STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	Civil Action No. 2011 CP 32[redacted]
[redacted] LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
[redacted] LLC,	)	
	)	
Defendant.	)	
	)	

FACTS UNDERLYING THE DISPUTE

CASE HISTORY

1. This matter was initiated in September, 2011 by the filing of the Complaint and the request for a temporary injunction. The dispute between two adjoining landowners stemmed from their disagreement over what changes could be made to the easement area by the owner of the underlying fee. That owner, the Defendant, who was developing a new retail commercial site, had initiated substantial construction on the easement area about the beginning of September 2011.

2. After notice to all parties, a hearing was held before the Honorable William B. Keesley wherein the Plaintiff sought a temporary injunction halting all construction on the easement parcel pending a determination on the merits of the underlying dispute. At that hearing Judge Keesley considered affidavits from both sides, written memoranda, and arguments of counsel. With his October 28, 2011 Order, Judge Keesley concluded that the Plaintiff's interpretation of the easement was more reasonable; that the Defendant had not demonstrated the Plaintiff's permission or acquiescence to the Defendant's construction; that the Plaintiff had

established a danger of irreparable harm and an inadequate remedy at law; that the Plaintiff had established a likelihood of success on the merits of the litigation; and that the potential for loss or waste would grow if the Court did not step in to halt the questioned construction. Having reached those and other conclusions, Judge Keesley ruled that the Defendant was to halt all construction in the easement area upon Plaintiff posting a bond, which Plaintiff promptly filed with the Court.

3. After issuing the October 28, 2011 temporary injunction, Judge Keesley referred the case to this Court pursuant to Rule 53, SCRCP. This Court heard of all further matters, including ruling on discovery matters and motions involving the merits presented by both sides. After consulting with counsel, this case was set for trial during the week of March 26, 2012. The last testimony was taken on March 30, 2012, and the Court heard final arguments from counsel at that time. Each counsel was thereafter given opportunity to file additional Memoranda which this Court has also considered. This Court now makes its final determination which is directly appealable under Rule 53, SCRCP. In the remainder of this Order, I have made an effort to separate findings of fact from conclusions of law, but the line between those matters is sometimes blurred. To the extent that I might have included either category of finding under an improper heading, this Court's Order is to be construed as if all matters were properly identified in that regard.

4. In addition to suing Defendant [redacted] LLC, the owner, Plaintiff also named as a Defendant [redacted] Construction Company, Inc., but negotiations on the eve of trial led to that Defendant being dismissed with prejudice as was the cause of action against Defendant [redacted] LLC for trespass.

EXISTENCE OF AN EASEMENT

5. By deed dated October 31, 1996, [redacted] of South Carolina, Inc., the predecessor in title to [redacted], LLC, conveyed to [redacted] Properties, Inc., predecessor in interest to the Plaintiff, rights and acreage in the [redacted] area of Lexington County which was a rapidly growing retail-oriented neighborhood. (Plaintiff's Exhibit B). That transfer included about eight acres in fee simple plus an easement in 2.01 acres which adjoined the eight acre transfer on its northern edge. The easement parcel was specifically defined by metes and bounds and by reference to a recorded plat.

6. That grant of easement, in addition to delineating the exact boundaries, explained the following rights of the dominant estate.

> "Grantor hereby grants to Grantee a non-exclusive perpetual easement for the purposes of ingress, egress, and parking across the property of Grantor designated as Parcel C on the Plat containing approximately 2.01 acres (the "Easement Parcel") and further described on Exhibit I hereto."

The Grantor thereafter reserved for itself certain rights spelled out in three categories: (i) the non-exclusive right for a drainage easement; (ii) the right to enter upon the fee simple property transferred to connect the drainage easement to existing pipes; and (iii) "all rights to the Easement Parcel not inconsistent with the easement expressly granted herein."

7. The deed of October 31, 1996 further provided for the construction and maintenance of the parking area and a roadway across the easement area placing upon Plaintiff's predecessor both the rights and duties associated with designing, clearing, and constructing the parking area including the paving and lighting to render it suitable for use by both parties. The duties also included maintaining liability insurance and bearing all expenses associated with future maintenance of the improvements to be constructed in the easement area. In addition,

Plaintiff's predecessor was to contribute $100,000 toward the costs of extending [redacted] Drive upon which fronted the fee property and the easement tract.

