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Nov 18 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2024-000794

Kenneth S. Hoffman, Linda J. Hoffman,
Harold W. Walters, Terrence Whitlock, and
Barrie Whitlock Appellants

v.

Saad Holdings, LLC, and Carl L. Jones, as Personal
Representative of the Estate of Anne E. Jones, deceased Respondents..

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Trial Court erred in finding that the restrictive covenants, as interpreted by Appellants, would violate public policy?
2. Whether the Trial court erred in failing to make findings urged by Appellants not required to support its holding?
3. Whether court erred in refusing to adopt Appellants' view of restrictive covenants in conflict with their own testimony and argument?

STATEMENT OF THE CASE

Appellants filed this declaratory judgment asking the trial court to permanently enjoin Respondents from walking across their property. Respondents filed their Answer and Counterclaim, acknowledging applicability of certain residential restrictive covenants to their property but denying any violations. Respondents denied that Appellants were entitled to the relief requested.

Appellants initiated this action by filing their Summons and Complaint on September 29, 2022. (R. 59, Summons and Complaint). Appellants alleged, essentially, that three specific uses of Respondents' property violated residential restrictive covenants of the development, at least when such conduct was undertaken by Respondents. Specifically, Appellants complained of 1) Respondents' use of property to obtain dock permits from the US Army Corp or Engineers, 2) accessing utilities on their property to permitted docks, 3) parking and being present on their property in connection to their intended use. Appellants sought a permanent injunction to prohibit these perceived violations of restrictive covenants.

Respondents Answered on November 2, 2022. (R. p. 82, Answer and Counterclaim). Respondents denied violating the subject covenants, sought the Court's Order declaring that their use of property was in conformity with the covenants, and seeking an award of attorney's fees. Appellants timely filed a Reply to the Counterclaim.

Following discovery, both sides agreed there was no genuine dispute of material facts. Appellants filed their Motion for Summary Judgment, with supporting exhibits, on January 22, 2024. (R. p. 91, Plaintiffs' Motion for Summary Judgment). Similarly, Respondents filed their cross-motion for Summary Judgment the following day, January 23, 2024. (R. p. 164, Defendants' Motion for Summary Judgment). Respondents subsequently filed a Memorandum of Law, with supporting exhibits, on March 29, 2024. (R. p. 165).

The matter proceeded to trial, non-jury, before the Honorable R. Scott Sprouse on April 9, 2024. The Court admitted all exhibits proffered by the parties without objection. Neither party presented testimony. The parties agreed to submit depositions of party witnesses into evidence. Both parties thoroughly argued their respective positions based on the record before the Court.

On April 26, 2024, Judge Sprouse issued an Order denying Plaintiffs' request for an injunction and denying Respondents' request for attorney fees. (R. p. 1, April 26, 2024, Order). In addition to jurisdictional findings, and relevant to issues under appeal, the Trial Court held:

- (1) Defendant Saad's boat docks are not violations of the Providence Point subdivision restrictive covenants. They are attached to the shoreline, which is owned by the U.S. Army Corp of Engineers.
- (2) Defendant Saad's walking across his lots to access these boat docks is not a violation of the restrictive covenants. Interpreting these restrictive covenants in the manner sought by the Plaintiffs would lead to an absurd result that violates public policy in that it would unreasonably interfere with the free use of property.
- (3) There is no evidence that Defendant Saad's current use of his lots would constitute a nuisance or other violation of the Providence Point subdivision restrictive covenants.

Appellants filed a Motion to Reconsider, Alter, or Amend on May 1, 2024, citing Rules 59 and 60, SCRCP. (R. p. 195). The trial court denied Appellants' Motion by Form 4 Order filed May 2, 2024 (R. p. 12). Appellants timely sought appeal with this Court.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (S.C. App. 2014) (*quoting 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.* An action seeking an injunction to enforce restrictive covenants is an action in equity. *Snow v. Smith ex rel. Stoudenmire*,

416 S.C. 72, 90, 784 S.E.2d 242, 251 (Ct. App. 2015). In an equitable action, this court may make findings according to its own view of the preponderance of the evidence. *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (S.C. App. 2014). However, ... [the] court is not required to disregard the ... [trial court's] factual findings or ignore the fact that the ... [trial court] was in the better position to assess the credibility of the witnesses. *Id.* (citing *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012)).

