THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0072

MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

INITIAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in concluding that Appellant-Respondent MAC Coastal Properties, Inc. ("**MAC Coastal**") can enforce the Indenture Deed Restrictions on any legal or equitable ground, including the existence of a common plan or scheme of development.

2. The Trial Court erred in concluding that the reference to the Sand Dunes Agreement in the Salley-Haun Deed is a restrictive covenant, that Ms. Salley created a common plan or scheme of development, and that MAC Coastal can enforce the Sand Dunes Agreement.

3. The Trial Court erred in ruling that Respondent-Appellant Shoestring Retreat, LLC ("**Shoestring Retreat**") violated the deed restrictions in grading the sand dunes in the Dunes Restricted Area.

4. The Trial Court erred in concluding that the Sand Dunes Agreement establishes an unfixed boundary of the Sand Dunes Restricted Area such that it increases in size as the beach accretes.

5. The trial court erred in concluding that Shoestring Retreat cannot claim any equitable defenses as a result of its knowledge of the Indenture Deed Restrictions and Sand Dunes Agreement prior to the purchase of the property.

6. Because MAC Coastal cannot enforce ay deed restrictions, it does not have standing to pursue its claims.

STATEMENT OF THE CASE

The issues in this appeal are whether subsequent grantees of real property can enforce certain deed restrictions appearing in the chain of title, and whether language in a different prior deed rises to the level of a restriction on the use of property or is merely a personal covenant between two parties.

The Trial Court found that MAC Coastal can enforce certain deed restrictions by virtue of negative reciprocal easements which were created by a common scheme for the benefit of subsequent grantees of the Boyle Trustees and Kathryn Wallace Salley. South Carolina law makes clear that the intent of the grantor determines the existence of a deed restriction, a common scheme, and the creation of negative reciprocal easements. In this case, the evidence in the record shows that neither the Boyle Trustees nor Kathryn Wallace Salley intended to create a common scheme.

On the contrary, the evidence demonstrates that the Boyle Trustees: (a) intended to create a personal covenant regarding the Sand Dunes Parcel with North Litchfield Beach, Inc. that does not run with the land and is not enforceable by subsequent purchasers; (b) intended to refer to that Sand Dunes Agreement in subsequent deeds and not create a new deed restriction; (c) intended to reserve the benefit and enforceability of the Indenture Deed Restrictions to themselves; and (d) intended that the location of the Sand Dunes Restricted Area extend sixty (60) feet landward from the mean high water mark of the Atlantic Ocean. The evidence is also clear that Kathryn Wallace Salley did not intend to create a common scheme, and further did not intend to create a new deed restriction in the Salley-Haun Deed.

The most compelling evidence of the Trustees' and Kathryn Wallace Salley's intent are the deeds themselves. In the Boyle Indenture Deeds, the Trustees expressly reserved the benefit and enforceability of the deed restrictions to themselves. In the case of *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), the Supreme Court of South Carolina held that when language to this effect is present, no intent to create a common scheme for the benefit of future grantees is inferable. The deed from Kathryn Wallace Salley is equally clear that no intent to create a common scheme or deed restriction is discernable from the language. Also compelling is the testimony of Thomas Boyle and Kathryn Wallace Salley, wherein they each clarify their understanding and intent. For all of these reasons, MAC Coastal does not have the right to enforce any of the deed restrictions at issue and does not have standing to bring its claims. (All capitalized terms in this Statement of the Case are defined herein below).

STANDARD OF REVIEW

This appeal arises out of the master-in-equity's final order following a two-day trial. Plaintiff's Third Amended Complaint sets forth two causes of action: (1) Declaratory Judgment

and (2) Injunction. "Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). To determine the standard of review for a cause of action filed pursuant to the Declaratory Judgment Act, the appellate courts look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought. *Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010). The main purpose of the Complaint in this case is injunctive relief. "Actions for injunctive relief are equitable in nature." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Id*. Here, the Plaintiff's primary purpose in bringing this action was to enjoin the Defendant from building on Defendant's lot in violation of restrictive covenants it alleges it has the right to enforce. Therefore, this suit is an action in equity, and this Court may review the master-in-equity's factual findings in accordance with the Court of Appeals' own view of the preponderance of the evidence. *See Cedar Cove Homeowners Ass'n, Inc. v. Di Pietro*, 368 S.C. 254, 264, 628 S.E.2d 284, 288 (Ct. App. 2006) (holding "an action to enforce restrictive covenants by injunction is in equity" and reversing the trial court's injunction).

FACTS

(a) The Boyle Trust

On December 4, 1952, Gene Boyle Brading, William B. Boyle, Edwin Boyle, Jr., Ann Boyle Pruet, Thomas B. Boyle, Jr., and E. C. McGregor Boyle, conveyed 334.25 acres in Georgetown County (the "**County**") in trust (the "**Boyle Trust**") to William B. Boyle And Thomas B. Boyle, Jr. as Trustees for the Boyle Trust (the "**Trustees**"). **Pl.'s Tr. Ex. 3 ("the Trust Deed").**

The Trust Deed provides, among other things, that the Trustees had the authority and power to subdivide, develop and manage the property for sale, and to sell all or part of such property on terms which they determined in their discretion, either with or without covenants and warranty. ***Id*. at 2.**

The Trust Deed further provides that the Boyle Trust terminates upon the sale of all of the land, but no later than 21 years after its execution, which means the Boyle Trust terminated by its own terms no later than December 3, 1973. ***Id.*** Thomas B. Boyle died on September 3, 2010, and William B. Boyle died on February 20, 2013. There are no successor trustees and no assignments of enforcement rights of record. **Def.'s Tr. Ex. 1 at 5-6**; **Tr. Transcr. 98:5-12 (April 21, 2020)**.

The vast majority of the property comprising North Litchfield Beach derives from the Boyle Trust. From 1952 to 1959, the Trustees sold some of the Boyle Trust property in piecemeal fashion to various individuals. **Tr. Transcr. 207:7-8 (April 20, 2021)**. The Trustees did not use a uniform conveyance document and instead used at least four different deed forms with differing deed restrictions, some with four, seven, nine, or thirteen restrictions, and others with no restrictions. **Tr. Transcr. 84:6-12 (April 20, 2021)**; **Tr. Transcr. 82:7-13 (April 21, 2021)**; **Def.'s Tr. Ex. 34, 38; Pl.'s Tr. Ex. 4, 5, 13, 14**.

(b) Conveyance to Kate H. Wallace

In 1953, through separate deeds, the Trustees conveyed what is known as Lot 3 and the Eastern portion of Lot 2 of Block 2-S to Kate H. Wallace. **Pl.'s Tr. Ex. 4, 5**. Both deeds contain certain restrictive covenants (the "**Indenture Deed Restrictions**") including restrictions against subdividing, and also provide that the benefit and enforcement of the restrictive covenants are reserved solely to the Grantors (the Trustees). Both deeds also contain a reverter clause that provides that, in the event of a violation of any of the restrictive covenants, the property shall revert to the Trustees. ***Id.***

(c) Conveyance to North Litchfield Beach, Inc.

On June 1, 1959, the Trustees conveyed a large portion of the northern section of North Litchfield Beach to North Litchfield Beach, Inc. (the "**North Litchfield Beach Deed**"). **Pl.'s Tr. Ex. 14**. The North Litchfield Beach Deed excluded certain lots that were reserved by the Grantors, the lots previously conveyed by the Grantors, including the conveyances to Kate H. Wallace, and any area of land between Front Beach and the Atlantic Ocean (the sand dunes area) adjacent to these lots (the "**Boyle Reserved Lots**"). ***Id.* at 2-3**. The North Litchfield Beach Deed also included an agreement between the Trustees and North Litchfield Beach, Inc. that provides, in relevant part:

> ...it being specifically agreed, however, by and between the Grantors and the Grantee that the area of land between the lots shown on said plat [the Boyle Reserved Lots] and the Atlantic Ocean shall never be used for the purpose of erecting any building or structure by the Grantors or the Grantee herein, their heirs or assigns or successors.

(the "**Sand Dunes Agreement**"). ***Id.* at 3**. By the time MAC Coastal filed the instant action, the Boyle Trust owned no real property that was benefitted by the Indenture Deed Restrictions.

(d) Conveyance of the Sand Dunes Parcel and 183 Summertime Lane.