8. Construction as contemplated in the deed was undertaken by Plaintiff's predecessor soon after acquiring the property. The layout for the improvements on the Easement Parcel was strictly coordinated with the improvements upon the fee property acquired at the same time. This construction included not only the coordinated rows of parking, lighting, and irrigation, but also a primary entrance onto and from [redacted] Drive across the Easement Parcel and into the fee parcel. That primary entrance was positioned so that it would be directly across [redacted] Drive from the entrance to a [redacted] store. The construction as designed and implemented by Plaintiff's predecessor was used without question or change for about 12 years, until Defendant [redacted] LLC undertook the construction which prompted this lawsuit. (Plaintiff's Exhibits C and D).

9. The Plaintiff, [redacted] LLC, acquired the eight acres south of the easement tract along with the improvements thereon in 2002. (Plaintiff's Exhibit A). This was Plaintiff's first and only venture into the acquisition of retail properties. That property had two substantial retail buildings already constructed upon it. One was occupied by Staples, Inc., and the other was under lease to Bassett Furniture. At that time, a new plat was made, Plaintiff's Exhibit C, which is most helpful in understanding the layout of the property and the coherent use plan developed by Plaintiff's predecessor for the existing retail development and possible future changes. An aerial photograph of the area as reflected in Plaintiff's Exhibit D also conveys a good perspective of the general area which is involved in the dispute.

INVOLVEMENT OF DEFENDANT COLUMBIA HARBISON, LLC

10. The Defendant, [redacted], LLC, is a single purpose limited liability corporation formed by [redacted] LLC for the purpose of constructing and selling the Project. [redacted] is a developer of retail properties which maintains its offices in Greenville, South Carolina. (Wilson T. p. 127, ll. 3-12) In 2010 when they undertook their initial involvement in the Harbison area, [redacted] had been in business for about 12 years. Their primary focus had been upon development of stand-alone retail units, but about ten percent of their approximately 400 developments had involved multi-tenant projects. (Wilson T. p. 127, l. 23 thru p. 128, l. 8) Their practice was that each of the three members of the LLC would be primarily responsible for "his" own project. In the development which led to this litigation, Neil [redacted] was the member representing Defendant [redacted] LLC, and the one who was primarily responsible. (Wilson T. p. 128, ll. 17-21) He testified at length in the trial.

11. In the summer of 2010, [redacted] LLC acquired four acres bordering on [redacted] Boulevard and [redacted] Drive. They had plans to build a McDonald's fast food restaurant on that corner and to have at least one other stand-alone retail facility in that initial parcel. (Defendant's Exhibit D5) In late March of 201[redacted] LLC acquired the additional four acres lying adjacent to and behind that initial purchase, having its eastern border along [redacted] Drive. (Defendant's Exhibit D6)

12. By the time it acquired the adjacent tract in March of 2011, [redacted] LLC had negotiated tentative leases with four tenants to furnish them retail space toward the rear of the combined parcels. Those four tenants were: (a) [redacted]; (b) [redacted] (c) [redacted] and (d) [redacted] (Wilson T. pp. 170-171)(Defendant's Exhibit D4)

13. As part of the purchase of the second parcel by [redacted] LLC (Defendant's Exhibit D6), Defendant [redacted] acquired the 2.01 acres which was subject to the easement conveyed on October 31, 1996 to Plaintiff's predecessor. Before acquiring that property, [redacted] LLC was aware of the easement both from the recorded records and from communications made by the seller's agent during the negotiations. (Plaintiff's Exhibits A and B) (Wilson T. p. 238, l. 15 thru p. 240, l. 4)

14. Neil [redacted] on behalf of [redacted], LLC, had begun communications in the summer of 2010 with Plaintiff [redacted] LLC with Paul [redacted], its primary manager. [redacted] broached with [redacted] the possibility of changing the use to which the Easement Parcel was being utilized. Those communications lasted off and on for more than a year. The substance of those communications and the conclusions to be drawn therefrom will be dealt with further in the conclusions section of this Order since there is disagreement between the parties about the communications and the implications thereof. There is no question, however, that Neil [redacted] sent to Paul [redacted] at least five or six conceptual plans which showed possible changes to the use of the easement area including the possibility of having several of the retail buildings extend into the easement area along with several alternative methods of allowing vehicular traffic to reach the rear of those retail stores. (Plaintiff's Exhibits E, I, 5, 12, 16) (Wilson T. p. 245, l. 19 thru p. 246, l. 15) Since the property which was acquired by [redacted] LLC slopes downward from Harbison Boulevard to the easement tract, most of the development plans provided for an elevated vehicular approach to the rear of the new retail buildings.