However, while injunctions sound in equity, restrictive covenants are contractual in nature subject to ordinary rules of contract interpretation. “[I]nterpretation of a contract ... is an action at law.” *Barnacle Broadcast. v. Baker Broadcast.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000) (citing *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App. 1988) (noting that an action to construe an unambiguous written contract is one at law). In an action at law, tried without a jury, ... [the] scope of review extends merely to the correction of errors of law. *Id.* (citing *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998)). Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings. *Id.*; *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

STATEMENT OF FACTS

The case concerns certain lots of vacant land located in Providence Point subdivision. Providence Point is located on Lake Hartwell in Anderson County. Lake Hartwell is owned by the US Army Corps of Engineers. Saad Holdings, LLC, purchased its property from Carl Jones in 2021. Saad Holdings, LLC, is a limited liability company

with its principal agent and only shareholder being Greg Saad. Mr. Saad divided the lot into three separate lots. Mr. Saad applied for two dock permits with the Corps of Engineers and was granted the two permits. (R. p. 183, Exhibit 3 to Defendants' Memorandum of Law).

On July 17, 1968, Restrictive Covenants were recorded for Providence Point with the Anderson County Register of Deeds. (R. p. 176, Exhibit 1 to Defendants' Memorandum of Law). The applicable provisions of the Restrictive Covenants for this dispute are as follows:

WHEREAS, for the purpose of protecting said tract of land as a residential development the undersigned desires to impose certain Restrictive Covenants upon said tract.

LAND USE AND BUILDING TYPE:

No lot shall be used for other than residential purposes. No residential building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than two cars.

...

NUISANCES:

No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood; and specifically including the following:

(a). Paper will be disposed of only by burning in an incinerator. All trash fires must be carefully watched and put out before dark.

(b). There will be no unsightly accumulation of trash, refuse, wood, brush, etc. on any lot.

(c). Pets must be kept quiet; no dangerous dog or dogs being permitted unless chained; and no dog or dogs shall be kept penned on said lots hereinabove described.

(d). No chickens, ducks, geese, cows, horses or ponies may be kept in the subdivision.

(e). Nor house trailers or mobile homes or trucks larger than a ¾ ton pick-up may be kept permanently in the subdivision. Such trucks must be parked in carports, garages or in the rear yard out of general view.

(f). No resident shall establish a place of business in the subdivision.

(g). No wash shall be hung out to dry, to sun, or to air in the front of any lot facing the street.

(h). Garbage cans and other trash disposal containers must be kept out of general view by the use of below-ground locations, or use of shrubs, etc. as a shielding medium.

...

Approximately 32 years after the original Restrictive Covenants were filed, on August 15, 2000, Amended Restrictions were filed with the Anderson County Register of Deeds. (R. p. 179, Exhibit 2 to Defendant's Memorandum of Law). The Amended Restrictions changed the minimum home size from 900 square feet to 1,500 square feet. Additionally, a provision was added to the nuisance list as follows: "no residence shall be

constructed closer than twenty (20) feet to the front lot line, front lot line being defined as that line bordering public street, nor nearer than ten (10) feet to any side lot line.”

Carl Jones and his now-deceased spouse, Anne Jones, owned the lot in question at the time of the Amended Restrictions in 2000. Due to the size and shape of the lot, increasing the minimum home size made the lot essentially unbuildable due to Anderson County Regulations and the additional language of the Restrictive Covenants.¹ Carl Jones did not consent to the Amended Restrictions, and the other owners of Providence Point never compensated Carl Jones for making his lot unbuildable. It is undisputed that no other lots in Providence Point were detrimentally impacted in the same manner as the subject lot by the Amended Restrictions.

