THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Stephen A. Spitz, Special Referee

Appellate Case No. 2016-001878

Julia Tompkins Ewing . . . . . Respondent,

v.

Keith A. Guest, Stephanie C. Guest, and
Pleasant Point Property Owners Association, . Defendants,

of whom

Keith A. Guest and Stephanie C. Guest are the . Appellants.

FINAL BRIEF OF RESPONDENT

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II. Did the circuit court err in finding that the right to use Pleasant Point Drive has not been abandoned or otherwise lost?

III. Was the existence of a prescriptive easement over the driveway either raised by the complaint or tried by consent?

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Counterstatement of Questions Presented

I.

Did the circuit court err in finding that the purchasers of Lots 1, 2, and 3 acquired at the moment of purchase a transmissible right to use the streets of the subdivision as shown on the developer's master plat incorporated in their deeds, including the portion of Pleasant Point Drive in question?

II.

Did the circuit court err in finding that the right to use Pleasant Point Drive has not been abandoned or otherwise lost?

III.

Was the existence of a prescriptive easement over the driveway either raised by the complaint or tried by consent?

Counterstatement of the Case

This action was commenced with the service and filing of a complaint on August 11, 2015 by Julia Tompkins Ewing, the respondent herein, against Keith A. Guest and Stephanie C. Guest, the appellants herein. Pleasant Point Property Owners Association, Inc., was also a defendant but is not a party to this appeal.

The plaintiff alleged that she owned three lots in Pleasant Point Plantation on Lady's Island. She alleged that her lots were accessed by Pleasant Point Drive, a forty-foot-wide drive referred to in the complaint as the access area, shown on the 1969 plat incorporated in the deeds of her predecessors in title. She further alleged continual use of the access area for more than forty years. The plaintiff alleged that she and the defendants Guest had entered into a mediated settlement agreement regarding the use of the access area but that the defendants Guest had failed to execute the agreement, and were obstructing plaintiff's access. Plaintiff sought a declaratory judgment establishing the rights of the parties with respect to the properties which are the subject of the action. Plaintiff further alleged causes of action for breach of the settlement agreement, trespass, and to quiet title, and sought injunctive relief.

The defendants Guest answered, alleging that the forty-foot-wide area in controversy provided access to the property of the Guests, not the property of the plaintiff. They denied the material allegations of the complaint. They joined in the prayer for declaratory relief, and counterclaimed for trespass, slander of title, and injunctive relief.

The action was referred to Stephen A. Spitz, Esquire, as special referee. The case was tried on January 20, 2016. By Final Order dated March 25, 2016, the special referee found that the respondent's predecessors in title acquired a transmissible right to use all the streets of the subdivision as shown on the subdivision plat incorporated in the deeds to their lots, including the forty-foot-wide area in controversy at the end of

Pleasant Point Drive.[1] The special referee held that the successor to the subdivision's developer had no authority to terminate that right by recording later plats which failed to show the area in controversy as a part of Pleasant Point Drive. The special referee further held, among other things, that the plaintiff's predecessors in title had acquired a prescriptive easement appurtenant for the use of Pleasant Point Drive. The prescriptive easement also applied to the use of a dirt driveway in controversy, as well as a small area bordering the respondent's carport. Injunctive relief was granted to the respondent. The claims and counterclaims for money damages were denied.

The appellants and the respondent moved under Rule 59, SCRCP, to alter or amend the judgment. By Supplemental Final Order dated August 8, 2016, the special referee granted respondent's motion in part and denied appellants' motion.

The appellants timely noticed this appeal.

Statement of Facts

South Carolina was introduced to the concept of a gated subdivision in 1956 with Sea Pines Plantation on Hilton Head Island. Pleasant Point Plantation followed a little more than a decade later on Lady's Island, across the Beaufort River from the City of Beaufort.[2]

The initial master plat of the Country Club Section of Pleasant Point Plantation, on Cuthbert Point, Lady's Island, was prepared for the developer in 1969 by R. D. Trogdon, R.L.S. Mr. Trogdon's plat is dated December 4, 1969 and is recorded in Plat Book 18 at page 45 in the office of the Beaufort County R.M.C. [Pltf. Exh. 1, part 1.

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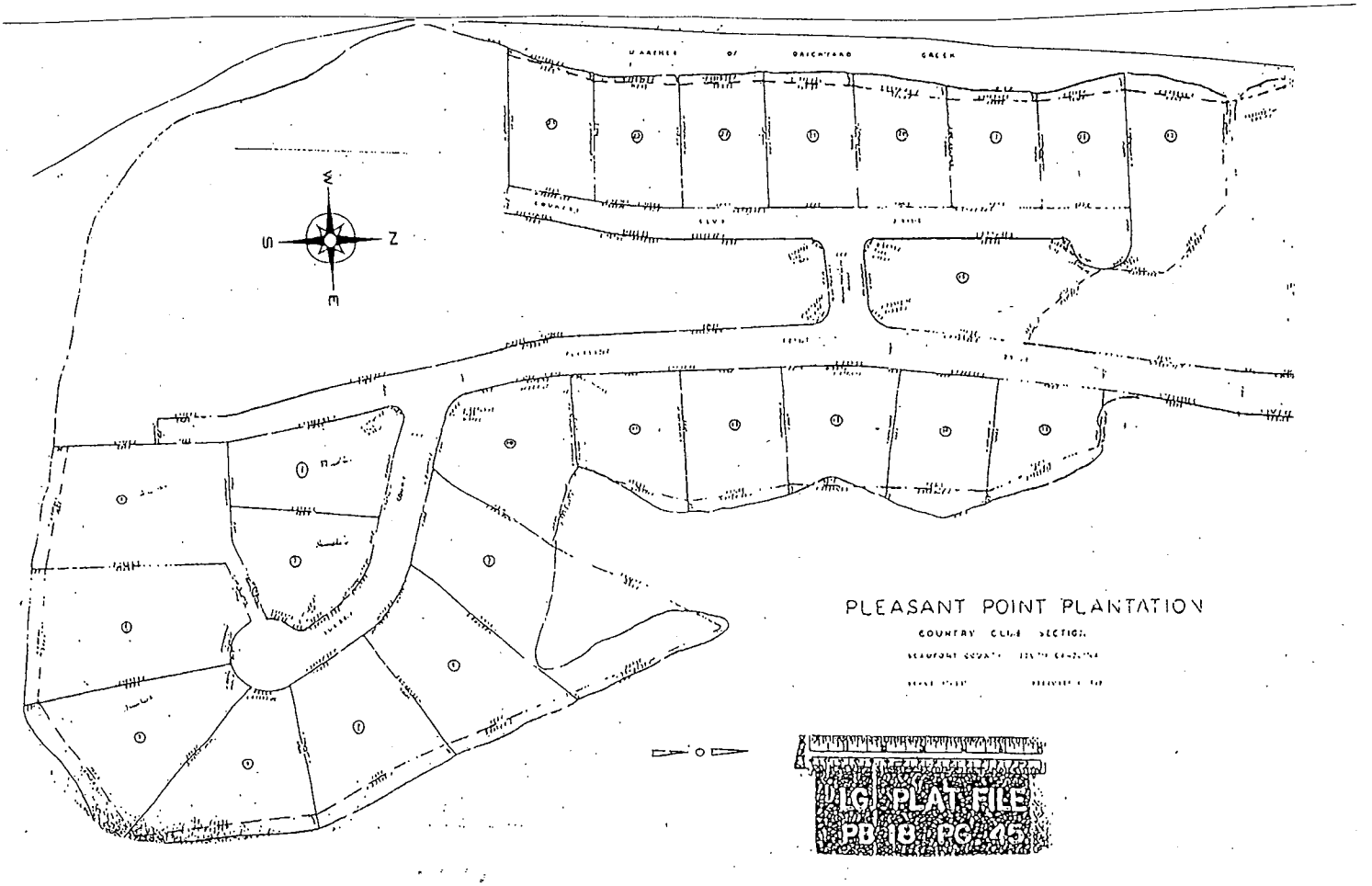
[1] In Issue I of their "Issues Presented," the appellants say that the circuit court found that the "scope" of the respondent's easement was "to provide ingress and egress to Lot 1." The circuit court order says nothing about "scope." What the circuit court found was that the incorporation of the plat gave the purchasers a right to use all the subdivision streets shown on the plat. This included Pleasant Point Drive, the same as all the other streets.

[2] *See: Pinckney v. City of Beaufort,* 296 S.C. 142, 370 S.E.2d 909 (Ct. App. 1988) (Lady's Island is contiguous to City of Beaufort; Beaufort River is no barrier to annexation).

Record at page 431 (hereafter, "R. 431.").] Twenty-four lots are depicted on the plat. An area roughly one-third the size of the depicted lots is left blank in the southwestern quadrant, being reserved for future development.



