

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Master-in-Equity

Maite Murphy, Master-in-Equity

Case No. 2009-CP-18-3315

Larry E. Kinard,

Appellant,

v.

Douglas S. Richardson and Julie D. Richardson,

Respondents.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER ERR IN DECLARING THAT THE RICHARDSON'S PROPERTY WAS NOT MADE SUBJECT TO THE ORIGINAL RESTRICTIVE COVENANTS?
2. DID THE MASTER ERR IN FINDING THAT KINARD LACKED PRIVITY OF CONTRACT AND STANDING TO ENFORCE THE RESTRICTIVE COVENANTS?
3. DID THE MASTER ERR IN CONCLUDING THAT THE "AMENDMENT TO RESTRICTIONS" WAS NOT A VALID AMENDMENT AND THEN DECLARING THAT THE RESTRICTIONS SURVIVED AS AN ORIGINAL RESTRICTION UPON THE RICHARDSON'S LAND?
4. DID THE MASTER ERR IN FINDING THAT THE RICHARDSONS PURCHASED TWO ADJOINING LOTS, THAT THE SECOND LOT WAS USED AS THEIR YARD AND THAT THEY LIVED THERE?
5. DID THE MASTER ERR IN DECLARING THE RICHARDSONS IN COMPLIANCE WITH THE COVENANTS IN USING TRACT B AS A SINGLE-FAMILY RESIDENTIAL BUILDING LOT?
6. DID THE MASTER ERR IN DECLARING THE RICHARDSONS IN COMPLIANCE WITH THE COVENANTS, IN KEEPING NO GREATER NUMBER OF HORSES ON TRACT B THAN PERMITTED?
7. IF THE MASTERS ERRED IN FAILING TO DECLARE THE RICHARDSONS IN BREACH, DID THE MASTER ERR IN BALANCING THE EQUITIES, SPECIFICALLY KINARD'S SETTLEMENT WITH THE ADJACENT EQUESTRIAN CENTER, AND DO THE EQUITIES WARRANT ENJOINING VIOLATIONS?

STATEMENT OF THE CASE

Claims between all other original parties were resolved and pleading allegations and exhibits associated with those claims shall be removed where possible. The Richardsons were not parties to the original action filed December 8, 2009. On February 23, 2010, Larry E. Kinard commenced this declaratory judgment action against Douglas S. & Julie D. Richardson via Amended Complaint alleging breach of restrictive covenants.

The action alleged commercial leasing and use of Senrab Farms subdivision Tract B for equestrian center business operations in violation of two restrictive covenants stating that lots shall be used as single family residential building lots (Amended Complaint, ¶¶105-111). Additionally, Kinard alleged that the Richardsons were keeping more horses than permitted under the covenants (Amended Complaint ¶¶113-114).

Kinard alleged irreparable harm to his quality of life, that the subdivision's quiet and solitude had been diminished by business traffic, including arrival and departure of riders and horse trailers, visual horse trailer blight, an unkept and seriously overgrazed field with odors and insects, and customer litter (Amended Complaint ¶¶100-101, incorporated via 104). The action sought a declaration of breach and to enjoin violations, without seeking damages (Amended Complaint ¶¶115).

By Amended Answer filed April 29, 2010, the Richardsons admitted to leasing Tract B to an individual in support of her equestrian center business operations (Amended Complaint ¶¶106; Amended Answer ¶¶52), while denying violating residential use restrictions (Amended Complaint ¶¶110; Amended Answer ¶¶56),

keeping more horses than permitted (Amended Complaint ¶¶113-114; Amended Answer ¶¶58-60), or damaging Kinard's quality of life (Amended Complaint ¶¶100-101; Amended Answer ¶¶49). The Amended Answer raised the affirmative defenses of unclean hands and statute of limitations (Amended Answer ¶¶61-65).

Cross motions for summary judgment were heard by Judge Edgar W. Dickson on August 1, 2011 and decided December 20, 2011. The Court's limited ruling was that the Richardsons had subdivided Tract L into Tracts A and B and that any covenants and restrictions applicable to original Tract L ran with the land, including the Amendments.

The case was heard before the Master-in-Equity on June 7, 2012. By order dated September 28, 2012, the Master held that Kinard lacked privity and standing to enforce any restrictions imposed upon the Richardson's land, in that the developers, the Barnes, did not formally amend the restrictions so as to bring the Richardson's land within the subdivision. The Master found that an "Amendment to Restrictions," applicable only to the Richardson's Tract "L," was effectively an original restriction, as the Barnes did not own any restricted lots at the time of the purported amendment. The Master alternatively held that even if the covenants did apply and Kinard did have standing, that neither the original or amended covenants prohibit the leasing of property for equine use, that the Richardson's use is in compliance, and that their lease is not a commercial business operation excluded by the covenants.

Kinard's motion to reconsider, alter or amend was filed October 9, 2012 and heard November 16, 2012. The motion asserted that an equestrian center is not a residential use and the evidence did not support a compliance finding. It noted that lack of privity/standing had not been pled. It asserted that it was error for the Master

to effectively blue penciled and rewrite: (1) Richardson's deeds to remove his property from the subdivision; (2) an admittedly invalid amendment so as to survive as an original declaration; and (3) the original restrictions so as to limit enforcement rights. Kinard asserted that it was error to find that Tract B can have up to 6 horses when photo evidence indicated more than 6, and when subdivision of Tract L was to be per the original restrictions, which allow only 1 horse.

Following oral arguments, on December 6, 2012, the Master issued a Final Order affirming the prior order and making additional findings and conclusions that: the term residential purposes does not prohibit the complained of conduct in that the second lot is akin to the Richardson's yard; the restrictions allow leasing without limitation; photo evidence of more than 6 horses may have reflected a visiting horse; the Richardson's service on the HOA board is irrelevant as the amendment procedures were not followed; Kinard's claim that keeping up to 6 horses ruined his quality of life is not credible as he settled with an equestrian center allowing up to 10 horses; and the claim of being blind-sided by the Court's finding of lack of privity is without merit as the burden is upon Plaintiff to establish enforcement standing.

FACTS

On August 29, 1997, a subdivision plat was recorded in the Dorchester County RMC Office entitled a "PLAT SHOWING ELEVEN LOTS OF SENRAB FARMS, A SUBDIVISION OWNED BY JAMES M. BARNES AND DELENE BARNES" (PI's. Ex.1). The plat shows eleven consecutively lettered Lots (A through K) with lots sizes ranging from 1 to 1.8 acres, two subdivision roads, Senrab Boulevard and Saddle Trail, a "temporary turn-around at the east end of Saddle Trail, and 14.19 acres residual (PI's. Ex.1 and Trial Tr. 24:15 to 25:8).

On September 11, 1997, "Restrictive Covenants" created and executed by the Barnes on September 8, 1997 were recorded in Dorchester County RMC Book 1821 at Page 331. While the opening paragraph states that "the owners of the property described herein or made subject hereto from time to time, hereby covenant and agree," as shown on attached Exhibit A, the covenants were initially impressed only upon six (6) lots, D, E, F, G, H and I (PI's. Ex.2, Pgs. 1 & 11; Trial Tr. 26).

Relevant numbered paragraphs of the covenants include the following.

Paragraph 1 of the covenants states:

"Whenever used herein, the term 'Lots' shall refer to lots which are subject hereto, whether by specific reference in this instrument, or to lots made subject to the provisions of this instrument by separate legal instrument recorded in the Dorchester County RMC Office" (PI's. Ex.2, Pg. 1, ¶1).

Covenants paragraph 3 allows enforcement in law or equity against any person violating the covenants, to either restrain violation or recover damages (PI's. Ex.2, Pg. 1, ¶3).

Covenants paragraph 5 states: "The lots are known and designated and shall be used as single-family residential building lots ..." (PI's. Ex.2, Pg. 2, ¶5).

Read together, Covenants paragraph 13 and subsection c) read:

“13. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood, and specifically including the following: c) It shall be permissible for the owner of any lot to keep up to one (1) horses on that lot so long as the rear portion of the lot is fenced for such purposes and such rear portion contains a minimum area of twenty-five thousand (25,000) square feet.” (Pl's. Ex.2, Pg. 6, ¶13).

Paragraph 9 details obligations and restrictions when subdividing or consolidating lots, reserving to lot owners the right to acquire a contiguous lot and use it “as a side yard” (Pl's. Ex.2, Pg. 4, ¶9).

Paragraph 16 grants lot owners an easement over Senrab Boulevard and Saddle Trail in exchange for agreeing to pay their pro rata share of a “Road Maintenance Assessment,” with the Barnes reserving the right to create an entity composed of lot owners to collect and administer the Assessment and to assign its rights to such entity (Pl's. Ex.2, Pg. 8-9, ¶16).

According to Covenants paragraph 18:

“These Protective Covenants may be altered, modified, canceled or changed at any time by the written consent of the majority of the owners of record of the lots which are subjected hereto.” (Pl's. Ex.2, Pg. 9, ¶18).

