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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III,
Master-in-Equity

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc…….Respondent,

v.

Estate at Westbury Owners Association, Inc…….Appellant.

REPLY BRIEF OF APPELLANT

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MISCELLANEOUS

Appellant Estate at Westbury ("Estate" or "Westbury Estate") respectfully replies to Respondent Westbury Park's ("Park" or "Westbury Park") brief.

COUNTER-STATEMENT OF THE CASE

Westbury Park apparently disagrees with portions of Estate's Statement of the Case, but then argues, tellingly, that those disagreements have "no bearing" on its purported renewal of the Declaration. Without dwelling on items that Westbury Park now asserts are irrelevant, it was indeed argued to the Master in Equity that, for years, Estate overpaid for the assessment. (R. pp. 531, Tr528: Tr. at p. 26, lines 16–22; p. 24, lines 11–13). And the evidence showed that Park used the Estate's assessment payments for mowing, trimming and leaf blowing of all single-family and townhome lawns—in other words, as a slush fund for Park's lifestyle. (R. pp. 668: Tr. pp. 142, line 13–p. 143, line 2 "Q.: Is that the truth? A. Yes."). Westbury Park then goes on to elucidate, with a notable lack of self-awareness, that "[t]here's no such thing as a free lunch."

Troublingly, the map on page four of Westbury Park's brief wrongly depicts the location of the "Westbury Park Way access," suggesting that Estate's residents are driving through significantly more of Park's neighborhood than they actually are, and that Park is maintaining more street than it actually is. In fact, the Westbury Park Way access is predominantly through the commercial portion of the development, which is not a party to this suit. Attached to this brief as Exhibit 1 is Park's graphic, corrected to reflect the actual access (blue line), with the incorrect yellow assertion crossed out in red.

These inaccuracies within Park's Statement of the Facts are significant because they highlight what is at the heart of this dispute: a design by the Developer, more than twenty years ago, which Westbury Park does not like today. Estate is not the Developer. Westbury Park is not the Developer. Neither can change the Developer's plan, as discussed below.

ARGUMENT

Westbury Park's frontrunner preservation and appealability arguments are wrong. An examination of the Record in this case leaves no doubt that Estate properly appealed the Master in Equity's Order, and that Estate raised (and the trial court ruled on) every issue that it now asks this Court to decide. As to the merits of the appeal, this Court should review de novo the documents in the Record and hold that Westbury Park as a matter of law had no right to extend the term of the assessment covenant.

APPEALABILITY AND PRESERVATION

I. The Master in Equity's Order is appealable.

Westbury Park repeatedly attempts to avoid the substantive merits of the appeal. Park's first run (end-run, actually) is to argue that the Order is unappealable because (says Park) it is a denial of summary judgment. This is the same argument that Park made, unsuccessfully, in its initial motion to dismiss this appeal, and it should be denied again here.

A. S.C. Code § 14-3-330 allows appeal of the Order.

S.C. Code § 14-3-330 addresses appellate jurisdiction:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and **shall** review upon appeal:
>
> (1) Any **intermediate** judgment, **order** or decree in a law case **involving the merits in actions commenced in the court of common pleas** and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; . . . .

S.C. Code § 14-3-330(1) (emphasis added)[1]; *see also* S.C. R. App. P. 201 (appeal may be taken from any final order, by a party aggrieved by the order). The South Carolina Supreme Court has stated that:

> an order which "involves the merits," [is] an order which "must finally determine **some substantial matter forming** the whole **or a part of some cause of action or defense**. . . . "

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780, (S.C. 1993) (internal citations omitted; emphasis added). The bolded wording above instructs that a party may appeal a substantive ruling on part of some action or defense—not (as Park incorrectly argues) only a final judgment "that ends the action and leaves the court with nothing to do but to enforce the execution." As our Supreme Court has stated, "[T]he question of whether an order is immediately appealable is determined on a case-by-case basis. . . ." *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (S.C. 2019); *see*

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[1] Arguably, §§ 14-3-330(2) and (3) apply here as well. This Reply will address the arguments under § 14-3-330(1) because that section appears to be most on-point; however, the same arguments apply as to §§ 14-3-330(2) and (3), and those points are asserted and preserved.

also id. ("Accordingly, the court weighed the evidence and finally determined a substantial matter forming **part** of Stone's **causes of action**, as well as Thompson's **defense**, which satisfies the test we clarified in *Mid-State*. . . ." (emphasis added)).

Here, the Master in Equity's Order "involves the merits," and "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense." Specifically, after extensive briefing on these issues, on September 16, 2020, the trial court held an extensive in-person hearing on numerous motions. The all-day hearing was, for practical purposes, a mini-trial on the merits: witnesses testified and were cross-examined, documents were submitted into evidence, videos were shown to the Court, and extensive legal arguments were made on the motions. On September 21, 2020, the trial court issued the written Order at issue here, making numerous substantive findings of fact and conclusions of law. On the assessment—a core issue in dispute, and a primary reason this lawsuit was filed—the trial court made findings of fact and conclusions of law:

> **I find** that the easement is an express appurtenant Easement and [1] that the renewal of the term was intended to be unilateral under 9.01. **I find** that [2] the term was properly extended by the filing of the extension as contemplated under 9.01. [3] I do not see a conflict between 9.01 and 9.02. [4] 9.01 deals with term and 9.02 deals with "… this Declaration, or any provision hereof, or any covenant, condition or restriction contained herein …"
>
> **Further**, the assessment provision (8.02) of the Declaration agreement (as further modified by paragraph 4 of the 2005 amendment), calls for a sum certain in payments. [5] The obligation of the Estate is to pay the contracted sum and the obligation of Park is to maintain the easement. Had the proportional maintenance cost exceeded the actual revenue received under the assessment provision, Park would have suffered a loss. [6] Estate has no right of accounting and [7] there is no right by Estate to direct how the funds are used. [8] So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations.

