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.

FINAL BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE CASE

Respondent John Musick ("Respondent" or "Musick") instituted this action by filing his Complaint on April 12, 2004 in the Court of Common Pleas for the Fifteenth Judicial Circuit, and his Amended Complaint on May 26, 2005. (R. pp. 67-71, 78-82). Respondent alleged that although the 1955 Plat (defined below) shows that Blocks 28 and 29 contain seven lots and although the 1972 Order (defined below) provides for right of revision of the lot arrangement for these seven lots and the arrangement thereof, that the recording by the Appellants, Thomas L. Dicks and Robert E. Dicks, Jr. ("Appellants" or the "Dicks"), of a plat showing the property as containing seven lots violated the terms of the 1972 Order.[1] (R. pp. 78-82). Musick requested that the lower court issue an order declaring the lot arrangement evidenced by the 2003 Plat (defined below) "constitutes a violation of the restrictions applicable to the [Subject Property] and to Long Bay Estates Subdivision as a whole." (R. p. 81).

The Dicks answered the Complaint and subsequently the Amended Complaint and asserted certain counterclaims against Musick alleging that no restrictive covenants apply to the Subject Property which affect the Dicks' right to own their Property as seven lots, and the Dicks requested a declaratory judgment stating they have not violated any restrictions, covenants, and orders that are alleged to encumber the Subject Property. (R. pp. 72-77, 89-95).

[1] Although the Amended Complaint filed by Musick in this action asserted certain claims against the Dicks based on issues related to the potential future use of the Subject Property as rental property, all of these claims have now been dismissed upon the agreement of the parties and as evidenced by the Stipulation of Dismissal which was filed in this matter on June 12, 2007.

The Dicks and Musick each filed Motions for summary judgment and the Honorable J. Stanton Cross, Jr., as Master-in-Equity for Horry County, held a hearing on these motions on August 16, 2006 and issued his Final Order Ending Action ("Order Granting Summary Judgment"), dated March 6, 2007 and filed on March 7, 2007, wherein he granted Musick's Motion for Summary Judgment. (R. pp. 21-35).

The Dicks appealed the Order Granting Summary Judgment and the Court of Appeals, after reviewing the briefs of both parties and hearing oral arguments on the issues presented, issued its Opinion (the "2010 Opinion") reversing the grant of summary judgment by Judge Cross and remanding the case for a trial on the merits. (R. pp. 59-66). Musick filed a petition for rehearing regarding this 2010 Opinion, which was denied, and Musick failed to pursue any appeal of the 2010 Opinion (or any portion thereof) or the Order Denying Musick's Petition for Rehearing.[2] (R. pp. 98-99, 18-19.)

Upon remand, the trial was held on April 12, 2011 which culminated in an Order issued by The Honorable Cynthia Graham Howe, as Master-in-Equity for Horry County (the "Master"), dated July 29, 2011 and filed on August 9, 2011 (the "Order") which found in favor of Musick, the particulars of which are more particularly discussed below. (R. pp. 10-17). The Dicks filed their Motion to Reconsider, Alter or Amend the Judgment on September 11, 2011, which Motion was denied by the Master's Order Denying Defendants' Motion for Reconsideration filed on July 18, 2012. (R. pp. 100-143, 6-9). The Dicks timely filed their Notice of Appeal of the Order and the Order Denying Motion for Reconsideration on August 20, 2012. (R. pp. 144-159).

[2] As will be discussed below, the 2010 Opinion finds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots." (R. p. 64). This finding was not appealed by Musick and therefore has become the law of this case.

STATEMENT OF THE FACTS

The Dicks and Musick each own certain real property within the Long Bay Estates subdivision in Myrtle Beach, Horry County, South Carolina. The Dicks own seven lots located within Blocks 28 and 29 of the aforementioned subdivision (the "Property" or "Subject Property") which are described with more particularity hereinbelow. (R. pp. 79-80, 536-537, 538-541). Musick is the owner of Lot 4 of Block 24 within the subdivision. (R. p. 78). In 1955, Robert L. Bellamy drew a plat of the subdivision (the "1955 Plat"), 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. (R. p. 530). The Subject Property is shown on the 1955 Plat as comprising seven individual lots within Blocks 28 and 29. Id.

Certain alleged restrictions were somehow attached to and recorded with the 1955 Plat despite the fact that these alleged restrictions are not signed, dated or acknowledged (the "1958 Restrictions"). Id. The 1958 Restrictions provide, in pertinent 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.

Id. Under the above-quoted provision of the 1958 Restrictions, the 1958 Restrictions only apply to Blocks 1 through 27 of the subdivision, and not to the Subject Property which comprises Blocks 28 and 29.

On June 1, 1972, Gene F. Lewis and Carmen F. Ward ("Gene Lewis" and "Carmen Ward"), alleging ownership of Blocks 28-33 of Long Bay Estates, filed an

action against Leroy Adams and numerous other owners of property in Long Bay Estates seeking, among other things, to quiet title to certain portions of said plaintiffs' property over which the 1955 Plat shows a road to be constructed, said road having never been constructed. (R. pp. 455-470). In connection with this action, an order was issued by the Honorable Winston Vaught, which was filed on November 21, 1972 (the "1972 Order"). Id. In the 1972 Order, the court concluded that the alleged 1958 Restrictions, by their express terms, apply only to Blocks 1 through 27, and that the property owned by the plaintiffs in that action – including Blocks 28 and 29 – is not subject to the 1958 Restrictions. (R. p. 460). In so holding, the court stated:

> *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 . . . I find and hold that the portion of the plaintiffs' property with which their actions concerns itself is not subject to any restrictions or protective covenants beyond Block 27.

Id. (emphasis added).

However, in connection with the above-referenced action, the parties apparently agreed to place certain restrictions upon Blocks 28 and 29, separate and apart from the 1958 Restrictions. (R. p. 461). The 1972 Order created these restrictions upon Blocks 28 and 29 by providing 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.

Id. (emphasis added).

The 1972 Order further explains that the above areas have been indicated as "residential" and as "residential (with right of revision)" on the copy of the map attached thereto. Id. On the map attached to the 1972 Order, the Subject Property, which consists of the seven lots making up the remaining portions of Blocks 28 and 29, is clearly identified as "residential (with right of revision)." (R. p. 470).