The six restricted lots were subsequently deeded out by the developers James M. Barnes and Delene B. Barns as follows: (1) Lot H to the Lutes on September 8, 1997 (Pl's. Ex. 3); (2) Lot I to Deschenes on November 25, 1997 (Pl's. Ex. 3); (3) Lot G to the Mims on November 25, 1997 (Pl's. Ex. 3); (4) Lot E to the Baribeaults on December 11, 1997 (Pl's. Ex. 3); (5) Lot D to the Vaughans on December 15, 1997 (Pl's. Ex. 3); (6) and Lot F to Larry E. Kinard (Plaintiff-Appellant) and Patricia A.

Kinard on January 21, 1998 (Pl's. Ex. 4).

Larry E. Kinard has resided with his wife Patricia at 217 Saddle Trail in Senrab Farms subdivision just outside of Summerville, SC since 1998 (Trial Tr. 22:5 to 22:20). He picked Senrab Farms for its solitude, quietness and farm atmosphere. When he purchased his lot, the only building present was an old farm that wasn't part of the subdivision (Trial Tr. 22:21 to 23-9).

Plaintiff's Exhibits 32 and 33 are photos taken by Kinard while laying out the foundation for their home. Photo Exhibit 32 shows in the background the barn that stands now on the Nguyens' property. In Exhibit 33 you can "see the road from the turnaround on Saddle Trail going down to the cul-de-sac with what eventually would be Mr. Richardson's property on the right." Kinard notes that Richardson's home isn't there yet and there are no horses in the field (Pl's. Ex. 32-33 and Trial Tr. 82:5-21).

Kinard was shown the plat of Senrab Farms subdivision prior to purchasing Lot F, where his home is now located. Subsequently, Kinard also purchased adjacent Lot G, upon which he planted fruit trees (Trial Tr. 23:10 to 24:11). He consolidated the lots pursuant to Restrictive Covenants paragraph 9, using it as a side yard (Trial Tr. 32:5-23).

On January 29, 1998, a plat dated December 29, 1997 and showing the Barnes' subdivision of the 14.19 residual acres into Tract L (7 acres) and Tract M (7.03 acres) indicates recording. It also shows four of the previously restricted lots on the North side of Saddle Trail, including Kinards, referring to them as Tract "E", Tract "F", Tract "G" and Tract "H" (Pl's. Ex. 5).

On February 25, 1998, the Barnes and Steve Hill/Habersham Builders, Inc. executed a three page document entitled "Amendment to Restrictions" (Pl's. Ex. 7

and (Trial Tr. 40:12-22). The Amendment to Restrictions indicates that the property affected is Tract 'L' as "further described on Exhibit 'A' attached hereto." Exhibit A describes the lot as "being known and designated as Tract 'L', Senrab Farms" as shown on the plat subdividing the residual 14.19 acres (Pl's. Ex. 7, Exhibit "A").

The 5th paragraph of Amendment to Restrictions states: "The property shall be designated and shall be used as a single family residential building tract ..." (Pl's. Ex. 7 and Trial Tr. 41:9-13). The 6th paragraph of states:

"It shall be permissible for the Purchaser to subdivide the property described herein as set out in Paragraph 5 of the restrictive covenants, dated September 9, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331 in so that each subdivided lot shall be used as a single family residential building lot" (Pl's. Ex. 7 and Trial Tr. 41:14 to 41:23).

The 8th paragraph states:

"It shall be permissible for the Purchaser, and his/her successors and assigns, to keep up to six (6) horses on the above described property. Such horses shall be permitted on the front portion of the property and the rear portion of the property" (Pl's. Ex. 7 and Trial Tr. 41:24 to 42:6).

The 10th paragraph states:

"EXCEPT AS HEREINABOVE MODIFIED AND SET OUT, and by acceptance hereof, undersigned do hereby agree and consent that the property shall be restricted in accordance with the restrictive covenants, dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331" (Pl's. Ex. 7 and Trial Tr. 42:7-16).

Kinard testified that Book 1821, Page 331 is the same restrictive covenants reference that appears in his deed (Trial Tr. 42:7 to 42:19).

Also on February 25, 1998, the Barnes executed a deed granting Steve Hill/Habersham Builders, Inc. title to what page one of the deed describes as "Tract "L"/ Senrab Farms" and deed Exhibit "A" describes as "Tract "L", Senrab Farms" (Pl's. Ex. 6). Exhibit "A" to the deed also recites that the deed is:

"SUBJECT TO: Restrictive Covenants dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331. Amendment to restrictions dated February 25, 1998 and recorded simultaneously herewith" (PI's. Ex. 6 Exhibit "A" and Trial Tr. 39:5 to 40:11).

The deed to Tract L, Senrab Farms indicates RMC Office recording on March 3, 1998. The deed signature page twice indicates that the deed was sealed and the acknowledgment expressly refers to the deed as an "instrument" (PI's. Ex. 6).

On June 18, 1998, a plat dated May 5, 1998 was recorded subdividing Tract "M" of Senrab Farms Subdivision into five new tracts, tracts "M," "N," "O," "P" and "Q" (PI's Ex. 9). Kinard noted that the plat showed that the temporary turnaround identified on the original subdivision plat had been extended (Trial Tr. 43:7-17). Three plats had now been recorded showing seventeen (17) lots/tracts that were sequentially lettered from "A" through "Q" (PI's Exhibits 1, 5 and 9).

On December 23, 1998, Steve Hill/Habersham Builders, Inc. executed a deed granting property described as "Tract L, Senrab Farms, 124 Saddle Trail, Summerville, SC 29483" to Douglas S. and Julie D. Richardson (PI's Ex. 10). Exhibit "A" attached to the deed declared the property as "being known and designated as Tract "L", Senrab Farms," "TMS# 136-00-00-222," and recites that the grant is "SUBJECT TO: Restrictive Covenants and amendments thereto recorded in the RMC Office for Dorchester County in Book 1821, Page 331" and "Book 1915, Page 263" (PI's Ex. 10, Exhibit "A" and Trial Tr. 44:23 to 46:9).

Mr. Richardson (hereafter referred to as Richardson) testified that he purchased the property "... to have horses. We had horses when we first married, and we wanted to have horses into retirement" (Trial Tr. 185:24 to 186:3).

Kinard testified that Richardsons' Tract L is located directly across from his

house and extra lot (Trial Tr. 38:25 to 39:4). Richardson testified that he lives at 124 Saddle Trail, in the back of Senrab Farms subdivision (Trial Tr. 148:8-17). Richardson was the original President of the homeowners' association and Mrs. Richardson is currently its Treasurer (Trial Tr. 148:18 to 149:5).

Richardson described construction of a three-board horse fence using 4x4 posts that he started building around 2000 (Trial Tr. 188:16 to 190:7).

A plat updated on March 15, 2003 and entitled "Plat showing a 7.01 acre lot to be subdivided into Tract A (1.18 acres) and Tract B (5.83 acres) surveyed at the request of the owners, Douglas S. & Julie D. Richardson" indicates recording on April 1, 2003. The plat shows the Richardson's home located on Tract "A" and no structures on Tract "B" (Pl's. Ex. 11).

According to Richardson, they subdivided their 7 acre lot in 2003 so that they could have agricultural use of the 5.8 acres (Trial Tr. 149:10-13). Richardson testified that they have never owned a horse since moving to South Carolina (Trial Tr. 158:2-6).

Kinard testified that, to his knowledge, no one within Senrab Farms other than the Richardsons have ever kept a horse on their lot, and no one within Senrab Farms owns a horse (Trial Tr. 33:21 to 34:3).

The Richardsons created a business entity that they named Greener Pastures, LLC and annually reported farm rental income from 2003 to 2010 (Trial Tr. 149:17 to 151:25 and Pl's. Ex. 37). All income and expenses shown on Plaintiff's Exhibit 37 was earned or incurred as part of Tract B, Senrab Farms (Trial Tr. 151:18-22 and Pl's. Ex. 37).

The first page of Plaintiff's Exhibit 37 is completed federal tax form 4835,

showing "Farm Rental Income and Expenses for 2009. At the top, above the Richardson's names it states "Greener Pastures." The form shows gross farm rental income of \$3,050, with expenses of \$411, including \$125 to HOA (PI's. Ex. 37, Form 4835).

Page 1 of 3 of Greener Pastures, LLC's Income and Expense Detailed Report from 01/01/2002 to 04/04/2008 states in the bottom left corner, "Account owner: Doug Richardson" and in the lower right corner "Printed on Friday, April 4, 2008" (PI's. Ex. 37, Detailed Report Pg. 1 of 3).