The Restrictive Covenants, as amended, are also notable in the context of this case for what they do not address or prohibit. There is no requirement for property owners to build a structure on their property, only restrictions on the nature of structures that may be erected. There is no restriction on recreational use of property subject to the covenants. There are no restrictions specifically addressing the use of vacant lots as distinguished from improved lots. There are no restrictions that prohibit dock applications, based on lot ownership, or that require owners to construct a residence as a condition of such use. Finally, there are no further definitions that would specifically address terms relevant to the parties’ dispute.

¹ Respondent Greg Saad, Defendant below, testified to his belief that he could not construct a residence on his property within the development. The Trial Court made no specific finding on this point. It is undisputed that Respondent divided his property into three (3) lots from one (1) original lot. Appellants argue that Respondents’ lots are each not large enough to construct a single-family residence. The parties agree. Respondents argue, and Appellants make no effort to suggest to the contrary, that pursuant to the Amended Covenants Respondents could not build a residence at all consistent with the Covenants.

It is undisputed there are no structures on Respondents' lots. Respondents own two (2) docks located on Corps of Engineers' property. Mr. Saad runs power and water across his property to his docks. Mr. Saad uses the docks for personal use and has never engaged in commercial activity on his lots. Additionally, he is not leasing the docks or the land to any other party. It is similarly undisputed that Mr. Saad is not engaged in any of the prohibited nuisances set forth in the Covenants.

Respondents engage in virtually identical behavior as other property owners in Providence Point. Every lot owner in Providence Point has a dock. There are multiple lot owners who do not reside in their homes, but rather utilize them for vacation purposes. (R. p. 188, Deposition of Terrence Whitlock, p. 9, lines 4-18). Other residents engage in behavior, arguably outside the scope of residential use within the meaning of the applicable covenants, that Mr. Saad does not engage in. Specifically, at least one home is listed for short-term rental via Airbnb website in Providence Point. (R. p. 189, Exhibit 5 to Defendants' Memorandum of Law). None of the parties has engaged in prohibited commercial activities on their respective lots. The distinguishing feature between owners here is solely based on Mr. Saad not building, and being unable to build, a residence on his property.

The record shows that the only thing Mr. Saad does on his property is park his vehicle and walk to his docks located on Corps of Engineers' property. None of the Appellants could testify as to how Mr. Saad's use of his property negatively impacted

their properties. (Deposition of Terrence Whitlock, p. 11, lines 6-11, Exhibit 6).² Every challenged use of Respondents' property is a use engaged in by other residents of the development without incident or complaint regarding the covenants: He walks on his lot, he parks on his lots, he has docks on adjoining Corp of Engineers property, and he has access to utilities. There was no testimony or evidence as to how Respondents' use of property conflicted with the overall plan for the development. The parties seem to agree on this factual background but not as to its effect, if any.

At trial, and on appeal, Respondents would point to the following undisputed facts relevant to this matter:

- Appellants seek to enjoin and permanently bar Mr. Saad from parking on, or walking across, his undeveloped, vacant property.
- Appellants concede Mr. Saad can place docks on Corps of Engineers' property associated with his property, as such property is beyond the scope of the Restrictive Covenants
- There are no structures on Mr. Saad's property.
- Mr. Saad is not engaged in any commercial enterprise on the property.
- Mr. Saad is not engaged in any of the enumerated nuisances identified in the Restrictive Covenants.
- Plaintiff Terrence Whitlock concedes Mr. Saad can walk across his property.

² Contrary to the relief he is seeking from this Court, Appellant Terrence Whitlock testified Mr. Saad is allowed to walk on his vacant property. (R. p. 188, Deposition of Terrence Whitlock, p. 14, lines 6-11).

- There is no evidence that Respondents' current use of property has caused any harm or damage to Appellants.

ARGUMENT

In this case, Appellants sought- and still seek- to prevent Respondents from having any use of their property. In support, they urged the Trial Court- and now this Court- to find the applicable covenants unambiguously prohibit use of property unless the owner resides thereon. The covenants contain no such requirements. This Court, like the Trial Court, should refuse to adopt an unreasonable interpretation not required by language in the covenants, not supported by any authority in this State, and that- if adopted- would constitute such an unreasonable interference with property use in violation of public policy.