In 1963, the Trustees conveyed the remaining Western portion of Lot 2 to Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle, who then conveyed it to Thomas B. Boyle (individually). **Def.'s Tr. Ex. 19, 20.** Neither deed contained any restrictions.

In 1964, the Trustees conveyed the sand dunes parcel adjacent to Lot 3 (the "**Sand Dunes Parcel**") and the Eastern portion of Lot 2 of Block 2-S, to Kate H. Wallace (the "**Sand Dunes Deed**"). **Pl.'s Tr. Ex. 6**. Said Sand Dunes Deed references the Sand Dunes Agreement: "The area of land conveyed hereby, by agreement between Grantors and North Litchfield Beach, Inc., cannot be used for the purpose of erecting any building or structure." The Sand Dunes Deed describes the "Dunes Restricted" area as having an easterly boundary at the Atlantic Ocean and measuring sixty (60) feet landward (the "**Sand Dunes Restricted Area**"). ***Id***.

Kate H. Wallace died in 1969. In 1972, Thomas B. Boyle conveyed the Western portion of Lot 2 to Kathryn Wallace Salley, subject to certain deed restrictions which are different from the ones contained in the 1953 deeds to Kate Wallace. **Pl.'s Tr. Ex. 7**. In addition to creating materially different deed restrictions, Thomas B. Boyle's deed conveyed the lot to Kathryn Wallace Salley in his individual capacity, and not as a trustee of the Boyle Trust. ***Id.***

In 1974, Jean Wallace Blount and Kathryn Wallace Salley, as beneficiaries of the Estate of Kate H. Wallace, conveyed Lot 3, the Eastern portion of Lot 2, and the Sand Dunes Parcel to Kathryn Wallace Salley in a Partition Deed. This property became known as 183 Summertime Lane. **Pl.'s Tr. Ex. 8**.

(e) Property of Shoestring Retreat

In 1978, Kathryn Wallace Salley conveyed Lot 3, Block 2-S, the Eastern 20 feet of Lot 2, Block 2-S, and the Sand Dunes Parcel, excepting the northeastern most 30 feet from each, to Louis and Katharine Haun (the "**Salley-Haun Deed**"). This property is hereinafter referred to as the "**Shoestring Property**". **Pl.'s Tr. Ex. 9**. This 1978 conveyance subdivided the original property conveyed to Kate H. Wallace, for which Ms. Salley sought and obtained the approval of the Trustees as evidenced by the *Modification of Covenants, Conditions and Restrictions* referenced below. **Def.'s Tr. Ex. 3**. The record is devoid of any evidence suggesting Ms. Salley sought or obtained any approval from any other property owner in North Litchfield Beach.

Louis Haun quitclaimed his interest in Shoestring Property to Katharine Haun in 2004. **Pl.'s Tr. Ex. 10**.

The foregoing conveyances are shown in Figure 1 attached hereto and incorporated herein by reference.

(f) Releases to Subdivide and Waivers by Trustees

In 1972, the Trustees recorded a *Release of Reverter, Release of Right of Re-Entry and Modification of Covenants, Conditions and Restrictions* whereby they released the right of reverter and re-entry reserved to them in the Boyle Trust deeds, including the property conveyed to Kathryn Wallace Salley, and also released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 2**. In 1978, the Trustees recorded a *Modification of Covenants, Conditions and Restrictions* whereby they again released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 3**.

Plaintiff offered no evidence and the record contains no evidence of either the Trustees or anyone else ever having attempted to enforce any of the Indenture Deed Restrictions. On numerous occasions, the Trustees recorded waivers or consents of variations to the restrictions contained in various grantees' deeds for the purpose of, for example, approval of resubdivisions as evidenced in the Release and Modification described above, as well as allowing construction in the Sand Dunes Restricted Area. **Def.'s Tr. Ex. 2, 3, 14, 15, 16, and 17**. In each of these instruments, the Trustees recorded waivers or consents to variations of the very restrictions MAC Coastal seeks to enforce. Conversely, there is no record of any actions filed by the Trustees seeking to enforce any of the Indenture Deed Restrictions.

(g) Property Owned by MAC Coastal

MAC Coastal owns three of the thirteen interval timeshares of the property located at 186 Parker Drive, which is adjacent to the Shoestring Property. MAC Coastal's title derives from the Salley Family Partnership, as well as Charles W. Salley, Mark H. Salley and Julian A. Salley, Jr., to whom Kathryn Wallace Salley conveyed the property in 1991. **Pl.'s Tr. Ex. 15**. In 1999, MAC

Coastal recorded a *Declaration of Covenants, Conditions and Restrictions* whereby the property was subdivided into thirteen interval timeshares. **Def.'s Tr. Ex. 13**.

The Covenants Conditions and Restrictions on MAC Coastal's lot derive in part from a different grantor and were imposed twenty years after those on the Shoestring Property. MAC Coastal's lot is comprised of all of Lot 1, Block 2-S, the remainder of Lot 2, and a portion of Lot 3 from the 1978 re-subdivision. Thomas Boyle owned Lot 1 and the remainder of Lot 2 from 1964 to 1972, free of any restrictions. Thomas Boyle, individually, imposed certain restrictive covenants in the deed conveying Lot 1 and the remainder of Lot 2 to Kathryn W. Salley. In addition to being imposed 20 years after Kate Wallace's lot restrictions, the covenants, conditions, and restrictions imposed by Thomas Boyle individually are substantially different in number and nature from those described in the Indenture Deed Restrictions.

(h) Purchase, Subdivision and Grading

By agreement dated February 23, 2019, Holly H. McManus contracted to purchase the Shoestring Property from Katharine Alden Haun. **Tr. Transcr. 21:15-17 (April 21, 2021)**. After signing the Purchase Agreement, Mrs. McManus contacted Greggory Cunningham of Parker Land Surveying to prepare a plat of the property. **Tr. Transcr. 46 (April 21, 2021)**. Mr. Cunningham prepared a draft plat on February 26, 2019, said plat depicting a sixty foot "Sand Dune Restricted Area." **Pl.'s Tr. Ex. 15**. Mr. Cunningham testified at trial that his reason for including the "Sand Dune Restricted Area" on said plat was solely based on such depiction appearing on prior recorded plats. **Tr. Transcr. 32:14 (April 20, 2021)**. Mr. Cunningham testified he is aware of other surveyors who do not show such a sand dunes restricted area on the plats they prepare. **Tr. Transcr. 47:8 (April 20, 2021)**. Further, Mr. Cunningham acknowledged several recorded plats of North Litchfield Beach properties which do not include or show a sand dunes restricted area at all, including plats of the Shoestring Property. **Tr. Transcr. 47-59 (April 20, 2021)**; **Pl.'s Tr. Ex.**

38; **Def.'s Tr. Ex. 5, 22, 25, 31.** Finally, Mr. Cunningham testified that he does not have an opinion on whether the Sand Dunes Restricted Area is restricted or whether there is an enforceable restriction involved. **Tr. Transcr. 60:1 (April 20, 2021)**. In addition to those about which Mr. Cunningham testified, the trial court admitted into evidence numerous recorded plats of beachfront properties, the title of which derives from the Boyle Trust, which do not include or depict a sand dunes restricted area at all, including plats of the Shoestring Property. **Def.'s Tr. Ex. 21, 23, 24, 32, and 33**.

Upon the advice from several attorneys that the Sand Dunes Agreement was unenforceable as a deed restriction, **Tr. Transcr. 29:5-11; 30-31; 47:20; 60:4-9 (April 21, 2021)**, Mr. and Mrs. McManus requested that Mr. Cunningham remove the "Sand Dune Restricted Area" from the plat. **Tr. Transcr. 48:18 (April 21, 2021)**. When he declined to do so, the McManuses contacted Kenneth Crawford of G3 Surveying to prepare a plat of the property, which he did on June 6, 2019, said plat did not depict the "Sand Dunes Restricted Area" **Pl.'s Tr. Ex. 1**; **Tr. Transcr. 48:18-24 (April 21, 2021)**.

