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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Court of Common Pleas Case No. 2016-CP-10-1560
Opinion No. 2021-UP-280 (S.C. Court of Appeals filed July 21, 2021)

CARPENTER BRASELTON, LLC, ... Petitioner,

vs.

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

APPENDIX (Volume 1 of 3)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carpenter Braselton, LLC, Appellant,

v.

Ashley Roberts, Jeremy Cook, and Salaheddine Ezzaoudi, Respondents.

Appellate Case No. 2017-002546

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Unpublished Opinion No. 2021-UP-280
Submitted June 1, 2020 – Filed July 21, 2021

AFFIRMED

Liam Donovan Duffy, of Yarborough Applegate, LLC, of Charleston, and John Edward Rosen, of J. Rosen Law, LLC, of Folly Beach, both for Appellant.

Demetri K. Koutrakos, of Callison Tighe & Robinson, LLC, of Columbia, for Respondents.

PER CURIAM: Carpenter Braselton, LLC, (Appellant), the owner of a lot in a subdivision, appeals the trial court's order granting summary judgment to Ashley Roberts, Jeremy Cook, and Salaheddine Ezzaoudi (collectively, Respondents), who

own other lots in the subdivision. Appellant challenges the trial court's holding that a notation on the subdivision plat (the Plat) that certain lots were "for agricultural use only" (Agricultural Use Provision) did not create a valid restriction on the use of the lots. We affirm.

Appellant argues the trial court erred in allowing and relying upon extrinsic evidence to conclude that there was no intent to create a restriction on the use of the parties' lots, despite the plain language on the face of the Plat that the lots were to be utilized "for agricultural use only." It also asserts the trial court erred as a matter of law in concluding that the language on the Plat was not a valid restriction on the use of those properties. We disagree.

"Restrictive covenants are contractual in nature." *RV Resort & Yacht Club Owners Ass'n, Inc. v. BillyBob's Marina, Inc.*, 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010) (quoting *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)). "A *restriction on the use of property must be created in express terms or by plain and unmistakable implication*, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 5, 498 S.E.2d 862, 864 (1998)). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor*, 332 S.C. at 4, 498 S.E.2d at 863. "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863-64 (1998) (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985)).

When a deed describes land as shown on a certain plat, the plat becomes a part of the deed. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). A plat may also be ambiguous as to the creation of an easement. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 381 (1980) (reviewing a plat to determine whether it created an open space easement and finding the plat was "obviously ambiguous"). The court explained,

> [W]here the language of a restrictive covenant is equally capable of two or more constructions, that construction will be adopted which least restricts the property. The same reasoning would apply to a restriction, such as an alleged easement shown on a plat incorporated by a deed, since restrictions on the use of real estate are to be strictly

> construed, with all doubts resolved in favor of the free use of the property. This rule of strict construction is subject to the provision that it is not applicable so as to defeat the plain and obvious purpose of the instrument.

Id. at 157-58, 263 S.E.2d at 381. "[I]n the interpretation of maps and plats[,] intention will not be inferred from symbols of uncertain meaning or from fanciful adornments on the plat . . . ." *Id.* at 157, 263 S.E.2d at 380. "Circumstances surrounding the origin of an alleged restriction may also be considered in construing that restriction." *Id.* at 158, 263 S.E.2d at 381.

"It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact." *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019) (quoting *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302-03). "On the other hand, the construction of a clear and unambiguous deed is a question of law for the court." *Id.* (quoting *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303).

Here, while the language used in the Agricultural Use Provision is not ambiguous, the origin of this language on the Plat may create an ambiguity. To indicate the dedication of a road on the Plat, the surveyor who prepared the Plat, F. Elliotte Quinn, III, placed the provision about the road in a box and the owners of the property at that time, the heirs of James Roper (Heirs), signed under this provision. In contrast, the Agricultural Use Provision is not in a box; it is in the area of the Plat with the notations placed by the Charleston County Planning Commission. The typeface of the Agricultural Use Provision does not match that used by Quinn in the Plat. Instead, as the trial court noted, it is in the same or similar typeface as the notations that the Charleston County Planning Commission definitely added to the Plat.

Even if we cannot say the Plat unambiguously shows that the Charleston County Planning Commission placed the Agricultural Use Provision on the plat, we find the Plat is ambiguous as to the origin of the provision. Furthermore, an easement created by a plat is an implied easement. *See Gooldy v. Storage Ctr.-Platt Springs, LLC*, 422 S.C. 332, 338, 811 S.E.2d 779, 782 (2018) ("Generally, when a deed references a plat that contains an easement, an implied easement arises even though the deed itself is silent."). The presumption of an implied easement may be "rebutted by a specific, contrary intention by the grantor." *Id.* Therefore, we find

the trial court did not err in considering extrinsic evidence to determine the Heirs' intent.

In his affidavit, Quinn stated the Charleston County Planning Commission placed the Agricultural Use Provision on the Plat "for the purpose of indicating that Charleston County would not, at that time, approve building permits for Lots C-2, C-3, C-4, and C-5 because those lots did not meet current minimum standards for a modified conventional sub-service disposal system." He explained Lot C-1 did meet that standard and "that is why Charleston County did not say Lot C-1 was not to be used for building purposes."

Quinn asserted,

> These notations on the Plat were not requested to be placed on the Plat, and were not placed on the Plat, by or at the request of the heirs of James Roper. These notations on the Plat were not, and are not, restrictions from use placed on Lots C-2, C-3, C-4 and C-5 by the heirs of James Roper. The heirs of James Roper indicated to me they wanted the ability to build residential homes on all five lots.

Quinn explained, "These notations were simply placed on the Plat by Charleston County to warn buyers of issues related to sewer disposal services."

In submitting the Plat for approval, the Heirs included a letter explaining they were "aware that this land possesses very poor soil conditions for septic systems and would like to request that the subdivision be approved with the stipulation that any lot which will not support a septic system be restricted from becoming a building lot until such time that public sewer service can be provided to that lot." They felt an urgency to have the land divided as they were getting older and they did not want their own descendants to have to deal with the problems of heirs' property.

Appellant argues it was entitled to rely on the Agricultural Use Provision when it purchased its lot. *See Ward*, 378 S.C. at 236, 662 S.E.2d at 457 ("Subsequent purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property."). Appellant's representative, Edward Lee Terry, claimed he relied on the notation on the plat and his title insurance company, which told him the lots were restricted.

We find *Ward*, upon which Appellant relies, distinguishable. In *Ward*, the subdivision plat included a fifty-foot right-of-way to the lots from the highway. *Id.* at 229, 662 S.E.2d at 453. Although the grantor, Ward, admitted in her pleadings she provided the right-of-way pursuant to county regulations, on appeal she claimed the surveyor included the road on the plat under the erroneous belief that the regulations required the easement for the creation of a subdivision. *Id.* at 229, 662 S.E.2d at 453-54. She also asserted she was unaware the plat included a fifty-foot roadway and only intended for the existing driveway to remain as a shared private drive. *Id.* at 229, 662 S.E.2d at 454.

The court held,

> [W]hen Ward subdivided the property and recorded a plat referencing a fifty foot right-of-way, it may be inferred that she intended the right-of-way to be a private easement dedicated to the use of the lot owners, their successors in title, and the public. The deed and the recorded plat in this case are controlling notwithstanding an "intent" analysis. By recording the easement on the plat, Ward evidenced an intention to grant that easement to any future lot owners in the subdivision. When Ward originally conveyed Lot 4 with reference to the recorded plat, her grantees and any subsequent purchasers acquired the right to use this easement to the full extent that it is indicated in the plat. [The respondent] relied upon the recorded plat when it purchased Lot 4. The dedication of the private easement was complete when Ward originally conveyed the lot. It would now be unfair to deny [the respondent] the right to the full use and enjoyment of the easement as indicated in the plat, regardless of what Ward now argues were her intentions at the time the plat was recorded.

Id. at 236, 662 S.E.2d at 457.

Here, the alleged restriction differs from the easement in *Ward*. First, Ward admitted in her pleadings that she provided the fifty-foot right-of-way pursuant to county regulations. The Respondents did not make such an admission here. In fact, the record undisputedly shows the Heirs wanted the lots to become building lots once public sewer service could be provided to those lots. Second, Ward's

surveyor placed the easement on the plat. Here, according to the Quinn, he did not place the Agricultural Use Provision on the Plat. Rather, Charleston County placed it there. Finally, in *Gooldy*, the supreme court clearly stated that while a plat may create an implied easement, the presumption of an implied easement may be rebutted by a specific, contrary intention of the grantor. *See* 422 S.C. at 338, 811 S.E.2d at 782 (stating when a deed references a plat containing an easement, "a presumption of an implied easement arises *unless rebutted by a specific, contrary intention by the grantor*" (emphasis added)). Here, Respondents' evidence of the Heirs' contrary intent is undisputed.

Although Appellant is correct that the deeds for all of the lots specifically state they are subject to all restrictions, reservations, easements and other limitations that appear of record, including on the Plat, this language does not create a restriction the Heirs did not intend to create.

> The fact that a conveyance is made "subject to" restrictions set forth in some other deed or instrument referred to will not, without more, make the restrictions applicable to the property conveyed, if in fact the restrictions do not otherwise apply thereto. If the "subject to" language of the instrument in question refers to restrictions which in fact do not exist at all at the time of the conveyance, it does not operate to impose the supposed restrictions on the granted land; nor does a conveyance made expressly subject to restrictions existing on the conveyed land "if any such there be" thereby impose restrictions where none existed theretofore. A conveyance of land with warranties which are expressly made "subject to" the restrictions set forth in a certain instrument referred to does not subject the conveyed lands to the restrictions so designated when by their terms the restrictions do not apply to such land. While conveyances "subject to" restrictions give notice that such restrictions are of record, they are not an acknowledgment of the validity of such restrictions.

20 Am. Jur. 2d *Covenants, Conditions, and Restrictions.* § 151 (2015) (footnotes omitted).

Similarly, Appellant's own title insurance document did not create a guarantee that the Agricultural Use Provision was a restriction that ran with the land. The title insurance company was noting the provision was on the Plat and was taking an exception that it would not be liable under the policy if Appellant could not build on its lot.

Furthermore, Respondents Roberts and Cook constructed a house on Lot C-3, which was completed on February 5, 2009. Terry acknowledged he was familiar with the lots and the house was present before Appellant purchased Lot C-5. *See Spence v. Spence*, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) ("The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed."). Therefore, we find Appellant's claimed reliance on the Plat could not defeat the Heirs' true intentions when evidence that the lots could be used for residential purposes was right before Terry's eyes.

We hold the record does not contain a scintilla of evidence to support the imposition of a building restriction on the Respondents' lots. *See Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) ("When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), [of the South Carolina Rules of Civil Procedure (SCRCP)]."); Rule 56(c), SCRCP (providing that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) ("Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact."); *Id.* ("Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial."). Appellant presented no evidence supporting the existence of a genuine issue of material fact as to whether the Charleston County Planning Commission placed the Agricultural Use Provision on the Plat to denote its inability to grant a building permit at that time. However, Respondents

presented undisputed evidence that the Heirs, who were the grantors in this case, never intended to create a restrictive covenant requiring the lots to be used for agricultural use only. As the grantors, their intent is paramount as only the grantors can create a restriction that runs with the land. Accordingly, we hold the trial court did not err in granting summary judgment to Respondents.[1]

AFFIRMED.[2]

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[1] In a footnote in the Statement of the Case section of its brief, Appellant asserts the trial court should not have granted summary judgment because there were material questions that must be tried before a factfinder. It asserts it had not taken the depositions of Quinn, the Respondents, and the Heirs "to understand more fully their intent." We find this argument is not properly before this court for several reasons. First, this argument is not listed in the statement of the issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Second, the trial court did not address this argument and Appellant did not file a motion to alter or amend requesting a ruling. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where a trial court does not explicitly rule on an argument raised and appellant does not make a Rule 59, SCRCP, motion to obtain a ruling, the appellate court may not address the issue). Third, Appellant offers no authority to support this argument; therefore, the argument is conclusory and abandoned. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Fourth, in its memorandum opposing summary judgment and at the hearing, Appellant only asserted that it had not deposed Respondents. It did not argue it needed the opportunity to depose Quinn or the Heirs. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Finally, Appellant does not assert what information it believes Respondents' depositions would reveal that would defeat Respondents' motion for summary judgment. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (stating "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a fishing expedition'" (quoting *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991))).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

HUFF, THOMAS, and MCDONALD, JJ., concur.

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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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]

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[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

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[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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ATTORNEYS FOR APPELLANT

Charleston, South Carolina
August 3, 2021.

RECEIVED
Aug 03 2021
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.

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.

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Aug 23 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Mikell R. Scarborough, Master-In-Equity
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RESPONDENTS' RETURN
TO APPELLANT'S PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Appellant Carpenter Braselton, LLC ("Appellant") failed in its first attempt to convince this Court that the disputed plat notation unambiguously established a restrictive covenant. In its Petition for Rehearing, Appellant rehashes its original, rejected, arguments and adds a new argument never before raised in this litigation.

This Court correctly affirmed the order of the Master-in-Equity ("Master") and held the plat notation by Charleston County ("County") did not create a restrictive covenant over the four lots making up the disputed property. In doing so, the Court neither overlooked nor misapprehended any aspect of the facts of this case or the arguments for reversal the Appellant put forth. Appellant's Petition for Rehearing merely repeats its prior arguments and adds a new argument it never raised either before the Master or in this Court which, therefore, must be rejected.

Appellant's Petition for Rehearing should be denied.

II. BRIEF BACKGROUND[1]

Appellant and Respondents each own one of the five lots created when the heirs of James Roper subdivided a tract of property (the "Property") in the early 1990s. The Property and the five lots are shown on a plat recorded on December 31, 1990, in the RMC Office for Charleston County in Plat Book CB at Page 130 (the "Plat"). R. at 91. As explained fully in Respondents' brief, the County made certain notations on the Plat because four of the five lots were not suitable for traditional sewer and alternative sewer service was not yet available. These notations were placed by the County after the Roper heirs requested the subdivision be allowed, but subject to the specific stipulation that building would not be allowed until municipal sewer service became available at

[1] The relevant facts and procedural background are fully set forth in this Court's Opinion and Respondent's Brief.

the Property for four of the five lots. Accordingly, the County placed the following notations on the Plat:

- THIS LOT MEETS CURRENT MINIMUM HEALTH DEPARTMENT STANDARDS FOR A MODIFIED CONVENTIONAL SUB-SURFACE DISPOSAL SYSTEM (FOR LOT C-1 ONLY)
- THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES[2]

(Quinn Aff. ¶ 8, R. at 94). Appellant asserts the four lots identified are subject to a restriction from building.

After the Plat was recorded and before Appellant purchased a lot, Respondents Ashley Roberts and Jeremy Cook purchased Lots C-2 and C-3 and constructed a home on Lot C-3, which construction was completed February 5, 2009. (Exhibit 6 to Summary Judgment Motion; R. at 195). Appellant then purchased Lot C-5 by deed dated November 10, 2014. (R. at 263). The remaining lots owned by Respondent are unimproved.

Edward L. Terry is the authorized agent of Appellant. His wife is the sole member and manager of Appellant. (Terry Dep. pp. 27-28, R. at 204). Mr. Terry has developed numerous subdivisions in multiple states. (Id. pp.12-14, R. at 200-201). He has developed approximately 20 subdivisions in South Carolina. (Id. p. 14, R. at 201). Some of the subdivisions he developed were restricted by traditional covenants, conditions, and restrictions. (Id. pp. 18-21 R. at 202). Mr. Terry was extensively involved in the purchase of Appellant's property, reviewing documents and visiting the property. (Id. pp. 25, 40–41, R. at 203, 207). Appellant constructed and owns a two story "Barn" on land adjoining the lots that make up the Property, complete with horse stables on the first floor and a second-floor office apartment containing two bedrooms and one bath. (Terry

[2] This language is derived from Standard Subdivision Stipulations that Charleston County used at that time. (Chas. Planning Dept. FOIA Response 3/7/17 p. 3, R. at 10.).

Dep. p. 37–38, ex. 11, R. at 206-207, 261). Appellant also purchased Lot C-5 well after Respondents Ashley Roberts and Jeremy Cook constructed a home on Lot C-3, despite Appellant's assertion, through Mr. Terry, that it relied on the Plat's notations.