The record is clear and largely undisputed. The parties simply disagree as to the implication of agreed facts. However, abundant authority supports the decision of the Trial Court. First, the Trial Court was correct to find that the covenants, as interpreted by Appellants, would violate public policy. Second, the Trial Court was correct to decline invitation by Appellants to make unnecessary findings in support of its holding. Finally, the Trial Court correctly refused to adopt Appellants' view which was contradicted by their own testimony and argument.

1. The Trial Court Correctly Ruled that the Covenants, as interpreted by Appellants, would Violate Public Policy

Restrictive covenants in residential real estate are contracts. As such, covenants must be construed as contracts whereby the court affords language its plan and ordinary meaning.³ However, restrictive covenants are also historically disfavored, emanating

³ See generally *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d (1998).

“from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land.” *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987) (additional citation omitted).

Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication. [additional citations omitted]. The rule of strict construction governing restrictive covenants does not preclude their enforcement. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant.[additional citations omitted]. [A] restrictive covenant is a voluntary contract between the parties. Courts shall enforce such covenants unless they are indefinite or **contravene public policy**. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (S.C. 1987) (emphasis added).

In this case, Respondents do not challenge the covenants. Similarly, Respondents have never argued that the applicable covenants, as written, violate public policy. Respondents argue, and the Trial Court found, that the interpretation of the subject covenants urged by Appellants- if adopted- would violate public policy. (R. p. 6, Order at p. 6).⁴ If Appellants prevail, a property owner subject to similar covenants would be compelled to build a residence merely to enjoy the same rights as his neighbors subject to the same covenants. If Appellants prevail, an unbuildable lot in a development restricted to “residential purposes” would be an unusable lot. Furthermore, should the Court adopt Appellants’ position, a potential owner of property subject to similar restrictive covenants would be compelled to make immediate plans to build- or

⁴ As the Trial Court explained, Appellants (Plaintiffs below) took the position that “any use of an of any empty subdivision lot other than maintenance would constitute an impermissible use under the restrictive covenants.” (R. ____, Order at p. 4). Appellants specifically argued that mere walking across property, picnics, or even birdwatching would constitute a hobby or recreation and thus- in their view- violate the residential purposes restriction of the Covenants.

face exclusion from his own property based on Appellants' view of "residential purposes." That view, and not the language of the covenants, would lead to absurd results in contravention of public policy.

In support of their position, Appellants hardly argue to the contrary. Instead, Appellants provide multiple citations in support of the undisputed proposition that residential purposes exclude commercial use.⁵ Similarly, single-family use clearly prohibits multi-family usage.⁶ The overriding issue is not contractual interpretation, ambiguity, or disputed facts. Rather, this case involves attempts to impose unusual interpretations of common covenants beyond the bounds of plain language, common sense, or precedent. As this Court has previously explained,

Common sense and good faith are the leading touchstones of the construction of a contract[,] and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair[,] and just, the latter construction will prevail.
Floyd v. Dross, 442 S.C. 79, 897 S.E.2d 191, 198 (Ct.App. 2024) (additional citations omitted).

In this case, the dispute between the parties arose when Appellants sought to impose requirements beyond the plain language of restrictive covenants and application of terms afforded their ordinary usage. Under the circumstances, the Trial Court correctly held that such an interpretation would violate public policy.

Respondents do not challenge application of covenants generally or the specific

⁵ See *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (finding commercial grazing lease beyond residential use); *Maxwell v. Smith*, 228 S.C. 182, 89 S.E.2d (1955) (holding that construction of commercial structures to support off-site business violated residential use restrictions even where commercial operation ceased but commercial accoutrements remained).

⁶ See *Easterly v. Hall*, 256 S.C. 336, 182 S.E.2d 671 (1971) (enforcing covenants restricting property to single-family use to prohibit completion of duplex if occupied by more than one family).

covenants in this case. Rather, Respondents agree with the Trial Court: the extreme and unwarranted interpretation urged by Appellants would lead to enforcement that contravenes public policy in conflict with precedent.

