RECEIVED
Aug 26 2022
SC Court of Appeals

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

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., Appellant-Respondent,

vs.

Shoestring Retreat, LLC, Respondent-Appellant.

INITIAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

TOBIAS G. WARD, JR. PA

s/ Tobias G. Ward, Jr.
Tobias G. Ward, SC Bar 5826
J. Derrick Jackson, SC Bar 15192
Post Office Box 50124
Columbia, South Carolina 29250
(803) 708-4200
tw@tobywardlaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

The Appellant-Respondent, MAC Coastal Properties, Inc. ("MAC") adopts and incorporates by reference the Statement of Issues, Statement of the Case, Standard of Review and Facts set forth in its Appellant-Respondent's Initial Brief.

MAC notes that the Statement of the Case by Respondent-Appellant Shoestring Retreat, LLC ("Shoestring") violates Rule 208(c) SCACR by including contested matters.

ARGUMENT

I. THE MASTER CORRECTLY CONCLUDED THAT MAC CAN ENFORCE THE DEED RESTRICTIONS BECAUSE OF A COMMON PLAN OR SCHEME.

a. There is ample support in the record of a common plan or scheme by the grantor (trustees).

It is well settled in this state that where the owner of a tract of land subdivides it and sells the distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by *any grantee against any other grantee*, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created. *McDonald v. Welborn*, 220 S.C. 10, 18-19, 66 S.E.2d 327, 331 (1951) (emphasis added) (*citing Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538; 26 C. J. S., *Deeds*, § 167, Page 542).

The rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property, should not be applied in such a way as to defeat the plain and obvious purpose of a contractual instrument of restriction. *McDonald v. Welborn*, 220 S.C. 10, 19, 66 S.E.2d 327, 331 (1951) (emphasis added).

"Subsequent cases have identified the following four elements needed to establish mutual negative equitable easements: Ordinarily, four elements must be established to show a reciprocal negative easement: (1) There must be a common grantor; (2) There must be a designation of the

land or tract subject to restrictions; (3) There must be a general plan or scheme of restriction in existence for the designated land or tract; and (4) The restrictive covenants must run with the land. If the above elements are satisfied, the restrictions are enforceable against the grantor and subsequent grantees of lots in the restricted area who take with actual or constructive notice of the restrictions." *Bomar v. Echols*, 270 S.C. 676, 679-80, 244 S.E.2d 308, 310 (1978) (emphasis added); *McDonald v. Welborn, supra*; 20 Am. Jur. (2d), *supra*.

In this case, each of these elements are satisfied: (1) the Boyle Trustees were a common grantor; (2) they specifically identified the land subject to the covenants (see various plats showing subdivision blocks and lots which were subsequently conveyed by Trustees) (P.30-34) and in Indentured Deeds; and (3) there was general scheme of restrictions in the Indentured Deeds used by the Trustees.

Chuck Salley testified based on his review of the 36 deeds conveyed out by the Trustees (P.13) that the number one restriction in each of the deeds was that "[t]he property shall be used for residential purposes only and shall not be subdivided or reduced in size without the written consent of the grantor." (I.83-84) The Plaintiff's expert, Jimmy Moore noted that it was not essential to establish a common plan or scheme that all the restrictions be identical. "There are cases from multiple jurisdictions which hold that they don't have to be identical, but it is important that they be relatively uniform, and the deeds at North Litchfield -- I think Mr. Wallace has referred to this, that there are a couple of different sets, but they're almost identical." (I. 139-140)

"Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots is essential to the existence of a neighborhood scheme." *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (S.C. 1949). Moore further specifically testified in his

professional opinion that there was a common scheme of development, and that the Plaintiff had the right to enforce the restrictions. (I. 138-141) (4) The restrictive covenants run with the land. The master already concluded the covenants run with the land.

b. The reservation of rights to modify by grantor is not fatal to a common plan or scheme where the grantors no longer have any interest in the development and *Hefner* is distinguishable.

Shoestring argues that since the trustees included language in the conveyance deeds reserving unto themselves the right to change or modify the restrictions that this precludes the finding of a common plan or scheme. A developer's reservation of rights is a common way that a developer retains control *while developing a subdivision.* However, this argument presupposes that the developer will always retain an interest in the development and be available to modify and enforce common restrictive covenants. It ignores cases like this one – and no doubt several others – where a developer conveys all its property (after changing and modifying the lots to suit the developer's needs). This is not dissimilar to the case of where a developer develops a subdivision with common restrictions but reserves the right to modify them. Subsequently, the developer either conveys all the property but fails to create an HOA or goes out of business. Does this then mean the property owners no longer have the right to enforce restrictions they relied upon when they purchased? The court's answer to this question could have a profound impact on developments throughout the state where developers reserve unto themselves the right to enforce and develop subdivision restrictions during development, but then fail to provide a subsequent means of enforcement.

