

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SEP 02 2020

Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

Case No.: 2019-002038

Jon H. Attridge and Janet L. Attridge, Robert W. Bankov, Virginia J. Bankov, Tom Bolton, Guy I. Collier, Nancy L. Collier, Richard Jay Coleman, Marlene Coleman, Russell G. Dimke, Sandra A. Dimke, James G. Goodwin, Jr., Carol A. Goodwin, George J. Lovett, Wilna W. Lovett, Peter Marzluff, Deborah C. Marzluff, Gary Okey, Nancy Okey, Michael Pellecchia, Janice S. Pellecchia, Frank H. Roberts, Sr., Richard Swilpa, Michele Gallant, Phyllis A. Kaupp-Seas, Robert P. Brendza, and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Plantation Property Owners Association

..... Respondents,

vs

The Board of Directors of Bull Point Plantation Property Owners Association, Inc., Bull Point Plantation Property Owners Association, Inc., Bull Point SC, LLC, William E. Gavigan, Michael Carey, Christopher J. Quick, James Riordan; DB Aster, LLC; and GSI, LLC,

..... Defendants/Counterclaimants,

Of which Bull Point SC, LLC, William E. Gavigan, Michael Carey, Christopher J. Quick; James Riordan; and GSI, LLC are

..... Appellants

And

Bull Point, SC, LLC, and William E. Gavigan,

..... Third-Party Plaintiffs/Appellants,

vs

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriett Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezmys, Rivers Reach at Pocotaligo, LLC, Rivers Reach Realty, LLC, and Jon Does 1-10, Third-Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THAT BULL POINT SC, LLC IS NOT THE PROPER “DECLARANT” OF BULL POINT PLANTATION?
- II. DID THE TRIAL COURT ERR IN FINDING THAT THE DECLARANT OF BULL POINT PLANTATION DOES NOT HAVE THE RIGHT TO APPOINT THE BOARD OF DIRECTORS OF THE PROPERTY OWNERS ASSOCIATION?
- III. DID THE TRIAL COURT ERR IN ORDERING INJUNCTIVE RELIEF THAT WAS NOT THE SUBJECT OF THE MOTION FOR SUMMARY JUDGMENT OR ADDRESSED AT THE UNDERLYING HEARING?

STATEMENT OF THE CASE

This appeal addresses the trial court's order granting Respondents' Motion for Partial Summary Judgment on November 18, 2019. (Order dated November 18, 2019, ROA, 630).

The underlying matter involves Bull Point Plantation, which is a residential development in Beaufort County, South Carolina that was established in 1995. Bull Point Plantation operates through its Declaration of Covenants, Conditions, and Restrictions (the "Declaration"), which invests certain rights in the "Declarant" or developer of Bull Point Plantation, and also invests certain duties in a property owners association (the "Association").¹ To date, approximately 250 lots have been developed through the first six phases of development at Bull Point Plantation. There is an additional seventh phase of over 156 acres that may be included in the development, and which has been permitted for approximately 45 additional lots.

Appellant Bull Point SC, LLC, obtained Declarant Rights by assignment on or about August 21, 2017. It currently owns property in the development, including the entirety of the seventh phase, as well as several additional lots within the other phases. Other Appellants are individuals who were former members of the Board of Directors of the Association from 2017 to 2019.

Respondents are a minority of property owners within the development, most of whom were part of a corporation known as "Huspah Properties, LLC," which was formed to purchase and/or seize the Declarant Rights (or "Declarancy") of the development. (Receipt for Purchase of Shares, ROA, 371).

¹ The history of the homeowners association is convoluted and has used many names. At times relevant to this appeal, the putative homeowners association operated under the name "Bull Point Plantation Property Owners Association, Inc." or "BPPPOA."

Amended Complaint), it also granted judgment on the following matters which were not the subject of Respondents' motion or argued at the hearing:

1. First Cause of Action – the trial court granted a declaratory judgment holding that Appellants did not have the authority to eliminate the Fifteenth Amendment to the Declaration regarding the Contingency Fund, and ordered that Appellants immediately relinquish control of the Contingency Fund.
2. Second Cause of Action – the trial court granted injunctive relief regarding the contingency fund that exceeded even the relief requested in the Second Cause of Action as stated in the Amended Complaint, ordering that Appellants “are enjoined from serving on the POA’s Board of Directors (unless elected by the POA members); [Appellants] are enjoined from taking any actions in further governance of the POA, including scheduling of an Annual Meeting or issuance of a Proposed Budget for 2020; [Appellants] are enjoined from occupying the offices in the POA clubhouse, and they must vacate the clubhouse offices within 24 hours of the entry of this Order; [Appellants] are enjoined from exercising any control over the POA funds.”
3. Seventh and Eighth Causes of Action – although Respondents neither referenced these causes of action in their motion or at the hearing, the trial court granted judgment as to both, rescinding the Eighteenth Amendment and reinstating the Fifteenth Amendment to the Declaration.
4. Further, although not raised by Respondents in their motion or at the hearing, the trial court order took further measures against Appellants, ordering that “[i]mmediately upon the [Respondents] notifying [Appellants] of the appointment of the interim Board of Directors, the [Appellants] shall turn over possession of: (a) the clubhouse offices and all property and records (both physical and electronic) located therein, including but not limited to cellular telephones and keys belonging to the POA; (b) all POA check books, credit cards, debit cards, financial records (both physical and electronic). At the same time, [Appellants] shall sign over to the interim Board all authority and control of all POA financial accounts and provide the interim Board all log-in credentials for all accounts as well as those needed to access the POA’s computers.”