The 1972 Order was indexed in the Clerk of Court's office under the name of Leroy Adams, but was not indexed as a judgment against the names of the plaintiffs in that case - Gene Lewis and Carmen Ward - as required by Section 15-35-520 of the South Carolina Code. (R. p. 167, lines 12-18, p. 182, lines 2-5); S.C. CODE ANN. § 15-35-520 (2005). Because the plaintiffs in the case out of which the 1972 Order arose were the record owners of the subject property, the 1972 Order was not indexed in the chain of title to the property that was the subject of that action, a portion of said property now being owned by the Dicks and identified herein as the Subject Property. Thus, the 1972 Order was not discoverable during a routine title examination of the Subject Property and did not operate to provide constructive or inquiry notice to third parties of its terms. (R. p. 360, lines 20-24, p. 380, line 16 – p. 381, line 5, p. 404, lines 11-22). This fact is acknowledged and admitted by all parties to this litigation. (R. p. 167, lines 12-18, p. 182, lines 2-5).

Following the execution and (improper) filing of the 1972 Order, David W. and Leigh Ammons Meese (collectively, the "Meeses") purchased the Subject Property from Carmen Ward and others. The Subject Property consists of the remaining portions of Blocks 28 and 29, as evidenced by that certain deed to the Meeses for the Subject Property, which was recorded on September 4, 1997 in Book 1971 at Page 134 in the

office of the Register of Deeds for Horry County (the "Meese Deed"). (R. pp. 532-535). At the time of the conveyance of the Subject Property to the Meeses as described above, it has not been proven that the Meeses had actual knowledge of the 1972 Order or the 1972 Restrictions contained therein. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8, p. 396, line 21 – p. 397, line 3). In fact, it is undeniable that David Meese did not have actual knowledge of the 1972 Order. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

The Subject Property was then conveyed by the Meeses to Thomas L. Dicks, as evidenced by that certain deed from the Meeses to Thomas L. Dicks recorded on May 19, 2003 in Book 2597 at Page 296 in the office of the Register of Deeds for Horry County. (R. pp. 536-537). On that same day, Thomas L. Dicks conveyed Lots 1, 2 and 3 of the Subject Property (as shown on the 2003 Plat defined below) to Robert E. Dicks, Jr. by deed recorded on May 19, 2003 in Book 2597 at Page 299 in the office of the Register of Deeds for Horry County. (R. pp. 538-541).

In accordance with and in reliance upon the language of the 1972 Order stating Blocks 28 and 29, which include the Subject Property, are subject to the residential restrictions established by the 1972 Order "but with right of revision of the lot arrangement," the Dicks caused to be prepared and recorded a plat which was approved for recording and recorded on May 19, 2003 in the office of the Register of Deeds for Horry County in Plat Book 189 at Page 237 (the "2003 Plat"). (R. p. 542). The 2003 Plat, like the 1955 Plat, shows Blocks 28 and 29 containing a total of seven lots. It is this 2003 Plat that Musick challenges.

Both Musick and Robert DeCiero, a neighboring landowner (who testified on Musick's behalf), testified that the Subject Property being used as seven lots is consistent with the overall character of the neighborhood. (R. p. 273, line 20 – p. 274, line 2, p. 319, line 23 – p. 320, line 1, p. 320, lines 3-4, p. 334, lines 3-4). Other than the common area and except for one large lot in Long Bay, this property remaining as one large lot would be abnormal for this subdivision. (R. pp. 530, 470).

STANDARD OF REVIEW

Musick seeks in his Amended Complaint a declaratory judgment and injunctive relief relating to the Dicks' alleged violation of certain restrictions relating to their Property. (R. pp. 81-82). "Declaratory judgments in and of themselves are neither legal nor equitable" and, therefore, the applicable standard of review for a declaratory judgment action is determined by the nature of the underlying issue. Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "Actions for injunctive relief are equitable in nature." Id. Likewise, "[a]n action to enforce restrictive covenants by injunction is in equity." Cedar Cove Homeowners Assoc. v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006) (on the other hand, an action for breach of restrictive covenants where damages are sought is an action at law). Accordingly, Musick's action to enforce the alleged restrictive covenants through injunction is one in equity. "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." Wiedemann, 344 S.C. at 236, 542 S.E.2d at 753; see also Cedar Cove, 368 S.C. at 258, 628 S.E.2d at 286. Therefore, this Court is not bound by the findings of

fact of the Master and is entitled to, and should, review the record and make findings of fact in accordance with its own view of the evidence.

ARGUMENTS

I. THE MASTER ERRED IN HOLDING THAT ONLY THE "GRANTORS" HAD THE RIGHT TO CHANGE THE LOT LINES.

The Master expressly found in her Order that the 1972 Order applied the 1958 Restrictions to Blocks 28 and 29 "subject only to the 'Grantor's' rights to change the boundary lines and building lines as to any unsold lots." (R. p. 11). This finding is in clear error. In reaching this conclusion the Master relied solely upon the language of the 1972 Order, which language 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.

(R. p. 461) (emphasis added).

As is glaringly evident from the language of the 1972 Order, Judge Vaught never said that the 1958 Restrictions 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." (R. p. 461).

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

added to state that the 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 known that limited rights existed 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 Master in this case has mistakenly relied on the "in any event" sentence, a sentence unnecessary to the ruling which 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, according to the plain language of the 1972 Order, are not limited to any particular party. (R. p. 461). 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 Master in this case has read a provision into the 1972 Order that simply does not exist.

The Master's 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, the Master's interpretation is 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 the Master 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." (R. p. 461) (emphasis added).

Restrictive Covenants, such as those contained in the 1972 Order, are contractual in nature, and therefore "the language used in the restrictive covenant is to be construed

according to its plain and ordinary meaning." Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). Furthermore, in light of the fact that restrictions on the use of property are historically disfavored, restrictive covenants are to be "strictly construed" and all doubts as to the proper construction of restrictive covenants must be resolved in favor of free use of the property. Id.; see also Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The reasoning behind these long applied and well recognized rules of construction is, again, the historical disfavor of restrictive covenants in South Carolina and the belief within this State that "the best interests of society are advanced by the free and unrestricted use of land." Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988).

