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,

v.

Shoestring Retreat, LLC, Respondent-Appellant.

FINAL APPELLANT BRIEF OF APPELLANT-RESPONDENT

TOBIAS G. WARD, JR. PA

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3. Are the covenants enforceable by the additional sustaining ground that MAC received an express grant from the successor to North Litchfield Beach, Inc. and Kathryn Salley?

STATEMENT OF THE CASE

The Appellant-Respondent, MAC Coastal Properties, Inc. ("MAC"), commenced this action on January 21, 2020, by filing a Summons and Complaint and Motion for Injunctive Relief against Georgetown County seeking a declaratory judgment that Respondent-Appellant Shoestring Retreat, Inc.'s ("Shoestring") land was subject to restrictive covenants and could not be subdivided. MAC sought an injunction against issuing permits allowing development of the property in violation of the restrictive covenants. Shoestring filed a motion to intervene in the action on February 6, 2020, and proposed motion by intervenor to dismiss the complaint under SCRCP Rule 12(b)(8) alleging an appeal from a decision of the Georgetown County Planning Commission was a similar action. Also on February 6, 2020, the Circuit Court denied the motion for temporary injunction without prejudice for failing to include the property owner.

By consent order dated February 24, 2020, MAC and Georgetown consented to Shoestring's intervention and agreed that MAC could amend its complaint. On February 25, 2020, Georgetown County filed its answer to the complaint. On February 28, 2020, MAC filed an Amended Summons and Complaint and Lis Pendens (this Lis Pendens was indexed with this action on March 02, 2020). The Amended Summons and Complaint added Yancey McLeod, III as a Plaintiff and included Shoestring, who had intervened, as a Defendant. By consent order dated March 5, 2020, the parties referred the matter to the Master-in-Equity for Georgetown

County, the Honorable Joe M. Crosby. Also on March 5, 2020, MAC filed a motion for temporary injunction to prevent Shoestring from developing the property pending the litigation concerning the covenants. On March 17, 2020, Shoestring filed a motion to dismiss the amended complaint alleging the covenants had been released or modified based on certain recorded documents. On March 26, 2020, Georgetown County filed a companion motion to dismiss the amended complaint on the same grounds. On May 22, 2020, the parties stipulated to the dismissal of Georgetown County as Defendant and Yancey A. McCleod, III as a Plaintiff. On June 3, 2020, Shoestring filed its answer. By order dated July 16, 2020, Judge Crosby entered a Form 4 order denying the motions to dismiss.

On September 3, 2020, MAC filed a Second Amended Complaint seeking a declaratory judgment concerning the enforcement of the restrictive covenants and against building in the Dunes Restricted Area. Shoestring filed its answer to the Second Amended Complaint on September 29, 2020. By consent order dated October 7, 2020, MAC filed a Third Amended Complaint which added allegations concerning certain assignment of rights. Shoestring filed its answer to the Third Amended Complaint on October 19, 2020. The case was tried in person before the Honorable Joe M. Crosby on April 20 and 21, 2021. Judge Crosby issued his final order on March 23, 2022. Thereafter, the parties filed cross-appeals.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id*. MAC seeks the enforcement of restrictive covenants. An action seeking an injunction to enforce restrictive covenants sounds in equity. *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). In an equitable action, this court may make findings according to its own view of the preponderance of the evidence. *Id*. However, this court is not required to disregard the master's factual findings or ignore the fact that the master was in the better position to assess the credibility of the witnesses. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012).

FACTS

I. THE BOYLE TRUST

On or about December 4, 1952, Gene Boyle Brading, William B. Boyle, Edwin Boyle, Jr., Ann Boyle Pruet, Thomas B. Boyle, Jr., and E. C. McGregor Boyle, transferred 334.25 acres in Georgetown County to William B. Boyle and Thomas B. Boyle, Jr. as Trustees (hereinafter the "Trustees") for the benefit of Boyle Brading, William B. Boyd, Edwin Boyle, Jr., Ann Boyle Pruet, Thomas B. Boyle, Jr., and E. C. McGregor Boyle in equal shares. Pl.'s Tr. Ex. 3 (R. pp. 291-294). Among the specific powers provided in the Deed of Trust were the powers of the Trustee "[t]o manage said property; to cause surveys and/or plats to be made thereof; to cause said property to be sub-divided into lots and blocks;" and to "provide and 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." (R. p. 292, ¶2). Pursuant to their powers the Trustees had the property surveyed, subdivided the land into blocks and lots, and