(Trial Court Order, November 18, 2019, pp. 18-20, ROA 647-649).

On November 21, 2019, Appellants filed their Motion to Alter or Amend Judgment under Rule 59(e), SCRCP. Following a hearing conducted on December 5, 2019, the trial court denied the motion on that same day. (Order Denying Motion, ROA 762).

Appellants filed a Notice of Appeal on December 10, 2019, which was served on the same day. Per direction of this Court of Appeals, an Amended Notice of Appeal was filed and served on December 17, 2019. (Notice of Appeal and Amended Notice of Appeal, ROA 765 and 768).

Appellants now timely file this Initial Brief of Appellants.

STATEMENT OF THE FACTS

I. Bull Point’s Founding Documents and Identification of the Declarant.

Since its founding in 1995, the Bull Point development has been governed by three documents (the “Governing Documents”).

First, Stancel E. Kirkland executed the Articles of Incorporation of the BPPPOA – then called the Bull Point Homeowners Association, Inc. – through a two-page form filed with the S.C. Secretary of State on September 26, 1995. Kirkland also filed three “associated” pages with the two-page form. (Articles of Incorporation and associated documents, ROA 388).

Second, the Articles of Incorporation expressly incorporate the Declaration as “applicable to the property recorded or to be recorded in the RMC Office for Beaufort County and as the same may be amended from time to time as herein, **said Declaration being incorporated herein as if set forth verbatim...**” (ROA 390) (emphasis added). As a consequence, the “Declaration” and its Amendments are fully a part of the Articles of Incorporation “**as if set forth verbatim...**”. The Declaration has been amended on a number of occasions since 1995, including the Ninth Amendment recorded on February 4, 2000, which restated the Declaration.³ Notably, the Declaration – fully a part of the Articles of Incorporation – states in Section 8.02 as follows:

The duties and powers of the Association that shall be those set forth in the provisions of the South Carolina Code relating to non-profit corporations, this Declaration, the By-Laws, and the Articles, together with those reasonably implied

³ Respondents rely on the Declaration as articulated on February 4, 2000. (Declaration, ROA, 393).

to effect the purposes of the Association; provided, however, that **if there are conflicts or inconsistencies among the South Carolina Code, this Declaration, the By-Laws, or the Articles, the provisions of the South Carolina Code, this Declaration, the By-Laws, and the Articles, in that Order, shall prevail**, and each Owner of a Lot or Dwelling by acceptance of a deed or other conveyance thereof, covenants to vote in favor of such amendments as will remove such conflicts or inconsistencies.

(emphasis added).

Third, the By-Laws of the BPPPOA were executed on September 26, 1995. (By-Laws, ROA, 439). The By-Laws provide that, “in the event of a conflict between the By-Laws and the Declaration of Covenants and Restrictions for the Bull Point Property, then the terms of the Declaration of Covenants and restrictions shall control.” (ROA, 448).

The Declaration identified Bull Point, LLC as the “Declarant,” and did so in several provisions, including the preamble as well as Section 1.01(j), which includes a definition of “Declarant.”⁴ The Declaration also references a Declarant’s “assigns” in numerous provisions:

- Preamble – the Declaration states that “shall touch and concern and run with the title to the real property subjected to this Declaration and shall be binding on **all parties** having any right, title or interest in the above described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and **assigns...**”
- Property Rights – 3.04 (Access) – “There is reserved unto **Declarant**, the Association, and their respective successors **and assigns** the right and privilege...”
- Property Rights – 3.07 (Easements for Utilities) – “There is hereby reserved for the benefit of **Declarant**, the Association, and their respective successors **and assigns...**”
- Property Rights – 3.09 (Sales Construction Offices and Temporary Residential and Maintenance Buildings) – “[T]here is hereby reserved for the benefit of **Declarant** and its successors **and assigns...**”

⁴ S.C. Code Ann. § 30-27-320(3) defines “Declarant” as a person or group of persons acting in concert who...reserve or succeed to a special declarant right, which means a right created under the declaration or bylaws for the person or group to exercise authority in addition to regular declarant rights in a unit of real property.”

