STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP2307707

R C Frederick Hanold III *vs.* Watsons Orchard Property Owners Association Inc

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 19th day of October, 2012.

Court Reporter:

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 19th day of October, 2012, and a copy mailed first class this 19th day of October, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

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Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. NO.: 2009-CP-23-7707
)	
R.C. Frederick Hanold, III and Rose)	
F. Hanold, and Carol R. Mitchell and)	
George P. Mitchell, Jr.,)	
)	
Plaintiffs/Counter)	
Defendants)	
)	
v.)	**ORDER**
)	
Watson's Orchard Property Owners)	
Association, Inc., a SC Corporation)	
And Pelham Farm, LLC, a SC)	
Corporation, Legacy One, LLC, a)	
SC Corporation, SESP, LLC, a)	
SC Corporation, an unknown Trustee)	
Of the Revocable Trust Agreement)	
Dated March 19, 1996 established)	
By James B. Stephens as amended)	
And unknown Jay Stephens and)	
Mike Stephens as Co-Personal)	
Representative of the Estate of James)	
B. Stephens,)	
)	
Defendants/Counter)	
Plaintiffs)	
v.)	
)	
Property Owners in Watson's)	
Orchard Subdivision, et al)	
)	
Third Party)	
Defendants)	
)	

This declaratory judgment action was tried before me on September 4 and 5, 2012. Randall S. Hiller, Esq. represented the Plaintiffs and William B. Herlong, Esq. represented the Defendants. The Third Party Defendants, comprising all of the remaining title holders of lots in Watson's Orchard Subdivision did not answer the third party complaint.

Plaintiffs seek a declaration that the agreement to release Declaration of Restrictions and Protective Covenants filed of record by the Defendants in the Greenville County ROD Office on November 9, 2009 in Deed Book 2364 at Page 2445 and as amended on December 21, 2009 in Deed Book 2366 at Page 1183 are invalid. The Plaintiff contends the number of votes calculated by the Defendants violated the provisions of the original covenants and restrictions which results in a failure to obtain sufficient votes to authorize the release. I agree.

The historical background of the factual circumstances leading to the recordation of the covenants and restrictions which are the subject of this action are not in dispute. In the 1960s Richard Watson and his wife began to develop their substantial landholdings, which up until that time had been an Orchard. The property stretched from what is now Interstate 385 up to and across Pelham Road. Restrictions were placed on the entire property owned by Mr. Watson requiring the properties use as single family residential. Subsequently, a subdivision plat was recorded creating 47 lots in what is known as Watson's Orchard Subdivision. These lots were developed into upscale homes.

In late 1979 it became apparent to Mr. Watson that the restricted property south of Pelham Road would realize a greater value if developed commercially. As a result he entered into negotiations with the owners of the subdivided lots in Watson's Orchard for the purpose of obtaining a release of the restrictions as to residential use for substantially all the property he owned south of Pelham Road.

Those negotiations ultimately resulted in all but J.B. Stephens agreeing to execute a release of the restrictions in exchange for the transfer of a buffer zone consisting of approximately 22 acres which was to be developed and sold as single family residential lots. The buffer zone was to be subject to previously approved covenants and restrictions which were very similar to the covenants already in place on the Watson's Orchard Subdivision. The property was to be owned by a corporation, the Defendant Watson's Orchard Property Owners Association, Inc., a for profit South Carolina corporation (WOPOA), which was tasked with the responsibility of developing and selling the subject parcels. The stock in the corporation was granted to the then owners of the 46 remaining lots in Watson's Orchard who would ultimately realize the financial benefits when the property was sold. While Mr. Stephens did not participate in the creation of the

#2

corporation or receive any stock in the corporation his cooperation was gained by allowing his purchase from the corporation of approximately 6 acres directly across Pelham Road from his home which contained sufficient property to allow it to be subdivided into 5 residential lots.

At the conclusion of the negotiations a friendly suit was initiated by Watson's company to confirm the transaction and quiet title to the premises being released from the covenants and restrictions.

