

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Carmen Mullen, Circuit Court Judge

SC Court of Appeals

Appellate 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 K. Kaupp-Seas, Robert P. Brendza and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Property Owners Association, Inc.

..... Respondents,

v.

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,

v.

Joseph P. D'Ambrosio, Mary D'Ambrosio, Michael Powers, Harriet Bosiack, Robert Wolfson, James Hayes, Steve Andrews, Ron Lambe, Dave Prezvys, Rivers Reach at Pocotaligo, LLC, Rivers Reach Realty, LLC and John Does 1-10,

..... Third-Party Defendants.

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**COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Did the circuit court properly grant Respondents' Motion for Partial Summary Judgment by finding that Bull Point SC, LLC is not and never was the "Declarant" of Bull Point Plantation?

**Suggested Answer: YES.**

2. Did the circuit court properly grant Respondents' Motion for Partial Summary Judgment by finding that even if Bull Point SC, LLC was the Declarant of Bull Point Plantation, it did not have the authority to appoint the Board of Directors of the Property Owners Association?

**Suggested Answer: YES.**

3. Did the circuit court properly order injunctive relief?

**Suggested Answer: YES.**

## COUNTERSTATEMENT OF THE CASE

Bull Point Plantation is a residential community in Beaufort County, South Carolina, established in 1995. In 2011 the developer and declarant, Bull Point, LLC, defaulted on its development loan. In 2012 it filed for bankruptcy protection, surrendered most of its remaining property through foreclosure to its lender's assignee, German American Capital Corporation, Inc., and executed an assignment of its declarant's rights to German American Capital's affiliate, DB Aster, LLC. Some five years later, in August, 2017, DB Aster sold its remaining property and attempted to sell the declarant's rights to Defendant/Appellant GSI, Inc., which then executed another assignment of the declarant's rights to Defendant/Appellant Bull Point SC, LLC. The question presented in this case is whether Bull Point SC, LLC could purchase the declarant's rights of the original developer, in particular the declarant's right to appoint the board of directors of the Bull Point Plantation property owners' association and the declarant's right to amend the Declaration of Covenants, Conditions and Restrictions ("Declaration"). Bull Point SC, LLC used these rights, among other ways, to take over management of the Bull Point Plantation property owners' association and to take control of the association's funds, including the sizeable contingency fund that the association had saved over the years. The circuit court correctly found that the Bull Point Plantation Declaration does not allow these declarant's rights to be bought and sold as commodities. Indeed, the Declaration's limitation on assignment of the declarant's key rights was undoubtedly intended to prevent precisely what prompted this lawsuit – the property owners' association being taken over by a real estate speculator intent on using the association's money to fund its development efforts.

Respondents commenced this action on December 3, 2018, seeking declaratory and injunctive relief to prevent Bull Point SC, LLC and the property owners' association board of

directors that it appointed from seizing control of the association's contingency fund. Plaintiffs initially alleged that the Defendants were breaching their fiduciary duties to the association by misusing the association's funds and by disbanding the association's contingency fund oversight committee so that Defendants could control those funds themselves. The Plaintiffs subsequently amended their Complaint to allege that Bull Point SC, LLC was never in fact the Declarant and that its actions, including appointing the board of directors and amending the Declaration to eliminate the contingency fund oversight committee, were invalid.

On October 15, 2019, the circuit court heard cross motions for partial summary judgment. On November 18, 2019 she issued her order finding, among things, that Bull Point SC, LLC was never the Declarant and, even if it was, it did not have the authority to appoint the property owners' association's board of directors. On December 10, 2019 the court denied Defendants' motion to alter or amend. On December 10, 2019, Defendants filed their Notice of Appeal of the circuit court's order. Defendants have not sought a stay of the order pending appeal.

## ARGUMENTS

### I. STATEMENT OF FACTS

#### A. The Articles of Incorporation, the Declaration, and the Bylaws

Bull Point Plantation is a private waterfront community located in Seabrook in Beaufort County, South Carolina. On September 26, 1995, the Bull Point Homeowners Association, Inc. (the “Association”).<sup>1</sup> was incorporated by filing Articles of Incorporation with the South Carolina Secretary of State. (R. pp. 239-243). In addition to the standard Nonprofit Corporation Articles of Incorporation form, this document includes a typewritten “Articles of Incorporation, Bull Point Homeowners Association, Inc.” The document contains ten articles that establish the framework of the Association. Section 6 sets out the establishment and maintenance of the Board of Directors. It lists the initial three members of the Board of Directors by name. It then proceeds to prescribe the selection of future Directors. Beginning with the first annual meeting, the members of the Association were to elect Directors in staggered terms (e.g., one Director for a one (1) year term, one Director for a two (2) year term, and one Director for a three (3) year term). By the fourth annual meeting, the Association’s members were supposed to be electing members of the Board of Directors every year for one (1) year terms. (R. p. 242). The Articles of Incorporation make no provision for anyone else to elect, appoint, or remove the Association’s Directors.

