed this day with the Clerk of Court for Horry
County, South Carolina, copy of said Master's Report being hereto
attached.

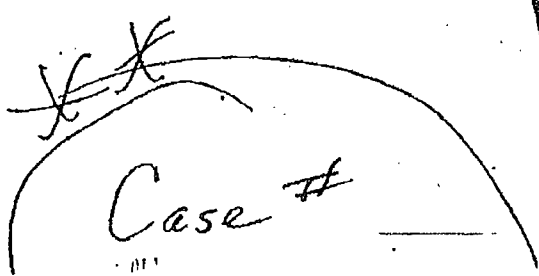
Unless you, through counsel, serve written exceptions to
this Master's Report on the undersigned at their office at 207 Beatty
Street, Conway, South Carolina, within ten days after service of this
notice upon you, exclusive of the date of such service, the plain-
tiffs will, through their attorney, apply to the Court of Common
Pleas for a decree confirming said report.


BURROUGHS, GREEN AND SASSER
Attorneys for Plaintiffs

Conway, S. C.

November 21, 1972.




Case #

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS

GENE F. LEWIS and CARMEN F. WARD, as Co-Executrices and Co-Trustees
Under the Last Will and Testament of Frederick W. Lewis, Deceased,

PLAINTIFFS,

vs.

ADAMS, LEROY
BEATY, DUDLEY C.
BEEBLE, PETER and JEAN B.
BELL, LLOYD A., JR.
BELL, ROBERT B.
BERNHARD, HARRY
BESS, LOUISE L.
BISSING, PAUL G. and JOHNNIE N.
BLACKWELL, WILLIAM H.
BRANTON, JOHN A. and RUTH P.
BRANTON, NORMA M.
BROOKSHIRE, J. C.
BRYANT, PEGGY BELL
BUSTLE, JAMES A. and PHYLLIS J.
BUTLER, JAMES W. and BETTY F.
CANNON, MARION C.
CARSON, ELEANOR BELL
CASALINA CORPORATION
CHINNES, LLOYD S. and
PATRICIA P.
COOPER, SIDNEY E. and MARY E.
CRAVEN, MALCOLM H. and MARY D.
CURLEE, HENRY C. and SUE N.
DAVIS, MARY ELIZABETH T.
DUBOSE, DONALD S.
DUSENBURY, FRANCIS C.
FLOYD, ANN BUSSEY
FLOYD, CHARLES D. and CAROLYN A.
FOGLE, RUBY HARRINGTON
FREDERICK, JOHN and OLLIE H.
GARRELL, C. D., JR.
GILBERT, HARRY M.
GINDER, JOHN W. and BETTY J.
GODFREY, JANE J.
HANNA, JANESE B.
HERSHBERGER, RICHARD E. and
PAULINE P.

HINSON, ANNE McQUEEN
HOLTZSCHEITER, EARL W. and
MARY LOIS M.
HOPPER, J. S. and DORIS
HYMAN, DONALD E. and MARY J.
JOHNSTON, H. DON
JOHNSTON, JERRY A.
JONES, W. E. and ANN L.
KADISON, MARY M.
KATES, GUY S., JR. and MARJORIE C.
LIDE, LANNEAU D.
LIVINGSTON, ROGER L. and DIANA S.
LONG, JUANITA
MARTIN, DIANE S.
MULLINIX, TED
NEELY, CLYDE C. and BETTY SUE
PALMER, R. A.
PERRY, PHILLIP E.
RANKIN, DOROTHY S.
RANKIN, O. A.
RAY, ALLEN L.
ROBERTS, GERALD D.
ROLEE, IRENE A.
ROYALS, DAGGETT O. and ELEANOR D.
SADLER, BETTY D.
SIMPSON, R. W., JR. and MARY H.
SISSLER, JOSEPH E.
SOUTHERN PROPERTIES CORP., INC.
SWANSON, WILLIAM S. and FRANCES T.
TATARSKI, LOUIS and PEGGY A.
THAMES, MRS. PRESTON B., III
TODD, WILLIAM J.
UPPER, WILLIAM J.
VERSEN, ARTHUR B. and LEONA O.
WALKER, NELSON R. and SADIE M.
WALSH, JOHN J., JR.
WARD, JESSE J. and HELEN M.
WOOD, TAYLOR and JESSIE MAE
ZACHARY, JACK T. and GERTRUDE W.

individually and as representatives of all lot owners in Long Bay
Estates Section and also all other persons unknown, claiming any
right, title, estate, interest in or lien upon the real estate
described in the complaint herein.

DEFENDANTS.

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MASTER'S REPORT

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PRELIMINARY NOTE: The above named defendants (other than for the defendant Norma M. Branton, who had conveyed her interest in the land formerly owned by her in Long Bay Estates Section) except for Casalina Corporation are also CROSS-DEFENDANTS on the cross-complaint of Casalina Corporation, which answered, counter-claimed against the plaintiffs and stated cause of action on cross-complaint against its co-defendants, all of which will more fully be stated in separate findings of fact as to the cross-action of Casalina Corporation.

-----oOo-----

Pursuant to a general order of reference issued by Honorable William L. Rhodes, Jr., Presiding Judge, under date of November 9, 1972, a reference was held before me on the date of this report.

Appearances are listed separately at the conclusion of the report.

Broadly stated there are two principal issues raised by the pleadings:

- The first of these has to do with the rights of the parties in an area shown as YE OLDE KING'S ROAD on the map hereinafter referred to.

The second issue is whether the entire area shown on the same map is confined to use as a restricted residential subdivision and the effect of restrictive covenants which were filed along with the map.

The plaintiffs' complaint is confined to the area shown on the map hereafter referred to (and on other maps) as being generally bounded on the northwest by U. S. Highway no. 17; on the northeast by S. C. State Forestry Commission; on the southeast by Blocks 24, 25 and 27, Long Bay Estates; and on the southwest by power line easement or property of Casalina Corporation.

Because the plaintiffs' describe one area in their complaint, which they allege to be their property, while the defendant Casalina Corporation describes another tract in its cross-complaint, which it alleges to be its property, with the exceptions noted or referred to in its cross-complaint, I have concluded that it will be better to make separate findings of fact, conclusions of law, and recommendations as to the issues arising out of the allegations of the complaint and those arising out of the allegations of the cross-complaint.

Based on testimony taken before me, stipulations of counsel appearing, and the documentary evidence introduced, including records of deeds and maps, which will not be set out in detail in this report, I find, hold and recommend:

FINDINGS OF FACT AS TO LEWIS ESTATE LANDS
(THE PLAINTIFFS' CAUSE OF ACTION)

1. There is recorded in Plat Book 25 at page 22, Clerk's office, Horry County, a map prepared by T. M. Jordan, C. E. and R. L. Bellamy, C. E. dated May 1955, and filed on May 5, 1958. This is captioned "Long Bay Estates, a residential subdivision on the Atlantic Ocean."

Part of the legend on this map states "distances are scaled and are subject to change when field survey is completed. Blocks 1, 2 and 9 surveyed."

Attached to this map is a list of restrictions which specifically state that they are applicable only to Blocks 1 through 27 as shown on the plat and these restrictions, among other things, state "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof."

2. The lands developed by the plaintiffs and their predecessors-in-title (for convenience hereafter sometimes referred to as the Lewis Estate lands) adjoin the lands developed by the

cross-complainant Casalina Corporation, and its predecessors-in-title (hereafter sometimes for convenience designated as Casalina Corporation lands), the boundary line between the two parcels being the center line of a certain power line easement extending from U. S. Highway no. 17 to what is shown on map as "utility lot" and the said boundary line continuing on same course to the Atlantic Ocean. The Blocks 1 through 27, referred to in the restrictions or protective covenants, lie in part on the Lewis Estate lands and in part on the Casalina Corporation lands.

3. All of the property on the Lewis Estate lands' side of the common boundary line is shown on the map recorded in Plat Book 25 at page 22 as being divided into lots and blocks, including additional Blocks numbered 28, 29, 30, 31, 32 and 33 thereon, which are shown within that portion of the plaintiffs' land area described on the first page of this report.

4. On the Casalina Corporation side of the common boundary this is not the case, only a portion of that property being shown as subdivided into lots and blocks, the rest of it being undeveloped according to the map.