Appellant filed this action seeking to enforce the Plat notation, "THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES," as a restrictive covenant on the four lots identified. After answering the complaint, Respondents filed a motion for summary judgment. The Master heard the motion, granted summary judgment in favor of Respondents, and this appeal followed. This Court affirmed the Master by Unpublished Opinion No. 2021-UP-280 on July 21, 2021 ("Opinion"). Appellant has now filed a Petition for Rehearing *en banc* before this full Court.

III. ARGUMENT

This Court affirmed the Master's order, holding the Plat notation was ambiguous as to its origin and extrinsic evidence was thus properly considered to determine intent. Appellant has not identified an error in this analysis because Appellant fails to acknowledge and address the Court's identified ambiguity, and accordingly the cases cited by Appellant are inapposite.

Even if the Court were to rehear Appellant's arguments, the Court would most likely alter its Opinion, if it altered anything, to hold that the Plat is either ambiguous about both the meaning and origin of the notations or it is unambiguous in Respondents' favor. Either way, Respondents would prevail and granting the Petition for Rehearing would be futile.

Additionally, Appellant asserts a new argument—the origin of the notation does not matter. However, this argument should not be considered because it was raised for the first time in the Petition for Rehearing. Moreover, the cases cited by Appellant are from other states and not persuasive on the facts presented here for a variety of reasons explained below.

This Court correctly decided this case in its Opinion, and the Petition for Rehearing *en banc* should be denied.

A. The Court rightly affirmed the Master's summary judgment order because the notations on the Plat were ambiguous as to their origin, extrinsic evidence was necessary to determine the intent of the notations, and the notations were not intended to restrict the Property as a matter of law.

1. The Court correctly considered the extrinsic evidence in the record and held there was no evidence the Roper heirs intended to create a restriction with Plat notations.

Contrary to Appellant's assertion, the Court correctly concluded the Plat notation was unclear on its face because the origin of the notation was ambiguous. *See* Opinion at 3 ("Even if we cannot say the Plat unambiguously shows that the Charleston County Planning Commission placed the Agricultural Use Provision on the plat, we find the Plat is ambiguous as to the origin of the provision.").

"[T]he paramount rule of construction is to ascertain and *give effect to the intent of the parties as determined from the whole document*." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985)) (emphasis added). Moreover, "[a] *restriction on the use of property must be created in express terms or by plain and unmistakable implication*, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 5, 498 S.E.2d 862, 864 (1998)). Accordingly, to determine the intent of the parties, courts first consider whether the plain meaning is unambiguous, which is a question of law for the court. *Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties.

The determination of the parties' intent is then a question of fact." *Id.* (quoting *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302–03).

The Court recognized the notation was ambiguous as a matter of law and properly considered extrinsic evidence to determine the grantor's intent, which as the evidence showed, was indisputably a limitation until alternative sewer systems became available to the subject lots. Appellant overlooks the Court's determination that the origin of the notation is ambiguous on the face of the Plat:

> Here, while the language used in the Agricultural Use Provision is not ambiguous, the origin of this language on the Plat may create an ambiguity. To indicate the dedication of a road on the Plat, the surveyor who prepared the Plat, F. Elliotte Quinn, III, placed the provision about the road in a box and the owners of the property at that time, the heirs of James Roper (Heirs), signed under this provision. In contrast, the Agricultural Use Provision is not in a box; it is in the area of the Plat with the notations placed by the Charleston County Planning Commission. The typeface of the Agricultural Use Provision does not match that used by Quinn in the Plat. Instead, as the trial court noted, it is in the same or similar typeface as the notations that the Charleston County Planning Commission definitely added to the Plat.

See Opinion at 3. The apparent ambiguity on the Plat requires that the Court consider extrinsic evidence to determine the parties' intent. *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 381 (1980) (A plat may also be ambiguous as to the creation of an easement); *Gooldy v. Storage Ctr.-Platt Springs, LLC*, 422 S.C. 332, 338, 811 S.E.2d 779, 782 (2018) ("The presumption of an implied easement may be rebutted by a specific, contrary intention by the grantor.") (internal quotation omitted); *see generally Harbin v. Williams*, 429 S.C. 1, 8, 837 S.E.2d 491, 495 (Ct. App. 2019) (ambiguous language means intent becomes a question of fact).

Likewise, the cases cited by Appellant are inapposite because extrinsic evidence is not admitted to create an ambiguity as Appellant asserts but rather to determine intent after the ambiguity is recognized. *Cf. Defeo v. Cmty. Servs. Assocs., Inc.*, No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. July 24, 2007) (no issue whether disputed plat restriction came from

developer); *Gibson v. Huffman*, 540 S.E.2d 222, 223 (Ga. Ct. App. 2000) (no issue whether deed restriction came from prior grantor); *City of Rio Rancho v. Amrep Sw. Inc.*, 260 P.3d 414, 418 (N.M. 2011) (no ambiguity and no dispute whether grantor placed the disputed drainage easement on the plat). This same distinction is present in *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008), as this Court recognized. *See* Opinion at 4–5 (noting the grantor in *Ward* admitted in her pleadings she provided the 50-foot right-of-way in the disputed plat and then tried to dispute it).

In this case, the Plat is ambiguous as to the notation's origin without resort to extrinsic evidence based on the location and significant differences in typeface of the County notations when compared to the notation and signatures of the Roper heirs. Accordingly, extrinsic evidence is necessary to resolve this ambiguity.

Once it becomes clear the Court properly recognized the ambiguity on the Plat in this case without extrinsic evidence, Appellant's public policy concerns evaporate. While purchasers may rely on unambiguous language, Appellant cites nothing to show prospective purchasers would not have a duty to investigate an ambiguous restriction to their satisfaction. South Carolina's recording regime and the public policy concerns underlying notice to prospective purchasers are no more harmed by the ambiguity identified on the face of the Plat by this Court (the ambiguous origin of the notation) than they would have been if the ambiguity presented in this case were two competing plat notations with one stating "no building allowed" and the other "all building allowed." In such a case, prospective purchasers would have notice of the hypothetical plat and its (plainly ambiguous) notations and may or may not be bound by the restrictive covenant depending on the extrinsic evidence presented.

In sum, Appellant fails to recognize the Plat is ambiguous on its face as to the notation's origin and compounds the error by forecasting the end of the recording system from this misunderstanding. Given the ambiguity on the face of the Plat, extrinsic evidence was necessary and properly considered by the Master and this Court.

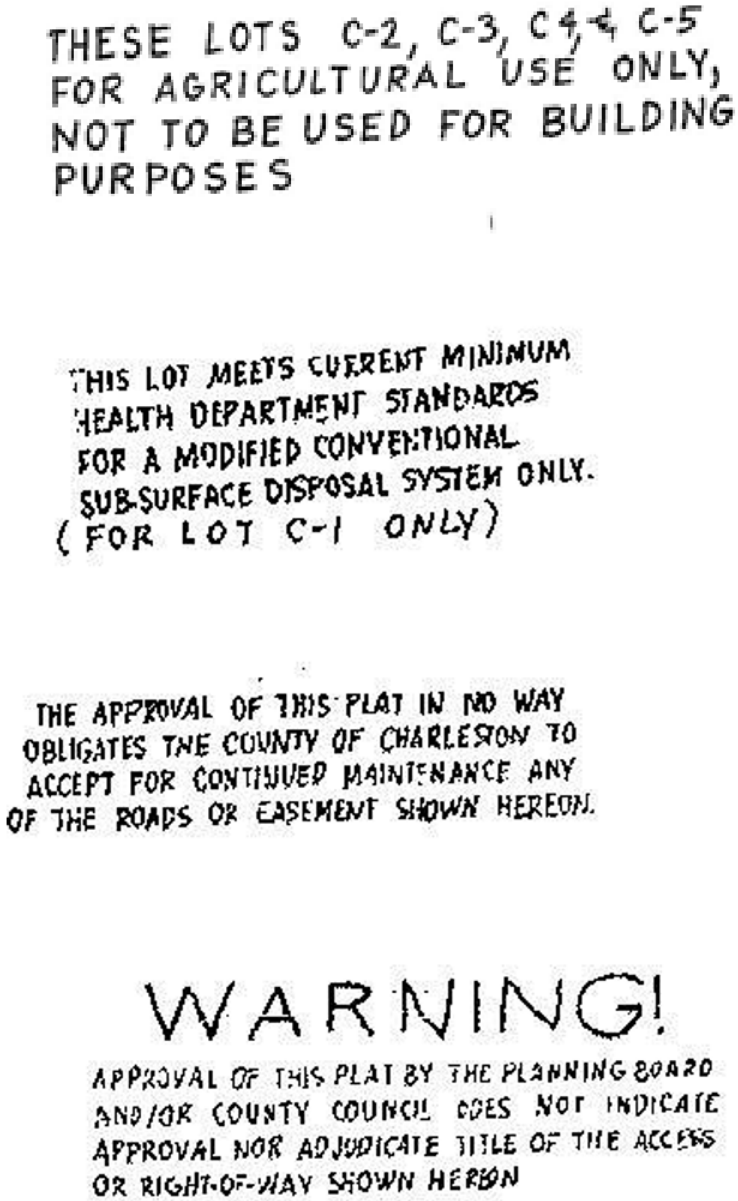
2. If anything, the notation on the Plat was ambiguous on its face as well.

If the Court were inclined to rehear this matter *en banc*, it would be futile because the Court could also recognize what the Court called the "Agricultural Use Provision" as actually unambiguous on its face. Both this Court and the Master held the notation was unambiguous; however, the Master held the notation was unambiguous according to *Respondents'* construction.[3] Of course, ambiguity exists where there are two reasonable constructions. *See generally Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) (describing the rule of construction when a restriction is capable of two interpretations).

The Master concluded as a matter of law that "[b]y reviewing and considering all matters shown on the Plat and not considering extrinsic evidence, the notations on the Plat related to agricultural use are due to Charleston County's determination at that time that the four lots did not meet the current minimum health department standards for a modified conventional sub-surface disposal system. However, if sewer or a modified conventional sub-surface disposal system would become available, then the lots could be used for building purposes." *See* Master's Order at 12 (R. at 17) (finding the Plat was unambiguous as to a limited restriction unless alternative sewer became available). If the Master and the Court in its Opinion each set forth reasonable constructions of the Plat and the entirety of the Plat notations, the Plat would be ambiguous on its face as to the meaning

[3] Under Rule 220(c), SCACR, the *en banc* Court on rehearing, if granted, could as easily affirm the Master's order entirely and conclude the alleged restriction is unambiguously a restriction only based on the sewer limitation, not a perpetual restriction to agriculture use and no buildings.

of the disputed notation in addition to its origin. Taken together, the notations make the alleged agricultural limitation ambiguous:



Reading the first two together (**This Lot Meets Current Minimum Health Department Standards For A Modified Conventional Sub-Surface Disposal System (For Lot C-1 Only**) and **These Lots, C-2, C-3, C-4, & C-5 For Agricultural Use Only, Not To Be Used For**

Building Purposes), it is a reasonable construction to interpret the limitation as one based on sewer and septic standards.

Accordingly, even if the full Court reheard this case, it should also conclude the disputed notation on the Plat is ambiguous when considered with the other Plat notations. Of course, as Appellant implicitly concedes, if the alleged restriction is ambiguous, then extrinsic evidence must be considered.

B. Appellant's New Argument that Notations Placed on the Plat by the County Constitute Restrictive Covenants Enforceable by Appellant is not preserved for review and is otherwise without merit.

For the first time in this litigation, Appellant argues it is "legally incorrect" to conclude that if the County placed the notations on the Plat, instead of the owners of the property or the surveyor, then the conditions cannot be a binding restrictive covenant running with the land.

The Master, in no uncertain terms, concluded that the notations were placed on the Plat by the County and "there was no intent to create a private restriction on the use of the lots." R. 18. Appellant never argued to the Master that it does not make a difference who placed the conditions on the Plat. Appellant certainly did not cite to the Master the out-of-state cases it now cites or any similar cases that Appellant argues support its position. Appellant never filed a motion pursuant to Rule 59(e), SCRCP, raising the issue it is now raising and requesting a ruling from the Master on this issue. In none of its prior briefs to this Court did Appellant raise this issue or reference these cases or similar cases.

Appellant cannot raise this issue in its Petition for Rehearing because it was never raised before, and it cannot be raised for the first time in a Petition for Rehearing. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be

considered which is not set forth in the statement of the issues on appeal."); *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n. 2 (2011) ("It is axiomatic that an issue cannot be raised for the first time on rehearing"); *Kennedy v. S.C. Retirement Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time."); *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of South Carolina*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved).

Appellant fails to cite one South Carolina case for this proposition. Instead, Appellant cites cases from other jurisdictions that are so different from the situation here that they are simply not persuasive and should not be followed by this Court. In considering the out-of-state cases cited by Appellant, the Court should consider the context of these cases and compare them to the different and distinct scenario in this case. *Hamilton v. CCM, Inc*., 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980) ("Circumstances surrounding the origin of an alleged restriction may also be considered in construing that restriction.").

First, the five-lot subdivision involved in this case is not a subdivision development created by a developer for the purpose of marketing lots to consumers. As is obvious from the chain of title to all property involved in this case, the Property was owned by James Roper and subsequently inherited by his heirs. The Roper heirs, through their surveyor, sought to subdivide the Property by submitting the Plat to the County. The purpose of the Plat, unlike in so many of the cases cited by Appellants, was not to establish a residential or commercial subdivision of property by a developer. The Roper heirs wound up owning the five lots created by the Plat.

Second, there would be no incentive or reason for the Roper heirs to self-impose restrictions on any of the lots. It defies logic that the Roper heirs would voluntarily restrict four of the lots while one of the lots remained unrestricted. From the County's perspective, it is clear from the language on the Plat, all taken into consideration, that the one lot that did not have a condition attached to it met the requirements for a septic system. The County placed the condition on the four lots simply because they were not sufficient at that time for a septic system.

Finally, when Appellant purchased his lot, it was glaringly apparent that the alleged restrictions were not followed as a large home was on one of the lots. The issues with Appellant's interpretation of the language on the Plat that it is seeking to enforce was available for Appellant to see on the ground and in the files of the Charleston County Planning Board. Instead, Appellant, a seasoned subdivision developer, failed to investigate this matter further (e.g., checking with the County and reviewing the publicly available planning file) and chose to bury its head in the proverbial sand. *See Spence v. Spence*, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) ("The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed."); 11 THOMPSON ON REAL PROPERTY § 92.09(C)(2) ("A purchaser of real estate has a duty to search the public real estate records pertaining to the interest being purchased, to make a reasonable physical inspection of the property, and in most states, to make inquiries of anyone found in possession. These duties provide the foundation of the doctrine of constructive notice."); 14 POWELL ON REAL PROPERTY § 82.02 [1][d][iii][A] ("Therefore, according to ordinary human experience, that person's possession is a sufficiently curious or suspicious fact, imposing on the purchaser an obligation to make a further inquiry.").

