STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
The SPUR at Williams Brice Owners Association, Inc.,	)	Case No: 2011-CP-40-6704
Plaintiff,	)	**ORDER**
v.	)	
Sunil V. Lalla and Sharon W. Lalla,	)	
Defendants.	)	

This is a Declaratory Judgment action by the Plaintiff, the Owners Association of The Spur at Williams Brice, a South Carolina horizontal property regime, seeking interpretation and enforcement of its Master Deed and Bylaws.

The Defendants are owners of a condominium unit in the regime.

The parties agreed to submit the case without testimony and have had full opportunity to create a record and to present evidence through stipulated facts and affidavits and to present argument through briefs.

The issue before the Court is whether a restrictive covenant that prohibits the renting of units in a regime to students at two- or four-year colleges, institutes, and universities is enforceable when it is contained in the master deed of the regime and agreed to by the owners of a unit in a regime.

After carefully considering the evidence and authorities submitted, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The SPUR at Williams Brice ("Regime") is a horizontal property regime consisting of real property, condominiums, and general and limited common areas. The Regime was created by a master deed dated September 19, 2006 ("Master Deed"). The Plaintiff is a nonprofit corporation that was organized and exists for the purpose of administering the Regime and enforcing the Regime's Master Deed and Bylaws. The Defendants are co-owners of Unit 101 in the Regime. When the Defendants purchased Unit 101, they became subject to the provisions of the Master Deed and Bylaws. Article XIV of the Master Deed ("Restrictive Covenant") provides, in relevant part, the following:

> The rental of any unit to any student currently enrolled in a two (2) or four (4) year college, institute, or university is strictly prohibited. Additionally, any tenant of any Unit shall be prohibited from having any roommate that is enrolled in a two (2) or four (4) year college, institute, or university. Any tenant in violation of this Restriction shall have their lease automatically terminated, and shall have thirty (30) days to vacate the Unit.

After purchasing Unit 101, the Defendants rented the Unit to one or more college students.

CONCLUSIONS OF LAW

I. The Plaintiff Has Met Its Burden of Showing an Enforceable Restrictive Covenant.

The Defendants voluntarily agreed to the terms of the Master Deed, including the Restrictive Covenant, therefore the Court finds that the restriction is valid and enforceable. The law governing the enforceability of covenants restricting the use of real property is well-established in South Carolina: a restrictive covenant is a voluntary contract between the parties and shall be enforced if the party seeking enforcement shows "that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication."

Buffington v. T.O.E. Enterprises, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). In an action for declaratory judgment, the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a preponderance of the evidence. *See Martin v. Cantrell*, 225 S.C. 140, 144, 81 S.E.2d 37, 38-39 (1954). As with any other action on a contract, the burden is on the Plaintiff to prove that the Defendants intended to create a covenant. *See Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988).

The Plaintiff has met its burden of proof as to the creation of a restrictive covenant binding on the Defendants. The Defendants have admitted in their Answer that they are owners of a unit in the Regime and that they are subject to the provisions of the Master Deed and Bylaws. (Answer ¶ 2.) Pursuant to the Master Deed, "[e]ach and every condominium . . . shall be, and is hereby declared to be, subject to the restrictions, easements, conditions, and covenants prescribed and established herein, governing the use of said Condominium . . . and setting forth the obligations and responsibilities incident to ownership of each Condominium." (Ex. A, Excerpt from Master Deed ¶ VIII.) The Bylaws of the Regime further provide that "[a]ll present or future co-owners, tenants, future tenants, or their employees . . . that might use the Regime or any of the facilities thereof in any manner are subject to the regulations set forth in these Bylaws and in said Master Deed." (Ex. B, Excerpt from Bylaws § 1(b).) Moreover, the South Carolina Horizontal Property Act states that "[e]ach co-owner shall comply strictly with the bylaws . . . and with the covenants, conditions and restrictions set forth in the master deed." S.C. Code Ann. § 27-31-170 (2007). Thus, the Defendants' admissions, the Master Deed and the Regime's Bylaws, and the statutory law of the State of South Carolina together show that when the Defendants became owners of a unit in the Regime, they voluntarily and intentionally bound

themselves by the restrictive covenants barring the rental of any unit to college students who are unrelated to the unit's owner.

