THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Judge Marvin H. Dukes III, Master-In-Equity

APPELLATE COURT CASE NO. 2019-000928
COMMON PLEAS CASE NO. 2017-CP-07-00851

River City Developers, LLC ..... Appellant,

v.

The Marshes at Lady's Island Homeowners' Association, Bundy Appraisal & Management, First Green, LLC, Tige Howie & Stephen Scott ..... Respondents.

APPELLANT'S REPLY TO RESPONDENTS' BRIEF

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ARGUMENTS IN REPLY

I. River City's lots are not encumbered by the covenants and restrictions absent the filing of a supplemental declaration.

In response to Respondents' Initial Brief, River City reemphasizes several points to support its position that the filing of a supplemental declaration is necessary to encumber the subject lots properly.

First, although River City may have agreed before the Master-In-Equity that its present day lots were part of the "future development" described in Exhibit A, River City maintains that the undeveloped land was also included in Exhibit B in the event that undeveloped land was later subdivided or rearranged to create different or new parcels which were not shown or described in Exhibit A. That envisioned scenario occurred in 2007 when a new plat was recorded, creating an entirely new subdivision with new lot lines and new open space areas, and thus an expanded and reconfigured community compared to the original 2005 plat. Following this expansion and reconfiguration, the method to effect an annexation described in Article IX of the Declaration applied and required Respondents to file a supplemental declaration to subject River City's lots to the covenants and restrictions. Any concession by River City that its lots were described in Exhibit A does not negate the applicability of Exhibit B.

Second, Respondents' argument regarding the plain and obvious purpose of the covenants and restrictions fails to consider the opposing interpretations offered by the local attorneys and real property law experts, whose opinions and affidavits were made part of the record before the Master-In-Equity. These experts support the parties' opposing interpretations of the Declaration, including the applicability of the property descriptions in Exhibits A and B, and further support the conclusion that the language of the Declaration is ambiguous as to whether River City's lots were intended to be subject to the covenants and restrictions. Any

ambiguities in the Declaration should be resolved in favor of free use of the land and the filing of a supplemental declaration to clarify that River City's lots are encumbered by the covenants and restrictions. See Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006).

Third, the significant public policy considerations raised in River City's initial brief are properly before this Court. River City has repeatedly set forth policy-based arguments in its motion for summary judgment, the supporting affidavits, the motion for reconsideration, and its supporting memorandum, thus satisfying preservation requirements. See I'On, LLC v. Town of Mt. Pleasant, 388 S.C. 406, 526 S.E.2d 716 (2000). Furthermore, an appellate court exercises de novo review of public policy issues. Williams v. Govt. Employees Ins., 409 S.C. 586, 762 S.E.2d 705 (2014). Throughout this action, River City has maintained that it is not attempting to avoid fees and assessments but rather advocating for the filing of a supplemental declaration to formalize and clarify the expansion of the association and trigger the assessment liability and voting power of the new members. River City reemphasizes that a certain level of formality and documentation should be required to effect changes in community associations as to membership, governance, assignments, voting, dues liability, and applicability of all the benefits and burdens that arise from an HOA membership. Community associations, which are the ultimate enforcement agency as to these benefits and burdens, have a responsibility to expand correctly so that they can properly administer the affairs and assets of the members.

Finally, the definition of "unit" that Respondents rely on so heavily should also be considered in light of these policy considerations. If a new unit is created by a plat recording where open space was previously platted, there needs to be a mechanism to inform the association members that the open space was dissolved. Here, the newly platted lots and design overlaid lots on previously open space; this is distinguishable from Cullen in which there was not

an alteration to the master plat but rather a supplemental filing describing new lots. Cullen v. McNeal, 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010). Further distinguishable from Cullen, the Declaration in this case provides a specific procedure for annexing and subjecting new lots to the covenants and restrictions through Sections 9.1 and 9.4 and Exhibit B, a procedure which Respondents failed to follow. River City asks the Court to consider the significant benefits of requiring a supplemental declaration in these circumstances and to establish a clear rule going forward for similarly situated parties.

Based on these arguments, this Court should find that River City's lots are not encumbered absent the filing of a supplemental declaration.

II. Alternatively, summary judgment should not have been granted in this case.

River City respectfully submits that the conflicting evidence in the record and the standard for summary judgment support the Court's exercise of discretion to not be bound by the relief sought before the Master-In-Equity, reverse summary judgment, and remand the case for trial. In response to Respondents' contention that this argument violates issue preservation rules, River City replies it is not raising new issues on appeal and that the relevant facts, law, and arguments in this case were raised before the Master-In-Equity, thus providing this Court with a "platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011); see also I'On, LLC, 338 S.C. 406, 526 S.E.2d 716. In the lower court, the parties presented the opposing affidavits, relevant documents, and policy-based arguments that are being raised on appeal.

River City acknowledges that prior counsel made certain statements before the Master-In-Equity regarding the propriety of summary judgment that are contrary to the request for relief on appeal. However, the opposing affidavits and opinions, filed below, present conflicting

interpretations of the Declaration, the land described in Exhibits A and B, and the requirement of filing a supplemental declaration. These conflicting opinions support a finding of ambiguity in the Declaration and show the need for further inquiry into the facts, such as the various relevant documents, communications between and intent of the parties, and community expansions and changes, and the conclusions that can be drawn from those facts. See McAlhany v. Carter, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015); Gilliland v. Elmwood Props., 301 S.C. 295, 391 S.E.2d 577 (1990). Furthermore, the issue of whether or not the contested facts bar summary judgment is a legal consequence that is a matter for the court, not the parties. Southern Ry. v. City Council of Greenville, 49 S.C. 449, 27 S.E. 652 (1897). Thus, as in Southern Railway, in which the Court refused to give weight to the lawyer's argument about interest which was a legal matter "purely for the court, and not for the parties," counsel's earlier statements here regarding the propriety of summary judgment should not restrict the Court from rendering a different result to which a party is legally entitled. 27 S.E. at 654.

Accordingly, River City asks this Court to consider this procedural argument and find, as an issue of law for the Court, that summary judgment was not appropriate in this case and improvidently granted.

CONCLUSION

River City first asks the Court to reverse the grant of summary judgment to Respondents and find that River City's lots are not encumbered by the Declaration absent the filing of a supplemental declaration. Alternatively, River City asserts that the case presents genuine issues of material fact, rendering summary judgment inappropriate, and respectfully requests the Court to remand the case for trial.

Respectfully submitted,

January 13, 2020

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CERTIFICATE OF COUNSEL

The undersigned certified that this final Reply Brief complies with Rule 211(b), SCACR.

January 13, 2020

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