Richardson recalls three leases of Tract B, all in writing, but he was only able to produce one, a 2010 nine page "Commercial Lease" between DJ Richardson Realty Inc. and Madeline Ingalls (Trial Tr. 152:11-24 and PI's. Ex. 36). The lease term was January 10, 2010 to December 31, 2010. The monthly rental rate \$350. The real property leased was described as "Subdivision Senrab Farms," "Address ~6 acs at 124 Saddle Trail," "Tax Map # 136-00-00-285" (PI's. Ex. 36, Pg 1 and Trial Tr. 84:5-25).

When asked if the commercial lease leased one hundred percent of Tract B for grazing, Richardson stated that "since I define it by the TMS and not the fenced area, I think that would be a true statement" (Trial Tr. 159:15-21). When asked, "Are you using it for residential purposes," Richardson replied "no" (Trial Tr. 213:15-17).

The lease listed the use of the premises as: "horse pasture – no more than 5 horses/ponies at 1 time; no lessons" (PI's Ex. 36, Pg. 3, ¶4 and Trial Tr. 85:1-7). No lease other than the Ingalls lease had forbid the giving of riding lessons (Trial Tr. 159:22 to 160:2). Asked how frequently horses were ridden upon Tract B, Richardson replied, "on a regular basis, weekly" (Trial Tr. 160:3-5). When asked by

his attorney, "What, if any, business did you run on that property other than leasing it for rent," Richardson replied, "That's what we did. We leased it for grazing and riding" (Trial Tr. 196:13-16).

Plaintiff's Exhibits 34 and 35 are two photos stamp dated 11/13/2010 showing a warning that was posted on Mr. Richardson's fence which states:

"WARNING Under South Carolina law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting from inherent risk of equine activities pursuant to Article 7, Chapter 9 of Title 47 Code of Laws of South Carolina 1976" (Trial Tr. 80:15 to 81:22 and Pl's. Ex. 34 & 35).

When asked, "Did your lease provide for customer parking" Richardson replied, "Yes. It's defined in page 3, paragraph 7," "outside the fenced pastures on the barn side of the fence" (Trial Tr. 160:6-12).

Plaintiff's Exhibits 19 through 21 show vehicles and trailers parked along Saddle Trail and on Richardsons' Tract B. The mailbox at 217 Saddle Trail is Kinard's. Kinard testified that Saddle Trail is a private road made of "some type of ROC, gravel that we bring in and then squash with a bulldozer" (Pl's. Ex. 19-21 and Trial Tr. 69:6 to 70:20).

When asked about horse dung removal from Tract B, Richardson explained that it's not removed but spread, that according to Clemson Extension Service the best management for fly eggs was to spread it (Trial Tr. 160:13-21). When asked if there were times when the fields were neglected and a large amount of dung accumulated he replied, "There's certainly is a lot of horse manure in our pasture, yes" (Trial Tr. 161:13-16).

Kinard testified that Plaintiff's Exhibit 25 is a photo showing "the amount of droppings from horses that were on Richardson's property, the white gate being part

of his property, and it shows why I encountered so many insects and flies" (Pl's. Ex. 25 and Trial Tr. 73:15-21).

Regarding the prior lease, Senrab Farms Equestrian Center is the name of the entity that Charity Fillmore had while she had the barn rented from the Nguyens (Trial Tr. 202:24 to 203:3). Richardson testified he was unaware of the Senrab Farms Equestrian Center website until he saw it in the lawsuit (Trial Tr. 154: 5-10), nor was he aware that the Center was advertising horses for sale (Trial Tr. 154: 18-20). He thought that the horses on the adjacent Nguyens' property were being rotated through Tract B for grazing but couldn't say for certain that every single horse came through (Trial Tr. 154:21 to 155:5).

Kinard testified that while the covenants do not prohibit him from having fruit trees on his adjacent lot, that article 5 of the covenants stating that lots are known, designated and shall be used as single family residential building lots prohibits him from having a pick-and-pay fruit stand (Trial Tr. 30:5 to 31: 13-7). Likewise, Kinard testified that while the covenants do not limit the number of vehicles he can have nor prohibit him from having a party and serving alcohol, that article 5 prohibits him from opening a parking lot, used-car lot, liquor store or bar on his land (Trial Tr. 31:8 to 32-4).

Although the number of horses he authorized to be on the property was 5, Richardson admits that at times there were more, at most 7 by his count (Trial Tr. 155:6-14). In that the Nguyens' barn holds 10 horses, Richardson thought that the maximum number of horses rotated through his property in a one-week period would be 10 (Trial Tr. 155:21 to 156:1). Richardson recalls Dorchester County Code Enforcement coming to his home with a complaint of too many horses on his lot, but

was only told that the person who complained was a neighbor. He doesn't recall the year (Trial Tr. 161:17 to 162:5).

While viewing a photo of horses on Richardsons' land Kinard testified that there "has at times been up to eight horses from what I've seen" (Trial Tr. 71:7 to 71:14 and Pl's. Ex. 21). When handed Plaintiff's Exhibit 28 and asked how many horses are seen in the photo Kinard replied, "Looks like seven and a small horse" (Trial Tr. 77:25 to 78:2 and Pl's. Ex. 28). When handed Plaintiff's Exhibit 26 Kinard counted "two, four, six – maybe eight horses with the rest – with the horses attempting to graze on the land" (Trial Tr. 73: 15-25 and Pl's. Ex. 26).

Richardson has no records of the names or number of horses that grazed on Tract B over the years (Trial Tr. 155:6-14). Nor does he have any idea of the number of horses that grazed upon Tract B since 2003 that were for sale while grazing there (Trial Tr. 156:10-14).

Shown two 2010 photographs of horses being ridden upon his land, Plaintiff's Exhibits 29 and 30, Richardson was unable to identify the riders or name the horses (Trial Tr. 159:6-14). Richardson was unable to name any of the horses that came or grazed upon his land since 2003. His explanation was, "I didn't take care of the horses. I didn't ride the horses" (Trial Tr. 159:5-14).

Kinard testified that he took the photo identified as Plaintiff's Exhibit 31 "because people are riding on private roads, people that don't live in our housing area and it appears to be one of Mr. Richardson's tenants." "This appears to me to be the lady that brings the check to his front door" (Trial Tr. 79:17 to 80:2 and Pl's. Ex. 26).

No vet certificate as to a horse's health was requested before allowing it to

graze in Senrab Farms upon Tract L. Richardson was never advised of illnesses the horses had, nor did he know the cause of death of a horse that had recently died on Tract L (Trial Tr. 157:5 to 158:1).

Richardson acknowledges that Kinard complained to him at the HOA about litter at times (Trial Tr. 163:7-9). Asked about his efforts in trying to keep litter cleaned up, "At the front of the subdivision, I was involved on a regular basis, not on Mr. Kinard's property." Richardson was unable to say whether litter inside Senrab Farms was related to equestrian activities (Trial Tr. 162:15 to 163:9).

Kinard testified that Plaintiff's Exhibit 27 is a photograph of "Saddle Trail and Senrab Boulevard and the corner of Mr. Richardson's property in the background. This particular picture was taken because of the amount of debris that was tossed over on my side." "My land is the stake..." Asked how common was litter on your land Kinard replied, "Enough for me to complain about it, but Mr. Richardsons said I couldn't prove whose trash it was" (Pl's. Ex. 27 and Trial Tr. 75:25 to 76:19).

When asked if Kinard complained to him about traffic and horse traffic tearing up the streets, Richardson replied, "We put the speed bumps in because of his complaints and a stop sign on Senrab Boulevard and a stop sign on the one his driveway is to stop the traffic on Saddle Trail, and those things were done based on his feedback" (Trial Tr. 163:10-22).

Kinard testified that Plaintiff's Exhibit 21 is a photo of a view "looking at the stop sign and speed bumps that we had to install in the area. We're looking on the right, the Nguyens' property; on the left, Mr. Richardson's property and that's the easement property that the vehicles are parked on, Mr. Richardson's side" (Pl's. Ex. 21 and Trial Tr. 70:21 to 71:6).

Kinard testified that while Richardson was President of the HOA, that "on several occasions, at the meetings, I brought it up to him about the noise, the traffic, the trailers in and out, and the numerous amount of horses, and nothing was ever taken seriously." "It was more or less passed over. It was brushed off." (Trial Tr. 47:23 to 48:12).

Richardson never told Kinard that he didn't own any of the horses that were grazing upon his land. "When he complained, I said I would talk to the owners at the barn about their horses. He complained about them riding on the road, all of that, and I said I would go talk to the owners at the barn" (Trial Tr. 163:23 to 164:6).

Asked if he'd ever told Kinard that he was "running a horse grazing enterprise" Richardson replied, "Not in those words, but I certainly told him I'd go talk to the owners of the horses when he was complaining" (Trial Tr. 164:19-23). Richardson doesn't think he ever mentioned by name the fact that he created a business in 2003 known as Greener Pastures (Trial Tr. 164:24 to 165:-14).