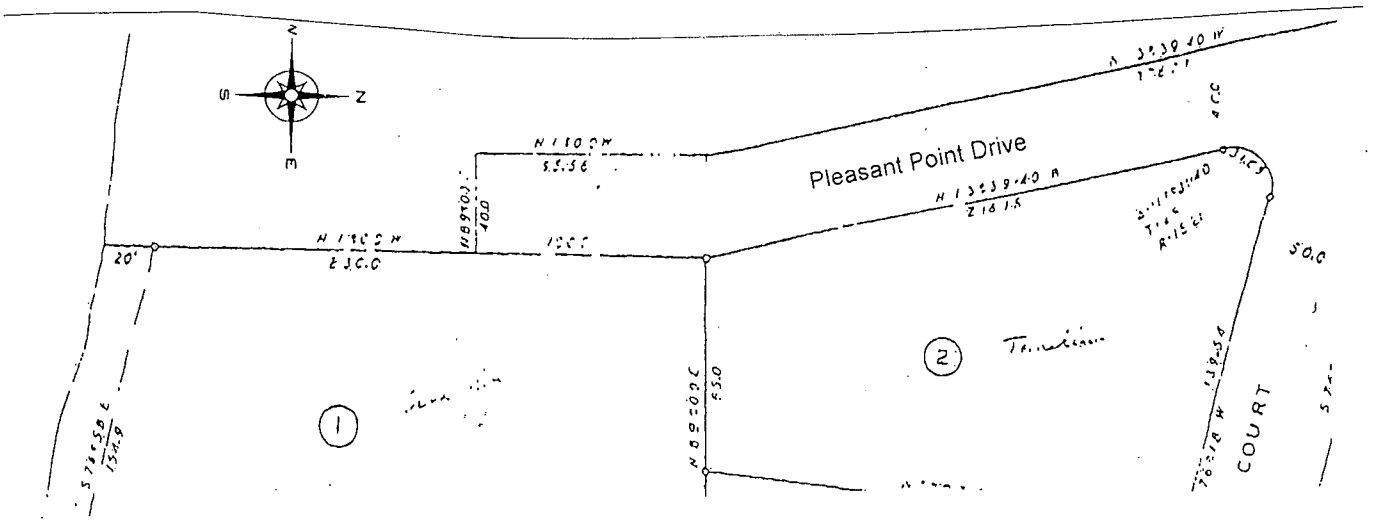
1969 Trogdon Plat
Country Club Section of Pleasant Point Plantation
Pltf. Exh. 1, part 1
(compass symbol added)

When a developer bought the land which would become Pleasant Point Plantation, two old houses on Cuthbert Point long pre-dated that purchase. One of these was Cuthbert House, built in about 1805.[3] Cuthbert House lay on what would

[3] Transcript, p. 114, lines 6-10 (hereafter, "Tr. 114/6-10"), R. 231. *See* www.cuthbertpoint.com.

become Lot 1 on Mr. Trogdon's 1969 plat. A second house, called by the parties "the Manor House," was built in the early 1930s.[4] The Manor House lay close to Cuthbert House in the blank space on Mr. Trogdon's plat. The Manor House had been unoccupied for years. [Tr. 151/2-6, R. 268.]

Two roads running north and south are shown on Mr. Trogdon's master plat of the Country Club Section. Country Club Drive borders nine lots in the western portion of Country Club Section. Mr. Trogdon leaves the southern end of Country Club Drive open, obviously because it will be extended to serve the lots which will later be platted in the blank space on the plat. Pleasant Point Drive borders eight lots in the eastern portion of County Club Section. Sussex Court, a cul-de-sac from Pleasant Point Drive, borders ten lots. Three lots — Lots 1, 2, and 10 — border both Pleasant Point Drive and Sussex Court. Pleasant Point Drive extends to roughly the midpoint of the western boundary of Lot 1, upon which sits Cuthbert House:



Portion of 1969 Trogdon Plat
Pleasant Point Drive Abutting Lots 1 and 2
Pltf. Exh. 1, part 1, R. 432
(compass symbol added)
("Pleasant Point Drive" added)

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[4] *See* R. Cuthbert & S. Huffius, NORTHERN MONEY, SOUTHERN LAND: THE LOWCOUNTRY PLANTATION SKETCHES OF CHLOTILDE R. MARTIN, page 53 (Univ. of S. Carolina Press 2009) (available at Thomas Cooper Library, U.S.C.). Respondent submits that the court may take notice of nonadjudicative historical facts described in a peer-reviewed scholarly account. *See generally:* Rule 201, SCRE. *See also: Knight v. State,* 248 Miss. 850, 161 So.2d 521, 522 (1964); *Unity Co. v. Gulf Oil Corp.*, 40 A.2d 4, 7 (Me. 1944); *McKay Constr. Co. v. ADA County Bd. of County Comm'r's,* 96 Idaho 881, 538 P.2d 1185, 1188 (1975). *Cf. Rowe v. Gibson,* 798 F.3d 622, 644 n.1 (7th Cir. 2015).

The Beaufort River and its marshes lie about one hundred seventy-five feet to the south of the end of Pleasant Point Drive.[5]

When General R. McC. and Julia Tompkins bought Cuthbert House on Lot 1, they bought the adjacent Lots 2 and 3 as well. They purchased on December 5, 1969, the day after Mr. Trogdon finished his plat. His plat was incorporated in their deeds. [Pltf. Exh. 2, R. 433 & 437.]

In 1972, Mr. Trogdon prepared a revision of his 1969 plat. [Def. Exh. 1, part 6, R. 480.] This 1972 revision, prepared for the original developer's successor, adds two new lots on Country Club Drive and extends that street toward the river correspondingly. Pleasant Point Drive is drawn the same as it was on the original 1969 plat, ending at roughly the midpoint of the western boundary of Lot 1.[6]

Mr. Trogdon's 1969 plat or its 1972 revision is referenced in every deed in evidence, from 1969 to time of trial.

Mr. Trogdon's plats do not show the location of Cuthbert House or the Manor House, but later plats, such as Mr. Youmans' 1997 plat,[7] show that these two old houses sit close together on either side of Pleasant Point Drive as shown on Mr. Trogdon's original 1969 plat. The Manor House is drawn on Mr. Youmans' 1997 plat

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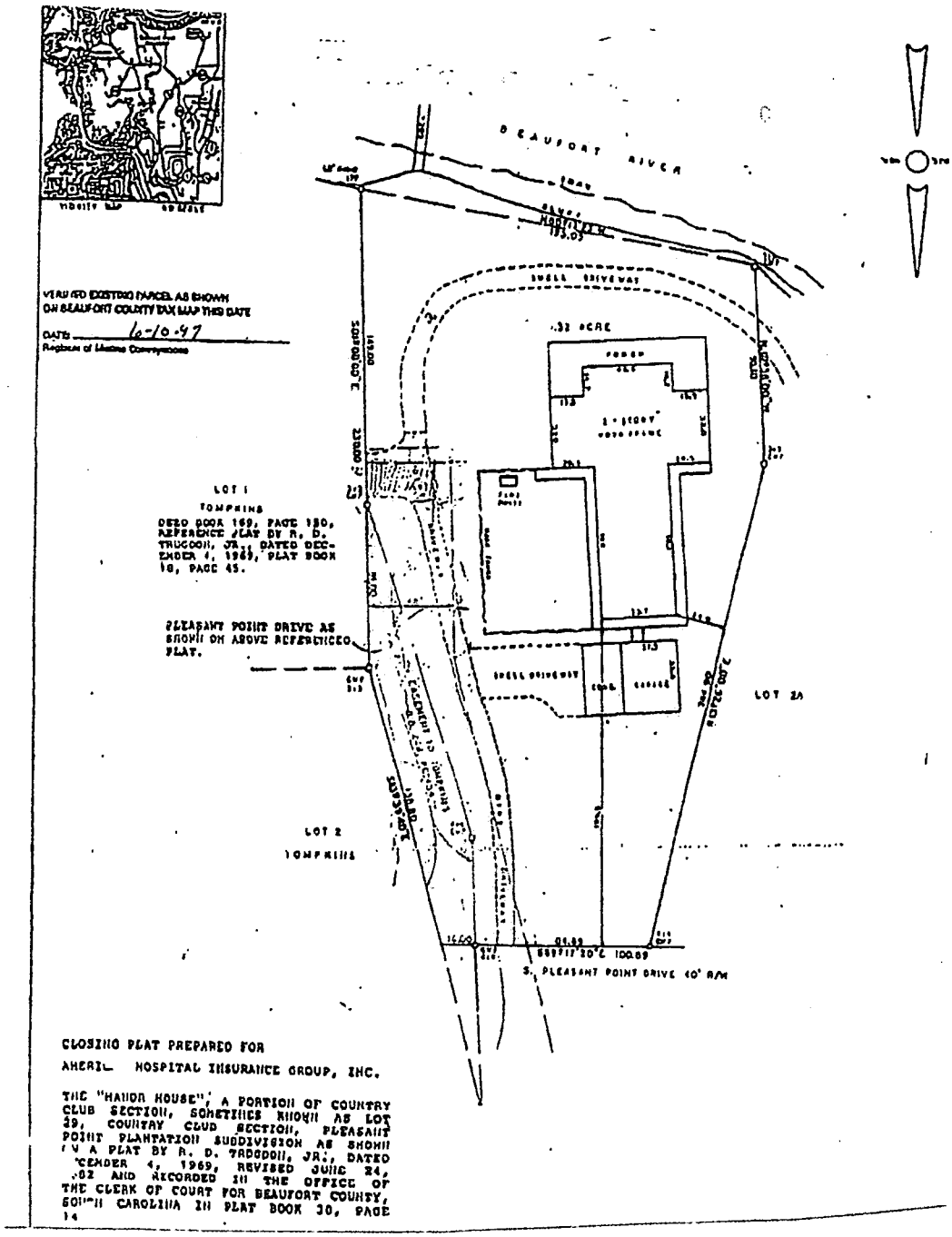
[5] This configuration is reminiscent of the "street ends" often seen in oceanside communities of our Lowcountry, although this one stops short of the marshes. *See, e.g., Hoogenboom v. City of Beaufort,* 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992), *cert. dismissed as improvidently granted,* 317 S.C. 12, 451 S.E.2d 393 (1994) (street end on Beaufort River); *F.M.P., Inc. v. Myrtle Beach Farms Co.,* 280 S.C. 592, 313 S.E.2d 357 (Ct. App. 1984) (street end on ocean).