5. On the map in 25 at 22 there is depicted a road or way designated as "YE OLDE KING'S ROAD" located roughly parallel to U. S. Highway no. 17, and running generally across the Lewis Estate land from the boundary of the Forestry Commission property in a southwestwardly direction and extending on across the Casalina Corporation lands.

6. Other maps of Long Bay Estates do not show "YE OLDE KING'S ROAD" and instead, on the Lewis Estate side of the boundary there are two parallel roads shown, one represented as being sixty (60) feet in width lying to the northwest of Blocks 30, 32 and 34 as shown on map in Plat book 53 at page 79-A and another of fifty (50) feet in width on the southeast of those blocks. These roads run southwestwardly from Dogwood Drive to the Lewis-Casalina boundary.

7. The testimony establishes that "YE OLDE KING'S ROAD" has never been opened and that there is no road, street or way of any kind within the limits of the area shown as "YE OLDE KING'S ROAD" on the map in Plat Book 25 at page 22.

The two roads on the Lewis Estate lands referred to above have been established and opened and are shown as paved streets on the map attached to plaintiffs' complaint.

8. The restrictions or protective covenants recorded along with the map in 25-22 expressly state that they are limited to Blocks 1 - 27, inclusive, and there have been no conveyances of any lots beyond Block 27 subject to such restrictions.

9. Counsel have stipulated:

That, as to the Lewis Estate lands, Blocks 30, 32 and 34 as shown on the Bellamy map recorded in Book 53 at page 79-A are declared to be residential in character and subject to restrictions of the same general type as those stated in the declaration recorded in Plat Book 25 at page 22 as being applicable to Blocks 1 - 27, inclusive, and also that the area lying between the rear of "old" Blocks 24 and 25 and the 50-foot "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement, or for combination with abutting portions of the lots in Block 24 and 25.

That the remaining lands in the portion of the Lewis Estate property under consideration here are free of any restrictions or plan of development.

10. E. Windell McCrackin, Esquire, Attorney and Guardian ad Litem for any persons under disability, did not enter in this stipulation, but asks that the rights of any such persons be protected by the Court, in any findings of fact or conclusions of law which might be made.

11. The aforesaid stipulations are fair to all parties concerned, equitable, and are approved.

CONCLUSIONS OF LAW AS TO THE LEWIS ESTATE LANDS

(THE PLAINTIFFS' CAUSE OF ACTION)

1. The area shown as YE OLDE KING'S ROAD within the boundaries of the Lewis Estate lands has never been dedicated or accepted as a public road or street and it is not subject to any private easement in favor of the defendants or any of them. Title to that area is vested in the plaintiffs free and clear of any right, title, estate or interest in said area by the defendants or by any other persons, except for the restriction as to use thereon in that portion of YE OLDE KING'S ROAD lying within the new Blocks numbered 30, 32 and 34, per Bellamy map of December 21, 1960, Plat Book 53, page 79-A, Clerk's office, Horry County, as to which area plaintiffs' stipulation is set out in the next numbered paragraph.

2. The declaration of restrictions or protective covenants recorded along with the plat in Plat Book 25 at page 22 expressly limits those restrictions to the residential lots shown within Blocks 1 - 27, inclusive. Such declaration negates an implicit extension of the restrictions or protective covenants outside of the specified blocks, and although defendants have alleged representations in sales of property, and have relied on the "residential subdivision" legend on the map, no proof of these allegations was offered and so I find and hold that the portion of the plaintiffs' property with which their action concerns itself is not subject to any restrictions or protective covenants beyond Block 27.

It should be pointed out, however, that this finding is modified by the agreement of the plaintiffs, submitted to this Court for approval that Blocks 30, 32 and 34 (Plat Book 53, page 79-A) should be restricted to residential purposes.

3. Blocks 30, 32 and 34 as shown on "Exhibit A" and as shown on the Bellamy map recorded in Book 53 at page 79-A are

declared to be residential in character and subject to restrictions of the same type and character as those stated by the declaration recorded in Plat Book 25 at page 22 as being applicable to Blocks 1 - 27, inclusive.

In like manner the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost "paved street" are subject to such residential restrictions, but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25. The restrictions uniformly used in this area and the declaration recorded in 25 at 22 reserved to grantor the right to change boundary lines and building lines as to any unsold lots in any event.

The agreement of the plaintiffs to so restrict the areas described or identified above gives further assurance to the defendants who are owners of lots in Blocks 1 - 27, inclusive. Such an agreement is equitable and should be approved.

The above areas have been indicated as "residential" and as "residential (with right of revision)" on the copy of the map attached to this report.

4. The sixty-foot PAVED STREET lying to the northwest of and abutting on Blocks 30, 32 and 34 and the fifty-foot PAVED STREET lying to the southeast of said Blocks, which streets extend in a general southwestwardly direction from Dogwood Drive are public streets.

5. The remaining lands in the portion of the Lewis Estate property under consideration here are free of any restrictions or plan of development.

6. DOGWOOD DRIVE is also a public street.

7. No costs should be taxed by or against the plaintiffs.

8. The foregoing conclusions do not in any manner affect the property which is the subject of the cross-complaint of Casalina Corporation in its area, same being separately treated in the following portion of this report.

9. It is recommended that as to the Lewis Estate lands a decree incorporating these findings of fact and conclusions of law be issued, and that the Court direct the recording of one of the maps showing the restricted and unrestricted portions of said Lewis Estate lands as established by the map which is attached to this report.

FINDINGS OF FACT
LANDS OF CASALINA CORPORATION
(THE CROSS ACTION OF CASALINA CORPORATION)

1. This action was initiated by plaintiffs to obtain a decree establishing their rights and those of the defendants named in the complaint (all of whom, other than Casalina Corporation and Norma M. Branton, are also designated as cross-defendants in Casalina Corporation's pleadings and in the caption of this report) with respect to a portion of the property shown on Plat Book 25, p. 22, Office of the Clerk of Court of Horry County, identified as "LONG BAY ESTATES, A Residential Subdivision on the Atlantic Ocean, Horry County, S. C.," by T. M. Jordan, C. E., and Robt. L. Bellamy, C.E., dated May 1955 and recorded May 5, 1958. Pasted to the plat (which bears the recording stamp) is a list of restrictions expressly applicable to "all lots in Blocks 1 through 27," though there are several other blocks shown on the plat as well as a large area not subdivided on the plat, some of the latter of which is not owned by any of the parties to this action. The restrictions expressly reserve the right to the "Grantors" to change the boundary and building lines of unsold lots.

2. Plaintiffs claim title to certain blocks as successors to Nursery Realty Corporation. One of the defendants, Casalina Corporation, filed an answer (a) admitting the allegations of the complaint and joining in plaintiffs' prayer for relief; (b) alleging ownership of Blocks 19 and 20, of a part of the park between Blocks 1 and 2, of a part of the utility lot between Blocks 15 and 16, the boat and the community landings, and of the land not subdivided on the plat but which is embraced in the description set forth below; and (c) counterclaiming against plaintiffs and cross-complaining against the other defendants except Norma M. Branton

for an adjudication of the rights of the parties with respect to this property. The description referred to is derived from deeds by Harold C. and Helen S. Lewis to Hewlett W. Lewis, Pauline L. Sherman, and Roscoe V. Lewis (recorded in Deed Book 11, p. 118), by these grantees to Greenvale Hills Corporation (recorded in Deed Book 129, p. 143), and by that corporation to Casalina Corporation (recorded in Deed Book 320, p. 280), and is as follows:

All grantor's (Greenvale Hills Corporation's) right, title and interest in and to the following land, as described in deed to grantor recorded in Deed Book 129, p. 143:

All that certain tract, piece or parcel of land situate and being in Socastee Township, Horry County, being more particularly described as follows:

Beginning at a concrete monument in the southeastern edge of U. S. Highway #17 at a distance of 524 feet southwest of the center of a road leading into the Long Bay Estates Property and running thence with the edge of said highway south 46 degrees 28 minutes west 890 feet to a corner in highway right-of-way line, thence south 43 degrees 32 minutes east 2460 feet more or less to the high water mark of the Atlantic Ocean, thence with the high water mark of the Atlantic Ocean north 44 degrees 41 minutes east 996 feet to a corner in the high water mark of said ocean, thence north 46 degrees 2 minutes west 43 feet more or less to a concrete monument, thence continuing north 46 degrees 2 minutes west 2386 feet to the point of beginning at U. S. Highway #17.

