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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

Case No. 2016-CP-10-1560
Appellate Case No. 2017-002546

CARPENTER BRASELTON, LLC, ... Appellant,

vs.

ASHLEY ROBERTS, JEREMY COOK, and
SALAHEDDINE EZZAOUDI, ... Respondents.

PETITION FOR REHEARING *EN BANC*

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Pursuant to SCACR 221(a), Appellant Carpenter Braselton, LLC ("Appellant") respectfully petitions this Court for a rehearing *en banc* of its opinion filed on July 21, 2021.

The Court's opinion correctly determines that the language on the face of the real estate plat (the "Plat")—which depicts the parties' properties, was duly recorded with the Charleston County Register of Deeds, and is incorporated by reference into the parties' deeds—stating that the properties are to be utilized "for agricultural use only" and "not to be used for building purposes" ***is unambiguous***. See Opinion p.3 ("Here, while the language used in the Agricultural Use Provision is not ambiguous …."). Despite this holding, however, the Court erroneously holds that the trial court properly relied upon extrinsic evidence to find as a matter of law that this same unambiguous language was "never intended to create a restrictive covenant requiring the lots to be used for agricultural use only." See Opinion p.8.

This Court reasoned that "while the language used [on the Plat] is not ambiguous, ***the origin of this language*** on the Plat" is ambiguous, thus opening the door to extrinsic evidence to divine the parties' "true intent." See Opinion p.3 (emphasis added). Relying on extrinsic evidence to establish the "origin" of the Plat restrictions, the Court found that the Charleston County Planning Commission placed the restrictions on the Plat as part of its approval of the subdivision plan for the properties. See Opinion pp.4, 6. Because the restrictions purportedly "were not placed on the Plat, by or at the request of" the owners, the Court ruled as a matter of law the owners did not intend the restrictions to limit the property to agricultural use. Id.

Appellant respectfully submits that the Court's holdings are erroneous for the reasons stated below, a rehearing should be granted, and the trial court's order should be reversed. Based on the exceptional importance and novelty of the issues addressed in this appeal, Appellant requests the Court to rehear this case *en banc* in accordance with SCACR 219.

A. The Opinion Erroneously Relies Upon Extrinsic Evidence to Contradict the Plain Language of the Unambiguous Restrictive Covenants:

Up until the Court's opinion in this case, our state law disallowed extrinsic evidence to add to, subtract from, vary, or explain the unambiguous terms of restrictive covenants, except in cases of fraud, accident, or mistake, which is not claimed in this case. Heretofore, our case law had never allowed for the admission of extrinsic evidence to create an ambiguity in a recorded plat where none existed. The Court now holds that extrinsic evidence regarding the "origin" of otherwise unambiguous terms in a recorded plat is properly admissible to add to, subtract from, vary, or explain those terms. The Court's opinion cites no authority from our state or any other jurisdiction supporting this radical departure from existing precedents.

Appellant respectfully submits that the Court's opinion jettisons centuries of well-settled South Carolina law and creates bad public policy. If not withdrawn, the Court's opinion will fundamentally alter existing law governing restrictive covenants and easements involving real property and will impair their enforceability. To allow extrinsic evidence to introduce and establish an ambiguity in the meaning of language in a recorded plat, when the language itself is unambiguous, obliterates the purpose of our statutes involving the recording of instruments affecting real estate, which is to ensure that subsequent purchasers of property have notice of and can rely upon the record information involving the property.

"Restrictive covenants are contractual in nature." Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). A "restriction of property must be created in express terms or by plain and unmistakable implication." Edwards v. Surratt, 228 S.C. 512, 521, 90 S.E.2d 906, 910 (1956). Restrictive covenants may be created several ways, such as by deed, by declaration, and by implication from a general plan or scheme of development. Queen's Grant II Horizontal Prop.

Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006).