Asked how Mr. Kinard would know that horses going down the road across from Senrab, back to the barn and parking area along the fence, that the horses that were grazing on your land weren't yours, Richardson replied, "Did he see me riding them, lead them, clean them, touch them? I would think for somebody that was so observant of all the activity on my property, I would have thought he would have seen that" (Trial Tr. 166:19 to 167:3). Asked if he told the neighbors that the horses were not his he replied, "They've never seen me ride one, they've never seen me feed one, water one. The time I came in contact with those horses was when one got out ..." (Trial Tr. 164:24 to 5:6-14).

Kinard testified that his attorney brought to his attention that on a web page

"horses were being bought and sold, and we visited the website together and looked at it, and we saw things going on that we weren't aware of what was going on; that the Richardsons' tract was being used to supplement the farm area" (Trial Tr. 50:11-20). "It was the first time that I learned that horses were being bought and sold off the website" and "that Mr. Richardson didn't own the horses" (Trial Tr. 51:6-13).

Kinard testified as to Plaintiff's Exhibit 12 through 15, indicating what he saw at the <http://senrabfarms.com> website. "This is Mr. Richardson's house and his lot behind it. It was advertised on the web as a gelding pasture" (Trial Tr. 52:23 to 53:1). Asked about the gelding pasture he referred to, "Be Lot L directly across from me and adjacent to Mr. Richardson's house"(Trial Tr. 56:21-24). When asked specifically about only Exhibit 15 he stated, "You're seeing the back lot of his house being used as a padlock for horses" (Trial Tr. 57:3-6 and Pl's. Ex. 15).

Senrab Equestrian Center's "About Us" page stated in part:

"Senrab is located on 15 acres in the middle of Senrab Farms subdivision in Summerville, SC"... "We have two large grass pastures and smaller private paddocks" (Pl's Ex. 14 and Trial Tr. 56:1-13).

Plaintiff's Exhibit 12 is a screen shot of the Senrab Equestrian Center "Horses for Sale" page. Asked what it told him was happening on the land adjacent to Mr. Richardson's, "They were offering a variety of top quality horses for sale," replied Kinard (Trial Tr. 55:10-13 and Pl's Ex. 12). Exhibit 13 "shows that one of the horses has been sold and they identify that horse online for the public" (Trial Tr. 55:22-25 and Pl's. Ex. 13).

Mr. Kinard explained that the Nguyens' property is immediately west of the Richardsons, that "they have an agriculture covenants and we have a residential

covenants” (Trial Tr. 58:12-19). He testified that on Plaintiff’s Exhibit 1 the two lots to the west “are shown with J.J. Madison,” that “that’s now the Nguyens’ property” (Trial Tr. 59:2-6 and Pl’s Ex. 1). A 1992 document entitled Reciprocal Covenants was introduced. Executed by the Barnes and Madisons on October 1, 1992, the covenants state that the property “shall be used only for residential and agricultural purposes ...” (Pl’s Ex. 16, Pg. 1, numbered ¶2 and Trial Tr. 60:12 to 61:1).

In reviewing an aerial photo of Nguyens’ lot, Kinard pointed out that horses only have about one acre of land to graze upon, on lands to the left or west of the house (Pl’s. Ex. 17 and Trial Tr. 62:6 to 63:8).

Richardson felt that use of Tract B and allowing horses to graze helped facilitate traffic by making the entire site more popular, available, better to use as a horse owner. “Yes. It was definitely better for the horses to have pasture from,” Richardson testified (Trial Tr. 164:13-18).

Kinard was questioned during cross examination about his settlement with the Nguyens, an original party to this action, in agreeing to allow them to keep up to ten horses on their property (Trial Tr. 109:4 to 111:25 and Defs’. Ex. 1). Kinard explained that the reason “I agreed with them to that because they don’t have but one acre of grazing land. I didn’t think they could put that many horses on one acre” (Trial Tr. 109:7-12). Kinard explained that the Nguyens had agricultural covenants and “we have different covenants” (Trial Tr. 110:10-17).

Plaintiff’s Exhibit 16(c) shows a survey of the Nguyens’ land, and Exhibit 18 shows an aerial view of the Senrab Farm area now (Pl’s. Ex. 16(c) and 18 and Trial Tr. 63:16 to 64:1). Exhibit 18 also shows the Nguyens’ property “on which agricultural uses are permitted” and the Richardsons’ land “on which residential uses

are permitted" (Pl's. Ex. 18 and Trial Tr. 66:21 to 67:2).

Richardson acknowledges never seeking the HOA's permission to allow patrons who were grazing under his commercial lease if they could use the subdivision's private roads (Trial Tr. 168:18-22).

At Kinard's direction, on July 2, 2009 his attorney sent the Richardsons a cease and desist letter giving notice that Kinard had discovered that Tract B was being advertised on the Internet in photos as being part of Senrab Equestrian Center and additionally advising that on numerous days there were a greater number of horses than 6, and that subdivision of Tract L into Tracts A & B would limit horse ownership to one horse per lot under Restrictive Covenants Paragraph 13(c). The Richardsons were asked to cease and desist using residentially restricted Tract B as an equestrian center and that they comply with the covenants as to the number of horses allowed per lot (Pl's. Ex. 36 and Trial Tr. 90:8 to 91:7).

Kinard was asked what he's asking the Court to do (Trial Tr. 93:13-14). "I'm just trying to have the businesses discontinued." "I'm also ... trying to have the amended restrictions declared null and void because we didn't have the majority of the homeowners' at the time, written permission to amend the covenants, and they should have been aware of that." "And there's just little excuse for not reading the covenants ... before you attempt to amend them..." "I'm just asking that the amendments be overturned ... and that that individual be allowed one horse for his lot the same way as anybody else is allowed." "The fact that you have more money or more property doesn't invalidate the covenants that were originally there, and the fact that people come in and use our housing area like they own the place is very disheartening to me" (Trial Tr. 94:2-20).

Mr. Kinard was asked, "In your opinion, what is fair?" "In my opinion, it would be fair for Mr. Richardson to fall under the the original covenants and abide by them just like the rest of us do in that none of us are allowed to run businesses. And if you do away with – if you allow businesses to come in, you're doing away with our whole housing area and this restrictive covenant. We no longer have any restrictive covenants. One person gets by with it, then the dominoes start to fall, and then the next person, well, why can't I have a business, he's got one across the street, he's bringing in people and money, why can't I do it? So it invalidates all of our covenants, and I'm just asking for everybody to play by the same rules (Trial Tr. 95: 8-22).

ARGUMENTS

- I. BECAUSE THE BARNES RESERVED THE RIGHT TO MAKE ADDITIONAL LOTS SUBJECT TO THE COVENANTS BY SEPERATE RECORDED INSTRUMENT, AND DID SO IN THEIR DEED TO RESPONDENTS' PRECECESSOR, THE MASTER ERRED IN DECLARING TRACT B NOT SUBJECT TO THE ORIGINAL COVENANTS.

The master declared that the Richardson's "property is not made subject to the original covenants and restrictions of the neighborhood" (Order, Pg.2, ¶1). The master reasoned that the "Barnes did not take any steps to amend the original Restrictive Covenants that applied to the Plaintiff's property to include this new property within that subdivision, nor did the subdivision vote to amend the original Restrictive Covenants to include this additional piece of property" (Order, Pg.3, top¶).

The master reasoned that "[w]hile Barnes could place the same restrictions on Defendants' property as he placed on Plaintiff's property, he was unable to do so without following the procedure in the original Restrictive Covenants to bring

Defendants' property within the contractual reach of the original property owners” (Order, Pg 4, 1st full paragraph).

While the master noted that under the covenants “Barnes reserved the right to make additional property subject to the original Restrictive Covenants,” as stated by the master, that “does not obviate the fact that the original Restrictive Covenants must be amended before they apply to additional property. Paragraph one of the original Restrictive Covenants specifically states that a separate legal instrument would be required to bring additional property with the Restrictions. This was never done.” (Order, Pg. 3, ¶3).

Restrictive covenants may be created by deed, declaration or implication. Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 at 913 (S.C. App. 2006). As occurred here, restrictive covenants in South Carolina are commonly impressed upon land by reciting their application within deeds. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C. App. 2009). “The earliest method of creating restrictive covenants was by deed.” 17 S.C. Jur. *Covenants* §61.

In Santoro v. Schulthess the master found that while the “subdivision's restrictive covenants as originally filed did not apply to Schulthess's triangular lot because it was not one of the specifically enumerated lots listed as being covered by the covenants,” that “the language in a deed in Schulthess's chain of title made his triangular lot subject to the restrictive covenants” Santoro v. Schulthess, 384 S.C. 250, at 270-271, 681 S.E.2d 897 at 907 (S.C.App. 2009). The Court of Appeals construed the deed and found that it evidenced four separate conveyances. In

reversing the master the court held that “the language of the deed in question makes only one of its four conveyances subject to the subdivision's restrictive covenants.” Santoro, 384 S.C. at 274, 681 S.E.2d at 909.