The "plain language" of the 1972 Order simply states the Subject Property is subject to residential restrictions "*but*[3] with right of revision of the lot arrangement." (R. p. 461) (emphasis added). The 1958 Restrictions, on the other hand, state that "the *Grantors* reserve the right to change the boundary lines . . . ." (R. p. 530) (emphasis added). In claiming the Dicks do not have the right of revision of the lot arrangement regarding the Subject Property, Musick requests this Court read into the restrictions contained in the 1972 Order, which are clear and unambiguous and do not restrict the right of revision of the lot arrangement to any particular party, the limitation on this right that was included in the 1958 Restrictions. This interpretation and broadening of the

[3] The Definition of the word "but," as provided in the American Heritage Dictionary of the English Language, is: "[o]n the contrary," "[c]ontrary to expectation" or "except that." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 260 (3d. ed. 1992). Therefore, the 1972 Order holds the Subject Property is subject to such residential restrictions "except that" - or except for - with right of revision of the lot arrangement.

1972 Order, however, is simply not within the bounds of this Court to consider, and should not have been undertaken by the Master.

The restrictions contained in the 1972 Order, like any other restrictions affecting real property, were agreed upon and negotiated between the parties thereto and are thus contractual in nature. See S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding that restrictive covenants are contractual in nature). Any such restriction upon real property shall not "be enlarged or extended by construction or implication beyond the clear meaning of its terms *even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.*" Id. (emphasis added).

In the present situation, if the parties intended to restrict the right of revision of the lot arrangement to the so-called "Grantor," or to any other particular party, the parties would have done so – much as they did in the 1958 Restrictions. See Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) (analyzing a situation similar to the one at hand and holding that if the parties had wanted to restrict the property at issue in that case in a particular way, they would have done so by including such language in the restrictions themselves). The fact that the parties did not so limit the right of revision of lot arrangement in the 1972 Order simply shows that the parties did not intend the right to be so limited. Instead, the right of revision of the lot arrangement, having not been reserved to any particular party, was intended to and should be construed to 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).

In finding that the right of revision of the lot arrangement was only in favor of some unidentified "Grantor," the Master failed to apply the rule of construction that "restriction[s] on the use of 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" and the Master failed to interpret the "plain language" of the 1972 Order which did not restrict the right of revision of the lot arrangement to any particular party. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Dicks respectfully request that the Master's Order in this regard, and her Order Denying Motion for Reconsideration, be reversed and vacated, and this Court find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

II. THE MASTER ERRED IN HOLDING THAT CARMEN F. WARD AND GENE F. LEWIS WERE THE "GRANTORS" CONTEMPLATED IN THE 1972 ORDER.

The Master further erred in finding that "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." (R. p. 11).

The Master purports to interpret and define the term "Grantor" when that term is not defined anywhere in the 1972 Order or the 1958 Restrictions. The Master does not refer to any specific language or evidence whatsoever upon which she relied in making

this finding.[4] If the Master relied upon evidence contained outside of what is in the 1972 Order, or perhaps the 1958 Restrictions, then the Master considered extrinsic evidence. It appears the Master did in fact consider some undefined extrinsic evidence insofar as the Order mentions that she considered "testimony" and "circumstances set forth throughout the hearing." (R. p. 11).

A court will not examine extrinsic evidence to interpret a contract absent an ambiguity. 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 Master never made a determination whether the language of the 1972 Order was either clear or ambiguous, although she should have made such a decision and it was

[4] The Court states in its Order that this holding is "[b]ased on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced," though no particular evidence or testimony is mentioned. (R. p. 11).

her duty to do so. In addition, the Master failed to describe the specific evidence she considered in reaching her conclusion.

If the Master in fact considered extrinsic evidence, which it appears that she did, then the Master must have found the language to be ambiguous or capable of being construed in more than one way. If that is the case, the Master 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 Musick. 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). And, 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).

Because the term "Grantor" is nowhere defined in the 1972 Order or the 1958 Restrictions, and the Master appears to have considered undefined extrinsic evidence, then the Master 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 Master should have strictly construed the ambiguity against Musick and construed the 1972 Order in favor of the free use of property, thus adopting the Dicks' interpretation of the 1972 Order which does not limit the reservation of the right of revision of lot arrangement to any particular "Grantor" and which allows the Dicks to own the Subject Property as seven lots. Accordingly, the Master's Order in this regard, and her Order Denying Motion for

Reconsideration, should be reversed and vacated, and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

III. THE MASTER ERRED IN FAILING TO FIND THAT THE 1972 ORDER WAS AMBIGUOUS (TO THE EXTENT THAT THE MASTER FOUND THAT THE DICKS DID NOT HOLD THE RIGHT OF LOT REVISION) AND IN THEREFORE CONSTRUING THE LANGUAGE OF THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY.

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

The Dicks assert and maintain the 1972 Order is *not* ambiguous and that according to the plain language of the 1972 Order the right of revision of the lot arrangement is not reserved to any particular party, but is a right that runs with title to the affected property. See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) ("the language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution"). However, to the extent the Master disagrees with the Dicks' interpretation of the 1972 Order, the Master was bound to find the 1972 Order is ambiguous and therefore construe the language in favor of the free use of the property. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980) (ambiguities must be resolved in favor of the free use of property).

The fact that the Court looked to extrinsic evidence (though unidentified) in interpreting the relevant provisions of the 1972 Order shows that the Court at that point in

its analysis considered the 1972 Order to be ambiguous.[5] Extrinsic evidence may only be considered when the language itself is found ambiguous. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) ("*Once the court decides the language is ambiguous*, evidence may be admitted to show the intent of the parties. . . . The determination of the parties' intent is then a question of fact. . . . On the other hand, the construction of a clear and unambiguous deed is a question of law for the court.") (emphasis added); see also Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("*Once the court decides that the language is ambiguous*, evidence may be admitted to show the intent of the parties.") (emphasis added). 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). Taken alone, the fact that the Court looked to (some unidentified) extrinsic evidence in construing the language of the 1972 Order shows that the Court found the relevant language of the 1972 Order ambiguous.

Although both the 1958 Restrictions and the 1972 Order use the term "Grantor," the operative language of the 1972 Order does not contain the term "Grantor." The Dicks submit 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

[5] The Court states in its Order that this holding is "[b]ased on the circumstances set forth throughout the hearing, through testimony and all of the documents introduced," though no particular evidence or testimony is mentioned. (R. p. 11).