The above described tract of land contains 52.9 acres.

Together with all the right, title and interest of the grantor in the strand of the Atlantic Ocean lying in front of and adjacent to said property and all the right, title and interest of the grantor to the hereinabove mentioned highway running adjacent to said property, to the center line of said highway.

Grantor's right, title, and interest being in that portion of Long Bay Estates (as shown on map recorded in Plat Book 25, p. 22) embraced within the above description, less portions thereof heretofore conveyed by grantor in deeds (listed at this point in the description in the deed by Greenvale Hills Corporation to Casalina

Corporation, each of which deeds conveyed lots in the subdivided areas shown in Plat Book 25, p. 22).

And being in particular:

Undivided portions of said land (including landings and utility lots), plus

The following lots shown in said map (Plat Book 25, p. 22) and in other maps as indicated:

(Various lots and blocks which Casalina Corporation has subsequently sold)

Block 19, Lots 1, 2 and 3

Block 20, Lots 1, 2 and 3

PLUS, all land and interests therein acquired by grantor by said deed recorded in Deed Book 129, p. 143, which may be mistakenly excepted therefrom above by reason of typographical or other error;

PLUS, all grantor's rights (including, but not limited to, reversionary rights, rights of re-entry, and rights to enforce restrictive and other covenants and conditions) contained in any conveyance heretofore made by grantor or otherwise applicable to such land and enforceable by grantor or its successors and assigns;

PLUS, the right and power to make and execute any correction deeds that might appear in the future to be appropriate with respect to any conveyance heretofore made by grantor as above listed;

PLUS, any and all other rights and interests in the land so acquired by the grantor, the same as if the grantee herein (Casalina Corporation) had been the grantee in the conveyance to the grantor.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the same premises belonging, or in any wise incident or appertaining thereto.

3. Following Casalina Corporation's answer, counterclaim, and cross-complaint, the following cross-defendants, represented by John C. Thompson, Esq., and by the law firm of Stevens & Holt, filed an answer to Casalina's cross-complaint and a cross-complaint of their own against Casalina Corporation, to which the latter duly replied (for simplicity, "cross-defendants," as used in this report, include only those designated as such in the caption of Casalina Corporation's pleadings and of this report):

Bell, Lloyd A., Jr.,
Bissing, Johnnie N. and Paul G.
Butler, Betty F. and James W.
Chinnes, Lloyd S. and Patricia P.

Cooper, Mary F. and Sidney E.
Curlee, Henry C. and Sue N.
Davis, Mary Elizabeth T.
Gilbert, Harry M.

Ginder, Betty J. and John W.
Holtzscheiter, Earl W. and Mary Lois M.
Hyman, Donald E. and Mary J.
Livingston, Diana S. and Roger L.
Perry, Phillip E.
Rolfe, Irene A.
Simpson, Mary M. and R. W., Jr.,
Southern Properties Corp., Inc.
Swanson, Frances T. and William S.
Vereen, Arthur B. and Leona O.

Walker, Nelson R. and
Sadie M.
Walsh, John J., Jr.
Ward, Helen M. and
Jesse J.
Wood, Jessie Mae and
Taylor
Zachary, Gertrude and
Jack T.

4.a. The following cross-defendants filed general denials:

Palmer, R. A., represented by Willcox, Hardee, Palmer, O'Farrell,
McLeod & Buyck, P.A.
Rankin, Dorothy S., in pro per
Rankin, O. A., in pro per

b. Prior to the institution of this action, the following defendants conveyed Long Bay Estates lots formerly owned by them and were therefore erroneously made parties: Leroy Adams and Norma M. Branton. As pointed out above, Casalina Corporation did not make Norma M. Branton a cross-defendant.

c. E. Windell McCrackin, Esq., was duly appointed guardian ad litem for any unknown claimants who may be under age or other legal disability and filed an answer submitting the interests of such persons to the protection of the Court.

5. All cross-defendants except those listed in paragraphs 3 and 4 are in default, as shown by affidavit of Casalina Corporation's attorney, supported by affidavits of service and publication, all of which are filed in the record of this case.

6. Since this report is consented to by all cross-defendants who are not in default, except Leroy Adams and except those unknown parties represented by said guardian ad litem, it is unnecessary to set forth in detail the issues presented by the pleadings. But in order to place this report in intelligible perspective, the contentions may be briefly stated as follows: Casalina Corporation agrees that the restrictions contained in Plat Book 25, p. 22, are applicable to Blocks 19 and 20 and that the park, utility lot, and community landings mentioned in paragraph 2 are subject to such servitudes in favor of cross-defendants and their successors

in title as exist under the law of this State in favor of purchasers of lots in platted subdivisions, but contends that it has the right to devote all the other property embraced in the foregoing description (that is, that portion of Casalina Corporation's property which is not subdivided on the plat) to any lawful use, residential (single or multiple) or commercial, and that neither plaintiffs nor any of the cross-defendants have any right or interest, by way of easement or otherwise, to or in what is shown on said plat as "Ye Olde Kings Road," which, in fact, exists only on paper--that is, on the plat. In short, Casalina Corporation contends that only Blocks 1 through 27 constitute the "residential subdivision" contemplated by said plat. On the other hand, the cross-defendants (explicitly in the pleading of those mentioned in paragraph 3, and impliedly by the general denials mentioned in paragraph 4b) claim that the Plat Book 25, p. 22, restrictions apply to all of Casalina Corporation's property embraced in said plat and that they have an easement in "Ye Olde Kings Road."

Plaintiffs and the non-defaulting cross-defendants (other than those represented by the guardian ad litem) having consented to the foregoing findings and to the following conclusions a through g adjudicating their conflicting contentions, I therefore make the following

CONCLUSIONS OF LAW AS TO CASALINA CORPORATION'S CROSS-ACTION:

- a. Casalina Corporation's cross-complaint should be dismissed as to Leroy Adams (for the reason stated in paragraph 4b).
- b. Casalina Corporation is vested of record with title to the property described in paragraph 2.
- c. Casalina Corporation's title is unaffected by the depiction on said plat of "Ye Olde Kings Road, which is hereby declared to be non-existent.
- d. Blocks 19 and 20 shall be subject to the Plat Book 25, p. 22, restrictions, subject, however, to the right reserved in

these restrictions to change building and boundary lines. The utility lot, the boat and community landings, and that portion of the park owned by Casalina Corporation are subject to such servitudes in favor of cross-defendants and their successors in title as exist under the laws of this State in favor of purchasers of lots in platted subdivisions.

e. Casalina Corporation has the right to devote its property embraced on said plat and abutting U. S. Highway 17, to a depth of 350 feet eastward from the right-of-way, to any lawful use, residential or commercial.

f. In any future sales, gifts, or leases by Casalina Corporation of any of its other property embraced on said plat, it shall restrict the same to residential use, single or multiple, but without regard to the Plat Book 25, p. 22, restrictions and with full freedom to subdivide such other property (with regard to streets, building lines, lot sizes, and water and sewer facilities) as it sees fit--subject, of course, to sovereign rights, if any, to marsh, lake, and other water bodies or courses, and to land-and/or-water use laws, ordinances, and regulations now or hereafter applicable and enforceable by governmental authorities.

g. No costs shall be taxable in favor of any party against any other party.

IT IS FURTHER FOUND AND CONCLUDED THAT

h. The interests of any unknown claimants who are under any legal disability have been adequately represented by their guardian ad litem and by the consenting cross-defendants as a class whose best interests coincide with the best interests of any such unknown claimants; the foregoing findings and conclusions are to the best interests of such possible claimants; and such provisions should be decreed to be binding on them.

Ariston A. Thught
Master for Horry County

November 15, 1972.

A-Bureau for away for Piff

Willard

Willard
John E. Willard atty for Cassinia Corporation.
10 on the Lloyd A. Bell St at

~~John L. Williams~~
~~John L. Williams~~ Atty for Lloyd A. Rich 1st et al
(one last appearance)
K. A. Palmer Defended in complaint

Don't forget to get a good night's sleep.

