

THE STATE OF SOUTH CAROLINA  
IN THE Supreme COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 07-CP-40-8107  
Court of Appeals Opinion No. 2013-UP-237

**RECEIVED**

SEP 18 2013

**S.C. Supreme Court**

**On Petition for a Writ of Certiorari  
to the South Carolina Court of Appeals**

Place on the Greene Homeowners Assoc., Inc., . . . Petitioner,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,  
Eva Nell Berry, and Jeffrey O. Kenney, . . . . . Respondents.

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**PETITION FOR A WRIT OF CERTIORARI**

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF SOUTH CAROLINA:

Place on the Greene Homeowners Association, Inc., respectfully petitions the Court to issue a writ of certiorari by which to review the decision of the South Carolina Court of Appeals in *Place on the Greene Homeowners Assoc., Inc. v. W.G.R.Q., LLC, Easy Coin Laundry, Inc., Eva Nell Berry, and Jeffrey O. Kenney*, Op. No. 2013-UP-237.

**QUESTION PRESENTED**

**Did the Court of Appeals err in rejecting the circuit court's finding that laches does not bar enforcement of the restrictive covenant against bars and restaurants?**

**STATEMENT OF THE CASE**

These four consolidated actions were commenced with the filing on December 4, 2007, of complaints by Place on the Greene Homeowners Assoc., Inc., the petitioner herein, against, respectively, W.G.R.Q., LLC, Easy Coin Laundry, Inc., Eva Nell Berry, and

Jeffrey O. Kenney, the respondents herein. The petitioner alleged that the respondents were owners of a total of seven condominium units of Place on the Greene, a condominium regime located on Greene Street in Columbia. The petitioner further alleged that businesses were being conducted in these units in violation of a restrictive covenant found in the Master Deed, prohibiting the operation of restaurants, bars, and other businesses dependent upon a volume of walk-in patrons. All four respondents admitted the operation of prohibited businesses but asserted the defenses of laches, waiver, and estoppel.

The cases were consolidated and tried before the Honorable Allison R. Lee, Presiding Judge of the Fifth Judicial Circuit, on April 9, 2009. By order dated July 1, 2011 and entered on July 6, 2011, Judge Lee rejected the defenses and enjoined further operation.

The Court of Appeals reversed the order of Judge Lee, holding that the defense of laches applied. The Court did not identify the standard of review which it applied, and did not rule upon the validity of the non-waiver provision found in the Master Deed.

After the Court denied the Association's petition for rehearing, this petition for a writ of certiorari followed.

## **STATEMENT OF FACTS**

Place on the Greene is a condominium regime comprised of seventy-one units in the five-storey building at 2002 Greene Street in Columbia. Sixty-three units are one- and two-bedroom residential apartments. Seven of these are located on the southern half of the street-level floor. On the northern half of street-level, facing Greene Street, are eight commercial units, seven of which are at issue in this action. At time of trial in 2009, three of these units were leased to two restaurants, Pita Pit and Blue Cactus; three were occupied by a bar, Tavern on the Greene; and one was leased to a convenience store, the Tobacco Shop.

Place on the Greene was developed in 1983–85 by Greene Street Partnership, a

limited partnership of Security Federal Savings & Loan Association and two individuals, Beau Powell and Craig Stoneburner. When the Master Deed for the condominium regime was written, the developer included a prohibition against the operation of bars or restaurants in the commercial units, as well as any “retail shop that relies on a volume of walk-in patrons . . . .” [Master Deed, Art. X § 3, p. 13, R. 264.] The intention was to limit the use of the commercial units to professional offices and the like. [R. 141.]