Lincoln of South Carolina, Inc., as Declarant, then imposed the Covenants and Restrictions which are the subject of this action upon the 22 acres and thereafter conveyed the property to the Defendant, Watson's Orchard Property Owners Association, Inc.. The Defendant, Watson's Orchard Property Owners Association, Inc., then conveyed the approximately 6 acre tract of land to J.B. Stephens (Stephens tract), whose successors are also Defendants in this action.

Although the restrictive covenants only apply to the 2 tracts of land initially conveyed to Watson's Orchard Homeowners Association the covenants may not be amended without a majority vote of the current property owners of Watson's Orchard Subdivision.

Public records reflect that the property which is the subject of the covenants and restrictions has since 1981 consisted of 3 tracts of land for property tax purposes and there has never been a plat filed for record of any of the subject property.

Both parties acknowledged at trial that if, as Plaintiff contends, the votes attributed to the WOPOA tracts and Stephens tract were not valid then the amended declarations as filed were equally invalid for lack of a majority. The Defendants' contend that the Defendants' properties qualified for multiple votes under the language contained therein. For the many reasons set forth hereinbelow the Court concludes that it does not.

South Carolina has been a record notice state since at least 1839. Title 30 of the *South Carolina Code of Laws* is entirely devoted to public records and recordation of documents with Chapter 7 thereof specifically stating that recordation is essential to validity. This state maintains facilities in every County solely for the purpose of the recordation of documents affecting real estate.

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Both sides agree that the language contained within the covenants that must be interpreted and applied by this Court is as follows:

> "...by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision..."

I find this language unambiguous. "The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract" Gilbert v. Miller, 586 S.C.2nd 861 (Ct. App. 2003). "If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement" *id at 30-31* 586 S.C.2nd at 864. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary and popular sense" *id,*586 S.C.2nd at 864. "Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract" Penton v. J.F. Cleckley & Co., 486 S.C.2nd 742 (1997).

"Words of restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution" Taylor v. Lindsey, 332 S.C. 1, 498 S.C.2nd 862 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document" (emphasis added) Taylor v. Lindsey (infra).

When "the language imposing restrictions upon use of property is unambiguous, the restrictions will be enforced according to their obvious meaning", Shipyard Property Owners Association v. Mangiaracina, 307 S.C. 299, 414 S.C.2nd 705 (Ct.App. 1992).

It is the Plaintiffs' contention that the 1981 covenants and restrictions, interpreted from the four corners of the document, is unambiguous and thus no further evidence is admissible regarding the parties' intent and they should be, and can be, enforced according to their obvious meaning.

The covenants themselves, other than the provision allowing enforcement and voting by property not subject to the covenants, were not atypical of residential covenants and restrictions utilized in that time frame. They restrict the property to single family residential use, prohibit certain nuisance and noxious activities, establish an architectural

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committee for control of the type and character of homes to be built thereon, regulate mailboxes and establish certain minimum lot sizes and building sizes that the property may be developed.

Subsequent to the imposition of the covenants by Lincoln of South Carolina, Inc., it conveyed the premises burdened by the restrictive covenants to Watson's Orchard Property Owner's Association, Inc., a corporation formed for the purpose stated in its articles of incorporation to "...engage in the business of selling and developing approximately 22.12 acres of residential real estate..." (emphasis added). Immediately after acquiring title, the property association conveyed a tract of land to the predecessor in title of the other Defendants. At the time of the attempt to remove the covenants from the premises the public records would reflect that neither of the tracts have ever applied for, been approved for or recorded a subdivision plat, nor have any homes been constructed thereon.

Applying these standards and giving the words "lot" and "developed" the plain, ordinary meaning which would have been attributed to them at the time of their execution means exactly what it says, lots that have been developed. To construe it in any other way would essentially eliminate the language from the covenants entirely. It is not permissible for this Court, in the face of clear and unambiguous language, to attempt to ascertain whether the Declarant of the document might have intended it to say something other than what it does. In order to read this language in the manner proposed by the Defendant it would be necessary to insert additional language into the covenants. That is not the Court's province. It does not say might be developed, it does not say may be developed, it does not say could be developed. It says that the lots into which the property shall have been developed will have a vote.