(R. p. 5 (Order at p. 1) (bolding and bracketed numbers added)).

Thus, to Estate's prejudice, the Order found in favor of Park on the assessment issue, including the following findings of law (as bracketed in the passage above):

1. The renewal of the assessment term was intended to be unilateral under the Declaration Section 9.01;

2. The assessment term was properly extended by the filing of the extension as contemplated under Section 9.01;

3. There is no conflict between Section 9.01 (regarding the extension of the Declaration) and Section 9.02 (requiring consent of all parties to extend, modify, or amend the terms of the Declaration);

4. Section 9.02 (requiring consent of all parties to extend, modify, or amend the terms of the Declaration) does not apply to the assessment at all;

5. Section 8.02 of the Declaration requires Estate at Westbury to keep paying the assessment;

6. Estate at Westbury has no right to an accounting for the money it pays for the specific purpose of its share of maintaining Kensington Boulevard (apparently meaning both the $1.3 million already paid, and the potentially millions the trial court was ruling that Estate at Westbury must keep paying);

7. Estate at Westbury has no right to direct how the funds are used;

8. "So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations." — in other words, as long as Estate at Westbury residents can get into and out of their property, the Estate at Westbury has no rights whatsoever regarding the assessment, and must simply pay as much as Westbury Park wishes, for as long as Westbury Park wishes.

(*See id*. (Order, emphasis added)).

In short, the Master in Equity expressly ruled upon the assessment issue in its entirety, construing the Declaration in favor of Westbury Park. The language of the Order is clear — the trial court repeatedly states that "I find . . . " — meaning the court is issuing

legal and factual rulings on the assessment issue. "I find" is not dictum.[2] Given that the assessment issue had substantively been decided, Estate had no choice but to seek appellate review of the Order. Contrary to Park's attempted end-run, Estate has appropriately sought review of the trial court's errors on dispositive questions of law, as permitted by S.C. Code § 14-3-330.

B. The law of the case doctrine requires immediate appeal of the Order.

Estate at Westbury is required to appeal the Order now, or risk it becoming the law of the case and impervious to future challenge. This Court recently issued a thoughtful summary of the law of the case doctrine:

> "**An unappealed ruling is the law of the case and requires affirmance**." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ; *see also Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("**There is no appeal from this ruling, and thus, it becomes the law of the case**."). "**Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'**" *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (*quoting Ashy v. WeCare Distribs., Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986)). "**The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former case**." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). "This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785.

Ralph v. McLaughlin, 428 S.C. 320, 341, 834 S.E.2d 213, 224 (S.C. App. 2019) (emphasis added), *rev.'d on other grounds*, Op. No. 28015 (S.C. Sup. Ct., March 17, 2021). As this

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[2] Park's brief argues that the Order's repeated use of the words "I find" is—in Park's words—"merely an explanation" of the Master in Equity's reasoning, not a ruling on the issue. *Black's Law Dictionary* defines "find" as "To announce a conclusion upon a disputed fact or state of facts . . . To determine a controversy in favor of one of the parties." *Black's Law Dictionary* 631 (6th ed. 1990). Every lawyer knows that a court order stating that "I find" is a final decision on that issue, and that lawyer would discount it as "merely an explanation" at his or her peril.

Court articulated, a substantive ruling on the merits of a lawsuit must be appealed, or it becomes the law of the case going forward.

So too here. The Master in Equity's Order is a final, substantive ruling on all key aspects of the assessment issue, which is a core legal and factual dispute in this lawsuit. Estate is *required* to appeal such a portentous decision, or risk having it become the law of this case and not subject to challenge later. *See id.* ("Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'"). This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court "shall review upon appeal."

C. The procedural posture does not override the substantive ruling by the trial court.

Park's brief makes the point that the Order includes a denial of a summary judgment motion, and such denials rarely are appealable. To be accurate, the Order contains: (1) the denial of a motion for preliminary injunction; (2) the grant of a motion for summary judgment; and (3) the denial of a motion for summary judgment. Two out of three of those items are, without question, immediately appealable.

Moreover, here the Order goes much further than to simply deny Estate's motion for partial summary judgment. The typical denial of summary judgment is based on the trial court's decision that there is a "mere scintilla of evidence" raising factual issues for a trier of fact. Affirmative rulings are not made; often only a Form 4 is issued. The parties then move forward on the substantive questions, which are to be decided by the trier of fact. Here, however, the Order "finds" on numerous *substantive, dispositive* questions of

law, and makes corresponding *substantive, dispositive* factual and legal determinations, that (as discussed above) finally resolve the assessment at issue:

- the legal construction of the key Declaration provisions, §§ 8.01, 9.01, 9.02;
- that the assessment was validly extended by Westbury Park in accordance with the contract at issue;
- that the contract requires Estate at Westbury to pay the assessment in perpetuity;
- that the contract gives to Estate at Westbury no rights with regard to the assessment funds, and no rights to an accounting of the use of the assessment funds.