2. The Trial Court did Not err in Declining to make Unnecessary Findings in support its Holding.

The Order below is well-supported. Appellants allege error by identifying proposed findings the Trial Court did not make. Each is without merit.

a. The Trial Court did Not Need to Reach the Question of Ambiguity

The relevant portions of applicable covenants in this case contain common provisions related to the residential character of the development and prohibiting typical nuisances. As an initial matter, Respondents would note they have not challenged the covenants as ambiguous. Respondents have simply, and consistently, argued that their conduct does not violate any provision of the restrictive covenants.

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.'..." *Cnty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831 (Ct. App. 2017). "Thus, 'a restriction on the use of the property must be created in express terms or by plain and *unmistakable* implication.'" *Id.* (emphasis in original) (*quoting Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). In construing such contractual language our courts seek to ascertain and "give effect to the intent of the parties as determined **from the whole document**." *Wall*, 421 S.C. at 582.

In this case, Appellants base their entire case on the single sentence limiting use of lots within the development to "residential purposes." (R. p. 176, Restrictive Covenants). The remainder of the same paragraph within the covenants more fully describes the nature

of permissible residences. Subsequent sections of the covenants prohibit nuisances, including- but not limited to- commercial usage. These restrictions, as a whole, protect the general nature of the development to ensure fulfillment of the ostensible purpose of planned, uniform development.

Appellants urge that the covenants are unambiguous, and that Respondents are in violation. Ironically, to the extent of any ambiguity, such confusion is created and exacerbated by Appellants. In arguing that “residential purposes” and related language does more than restrict commercial activities, Appellants seek to have the Court amend the covenants and add requirements for property owners to build residences. Such a requirement does not appear in the covenants. In order to reach such a conclusion, the trial court would have been required to find a latent ambiguity, and to then conclude that Appellant’s preferred interpretation prevailed: to wit, that any “residential purpose” requires erection of a residence.

In *Kinard v. Richardson*, this Court confronted commercial use of property restricted to residential purposes. 407 S.C. 247, 754 S.E.2d 888 (Ct.App. 2014). In that case, applicable covenants restricted uses to residential purposes but specifically allowed horses. *Id.* One property owner leased a portion of their property to an equestrian center for grazing horses, which the Court found violated the covenants. The Court concluded “[i]n sum, the Restrictive Covenants, deeds, and plats clearly and unambiguously show Developers’ intent to maintain a residential neighborhood and to exclude commercial activities from the neighborhood.” *Id.* at 895.⁷

⁷ The same Court explained, specific to the language of the covenants at issue, that “‘Single-family residential use’ involves the act of residing in a single-family dwelling...” *Kinard*, 754 S.E.2d 888 at 898.

Neither the Trial Court nor this Court need reach the question of ambiguity. The Court should simply discount Appellants' selective reading and attempts to introduce additional requirements, efforts which only serve to create the ambiguity they eschew.

b. The Trial Court Did Not Need to Define "Residential purposes"

The covenants at issue in this case do not specifically define residential purposes. The Trial Court did not define or specifically delineate examples of residential purposes. However, as Appellants urged an interpretation that would lead to an absurd result, the Trial Court was not required to reach the issue. Seeking to remedy this perceived error, Appellants argue that "residential" and "recreational" are separate and distinct. As a matter of dictionary definitions, Appellants may correct as the words are distinct. But any perceived advantage founded on mere dictionary definitions collapses as soon as the Court considers that recreational purposes and recreational purposes overlap. Otherwise, the Court would face two (2) unsavory choices: judicial amendment to add terms to the covenants or prohibiting property owners from recreation- again an absurd result.

Appellants offer no authority beyond dictionary definitions that use of property for recreation, without building a residence, violates use limitations confined to residential purposes. Indeed, a variety of searches of South Carolina authorities yield no cases directly on point. Appellants merely assume that if they classify behaviors as solely recreational, they have created a category of use outside the scope of the covenants.