Numerous cases recognize that restrictive covenants can be created when property is sold by a deed which refers to a recorded plat or map. See, e.g., Epps v. Freeman, 261 S.C. 375, 388, 200 S.E.2d 235, 242 (1973). When a deed incorporates or refers to a plat describing the property conveyed, the plat becomes a part of the deed. Bellamy v. Bellamy, 292 S.C. 107, 110, 355 S.E.2d 1, 3 (Ct. App. 1987); see also 20 AM. JUR. 2D Covenants, Conditions and Restrictions § 158 ("A deed and the plat which includes the property granted must be read together, and whatever appears on the plat is to be considered as a part of the deed."); McDonald v. Welborn, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951) ("Here the restrictive covenants contained in a separate instrument, specifically referred to in defendants' deed and easily to be found of record, were just as fully and effectually a part of defendant's deed as if copied therein.").

"Where the language imposing restrictions upon the use of property is unambiguous, the covenant will be enforced according to its obvious meaning" and "[i]n such cases there is no room for construction and the rule requiring a strict construction is without relevance." Donald E. Baltz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 488, 151 S.E.2d 441, 443 (1966). "To that end, when the language creating restrictions on the use of property is unambiguous, the restrictions will be enforced according to their plain and obvious meaning." Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc., 412 S.C. 387, 396-97, 772 S.E.2d 528, 533 (Ct. App. 2015), aff'd, 419 S.C. 162, 797 S.E.2d 47 (2017).

When the restrictive covenant is unambiguous, the court looks only to the language of the covenant itself and not to extrinsic evidence to discover the parties' intent—i.e., that intention must be found within the covenant's "four corners." Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009); see Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App.

1999). The language "contained therein is to be taken as conclusive evidence of the intention of the parties." Kirven v. Bartell, 266 S.C. 385, 389, 223 S.E.2d 597, 599 (1976).

"Extrinsic evidence is admissible to resolve ambiguities but not to create them where none exist." Walters v. Summey Bldg. Sys., Inc., 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct. App. 1993); Kirven, 266 S.C. at 389, 223 S.E.2d at 599. "[I]f a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement." Bellamy, 292 S.C. at 111, 355 S.E.2d at 3; see C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377–78, 373 S.E.2d 584, 586 (1988) ("Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.").

This Court's decision in Defeo v. Cmty. Servs. Assocs., Inc., No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. July 24, 2007), aptly illustrates these principles. Although that unpublished decision is not binding authority, it certainly is persuasive given its close parallel to the facts of the instant case. In Defeo, a recorded plat depicted the plaintiff's property as well as the defendant's adjacent parcel of property. Id. at *1. The reference on the plat to the adjacent parcel contained a label stating: "RESERVED FOR FUTURE USE FOR GOLF COURSE." Id. This Court held this language unambiguously restricted the use of the adjacent parcel to golf course purposes only, thus it enjoined the defendant from building residential structures on the property. Id. at *2 ("[W]e hold the clear, unambiguous language of the Plat restricts the Lot to golf course use only.").

Importantly, this Court in Defeo rejected the defendant's argument that it should have allowed extrinsic evidence to explain the unambiguous label on the plat. At trial, the defendant offered the testimony of its owner and officer as well as expert testimony from a real estate

attorney to explain why the label was used on the plat and what it meant. Specifically, the defendant asserted that the use of the word "reserved" on the label to the plat was simply to "reserve" the right to develop the lot for golf course use, but it was not intended to affect the owner's right to use the lot for other purposes, such as for residential use. Id. at *2. This Court held the testimony of the owner and lawyer was inadmissible as extrinsic evidence. Id. at *3. In so finding, this Court cited to the settled rule that "[w]ere the language used in a restrictive covenant is unambiguous, there is no room for construction and the language must be enforced in accordance with its plain meaning." Id.