II. **The Defendants Have Not Met Their Burden of Showing that the Restrictive Covenant is Unenforceable.**

Upon a showing by the Plaintiff that the restrictive covenant is binding on the Defendants, the Defendants may assert affirmative defenses to the Restrictive Covenant's enforceability. In this case, the Defendants allege that the Restrictive Covenant contravenes public policy in that it is unconstitutionally discriminatory and violates the statutory laws of the United States and the State of South Carolina. The Defendants also assert that the Restrictive Covenant should fail because of a change in conditions and because the Plaintiff waived its right to enforce them.

a. **The Restrictive Covenant Does Not Fail for Violating Public Policy.**

In South Carolina, "courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); *Batchelor v. Am. Health Ins. Co.*, 234 S.C. 103, 107 S.E.2d 36 (1959). The Defendants claim that the Restrictive Covenant is impermissibly discriminatory pursuant to Article I, Section 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution. They further assert that the restrictive covenant violates the South Carolina Fair Housing Law and the Federal Fair Housing Act.

1. **The Restrictive Covenant Does Not Contravene the United States or South Carolina Constitution.**

In general, the private acts and agreements of individuals do not implicate the Equal Protection Clauses of the South Carolina and United States Constitutions. Both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution guarantee that the State shall not deny any person the equal protection of the laws. *See* U.S. Const. amend. XIV, § 1; S.C. Const. art. 1, § 3. By their terms, these mandates apply to state, and not private, action. However, when judicial officers of the State participate in their official capacities in the enforcement of an impermissibly discriminatory restriction, that participation "is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 (1948). Thus, for a restrictive covenant to be judicially enforceable, it must not discriminate on the basis of a classification that, if applied by the State, would contravene either state or federal Equal Protection Clauses.

Use of a classification will be declared unconstitutional under the Equal Protection Clause only if its repugnance to the Constitution is clear beyond a reasonable doubt. *See Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998). As a general rule, state action is presumed to be constitutional despite the fact that, in practice, some inequality results. *See McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961). Accordingly, unless a classification warrants some form of heightened review because it jeopardizes a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification be rationally related to a legitimate purpose. *See Nordlinger*

v. Hahn, 505 U.S. 1, 10 (1992); *Hendrix v. Taylor*, 353 S.C. 542, 549, 579 S.E.2d 320, 323 (2003). Challengers of the validity of state action "have the burden to negate every conceivable basis which might support it." *Lee v. S. Carolina Dept. of Natural Res.*, 339 S.C. 463, 470, 530 S.E.2d 112, 115 (2000); *see also F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

An inherently suspect classification is one whose members have faced a long history of discrimination, *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), are a discrete and insular minority who would otherwise be unheard by the political process, *see United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), or which is drawn according to an immutable trait acquired at birth. *See Frontiero v. Richardson*, 441 U.S. 677, 686 (1973). Because college students have not faced a long history of discrimination and are not an insular minority, and because college admission is not a characteristic with which any person is born and is one that most people eventually shed, classifications based on a person's status as college student are not inherently suspect. Moreover, the Defendants have not implicated any fundamental right that the classification of college students would affect. Thus, rational basis review is appropriate to determine the constitutionality of enforcing the restrictive covenant in Article XIV of the Master Deed.

A classification bears a rational relationship to its purpose as long as there is some evidence that it will further a legitimate purpose. *See Nordlinger*, 505 U.S. at 10; *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 323. Thus, a classification will remain constitutional under rational basis review even if it is underinclusive. *See Ry. Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 110 (1949) (stating that "[i]t is no requirement of equal protection that all evils of the same

genus be eradicated or none at all); *but*, for overinclusive, *see New York Transit Auth. v. Beazer*, 440 U.S. 568, 592-94 (1979) (holding that the exclusion of those in methadone maintenance programs from employment with the Transit Authority was constitutionally permissible despite the fact many in such programs would be able to perform the requisite job functions safely); or for both *see Vance v. Bradley*, 440 U.S. 93, 108-09 (1979) (holding that a mandatory retirement age was constitutional even though it was underinclusive in failing to remove from employment some younger individuals who were not qualified to continue working and overinclusive in removing from employment those who were older but still capable). Only if the use of a classification is arbitrary will it be deemed to be not rationally related to its asserted purpose. *See McLaughlin v. State of Fla.*, 379 U.S. 184, 190 (1964); *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009).