This issue was addressed in *Richmond v. Pennscott Builders, Inc.*, 43 Misc.2d 602, 251 N.Y.S.2d 845 (Sup. Ct. Queens Cnty. 1964), a case cited by the South Carolina Supreme Court

in a summary opinion where they granted certiorari in *AJG Holdings, LLC v. Dunn*, 410 S.C. 346, 764 S.E.2d 912 (2014).[1]

In Richmond, "the Kew Gardens Corporation, the common grantor, not only disposed of its sole remaining parcel after it had completed the development of its tract as shown on the filed maps, but it voluntarily dissolved on January 22, 1953, and has since owned no property, real or personal."

Like the present case, the Defendants argued that the grantors reservation of rights made the covenant personal and that a subsequent grantee could not enforce the covenants. The court stated, "While the Kew Gardens Corporation reserved the right to waive or modify the restrictions by written consent, it was held in *Elliston v. Reacher* ([1908] 2 Ch. 665), cited favorably in *Booth v. Knipe* (225 N.Y. 390, 397, 122 N.E. 202, 203, *supra*), that a common grantor's reservation of such a power is not fatal to the existence of a common plan or scheme of development. The English Court noted that 'it is altogether exceptional not to see some power reserved to the vendor to abstract certain property from the scheme', (p. 672) and that such power was 'one element to consider and assist the Court in arriving at the conclusion of fact whether there was or was not a scheme, and nothing more than that.' (P. 674.) *Richmond v. Pennscott Builders, Inc.*, 43 Misc.2d 602, 251 N.Y.S.2d 845 (Sup. Ct. Queens Cnty. 1964).

Shoestring bases this argument on the case of *Heffner v. Litchfield Golf Co.,* 258 S.C. 447, 189 S.E.2d 3 (1972); however, this case is distinguishable.

In *Heffner*, the lot owner bought property in a subdivision that surrounded a golf course.

[1] This opinion also shows that the court will protect the investment of owners in a subdivision from arbitrary deviations from the covenants by imposing conditions on a developer who reserves in their sole discretion the right to amend the covenants.

All the lots contained use limitations and were restricted to residential use. A later provision stated that restrictions were made solely for the benefit of the grantor and a grantee and could be changed at any time by mutual consent in writing by the parties or their successors.

The golf company sought to purchase two lots adjacent to the lot owner's property and build a tennis court for public use. The lot owner sought an injunction and argued that the restrictions required the property to be used for residential use. The court denied the injunction and held that the lot owner did not have standing to argue against golf company.

First, the golf company, as an original grantor and successor grantee, reserved the right to modify the lot restrictions. Here, 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. However, Shoestring is not an original grantor, and the Trustees no longer own any property in the subdivision.

Second, the covenant in *Heffner* was already mutual, providing modification by mutual consent of the grantor and grantee, thus there could be no implied mutuality. The same is not true in this case, and once the Trustee's conveyed all their property and could no longer modify the restrictions, the implied mutuality of the common plan or scheme should control.

Finally, the Supreme Court noted the following in the last paragraph of *Heffner*: "We add that the use to which Litchfield proposes to put these lots is consistent with the combined recreational and residential character of the development. We do not intend to imply that the residents of this subdivision *would be without remedy against an incompatible use*. That question has not been presented." *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 452, 189 S.E.2d 3, 5 (1972).

This court should hold that when a developer reserves a right to modify and enforce the covenants but then conveys away all its property and no longer has an interest that the covenants can be enforced under a common plan or scheme by the grantees in the subdivision.

c. 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.

South Carolina courts have long protected the expectation rights of residential purchasers. 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). *See McLeod v. Baptiste*, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) (Developer grantor can no longer enforce covenants once developer no longer owns any property benefited by the covenant[2]).

Shoestring misconstrues the court's use of the *McLeod* case by stating the court misstates the holding. *McLeod* is an example, like the *Richmond* case where an overzealous developer continued to try and control property long after it to no longer had any interest in the development.[3] The point is that the owners in the subdivision should be the ones enforcing the covenants, not a remote developer with no interest.

This court should continue its protection of the rights of residential purchasers.

[2] This was one of the issues in the *Richmond* case where the developer was in effect selling waivers of restrictions after it had sold all the property.

[3] The owners were trying to build a play platform in the woods for their children, and the remote developer sought to enforce architectural design rights.

II. THE MASTER CORRECTLY HELD THAT SHOESTRING COULD NOT BUILD IN THE DUNES RESTRICTED AREA

DUNES RESTRICTED AREA

As part of their development of Retreat Beach, the Trustees created a strip of land labeled as "Dunes Restricted." This strip is shown on several early plats. P[4]. 30, dated Dec. 12, 1952; P. 31, August 15, 1956; P. 32, October 1956. The strip is shown on all the plats as running 60 feet from the eastern border of the lots adjacent to the Atlantic Ocean. On the December 13, 1952 plat (P.30), the eastern border of the strip coincides with the "Mean High Water Mark."