In sum, and as discussed above, the assessment issue has been fully and finally determined by the trial court; there is nothing remaining for a trier of fact to decide on that issue. Instead, the inevitable next step is for this Court to review whether the trial court's rulings were erroneous as a matter of law. This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court "shall review upon appeal."

II. The issues of the appeal are preserved.

Park next argues that the appeal issues are unpreserved. There is no question that Estate timely appealed the Order. Instead, Park argues that Estate was required to file a Rule 59(e) motion, first.

In this argument, Park misstates the events in the trial court, and then argues against the strawman that Park itself created. The rule is that:

> South Carolina courts "have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). When a party receives an order that grants certain relief **not previously contemplated or presented to the trial court**, the aggrieved party must

> move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.

In re Timmerman, 331 S.C. 455, 461, 502 S.E.2d 920 (S.C. App. 1998) (emphasis added). "Post-trial motions are **not necessary to preserve issues that were ruled upon at trial**; they are used to preserve those issues that were raised to the trial court but not ruled upon." Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 188 (S.C. Bar, 2016) (emphasis added, citations omitted).

During the all-day hearing before the Master in Equity, Estate argued at length that the unilateral notice of extension of the assessment was improper and requested that the Master-in-Equity declare it void.[3] Estate also argued the issues in its legal memorandum filed with the court. (*See, e.g.*, R. pp. 169–185 (Memo. pp. 15, 25, 28–31)). Similarly, Park repeatedly argued that its unilateral notice of extension of the assessment was proper, and that the assessment was properly extended.[4] Park also argued the issues in its legal memorandum filed with the court. (*See, e.g.,* R. pp. 430–438 (Memo. pp. 1, 8–9)). In the end, the Master in Equity issued a ruling deciding the issues.

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[3] *See, e.g.*, R. pp. 748, 753, 760 (Tr. pp. 210, pp. 10–15: "So, at any rate, Your Honor, so that—the other argument that the [Park] has—so we're seeking a ruling in our favor, in [Estate's] favor, is as to the question of whether the apartment declaration was ever renewed."; p. 215, line 7–p. 217, line 19: "Then we come the sentence that the [Park] makes much of. And that is, it says in Section 9.01 that this declaration may be renewed for an unlimited number of successive 10-year periods by the declarant. . . And for three separate reasons, that unilateral extension was invalid. . . .; pp. 220, line 24–p. 221, line 8).

[4] *See, e.g.*, R. pp. 512, 519, 769 (Tr. pp. 10, line 20–p. 12, line 2; p. 16, lines 10–15: "This is despite the fact that the Park filed a notice of extension and thereby renewed the declaration for Section 9.01 of the declaration for a successive ten-year term precisely by doing what the declaration says to do in 9.01."; pp. 228, line 20–p. 234, line 2: "By filing a renewal, nothing was modified in this agreement. Nothing was changed. Nothing was changed to the amendment. . . . There is no requirement for renewal to be signed on to by a separate party . . . . We believe that it's clear by its terms that the renewal provision does not require a signatory from the Estate, or at the time the apartments. . . . ").

In contrast to Park's strawman argument, Estate's point was that Estate requested an affirmative ruling that the purported renewal of the assessment was void.[5] Instead of simply denying Estate's motion and leaving the issue open for further proceedings in the trial court, the Master in Equity affirmatively ruled in the opposite direction, and issued findings ("I find") that renewal of the assessment was "intended to be unilateral" and was "properly extended" (*inter alia*). (R. p. 5). Thus, the issue had been fully briefed, argued, and ruled upon, and it is ripe for appeal.

In sum, the Record indisputably establishes that (1) the issue was presented to the trial court, both in writing and at the hearing, (2) the parties argued the issue at length to the trial court, and (3) the trial court issued a ruling on the issue. The issue was "previously contemplated or presented to the trial court." *In re Timmerman*, 331 S.C. at 461. As such, no Rule 59(e) motion was required, and the issue was properly preserved for appeal.

MERITS

I. As a matter of law, Westbury Park is not the Declarant under the Apartment Declaration.

Westbury Park's discussion of the minutiae of Article 9 of the Declaration would have this Court ignore the elephant in the room—which is that none of Article 9's provisions apply to Westbury Park, since Park is not the "Declarant" empowered by those sections to act.

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[5] *See, e.g.*, R. pp. 759 (Tr. p. 220, lines 1–8: "And [Park] attempted unilateral extension. We're asking for a ruling from this court was in that—it was void under the law. It was void under the contract.").

Westbury Park's brief attempts to breeze past Estate's argument that it is not the "Declarant," as if it were of little import. But the question is actually dispositive. The Master in Equity wrongly found that Westbury Park "properly extended by the filing of the extension as contemplated under 9.01" because Article 9 makes it clear that only the "Declarant" has the power (jointly with the "Owner") to extend the Declaration. The Developer's Declarant rights are real property interests that were never assigned to Westbury Park.