- Property Rights – 3.10 (Easements for Additional Property) – “[T]here is hereby reserved for **Declarant**, and its successors, **assigns**, and successors-in-title to the additional Property...”
- Property Rights – 3.11 (Maintenance Easement) – “Subject to the terms of Section 5.02 (b) hereof, there is hereby reserved for the benefit of **Declarant**, the Association, and their respective agents, employees, successors, and **assigns**,...”
- Property Rights – 3.12 (Environmental Easement) – “There is hereby reserved for the benefit of **Declarant**, the Association, and their respective agents, employees, successors, and **assigns**,...”
- Property Rights – 3.13 (Wells and Effluent) – “There is hereby reserved for the benefit of **Declarant**, the Association and their respective affiliates, agents, employees, successors and **assigns**,...”
- Property Rights – 3.16 (Easements for Walks, Trails and Signs) – “There is hereby reserved for the benefit of **Declarant**, the Association, and their respective successors and **assigns**,...”
- Architectural Standards and Use Restrictions – 10.10 (Signs) – “Notwithstanding the foregoing, the restrictions of this Section 10.10 shall not apply to **Declarant or its assigns**.”
- General Provisions – 13.05 (Duration) – “The provisions of this Declaration shall run with and bind title to the Property, shall be binding up and inure to the benefit of all **Owners** [including **Declarant**] and Mortgagees and their respective heirs, executors, legal representatives, successors, and **assigns**, and shall be and remain in effect for a period of thirty (30) years from and after the date of the recording of this Declaration, provided that right and easements which are stated herein to have a longer duration shall have such longer duration. Upon the expiration of said thirty (30) year period, this Declaration shall be automatically renewed for successive ten (10) year period.”
- General Provisions – 13.12 (No Trespass) – “Whenever the Association, **Declarant**, the Architectural Review Board, and their respective successors, **assigns**, agents or employees...”

(Declaration, ROA, 394) (emphasis added).

II. **Transfer of Rights of Declarant to Bull Point.**

The original Declarant, Bull Point, LLC, lost most of their interest – but not their entire interest – in Bull Point in 2012. Since that time, the Rights of the Declarant have passed several times by assignment.

- DB Aster, LLC acquired certain property in the Bull Point development from Bull Point, LLC on February 2, 2012. (ROA, 255-271).⁵
- Later, on December 28, 2012, Bull Point, LLC transferred the Declarant Rights by assignment to DB Aster, LLC. (Assignment to DB Aster, ROA, 273 and 504).
- Following a sale of certain property in the Bull Point development from DB Aster, LLC to GSI, LLC in August 2017, DB Aster, LLC assigned Declarant Rights to GSI, LLC on August 18, 2017. (Assignment to GSI, LLC, ROA, 278-293 and 509).
- Thereafter, on August 21, 2017, GSI, LLC assigned the Declarant Rights to Bull Point SC, LLC. (Assignment to Bull Point, SC, LLC, ROA, 522).

Indeed, the minutes of the Board of Directors Meeting of the Bull Point Property Owners Association on February 1, 2013, which were prepared by Respondent Russell Dimke, affirmatively acknowledge that the “**Declarant Rights as specified in the Bull Point Plantation Covenants have now been legally transferred from Bull Point LLC to DB Aster, LLC.**” This transfer was accomplished by an assignment of Declarant Rights from Bull Point, LLC to DB Aster, LLC. (ROA, 273) (emphasis added).

III. **Respondents’ Admissions Regarding Bull Point SC, LLC as the “Declarant.”**

Indeed, several of the Respondents have already admitted – by sworn affidavit previously filed in this action – that Bull Point SC, LLC is the Declarant.

- Respondent Russell Dimke identified Bull Point SC, LLC as the “developer and Declarant of Bull Point POA...” and attested that “Mr. Gavigan became the new developer/Declarant and took over control of the POA Board.” Dimke also attested under oath that “[a]s managing member of the developer/Declarant, Bull Point SC,

⁵ The last page of this document is actually the first page of the document. Exhibit was filed in lower court with page out of order.

LLC, Mr. Gavigan has control over the POA Board, including the power to appoint and remove any member or members of Board of Directors and/or any other officers of the Association.” (Affidavit of Russell G. Dimke, ¶¶ 6, 11, and 15, ROA, 526).

- In his sworn affidavit, Respondent Gary Okey represented that he resigned shortly after “William Gavigan and Bull Point SC, LLC took over as Declarant.” (Affidavit of Gary Okey, ¶ 5, ROA, 533).
- In his sworn affidavit, Respondent Peter W. Marzluff specifically identifies the Declarant as Bull Point SC, LLC. (Affidavit of Peter W. Marzluff, ¶ 8, ROA, 536).

IV. Respondents’ Previous Attempts to Purchase Declarant Rights.

This lawsuit, and others like it that have recently been filed, are a part of an effort by many of the Respondents to obtain control of the “Declarant Rights” of the development. In fact, almost all of the Respondents formed a corporation in 2017 called “Huspah Properties, LLC” with the stated intent to purchase and/or seize the Declarant Rights (or “Declarancy”) of the development. Most notably, the “Receipt for Purchase of Share(s)” in Huspah Properties, LLC actually states that “the principal purpose of the Company is to purchase the Declarency [*sic*] for the Development known as Bull Point Plantation located in Seabrook, South Carolina.” (“Receipt for Purchase of Share(s),” ROA, 371) (emphasis added).⁶

With remarkable clarity, members of this group actually memorialized their plan in a memorandum dated April 27, 2017, which was then circulated among the conspirators by e-mail on April 28, 2017. (“Current Situation” Memorandum, ROA, 375). In their memorandum, their stated goal was to purchase the Declarant Rights from DB Aster, LLC, the then-Declarant of Bull Point Plantation, by using money taken from the BPPPOA’s “contingency fund” for their own

⁶ Given Respondents’ previous attempt to obtain Declarant Rights by purchase – and assignment – their current argument that Declarant Rights can only be transferred by foreclosure appears particularly disingenuous.

private purposes. Failing that, the conspirators “could enter into extended/constant litigation to attempt to enforce the current covenant and rules & regulations.” The conspirators acknowledged to themselves that their scheme of “[o]n-going lawsuits would drive away potential property/home buyers and depress property values during the period of litigations [sic]. It might be hard to get widespread participation by the homeowners and money for legal expenses.” (ROA, 378) (emphasis added).