recorded plats showing the roads and lots in the subdivision known as "Retreat Beach." Pl.'s Tr. Ex. 30-34 (R. pp. 575-581). The Trustees also started to sell and deed lots in the subdivision including the lot, which is now owned by the Defendant Shoestring Retreat, LLC ("Shoestring"). This case concerns portions of lots 2 and 3 located in Block 2-S as shown on the plats. Pl.'s Tr. Ex. 30-34, 38 (R. pp. 575-581, 585). The term of the Trust was twenty-one years and the trust terminated on the twenty-first anniversary of its execution date, December 4, 1973.

II. THE RESTRICTIVE COVENANTS

As explained by the MAC's expert, James B. Moore, Jr., at the time the Trustees started conveying lots, the standard practice to adopt restrictive covenants was by use of "Indentured Deeds" placing the restrictions in the actual deeds as opposed to the practice today to record a set of restrictive covenants binding property before it is conveyed. Moore Test. at 138-139 (R. pp. 175-176); Stacy Test. at 82. (R. p. 267).

By indentured deed dated April 2, 1953, and recorded in Deed Book A-4 at Page 107, the Trustees conveyed Lot 3, Bock 2-S to Kate Wallace. Pl.'s Tr. Ex.4 (R. pp. 295-298). The deed to Kate Wallace from the Trustees contained the following language in all caps:

> 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. (R. p. 295).

Relevant enumerated restrictive covenants on the property, which are common to other properties in the development, and which are applicable to Shoestring's development plans, include: Restriction 1, prohibiting subdivision of the lot; Restriction 2 prohibiting building more than one single family dwelling; and Restriction 12 prohibiting building in the Sand Dunes Restricted area. (R. p. 295). There also various setback and other restrictions in the deeds. These setbacks are generally greater than currently required by Georgetown County.

The Trustees as Grantors reserved unto themselves, their heirs and assigns the right to enforce the Covenants. The Covenants provided, "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." (R. p. 296).

By deed dated October 27, 1953, and recorded in Deed Book 4 at page 68 in the Register of Deeds for Georgetown County, the Trustees conveyed a portion of Lot 2 to Kate Wallace which was combined with Lot 3 previously conveyed. Pl.'s Tr. Ex.5 (R. pp. 299-300). The Deed further provided that these two lots shall be considered as one for the purposes of the restrictions. The Trustees conveyed a total of 36 deeds out from the Boyle Trust before conveying its remaining property to North Litchfield Beach, Inc. Pl.'s Tr. Ex.13 (R. p. 329). Chuck Salley testified based on his review of the 36 deeds conveyed out by the Trustees that the number one restriction <u>in each of the deeds</u> 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." Salley Test. at 83:24-84:2 (R. p. 159, line 24-p. 160, line 2).

By deed dated June 1, 1959, and recorded in Deed Book 33 at Page 283, the Trustees, Thomas B. Boyle and Boyle Construction Company, conveyed their remaining property in North Litchfield Beach to the North Litchfield Beach Company, Inc. Pl.'s Tr. Ex.14 (R. pp. 460-466). Excepted from this transfer were the deeds previously conveyed by the Trustees (including the Kate Wallace deeds) and "any area of land between the Said Lots on Front Beach and the Atlantic Ocean, *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 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." (R. p. 462) (emphasis added). This is the same land identified under Restriction No. 12, under the Wallace deeds 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" (hereinafter referenced as the "Dunes Restricted Area" as it is called on the plats). Pl.'s Tr. Ex. 4, ¶ 12 (R. pp 295-296, ¶ 12). By deed dated June 2, 1964, and recorded in Deed Book 60 at Page 379, the Trustees deeded the Dunes Restricted area to Wallace thus extending the Wallace deeds to the high water mark of the Atlantic Ocean; however, this transfer was limited by the following, "[t]he 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.'s Tr. Ex. 6 (R. p. 301).