Here are Westbury Park's arguments, and why they are wrong:

A. Westbury Park: But . . . Illinois law suggests that developer's rights are personal.

As a matter of law, the developer's rights in this case are bound to the land only. Westbury Park looks to Illinois law for the proposition that "developer's rights are generally personal in nature." *Bd. of Managers of Medinah on the Lake Homeowners Ass'n v. Bank of Ravenswood*, 692 N.E.2d 402 (Ill. App. Ct. 1998). Park argues that the South Carolina Supreme Court, in dicta, noted this Illinois case. First, Illinois cases are not binding precedent. Second, "dictum is not the law." *Gordon v. Lancaster*, 425 S.C. 386, 395, 823 S.E.2d 173, 177-78 (2018) (Few, J., concurring). Finally, and most importantly, **the Declaration itself defines the nature and scope of the declarant's rights in this case. Those rights are bound to the property and not personal.**

Rather than looking to out-of-state dictum, this Court should look to the specific provisions of the Declaration at issue in this appeal, which it has the power to review de novo. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667 (2018) (appellate courts review questions of law de novo, including the interpretation of

clear contracts). The Developer in this case chose to bind its declarant rights to the property. The developer's rights are found in only one place in this case: within the recorded Declaration of Covenants. The Declaration identifies the promises, rights, and obligations of the Developer, and it makes clear that those rights touch and concern the land. (R. p. 190) (§ 1.02, § 2.01):

> 1.02 General Plan: To establish a general plan for the improvement and development of the Property, Declarant hereby subjects the Property to the conditions, covenants and restrictions set out below, upon and subject to which all of the Property shall be hereafter owned, leased, hypothecated and used.

> 2.01 Establishment of Restrictions: Declarant, owner of the Property, hereby declares that the Property is now held, and shall hereafter be owned, leased, hypothecated and used subject to the restrictions set forth in this Declaration, each and all of which is and are for, and shall inure to the benefit of, and pass with, and be enforceable as equitable servitudes by the Owner or Lessee of each and every portion of the Property, and shall apply to and bind the heirs, assignees and successors in interest of any Owner or Lessee of each and every portion of the Property.

The Declaration is a sealed instrument, witnessed, notarized, and recorded, and otherwise compliant with the requisites of South Carolina law on property and conveyances. *See*, *e.g.*, S.C. Code § 30-5-30 "Prerequisites to Recording" (requiring affidavit of subscribing witness, signature of notary, seal, etc.); S.C. Code § 30-5-35 (derivation clause required in instrument conveying an interest in real property); S.C. Code § 30-7-10 ("Recordation Essential to Validity") ("All . . . instruments in writing . . . encumbering [an estate in real property] . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the

register of deeds"). The result, specific to the Declaration in this case,[6] is that the declarant rights are interests in the bound property.

Because of the specific way that they were established, the declarant rights in the Declaration at issue constitute an encumbrance on real property. Westbury Park is wrong to contend that the rights and restrictions in the Declaration are personal and/or contractual. As a matter of law, they constitute appurtenant real property interests, stemming from the developer's purpose of controlling development of the property.[7]

Property rights in South Carolina cannot be willy-nilly transferred or conveyed or assigned. If such property rights are going to be transferred, then that conveyance must be effectuated in manner compliant with South Carolina law. Westbury Park did not do that, as discussed next.

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[6] Perhaps, in some hypothetical instances, certain developer's rights might be held personally, in gross. That is not the case, here. Alternatively, a personal, in gross right to affect real property would be equivalent to a mere license, which is not transferable.

[7] For example, within the Declaration at issue here, the developer reserved to itself the right to enforce restrictions including:

- Declarant has the right to enforce building regulations, such as exterior paint color (R. p. 190, *et seq.*) (§ 3.10).
- Declarant has the right to designate materials to be used in construction of structures on the bound property (§ 4.01).
- Declarant has the right to approve design of structures on the bound property (§ 4.01).
- Declarant dictates whether trailers may be stored on the bound property (§ 5.02).
- Declarant has the right to approve of satellite dishes for television (§ 5.02).
- Declarant has the right to enforce restrictions relating to clothes lines, garbage cans, and mailboxes. (§ 5.02).
- Declarant has the right to dictate drainage. (§ 3.12).
- And the list goes on.

These, and every other term of the Declaration at issue here, are rights and interests pertaining to real property—they are not personal; they are bound to the land only.

B. Westbury Park: But . . . didn't the developer assign all its declarant rights to Westbury Park?

No. Westbury Park's argument that the developer assigned to Park all of its declarant rights is wrong for numerous reasons. First, the Declaration itself requires the Declarant to own the Property. Second, the Payment Agreement was not a valid means of conveyance under South Carolina law. Third, even assuming *arguendo* that the Payment Agreement could validly convey declarant rights, the agreement was restricted to discussion of a single right—which did not include the power to extend the Declaration. Finally, even assuming *arguendo* that the Payment Agreement could validly convey declarant rights, Westbury Park did not hold those rights alone and could not wield the rights without acting together with the Commercial Association.

1. The Declaration specifies that the Declarant must own the Property.

The Apartment Declaration, including §§ 9.01 and 9.02 at issue on appeal, contemplates two actors. Those actors are specifically defined within the Declaration. The first actor is the "Owner," identified as the holder of the fee interest in the property.[8] (R. p. 190) (Declaration, § 2.03). The second actor is the "Declarant."

The term "Declarant" is given several meanings, each of which is significant, and all of which together define the identity of the Declarant. *Brady v. Brady*, 222 S.C. 242, 72

[8] As discussed in Estate's initial brief, the holder of the fee interest has evolved over time. At first, it was Plantation Properties (the developer). The developer subsequently conveyed its interest to another entity, which then conveyed it to another entity, which then converted it to condominiums. The "Owner" is now 320 individual condominium unit holders, as well as the Estate, which owns the common areas. (*See also* R. p. 161, Memorandum in Support of Motion for Summary Judgment p. 7, fn. 3).