In the initial conveyance of Lot 3 to Kate Wallace, the Trustees included among the restrictive covenants that "If the lot hereinabove described borders on the strip of land presently measuring sixty (60') feet, more or-less, in width, shown on the aforementioned plat, **which run along the Atlantic Ocean and is bounded on the East by the high water mark**, the grantee, her heirs and assigns, herein shall have, and is/are hereby granted, the right and privilege, **appurtenant to the lot** hereby conveyed, to cross over said strip of land for the purpose of ingress, and egress to the ocean for swimming, sunbathing and fishing, subject to the following conditions…" (P.4 *emphasis added*) The conditions restricted from building any structure on the strip and from doing any act or thing "which shall or may tend to change the contour, height or width of said strip of land or of the sand dunes thereon." *Id.*

When the Trustees decided to get out of the land development business and sell the rest of the property to North Litchfield Beach, both the Trustees and the North Litchfield realized the importance of maintaining the beaches and dunes in the area. For that reason, they mutually covenanted and agreed in the deed of conveyances from the Trustees to North Litchfield Beach,

[4] Plaintiff's exhibits are designated P. followed by a numeral identifying the exhibit. Defendant's exhibit by a D. followed by a numeral identifying the exhibit.

Inc. "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." (P. 14, emphasis added) Prohibiting construction in this area was important for two reasons: "First of all, the restriction that prohibits building in the dunes restricted area is to preserve those dunes both from an aesthetic standpoint, but also we all know today that sand dunes protect property from hurricane damage and storm damage in the event of a flood and high water coming to shore. Restrictive covenants like that also protect property values because it prohibits somebody from building out in front of his neighbor and blocking the view." (Moore, Day 1, TR 147-148)

After agreeing to limit construction on the land between the front ocean lots and the Atlantic Ocean, the Trustee's thereafter conveyed the Dunes Restricted property to Wallace as follows:

All that certain piece, parcel or lot of, land situate, lying and being in the County of Georgetown, State of South Carolina, in Township No. 7, and being shown and delineated on plat of property of William B. Boyle and Thomas B. Boyle, Jr., dated August 15, 1956, and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina, in Plat Book L, at page 29, as that portion of the area marked "Dunes Restricted" on said plat between the northern and southern side lines of Lot 3, Block 2S, as shown on said plat, **extended to the Atlantic Ocean**, said piece of property being bounded and measuring as follows: on the northerly side by a portion of the property marked "Dunes Restricted' on said plat, and measuring therein, along the northern side line of Lot 3, Block 2S extended to the Atlantic Ocean, a distance of Sixty (60') Feet, more or less; on the easterly side **by the Atlantic Ocean** and measuring thereon One Hundred Seventy (170') Feet, more or less; on the southerly side by a portion of the property marked Dunes Restricted on said plat, and measuring thereon, along the southerly side of Lot 3, Block 2S, **extended to the Atlantic Ocean**, a distance of Sixty· (60') Feet, more or less; and on the west by Lot 3, Block 2S, and measuring thereon One Hundred Seventy (170') Feet, more or less; 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 between the northerly and southerly side lines of Lot 3, Block 2S, extended**.

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. (P. 6, *emphasis added*).

This language prohibiting building in the Dunes Restricted Area was included in the partition deed from Kate Wallace to Kathryn Salley (Plaintiff 8) and in the deed from Kathryn Salley to Louis and Katherine Haun (Shoestring's predecessor in title) (Plaintiff 9). It was conspicuously absent in the Deed from Haun to Shoestring. (Plaintiff 11)

a. The covenant not to build in the Dunes Restricted Area is a real (not personal) covenant which runs with the land and is binding on the heirs, successors and assigns of the Trustees.

Shoestring argues that the express covenants in its chain of title which prohibit building in the Dunes Restricted area is a mere personal covenant between the Trustees and North Litchfield Beach, Inc. that does not run with the land and is not enforceable by subsequent purchasers. This conclusion is contrary to the facts and the law.

First, as to intent to create a restrictive covenant, the Trustees included the restrictive area in its earliest deeds to Kate Wallace and gave the owners an *appurtenant* right to cross this area for ingress and egress under certain conditions. (P.4 *emphasis added*) The conditions restricted from building any structure on the strip and from doing any act or thing "which shall or may tend to change the contour, height or width of said strip of land or of the sand dunes thereon." *Id.* If the covenant was intended to be personal, why did the Trustees include it with grantees prior to its conveyance to North Litchfield Beach, Inc. Second, as discussed above, the Trustees conveyed the Dunes Restricted Area to Wallace and others after the conveyance to North Litchfield and expressly included the restrictive language of the covenant. If the covenant was merely personal and not intended to run with the land, this would not have been necessary. Third, in their conveyance, North Litchfield and the Trustees expressly made the covenant binding on the "Grantors or Grantee herein, their heirs or assigns, or successors." (Plaintiff 14, Book 33 at Page 285)