The purpose of the Restrictive Covenant is to insure the comfort and safety of all residents and to protect the investment of all owners. (Ex. C, The SPUR at Williams Brice Rules & Regulations Revised 8/28/08.) The Restrictive Covenant is rationally related to its purpose because it bars from the possible pool of renters a population that the Plaintiff alleges to have a tendency to engage in certain behaviors that are dangerous to themselves and disruptive to those around them.

The Restrictive Covenant is rationally related to maintaining the safety, comfort, and investment of owners in light of that recognition.

2. **The Restrictive Covenant Does Not Contravene Federal or State Statutory Law.**

Both the federal government and the State of South Carolina prohibit certain kinds of discrimination in the housing market, including the market for rentals. Under the federal Fair

Housing Act and the South Carolina Fair Housing Law, it is unlawful to refuse to rent or to refuse to negotiate for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. *See* 42 U.S.C. § 3604(a); S.C. Code Ann. § 31-21-40(1). Within both statutes, familial status "means one or more individuals who have not attained the age of eighteen years and are domiciled with: (i) a parent or another person having legal custody of the individual; or (ii) the designee of the parent or other person having the custody, with the written permission of the parent or other person." S.C. Code Ann. § 31-21-30(6)(a); 42 U.S.C. § 3602(k). Thus, discrimination in housing on the basis of familial status implicates the refusal to sell or rent to an individual because that individual is the parent or has legal custody of a child that would live in the dwelling. *See Glover v. Crestwood Lake Section 1 Holding Corporations*, 746 F. Supp. 301, 310 (S.D.N.Y. 1990) (holding, under the Fair Housing Act, that refusing to rent to a person on the basis of that one of the persons in the household was a child is unlawful discrimination on the basis of familial status). In order to successfully raise a violation under either the state or federal fair housing statute, the Defendants must show that the Plaintiff discriminated on the basis of race or some other prohibited factor, not that they just disliked the Defendants' tenants. *See Harrison v. Darby*, C.A. 2:08-3874-PMD, 2009 WL 936469, at *5 (D.S.C. Apr. 7, 2009) aff'd, 333 F. App'x 801 (4th Cir. 2009).

The Restrictive Covenant does not discriminate on the basis of any factor prohibited by federal or state law. Neither on its face nor in its application does the Restrictive Covenant prevent any person from renting because of their race, color, religion, sex, familial status, or national origin. Rather, the classification on which the restriction relies—status as a student at a

two- or four-year college, institution, or university—is wholly unrelated to the classifications that the state and federal statutes protect. The restriction applies because a person is a college student who is not related to the unit's owner. That classification bears no relation to a person's race, color, religion, sex, familial status, or national origin, and a restrictive covenant that discerns among potential renters on the basis of that classification violates neither the South Carolina Fair Housing Law nor the federal Fair Housing Act.

The Restrictive Covenant is neither unconstitutionally discriminatory nor violates the laws of the United States or of the State of South Carolina.

b. **The Restrictive Covenant Does Not Fail on Account of a Change in Conditions.**

The Defendants assert the affirmative defense that a change in the economy and the real estate market should allow for the discharge of the Restrictive Covenant. However, this defense is not applicable.

South Carolina does not recognize a change in market conditions as a basis for extinguishing a restrictive covenant. The cases that discuss a change in circumstances address changes in the character of the neighborhood or other area immediately surrounding the restricted or servient estate. *See Dunlap v. Beatty*, 239 S.C. 196, 207, 122 S.E.2d 9, 14 (1961); *Inabinet v. Booe*, 262 S.C. 81, 84, 202 S.E.2d 643, 645 (1974); Martin v. Cantrell, 225 S.C. 140, 146, 81 S.E.2d 37, 40 (1954); *Pitts v. Brown*, 215 S.C. 122, 133, 54 S.E.2d 538, 543 (1949); *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006); *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). None of these cases provide for the termination of a restrictive covenant on the basis of a change in market conditions.

