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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

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

Court of Common Pleas Case No. 2016-CP-10-1560
South Carolina Court of Appeals Appellate Case No. 2017-002546
Opinion No. 2021-UP-280 (S.C. Court of Appeals filed July 21, 2021)
South Carolina Supreme Court Appellate Case No. 2021-001376

CARPENTER BRASELTON, LLC Petitioner,

vs.

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

**RESPONDENTS' RETURN TO PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF
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- 1. Did the Court of Appeals correctly hold the Plat was ambiguous as to the origin of the Plat notations and that extrinsic evidence was admissible to resolve the ambiguous origins where the alleged restriction is plainly different from the signed statements by the landowners who recorded the Plat and plainly the same as notations added by Charleston County?**

- 2. Did the Court of Appeals correctly hold there was not a scintilla of evidence showing the alleged restriction was intended by the landowners where the only evidence in the record showed the landowners did not create the restriction, the surveyor who drafted the Plat was clear Charleston County placed the notation on the Plat to warn purchasers of sewer disposal services, and Petitioner was fully aware of an existing home constructed on one of the allegedly restricted lots before its purchase?**

- 3. Did the Court of Appeals properly reject Petitioner's claimed reliance on the recorded Plat because Petitioner was fully aware of the house constructed on an allegedly restricted lot in open contradiction to Petitioner's alleged restriction?**

INTRODUCTION

Petitioner Carpenter Braselton, LLC ("Petitioner") failed in its first attempt to convince an appellate court that the disputed plat notation unambiguously established a restrictive covenant. In the Petition for a Writ of Certiorari, Petitioner rehashes the same rejected arguments, including a new argument not raised to the trial court and not raised in this litigation until the Petition for Rehearing before the Court of Appeals. Moreover, Petitioner's report about the death of the recording system has been greatly exaggerated, and no public impact results from faithful applications of existing law by both the trial court and the Court of Appeals.

The Court of Appeals correctly affirmed the order of the Master-In-Equity for Charleston County, the Honorable Mikell R. Scarborough, ("Master") and held the plat notation placed by Charleston County ("County") did not create a restrictive covenant over the four lots making up the disputed property. Moreover, the Court of Appeals rejected further effort by a seasoned real

estate developer to enforce restrictive covenants that no one ever intended to create where that developer knew a house had been built on a supposedly restricted lot when he purchased. In doing so, a unanimous Court of Appeals did not address novel questions of law because none were presented, did not address questions arising under federal law or the Federal or South Carolina constitutions because none were presented, and followed the applicable precedents of this Court. The Petition for a Writ of Certiorari is now more of the same and should be rejected.

Accordingly, this Court should deny the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to the Court of Appeals following the recent unpublished decision by the Court of Appeals affirming the trial court's ruling in favor of Respondents Ashley Roberts n.k.a. Ashley Roberts Cyronak, Jeremy Cook, and Salaheddine Ezzaoudi ("Respondents"). *See Carpenter Braselton, LLC, v. Ashley Roberts, Jeremy Cook, And Salaheddine Ezzaoudi*, No. 2021-UP-280, 2021 S.C. App. Unpub. LEXIS 305 (S.C. Ct. App. July 21, 2021) ("Opinion"). The Opinion affirmed the order by the Master dated November 8, 2017, and entered November 14, 2017 ("Order"). Petitioner contends in its petition that the Court of Appeals erred in affirming the Master, who held certain notations placed on a plat depicting the parties' properties do not restrict the property.

Petitioner filed this action against Respondents on March 28, 2016, seeking a declaratory judgment and a permanent injunction enjoining Respondents from building residences or other structures upon their lots because Petitioner claims those lots are burdened by claimed restrictions on a plat. (R. pp. 23–35).¹ On June 17, 2016, Respondents served their Answers and Counterclaims, in which they too sought a declaratory judgment as to the effect of certain notations

¹ Citations are to the Record on Appeal.

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 Petitioner was deposed on March 22, 2017, through its designee Edward L. Terry, Respondents moved for summary judgment on August 2, 2017. (R. pp. 68–85). Respondents moved for summary judgment on their Counterclaims and on Petitioner’s Complaint. (R. pp. 68, 85).

A hearing on Respondents’ summary judgment motion was held on September 21, 2017. The Order was entered November 14, 2017, granting summary judgment to Respondents. (R. pp. 6-21). Petitioner failed to file a motion to alter, amend, or reconsider pursuant to Rule 59(e), SCRPC.

Petitioner’s appeal followed. The Court of Appeals affirmed the Master’s Order in its unpublished Opinion. Petitioner filed a timely Petition for Rehearing, which the Court of Appeals denied.

Petitioner has now filed a Petition for a Writ of Certiorari in this Court.

COUNTERSTATEMENT OF FACTS

Petitioner and Respondents each own one of the five lots created when the heirs of James Roper (“Roper heirs”) 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). 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 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 PURPOSES²

(*Quinn Aff.* ¶ 8, R. at 94). Petitioner asserts the four lots identified are subject to a restriction from building because of these notations.