The application of the law also supports the construction that the Dunes Restricted Area covenant runs with the land. "So a covenant is personal when it has no relation to the land conveyed (*Howard Manufacturing Co. v. Water Lot Co.*, 53 Ga. 689; *Wells v. Benton*, 108 Ind., 585, 8 N.E., 444, 9 N.E., 601); or is not connected with the title " *Epting et al. v. Lexington Water Power Co.*, 177 S.C. 308, 320 (1935). In contrast, "'In order to run with the land (the covenant) must respect the thing demised, and the act covenanted to be done or omitted must concern the land, or the estate conveyed.' 15 C.J., 1240." *Epting et al. v. Lexington Water Power Co.*, 177 S.C. 308, 317 (S.C. 1935). If a covenant is such that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises, it is not a mere personal covenant, but one that runs with the land and binds assignees of the covenantor as well as the covenantee and his personal representative. *(string citations omitted) Epting et al. v. Lexington Water Power Co.*, 177 S.C. 308, 318 (1935). Here, the covenant not to build on the land obviously touches and concerns the land and the act covenanted concerns the land. Therefore, it is a real (not personal) covenants which runs with the land.

Shoestring relies on *Charping v. Scurry Co., Inc.*, 296 S.C. 312 (S.C. Ct. App. 1988) in support of its argument that the Dunes Restrictive Covenant is personal; however, that case is distinguishable on its facts. In *Charping*, the grantor Townsend made no reference to the covenant in the deed to *Charping* who later wanted to enforce it. The court held, "Charping has failed to produce any evidence of Townsend's intent as would constitute a genuine issue of fact. The stipulated facts indicate *Charping* entered into the contract to purchase in ignorance of the restriction." *Charping v. Scurry Co., Inc.*, 296 S.C. 312, 316 (S.C. Ct. App. 1988). In this case, in contrast, as discussed above there is ample evidence that both the Trustees and North

Litchfield intended the restriction to be binding on their heirs, successors and assigns. MAC further notes that Judge Gardner gave a vigorous dissent in that case based on *Epting.*

This court should hold that the Dunes Restricted Covenant runs with the land and is binding on Shoestring.

b. MAC does not argue that Kathryn Salley and the Hauns intended to create a common plan or scheme, nor did they need that to enforce the real covenants running with the land.

MAC agrees with Shoestring that the Sand Dunes Restriction was not intended by Sally-Haun as part of a common plan or scheme because as discussed in the previous arguments, that is an equitable remedy for the enforcement of covenants. However, it was never necessary for Salley-Haun to invoke that remedy as the Sand Dunes Restriction was an express, appurtenant covenant in their chain of title, binding on them, their successors, and assigns. Shoestring wants to have it both ways, on the one hand it wants this court to hew closely to the deeds to express the grantor's intent, but when it comes to provisions Shoestring does not like (like the Dunes Restricted Covenant), it becomes the law firm copying language from prior deeds. Shoestring cannot have it both ways.

III. THE MASTER CORRECTLY HELD THAT SHOESTRING BREACHED THE DUNES RESTRICTED AREA COVENANT BY DEMOLISHING THE EXISTING SAND DUNES IN THE RESTRICTED AREA.

Shoestring inexplicably argues that it did not violate the Dunes Restricted Area covenant by leveling the sand dunes so it can build its massive house. Shoestring argues that since the restriction in the agreement with North Litchfield beach provides the land "cannot be used for the purpose of erecting any building or structure," that somehow bulldozing the dunes is permitted. This, of course, ignores the following language from Restriction 12 (in the Trustees deed to Wallace, P.4) and in Shoestring's chain of title:

Grantee, her heirs and assigns, shall not alter, tear down, deface, or do any act or thing which shall or may tend to change the contour, height or width of said strip of land or of the sand dunes thereon.

Not only did Shoestring violate these restrictions, but it also violated the Georgetown County Sand Dunes ordinance[5]. (Order paragraphs 32 and 33) As noted by McManus in his testimony, Georgetown County issued a stop work order after complaint by MAC that Shoestring was violating the ordinance. (R. II, pp. 33-34)

The ordinance provides in relevant part:

Sec. 5.5-54. - Regulatory provisions.[6]

(a) ***Sand dunes***. It shall be unlawful for any person, firm, corporation or private authority in any manner to damage, destroy, remove, or redistribute sand dunes or to alter, interfere with, do or perform any act which tends to lessen the protection afforded by the dunes, without first having obtained a permit from the building inspector of Georgetown County, South Carolina.

(b) ***Vegetation***. It shall be unlawful for any person, firm, corporation or private authority in any manner to kill, destroy, remove or alter the form of any trees, shrubbery, plants, grass or other natural form of vegetation or to interfere with, do or perform any act which tends to lessen the protection and natural purpose of such vegetation without first having obtained a permit for such action from the building inspector of Georgetown County, South Carolina.

(Emphasis added).

The ordinance also provides:

d) *Guidelines for issuance of development permits.* Any activity that will disturb the dune or dune vegetation requires a development permit from Georgetown County. The following guidelines are established for dune and dune vegetation protection:

(1) Sand dunes shall not be altered in any form unless there is no feasible alternative such as relocation, realignment or reduction in size of the proposed construction or alteration.