A “Declaration of Covenants, Conditions and restrictions for Bull Point Plantation” (hereinafter the “Declaration”), was first recorded in 1995 and substantially revised in 2000. It has been amended numerous other times as well. Among other things, the Declaration defines “Declarant” and sets out the Declarant’s rights. The Declaration defines “Declarant” as follows:

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<sup>1</sup> The name was changed twice and is currently Bull Point Plantation Property Owners Association, Inc. (hereinafter the “Association”).

“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.

(R. p. 394-438). The Declaration conflicts with the Articles of Incorporation in one important respect, by providing that the Declarant has the authority to appoint and remove members of the Board of Directors. (R. pp. 414, 432; Sections 8.01 and 13.01). The Declaration purports not to give the Association’s members the right to elect Directors until the Declarant’s rights expire. (R. p. 432; Section 13.01). As will be shown later, when there is any conflict between governing documents (e.g. the Articles and the Declaration), the South Carolina Nonprofit Corporation Act, S.C. Code Ann. §33-31-10 *et seq.*, resolves the conflict in favor of the Articles of Incorporation.

**B. Bull Point SC, LLC’s Purchase and Claim as the Declarant**

Bull Point, LLC<sup>2</sup> was the original developer and “Declarant” of Bull Point Plantation. Bull Point, LLC was eventually unable to meet its financial obligations and filed for bankruptcy protection. Most, but not all, of Bull Point, LLC’s remaining property in Bull Point Plantation was foreclosed upon and sold at public auction on January 23, 2012, wherein the lender’s assignee, German American Capital Corporation (“GACC”) submitted a successful credit bid of \$5.3 million dollars. On July 9, 2012, GACC acquired most of Bull Point, LLC’s real estate interests in Bull Point Plantation. (R. pp. 255-271; Deed by Judicial Order). GACC simultaneously assigned its bid to its affiliated company, DB Aster, LLC. (R. p. 271). On December 28, 2012, Bull Point

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<sup>2</sup> Bull Point, LLC is unrelated to Appellant Bull Point SC, LLC and, until recently, the two entities had separate ownership. After he acquired DB Aster’s interests in Bull Point Plantation, Appellant William Gavigan acquired Bull Point, LLC which was then an inactive shell corporation. Appellant William Gavigan is also the sole member of Appellant Bull Point SC, LLC.

LLC purported to assign to DB Aster, LLC its Declarancy Rights. The purported assignment was recorded on January 8, 2013. (R. pp. 273-276; Assignment of Rights Under Declaration).

About three years later, on or about February 23, 2016, DB Aster entered into a contract with GSI, LLC, (“GSI”) a Gavigan-owned entity, to sell its remaining Bull Point Plantation property. On or about June 7, 2016, DB Aster declared GSI, LLC in default under the contract. Litigation ensued between GSI, LLC and DB Aster. The parties entered into a new contract on August 9, 2017, and the suit was dismissed on August 10. On August 21, 2017, GSI purchased the property owned by DB Aster for \$1.2 million. Title was conveyed by Limited Warranty Deed. Also, on August 21, 2017 a document was recorded which purported to assign all Declarant’s rights from DB Aster to GSI, LLC. (R. pp. 509-516; Assignment and Assumption of Declarant’s Right). On the same day, GSI, LLC executed an “Assignment of Rights Under Declaration” to Bull Point SC, LLC. (R. pp. 522-524).

Critically, Appellant Bull Point SC, LLC did not acquire the entire interest of the original Declarant, Bull Point, LLC. In fact, it did not acquire the entire interest of the original Declarant’s successor, DB Aster, LLC. It did not even acquire the entire interest of DB Aster’s immediate successor in title, GSI, LLC. As noted above, DB Aster obtained some, but not all, of Declarant Bull Point LLC’s Bull Point Plantation property from its affiliate, GACC, which acquired that property through foreclosure in July 2012. DB Aster did not sell that entire interest to GSI, LLC, however. Between July 2012 and August 21, 2017, when it sold its interest to GSI, LLC, DB Aster made a conveyance of property to the Association (R. pp. 310-314). It also sold at least five individual lots (R. pp. 316-335). In other words, GSI did not acquire the entire former interest of the original Declarant, which the Declaration requires in order to become the Declarant.