After the Plat was recorded and before Petitioner 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. (R. at 195). Respondent Salaheddine Ezzaoudi purchased Lot C-4 in 2013, which lot remains unimproved. (R. at 301–08). Petitioner then purchased Lot C-5 by deed dated November 10, 2014. (R. at 263).

Edward L. Terry is the authorized agent of Petitioner. His wife is the sole member and manager of Petitioner. (*Terry Dep.* pp. 27–28, R. at 204). Mr. Terry has developed numerous subdivisions in multiple states. (*Id.* pp. 12–14, R. at 200–01). 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 Petitioner’s property, reviewing documents and visiting the property. (*Id.* pp. 25, 40–41, R. at 203, 207). While trying to prevent construction on Respondents’ lots for some unknown reason, Petitioner has 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 Dep.* p. 37–38, ex. 11, R. at 206–07, 261). Petitioner also purchased Lot C-5 well after Respondents

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.).

Ashley Roberts and Jeremy Cook constructed a home on Lot C-3, despite Petitioner’s assertion, through Mr. Terry, that it relied on the Plat’s notations.

Petitioner 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 in his Order, and this appeal followed. The Court of Appeals affirmed the Master in its unpublished Opinion on July 21, 2021. Petitioner now seeks a Petition for a Writ of Certiorari before this Court.

III. ARGUMENT

A. The Court of Appeals rightly held the notations on the Plat were ambiguous as to their origin and that extrinsic evidence was necessary to determine the intent of the notations.

Contrary to Petitioner’s assertion, the Court of Appeals correctly held the Plat notation was ambiguous 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. Petitioner overlooks the Court’s determination that the origin of the notation is ambiguous on the face of the Plat because the various notations plainly have different origins:

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 Petitioner are inapposite because extrinsic evidence was not admitted to create an ambiguity as Petitioner asserts but rather to determine intent in light of the recognized ambiguity. *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). As the Court of Appeals recognized, other cases relied on by Petitioner do not have the same question as to origin. *See* Opinion at 4–5 (citing *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008) and 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, as the Court of Appeals noted, based on the location and significant differences in typeface of the County notations compared to the notation and signatures of the Roper heirs. Accordingly, the Plat is ambiguous as a matter of law, and extrinsic evidence is allowed to resolve this ambiguity.

Once it becomes clear the Court properly recognized the ambiguity on the Plat in this case without extrinsic evidence, Petitioner's public policy concerns evaporate. While purchasers may rely on unambiguous language, Petitioner 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 the Master and Court of Appeals (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 a restrictive covenant depending on what the extrinsic evidence showed.

In sum, Petitioner 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 the Court of Appeals properly affirmed.

B. Alternatively, the meaning of the disputed Plat notation was ambiguous on its face as a matter of law, and Rule 220(c), SCACR, allows this Court to affirm on any ground appearing in the record.

Alternatively, the “Agricultural Use Provision” relied on by Petitioner is ambiguous on its face as a matter of law. Both the Court of Appeals and the Master held the notation was unambiguous. However, the Master held the notation was unambiguous according to *Respondents’* construction.³ The Master concluded as a matter of law:

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 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) (emphasis added) (finding the Plat was unambiguous as to a limited restriction unless alternative sewer became available). Of course, ambiguity exists where there are two reasonable constructions. *See generally Anderson v. Buonforte*, 365 S.C. 482, 617

³ Under Rule 220(c), SCACR, this Court 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.

S.E.2d 750 (Ct. App. 2005) (describing the rule of construction when a restriction is capable of two interpretations).

If the Master and the Court of Appeals 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 of the disputed notation in addition to its origin. Taken together, the notations make the alleged restriction to agricultural use ambiguous:

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

THIS LOT MEETS CURRENT MINIMUM
HEALTH DEPARTMENT STANDARDS
FOR A MODIFIED CONVENTIONAL
SUB-SURFACE DISPOSAL SYSTEM ONLY.
(FOR LOT C-1 ONLY)

THE APPROVAL OF THIS PLAT IN NO WAY
OBLIGATES THE COUNTY OF CHARLESTON TO
ACCEPT FOR CONTINUED MAINTENANCE ANY
OF THE ROADS OR EASEMENT SHOWN HEREON.

WARNING!

APPROVAL OF THIS PLAT BY THE PLANNING BOARD
AND/OR COUNTY COUNCIL DOES NOT INDICATE
APPROVAL NOR ADJUDICATE TITLE OF THE ACCESS
OR RIGHT-OF-WAY SHOWN HEREON

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

(**For Lot C-1 Only**”), it is a reasonable construction to interpret the notation as providing only a limitation imposed by then-current sewer and septic availability, not a restrict covenant.

Accordingly, this Court should also affirm on the alternative basis in the record that the disputed Plat notation is ambiguous as to its meaning as a matter of law. Of course, as Petitioner implicitly concedes, if the alleged restriction is ambiguous, then extrinsic evidence is properly considered to resolve the ambiguity.