With that in mind, many of the out-of-state cases cited by Appellant concern subdivisions of property effected by developers for profit. Some of the cases contain separately recorded

restrictions or covenants that are similar or identical to those noted on the recorded plat involved in those cases. Other cases turn on statutes, ordinances, or regulations that make notations on plats covenants running with the land. Other cases were simply at the motion to dismiss or preliminary injunction stage of the proceedings. These cases are not binding on this Court, and they are not persuasive. *See Brescia v. N. Shore Ohana*, 168 P.3d 929, 951 (Haw. 2007) (subject conditions were also included in separately recorded restrictions and the applicable code section provides that conditions shall be established as restrictive covenants within each deed at the time of subdivision and constituted restrictive covenants imposed on properties in subdivision); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 696-97 (Alaska 2003) (the applicable code section "provides that these notes become restrictive covenants in favor of the municipality that run with the land."); *Stansbury v. Jones*, 812 A.2d 312, 333 (Md. 2002) ("the only condition required by Anne Arundel County was that the reserved parcel not be used until such time as it passed a percolation test" and it was later determined "that there was an area within the parcel that could, and did, pass a percolation test."); *Village of Los Ranchos de Albuquerque v. Shiveley*, 791 P.2d 466, 469-70 (N.M. Ct. App. 1989) (cluster housing developer had plat and accompanying recorded declarations recorded that both restricted Lot 8 to a common area, with the appellate court finding that the planning authority had standing to enforce the restrictions imposed as a condition of subdivision approval); *Green v. Lawrence*, 2004 Me. Super. LEXIS 236, *2-3 (Me. Super. Ct. Oct. 01, 2004) (Menatoma Realty Corporation's plat subdividing old camp site into 18 lots was approved with four lots limited to "wood lot use only" and with required language that the "restrictions apply to all purchasers of property in Camp Menatoma, their heirs, successors, and assigns," which language was included in each deed for each parcel as it was sold); *Doylestown Township v. Teeling*, 635 A.2d 657, 659 (Pa. Sup. Ct. 1993) (three developers subdivided 48 acres

into five lots, but town required four of the lots not be further subdivided and "will be deed restricted to prohibit any further subdivision"); *City of Rio Rancho v. Amrep Sw. Inc.*, 260 P.3d 414 (N.M. 2011) (Cloudview Estates purchased Parcel F which was shown on the plat as being subject to a drainage easement in favor of the City and the court rejected the City's claim that the intent was to perpetually dedicate Parcel F as an open space); *Parrish v. Newbury*, 279 S.W.2d 229 (Ky. 1955) (developer of Elkhorn Parks Subdivision recorded a plat showing 14 blocks with a key showing Block 3 as "Apartments 10 Lots," but when the same developer started building part of a hotel on Block 3, not apartments, the Court noted that "restrictions placed upon the use of property by merely marking or designating them on a plat are not looked upon with favor" and "the effect of such indications or statements depends upon the facts in the particular case," and found the restriction ambiguous, construed the restrictions against the developer, and found it odd that the developer was seeking to avoid the restrictions it created); *Perrige v. Horning*, 654 A.2d 1183, 1188 (Pa. Sup. Ct. 1995) (appellate court reviewed a decision of the trial court granting a motion to dismiss for lack of standing where "the court obviously may not make such factual findings of intent" and remanded the case for further proceedings).

Accordingly, the Court should deny Appellant's Petition for Rehearing because the Court should not consider Appellant's new argument raised for the first time in its Petition for Rehearing, and in any event, Appellant's new argument fails on the merits.

IV. CONCLUSION

For these reasons, this Court should deny the Petition for Rehearing *En Banc*, leaving the Opinion in place.

Respectfully submitted,

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Attorneys for Respondents

August 23, 2021

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Aug 23 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity
Ninth Judicial Circuit

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

Carpenter Braselton, LLC, ...Appellant,

vs.

Ashley Roberts, Jeremy Cook, and Salaheddine Ezzaoudi, ... Respondents.

PROOF OF SERVICE

I hereby certify that, on this date, the **Respondents' Return to Appellant's Petition for Rehearing *En Banc*** was served on Appellant's counsel via AIS email, pursuant to Supreme Court Order dated March 20, 2020, as amended on May 29, 2020, as follows:

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(Attorneys for Appellants)

A copy of the service email is attached hereto, as required.

I further certify that all parties required by Rule to be served have been served.

s/ Demetri K. Koutrakos
Demetri K. Koutrakos

August 23, 2021
Columbia, South Carolina

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.

REPLY TO RETURN TO PETITION FOR REHEARING *EN BANC*

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ATTORNEYS FOR THE APPELLANT

Appellant Carpenter Braselton, LLC ("Appellant") respectfully submits this reply in support of its Petition for a Rehearing *En Banc*.

In Respondents' Return, they argue (1) extrinsic evidence was properly considered to add to, subtract from, vary, or explain the unambiguous terms on the recorded subdivision plat (the "Plat") because the "origin" of those unambiguous terms is supposedly ambiguous, (2) the terms on the Plat stating the properties are to be utilized "for agricultural use only" and "not to be used for building purposes" are purportedly ambiguous (despite the fact this Court held those same terms are unambiguous), and (3) Appellant allegedly waived its argument that the notes which the County added to the Plat as conditions to its approval of the owners' subdivision plan constitute enforceable restrictive covenants running with the land.

First, no South Carolina case has ever held that extrinsic evidence is admissible to explain or add to an unambiguous notation on a recorded plat because the "origin" of the notation is ambiguous. See Return p.6. Although Appellant has read the Return several times, Respondents conspicuously fail to cite a single case from South Carolina or any other jurisdiction adopting such a rule. To the contrary, as noted in Appellant's Petition, in Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980), our Supreme Court held the circumstances surrounding the origin of a plat restriction may be considered in construing that restriction *when the language of the restriction is ambiguous*. Id. at 157, 263 S.E.2d at 381. However, when the language of the restriction is unambiguous, as is the case here, it is improper to "construe" the restriction or to inquire into the circumstances surrounding the restriction's origin.

As stated in an oft-cited legal treatise:

> 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***.

21 C.J.S. Covenants § 25 (emphasis added); see also Linder Corp. v. Pyeatt, 264 S.W.2d 619, 622 (Ark. 1954) ("The cases uniformly hold (a) that when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed; and (b) that if the language is plain and unambiguous, it is unnecessary and improper to inquire into the surrounding circumstances or the objects and purposes of the restriction for aid in its construction, because when the language is clear and unambiguous it needs no evidence to explain it."); de Castro v. Durrell, 671 S.E.2d 244, 250 (Ga. Ct. App. 2008) ("As the recorded documents are unambiguous, we may not consider either parol evidence or surrounding circumstances to interpret them.").

This Court correctly held in its initial Opinion that the notation on the Plat stating the properties are to be used "for agricultural use only" and "not to be used for building purposes" is unambiguous. See Opinion p.3. As such, the Court's task is to enforce those terms "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). It was error to engage in construction or to admit extrinsic evidence to explain those terms.

Second, despite the fact this Court held the restrictions on the Plat are unambiguous, Respondents now ask this Court to reverse course and to modify its Opinion to find the restrictions are ambiguous, thus justifying the consideration of extrinsic evidence. The Plat in this case clearly states: "THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES." R. p.688. There is no dispute this

restriction applies to Respondents' properties.

Courts in other jurisdictions applying similar plat restrictions have rejected claims they were ambiguous. In Perrige v. Horning, 654 A.2d 1183 (Pa. Sup. Ct. 1995), a subdivision plat contained a note stating: "LOT NO. 4 (RESIDUE) WILL BE USE [sic] FOR AGRICULTURAL USE ONLY." The Court held the restriction was unambiguous and that subdivision owners could enforce it to limit the use of the Lot 4 property to "agricultural use only." Id. at 1187. Similarly, in Gibson v. Huffman, 540 S.E.2d 222 (Ga. Ct. App. 2000), the Court held that a deed allowing property to be used for "agricultural or recreational purposes only" was not ambiguous. Id. at 223 ("The deed at issue is not ambiguous.").

In Green v. Lawrence, No. RE-03-23, 2004 WL 6241302 (Me. Super. Ct. Oct. 01, 2004), the subdivision plat contained a note stating that "Lots 8, 9, 10, and 11 are restricted to use as wood lots only." Id. at *2. The Court held "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. In Defeo v. Cmty. Servs. Assocs., Inc., No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. July 24, 2007), this Court held the following plat restriction was unambiguous: "RESERVED FOR FUTURE USE FOR GOLF COURSE." Id. at *2. This Court held the plat unambiguously restricted the use of the property to golf course purposes only. Id.

Respondents again conspicuously fail to cite a single case from South Carolina or any other jurisdiction holding the Plat restriction in this case is ambiguous. Respondents nevertheless attempt to manufacture or create an ambiguity where none exists. They first argue the restriction must be ambiguous because the Respondents interpret it differently than does the Appellant. "But a contract is not ambiguous merely because a party to it, often with a rearward glance colored by self-interest, disputes an interpretation that is logically compelled." Muskat v. United

States, 554 F.3d 183, 190 (1st Cir. 2009).[1] Rather, a "contract is ambiguous when *the terms of the contract* are *reasonably susceptible* of more than one interpretation." S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (emphasis added); see also 17A AM. JUR. 2D Contracts § 326 ("A contract is not ambiguous simply because the parties urge varying or competing interpretations. Terms of a contract are not ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests. A mere disagreement between the parties as to the meaning of a disputed contractual provision is not enough to support a claim that the contractual language is ambiguous, as any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of its terms.").

The terms of the restriction on the Plat are not reasonably susceptible of more than one interpretation. They clearly and emphatically state that Lots C-2, C-3, C-4, and C-5 are "for agricultural use only" and "not to be used for building purposes." R. p.688.

Respondents next argue that the above-quoted note on the Plat referring to Lots C-2, C-3, C-4, and C-5 does not really mean those lots are "for agricultural use only" and "not to be used for building purposes" because a separate note that does not even refer to Lots C-2, C-3, C-4, and C-5 at all—but which is expressly directed to Lot C-1 and only to that lot—states that Lot C-1 "meets current minimum health department standards for a modified conventional sub-surface disposal system only." Respondents claim this note involving Lot C-1 must mean that "if sewer or a modified conventional sub-surface disposal system would [ever] become available [for Lots C-2, C-3, C-4, and C-5 at some point in the future], then [those] lots could be used for building

[1] "Restrictive covenants upon real estate are contractual in nature and bind the parties thereto just like any other contract." Hynes Fam. Tr. v. Spitz, 384 S.C. 625, 629, 682 S.E.2d 831, 833 (Ct. App. 2009).

purposes" and they would no longer be restricted to agricultural use. See Return p.8.

Of course, no such meaning or intent is expressed anywhere on the face of the Plat. Instead, to reach such a conclusion, the Court must accept extrinsic evidence showing that Respondents *secretly or subjectively intended* for Lots C-2, C-3, C-4, and C-5 to no longer be restricted to "agricultural use only" and for them to be used "for building purposes" if sewer or a modified conventional sub-surface disposal system became available for those lots. It is exactly this type of extrinsic evidence of secret or subjective intentions the law rejects. Our courts have repeatedly said that the "'[i]nterpretation of a contract is governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.'" Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017) (emphasis in original).

In construing a restrictive covenant, the Court "is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc., 393 S.C. 65, 71, 710 S.E.2d 90, 93 (Ct. App. 2011); see Defeo, 2007 WL 8327948 at *3 (testimony of owner and lawyer offered to explain why unambiguous label was used on a plat and what it meant was inadmissible as extrinsic evidence); Northpark Assoc. No. 2 v. Homart Dev. Co., 414 S.E.2d 214 (Ga. 1992) (developer's and county's subjective intent in recording a plat inadmissible where plat is unambiguous); Kepler-Fleenor v. Fremont Cty., 268 P.3d 1159 (Idaho 2012) (Engineer's affidavit regarding his intent when drafting subdivision plat was inadmissible parol evidence in action for declaratory judgment as to whether unnamed road in subdivision was public by common law dedication, as plat unambiguously dedicated the disputed road to the public.).

If the County or owners had wanted to place a caveat on the Plat stating that Lots C-2, C-3, C-4, and C-5 will no longer be restricted to "agricultural use only" if sewer or a modified conventional sub-surface disposal system becomes available in the future, they could have easily stated such on the Plat. They did not do so. Respondents are asking the Court to construe the Plat to include language the owners should have added to the Plat, not the actual language on the Plat. It is not the Court's function to add language to the restrictions which the owners may have desired if they had thought about it more carefully, but which they did not in fact include on the recorded Plat. Arcadian Shores Single Fam. Homeowners Ass'n, Inc. v. Cromer, 373 S.C. 292, 299, 644 S.E.2d 778, 782 (Ct. App. 2007) ("The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written."); Steffenson v. Olsen, 360 S.C. 318, 322, 600 S.E.2d 129, 131 (Ct. App. 2004) ("Had the parties intended to limit the award to those benefits accrued during the marriage, they could have so provided, and it is not for the trial court or this court to change the terms the parties agreed upon.").

Respondents are now unabashedly inviting this Court to distort or rewrite—not interpret—the restrictions on the Plat. The Court obviously cannot accept their invitation. "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003). Courts "are without authority to alter a contract by construction or to make new contracts for the parties." C.A.N. Enterprises, Inc. v. S.C. Health & Hum. Servs. Fin. Comm'n, 296 S.C. 373, 378,

373 S.E.2d 584, 587 (1988) (citing Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984)). The Court's "duty is limited to the interpretation of the contract made by the parties themselves '... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Id.

The mere fact that Lots C-2, C-3, C-4, and C-5 could meet the standards for a sub-surface disposal system at some point in the future does not mean the restrictions placed on those lots simply vanish. The Court rejected this same claim in Green. There, the defendant owned a parcel of property that 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).

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 to develop the lots and to use them for residential purposes because they then had suitable soil conditions. However, in a 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 constituted a restrictive covenant enforceable by those owners. Id. at *2. The Court further 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.

Respondents' Return spends considerable effort trying to explain why it was irrational or nonsensical for the owners to have placed *permanent* restrictions on Lots C-2, C-3, C-4, and C-5. They argue the owners should be given a break and treated differently under the law because they may not have subdivided the property with the intent to "develop" it. See Return p.11.[2] Of course, Respondents cite no law for the proposition that restrictive covenants should be enforced differently or not as stringently against individual owners who subdivide property with no intent of developing it. There is simply no such law or rule.

Respondents further claim there was "no incentive or reason" for the owners to "voluntarily restrict four of the lots while one of the lots remained unrestricted." See Return p.12.[3] The fact that the owners may have made a poor or ill-considered decision in recording permanent restrictions against the property is immaterial. The Court's "duty is limited to the interpretation of the contract made by the parties themselves '... regardless of its wisdom or folly,

---

[2] Respondents cite no evidence in the record to support this assertion. It appears to be speculation.

[3] Respondents again fail to cite any evidence in the record supporting this assertion. For all the record shows, there could have been very good reasons why the owners placed the restrictions on the property. F. Elliotte Quinn, III, the surveyor who prepared the Plat, offers his subjective intent as to reasons why the restrictions were placed on the Plat. Even ignoring the fact that his affidavit is inadmissible extrinsic evidence, he states the restrictions were placed on the Plat so the owners could obtain approval to subdivide their larger tract of property into smaller lots. R. p.687-89. This certainly was a benefit to the owners. It is not "illogical" to think the owners were willing to agree to the County's restrictions on the property to obtain permission to subdivide their larger property into smaller lots and to obtain approval to record their subdivision plat even though they had not been given any assurance that Lots C-2, C-3, C-4, and C-5 could ever be used for any purpose other than agricultural use. Respondents are asking this Court to engage in speculation and conjecture as to what the owners may have intended.

apparent unreasonableness, or failure to guard their rights carefully.'" C.A.N. Enterprises, Inc., 296 S.C. at 378, 373 S.E.2d at 587.

Finally, Respondents claim that Appellant cannot enforce the restrictions if the County (and not the owners or their surveyor) put them on the Plat because Appellant allegedly waived this issue by not specifically arguing that the County's notes on the Plat are enforceable as restrictive covenants. Respondents altogether ignore the fact that Appellant has consistently argued in the trial court and in this Court that the restrictions on the face of the Plat are enforceable against Respondents. See Appellant Brief pp. 15-20; Reply Brief pp. 1-2; R. p.341-42, 672-75. At every stage, Appellant has repeatedly quoted the actual note on the Plat (which was apparently placed there by the County) and specifically argued that this same note (the one apparently placed there by the County) "create[s] a valid restrictive covenant that requires the Lots C-2, C-3, C-4, and C-5 to be used for agricultural purposes only." See Appellant Brief p.20; Reply Brief pp.3-4 (pointing out Appellant relied upon the note placed on the Plat by the County in purchasing its property and it would be unfair to deny it the benefit of the restriction); R. p.341-42 (quoting the note on Plat and stating it "create[s] a valid restrictive covenant that requires the Lots C-2, C-3, C-4, and C-5 to be used for agricultural purposes only"); R. p.672-75.

Appellant's position is that it does not matter *who* placed the restrictions on the Plat. Rather, the important fact is *what* restrictions were placed on the Plat which the owners recorded with the Register of Deeds. As discussed in Appellant's Petition, plat restrictions are enforceable even if they were placed there by a governmental entity as part of its approval of the subdivision plan for the properties. This is not some radical holding, but is in keeping with the "well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions, and land-marks, becomes as much a part of the

grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." Cragin v. Powell, 128 U.S. 691, 696 (1888).

