STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Wando Partners L.P, and Hitchcock Crossing Homeowners Association, Inc.
Plaintiff,

vs

Greg A. Baughman and Jennifer K. Ray
Defendant(s).

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2019-CP-02-02818

ORDER

PROCEDURE

1. The summons and complaint were filed on November 11, 2019.
2. The defendant filed an answer and counterclaim on January 14, 2020.
3. The plaintiff filed a reply on July 30, 2021.
4. A motion for summary judgment was filed by the plaintiff on January 4, 2021. The motion was denied on March 15, 2021.
5. The order of reference was filed on March 26, 2021.
6. An amended answer was file on July 20, 2021.
7. The trial was held on August 3, 2021 and August 4, 2021
8. The plaintiff's complaint contains causes of action for declaratory relief finding the property is a garden unit as defined in the recorded documents and for the recovery of cost and reasonable attorney fees. The defendants answer and counterclaims contains defenses based on Rule 12(b)(6), SCRCP, estoppel, waiver, and the statute of frauds. The counterclaim requests the court to issue an

order to allow the defendants to make improvements on their property, costs and attorney fees.

STATEMENT OF FACTS

The defendants presented the testimony of C.J. Panghorn who is a para-legal for the attorney retained to conduct the real estate closing. In July 2019, there were emails from the defendants about issues with the homeowners association. The real estate agent for the defendants informed her the defendants would not sign anything to indicate the lot was a garden unit. There was also an email concerning the lawn care credit or payment that was eventually made to the defendants.

On cross-examination, the witness agreed the closing attorney represented both parties. The witness was not present at the closing for the review and signing of the documents. She had no knowledge if the lot was a garden unit. She understood the homeowners association and the plaintiffs believed it was a garden unit.

Don Howard is a partner with Wando Partners, L.P. and President of the Hitchcock Crossing Homeowners' Association. The Declaration of Covenants, Conditions and Restrictions for Hitchcock Crossing were executed on June 20, 2006. The document was recorded in Book 471, Pages 1517-1541, in the Aiken County RMC Office. In Article II, Definitions, 2.16, a "Garden Unit" is defined as "any Unit for which the Association is responsible for maintaining the landscaping and irrigation located herein." [Section II also defines an "Equestrian Unit" and an "Individual Unit".] Article VIII section 8.1 states that, "In no event shall an Owner of a Garden Unit alter, remove or add to the existing landscaping or irrigation without

the prior written consent of the Association." Section 8.2 states in part, "the Association shall be solely responsible for the installation, maintenance, and repair of all landscaping and irrigation on any garden units.

Exhibit A to the covenants is the legal description attached to the covenants. The lots are designated as lots 1-20 and references a plat dated September 15, 2005, last revised February 13, 2006 and recorded February 21, 2006 in Plat Book 50. Page 965.

On July 21, 2007, Wando Partners, LP executed an Amendment to Declaration of Covenants, Conditions, and Restrictions for Hitchcock Crossing stating that the property described in the attached Exhibit A will be subject to the covenants recorded in the Aiken County RMC Office in Record Book 4071, Page 517. The document was recorded in Record Book 4151, Pages 137-139 of the Aiken County RMC Office. The legal description describes lots 1-57 as shown on a plat at Hitchcock Crossing Section Two, dated June 20, 2006, last revised March 26, 2007 and recorded April 24, 2007 in Plat Book 52, Pages 617-619 in the Aiken County RMC Office.

Mr. Howard testified the purpose of the garden unit designation was to maintain the uniformity of the land and streetscape to maintain the value of the homes. In 2007, Essex Homes Southeast, Inc. (hereinafter Essex Homes) purchased twenty-eight lots and those were sold as garden units according to Mr. Howard.

The defendants purchased lot 16 in Hitchcock Crossing Section Two and the deed references a plat dated June 20, 2006, last revised March 26, 2007 and recorded

in Plat Book 52 at Pages 617-619 of the Aiken County RMC Office. The deed was recorded on July 31, 2019 in Record Book 4792, Pages 1142-1145.

Mr. Howard referred to a marketing document, and identified lot 16 purchased by the defendants. He testified all of the lots in that area were garden units. The document lists Section I and Section II in the legend. The defendant's lot is in Section II. There is no area listed as garden units. After the real estate closing, the defendants refused to let the yard maintenance group work on lot 16. The defendants also refused to pay garden unit dues or to admit their lot was garden unit.