On or about July 19, 2019, Ms. Haun submitted an application to the County to subdivide the Shoestring Property into two lots, which was approved on August 26, 2019. **Pl.'s Tr. Ex. 2**. On September 16, 2019, Ms. Haun conveyed the Shoestring Property to Shoestring Retreat. The deed of conveyance does not contain any restrictions but is subject to "all applicable restrictions and easements of record." On September 23, 2019, Shoestring Retreat recorded the subdivision plat in the Register's Office for the County. **Pl.'s Tr. Ex. 11**.

In late 2019, Shoestring Retreat obtained the requisite permits from the County and demolished the structure located on the Shoestring Property and graded the property, including in

the sand dunes area, in preparation to build a single-family home for the McManus' retirement. **Tr. Transcr. 58:13-59:14 (April 21, 2021)**.

(i) Assignments to MAC Coastal Properties, Inc.

On November 11, 2009, The Litchfield Company of South Carolina Limited Partnership conveyed various properties to Litchfield Crossing Development Co., LLC incidental to its liquidation of assets. In conjunction with that transaction, The Litchfield Company of South Carolina Limited Partnership recorded a Quit Claim deed purporting to convey to Litchfield Crossing Development Co., LLC any remaining easements, appurtenances, and interests in land owned by the grantor in the County. **Pl.'s Tr. Ex. 22**.

On September 1, 2020, Litchfield Crossing Development Co., LLC recorded an *Assignment of Right of Abatement and Right to Enforce Compliance with Restrictions* whereby it purports to assign to MAC Coastal its right to enforce the restrictive covenants contained in the Sand Dunes Deed and the Sand Dunes Agreement. **Pl.'s Tr. Ex. 26**.

On September 25, 2020, Charles Salley, having Kathryn Wallace Salley's power of attorney, recorded an *Assignment of Right to Enforce Compliance with Restrictions* whereby he purports to assign to MAC Coastal her right to enforce the Sand Dunes Agreement that is referenced in the Sand Dunes Deed, the Partition Deed, the Salley-Haun Deed, and the Haun Quitclaim Deed. **Pl.'s Tr. Ex. 25**. There is no evidence in the record that, at the time of the Assignment from Salley, Ms. Salley owned any real property that would be benefitted by the enforcement of any covenant or restriction or the Sand Dunes Agreement.

(j) Procedural History

On January 21, 2020, MAC Coastal filed a Verified Complaint in the Court of Common Pleas for the 15th Judicial Circuit of South Carolina for Declaratory Judgment and Injunction against Georgetown County. Upon Motion to Intervene filed on February 6, 2020, Shoestring Retreat, LLC was added as a Defendant by Consent Order. On February 28, 2020, MAC Coastal filed an Amended Complaint, along with Yancey A. McLeod, III as additional Plaintiff, against

Georgetown County and Shoestring Retreat, LLC. On March 5, 2020, the case was referred to the Master in Equity for Georgetown County by consent order. On May 22, 2020, the parties filed a Stipulation of Dismissal Without Prejudice as to Defendant Georgetown County and as to Plaintiff Yancey A. McLeod, III. On June 3, 2020, Shoestring Retreat, LLC filed its Answer to the Amended Complaint. On September 3, 2020, MAC Coastal filed a Second Amended Complaint against Shoestring Retreat, LLC. On September 29, 2020, Shoestring Retreat, LLC filed its Answer to the Second Amended Complaint. On October 7, 2020, MAC Coastal filed a Third Amended Complaint against Shoestring Retreat, LLC, and on October 19, 2020, Shoestring Retreat, LLC filed its Answer to the Third Amended Complaint. Following a full trial on the merits on April 20-21, 2021, the Trial Court entered a Final Order entered on March 23, 2022.

ARGUMENT

I. The Trial Court erred in concluding that MAC Coastal can enforce the Indenture Deed Restrictions on any legal or equitable ground, including the existence of a common plan or scheme of development.

a. No Common Scheme of Development and No Reciprocal Negative Easements Exist Which Would Give MAC Coastal Enforcement Rights

The Trial Court erred in finding that the Trustees intended to create a common plan or scheme in the Indenture Deeds, and in finding that such a common scheme exists at all. Specifically, the Trial Court incorrectly concluded that the Trustees intended by implication to create a common scheme, notwithstanding the plain language in the Trust Deed, and it erred in finding the existence of a common scheme that creates negative reciprocal easements enforceable by MAC Coastal.

On numerous occasions, the Supreme Court of South Carolina has articulated the laws of restrictive covenants, common schemes of development and negative reciprocal easements. Of particular relevance are the cases of *Edwards v. Surratt,* 228 S.C. 512, 90 S.E.2d 906 (1956), *McDonald v. Welborn,* 220 S.C. 10, 66 S.E.2d 327 (1951), *Bomar v. Echols,* 270 S.C. 676, 244 S.E.2d 308 (1978), *Charping v. J.P. Scurry & Co., Inc.,* 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988), *Gambrell v. Schriver,* 312 S.C. 354, 440 S.E.2d 393 (Ct. App. 1993), and importantly, *Heffner v. Litchfield Golf Co.,* 258 S.C. 447, 189 S.E.2d 3 (1972). These cases formed and established the guiding principles relevant to the present appeal. Such principles include the

standard that, in South Carolina, "restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restriction" *Edwards,* 228 S.C. at 519, 90 S.E.2d at 909. The Court in *Edwards* held the intent of the grantor is *pivotal* in the determination of whether an enforceable restrictive covenant exists in the context of a common scheme: "the court will have recourse to every aid or canon of construction to ascertain the intention of the parties." *Id.* (citing 26 C.J.S., Deeds, § 163); see also *Charping,* 296 S.C. at 312, 372 S.E.2d at 120. "In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" *Windham v. Riddle,* 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (citing *Wayburn v. Smith,* 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977)).

In particular, where an intent to create a **common scheme** can be ascertained, such restriction on the use of property must be created in express terms or by plain and unmistakable implication. *Edwards,* 228 S.C. at 519, 90 S.E.2d at 910 (citing 14 A.J., 1955 Cum.Sup. Sec. 196; *Starmount Co. v. Greensboro Memorial Park,* 233 N.C. 613, 65 S.E.2d 134, 25 A.L.R.2d 898 (1951)). In the absence of an express intent, the Court must determine whether or not a grantor intended, **by plain and unmistakable implication**, to create a common scheme, and the burden of proof is on the subsequent grantee to show the grantor's intention to create a common scheme. *Charping,* 296 S.C. at 314, 372 S.E.2d at 121. In any event, "[c]ovenants, expressed or implied, restricting the free use of land are not favored and must be strictly construed," and "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction." *Gambrell,* 312 S.C. at 357-358, 440 S.E.2d at 395 (citing *Bomar,* 270 S.C. at 676, 244 S.E.2d at 308).

Essential to the determination of whether intent by the grantor arises by plain and unmistakable implication is the language of the deed itself. "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Windham*, 672 S.E.2d at 583, 381 S.C. at 192 (citations omitted). In addition, "[i]n determining whether reciprocal negative easements have been created, resort should be had not only to the language of the deeds, but 'the circumstances surrounding the origin of covenants should also be considered.'" *Bomar*, 270 S.C. at 680, 244 S.E.2d at 310 (citing *Nance v. Waldrop*, 258 S.C. 69, 72, 187 S.E.2d 226, 228 (1972); accord, *Arrants v. Rankin*, 268 S.C. 567, 571, 235 S.E.2d 135, 136 (1977)).

In looking to the language of the deed itself, where a deed expressly limits the benefit of a restrictive covenant to the grantor and grantee in the deed, the Court in *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), held that no enforceable common scheme is created among the subsequent grantees, and a remote grantee does not have standing to enforce such restrictions.

In *Heffner*, the deed at issue contained certain restrictions along with the following provision:

> It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the Grantor and Grantee herein and may be changed at any time by mutual consent in writing of the parties hereto, their heirs, successors or assigns.

Id. at 449, 189 S.E.2d at 4. The Supreme Court held that the suit brought by the remote grantee to enforce the deed restrictions "must fail unless it is supported by the doctrine of reciprocal negative easements by implication," *Id.* at 450, 189 S.E.2d at 4. The Court then explained the doctrine of reciprocal negative easements by implication as follows:

> Where a common grantor opens a tract of land to be sold in lots and blocks, and before any lots are sold inaugurates a general scheme of improvement, and thereafter sells each lot subject to such scheme of improvement, mutuality of covenant and consideration exists

> among the various purchasers of the lots, and they each have an interest in the negative equitable easement thus created.