Expanding to other states for persuasive authority, multiple jurisdictions have

However, while indicating residential purposes involved residing, the Court never found that failure to build a residence remove otherwise permissible uses from the scope of residential purposes. Rather, the Court construed the restrictions as a whole to discern the unambiguous intent of the developer.

addressed the interplay between residential and recreational use. North Carolina courts have allowed municipal parking lots, in aid of recreational usage, on property restricted to residential use. *White v. Town of Emerald Isle*, 346 S.E.2d 176, 82 (N.C. App. 1986).⁸ The same court found that other jurisdictions had reached similar results. *Id.*⁹

Other jurisdictions have also addressed use of property restricted to residential purposes for constructing access to adjoining parcels. The Maryland Court of Appeals surveyed treatment of this issue from multiple jurisdictions, ultimately finding that the access road at issue in the case before that Court violated the covenants. However, that holding rested on the conclusion that the use at issue altered the planned character of the development which otherwise had only a single road. *Namleb Corp. v. Garrett*, 814 A.2d 585, 149 Md. App. 163 (Md. App. 2002). However, the same Court also found multiple examples where similar access roads were permitted residential uses based on the specific factual scenarios referenced. *Id.*¹⁰

In a particularly extreme case, Indiana confronted alleged violations of covenants restricting property to residential use where a homeowner constructed a full baseball practice area on an adjoining lot. *Bagko Development Co. v. Damitz*, 640 N.E.2d 67 (Ind. App. 1994). In that case, the homeowner installed substantial improvements and allowed a baseball team to use the constructed improvements for team practices consistent with

⁸ To be candid, the covenants at issue in that case, while limiting property to residential purposes, also specifically allowed multi-family use.

⁹ Citing cases in both Washington and New York in accord with its decision.

¹⁰ Finding that Arkansas reached the opposite result where the subject access road only served owners in the same subdivision; Nebraska permitted an access road from a restricted parcel to an unrestricted parcel, where the restrictions contained limitations to residential use; New York allowed public construction; North Carolina permitted a pathway over a restricted lot to an unrestricted lot with a recreational home. [internal citations omitted].

covenants which prohibited uses other than residential. *Id.* As that Court explained, the homeowners did not lease their property or operate a business. Where the applicable covenants did not define the term "residential purposes", the court explained that "[r]esidential use is distinguishable from commercial or business use" and serves to "merely limit the use of the property to living purposes as distinguished from business or commercial purposes." *Id.* [additional citations omitted].

In the closest parallel to the facts of the instant case, New Hampshire Courts confronted allegations that use of an unimproved lot to access a dock, and thereafter a private island, violated residential purpose covenant restrictions. *Voedisch v. Town of Wolfeboro* 136 N.H. 91, 612 A.2d 902, 905 (1992).¹¹ In that case, other property owners alleged that use of an otherwise vacant lot solely for dock access violated residential use restrictions. *Id.* The court disagreed, explaining "[g]enerally covenants restricting the use of property to 'residential purposes' merely limit the use of the property to living purposes as distinguished from business or commercial purposes. [additional citation omitted]. The trial court found that the **use of the dock is a usual residential use, regardless of whether there is a residence on the property...**" *Id.* (emphasis added). The appellate court agreed and affirmed.

In this case, the Trial Court did not specifically define residential purposes. To the extent Appellants claim error, they have failed to identify any authority supporting similar application of their distinction between recreational and residential use. Moreover, the uses Appellants attack are the same uses permitted by other owners in the same

¹¹ While not at issue in the instant case, *Voedisch* also involved allegations of improperly dividing the subject lot and violating local land use ordinances.

development. Persuasive authority from other jurisdictions supports the finding that use of property beyond constructing, or living in, a residence is within the gambit of residential purposes.

3. The Trial Court Correctly Considered Respondents' Actual Use of His Property

The Trial Court found that Appellants' position would lead to an absurd result, in violation of public policy, as they sought to restrict walking across a vacant lot. (R. p. 1, Order). It is undisputed that Respondents obtained dock permits, and secured utilities services, by virtue of ownership of lots in Providence Point. However, the actual use of Respondents' property, as opposed to adjoining property owned by the U.S. Army Corp of Engineers, involved parking and walking across the subject lots. The Trial Court correctly considered actual use and found such use consistent with residential purposes.