By *Wm. H. Smith* Attorney at Law

WAF Com.
Christy S. Rendon

*Noted
N. Asha 4-10-05*

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 98-CP-26-4275

✓ ROBERT & SANDRA DeCIERO, NOEL A.
COLANERI, EDWARD J. EDELEN, III, JAMES
& SHARON VEST, SALEEMA S. COBB, JOHN
& PAMPELLERITO, CHARLES & MARILYN
RIVERS, EDDIE E. WILLIAMS, EDWARD
FLEMING, ROYAL & MARION ALVIS, GAIL
PERRY, JANET NEASE, RICHARD ELLIS,
WILLIE SALEEBY, BOBBY & MILDRED
KELLER, ROSCOE LEWIS, WILLIAM & JANET
AUER, ALFRED TISDALE, III, JOHN
RATHBUN, RALPH & CYNTHIA SHAMAH,
✓ NADINE HOLLINGER, GENE & VALERIE
GRIFFITH, WENDY LEE, THOMAS TATUM,
FRANCIS DUSENBERRY, JOSEPH & MARY
JEAN DAVEY, WILLIAM & RHONDA
HOFMANN, CESAR & MARTHA LEON,
PATRICIA CRAWFORD, WILLIAM & RUTH
GUYETTE, JACK & GERTRUDE ZACHARY,
✓ DEWEY & JUDY BALDWIN, ROBERT &
CAROLYN JONES, JOSE & HELEN ARMONIO,
JR., MITCHELL & ELLEN SPERLING, ROBERT
BELL, PAUL RATHBUN, ERIC & LUCIE
BENDLECHNER, WILLIAM & CLAIRE
DOBINSKI, JOHN & PEGGY MUSICK, HELEN
POLITIS, JAMES HARDEE, THOMAS TATUM,
✓ RICHARD & ROGER SIMPSON, RENATE
MARTIN, LLOYD BELL, JR., JULIAN &
JACQUELYN KOELEN, MARVIN McHONE,
✓ DIANE MARTIN, JOHN & BIRDIE BASSETT,
✓ ALFRED & PHYLLIS TOMLINSON, RONALD
& GAIL FOX, MARY STANLEY, ASHLYN
CANNON, and MARIPOSA LLC,

Plaintiffs,

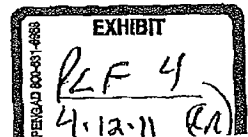
vs.

LONG BAY PROPERTIES, A South
Carolina General Partnership,

Defendant.

FILED
HORRY COUNTY
60 MAR 14 PM 1:41
JENNIFER J. ROBERTS
CLERK OF COURT

FINAL ORDER



DATE OF HEARING: January 28, 2000
PLAINTIFF'S ATTORNEYS: Scott Umstead and Thomas Brittain
DEFENDANT'S ATTORNEY: Robert M. Erwin, Jr.
COURT REPORTER: Dru Chavis

The Plaintiffs bring this action pursuant to South Carolina Code § 15-53-10 et seq. seeking a Declaratory Judgment that the Restrictive Covenants recorded in Plat Book 25, Page 22 apply to Defendant's property and restrict the use thereof. The Defendant filed a timely Answer and the matter was referred to this Court with finality by Order of Reference dated October 1, 1999. The Plaintiffs and Defendant presented documentary evidence, but no testimony was adduced. I conclude Plaintiff's are entitled to the relief requested.

BACKGROUND

4
2
This action concerns the applicability of Restrictive Covenants to certain subdivision lots. The Plaintiffs are owners of property within Long Bay Estates subdivision in Horry County, South Carolina. Long Bay Estates was created in the 1950's and a plat delineating the lots, blocks and streets together with Restrictive Covenants as to all lots in Blocks 1 - 27 was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. The Restrictive Covenants are attached to this Final Order as Exhibit "A".

By Deed dated January 20, 1984, and recorded in Horry County Courthouse Deed Book 848, Page 714 on February 7, 1984, the Defendant, Long Bay Properties, a general partnership, purchased Lots 1 and 2 of Block 11 of the Long Bay Estates from Carmen F. Ward, as Trustee, Marion G. Whitaker, Richard C. Lewis, Jr., Raymond H. Lewis, Carol L. McKellar, and Peter S. Lewis. Defendant's property is more particularly described as follows:

All and singular that certain piece, parcel or lot of land situated, lying and being in Socastee Township, Horry County, South Carolina, and being more particularly

described as Lots one (1) and two (2) of Block eleven (11) of the Long Bay Estates subdivision near Myrtle Beach, South Carolina; said lot being shown on a map by Robert L. Bellamy & Associates Engineers & Surveyors dated August 22, 1983 with said map being recorded in Plat Book 79, Page 125 records of the Clerk of Court for Horry County.

At the time of Defendant's purchase, a plat depicting Block 11, Lots 1 and 2 was recorded in Horry County Courthouse, Plat Book 79, Page 125 and said plat is referenced in the property description above. Block 11, Lots 1 and 2 of Long Bay Estates as depicted in Plat Book 79, Page 125 is/are identical to Block 11, Lots 1 and 2 as depicted in Plat Book 25, Page 22.

3
The Defendant has manifested an intention to subdivide Block 11, Lots 1 and 2 into several smaller lots. The Plaintiffs, as owners of various lots throughout Long Bay Estates subdivision seek to prevent the Defendant from subdividing Block 11, Lots 1 and 2 and contend the Restrictive Covenants recorded in Plat Book 25, Page 22 disallow the subdividing of any lot within Long Bay Estates subdivision.

The Plaintiffs rely on the following language from the Restrictive Covenants recorded in Plat Book 25, Page 22:

"No lot shall be subdivided and no building, including porches or projections of any kind, shall be erected at a distance less than 40 feet from the front line on Blocks 1 through 5 and not less than 20 feet from the front line on Blocks 6 through 27, 10 feet from any side line and 20 feet from the rear.

As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

The Plaintiffs further contend only one duplex may be erected on any one lot and again rely on the Restrictive Covenants recorded in Plat Book 25, Page 22 which provides as follows:

"This property shall be used only for private residential purposes and no more than one dwelling containing not more than two apartments or living units each for the occupancy and use of not more than one family, with necessary out buildings, shall be erected thereon. No garage apartments except for the use and occupancy of

servants employed on the premises may be included in a garage building."

In its Answer, the Defendant contends the Restrictive Covenants recorded in Plat Book 25, Page 22 do not control the Defendant's use of its property.

Attached to Defendant's Deed, is a set of purported Restrictions substantially identical to those Restrictions recorded in Plat Book 25, Page 22, but containing, as well, certain key differences. The 1984 purported Restrictions do not contain the same prohibition against subdividing as is contained in those Restrictive Covenants recorded in Plat Book 25, Page 22. The 1984 purported Restrictions instead state as follows:

"This property may be subdivided, provided however each subdivided lot must have an area of not less than 9,000 square feet. Each subdivided lot shall be subject to these restrictions. No building, including porches or projections of any kind, shall be erected at a distance less than 20 feet from the front line, 10 feet from any side line, and 20 feet from the rear line thereof."

Neither party contends the Restrictive Covenants are ambiguous and this Court is, therefore, not asked to construe the Restrictive Covenants.

Thus, the Defendant contends the Restrictive Covenants recorded in Plat Book 25, Page 22 do not have application to Defendant's property and that Defendant is permitted to subdivide pursuant to the purported Restrictions attached to Defendant's Deed as quoted above.

RATIONALE FOR DECISION

A. THE 1958 RESTRICTIVE COVENANTS APPLY TO DEFENDANT'S PROPERTY

On their face, it is clear the 1958 Restrictive Covenants apply to the entire Long Bay Estates subdivision. The Restrictions state in pertinent part as follows:

"Restrictions to be imposed on the residential property in the Long Bay Estates subdivision ...

These Protective Covenants are recorded as Blanket Covenants covering all lots in Blocks 1 through 27, as shown on the Plat of Long Bay Estates dated May, 1955 ..."

Neither party claims any ambiguity exists in the stated application of the Restrictions to all of Blocks 1 through 27. Indeed, this Court agrees no ambiguity is presented; the Restrictions obviously apply to all of Blocks 1 through 27. In South Carolina 'where language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning'. Shipyards Property Owners v. Mangiaracina, 307 SC 299, 305, 414 S.E.2d 795, 801 (S.C. App. 1992); citing Blatz v. Chandler, 248 S.C. 484, 151 S.E.2d 441 (1966).