Kate H. Wallace died in 1969, and Lot 3, a portion of Lot 2, and the Dunes Restricted parcel were conveyed to Kathryn Wallace Salley in 1974 as part of the division of her estate property. Pl.'s Tr. Ex.8 (R. pp. 310-313). In 1963, the Trustees conveyed the remaining portion of Lot 2 to Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle, who conveyed it to Thomas B. Boyle (individually), who then conveyed it to Kathryn Wallace Salley in 1972.

In 1972, the Trustees recorded a document entitled *Release of Reverter, Release of Right of Re-Entry and Modification of Covenants, Conditions and Restrictions*. In this document, the Trustees did essentially three things: (1) they released the possibility of reverter from their deeds out of the Trust; (2) they modified the covenants and restrictions so they could reconfigure lots 4, 5, and 6, Def.'s Tr. Ex. 21 (R. p. 662), and (3) stated, "In all other respects all deeds from the undersigned, or any of them, and the restrictions, covenants and conditions contained therein shall be and remain as set forth of record heretofore." Def.'s Tr. Ex. 2 (R. p. 609).

In 1978, the Trustees recorded a *Modification of Covenants, Conditions and Restrictions* to allow Kathryn Salley to redivide Lots 2 and 3 reserving a 30-foot-wide strip along the Northeast border of the lots to permit direct access to the Atlantic Ocean from Lot 1 and to allow the house to face the Atlantic Ocean instead of Third Street South (now Parker Avenue). The Trustees again included, "In all other respects all deeds from the undersigned, or any of them, and the restrictions, covenants and conditions contained therein shall be and remain as set forth of record heretofore." Def.'s Tr. Ex. 3 (R. p. 614); see also "Salley Plat," Pl.'s Tr. Ex. 38 (R. p. 585).

In 1978, Kathryn Wallace Salley conveyed Lot 3, Block 2-S, the Eastern 20 feet of Lot 2, Block 2-S, and the adjacent sand dunes area, excepting the northeastern most thirty feet from each to Louis and Katharine Haun ("Haun Deed"). Pl.'s Tr. Ex. 9 (R. pp. 314-317); see also "Haun Plat," Pl.'s Tr. Ex. 37 (R. p. 584). It is the proposed future development of this lot by Defendant Shoestring Retreat, LLC which is the subject of this litigation (hereinafter referred to as "the Property"). The 1978 Haun Deed included the covenant, "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." (R. p. 315). Louis Haun quitclaimed his interest in said property to Katherine Haun in 2004. Pl.'s Tr. Ex. 10 (R. pp. 318-322).

Shoestring executed a contract to purchase the tract from Ms. Haun on February 23, 2019. The contract contained a due diligence period. Shortly after signing the contract, the McManus's engaged Gregory Cunningham of Parker Land Surveying to prepare a plat of the Haun lot being purchased. Pl.'s Tr. Ex. 36 (R. p. 583). Cunningham prepared and sealed a plat for the property on February 26, 2019. This plat showed and marked the existence of a 60' Sand Dune Restricted Area. The plat also identified set back requirements as shown in the recorded Deed Restrictions. McManus contacted Cunningham and asked him to remove the reference to

the 60' Sand Dune Restricted Area from the plat and when he refused, McManus moved on to another surveyor. McManus Test. at 47-48 (R. pp. 246-247).

McManus disclosed to Haun that he planned to try and subdivide the property (despite knowing of the restrictions which he believed unenforceable) and that if he were successful, there would be a favorable upward price adjustment at closing. McManus Test. at 49-50 (II. 49-50 (R. pp. 249-250); see also "Haun-McManus Second Contract of Sale" Pl.'s Tr. Ex 17 (R. pp. 528-533).

McManus contracted with a different surveyor, Kenneth Crawford with GB Surveying to prepare a subdivision plat, which he did on June 6, 2019. This plat did not show the Dunes Restricted Area and did not contain any references to the setback requirements shown in the recorded deed restrictions. Pl.'s Tr. Ex. 1 (R. p. 285).