Nor did GSI convey *its* entire interest to the Appellant Bull Point SC, LLC. On September 1, 2017, GSI, LLC conveyed a parcel, Lot 260 of Phase V-B, “that being a portion of that same property conveyed to GSI, LLC by DB Aster, LLC ...”, to Craig Elachie, LLC (R. pp. 337-339). Further, GSI, LLC still owns a parcel, Lot 170 located at 87 Barnaby Bluff. (R. p. 341). Thus, Appellant Bull Point SC, LLC did not acquire the entire interest of GSI, LLC, let alone the entire interest of the Declarant Bull Point, LLC.

Equally important, Appellant Bull Point SC, LLC did not obtain *any* interest in Bull Point Plantation pursuant to foreclosure of a mortgage, which is another requirement that the Declaration imposes upon a would-be successor Declarant. A chronology showing the foregoing transactions is included at R. pp. 343-348.

Nevertheless, in August 2017 Appellant Bull Point SC, LLC began claiming it was the Declarant and began to exercise the Declarant’s rights, among other ways by purporting to remove and appoint the members of the Board of Directors of the Association, including appointing Appellant Gavigan as President; by unilaterally purporting to amend the Declarations to eliminate the contingency fund oversight committee; and by not paying assessments on the Lots that it owned individually or through related entities.

**C. Procedural History**

Respondents filed this action for a Declaratory Judgment, Injunctive Relief, and Accounting on December 3, 2018 after Defendants seized control of the Association’s contingency fund, which had historically been safeguarded by an elected group of Association members unaffiliated with the Declarant. (R. pp. 1-17). Respondents filed an Amended Complaint on June 13, 2019, alleging that Appellant Bull Point SC, LLC was not the rightful Declarant and that its actions as such were invalid. (R. pp. 97-122). Respondents filed a Motion for Partial Summary

Judgment and a Memorandum in Support on July 2, 2019. (R. pp. 216-237). In their Motion for Partial Summary Judgment, Respondents asked the circuit court to declare (1) that Appellant Bull Point SC, LLC is not and never was the Declarant and/or (2) even if it was the Declarant, Bull Point SC, LLC did not have the authority to appoint the Association's Board of Directors. Respondents asked the circuit court to declare that all of the actions taken by Bull Point SC, LLC and its appointed Boards of Directors, were void. Defendants filed their own cross Motion for Partial Summary Judgment, asking for a declaration that Bull Point SC, LLC was the Declarant and that it had the authority to appoint and remove members of the Association's Board of Directors. (R. pp. 349-369).

A hearing was held on October 15, 2019. On October 28, 2019, the circuit court announced that it would grant Respondent's Motion for Partial Summary Judgment and requested a proposed order from Plaintiffs.<sup>3</sup> (R. p. 623). After Respondents submitted their proposed order on November 5, 2019, Defendants objected via letter dated November 12, 2019 whereby, among other things, they claimed for the first time that *Bull Point, LLC* is still the Declarant. (R. pp. 624-629). On November 18, 2019, the circuit court entered an Order granting Respondents' Motion for Partial Summary Judgment and denying Defendants' Motion for Partial Summary Judgment. The circuit court held that (1) Bull Point SC, LLC was not and never was the Declarant and (2) regardless of the who is or was the Declarant, the Association's members have the sole authority to elect the Association's Board of Directors. To effectuate its holdings, the circuit court (1) declared that Bull Point SC, LLC is not and never was the Declarant and all actions it took as

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<sup>3</sup> Appellants continue to argue this position in this appeal, asking this Court to reverse the circuit court's finding that Bull Point SC, LLC is not the Declarant while also arguing that Bull Point, LLC is the Declarant. See Appellant's Brief at p.21. The question whether Bull Point, LLC might be the Declarant was not before the court and is not germane to this appeal. Bull Point, LLC is not a party to the case and no pleading asks the court to find that Bull Point, LLC is the Declarant. The circuit court was not called upon to -- and did not -- make any finding as to whether Bull Point, LLC might still be the Declarant.

purported Declarant, including appointing the Board of Directors and amending the Declaration, are void; (2) ordered that Plaintiffs appoint an interim Board of Directors to serve until the Association's members could hold an election of a new Board; (3) ordered that Defendants must immediately relinquish control over the Association's savings account ("Contingency Fund"); and (4) enjoined Defendants from: (a) serving on the Association's Board of Directors unless duly elected; (b) taking actions in further governance of the Association; (c) occupying the offices in the Association's clubhouse; and (d) exercising any control over the Association's funds. After the circuit court denied Defendants' Motion to Alter or Amend Judgment following a hearing, Defendants filed a Notice of Appeal.