Interestingly, in 1972, an action was filed in this Court by the subdivision grantors against the individuals who, at that time, owned property within Long Bay Estates subdivision. This action is styled Gene F. Lewis and Carmen F. Ward v. Leroy Adams, et al., number 37417. While neither party to this action contends the ultimate issue in the 1972 action is identical to the ultimate issue presented today, the Master's Report ending the 1972 action was offered and admitted as evidence without objection and it is instructive to the extent it deals with the applicability of the 1958 Restrictive Covenants to all of Blocks 1 through 27 in Long Bay Estates subdivision. The 1972 Master's Report states in pertinent part as follows:

"8. The Restrictions or Protective Covenants recorded along with the map in [Plat Book] 25 [Page] 22 expressly state that they are limited to Blocks 1 - 27, inclusive, and there have been no conveyances of any lots beyond Block 27 subject to such restrictions.

9. Counsel have stipulated:

That, as to the Lewis Estate lands, [they] ... are declared to be residential in character and subject to restrictions of the same general type as those stated in the Declaration recorded in Plat Book 25 at Page 22 as being applicable to Blocks 1 - 27, inclusive, ..."

As part of the Court's conclusions of law, the 1972 Master's Report states in pertinent part

as follows:

"2. The Declarations of Restrictions or Protective Covenants recorded along with the Plat in Plat Book 25 at Page 22 expressly limits those restrictions to the residential lots shown within Blocks 1 - 27, inclusive. ... The agreement of the Plaintiffs ... gives further assurance to the defendants who are owners of lots in Blocks 1 - 27, inclusive."

Thus it is clear the Restrictive Covenants apply to all of Blocks 1 - 27 Long Bay Estates subdivision, including Block 11, Lots 1 and 2. The Restrictive Covenants themselves so state and this Court finds no reason to hold otherwise.

B. THE DEFENDANT IS ON NOTICE OF THE 1958 RESTRICTIVE COVENANTS

In South Carolina, purchasers of real property are charged with constructive notice of "any restriction property recorded within the chain of title" even if such restriction does not appear in that purchaser's deed. Harbison Community Association v. Mueller, 319 S.C. 99, 102, 459 S.E.2d 860, 863 (1995), citing in part Carolina Land Company v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975). While the Defendant, in its Answer and at the hearing, neither admits nor denies it had actual notice of the 1958 Restrictive Covenants, the Restrictive Covenants were recorded in the Horry County Courthouse and appear in Defendant's chain of title. Accordingly, the Defendant is charged with constructive notice of these Restrictive Covenants and their applicability to the subject property.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

1. The Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1 - 27 of Long Bay Estates subdivision, including Block 11, Lots 1 and 2;
2. The Defendant was on notice, actual or constructive, of the existence of the Restrictive

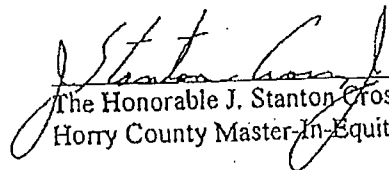
Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court;

3. The 1958 Restrictive Covenants are fully enforceable against the Defendant by any or all of the property owners within Long Bay Estates subdivision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court apply to Defendant's property (Block 11, Lots 1 and 2) and Defendant is not permitted to subdivide or change the lot lines of Block 11, Lots 1 and 2. Defendant's use of its property is controlled by the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court, in the same manner and to the same extent as all property contained in Blocks 1 through 27 as depicted in Plat Book 25, Page 22.

AND IT IS SO ORDERED.

Dated this 14 day of March, 2000.


The Honorable J. Stanton Cross, Jr.
Horry County Master-in-Equity

Conway, South Carolina

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

WHEREAS, the property known as Longbay Estates Subdivision consists of Blocks 1 - 27 in Horry County Plat Book 25 at Page 22 and modified in Horry County Plat Book 53 at Page 79-A; and

WHEREAS, Restrictive Covenants were recorded in Horry County Plat Book 25 at Page 22 relating to Blocks 1 - 27 of Longbay Estates Subdivision (a legible and complete copy of such Restrictive Covenants is attached as Exhibit "A"); and

WHEREAS, in Lewis, et al. v. Adams, et al. (LP 23428/37417), it was stipulated by Counsel and ordered by the Court that the Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22 covering Blocks 1 - 27 inclusive were extended to include Blocks 30, 32 and 34 as well as the remaining portions of old Blocks 28 and 29 of Longbay Estates Subdivision; and

WHEREAS, all Plaintiffs and Defendant in the current action are owners of property within Longbay Estates Subdivision and are bound by the Restrictive Covenants contained in Horry County Plat Book 25 at Page 22; and

WHEREAS, by Deed dated January 20, 1984 and recorded on February 7, 1984 in Horry County Deed Book 848 at Page 714 Defendant purchased Lots 1 and 2 of Block 11 of Longbay Estates Subdivision; and

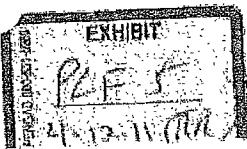
WHEREAS, at the time of Defendant's purchase, a Plat was recorded in Horry County Plat Book 79 at Page 125, depicting the property and boundary lines of Lots 1 and 2 of Block 11 as identical to those shown in Horry County Plat Book 25 at Page 22 and in Horry County Plat Book 53 at Page 79-A; and

WHEREAS, a set of Restrictions (hereinafter "Invalid Restrictions") were attached to Defendant's Deed (Horry County Deed Book 848 at Page 716) which purported to be less restrictive in certain respects than the Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22; and

WHEREAS, in reliance on the Invalid Restrictions, Defendant sought to subdivide its two lots into several smaller lots; and

WHEREAS, Plaintiffs filed an action relating to the attempted subdivision styled as Deciero, et al. v. Longbay Properties, Civil Action No. 98-CP-26-4275; and

WHEREAS, the Plaintiffs prevailed and the Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22 were enforced against the Defendant and the attempted subdivision was halted; and



WHEREAS, the Defendant appealed to the South Carolina Court of Appeals; and

WHEREAS, during the pendency of the appeal, the parties have agreed and resolved their differences and memorialize that Agreement as follows:

1. The Defendant shall dismiss its appeal with prejudice; and the Final Order of Judge Stanton J. Cross dated March 4, 2000 remains in full force and effect; and
2. The Defendant shall be permitted to move the lot line between Lots 1 and 2 of Block 11 so that Lot 1 and 2 are of equal size; and
3. No Plaintiff shall oppose the aforescribed moving of the lot line or take any step to prevent it nor shall any Plaintiff encourage or assist any other person or entity to oppose, object to, or seek to prevent the moving of the lot line as described above; and
4. The Defendant, its heirs, successors, assigns, and grantees, shall otherwise be bound by the Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22; and
5. The Defendant additionally binds itself, its heirs, successors, assigns, and grantees, so that no structure erected on Lots 1 and 2 of Block 11 shall contain more square footage than any structure at that time existing on any single lot within Blocks 1 - 27 as shown in Horry County Plat Book 53 at Page 79-A; and
6. The Defendant shall execute and take whatever steps are necessary to record the Addendum to Restrictive Covenants (attached as Exhibit "B") with the Horry County Registrar of Deeds; and
7. It is understood the Restrictive Covenants in Horry County Plat Book 25 at Page 22 as well as the Addendum to Restrictive Covenants are intended to run with Lots 1 and 2 of Block 11 in perpetuity; and
8. The Defendant obligates itself to notify any individual or entity who purchases either or both Lots 1 and 2 of Block 11 from Defendant of the existence and applicability of the Restrictive Covenants (Horry County Plat Book 25 at Page 22) as well as Addendum to Restrictive Covenants attached hereto and identified as Exhibit "B" and shall reference both documents in any deed from Defendant of either Lot 1 or 2 of Block 11; and
9. Plaintiffs and Defendant for and in consideration of the promises and the mutual covenants herein contained do hereby release each from the other, and any and all other persons, firms or corporations whomsoever, of and from any and all causes of action, claims, demands, and costs and all claims of any nature including but not

limited to any claims of any kind whatsoever, or otherwise known or unknown, which the undersigned parties have or may in the future, be entitled to have, against the other, whomsoever, or on account of or in any way resulting from the allegations contained in the Complaint and Answer all as more fully set forth in the Complaint and Answer on file of the office of the Clerk of Court for Horry County, South Carolina and for any other matters related to the development of either Lot 1 or 2 of Block 11 of Long Bay Estates Subdivision.