"Grantor" is not defined anywhere in the 1972 Order or the 1958 Restrictions. Thus, the Master's application of the undefined term "Grantor" to the operative language of the 1972 Order (though the Dicks submit any such application is misplaced) would necessarily result in ambiguity. See Hawkins, 328 S.C. at 592, 493 S.E.2d at 878-79) ("A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation") (quoting 17A AM. JUR. 2D *Contracts* § 338, at 345 (1991)). Again, 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).

The Master in her Order relies on some undefined extrinsic evidence to define "Grantor," and then uses an awkward construction of the 1972 Order to support her holding. This manner in which the Master interpreted the 1972 Order in and of itself appears to show that the Master believed the 1972 Order to be ambiguous. In light of this perceived ambiguity the Master was bound to resolve all doubts in favor of the free use of the property. Hamilton, 274 S.C. at 157, 263 S.E.2d at 382. Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here Musick. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Ass'n. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). The Master failed in all respects to strictly construe the ambiguity in the 1972 Order against Musick and to construe the (apparently ambiguous) 1972 Order in favor of the free use of property. The Master respectfully erred in this regard and the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find

the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

IV. THE MASTER ERRED IN HOLDING THAT THE PROPERTY IN QUESTION HAD ALWAYS BEEN SOLD AS ONE LOT.

The Master 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." (R. pp. 11, 17). In actuality, the Subject Property was divided into seven lots on the 1955 Plat and the map attached to the 1972 Order and the Dicks' revision of this lot arrangement also results in the Subject Property being divided into a total of seven lots. The subdivision of the Subject Property that is now in dispute involves nothing more than a revision of the lot lines of these same seven lots – in accordance with those rights established and agreed upon in the 1972 Order.

A. The 1955 Plat and the map attached to the 1972 Order both show the property as containing seven lots, and Musick admitted that the Property consisted of seven lots.

The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530).[6] 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. (R. p. 470). In fact, Musick admitted in his Answers to Defendants' First Request for Admissions, which were entered into

[6] The Dicks sought legal counsel for the purpose of confirming that, based on the 1955 Plat, the Dicks could own the Subject Property as seven lots. (R. p. 310, line 13 – p. 311, line 6). The Dicks' counsel confirmed the Dicks' understanding that they could own the Subject Property as seven lots, and the Dicks relied on this advice in making the decision to purchase the Subject Property. Id. The Dicks would not have purchased the Subject Property without knowing they could own it as seven lots. Id.

evidence without objection, that the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). Musick specifically admitted as follows:

> 6. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 29 contains three lots.
> Response:
> Admit
>
> 7. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Block 28 contains four lots.
> Response:
> Admit
>
> 8. Admit that the plat recorded in Plat Book 25 at Page 22 shows that Blocks 28 and 29 contain a total of seven lots.
> Response:
> Admit

Id. The Court, however, failed to give any credence not only to the 1955 Plat itself, but moreover 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 S.C. 639, 650-51, 579 S.E.2d 151, 152 (Ct. App. 2003) (any matter admitted under Rule 36 is conclusively established.).

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. (R. p. 461). However, the Master in this case has erroneously concluded that, despite the plain language of the 1972 Order and the map attached thereto, the Subject Property has always been one lot, as Blocks 28 and 29.

Finally, the Master seems to acknowledge the property is or was divided into two separate blocks on the 1955 Plat, but somehow has reached a conclusion that these two

blocks not only do not contain more than one lot, but that these two blocks have always been just one lot. In other words, the Master has apparently found two separately platted blocks on a subdivision plat constitute one lot. Respectfully, the Master's ruling does not make sense and it is in error.

B. The Court of Appeals previously held that the 1955 Plat and the map attached to the 1972 Order show the Subject Property divided into seven lots, and this is the law of the case.

The Court of Appeals' prior Opinion in this case (the "2010 Opinion"), reversing an earlier 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." Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). As such, it has already been determined that Blocks 28 and 29 were divided into seven lots and that is the law of this case.

It is well settled law that an un-appealed final ruling on the merits becomes the law of the case. King v. James, 388 S.C. 16, 25, 694 S.E.2d 35, 40 (Ct. App. 2010) (noting that "neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements" and holding that "[t]herefore, this ruling is the law of the case.") (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) for the proposition that "an unappealed ruling, *right or wrong*, becomes the law of the case.") (emphasis added).

This is true on remand to the trial level as well as upon further appellate review. In Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) ("Charleston Lumber II"), our Supreme Court considered whether failing to

appeal a final order rendered certain findings to be the law of the case. In the prior proceedings ("Charleston Lumber I"), the Court of Appeals reversed the trial court's order granting summary judgment to the plaintiff and instead held the defendant was entitled to recover lost employee time as damages on his fraud counterclaim. Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). The Court of Appeals remanded the matter to the trial court for a determination of the extent of the damages. Id. The plaintiff did not seek further appellate review of Charleston Lumber I. Charleston Lumber II at 174, 525 S.E.2d at 871.

On remand, the plaintiff moved again for summary judgment on the fraud counterclaim, and the trial court again granted the plaintiff summary judgment. Id. The defendant appealed (Charleston Lumber II), arguing that the ruling permitting it damages for fraud in Charleston Lumber I was binding on the trial court. Id. This Supreme Court held that the ruling in question in Charleston Lumber I was "adverse to Charleston Lumber" and "[a]ccordingly, it was incumbent upon Charleston Lumber to seek rehearing and/or petition [the Supreme Court] for a writ of certiorari or be bound by Charleston Lumber I as the law of the case." Id. at 174-75, 525 S.E.2d at 871 (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unappealed ruling is the law of the case).

In fact, the established law of the case rule applies even if the holding reached in the un-appealed order, which has consequently become the law of the case, was wrong. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "*right or wrong*, is the law of this case and requires affirmance") (emphasis added). This is certainly a persuasive aspect of the law of the case rule –

particularly considering the law of this case as established in the 2010 Opinion regarding the existence of the Property as seven lots is correct and consistent not only with the 1955 Plat and the Plat attached to the 1972 Order, but also with the unequivocal admissions of Musick.

The Court of Appeals' 2010 Opinion in this case found that "the 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 divided into seven different lots." Musick did not appeal this 2010 Opinion. This finding is now the law of this case and the Master was bound thereby. Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). Counsel for Musick admits that "[t]he Court of Appeals issued an Order that we are functioning under. And they made several findings that I don't think we *can* or should litigate here." (R. p. 165, line 25 – p. 166, line 3) (emphasis added).