15. In the several discussions between Neil [redacted] and Paul [redacted] which occurred before the March, 2011 purchase of the easement tract by [redacted] LLC, Mr. [redacted]

consistently explained that the existing leases which he had on the fee property were to expire within a couple of years and that he was not in a position to agree to any changes of the easement area until he was able to negotiate replacement leases for his property. (Wilson T. p. 249, l. 19 thru p. 250, l. 12)

16. Neil [redacted] indicated that in all of the communications with Paul [redacted], the concern was expressed that access, including the existing access across the easement tract was important to him. (Wilson T. p. 248, ll. 8-11) Mr. [redacted] also agreed that Paul [redacted] had never expressed a consent to move the existing entrance onto Park Terrace from the easement area. (Wilson T. p. 249, ll. 4-7)

17. Since the Defendant's proposed development was within the Harbison commercial area, the PUD restrictions applicable required any developer to receive the approval of the Association's Design, Development and Review Committee ("DDRC"). (Cloutier T. p. 110, ll. 9-12) As [redacted] LLC moved forward during the spring of 2011 with its tentative plans, it submitted a request to the DDRC for the required approval. That entity responded through its attorney on July 5, 2011 (Plaintiff's Exhibit 19). The position was clearly stated that the DDRC would not approve the construction of any changes upon the Easement Parcel absent receipt by the DDRC of a written statement from Plaintiff approving the new construction plan. No such written approval was ever presented to the DDRC. (Cloutier T. p. 119, ll. 12-16). In fact, no response was ever made by [redacted] LLC to that requirement.

18. There was only one written proposal from Neil [redacted] addressed to Paul [redacted] which requested a signed agreement on the part of the Plaintiff. That proposal, which was forwarded to Mr. [redacted] on June 20, 2011 (Plaintiff's Exhibit 16), offered a substantial

monetary payment and other valuable concessions if Plaintiff would relinquish its interest in the front portion of the easement area. As was reflected in Mr. [redacted]'s email to Mr. [redacted] on July 6, 2011 (Plaintiff's Exhibit 20), that offer was unequivocally refused. (Wilson T. p. 227, ll. 6-25) Other than that offer on June 20, 2011, there was no other writing created by either Plaintiff or Defendant which supposedly reflected the terms of any agreement that the parties might have reached. (Wilson T. p. 225, l. 17 thru p. 226, l. 7; p. 228, ll.8-11) Neither were there any written notes of conversations between Mr. [redacted] and Mr. [redacted] which reflected any sort of agreement between the parties with respect to a possible agreement for a comprehensive change to the easement use. (Wilson T. pp. 224-226) Neither was there any communication from Neil [redacted] to [redacted] his project engineers, that reflected any sort of agreement with the Plaintiff. (Wilson T. p. 275, ll. 2-10) Mr. [redacted]'s project manager, Dale [redacted] was never made aware of any sort of agreement. As late as August 15, 2011, Mr. [redacted] was still exchanging emails with the general contractor recognizing a possibility of a lawsuit by Plaintiff to halt the construction. (Waldrop deposition publication, T. p. 153, l. 25 to p. 156, l. 20) (Plaintiff's Exhibit 87).

19. In August of 2011, when [redacted] LLC applied for a building permit from the City of Columbia for the construction which overlapped the easement area, the City responded on August 18, 2011 (Plaintiff's Exhibit 22) that full approval from the [redacted] DDRC would be required as a precursor to Zoning Department approval. They specifically referred to the attorney letter of July 5, 2011 (Plaintiff's Exhibit 19) as being inadequate since it reflected only a conditional approval. For some reason which is not clear, the City issued a zoning permit on August 23, 2011. Witness Zachary [redacted] who works for the City, testified that he approved the permit because the notation on his computer screen changed from "unapproved"

to "approved." (T. p. 347, l. 14 – p. 348, l. 3) He could give no explanation, and none was made apparent through other evidence. The permit itself (Plaintiff's Exhibit 24) listed as a condition the fact that the developer, "must also comply with all conditions of [redacted] Group approval as indicated on the July 5, 2011 approval letter ...." As mentioned above, no efforts were made by developer to comply with the requirements set out in that letter. [redacted] Neil [redacted] testified that he was never aware of this condition in the permit and, in fact, that he had never seen this zoning permit. (Wilson T. p. 297, ll. 9-17) Russell [redacted], the representative of the contractor [redacted], testified that he went to the offices of the City of Columbia to sign this permit, but that he did not ever receive a copy of it and that he knew nothing about either the existence of or compliance with the requirements of the July 5, 2011 letter. (T. pp. 355 and 356).