In McDonald v. Welborn, 220 S.C.10, 66 S.E.2nd 327 (1951) the developer failed to sign, witness or probate a declaration of restrictive covenants prior to recording them, but referenced the recorded restrictions in deeds subsequently conveyed. There, citing 16 Am.Jur., Sec. 273, Page 593, the Court held that, “[h]ere the restrictive covenants contained in a separate instrument, specifically referred to in defendants' deed and easily to be found of record, were just as fully and effectually a part of defendant's deed as if copied therein.” McDonald at 220 S.C. 16, 66 S.E.2nd 330.

Here, the opening two paragraphs of the Restrictive Covenants recorded in Book 1821 at Page 331 contain language intended to contractually bind future lots owners to following them (“owners of the property ... made subject hereto from time to time, hereby covenant and agree”), while reserving to the Barnes the right to add additional lots, while defining the means for doing so. Numbered paragraph 1 states:

“Whenever used herein, the term 'Lots' shall refer to lots which are subject hereto, whether by specific reference in this instrument, or to lots made subject to the provisions of this instrument by separate legal instrument recorded in the Dorchester County RMC Office” (PI's. Ex.2, Pg. 1).

The Barnes' deed granting Tract L to Hill, the Richardson's predecessor indicates RMC Office recording on March 3, 1998 in Book 1906, Page 113 (PI's. Ex. 6, Pg. 1). It also refers to the deed as being an instrument (PI's. Ex. 6, Pg. 2 - “The foregoing instrument”).

Black's defines "instrument" as "a written document: a formal or legal document in writing, such as a contract, deed, will, bond or lease." Black's Law Dictionary, 719 (5th ed. 1979).

Barnes' deed conveying Tract L to Hill states in Exhibit "A" that the grant is "SUBJECT TO: Restrictive Covenants dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331." Likewise, Hill's deed to the Richardsons states that it is: SUBJECT TO: Restrictive Covenants and amendments thereto recorded in the RMC Office for Dorchester County in Book 1821, Page 331 ..." (Pl's. Ex. 10, Exhibit "A").

Clearly, the Barnes express reservation of right to add additional lots from time to time is independent of the right to amend or change the restrictive covenants themselves. While the Barnes had executed deeds to all six lots previously subjected to the covenants by February 25, 1998 (the date of the deed of Tract L from Barnes to Hill) the evidence shows that on February 25, 1998 they were still actively engaged in creating, overseeing and enlarging the subdivision.

The original subdivision plat included reference to the 14.19 residual acres while indicating that the termination point at the east end of Saddle Trail was a "TEMPORARY TURN-AROUND" (Pl's. Ex.1). Extension of the temporary turn-around can be seen in Plaintiff's Exhibit 33. The plat subdividing the residual 14.19 into sequentially lettered lots "L" and "M" was created two months prior to the Tract L deed, on December 29, 1997 (Pl's. Ex.5). Also, the Barnes to Hill deed itself recites in Exhibit "A" that property being conveyed is "Tract 'L', Senrab Farms, as shown on that certain plat entitled: 'PLAT SHOWING OF 14.19 ACRES OF LANG BEING

SUBDIVIDED INTO TRACT 'L' (7.00 AC) AND TRACT 'M' (7.03 AC)" (Pl's. Ex.6, Exhibit "A").

Additionally, no evidence was presented that the Barnes had yet relinquished ownership of the subdivision's private roads or Maintenance Assessment oversight obligations under the Restrictive Covenants (Pl's. Ex. 2, Pg. 8, ¶16).

As proffered to the master in requesting a new trial after ruling that Kinard lacked standing, allowing this ruling to stand "will effectively destroy the eighteen (18) lot residential subdivision known as Senrab Farm, in that after the initial 6 lots subsequent properties were brought into the subdivision via deed not amendment" (Motion to Reconsider, Pg. 4).

II. BECAUSE TRACT B IS SUBJECT TO THE ORIGINAL COVENANTS, THE MASTER ERRED IN FINDING APPELLANT LACKED PRIVACY/STANDING, A DEFENSE NOT PLED BY RESPONDENTS.

Should the court rule on Issue and Argument 1, that the master erred in declaring Tract L to not have been made subject to the original Senrab Farm subdivision restrictions, it would appear that analysis of this alleged error is unnecessary as Kinard would apparently have standing and privity.

As noticed and argued in Kinard's motion to reconsider or alternatively for a new trial, Kinard was pretty much blind-sided by the master's finding that he lacked standing and privity, defenses not raised or noticed by the pleadings (Memorandum of Law in Support of Plaintiff's Motion to Reconsider, Pg. 5).

The master addressed the issue in paragraph 6 of her Final Order in stating:

As previously mentioned, the Final Order states "I find that the term residential purposes for the lots of the Defendants do not prohibit the complained of conduct" (Final Order, ¶1).

The original Restrictive Covenants state that the "lots are known and designated and shall be used as single-family residential building lots" (Pl's. Ex. 2, ¶5). The Amendment to Restrictions states that "[t]he property shall be designated and shall be used as a single family residential building tract" (Pl's. Ex. 7, ¶5), and that the purchaser may subdivide the property as described in Paragraph 5 of the original Restrictive Covenants, "in so that each subdivided lot shall be used as a single family residential building lot" (Pl's. Ex. 7, ¶6).

The master correctly cites Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2nd 862 (1998) for the general rule that the "clear meaning" of a restriction controls but then errs in using non sequitur to hold that because the restrictions do not prohibit the leasing of real property or the keeping of horses on leased property (Order, Pg. 6, Ln 1-3), that they do not prohibit "Defendants from leasing their property for equine use" (Order, Pg. 5, 4th¶, last line), including "horse grazing and other equine activities" (Order Pg. 7, Ln. 15-17).

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms." Forest Land Co. v. Black, 216 S.C. 255 at 262, 57 S.E.2d 420 at 424 (1950).

A restriction on the use of the property must be created in express terms or by plain and unmistakable implication. Hardy v. Aiken, 369 S.C. 160 at 166, 631 S.E.2d

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The master addressed the issue in paragraph 6 of her Final Order in stating:

"The Court found that Restrictive Covenants are contractual in nature and as such can only be enforced by those in privity of contract. The burden of proof is on the Plaintiff to establish standing to enforce the Restricted Covenants" (Final Order, Pg. 2, ¶6).

As reviewed in the facts, Kinard did prove that the exact same restrictive covenants recited in his deed (Book 1821, Page 331) were also recited in the Richardson's chain of title (Book 1821, Page 331), and that paragraph 3 of those covenants authorized him to seek to enjoin violations (Pl's. Ex. 2). What Kinard was totally unprepared for was the assertion that the Senrab Farm HOA original and past president (Mr. Richardson) and its current treasurer (Mrs. Richardson) were not in the subdivision.

Rule 8(c), SCRCP states, "In pleading to a preceding pleading, a party shall set forth affirmatively the defenses ... and any other matter constituting an avoidance or affirmative defense. Rule 12(b), SCRCP states that "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in a responsive pleading thereto if one is required ..."

Whether the Court's order is construed as finding a lack of privity or a lack of standing, neither was raised by Defendants as either a defense or affirmative defense. Never once did Mr. Richardson testify during trial contending that his property was not part of Senrab Farm subdivision, not subject to the original restrictions or that he was not obligated to pay his pro rata share of the subdivision's road maintenance assessment.

Although poorly phrased by me, Mr. Richardson was asked, "In your covenants, you're not denying that your covenants contain a clause say that both – that both the original covenant and the amended covenant apply to your lot?" He replied, "Both the original restriction – my lot is restricted, yes, by both of those things" (Trial Tr. 208:14-20).

Kinard brought suit to enforce shared restrictive covenants against the neighbor across the street. The Richardsons replied to those allegations, admitting some, denying others. What wasn't an issue was the existence or non-existence of an eighteen lot residential subdivision.

III. WHILE AGREEING THAT THE DEVELOPERS LACKED THE VOTES TO AMEND THE COVENANTS, THE MASTER ERRED IN REWRITING THE FAILED ATTEMPT TO AMEND, SO AS TO TRANSFORM IT INTO ORIGINAL RESTRICTIONS.

Kinard contends that the master correctly found that the Barnes did not own any of the six originally restricted lots when the Barnes signed the Amendment to Restrictions on February 25, 1998. Likewise, while disputing as stated in Issue 1 that formal amendment was needed to make Tract "L" subject to the original restrictions, Kinard agrees with the following specific words in the order stating that the Barnes "could not amend the original Restrictive Covenants that apply to the original six (6) lots" (Order, Pg. 3, last ¶).

The Restrictive Covenants clearly state that "These Protective Covenants may be altered, modified, canceled or changed at any time by the written consent of the majority of the owners of record of the lots which are subjected thereto" (Pl's. Ex. 2,

Pg. 9, ¶18). Owning none of the six lots at the time of amendment, Kinard submits that the purported February 25, 1998 amendment was void ab initio, leaving Richardsons' Tract's A and Tract B subject to the exact same restrictions (Book 1821, Page 331) as other Senrab Farms lots.