[6] The 1972 revision is dated March 13, 1972, recorded in Plat Book 19 at page 160. This plat is attached to the deed dated June 19, 1987, Defendant Guests' Exh. 1 (hereafter, "Def. Exh. 1"), part 6, R. 477. *See* recording information for the 1972 revision at Def. Exh. 26, R. 613. There appears to be a line on this plat extending from the end of Pleasant Point Drive to the marshes, but this is not a survey line. It is an anomaly resulting from placing one piece of paper atop another in the process of photocopying.

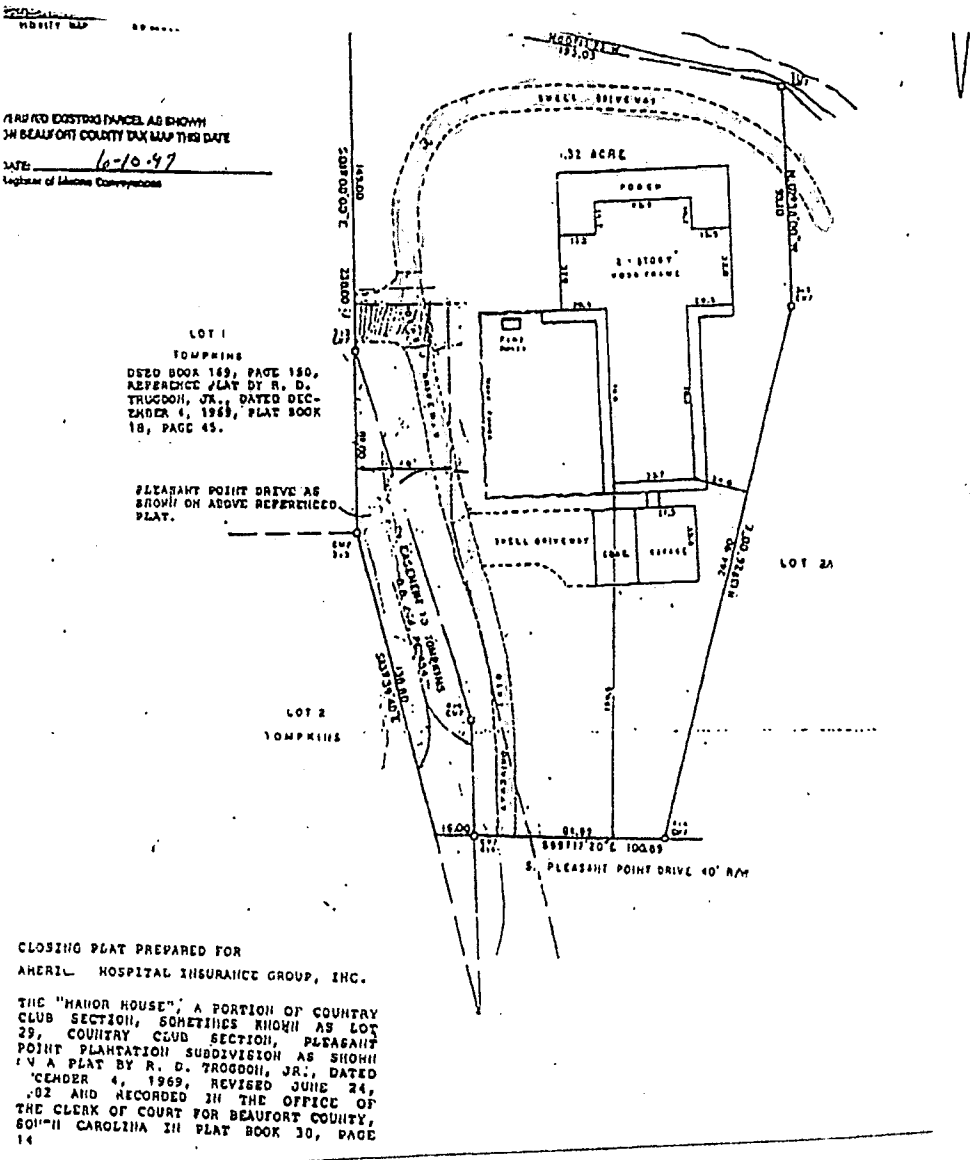
[7] Plat dated May 30, 1997, recorded in Plat Book 60 at page 190. Def. Exh. 1, Part 8a, R. 538.

since that plat was prepared for a closing on Lot 29, where the Manor House sits. Cuthbert House on Lot 1 is not drawn, but its location can be seen because Mr. Youmans depicts the entrance to the carport which the Tompkinses added to the house. Mr. Youmans shows Pleasant Point Drive on his 1997 plat, as mapped by Mr. Trogdon in 1969. Pleasant Point Drive is shaded blue on the reproduction of Mr. Youmans' 1997 plat below:



Pleasant Point Drive
1997 Youmans Plat
Def. Exh. 1, part 8a
(blue shading added)

Mr. Youmans also shows the driveway which served both Cuthbert House and the Manor House, beginning at its northern terminus as dirt, then changing to oyster shell as it passes the Tompkinses' carport and loops around the front of the Manor House.[8] The driveway drifts off of Pleasant Point Drive for a time and travels partly outside the western boundary of the Drive. The driveway is shaded blue on the reproduction below:



Dirt/shell Driveway
1997 Youmans Plat
Def. Exh. 1, part 8a
(blue shading added)

[8] Old river houses such as these two always faced the river, not the landward side. Typical is the front porch of the Manor House, shown on Mr. Youmans' plat. The porch looks out on the river and extends the entire seventy-five foot width of the house.

From the time they bought Cuthbert House, the Tompkinses used Pleasant Point Drive and the driveway shown above for ingress and egress. Lot 1 bordered not only Plantation Point Drive but also Sussex Court, as do Lots 2 and 10, but the Tompkinses never made use of Sussex Court to access their home. [Tr. 113/22 – 114/15-25, R. 230-31.]

As the purchasers of lots in a platted subdivision, General and Mrs. Tompkins acquired at purchase the long-settled right described in the seminal case of *Billings v. McDaniel,* 217 S.C. 261, 60 S.E.2d 592, 593-94 (1950), and its progeny (hereinafter called simply a "*Billings* right").[9] This is the right to use the streets of the subdivision in the ordinary way that streets are used. They could drive on them, walk on them, cycle on them, park on them (if subdivision restrictions did not forbid parking on the streets,