On or about July 2, 2019, Haun applied for a subdivision plat approval with Georgetown County Planning Division pursuant to the procedures of Appendix B, Article 2, Section 4.1 of the Georgetown County Ordinances. The application was prepared by McManus who is listed as the contact person in the application. Pl.'s Tr. Ex. 2 (R. pp. 286-290). McManus provided the June 6, 2019, plat from GB Surveying with the application. Pursuant to S.C. Code Ann. §6-29-1145, the applicant was required to sign a form and answer the following question: "Is the applicant aware or have any knowledge whether the tract or parcel of land represented in the attached plat is restricted by any recorded covenants that are contrary to, conflicts with, or prohibits the permitted activity requested by approval of the plat?" Pl.'s tr. Ex. 2 (R. p. 288). That is, do restrictive covenants exist on the subject land that prohibits the subdivision of this property in the manner in which it is represented in the attached plat? Haun/McManus answered "No", (R. p. 288), and failed to disclose that subdividing the lot is prohibited by restrictive

covenants in the deeds, which state building more than one single family dwelling is prohibited, and that Haun could not build in the Dunes Restricted Area. See Pl.'s Tr. Ex. 4 (R. pp. 295-298); Pl.'s Tr. Ex. 9 (R. pp. 314-317); Pl.'s Tr. Ex. 36 (R. pp. 583); McManus Test. at 47-48 (R. pp. 246-247).

On July 18, 2019, McManus and Haun executed a second contract reducing the sales price to one million six hundred thousand dollars ($1,600,000[1]) but included a pricing addendum which provided that if the government approved the subdivision of the property and title insurance provided coverage for the "subdivision restriction" then Haun would receive an additional $100,000 within five days. Pl.'s Tr. Ex. 17 (R. pp. 528-533). This addendum was deleted by the parties on August 30, 2019, after the county approved the subdivision plat and the property sold for $100,000 more than the second contract price. (R. p. 533). On August 26, 2019, Georgetown County staff gave final approval to the subdivision plat.[2] Pl.'s Tr. Ex. 1 (R. p. 285).

The sale from Haun to Shoestring Retreat, LLC closed and on September 16, 2019, Haun deeded the Property to Shoestring. Pl.'s Tr. Ex. 11 (R. pp. 323-328). The deed from Haun to Shoestring does not include any mention of the restrictive covenants, setbacks, or subdivision restrictions nor does it contain the language referencing the restrictions prohibiting building in the Dunes Restricted Area contained in the Salley deed or the recorded indenture deeds. Final Order ¶ 32, March 23, 2022 (R. p. 7, ¶ 32). Upon receiving title to the property, Shoestring applied for and received a building permit. Shoestring demolished the Haun house and graded the property to the OCRM line, demolishing the existing sand dunes in the process. Upon

[1] McManus testified this was because the house had no value. (R. p. 248).
[2] MAC appealed this subdivision approval by the staff to the planning commission which affirmed and then to the circuit court which was referred to Judge Crosby by consent. Judge Crosby ruled that staff had the right to rely on the representations in the application but made clear that his decision did not affect this case on the enforceability of the restrictive covenants.

receiving a complaint for a violation of the Georgetown County Sand Dunes ordinance, Georgetown County issued a stop work order. (R. p. 7, ¶ 33).

The Plaintiff MAC Coastal Properties, Inc. ("MAC") is the successor in interest and title to the property previously owned by Kathryn Salley. MAC's property is immediately adjacent and behind (landward) the northern corner of the Shoestring property and shares the northeastern border to the Shoestring property all the way to the Atlantic Ocean. Thus, Mac's property borders Shoestring's property on two sides. Pl.'s Tr. Ex. 1, (R. p. 285); Pl.'s Tr. Ex. 15, "MAC Plat" (R. p. 520).