C. The property lines shown on the 1955 Plat and the map attached to the 1972 Order are actual property lines as opposed to an indication of a "potential subdivision" as held by the Master.

The 1955 Plat and the map attached to the 1972 Order showed the Subject Property as being divided into seven lots. This is clear upon a review of each of these plats. (R. pp. 530, 470). This was expressly admitted by Musick. (R. p. 529). This was held by the Court of Appeals in its 2010 Opinion. (R. p. 59). The 1972 Order even treats the Property as being already divided into separate lots. (R. pp. 455-470). Despite the foregoing, however, the Master concluded in her Order Denying Defendants' Motion for Reconsideration that the lines showing the subdivision of the Subject Property into seven lots on the prior plats indicated a mere "potential subdivision" of the Subject Property. (R. p. 8). This is simply not the case.

The 1955 Plat shows the Subject Property as being divided into seven lots, with the division being clearly shown by solid lines. (R. p. 530). Thereafter, the 1972 Order, which shows the seven lots as dotted lines, expressly and clearly establishes that the reason such dotted lines are used is only for the purpose of indicating that, as opposed to other lot lines shown on said map, the lot lines shown within the Subject Property were taken directly from the 1955 Plat - which 1955 Plat in fact does show the subdivision in solid lines. (R. p. 470). In other words, the dotted lines were used in the map attached to the 1972 Order only to differentiate, for the purposes of that map, certain Blocks that are depicted on the map as they were shown on the 1955 Plat, from other Blocks depicted on the map as they were shown on some other plat (from December 21, 1960). Id. This map, which was attached to the 1972 Order, clearly states that "Blocks 30, 32 & 34 [are] shown by solid lines from map of December 21, 1960" and "Blocks 28, 29, 30, 31, 32 & 33, as shown in Plat Book 25 at Page 22 [are] represented by dotted lines." Id. In any event, "[t]he general rule is that where the lines of senior and junior surveys conflict, the lines of the senior survey control." Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Accordingly, the solid lines shown on the 1955 Survey control.

Despite the foregoing language which was clearly incorporated on the face of the map attached to the 1972 Order, and despite the fact that the Subject Property is subdivided into seven lots by *solid* lines as shown on the 1955 Plat, as admitted by Musick and as previously held by this Court in its 2010 Order, which is now the law of this case, the Master held that the dotted lines shown on the map attached to the 1972

Order only indicated a "potential subdivision" of the Subject Property. This conclusion is obviously erroneous and a misinterpretation of the actual facts before the Court.

D. The Master erred in relying upon the fact that at some point the Subject Property was identified as only one tax map number by the Horry County Tax Assessor's office.

The fact that the Subject Property may have previously been identified by the Horry County Tax Assessor's office by only one tax map number simply has no bearing on the issue at hand. No evidence has been presented as to what information the Tax Assessor's office relied upon in creating its tax maps. It may be that the Tax Assessor's office erroneously relied upon the Culler Survey (which was only a boundary survey) without also looking to the 1955 Plat and therefore reflected the Subject Property as one lot without showing the lot lines established by the 1955 Plat. Again, no evidence was presented as to any of these issues other than the fact that at one point in time the seven lots comprising the Subject Property were identified by the Horry County Tax Assessor under one tax map number. This fact, however, particularly when unsupported by any additional evidence or information, is simply insufficient to support the Master's finding that the Subject Property has always been one lot.

In fact, Robert DeCiero, Musick's own witness, testified as follows:

> A: There isn't anything that says someone can't take several lots that they own and combine them underneath the tax map number in our subdivision. In other words, if you bought four lots and built one home and recorded it and had it recorded so that they were separate lots listed underneath the tax map number, then you could go back and do something to it. And I had an example of that. We have one of our neighbors that has done that.

(R. p. 282, lines 5-14). Courts have even recognized that "having separate tax parcel numbers and being separately taxed is not relevant in determining whether or not two properties have merged." In re Moyer, 978 A.2d 405 (Pa. Commw. Ct. 2009). Again,

the fact that the seven lots comprising the Subject Property were at some point in time identified by the Horry County Tax Assessor under one single tax map number is of no effect whatsoever, and no supporting evidence has been presented on this issue.

Based upon the foregoing, the Master erred in holding the Subject Property had always been one lot, and the Master's Order in this regard, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

V. THE MASTER ERRED IN FINDING THAT CARMEN WARD HAD A RIGHT TO SUBDIVIDE THE SUBJECT PROPERTY.

The Court further erred in finding 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." (R. p. 13).

Carmen Ward had absolutely no right to subdivide the property. The Master'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.

(R. p. 530) (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. Id. No one had the right to subdivide any lot. Id.

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." Id. 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. As aptly described by Musick at trial, "[i]f you *subdivide* then you take one lot and make it more than one." (R. p. 198, lines 17-23) (emphasis added).

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." Id. 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. Id.

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." (R. p. 461) (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 the Dicks 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." Id. 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 arrangement[7]; and (4) combine the lots with the abutting portions of lots in Blocks 24 and 25. That is it. One prohibition in the 1958 Restrictions is applicable here – "No lot shall be subdivided." (R. p. 530). 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. The Master erred in finding and holding that Carmen Ward has any right to subdivide the Subject Property and the Master's Order in this regard, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

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[7] "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.

VI. THE MASTER ERRED IN RELYING IN ANY WAY ON THE FACT THAT CERTAIN PORTIONS OF THE SUBJECT PROPERTY MAY BE WETLANDS, AND IN ATTEMPTING TO EVALUATE AND RELY UPON HER OPINION OF WHETHER THE DICKS' LOT ARRANGEMENT WAS "PRACTICAL"

The Master erred in finding "[t]he majority of Blocks 28 and 29 is wetlands . . . which makes this division somewhat impractical." (R. p. 15). The Master further erred to the extent she relied upon this finding to make her decision. Whether it is practical or not for the lots to be arranged in the manner the Dicks chose to arrange them is of no consequence to issues before the Master. Furthermore, no testimony was presented as to whether this lot arrangement is practical or, moreover, what impact the "practicality" of the Dicks' lot arrangement has on the Dicks' right to so arrange the lots. The Dicks submit that no such relation exists between their right to revision of the lot arrangement and the resulting "practicality" of their chosen arrangement. The 2003 Plat was approved by the applicable authorities for recording and nothing more should be required with respect to their chosen arrangement. (R. p. 542).