Mr. Howard had no contact with the defendants prior to the closing. The covenants were recorded but Mr. Howard agreed there was nothing in the covenants or the amendment that stated the defendant's lot 16 was a garden unit. He advised Essex Homes that all of the lots sold were garden units but he could not reference any specific document to show the defendants' lot as a garden unit. Mr. Howard believes the definition in the covenants establishes a garden unit and the defendant's lot was subject to the homeowner's association providing and maintaining the landscaping and irrigation. He agrees that the restrictions are an encumbrance on the property but feels it maintains the value of the property. He remembered a telephone conversation with Patrick Buckszar, who worked with Essex, that lot 16 and all other lots purchased by Essex were garden units.

The witness was presented with a document admitted as Defendant Exhibit 2 but he had not seen the document prior to his testimony. It appears to be a document prepared by Essex Homes. That document identifies lot 16 as a "Premier Home" as opposed to a "Patio Home" but it has no lots designated as a garden unit. Mr. Howard

said the plaintiffs were not involved in developing the exhibit, does not use those designations for the lots, and those designations are not part of the covenants.

The homeowners association denied the defendant's request to install a fence on lot 16. The denial was based on the garden unit designation. Mr. Howard was presented with a document labeled Defendant Exhibit 3 that was described by the witness as a rendering showing a fence, tress, and other landscaping and has the address of 1043 Prides Crossing. Mr. Howard said the rendering, not prepared by the plaintiffs, was to show the home and not to represent what was allowed on the lot.

He received an email from Karen Clayton, the manager of the homeowners' association, that the defendants were advised the lot was a garden unit prior to the real estate closing. Essex Homes acknowledged the lots were garden lots at a homeowner's association meeting. He admitted the minutes for that meeting had not been produced in the discovery responses. The garden units obtain water through a private well (22 of the lots) and all of the other garden units receive water by a public provider. The homeowner association still addresses all irrigation issues as provided in the covenants.

Patrick Buckszar was employed by Essex Homes when the defendants purchased their property. He testified that he provided the defendants with a copy of the restrictive covenants. The plaintiff introduced a form (Plaintiff Exhibit 7) indicating the defendants received and understood the covenants. Prior to the real estate closing, he told the defendant's lot 16 was a garden unit. Originally, he advised them it was not a garden unit. He believed lots 13-22 (defendants purchased lot 16) and three other lots were not garden units.

Mr. Buckszar also had other buyers in the same situation. When those prospective buyers were told they were purchasing a garden unit, one had their deposit returned, one transferred the purchase to another neighborhood and another buyer selected another lot. The defendants proceeded to purchase lot 16. He admits there were conversations with the defendants and the realtor about changes to the home. After he discovered his mistake, he met with them at the home and discussed the covenants preventing a fence, a shed, maintaining their own yard and parking in the driveway. He believed they reached an agreement to resolve the issues. No written memo signed by the parties was prepared. The sellers added an attached storage room for an additional $5,000.00-$8,000.00 that was not charged to the defendants. The defendants were also paid the first year of the lawn maintenance free. The $1,380.00 was paid to the defendants. It does not mention a garden unit. The addendum reflects payment of twelve months for lawn maintenance. The addendum was signed by the defendants and the seller. The homeowner's association passed an amendment that allowed vehicles to be parked in the driveway. The driveway issue was not exclusive to the defendants.

On cross-examination, Mr. Buckszar admitted there was confusion over lot 16 being a garden unit. Other than the definition of a garden unit in the covenants, he admits there is nothing in the covenants that would advise the defendants that lot 16 was a garden unit. There is no plat, including the plat referenced in the deed to designate lot 16 as a garden unit. The deed into the defendants does not contain any information about the lot being a garden unit. There is no closing document stating that lot 16 is a garden unit and he admits that was a mistake.

Despite those admissions, he believes the defendants knew and were verbally advised that the lot was garden unit. The payment of the first year of the lawn maintenance would not have been made if the lot was not a garden unit. The defendants were provided with a copy of the covenants and were verbally told lot 16 was a garden unit.