North Litchfield Beach, Inc. and Litchfield Realty Company merged into Litchfield Beach, Inc. as the surviving corporation pursuant to Articles of Merger dated November 6, 1965, recorded November 9, 1965, in the Office of the Secretary of State for South Carolina, and recorded November 15, 1965, in the Office of the Clerk of Court for Georgetown County in Charter Book 3 at page 150. Compl. ¶ 28, October 7, 2020 (R. p. 32, ¶ 28). Litchfield Beach, Inc. thereafter merged into Fairlane Finance Co., Inc. as the surviving corporation and the name of the surviving corporation was changed to Fairlane/Litchfield Company, Inc. pursuant to Articles of Merger filed July 31, 1973, in the Office of the Secretary of State for South Carolina and recorded September 17, 1973, in the Office of the Clerk of Court for Georgetown County in Charter Book 4 at page 205. (R. p. 32, ¶ 29). Fairlane/Litchfield Company, Inc. thereafter changed its name to The Litchfield Company of South Carolina, Inc. pursuant to Articles of Amendment dated June 22, 1982, recorded in the Office of the Secretary of State for South Carolina on June 23, 1982, and recorded November 15, 1982, in the Office of the Clerk of Court for Georgetown County in Miscellaneous Book 3 at page 32. (R. p. 33, ¶ 30).

The Litchfield Company of South Carolina, Inc., effective as of December 31, 1986, was dissolved and its successor in interest is The Litchfield Company of South Carolina Limited Partnership as reflected in an Agreement and Certificate of Limited Partnership recorded March 9, 1987, in the Office of the Clerk of Court for Georgetown County in Deed Book 244 at page 1318. (R. p. 33, ¶ 31). The Litchfield Company of South Carolina Limited Partnership conveyed unto Litchfield Crossing Development Co., LLC, all easements, appurtenances, and interests in land owned by The Litchfield Company of South Carolina Limited Partnership in Georgetown County, South Carolina not previously conveyed by Quit Claim Deed dated November 11, 2009, and recorded in Deed Book 1385 at Page 225 in the Office of the Clerk of Court for Georgetown County. (R. p. 33, ¶ 32). Litchfield Crossing Development Co., LLC, as the successor in interest to the aforementioned entities, has assigned, set over and transferred its right of abatement and its right to enforce compliance by injunction or any other appropriate legal action in the Dunes Restricted Area referred to above to MAC. Pl.'s Tr. Ex. 6 (R. pp. 301-304).

MAC brought the present action seeking declaratory and injunctive relief against Shoestring declaring that Shoestring's property is subject to the covenants which, among other restrictions, prohibits subdivision of the lot, construction of more than one single family dwelling, building in the Dunes Restricted Area, and building in setback areas set forth in the restrictions.

ARGUMENT

The Master found several facts consistent with MAC's arguments in the case; however, in MAC's view, the Master unnecessarily limited the application of those favorable facts to the 60' Dunes Restricted Area and did not allow MAC to fully enforce the restrictive covenants and setbacks set forth in the appurtenant deeds in the chain of title.

I. THE MASTER ERRED IN LIMITING THE ENFORCEMENT OF THE RESTRICTIVE COVENANTS TO THE DUNES RESTRICTED AREA AFTER CONCLUDING THE RESTRICTIVE COVENANTS IN THE DEEDS RUN WITH THE LAND.

The master held the following in his order: "This Court holds that the restrictive covenants in the deed to Wallace run with the land and are binding on Shoestring and enforceable by MAC *through the Salley Deed*." Final Order ¶ 43, March 23, 2022 (R. p. 9, ¶ 43) (emphasis added).

"Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable *by and against later grantees*." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006) (emphasis added). Pursuant to South Carolina law, a covenant is a real covenant that runs with the land and binds successors to the original covenantor if three elements are found: (i) an indication the covenanting parties intended the covenant to run with the land; (ii) the covenant touches and concerns the real property; and (iii) the party required to observe the covenant has actual or constructive notice of the covenant. *In re T 2 Green, LLC*, 363 B.R. 753, 766 (Bankr. D.S.C. 2006); *and see Harbison Cmty. Ass'n v. Mueller*, 319 S.C. 99, 102-03, 459 S.E.2d 860, 862-63 (Ct. App. 1995).

In considering the first element, the Court must construe the covenant "so as to carry into effect the intention of the parties, which is to be collected from the whole instrument and from the circumstances surrounding its execution." *Cheves v. City Council of Charleston*, 140 S.C. 423, 138 S.E. 867, 869 (1927); *see also Midway Props., Inc. v. Pfister*, 292 S.C. 104, 106, 354 S.E.2d 926, 927 (Ct. App. 1987) (reviewing the instrument as a whole to discern the parties' intent and finding the general rule of strict construction of restrictions is "not applicable if it will defeat the plain and obvious purpose of the restrictions").