Although Appellant's prior briefs did not specifically say the restrictions on the Plat are enforceable *regardless of who placed them there*, that assertion was subsumed in its arguments to the trial court and this Court. It was unnecessary to make a more nuanced argument to preserve the fundamental issue of whether the restrictions on the Plat are enforceable against Respondents as restrictive covenants running with the land, which is the argument that Appellant has consistently made from the outset of this litigation. The cases cited in Appellant's Petition simply reinforce the same argument that Appellant has been making all along, which is that the restrictions on the Plat are restrictive covenants running with the land and they can be enforced against Respondents (even assuming it was the County who placed them on the Plat). Appellant has not waived any argument.[4]

In conclusion, Appellant respectfully submits that the Court's holdings are erroneous, a rehearing should be granted, and the trial court's order should be reversed.

---

[4] "[I]ssue preservation is not a 'gotcha' game." State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019). "Instead of being hyper-technical, [the appellate courts] approach preservation with a practical eye." Id. Issue preservation rules "are designed to give the trial court a fair opportunity to rule on the issues." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006); see also Bartles v. Livingston, 282 S.C. 448, 463, 319 S.E.2d 707, 716 (Ct. App. 1984) ("The standard which guides [this Court] is whether, despite the improperly framed exception, the issue sought to be raised is reasonably clear to this Court and the adverse party.").

Respondents cannot seriously contend that Appellant failed to make it reasonably clear that its position is the restriction on the Plat (even if put there by the County) is enforceable against the Respondents as a restrictive covenant running with the land. Respondent also cannot claim that Appellant failed to give the trial court a fair opportunity to rule on the question of whether the restriction (even if put there by the County) is enforceable against Respondent as a restrictive covenant. That is all that is required.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

Charleston, South Carolina
August 27, 2021.

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.

PROOF OF SERVICE

I hereby certify that on the date referenced below, a true and correct copy of the Reply to Return to 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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The South Carolina Court of Appeals

Carpenter Braselton, LLC, Appellant,

v.

Ashley Roberts, Jeremy Cook, and Salaheddine Ezzaoudi, Respondents.

Appellate Case No. 2017-002546

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff
_____ J.

Paula D. Thomas
_____ J.

Stephanie P. McDonald
_____ J.

Columbia, South Carolina

cc:
John Edward Rosen, Esquire
Demetri K. Koutrakos, Esquire
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FILED
Oct 27 2021

Harry Alwyn Dixon, Esquire
The Honorable Mikell R. Scarborough

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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err as a matter of law in allowing and relying upon extrinsic evidence to conclude there was no intent to create a restriction on the use of the parties' adjoining lots, despite the plain language on the face of the Plat that the lots were to be utilized "for agricultural use only"?

2. Did the trial court err as a matter of law in concluding that the language: "LOTS C-2, C-3, C-4 & C-5 FOR AGRICULTURAL USE ONLY; NOT TO BE USED FOR BUILDING PURPOSES" was *not* a valid restriction on the use of those properties?

STATEMENT OF THE CASE

This case arises from a dispute between adjoining landowners over the meaning and effect of certain restrictive language placed on a Plat (hereinafter the "Plat") which depicts the parties' properties, and which is incorporated by reference in the pertinent deeds. Specifically, the Plat—which describes five (5) lots (delineated as Lots C-1 through C-5)—contains the following notation:

> THESE LOTS C-2, C-3, C-4 & C-5 FOR AGRICULTURAL USE ONLY; NOT TO BE USED FOR BUILDING PURPOSES.[1]

As discussed more fully below, Appellant is the owner of lot C-5, and Respondents are the owners of lots C-2, C-3, and C-4. Appellant filed this action on March 28, 2016, seeking declaratory judgment and a permanent injunction enjoining Respondents from building residences or other structures upon their lots because those lots are burdened by the "agricultural use only" restriction described above.

[1] This notation does not apply to Lot C-1, and therefore that property is not implicated by this lawsuit.

On or about June 17, 2016 Respondents served their Answers and Counterclaims, in which they, too, sought declaratory judgment as to the effect of the restriction contained on the Plat. Respondents claimed that the notation on the Plat was not a restriction on the use of their properties. Instead, they claimed the "agricultural use only" notation was a stamp placed on the Plat by Charleston County which did not prevent future construction, if and when the County later determined that the land was suitable for construction. Respondents likewise sought to quiet title to their respective lots and requested an order from the Court declaring that they own lots C-2, C-3, and C-4 free and clear of any restriction, and declaring that they are entitled to build residences or other structures on their land, despite the "agricultural use only" notation on the Plat.

After written discovery was exchanged, and Appellant's deposition was taken (through its corporate designee, Mr. Edward L. Terry) on March 22, 2017,[2] Respondents filed a Motion for Summary Judgment on August 2, 2017. Appellant opposed the motion, and a hearing was held on September 21, 2017 before Mikell R. Scarborough, Master-in-Equity for Charleston County. Thereafter, on November 14, 2017, the trial court issued its Order granting summary judgment to Respondents. Appellant received written notice of the entry of the Order on November 15, 2017. Appellant filed a Notice of Appeal on December 12, 2017.

---

[2] Appellant's deposition is the sole deposition that has been taken in this case. The surveyor's deposition has not been taken. None of the Respondents' depositions have been taken. And importantly, no depositions have been taken of the heirs of James Roper to understand more fully their intent with respect to the restrictions placed on lots C-2, C-3, C-4 and C-5. These are material questions which must be tried before a factfinder, and therefore the Court erred in granting summary judgment to Respondents.

STATEMENT OF THE FACTS

1. Subdivision of the property and the Plat.

In 1990, the heirs of James Roper subdivided an 11.95-acre tract to create five lots, Lots C-1, C-2, C-3, C-4, and C-5, with a private road to access those lots. The property was surveyed by F. Elliotte Quinn, III, a professional land surveyor, who prepared the Plat entitled "PLAT OF THE SUBDIVISION OF A 11.95 TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA." The Plat was recorded December 31, 1990, in the RMC Office for Charleston County in Plat Book CB at Page 130.

2. Acquisition of Lots.

A. Lot C-5: Appellant Carpenter Braselton, LLC.

Lot C-5 is described as follows:

> All that certain lot, piece or parcel of land, situate, lying and being at the end of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 31,845.3 square feet of highland and six (6) acres of marshland, more or less, and known and designated as LOT C-5 on a plat entitled, "PLAT OF THE SUBDIVISION OF A 11.95 TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA," made by F. Elliotte Quin, III, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130 in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.
>
> BEING the same property conveyed to Carpenter Braselton, LLC by deed of Herbert Brown dated November 10, 2014, and recorded November 12, 2014, in the RMC Office for Charleston County in Book 440 at Page 255.
>
> TMS: 341-00-00-029

Appellant Carpenter Braselton, LLC owns Lot C-5. Edward L. Terry, an experienced real estate developer, is the authorized agent of Appellant. Mr. Terry's wife

is the sole member and manager of Appellant. In his capacity as authorized agent of Appellant, Mr. Terry was involved in the purchase of Lot C-5, including reviewing related documents and visiting the property.

Appellant purchased Lot C-5 by deed of Herbert Brown dated November 10, 2014, and recorded November 12, 2014, in the RMC Office for Charleston County in Book 440 at Page 256.

Herbert Brown acquired the property by deed of Virginia R. Brown a/k/a Virginia Roper Brown, dated February 22, 1995, and recorded February 22, 1995, in the RMC Office for Charleston County in Book U-252 at Page 034; by Decree Quieting Title (Case No: 07-CP-10- 1185) dated June 7, 2007, and filed in the Clerk of Court of Common Pleas on June 13, 2007 ("Decree Quieting Title"); and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office for Charleston County in Book T-631 at Page 283.

Lot C-5 is unimproved. Of all the lots in this case, Lot C-5 is closest to the Stono River.

B. Lot C-4: Respondent Salaheddine Ezzaoudi.

Lot C-4 is described as follows:

> All that certain piece, parcel or lot of land, situate, lying and being on the South Side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 24,0062.7 square feet of land, more or less and known and designated as Lot C4 on a plat entitled "Plat of the Subdivision of 11.95 acre tract (5.95 highland) owned by James Roper to Create 5 lots on James Island, Charleston County, South Carolina", made by F. Elliotte Quinn, III, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130, RMC Office for Charleston County.
>
> BEING the same property conveyed to Perciel R. DeLaine, James A. Roper, III, Mildred R. Anderson, Ruby Roper and Raymond Roper by Decree

Quieting Title (Case No: 07-CP-10 1185) dated June 7, 2007 and filed in the Clerk of Court of Common Pleas on June 13, 2007 ordered by the Honorable Mikell R. Scarborough, Master in Equity for Charleston County and by Master's Deed dated June 15, 2007 and recorded July 10, 2007 in the RMC Office of Charleston County in Book T631 at Page 287.

TMS No: 341-00-00-072

Respondent Ezzaoudi owns Lot C-4, having acquired it from Perceil R. Delaine, James A. Roper, III, Mildred R Anderson, Ruby Roper and Raymond Roper by Deed executed on various dates in 2013 and recorded August 1, 2013, in the RMC Office for Charleston County in Book 349 at Page 974.

Perceil R. DeLaine, James A. Roper, III, Mildred R. Anderson, Ruby Roper and Raymond Roper acquired Lot C-4 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 287.

Lot C-4 is unimproved.

C. Lot C-3: Respondents Ashley Roberts and Jeremy Cook.

Lot C-3 is described as follows:

All that certain piece, parcel or lot of land, situate, lying and being on the South side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 23,669.9 square feet, more or less, and known and designated as Lot C3 on a plat entitled "Plat of the Subdivision of a 11.95 tract (5.95 Highland) owned by James Roper to Create 5 lots on James Island, Charleston County, South Carolina" made by F. Elliotte Quinn, III, R.L.S., dated January 9, 1989, and recorded on December 31, 1990 in Plat Book CB, Page 130, RMC Office for the County of Charleston.

BEING the same property conveyed by Deed from Mikell R. Scarborough, as Master in Equity for Charleston County, to Ruth Craig dated June 15, 2007 and recorded July 10, 2007 in Deed Book T631 at Page 279.

TMS No: 341-00-00-073

Respondents Roberts and Cook own Lot C-3, having acquired it from Ruth R. Craig, by her attorney-in-fact Percile DeLaine, by Deed dated September 6, 2007, and recorded September 11, 2007, in the RMC Office for Charleston County in Book J638 at Page 712.

Ruth R. Craig acquired Lot C-3 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 279.

Respondents Ashley Roberts and Jeremy Cook constructed a home on Lot C-3, which construction was completed February 5, 2009.

D. Lot C-2: Respondents Ashley Roberts and Jeremy Cook.

Lot C-2 is described as follows:

> All that certain piece, parcel or lot of land, situate, lying and being on the south side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 1.26 acres, more or less, and known and designated as Lot C2 on a plat entitled "Plat of the Subdivision of a 11.95 acre tract (5.95 Highland) owned by James Roper to create 5 lots on James Island, Charleston County, South Carolina" made by F. Elliotte Quinn, III, R.L.S., dated January 9, 1989 and recorded on December 31, 1990, in Plat Book CB, Page 130, in the RMC Office of the County of Charleston.
>
> BEING the same property conveyed by Deed from Mikell R. Scarborough, as Master in Equity for Charleston County, to John Fleming dated June 15, 2007 and recorded in Deed Book T631 at Page 275.
>
> TMS No: 341-00-00-074.

Respondents Ashley Roberts and Jeremy Cook own Lot C-2 having acquired it from John W. Fleming by Deed dated September 6, 2007, and recorded September 11, 2007, in the RMC Office for Charleston County in Book J638 at Page 717.

John W. Fleming acquired Lot C-2 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 275.

Lot C-2 is unimproved.

3. <u>This Action.</u>

In this action, Appellant sought declaratory judgment that the Plat contained a valid and enforceable restriction on the lots of all of the parties. The deeds conveying Lots C-2, C-3, C-4 and C-5 to Appellant and Respondents specifically state that the conveyances are being made subject to all restrictions, reservations, easements, and other limitations that appear of record, *including on the recorded Plat*. R. p. 648, ln. 10-15. Each of the deeds conveying Lots C-2, C-3, C-4 and C-5 to Appellant and Respondents specifically reference the Plat. The Plat has been public record since December 31, 1990 and contains a notation near the center of the page in all capital letters that reads:

> "THESE LOTS C-2, C-3, C-4 & C-5 FOR AGRICULTURAL USE ONLY;
> NOT TO BE USED FOR BUILDING PURPOSES."

The Plat was recorded December 31, 1990 in the RMC Office for Charleston County in Plat Book CB at Page 130. No document or record has ever been filed purporting to amend, waive, or rescind the agricultural use restriction stated on the Plat.

Moreover, Appellant purchased Lot C-5 in reliance on the agricultural restriction stated in the Plat, which created and limited the use of Lots C-2, C-3, C-4 and C-5. R. p. 646, ln. 1-p. 647, ln. 21. Appellant also relied on its review of the plat and advice from its attorney. R. p. 646, ln. 19-p. 647, ln. 22. Respondents' contentions that Appellant was

made aware through Mr. Terry that the Plat's agricultural use restriction was somehow defective is without merit or support in the record.[3]

Appellant also relied on its title insurance company and the title insurance policy it issued as to Lot C-5 to conclude that the restriction on the property for only agricultural use was valid. R. p. 644, ln. 25-p. 645, ln. 10. The title insurance company took exception to the agricultural building restriction in its policy. See R. pp. 615-619. That policy provides as follows:

> Subject to any and all applicable easements, restrictions, conditions, rights-of-way, setback and other matters which may be disclosed by that certain plat entitled, "PLAT OF THE SUBDIVISION OF A 11.95 AC. TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA," made by F. Elliotte Quin, III, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130 in the RMC Office for Charleston County.
>
> **Note Building Restriction shown on said plat: "These lots C-2, C-3, C-4 and C-5 for Agricultural Use only, not to be used for Building Purposes**.

Id. (emphasis added).

In response to Appellant's lawsuit, Respondents sought their own declaratory judgment and introduced an affidavit of Mr. Elliotte Quinn, along with a litany of other

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[3] Appellant has not yet been able depose Respondent Roberts or Respondent Cook, who currently reside in California. Summary judgment was a drastic and premature remedy where, as here, discovery—including taking party depositions—had not yet been completed. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); see also Robertson v. First Union Nat. Bank, 350 S.C. 339, 346–47, 565 S.E.2d 309, 313 (Ct. App. 2002) ("Generally, it is not premature for the trial court to grant summary judgment ***after all relevant parties have been deposed*** because the litigants have had a full and fair opportunity to develop the record in the case.") (emphasis added).

documents obtained through FOIA requests and discovery, to support their position that no valid restriction on the use of their properties exists. Respondents now desire to sell their lots to purchasers who intend to build residential structures on one or more of the lots.

The underlying action before the trial court presented a relatively simple and straight-forward matter. Namely, whether the Plat (and the restrictive language contained therein) unambiguously speaks for itself, or whether it is ambiguous such that extrinsic evidence should have been allowed to explain, contradict, elaborate upon, or otherwise controvert the ordinary, plain, and unambiguous. Respondents sought, and were granted summary judgment because the trial court ultimately allowed the introduction of extrinsic evidence which injected a contrived ambiguity into the four corners of the Plat, which is unequivocally unambiguous on its face.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)). "Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law." Id. (citing S.C.R. Civ. P. 56(c)). When determining whether a material issue of fact exists, the appellate court must view all evidence and the inferences to be drawn in a light most favorable to the non-moving party. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161,

165 (2003)). If more than one inference can be drawn, then the task is one for the jury, and summary judgment should not be granted. Id. (citing Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006).

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RELYING ON EXTRINSIC EVIDENCE TO CONCLUDE THAT THE UNAMBIGUOUS "AGRICULTURAL USE ONLY" NOTATION ON THE PLAT DID NOT CREATE A VALID USE RESTRICTION.

The trial court committed reversible error in granting summary judgment to the Respondents based on its clearly erroneous reliance on extrinsic evidence to reach the conclusion that the Plat's clear "agricultural use only" limitation was not a valid restriction on the use of Respondents' land. Under the relevant facts of this case and a proper application of the law, extrinsic evidence should not have been allowed because the restriction is unambiguous on its face and not susceptible to any interpretation other than that the Respondents' land is to be put to agricultural use only, and not to be used for building purposes.

A. The trial court erred as a matter of law in relying on extrinsic evidence, including the surveyor's affidavit and a letter from the heirs of James Roper.