On July 26, 2019, he provided the defendants realtor with a diagram (Defendant Exhibit 1). The diagram does not show any designation that lot 16 was a garden unit. The rendering admitted as Defendant Exhibit 2 was prepared by Essex Homes and is an artistic representation. The document uses the terms "Patio Homes" and "Premier Homes". Lot 16 is in the premier home section but Mr. Buckszar emphasized these terms were not in the covenants and the terms were not used by the plaintiffs. Defendant Exhibit 3 is a rendering prepared by Meybolm Realty. It does show the home with a fence in the backyard. The witness believes this is a generic backdrop used by the realty company. Essex Homes cannot change the garden unit designation.

The defendants made a directed verdict motion in reference to the statute of fraud defense and the plaintiff's declaratory judgment action. After hearing arguments, the court denied the motion.

Greg A. Baughman and Jennifer K. Ray purchased lot 16 in Hitchcock Crossing on July 30, 2019. Prior to the purchase, the defendants researched the property in the subdivision, including any restrictions. They believed their home was an "Individual Unit" as defined in section 2.17 of the covenants. The water hookup was with a public service as opposed to the homeowner's association. Mr. Baughman

agrees that some conditions do apply to their property, but not the garden unit restrictions. The defendants did not want to purchase a garden unit since those lots had additional restrictions and they wanted a shed, a fence, and to maintain their own yard. He noted that a home seven lots away from lot 16 has a fence, detached sheds, swimming pool and looks similar to the defendant's home. He relied on Defendant Exhibit 2, which identifies lot 16 as a "Premier Home". He is aware of no maps or plats that identify the lot as a garden unit.

Mr. Baughman denies that Mr. Buckszar told them the lot was a garden unit. He did see the document marked as Defendant Exhibit 1 but it does not show their lot as a garden unit. Mr. Baughman denies he spoke with Mr. Howard prior to the real estate closing. He did speak with him in August 2019, after the lot was purchased.

His discussions with Mr. Buckszar concerned a drainage issue in the yard, cabinets and clearing a portion of the lot. He also discussed building a fence and the yard maintenance. At the closing, the defendants believed they could build a fence and a shed. He agrees that Essex Homes built an attached storage area on the home that is approximately 10'x10' but it is only a storage area, not a work area. Mr. Buckszar told them they did not need to cancel the contract and provided them with no written notice that the lot was a garden unit. The defendants were not told the lot was a garden unit prior to or at the closing by Mr. Howard, Mr. Buckszar, the closing attorney or her staff. There was no reference in the deed or on any plats that were referenced by the deed.

After moving into the home, the defendants submitted a request to build a shed and install a fence. The homeowner's association advised them the lot was a garden unit, and the defendants requested documentation.

On cross-examination, Mr. Baughman agreed the home with the fence is in a different shaded area when Plaintiff Exhibit 4 is reviewed. He admits that Essex Homes brought up cancelling the contract but Mr. Buckszar also advised them they did not need to cancel the contract. The defendants did refuse to have Cold Creek Nursery maintain their landscaping because they do not have a contract with them. They do pay homeowners dues to the association but have never signed any document designating their lot as a garden unit. They have not paid any fee associated with a garden unit.

Dr. Jennifer Ray owns Hitchcock Animal Hospital in Aiken, S.C. that is located close to Hitchcock Crossing. She denies there was any pressure to move from their previous home. She did not speak with Mr. Howard prior to purchasing the property. She also denies that anyone with Essex Homes told them the lot was a garden unit prior to the real estate closing. The closing attorney did not advise them. She remembers Mr. Buckszar telling them they could cancel the contact but it was not necessary since there was nothing in writing that stated the lot was a garden unit. It was important to her that they be able to maintain the landscaping and have a fence installed. The defendant's own dogs and the fence is important for privacy and to keep animals and people out of their yard.

Dr. Ray looked at homes described as Patio Homes shown on Defendant Exhibit 2. These were lots being sold by Essex Homes and the signs advertising the

sale had a "G" on them. She believed that designated those lots as garden units. Their home was listed as P-16 and she felt that designated it as a premier home. If the defendants had been advised they were buying a garden unit, they would not have agreed to purchase the home. They are billed for lawn maintenance but they do not pay that bill since they deny their lot is a garden unit. She agrees that a neighbor raised the issue about the lot being a garden unit and that Mr. Buckszar offered to cancel the contract, but then advised them they did not need to cancel the contract.

Bridgett Ricks was the defendant's realtor and is licensed in South Carolina and Georgia. She testified the defendants wanted a fence installed and a shed with the home. She felt the defendants were clear that these items were "deal breakers" for the defendants. Dr. Ray wanted a short commute to her office and Hitchcock Crossing satisfied that condition. There was no discussion about restrictions on installing a fence or building a shed. They were not shown any document that classified the lot as a garden unit. When the defendants needed more trees removed for the fence, nothing was said about the covenants preventing a fence from being installed.