Id. at 451, 189 S.E.2d at 5 (citing *Stanton v. Gulf Oil Corporation*, 232 S.C. 148, 152, 101 S.E.2d 250, 251-252 (1957). This holding is consistent with the rule set out in *Bomar*, 244 S.E.2d at 310, 244 S.E.2d at 679: "Where they arise by implication, the restrictions are said to create a reciprocal negative easement." (citing 20 Am.Jur.2d Covenants, Conditions and Restrictions, § 173 (1965)).

Of key importance, however, the *Heffner* Court held:

> Mutuality of covenant and consideration, which are essential to the existence of a general scheme of development enforceable, Inter se, by the purchasers of lots in a subdivision, ***may be implied only when the common grantor manifests his intention to subject the parcels conveyed to common restrictions for the benefit of all grantees***. By the express terms of the twentieth provision, uniformly included in the Litchfield deeds, ***the benefit of the restrictions in each is limited to the parties thereto***, who reserve the right to modify or abrogate by mutual assent. ***This directly precludes an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision. By near unanimous authority, no enforceable general scheme of development is inferable in the face of a provision of this tenor.***

Id. at 451, 189 S.E.2d at 5 (emphasis added). The rule articulated here by the Court is that no implied intent exists and no negative reciprocal easements arise where the grantor has expressly reserved the benefit of the deed restrictions to itself.

i. The Deeds from the Boyle Trust show an Intent by the Trustees ***Not*** to Create a Common Plan or Scheme

In the present appeal, the 1953 deeds to Kate H. Wallace contain the following provision:

> IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made ***solely for the benefit of the grantors***, who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions, or restrictions by grantee, her heirs or assigns, ***the grantors*** shall have the right of abatement and the right to enforce compliance by injunction or any other appropriate legal or equitable action.

Plf. Tr. Ex. 4 at 2, 5 at 2 [emphasis added]. This deed from the Boyle Trust uses nearly identical language as the *Heffner* deed, *supra*. As a result, as in *Heffner*, it is clear that the Boyle Trustees did not intend to subject the parcel to common restrictions for the benefit of all grantees. The Trustees expressly limited the benefit of the deed restrictions therein and reserved the enforceability thereof solely to themselves.

In its analysis, the Trial Court incorrectly relies on the termination of the Trust as leaving the door open for the existence of a common scheme of development. The Trial Court held:

> If the Trustees had still owned Shoestring's lot and decided to subdivide the lot, they could have done so over the objections of MAC. The Court agrees with this point but it does not alter the determination that the Trust is defunct and MAC cannot enforce the Covenants as a Trustee. The now extinguished power of the Trust to make changes is not fatal to the existence of a common plan or scheme of development.

Final Order at 11, ¶55. The extinguished power of the Trust to make changes such as subdividing property it owns may or may not be fatal to the existence of a common plan; however, what *is certainly* fatal to the existence of a common plan or scheme of development is that the Trustees *expressly* reserved the benefit and enforceability of the deed restrictions to themselves. According to the *Heffner* Court, "no enforceable general scheme of development is inferable in the face of a provision of this tenor." *Id.*

The Trial Court's reliance on *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993) is similarly misplaced, when it held that:

> the remedy of mutual reciprocal negative easements is equitable and was created to protect the expectation and reliance interests of purchasers in a subdivision or common plan. Therefore, the focus should be on the equitable rights and remedies of the purchasers and not a developer (or in this case trustees who conveyed away all property interest.)

Final Order at 11-12, ¶56. This conclusion misstates the holding of *McLeod* and contradicts the holding of *Heffner*. The issue in *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834, was whether "respondent (trustee), the original grantor of a restrictive covenant, has standing to enforce that covenant against a remote grantee when the trust no longer owns any real property which would be benefitted by its enforcement." *Id*. at 246-247, 433 S.E.2d at 834. The *McLeod* Court noted that "a person seeking to enforce a covenant must be benefitted by that act," and that "the trustee lacked standing to enforce this covenant against appellants since the trust no longer owns any real property which would benefit from the covenant's enforcement." *Id*. The only relevance of the *McLeod* decision in the present appeal is that even the original Trustees would lack standing to enforce the Indenture Deed Restrictions because the Trust no longer owns any real property which would be benefitted by their enforcement. Nowhere in the *McLeod* decision does the Court address the theory of reciprocal negative easements or the expectations of a remote grantee, and the proposition that MAC Coastal should have such a right, simply because it hopes to, is completely unfounded. The Court in *Edwards* makes clear that it is the intent of the *grantor* that is the controlling factor, and in accordance with the *Heffner* decision, no intent to create a common scheme can be found where the grantor clearly and expressly reserves the benefit of the deed restrictions to itself.

ii. The Circumstances Surrounding the Creation of the Indenture Deed Restrictions Show No Intent of the Trustees to Create a Common Scheme.

There is no evidence in the record that would show an intent by the Trustees to create a common plan or scheme. To the contrary, the testimony of Kathryn Salley and Tom Boyle (a Trustee) both agree that the Trustees were the sole enforcers of the covenants, conditions and restrictions. In transcript testimony admitted by the Trial Court, Kathryn Salley testified that the Boyle Trust, and no one else, had the power to modify and to enforce:

Q. Now, you don't believe that Ms. Boyle has a right to come in and change your lot lines, do you, on your property?

A. No. She – no I do not believe she has a right to come change my lot lines, but if I want to change my lot lines myself, I do feel like I have to ask her.

Q. All right. So if you want to change it you think you have to get permission of whoever has the right to enforce restrictive covenants?

A. Well, it so happens it was the Boyle Trust.

Q. That was Mr. Hinds' opinion at that time, but --

A. Well, I mean, that's the only way we got them changed.

Q. Did you go to the, for example, Litchfield Beach Company or the North Litchfield Beach Company and ask their permission?

A. No. We were told that we had to have the Boyles permission.

Q. Okay. But you didn't seek the permission of anybody else?

A. No.

Def.'s Tr. Ex. 37 at 19:2-23. Later, Mrs. Salley again testified that the Boyle Trust was the sole source of permission for subdivision:

Q. And did Mr. Hinds attempt to record the plat?

A. It's my -- let me just explain to you exactly what I remember because I remember that he called and said that I could not -- that he could not get the plats recorded at the courthouse as such unless I had the permission of the Boyles.

Q. Okay. As a result of what Mr. Hinds told you, okay, what did he have -- what did he do for you?

A. Well, at that point, I called Tom Boyle and he said to talk to Gene Pruet. And Gene had the Trustees to sign an agreement that I could do that.

Def.'s Tr. Ex. 37 at 32:13-24. The record includes evidence that other property owners sought and obtained consents or waivers of these restrictive covenants. **Def.'s Tr. Ex. 2-3, 14-17**.

Tom Boyle's testimony confirms the "grantors" referenced in the reservation language were the Trustees:

Q. … Would you publish paragraph one [of the deed restrictions]?

A. "This lot shall be restricted to residential purposes only and shall not be subdivided or reduced in size by the grantee, their heirs or assigns, without the written consent of the grantors, their successors and assigns."

Q. And you and Bill Boyle were the grantors in this deed?

A. Yes.

Def.'s Tr. Ex. 36 at 16:2-10. Mr. Boyle testified more specifically that the rights in the deed restrictions were reserved solely to the Trustees:

Q. … Now, it provides – and let me read to you. I know it's awful. But after restriction No. 10 it is provided, "It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the grantors" – that's the Trust?

A. Yes.

Q. -- "who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions and restrictions, their heirs or assigns have the right of abatement and the right to enforce compliance by injunction or other appropriate legal or equitable action." **Was that right reserved solely to the Trustees?**

A. Yes.

Q. All right, sir.

A. That's the purpose of it.

Def.'s Tr. Ex. 36 at 19:8-25 (emphasis added). In summary, the Trustees intended themselves, ***and no one else***, to be the sole enforcers of the restrictions. MAC Coastal's predecessor in title, Kathryn Salley, considered the Trustees to be the sole enforcers. The circumstances surrounding the origin of the covenants, as considered in light of *Bomar*, as outlined above and including that the Trustees used many different forms of deeds and not a uniform one, indicate no intent by the Trustees to create a common scheme. Of key importance, because the reservation language does not mention other owners or future purchasers or heirs or assigns, there can be no implied right of enforcement in favor of MAC Coastal under *Heffner.* As the Court held in *Gambrell*, 312 S.C. at

358, 440 S.E.2d at 395, "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction."