V. **The Factual Record Related to Appointment of Members of the Board of Directors.**

Regarding election, designation, and appointment of directors, South Carolina’s Non-Profit Corporation Act provides as follows:

If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected at the first annual meeting of members, and at each annual meeting thereafter, **unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or designated.**

S.C. Code Ann. § 33-31-804(a) (emphasis added).

In this case, the Association’s Articles of Incorporation specifically incorporate the Declaration. In turn, regarding the Declarant’s right to appoint and remove the Association’s Directors and Officers, the Declaration clearly provides as follows:

- General Provisions – 13.01 (Control by Declarant) – the Declaration provides that “NOTWITHSTANDING ANY OTHER LANGUAGE OR PROVISION TO THE CONTRARY IN THIS DECLARATION, IN THE ARTICLES OF INCORPORATION, OR IN THE BY-LAWS OF THE ASSOCIATION, **Declarant hereby retains the right to appoint and remove any member or members of the Board of Directors of the Association by and for the term set forth in Section 8.01 hereof. Every grantee⁷ of any interest in the Development, by acceptance of a deed or other conveyance of such interest, agrees that Declarant shall have the authority to appoint and remove directors and officers of the Association in accordance with the foregoing provisions of this Section 13.01 and the provisions of Section 8.01.**”

⁷ Obviously, this includes all parties in this action.

- Administration – 8.01 (Common Areas) – Declarant shall have the right to appoint or remove any member or members of the Board of Directors or any officer or officers of the Association until such time as the first of the following events shall occur: (i) the expiration of twenty-five (25) years after the date of the recording of this Declaration; or (ii) the surrender by Declarant of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Declarant. Each Owner, by acceptance of a deed to or other conveyance of a Lot vests in Declarant such authority to appoint and remove directors and officers of the Association as provided by this Section 8.01 and by Section 12.01 hereof.

(Declaration, ROA, 394) (emphasis added).

Furthermore, for over twenty years, the Declarant of the Bull Point Plantation development has appointed Board members of the BPPPOA, or have permitted the members to elect no more than one voting member of the Board. Indeed, in their memorandum of April 27, 2017, Respondents admit as follows:

There is nothing in the Covenants or Amendments spelling out how the property owners elect 1 voting POA Board member and the Declarant appoints 2 others – thus controlling the Board. This seems to have just been permitted by the Declarant (Bull Point LLC) and followed since that time without any change in the Covenants.

The Covenants say that for 25 years the Declarant has the power “to appoint and remove all POA Board members.”

(Memorandum dated April 27, 2017, ROA, 379) (emphasis in the original).

STANDARD OF REVIEW

The questions before this Court in this appeal are questions of law, which are reviewed *de novo*. “It is a question of law for the court whether the language of a contract is ambiguous.” *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) The interpretation of an unambiguous contract is also question of law. *McCord v. Laurens Cty.*

Health Care Sys., 429 S.C. 286, 292, 838 S.E.2d 220, 223 (S.C. App. 2020) (“Ambiguity of a contract is a question of law, which we review *de novo*.”).

In construing contracts, such as the Governing Documents, the Court’s “primary objective is to ascertain and give effect to the intention of the parties.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (S.C. App. 2007). “Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.” *Id.* “The parties’ intention must, in the first instance, be derived from the language of the contract.” *Id.* “To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Id.* at 498, 649 S.E.2d at 501. **“The parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.”** *Id.* at 498, 649 S.E.2d at 502 (emphasis added); *Cullen v. McNeal*, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (S.C. App. 2010); *Mattox v. Cassady*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (S.C. App. 1986) (“Like any other agreement, when the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties.”).

If the contract is ambiguous, it is the court's duty to determine the intent of the parties. *Id.* It may do so by examining extrinsic evidence. *McKinney v. McKinney*, 274 S.C. 95, 97, 261 S.E.2d 526, 527 (1980). *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011).

Whether the Governing Documents are considered either unambiguous or ambiguous, in this case, the results should be the same. The Governing Documents permit transfer of Declarant Rights by assignment, and the Declarant Rights were properly assigned to Bull Point SC, LLC.

ARGUMENT

I. DID THE TRIAL COURT ERR IN FINDING THAT BULL POINT SC, LLC IS NOT THE PROPER “DECLARANT” OF BULL POINT PLANTATION?

A. UNDER THE ARTICLES OF INCORPORATION, AND THE DECLARATION AND ITS AMENDMENTS THAT ARE INCORPORATED INTO THE ARTICLES OF INCORPORATION, AND THE BY-LAWS, IT IS CLEAR THAT BULL POINT SC, LLC IS THE DECLARANT OF BULL POINT PLANTATION, AND MAY EXERCISE THE RIGHTS OF THE DECLARANT.