10. All parties agree to cooperate fully in executing any and all supplementary documents and to take all additional acts, which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement.

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE, dated this _____ day of _____, 2000.

AS TO THE DEFENDANT:

[Signature]
Witness

[Signature]
Witness

Longbay Properties, A General Partnership

By: [Signature]
Partner - Steven F. Ammons

By: [Signature]
Partner - Cornelius J. Ammons

AS TO THE PLAINTIFFS:

[Signature]
Royal Alvis

[Signature]
Dr. Jose Armonio

[Signature]
William Auer

[Signature]
Dewey Baldwin

* Refer to attached
[Signature]
Eddie Bassett

[Signature]
Robert Bell

[Signature]
Addelene Bell
[Signature]

[Signature]
Eric Bindlechner

* Refer to attached
[Signature]
Ashley Cannon

* Refer to attached
Jackson Cobb

Robert DeCiero
Robert DeCiero

* Refer to attached
Edward Edelen

* Refer to attached
Ron Fox

William Hoffman
William Hoffman

Bob Keller
Bob Keller

Cesar Leon
Cesar Leon

* Refer to attached
Diane Martin

Janet Nease
Janet Nease

Tony Politis
Tony Politis

* Refer to attached
Edward Saleeby Sr.

Noel Colaneri
Noel Colaneri

William Dobinski
William Dobinski

Richard Ellis
Richard Ellis

Gene Griffith
Gene Griffith

Nadine Hollinger
Nadine Hollinger

Julian Koplen
Julian Koplen

* Deceased
Roscoe Lewis

Marvin McHone
Marvin McHone

John Pellerito
John Pellerito

Dr. John Rathbun
Dr. John Rathbun

Ralph Shamah
Ralph Shamah

* Refer to attached
Pat Crawford

* Refer to attached
Francis Dusenberry

Ed Fleming
Ed Fleming

* Refer to attached
William Guyette

Robert E. Jones
Robert Jones

Dr. Wendy Lee
Dr. Wendy Lee

Lothar Martin
Lothar Martin

John Musick
John Musick

Gail Perry
Gail Perry

* Refer to attached
Charles Thomas Rivers

Richard Simpson
Richard Simpson

Mitch Sperling
Mitch Sperling

Mary O. Stanley
Mary Stanley

Thomas Tatum
Dr. Thomas Tatum

Edward Tidale
Edward Tidale

Alfred J. Tomlinson
Alfred Tomlinson

James Vest
Dr. James Vest

* Refer to Attached
Edward Williams
Edward Williams

Jack Zachary
Jack Zachary

James Davey
Dr. James Davey

* Refer to attached
Paul Rathbun
Paul Rathbun

James Hardee
James Hardee

**ADDENDUM TO RESTRICTIVE COVENANTS
(AS TO LOTS 1 AND 2, BLOCK 11, LONGBAY ESTATES SUBDIVISION)**

This is an Addendum to the Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22 which are fully applicable to, *inter alia*, Lots 1 and 2, Block 11, Longbay Estates Subdivision. This Addendum applies only to Lots 1 and 2, Block 11, Longbay Estates Subdivision.

- I. No structure erected on either Lot 1 or Lot 2 of Block 11, Longbay Estates Subdivision may contain square footage greater than any then-existing similar structure on any single lot within Blocks 1 - 27 of Longbay Estates Subdivision as shown in Horry County Plat Book 53 at Page 79-A.

This Addendum to Restrictive Covenants is part of a Settlement Agreement and Mutual release in the action of Deciero et al. v. Longbay Properties, A General Partnership, Civil Action No. 98-CP-26-4275.

This Addendum to Restrictive Covenants shall run with the land in perpetuity Grantor hereby binds itself, its heirs, assigns, and grantees to this Addendum to Restrictive Covenants.

The Restrictive Covenants recorded in Horry County Plat Book 25 at Page 22 are full, applicable to Lots 1 and 2 of Block 11 to the extent they do not conflict with this Addendum to Restrictive Covenants.

WHEREBY the execution hereof by Grantor this _____ day of _____ in the year of our Lord, Two Thousand.

LONGBAY PROPERTIES, A GENERAL
PARTNERSHIP

By: _____

Steven F. Ammons

Title: _____

C.J. Ammons

Singed, Sealed and Delivered in the
Presence of:

A. Ammons

David H. Hearn

Michael David Hearn

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

PERSONALLY appeared before me, DAVID MOORE and
made oath that he/she saw the within named Steven F. Ammons
as Partner of Longbay Properties, A General Partnership,
sign, seal, and as his Act and Deed deliver the within written Addendum to Restrictive
Covenants and that he/she with DAVID MOORE witnessed the
execution thereof.

Sworn to before me this _____ day of
_____, 2000.

DAVID MOORE
Notary Public for South Carolina
County of Horry
My Commission Expires: 07-05-01

[Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
John Musick,)
)
Plaintiff,)
)
vs.)
)
Thomas L. Dicks and)
Robert E. Dicks, Jr.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2004-CP-26-2075

FINAL ORDER ENDING ACTION

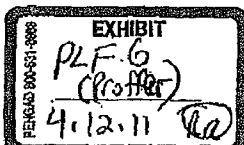
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This matter is before the Court upon cross-motions for Summary Judgment filed by the Plaintiff John Musick and the Defendants, Thomas Dicks and Robert Dicks. The Court has carefully reviewed the motions, memoranda of counsel and numerous exhibits in this case. For the reasons set forth below, the court finds in favor of the Plaintiff and grants his Motion for Summary Judgment. Because the parties filed cross-motions for Summary Judgment, I decided and find that the Plaintiffs are entitled to the relief requested.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY:

The Long Bay Subdivision was created in the 1950's by the Lewis Family ("Grantors"). A map captioned "Long Bay Estates, a residential subdivision on the Atlantic Ocean" was prepared by T.M. Jordan and R.L. Bellamy ("1955 map"). Said map delineated the lots and blocks of said subdivision and was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. Attached to the 1955 map is a list of restrictions which state that the restrictions apply to Blocks 1 through 27 as shown on the plat. These restrictions state that no lot shall be subdivided



but that "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof"

On November 21, 1972, Winston Vaught, Master-In-Equity for Horry County, signed an Order setting forth Findings of Fact in an action filed by the Grantors against all property owners in the subdivision. Specifically, the Order stated that the restrictions apply to Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street, are subject to such residential restrictions with right to change boundary lines and building lines as to any unsold lots being reserved to the Grantor. This same issue was addressed again on March 14, 2000 in a similar case involving subdividing lots in Long Bay Estates¹ wherein this Honorable Court issued an Order incorporating the 1972 Order of Judge Vaught.

Plaintiff owns Lot 4 of Block 24 in Long Bay Estates. On May 19, 2003, Defendants purchased a 2.67 acre parcel of land in Long Bay Estates.² Plaintiff alleges that Defendants subdivided the property in violation of the applicable covenants and restrictions which restrict Defendants from being able to subdivide their property. Specifically, the restrictions of record provide, among other things, as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina. . .

(a) No lot shall be subdivided . . . As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

¹DeCiero, et. al. vs. Long Bay Properties, 98-CP-26-4275

²This lot is referred to as Block 28 and 29 in the previous Orders

When Defendants purchased the 2.67 acre tract of land and subdivided it into seven lots in 2003, they breached the covenants and restrictions of Long Bay Estates. Specifically, Defendants breached the "no lot shall be subdivided" restriction.

Before the Defendants purchased the 2.67 acre tract of land, Plaintiff verbally and by letters advised the Defendants of the restrictive covenants and the "no lot shall be subdivided" restriction. Plaintiff made a timely objection to Defendants' actions by protesting the breach of the restrictive covenants. However, Defendants refused to abide by the covenants and continued with subdividing the property. Defendants, knowing their violation, eventually subdivided the property and have further refused to return the property to its original condition. Plaintiff then filed this action.

II. STANDARD OF REVIEW:

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."³ In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the nonmoving party.⁴ If triable issues exist, they must be submitted to the jury.⁵

³ Rule 56(c), SCRCP

⁴ *Worsley Cos. v. Town of Mt. Pleasant*, 339 S.C. 51, 55, 528 SE2d 657, 659 (2000).

⁵ *Bray v. Marathon Corp.*, 2001 WL 1028330 (S.C. App. 2001).