Because I have found the original covenants and restrictions unambiguous I have not relied upon or considered the additional evidence submitted other than as set forth below, however were it necessary to do so I would find that such evidence supports the interpretation I have applied to the covenants.

Having determined that the language within the covenants are clear and unambiguous and having given them their plain and ordinary meaning the only issue

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remaining is whether the subject premises have been developed into lots as contemplated by the covenants.

The Plaintiffs' position, supported by the testimony of the administrator of the Greenville County Planning Commission, is that absolutely nothing has been done to the subject property subsequent to the recording of the covenants that could or would constitute its development into lots. The testimony was uncontradicted that there existed at the time of the recordation of the covenants a subdivision ordinance in Greenville County and such subdivision ordinance has remained in place, with some amendments, throughout the existence of the covenants. It is uncontradicted that in order to subdivide or offer for sale, in compliance with the Ordinance, the five lots the Defendant contends have been developed would require the submission to the planning commission of a plat meeting the requirements of the ordinance, stamped as recordable and then the recording of the plat. The evidence is also uncontradicted that no such application was made, no plat was ever submitted, no approval was ever granted and no plat was ever recorded. Finally, it was also uncontradicted that the subject property had a single tax map number and, as of the date of the attempted cancellation of the restrictive covenants, the property could not be legally sold as Five (5) individual lots.

In addition to the Greenville County Subdivision Ordinance, Section 30-5-240 of our recordation statute specifically requires the recordation of a plat whenever property is subdivided for the purpose of sale or offering of sale and Section 30-5-230 authorizes reference in recorded documents to recorded plats in lieu of the necessity of a metes and bounds description of the property.

Defendant's arguments to the contrary are essentially threefold. Primarily, the Defendant relies upon the prefatory language contained within the deed from WOPOA which states "containing five (5) lots" and then references a plat which was never recorded (and per the testimony of the planning commission could never be recorded). The actual description contained within the deed is a metes and bounds description of the boundary of the entire tract. The Defendant also relies on various documents contained within the 1980 lawsuit and the repetition of the "five lots" referenced in various attorneys' files and indexes. Finally, the Defendant contends that the aforementioned

#6

language in the deed constituted a subdivision for the purposes of creating additional votes pursuant to the covenants without regard to its otherwise illegality as a subdivision.

Despite the fact that the character of the property owned by the Defendants has not changed in thirty years, no subdivision plat has ever been prepared or recorded and the claimed lots within the property could not be legally be sold, the Defendant wishes this Court to award it votes for lots that do not and cannot legally exist only long enough for the Defendants to vote that the lots will never exist.

These arguments are unpersuasive. The documents and the deed relied upon by the Defendants are transactions between the Defendants. The Declarant of the Covenants and Restrictions was not a party to the conveyance and the Covenants were recorded in advance of the deed. The intent of the parties to the conveyance has no relevancy whatsoever to the intent of the Declarant of the Covenants. Even were that not the case, I find no evidence whatsoever that any attempt or effort was made to develop this property in the context that I have determined the covenants require. To the contrary, the only evidence of the intent of the Grantee for the Stephens tract was the testimony of his personal attorney that he had no intention of preparing or filing a subdivision plat because he purchased the property as a buffer for his existing residence.

As stated previously, South Carolina is a record state. Everyone is presumed to know the law. Six acres of property having a single tax map number for thirty consecutive years does not and can not qualify under the clear language of the covenants as having been developed into five lots. Whether it could have, should have, or whether someone somewhere intended that it be does not equate to actually doing it as the law in the State of South Carolina requires it to be done. It is plain and obvious under the language of the covenants that these properties were intended to be subdivided into lots, sold and to have houses sitting upon them long before the date for renewal of the covenants arrived. It is equally plain and obvious that doing nothing that the law required to develop and sell the property could not qualify as developing lots in the context of the covenants. To construe "lots which shall have been developed" to mean anything other than the lots being developed in accordance with local and state law would require both a complete disregard of all of the above enumerated factors to be considered in interpreting covenants and abandoning all common sense. Simply drawing lines on a piece of paper

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or referring to their property as lots is obviously not what the covenants intended "shall have been developed" to mean.