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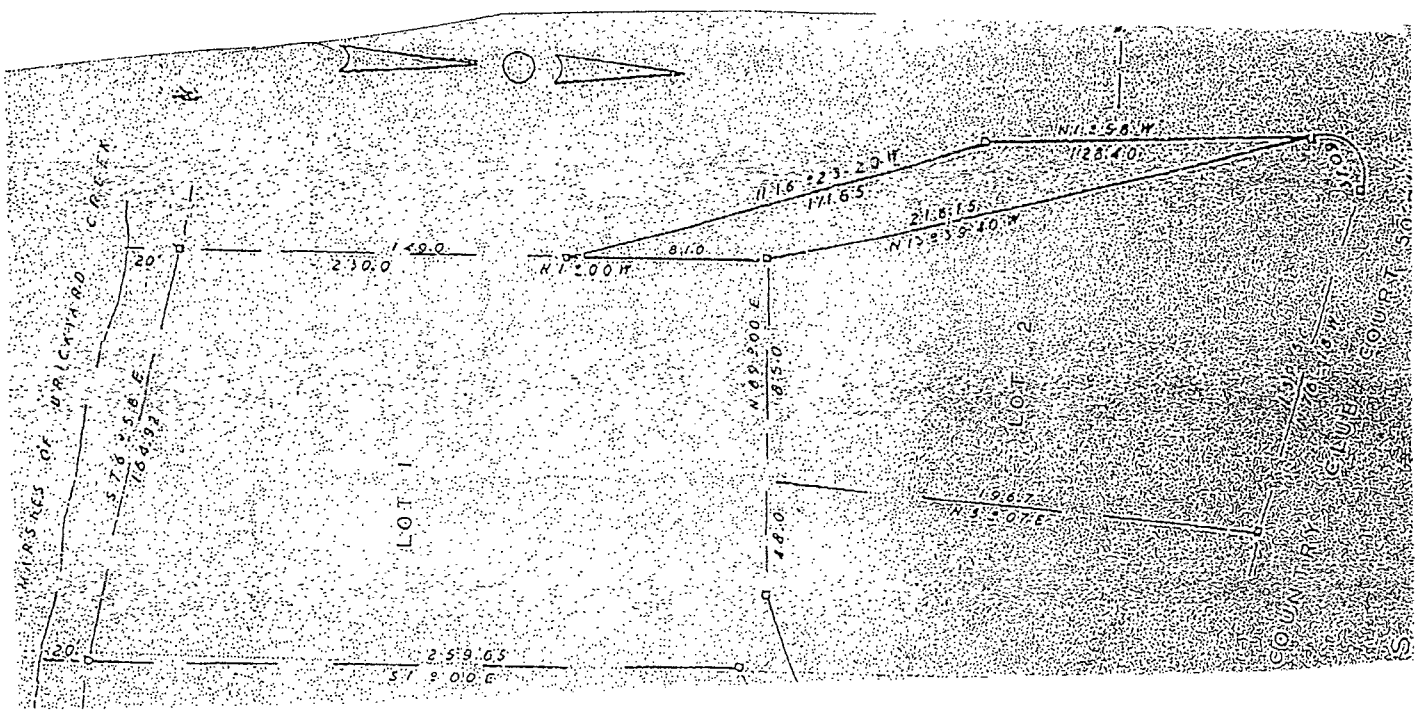
[9] "Generally, where property sold is described with reference to a plat or map upon which streets and ways are shown, an easement therein is implied. * * * There is an implied covenant that such ways exist and shall continue to exist. Easements implied in accord with such principles are deemed a part of the property to which the grantee is entitled, and neither the grantor nor any person claiming under the conveyances can repudiate the easements or deny that they exist, where they are capable of existing." 17 AM.JUR., Par. 47, P. 958. " * * * [A]ccording to the great weight of judicial opinion, the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases. * * * This being the law, the land owner, when he lays off his land into lots, streets, and alleys, and has the same platted, and then sells lots with reference to the map thereof, must be presumed to know that he thereby dedicates such streets and alleys to the use of such lot owners and the public; and the rights of the lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys, but he is at once entitled to have all such streets and alleys opened for his use, necessary to the enjoyment of his property. All such streets and alleys must be considered as appurtenant thereto, for they begin at his property and extend in a network all over the land platted." *Cook v. Totten,* 49 W.Va. 177, 38 S.E. 491, 492, 87 Am.St.Rep. 792.

Billings v. McDaniel, 217 S.C. 261, 262, 60 S.E.2d 592, 593-94 (1950).

as is sometimes the case). A homeowner's right to use the platted streets of the subdivision in the usual way, however, does not extend to landscaping the border of a street or doing anything in the street other than the customary uses made of streets. In *1976, when General Tompkins wished to landscape and perhaps make other* improvements on a narrow sliver of Pleasant Point Drive adjacent to Lots 1 and 2, he sought and received from the developer's successor an express easement for that purpose.[10] [Def. Exh. 1, part 7a, R. 485.] (The successor developer, Pleasant Point Plantation, continued to own fee simple title to the streets, subject to the *Billings* right of lot purchasers.)

Mr. Trogdon prepared for General and Mrs. Tompkins a plat depicting the landscaping easement area:

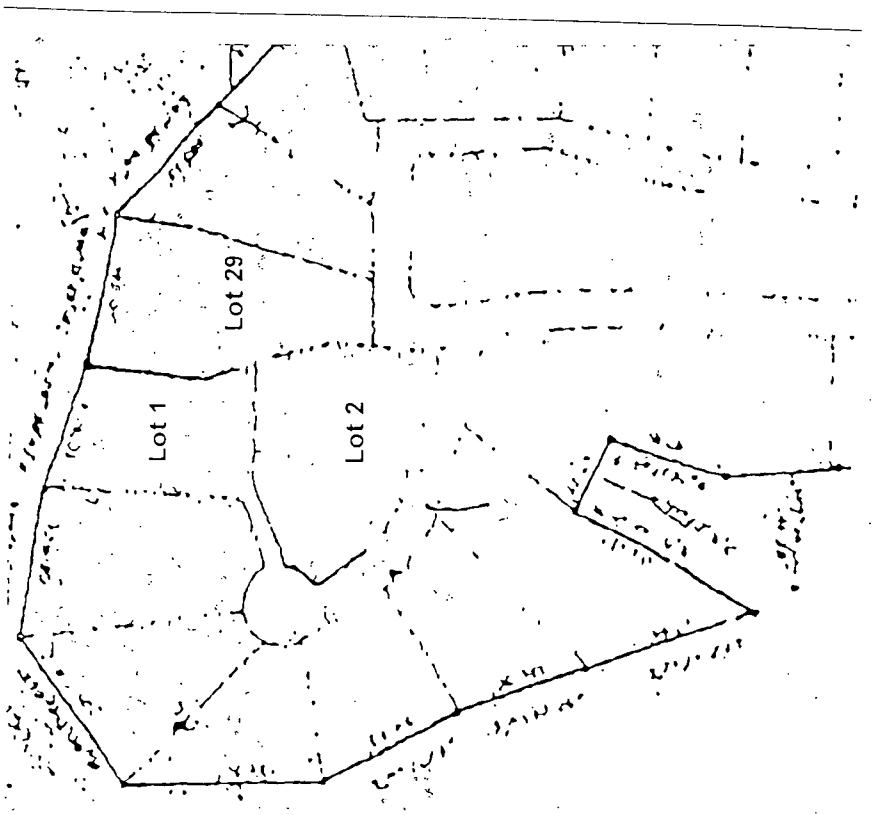


1976 *Trogdon Plat*
of Tompkinses' Landscaping Easement
Portion of Def. Exh. 1, part 4, R. 486

[10] Mrs. Ewing testified that her father was mowing the grass in the easement area and felt that he should get a "right" to do so. Tr. 115/24 – 116/7, R. 232-33; Tr. 139/1-7, R. 256.

The easement area begins on the north, not on a side but at a point, and ends on the south, likewise not on a side but at a point, approximately twenty feet shy of the Tompkinses' carport.[11] This is principally a landscaping easement, as the circuit court found.[12] Order of March 25, 2016 at 9-10, ¶¶ 21-22, R. 21-22.

By 1974 the successor developer was ready to subdivide the property shown as a blank space on the original 1969 subdivision plat. Mr. Trogdon prepared a new plat showing lots now laid out in what had been the blank space on the original plat:



Portion of Trogdon's 1974 Plat
New Lot 29 and Other New Lots
Truncation of Pleasant Point Drive
Def. Exh. 1, part 2, R. 475

[11] The easement area was described at trial as having the shape of a trapezoid. A trapezoid, however, has two parallel sides and the easement area has none, although its eastern and western sides are nearly parallel. Geometrically, the easement area is simply a quadrilateral.

[12] The appellants think it material that Mr. Trogdon did not draw Pleasant Point Drive on this plat of the landscaping easement area. [Appellants' brief at p. 5.] Pleasant Point Drive is not shown on this plat because there was no need to show it. The sole purpose of the plat was to define the area of the landscaping easement, not to re-plat the Country Club Section of Plantation Point.

Shown on this 1974 plat is the layout of a new street, continuing to bear the name "Pleasant Point Drive". It fronts a new Lot 29, the site of the Manor House, to the west of Lots 1 and 2, then turns to front on several of the other newly platted lots, west and northwest of Lot 29.[13]

The newly platted extension of Pleasant Point Drive could not begin at the point where Pleasant Point Drive ended on the 1969 plat, however. The Manor House was in the way. The newly minted extension of Pleasant Point Drive begins about 250 feet north of its 1969 end. Although the successor developer had no reason to "erase" the last 250 feet of Pleasant Point Drive, that was done in Mr. Trogdon's 1974 plat. Pleasant Point Drive as originally platted in 1969 is truncated on Mr. Trogdon's new 1974 plat. Pleasant Point Drive is now depicted as turning west at a right angle, roughly 250 feet short of its 1969 terminus at the midpoint of Lot 1.

The creation of this new plat in 1974 resulted in no change in the use made of Pleasant Point Drive by the Tompkins family. They continued to use the last 250 feet of Pleasant Point Drive, and the dirt driveway shown in Mr. Youmans' 1997 plat, for the next four decades. The current owner of Lots 1, 2, and 3, Mrs. Ewing, uses it today in the same way.