Appellants position here, that the Court did not evaluate actual usage and referenced other hypothetical uses testified to by Appellants, does not change the result.¹² First, such a position is inconsistent with the record and evidence below. Second, Appellants contradict their own argument in favor of an extreme interpretation of residential purposes restrictions.

The Trial Court found that Appellants sought to restrict merely walking across vacant lots. The record supports that finding. Appellant Kenneth Hoffman, in his deposition testimony, indicated that merely walking across the subject property would be

¹² Appellants' Brief at p. 14 (referencing the additional usages, including picnicking and birdwatching, which Appellants indicated would also be violations of the covenants). Similarly, Appellants argue that use of property for investment purposes or accessing property for maintenance, is not a violation as it is not a "use." *Id.*

outside the scope of permissible usage.¹³ Similarly, Mr. Hoffman opined that merely watching birds, at a vacant lot, would exceed the covenanted restriction to residential purposes. *Id.* At the hearing below, Appellants further argued that a mere picnic at an otherwise vacant lot would constitute violation of the covenants.¹⁴ Having already admitted that docks adjoining Respondents' property were on US Army Corp of Engineers property, and admitting that running electricity was permissible, Appellants are left with their argument that merely walking across the property is an impermissible use.¹⁵ While mere walking is the only usage left under attack, Appellants themselves were not consistent in their view on even this point.¹⁶

Perhaps more telling, Appellants own argument undercuts their view that residential purposes require owning a residence on the subject property. First, Appellants graciously allow that performing maintenance on a vacant lot to prevent a nuisance is permissible, premised on such conduct not being a "use" of the property.¹⁷ It is beyond dispute that property maintenance is, and ought to be, associated with ownership of residential property. However, Appellants' position here belies the main current of their argument that ordinary usage of property becomes impermissible if not associated with residing on the property.¹⁸ Similarly, Appellants are willing to allow ownership of property for investment purposes, which they also define outside the scope of "use."

13 R. p. 4, Order at p. 4 (quoting Deposition of Kenneth Hoffman pp. 26-27).

14 See Order at p. 4, R. p. 4.

15 R. p. 4 (Deposition of Kenneth Hoffman p. 22).

16 R. p. 177 (Deposition of Terrence Whitlock p. 14) (indicating of Respondent Greg Saad ... "I guess he—he would be able to walk on the property.").

17 Appellants' Brief at p. 14.

18 As indicated in the record, Appellants attack use of the property by Respondents that is typical of the development and engaged in by all other owners, resting their argument solely on the lack of a residence on Respondents' property.

However, it defies logic to suggest that a property owner holding property for investment purposes is not making use of his property. Investment is both the purpose and a use, just as every investor makes use of their property in hopes of such use yielding a return. Examples proffered by Appellants as to uses they do not attack merely highlight an inescapable conclusion: the line drawn by Appellants between permissible and impermissible usage comes at the tip of their pen of personal preferences rather than any legitimate distinction arising from the language of the covenants.

The Trial Court took Appellants at their- occasionally inconsistent- word and evaluated their request to apply the subject covenants to prohibit walking across an otherwise vacant lot. The Trial Court found that interpretation would lead to an absurd result and Appellants have done nothing to undermine that conclusion.

CONCLUSION

This case concerns restrictive covenants for residential development that are undisputedly consistent with restrictions in similar developments. The peculiarly absurd result sought by Appellants does not concern any unusual language in the covenants themselves but rather the interpretation urged by Appellants. The applicable covenants, undeniably a contract, require this Court- like the trial court- to ascertain and give effect to intent of the contracting parties as expressed in the written record of their intent. Appellants seek something more. Appellants seek to require building, and occupying, a residence as a condition of property use consistent with other owners. However strongly Appellants may believe in enforcing such unwritten rules, their faithful and fateful efforts to enforce contrived requirements are beyond the proper scope of the court's review.

There is no error in the Order below and no grounds contained in the record on appeal to depart from the well-reasoned findings of the Trial Court. The Order below should be AFFIRMED.

Respectfully submitted,



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Anderson, South Carolina
November 18, 2024