S.E.2d 193, 195 (1952) ("Different provisions dealing with the same subject matter are to be read together."). The Declaration defines the Declarant thus:

(A.) The "Declarant" is Plantation Properties, LLC:

> This Declaration of Covenants, Conditions and Restrictions ("Declaration") is made this 10th day of November, 1998, by Plantation Properties, L.L.C., a South Carolina Limited Liability Company ("Declarant") as follows:

(B.) The "Declarant" is owner of the 20-acre parcel of real property:

> 1.01 Declarant is the owner of the approximately twenty (20) acre parcel of real property in Bluffton Township, Beaufort County, South Carolina; more fully described on attached Exhibit "A" (the "Property").

(C.) Again, the Declarant is owner of the Property:

> 2.01 Establishment of Restrictions: Declarant, owner of the Property, hereby declares that the Property is now held, and shall hereafter be owned, leased, hypothecated and used subject to the restrictions set forth in this Declaration, each and all of which is and are for, and shall inure to the benefit of, and pass with, and be enforceable as equitable servitudes by the Owner or Lessee of each and every portion of the Property, and shall apply to and bind the heirs, assignees and successors in interest of any Owner or Lessee of each and every portion of the Property.

(R. pp. 190). Reading these provisions together, as one must, it is clear that the Declarant must be the owner of the twenty-acre Property.

And this makes sense. The Declarant is defined by the Declaration with reference to the land because the developer's declarant rights are bound to the land—*i.e.*, **the declarant rights are real property interests**. As Westbury Park points out, the Declaration does state that the term "Declarant" may include successors and assigns. But this allowance does not negate the other requirements to be a Declarant, which still stand. The other definitions within the Declaration still apply to limit assignees to the "owner of the Property." In other words, the Declarant can only assign the right to be the Declarant to the "owner of the Property." This has a practical purpose, since typically declarant rights would be conveyed along with the land, as discussed next.

2. The Payment Agreement was not a valid means of conveyance of an interest in real property.

Because the declarant rights in the Declaration are property interests, encumbering real property (which now belongs to each of the 320 individual condominium owners at Estate at Westbury), an effective transfer of those rights would have to be done along with the property itself, by a sealed, notarized, and recorded instrument. *See, e.g.,* S.C. Code § 30-7-10 *et seq.* ("Recordation Essential to Validity"). But Westbury Park bases its untenable argument that it is the "Declarant," vested with the power to "renew" the entire Declaration, on an un-dated, un-sealed, un-notarized contract, without a derivation clause, which was never recorded, and which purports to bestow certain rights not only on Westbury Park but also on another separate entity (silent in this litigation). This was the "Estate Payment Division Agreement and Assignment" (the "Payment Agreement"). (R. p. 288).

Westbury Park's argument on the unrecorded nature of the Payment Agreement is that it was "recorded along with the Notice of Extension." (Resp. Br. p. 22, fn. 10). This argument does not fly. The unsigned, unsealed, un-notarized Payment Agreement was attached *as an exhibit* to the purported Notice of Extension. It was not independently recorded, in such a way as to comply with South Carolina law on real property conveyances.

The Payment Agreement does not itself meet the statutory requirements for conveyance of a property interest and recordation. *See*, *e.g.* S.C. Code § 30-5-30 "Prerequisites to Recording" (requiring affidavit of subscribing witness, signature of notary, seal, etc.); S.C. Code § 30-5-35 (derivation clause required in instrument

conveying an interest in real property); S.C. Code § 30-7-10 ("Recordation Essential to Validity") ("All . . . instruments in writing . . . encumbering [an estate in real property] . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds").

As a matter of law, the Payment Agreement did not convey any property right, including declarant's rights and powers, to Westbury Park. Therefore, the Master in Equity was legally wrong to find that Westbury Park could act as the "Declarant" under § 9.01 of the Declaration.

3. *Arguendo*, the Payment Agreement did not assign the power to renew, extend, or otherwise modify the Apartment Declaration.

For the sake of argument, even if the Payment Agreement was a valid means of conveyance of declarant's rights, it clearly intended to apportion only a select, limited right to divide and collect money, and not the totality of the Developer's rights. Also, it divided that purported right between Westbury Park and the separate Commercial Entity. The contract's intent—to divide money, only—is clear from its title:

ESTATE PAYMENT DIVISION AGREEMENT AND ASSIGNMENT

THIS ESTATE PAYMENT DIVISION AGREEMENT AND ASSIGNMENT is made and entered into this ____ day of _____, 2015, among Plantation Properties, LLC (hereinafter "PPLLC"), Westbury Park Residential Association, Inc. (hereinafter "ROA") and Westbury Park Commercial Center Property Owners' Association, Inc. (hereinafter "COA").

The Payment Agreement itself is all about the money, and it is only about the money. While it is impossible to include the entire Payment Agreement within the body of this brief, Estate urges this Court to take a moment to read it. (R. p. 288). Its sole concern is who gets money from the Estate, and why those folks get that money, and how that

money will be divided, and why Plantation Properties does not get the money anymore. (R. p. 288) (Payment Agreement).