In reviewing the language Governing Documents and the undisputed history of assignment of Declarant Rights, it is clear that Bull Point SC, LLC is the Declarant of Bull Point Plantation. In their memorandum supporting their Partial Motion for Summary Judgment, Respondents focus exclusively – and for them, fatally – on a single provision of the Declaration rather than construing the entire document, which not only identifies the then-current Declarant by name, but also enshrines its right to have “assigns.” Respondents also neglect to reference their own admissions that Bull Point SC, LLC is the Declarant. For these reasons alone, the order of the trial court must be reversed.

The single provision on which Respondents rely is Section 1.01(j) of the Declaration, which states:

“Declarant” shall mean and refer to Bull Point, LLC which has executed this Declaration with respect to the Property and the Additional Property at the time of such transfer to said successor-in-title, or any party which acquires said Declarant’s entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant’s interest in the Property and the Additional Property.

(Declaration, ROA, 395).

In this case, Respondents and the trial order have failed abjectly to address the numerous provisions of the Governing Documents that also define clearly and unmistakably reference the Declarant's "assigns." As such, the trial order is fundamentally flawed by concluding that the only way Declarant rights could be assigned is via a single section of the Declaration to the exclusion of all others.

As referenced above, the Governing Documents state over one dozen times that the Declarant may have "assigns." Even the preamble states at length that the Declaration "shall touch and concern and run with the title to the real property subjected to this Declaration and shall be binding on all parties [including a Declarant] having any right, title or interest in the above described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns..." By contrast, Section 1.01(j) of the Declaration does not address "assignability" of Declarant Rights in any regard. For this reason alone, the trial court should have looked to the entire document at issue, and concluded that Declarant rights could be assigned as they had been in the past.

Nor is there anything unusual about a Declarant assigning its rights as a Declarant to a third party. South Carolina jurisprudence has long recognized that a contract or property right can be validly assigned in either law or equity. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (S.C. App. 2007), *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). It is axiomatic that an "interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights to causes of action." 5 S.C. Jur. *Assignments* § 2 (2006).

In fact, the Declaration and its amendments identify both GSI, LLC and Bull Point SC, LLC, in their respective turns, as Declarants. Section 1.01(k) notes that the "Declaration" shall include "all amendments thereof filed for record in the records of the RMC Office of Beaufort

County, South Carolina.” This includes the Seventeenth Amendment, filed with the RMC Office of Beaufort County on August 21, 2017 at 1:34 p.m., which identifies GSI, LLC as the Declarant. (Seventeenth Amendment, ROA, 518) The Declaration also includes the Eighteenth Amendment, which memorializes the assignment of all Declarant Rights from GSI, LLC to Bull Point SC, LLC, and which was filed with the RMC Office of Beaufort County on November 16, 2018. (Eighteenth Amendment, ROA, 69). For this reason alone, the Court must find that Bull Point SC, LLC is the Declarant.

In construing contracts, such as the Governing Documents, the Court’s “primary objective is to ascertain and give effect to the intention of the parties.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (S.C. App. 2007). “Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.” *Id.* “The parties’ intention must, in the first instance, be derived from the language of the contract.” *Id.* “To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Id.* at 498, 649 S.E.2d at 501. **“The parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.”** *Id.* at 498, 649 S.E.2d at 502 (emphasis added); *Cullen v. McNeal*, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (S.C. App. 2010). This is the most fatal flaw in the trial court’s order. In order to focus the attention of the trial court on Section 1.01(j) to the exclusion of all other provisions in the Declaration, Respondents directed the trial court to ignore the cardinal rule of contractual construction – the parties’ intention must be gathered from the contents of the entire agreement, and not from any particular clause. This is exactly why their proposed construction is unlawful.

Respondents, and the order adopted by the trial court, not only neglect to refer to the entire Declaration, rather than an isolated provision of the Declaration, they also mistakenly rely on *Highlands Prop. Owners Ass'n, Inc. v. Shumaker Land, LLC*, 397 S.C. 432, 724 S.E.2d 685 (S.C. App. 2012), to support their argument that the Declarant's Rights could not be assigned to GSI, LLC or to Bull Point SC, LLC. The covenants at issue in *Shumaker* are quite different from the Declaration at issue in the instant case. In *Shumaker*, the covenants required that an assignment of Declarant right could be effective "if the instrument of sale or assignment expressly so provides." Because the deed to Shumaker Land, LLC did not reference the rights of the Declarant, it did not receive an assignment of these rights.

No such requirement exists in the instant case.⁸ Instead, the applicable precedent in this case is *Cullen v. McNeal*, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (S.C. App. 2010), *cert. dismissed as improvidently granted*, 411 S.C. 270, 768 S.E.2d 401 (2015). In *Cullen*, the Court found that it was entirely appropriate for a successor-in-interest to assume the authority as a "Developer," or declarant, through an "Assignment of Developer's Rights." 390 S.C. at 487, 702 S.E.2d at 387 ("McNeal did not become a successor developer through a deed, but rather through the Assignment of Developer's Rights. The Developers also note McNeal was specifically identified as the successor developer by the grantor.") In the instant case, the "definition" of Declarant in Section 1.01(j) unsurprisingly names the entity that was the Declarant at the time of execution – Bull Point, LLC. It also references other ways that Declarant Rights might be transferred, but in no way restricts the Declarant from transferring Declarant Rights by assignment to another party. In fact,

⁸ Indeed, most if not all of Respondents were fully aware that the Declarant could – and did – transfer Declarant's Rights as of December 28, 2012. For that reason alone, they are estopped from challenging a transfer of Declarant Rights by the doctrine of laches, discussed below.

the Declaration does not forbid transfer of Declarant Rights by assignment, and actually references a Declarant's "assigns" on multiple occasions. Indeed, not only have Declarant Rights been assigned no fewer than three (3) times since December 2012, Respondents themselves organized a company whose primary purpose was to purchase the Declarant Rights for their own purposes. (Receipt for Purchase of Huspah Properties, ROA 371).