III. RATIONALE FOR DECISION:

1. THE 1958 RESTRICTIVE COVENANTS APPLY TO DEFENDANTS' PROPERTY, ONLY THE GRANTOR HAD RIGHT OF REVISION AND THE GRANTOR NEVER SUBDIVIDED THE PROPERTY.

The first issue presented is whether the 1958 Restrictive Covenants apply to the Defendants' lot. The court finds that the 1958 Restrictive Covenants apply to all the lots in the Long Bay Subdivision. Further, Judge Vaught's 1972 Order states that the Defendants' property is subject to the residential restrictions but with right of revision of the lot arrangement reserved to the grantor. Only the grantor had the right to change boundary lines and building lines as to any unsold lots in Long Bay Estates. The Defendant raises the argument that there was no evidence presented that proves "Carmen Ward or her predecessors in the Trust, owned the property from the time of creation of Long Bay Estates . . ."⁶ There was proof that Carmen Ward or her predecessors in the Trust, owned the property from the time of creation of Long Bay Estates. In fact, Defendants' attorney himself admits this fact in the deposition of Robert DeCiero dated April 28, 2005. On page nineteen of the deposition, he stated to Mr. DeCiero, "Let me just help educate you a little bit. The significance of the two lots is because the development was established by the Lewis and the Ward family."

Furthermore, Plaintiff offered the Final Order of *DeCiero, et al. v. Long Bay Properties*, number 98-CP-26-4275, dated March 14, 2000 into evidence and it was admitted without objection. Page 5 and 6 of this Final Order brings in the 1972 action filed in this Court⁷ in which it states, the Long Bay Estates grantors, Gene F. Lewis and Carmen F. Ward, filed suit against all

⁶ Letter dated November 7, 2006 to The Honorable J. Stanton Cross, Jr. from Demetri Koutrakos, Esq.

⁷ *Gene F. Lewis and Carmen F. Ward v. Leroy Adams, et al.*, number 37417.

individuals who owned property, at that time. The 2000 Final Order refers to the property in question as the "Lewis Estate lands". These facts establish that the Grantor, Carmen Ward or her predecessors in the Trust, owned the property from the time of the creation of Long Bay Estates until 1997. At that time, Carmen Ward sold the property to David and Leigh Meese. This Court incorporated in its 2000 Order the 1972 Order of Judge Vaught lending credence to the restrictions and their application to all the lots in Long Bay Estates, including the one that these Defendants purchased.

The Restrictive Covenants apply to all of Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street.

2. **THE DEFENDANTS ARE ON NOTICE OF THE 1958 RESTRICTIVE COVENANTS.**

The second issue presented was whether Defendants had notice of the restrictive covenants. In South Carolina, purchasers of real property are charged with constructive notice of any restrictions properly recorded in the homeowner's chain of title. "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led]."⁸

Defendants claim that they are allowed to subdivide Blocks 28 and 29 by relying on the "shelter rule". Under the "shelter rule", a grantee from a bona fide purchaser is protected as a bona fide purchaser, even though the grantee would not otherwise qualify for this status. In order to qualify as a bona fide purchaser, it must be shown that the grantee purchased "for value,

⁸ *Lo Presti v. Burry*, 364 S.C. 271, 275, 612 S.E.2d 730, 732 (S.C. App., 2005).

without notice of defect in his title, by showing: (1) he has actually paid in full the purchase money, (2) he purchased and acquired the legal title, or the best right to it, and (3) he purchased bona fide, i.e., in good faith and with integrity of dealing, without notice of a lien or defect.”⁹

In South Carolina, purchasers of real property are charged with constructive notice of “any restriction properly recorded in the homeowners’ chain of title” even if such restriction does not appear in that purchaser’s deed”.¹⁰ “One with knowledge of the truth or the means by which with reasonable diligence he could acquire cannot claim to have been [mis]led.”¹¹ After judgment or final order, an index by the names of defendants and a cross index by the names of plaintiffs are alphabetically arranged and kept in separate volumes with the number of enrollment of judgment.¹² “And whenever judgment against any party plaintiff or defendant has been entered the names of such party, and each of them, shall appear in the index and the name of the party plaintiff or defendant in whose favor judgment has been entered and each of them shall appear in the cross index.”¹³ By this entry a lien is created upon the real estate of the judgment debtor, and such entry is constructive notice to all persons dealing with reference to the property affected by such lien.¹⁴ The object of this statute in requiring the formulated judgment to go into the clerk's

⁹*Spence v. Spence* (S.C. 2006) 2005 WL

¹⁰*Harbison Community Association v. Mueller*, 319 S.C. 99, 102, 459 S.E.2d 16 (1975).

¹¹*LoPresti v. Burry*, 364 S.C. 271, *275, 612 S.E.2d 730, **732 (S.C.App., 2005).

¹² South Carolina Code 1976 § 15-35-520.

¹³ *Id.*

¹⁴ *Ex Parte Graham*, 54 S.C. 163, 32 S.E. 67 (1899).

office was to give notice to the world of the lien which had been established, so that third parties might deal with the property without peril.¹⁵

Defendants claim neither they nor their grantor, the Meeses, who purchased this property in 1997, had notice of the restriction because it did not appear in their chain of title. However, the 1958 Restrictive Covenants were recorded in the office of the Horry County Clerk of Court in Plat Book 25, page 22, and the 1972 Order signed by Judge Vaught was indexed in the Horry County Court House under the Long Bay Subdivision as an entry of judgment under South Carolina Code § 15-35-520.¹⁶ Further, a copy of the 1972 Order was given to Robert Bellamy, the Defendants' surveyor, *before* the Defendants purchased the property¹⁷, and the Plaintiff advised Defendants of the restrictions. Jay Dusenbury, attorney for the Meeses, learned that the 1972 Order was mis-indexed when the Meeses bought the lot and advised the Defendants before they purchased the lot that there was a strong possibility that the restrictions applied to this lot.¹⁸ Before the Defendants purchased the 2.67 acre tract of land, Plaintiff verbally and by letters advised the Defendants of the restrictive covenants and the "no lot shall be divided" restriction.

Plaintiff made a timely objection to Defendants' actions by protesting the breach of the restrictive covenants. However, Defendants refused to abide by the covenants and continued the subdividing of the property.

¹⁵ *Hardin v. Melton*, 28 S.C. 38, 4 S.E. 805 (1888).

¹⁶ Affidavit and Deposition of Robert DeCiero, pg. 34, line 10 - pg. 35, line 15.

¹⁷ *Id.* at pg. 63, line 21 - 65, line 9.

¹⁸ Deposition of Jay Dusenbury, p.10, line 15 and p.17, lines 9-10 and p.18, line 17-22.

Accordingly, the Defendants and their grantor, the Meeses, are each charged with having both constructive and actual notice of the existence of the covenants and restrictions and their applicability to the subject property. The 1958 Restrictive Covenants appear in the chain of title, and at the very least, Defendants were under constructive notice as to the restrictions placed on their property, and should have followed due diligence in searching their title by including the name of the subdivision.

. As a result, the Defendants are not entitled to protection under the "shelter rule", and are therefore restricted from subdividing Blocks 28 and 29.

3. DEFENDANTS DO NOT HAVE THE RIGHT OF REVISION OF LOT ARRANGEMENTS.

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The third issue presented is whether the Defendants had the right of revision of lot arrangements. The Grantor, Carmen Ward, had the sole right of revision of the lot arrangement of the subject property. The restrictions that were recorded at the Horry County Courthouse state as follows:

"Restrictions to be imposed on the Residential Property in the Long Bay Estates Subdivision, Myrtle Beach, Horry County, South Carolina. . . .

(a) No lot shall be subdivided . . . As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof."

The Defendants argue that restrictions on the use of property, "are to be strictly construed, with all doubts resolved in favor of the free use of the property".¹⁹ Defendants have taken this rule of construction, and have attempted to convince the Court that it applies to the present case

¹⁹ *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378 (1980).

under the 1972 Order. This rule of construction "is not applicable to defeat the plain and obvious purpose of the instrument."²⁰ The plain language of the 1958 Restrictive Covenants, and the conduct of the parties establish that only the Grantor, and not the Defendants, had the right of revision.