(Emphasis added).

[5] MAC requested the court take judicial notice of the ordinance.
[6] This is independent of the requirements of the Dunes Restricted Area covenant.

Shoestring subsequently applied for and received a development permit from Georgetown County. I suppose it is better to ask forgiveness rather than permission.

This court should affirm the Master's conclusion that Shoestring violated the Dunes Restricted Area and his order that "Shoestring shall take immediate action to remediate its violation of the Dunes Restricted Area by restoring the sand dunes to as close to its former state as possible."

IV. THE MASTER CAREFULLY EVALUATED THE DIFFERING VIEWS REGARDING THE BOUNDARIES OF THE DUNES RESTRICTED AREA AND PROPERLY HELD IT EXTENDS FROM THE ORIGINAL EASTERN BORDER OF THE PROPERTY TO THE ATLANTIC OCEAN.

Shoestring in an effort to maximize the buildable area for it home subscribes to the conveyor belt theory of the area covered by the Dunes Restricted Area. Under this theory, the area is a 60' fixed strip that moves with the high-water mark of the Atlantic Ocean ever eastward as the property accretes. However, this view is contrary to a plain reading and construction of the restrictive language in the deeds and the clear intent of the trustees and North Litchfield Beach to protect the sand dunes and the parties' views of the ocean.

As part of their development of Retreat Beach, the Trustees created a strip of land labeled as "Dunes Restricted." This strip is shown on several early plats. P. 30, dated Dec. 12, 1952; P. 31, August 15, 1956; P. 32, October 1956. The strip is shown on all the plats as running 60 feet from the eastern border of the lots adjacent to the Atlantic Ocean. On the December 13, 1952, plat (P.30), the eastern border of the strip coincides with the "Mean High Water Mark."

In the initial conveyance of Lot 3 to Kate Wallace, the Trustees included among the restrictive covenants that "If the lot hereinabove described borders on the strip of land presently measuring sixty (60') feet, more or-less, in width, shown on the aforementioned plat, which run

along the Atlantic Ocean and is bounded on the East by the high water mark, the grantee, her heirs and assigns, herein shall have, and is/are hereby granted, the right and privilege, appurtenant to the lot hereby conveyed, to cross over said strip of land for the purpose of ingress, and egress to the ocean for swimming, sunbathing and fishing, subject to the following conditions…" (P.4 emphasis added) The conditions restricted from building any structure on the strip and from doing any act or thing "which shall or may tend to change the contour, height or width of said strip of land or of the sand dunes thereon." Id.

When the Trustees decided to get out of the land development business and sell the rest of the property to North Litchfield Beach, both the Trustees and the North Litchfield realized the importance of maintaining the beaches and dunes in the area. For that reason, they mutually covenanted and agreed in the deed of conveyances from the Trustees to North Litchfield Beach, Inc. "…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." (P. 14, emphasis added) Prohibiting construction in this area was important for two reasons: "First of all, the restriction that prohibits building in the dunes restricted area is to preserve those dunes both from an aesthetic standpoint, but also we all know today that sand dunes protect property from hurricane damage and storm damage in the event of a flood and high water coming to shore. Restrictive covenants like that also protect property values because it prohibits somebody from building out in front of his neighbor and blocking the view." (Moore, Day 1, TR 147-148)

After agreeing to limit construction on the land between the front ocean lots and the Atlantic Ocean, the Trustee's thereafter conveyed the Dunes Restricted property to Wallace as follows:

All that certain piece, parcel or lot of, land situate, lying and being in the County of Georgetown, State of South Carolina, in Township No. 7, and being shown and delineated on plat of property of William B. Boyle and Thomas B. Boyle, Jr., dated August 15, 1956, and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina, in Plat Book L, at page 29, as that portion of the area marked "Dunes Restricted" on said plat between the northern and southern side lines of Lot 3, Block 2S, as shown on said plat, **extended to the Atlantic Ocean**, said piece of property being bounded and measuring as follows: on the northerly side by a portion of the property marked "Dunes Restricted' on said plat, and measuring therein, along the northern side line of Lot 3, Block 2S extended to the Atlantic Ocean, a distance of Sixty (60') Feet, more or less; on the easterly side **by the Atlantic Ocean** and measuring thereon One Hundred Seventy (170') Feet, more or less; on the southerly side by a portion of the property marked Dunes Restricted on said plat, and measuring thereon, along the southerly side of Lot 3, Block 2S, **extended to the Atlantic Ocean**, a distance of Sixty· (60') Feet, more or less; and on the west by Lot 3, Block 2S, and measuring thereon One Hundred Seventy (170') Feet, more or less; 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 between the northerly and southerly side lines of Lot 3, Block 2S, extended**.