Restrictive covenants are contractual in nature. Seabrook Island Prop. Owners' Ass'n v. Berger, 616 S.E.2d 431, 434 (S.C. Ct. App. 2005). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." Hamilton v. CCM, Inc., 263 S.E.2d 378, 380 (S.C. 1980). Despite this general rule of strict construction, such restrictive covenants remain fully enforceable when their intent is clearly expressed. Sea Pines Plantation Co. v. Wells, 363 S.E.2d 891, 894 (S.C. 1987). "A restrictive covenant will be enforced if the covenant expresses the

party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant." Id. Where 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. Donald E. Baltz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441 (1966); Hardy v. Aiken, 631 S.E.2d 539, 542 (2006).

It is a fundamental aspect of contract and property law that the intention of the grantor must be found within the four corners of the document. Windham v. Riddle, 672 S.E.2d 578, 582–83 (S.C. 2009); Moser v. Gosnell, 513 S.E.2d 123, 126 (S.C. Ct. App. 1999) (stating when a covenant is clear and unambiguous, the court looks only to the language of the covenant and not to extrinsic evidence to determine the intent of the parties). It is error for a court to rely on extrinsic evidence where a document is unambiguous on its face and where its meaning can be ascertained from within the four corners of the document. See Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 572, 772 S.E.2d 882, 892 (Ct. App. 2015) ("By referencing certain testimony and exhibits to support his interpretation of the lease, the master erred in considering extrinsic evidence outside the four corners of the contract.");[4] Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 832 F.2d 214, 220–21 (1st Cir. 1987) (holding that "[i]n the absence of any express language or any ambiguous language, which would permit the admission of relevant

[4] In Bluffton, the South Carolina Supreme Court ultimately determined that the master's error was harmless because the "master's interpretation—based on the extrinsic evidence presented at trial—was consistent with the contract's language." Bluffton, 412 S.C. at 572, 772 S.E.2d at 892. Here, the master's conclusion that the "notations on the Plat do not create restrictions," Order p. 12, is patently *inconsistent* with the Plat's language, which on its face clearly expresses a *restriction* to "agricultural use only."

extrinsic evidence," the four corners of the document shall govern the court's interpretation).

Furthermore, where a deed describes land as it is shown on a plat, the plat becomes 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, n. 2 citing 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."). And it is fundamental law in South Carolina that "if 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 at 111.

Bellamy was a case in which the plaintiff sought declaratory judgment to resolve a boundary line dispute between the parties. Id. at 108. The plaintiff's father had conveyed to him certain property, a portion of which the plaintiff later conveyed to the defendant. Id. at 108–09. The property was clearly and accurately described in the deed which conveyed it. Id. at 111. The deed contained a written description of the land, and then incorporated the plat by reference using the following phrase: "*as reference to above mentioned plat will fully show.*" Id. at 108.

Over the defendant's objection, the master-in-equity allowed the plaintiff to testify about his deceased father's (and his own) intentions in making the relevant conveyances. Bellamy at 108–09. The sole issue on appeal was whether the trial judge erred in allowing the extrinsic evidence relating to the intent of the plaintiff and his father. Id. at 110. The Court of Appeals reversed the master's finding in favor of the plaintiff, stating that [s]ince there was no ambiguity in the description of the realty conveyed by the deed, [the

plaintiff]'s intent must be determined from within the four corners of the deed . . . ." Id. at 111. It noted that "[e]xtrinsic evidence is admissible to resolve ambiguities, not to create them where none exists." Id. Therefore, the Court concluded that the trial court erred in allowing extrinsic evidence relating subsequent plats of the property and relating to the plaintiff's and his father's intent. Id.

The case of Defeo v. Community Services Assocs., Inc., No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. 2007), is also instructive. The plat in Defeo contained the following restriction on the lot in question: "RESERVED FOR FUTURE USE FOR GOLF COURSE." Id. at 1. In that case, the Court of Appeals rejected the developer's argument that this language merely reserved its right to develop the land for golf course use, but did not prevent it from developing the land for other purposes, such as for residential use. Defeo, 2007 WL 8327948 at *2. This Court held that nothing in the phrase conveyed a similar intent to develop the lot for non-golf course use, and therefore "the clear, unambiguous language of the Plat restrict[ed] the Lot to golf course use *only*." Id. (emphasis added).

Here, the restriction on Appellant's and Respondents' land comes in the form of the "agricultural use only" notation on the Plat, which is expressly referenced and incorporated in the pertinent deeds.

In its Order granting Respondents' Motion for Summary Judgment, the trial court stated:

> From a review of the Plat and considering all matters shown within the four corners of the Plat, *and not considering any extrinsic evidence*, I find and conclude the notations on the Plat related to agricultural use were placed on the Plat by Charleston County.
>
> * * *

> By reviewing and considering all matters shown on the Plat and *not considering extrinsic evidence*, the notations on the Plat related to agricultural use are due to Charleston County's determination at that time that the four lots did not meet current minimum health department standards for a modified conventional sub-surface disposal system. However, if sewer or a modified conventional sub-surface disposal system would become available, then the lots could be used for building purposes.
>
> Because the notations on the Plat do no create restrictions, and certainly do not create restrictions enforceable by [Appellant], [Respondents] are entitled to summary judgment.
>
> R. pp. 16-17 (emphasis added).

As shown above, the trial court in its November 14, 2017 Order claimed that it was not relying on any extrinsic evidence in reaching its findings. Yet the court clearly did just that. See R. p. 676, ln. 9-11 ("Good or bad, this is extrinsic evidence because it has to do with my background."). The Order repeatedly referenced and relied upon an Affidavit of F. Elliotte Quinn, III, Order pp. 3–4, and a July 5, 1989 letter from the heirs of James Roper to the Charleston County Planning Board support its decision to grant Respondents summary judgment. The letter from the heirs and the sworn statements contained in Mr. Quinn's Affidavit both constitute impermissible extrinsic evidence. Both pieces of extrinsic evidence are akin to the testimony regarding intent that this Court found to be erroneously admitted in Bellamy, where the four corners of the deed and plat were unambiguous in meaning.

In this case, setting aside all extrinsic evidence and looking solely within the four corners of the deeds (and the Plat which is part of them), only one conclusion can be reached—that the properties at issue are restricted to "agricultural use only, [and] not to be used for building purposes." Merriam-Webster Dictionary defines the word "agricultural" as meaning "of, relating to, used in, or concerned with agriculture" – i.e., farming. (R. pp.

693-702.) It defines "only" as meaning "alone in a class or category," "as a single fact or instance and nothing more or different," or "with the *restriction* that." (R. pp. 703-716.) Under any of those accepted definitions, it is clear that the notation on the Plat prohibits the use of Lots C-2, C-3, C-4 and C-5 for anything *other than* agricultural use.

As a result, the trial court erred as a matter of law in relying on extrinsic evidence, including Mr. Quinn's Affidavit and the July 5, 1989 letter from the heirs of James Roper, in interpreting the restrictive notation on the Plat and granting Respondents summary judgment. This Court should reverse the trial court's ruling and should instead interpret the plain and unambiguous language of the Plat's restriction, without reference to extrinsic evidence.

B. The trial court erred as a matter of law in finding that the "agricultural use only" notation did not create a valid restriction on the use of Respondents' land.

There are a number of ways to create valid restrictions on the use of land, including by a plat referenced within a deed. See Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 628 S.E.2d 902, 913 (S.C. Ct. App. 2006) (restrictions can be created: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development); see also Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975) ("[P]urchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat."). Although the Plat in this case was signed, even unsigned restrictions can create valid restrictions on property. See 17 S.C. Jur. Covenants § 63 (citing McDonald v. Welborn, 220 S. C. 10, 66 S. E. 2d 327 (1951) for the proposition that "(1) irrespective of their validity, the restrictions were incorporated

by reference into the deed to the grantees; and (2) in any event, the unsigned restrictions gave notice of the restrictions and the general scheme incorporated in them.").

Murrells Inlet v. Ward, 378 S.C. 225 (Ct. App. 2008), is a case which demonstrates the significance of restrictive language located on a plat description—*referenced by the deed.* 378 S.C. 225 (Ct. App. 2008). In Murrells, an easement was created when the owner (Ward) subdivided a large tract of land in an effort to allow her children to live and enjoy the property. Id. at 228. Though Ward admitted she provided the fifty foot right-of-way road access pursuant to Horry County Zoning and Planning Regulations, she argued that the surveyor erroneously included the easement in the plat, and that she never intended for this use. Id. First, the Court of Appeals stated the general rules regarding restricting land use, focusing on the extensive case law supporting the view that a plat mentioned in a deed, *is part of the deed.* Id. at 232–33 (emphasis added). More specifically, the court said an "easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general." Id. at 233. Further still, "[a]s to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made." Id.

The Court of Appeals explained that "when Ward subdivided the property and recorded a plat referencing a fifty foot right-of-way, it may be inferred that she intended the right-of-way to be a private easement dedicated to the use of the lot owners, their successors in title, and the public." Id. at 236. Furthermore, "[b]y recording the easement on the plat, Ward evidenced an intention to grant that easement to any future lot owners in the subdivision." Id. Importantly, the Court of Appeals emphasized that "[s]ubsequent

purchasers are *entitled to rely on recorded deeds and plats* to determine their rights in respect to property." Id. (emphasis added); see also Bomar v. Echols, 270 S.C. 676, 679, 244 S.E.2d 308, 310 (1978) (explaining restrictive covenants arising by implication and stating, "where the owner of a tract of land subdivides it and sells the distinct parcels thereto to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee").[5] Thus, regardless of what she "now argues were her intentions at the time the plat was recorded," it would be unfair to deny a subsequent purchaser the right to use the easement since it "relied on the recorded plat when it purchased [the lot]" and since the "dedication of the private easement was complete when Ward originally conveyed the lot." Id.

Likewise, the settled principles of Marshall v. Columbia & E.C. Electric Street Ry. Co., 73 S.C. 241, 53 S.E. 417 (S.C. 1906) provide guidance in this matter.[6] In Marshall, the defendant owned a large acreage which was platted for the purpose of laying out the town of Eau Claire, South Carolina. Marshall, 53 S.E. at 418. At the intersection of two main streets, about four acres were designated on the map as the 'Circle.' Id. The plaintiff purchased large abutting lots which were described by reference to a plat, and the 'Circle' was designated as one of the boundaries of her property. Id. The defendant also orally

[5] There are no 'magical words' required to create a restrictive covenant. SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 84 (Ct. App. 2015).

[6]While Marshall deals with an easement, as opposed to a restrictive covenant, for purposes of "incorporation by reference"—this difference is immaterial. See e.g., Newington Plantation Estates Ass'n v. Newington Plantation Estates, 318 S.C. 362, 365 (1995) (finding both restrictive covenants and easements based on a recorded plat referenced in a deed).

represented to the plaintiff that the 'Circle' which bordered her lots had been dedicated for public purposes and would be "kept open," a fact upon which the plaintiff relied in making the purchase. Id. The defendant later altered its plan and subdivided the area of the 'Circle' into lots which were sold to various purchasers. Id.

The plaintiff brought an action to enjoin the defendant and its subsequent purchasers from building on the 'Circle' previously dedicated for public uses only. Marshall, 53 S.E. at 418. The court concluded that the seller had dedicated the 'Circle' to public uses and that the plaintiff, having bought her land in reliance on that fact, had an easement in the 'Circle' area and none of it could be sold as lots to others who had notice of her contention that it should remain open to the public. Id. at 419. In affirming the lower court's issuance of a permanent injunction, the South Carolina Supreme Court said that, "[e]ven if the 'Circle' was not dedicated so as to confer rights that could be enforced by the public, nevertheless, if the [defendant] represented to the plaintiff that the 'Circle' would be kept open, and thereby induced the plaintiff to purchase her lots, such representations would be binding upon the defendant." Id. at 421.

Here, the language of the plat at issue is clear and unambiguous. It states: "THESE LOTS C-2, C-3, C-4, C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES." As in Defoe, this language unequivocally created a restrictive covenant for the use of the properties in question. Appellant purchased Lot C-5 in reliance on the agricultural restriction stated in the Plat (which created and limited the use of Lots C-2, C-3, C-4 and C-5), as Appellant intended to, and did, in fact, build a barn and is now utilizing its property adjacent to these lots for a horse farm. Appellant was entitled to rely

on the recorded deeds and plat which contained the restrictive language. See Murrells, 378 S.C. at 226.

In their Motion for Summary Judgment, Respondents claimed that Appellant bought Lot C-5 after Respondent Roberts' house was already built on Lot C-3, and therefore, Appellant must have known there were issues with the agricultural restriction on the Plat. However, Appellant testified that he relied on his title insurance company and the title insurance policy it issued as to Lot C-5 to conclude that the restriction on the property for only agricultural use was, in fact, valid. R. p. 644, ln. 25-p. 645, ln. 10. The title insurance company took exception to the agricultural building restriction in its policy. See R. pp. 615-619. That policy provides as follows:

> Subject to any and all applicable easements, restrictions, conditions, rights-of-way, setback and other matters which may be disclosed by that certain plat entitled, "PLAT OF THE SUBDIVISION OF A 11.95 AC. TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA," made by F. Elliotte Quin, III, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130 in the RMC Office for Charleston County.
>
> **Note Building Restriction shown on said plat: 'These lots C-2, C-3, C-4 and C-5 for Agricultural Use only, not to be used for Building Purposes.'**

The deeds conveying Lots C-2, C-3, C-4 and C-5 specifically state that the conveyances are being made subject to all restrictions, reservations, easements and other limitations that appear of record *including on the recorded Plat*. R. p. 648, ln. 10-15. Appellant relied on its review of the Plat and advice from his attorney. R. p. 646, ln. 19-p. 647, ln. 22. Appellant also stated that it would not have bought lot C-5—at least not for the price which was paid—if there had not been the "agricultural use only" restriction on

the adjoining lots. R. p. 643, ln. 10-21. The Plat created a valid restrictive covenant that requires the Lots C-2, C-3, C-4 and C-5 be used for agricultural purposes only.

The well-established law in this state, as discussed above, is that a restrictive use provision located on a plat which is referenced by a deed can operate as a valid restriction on the use of property. Such is the case here. Furthermore, if any inference is to be made, it must be made in the light most favorable to Appellant. Murphy, 384 S.C. at 54, 681 S.E.2d at 30. Therefore, based on the foregoing analysis, the trial court erred as a matter of law in finding that the Plat's clear agricultural use limitation did not create a valid restriction on the use of Respondents' land.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's Order granting summary judgment to the Respondents.

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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.

PROOF OF SERVICE

I do hereby certify that on June 29, 2018, I served all counsel in this action with a copy of the document herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address:

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The Honorable Mikell R. Scarborough, Master-In-Equity
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STATEMENT OF ISSUES ON APPEAL

I. Should the Master be affirmed when many of the issues raised by Plaintiff have not been preserved for review as they were either not raised or ruled upon by the Master and Plaintiff failed to file a motion to alter or amend judgment?

II. Did the Master consider extrinsic evidence when he determined the notations on the Plat do not create a restriction even though the Master expressly stated in his written order that he was not considering extrinsic evidence and did not refer to extrinsic evidence in so ruling?

III. Whether the Master correctly determined the notations on the Plat do not create a restriction when it is evident in reviewing the four corners of the Plat that the notations were not placed on the Plat by the landowners but instead were placed on the Plat by Charleston County as part of its approval process and were related to the availability of septic or sewer?

IV. Did the Master correctly make an alternative finding and ruling that, if the Plat was found to be ambiguous, then all extrinsic evidence shows the notations on the Plat were placed on the Plat by Charleston County and were not intended to restrict the property?

V. Whether the Master granted summary judgment prematurely even though Plaintiff failed to advance a good reason why it had insufficient time, failed to set forth why further discovery would uncover additional evidence to create an issue of fact, failed to comply with Rule 59(f), and took no depositions in nearly 18 months?

STATEMENT OF THE CASE

Appellant Carpenter Braselton, LLC ("Plaintiff") appeals the Order of the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County, dated November 8, 2017, and entered November 14, 2017 ("Order"). Plaintiff contends the Master erred in finding certain notations placed on a plat depicting the parties' properties do not restrict the property.