The Court may look to the language of the covenant to determine whether the language used evidences an intention to attach the attribute of assignability. *Cheves*, 140 S.C. 423, 138 S.E. at 869; *see also Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 382-83, 635 S.E.2d 538, 541 (2006) (construing the language of an easement). The use of language indicating a covenant shall bind the "heirs and assigns" of a property owner is evidence of such intent. *Id*.

Applying these factors and the circumstances surrounding the execution of the deed into Wallace with the covenant restrictions the court properly concluded that the grantor intended the covenants to run with the land. Pursuant to their powers the Trustees had the property surveyed, subdivided the land into blocks and lots, and recorded plats showing the roads and lots in the subdivision known as "Retreat Beach." The Trustees were empowered 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. Pl.'s Tr. Ex. 3 (R. p. 292, ¶ 2). The Plaintiff's expert Jimmy Moore testified in his professional opinion that the covenants run with the land stating it touches and concerns the land and runs with the title. Moore Test. at 141 (R. p. 178). He further noted that the deed states these restrictions are going to be binding upon grantees, their heirs, successors, and assigns. (R. p. 178); Pl.'s Tr. Ex. 4 (R. pp. 295-298).

In determining whether the second element is satisfied, *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935) is instructive. The *Epting* Court distinguished personal covenants and covenants running with the land, stating "a covenant is personal when it has no relation to the land conveyed ... or is not connected with the title." *Id.* at 308, 181 S.E. at 71. In contrast, to run with the land, a covenant "must relate to the realty demised, having for its object something annexed to, or inherent in, or connected with the land; that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised

premises." *Id*. In *Charping v. J.P. Scurry & Co., Inc.*, Judge Goolsby in his dissent writes, "Other authorities have reduced the rule to simply whether the restriction is one which touches and concerns the land itself. 20 Am.Jr.2d *Covenants, Conditions, and Restrictions* Section 30 (1965); 21 C.J.S. *Covenants* Section 54 (1940). And I observe that in determining whether restrictions "touch or concern" the subject land, courts must decide in each case whether the purpose of the restriction is to alter the legal rights that otherwise would flow from the ownership of the land. 21 C.J.S. Covenants Section 54 (1940)." 296 S.C. 312, 372 S.E.2d 120 (S.C. App. 1988) (Goolsby dissenting). Certainly, a restriction against subdivision, building and setback requirements touches and concern the land and alter the legal rights that otherwise would flow from ownership.

Finally, it is undisputed in the record that Shoestring and its members had both actual and constructive notice of the restrictions prior to purchasing the land. Indeed, the record shows that McManus requested that references to the restrictions be removed from his plat.

Having concluded that the covenants in the Wallace deed run with the land and thus are enforceable by and against later grantees like Shoestring it was error for the master to limit the covenants to only those in the Salley deed which prohibits building in the 60-foot Dunes Restricted Area. The master apparently was concerned that these original restrictions were only enforceable by the Trustees and not subsequent grantees; however, nothing in the language of the deeds limits enforcement of these restrictions beyond the Trust and Trustees once these restrictions became appurtenant and the trust terminated. Indeed, limiting the enforceability of these covenants to the trustees after the termination of the trust would make the covenants personal and not appurtenant, running with the land. This court should reverse this limitation by

the master and hold that the restrictive covenants in the deed to Wallace run with the land and are binding on Shoestring and enforceable by MAC.

II. THE MASTER ERRED IN LIMITING THE ENFORCEMENT OF THE RESTRICTIVE COVENANTS TO THE DUNES RESTRICTED AREA WHEN THERE WAS A COMMON PLAN AND SCHEME.

The master found "that the grantors intended the restrictions to benefit their grantees as part of a common plan or scheme." Final Order ¶ 57, March 23, 2022 (R. p. 12, ¶ 57). However, the master then appears to have conflated enforceability by the Trustees (which is a legal/contractual doctrine) with enforceability by the owners in a common plan or scheme which is an equitable doctrine.

"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 (1949); 26 C. J. S., *Deeds*, § 167.