For these reasons alone, the Court should reverse the trial court's order.

B. THE COURT MAY ALSO RELY ON EVIDENCE IN THE RECORD TO DETERMINE THE RIGHTS OF THE PARTIES PURSUANT TO THE DECLARATION, INCLUDING BULL POINT SC, LLC'S RIGHT TO ACT AS THE DECLARANT.

Furthermore, the record before the Court establishes clearly that Bull Point SC, LLC is the Declarant. *Cullen*, 390 S.C. at 482, 702 S.E.2d at 384 ("While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties.").

In determining the rights of the parties pursuant to the Declaration, the trial court should have taken note of the following:

- As referenced above, three of the Respondents have, in this case, presented sworn affidavits to this Court identifying Bull Point SC, LLC as the Declarant.
- Respondents have referenced on multiple occasions their plan to "purchase" the Declarancy, and to "pursue a possible sale of the Declarancy to the Property Owners after the investors buy the Declarancy and Property from DB Aster..."
- The minutes of the Board of Directors Meeting of the Bull Point Property Owners Association on February 1, 2013, which were prepared by Respondent Russell Dimke, affirmatively acknowledge that the "**Declarant Rights as specified in the Bull Point Plantation Covenants have now been legally transferred from Bull Point LLC to DB Aster, LLC.**" This transfer was accomplished by an assignment of Declarant Rights from Bull Point, LLC to DB Aster, LLC. (emphasis added).

(ROA, 465).

The trial court failed to account for this record in any regard, and as in *Cullen*, it should have done so. For these reasons alone, the Court should reverse the trial court's order.

C. RESPONDENTS' ARGUMENT THAT TRANSFER OF DECLARANT RIGHTS CAN ONLY BE ACCOMPLISHED BY FORECLOSURE WHOLLY IGNORES SOUTH CAROLINA LAW AND THE VERY TERMS OF DECLARATION.

Respondents' argument that Bull Point SC, LLC – or, by extension, DB Aster, LLC – is not the Declarant because they did not acquire their predecessor's entire interest by foreclosure also fails. By focusing solely on one part of one provision of the Governing Documents, instead of the entirety of these documents, Respondents' interpretation of the meaning of these documents is fatally flawed from the start.

The standards for construing the meaning of a contract are well-established. As set forth above, the law of South Carolina demands that a court must derive the parties' intention from the language in the document itself. Contrary to the Respondents' effort to focus attention solely on a single provision of the document, the Court should instead derive the parties' intention from “the contents of **the entire agreement and not from any particular clause thereof.**” *Cullen*, 390 S.C. at 483, 702 S.E.2d at 385.

While it is certainly true that a party can obtain Declarant Rights by acquiring the existing Declarant's “entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to a foreclosure of a Mortgage encumbering said Declarant's interest in the Property and Additional Property,” as provided for in Section 1.01(j) of the Declaration, Respondents' faulty interpretation would require this Court to ignore over a dozen sections of the Declaration that specifically reference a Declarant's “assigns.” In essence, Respondents seek to deprive Bull Point SC, LLC of its rights as Declarant that it purchased from DB Aster, LLC by

asking this Court to affirm an order that (1) misapplied well-established South Carolina law and (2) ignored multiple sections of the documents.

Indeed, if Respondents' argument is taken to its logical conclusion, focusing entirely on Section 1.01(j) leads to the inevitable conclusion that Bull Point, LLC is the current Declarant. Taken in isolation, the provisions defines "Declarant" as either: (1) Bull Point, LLC which has executed this Declaration with respect to the Property and the Additional Property at the time of such transfer to said successor-in-title, or (2) "any party which acquires said Declarant's entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant's interest in the Property and the Additional Property." Because no party has – or even could – acquire the Declarant rights pursuant to the second named condition (through foreclosure on Bull Point's entire interest), if one looks solely to the provisions of Section 1.01(j), the current Declarant is Bull Point, LLC.

In any event, to grant Respondents' motion, the trial court had to (1) ignore years of an established course of dealing of which Respondents are fully aware, and (2) ignore the sworn statements of Respondents acknowledging that Bull Point SC, LLC is the Declarant. As set forth above, Respondents had been fully aware since 2012 that the Declarant Rights to the Bull Point development have been transferred by assignment, and have been assigned no fewer than three times since 2012. (ROA, 503, 509, and 522). Further, and most damaging to Respondents' argument, at least three of the Respondents stated in sworn affidavits filed in this action that Bull Point SC, LLC is the Declarant. (Affidavits of Russell Dimke, Gary Okey, and Peter W. Marzluff,

ROA, 526, 533, and 536). The trial court's order should not have abetted the attempt of Respondents to contradict their own prior sworn testimony.⁹

For these reasons alone, the Court should reverse the trial court's order.