## II. STANDARD OF REVIEW

"Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous." MCG Management of Charleston, Inc. v. Kinghorn Ins. Co., 336 S.C. 542, 546 520 S.E. 2d 820, 822 (Ct. App. 1999). See also S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (stating the determination of whether a contract's language is ambiguous is a question of law); Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co., 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (stating the construction and enforcement of an unambiguous contract is a question of law for the court and thus can be properly disposed of at summary judgment); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (defining an ambiguous contract as one where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011) ("When the language of a contract is clear, explicit, and unambiguous, the

language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning.” “The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties *as shown by the agreement*, governs.” Forest Land Co. v. Black, 216 S.C. 255 57 S.E.2d. 420 (1950) (emphasis added).

Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRPC. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452 548 S.E.2d 868, 874 (2001). When faced with cross motions for summary judgment, the issue before the court should be decided as a matter of law. Buchanan v. The S.C. Prop. & Cas. Ins. Guar. Ass'n, 417 S.C. 562, 566, 790 S.E.2d 783, 785 (Ct. App. 2016), aff'd as modified sub nom. Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 424 S.C. 542, 819 S.E.2d 124 (2018), citing Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

### **III. THE CIRCUIT COURT CORRECTLY RULED THAT BULL POINT SC, LLC IS NOT AND NEVER WAS THE DECLARANT**

The parties agree that the language of the Declaration determines who, if anyone, is the Declarant of Bull Point Plantation. The Declaration defines “Declarant” as follows:

“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.

(R. p. 395). Accordingly, to become the Declarant, one must do two things: (1) acquire Bull Point, LLC's entire interest in Bull Point Plantation and (2) do so by foreclosure of a mortgage. As shown in the factual recitation above and as admitted by Defendants, Bull Point SC, LLC did not

acquire any of the interest – let alone the entire interest (see the following section) -- of the original Declarant, Bull Point, LLC through foreclosure. GACC acquired most of the interest of Bull Point, LLC through foreclosure after Bull Point, LLC filed for bankruptcy. GACC then assigned its interests to its affiliate, DB Aster, LLC. DB Aster conveyed some property and then later sold its remaining interest to GSI, LLC (owned by Appellant Gavigan) at arm's length for \$1.2 million. GSI, LLC then assigned its interests to Bull Point SC, LLC. Appellant Gavigan owns GSI, LLC and Bull Point SC, LLC, but neither were related in any way to GACC or DB Aster. In fact, Bull Point SC, LLC litigated against DB Aster over the sale. Bull Point SC, LLC thus acquired none of its interest in Bull Point Plantation through foreclosure of a mortgage. This fact alone disqualifies Bull Point SC, LLC as the Declarant as defined in Section 1.01(j) of the Declaration.

Additionally, Bull Point SC, LLC did not acquire Bull Point, LLC's *entire* interest. Defendants have admitted this critical fact. See Appellant's Brief at p.8 ("The original Declarant, Bull Point, LLC, lost most of their interest – but not their entire interest – in Bull Point in 2012."). If any more were needed, the chain of title shows that Appellant Bull Point SC, LLC did not acquire the entire interest of the original Declarant, Bull Point, LLC. In fact, it did not acquire the entire interest of the original Declarant's successor, DB Aster, LLC. It did not even acquire the entire interest of its immediate predecessor in title, GSI, LLC. As noted above, DB Aster obtained some, but not all, of Declarant Bull Point LLC's Bull Point Plantation property from its affiliate, GACC. DB Aster did not sell that entire interest to GSI, LLC, however. Between July 2012 and August 21, 2017, when it sold its interest to GSI, LLC, DB Aster made a conveyance of property to the Association (R. pp. 310-314). It also sold at least five individual lots (R. pp. 316-335). Therefore, GSI did not acquire the entire former interest of the original Declarant. This fact too disqualifies Bull Point SC, LLC as the Declarant as defined in Section 1.01(j) of the Declaration.