It is clear from its plain terms that the Payment Agreement is **not intended to be a conveyance of an interest in real property**, and nor can it conceivably be construed to have been intended to convey all of the former developer's long-obsolete declarant rights. The Estate Payment Agreement makes no reference, for example, to the developer's drainage rights, or its architectural control rights, or its easement rights. Most importantly, it makes no reference whatsoever to any declarant right or power to amend the (defunct) Apartment Declaration.

Moreover, although the Payment Agreement is a contract between three parties, it cannot possibly be construed to bind folks (like Estate and *each* of its 320 individual unit holders) who are not party to the contract. Particularly since it was never recorded nor indexed, there would be no conceivable way the Estate's 320 individual unit holders would have notice that they were bound by the Payment Agreement, nor that it could affect their property interest.

4. *Arguendo*, Westbury Park's Notice of Extension was void because it was not signed by the Commercial Center.

Finally, and also for the sake of argument, the Payment Agreement does not purport to give ***anything*** at all to Westbury Park ***alone***. Instead, within the Payment Agreement, the original developer agrees to divide the assessment money between Westbury Park and the Commercial Center—a separate entity. Therefore, if the Payment Agreement could (in some near-magical way) be construed to convey any of the

Declarant's powers (including the power to act to amend the Declaration), then Westbury Park would hold those rights and powers jointly with the Commercial Center. Westbury Park's purported Notice of Extension is therefore void for lack of the signature of a necessary party. (R. p. 286) (Notice of Extension, p. 3).

C. Westbury Park: But . . . the Estate recognized Plantation Properties as the Declarant.

Westbury Park's last argument on the declarant rights issue is a desperate "penalty for ignorance" argument. (Resp. Br., p. 22). Here—citing no authority whatsoever—Westbury Park appears to be arguing that even if the Developer no longer held any property interest in the bound parcel (which it didn't), then it could nonetheless still validly exercise and convey property rights in property it no longer owned, because no one had ever tried to stop it before. Obviously, this is nonsense, and this Court should ignore this argument, which is supported by zero caselaw.

South Carolina law is clear that once a developer divests itself of its interest in its property, it no longer has the right to control it. *Queen's Grant v. Greenwood Development*, 628 S.E.2d 902, 368 S.C. 342 (Ct. App. 2006). As Westbury Park states, Plantation Properties conveyed all of its interest in the tract at issue on November 10, 1998, to another entity not a party to this litigation. (Resp. Br. p. 22). Having conveyed all of its interest away, the Developer as a matter of law could not affect the property by assigning declarant property rights. *Id.*; *see also Highlands Prop. Owners Ass'n, Inc. v. Shumaker Land, LLC*, 397 S.C. 432, 724 S.E.2d 685 (Ct. App. 2012); *see also Von Elbrecht v. Jacobs*, 286 S.C. 240, 243, 332 S.E.2d 568, 570 (Ct. App. 1985) ("[A] grantor of real property generally can

transfer no greater interest than he himself has in the property."). In other words, the Developer could not convey something (declarant rights, *e.g.*) it did not own. This divestment by the Developer did not have the effect of rendering the creation of the condominium regime void, as Westbury Park cheekily suggests; instead, it had the effect of rendering the property unrestricted by developer control. Meaning, the condominium regime is valid, with or without developer's consent.

Moreover, Westbury Park argues (again, with no legal citation whatsoever) that because Estate paid assessments for seventeen years to which the Developer may not have been entitled, then it should therefore be bound to spontaneously recognize Westbury Park as the rightful Declarant, and it should not put up a fuss about paying millions of dollars in assessments, forever. First, this is nonsense, for all the reasons set forth above about the declarancy. Second, this Court has expressly held that while a party may at times abandon a claim for excessive assessments paid in the past, that abandonment does not apply to a claim for prospective relief. *Queen's Grant v. Greenwood Development*, 628 S.E.2d at 902, 368 S.C. at 342 (Ct. App. 2006).

In short, under its "penalty for ignorance" argument, Westbury Park would have this Court permit it to do whatever it wants with property it does not own, so long as no one tries to stop it, forever. Tsk.

Because Westbury Park was not, under any conceivable theory, the Declarant in Section 9 of the Declaration, the Master-in-Equity was wrong to conclude that Westbury Park could take any action at all to extend the Declaration. This Court should so hold, as a matter of law.

II. Westbury Park cannot unilaterally extend the contract by ignoring § 9.02.

Westbury Park next turns to the language of the Declaration. As it must, Park admits that only the Declarant may renew or extend the Declaration. As discussed above, Westbury Park is not the Declarant, and the analysis may stop here.

For the sake of argument, the thrust of Park's claim is that § 9.01 should be read in a vacuum, as a stand-alone provision that would entitle a legal stranger to control the property rights of hundreds of people. This defies the law, which requires that the provisions of a contract should be construed together. "It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Highlands Prop. Owners Ass'n, Inc.*, 397 S.C. at 432, 724 S.E.2d at 685, *quoting Brady v. Brady*, 222 S.C. at 246, 72 S.E.2d at 195. Park urges the Court to ignore that § 9.02 modifies § 9.01, and that § 9.02 particularly identifies how the Declaration may be extended.