20. During the spring of 2011, Paul [redacted] on behalf of Plaintiff, continued to search for potential tenants to occupy his commercial property after the expiration of the [redacted] leases. As part of that effort, about April 18, 2011, [redacted] LLC and [redacted] signed a non-binding letter of intent outlining potential terms of a lease agreement to be thereafter incorporated into a formal lease. (Defendant's Exhibit D40) No such lease was ever consummated. The letter of intent did include a discussion of possible changes to access and orientation of the buildings on the [redacted] property. In fact, it contemplated that the existing buildings would be torn down and that an entirely new facility would be built. A part of that was one of the drawings which had previously been forwarded to Mr. [redacted] from [redacted] LLC, and the indication was made that if [redacted] were to enter into a lease, that such a plan would not be offensive. No one from [redacted] LLC relied upon the existence of that letter of intent. In fact, no one was aware of it until after this litigation arose. (Wilson T. p. 228, l. 18 thru p. 229, l. 18)

CONSTRUCTION WAS UNDERTAKEN BY [redacted] LLC IN THE EASEMENT AREA.

21. In 2011, [redacted] asked several contractors to submit bids for construction of the retail project as it then was planned. (Waldrop T., p. 131, l. 15 thru p. 132, l. 23) Several contractors responded. [redacted] LLC concluded that the price offered by each was too high, so they worked with the several contractors to find ways to reduce the price of construction. One of these contractors was [redacted] Construction Company, Inc. ("[redacted]") which was ultimately awarded the construction contract based on revised plans.

22. One of the suggestions received by [redacted] LLC for reducing the cost was to further extend the proposed ramp within the easement area thereby increasing the fill area from about twenty-five percent (25%) of the entire easement parcel to about forty percent (40%). That change, which resulted in a cost saving of about $600,000 to $700,000, was conveyed to Mr. [redacted] as yet another set of plans for his consideration on July 19, 2011. (Plaintiff's Exhibit 12). (Waldrop T. p. 149, l. 21 thru p. 150, l. 1) Mr. [redacted] made no response to that latest set of proposed plans.

23. On August 29, 2011, Neil [redacted] sent an email to Paul [redacted] (Defendant's Exhibit 32), in which he informed Mr. [redacted] that he was going ahead with his construction plans and that the easement area was to be dug up to allow for the building of a ramp supported by a retaining wall to be constructed across the easement area. He went on to say that the entire two-acre easement area would be fenced off during the time required for construction. He acknowledged that [redacted] LLC needed a temporary construction agreement from [redacted] LLC as well as an easement agreement to allow access to the lower portion of the easement area once construction was completed. Neither agreement was ever received.

(Wilson T. p. 310, ll. 1-6) He also said that at least one of the parking lot light poles would be removed which might have an impact on the power to the other poles.

24. Defendant [redacted] LLC, by way of its general contractor [redacted] Construction Company, Inc., did promptly undertake the construction as suggested in the August 29, 2011 email. The photographs taken on September 23, 2011, the effective date of the lawsuit (Plaintiff's Exhibits J, K, and L) reflect the easement area as being completely fenced off, partly dug up, and housing construction equipment and large drainage pipes.

25. Plaintiff's Exhibit G is one of the construction drawings by which [redacted] was to build buildings and a truck ramp into the easement area. The extensiveness of that construction is even more apparent in Plaintiff's Exhibits M through Q reflecting the extent of construction and the sheer size of the retaining wall being built across the easement area. These last photographs were taken shortly after Judge Keesley's Order of October 28, 2011, which resulted in the cessation of construction. The extent of the impact of the construction is also apparent on Plaintiff's Exhibit I wherein the blue-shaded area is an upward sloping ramp to service the backs of several retail stores and the yellow area is the built-up deck over still another portion of the easement area. The impact of the intended construction is also reflected in Plaintiff's Exhibit S which reflects the similar extent of encroachment but on an aerial photograph which gives a different perspective.