The Court should have reached the same result in this appeal. Because the Court correctly determined that the phrases or terms "for agricultural use only" and "not to be used for building purposes" on the Plat are unambiguous, the analysis should have ended there. Gibson v. Huffman, 540 S.E.2d 222, 223 (Ga. Ct. App. 2000) (deed allowing "agricultural or recreational purposes only" was not ambiguous). The Court should have simply enforced the unambiguous language on the Plat as plainly written. It was error to engage in construction or to consider extrinsic evidence. The Court erred by going beyond the plain language of the restrictions—which state the properties are to be utilized "for agricultural use only" and "not to be used for building purposes"—and relying upon extrinsic evidence to find that the parties did not intend for this unambiguous language to restrict the property to agricultural usage.[1]

[1] The Court's opinion suggests it was proper to consider extrinsic evidence on the grounds the Plat restrictions are "implied easements." See Opinion p.3. However, this assertion is misguided because the restrictions in this case were created *in express terms*. It was unnecessary to "imply" any restrictions in the present case because they were express. Edwards, 228 S.C. at 521, 90 S.E.2d at 910 ("A restriction of property must be created *in express terms or by plain and unmistakable implication*.") (emphasis added).

The Court's decision in this case to allow extrinsic evidence to create an ambiguity in the meaning of plain language on the Plat necessarily undermines the protections of our state statutes involving the recording of instruments affecting real estate. The obvious consequence for real estate purchasers is they can no longer trust or rely upon the unambiguous language of a recorded plat involving the property. Instead, subsequent purchasers now have a duty to go beyond the unambiguous language on the plat and investigate or inquire as to its origin or source to determine whether the parties may have intended something different. Otherwise, subsequent purchasers will be bound by what such an investigation or inquiry into the unambiguous language on the plat would have revealed. South Carolina law had never imposed such a duty on subsequent purchasers of real estate.[2]

The South Carolina recording acts provide that "[a]ll deeds of conveyance of lands … and generally all instruments in writing conveying an interest in real estate required by law to be recorded … are valid so as to affect the rights of subsequent creditors … or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the

[2] The Court's opinion cites Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980), as support for the proposition that the "[c]ircumstances surrounding the origin of an alleged restriction may also be considered in construing that restriction." See Opinion p.3. However, the opinion overlooks the fact that Hamilton involved the construction of a plat that was "obviously ambiguous." Hamilton, 274 S.C. at 157, 263 S.E.2d at 381 ("[T]he Harbour Town Townhouse Plat is, as previously stated, obviously ambiguous."). Thus, unlike the present case, the Hamilton Court considered extrinsic evidence to resolve an ambiguity in the recorded plat, not to create one. When the restrictions are unambiguous, as in this case, it is improper to "construe" their plain terms or to inquire into the circumstances surrounding their origin. See 21 C.J.S. Covenants § 25 ("If the language of a restrictive covenant is clear and unambiguous, the covenant is given effect according to its terms, and ***if the plain terms of restrictive covenants are sufficiently clear, the court interprets them without reference to any attendant facts and circumstances or extrinsic evidence***. That is, when there is no ambiguity, there is no need to inquire into the intention of the parties to a restrictive covenant. In fact, ***when the language of a restrictive covenant is clear and unambiguous, it is improper to inquire into surrounding circumstances or objects and purposes of restrictions for aid in its construction***.") (footnotes omitted and emphasis added).

office of the register of deeds.…" S.C. CODE ANN. § 30-7-10. The statutes mandate that "[w]hen real property is subdivided for the purpose of sale and is sold or offered for sale according to a plat of a survey thereof, the person first offering such property for sale shall file a plat or blueprint of such survey in the office of the clerk of court of the county in which such real estate is situate." Id. § 30-5-240.