Accordingly, to the extent that the Master's Order is based upon any issues relating to wetlands within the Subject Property, or whether or not the Dicks' chosen lot arrangement is "practical," the Master's Order, and her Order Denying Motion for Reconsideration, must be reversed and vacated and this Court should find that the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

VII. THE MASTER ERRED IN HOLDING THAT THE PROPERTY IN QUESTION SHOULD CONTINUE TO BE ONE LOT AND IN FAILING TO FIND THAT THE DICKS COULD OWN THEIR PROPERTY AS SEVEN LOTS AS SHOWN ON THE 2003 PLAT.

The Master respectfully misconstrued the 1972 Order by failing 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 the property. Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). The Master 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.[8] Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The plain meaning of the 1972 Order and the evidence submitted show Musick is not entitled to any relief and in fact show that the Dicks are entitled to own the Subject Property as seven lots as shown on the 2003 Plat.

A. The Master 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 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 but instead expressly provide that "no lot shall be subdivided." (R. p. 530). Neither the 1958 Restrictions nor the 1972 Order provide the Grantors, whoever they are, or anyone else, the right to do away with lots or to combine the seven lots into one lot. (R. pp. 530, 455-470).

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. (R. p. 530). Likewise, the 1972 Order is replete with language which implies the parties were concerned with preserving the residential character of the

[8] None of these rules or cases setting forth these rules were cited or mentioned in the Court's Order.

neighborhood. (R. pp. 455-470). Thus, it does not make sense that the Master 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.

Using the Subject Property as one lot is not consistent with the rest of the neighborhood. In fact, across the street from the Subject Property there are seven or eight houses in generally the same amount of space as the Subject Property, entirely consistent with the lot configuration of the Subject Property as shown on the Dicks' 2003 Plat. (R. p. 319, line 23 – p. 320, line 1). The Subject Property consists of 2.67 acres and the testimony at trial was that "95 or even 100 percent of lots are one acre or less" and the "density [of the seven lots on the 2003 Plat] is equal to what the density that exists there [in the neighborhood]." (R. p. 320, lines 3-4, p. 334, lines 3-4). Photographs were introduced showing the location of houses on lots in other portions of the neighborhood consistent with typical residential developments on relatively small lots – certainly lots of far less than 2.67 acres each. (R. p. 320, line 9 – p. 321, line 5, pp. 544-560). P. Wayne Mumford, Esq., who represented the Dicks in their purchase of the Subject Property, testified that upon his review of the 1955 Plat "it was obvious that this was a residential community. And when I saw the manner and methodology on which those lots were entered, it seemed to me that what Mr. Dicks was attempting to do was to continue the scheme of development by having seven lots on that property." (R. p. 410, lines 3-10).

The Master appears to have created in Carmen Ward and Gene Lewis a right 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). (R. p. 530). The 1958 Restrictions expressly prohibit the subdivision of lots. Id. As also mentioned above, the 1955 Plat shows the Subject Property as containing seven lots and the map attached to the 1972 Order shows the Subject Property as containing seven lots. (R. pp. 530, 455-470). The 1972 Order created rights to revise the lot arrangement and to combine the lots with adjoining lots. (R. p. 461). 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 Master that the Subject Property is anything other than seven lots is clearly erroneous and authorizes a prohibited act.

In addition, the Master made a finding that Carmen F. Ward sold the Subject Property to Leigh and David Meese as one lot and that the survey referenced in the deed from Carmen Ward to the Meeses (the "Culler Survey") shows the Subject Property as one lot. (R. p. 13). However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks' closing attorney) testified it is customary that old lot lines would be indicated on a survey and that the Culler Survey, which did not show these old lot lines, "didn't appear to be anything but a boundary survey and [he] took it as such." (R. p. 422, lines 20-22, p. 423, lines 12-15). 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. (R. p. 517). There is no indication on the Culler Survey that the existing seven lots were being eliminated, which is required by local ordinance. (R. p. 517, p.

308, lines 8-11). In fact, the Culler Survey is in the name of the Meeses, not Ms. Ward. (R. p. 517). Certainly the Meeses had no right to change seven lots into one lot.

Moreover, in light of the general rule that lines shown on a senior survey control over lines shown on a junior surveys if conflict occurs between the two, the lot lines shown on the 1955 Plat must be controlling if any asserted discrepancy arises between the 1955 Plat and the Culler Survey, which is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore, even if the Court found the Culler survey was more than just a boundary survey, the lot lines as clearly shown, in solid lines, on the 1955 Plat would have to control. Id.

Thus, the Master also erred in relying on the Culler survey to support her findings and conclusions.

Based upon the foregoing, the Master erred in failing to find that the Subject Property could be anything other than seven lots. The Master 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 that therefore the Subject Property is and has always been seven lots. Any findings in the Master's Order inconsistent with the foregoing are clearly erroneous.

B. The Master erred in failing to find that the Dicks hold or held the right of revision of the lot arrangement as set forth in the 1972 Order and therefore are entitled to arrange the seven lots comprising the Subject Property as shown on the 2003 Plat.

The 1972 Order expressly provides that the 1958 Restrictions apply but with right of revision of the lot arrangement. (R. pp. 455-470). The Dicks recorded their 2003 Plat

which shows seven lots, which was fully approved by the appropriate Horry County officials. (R. p. 542). The 1955 Plat showed seven lots, the map attached to the 1972 Order shows seven lots (with right of revision). (R. pp. 530, 470). The Dicks exercised the right that was provided to any owner of the Subject Property as provided in the 1972 Order, to revise the lot arrangement.

The Master has apparently concluded that only the owners of the Subject Property at the time the 1972 Order was issued or the "Grantors," whoever they are, could revise the lot arrangement. (R. p. 13). However, that is not what the 1972 Order states and as set forth in great detail above, the Master erred in so restricting the right of revision of the lot lines to these unidentified "Grantors." Moreover, and also as discussed above, the Master erred in holding that the "Grantors" who did, according to the Master, hold the right of revision of the lot lines were Gene Lewis and Carmen Ward.