Upon her mother's death in 2013, Julia Tompkins Ewing inherited Lots 1, 2, and 3. She and her husband Charles returned to live in Cuthbert House on Lot 1.[14] Dr. and Mrs. Guest, the appellants, bought the Manor House, Lot 29, in 2010. Following the death of Mrs. Ewings' mother, the Guests began the obstructions which led to this action.

Special Referee Stephen Spitz, formerly professor of property law at both the

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[13] The shrunken version of Mr. Trogdon's 1974 plat in evidence is barely legible. The copy shown here is enlarged, some of the photocopying detritus has been removed, and Lots 1, 2, and 29 are identified.

[14] Mrs. Ewing was a teenager when her parents bought the house in 1969. Tr. 111/7-19, R. 228.

University of South Carolina School of Law and the Charleston School of Law, entered judgment in favor of Mrs. Ewing. The special referee held that the successor developer was powerless to deprive earlier purchasers of their *Billings* right by recording later plats which purported to change the configuration of subdivision streets. The developer could potentially prevent *subsequent* purchasers of *other* lots from acquiring a *Billings* right on the streets as previously platted, but could not unilaterally deprive earlier purchasers of their *Billings* right. The special referee further held, among other things, that the owners of Lots 1 and 2 had long since acquired a prescriptive easement appurtenant for the use of the southern end of Pleasant Point Drive as shown on the 1969 plat and of the dirt driveway shown on Mr. Youmans' 1997 plat.

ARGUMENT

I.

When General and Mrs. Tompkins purchased Lots 1, 2, and 3, they acquired a transmissible property right to the use of the streets depicted in the developer's master subdivision plat. A successor developer could not destroy that right by recording different plats years later.

A. Purchasers whose deeds incorporated the 1969 Trogdon plat acquired a transmissible right to the ordinary use of all streets shown on that plat. Neither a successor developer nor other lot owners had the power to cancel or diminish that right by filing different plats later.

Our courts have used a variety of terms to describe the property interest which a subdivision lot purchaser acquires in the platted streets of the subdivision, but they all amount to the same thing. The cases include *Billings v. McDaniel,* 217 S.C. 261, 60 S.E.2d 592, 593-94 (1950);[15] *Cason v. Gibson,* 217 S.C. 500, 508, 61 S.E.2d 58, 62

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[15] "'Generally, where property sold is described with reference to a plat or map upon which streets and ways are shown, ***an easement therein is implied***. * * * There is ***an implied covenant*** that such ways exist and shall continue to exist. Easements implied in accord with such principles are deemed a part of the property to which the grantee is entitled, and neither the grantor nor any person claiming

(continued...)

(1950);[16] *Outlaw v. Moise,* 222 S.C. 24, 71 S.E.2d 509 (1952);[17] *Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956);[18] *Hodge v. Manning,* 241 S.C.

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[15](...continued)
under the conveyances can repudiate the easements or deny that they exist, where they are capable of existing.' 17 AM.JUR., Par. 47, P. 958. ' * * * [A]ccording to the great weight of judicial opinion, the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases. * * * This being the law, the land owner, when he lays off his land into lots, streets, and alleys, and has the same platted, and then sells lots with reference to the map thereof, must be presumed to know that he thereby ***dedicates*** such streets and alleys to the use of such lot owners and the public; and the rights of the lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys, but he is ***at once entitled*** to have all such streets and alleys opened for his use, necessary to the enjoyment of his property. All such streets and alleys must be considered as ***appurtenant thereto,*** for they begin at his property and extend in a network all over the land platted.' *Cook v. Totten,* 49 W.Va. 177, 38 S.E. 491, 492, 87 Am.St.Rep. 792." (Emphasis added.)

[16] "Persons owning lots fronting on or adjacent to property dedicated as public parks or squares, or streets, highways, and the like, have such ***special property interests*** as entitle them to maintain a suit for the enforcement and preservation of the use of the property as such. This right is not affected by the fact that the dedication has never been accepted by the municipal authorities." (Emphasis added.)

[17] "'[A]s between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the ***dedication*** is complete when the conveyance is made, even though the street is not accepted by the public authorities.' 16 Am.Jur., Dedication, Section 31." (Emphasis added.)

[18] "Such purchasers acquired ***every easement, privilege and advantage*** which the plat represented as belonging to them. The [developer] could not without the consent of [the lot purchaser] change the location or width of [a platted street]. *Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach,* 216 N.C. 778, 7 S.E.2d 13 (1940); 16 AM.JUR., Dedication, Section 57." (Emphasis added.)

142, 127 S.E.2d 341, 343 (1962);[19] *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 119, 145 S.E.2d 922, 925 (1965);[20] *Carolina Land Co., Inc. v. Bland,* 265 S.C. 98, 217 S.E.2d 16 (1975);[21] and *Murrells Inlet Corp. v. Ward,* 378 S.C. 225, 662 S.E.2d 452, 455-56 (Ct. App. 2008).[22]

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19 "[It is a] well settled principle of law that, where property is sold and described with reference to a plat or map upon which streets and ways are shown, ***an easement therein is implied*** in favor of the grantee. *Billings et al. v. McDaniel,* 217 S.C. 261, 60 S.E.2d 592. 127 S.E.2d 341." (Emphasis added.)

20 "'[A]s between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the ***dedication*** is complete when the conveyance is made, even though the street is not accepted by the public authorities.' 16 AM.JUR., Dedication, Section 31." (Emphasis added.)

21 "Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a ***private easement by implication*** with respect to those streets, whether or not there is a dedication to public use. *McAllister v. Smiley,* 301 S.C. 10, 389 S.E.2d 857 (1990); *Cason v. Gibson,* 217 S.C. 500, 61 S.E.2d 58 (1950). As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made." (Emphasis added.)

22 "'Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a ***special property right*** in the roads shown on the plat. If the deed references the plat, the grantee acquires a ***private easement*** for the use of all streets on the map.' *Davis v. Epting,* 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994). *Accord Carolina Land* [*v. Bland*], 265 S.C. at 105, 217 S.E.2d at 19; *Blue Ridge Realty Co. v. Williamson,* 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965); *Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956); *Newton v. Batson,* 223 S.C. 545, 549-550, 77 S.E.2d 212,213 (1953); *Outlaw v. Moise,* 222 S.C. 24, 30, 71 S.E.2d 509, 511 (1952); *Cason v. Gibson,* 217 S.C. 500, 508-509, 61 S.E.2d 58, 61 (1950); *Billings v. McDaniel,* 217 S.C. 261, 265, 60 S.E.2d 592, 593-594 (1950); *Van Blarcum* [*v. North Myrtle Beach*], 337 S.C. 446, 451, 523 S.E.2d 486, 488; *Giles v. Parker,* 304 S.C. 69, 73, 403 S.E.2d 130, 132

(continued...)

Special Referee Spitz used several of these terms to describe a purchaser's right to use the streets of the subdivision. Order of March 25, 2016, pp.3-4, ¶¶ 5-6, R. 15-16.

The special referee rejected the testimony of Mr. Branning, forty-six years after the fact, that the driveway was meant for only the Manor House, not Cuthbert House next door.[23] The special referee found this kind of parol evidence troubling:

> Moreover, I am at least somewhat leery of testimony delivered in a trial many decades after the fact that appears to squarely contradict a recorded document that has been filed of record for many decades because accepting that testimony opens the door to the impeachment of recorded documents that others have testified that they have relied upon for many years. Strictly as a policy [matter], this would unsettle many previously recorded property claims.

Order of March 25, 2016, p. 10, ¶ 24, R. 22.

The developer has no power to nullify the property interest of lot purchasers in the streets and public places shown on the subdivision plat incorporated in their deeds.

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[22](...continued)
(Ct. App. 1991). The easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general. *Carolina Land,* 265 S.C. at 105, 217 S.E.2d at 19; *Blue Ridge,* 247 S.C. at 118, 145 S.E.2d at 925. As to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made. *Newington Plantation Estates Ass'n v. Newington Plantation Estates,* 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995); *Immanuel Baptist Church of North Augusta v. Barnes,* 274 S.C. 125, 130-131, 264 S.E.2d 142, 145 (1980); *Carolina Land,* 265 S.C. at 105, 217 S.E.2d at 19; *Outlaw,* 222 S.C. at 30, 71 S.E.2d at 511; *Pittman,* 355 S.C. at 542, 586 S.E.2d at 152. * * * The rule applied in *Blue Ridge* is nothing more than a presumption that when a grantor conveys property with reference to a plat showing streets or ***other ways of passage***, the grantor intends to allow the grantee ***the use of the delineated streets and ways of passage***." (Emphasis added.)

[23] Mr. Branning had no relation to Pleasant Point Plantation when the subdivision was laid out or when the Tompkinses bought Lots 1, 2, and 3 in 1969. He moved into the Manor House in 1971. Tr. 169/17 – 170/5, R. 286-87. His company succeeded to the rights of the initial developer years after the Tompkinses bought their property. Tr. 170/3-13, R. 287.