Prior to the closing, Mr. Buckszar did make a comment to her that the developer contacted him about the lot being a garden unit but Mr. Buckszar said Essex Homes would not purchase those lots as garden units. She is familiar with Hitchcock Crossing and not all units are garden units. She and the defendants researched the issue and the lot did not match those standards. She researched Aiken County records including those at the Aiken County RMC Office. She requested, but did not receive any documentation from Mr. Buckszar that the lot was a garden unit. At the closing, no documentation was presented indicating the lot had that

designation. She was not aware of any offer to cancel the contract. She agrees the covenants define the term "garden unit".

Patrick Buckszar was called as a witness for the defense. He knew that some lots were garden units. Two streets did have specific build requirements. He does not agree with Ms. Ricks definition of a garden unit. Looking at Plaintiff Exhibit 4, Section II is garden units and that includes lot 16 but nothing in the covenants state that lot is a garden unit. The Defendants were told about the lawn maintenance requirement and that is why they received payment for the first year payment for the lawn service.

Mr. Howard was recalled and testified the common scheme was a residential development. There were some lots in the subdivision that were not garden units. Wando Partners, L.P. signed the original covenants and was the owner of the land described in Exhibit A attached to the covenants. That exhibit describes lots 1-20 as shown on the referenced plat. The amendment was signed by Wando Partners, L.P. on July 24, 2007 and stated the property attached to that amendment was subject to the covenants. Exhibit A described lots 1-57 and referenced a plat that included Hitchcock Crossing Section Two.

The parties made directed verdict motions at the close of all the evidence. The court, considering the arguments in the light most favorable to the non-moving party, denied the motions.

CONCLUSIONS OF LAW

This Court has subject matter jurisdiction over this proceeding and personal jurisdiction over the parties. Venue of this action is proper in Aiken County and this

court and all persons entitled to be served and/or provided notice of these proceedings have been served and/or provided such notice or have otherwise appeared in this action.

The parties do not dispute the Declaration of Covenants, Conditions and Restrictions for Hitchcock Crossing were recorded and the defendants were aware of the document. This includes the amendment to the covenants recorded on July 24, 2007. A "Garden Unit" is defined as, "any unit for which the association is responsible for maintaining the landscaping and irrigation located thereon." In section 2.20 the term "map" is defined as, "that certain plat prepared by Southern Partners, Inc. dated 9/15/05 and recorded in Plat Book 50, Page 965, Aiken County Records and any amendments and modifications thereto."

The plaintiffs did not sell the defendants lot 16 in Hitchcock Crossing Section Two. Wando Partners, L.P. are the developer of the subdivision and sold Essex Homes Southeast, Inc. lots in the subdivision. It developed the restrictive covenants. Hitchcock Crossing Homeowners Association, Inc. is defined in section 2.4 of the covenants and may bring an action to enforce the covenants.

The deed into the defendants was recorded on July 31, 2019. The property is described as follows:

> All that certain Piece, Parcel, or Lot of land, with improvements thereon, if any, situate, lying, and being in the County of Aiken, State of South Carolina, being shown and designated as Lot 16 on a Plat entitled Hitchcock Crossing Section Two, prepared by Southern Partners, Inc., dated June 20, 2006, last revised March 26, 2007, and recorded in the Office of the RMC for Aiken County in Plat Book 52 at Page 617 through 619. Reference to said plat is made for a more complete and accurate description. All measurements being a little more or less.

> This being property conveyed to Essex Homes Southeast, Inc., a South Carolina Corporation by deed of Wando Partners, L.P., dated November 15, 2018 and recorded December 6, 2018 in the Office of the RMC for Aiken County in Book 4752 at Page 2402.
>
> TMS#: 088-13-03-008
> 1043 Prides Crossing, Aiken, SC 29801

The deed does not reference the restrictive covenants but, as stated above, the parties do not dispute the covenants are properly recorded and the defendants were aware of the covenants and reviewed them prior to purchasing the property. The legal description does not refer to lot 16 as a garden unit. The plat referenced in the deed does not identify the lots as particular units. The failure to mention restrictive covenants in the deed may be of no legal significance if the restrictions are recorded. *Flinkingshelt v. Johnson*, 258 S.C. 77, 187 S.E.2d 233 (1972); S.C. Juris Prudence, Covenants, Section 63.