The Declaration's limitation on the assignment of the key Declarant rights is undoubtedly intentional. The original developer would have expected to see the development of Bull Point Plantation through to maturity and then hand control over to the property owners. Yet, its lender would require the ability to acquire control of the development if it had to foreclose on its mortgage. Thus, the Declaration allows a foreclosing lender – but nobody else – to succeed to the Declarancy. The developer would not have wanted to subject future Bull Point Plantation property owners to what happened here, a real estate speculator seizing control of the property owners' association and using its money to fund its development efforts.

Defendants attempt to overcome their inability to meet the definition of Declarant contained in Section 1.01(j) of the Declaration by pointing to other parts of the Declaration which make reference to the Declarant's "assigns." Defendants argue that, because the Declaration includes the word "assigns" at various places, the Declarant rights must be freely assignable despite what Section 1.01(j) says. But the Declarant rights are not freely assignable. They are assignable only if the other terms of the Declaration are strictly complied with. "Restrictive covenants<sup>4</sup> are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." Hardy v. Aiken, 631 S.E.2d 539, 369 S.C. 160 (S.C. 2006). The transferability of Declarant's rights depends on whether the Declarations make them transferable.

Highlands Prop. Owners Ass'n, Inc. v. Shumaker Land, LLC, 397 S.C. 432, 724 S.E.2d 685 (Ct. App. 2012) is directly on point. Like this case, Highlands involved a dispute between property owners and a developer hinging on whether the developer was in fact the Declarant. In

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<sup>4</sup> The Declarations are, of course, covenants. Their full title is "Declaration of Covenants, Conditions and Restrictions of Bull Point Plantation."

deciding this issue, the Court of Appeals looked to the language of the association's declarations and the definition of "Declarant", which was as follows:

"Declarant" shall mean and refer to HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of Declarant to any portion of the Properties by sale or assignment of all of the interests of the Declarant in the Properties, *if the instrument of sale or assignment expressly so provides...*

397 S.C. at 437, 724 S.E.2d at 687 (emphasis by the Court). The developer/putative Declarant had acquired certain lots from the prior Declarant through a deed that did not refer to or assign the Declarant rights. The transfer of Declarant rights occurred fourteen months later through a separate assignment document. The association members, pointing to the fact that the deed did not expressly provide for a transfer of Declarant rights, took the position that the developer/putative Declarant was in fact not the Declarant under the definition in the declarations. This is exactly the situation here. In applying the above definition, the Highlands Court recognized the issue as one of contract law:

"The law in this state regarding the construction and interpretation of contracts is well settled." Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect. Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, "[w]here an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

397 S.C. at 437, 724 S.E.2d at 687. In applying the above principles, the Court first found the definition of "Declarant" to be unambiguous. The Court then went on to apply the definition of Declarant, looking to the plain language of the definition:

We find the Covenants, when read in their entirety, support a finding that Shumaker LLC is not the Declarant. As noted previously, Article I, Section 7 of the Covenants defines Declarant as the "HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of

Declarant . . . by sale or assignment of all of the interests of the Declarant in the Properties, *if the instrument of sale or assignment expressly so provides.*” [emphasis by the Court]. HDLP, as the original Declarant under the Covenants, conveyed the property to Shumaker on July 28, 2006. The deed to Shumaker does not reference any rights held by HDLP as Declarant, nor does the deed purport to transfer any of those rights to Shumaker. Because the deed does not expressly convey the Declarant’s rights to Shumaker upon taking title to the seven lots, Shumaker does not qualify as a Declarant under Article I, Section 7 of the Covenants.

397 S.C. at 437, 724 S.E.2d at 688. In other words, the purported assignee of the Declarant rights was not the Declarant because the purported assignment agreement did not meet the requirements set out in the declaration’s definition of Declarant.

As the Highlands decision demonstrates, under South Carolina law the definition of “Declarant” must be strictly observed and all requirements for transfer of Declarant’s rights complied with. In this case, the definition requires that a successor: (1) Acquire the original Declarant’s entire interest and (2) do so by foreclosure. The Appellant Bull Point SC, LLC did not meet either of these requirements.