As previously noted, the Master's finding in this regard is 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. (R. p. 461). The plain 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).

Again, 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. (R. pp. 455-470). Any other construction of the 1972 Order requires reading something into the 1972 Order which simply does not exist. The Master 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) "Grantors." (R. p. 17). 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." (R. p. 530). On the contrary, the 1972 Order does not say that the right of revision was reserved to the plaintiffs in that case or any so-called "Grantors." Instead, the 1972 Order states that the

restrictions attached to the 1955 Plat apply to Blocks 28 and 29, "**but**[9] with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. pp. 455-470) (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 any so-called "Grantors," they would have stated that "Plaintiffs (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. (R. pp. 455-470). Moreover, if the Court 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. 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. This is clearly authorized pursuant to the 1972 Order, and the Master should have so held.

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[9] 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.

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 the Dicks' favor and in favor of the free use of the property. 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. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006); Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007).

Accordingly, the Dicks owning their property as seven lots as shown on their 2003 Plat is entirely proper as the Subject Property was shown as seven lots on the 1955 Plat and shown as seven lots according to the map attached to the 1972 Order, and the right of revision of the lot arrangement was not reserved to any particular party but instead was intended to, and according to the 1972 Order does, run with the title to the Subject Property.

In accordance with the foregoing, the Master clearly erred in holding the Subject Property should continue to be one lot and in failing to find that the Dicks could own the Subject Property as seven lots as shown on the 2003 Plat. Therefore, the Master's Order and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

VIII. THE MASTER ERRED IN FAILING TO FIND THAT THE SHELTER RULE PROTECTS THE DICKS AND ALLOWS THEM TO HOLD TITLE TO THE SUBJECT PROPERTY UNENCUMBERED BY THE RESTRICTIONS ESTABLISHED IN THE 1972 ORDER.

The Master erred in holding that "[t]he Shelter Rule does not provide Mr. Thomas Dicks or Mr. Robert Dicks any freedom to subdivide the lot," that "[t]he Dickses may not use the Shelter Rule in this instance because the Meeses are not innocent purchasers" and that "[t]he Dickses' title is not 'sanctified' under the Shelter Rule." (R. p. 16). As discussed in greater detail below, these findings and holdings are not consistent with the testimony presented at trial, nor with the law of this State.

Under this well-established rule, commonly known as the "Shelter Rule," a purchaser with notice of an unrecorded title or claim will be protected if his grantor was an innocent purchaser. See 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 77-78 (3d. 2003); Liberty Loan Corp. of Darlington, S.C. v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) ("whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified."). With respect to the Shelter Rule and its application, our Supreme Court has stated as follows:

> The governing law has been established by many decisions; among them are; Fretwell v. Neal, 11 Rich.Eq. 559, 572, "the well-recognized doctrine of equity being that wherever, in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified"; Foster v. Bailey, 82 S.C. 378, 382, 64 S.E. 423, 424, "The case illustrates the danger of negligence in complying with the recording statute"; Southern Railway v. Carroll, 86 S.C. 56, 67 S.E. 4; and McCandless v. Klauber, 158 S.C. 32, 155 S.E. 141. The rule is well stated in 77 C.J.S. Sales § 296 d, p. 1110, as follows:
>
> > After property has passed into the hands of a bona fide purchaser, *every subsequent purchaser* stands in the shoes of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, *irrespective of notice*, unless such purchaser was a former purchaser, with notice,

> of the same property prior to its sale to the bona fide purchaser.

Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255, 258 (1957) (emphasis added).

As one commentator has stated:

> In accordance with the general rule that a remote purchaser of real estate whose purchase does not fulfill all the requisites for protection due a bona fide purchaser may nevertheless be accorded protection because of a purchase from one who is entitled to such protection, *if one is entitled to protection as a bona fide purchaser, such person may convey a good title to a subsequent purchaser irrespective of the latter's notice of an outstanding equity or unrecorded interest; in other words, a purchaser with notice from a bona fide purchaser without notice succeeds to the rights of the latter.*

77 AM. JUR. 2d. Vendor & Purchaser § 423 (2007) (emphasis added).

The 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 noted above, and as acknowledged and admitted by all parties, the 1972 Order was not indexed properly so as to comply with Section 15-35-520 of the Code, and therefore could not operate to provide notice to third parties of any matters contained therein. (R. p. 167, lines 12-18, p. 182, lines 2-5, p. 360, lines 20-24, p. 380, line 16 – p. 381, line 5, p. 404, lines 11-22); S.C. CODE ANN. § 15-35-520 (2005). Therefore, the Meeses clearly took title to the Subject Property without constructive or inquiry notice of any matters contained in the 1972 Order. In addition, the testimony establishes that the

Meeses took title to the Subject Property with no actual notice of the 1972 Order, and the Master erred in interpreting the testimony otherwise.

The Dicks, in turn, purchased the Subject Property from the Meeses. Because the Dicks purchased the Subject Property from the Meeses, who were bona fide purchasers for value without notice, the Dicks are entitled to step into the shoes of the Meeses, regardless of any notice that the Dicks may have had regarding the 1972 Order or any other restrictions. Thus, the Dicks are to be afforded the same protections that the Meeses had and the Master erred in holding the Dicks are not entitled to such protection.

A. The Court erred in its analysis of the Shelter Rule by considering evidence of knowledge or notice after the Meese's purchased the Subject Property. Any such knowledge is irrelevant.

The Court erred in considering any evidence of notice or knowledge of the 1972 Order or any restrictions created thereby which was acquired after the Meeses purchased the Subject Property. Any such evidence is not relevant to an analysis regarding whether the Meeses were bona fide purchasers for value without notice for purposes of the Shelter Rule. 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); see also S.C. Tax Comm'n v. Belk, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976) ("A person may not invoke the doctrine of innocent purchaser for value unless he establishes

'(1) [t]hat the purchase money was actually paid *before* notice of outstanding incumbrances or equities . . . ; (2) that he has purchased and acquired the legal title, or the best right to it, *before* notice of outstanding incumbrances or equities; and (3) that he *purchased* bona fide without notice.") (emphasis added) (quoting Jones v. Eichholz, 212 S.C. 411, 422, 48 S.E.2d 21, 26 (1948).