Plaintiff filed this action against Respondents Ashley Roberts n.k.a. Ashley Roberts Cyronak, Jeremy Cook, and Salaheddine Ezzaoudi ("Defendants") on March 28, 2016, seeking a declaratory judgment and a permanent injunction enjoining Defendants from building residences or other structures upon their lots because Plaintiff claims those lots are burdened by claimed restrictions on a plat. (R. pp. 23-35). On June 17, 2016, Defendants served their Answers and Counterclaims, in which they too sought a declaratory judgment as to the effect of certain notations on the plat. (R. pp. 36-59). This case was referred to the Master by Order of Reference entered April 3, 2017. (R. pp. 2-3).

After written discovery was exchanged and Plaintiff was deposed on March 22, 2017, through its designee Edward L. Terry, Defendants moved for summary judgment on August 2, 2017. (R. pp. 68-85). Defendants moved for summary judgment on their Counterclaims and on Plaintiff's Complaint. (R. pp. 68, 85).

A hearing on Defendants' summary judgment motion was held on September 21, 2017. The Order was entered November 14, 2017, granting summary judgment to Defendants. (R. pp. 6-21).

Plaintiff failed to file a motion to alter, amend, or reconsider pursuant to Rule 59(e), SCRCP.

This appeal followed.

FACTS

1. Subdivision of the property and the Plat.

In 1990, the heirs of James Roper subdivided an 11.95-acre tract to create five lots, Lots C-1, C-2, C-3, C-4, and C-5, with a private road to access those lots. (R. p. 687). The property was surveyed by F. Elliotte Quinn, III, a professional land surveyor, who prepared a plat entitled "PLAT OF THE SUBDIVISION OF A 11.95 TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA." This plat was recorded December 31, 1990, in the RMC Office for Charleston County in Plat Book CB at Page 130 ("the Plat"). (R. p. 687).

Charleston County was required to approve the subdivision of the 11.95-acre tract into five lots. (R. p. 688). On June 22, 1989, Mr. Quinn's surveying company applied for subdivision approval. (R. p. 110). During the permitting and approval process for the subdivision, the Charleston County Planning Board determined that one of the five lots, Lot C-1, met the current minimum health department standards for a modified conventional sub-surface disposal system. (R. p. 688).

The Charleston County Planning Board, based on a letter dated September 6, 1989, from the South Carolina Department of Health and Environmental Control ("DHEC"), determined that four of the five lots, Lots C-2, C-3, C-4, and C-5, did not meet the current minimum health department standards for a modified conventional sub-surface disposal system. (R. pp, 117-118).

On July 5, 1989, the Heirs of James Roper wrote the Charleston County Planning Board and stated as follows:

Re.: Application #13511; Heirs of James Roper

Dear Sirs:

We the Heirs of James Roper would like to request variances from sections of the Charleston County Subdivision regulations due to the fact that we are trying to subdivide this tract for family purposes. We as heirs of James Roper, Sr. are ourselves getting old and would like to straighten out the title of this property prior to our deaths so that our children and grandchildren don't have the problems associated with heirs property.

Through the years this tract which once stretched from Riverland Drive to the marshes of the Stono River, has been subdivided until this 5.95 Acre tract remained with only a 20' access connecting it to Bradham Road. We cannot give an additional 5' for road right-of-way due to the fact that a great portion of it would have to come from someone else's property. We are aware that this land possesses very poor soil conditions for septic systems and would like to request that the subdivision be approved with the stipulation that any lot which will not support a septic system be restricted from becoming a building lot until such time that public sewer service can be provided to that lot.

Please consider our request and thank you for your time.

(R. p. 122).

According to Mr. Quinn, the Charleston County Planning Board then required the following language be placed on the Plat:

- THIS LOT MEETS CURRENT MINIMUM HEALTH DEPARTMENT STANDARDS FOR A MODIFIED CONVENTIONAL SUB-SURFACE DISPOSAL SYSTEM (FOR LOT C-1 ONLY)
- THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES[1]

(R. p. 688).

Also, according to Mr. Quinn, these notations were placed on the Plat by Charleston County to indicate Charleston County would not, at that time, approve building permits for Lots

[1] This language is derived from Standard Subdivision Stipulations that Charleston County used at that time. (R. p. 102).

C-2, C-3, C-4, and C-5, because those lots did not meet current minimum standards for a modified conventional sub-surface disposal system. (R. p. 689). Lot C-1 did meet the current minimum standards for a modified conventional disposal system, and that is why Charleston County did not say Lot C-1 was not to be used for building purposes. (R. p. 688).

Mr. Quinn further stated in his affidavit that these notations on the Plat were not requested to be placed on the Plat and were not placed on the Plat by or at the request of the heirs of James Roper. He further stated these notations on the Plat were not, and are not, restrictions from use placed on Lots C-2, C-3, C-4, & C-5 by the heirs of James Roper. (R. pp. 688-689).

The heirs of James Roper indicated to Mr. Quinn they wanted the ability to build residential homes on all five lots. Charleston County required that each lot be suitable for a septic system before issuing building permits. At that time, lots would not be suitable for a septic system if they did not "perk."[2] At that time, Charleston County would not permit septic systems on four of the lots because four of the lots did not "perk." Apparently, at that time, Lot C-1 did perk, but the others did not. That is why Charleston County placed a different notation for Lot C-1 on the Plat. (R. pp. 688-689).

These notations were placed on the Plat by Charleston County to warn buyers of issues related to sewer disposal services. (R. p. 689). Charleston County would not permit buildings to be placed on Lots C-2, C-3, C-4, and C-5 because, at that time, those lots did not meet the current minimum standards for a sewer disposal system, because those lots did not "perk." (R. p. 689).

As indicated on the face of the Plat, Charleston County approved the Plat on December 4, 1990.

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[2] A perc or perk test is or was used to evaluate the suitability of soils for septic tank systems to see if the soil properly absorbs fluids.

2. **Acquisition of the Lots.**

A. **Lot C-5: Plaintiff Carpenter Braselton, LLC.**

Lot C-5 is described as follows:

> All that certain lot, piece or parcel of land, situate, lying and being at the end of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 31,845.3 square feet of highland and six (6) acres of marshland, more or less, and known and designated as LOT C-5 on a plat entitled, "PLAT OF THE SUBDIVISION OF A 11.95 TRACT (5.95 HIGHLAND) OWNED BY JAMES ROPER TO CREATE 5 LOTS ON JAMES ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA," made by F. Elliotte Quin, III, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130 in the RMC Office for Charleston County. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.
>
> BEING the same property conveyed to Carpenter Braselton, LLC by deed of Herbert Brown dated November 10, 2014, and recorded November 12, 2014, in the RMC Office for Charleston County in Book 440 at Page 255.
>
> TMS: 341-00-00-029

Plaintiff Carpenter Braselton, LLC owns Lot C-5. Plaintiff purchased Lot C-5 by deed of Herbert Brown dated November 10, 2014, and recorded November 12, 2014, in the RMC Office for Charleston County in Book 440 at Page 256. (R. pp. 263-267).

Herbert Brown acquired the property by deed of Virginia R. Brown a/k/a Virginia Roper Brown, dated February 22, 1995, and recorded February 22, 1995, in the RMC Office for Charleston County in Book U-252 at Page 034 (R. pp. 269-271); by Decree Quieting Title (Case No: 07-CP-10-1185) dated June 7, 2007, and filed in the Clerk of Court of Common Pleas on June 13, 2007 ("Decree Quieting Title") (R. pp. 273-279); and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office for Charleston County in Book T-631 at Page 283 (R. pp. 296-299).

Lot C-5 is unimproved. Of all the lots in this case, Lot C-5 is closest to the Stono River.

B. Lot C-4: Defendant Salaheddine Ezzaoudi.

Lot C-4 is described as follows:

> All that certain piece, parcel or lot of land, situate, lying and being on the South Side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 24,0062.7 square feet of land, more or less and known and designated as Lot C4 on a plat entitled "Plat of the Subdivision of 11.95 acre tract (5.95 highland) owned by James Roper to Create 5 lots on James Island, Charleston County, South Carolina", made by F. Elliotte Quinn, Ill, R.L.S., dated January 9, 1989 and recorded December 31, 1990 in Plat Book CB at Page 130, RMC Office for Charleston County.
>
> BEING the same property conveyed to Perciel R. DeLaine, James A. Roper, III, Mildred R. Anderson, Ruby Roper and Raymond Roper by Decree Quieting Title (Case No: 07-CP-10-1185) dated June 7, 2007 and filed in the Clerk of Court of Common Pleas on June 13, 2007 ordered by the Honorable Mikell R. Scarborough, Master in Equity for Charleston County and by Master's Deed dated June 15, 2007 and recorded July 10, 2007 in the RMC Office of Charleston County in Book T631 at Page 287.
>
> TMS No: 341-00-00-072

Defendant Salaheddine Ezzaoudi owns Lot C-4, having acquired it from Perceil R. Delaine, James A. Roper, III, Mildred R Anderson, Ruby Roper and Raymond Roper by Deed executed on various dates in 2013 and recorded August 1, 2013, in the RMC Office for Charleston County in Book 349 at Page 974. (R. pp. 301-308).

Perceil R. DeLaine, James A. Roper, III, Mildred R. Anderson, Ruby Roper and Raymond Roper acquired Lot C-4 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 287. (R. pp. 310-313).

Lot C-4 is unimproved.

C. Lot C-3: Defendants Ashley Roberts and Jeremy Cook.

Lot C-3 is described as follows:

> All that certain piece, parcel or lot of land, situate, lying and being on the South side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 23,669.9 square feet, more or less, and known and designated as Lot C3 on a plat entitled "Plat of the Subdivision of a 11.95 tract (5.95 Highland) owned by James Roper to Create 5 lots on James Island, Charleston County, South Carolina" made by F. Elliotte Quinn, III, R.L.S., dated January 9, 1989, and recorded on December 31, 1990 in Plat Book CB, Page 130, RMC Office for the County of Charleston.
>
> BEING the same property conveyed by Deed from Mikell R. Scarborough, as Master in Equity for Charleston County, to Ruth Craig dated June 15, 2007 and recorded July 10, 2007 in Deed Book T631 at Page 279.
>
> TMS No: 341-00-00-073

Defendants Ashley Roberts and Jeremy Cook own Lot C-3, having acquired it from Ruth R. Craig, by her attorney-in-fact Percile DeLaine, by Deed dated September 6, 2007, and recorded September 11, 2007, in the RMC Office for Charleston County in Book J638 at Page 712. (R. pp. 315-319).

Ruth R. Craig acquired Lot C-3 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 279. (R. pp. 321-324).

On July 30, 2007, the City of Charleston Department of Planning approved the plans for the construction of a home on Lot C-3.[3] (R. p. 193). The City of Charleston Department of Planning noted as follows:

> The plans submitted for the development of the above referenced property have been reviewed and approved by the City of Charleston Zoning Division and Architecture & Preservation Division.
>
> The above referenced property has a base zoning classification of SR-1 (Single Family Residential) under the City of Charleston Zoning Ordinance. The use of "881. One family detached dwelling" is a permitted use in the SR-1 district. There are currently no pending zoning violations on this property. Legal non-conforming

[3] The Planning Department provided this approval for construction of a home on both Lot C-3 and Lot C-2, although a home was only constructed on Lot C-3. (R. p. 193).

uses are subject to the restrictions contained in Article 1, Part 2 of the Zoning Ordinance.

The architectural and structural design including all necessary elevation and plan views were in accordance with building requirements set by the Board of Architectural Review (BAR).

(R. p. 193).

Defendants Ashley Roberts and Jeremy Cook constructed a home on Lot C-3, which construction was completed February 5, 2009.[4] (R. p. 195).

D. Lot C-2: Defendants Ashley Roberts and Jeremy Cook.

Lot C-2 is described as follows:

All that certain piece, parcel or lot of land, situate, lying and being on the south side of Roper Road, James Island, County of Charleston, State of South Carolina, measuring and containing 1.26 acres, more or less, and known and designated as Lot C2 on a plat entitled "Plat of the Subdivision of a 11.95 acre tract (5.95 Highland) owned by James Roper to create 5 lots on James Island, Charleston County, South Carolina" made by F. Elliotte Quinn, III, R.L.S., dated January 9, 1989 and recorded on December 31, 1990, in Plat Book CB, Page 130, in the RMC Office of the County of Charleston.

BEING the same property conveyed by Deed from Mikell R. Scarborough, as Master in Equity for Charleston County, to John Fleming dated June 15, 2007 and recorded in Deed Book T631 at Page 275.

TMS No: 341-00-00-074.

Defendants Ashley Roberts and Jeremy Cook own Lot C-2 having acquired it from John W. Fleming by Deed dated September 6, 2007, and recorded September 11, 2007, in the RMC Office for Charleston County in Book J638 at Page 717. (R. pp. 326-330).

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[4] Plaintiff is not seeking injunctive relief as to the house constructed on Lot C-3. See Tr. p. 27 (Wherein Plaintiff's counsel stated, "No, Your Honor, we are not looking to do that at all. We're just trying to keep it as it is. So that's our requested declaration."). (R. p. 675, lines 23-25).

John W. Fleming acquired Lot C-2 by the Decree Quieting Title and by confirmatory deed dated June 15, 2007, and recorded July 10, 2007, in the RMC Office of Charleston County in Book T631 at Page 275. (R. pp. 332-335).

Lot C-2 is unimproved.

3. Plaintiff's Adjacent Property.

In its Complaint, Plaintiff claims it derives a benefit from the alleged restriction. Among other benefits, Plaintiff claims the restriction allows Plaintiff to experience and benefit from the "views, peace, and comfort of the undeveloped properties." (R. p. 30).

Despite this claimed concern by Plaintiff regarding "views, peace, and comfort of the undeveloped properties," Plaintiff constructed a two-story single-family residence on property it owns adjacent to Lot C-5, which property is located at 2284 Lucky Road. (R. p. 384, lines 3-4). Plaintiff constructed a two story "Barn," which has horse stables on the first floor. Id. The second floor contains an office apartment with two bedrooms and one bath. People spend the night at this building. (R. p. 385, lines 5-7).

4. This Action.

A. Plaintiff.

Edward L. Terry is the authorized agent of Plaintiff. His wife is the sole member and manager of Plaintiff. (R. p. 374, lines 20-25, R. p. 375, lines 1-2). Mr. Terry has developed numerous subdivisions in multiple states. (R. p. 359, line 18 – R. p. 361, line 11). He has developed approximately 20 subdivisions in South Carolina. (R. p. 361, lines 7-9). Some of the subdivisions he developed were restricted by traditional covenants, conditions, and restrictions. (R. p. 365, line 21 – R. p. 368, line 10). Mr. Terry was extensively involved in the purchase of the property, reviewing documents and visiting the property. (R. p. 387, line 7 – R. p. 388, line 25).

B. Plaintiff's Complaint.

On March 28, 2016, Plaintiff filed this action claiming the notation on the Plat that Charleston County mandated be placed on the Plat and which provides "THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES," creates a restriction that the lots not be used for building purposes and be limited to agricultural uses. (R. p. 29).

Plaintiff asserted claims for injunctive relief and declaratory relief.

C. Defendants' Answers and Counterclaims.

Defendants denied the material allegations of the Complaint and asserted various affirmative defenses. (R. pp. 36-45, R. pp. 48-57).

Defendants asserted counterclaims for declaratory relief asking the Court to declare Defendants own their lots free and clear of any use restriction claimed to be created by the Plat and the claims of Plaintiff and its successors and assigns. (R. pp. 44-45, R. pp. 56-57).

Defendants asserted counterclaims to quiet title to their respective lots in their respective names free and clear of any claimed restriction and of any right, title, claim, lien, or interest of Plaintiff and its successors and assigns. (R. p. 45, R. p. 57).

D. Summary Judgment.

Defendants moved for summary judgment on their Counterclaims and on Plaintiff's Complaint arguing there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. (R. pp. 69-85).

A hearing on Defendants' summary judgment motion was held before the Master-in-Equity on September 21, 2017. The Order was entered November 14, 2017, granting summary judgment to Defendants. (R. pp. 6-21).

In the Order, the Master reviewed the four corners of the Plat to determine whether the notations on the Plat create a restriction on use by express terms or by plain and unmistakable implication. The Master determined from a review of the Plat and considering all matters shown within the four corners of the Plat, and not considering extrinsic evidence, that the notations on the Plat related to agricultural use were placed on the Plat by Charleston County and they do not create restrictions. (R. p. 16).