Moving forward, however, takes the reader to Westbury Park's inhumane torturing of the contract language. Park argues that it merely "renewed" the Declaration for ten years, but did not "extend" it for those ten years. Those verbal acrobatics are semantically unsound. Park never offers an explanation or law—nor could it—of its subjective definition of "renew," or of how invoking that enchanted word frees Park from the requirements for extensions in § 9.02. (R. p. 199). Park's omission is particularly glaring given that Estate has pointed out that *Black's Law Dictionary* defines "extension" as: "The continuation of the same contract for a specified period. Cf. Renewal." *Black's*

Law Dictionary p. 728 (11th ed. 2019) ("extend"). Here, there is no question that Park has attempted to "continu[e] the contract for a specific period." Meaning, it has been extended, invoking § 9.02.

Similarly, Park explains that it did not alter the Declaration in any way, shape, or form.[9] Except . . . Park made the assessment ten years longer. Park just ignores this decade-long detail, without credible explanation. It is well-established that the length, or duration, of a contract is a material term to a contract.[10] Material terms can only be modified by agreement of all parties to the contract, which did not occur here.[11] Under any reasonable and logical reading of the contract language, Park's unilateral extension of the contract by a decade is indeed an extension, modification, or amendment, falling under § 9.02.

Park demands an explanation of § 9.01, and why that clause should not be read to give Park ultimate, untouchable power to extend the contract for as long as Park wishes. In addition to the many reasons offered in Estate's opening brief, § 9.01 refers to a notice of "extension", which thereby invokes the "extension" process specified for "extension, modification, or amendment" in § 9.02.[12] If, as § 9.02 notes, the Owner exists at that time,

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[9] In its brief, Park writes that it "did not terminate, modify, amend or change the existing covenant and did not add new covenants." (Resp. Br. p. 16). Park conspicuously leaves out the word "extend" because it cannot in good faith represent to this Court that it did not extend the Declaration.

[10] *See Rose Elec., Inc. v. Cooler Erectors of Atl., Inc.*, 418 S.C. 424, 794 S.E.2d 382 (S.C. App. 2016) ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty.") (internal quotations omitted).

[11] *See Lee v. Univ. of South Carolina*, 407 S.C. 512, 757 S.E.2d 394 (2014) (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration).

[12] This interpretation is supported by other courts' discussions of the meaning of the word "renew," which generally is synonymous with "extend." In other words, by attempting to "renew" by a "notice of extension," Park is required to follow the mandatory provisions for "extensions" in § 9.02. *Cf. Quality*

that Owner must consent to the extension. If, however, no Owner yet exists—as in the formative years of the development—then obviously a non-existent party is not needed to consent. Sections 9.01 and 9.02 are meant to be read together: they allow the Declarant flexibility as it built the development, but do not allow the Declarant unlimited power once the Owner came into existence. That is why, when the Declaration was modified previously, it was done by the Declarant and Owner *jointly*. (R. p. 204: Ex. 3 to Estate Summary Judgment motion).

Westbury Park's interpretation is nonsensical. Park argues that, although § 9.01 requires a "notice of extension," Park may simply ignore the mandatory process for "extension" in § 9.02. "Extension" or "extend" are specified three times in § 9.02, but Park's interpretation would simply pretend the word does not exist there. So too with Park's notice of extension itself, which specifies the word "extension" or "extend" at least four times. R. pp. 284–296. Any "extension, modification, or amendment" must follow the process in § 9.02—joint approval—and Park may not unilaterally extend the contract.

III. The Order upholding the unilateral extension violates contractual and property law of South Carolina.

On this point, Westbury Park argues that "Park did not modify or alter the Declaration" and therefore it can do what it wants. (Resp. Br. p. 23). This is incorrect

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Towing v. City of Myrtle Beach, 345 S.C. 156, 167, 547 S.E.2d 862 (S.C. 2001) ("Under S.C. law, a municipality can grant, **renew, or extend** a franchise only by ordinance.") (emphasis added); *Cox Commc'n, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 708 F. Supp. 2d 1322, 1327 (N.D. Ga. 2010) ("The *American Heritage Dictionary* defines **renew** as '[t]o arrange for the **extension** of: renew a contract' . . . . [Plaintiff] cannot **renew (which means to extend)** or replace (which means to take the place of) another company's policy." (emphasis added); *Van Reken v. Darden, Neef & Heitsch*, 674 N.W.2d 731, 259 Mich. App. 454 (Mich. App. 2004) ("Taking the plain meaning of the phrase 'an action,' we find that in MCL 600.5809(3) the Legislature clearly intended actions beyond just civil complaints **to extend or renew** a judgment...") (emphasis added).

because Park unilaterally extended the term, or duration, of the contract by a decade. And Park maintains that it can *continue* to extend the contract for as long as it wants, forever. As discussed above, the length, or duration, of a contract is a material term of a contract, and material terms can only be modified by agreement of all parties to the contract, which did not occur here.[13]

Park's point that "parties may bind themselves as they see fit" is actually a non-point. (Resp. Br. p. 24). The disagreement here is over the terms of the contract, the renewal provision and requirements, and whether Park is even a party to the contract itself, since it is not the Declarant.

Westbury Park cannot extend the contract on its own, in contradiction of the plain language of the contract that requires mutuality. Moreover, for the reasons discussed above, and in Estate's initial brief, Westbury Park's unilateral extension of the Declaration violates property law. Park holds no property interest in the power of the Declarant to act under §§ 9.01 or 9.02 of the Declaration, and therefore any action Westbury Park attempted to take pursuant to those sections is invalid and void as a matter of law.