"Protective covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct.App.1985), *Seabrook Island Pro ert Owner's Ass'n v. Ber er*, 365 S.C. 234, 616 S.E. 431 (Ct.App.2005). Historically, courts do not favor protective covenants based on the belief that society's best interest encourage unrestricted use of land. *Edward v. Surratt*, 228 S.C. 894, 90 S.E.2d 906 (1956), *Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (S.C. 1987). Although protective covenants are strictly interpreted and any doubts or ambiguities are resolved in favor of free use of the land, the covenant will be enforced if it expresses the party's intent or purpose. The party seeking to enforce the protective covenant must show the

restriction applies by the express language of the covenant or by plain and unmistakable implication. Id.

RECORD NOTICE

The deed into the defendants do not reference a plat or other document which identifies the defendant's lot as a garden unit. The plat referenced in the deed was not introduced as an exhibit. The plat referenced in the covenants and the definition of "map" in the covenants states that Hitchcock Crossing, Section Two was under construction and does not identify those lots as garden units.

The restrictive covenants do define a garden unit. It does not reference a plat or list lots. The addendum contains the legal description for Hitchcock Crossing, Section Two but does not identify any garden units. The plat was not admitted as an exhibit.

The documents used by Essex (Defendant's Exhibits 1-3) do not identify the defendant's lot as a garden unit. No closing documents were introduced that identify the defendant's lot in that manner.

The court finds that the defendants did not have any record notice that lot 16 in Hitchcock Crossing, Section Two, was a garden unit as defined in the covenants.

ACTUAL NOTICE

Actual notice has been defined as a person knowing the existence of the particular facts or "is conscious of having the means of knowing it, even though such means may not be employed by him." *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117(1998). Where a party has actual notice of a

restrictive covenant, they are bound by it even if the property is deficient. *McDonald v. Welburn*, 220 S.C. 10, 66 S.E.2d 327(1951).

Actual notice may be express or implied. Express actual notice is defined as "embracing not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated." *Strother v. Lexington County Recreation Comm'n*, 332 S.C 54, 504 S.E.2d 117(1998). Implied actual notice is "a kind of facts so informing that a reasonably cautious person would be led by them o the ultimate fact; that which, if prosecuted with ordinary diligence, will furnish information of fact." *Id*

The plaintiffs argue the court should consider extrinsic evidence to determine the intent of the parties. This includes the court determining the general scheme that was promoted by the restrictive covenants. *Cheves v. City Council of Charleston*, 140 S.C. 423, 138 S.E. 867 (1927), *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974).

The plaintiffs believe the defendants had actual notice prior to the real estate closing that the defendant's lot was located in a section of the subdivision where all of the homes were garden units. Patrick Bukszar, then a general manager of Essex Homes Southeast, Inc. testified he informed the defendants and their agent that the lot under contract with the defendants was a garden unit. As further evidence of the defendant's knowledge, the plaintiffs rely on the defendant's agreement to accept the offer from Essex Homes to pay a portion of the homeowners' dues owed by garden unit owners for lawn maintenance.

The defendants agree that the general scheme of the subdivision restrictions is for a residential setting or development. The general scheme does not impose garden unit restrictions on all of the homes in the subdivision. They point out the different descriptions of lots in Hitchcock Crossing. It is correct that evidence was introduced to describe lots as individual homes, premier homes, patio homes, and garden units. Some of these descriptions were used by Essex Homes as opposed to the plaintiffs. It is also clear the plaintiffs did not communicate with defendants prior to the closing about the lot being a garden unit. The plaintiffs rely on Patrick Bukszar with Essex Homes for the argument that the defendants were provided with notice. Mr. Bukszar admitted that he was confused about the lot being a garden unit. The matter was clarified and the plaintiffs presented an exhibit to support Mr. Bukszar's testimony that the defendants were offered a "Release of Contract Agreement" dated July 17, 2019 after it was determined the lot the defendants were buying was a garden lot. The document was not signed by the defendants. He also testified he met with the defendants to discuss the restriction on having a fence or any freestanding storage shed. The defendants also wanted to park in their driveway as opposed to the garage and to do their own yard maintenance. He believes the agreement was reached by allowing an attached storage room to be approved and built, at no charge to the defendants. The next concession was to pay the first year of lawn maintenance by paying $1,380.00 to the defendants. The ALTA Settlement statement was introduced to establish the defendants received a credit for $1,380.00 for one year of the landscaping fees. The plaintiffs also introduced an addendum signed by the defendants confirming Essex Homes would pay for twelve months of the lawn

maintenance. Mr. Bukszar admits there is no document expressly informing the defendants the lot they were purchasing was a garden unit, or if the above changes were made to complete the sale of the home. There is nothing in writing that these credits and other work were allowed or performed because the lot was a garden unit.