To enforce a restrictive covenant in South Carolina, a party must show that the restriction applies to the property either by the covenant's express language or by unmistakable implication.²¹ However, this rule will not be used to defeat the clear express language of the covenant.²² Only where there is language in a restrictive covenant that is equally capable of two or more constructions, will the construction be adopted which least restricts the property.²³

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The express, clear language of the covenant set forth above leaves no room for doubt as to the meaning and purpose of the instrument. The plain language and conduct of the Grantor speak louder than any order. Therefore, Defendants do not have the right of revision of lot arrangement per the express terms of the 1972 Order.

4. **THE 1955 PLAT AND THE MAP ATTACHED TO THE 1972 ORDER DO NOT INDICATE THAT LOTS 28 AND 29 ARE TO BE SUBDIVIDED.**

The fourth issue presented is whether the 1955 Plat and the map attached to the 1972 Order indicate that Blocks 28 and 29 are allowed to be subdivided. Defendants argue that the two

²⁰ *Id.* at 157-58, 263 SE2d at 381.

²¹ *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987).

²² *Id.*

²³ *O'Shea v. Lesser*, 308 S.C. 10, 416 SE2d 629 (1992).

maps portray Blocks 28 and 29 as being subdivided into seven lots. This is an incorrect presumption. The two above referenced maps indicate a proposed plan to subdivide the two Blocks. Traditionally, dotted lines on maps indicate proposed boundary lines or subdivision proposals and are not symbolic of the final decree of the Grantor.

The 1955 Plat and the map attached to the 1972 Order show Blocks 24, 25, 27, 30, 32 and 34 represented by solid lines. These lots also show the course and distance of each lot in that Block. Blocks 28, 29, 30, 31, 32 and 33 are represented by dotted lines. These Blocks do not show the course and distance of each Lot in the Blocks.

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Grantor, Ms. Ward, who had the sole right to change the boundary lines and building lines as to any unsold lots under the 1972 Order, elected to create one lot on the property sold to the Meeses in 1997. The Meeses further corroborated the grantor's intent when they confirmed in their depositions taken in this case that the lot was sold to them as one lot and that they sold it to the Defendants as one lot.²⁴

The preceding facts prove that the dotted lines on the two maps indicate mere proposals to the subdivision of Blocks 28 and 29, and are not indicative of the fact that the Grantor intended the Defendants the right to subdivide their property. Furthermore, the actions of the Grantor and the Meeses indicate that the Defendants' property was intended to be one lot and not to be subdivided into seven lots.

²⁴ Deposition of Leigh Meese, pgs. 36, line 24-37, line 6) and Deposition of David Meese.

5. THIS FINAL ORDER JUSTIFIABLY RELIES ON THE MARCH 14, 2000 ORDER SET FORTH BY THIS COURT WHICH ENCUMBERS BLOCKS 28 AND 29.

In March of 2000, this Court ruled on *DeCiero et al. v. Long Bay Properties* in which the issue was similar to the one in the present case. Both cases concern the applicability of Restrictive Covenants to the subdivision of lots in Long Bay Estates. The 2000 Order incorporated the 1972 Order of Judge Vaught in *Lewis v. Adams, et al.*, number 37417. The Order states that the Restrictive Covenants recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958 apply to Blocks 1-27, 30, 32 and 34 "and the remaining portions of "old" Blocks 28 and 29 that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street."

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The Defendants assert that the 2000 Order does not encumber the subject property. However, even though the property in dispute under the 2000 Order was in Block 11, the same Restrictive Covenants apply to the subject property in Blocks 28 and 29. The restrictions stated in both the 1972 Order and the 2000 Order apply to all property within Long Bay Estates. The plain language of the restrictions and the conduct of the parties prove that the Grantors intended the Restrictive Covenants to apply to all Blocks within Long Bay Estates including Blocks 28 and 29.

6. THIS MOTION FOR SUMMARY JUDGMENT IS GRANTED IN LIGHT MOST FAVORABLE TO THE DEFENDANTS, AND IS SUPPORTED BY PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Motion for Summary Judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."²⁵ In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed by the court considering a motion for summary judgment in the light most favorable to the nonmoving party.²⁶ "Summary judgment is proper where plain, palpable, and undisputed facts exist on which reasonable minds cannot differ."²⁷

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Despite the assertion by the Defendants to the contrary, this Court viewed the facts in light most favorable to the Defendants, the non-moving party. All of the evidence presented by the parties proved that there is no issue as to the fact that the Defendants are not entitled to subdivide Blocks 28 and 29. Defendants' argument that the eight-page brief submitted by the Plaintiff prove that there are issues of fact that require a trial on the merits is displaced. This eight page brief is entitled, "Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment." Obviously, the purpose of this memorandum is to rebut arguments made by the Defendants in their Motion for Summary Judgment. The Plaintiff's memorandum simply confirms that there is "plain, palpable, and undisputed facts [in existence] on which reasonable minds cannot differ"²⁸ that the restrictions on record at the Horry County Courthouse apply to the Defendants' property.

²⁵ SC R CP Rule 56©)

²⁶ *Pye v. Estate of Fox*, 369 SC 555, 633 SE2d 505 (2006).

²⁷ *Rothrock v. Copeland*, 305 S.C. 402, 409 SE2d 366 (1991).

²⁸ *Id.*

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The 1955 map delineated the lots and blocks of the Long Bay subdivision and was recorded at the Horry County Courthouse in Plat Book 25, Page 22 on May 5, 1958. Attached to the 1955 map is a list of restrictions which state that the restrictions apply to Blocks 1 through 27 as shown on the plat. These restrictions state that no lot shall be subdivided but that "as to all unsold lots, the grantor reserves the right to change the boundary lines and the building lines thereof." On November 21, 1972, Judge Vaught signed an Order that stated the restrictions apply to Blocks 1-27, 30, 32 and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street, are subject to such residential restrictions with right to change boundary lines and building lines as to any unsold lots being reserved to the Grantor. This same issue was addressed again on March 14, 2000 in a similar case involving subdividing lots in Long Bay Estates²⁹ wherein this Court issued an Order incorporating the 1972 Order of Judge Vaught.

These facts prove that the present issue has been litigated on two prior occasions, and that no issue of fact exists that, taken in the light most favorable to the Defendants, would reverse the language and plain meaning of the covenants attached to the 1955 map. As a result, the Plaintiff's Motion for Summary Judgment is granted.

7. **THE AFFIDAVIT OF ROBERT DECIERO IS ADMISSIBLE AS EVIDENCE AND INFERENCES DRAWN FROM IT WERE VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENDANTS.**

Defendants argue that the affidavit of Robert DeCiero is littered with hearsay statements, and therefore should not have been admitted into evidence. As this Court stated during the

²⁹*DeCiero, et. al. vs. Long Bay Properties*, 98-CP-26-4275.

Hearing on August 15, 2005, the affidavit of Mr. DeCiero was a proffered affidavit that the Plaintiff's attorneys divulged during discovery, as a result Plaintiff is allowed to admit it.³⁰ Accordingly, this Court may draw whatever conclusion it can from it. Any inferences drawn from Mr. DeCiero's affidavit were viewed in the light most favorable to the Defendants.

IV. CONCLUSIONS OF LAW:

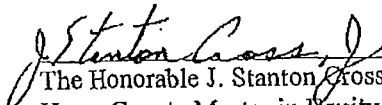
This Court makes the following conclusions of law:

1. The Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Blocks 30, 32, and 34 and the remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street.
2. The Defendants had both actual and constructive notice of the existence of the Restrictive Covenants recorded in Plat Book 25, Page 22, Horry County Clerk of Court and the 1972 Order signed by Judge Vaught.
3. The 1958 Restrictive Covenants are fully enforceable against the Defendant by any or all property owners within Long Bay Estates Subdivision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Restrictive Covenants recorded in Plat Book 25, Page 22, Office of the Horry County Clerk of Court apply to all of Blocks 1-27 of Long Bay Estates subdivision, including Blocks 30, 32, and 34 and the

³⁰ See Transcript of *Musick v. Dicks* dated August 15, 2005 (page 37 line 21 thru page 38, line 16).

remaining portions of "old" Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southernmost paved street. The Defendant is further Ordered to return the property back to its original condition as being one lot with only one tax map number and is prohibited from subdividing or changing the lot lines from its original condition when Defendants originally purchased the property.


The Honorable J. Stanton Cross, Jr.
Horry County Master in Equity

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March 6, 2007