Returning to Defendants’ argument that the Declaration allows for the Declarant to have “assigns,” Respondents agree. Bull Point, LLC, or any other Declarant, can have assigns. The Declaration expressly identifies certain rights of the Declarant that are freely assignable. As just one example, Section 3.05 of the Declaration provides that “[d]uring the period that Declarant owns any Lot primarily for the purpose of sale or has the unexpired option to add the Additional Property or any portion thereof to the Development, *Declarant shall have an alienable and transferable right and easement on, over, through, under, and across the Common Areas for the purpose of construction Dwellings and other improvements . . . .*” (R. p. 401) (emphasis added). See also Section 3.07 (easements for utilities); Section 3.09 (maintenance of signs, sales offices, construction offices, etc.); Section 3.11 (maintenance easement); and Section 3.12 (environmental

easement); (R. pp. 402-404). Some Declarant rights, which are not at issue in this case, unquestionably are assignable by the Declaration's express terms. But the Declaration does not permit assignment of the rights that are at issue in this case, including the right to amend the Declaration and the right to appoint the directors of the Association. Only the Declarant can exercise these rights, and only if it meets the Declaration's definition of Declarant.

Defendants argue that Highlands Prop. Owners Ass'n v. Shumaker Land, LLC, is inapplicable because the definition of "Declarant" is different from this case. While that is correct, the relevant principle from the holding of Highlands is that one cannot be a Declarant unless one meets the definition of the Declarant contained in the governing documents, whatever that definition may be. Just like the purported declarant in Highlands, Bull Point SC, LLC does not meet the definition of a Declarant, so it is not and has never been the Declarant.

Instead of Highlands, Defendants believe 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) is controlling because it permitted assignment of declarant's rights. That decision is entirely consistent with Highlands, however. In Cullen, as it did in Highlands, the Court of Appeals looked to the definition of declarant (or "developer" in that case) contained in the declarations. In Cullen the definition of developer recognized two different ways that the developer's rights could be transferred. The definition of developer included either a successor-in-title or a successor-in-interest to the original developer. The Court of Appeals held that the putative developer qualified under the declaration's definition of developer even though it was not the successor-in-title, because it was the successor-in-interest by assignment. By contrast, the Declaration in this case provides only one way for a successor to acquire the Declarant's rights, and Bull Point SC LLC did not acquire the rights that way. The definition requires that a successor

acquire the original Declarant's entire interest by foreclosure. The Appellant Bull Point SC, LLC does not meet this requirement.

Even if the Declaration was ambiguous – which it isn't – the circuit court would have been right to construe it in favor of the homeowners, since the Declaration comprises restrictive covenants burdening the Association's members' properties. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication, Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956), and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property. Davey v. Artistic Builders, Inc., 263 S.C. 431, 211 S.E.2d 235 (1975)." Hamilton v. CCM Inc. 263 S.E.2d 378, 274 S.C. 152 (1980). It would be odd indeed for governing documents to allow an outside investor to seize control of a more than twenty-year old property owners' association to the detriment of the homeowners who had built a mature, financially self-sufficient residential community.

Next, Defendants contend that Plaintiffs should be estopped to deny that Bull Point SC, LLC is the Declarant because some of the Plaintiffs submitted affidavits in this case in which they refer to Bull Point SC, LLC as the Declarant. These affidavits are not inconsistent with the position the Plaintiffs have taken from the outset of this litigation. In the original Complaint filed on December 3, 2018 – before the affidavits were submitted – the Respondents alleged, at paragraph 3, "Bull Point SC, LLC ('Declarant') is a separate Limited Liability Company incorporated under the laws of South Carolina and is currently the purported declarant of the Bull Point Plantation (although it does not meet the definition of Declarant under the Declarations)." The affidavits' references to Bull Point SC, LLC as the Declarant are consistent with the Plaintiffs' contention in this case that Bull Point SC, LLC was *claiming* to be the Declarant.

Plaintiffs also point to various past meeting minutes and other documents in which some of the Plaintiffs referred to the assignment of the Declarant's rights. However, those references were to DB Aster, not to Bull Point SC, LLC. DB Aster acted as the Declarant and was recognized as such. The question whether DB Aster was actually the Declarant is not before the court.

Finally, Defendants argue that because some of the Plaintiffs, through another entity, Huspah Properties, LLC, in the past attempted to purchase the Declarant rights from Bull Point, LLC, Plaintiffs must agree that the rights were and are assignable. It is true that in the wake of Bull Point LLC's bankruptcy, a number of Bull Point Plantation homeowners, including some of the Plaintiffs herein, investigated options for protecting the development from any developer who might not have the community's best interests in mind. One of the options they considered was to attempt to purchase the Declarant's rights. However, they never actually attempted to do so, and they do not allege in this litigation that they could have done so. Their past exploration of the feasibility of acquiring the Declarant rights should not estop them and the other Plaintiffs from requiring Defendants to comply with the Declaration.