"Plat books kept in the office of the county recorder are public records … and the recording of a plat of a subdivision is notice to the world of the dedication of streets and alleys and of the restrictive covenants therein contained." Wischmeyer v. Finch, 107 N.E.2d 661, 663 (Ind. 1952). The recording acts protect subsequent purchasers and creditors by giving them notice of instruments involving the property, including restrictions affecting the property's use. Epps v. McCallum Realty Co., 139 S.C. 481, 138 S.E. 297, 302 (1927); First Presbyterian Church of York v. York Depository, 203 S.C. 410, 27 S.E.2d 573, 576 (1943). Restrictions shown on the subdivision plat "cannot be modified by *ex parte* acts or secret intentions of those who by the public records are shown to be bound by the restrictive covenants." Coffman v. James, 177 So. 2d 25, 30 (Fla. Dist. Ct. App. 1965). "Purchasers of property covered by lawful restrictive covenants running with the land … [are] entitled to rely on the public records and are not bound by such secret intentions of which they had no knowledge." Id.

Under the recording laws, subsequent purchasers are charged with notice of the record of an instrument affecting the land. Indeed, these statutes impose a "***duty*** upon a person about to advance money or anything else of value for the purchase of property, or to extend credit to the owner of such property, ***to investigate the record*** before paying out his money, or parting with anything else of value, ***to ascertain if there are any instruments of record affecting the title***, and if he fails to do this he will be bound by what the record shows." First Presbyterian, 27 S.E.2d at

576 (emphasis added); see Epps, 138 S.E. at 303 ("[I]t is always in the power of the subsequent purchaser, by searching the records, to ascertain whether or not there has been a previous conveyance; and if he fails to make the necessary examination, it is his own fault, and his rights must be determined by the facts of the record within his reach on the subject.").

This Court's decision now expands this duty to require subsequent purchasers to investigate the origins of even unambiguous record information involving the property. It is unclear how any real estate purchaser could ever hope to achieve compliance with such a duty. If a purchaser can no longer trust or rely upon the unambiguous language of a recorded plat when they buy property because they are deemed to be on notice of facts that may contradict the unambiguous record, then the recording acts are illusory and offer little protection.

In City of Rio Rancho v. Amrep Sw. Inc., 260 P.3d 414 (N.M. 2011), the New Mexico Supreme Court cautioned against the unwise consequences which this Court's decision will bring about. In that case, which involved a recorded plat depicting a drainage easement that had been granted to the city over ten acres of property (Parcel F), a subsequent purchaser (Cloudview) of the Parcel F property challenged the city's claim that the plat was really intended to grant the city an open space easement over the entire ten acres. The city relied upon extrinsic evidence to show that the term "drainage easement" as expressed on the recorded plat was really meant as a surrogate term for "open space." The city also offered evidence that it had relied on the prior owner's representations that it would set aside Parcel F "as open space in perpetuity" when the city approved the plat. Id. at 421.

In rejecting the city's claim, the Court in City of Rio Rancho held that the unambiguous language on the recorded plat showed that the easement's purpose was for drainage only and it was not an open space easement, thus Cloudview was "entitled to rely upon the recorded plat's

specific recital of the city's right to use Parcel F only for drainage purposes." Id. at 421, 424. The Court further rejected the city's attempt to introduce extrinsic evidence to show that the plat "was ambiguous as to the true intent of the parties regarding the designation and future use of Parcel F." Id. at 425. In explaining its decision, the Court stated in relevant part:

> ***To allow extrinsic evidence to establish an ambiguity in the meaning of language in a plat, when the language itself is unambiguous, would frustrate the purpose of our law that governs the recording of instruments affecting real estate.*** To ensure that subsequent purchasers of property have notice of prior claims of interest, New Mexico law provides that all "writings affecting the title to real estate shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated." [N.M. STAT. ANN. § 14-9-1]. The inevitable consequence of this requirement is the constructive knowledge that flows from it because "[s]uch records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording." [N.M. STAT. ANN. § 14-9-2].
>
> The purpose for requiring the recording of instruments affecting real estate in the county where the property is situated is to provide "a place and a method by which an intending purchaser ... can safely determine just what kind of title [the purchaser] is in fact obtaining." Romero v. Sanchez, 83 N.M. 358, 361, 492 P.2d 140, 143 (1971). The recording requirement seeks "to protect [good faith] purchasers against loss" from adverse claims of interest that are "not disclosed by any public record" and "not ascertainable by due diligence." Id. ….
>
> ***The final recorded plat is what governs in this case, and the recorded plat unambiguously grants a drainage easement to the City. Because the drainage easement is unambiguous, Cloudview did not have a duty to investigate any additional adverse claims the City might have had to the title of Parcel F.*** Even if the City and Amrep intended "drainage easement" to mean "open space," their intent is now irrelevant in light of Cloudview's good faith purchaser status. When a good faith purchaser takes real property without notice of an unrecorded easement, the unrecorded easement is extinguished…. We agree with [RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.14 cmt. a] that the "benefits produced by subjecting [easements] to extinguishment under the recording act will outweigh the social costs" because prospective purchasers will be able to rely on the property records. Id.