II. The Trial Court erred in concluding that the reference to the Sand Dunes Agreement in the Salley-Haun Deed is a restrictive covenant, that Kathryn Wallace Salley created a common plan or scheme of development, and that MAC Coastal can enforce the Sand Dunes Agreement.

The Trial Court's conclusion that Kathryn Wallace Salley created a deed restriction by referring to the Sand Dunes Agreement in the Salley-Haun Deed is in error. The record demonstrates not that Ms. Salley "exacted this restriction for the benefit and protection of that land," as the Trial Court held, **Final Order at 9, ¶46**, but that, in preparing the deed, the law offices of Grimes, Hinds & Cowan of Georgetown, S.C. copied that language referencing the Sand Dunes Agreement from prior deeds in the chain of title into the metes and bounds description of the Salley-Haun Deed. This does not evidence an intent to create a restriction, and there is no evidence anywhere in the record of such intent by Ms. Salley.

Furthermore, the actions of Ms. Salley in assigning her purported enforcement rights to MAC Coastal in September, 2020, undermine the Trial Court's conclusion that she intended to create a common scheme, since such an assignment would have been unnecessary if she intended or believed that she had so intended to create an enforceable scheme. The Trial Court's conclusion is at odds with there being a "clear intention to create a covenant that would run with the land," *Charping*, 296 S.C. at 314, 372 S.E.2d at 121, and "words cannot be read into a deed to impart an intent unexpressed when the deed was recorded." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020).

The Trial Court's finding that Kathryn Wallace Salley intended to create a common scheme is further in error. **Final Order at 11-12, ¶¶51, 57.** Neither MAC Coastal nor Shoestring Retreat

argued this conclusion, and there is no evidence in the record, express or implied, that Ms. Salley intended to create a common scheme that would give rise to negative reciprocal easements.

a. The Reference to the Sand Dunes Agreement in the Salley-Haun Deed is a Personal Covenant between the Trustees and North Litchfield Beach, Inc., Not a Restrictive Covenant.

As made clear in South Carolina case law, the intent of the Trustees and the intent of Kathryn Wallace Salley are central to the issues in this appeal. The Sand Dunes Agreement and other evidence in the record clearly demonstrate that the Trustees intended to create a personal covenant with North Litchfield Beach, Inc., that does not run with the land and is not enforceable by subsequent purchasers. As evidenced by the original Indenture Deeds, the Trustees knew how to create restrictive covenants if that is what they intended. However, what the record demonstrates is that the Trustees intended to refer to the Sand Dunes Agreement in subsequent deeds and *not* create a new restriction.

The Court of Appeals held in *Charping*, 296 S.C. at 315, 372 S.E.2d at 120 that, for a subsequent purchaser to enforce a restriction limiting the use of real property, as opposed to a personal covenant which is enforceable only by the parties thereto, such a restriction must (a) touch and concern the land, and (b) "there must also be an indication that the parties intended for the covenant to run with the land." *Id*. (citing *Cheves v. City Council of Charleston*, 140 S.C. 423, 138 S.E. 867 (1927)). The Court in *Charping* found that because the covenant at issue did not indicate that it should benefit the grantor's heirs, successors and assigns, it did not express such an intention for it to run with the land and therefore the subsequent purchaser had no right of enforcement.

To be enforceable, a "restriction on the use of the 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." *Buffington v. T.O.E. Enterprises*, 383 S.C.

388, 392, 680 S.E.2d 289, 291 (S.C. 2009) (citing *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (S.C. 2006)). "A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose . . . ." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). "The court is without authority to consider parties' secret intentions…" *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Therefore, "words cannot be read into a deed to impart an intent unexpressed when the deed was recorded." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020) (quoting *Pee Dee Stores*, 831 S.C. at 241, 672 S.E.2d at 802). "The intention of the grantor must be found within the four corners of the deed." *Williams v. Tamsberg*, 425 S.C. 249, 259, 821 S.E.2d 494, 500 (Ct. App. 2018).

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)).

In the present appeal, the record is clear that the Trustees neither expressed an intent to create a covenant that runs with the land, nor is there a plain and unmistakable implication of the Trustees' intent to do so.

In the vast majority of the Trustees' deeds in the record, the Trustees established a course of practice in both the placement and specific language used when creating restrictive covenants in deeds. For example, in the original deed to Ms. Wallace, after and separate and apart from the metes and bounds description of the property and the derivation clause, is the following language:

> THIS CONVEYANCE IS MADE SUBJECT TO THE FOLLOWING CONDITIONS, COVENANTS AND RESTRICTIONS, WHICH SHALL BE BINDING ON THE GRANTEE, her HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS:

with a list of the specific conditions, covenants and restrictions following. **Pl. Tr. Ex. 4 at 1**. Regardless of the number of conditions, covenants and restrictions contained in the various forms of deeds, this language was used routinely by the Trustees.

In the North Litchfield Beach Deed (**Pl. Tr. Ex. 14**), however, the Trustees did not include this or similar language and did not otherwise create a restriction, but rather memorialized an agreement between the parties:

> [I]t being specifically agreed, however, by and between the Grantors and the Grantee that the area of land between the lots shown on said plat and the Atlantic Ocean shall never be used for the purpose of erecting any building or structure by the Grantors or the Grantee herein, their heirs or assigns, or successors.

Pl. Tr. Ex. 14 at 3. This language (the Sand Dunes Agreement) created a personal covenant between the parties regarding the Sand Dunes Restricted Area that does not run with the land and which subsequent purchasers cannot enforce.

Here, as in *Charping*, there is no indication in the North Litchfield Beach Deed that the Sand Dunes Agreement should ***benefit*** the parties' heirs, successors and assigns. The Sand Dunes Agreement limits the use of the Sand Dunes Restricted Area by the parties' "heirs or assigns, or successors," but it expresses *no intent that it should accrue to their benefit*. MAC Coastal has the burden of proving that the Trustees had a "clear intention to create a covenant that would run with

the land,"[1] and there is no evidence in the record in support thereof. The Sand Dunes Agreement therefore does not run with the land and is not enforceable by subsequent purchasers.

The language used by the Trustees in conveying the Sand Dunes Parcel does not contain restrictive covenants such as their other deeds. It contains no "subject to," "restricted by" or other similar language. It merely states, at the end of the metes and bounds description:

> The area of land conveyed hereby *by agreement between Grantors and North Litchfield Beach, Inc.* cannot be used for the purpose of erecting any building or structure.

Pl. Tr. Ex. 6 at 1 (emphasis added). As a matter of course for the Trustees, this language does not create a new covenant or restriction because the Boyle Indenture Deeds already contained such a restriction at Paragraph No. 12, a through c. **See Pl.'s Tr. Ex. 4 at 2**. This obviates the need for an additional restriction. The language in the Sand Dunes Deed is clearly a reference to the personal, non-reciprocal Sand Dunes Agreement, and the mere recitation of a covenant or agreement contained in a prior deed does not create a new covenant where there is no intent by the grantor to create a new restriction. This recitation solely puts the other party on notice of the Sand Dunes Agreement. As Mr. Stacy testified, in his opinion, this notice is analogous to the Oceanfront Property Disclosure Statement found in many deeds conveying oceanfront property in Georgetown County today, which provides notice to the purchaser that the property may be subject to regulation under The South Carolina Coastal Zone Act. **Tr. Transcr. 116:7-118:16 (April 21, 2020)**.

Additionally, Kathryn Wallace Salley did not create a new or "additional" restriction on the Sand Dunes Parcel in the Sally-Haun Deed, and there is no evidence in the record that she did.

[1] *Charping*, 296 S.C. 312 at 314, 372 S.E.2d at 121, (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956)); *Stegall v. Housing Authority of Charlotte*, 278 N.C. 95, 178 S.E.2d 824 (1971) (burden of showing restrictions in a deed are covenants running with the land is upon the party claiming the benefit of the restriction); *Traylor v. Holloway*, 206 Va. 257, 142 S.E.2d 521 (1965) (the party who seeks to enforce a covenant restricting free use of land has the burden of proving it prohibits the acts of which he complains).