As the Court observed in *Murrells Inlet Corp. v. Ward,* 378 S.C. 225, 662 S.E.2d 452, 457 (Ct. App. 2008):

> The dedication of the private easement was complete when [the developer] originally conveyed the lot. It would now be unfair to deny [the purchaser] the right to the full use and enjoyment of the easement as indicated in the plat, regardless of what [the developer] now argues were her intentions at the time the plat was recorded. Subsequent purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property.

This has been held many times, as it was in *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965). Speaking for the Court, Justice Moss cited with approval the Texas case of *Blair v. Astin,* 10 S.W.2d 1054 (Tex. Civ. App. 1928), where

> it was held that persons acquiring lots of land according to a map showing a street thereon are entitled to enjoin other landowners, who also purchased according to such map, from closing a portion of such street on the vacation thereof, since they have a special property right or easement in the street, although not abutting on the portion closed and although they have ample means of ingress and egress notwithstanding the closing.

Blue Ridge at 927.[24] *Accord: Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956). *See: Home Sales, Inc. v. North Myrtle Beach,* 299 S.C. 70, 382 S.E.2d 463 (Ct. App.1989) (subdivision plat did not dedicate avenues where legend on plat reserved to developer's discretion whether or not to open such avenues).

When they purchased Lots 1, 2, and 3 on December 5, 1969, General and Mrs. Tompkins acquired a special property interest in the streets of the Country Club Section of Pleasant Point Plantation as shown on Mr. Trogdon's plat of December 4, 1969. That property interest is appurtenant to the lots and passes to later transferees by deed or inheritance. That interest cannot be nullified by any later conduct of the developer or its successor. As the circuit court held, the respondent possesses that interest today in Pleasant Point Drive as shown on the 1969 plat, as will future owners of her lots.

The thrust of appellants' argument is that because Cuthbert House is provided

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[24] *Blue Ridge* is the "Gippy Court" case relied upon by the special referee. Order of March 25, 2016 at 3-4, ¶¶ 4-5, R. 15-16.

with access from Sussex Court, the cul-de-sac, it could not have been the intention of the parties for the Tompkinses to acquire a *Billings* right to use the final 250 feet of Pleasant Point Drive.

There is no support, legally or factually, for this contention. Access to Cuthbert House has always been from Pleasant Point Drive, never from Sussex Court. Lot 1 could have a dozen means of access apart from Pleasant Point Drive without canceling the purchasers' right to use all the platted streets of the subdivision. That right applies to all the platted subdivision streets even though the lot purchasers "have ample means of ingress and egress [apart from the street in question]." *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922, 927 (1965).

The advent of the gated subdivision has removed the "public dedication" prong of the rights recognized in *Billings v. McDaniel* and its progeny. The developer of a gated subdivision does not intend to dedicate *anything* to the public. On the contrary, the intention is to exclude the public. Thus, lot purchasers possess a nearly exclusive right to the use of the subdivision streets and public places. Private rights and public rights to the use of subdivision streets have always been viewed as independent of one another. Our caselaw recognizes that a lot purchaser's transmissible right to use the platted streets is acquired at the moment of purchase. That right exists regardless of whether a dedication to the public is offered and, if offered and accepted, is later abandoned. *Cason v. Gibson,* 217 S.C. 500, 508, 61 S.E.2d 58, 62 (1950); *Outlaw v. Moise,* 222 S.C. 24, 30, 71 S.E.2d 509, 511-12 (1952); *Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956); *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118-19, 145 S.E.2d 922, 925 (1965); *Giles v. Parker,* 304 S.C. 69, 73, 403 S.E.2d 130, 132 (Ct. App. 1991); *Newington Plantation Estates Ass'n v. Newington Plantation Estates,* 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995); *Vick v. South Carolina Dept. of Transportation,* 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001); and *Town of Kingstree v. Chapman,* 405 S.C. 282, 747 S.E.2d 494 (Ct. App. 2013).

The appellants contend that the issue here is the "scope" of the easement — an issue in equity. This is incorrect, since there is no question about the "scope" of a *Billings* right. The appellants contend that the owner of the respondent's lots has no right to use the last 250 feet of Pleasant Point Drive *at all.* The issue is the existence of the right, not its "scope."

South Carolina courts often use the law of easements in describing the right which a subdivision lot purchaser acquires in the platted streets and public places of the subdivision. Several opinions, however, discuss this right without any reference to easements, or sometimes with reference to legal concepts in addition to the law of easements.[25] In any event, the nature and extent of the *Billings* right is always the same. It is the right to use the streets of the subdivision in the ordinary way that streets are used. This case involves no issue of the "scope" of an easement.

The circuit court's findings of fact regarding the existence of respondent's *Billings* right and the prescriptive easement to use the driveway are findings of fact in a law case. *Any* evidence would conclude the matter, but *all* the evidence points the same way. The circuit court's findings are therefore conclusive. *Inlet Harbour v. South Carolina Dept. of Parks, Recreation and Tourism,* 377 S.C. 86, 659 S.E.2d 151, 153 (2008).

B. The Guests had actual knowledge or constructive notice, or both, of the right of the owners of Lots 1, 2, and 3 to the use of Pleasant Point Drive as configured on the 1969 plat. Likewise, they had constructive notice of the prescriptive right of the owner of Lot 1 to use the dirt driveway.

The Guests disclaim any knowledge that Pleasant Point Drive extended to the Ewings' carport.

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[25] *See, e.g., Billings v. McDaniel,* 217 S.C. 261, 60 S.E.2d 592, 593-94 (1950) ("implied covenant"; "entitle[ment]"); *Cason v. Gibson,* 217 S.C. 500, 508, 61 S.E.2d 58, 62 (1950) ("special property interests"); *Outlaw v. Moise,* 222 S.C. 24, 71 S.E.2d 509 (1952) ("dedication"); *Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956) ("every easement, privilege and advantage"); *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 119, 145 S.E.2d 922, 925 (1965) ("dedication"); and *Murrells Inlet Corp. v. Ward,* 662 S.E.2d 452, 455-56, 378 S.C. 225 (Ct. App. 2008) ("special property right").

When the Guests examined the plat which they received at closing [Tr. 186/1, R. 303], they saw that "PLEASANT POINT DRIVE AS SHOWN ON ABOVE REFERENCED PLAT [DATED DECEMBER 4, 1969, PLAT BOOK 18, PAGE 45]" extended to the Ewings' carport. For some reason they imagined that the plat stated that Pleasant Point Drive had been abandoned. [Tr. 186/2-4, R. 303.] The plat said nothing of the kind, nor did their closing attorney tell them anything of that nature. [Tr. 224/2-10, R. 341.] From the closing plat, they saw that the dirt driveway which served both the Manor House and Cuthbert House was partly located outside the western boundary of Pleasant Point Drive.[26] [Tr. 186/11-15, R. 303.] When they inspected the house before buying it, they could not have failed to see that the driveway extended from the paved portion of Pleasant Point Drive to the Ewings' carport. Any inquiry of Mrs. Ewing, the user of the driveway, was bound to reveal that it had existed and been the sole means of access to Cuthbert House at least since General and Mrs. Tompkins bought the house, forty-one years earlier.[27] [Tr. 111/20 – 112/7, R. 228-29; Tr. 116/21 – 117/3, R. 233-34.]

Thus, the Guests had actual knowledge of the 1969 configuration of Pleasant Point Drive and of the Ewings' driveway.

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[26] The driveway departs from Pleasant Point Drive for about 150 feet, as the Guests' closing plat showed and as a visual inspection would have disclosed. *See* Mr. Youman's 1997 plat, Def. Exh. 1, Part 8a, R. 538.

[27] It is settled law that knowledge of facts sufficient to put a reasonable man on inquiry is equivalent to actual notice of such facts as a reasonably diligent inquiry would certainly have disclosed.

Government Employees Ins. Co. v. Chavis, 252 S.C. 507, 525, 176 S.E.2d 131, 140 (1970) (Brailsford, J., dissenting). Witness Branning — most of whose testimony was incoherent — testified in response to a leading question that there had been no driveway to Cuthbert House before 1979, the last year in which he knew anything about the property. The special referee charitably found no need to pass upon the credibility of this testimony since the driveway was much older than the prescriptive period of twenty years, in any case. Order of August 8, 2016, pp. 4-5, ¶ 5, R. 6-7.

The Guests likewise had *constructive* notice of the 1969 configuration of Pleasant Point Drive and the existence of the driveway. Constructive notice is, of course, the foundation of the recording laws.[28] *All thirteen deeds in the Guests' chain of title refer to the 1969 plat or its 1972 revision, showing that Pleasant Point Drive extends to the carport of Cuthbert House.*[29]

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[28] The special referee gave special emphasis to the case of *Carolina Land Co., Inc. v. Bland,* 265 S.C. 98, 217 S.E.2d 16 (1975), on the role played by constructive notice in the law of property. Final Order of March 25, 2016, pp. 17-19, ¶¶ 8-9. *Accord: Frierson v. Watson*, 371 S.C. 60, 636 S.E.2d 872, 876 (Ct. App. 2006); *Ten Woodruff Oaks, LLC v. Point Development, LLC,* 385 S.C. 172, 683 S.E.2d 510, 515 (Ct. App. 2009), and a myriad of other cases.