There are no emails to the defendants stating that the defendant's lot is a garden unit. On July 26, 2019, Patrick Bukszar emails the defendant's agent that the provided picture is the documentation to show the lot is a garden unit. The photo does not identify lot 16 as a garden unit. On July 29, 2019, the defendants' agent advises the closing attorney the defendants will not sign any document that states the lot they are purchasing is a garden unit. On the same date, the defendant's agent states the defendants are not happy about the issue. The emails on July 30, 2019 discusses the lawn maintenance money being credited to the defendants.

This plaintiff relies on the case of *McDonald v. Welborn*, 220 S.C 66 S.E.2d 327 (1951). The case involves restrictive covenants that state the lots are for residential purposes. The case raised the question of the purchasers having notice that the lots were restricted for residential use. The court noted that knowledge was imputed to buyers when notice was provided in written instruments that were found in the purchaser's chain of title. The parties in the current case all agree the restrictive covenants are recorded and in the defendant's chain of title. A copy of the covenants was provided to the defendants. The covenants define a garden unit, but does not identify the lots.

"If there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which the inquiry, properly conducted would disclose."

McDonald, *id quoting City of Greenville v. Washington American L.B. Club*, 205 S.C. 495, 32 S.E.2d 777. Here, there are no maps or plats that identify the defendant's lot as a garden unit. The emails do not establish that the sellers or the plaintiffs advised the defendants their lot being a garden unit. Otherwise, the defendant's agent would not send emails discussing her research to discover any recorded document identifying the defendant's lot as a garden unit. She also advised the closing attorney the defendants would not sign anything identifying the lot as a garden unit.

While the evidence does show the defendants had actual knowledge about the existence of garden units, it does not establish the general scheme or uniform plan of development as to the location of garden units or anything identifying their lot as that type of unit. It did place them on notice to see if the lot was identified as a garden unit. For the reasons states above, the defendants found no restrictions which identified the lot they were purchasing as a garden unit.

The general rule on restrictive covenants is the use of real estate should be strictly construed in favor of the free use of the property. Mr. Baughman testified that, "Mr. Bukszar told us about it in a meeting one time. He said a neighbor had brought up an issue that these were possible garden unit homes." Mr. Baughman believed garden units were retirement homes.

There is a home within seven lots of the defendant's home that Mr. Baughman believes looks similar to their home and it has a fence, two sheds, and pool. He relied on the covenants to establish their home was an individual home, not a garden unit. The seller did build the attached shed and paid the defendants one-year lawn maintenance fee.

Dr. Jennifer Ray admits the defendants spoke with Mr. Bukszar multiple times. She never signed anything indicating the lot was a garden unit and denies she was ever told the lot was a designated as such. The Defendants did research the issue but found nothing stating the lot was a garden unit. The closing attorney did not advise her of this designation. Mr. Bukszar did tell them there were rumors about the lot, told them they could cancel the contract if they were not comfortable, but also stated there was no need to do that because there was nothing in writing stating the property was a garden unit. They relied on that statement and their own research.

From their testimony and the emails introduced, it seems clear the Defendants knew that there was an issue of the lot being classified as a garden unit. Mr. Bukszar provided testimony but did not provide any document to establish the defendants lot was a garden unit. A form agreement was introduced, but it is a blank document. The defendant's agent sent emails requesting documentation to establish the status of the lot. The sales documents and diagrams do not place a party on notice about the garden unit issue.

The plaintiffs also rely on the improvements of a storage room and the one-year credit for lawn maintenance to show the defendant's recognizing the lot was a garden unit. However, there are no documents to verify this was the agreement. Those changes or agreements could also be demands by the defendants to purchase the lot.