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

I. MANY OF THE ISSUES RAISED BY PLAINTIFF HAVE NOT BEEN PRESERVED FOR REVIEW AS THEY WERE EITHER NOT RAISED OR RULED UPON BY THE MASTER AND PLAINTIFF FAILED TO FILE A MOTION TO ALTER OR AMEND JUDGMENT.

Plaintiff makes numerous arguments that are not preserved for appellate review.

First, Plaintiff argues the Master erred as a matter of law in relying on extrinsic evidence, including the surveyor's affidavit and a letter from the heirs of James Roper (Appellant's Brief pp.

10-15). Second, Plaintiff argues summary judgment was premature because it was granted before Plaintiff could take many key party depositions. See (Appellant's Brief at p. 2 n. 2; p. 8 n. 3). As set forth more fully below, these arguments are not preserved for appellate review.

An appellant may not argue one ground at trial and an alternate ground on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the lower court. Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996) rev'd on other grounds, 329 S.C. 371, 496 S.E.2d 17 (1998). It is the responsibility of counsel to preserve issues for appellate review. See State v. Rivers, 411 S.C. 551, 555 n.2, 769 S.E.2d 263 n.2 (2015) ("our appellate courts have consistently refused to apply the plain error rule and it is the responsibility of counsel to preserve issues for appellate review"). An appellate court may not reverse a trial court's ruling merely for any reason appearing in the record; rather, the losing party must first try to convince the trial court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the trial court erred. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

The record must show the issue was raised to the trial court, and any issue not raised to and ruled upon by the trial judge is not preserved for appeal. Zaman v. S.C. Bd. of Med. Examrs., 305 S.C. 646, 594 S.E.2d 462 (2004); I'On, 338 S.C. at 421, 526 S.E.2d at 724 (stating parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling). Further, a party must file a motion to alter or amend judgment when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Rule 59(e), SCRCP; Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Imposing these preservation requirements on appellants is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal).

Further, when an order is claimed to be internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review. Parker v. Shecut, 340 S.C. 460, 480, 531 S.E.2d 546, 557 (Ct. App. 2000), rev'd on other grounds, 349 S.C. 226, 562 S.E.2d 620 (2002). A post-trial motion must also be made where there are errors or inconsistencies in the trial court's final order. Grant v. South Carolina Costal Council, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (alleged inaccuracies or prejudicial matter in trial court's order were not preserved for appeal where no post-trial motion was made raising these errors).

A. Plaintiff Failed to Preserve for Appellate Review its Argument that the Master Erred in Relying upon Extrinsic Evidence.

Plaintiff argues the Master considered extrinsic evidence, including the surveyor's affidavit and a letter from the heirs of James Roper. That is simply not the case because the Master, in finding the notations on the Plat did not create a restriction, expressly stated he was not considering extrinsic evidence. Nonetheless, Plaintiff never raised this issue to the Master and failed to file a motion pursuant to Rule 59(e), SCRCP, failing to preserve this issue for appellate review.

Plaintiff argues the Master's ruling is inconsistent because the Master claimed in his Order he was not relying on any extrinsic evidence in reaching his finding but then referenced extrinsic evidence in the Order. (Appellant's Brief p. 14) (". . . the trial court in its November 14, 2017

Order claimed that it was not relying on any extrinsic evidence in reaching its findings. Yet the court clearly did just that") ("The Order repeatedly referenced and relied upon an Affidavit of F. Elliotte Quinn, III, Order pp. 3-4, and a July 5, 1989 letter from the heirs of James Roper to the Charleston County Planning Board support its decision to grant Respondents summary judgment"). Plaintiff argues that because the Master found the Plat to be unambiguous, he "erred as a matter of law in relying on extrinsic evidence, including Mr. Quinn's Affidavit and the July 5, 1989 letter from the heirs of James Roper, in interpreting the restrictive notation on the Plat and granting Respondents summary judgment." (Appellant's Brief p. 15).

The record must show the issue was raised to the trial court, and any issue not raised to and ruled upon by the trial judge is not preserved for appeal. Zaman v. S.C. Bd. Of Med. Examrs., 305 S.C. 646, 594 S.E.2d 462 (2004). However, at no time did Plaintiff raise the issue regarding alleged inconsistencies in the ruling to the Master, much less obtain a ruling on the issue.

Further, and most importantly, Plaintiff failed to file a motion pursuant to Rule 59(e), SCRCP, seeking to alter or amend the Order. Plaintiff claims the Order is inconsistent because it states the Master is not relying on extrinsic evidence, but then cites extrinsic evidence. However, this issue is not preserved for appellate review. When an order is alleged to be internally inconsistent or the written order is not consistent with an oral order, those inconsistencies must be raised to the trial court by way of a post-trial motion to preserve the issue for appellate review. See Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), rev'd on other grounds, 349 S.C. 226, 562 S.E.2d 620 (2002); see also Grant v. South Carolina Costal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (alleged inaccuracies or prejudicial matter in trial court's order were not preserved for appeal where no post-trial motion was made raising these errors); Pelican Bldg. Ctrs. of Horry–Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (holding when

trial court's oral and written orders are inconsistent, appellant must bring these inconsistencies to the trial court's attention through a motion to alter or amend to preserve the issue for appeal); Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439, 441, 381 S.E.2d 212, 213 (Ct. App. 1989) (Any question regarding the inconsistency of a verdict must be raised by a motion for a new trial).

Here, Plaintiff failed to move under Rule 59(e), SCRCP, regarding Plaintiff's claim that the Master wrongfully considered extrinsic evidence, that the Order is internally inconsistent, or that the Order is not consistent with the Master's oral ruling. These issues are therefore not preserved for appellate review.

B. Plaintiff Failed to Preserve its Argument that Summary Judgment was Premature.

Plaintiff argues summary judgment was premature because it was granted before Plaintiff could take many key party depositions. (Appellant's Brief p. 2 n. 2) ("Appellant's deposition is the sole deposition that has been taken in this case. The surveyor's deposition has not been taken. None of the Defendants' depositions have been taken . . . These are material questions which must be tried before a factfinder, and therefore the Court erred in granting summary judgment to Respondents." (Id. at p. 8 n. 3) ("Appellant has not yet been able [to] depose Respondent Roberts or Respondent Cook, who currently reside in California. Summary judgment was a drastic and premature remedy where, as here, discovery-including taking party depositions-had not yet been completed.").

Plaintiff failed to preserve this argument because it failed to obtain a ruling on this issue. See Rule 59(e), SCRCP; Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding that a party must file a motion to alter or amend a judgment when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review). Although Plaintiff

raised this issue in its Memorandum in Opposition to Summary Judgment (R. p. 342), Plaintiff failed to obtain a ruling from the Master on the issue. At no time did Plaintiff raise this argument with the Master at the summary judgment hearing. (R. pp. 649-679). The Master did not rule on the issue orally from the bench or address the issue in his Order. (R. pp. 649-679, R. pp. 6-21). Plaintiff also failed to raise the issue in any sort of post-trial motion. Therefore, because Plaintiff failed to obtain a ruling from the Master and failed to raise the issue in a motion to alter or amend the judgment, Plaintiff's argument that summary judgment is premature is not preserved and may not be considered on appeal.

Furthermore, Plaintiff made no mention of the issue in its statement of issues on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.").

Accordingly, this issue is not preserved for review.

II. THE MASTER DID NOT CONSIDER EXTRINSIC EVIDENCE WHEN HE DETERMINED THE NOTATIONS ON THE PLAT DO NOT CREATE A RESTRICTION BECAUSE MASTER EXPRESSLY STATED IN HIS WRITTEN ORDER THAT HE WAS NOT CONSIDERING EXTRINSIC EVIDENCE AND DID NOT REFER TO EXTRINSIC EVIDENCE IN SO RULING.

Plaintiff argues the Master improperly considered extrinsic evidence. Assuming this issue is preserved for appellate review, this argument is without merit.

Defendants acknowledge the Master did reference extrinsic evidence at the summary judgment hearing. (R. p. 676, lines 10-11) ("Good or bad, this is extrinsic evidence because it has to do with my background."). However, despite any oral statements made by the Master at the hearing, the final written Order granting summary judgment makes it clear he did not consider extrinsic evidence in reaching his decision.

In the Order, the Master stated:

> From a review of the Plat and considering all matters shown within the four corners of the Plat, *and not considering any extrinsic evidence,* I find and conclude the notations on the Plat related to agricultural use were placed on the Plat by Charleston County.
>
> ***
>
> By reviewing and considering all matters shown on the Plat and *not considering extrinsic evidence,* the notations on the Plat related to agricultural use are due to Charleston County's determination at that time that the four lots did not meet current minimum health department standards for a modified conventional sub-surface disposal system. However, if sewer or a modified conventional sub-surface disposal system would become available, then the lots could be used for building purposes.
>
> Because the notations on the Plat do not create restrictions, and certainly do not create restrictions enforceable by Plaintiff, Defendants are entitled to summary judgment.

(R. pp. 16-17) (emphasis added).

The Master's oral statements at the summary judgment hearing are inconsequential in light of the final written Order. Although a court may make an oral ruling, it is only the final written order that is determinative. An order is not final until it is written and entered by the clerk of court. First Union National Bank of South Carolina v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) (holding a judge was not bound by a prior oral ruling and could issue a written order which conflicted with the prior oral ruling); see also Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (holding even if the trial judge made an oral ruling in favor of one party, such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge, and delivered for recordation).

Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly. Id. In Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990), the court stated as follows:

> ***Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery.*** ... 'A judgment is the final determination of the rights of the parties in an action. ***While the written instrument purporting to be the judgment in a cause remains in the possession of the judge who is to pronounce it, it is of no effect***, and like a deed not delivered. * * * ' Even if as contended by defendant the trial Judge granted an oral divorce to plaintiff such pronouncement ***is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the Judge and delivered for recordation***. The Decree must be in writing and until such time the Judge may modify, amend or rescind such an oral Order.

302 S.C. at 209-210, 394 S.E.2d at 727 (Ct. App. 1990) (citation omitted) (quoting Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896) (emphasis added).

Although the Master in his oral ruling referenced extrinsic evidence, his final written order makes it abundantly clear he did not base his decision on extrinsic evidence. The Master mentioned twice that he was not considering extrinsic evidence. The Master only referenced extrinsic evidence in that part of his ruling where he made an alternative finding if the notations on the Plat were considered to be ambiguous. There is nothing wrong with the Master making this alternative finding and considering extrinsic evidence in making this finding, as the Master is allowed to do when considering an ambiguous contract or an ambiguous alleged restriction.

Accordingly, Plaintiff's argument is without merit and the Master should be affirmed.

III. THE MASTER CORRECTLY DETERMINED THE NOTATIONS ON THE PLAT DO NOT CREATE A RESTRICTION WHEN IT IS EVIDENT IN REVIEWING THE FOUR CORNERS OF THE PLAT THAT THE NOTATIONS WERE NOT PLACED ON THE PLAT BY THE LANDOWNERS BUT INSTEAD WERE PLACED ON THE PLAT BY CHARLESTON COUNTY AS PART OF ITS APPROVAL PROCESS AND WERE RELATED TO THE AVAILABILITY OF SEPTIC OR SEWER.

Plaintiff argues the Master erred as a matter of law in finding the "agricultural use only" notation on the Plat did not create a valid restriction on the use of Defendants' land. The Master correctly reviewed the four corners of the Plat, did not consider extrinsic evidence, but looked at

all notations on the Plat and read them together to properly conclude the notations on the Plat do not create a restriction on the use of the property.

"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, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). "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." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (quoting Taylor v. Lindsey, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998)).

"To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C., 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007). The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Thomas–McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). If practical, documents will be interpreted to give effect to all of their provisions. Ecclesiastes, 374 S.C. at 498, 649 S.E.2d at 502. In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977).

With that in mind, "restriction[s] on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). In addition, "a covenant must express the purpose of the parties thereto to be valid and enforceable and it must not be too indefinite." Vickery v. Powell, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976).

In construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here, Plaintiff, and strictly against limitations upon the property's free use. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004); Hyer v. McRee, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991).

Where there is doubt, the doubt must be resolved in favor of the property's free use. Hyer, 306 S.C. at 212, 410 S.E.2d at 605. Where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

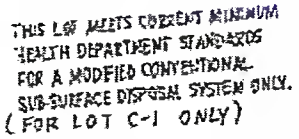
It is a question of law for the court whether the language of a contract is ambiguous. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur.2d Contracts § 338, at 345 (1991)). Once the Court decides the language is ambiguous, evidence may be admitted showing the intent of the parties. Id.

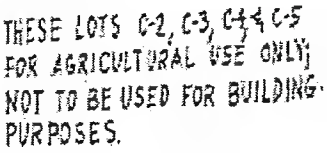
The Master reviewed the four corners of the Plat to determine whether the notations on the Plat create a restriction on use by express terms or by plain and unmistakable implication. The Master determined from a review of the Plat and considering all matters shown within the four

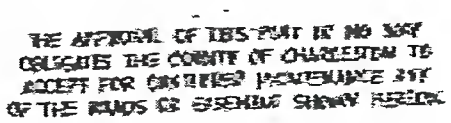
corners of the Plat, and not considering any extrinsic evidence, that the notations on the Plat related to agricultural use were placed on the Plat by Charleston County. (R. p. 16).

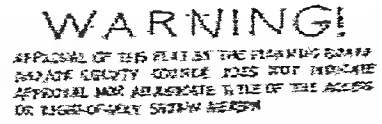
The Master properly found the notations were not placed on the Plat by either the surveyor or the owners of the property. Charleston County placed these notations on the Plat as part of its approval process. After all, the Plat is stamped approved as an "approved final plat" by Charleston County, with an associated planning board number. The other notations including the notations in question are in the same or similar typeface as those notations that were without question placed on the Plat by Charleston County. The typeface of the remaining parts of the Plat are much different that the notations on the Plat in question.

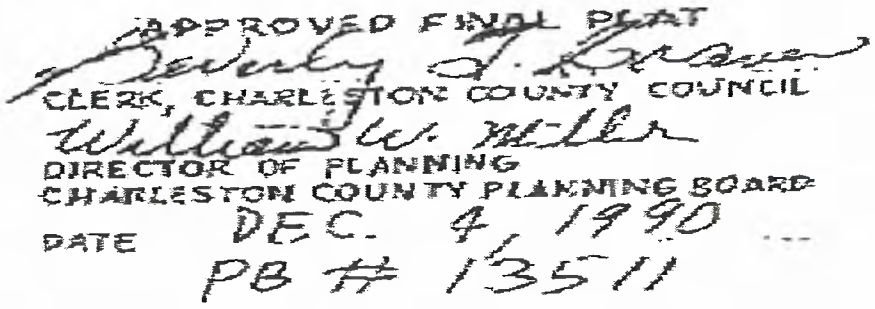
These notations and markings placed by Charleston County on the Plat are:











A review of all matters shown on the Plat, without considering extrinsic evidence, shows the notations on the Plat related to agricultural use are due to Charleston County's determination at that time that the four lots did not meet the current minimum health department standards for a modified conventional sub-surface disposal system. Charleston County set forth a notation related to Lot C-1, as it apparently was sufficient for a modified conventional sub-surface disposal system. The language related to agricultural use only and not for building purposes did not include Lot C-1.

There was no notation that says Lots C-2, C-3, C-4, and C-5 were suitable for a modified conventional sub-surface disposal system. Thus, a proper reading of the Plat that gives effect to all provisions of the Plat is that those lots were not suitable for a modified conventional sub-surface disposal system. However, if sewer or a modified conventional sub-surface disposal system would become available, then those other lots could be used for building purposes.

The notation saying "not for building purposes" was not placed in the middle of the lots. This notation was not signed by the landowners. The landowners had signed another part of the Plat related to dedication of a road. They did not sign anywhere near this notation on the Plat, all placed in that part of the Plat where the above-notations were placed by Charleston County and in similar typeface and font, different from the typeface and font used by the surveyor.