[29] The Guests traced their chain of title back to 1981. Each of the thirteen deeds offered in evidence by them to establish their chain of title references either the original subdivision plat by Mr. Trogdon, Plaintiff's Exhibit 1, dated December 4, 1969, recorded in Plat Book 18 at page 45, or its revision three years later, recorded in Plat Book 19 at page 160. These references are contained either in the property description found in the deed or on one or more plats incorporated therein:

1. Deed dated 7/16/81 conveying a larger tract which included what would become the Guests' Lot 29, "SAVE AND EXCEPT * * * Lots 1, 2, 3 * * * as shown on plat recorded in Plat Book 18 at Page 45 * * *." Def. Exh. 1, part 1, R. 468. (Lots 1, 2, and 3 are the lots purchased by General and Mrs. Tompkins in 1969. The plat recorded in plat book 18 at page 45 is the original subdivision plat of Mr. Trogdon.)

2. Deed dated 5/31/85 conveying "'Old Manor House', * * * known as Lot 29 * * * , being shown as an unnumbered lot on a plat * * * by R. D. Trogdon, Jr., R.L.S., dated December 4, 1969, revised [in 1971, 1974, and 1982]." Def. Exh. 2, R. 471 & 524.

3. Deed dated 6/19/87 conveying "'Old Manor House', * * * known as Lot 29 * * * , being shown as an unnumbered lot on a plat * * * by R. D. Trogdon, Jr., R.L.S., dated December 4, 1969, [revised in 1974]." Def. Exh. 1, R. 476. The plat attached to this deed is not the 1974 revision showing a truncation of Pleasant Point Drive but rather the 1972 revision which continues to show Pleasant Point Drive as drawn on the original 1969 plat. Def. Exh. 1, part 8a, R. 480.

4. Deed dated 6/6/97 conveying "Lot 29 (a/k/a The Manor House) * * * on a plat prepared by David S. Youmans, SCRLS, on May 30, 1997 * * * recorded in Plat Book 60 at Page 190 * * * ." Def. Exh. 1, part 7, R. 488. Mr. Youmans' 1997 plat shows that "PLEASANT POINT DRIVE AS SHOWN ON ABOVE REFERENCED PLAT [DATED DECEMBER 4, 1969, PLAT BOOK 18, PAGE 45]" extends to the carport of the house on Lot 1. Mr. Youmans' 1997 plat also shows the dirt driveway extending

(continued...)

Thus, every deed in the chain of title placed any purchaser of Lot 29 on notice that pre-1974 purchasers of other lots in Country Club Section acquired an irrevocable right to the use of Pleasant Point Drive as shown on the 1969 subdivision plat and its 1972 revision.

The title examiner would also have taken exception, as examiners always do, to

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[29](...continued)
from the paved portion of Pleasant Point Drive to the carport, where the driveway becomes a "shell driveway" (oyster shells) and continues in a loop around the front of the Manor House. (The front of the house faces the Beaufort River.) The 1997 Youmans plat is Def. Exh. 1, part 8a, R. 492.

5. Deed dated 1/22/99 uses the same description of Lot 29 as does Deed No. 4, above. Def. Exh. 1, part 9, R. 496.

6. Deed dated 11/8/00, R. 493.

7. Deed dated 9/20/01 conveys property shown "on a plat prepared by David S. Youmans, RLS, dated January 27, 1999 and recorded * * * in Plat Book 68 at Page 171." Def. Exh. 1, part 9, R. 500. Mr. Youmans 1999 plat continues to show, as did his earlier 1997 plat, that "PLEASANT POINT DRIVE AS SHOWN ON ABOVE REFERENCED PLAT [DATED DECEMBER 4, 1969, PLAT BOOK 18, PAGE 45]" extends to the carport of the house on Lot 1. It also continues to show the dirt driveway extending to the carport of the house on Lot 1 but no longer shows the driveway extending as a "shell driveway" around back of The Manor House. It now shows for the first time the "SETBACK FROM CRITICAL LINE". The 1999 Youmans plat is Def. Exh. 1, part 12, R. 523.

8. Deed dated 9/20/01 uses the same property description as does Deed No. 6, above. Def. Exh. 1, part 9, R. 500.

9. Deed dated 10/30/02 uses the same property description as does Deed No. 6. Def. Exh. 1, part 9, R. 504.

10. Deed dated 11/7/02 uses the same property description as does Deed No. 6. Def. Exh. 1, part 9, R. 506.

11. Deed dated 12/16/02 uses the same property description as does Deed No. 6. Def. Exh. 1, part 9, R. 508.

12. Deed dated 7/20/09 uses the same property description as does Deed No. 6. Def. Exh. 1, part 9, R. 514.

13. Deed dated 1/28/10, into Dr. and Mrs. Guest, uses the same property description as does Deed No. 6. Def. Exh. 1, part 9, R. 519.

any condition which a visual inspection of Lot 29 would reveal — in this case, the Ewings' driveway — a condition shown on the closing plat and obvious upon inspection.[30]

Thus, the Guests had actual knowledge, or constructive notice, or both, that Pleasant Point Drive extends to the carport of the house on the lot next to theirs, and that the driveway had been in use by the owners of that house for decades.

II.

The owners of Lots 1, 2, and 3 have not lost their right to travel the streets shown on the plat by which they purchased. On the contrary, they have traveled Pleasant Point Drive as shown on the plat continually for forty-seven years.

The appellants offer two reasons for their claim that the Tompkinses lost the right to travel on Pleasant Point Drive as shown on the plat by which they purchased. First, the appellants say that the right was forfeited when the Tompkinses sought and received the right to landscape a small portion of Pleasant Point Drive bordering their property. The appellants style this as some sort of "accord and satisfaction."[31] Second, the appellants say that the Tompkinses somehow lost the right in question when an action against a previous owner of Lot 29 was dismissed.

As the circuit court found, there is no evidence to support either contention.

A. The 1976 express easement was principally to authorize landscaping in a sliver of Pleasant Point Drive.

The special referee found as a fact that the 1976 express easement covering a

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[30] The Guests obtained a title examination before buying the property. Tr. 215/21 – 216/2, R. 332-33.

[31] Accord and satisfaction is an affirmative defense which must be pled, Rule 8(c), SCRCP, but was not. In his opening statement, appellants' attorney appeared to say that an "accord and satisfaction" resulted from the dismissal of an earlier suit involving the Youngs. Tr. 36/11-16, R. 153. In closing argument, however, counsel appeared to identify the grant of the landscaping easement as the "accord and satisfaction." Tr. 267-68, R. 384-85.

sliver of Pleasant Point Drive adjacent to Lots 1 and 2 was principally to allow landscaping. Order of March 25, 2016 at 9-10, ¶¶ 21-22, R. 21-22. The special referee found that if the owners of Lots 1 and 2 had meant to forfeit their *Billings* right by accepting such an easement, the easement would have said so. Moreover, the special referee relied upon uncontradicted expert evidence [Tr. 71/10 – 72/9, R. 188-89] that the landscaping easement was not a substitute for Pleasant Point Drive as shown on Mr. Trogdon's original plat, and would have been useless for vehicular access. Final Order of March 25, 2016, pp. 9-10, ¶ 22, R. 21-22.

There are at least seven additional reasons why this landscaping easement had nothing to do with vehicular access to Lots 1 and 2:

First, General and Mrs. Tompkins acquired the right of vehicular travel on Pleasant Point Drive — *all* of Pleasant Point Drive — at the moment they purchased Lots 1, 2, and 3, six years earlier. Pleasant Point Drive extended to the carport which they added to Cuthbert House. They needed no further document to establish that right, and certainly would not have forfeited it in exchange for the right to landscape the fringe of a portion of Pleasant Point Drive.

Second, the easement area begins and ends ***with a point***, not the width of a car. It would be impossible for a vehicle to enter and leave the landscaping easement area without traversing Pleasant Point Drive before and after passing through the easement area. [Tr. 126/1-25, R. 243.]

Third, the easement area fails by about twenty feet to reach the Tompkins' carport.[32] It would have been useless as a means of access. No expert evidence is needed to see this.

Fourth, the easement ended with the death of the grantees. If an easement were needed to reach the house by vehicle, it would have been absurd to obtain a right

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[32] Tr. 100/15-19, R. 217. The scale of Mr. Youmans' 1997 plat supports the estimate of twenty feet.

which died with the present owners.