D. RESPONDENTS ARE EQUITABLY ESTOPPED FROM ARGUING THAT BULL POINT SC, LLC IS NOT THE DECLARANT.

Even if Respondents' characterizations of the facts were accurate – which they are not – they are equitably estopped from arguing that Bull Point SC, LLC is not the Declarant.

The essential elements of equitable estoppel are divided between the estopped party (in this case, Respondents) and the party claiming estoppel (in this case, Bull Point SC, LLC). *Strickland v. Strickland*, 375 S.C. 76, 84–85, 650 S.E.2d 465, 470 (2007). The elements of equitable estoppel as related to the party being estopped are:

- conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- the intention that such conduct shall be acted upon by the other party; and
- actual or constructive knowledge of the real facts.

The party asserting estoppel must show:

- lack of knowledge, and the means of knowledge, of the truth as to the facts in question;
- reliance upon the conduct of the party estopped; and
- a prejudicial change of position in reliance on the conduct of the party being estopped.

⁹ *Coves Darden, LLC v Ibanez*, 2013 WL 12377622, at *2 (S.C.Com.Pl. Dec. 20, 2013); *Cothran v. Brown*, 357 S.C. 210 (S.C. 2004) (“[A] court may disregard a subsequent affidavit as a ‘sham,’ that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party’s own prior sworn statement.”)

375 S.C. at 84–85, 650 S.E.2d at 470; *Boyd v. Bellsouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

The record in this case clearly establishes that Respondents are estopped from arguing that Bull Point SC, LLC is not the Declarant.

- Respondents have specifically represented that Bull Point, LLC lawfully assigned its rights as Declarant to DB Aster, LLC, as in the approved Minutes of the February 1, 2013 Board of Directors Meeting, authored by Respondent Russ Dimke. (Minutes of the Board of Directors Meeting, ROA, 465).
- Respondents have specifically represented on numerous occasions that DB Aster, LLC was the Declarant, which would be an impossibility under the logic contained in their current argument or the order of the trial order. (Order dated November 18, 2019, ROA, 630).
- Respondents submitted these representations to Gavigan, upon which Gavigan (through GSI, LLC) relied and acted in completing the purchase of the property and Declarant's Rights at the Bull Point Development. (ROA, 450)

A straightforward application of these principals estops Respondents from now arguing – or the trial court from ordering – that GSI, LLC or its assignee, Bull Point SC, LLC, could not be the Declarant at the Bull Point development.

For these reasons, the Court should reverse the trial court's order.

II. DID THE TRIAL COURT ERR IN FINDING THAT THE DECLARANT OF BULL POINT PLANTATION DOES NOT HAVE THE RIGHT TO APPOINT THE BOARD OF DIRECTORS OF THE PROPERTY OWNERS ASSOCIATION?

A. AS DECLARANT, BULL POINT SC, LLC CLEARLY HAD THE RIGHT TO APPOINT AND REMOVE MEMBERS OF THE BOARD OF DIRECTORS OF BPPPOA.

Given the language of the Governing Documents and the undisputed practice of over twenty years, Respondents' argument that the Declarant does not have the right to appoint and remove members of the Board of Directors of the Association is especially baseless.

As indicated above, the Association's Articles of Incorporation not only wholly incorporate the Declaration "as if set forth verbatim," the Declaration clearly sets forth that its provisions **take precedence** over other provisions of the Articles of Incorporation, or the By-Laws. Declaration, Section 8.02. In two separate sections of the Declaration, 8.01 and 13.01, and in the clearest possible terms, the Declarant has the right to appoint or remove any member or members of the Board of Directors or any officer or officers of the Association.¹⁰

This result is the unremarkable and rather obvious result of looking to the language of the Governing Documents and giving effect to the "entire agreement and not from any particular clause thereof." *Cullen*, 390 S.C. at 483, 702 S.E.2d at 385.

Indeed, Respondents' unavailing reliance on S.C. Code § 33-31-206 is particularly curious, as the statute actually supports the conclusion that the Articles of Incorporation control the issue at hand. The statute explicitly states as follows:

- (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
- (b) The bylaws may contain any provision for regulating and managing the affairs of the corporation **that is not inconsistent with law or the articles of incorporation**.

(emphasis added). Similarly, regarding election, designation, and appointment of directors, South Carolina's Non-Profit Corporation Act provides as follows:

If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected at the first annual meeting of members, and at each annual meeting thereafter, **unless the articles or bylaws provide some other**

¹⁰ In this regard, the trial court's order conflating the Declaration with the By-Laws (Order dated November 18, 2019, ROA, 630 is especially incomprehensible.

time or method of election, or provide that some of the directors are appointed by some other person or designated.

S.C. Code Ann. § 33-31-804(a) (emphasis added). For this reason alone, the Association's Articles of Incorporation – which explicitly incorporate the Declaration – control over the By-Laws. In turn, the Declaration provides for the “Declarant to retain the right to appoint and remove any member or members of the Board of Directors of the Association by and for the term set forth in Section 8.01 hereof.”