The language in the Salley-Haun Deed simply references the Sand Dunes Agreement. In 1974, Kate Wallace's daughters Jean Wallace Blount and Kathryn W. Salley, by partition deed, conveyed the Sand Dunes Parcel to Kathryn W. Salley. That deed, **Pl. Tr. Ex. 8**, contains the following language:

> The area of land conveyed hereby, by agreement between the Grantors and North Litchfield Beach, Inc., cannot be used for the purpose of erecting any building or structure…

Pl. Tr. Ex. 8 at 3. This language is *identical* to the language in the prior deed to Ms. Wallace. The record is devoid of evidence of any agreement between Ms. Blount and Kathryn Salley as grantors and North Litchfield Beach, Inc. so the language quoted above cannot be anything other than a reference to the Sand Dunes Agreement. The deed from Mrs. Salley to the Hauns contains identical language, with the important exception that, rather that referring to an agreement between *grantor* and North Litchfield Beach Inc., it refers to an agreement between "*Grantor's predecessor in title* and North Litchfield Beach, Inc.". **Pl. Tr. Ex. 9 at 2** (emphasis added). This language is the antithesis of a clear, unmistakable intention by Ms. Salley to create a "new" restriction in the deed to the Hauns. Rather than expressing a current intention to restrict the property, it specifically references the Sand Dunes Agreement entered into by her predecessor in title.

Given the language of the Sand Dunes Agreement, the customary use of metes and bounds descriptions, the past practices of the Trustees in crafting restrictive covenants, and the different language used in the Salley-Haun Deed, there no evidence in the record of a clear intent to create an additional restrictive covenant.

b. There is No Evidence in the Record that Kathryn Wallace Salley or the Hauns Intended to Create a Common Plan or Scheme.

The Trial Court erred in concluding that Kathryn Wallace Salley and the Hauns intended to create a common plan or scheme. **See, e.g., Final Order at 11, ¶51, and at 17, ¶79**. This

conclusion was not advanced as a legal theory by either party, and it is not supported by the evidence in the record. It appears that the Trial Court may have conflated the conveyances by the Trustees and the conveyance by Kathryn Wallace Salley in finding the existence of a common scheme. The record contains no evidence of such intent of either Mrs. Salley or Ms. Haun in their respective deeds.

As held in the case law cited above, the grantor's intent to create a common scheme is determinative to its existence. Here, there is absolutely no evidence that Kathryn Wallace Salley intended to create a common scheme, and in fact did not even intend to create a new or additional restriction. The Trial Court infers that Ms. Salley intended to create a deed restriction, **Final Order at p, ¶46**; however, such a conclusion, in the absence of express intent, must be based upon a *plain and unmistakable* implication. *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988). Such implication simply does not exist in the record. In the face of such an unmet threshold, the Trial Court nevertheless goes on to conclude that, not only is the reference to the personal covenant memorialized in the Sand Dunes Agreement a deed restriction, Ms. Salley additionally intended to create a common plan by which such restriction is enforceable by all grantees. **Final Order at 12, ¶57.** Again, as there is no factual basis upon which to assert such a conclusion, neither party made this argument even as a possible theory. The evidence in the record shows that Ms. Salley copied the identical language from the Sand Dunes Deed into the metes and bounds description in the Salley-Haun Deed. The language does not contain any reference to it being for the benefit or enforceable by subsequent grantees, heirs, assigns or, in fact, anyone. It merely refers to the Sand Dunes Agreement.

III. The Trial Court Erred in Ruling that Shoestring Retreat, LLC Violated the Deed Restrictions in Grading the Sand Dunes in the Sand Dunes Restricted Area.

The Trial Court's ruling in para. 84 of the Final Order that "Shoestring violated the deed restrictions 'demolishing' the sand dunes in the Dunes Restricted Area to prepare for building" is in error. The provision that the Court enforced, pursuant to its finding of a common scheme, arose from the Sand Dunes Agreement: "The area of land conveyed hereby, by agreement between Grantor's predecessor in title and North Litchfield Beach, Inc., cannot be used for the purpose of erecting any building or structure." **Pl. Tr. Ex. 9 at 1**. For the reasons stated above, this language does not create a deed restriction that is enforceable by MAC Coastal. Even assuming the language creates an enforceable restriction, as the Trial Court held, the actions of Shoestring Retreat, LLC did not violate the plain and ordinary meaning of the language. Shoestring Retreat did not erect or build any structure in the Sand Dunes Restricted Area. The grading of a portion of the sand dunes is simply not restricted or prohibited. As referenced above, "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)). In the present case, as a matter of law, the Trial Court cannot extend the clear meaning of the deed provision to accomplish what the parties might or might not have desired, and Shoestring Retreat's actions have not violated the clear language in the deed. The Trial Court erred in ruling that Shoestring Retreat violated the restriction, and it erroneously ordered Shoestring Retreat to restore the sand dunes to their previous condition.

IV. The Trial Court erred in concluding that the Sand Dunes Agreement establishes an unfixed boundary of the Sand Dunes Restricted Area such that it increases in size as the beach accretes.

The language in the Sand Dunes Deed indicates that the Trustees intended to create the Sand Dunes Restricted Area as a fixed area with static boundaries. Specifically, the boundary of the Sand Dunes Restricted Area is described as extending 60 feet landward of the Atlantic Ocean, and nowhere in the description is there an indication that that is subject to change. The Trial Court expanded the Sand Dunes Restricted Area well beyond the original intent of the Trustees.

The language of the deeds, coupled with the testimony of Dan Stacy, show that the Sand Dunes Restricted Area extends 60 feet landward from the mean high water mark of the Atlantic Ocean. Tom Boyle himself specifically testified confirming the Trustees' intent. **Df. Tr. Ex. 36 at 8, ll. 3-13.** As Mr. Stacey testified, over the last 67 years, the Sand Dunes Restricted Area moved eastward with the mean high water mark as the beach accreted over the decades. **Tr. Transcr. 53:24-55:9 (April 21, 2020)**. MAC Coastal, by contending the 60-foot sand dunes area has not moved but has expanded in size, has created an ambiguity in the interpretation of the instruments regarding the location of the area subject to restriction. When such an ambiguity exists, all doubts are to be "resolved in favor of free use of the property." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

The Kate Wallace deeds describe the Sand Dunes Restricted Area as "the strip of land presently measuring sixty (60) feet, more or less, in width, shown on the aforementioned plat, ***which runs along the Atlantic Ocean and is bounded on the East by the high water mark…***" **Pl. Tr. Ex. 4, pp. 1-2, ¶12** (emphasis added). This description in the restriction does not mention the western boundary. The description is identical in many of the indenture deeds MAC Coastal entered in the record. *See, e.g.,* **Pl. Tr. Ex. 13, pp. 6-7, 10, 14, 18, 22, 24, 27, 30, 36**. The sand dunes restricted area in the North Litchfield Beach Deed is similarly described as "…the area of land between the lots shown on said plat ***and the Atlantic Ocean***..." (MAC Coastal Ex. 14 at 3

(emphasis added)), which is referenced in the 1964 deed of the sand dunes area from the Trustees to Kate Wallace (**Pl. Tr. Ex. 6 at 1**), all of which clearly illustrate the Trustees' intent to restrict only the property immediately adjacent to the mean high water mark.

Perhaps most illuminating is Tom Boyle's own testimony, as relied on by Dan Stacy, which corroborates the location of the Sand Dunes Restricted Area and makes explicit the Trustee's intent. Mr. Boyle testified as follows:

> Q. All right, sir. Now, while I've got you, did you reserve on this map an area called "dunes restricted"?
>
> A. Yes, sir.
>
> Q. And describe where it is so that the record will reflect that?
>
> A. The dunes restricted area was ***the 60 foot strip beginning at the mean high water mark*** running parallel with the beach.
>
> Q. How far back did it go?
>
> A. 60 feet.
>
> Q. It ran 60 feet. Did it basically abut the lots on Exhibits 8, 9 and 10?
>
> A. Yes, sir.