Fifth, the Tompkinses from the beginning used the driveway which serves both Cuthbert House and the Manor House. (This is the driveway shown on Mr. Youmans' 1997 plat. *See* Order of 3/25/16, p. 10, ¶ 23, R. 22.) The driveway does not touch any part of the landscaping easement area. By about 1990 they had acquired a prescriptive right to use that driveway.

Sixth, the grant begins by reciting that the grantor, Pleasant Point Plantation, is the owner of the property shown on Mr. Trogdon's *1969* plat. There is no mention of the 1974 plat truncating Pleasant Point Drive. This is an acknowledgment by the successor developer that the *Billings* rights of pre-1974 purchasers such as the Tompkinses are defined by the 1969 plat, not the 1974 plat.

Seventh, the instrument granting the easement names the three kinds of things which the grantee is permitted to do within the easement area, none of which is ingress and egress. The grant of an easement for ingress and egress invariably uses those words, as any South Carolina lawyer knows.[33]

The landscaping easement was an "accord and satisfaction" of nothing.

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[33] The successor developer grants to the Tompkinses the right to do the following things in the easement sliver:

> (1) to construct walkways, driveways, install water lines and sewer lines, utility lines and poles;
>
> (2) [to install] ornamental exterior objects;
>
> (3) and to plant and maintain trees, shrubbery and grass in and on the [easement area].

Def. Exh. 1, part 4, R. 485. Although the grant contains the word "driveway" — probably because the scrivener was attempting to authorize everything possible — such a driveway would have been not only uniquely shaped but entirely useless. It would not be as wide as a car through most of its length and would not reach the carport before it vanished at a point.

B. The 1999 action between the Tompkinses and the Youngs did not result in a loss of the right to use Pleasant Point Drive. On the contrary, it re-confirmed it.

The appellants placed in evidence the pleadings from a 1999 action between the Tompkinses and previous owners of Lot 29, the Youngs, but they offered no evidence of the result of the suit, only that it was dismissed. The appellants conclude from this that the action resulted in a loss of the right to use Pleasant Point Drive.

The logic behind this contention is unclear since claim preclusion results from judgments, not dismissals. But even without documentary evidence of how the suit ended, other evidence shows that the suit resulted in the Youngs' acknowledgment of the fact that the 40-foot-wide area in controversy is part of Pleasant Point Drive. After the suit concluded, Mr. Young wrote to the Property Owners Association asking that the portion of Pleasant Point Drive in question be paved by the Association. Def. PPPOA Exh. 2, R. 667. This request could only be based on the Youngs' acknowledgment that the area in controversy is part of Pleasant Point Drive.[34]

III.

A prescriptive easement was alleged. In any event, the issue was tried by consent.

The appellants contend that the issue of a prescriptive easement over the driveway was not pled and therefore should not have been considered.[35]

A. The allegations of the complaint were broad enough to encompass a prescriptive easement in addition to a *Billings* right.

In addition to the allegations appropriate to a *Billings* right, the complaint alleged that the plaintiff and her predecessors in title had continually used the portion of

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[34] The Association refused the Youngs' request, not because this part of Pleasant Point Drive was not a subdivision street, but because paving would serve only the owners of Cuthbert House and the Manor House. The expense of paving could not be justified as an Association expense. PPPOA Exh. 3, R. 668. This part of Pleasant Point Drive would remain dirt, as all the roads in the subdivision were initially. *See* Appellants' Brief at 14, 16, and 17.

[35] The appellants attempted at trial to raise at least five affirmative defenses, none of which were pled. *See* Tr. 268/9-16, R. 385, and Rule 8(c), SCRCP.

Pleasant Point Drive in question for forty-five years. [Cpt., ¶ 28, R. 41.] The prayer of the complaint was for an order establishing the rights of the parties in the property in controversy. [Cpt., p. 7, R. 44.] The appellants joined in that prayer. [Answer, p. 5, ¶ 33, R. 60.] This was enough to place the defendants on notice that a prescriptive easement was at issue.

Pleadings allege facts, not legal theories.

> The law requires a plaintiff to state the facts constituting his cause of action and demand the relief to which he supposes himself entitled, [but] he is not required to characterize the facts stated, or to give his cause of action a name; that being the province of the court.

Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965).

Without objection, Mrs. Ewing's attorney alluded to the evidence of a prescriptive easement in his closing argument,[36] although that was not the principal focus.

This was enough to place the defendants on notice that a prescriptive right was at issue, as the special referee understood.

B. The question of whether a prescriptive easement was acquired by decades of use was tried by consent.

The plaintiff, Mrs. Ewing, offered evidence of continual use of not only the 40-foot-wide area at the street end of Pleasant Point Drive and the driveway but also an additional few feet just south of the street end, leading into the southern half of her carport. Not only did the Guests not object to this evidence, but they attempted to rebut it with evidence of their own.

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[36] The driveway that was used, albeit outside of the area, for 40-some-odd years doesn't negate the fact that there's a 40-foot easement there. They probably have a prescriptive easement to the use of the driveway outside that easement area under the law of applied easements in South Carolina, including that area that is beyond the 40-foot easement toward the marsh by the carport, where the carport extends further than the 40-foot easement — or right-of-way easement shown on this as Pleasant Point Drive.

Tr. 261/10-20, R. 378.

The evidence offered by both sides on the question of continual use had no relevance to the *Billings* issue. As the circuit court found, the right to use each and every subdivision street depicted on the map was acquired upon purchase of a lot. That right is *irrevocable*. Actual use is unnecessary. *Cason v. Gibson,* 217 S.C. 500, 506, 61 S.E.2d 58, 61 (1950); *Outlaw v. Moise,* 222 S.C. 24, 30-31, 71 S.E.2d 509, 512 (1952). *See: Town of Estill v. Clarke,* 179 S.C. 359, 184 S.E. 89, 90 (1936). The purchasers of lots in Pleasant Point Plantation need not have driven *any* subdivision streets in order to preserve that right. Evidence of decades of actual use could *only* be relevant to the question of whether a prescriptive easement was acquired. If proved, a prescriptive easement would then exist in two parts. First, it would exist in addition to the *Billings* right to use Pleasant Point Drive which arose at the moment of sale. Second, it would apply to the driveway and to the additional few feet leading from the end of Pleasant Point Drive to the southern half of the carport.

By failing to object to Mrs. Ewing's evidence of prescriptive use and by offering evidence on that issue themselves, the Guests consented to the trial of the issue. Rule 15(b), SCRCP;[37] *Sherman v. Sherman,* 307 S.C. 280, 282, 414 S.E.2d 809, 811 (Ct. App. 1992).[38] *Accord: Simmons v. Tuomey Regional Med. Ctr.,* 330 S.C. 115, 125 n.2,

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[37] Rule 15(b), SCRCP:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

[38] There is nothing in the record which indicates that the [appellant] objected to the evidence of legal research costs or deposition costs. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. * * * We find that the issue was tried by consent and find no abuse of discretion in the court's award.

307 S.C. at 282.

498 S.E.2d 408, 413 n.2 (Ct. App.1998) (an issue not expressly mentioned in the complaint but tried without objection and incorporated in the trial court's order is tried by consent according to Rule 15, SCRCP); *McCurry v. Keith,* 325 S.C. 441, 481 S.E.2d 166 (Ct. App.1997) (issues tried by consent will be treated as if raised in the pleadings); *Hudson v. Hudson,* 340 S.C. 198, 201, 530 S.E.2d 400 (Ct. App. 2000).

The prescriptive period had run long before any interference or objection by an owner of Lot 29. Order of March 25, 2016, p. 11, ¶ 26, R. 23.

The appellants raised no issue regarding the pleading or proof of prescriptive easements in their Rule 59(e) motion. [R. pp. 69-97.] These issues appear for the first time in the appellants' brief to this Court.[39] Accordingly, appellants' Questions IV and V are not properly before the Court. *West v. Newberry Elec. Coop., Inc.,* 357 S.C. 537, 543, 593 S.E.2d 500 (Ct. App. 2004), and many other cases. In particular, the appellants' contention that the proof of a prescriptive easement was not made by clear and convincing evidence appears for the first time in their brief to this Court.

These issues lack merit, in any event.

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[39] The appellants attempted to argue the pleadings issue (but not the "clear and convincing evidence" issue) at the hearing of their Rule 59 motion, but the ten-day period for service of a Rule 59 motion is the only opportunity to state the grounds, and this ground was not included in the motion. *See: Camp v. Camp,* 378 S.C. 237, 662 S.E.2d 458, 459 (Ct. App. 2008) (motion must "state with particularity the grounds therefor * * * ." Rule 7(b)(1), SCRCP). There is no authority for amending such a motion after the ten-day window has passed.

CONCLUSION

The circuit court's findings of fact are all supported by the evidence.

The appellants' contention that the right of a lot purchaser to use the subdivision's platted streets can be nullified by recording different plats for later sales, or by parol evidence decades after the fact, has no merit.

The issues which the appellants attempt to raise regarding the prescriptive easement are not properly before the Court, but have no merit in any event.

For these reasons the respondent urges the Court to affirm.

Respectfully submitted,

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