Thus, here Kinard alleges as error all portions of the master's order supporting the proposition and finding that "Therefore, the document entitled 'Amendment to Restrictions' is actually an original restriction on Defendants' property and does not amend the original Restrictions that applied to Plaintiff's property" (Order, Pg 3, final sentence to Pg 4), and that "[t]he document entitled 'Amendment to Restrictions' was the first and only Restriction placed on the property" (Order, Pg. 4, Lines 9-10).

Although understandable to want to give the Richardsons the benefit of their 1998 bargain, the master's attempt to salvage and transform an invalid amendment into original restrictions requires substantial blue penciling that totally alters relationships. The ruling clearly rewrites the Barnes' intent, removes the Richardson's land from the subdivision, and alters rights and obligations, including financial, between the immediate parties, and effectively for all Senrab Farms homeowners.

Not only is an invalid amendment transformed into original restrictions, its then used as the foundation to create a stand-alone two lot subdivision. As stated on Page 4 of the order, "[t]he document entitled 'Amendment to Restrictions' was the first and only Restriction placed on the property" (Order, Pg. 4, Lines 9-10). But then the order goes on to suggest that the original Restrictive Covenants apply too, but with zero ties to Senrab Farms.

“Barnes as a Declarant and property developer can make property he is developing subject to the identical Restrictive Covenants. He can use the same document for different subdivisions. It does not follow however, that because he uses the same language, property owners in one subdivision can enforce restrictions in another separate subdivision” (Order, Pg. 5, 2nd¶). “The close geographic location of the two is irrelevant. Plaintiff has no more right to enforce Covenants on Defendants' land than he does to enforce Covenants on a homeowner in a completely different geographically separated subdivision.” (Order, Pg. 5, 1st¶).

Imagine two property owners on opposite sides of the street within the same subdivision, who have identical restrictive covenant citations in their deeds, signed by the same developer, and a subsequent court order declaring the covenants unrelated.

The order effectively rewrites the title to Plaintiff's Exhibit 7, transforming it from Amendment to Restrictions to Original Restrictions. It keeps the 5th paragraph's requirement that the property shall be used as a single family residential building tract but destroys Barnes' clear intent that Kinard and other Senrab Farms homeowners have enforcement standing.

The order destroys oversight and renders meaningless the 6th paragraph of the Amendment to Restrictions, requiring that any subdivision of lots be done in accordance with paragraph 5 of the original restrictive covenants dated September 9, 1997 and recorded in Book 1821, Page 331.

The order effectively renders meaningless the second full paragraph on page 2 of the Amendment to Restrictions which reads:

“EXCEPT AS HEREINABOVE MODIFIED AND SET OUT, and by acceptance hereof, undersigned do hereby agree and consent that the property shall be restricted in accordance with the restrictive covenants dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821

(Pl's. Ex. 7, Pg. 2, 2nd full ¶)

The order effectively erases those first 7 words, while frustrating the Barnes obvious intent by dividing his subdivision and leaving no one to enforce the covenants. And on Exhibit "A," where the property is described as being Tract "L" Senrab Farms, the order erases the words Senrab Farms (Pl's Ex. 7). It does the same to both deeds in the Richardson's chain of title, removing a total of four references to Tract L being in Senrab Farms, while rendering new meaning to references in each deed that the property is subject to restrictive covenants in "Book 1821, Page 331" (Pl's Ex. 6 & 10).

In removing the Richardsons' land from Senrab Farms, what happens to their pro rate share of the "Road Maintenance Assessment under §16 of the original Restrictive Covenants? In addition to paying for gravel road wear caused by Richardsons' customers, are the original six lot owners now responsible for the entire road?

The Court's opinion in Poynter Investments v. Century Builders, 387 S.C. 583, 694 S.E.2d 15 (S.C. 2010) suggests that judicial "blue-penciling" is dead in South Carolina. As noted by the S.C. Court of Appeals during 2011, "we interpret the supreme court's holding in Poynter to mean that (1) a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable." Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103 (S.C.App. 2011).

IV. BECAUSE RESPONDENTS SUBDIVIDED TRACT L INTO TRACTS A AND B, AND LEASED THE ENTIRETY OF NEW TRACT B FOR HORSE GRAZING, RIDING AND CUSTOMER PARKING, THE MASTER ERRED IN FINDING THAT RESPONDENTS PURCHASED TRACT B AND USED IT AS THEIR SIDE YARD.

Paragraph 1 of the Final Order states:

"I find that the term residential purposes for the lots of the Defendants do not prohibit the complained of conduct, the Defendant clearly testified that when he and his wife looked to purchase property to build on, they specifically wanted enough acreage that they could have horses. They purchased two adjoining lots to accommodate their building plans. As found in the previous Order, the Defendants are not bound by the original Restrictive Covenants and they are allowed to keep six (6) horses. The second lot that contains the horses is akin to the Defendant's yard of their residence. The fact that the actual residence does not occupy both lots does not mean that the Defendant's are not using their property for residential purposes. They live there" (Final Order, ¶1).

The above paragraph is the only language of either order that directly asserts use of Tract B for residential purposes. Clearly, motivations for purchase or the amount of land sought do not determine the character of its use.

The master is mistaken as to the number of lots purchased by the Richardson's, as their only deed was to Tract "L"/Senrab Farms (see Pl's. Ex. 10), which they subdivided into Tracts "A" and "B" in 2003, as shown by Plaintiff's Exhibit 11, their survey. Richardson testified that they subdivided their 7 acre lot in 2003 so that they could have agricultural use of the 5.8 acres (Trial Tr. 149:10-13).

The record is contrary to a finding that the Richardson's used Tract B as a side yard, that they lived there. When asked if the commercial lease leased 100% of Tract B for grazing, Richardson stated that "since I define it by the TMS and not the fenced area, I think that would be a true statement" (Trial Tr. 159:15-21).

When asked, "Are you using it for residential purposes," Richardson replied "no" (Trial Tr. 213:15-17).

Asked by his attorney, "What, if any, business did you run on that property other than leasing it for rent" Richardson replied, "That's what we did. We leased it for grazing and riding" (Trial Tr. 196:13-16).

Further, Richardson testified that they have never owned a horse since moving to South Carolina (Trial Tr. 158:2-6). The undisputed testimony was that no one within Senrab Farms, other than the Richardsons, have ever kept a horse on their lot, and no one within Senrab Farms owns a horse (Trial Tr. 33:21 to 34:3).

Shown two 2010 photos of horses being ridden upon his land, Richardson was unable to identify the riders or name the horses (Trial Tr. 159:6-14). In fact, Richardson was unable to name any of the horses that came or grazed upon his land since 2003. His explanation was, "I didn't take care of the horses. I didn't ride the horses" (Trial Tr. 159:5-14).

There is no evidence in the record of the Richardson's residing upon or using any portion of 5.83 acre Tract B as as side yard.

V. BECAUSE RESPONDENTS LEASED THE ENTIRETY OF TRACT B FOR HORSE GRAZING, RIDING AND CUSTOMER PARKING, THE MASTER ERRED IN DECLARING COMPLIANCE IN USING TRACT B AS A SINGLE-FAMILY RESIDENTIAL BUILDING LOT.

As stated in the Order, "Even if the original Restrictive Covenants did apply to Defendants' property, and even if Plaintiff had the ability to enforce them against Defendants, the fact that the original Restrictive Covenants state that the property shall be used as single-family residential building lots does not prohibit the leasing of real property or having horses on that leased real property" (Order, Pg. 5-6).

As previously mentioned, the Final Order states "I find that the term residential purposes for the lots of the Defendants do not prohibit the complained of conduct" (Final Order, ¶1).

The original Restrictive Covenants state that the "lots are known and designated and shall be used as single-family residential building lots" (Pl's. Ex. 2, ¶5). The Amendment to Restrictions states that "[t]he property shall be designated and shall be used as a single family residential building tract" (Pl's. Ex. 7, ¶5), and that the purchaser may subdivide the property as described in Paragraph 5 of the original Restrictive Covenants, "in so that each subdivided lot shall be used as a single family residential building lot" (Pl's. Ex. 7, ¶6).

The master correctly cites Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2nd 862 (1998) for the general rule that the "clear meaning" of a restriction controls but then errs in using non sequitur to hold that because the restrictions do not prohibit the leasing of real property or the keeping of horses on leased property (Order, Pg. 6, Ln 1-3), that they do not prohibit "Defendants from leasing their property for equine use" (Order, Pg. 5, 4th¶, last line), including "horse grazing and other equine activities" (Order Pg. 7, Ln. 15-17).

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms." Forest Land Co. v. Black, 216 S.C. 255 at 262, 57 S.E.2d 420 at 424 (1950).

A restriction on the use of the property must be created in express terms or by plain and unmistakable implication. Hardy v. Aiken, 369 S.C. 160 at 166, 631 S.E.2d

539 at 542 (2006). Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property; however the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). 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. Id.