C. Petitioner’s new argument that the Plat notations are enforceable regardless of whether the County placed the notations on the Plat is not preserved for review and is otherwise without merit.

Petitioner raised this new argument for the first time in its Petition for Rehearing before the Court of Appeals and raises it again here, asserting 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 notations cannot create 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. Petitioner never argued to the Master that it does not make a difference who placed the conditions on the Plat. Petitioner certainly did not cite to the Master the out-of-state cases it now cites or any similar cases that Petitioner argues support its position. Petitioner never filed a motion pursuant to Rule 59(e), SCRCF, raising the issue it is now raising and requesting a ruling from the Master on this issue. Petitioner’s briefs before the Court of Appeals did not raise this issue or reference these cases or similar cases. Not until the Petition for Rehearing in the Court of Appeals did Petitioner raise this argument.

Petitioner cannot raise this issue in its Petition for a Writ of Certiorari for the same reason it could not do so for the first time in its Petition for Rehearing—because it was not properly raised to the Master or even the Court of Appeals in initial briefing. *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.”); *see also 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).

Moreover, Petitioner fails to cite one South Carolina case for this new proposition. Instead, Petitioner 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 Petitioner, the Court should consider the context of these cases and compare them to the different and distinct scenario in this case. *See, e.g., 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 the Roper 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 Petitioners, 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 without a condition noted already met the requirements for a septic system. The County placed the condition on the four lots simply because those lots at that time could not support a traditional septic system.

Finally, when Petitioner purchased its lot, it was glaringly apparent that the alleged restrictions were not applicable as a large home was on one of the supposedly restricted lots. The issues with Petitioner's interpretation of the language on the Plat it is seeking to enforce were available for Petitioner to see on the ground and in the files of the Charleston County Planning Board. Instead, Petitioner, 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 Petitioner 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 the Petition for a Writ of Certiorari because Petitioner waived this new argument by raising it for the first time in its Petition for Rehearing and, in any event, Petitioner’s new argument fails on the merits.

D. The Court of Appeals properly rejected Petitioner’s claimed reliance on the recorded Plat because Petitioner was fully aware of the house constructed on an allegedly restricted lot in open contradiction to Petitioner’s alleged restriction.

Petitioner asserted numerous bases for finding the Plat notation enforceable, including Petitioner’s alleged reliance on the Plat as a recorded public document. However, the Court of Appeals rejected this alleged reliance because Petitioner’s agent, Edward L. Terry, acknowledged he was familiar with the lots and the house on Lot C-3 before Petitioner purchased Lot C-5. The Court of Appeals correctly found Petitioner could not have relied on the Plat where Petitioner had actual knowledge that the alleged restriction was not intended by the prior grantors because a house had been built on the supposedly restricted lot. *See* Opinion at 7 (*citing 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.”)).

Conversely, Petitioner continues to assert that Petitioner could rely on its view of the Plat because the alleged restriction was valid and therefore Respondents were required to bring an action to declare the alleged restriction was no longer enforceable based on significantly changed neighborhood circumstances. However, Petitioner incorrectly assumes the restriction was valid and then explains the law of declaring a once-valid restrictive covenant to be unenforceable. The Court of Appeals did not reach any such holding in this case. Rather, the Court of Appeals held the Plat notation did not create a restrictive covenant as a matter of law. *See* Opinion at 7 (“We hold the record does not contain a scintilla of evidence to support the imposition of a building restriction on the Respondents’ lots.”). In considering the evidence offered to support the alleged restriction, the Court of Appeals rejected Petitioner’s alleged reliance on the recorded Plat. *See* Opinion at 7 (“[W]e find Petitioner’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.'). Accordingly, Respondents did not need to show changed circumstances for a restriction both the Master and Court of Appeals held never existed.

Moreover, Petitioner's reliance is misplaced on the cited cases, which state generally that implied easements arise over roads shown on subdivision plats when the grantor references a subdivision plat in a deed. *See Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 236, 662 S.E.2d 452, 457 (Ct. App. 2008) (implied easement over road); *Carolina Land Co. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975) (same); *Corbin v. Cherokee Realty Co.*, 229 S.C. 16, 24, 91 S.E.2d 542, 546 (1956) (same). Notably, these cases do not address the situation here, where notations on a Plat are ambiguous.

Likewise, Petitioner erroneously relies on cases for invalidating a valid restrictive covenant by assuming the Plat notation creates a valid restriction. *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006) (challenge to valid dock restriction based on changed circumstances); *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949) (minor violations do amount to radical changes). As stated, the Court of Appeals held there was no restriction, Respondents did not have to show changed circumstances, and therefore these cases are inapposite.

Accordingly, Petitioner has not identified an error in the analysis by the Court of Appeals, and the Petition for a Writ of Certiorari should be denied.

IV. CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

[Signatures on Following Page]

Respectfully submitted,

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