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. (P. 6, *emphasis added*)

The parties presented differing views as to what property is subject to the restrictive covenant in the Salley/Haun given the accretion that has taken place on the beach. One view is that there is a "strip" which is measured from the eastern lot line and extends 60 feet as shown on the early plats and also as shown on subsequent plats including Haun's plat (P.37) and the initial subdivision plat prepared for Shoestring (McManus) by Gregory Cunningham (P.36) Cunningham testified that the strip affected the land and showing the strip was required. He also testified that he would not remove the 60 feet strip despite McManus request that he do so. (Tr 33, 37-38) The Plaintiff's expert, Jimmy Moore, also expressed this view that the 60 foot is measured from the easternmost property boundary line and did not move. (Day 1 Tr. 241-242)

The second view, expressed by the Defendant's expert, Dan Stacy, relying on the use of the term "presently" and the landmark of the mean high-water mark in Plaintiff's Exhibit 30, testified that this 60-foot strip moved (presumably with the high-water mark). (Day 2, Tr. 165)

However, there is a third view which the Master adopted and included in his order that is consistent with rules of construction for deeds: the Dunes Restricted Area expanded with the high-water mark thus extending its border eastward to the Atlantic Ocean. This view is consistent with the intent of the Trustees to protect and preserve the dunes aesthetically and as protection from hurricanes and storms. Also, this is consistent with Trustees intent to protect property values by preventing somebody from building out in front of his neighbor and blocking the view." (Testimony of Moore, Day 1, TR 147-148) (See also Deed of Trust, P.3, authorizing Trustees to "record such restrictions and/or restrictive covenants relating to the said property as they may deem necessary and proper to maintain, preserve and protect the value of the said property." "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *DNR v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (S.C. 2001). "The paramount and cardinal rule of construction of a deed is to ascertain the intention of the grantor as expressed by him in the deed and then to give effect to that intention if it can be done without violating an established rule of law." *Phipps v. Hardwick*, 253 S.E.2d 506, 273 S.C. 17 (S.C. 1979).

Here the language in the deed supports the construction that the restriction goes to the high-water mark of the Atlantic Ocean. As indicated in the highlighted language above, the original deed to Kate Wallace refers to the strip being bounded on the East by the high-water mark. The covenant with North Litchfield, Inc. by the Trustees refers to the "land between the lots and the Atlantic Ocean." The deed conveying the Dunes Restricted area to Wallace refers to the property being "extended to the Atlantic Ocean" and noting: "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."

This view is also consistent with the rule of construction that a natural boundary takes precedence over course and distance. "In locating lands, the following rules are resorted to, and generally in the order stated. (1.) Natural boundaries; (2.) Artificial marks; (3.) Adjacent boundaries; (4.) Course and distance." *Smith v. Du Rant*, 236 S.C. 80, 92, 113 S.E.2d 349 (1960).

Two things are clear from the Salley/Haun deed: (1) the area of land conveyed has the Atlantic Ocean as its eastern boundary, and (2) all the property conveyed is subject to the restriction. There is absolutely nothing in the deed to indicate that a portion of the property conveyed would be free from the restriction.

Stacy's view that the 60' strip moved with the high-water mark is not plausible for several reasons. First, it defeats the primary intent of the Grantor Trustees to protect the existing dune structures as witnessed by what has already happened in this case with Shoestring demolishing the dunes. If the 60' strip moves down to the current high-water mark, the existing dunes would not be protected. Second, it ignores the language in the deed extending the area to the Atlantic Ocean. As noted by Stacy, the deed to Kate Wallace (P.4) states "presently measuring sixty (60') feet, more or-less…" Thus, the sixty (60') feet is just a unit of measure for describing the distance to the high-water mark, it is not a limitation on the area covered by the restriction which moves. Third, Stacy's view would ignore the plain language prohibiting building in the area conveyed which included "all of the property from the easterly side of Lot 3, Block 2S, to the Atlantic Ocean between the northerly and southerly side lines of Lot 3, Block 2S, extended." Finally, Stacy's view would create a building "arms race" to build structures closer to the ocean so your neighbor would not obstruct your view.

For all these reasons, this court should find that the Master correctly concluded that Trustees intended to and did covenant to protect the property from the eastern lot lines to the Atlantic Ocean and that building in this Dunes Restricted area then and now is prohibited.

V. THE MASTER CORRECTLY HELD THAT SHOESTRING WAS BARRED FROM HIS AFFIRMATIVE EQUITABLE DEFENSES BY ITS UNCLEAN HANDS AND IN ANY EVENT THESE DEFENSES LACK MERIT.