Additionally, "[t]he 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." *Id.* at 19, 66 S.E.2d at 331.

Subsequent cases have identified the following four elements needed to establish mutual negative equitable easements: "(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) (*citing McDonald v. Welborn, supra*; 20 Am.Jr.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), Pl.'s Tr. Ex. 30-34 (R. pp. 575-581), and in Indentured Deeds, Pl.'s Tr. Ex. 13 (R. pp. 329-459); 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, Pl.'s Tr. Ex.13 (R. pp. 329-459), 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." Salley Test. at 83-84 (R. pp. 159-160). 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. Moore Test. at 139-140 (R. pp. 176-177). "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." Moore Test. at 139:25-140:6 (R. p. 176, line 25-p. 177, line 6).

"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, 130, 54 S.E.2d 538, 542 (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. Moore Test. at 138-141 (R. pp. 175-178). The restrictive covenants run with the land. The master already concluded the covenants run with the land. Final Order ¶ 43, March 23, 2022 (R. p. 9, ¶ 43).

a. Heffner v. Litchfield Golf Co.

Shoestring made several arguments against enforcement as common plan or scheme, but its primary argument is that there cannot be a common plan or scheme when the grantors (the Boyle Trustees) reserved to themselves the right to release or modify the restrictive covenants.

In support of this argument, Shoestring relies heavily 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. *Id.* at 449, 189 S.E.2d at 4. All the lots contained use limitations and were restricted to residential use. *Id.* 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. *Id.*

The golf company sought to purchase two lots adjacent to the lot owner's property and build a tennis court for public use. *Id.* at 450, 189 S.E.2d at 4-5. The lot owner sought an injunction and argued that the restrictions required the property to be used for residential use. *Id.* at 449, 189 S.E.2d at 4. The court denied the injunction and held that the lot owner did not have standing to argue against golf company. *Id.* at 450, 189 S.E.2d at 5.

First, the golf company, as an original grantor and successor grantee, reserved the right to modify the lot restrictions. *Id.* 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. *Id.* at 451, 189 S.E.2d at 5. 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.

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 Bldrs., 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).[3]

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." 43 Misc.2d at 606.

[3] 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.

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 [*Elliston*] 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.' (674)." *Richmond*, 43 Misc.2d at 608.

This raises another key point: 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) [4].

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

[4] 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.

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*, 258 S.C. at 452, 189 S.E.2d at 5.

In this case, the massive structure planned by Shoestring to be built through the pristine dunes coupled with a similar massive structure which could be built immediately beside the first as a result of the subdivision of the lot and the reduction in setbacks is certainly incompatible with the restrictions and plans of the development.

The court should find that the grantors intended the restrictions to benefit their grantees as part of a common plan or scheme and that restrictive covenants are enforceable by MAC and other grantees who purchased from the Trustees, their successors and assigns in title.

III. THE COVENANTS ARE ENFORCEABLE BY THE ADDITIONAL SUSTAINING GROUND THAT MAC RECEIVED AN EXPRESS GRANT FROM THE SUCCESSOR TO NORTH LITCHFIELD BEACH, INC. AND KATHRYN SALLEY.

By deed dated June 1, 1959, and recorded in Deed Book 33 at Page 283, the Trustees, Thomas B. Boyle and Boyle Construction Company conveyed their remaining property in North Litchfield Beach to the North Litchfield Beach Company, Inc. Pl.'s Tr. Ex. 14 (R. pp. 460-466). Excepted from this transfer were the deeds previously conveyed by the Trustees (including the Kate Wallace deeds) and "any area of land between the Said Lots on Front Beach and the Atlantic Ocean, 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 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.'s Tr. Ex. 14 (R. p. 462). This is the same land identified under Restriction No. 12 of the Wallace deeds 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.'s Tr. Ex. 4, ¶ 12 (R. pp. 295-296, ¶ 12).