260 P.3d 425-26 (internal citations omitted) (emphasis added).

The outcome should be the same in this case. When Appellant purchased his property, the

unambiguous language on the Plat showed that his property and the Respondents' properties are to be utilized "for agricultural use only" and "not to be used for building purposes." Nothing in the Plat notified Appellant that Respondents could lawfully use their properties for any purpose greater than agricultural use, including the building of residential structures.

The decision to allow extrinsic evidence to establish an ambiguity in the meaning of language in the recorded Plat, when the language itself is unambiguous, thwarts the protections of the recording statutes. It means that real estate purchasers cannot trust or rely upon the unambiguous language on a recorded plat when they buy property. The Court erred in relying upon extrinsic evidence to expand the unambiguous language on the Plat to allow usages of the Respondents' property beyond agricultural use. It is also bad public policy to do so.

B. The Opinion Fails to Appreciate that the County's Conditions Placed on the Plat as Part of Its Subdivision Approval Constitute Restrictive Covenants Running with the Land that are Enforceable by Appellant:

Relying on extrinsic evidence regarding the "origin" of the Plat restrictions, this Court held as a matter of law that the County placed the restrictions on the Plat as part of its approval of the subdivision plan and the restrictions were not placed thereon by or at the owners' request. See Opinion pp.4, 6.[3] Based on this same evidence, the Court further ruled as a matter of law that the owners did not intend for the restrictions to limit the property to agricultural use.

This Court's opinion assumes as a matter of law that if the County (rather than the

[3] The affidavit of F. Elliotte Quinn, III, the surveyor who prepared the Plat, indicates that the language on the Plat stating that the properties must be utilized "for agricultural use only" and not "for building purposes" was added as part of the County's approval process involving the subdivision of the properties. He states that "Charleston County was required to approve the subdivision of the property into five lots," "[a]s noted on the Plat, the Plat was approved by Charleston County on December 4, 1990," "[a]s part of the approval process, Charleston County made various notations on the Plat," and among the notations which the County placed on the Plat are the following: "THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES." R. p.688.

owners or their surveyor) placed the restrictions on the Plat, then those restrictions cannot constitute binding covenants running with the land. This assumption is legally incorrect.