CONCLUSIONS OF LAW

MEANING OF THE EASEMENT AGREEMENT

26. [redacted] LLC filed its Summons and Complaint against Defendant seeking an injunction for violation of its easement across Defendant's property. To establish a

prima facie case in an action against a servient landowner for unreasonable interference with use of an easement by the placement of an obstruction on the easement, the plaintiff first must prove that he has an easement over the defendant's property 20 *Causes of Action* 2d 177 § 8 -10. The plaintiff must then prove that the defendant placed an obstruction on the easement that substantially interfered with the plaintiff's use of the easement *Id.* § 11. Whether an interference is substantial depends on whether the servient owner's conduct deprived the dominant owner of a degree of use to which he or she was entitled by the easement. *Id.* § 7.

27. Where an easement holder claims that the servient landowner's use of land is unreasonably burdensome or inconsistent with the existing dominant uses of the easement, the easement holder has the burden of proof. *Jones v. Edwards*, 219 Or. 429, 347 P.2d 846 (1959); *Shenandoah Acres, Inc. v. D.M. Conner, Inc.*, 256 Va. 337, 505 S.E.2d 369, 371 (1998). The dominant estate owner has the burden of establishing that the servient owner's activities unreasonably interfere with the dominant owner's use and enjoyment of the easement. *Connecticut Light and Power Co. v. Holson Co.*, 185 Conn. 436, 440 A.2d 935, 939 (1981); *Craft v. Weakland*, 174 Or. App. 185, 23 P.3d 413, 415 (2001); *Watson v. Banducci*, 158 Or. App. 223, 973 P.2d 395, 402 (1999).

28. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist.*, 558 S.E.2d 902, 909, 348 S.C. 58, 71 (Ct. App. 2001). "The language of an easement determines its extent. Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used. " *Plott v. Justin Enters.*, 374 S.C. 504, 513-514, 649 SE.2d 92, 96 (Ct. App. 2007).

29. "Traditionally, the location of an easement, once selected or fixed, cannot be changed by the owner of the servient estate without the express or implied consent of the owner of the dominant estate." *Sheppard v. Justin Enters.*, 646 S.E.2d 177, 178, 373 S.C. 518, 521 (Ct. App. 2007); *see also Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, 410 SE.2d 580, 581-582, 306 S.C. 170, 171-173 (Ct. App. 1991) (an easement specific as to width, length and location "cannot be constricted to any degree"). *Sheppard* and *Xanadu* are analogous to the present case in that they involved express easements with specific, recorded dimensions, and efforts by the defendants to obstruct the easements. The courts in both cases enjoined obstruction of the easements.

30. In *Sheppard*, an easement, created in a deed, granted the right of ingress and egress via an Avenue, and the deed referenced an attached plat that showed the Avenue. Appellants, owners of the servient estate, unilaterally blocked access to part of the Avenue and relocated the easement in a way that still allowed the dominant estate holder ingress and egress. 646 S.E.2d at 178, 373 S.C. at 520. The Court of Appeals applied the traditional rule that the location of the easement could not be changed by the owner of the servient estate and affirmed the trial court's order "requiring Appellants to restore the easement to its original location." 646 S.E.2d at 178-179, 373 S.C. at 520-523.

31. Likewise, in *Xanadu*, the location, width and length of the easement were described on a plat and recorded in language almost identical to the easement in this case. The "'grant of easement,' conveyed to Xanadu '[a] perpetual non-exclusive easement of ingress and egress located on a portion of property of Third Financial Services, Inc.[,] shown and described on an [attached] plat.'" *Xanadu*, 410 S.E.2d at 581, 306 S.C. at 171. "The plat, entitled 'Ingress-Egress XANADU CONDOMINIUMS,' depicts a rectangular area measuring 50 feet

wide and 383 feet long, consisting of 0.44 acre, and adjoining South Forest Beach Drive, a street on Hilton Head Island." *Id.* When the holder of a similar easement over a portion of the same property sought to construct parking spaces on the property, Xanadu brought an action to enjoin the construction on its easement, "alleging the parking spaces [will] interfere with its right 'to utilize the property for ingress and egress.'" *Id.* The Court of Appeals found that the injunction should have been granted because: "the grant of easement in issue here is specific in its terms as to the easement's width, length, and location. Since it is so, the easement cannot be constricted to any degree by the placement of parking spaces thereon." 410 S.E.2d at 581-582, 306 S.C. at 171-172.