The Master specifically addressed the affirmative defenses of change of conditions and release, but held the other equitable defenses were barred because one who seeks equity must do equity. The Master further held these defenses lacked merit. (Order, p.16, paragraphs 75-77)

Shoestring argues this was a misapplication of the doctrine arguing the doctrine is limited to barring claims by a *plaintiff*. In *Anderson v. Buonforte*, 365 S.C. 482, 493 (S.C. Ct. App. 2005), the court stated, "However, if a *party* has unclean hands, the party is precluded from recovering in equity. A *party* will have unclean hands where the party behaves 'unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'" (*quoting Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000) (emphasis added). In that case, a group of neighbors (Anderson was one) sued an owner in the subdivision arguing a building they were constructing violated their restrictive covenants. They also argued the defendant could not claim equitable relief. The court stated, "We conclude the Buonfortes did not have unclean hands such that they are precluded from the aid of equity, as they have not acted unfairly to the prejudice of the Neighbors. " *Anderson v. Buonforte*, 365 S.C. 482, 495 (S.C. Ct. App. 2005). This is an example of the doctrine being applied to a Defendant. Other jurisdictions apply the doctrine to Defendants as well. Unclean hands is an equitable defense to equitable claims. See, e.g., *PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004); Under New York law, the doctrine of unclean hands may bar a party from raising an

equitable defense, just as it may prevent a party from asserting an equitable claim. *Matter of Uciechowski v. Ehrlich*, 221 A.D.2d 866, 868 (3d Dept. 1995) (laches defense).

The Master specifically noted that, "It is undisputed that Shoestring and McManus had knowledge of the restrictive covenants and Dunes Restricted Area prior to his purchase of the property and application for subdivision of the lot with Haun. Despite this knowledge, Shoestring and McManus represented on their application with Haun that they had no knowledge of restrictive covenants which would prohibit the subdivision of the lot and changed surveyors to remove the Dunes Restricted Area and references to restrictive covenants from his plat." This was before submitting it for consideration by planning commission staff. (See Plaintiff Exhibits 1 and 5) One who seeks equity must do equity and the court properly concluded that Shoestring cannot claim any equitable defenses. However, even if Shoestring could claim equitable defenses, the court properly concluded they lack merit.

SHOESTRINGS CLAIMS AND DEFENSES[7]

CHANGED CONDITIONS

Shoestring has argued that changed conditions in the area over the years preclude the enforcement of the covenants. "To defeat enforcement of covenants restricting the use of land, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants." *Shipyard Property Owners' Ass'n v. Mangiaracina*, 414 S.E.2d 795, 307 S.C. 299 (S.C. App. 1991) (*quoting Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949)).

In this case, most, if not all of the alleged changes occur outside the 36 deeds in the subdivision. Litchfield by the Sea is an example of this. Moore testified that within the subdivision he saw only two or three encroachments out of 30 some lots and that these were minor deviations.

[7] The Master specifically addressed "Release" and "Change of Conditions in his order. (paragraphs 69-74)

(Moore, I. 151-152, 184) Hardly, the radical changes necessary to practically destroy the objects of the restrictions.

ESTOPPEL/WAIVER/ACQUIESCENCE

Although there are technical differences in the doctrine of laches, waiver, and estoppel, as applied in equitable actions for enforcement of restrictive covenants, all are affirmative defenses, and the burden of proof to establish the elements necessary to give rise to a defense of laches, estoppel or waiver is on the party who seeks to be protected by such a defense. *Wallace v. Timmons,* 232 S.C. 311, 101 S.E.2d 844 (1958); *Frady v. Smith,* 247 S.C. 353, 147 S.E.2d 412 (1966). The essential difference arises in whether the affirmative defense is based on passivity (laches) or an affirmative act (waiver or estoppel). In this case, as in the case of *Circle Square Co. v. Atlantis Development Co.,* 267 S.C. 618, 230 S.E.2d 704 (1976), the Defendant has neither alleged nor proved any affirmative act by MAC but bases its alleged defense on the alleged acquiescence or abandonment of the covenants by MAC and the Trustees. Therefore, the defenses of waiver and estoppel simply do not apply here.

The court should also note MAC's rights of enforcement are separate and distinct from the developer/trustees. Even if there was an act which could constitute a waiver, a party's waiver of the right to object to a minor violation of a covenant does not result in waiver of his right to object to a subsequent and more substantial violation. *See Holling v. Margiotta,* 231 S.C. 676, 682, 100 S.E.2d 397, 400 (S.C. 1957). The case law holds that restrictive covenants will not be enforced if substantial changes have occurred in the restricted area. To defeat enforcement of covenants restricting the use of land, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants." *Shipyard Property Owners' Ass'n v.*

Mangiaracina, 414 S.E.2d 795, 307 S.C. 299 (S.C. App. 1991) (*quoting Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949)).

Here the Trustees modified or amended the restrictive covenants as necessary to redivide (as opposed to subdivide) some of the lots sold and may have given themselves some preferential treatment for lots which they owned; however, the trustees consistently maintained that the covenants remained. Further, modification or changes of property not part of the conveyances by the trustees as part of their development should not be considered. *See* Change of Conditions discussion, *supra*. The court should conclude, if not barred, the actions of the trustees is not a waiver of enforcement of the covenants, nor does it demonstrate acquiescence or abandonment of the covenants.