Df. Tr. Ex. 36 at 8, ll. 3-13 (emphasis added). The Trustees' intent could not be more clear. Tom Boyle's sworn testimony evidences the Trustees' intent to locate the Sand Dunes Restricted Area ***60 feet from the mean high water mark***. This testimony was given in 1995, after Hurricane Hugo destroyed the sand dunes, the Litchfield Beach Property Owners Association and other owners rebuilt the dunes, and at a time when accretion of the beach had occurred and was widely known.

The movement of the Sand Dunes Restricted Area with the mean high water mark is consistent with the law of accretion. When the Trustees conveyed the Sand Dunes Parcel to Kate Wallace in 1964, they conveyed the land from Lot 3 all the way to the Atlantic Ocean, "it being the intention of the Grantors to convey by this deed all of the property from the easterly side of

Lot 3, Block 2S, to the Atlantic Ocean…" **Pl. Tr. Ex. 6 at 1**. Since that time, the beach has accreted significantly, which South Carolina courts recognize as benefiting the land owner:

> "South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to. … Conversely, lands gradually encroached upon by water cause to belong to the former riparian or littoral owner. … The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring."

Horry County v. Woodward, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (1984). "Generally, a riparian owner enjoys the right to any lands formed by accretion." *Hilton Head Plantation Property Owners' Assoc., Inc. v. Donald*, 375 S.C. 220, 224, 651 S.E.2d 614, 617 (Ct. App. 2007). Unquestionably, Shoestring Retreat, as the littoral owner, has the right to the additional property created by accretion, and as the lot line moves with the Atlantic Ocean, so too does the Sand Dunes Restricted Area. This conclusion is also consistent with survey guidelines of the Bureau of Land Management, which include guidelines for mapping property boundaries based on ambulatory descriptions (which are descriptions that contain reference to described limits that do not have fixed positions but are subject to change over time) such as mean high tide or mean high water. *See generally* United States Department of Interior, Bureau of Land Management, *The Manual of Surveying Instructions* (2009). It is also consistent with the State of South Carolina's management of the coastal zone and primary oceanfront sand dune system – the area from the mean high-water mark to the setback line as established pursuant to S. C. Code Section 48-39-280. The setback lines are not fixed or static but are established based on staggered establishment cycles.

The intent of the Trustees to protect the beachfront by prohibiting building in the Sand Dunes Restricted Area is accomplished by maintaining a 60-foot restricted area. This was, in actuality, the express original intent and size of the Sand Dunes Restricted Area. The 60-foot area was the expression of and did accomplish what the Trustees intended. Yet, the Trial Court's ruling makes the Sand Dunes Restricted Area more than 200 feet and potentially growing. See **Pl. Tr. Ex. 36**. As held in *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 808 S.E.2d 831 (Ct. App. 2017), the role of the Court is to ascertain and give effect to the Trustees' intent, which we know to be a 60-foot area:

> The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

Cmty. Servs. Assocs., Inc., 421 S.C. at 583, 808 S.E.2d at 835. Subsequent regulatory measures such as the OCRM lines and Georgetown County ordinances were put in place for the exact same purpose, which supports the argument here that extending the Sand Dunes Restricted Area from the mean high water mark to Shoestring Retreat's adjacent property line is not necessary, does not serve the Trustee's intended purpose, and results in a very burdensome restriction on the use of the property well away from the OCRM setback line.

Based on all of the evidence, including the testimony of Tom Boyle, the description of the sand dunes in the Indenture Deeds, and the North Litchfield Beach Deed, the location of the Sand Dunes Restricted Area logically moves with the mean high water line. An example is shown on a recorded plat of Lot 4, Block 3S, which lies across Summertime Lane from Shoestring's lots (**Def.'s Tr. Ex. 25**), where, as Dan Stacy testified, the reserved dunes area adjacent to Lot 4, Block

3S has remained adjacent to the mean high water mark of the Atlantic Ocean as Lot 4 has significantly accreted. **Tr. Transcr. 53:24-55:9 (April 21, 2020)**.

Lastly, it is important to remember the Trustees' restriction against construction in the Sand Dunes Restricted Area was not absolute. The restriction does not appear in any of the deeds conveyed to the beneficiaries of the Boyle Trust, even for properties adjacent to the sand dunes area. *See* **Pl. Tr. Ex. 13**; **Def.'s Tr. Ex. 19, 34**. Additionally, other lot owners in the vicinity obtained waivers to build in the sand dunes area. *See, e.g.,* **Def.'s Tr. Ex. 14, 15**. The Kate Wallace deeds also clearly allow construction in the Sand Dunes Restricted Area with the Trustees' written permission. **Pl. Tr. Ex. 4**. Many of the deeds entered in the record contain a similar clause that allows construction in the sand dunes area with the permission of the Trustees, *see* **Pl. Tr. Ex. 13, pp. 9, 17, 28, 31, 45, 57, 63, 66, 78, and 93**, which was granted on many occasions, *see* **Def.'s Tr. Ex. 2-3, 14-17.**

V. The Trial Court Erred in Concluding that Shoestring Retreat Cannot Claim Any Equitable Defenses as a Result of its Knowledge of the Indenture Deed Restrictions and Sand Dunes Agreement Prior to the Purchase of the Property.

The Trial Court erred in ruling that Shoestring Retreat cannot claim any equitable defenses. On the basis that Shoestring Retreat had knowledge of the "restrictive covenants, deed restriction and Sand Dunes Restricted Area prior to the purchase of the property and application for subdivision of the lot with Haun," (**Final Order at 75**), the Trial Court held that "One who seeks equity must do equity and this court concludes that Shoestring cannot claim any equitable defenses." (**Final Order at 76**). This is a misapplication of the law of unclean hands and is internally inconsistent with other provisions of the Trial Court's Final Order.

South Carolina case law has established the doctrine of unclean hands as a bar to equitable relief by a *plaintiff* who comes to court having acted unfairly or in bad faith. "The doctrine of

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'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009).

In the present case, Shoestring Retreat raised several equitable defenses before the lower court, not claims upon which it demands relief. These included waiver, acquiescence and abandonment, laches, unclean hands of MAC Coastal, and change of conditions. The substance of these defenses, when evaluated relative to the claims of MAC Coastal, operate to bar such claims on the respective bases for which they are designed. That is, Shoestring Retreat's defense that the Trustees relinquished their enforcement rights of the Indenture Deed Restrictions due to waiver, acquiescence and abandonment should not be cast aside based on the unrelated fact that Shoestring Retreat had knowledge of such restrictions. Shoestring Retreat acted, as the record demonstrates, not unfairly or in bad faith, but upon the advice of counsel that such restrictions are unenforceable – a conclusion with which the Trial Court itself agrees:

> The covenants and restrictions in the deed from the Trustees to Wallace (P.4) were valid and enforceable covenants running with the land and would be binding on Shoestring if MAC was a legitimate assignee of the Trustees. However, all Trustees are deceased and ***those restrictions terminated with the passing of the last Trustee***."

Final Order at 78 (emphasis added).

The Trial Court appears to rely on the testimony of Greggory Cunningham and the testimony of Mr. McManus that, upon Mr. Cunningham declining to remove the Sand Dunes Restricted Area from the draft plat he had prepared and Mr. McManus then engaging Ken Crawford to prepare a plat that does not show the Sand Dunes Restricted Area, Mr. McManus' actions constitute an unfair or bad faith act. However, not only had Mr. McManus acted upon the advice of counsel that the reference to the Sand Dune Agreement in the Sand Dunes Deed and Salley-Haun Deed was not a valid and enforceable restriction, Mr. Cunningham himself testified that he does not have an opinion as to its enforceability and acknowledged that many recorded plats including those of the Shoestring Property do not, in fact, show such a Sand Dunes Restricted Area. This is not indicative of unfair or bad faith actions, but those resulting from a careful examination of the title and past practices during due diligence in preparation to purchase the real estate.