Plaintiff cites cases to support its argument that the Master erred in considering extrinsic evidence. None of these cases apply here or support Plaintiff's arguments.[5]

Plaintiff cites Bluffton Towne Ctr., LLC v. Gilleland-Prince, for the proposition that "[b]y referencing certain testimony and exhibits to support his interpretation of the lease, the master erred in considering extrinsic evidence outside the four corners of the contract." 412 S.C. 554, 572, 772 S.E.2d 882, 892 (Ct. App. 2015). In Bluffton, the appellate court reviewed the Master's determination of whether restrictions in a lease were enforceable where the Master determined the subject lease was unambiguous and then considered extrinsic evidence. Id. While the court found that the Master did err in considering extrinsic evidence after determining the lease was unambiguous, the court makes it clear that the error was harmless because the Master, in referencing extrinsic evidence, was simply setting forth alternative grounds for his ruling. The court explained:

> Based upon our review of the order as a whole, we find any error in considering extrinsic evidence was harmless because it is reasonable to infer the master was simply setting forth alternative grounds for his interpretation of the contract. See Williams, 363 S.C. at 123 n. 1, 609 S.E.2d at 814 n. 1 (noting that, in construing a judge's order, an appellate court must do so in light of the judge's intent "as discerned from the order as a whole"); Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 336, 676 S.E.2d 139, 145 (Ct. App. 2009) (stating it was "reasonable to infer that the circuit court was setting forth alternative grounds for its interpretation of the contract" by referencing certain testimony and exhibits in its order).
>
> Id.

Further the court explained: "In construing a master's order, an appellate court must do so in light of the master's intent as discerned from the order as a whole. Adhering to this principle,

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[5] While Plaintiff argues the Master erred in considering extrinsic evidence, which is simply incorrect, Plaintiff cites to a document created years after the Plat, its title insurance policy and exceptions noted therein, to argue the property is restricted.

this court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of the issues presented." Id. (citing White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 123 n. 1, 609 S.E.2d 811, 814 n. 1 (Ct. App. 2005) (internal quotations omitted).

Here, the extrinsic evidence was set forth in the Order because the Master made an alternative finding had he found the notations on the Plat to be ambiguous. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 336, 676 S.E.2d 139, 145 (Ct. App. 2009) ("It is reasonable to infer that the circuit court was setting forth alternative grounds for its interpretation of the contract.").

In his ruling on the meaning of the notations, the Master expressly stated that he was reviewing only the four corners of the Plat and not considering extrinsic evidence. The Master did not cite to extrinsic evidence in setting forth his ruling on the plain meaning of the notations on the Plat. Any argument to the contrary is wholly without merit and is a gross misreading of the Order.

Plaintiff also relies upon the case of Defeo v. Community Services Assocs., Inc., No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. 2007). The plat in Defeo contained the following restriction on the lot in question: "RESERVED FOR FUTURE USE FOR GOLF COURSE." Id. at *1. In that case, the Court of Appeals rejected the developer's argument that this language merely reserved its right to develop the land for golf course use but did not prevent it from developing the land for other purposes, such as for residential use. Id. at *2. This Court held that nothing in the phrase conveyed a similar intent to develop the lot for non-golf course use, and therefore "the clear, unambiguous language of the Plat restrict[ed] the Lot to golf course use only." Id. Plaintiff argues that the restriction in Defeo, is similar to the restriction at issue in our case.

However, unlike Defeo, the notations the Plat here are grouped with other notations that, when read as a whole, support the Master's interpretation. Furthermore, Defeo is an unpublished opinion that has no precedential value. See Rule 220(a), SCACR; Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) ("unpublished opinions have no precedential value").

Further, Plaintiff cites SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 781 S.E.2d 115 (Ct. App. 2015), for the proposition that there are no 'magical words' required to create a restrictive covenant. (Appellant's Brief p. 17, n. 5). However, that same case holds that "[i]n order to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication." Id. at 83, 781 S.E.2d at 121.

Plaintiff relies on Marshall v. Columbia & E. C. Electric Street R. Co., 73 S. C. 241, 53 S. E. 417 (1906), which involved a circle shown on a plat that bounded plaintiff's lots also shown on the plat. The seller represented to plaintiff that the circle was dedicated for public use and would be kept open. The seller then tried to subdivide the circle into lots. The court found in favor of plaintiff, found the circle was dedicated to public use, and relied heavily on representations made by the seller to plaintiff. That case is not a restrictions case, but instead is a dedication and easement case. Also, the court in that case relied heavily on representations made by the seller to the plaintiff. That case simply does not apply here.

Because the notations on the Plat do not create restrictions, the Master should be affirmed.

IV. THE MASTER CORRECTLY MADE AN ALTERNATIVE FINDING AND RULING THAT, IF THE PLAT WAS FOUND TO BE AMBIGUOUS, THEN ALL EXTRINSIC EVIDENCE SHOWS THE NOTATIONS ON THE PLAT WERE PLACED ON THE PLAT BY CHARLESTON COUNTY AND WERE NOT INTENDED TO RESTRICT THE PROPERTY.

The Master correctly made an alternative ruling that, had he found the notations on the Plat to be ambiguous, then all extrinsic evidence shows the notations did not create a restriction. Moreover, if this Court were to find the notations on the Plat created an ambiguity as it relates to the issues raised in this appeal, it should affirm the Master's decision.

It is a question of law for the court whether the language of a contract is ambiguous. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 338, at 345 (1991)). Once the Court decides the language is ambiguous, evidence may be admitted showing the intent of the parties. Id.

"A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation." See Hawkins, 328 S.C. at 592, 493 S.E.2d at 878-79. Again, where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 495, 617 S.E.2d 750, 757 (Ct. App. 2005).

If this Court finds the notations on the Plat to be ambiguous, this Court must then look at extrinsic evidence to determine the intent of the parties. At the same time, the Court must remember the essential guideposts created by our case law that, where there is doubt, the doubt must be resolved in favor of the free use of property and where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored.

Here, the evidence conclusively shows the owners of the property at that time, the Heirs of James Roper, did not want the property restricted. They sought a variance to allow the subdivision

of the lots. Because the lots were not suitable for a septic system, Charleston County placed the notations on the Plat. The owners of the property wanted the lots to be used for residential purposes when sewer was available. The surveyor testified as to why these notations were placed on the Plat, and they were not placed on the Plat to create a restriction. Plaintiff provided no evidence to the contrary.

As a result, the undisputed extrinsic evidence, considered by the Master if he had alternatively found the Plat to be ambiguous, shows there was no intent to create a private restriction on the use of the lots. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (ambiguities must be resolved in favor of the free use of property).

Plaintiff relies on language in some of the deeds that states the conveyances are being made subject to all restrictions, reservations, easements and other limitations that appear of record including on the recorded Plat. (Appellant's Brief p. 19). Plaintiff concludes the "subject to" language creates a restriction. Id.

However, this language does not create a restriction. It is just a limitation on the general warranty provided in the respective deeds. A conveyance that "is made 'subject to' restrictions set forth in some other deed or instrument referred to will not, without more, make the restrictions applicable to the property conveyed, if in fact the restrictions do not otherwise apply thereto." 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 151 (2017).

> If the "subject to" language of the instrument in question refers to restrictions which in fact do not exist at all at the time of the conveyance, it does not operate to impose the supposed restrictions on the granted land; nor does a conveyance made expressly subject to restrictions existing on the conveyed land "if any such there be" thereby impose restrictions where none existed theretofore. A conveyance of land with warranties which are expressly made "subject to" the restrictions set forth in a certain instrument referred to does not subject the conveyed lands to the restrictions so designated when by their terms the restrictions do not apply to such land. *While conveyances "subject to" restrictions give notice that such restrictions are of record, they are not an acknowledgment of the validity of such restrictions.*

Id. (emphasis added).

Here, just because some of the deeds provide that the property is being conveyed subject to restrictions that "may appear of record on the recorded plats," that language does not create a restriction where none exists. Nor does the language create a restriction when there is no plain and unmistakable implication to create a restriction. Because no restrictions are created by the subject notations on the Plat, the subject language in some of these deeds does not create a restriction.

The Master properly and correctly made an alternative finding and ruling based on if he had found the Plat to be ambiguous. All extrinsic evidence shows the notations on the Plat were placed on the plat by Charleston County and were not intended to restrict the property. Accordingly, the Master should be affirmed.

V. THE MASTER DID NOT GRANT SUMMARY JUDGMENT PREMATURELY.

Plaintiff argues the Master granted summary judgment prematurely. Even assuming this argument is preserved for review, this argument is without merit.

Plaintiff argues summary judgment was premature because it was granted before Plaintiff could take many key party depositions. See (Appellant's Brief p. 2 n. 2) ("Appellant's deposition is the sole deposition that has been taken in this case. The surveyor's deposition has not been taken. None of the Defendants' depositions have been taken . . . These are material questions which must be tried before a factfinder, and therefore the Court erred in granting summary judgment to Respondents."); (Id. at p. 8 n. 3) ("Appellant has not yet been able [to] depose Respondent Roberts or Respondent Cook, who currently reside in California. Summary judgment was a drastic and premature remedy where, as here, discovery-including taking party depositions-had not yet been completed.").

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009); see also Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding that a summary judgment motion heard four months after the action was filed and granted nine months after the action was filed was not premature on grounds that plaintiffs did not have a full and fair opportunity for discovery and finding the nonmoving party must demonstrate it is not merely engaged in a 'fishing expedition' by showing the likelihood that further discovery will uncover additional relevant evidence); Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . the court . . . may order a continuance to permit . . . discovery to be had . . . ."); Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.").

Here, Plaintiff had a full and fair opportunity to participate in discovery before the motion for summary judgment was heard. Plaintiff filed its Complaint on March 28, 2016, nearly a year and six months before the summary judgment hearing on September 21, 2017. In that span of time, Defendants were able to depose Plaintiff. However, Plaintiff never noticed a single deposition, yet Plaintiff now complains that, at the time of the summary judgment hearing, Plaintiff had not yet deposed any of the Defendants or the surveyor.

Plaintiff has not provided a good reason why nearly a year and a half is not sufficient time in this case to have developed facts in opposition to Defendants' motion for summary judgment.

Thus, Plaintiff had a full and fair opportunity to engage in discovery and the Master's grant of summary judgment was not premature.

CONCLUSION

For the above-referenced reasons, the Master's Order should be affirmed.

Respectfully submitted,

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June 29, 2018

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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June 29, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity
Ninth Judicial Circuit

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

Carpenter Braselton, LLC, ...Appellant,

vs.

Ashley Roberts, Jeremy Cook, and Salaheddine Ezzaoudi, ... Respondents.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondents, do hereby certify that, on this date, I caused to be served a copy of the **Final Brief of Respondents** upon Appellant's counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

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June 29, 2018

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.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

A. Appellant validly appealed the issue of the Master's consideration of extrinsic evidence and thus the Respondents' argument that it failed to preserve the issue for appeal is without merit.

Respondents have attempted to complicate Appellant's simple argument that the Master improperly considered extrinsic evidence in concluding that the language: "LOTS C-2, C-3, C-4 & C-5 FOR AGRICULTURAL USE ONLY; NOT TO BE USED FOR BUILDING PURPOSES" was *not* a valid restriction on the Plat in this case. Appellant was not required to file a motion to alter or amend that ruling despite Respondents' insistence that it should have. The Master stated that he was not relying on extrinsic evidence in concluding in the final written order that lots C-2, C-3, C-4 and C-5 did not meet current minimum health department standards for a modified conventional sub-surface disposal system, but that when they did that the lots could be used for building purposes. (Order, R. at pp. 16-17.) However, for the reasons stated in Appellants initial brief, and those herein, it is clear that the Master did, in fact, rely on extrinsic evidence even if the order states he did not.

Respondents cite Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 Ct. App 2000), 349 S.C. 226. 562 S.E. 2d 620 (2002), for the proposition that when an order is claimed to be internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review. Id. In Parker, the plaintiff tried to raise an argument at trial that an agreement among heirs merged into deeds of distribution and thereby extinguished the previous agreement among the heirs. Id. In that case, the Master refused to allow the plaintiff to raise the issue at trial and the plaintiff failed to challenge the issue by post trial motion. Parker is a very different case than the one before this Court. Here, the Appellant appealed the central issue in the litigation—the consideration by the Master of extrinsic evidence to interpret the

meaning of an unambiguous notation on the Plat. The present case is also distinguishable from Parker in that Appellant has not made any argument that the Master made an oral ruling that he later contradicted in a written one. The statements that the Master made orally and in his written order are consistent and it is the written order that is being appealed.

Respondents' citation to Grant v. South Carolinas Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995), in which the appellant failed to review the order prepared by opposing counsel prior to its entry, is also misplaced. Likewise, Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) stands for the same proposition as that in Parker and is inapplicable to the case at bar, as is Dowd v. Imperial Chrysler-Plymouth, Inc., 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989).

B. The Master erred in concluding that the notations were placed on the Plat by Charleston County as it is not evident that the notations were placed on the Plat as part of the Charleston County approval process and any relation to availability of sewer and septic unless the Master considered extrinsic evidence.

Respondents argue that the Master only looked to the four corners of the Plat to conclude that the notations on the plat do not create a valid restriction, that the notations on the Plat were placed there by Charleston County as part of their approval process, and that the notations were related to the availability of water and sewer. (Respondents Brief, p. 20). Respondents emphasize that Charleston County "placed these notations on the Plat as part of its approval process" and "[a]fter all, the Plat is stamped approved as an 'approved final plat' by Charleston County, with the associated planning board number." (Respondents Brief, p.22). These points are meaningless, as all plats must be approved by the County. If anything, the fact that it is a final plat begs the question of why the restriction in question does not provide a caveat to allow for future building if a septic system is obtained if Respondents interpretation is the correct one. If

Lots C-2 through C-5 were not to be permanently restricted, and the restriction was placed on the Plat by the County, then the County should have so indicated. The Master must have relied upon extrinsic evidence, in some form, to conclude that the County made the notations at issue and that they are connected to water and sewer approval.

Respondents contend that "the other notations including the notations in question are in the same or similar typeface as those notations that were without question placed on the Plat by Charleston County." Id. The typeface of the remaining parts of the Plat are much different tha[n] [sic] the notations on the plat in question." Id. If one looks at the typeface of the language at issue in this case, "LOTS C-2, C-3, C-4 & C-5 FOR AGRICULTURAL USE ONLY; NOT TO BE USED FOR BUILDING PURPOSES", it *does not* look like the language the County placed on the Plat as to Lot C-1 or otherwise. Respondents would like to convince the Court that the language is obviously similar but it simply is not.

C. Respondents fail to sufficiently address Appellant's argument that subsequent purchasers of land are entitled to rely on recorded deeds and plats to determine their rights with respect to property.

Appellant relied on the recorded deeds and plats in this case when it purchased Lot C-5 and when it also purchased the horse farm adjacent to lots C-2, C-3 and C-4, the lots of the Respondents. (R. p. 29). In its brief, Appellant presented a thorough analysis of several cases supporting the significance of restrictive language located in a recorded plat description referenced by a deed, including Murrells Inlet v. Ward, 378 S.C. 225 (Ct. App. 2008). Respondents ignore the Murrells case entirely. In Murrells, an easement was created when the landowner subdivided a large tract of land in an effort to allow her children to live and enjoy the property. Id. at 228. Though Ward admitted she provided the fifty foot right-of-way road access pursuant to Horry County Zoning and Planning Regulations, she argued that the surveyor

erroneously included the easement in the plat, and that she never intended for this use. Id. The thrust of the Court of Appeals holding there was that "[s]ubsequent purchasers are *entitled to rely on recorded deeds and plats* to determine their rights in respect to property." Id. (emphasis added). Respondents, like Ward, cannot now argue what their intentions were at the time of the subdivision of the land because it would be relying on extrinsic evidence and, as in Ward, it would be unfair to deny a subsequent purchaser the right to use the easement since it "relied on the recorded plat when it purchased [the lot]" and since the "dedication of the private easement was complete when Ward originally conveyed the lot." Id.

In the case at bar, Appellant purchased Lot C-5 in reliance upon the recorded Plat at issue in this case and the restrictions set forth in it, including the one that restricted the use of the lots to agricultural use. Thus, it would be unfair to deny Appellant the right to the benefit of the restriction it relied on when purchasing lot C-5.

CONCLUSION

For the reasons stated, and for those in the Appellant's Initial Brief, this Court should reverse trial court's Order granting summary judgment to the Respondents.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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Charleston, South Carolina
June 29, 2018

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.

PROOF OF SERVICE

I do hereby certify that on June 29, 2018, I served all counsel in this action with a copy of the document herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following address:

Document: **APPELLANT'S FINAL REPLY BRIEF**

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