32. As with other written instruments, "[i]n construing a deed, it is elementary the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy. The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement. If the language in the grant or reservation is uncertain or ambiguous in any respect, the court may inquire into and consider all surrounding circumstances, including the construction which the parties have placed on the language." *Springob v. Farrar*, 334 S.C. 585, 594-595, 514 S.E.2d 135, 140-141 (Ct. App. 1999) (internal citations and quotations omitted). If there is no ambiguity, patent or latent, in the deed, "the description 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 (S.C. 1976).

33. I find that the language in the easement agreement incorporated in the deed of October 31, 1996 is unambiguous. No uncertainty arises from the words of the deed, the surrounding circumstances or the subsequent conduct of the parties. It provides that the

dominant estate, that of the Plaintiff, is entitled to use the 2.01 acres for parking and for ingress and egress across the parcel to include access to Park Terrace Drive. I further find that it is the right of the dominant estate under the provisions on Page 4 of that indenture to determine the layout for the parking and the roadways across the easement area subject only to the right of the serviant estate to also use that parking and ingress and egress. The suggestion by the Defendant that its rights to use the easement area were enlarged or unlimited because the Plaintiff's own rights were "non-exclusive" is not reasonable. That simply meant that parties in addition to the Plaintiff could use the easement parcel for parking, ingress and egress.

34. I do not find that ambiguity was created or particular rights accrued to the Defendant [redacted] LLC from the provision on Page 3 of the deed and indenture which "RESERVES ... (iii) all rights to the Easement Parcel not inconsistent with the easement expressly granted herein." These terms cannot be construed to mean that, "One can unilaterally take back or alter what he has contractually agreed to do." The grantor had specifically reserved the right to bury a drain pipe under the parking lot to provide for storm drainage which is consistent with my conclusion that the reservation in (iii) was not to be of a nature which would completely invalidate the express purpose of the easement. The Defendant's current plans to surround forty percent (40%) of the easement area with a 12-foot concrete wall and to cover another twenty five percent (25%) with a deck supported by approximately twenty columns is neither a reasonable legal construction nor does it comport with common sense.

35. The Defendant [redacted] LLC has suggested repeatedly, both initially to Paul Frankel and then to this Court, that it can change the easement area in any way it sees fit so long as Plaintiff would have a similar number of parking places available to it after all was said and done. Such a narrow reading of the broad terms of the easement cannot be supported by

either reading the document or logic and would have made a mockery out of the written words. As is apparent from the layout used for the dozen years before Defendant's construction, the positioning of the access across from the Wal-Mart exit, the wide roadway onto the site which allowed easy vehicular access to all of the parking lanes and truck access to the rear of the retail buildings, a comprehensive plan was initially envisioned and implemented. The rights created in the dominant estate were very significant. In light of the legal premise that a deed is to be construed in favor of one receiving a property and against the grantor, *Williams v. Burton,* 121 S.C. 30 (S.C. 1921), there is no reason to even open the door to consider possible ambiguity since the Plaintiff would still prevail under that rule of construction and under all the facts about the historical use of the property which have been presented to this Court.

AFFIRMATIVE DEFENSES RAISED BY [redacted] LLC

36. The affirmative defenses presented at trial by the Defendant's pleadings are (1) laches, (2) unclean hands, (3) waiver, and (4) estoppel. In addition, Defendant asserted in their pre-trial brief the Plaintiff impliedly consented to Defendant's violation of the easement.

Defendant Has Not Shown Misconduct By Plaintiff That Would Excuse Defendant's Violation Of The Easement.

37. Defendant's defenses depend on the proposition that before or after the Defendant violated the easement, Plaintiff did something that precludes the Plaintiff from enforcing the easement. In some defenses, Defendant alleges that Plaintiff's misconduct excuses Defendant's own misconduct. In this category fall Laches, Unclean Hands, Estoppel, and Implied Consent. For each of these affirmative defenses, the burden of proof shifts to the Defendant to prove each element.

38. "To demonstrate laches, a party had to establish the following elements: (1) delay, (2) that is unreasonable, and (3) prejudice." *Terry v. Lee*, 314 S.C. 420, 426 (1994).

39. Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

40. Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party claiming the estoppel, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped. *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998).

41. As to implied consent, "any action which would tend to deceive or mislead may constitute sufficient grounds for a court to find acquiescence or an implied consent to [a] relocated easement." *Sheppard v. Justin Enterprises*, 373 S.C. 518, 646 S.E.2d 177 (Ct. App. 2007).