A "plat" is a term of art that generally refers to a subdivision map prepared for approval by a governmental authority. Metro. Gov't of Nashville & Davidson Cty. v. Barry Const. Co., 240 S.W.3d 840, 845 n.12 (Tenn. Ct. App. 2007); Sellon v. City of Manitou Springs, 745 P.2d 229, 233-34 (Colo. 1987). ***Notes added or attached to a plat as conditions to government approval of a subdivision plan constitute restrictive covenants running with the land and may be enforced in equity by owners of other lots in the subdivision***. Perrige v. Horning, 654 A.2d 1183, 1185 (Pa. Sup. Ct. 1995); Doylestown Township v. Teeling, 635 A.2d 657, 661 (Pa. Sup. Ct. 1993); Green v. Lawrence, No. RE-03-23, 2004 WL 6241302, at *2 (Me. Super. Ct. Oct. 01, 2004); see also Brescia v. N. Shore Ohana, 168 P.3d 929, 951 (Haw. 2007) (setback requirements that were included on recorded subdivision map as condition to county planning commission's approval of subdivision plan constituted restrictive covenants imposed on properties in subdivision); Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692, 696-97 (Alaska 2003) (observing that municipality's platting authority was authorized to place conditions on the final approval of a subdivision plat by indicating those conditions through notations on the plat and the notes become restrictive covenants that run with the land); Albright v. Lombardo, No. 09 CV 7772, 2010 WL 2746467, *11 (Pa. Com. Pl. Mar. 2, 2010) (conditions contained in notes that were added to a recorded subdivision plan so that the developer could receive final approval of the development from the township were enforceable as restrictive covenants running with the land); Village of Los Ranchos de Albuquerque v. Shiveley, 791 P.2d 466, 469-71 (N.M. Ct. App. 1989) (conditions relating to design, dedication of land, improvements, and restrictive use of land imposed by county or municipality as part

of approval of a subdivision plat can be enforced through specific performance); Stansbury v. Jones, 812 A.2d 312, 329 (Md. 2002) (noting that conditions attached to parcels at the direction of the governmental entity that approves the subdivision plats are enforceable).

In Perrige, for instance, the owners of a farm hired surveyors to draft plans for the subdivision of the farm into four parcels (Lots 1 through 4). The plan was approved by the town's planning commission and was recorded with the county recorder of deeds. The plan contained several notes of conditions the town had imposed as part of its approval of the owners' subdivision of the property. Id. at 1186. The notes included the following:

> 2. TOTAL NUMBER OF LOTS 3 + RESIDUE (TO REMAIN FARM USE) A) LOT NO. 4 (RESIDUE) WILL BE USE [sic] FOR AGRICULTURAL USE ONLY.
> . . . . .
> 9. THE RESIDUE LOT WAS AND WILL REMAIN AGRICULTURAL USE, NO WETLAND DELINEATION IS REQUIRED.
> . . . . .
> 10. IF LOT 4 IS SUBDIVIDED OR DEVELOPED IN THE FUTURE WETLAND DELINEATION, STREAM ENCROACHMENT PERMITS ARE REQUIRED. THE 100 YEAR FLOOD PLAIN MUST BE CALCULATED, BOUNDARIES DELINEATED, AND ELEVATIONS PROVIDED.

Perrige, 654 A.2d at 1185.

Subsequent purchasers of one of the lots (Lot 3) later sued to enjoin the owner of Lot 4 from using the property for any purpose other than agricultural use based on the grounds that the notes on the subdivision plan constituted enforceable restrictive covenants. The court agreed and held that "Notes 2A and 9 on the Plan clearly state that Lot 4, or 'the residue lot,' will remain agricultural use." Id. at 1187. The Court held the subsequent purchasers could enforce the covenants restricting the Lot 4 property to "agricultural use only." See also Doylestown, 635 A.2d at 660 ("Because the subdivider agreed to the notation restricting further subdivision, that restriction, which runs with the land, is binding upon all subsequent purchasers."); Albright,

2010 WL 2746467 at *11 ("[T]hese notes were added to the plan so that the developer could receive final approval of the development from the township. These notes restrict the lot size and mandate two lots be combined…. These notes became conditions or prerequisites to final approval of the subdivision plan…. Because the conditions in the Phase II plan were added to the plan to receive final approval, they relate to the land and were intended to be binding on the current property owner and successors in interest. Therefore, the notes contained in the Phase II subdivision plan are restrictive covenants running with the land.").