Defendant's testimony from the former and current directors of the Greenville County Planning Commission implying that it was not uncommon to violate the statute or that no one had been prosecuted for violating the statute is irrelevant. This Court will not "find" that a subdivision occurred in violation of state and county law under any circumstances. "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract", Jackson v. Bi-Lo Stores, Inc., 437 S.C.2nd 168 (Ct. App. 1993). "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decision", Beach Co. v. Twillman, Ltd., 566 S.C.2nd 863 (Ct. App. 2002). It is a well-settled principle of contract law that "a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice." McConnell v. Kitchens, 20 S.C. 430, 43738 (1884); *see also* Pendarvis v. Berry, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) ("'Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.'") (quoting Gilliland v. Phillips, 1 S.C. 152 (1869).

Even were this Court not prohibited in aiding in the avoidance of the law, it is the Court's conclusion that the deed and unrecorded survey do not, nor did they, constitute a subdivision of the property under state or local law nor did they constitute the development of the property into lots under the plain language of the covenants.

During the course of the trial the Defendants proffered purported expert testimony, over the objection of the Plaintiff, which ultimately was decidedly unhelpful. After careful review the Court is of the opinion that the Plaintiffs' objection to this testimony and evidence was well founded. The testimony of the experts amounted to

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nothing more than an expression of their opinion as to how the covenants and restrictions should be interpreted and how the subsequent treatment of the property should be applied to that interpretation. The opinions themselves displayed, at times, a lack of complete knowledge of the circumstances as well as a complete lack of any citation to authority to support the opinions. Ultimately the experts opined only on the very issue that it is the sole responsibility of this Court to determine, the construction and application of the facts and law. I have not relied on any of those opinions in making my rulings in this matter.

Based upon the forgoing I make the following findings of fact:

1. That the subject matter and the parties are within the jurisdiction of and properly before this Court.

2. That the covenants and restrictions recorded in Deed Book 1140 at Page 961 applies and restricts the property which is the subject of this action.

3. That the covenants and restrictions are unambiguous.

4. That the covenants and restrictions unambiguously provide a vote for the purpose of amending the covenants only to lots which shall have been developed.

5. That the property owned by the Defendant, Watson's Orchard Property Association, Inc. and the property presently owned by the Defendants, Pelham Farm, LLC, Legacy One, LLC, SESP, LLC, an unknown trustee of the revocable trust agreement dated March 19, 1996 established by James B. Stephens as amended, and J. Stephens and Mike Stephens as co-personal representatives of the estate of James B. Stephens, has not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants.

6. That the agreement to release declarations and restrictions and protective covenants recorded in Deed Book 2364 at Page 2445 on November 9, 2009 and as amended by recording in Deed Book 2366 at Page 1183 on December 21, 2009 in the ROD Office for Greenville County are void and of no force and effect.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That the agreement to release declarations and restrictions and protective covenants recorded in Deed Book 2364 at Page 2445 on November 9, 2009 and as amended by recording in Deed Book 2366 at Page 1183 on December 21, 2009 in the ROD Office for Greenville County are void and of no force and effect.

#9

Edward W. Miller
Circuit Court Judge, 13th Circuit

Dated: 10/19/12

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JAN 28 P 3:59

JUDGMENT IN A CIVIL CASE

CASE NO: 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr. v. Watson's Orchard Property Owners Association, Inc.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Defendant's Motion for Reconsideration is Denied.

Dated at Greenville, South Carolina, this 16th day of January, 2013.

Court Reporter:

PRESIDING JUDGE - EDWARD W. MILLER

This judgment was entered on the 1/28/13, and a copy mailed first class this 1/28/13, to attorneys of record or to parties (when appearing pro se) as follows:

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Paul B. Wickensimer Greenville County Clerk Of Court