42. The burden would be upon the Defendant to prove any of these defenses by a preponderance of the evidence. I conclude that the Defendant has failed to do so.

43. An assessment of these defenses depends upon the Court's examination of the numerous exhibits stemming from communications between the parties and the Court's assessment of the credibility of the witnesses. Mr. [redacted] testified that he never would have bought the second parcel in March of 2011 had he not had the necessary agreement of Paul [redacted]. Mr. [redacted] referred to numerous sets of plans which had been submitted. Sometimes Mr. [redacted] responded; sometimes he did not. Mr. [redacted] was aware of the fact that during the summer of 2011 Mr. [redacted] father was seriously ill. (Wilson T. p. 306, ll. 18-23). Mr.

[redacted] testified in no uncertain terms that he never agreed to a change of the use of the easement. (Frankel T. p. 50, ll. 8-13). This is consistent with Neil [redacted] own affirmation that Mr. [redacted] continually informed him that he was concerned about access and that the uncertainty of not having a tenant for his property created a continuing cloud. Neil [redacted] was an experienced, sophisticated developer who certainly understood the significance of written documents, particularly as related to real estate transactions. He had an attorney who was working with him throughout the entire process. When he did send a written proposal to Mr. [redacted] on June 20, 2011, he included a form for written acceptance and asked Mr. [redacted] to sign it and send it back to him. [redacted] DDRC, in its letter of July 5, 2011, emphasized the absolute requirement of receiving a signature reflecting the consent of [redacted] LLC. The fact that Neil [redacted] would testify to this Court that an oral consent was sufficient for [redacted] since the letter only required "written authorization or consent," (Wilson T. p. 286, ll. 8-19) suggests that Mr. [redacted] was hoping with his heart rather than thinking with the mind of an experienced real estate developer who knows that all significant items should be clearly spelled out on paper. All of this, and my observation of the witnesses, leads me to conclude that the account presented by the Plaintiff is more credible.

44. Any contract affecting real estate requires that the person being held responsible must have agreed in writing to the terms according to South Carolina Code §32-3-10. Since there was no writing signed by a representative of [redacted] LLC reflecting consent to the changes to the easement, I find that is another reason to rule against Defendant on this issue.

45. The Court's conclusion in denying the defenses of laches, estoppel and waiver include much of the same thought process as that reflected above in connection with the conclusion that Plaintiff never consented to the changes. The business setting, and particularly

the complicated nature of this constantly changing project and the continual involvement of an experienced attorney on the part of Defendant [redacted] LLC, lead to skepticism about any claim that a matter as important as the easement use would be left to inexact communication without even subsequent efforts at confirmation. The fact that neither Dale, [redacted] Mr. [redacted] project manager, nor [redacted] his engineers, (Plaintiff's Exhibit 66) believed that any arrangement had been concluded with [redacted] LLC casts further doubt upon Mr. [redacted] mindset as he sent the bulldozers onto the easement tract.

46. Defendant [redacted] LLC argued strenuously to the Court that the letter of intent between Plaintiff and [redacted] executed April 18, 2011 should be grounds for supporting the claims of implied consent or estoppel. This falls short for several reasons, however. First, the letter of intent was no more than that, just an outline to allow further discussion and refinement which, incidentally, never occurred. Second, estoppel requires reasonable reliance by the party complaining. Yet, in this case, the Defendant had no knowledge of the very existence of the letter of intent until after the document was produced during discovery in this very litigation. Mr. [redacted] admitted that he had never relied upon the existence of that document for any purpose.

47. "Waiver is an intentional relinquishment of a known right and the party claiming such has the burden of proof to establish such waiver." *Heritage Federal Sav. & Loan v. Eagle Lake & Golf*, 318 S.C. 535, 458 S.E.2d 561, 567 (Ct. App. 1995). "Waiver requires a party to have known of a right and known that right was being abandoned." *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 685 S.E.2d 600 (2009). Before Defendant violated the easement, Plaintiff took no affirmative action to waive its rights. To the contrary, Plaintiff consistently told Defendant that he was not yet willing to compromise the easement or

ultimately, to sell his rights for $260,000. As soon as the Defendant actively started demolishing the easement parcel, the Plaintiff, through his lawyer, demanded that the project stop and that easement be returned to its prior condition. When that failed, the Plaintiff immediately and timely filed this suit.