For the reasons stated above, MAC Coastal cannot enforce the deed restrictions at issue, and Shoestring Retreat should not equitably be punished for its informed belief at the time it purchased the property. Shoestring Retreat's equitable defenses should therefore not have been summarily dismissed, and the record is replete with evidence that MAC Coastal's claims are barred by: (i) the defense of waiver because the Trustees consistently granted waivers and releases of restrictions, including the Sand Dunes Agreement, to build in the Sand Dunes Restricted Area, and allowing subdivisions including those relating to the Shoestring Property and MAC Coastal Property, **Def.'s Tr. Ex. 2-3, 14-17**; (ii) the defense of acquiescence because over the years there has been unchallenged building in the sand dunes area by other owners and subdivisions of restricted properties (**Tr. Transcr. 126:5-131:25 (April 21, 2020)**); (iii) the defense of abandonment because there has been

a lack of enforcement of deed restrictions and Sand Dunes Agreement for 67 years (**Tr. Transcr. 131:7-252 (April 21, 2020)**); (iv) the defense of laches because of the undue, unreasonable and unexplained lapse of time in enforcement of deed restrictions (60+ years), the opportunity to attempt to enforce, and neglect thereof (**Tr. Transcr. 131:7-252 (April 21, 2020)**). *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E.2d 611 (1962); *Babb v. Sullivan*, 43 S.C. 436, 21 S.E. 277 (1895). MAC Coastal's enforcement after such delay would work injury, prejudice and disadvantage to Shoestring. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E.2d 357 (Ct. App. 1984); (v) the defense of unclean hands because of the repeated subdivisions of MAC Coastal's property (**Pl.'s Tr. Ex. 9, 13; Def.'s Tr. Ex. 2, 3**); and (vi) the defense of change of conditions because of the movement of the mean high water mark by natural and man-made beach accretion, the establishment of the OCRM lines, and the Georgetown County ordinances (**Tr. Transcr. 53:24-55:9 (April 21, 2020))**.

VI. Because MAC Coastal Cannot Enforce the Deed Restrictions it Does Not Have Standing to Pursue its Claims.

For the foregoing reasons, and for the reasons appearing in the record, MAC Coastal lacks standing to enforce any of the Indenture Deed Restrictions or the Sand Dunes Agreement referenced in the Salley-Haun Deed at issue. Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*, 346 S.C. 298, 302-303, 551 S.E.2d 588, 590 (Ct. App.2001); see also *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). The injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000). An "injury in fact" has

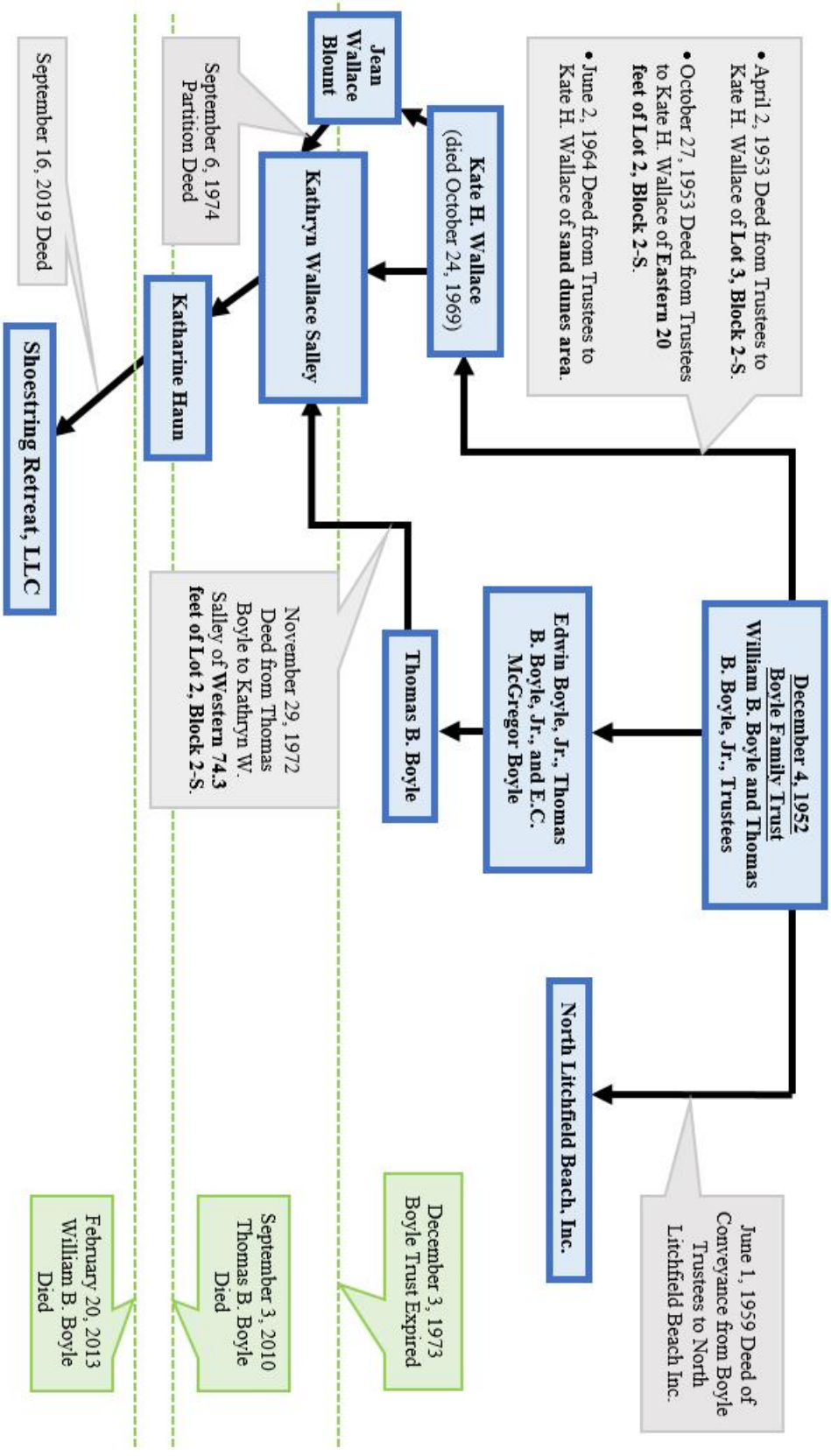
been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc*., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In the case at bar, MAC Coastal has failed to produce any evidence describing or quantifying any concrete, particularized injury or damages.

CONCLUSION

The law in South Carolina is clear that the intent of the grantor defines the existence of a deed restriction and a common scheme. The evidence in the record shows absolutely no intent, express or implied, by either the Trustees or Kathryn Wallace Salley to create a common scheme that would give rise to negative reciprocal easements enforceable by MAC Coastal. The record also shows that the Trustees intended for the Sand Dunes Restricted Area to extend 60 feet from the mean high water mark of the Atlantic Ocean. Finally, the record shows that the Trustees put the reference to the Sand Dune Agreement in the Sand Dune Deed, and that Kathryn Wallace Salley included the reference to the Sand Dunes Agreement in the Sally-Haun Deed, not as an additional, superfluous deed restriction, but as notice to grantees of the agreement among the Trustees and North Litchfield Beach, Inc. The Trial Court erred in concluding that: the Trustees created a common scheme; the reference to the Sand Dunes Agreement in the Salley-Haun Deed created a new deed restriction; Kathryn Wallace Salley created a common scheme; the size of the Sand Dunes Restricted Area is greater than a 60-foot setback from the Atlantic Ocean; Shoestring Retreat has violated a deed restriction by grading in the sand dunes area; and that MAC Coastal

has standing. Shoestring Retreat prays that this Court REVERSE the Trial Court's decision for the reasons set forth herein.

Fig. 1


December 4, 1952
Boyle Family Trust
William B. Boyle and Thomas B. Boyle, Jr., Trustees
• April 2, 1953 Deed from Trustees to Kate H. Wallace of Lot 3, Block 2-S.
• October 27, 1953 Deed from Trustees to Kate H. Wallace of Eastern 20 feet of Lot 2, Block 2-S.
• June 2, 1964 Deed from Trustees to Kate H. Wallace of sand dunes area.
Kate H. Wallace (died October 24, 1969)
Jean Wallace Blount
Kathryn Wallace Salley
Katharine Haun
Shoestring Retreat, LLC
September 6, 1974 Partition Deed
September 16, 2019 Deed
Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle
Thomas B. Boyle
November 29, 1972 Deed from Thomas Boyle to Kathryn W. Salley of Western 74.3 feet of Lot 2, Block 2-S.
North Litchfield Beach, Inc.
June 1, 1959 Deed of Conveyance from Boyle Trustees to North Litchfield Beach Inc.
December 3, 1973 Boyle Trust Expired
September 3, 2010 Thomas B. Boyle Died
February 20, 2013 William B. Boyle Died