The phrase “lots are known and designated and shall be used as single-family residential building lots” is clear and unambiguous. The word “known” means “recognized” or “understood” (Black's Law Dictionary, 785, 5th ed. 1979). The word “designate” means “To indicate, select, appoint, nominate, or set apart for a purpose or duty...” (Black's Law Dictionary, 402, 5th ed. 1979). The word “use” means the “To make use of, to convert to one's service, to avail one's self of, to employ” (Black's Law Dictionary, 1381, 5th ed. 1979).

Common usage of the word “residential” means: (1) “used as a residence or by residents”; (2) “restricted to or occupied by residences, a residential neighborhood”; and (3) “of or relating to residence or residences” (Merriam-Webster.com February 5, 2013). The word “building” means a “A structure or edifice inclosing a space within its walls ...” (Black's Law Dictionary, 176, 5th ed. 1979). The word “shall” makes compliance mandatory, that lots must be used as single-family residential building lots.

The March 15, 2003 plat of Richardson's land (Plaintiff's Exhibit 11) shows seven acre Tract L being subdivided into Tract “A”, a 1.18 acre lot upon which Defendants' home is located, and Tract “B”, a 5.83 acre undeveloped lot. The

Commercial Lease dated January 10, 2010 leases the entirety of Tract "B" in describing it as "~ 6 acs at 124 Saddle Trail." As noted in the prior argument, when asked if the commercial lease leased one hundred percent of Tract B for grazing, Richardson stated that "since I define it by the TMS and not the fenced area, I think that would be a true statement" (Trial Tr. 159:15-21).

As seen on Plaintiff's Exhibits 15, 18, 23, 24, 25, 26, 28, 30 and 34, there is no residential building on Tract B. Tract B is not being used as a single-family residential building lot. As Richardson testified, "We leased it for grazing and riding" (Trial Tr. 196:13-16). "Did your lease provide for customer parking?" "Yes," replied Richardson. "It's defined in page 3, paragraph 7," "outside the fenced pastures on the barn side of the fence" (Trial Tr. 160:6-12).

When read as a whole, the clear and obvious intent of the covenants is that the right to "keep" horses is ancillary to and predicated upon lots being used as a single-family residential building lots. While the covenants contain no prohibition upon leasing a lot, the uses made under the lease must be ancillary to use of the lot as a single-family residential building lot. While the covenants permit the keeping of cars, do they permit use of lots for commercial parking? Obviously not.

Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (S.C. 2009) is nearly on point. There, the language of the residential restriction found to have been violated stated that, "[n]o lot shall be used except for residential purposes." T.O.E. Enterprises operated a Toyota dealership adjacent to the subdivision. It purchased four adjacent residential lots intending to park cars upon them. In contrast, here, the Richardsons have parked the automobile's predecessor - horses - upon their lot,

together with parking the vehicles of horse owners, riders, prospective buyers and visitors.

The master's order suggests that the Richardson's are free to engage in "other equine activities." Unless corrected, this order grants license to transform this once quiet residential subdivision into a horse riding school, a horse auction, or an equestrian jumping competition site.

The order and final orders err in holding that "Defendants' lease of that property is not a commercial business operation excluded by the original Restrictive Covenants" (Order Pg. 7, Ln 6-9).

While Plaintiff is only required to show that Defendants' use of Tract B is other than as a single-family residential building lot, as recited in the facts, the Richardson's incorporated Greener Pastures and used the LLC to report "Farm Rental Income and Expenses" tax deductions from 2002 through 2009 (Pl's. Ex. 37).

Tract B was advertised on the Internet as a grass pasture for Senrab Equestrian Center where horses were being sold (Pl's. Ex.12-15). The entirety of Tract B was leased under a "Commercial Lease" for grazing, riding and customer parking (Pl's. Ex. 36).

"Commercial" is defined as "Relates to or is connected with trade and traffic or commerce in general..." (Black's Law Dictionary, 245, 5th ed. 1979). "Business" is defined as a "... commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood." (Black's Law Dictionary, 179, 5th ed. 1979).

A farm is a business, an LLC is a business, and a "commercial lease" is

obviously commercial. Defendants openly admit to owning no horses and to receiving income in exchange for horse grazing, riding and vehicle parking rights. Whether simply viewed as trading grazing rights for money, the use is commercial, not residential. Additionally, Defendants' tax returns show a net "Greener Pastures LLC" gain from 2002 through 2009 (Plaintiff's Exhibit 37).

As lot owners, clearly Defendants are not only accountable for their commercial lease but all activities that their lease of Tract B expressly or impliedly allows.

VI. BECAUSE MORE THAN 6 HORSES WERE KEPT ON TRACT B, AND/OR SUBDIVISION OF TRACT L LIMITED TRACT B TO 1 HORSE, THE MASTER ERRED IN DECLARING COMPLAINEE IN THE NUMBER OF HORSES BEING KEPT.

Obviously, should the court find the Amendment to Restrictions void ab initio there would be no need to address this argument, as the Richardson's would be entitled to the same horse rights as all other Senrab Farms lot owners, one per lot.

The Order holds that "The Amendment to Restrictions specifically allows the property owner to have up to six (6) horses on the property" (Order, Pg. 7, Final ¶), without addressing trial evidence of more than six. The Final Order addresses one aspect of that evidence.

As noted in the Final Order:

"Plaintiff asserts that because there is a picture of more than six horses on the property at some point in time is a violation of said covenants. The Court finds credible the Defendants argument that they do not keep more than six horses at a time on their property and that nothing in restrictions prevents a neighbor from riding their horse over for a visit. A visit is vastly different from continuous

keeping of horses. The Plaintiff failed to prove otherwise” (Final Order, ¶3).

As reviewed in the facts, two photographs were introduced in which Kinard counted up to 8 horses (Pl's. Ex. 26 & 28). That testimony was not challenged. Respectfully, there are no riders or people seen in the fields. Plaintiff's Exhibit 26 shows bare, unsaddled horses and in Exhibit 28 they are wearing blankets. As reviewed above, trial testimony was that no one living within Senrab Farms, including the Richardsons, was known to own horses.

Although the number of horses Richardson claims to have allowed on the property was 5, he admits that at times there were more, at most 7 by his count (Trial Tr. 155:6-14). But Richardson was asked: Q: “Do you have any idea how many horses in a one-week period would be rotated through your property?” A: No. I would think that that barn is holding ten, so, again, I would think the maximum number would be ten coming through” (Trial Tr. 155:21 to 156:1).

Thus, the weekly burden upon the land is up to 10 horses, photo evidence indicates up to 8, Richardson admits to 7 and each is greater than 6. I was unable to locate any transcript testimony discussing any visits by visiting horses.

The original Restrictive Covenants allow lot owners to keep up to 1 horse if sufficient square footage exists (Pl's. Ex. 2, ¶13c). The master declares the Barnes' attempt to amend invalid yet allows survival of the right to keep up to 6 horses, while failing to declare more than 6 a breach.

As noticed on Page 7 of Kinard's Motion to Reconsider, “[e]ven if the purported Amendment was valid, Paragraph 6 allows the 'Purchaser to subdivide the property described herein as set out in Paragraph 5 of the restrictive covenants ... recorded in

... Book 1821, Page 331” (Motion to Reconsider and Alter or Amend Order of Judgment or Alternatively a New Trial, Pg. 7, final ¶).

As contended by Kinard's reconsideration memo, Defendants chose to subdivide Tract L into Tract “A”, their home site, and Tract “B”, which they leased for grazing, riding and parking. The intent of Paragraph 6 is clear. Subdivision must be in accordance with the original restrictions, which only permit 1 horse per lot. To rule otherwise would mean that Richardsons are now entitled to 6 horses on Tract “A,” 6 on Tract “B,” and 6 additional horses with each additional lot subdivision.

And this isn't some new theory. Plaintiff's Exhibit 38 is Kinard's July 2, 2009 Tract B cease and desist letter to the Richardsons. Paragraph 3 alerts the Richardsons that subdivision of original Tract L was required to be done in accordance with the original restrictions, which limit the number of horses upon each lot to one (Pl's Ex. 38).

Judge Dickson's December 20, 2011 Summary Judgment Order did not rule upon the validity of the Amendments to Restrictions nor upon the operation or effect of any specific language. He ruled that “[r]estrictive covenants run with the land and subdividing the land does not release it from those restrictions.” He ruled that Tracts A and B were created out of Tract L and are subject to any covenants that applied to the original Tract L, which include the Amendment to Restrictions (Order on Plaintiff's and Defendants' Motions for Summary Judgment of August 1, 2011).

Although the master found the Amendment to Restrictions was not a valid amendment, the sixth paragraph of those restrictions mandated that lot subdivision be in accordance with Paragraph 5 of the original restrictive covenants (Pl's. Ex. 7, 6th

11).