Defendants also claim that Bull Point SC, LLC must be the Declarant because the Seventeenth Amendment to the Declaration identifies GSI, LLC as the Declarant and the Eighteenth Amendment memorializes the purported assignment of Declarant rights from GSI to Bull Point SC, LLC. This argument is circular, as these amendments were made by Defendants GSI and Bull Point SC, LLC, who claimed to be the Declarants at the time. They do not cure either entities' failure to meet the definition of Declarant.

This appeal concerns the assignability of the Declarant's control rights, including the rights to appoint the directors of the Association and to amend the Declaration. It is these rights that confer control over the Association and its money. The appeal does not concern the assignability

of Declarant rights such as access easements appurtenant to real property. As noted above, the Declaration's limitation on assignability of Declarant's control rights is not a mere technicality but was obviously intentional on the part of the original developer. The developer clearly did not intend for the Declarant's rights to be bought and sold as a commodity, which would threaten the very integrity of the Bull Point Plantation community. Indeed, the actions of Plaintiffs alleged in the Amended Complaint would exemplify the adverse consequences of freely assignable Declarant's rights.

For the foregoing reasons, Respondents request that this Court affirm the circuit court's ruling that Appellant Bull Point SC, LLC is not and never was the Declarant of Bull Point Plantation.

**IV. THE CIRCUIT COURT CORRECTLY RULED THAT, REGARDLESS OF WHO THE DECLARANT IS, THE ASSOCIATION'S MEMBERS HAVE ALWAYS HAD THE SOLE AUTHORITY TO ELECT ITS BOARD OF DIRECTORS**

Even if Appellant Bull Point SC, LLC were the Declarant, it does not have the power to appoint the Association's Board of Directors even though the Declaration appears at first blush to give it that right. That authority is exclusively held by the Association's members.

The South Carolina Nonprofit Corporations Act of 1994 S.C. Code Ann §33-31-10 *et seq* (the "Act") governs mutual benefit corporations including the Association. The Declaration provides – as it must -- that South Carolina law governs any conflicts in its interpretation. The Act in turn resolves conflicts among governing documents in favor of the articles of incorporation. Section 33-31-206 provides:

- (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.*

The Code defines "bylaws" as any governing document other than the articles of incorporation:

“‘Bylaws’ means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated.” S.C. Code Ann. §33-31-104(4). The Official Comments to §33-31-104 state, “The term ‘bylaws’ has a particularly expansive definition. The term refers to the code or codes of rules, other than the articles, adopted for regulation or management of corporate affairs regardless of the name by which such rules are designated.” Accordingly, Bull Point’s Declaration is one of its “bylaws” for purposes of the Act. The Act allows the Declarations to contain any provision for the operation of the Association that does not conflict with the law or with the Articles of Incorporation.

The Bull Point Plantation Declaration conflicts with the Articles of Incorporation in one important respect. The Articles of Incorporation provide for the election of the Board members by the members of the Association, whereas the Declaration purports to allow the Declarant, during the term of the Declarancy, to appoint and remove the members of the Board. As shown in the statement of Facts above, the Association’s Articles of Incorporation provide that its members shall elect its Board of Directors:

At the first annual meeting, the members shall elect one (1) Director for a term of one (1) year, one Director for a term of two (2) years and one (1) Director for a term of three (3) years. At each annual meeting thereafter, the members shall elect one (1) Director for a term of one (1) year.

This provision is inconsistent with the Declaration/Bylaws, which purport to allow the Declarant to appoint and remove members of the Board of Directors:

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 to 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.

(capitalization in original). However, the Declaration/Bylaws also (in addition to the Act itself), provides that the Act takes precedence in the event of a conflict among the governing documents:

Duties and Powers. The duties and powers of the Association 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 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). Thus, the Declaration expressly conforms itself to the Act, which expressly conforms the Declaration to the Articles of Incorporation. The Board of Directors of the Association must therefore be elected by the members, not appointed by the Declarant.<sup>5</sup>

Defendants attempt to avoid this result by claiming that the Declaration and the Articles of Incorporation are the same document and, therefore, the provision in the Declaration which conflicts with the Articles should prevail. The full text of the provision of the Articles to which Defendants cite is from Paragraph 3(a), which states:

3. The Association does not contemplate pecuniary gain or profit to the members thereof, and the specific performance for which it is formed is to provide for maintenance, preservation and architectural control of the residence lots and common area within that certain tract of property known as the Bull Point Property, and to promote the health, safety and welfare of the residents within the above-

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<sup>5</sup> The Act elsewhere protects the rights of members to elect their Board members. Section 33-31-804 states, "(a) 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." (emphasis added).

described property, and any additions thereto as may hereafter be brought within the jurisdiction of this Association for the purpose of:

(a) exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the [Declaration] 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 provided, said Declaration being incorporated herein as if set forth verbatim.