Even if this Court were to apply the doctrine of change in circumstances to the market conditions surrounding the Defendants' purchase of the unit, the extent of those changes does not merit the termination of the Restrictive Covenant. To defeat enforcement of a restrictive covenant, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants. *See Mangiaracina*, 307 S.C. at 308, 414 S.E.2d at 801. "[T]he determining factor is whether the object of such a covenant has been so nearly destroyed by changed conditions as to render its enforcement inequitable or oppressive." *Holling v. Margiotta*, 231 S.C. 676, 681, 100 S.E.2d 397, 399 (1957). Notwithstanding the changed character of the neighborhood, where the purpose of the covenant may still be accomplished, the defense will be denied. *See Circle Square Co. v. Atlantis Dev. Co.*, 267 S. C. 618, 631, 230 S.E.2d 704, 709 (1976).

In this case, the purpose of the Restrictive Covenant is to ensure the comfort and safety of all residents and to protect the investment of all owners. (Ex. C, The SPUR at Williams Brice Rules & Regulations Revised 8/28/08.) The fact that the market for real estate, and the economy in general, is in a worse condition than it was at the time that the Defendants purchased their property has no effect on the need to maintain the safety, comfort, and protection of those who own units in the Regime.

Thus, the alleged change in conditions does not allow for the discharge of the Restrictive Covenant.

c. **The Restrictive Covenant Does Not Fail for Waiver.**

Waiver is "an intentional relinquishment of a known right." *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). Waiver may be either express or implied. *See Lawrimore v.*

Am. Health & Life Ins. Co., 276 S.C. 112, 118, 276 S.E.2d 296, 299 (1981). An implied waiver is one that arises "from conduct of the party against whom the doctrine is invoked from which voluntary relinquishment of his known right is reasonably inferable." *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 552, 148 S.E.2d 369, 371 (1966). The party claiming waiver must show that its opponent possessed, at the time of the waiver, actual or constructive knowledge of his rights or of all the material facts upon which those rights depended. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88.

The Defendants have not shown that the Plaintiff had sufficient knowledge of their violation such that the Plaintiff waived its right to enforce the Restrictive Covenant. The Defendants have produced no credible evidence. The defense of waiver is not applicable because the Defendants have failed to produce any evidence in support.

CONCLUSION

The right to enforce a restrictive covenant is not limited to mere preventive action, but can "extend to requiring a defendant, by mandatory injunction, to repair any injury already done." *Kneale v. Bonds*, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1994). A party seeking injunctive relief "must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *See City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000).

The harm that the Plaintiff will suffer if the Defendants are allowed to continue to violate the Restrictive Covenant would be irreparable. Permitting the Defendants to violate the Restrictive Covenant emboldens others in the Regime to engage in similar violations.

In this case, the legal remedy for a violation of a restrictive covenant – money damages – fails to provide an adequate remedy. First, the nature of the damage that the Regime experiences because of the Defendants' violation of the Restrictive Covenant is not susceptible to quantification with sufficient certainty to render a money damages award. The damage that violation of the Restrictive Covenant does is to the safety and comfort of the Regime's other owners. These are intangible benefits that emanate from the Restrictive Covenant, and are not usually the subject of monetary damages. Because only performance under the Restrictive Covenant, and not damages, can restore to the owners in the Regime the benefit of their bargain, there is no adequate legal remedy.

ACCORDINGLY, it is ORDERED:

1. Article XIV of the Master Deed and Restrictive Covenant prohibiting renting of a condominium unit in The Spur at Williams Brice to a tenant who is currently enrolled in a two (2) or four (4) year college, institute or university and prohibiting any tenant from having any roommate that is enrolled in a two (2) or four (4) year college, institute or university is hereby declared to be valid and enforceable.
2. The Defendants, Sunil V. Lalla and Sharon W. Lalla, are hereby enjoined from renting or continuing to rent to any tenant who is a student currently enrolled in a two (2) year or four (4) year college, institute or university or any tenant who has a roommate that is enrolled in a two (2) or four (4) year college, institute or university.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

May 23, 2013

Lexington, South Carolina