North Litchfield Beach, Inc. and Litchfield Realty Company merged into Litchfield Beach, Inc. as the surviving corporation pursuant to Articles of Merger dated November 6, 1965, recorded November 9, 1965, in the Office of the Secretary of State for South Carolina, and recorded November 15, 1965, in the Office of the Clerk of Court for Georgetown County in Charter Book 3 at page 150. Compl. ¶ 28, October 7, 2020 (R. p. 32, ¶ 28). Litchfield Beach, Inc. thereafter merged into Fairlane Finance Co., Inc. as the surviving corporation and the name of the surviving corporation was changed to Fairlane/Litchfield Company, Inc. pursuant to Articles of Merger filed July 31, 1973, in the Office of the Secretary of State for South Carolina and recorded September 17, 1973, in the Office of the Clerk of Court for Georgetown County in Charter Book 4 at page 205. (R. p. 32, ¶ 29)

Fairlane/Litchfield Company, Inc. thereafter changed its name to The Litchfield Company of South Carolina, Inc. pursuant to Articles of Amendment dated June 22, 1982, recorded in the Office of the Secretary of State for South Carolina on June 23, 1982, and recorded November 15, 1982, in the Office of the Clerk of Court for Georgetown County in Miscellaneous Book 3 at page 32. (R. p. 33, ¶ 30) The Litchfield Company of South Carolina, Inc., effective as of December 31, 1986, was dissolved and its successor in interest is The Litchfield Company of South Carolina Limited Partnership as reflected in an Agreement and Certificate of Limited Partnership recorded March 9, 1987, in the Office of the Clerk of Court for Georgetown County in Deed Book 244 at page 1318. (R. p. 33, ¶ 31)

The Litchfield Company of South Carolina Limited Partnership conveyed unto Litchfield Crossing Development Co., LLC, all easements, appurtenances, and interests in land owned by

The Litchfield Company of South Carolina Limited Partnership in Georgetown County, South Carolina not previously conveyed by Quit Claim Deed dated November 11, 2009, and recorded in Deed Book 1385 at Page 225 in the Office of the Clerk of Court for Georgetown County. (R. p. 33, ¶ 32)

Litchfield Crossing Development Co., LLC, as the successor in interest to the aforementioned entities, has assigned, set over and transferred its right of abatement and its right to enforce compliance by injunction or any other appropriate legal action in the Dunes Restricted Area referred to above to MAC. Pl.'s Tr. Ex. 6 (R. pp. 301-304).

Therefore, MAC as the successor by express, recorded assignment to any interests retained or held by the successor to North Litchfield Beach, Inc. and Kathryn Salley. The Plaintiff's expert James B. Moore, Jr. testified that MAC received by assignment the right to enforce the restrictive covenants that North Litchfield, Inc. possessed and that it was enforceable by MAC. Moore Test. at 156-162 (R. pp. 193-199); see also Pl.'s Tr. Ex. 25-26 (R. pp 562-574). The court should further note that at the time of the assignments to MAC Litchfield Crossing owned property which could be affected by the activity of the Defendants. Moore Test. at 159-160 (R. pp. 196-197).

This court should affirm the master on the additional sustaining ground that MAC has right to enforce the covenants as to the Dunes Restricted area by express grant and assignment.

CONCLUSION

Restrictive covenants that run with the land are a matter of public record in Shoestring's chain of title which prohibit its subdivision of the land, building more than one single family dwelling, and building in a Dunes Restricted area. These restrictions contain common setbacks to promote a uniform character in the neighborhood. Shoestring wants to the court to allow it to have an unfair advantage over its neighbors, ignore these restrictions, subdivide its land and

build in the Dunes Restricted area. MAC as an adjacent property owner on two sides, grantee in the chain of title, assignee of the successor developers to the trustees, and Kathryn Sally and lot owner in a common plan or scheme has the right to enforce these covenants and relied upon by MAC and others and this court should so hold. The court should affirm the master to the extent he holds that Shoestring cannot build in the Dunes Restricted area and must restore the dunes to their original condition. The court should reverse the master to the extent the master limits MAC's enforcement rights to the Dunes Restricted area and hold that MAC can enforce the full restricted covenants in the chain to title which run with the land including the prohibition against subdivision, building more than one single family dwelling and the setback requirements.

RESPECTFULLY SUBMITTED,

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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.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent, MAC Coastal Properties, Inc. hereby certifies that Appellant-Respondent's Final Appellant's Brief and Appellant-Respondent's Final Respondent Brief comply with Rule 211(b) SCACR

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