The plaintiffs are seeking to enforce the protective covenants and must show the restriction, here the garden unit designation and restrictions apply by the express language of the restrictions or by plain and unmistakable implication. *Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (S.C.1987). For the

reasons stated above, the court finds that while all parties acknowledged the recorded covenants, the definition of a garden unit does not establish or put the defendants on notice that lot 16 in Hitchcock Crossing Section Two is a Garden Unit either through record or actual notice. The court finds the plaintiffs' requested relief is denied.

DEFENDANT'S COUNTERCLAIM

After purchasing the home, the defendant's submitted a request to a build an unattached shed and install a fence. That request was denied based on the garden unit designation. Based on the court's order, that is not a valid reason to refuse the written request. The defendants request the court issue an order granting the defendants the right to move forward on their request.

The court finds that its ruling is limited to the issue of the garden unit designation. Other owners who do not own a garden unit may make similar requests to the board. The defendant's lot should be reviewed in the same manner as those owners. The court will not substitute its judgment for the board to review these requests. The only restriction in the boards review is the defendant's lot is not a garden unit.

Based on the pleadings, and the evidence, the defendants are not entitled to any relief based on their Rule 12(b)(6), SCRCP defense.

The defendants pled to doctrine of estoppel. For an equitable estoppel claim, the defendants must prove the following:

As related to the plaintiff in this matter:

a) A false representation or concealment of material facts which are intended to create an impression that certain facts are inconsistent with facts subsequently asserted;

b) Intention that the conduct shall be acted on by the other party; and

c) Plaintiff has actual or constructive knowledge of the real facts.

As related to the plaintiffs in this matter:

a) Lack of knowledge of the truth

b) Reliance on conduct of plaintiff

c) Action which is prejudicial.

Boyd v. Bellsouth Tel. & Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (2006).

The plaintiffs and the defendants both knew and acknowledge the recorded covenants and the definition of a garden unit. The dispute is whether the plaintiffs concealed facts about the defendant's lot being a garden unit. The evidence does not support a finding that the plaintiff attempted to conceal the material fact about garden units or that there was a dispute about that issue. The defendant's claim of equitable estoppel is denied.

WAIVER

Waiver is a voluntary or relinquishment or abandonment of a known right. *Strickland v. Strickland*, 365 S.C. 76, 650 S.E.2d 465 (2007). The defendants must prove the plaintiffs has actual or constructive knowledge of its rights and failed to assert that right. *Jonasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 387 (1992).

Based on the testimony and the exhibits, the plaintiffs did assert that the defendants were purchasing a garden unit. The plaintiffs did not discuss the issue with the defendants prior to or during the real estate closing. They relied on a third party to establish the defendant's home was aa garden unit. While the plaintiffs failed to establish that issue through record or actual notice, the plaintiffs did not waive that right by their actions.

STATUTE OF FRAUDS

The defendant's assert the plaintiff's claims fail due to S.C. Code Ann. 32-3-10 (1976). The statute states that no action may be brought to charge any person "upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged…"

The plaintiff argues that the Supreme Court of South Carolina has held that restrictive covenants are not subject to the statute of frauds. *McDonald v. Welborn*, 220 S.C. 10, 66 S.E.2d 327 (1951). The Court, discussing the general scheme created found the restrictive covenants were not precluded by the statute of frauds.

The covenants at issue do provide a definition for a garden unit. While it does not provide any additional details, there is some information. Based on this and the findings in *McDonald* discussed above, the court finds the defendants claim in reference to the statute of frauds is denied.

ATTORNEY FEES

Both parties alleged the prevailing party is entitled to attorney fees and costs associated with the litigation. It was also stipulated during the trial that this issue will be decided at a separate hearing after the Order addressing the other issues is filed.

IT IS SO ORDERED.

Aiken, South Carolina.

December ___, 2021

_____
M. Anderson Griffith
Master in Equity for Aiken County

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-02-02818

Wando Partners L.P, and Hitchcock Crossing Homeowners Association, Inc.

PLAINTIFF(S)

Greg A. Baughman and Jennifer K. Ray

DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Wando Partners L.P, and Hitchcock Crossing Homeowners Association, Inc.	Greg A. Baughman and Jennifer K. Ray	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

M. Anderson Griffith — **Master in Equity Judge**

3076 — **Judge Code**

Date

Aiken Common Pleas

Case Caption: Wando Partners, L.P. , plaintiff, et al VS Greg A Baughman , defendant, et al

Case Number: 2019CP0202818

Type: Master/Order/Other

AND IT IS SO ORDERED

s/M Anderson Griffith-3076