LACHES

Laches is the negligent failure to act for an unreasonable period of time. *Gray v. South Carolina Public Service Authority*, 284 S.C. 397, 400, 325 S.E.2d 547, 549 (1985). A court of equity will refuse to protect a party's rights if the party's unreasonable delay has resulted in injury to his adversary. Delay alone in the assertion of a right, without injury to the adversary, does not constitute laches. *Grossman v. Grossman*, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963). The record reflects that as soon as MAC learned about Shoestring's actions in subdividing its property it took immediate action to contest Georgetown County's approval of the subdivision plat by letter and appeal. MAC also filed the present action to enforce the restrictive covenants and protect the Dunes Restricted Area. MAC did not unreasonably delay in enforcing the covenants. Furthermore, even if MAC allegedly did delay or not enforce the covenants, this did not injure Shoestring. Shoestring knew full well about the restrictive covenants and the Dunes Restricted

Area before purchasing and starting to develop the property but deliberately chose to proceed without a determination of those rights.

UNCLEAN HANDS

Shoestring alleges MAC has unclean hands in seeking enforcement of the covenants because of its "repeated subdivision" of its property. This argument lacks merit. MAC has not subdivided its property. MAC has divided its ownership of the property into 13 intervals of which MAC retains 3 shares. Shoestring also claims that MAC built in the Dunes Restricted Area. This claim too lacks merit. Most if not all the owners constructed boardwalks across the dunes to access the beach and the record reflects that the Boyles did not consider a walkway to be a violation. (I. 79-80) Thomas Boyle, Jr. specifically testified "Q. All right, sir. Is the walkway over the dunes restricted area consistent with this restriction? Yes. In fact, did the Trust build some wooden walkways over the dunes restricted area? Yes, yes." (D.36, P.58)

VI. MAC HAS STANDING TO ENFORCE THE DEED RESTRICTIONS AND ENFORCE ITS CLAIMS.

In the final argument in its appeal, Shoestring argues that MAC does not have constitutional standing to bring its claims and enforce the restrictive covenants. Shoestring notes that MAC must have suffered or be in danger of suffering an injury which is personal in nature and is not in common with the general public. MAC meets these tests. Shoestring has subdivided its property in violation of the covenants and plans to build in the Dunes Restricted Area, also in violation of restrictive covenants. As the Master concludes in his order, "MAC has a personal stake in this lawsuit and is a real party in interest as a predecessor in interest, its property borders Shoestring's property on two sides and MAC also owns property in

the Dunes Restricted Area. The court concludes Mac has standing." The court further shows through the various subheadings in its order the multiple ways MAC has standing to enforce the restrictive covenants: enforceable as grantee of covenants running with the land; enforceable as covenant in Salley-Haun deed; and enforceable as a mutual covenant in a common plan or scheme. The court did not find, but MAC asserts as an additional sustaining ground and as argued in its appeal, enforceable by express grant and assignment. This court should affirm the master's conclusion that MAC has standing.

CONCLUSION

For the reasons set forth herein and in MAC's Appellant brief, this court should affirm the holdings of the master as modified by MAC's appeal and deny Shoestring any relief.

RESPECTFULLY SUBMITTED,

TOBIAS G. WARD, JR. PA

s/ Tobias G. Ward, Jr.
Tobias G. Ward, SC Bar 5826
J. Derrick Jackson, SC Bar 15192
Post Office Box 50124
Columbia, South Carolina 29250
(803) 708-4200
tw@tobywardlaw.com
Attorneys for Appellant

Columbia, South Carolina
August 26, 2022

RECEIVED
Aug 26 2022
SC Court of Appeals

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

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., Appellant-Respondent,

vs.

Shoestring Retreat, LLC, Respondent-Appellant.

PROOF OF SERVICE

The undersigned counsel for the Appellant-Respondent, MAC Coastal Properties, Inc. hereby certifies that on August 26, 2022 a copy of the Initial Respondent's Brief of Appellant-Respondent was served on Respondent-Appellant, Shoestring Retreat, LLC by emailing a copy of the same to Respondent Counsels' AIS Email address as shown on the attached email which is incorporated by reference.

TOBIAS G. WARD, JR. PA

s/ J. Derrick Jackson
J. Derrick Jackson, SC Bar 15192
Tobias G. Ward, SC Bar 5826
Attorneys for Appellant-Respondent

dj tobywardlaw.com

From:	dj tobywardlaw.com
Sent:	Friday, August 26, 2022 2:03 PM
To:	'Wallace, Bruce'; Shahid, Mary D.
Cc:	Toby Ward
Subject:	Appellant Respondent Initial Respondent Brief Appellate Case No. 2022-000545
Attachments:	MACs Inital Respondents Brief.pdf

Dear Bruce and Mary,

Enclosed and served upon you as counsel for Respondent Appellant Shoestring Retreat, LLC is a copy of Appellant-Respondent Mac Coastal Properties, Inc. Initial Respondent Brief.

/s Derrick Jackson

J. Derrick Jackson
Tobias G. Ward, Jr. PA
Post Office Box 50124
Columbia, SC 29250
(803) 708-4200 (Phone)
(803) 403-8754 (Fax)
dj@tobywardlaw.com