The Master found actual notice to exist because the Dicks' closing attorney knew about the 1972 Order and the Dicks knew about it. (R. pp. 13, 15). The Master appears to have improperly relied on conversations between the Dicks and the Meeses, all of which occurred after the Meeses purchased the Subject Property. (R. pp. 14-15). All of these factors are absolutely irrelevant to application of the Shelter Rule. Whether or not the Dicks, or their attorney, had any actual or other notice of the 1972 Order has no impact whatsoever on the Shelter Rule analysis, as the only knowledge which has any impact on the Shelter Rule application is the knowledge of the Meeses *at the time of their purchase* of the Subject Property. Id. Any knowledge of the Meeses - or any other party for that matter - *after* the moment of the Meeses purchase of the Subject Property is wholly irrelevant and should not have been considered, and certainly not relied upon, by the Master.

B. The Master erred in interpreting the testimony of James F. Dusenbury.

Mr. Dusenbury 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 revealed no restrictions, including those within the 1972 Order, applicable to the Subject Property. (R. p. 361, lines 7-9). He issued a title policy showing that no restrictions applied and did not take exception to the 1972 Order. (R. p.

366, line 25 – p. 367, line 5). Mr. Dusenbury's testimony as to his knowledge of the 1972 Order at the time of the Meeses' purchase was actually as follows:

> Q: Do you have any knowledge at the time David and Leigh Meese purchased the property that they would have knowledge of any restrictions on the property?
> A: To the best of my recollection, no, I did not have such knowledge.
> . . . .
> Q: And you knew there was a strong possibility that they applied to this tract but your knowledge was not acquired until after the Meeses purchased the property; is that correct?
> A: To the best of my recollection, that is correct.
> Q: You had not had that knowledge before; correct?
> A: Correct.

(R. p. 364, lines 8-13, p. 371, line 23 – p. 372, line 4).

Despite the foregoing unequivocal testimony the Master held in her Order that "Attorney Jay 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." (R. p. 13). In reality, however, the knowledge of Mr. Dusenbury relating to the 1972 Order's application to the Subject Property was not acquired until *after* the Meese's purchase; and, again, any knowledge of the Dicks regarding the 1972 Order is simply irrelevant for purposes of the Shelter Rule.

The Master erred in her interpretation of, and reliance upon, the testimony of Mr. Dusenbury in finding the Shelter Rule inapplicable to this case.

C. <u>The Master erred in her findings regarding the testimony of David Meese</u>.

David Meese clearly testified he had no knowledge about any restrictions on the Subject Property, and in particular any judgments or restrictions that would prevent his owning the Subject Property as seven lots, prior to he and his wife's purchase of the Subject Property. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386,

line 25 – p. 387, line 8). Mr. Meese testified, verbatim, as follows:

> Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?
> A: No, I'm not.
> . . . .
> Q: At the time you and your wife purchased the property, did y'all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?
> A: I did not believe there were any restrictions to our knowledge and belief.
> Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?
> A: None that I recall.
> . . . .
> Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?
> A: I don't remember such a thing from the purchase, no.
> . . . .
> Q: You had no knowledge of any restrictions on the property; correct?
> A: Restrictions in terms of subdivision?
> Q: Yes.
> A: I was not aware of any such restrictions for subdivision.

Id.

Despite the foregoing unequivocal testimony from Mr. Meese that he purchased the Subject Property without knowledge of the 1972 Order, the Master held the Dicks were not entitled to the protections of the Shelter Rule because "the Meeses had notice that Blocks 28 and 29 were subject to the restrictions. . . ." (R. p. 15). Respectfully, the Master has disregarded, or at the very least misinterpreted, the testimony of Mr. Meese and this finding and holding cannot be sustained.

D. The Master erred in interpreting Leigh Meese's testimony.

Likewise, the Master held that Leigh Meese "had notice of the order." (R. p. 16). However, Leigh Meese testified as follows:

> Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?
> A: **I did not**. At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don't know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Despite the foregoing testimony, the Master held that "she was convinced" that Leigh Meese had notice of the 1972 Order at the time of her purchase. (R. pp. 15-16). The Master's conclusion in this regard is expressly based on the fact that "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." Id. (emphasis added). This conclusion by the Master is not supported by any evidence in the record and simply cannot be sustained. Leigh Meese expressly stated that although she may have become aware of the restrictions *at some point*, she was not aware of the restrictions at the time of her purchase. (R. p. 396, line 21 – p. 397, line 3). Any knowledge of Leigh Meese at any time after her purchase of the Subject Property is, again, absolutely irrelevant. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006).

E. To the extent the Master found that David Meese had no knowledge of the 1972 Order or any restrictions on the Subject Property, but Leigh Meese did, the Master erred in failing to find that the bona fides of either of them is sufficient for the purpose of the Shelter Rule.

Despite the foregoing testimony of Leigh Meese at trial, in the event that the Master still felt "convinced" that Leigh Meese was aware of the 1972 Order at the time of

her purchase of the Subject Property, the Master erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was not sufficient for purposes of the Shelter Rule.

This is similar to a situation where one of two cotenants has knowledge of a prior judgment or monetary lien that was not recorded properly, in which case the judgment as a matter of equity should only attach to the undivided interest of one cotenant, but not the other who is a bona fide purchaser for value without notice. In this case, however, 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 in order for the Shelter Rule to apply. 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 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.).

Again, 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 that restriction. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

To the extent that the Master somehow construed the testimony in such a way that she believed Leigh Meese to have had notice of the 1972 Order at the time of the purchase of the Subject Property by the Meeses, the Master erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice was sufficient to afford them both the benefit of the protection of the Shelter Rule.

The Master erred in failing to find the Dicks are protected by the Shelter Rule and therefore not subject to the restrictions established in the 1972 Order. The Master's Order and her Order Denying Motion for Reconsideration should be reversed and vacated and this Court should find the Dicks are protected by the Shelter Rule, not bound by the restrictions set forth in the 1972 Order, and entitled to own the Subject Property as seven lots as shown on the 2003 Plat.

CONCLUSION

For all of the reasons set forth above, the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

Respectfully submitted,

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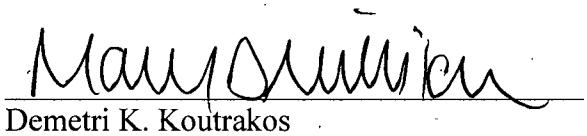

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I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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