

## MEMORANDUM

To: File

From: Paul Mitchell

Date: January 11, 2014

Re: Jefferson Estates Landscape Easement

I have reviewed a Memorandum prepared by Kevin Gensler dated November 14, 2013. In the Memorandum he argues that the Grant of Grading and Landscape Easement, and Public Utility and Drainage Easement (the "Landscape Easement") is invalid. Three main arguments are made.

1. Order of Recording. A deed conveying the Church parcel (which included the Landscape Easement Parcel) was recorded as Document R2004-599734, and the Landscape Easement was recorded as the next document, R2004-159735, with both documents dated June 4, 2004. The argument is that since the deed conveyed property which included the Landscape Easement Parcel, the Grantor (Charleston Classic Homes, Inc.) had no ability to reserve an easement over the Landscape Easement Parcel. First, a general comment concerning this position. In today's world, documents are many times recorded out of order. If the order of recording were to invalidate a conveyance or other document, there would be many transactions which would be invalidated.

In analyzing transactions, courts always try to determine the intent of the parties. Here the clear intent was to impress the property with the Landscape Easement. The courts also look at the transaction as a whole. It would be nonsensical to conclude that the Landscape Easement had no purpose.

In addition, the Deed clearly states that the conveyance is subject to the Landscape Easement. This means the Grantee was aware of and took subject to the Landscape Easement. The argument is made that the name of the easement named in the Deed is slightly different than the actual title of the Landscape Easement. This appears to be an argument with no significance. What document was the Deed referring to if not the Landscape Easement?

2. Granting One Self and Easement. It is argued that a property owner cannot grant itself an easement, and that the ownership interest and the easement interest merge together. If this were true, many documents would be invalid, including many documents drafted by Gensler's office. Many times a property owner imposes conditions or restrictions on property and then conveys it to third parties subject to such conditions. For instance, just consider restrictive covenants, declarations of cross parking easements, declarations of access easements, homeowner declarations, and

condominium declarations. In all these situations the owner owns all the parcels. The Gensler Memorandum attempts to make a distinction that somehow the Landscape Easement is different. I fail to see how.

3. The Association Was not in Existence. The Memorandum argues that that the Landscape Easement is invalid since the Association was not in existence at the time the Landscape Easement was recorded. The Landscape Easement states that the Charleston property is being subdivided into Jefferson Estates. In Paragraph1 of the Landscape Easement the actual granting of the easement is "to the owners of the Jefferson Estates Parcel", which means the owners of what was to become the Jefferson Estates Subdivision. It then provides that once the subdivision is completed and the Association is organized, the easements "shall run to the benefit of the Jefferson Estates Homeowners Association." Thus, the conveyance is not to an entity that does not exist, and it is clear that the conveyance to the Association shall only take place once the Association is organized.