Clearly, the declarant's intent controls. In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law, and the intention of the grantor must be found within the four corners of the deed. Windham v. Riddle, 381 S.C. 192, 672 S.E.2d 578 (S.C. 2009) (citations omitted).

Paragraph 13 of the original "Restrictive Covenants" defines "noxious or offensive" activities as violating the section's eleven listed restrictions, "a)" through "k)." Section 13c permits up to one horse per lot, so long as the lot otherwise qualifies. (Pl's. Ex. 2, Pg. 6) As shown by the original Senrab Farms subdivision plat, the original 11 lots ranged in size from 1.14 to 1.78 acres (Pl's. Ex. 1).

As contended on Page 14 of Plaintiff's Memo in Support of Reconsideration, amendment validity aside, in limiting 7 acre Tract L (Pl's. Ex. 5) to six horses (Pl's. Ex. 7), while permitting subdivision of Tract L pursuant to paragraph 5 of the original restrictive covenants (Exhibit 7, paragraph 6), in light of a greater number of horses than originally permitted constituting a noxious or offensive activity, clearly it was the developer's intent that horse rights after subdivision would be governed by the original covenants, covenants the Barnes intentionally recited in Richardsons' deeds.

Kinard contends that the master erred in failing to declare breach of covenants for keeping more horses on Tract B than permitted under them, whether using the Amendment to Restrictions six horse limit, or the Restrictive Covenant's limit of one

horse per lot.

VII. IF THE COURT OF APPEALS FINDS THAT THE MASTER ERRED IN FAILING TO DECLARE DEFENDANTS IN BREACH, THE EQUITIES, INCLUDING THE KINARD'S SETTLEMENT WITH THE ADJACENT EQUESTRIAN CENTER, INDICATE THAT THE VIOLATIONS SHOULD BE ENJOINED.

An action to enforce restrictive covenants by injunction is in equity. Holling v. Margiotta, 231 S.C. 676, 100 S.E.2d 397 (1957). On appeal, in an equitable action tried by a master alone, the court can find facts in accordance with its view of the evidence. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

"[W]hile there is no formulaic balancing test, [our Supreme Court] has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant." Buffington v. T.O.E. Enterprises, 680 S.E.2d 289 at 291, 383 S.C. 388 (S.C. 2009).

Kinard's Motion to Reconsider requested that the master make findings as to the specific uses which occurred on Tract B, noting that "[f]indings that enable balancing of the equities would diminish risk of remand" (Motion to Reconsider, Pg. 3, ¶13).

Paragraph 5 of the Final Order states:

"The Court finds not credible the Plaintiff's claim that the Defendants keeping of six horses on their property is ruining their quality of life. The Plaintiff settled with the equestrian center in the neighborhood to allow keeping up to ten horses on the property. An active equestrian center would certainly have a

greater impact on traffic and activity in the neighborhood, than the Defendants using their property and allowing up to six horses to graze” (Final Order, Pg.2, ¶15).

The master's finding relates to Plaintiff's Exhibit 16, 1992 Reciprocal Covenants in which the Barnes granted what's now the Nguyens' land the right to be used for “residential or agricultural purposes” (Pl's. Ex. 16, numbered ¶12). That right was granted 5 years prior to the Barnes' creation of the 1997 Senrab Farms subdivision plat (Pl's. Ex. 1).

Defendants' Exhibit 2 is the actual Amended Reciprocal Covenants executed on November 17, 2010. As clearly stated on Def's. Ex. 2, that settlement resolved a dispute regarding the meaning of the term “agricultural purposes” as used in numbered paragraph 2 of the Reciprocal Covenants (Def's. Ex. 2).

That settlement agreement recites that:

The phrase “agricultural use,” as used above, shall include the raising of crops and the keeping and raising of farm animals. Specifically in regard to horses (which shall include ponies), “agricultural” shall mean that the barn, stable and pasture at 125 Saddle Trail, Summerville, South Carolina, TMS # 136-00-00-183 (above referred to as Tracts A and B but now combined into a single lot herein referred to as the “Property”) may be leased solely to individuals wishing to board their personal horses upon the Property, that the Property shall not accommodate more than ten (10) horses at any one time, and that no riding lessons, horse sales or horse rental, or any other form of commercial activity shall be permitted or conducted upon the Property” (Def's. Ex. 2, Pg. 2).

Contrary to the master's assertion that the settlement allowed an “active equestrian center” that “would certainly have a greater impact on traffic and activity in the neighborhood than the Defendants using their property and allowing up to six horses to graze” the express language of the settlement destroyed the Nguyens' right to have an active equestrian center by expressly forbidding horse sales, ridding lessons, horse rental or any other form of commercial activity other than keeping up

to ten horses (Def's. Ex. 2, Pg. 2).

Regarding limiting the Nguyens to ten horses, as Kinard pointed out, and an aerial photograph supports, the Nguyens only have about one acre of land for horses to graze upon (Pl's. Ex. 17 and Trial Tr. 62:6 to 63:8). Questioned during cross, Kinard explained the reason. "I agreed with them to that because they don't have but one acre of grazing land. I didn't think they could put that many horses on one acre" (Trial Tr. 109:7-12).

Richardson's testimony supports Kinard's thinking. Richardson felt that use of Tract B and allowing horses to graze helped facilitate traffic by making the entire site more popular, available, better to use as a horse owner. "Yes. It was definitely better for the horses to have pasture from," he testified (Trial Tr. 164:13-18).

What the master has effectively granted Richardson is the right to use Tract B for any equestrian commercial purpose, so long as the Richardsons act only as the lessors and are not themselves actively running the business.

A wide array of equities that support enjoining the violations were openly admitted by Richardson and supported by photo Exhibits 12-15, and 18-35. They include: allowing weekly rotation of up to ten horses through Tract B (Trial Tr. 155:21 to 156:1); admitting to allowing large amounts of horse dung to accumulate on Tract B (Trial Tr. 161:13-16) leaving Kinard to deal with insects and flies" (Pl's. Ex. 25 and Trial Tr. 73:15-21); no oversight of the health of horses kept on Tract B with one dying and Richardson not knowing the cause of death (Trial Tr. 157:5 to 158:1); admitting that Kinard complained to him about litter (Trial Tr. 163:7-9); admitting that Kinard complained about traffic and horse traffic tearing up the streets (Trial Tr. 163:10-22); Greener Pastures, LLC basing operations on Tract B (Trial Tr. 149:17 to 151:25 and

Pl's. Ex. 37); leasing Tract B to generate farm rental income (Trial Tr. 151:18-22 and Pl's. Ex. 37); a lease during which horses rotated through Tract B were sold via the Internet (Trial Tr. 154: 5-20); a subsequent commercial grazing and riding lease of Tract B (Trial Tr. 196:13-16) with riding on a "regular basis (Trial Tr. 160:3-5); Tract B being used for customer parking (Trial Tr. 160:6-12); the subdivision's private roads being used by Richardsons' customers (Pl's. Ex. 19-21 and Trial Tr. 69:6 to 70:20); and Richardson admitting that Tract B was not used for residential purposes (Trial Tr. 213:15-17).

The primary equity testified to by Richardson was that they purchased Tract L wanting to have horses (Trial Tr. 188:16 to 190:7). Interestingly, Richardson was unable to provide the name of any of the horses that had been kept upon Tract B since 2003 (Trial Tr. 159:5-14). The Richardsons also built a horse fence to retain the horses (Trial Tr. 188:16 to 190:7).

But as the Court noted in Buffington in dismissing T.O.E.'s expenditure of \$700,000 in improvements, "it would be inequitable to consider Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property. To find otherwise would indicate that any business could defeat a restrictive covenant by spending a significant amount of money developing the land." Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 at 291 (S.C. 2009).

Here, the original 1997 Restrictive Covenants and the 1998 Amendments recited in Defendants' deed clearly placed them on notice that lot use was restricted to single-family residential. When Kinard purchased Lot F upon which he built their home, he had a right to rely upon the covenants as restricting all future subdivision

lot use to residential purposes.


Kinard respectfully requests that the parties not be made to endure the time and expense of remand, that the court balance the equities and grant an injunction against the Richardsons using their land for commercial grazing, parking and riding, and/or for having more than horses that permitted under the covenants.

CONCLUSION

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

Respectfully submitted,

February 5th, 2013


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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Master-in-Equity

Maite Murphy, Master-in-Equity

Case No. 2009-CP-18-3315

Larry E. Kinard,

Appellant,

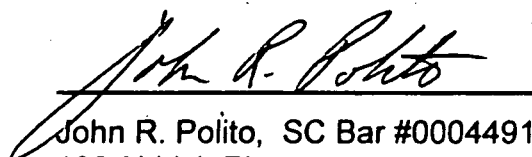
v.

Douglas S. Richardson and Julie D. Richardson,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Initial Brief of Appellant complies with the requirements of Rule 208(b), SCACR.



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February 5th, 2013