(R. p. 241). True, the Articles do incorporate the Declaration, but the context shows that they do so to expand on the powers and duties that the Association has, not to limit the powers otherwise given to the Association in the Articles (i.e. to elect the Board of Directors). In any event, even with the Declaration being incorporated in the Articles, there still exist both the Articles and the Declaration, which have conflicting provisions. According to the Act and the Declaration itself, the conflicting provision from the Articles controls. See also Centex/Worthgroup, LLC v. Worthgroup Architects, L.P., 365 P.3d 37 (N.M. App. 2015); Perry v. United States, 146 F.2d 398 (5th Cir. 1945) (“We reaffirm here what we there decided, that while a reference in a subcontract to the provisions, plans and specifications of a general contract imports them into the subcontract where not inconsistent with its terms, it is quite well settled that such a reference is not effective beyond this, and that if the subcontract contains words of definite limitation, they will be given effect and the reference limited accordingly.”).

Accordingly, the circuit court correctly rule that Defendants’ purported appointment of the Board of Directors was a nullity and the actions of the illegally appointed Board are nullities.

V. **THE INJUNCTIVE RELIEF THE CIRCUIT COURT GRANTED WAS APPROPRIATE AND NECESSARY TO EFFECT THE COURT’S DECLARATORY JUDGMENT**

Finally, Defendants complain that the circuit court’s order was procedurally inappropriate in that it granted relief that was not requested in the motion and did not provide Defendants an opportunity to be heard. The injunctive relief that the circuit court ordered is no more far-reaching

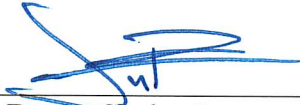
than the declaratory relief that Plaintiffs requested and the circuit court granted. The circuit court granted no relief that is not prayed for in the Amended Complaint. Plaintiffs' Motion for Partial Summary Judgment did not specify the relief requested, but rather simply moved for partial summary judgment. Respondents' Memorandum in Support of their Motion specifically asked for the Court to find that "Bull Point SC, LLC is not the Declarant and therefore cannot exercise the Declarant's rights and the actions taken by the [Respondents] as putative Declarant are invalid." In the alternative, it asked the circuit court to find that even if Bull Point SC, LLC is the Declarant, "the South Carolina Nonprofit Corporations Act and the Bull Point Plantation governing documents provide that the members of the Association are entitled to elect the Association's Board of Directors, rather than the Directors being appointed by the Declarant and that an immediate election be held in this regard." (R. p. 221). The motion thus specifically asked for the circuit court's determinations that Appellant Bull Point SC, LLC is not the Declarant, that its actions taken as putative Declarant are invalid, that the members of the Association are entitled to elect the Board, and that an immediate election should be held. The circuit court's findings that indeed Appellant Bull Point SC, LLC was not and is not the Declarant, that its actions taken as putative Declarant are invalid, that the members of the Association are entitled to elect the Board, and that an election should be held, *required* a consonant order that Appellant Bull Point SC, LLC cease exercising the rights of the Declarant and that the other Defendants cease acting as the Declarant-appointed Board. In fact, it is quite cynical for Defendants even to complain about being required to honor the court's declaratory judgment.

It would have been a gross disservice to the parties, to all the residents of Bull Point Plantation, and to those doing business with the Association to leave any doubt about who is in charge. They are all entitled to a measure of stability in their lives, and the circuit court's Order

provides that. The inclusion of injunctive relief in the circuit court's order is appropriate, in that it does no more than give effect to its declaration of the rights of the parties.

**CONCLUSION**

For the reasons stated above, Respondents request that the Court affirm the circuit court's order.



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Dated: September 2, 2020  
Charleston, South Carolina

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

Honorable Carmen Mullen, Circuit Court Judge

Appellate 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 K. Kaupp-Seas, Robert P. Brendza and Robin E. Brendza individually and in their derivative capacity on behalf of Bull Point Property Owners Association, Inc.

..... Respondents,

v.

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,

v.

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

..... Third-Party Defendants.

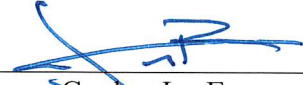
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**RULE 211 CERTIFICATE**

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I hereby certify that this Final Brief of Respondents complies with Rule 211(b), S.C.A.C.R.

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