IV. The Order erred in holding that Estate at Westbury was not entitled to an accounting.

Westbury Park is incorrect when it argues that the accounting issue is unpreserved because no authority was cited. In fact, Estate cited to the contracts at issue, and referenced the fiduciary duty that is inherent in Park's claim to be the Declarant. Moreover, Park acknowledges that this claim is equitable, and that "there is scant law"

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[13] *See* citations at footnotes 10–11, *supra*.

on the topic. Based on Estate's citations and correct legal argument, the issue certainly is preserved.

Park then argues, oddly, that Park is not subject to this equitable claim because no fiduciary relationship exists. But Park already has claimed—repeatedly—that it is the Declarant, with the duties and rights inherent therein. (*See, e.g.*, Resp. Br. p. 23). **If** that proclamation is taken as true, *arguendo*, then Park also would be subject to the special relationship inherent in the declarant position. *Cf. Dunes West Residents v. Ga.-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633 (S.C. 2002) ("That is to say, the developer has a fiduciary duty to the POA to transfer common areas that are in good repair; . . ."). Accordingly, as argued in Estate's opening brief, under the clear language of the contract at issue, Estate is entitled to an accounting of Park's use of the assessment funds that it collected, and the Order is in error ruling that no such right exists under the contract and under the law.

CONCLUSION

For these reasons, the Court should (a) reverse the Order of the Master in Equity and (b) hold that the Extension is invalid and not binding on Estate at Westbury, as a matter of contract language and of contract and property law of South Carolina.

Respectfully submitted,

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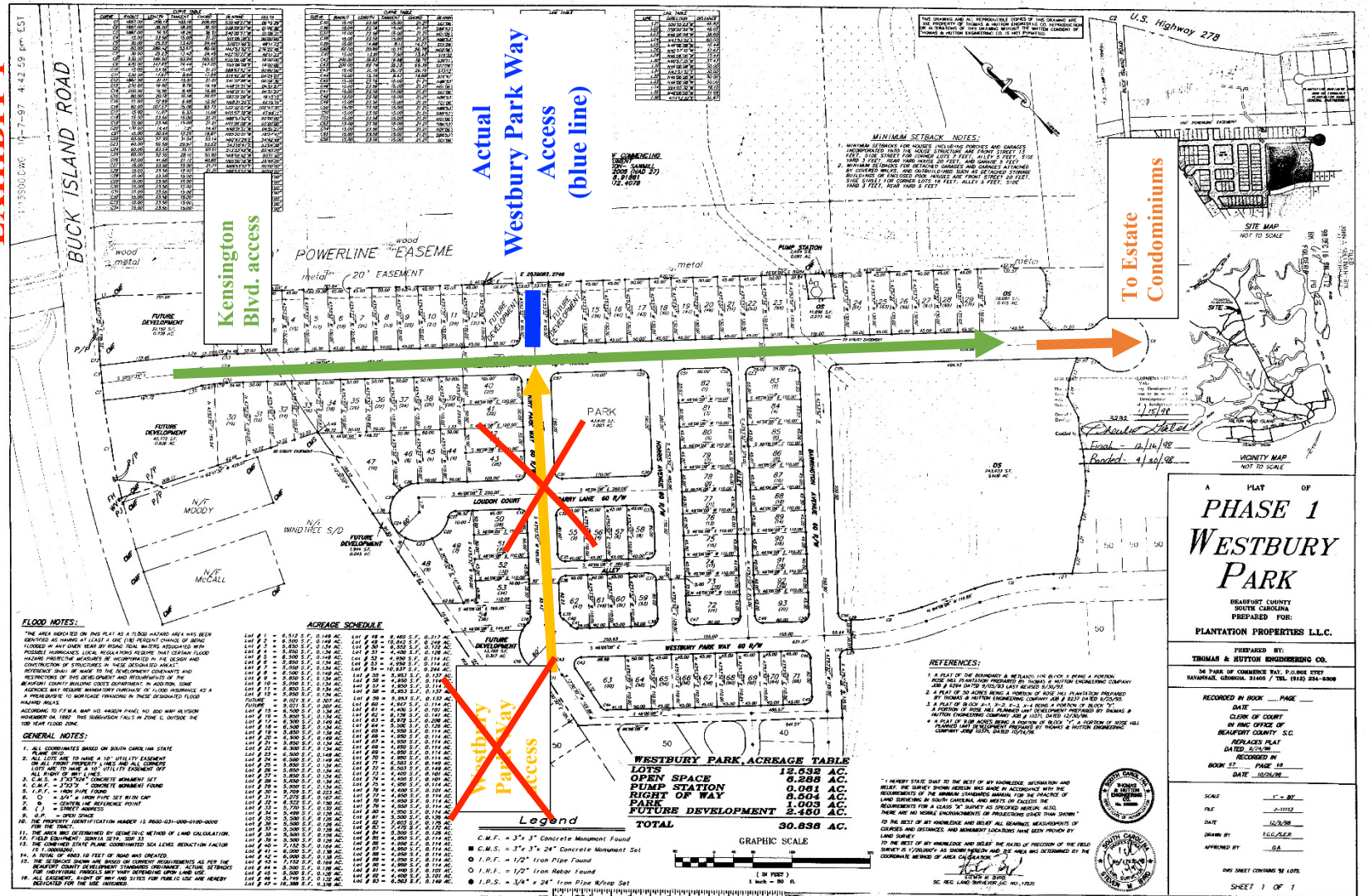
EXHIBIT 1



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