Likewise, in Green, the defendant owned an 89-acre parcel of real property that was a former youth summer camp, which it intended to subdivide into 18 lots. After the defendant applied for subdivision approval with the town's planning board, it was discovered that lots 8-11 did not have soil conditions suitable for construction of a wastewater septic system. As a result, the town required that lots 8-11 be limited to "wood lot use only." The subdivision plan that the town approved included notes for each of the four lots stating "Lot_ Not Suitable For Subsurface Sewerage Disposal" and also stating: "No more than one single-family dwelling shall be maintained on lots 1, 2, 3, 4, 5, 6, 7, 12, 13, 14, 15, and 16. ***Lots 8, 9, 10, and 11 are restricted to use as wood lots only***." Green, 2004 WL 6241302 at *1 (emphasis added). This subdivision plan was later incorporated into the deeds for each parcel as they were sold.

Twenty years later, after soil requirements for subsurface disposal systems had changed so that lots 8-11 could qualify for residential development, the defendant sought approval from the town to develop the lots. Id. However, in a subsequent lawsuit by other property owners in the subdivision to prevent the defendant from developing the lots, the Court ruled that the "wood lots only" language in the subdivision plan and deeds constituted a restrictive covenant enforceable by those owners. Id. at *2. The Court found that "there is no ambiguity in the 'wood

lots only' language and it is not necessary to consider extrinsic evidence for purposes of interpretation of the contract." Id. The Court enforced the notations on the subdivision plan as written and entered a judgment declaring that lots 8-11 "are limited to wood lot use only as provided in the provisions of the … restrictive covenants unless this restriction is removed by those property owners benefiting from this restriction." Id. at *3; see also Parrish v. Newbury, 279 S.W.2d 229 (Ky. 1955) ("[B]uilding restrictions properly written upon a recordable plat become part of [the deed] and constitute constructive public notice of the restrictions." (cited in 20 AM. JUR. 2D Covenants, Conditions and Restrictions § 158)).

In the present case, this Court erred by holding as a matter of law that the unambiguous restrictions on the Plat are not enforceable against the Respondents because the County placed them on the Plat as part of its approval of the subdivision plan for the properties. Even assuming the Court is correct that the County (and not the owners) placed the restrictions on the Plat, the restrictions nevertheless constitute covenants running with the land that may be enforced by Appellant (an owner of property in the subdivision). The fact the County, rather than the owners, may have placed the restrictions on the plat is not dispositive of whether Appellant can enforce those restrictions as a property owner in the subdivision. This Court overlooked this point.[4]

[4] This Court held that Appellant's reliance upon the unambiguous restrictions on the recorded Plat could not defeat the owners' "true intentions" because extrinsic evidence showed that two of the Respondents had built a house on their lot before Appellant bought his lot in the subdivision. See Opinion p.7. In Pitts v. Brown, 215 S.C. 122, 132, 54 S.E.2d 538, 543 (1949), however, the Court held that "the violation of some of the restrictions by some of the purchasers of lots in the tract, without action by appellant, does not affect his right to enforce the restrictions against the respondents" when "there has been no fundamental change in the residential character of the [subdivision] making inequitable the specific enforcement of the restrictions." Id. Respondents did not show and the trial court did not find that the construction of one house on one of the lots had so fundamentally changed the subdivision's character that it would be inequitable to enforce the restrictions.

For the forgoing reasons, Appellant respectfully submits the Court has disregarded or overlooked important legal principles in adjudicating Appellant's appeal and has contradicted itself in its own opinion issued in the Defeo case. Appellant respectfully submits that the Court's holdings are erroneous, a rehearing should be granted, and the trial court's order should be reversed. Because of the exceptional importance and novelty of the issues addressed in this appeal, Appellant further requests the Court to rehear this case *en banc*.

Respectfully submitted,

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CARPENTER BRASELTON, LLC, ...Appellant,

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SALAHEDDINE EZZAOUDI, ... Respondents.

PROOF OF SERVICE

I hereby certify that on the date referenced below, a true and correct copy of the Petition for Rehearing *En Banc* in the above-captioned action was e-mailed and deposited in the U.S. mail with sufficient first-class postage affixed thereto and addressed to:

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This the 3rd day of August, 2021.

ROSEN HAGOOD, LLC

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