Furthermore, to the extent the Court wishes to review evidence regarding over twenty years of prior practice at Bull Point Plantation – all of which was well known and accepted by Respondents – it is undisputed that Respondents themselves have acknowledged that the Declaration specifically provides that “for 25 years the Declarant has the power ‘to appoint and remove all POA Board members.’” (ROA, 379); *Cullen*, 390 S.C. at 482, 702 S.E.2d at 384 (“While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties.”).

Indeed, even a cursory review of the minutes of Annual Meetings indicate, again and again, that Respondents were fully aware of the process by which the Declarant appointed Board members and Officers of the Association and its predecessors, and actually participated in this process. In this regard, Respondents' claims appear to be subject to dismissal under the doctrine of laches. “Laches” is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (S.C. App. 2004) (quoting *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (S.C. App. 1999)). “Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show

prejudice.” *Gordon*, 358 S.C. at 612, 595 S.E.2d at 871 (quoting *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (S.C. App. 2001)); *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 359, 628 S.E.2d 902, 912 (S.C. App. 2006). In the instant case, Respondents have acknowledged the right of the Declarant to appoint Officers and Directors for over twenty years. Laches bars Respondents from now seeking to injure the Declarant by now seeking belatedly to rob it of the right to appoint Officers and Directors.

For these reasons, the Court should reverse the trial court’s order.

III. DID THE TRIAL COURT ERR IN ORDERING INJUNCTIVE RELIEF THAT WAS NOT THE SUBJECT OF THE MOTION FOR SUMMARY JUDGMENT OR ADDRESSED AT THE UNDERLYING HEARING?

A. THE TRIAL COURT’S ORDER MUST BE AMENDED OR ALTERED BECAUSE IT GRANTS REMEDIES NOT RAISED IN RESPONDENTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, AND RULES ON CAUSES OF ACTION THAT WERE NOT A PART OF RESPONDENTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT.

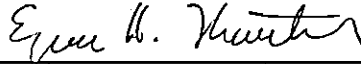
The Order grants Respondents’ demand that this Court issue findings and order remedies on causes of action that have never been heard before the Court, which (1) grant a Declaratory Judgment under the First Cause of Action, (2) grant a Declaratory Judgment under the Second Cause of Action, (3) grant a Declaratory Judgment under the Seventh Cause of Action, (4) grant a Declaratory Judgment under the Eighth Cause of Action, and (5) enact far-reaching equitable remedies not addressed at the hearing, which would involve a motion not yet heard by the Court, and which, as set forth below, would themselves be illegal. (Order dated November 18, 2019, ROA, 630).

In so doing, the Order (1) ruled on a putative motion for preliminary injunction without so much as a cursory hearing to permit Appellants to submit their own evidence to refute Respondents' claims, and (2) fashioned equitable remedies out of whole cloth that deprived the Defendants of their rights to be heard. To borrow from the maxims of administrative law, "[b]y silently reserving the right to not only reject the Hearing Officer's factual findings and rulings but to make its own findings without notice, hearing, or any further opportunity for input, the Commissioner undermined its own ad hoc procedure. A party is not entitled to a hearing at each stage of agency review, but a meaningful hearing must occur at some stage." *McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 445, 823 S.E.2d 193, 196 (S.C. App. 2018) (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68–69, 492 S.E.2d 62, 71–72 (1997)) (emphasis added). By adopting the provisions of the proposed order submitted by Respondents, the trial court failed to provide Respondents with a meaningful opportunity to be heard on these matters.

For these reasons, the Court should reverse the trial court's order.

CONCLUSION

For the forgoing reasons, this Court should reverse the trial court's decision, and direct to grant the relief requested by Respondents in their Motion for Partial Summary Judgment.



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August 31, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

SEP 02 2020

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No.: 2019-002038

John H. Attridge and Janet L. Attridge, Robert W. Bankov, Virginia J. Bankov, Tom Bolton, Guy I. Collier, Nancy L. Collier, Richard Jay Coleman, Marlene Coleman, Russell G. Dimke, Sandra A. Dimke, James G. Goodwin, Jr., Carol A. Goodwin, George J. Lovett, Wilna W. Lovett, Peter Marzluff, Deborah C. Marzluff, Gary Okey, Nancy Okey, Michael Pellecchia, Janice S. Pellecchia, Frank H. Roberts, Sr., Richard Swilpa, Michele Gallant, Phyllis A. Kaupp-Seas, Robert P. Brendza, and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Plantation Property Owners Association

..... Respondents,

vs

The Board of Directors of Bull Point Plantation Property Owners Association, Inc., Bull Point Plantation Property Owners Association, Inc., Bull Point SC, LLC, William E. Gavigan, Michael Carey, Christopher J. Quick, James Riordan; DB Aster, LLC; and GSI, LLC,

..... Defendants/Counterclaimants,

Of which Bull Point SC, LLC, William E. Gavigan, Michael Carey, Christopher J. Quick; James Riordan; and GSI, LLC are

..... Appellants

And

Bull Point, SC, LLC, and William E. Gavigan,

..... Third-Party Plaintiffs/Appellants,

vs

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriett Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezvy, Rivers Reach at Pocotaligo, LLC, Rivers Reach Realty, LLC, and Jon Does 1-10, Third-Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies, that this Final Brief complies with Rule 211(b), SCACR.

Dated this 31st day of August, 2020.

Respectfully submitted,

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