48. Defendant's reliance on its defenses is misplaced, as there has been no deception, neglect, or unfair treatment by the Plaintiff. Neil [redacted] admitted numerous times at trial that he never once received consent from the Plaintiff as to a change in the ingress and egress onto Park Terrace Drive. He further explained that all the discussions never altered the rights he started out with. (Wilson T. p. 227, ll. 1-5) The crux of the matter was revealed in Mr. [redacted]'s testimony wherein he explained several times that he really did not believe that he needed the consent of [redacted] LLC in order to use the easement tract as he wished and planned. (T. p. 226, ll. 18-25, p. 253, ll. 16-18) That conclusion on his part was not reasonable or in accordance with the terms of the easement, but it is apparent that he relied upon that belief and not anything said or done by Paul [redacted] or [redacted] LLC. His mistake was of his own making.

APPLICABLE SOUTH CAROLINA LAW

49. In addition to the *Shephard* (supra) and *Xanadu* (supra) cases cited above, enforcement by mandatory injunction has been ordered by the South Carolina courts consistently in easement cases where the dominant estate has been changed or constricted without permission. For example, in *Davis v. Epting*, 317 S.C. 315, 318-319 (Ct. App. 1994), Epting wrongfully obstructed an ingress-egress easement known as Virginia Lane by barricading Virginia Lane, putting a fence across Virginia Lane, and rebuilding his house so that the his staircase hung one foot over Virginia Lane. The Court of Appeals affirmed an injunction requiring Epting to remove all obstructions, including the portion of the staircase that encroached

a mere foot upon Virginia Lane. And in *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452 (Ct. App. 2008), Ward wrongfully obstructed a right-of-way easement by placing on the right-of-way an old truck filled with trash and debris, a rusty water heater, wooden poles, a wooden storage shed, a garden, various scrap metal, mattress springs, lawnmowers, and some other miscellaneous trash and debris. 378 S.C. at 230, 662 S.E.2d at 454. The Court of Appeals affirmed the master's order that Ward could not block the easement or use the easement for any purpose other than as a private driveway, which was the express grant given by the easement.

APPROPRIATE REMEDIES

50. Undeniably, the Defendants have taken actions which will forever change and constrict the Plaintiff's rights to parking, ingress and egress across the easement tract. As proven at trial, the Defendant's project will completely and permanently eliminate 40% of the easement area, permanently alter another 25% underneath a concrete deck with numerous support columns and forever terminate the ability of the Plaintiff to enter and exit across the easement parcel and onto Park Terrace Drive. Furthermore, the Defendant's project, if allowed, will also permanently eliminate the Plaintiff's ability to construct, maintain and insure a parking lot and/or roads across the easement area as it would choose.

51. It is appropriate under existing South Carolina law and the facts of this case that the Defendant, [redacted] LLC, should be permanently enjoined from constructing the retail facilities as reflected in Plaintiff's Exhibit G in the easement area as defined in Exhibit I (Easement Parcel), to Plaintiff's Exhibit B. Further, the Defendant, [redacted] LLC, is prohibited from undertaking any sort of permanent construction in the easement area which would interfere with the ingress, egress, and parking as it had been established prior to 2011 as

reflected on the plat filed December 18, 2002 (Plaintiff's Exhibit C), and shown in some detail in the aerial photograph, Plaintiff's Exhibit D.

52. Within one hundred twenty (120) days after the receipt of this Order, Defendant, [redacted] LLC, shall complete the following steps:

1) Remove all obstructions, including the retaining wall, which it has had constructed in the Easement Parcel;

2) Restore the roadway and parking area within the Easement Parcel as it was prior to 2011;

3) Restore the roadway entrance/exit at Park Terrace Drive across from the Wal-Mart entrance as it was prior to 2011;

4) Remove all fencing from the easement area;

5) Restore lighting and irrigation in the easement area as it existed before 2011;

6) Restore bushes and trees within the easement area as they existed before 2011; and

7) Re-stripe the parking lot and roadway in the easement area as they existed before 2011.

53. THE COURT FURTHER ORDERS that the Defendant not again obstruct or impede the Plaintiff's ingress, egress, and parking on and across the Easement Parcel.

54. This Court shall retain jurisdiction to enforce this Final Order should that become necessary.

55. Each party is to bear its own costs and attorney's fees unless it is necessary to return to this Court to seek further enforcement as is reserved in the preceding paragraph.

IT IS SO ORDERED.

June 15, 2012
Lexington, South Carolina

[redacted]
Master-in-Equity for Lexington County