In November of 1985 the developer deeded six of the eight commercial units to its limited partners — four units to Mr. Powell and two units to Mr. Stoneburner. Powell and Stoneburner persistently tried to remove the restriction but never succeeded. [R. 90; 151; 158; 161–62.] Instead, they simply ignored the restriction. In 1988 Mr. Stoneburner rented his Unit A to a 24-hour laundromat [R. 203] and his Unit B to a shoe store. [R. 205.] The board of directors of the homeowners’ association — dominated by board member Powell — took no action. By 1993, a jeweler and a “tan spa” occupied two of the units (not identified in the evidence). [R. 92.] By 1995, Bo-D’s restaurant occupied one of the units. [R. 93.] In 1994 Mr. Powell rented his Units F and G to a restaurant, the Blue Cactus. [R. 193.] Several years earlier, Powell had rented Unit F to Sub Pub restaurant and bar. [R. 120–21.] In 1999, the shoe store in Unit B was succeeded by a new bar, Tavern on the Greene, which also rented Units C and D. Thus, Tavern on the Greene occupied three of the eight commercial units. The laundromat in Unit A closed in 2000 and was replaced by a restaurant, Pita Pit. Powell sold his commercial units in 2002 to a new owner, who continued the lease of Units G and H to the Blue Cactus restaurant, and rented Unit F to a convenience store in 2009. [R. 250.]

Mr. Powell knew that it is the duty of the board of directors of the homeowners’ association — of which he was the dominant member for ten years — to enforce those covenants. He was able to intimidate the board into inaction. [R. 167.] He controlled and dominated the board. [R. 167; 178.] He was louder and stronger than the other board members. [R. 181.] He was knowledgeable and authoritative. [R. 181.] Most of the other

board members trusted him [R. 175] or at least wanted to appease him. [R. 190–91.] He assured them that he was within his rights to rent to the Blue Cactus and that restaurants were allowed. [R. 171; 175.] They believed him. [R. 189; 178.] The only board member who opposed him was a lone voice. [R. 178–79.] Homeowners are generally reluctant to serve on such boards and often are naive about their duties and about the legalities of condominium operation [R. 175], rendering them especially vulnerable to lingering developer influence. This was clearly true of the board members who allowed Powell and Stoneburner to violate the covenants as they did.

Each of the present owners of the eight commercial units took ownership subject to the restrictions found in the Master Deed.<sup>1</sup> Three of the present owners acknowledged *actual* notice. The present owner of Unit A was given a copy of the Master Deed when he bought from Stoneburner in 1990. [R. 212.] He continued to operate his laundromat until 2000, when he rented Unit A to Pita Pit restaurant in violation of the restriction. The present owner of two of the three units leased to Tavern on the Greene bar was advised at closing by her attorney of the restriction against bars, but chose to take the risk. [R. 235.] The present owner of Units F, G, and H rented Unit F to a convenience store in

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<sup>1</sup> Every owner has notice of the Master Deed, of course. More than that, deeds in the chain of title of every unit involved in this suit contain the following express agreement:

The provisions of the Master Deed . . . shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Unit, his heirs and assigns, . . . as though such provisions were recited and stipulated at length herein. By subscription to and acceptance of this Indenture Deed, Grantee acquiesces in the provisions of the Master Deed . . . .

Pl. Ex. 3, ¶ 4, R. 272, deed of Unit A dated 11/8/85 from the developer to Stoneburner; Pl. Ex. 4, ¶ 4, R. 283, deed of Unit B dated 11/8/85 from the developer to Stoneburner; Pl. Ex. 4, ¶ 4, R. 280, deed of Unit B dated 2/24/04 from Stoneburner to EHM Investments, LLC (slight, immaterial variation in language of last sentence); Pl. Ex. 5, ¶ 4, R. 305, deed of Units C and D dated 10/29/84 from the developer to Bain; Pl. Ex. 6, deed of Units F, G, and H from the developer to Powell dated 11/8/85 (apparently inadvertently omitted from Record on Appeal).

violation of the restrictions **after** this suit was brought to enjoin his violation with respect to the Blue Cactus restaurant in Units G and H.

The bar in Units B, C, and D is open until 2 o'clock in the morning on Saturdays and Sundays and 3 o'clock on the other five days of the week. [R. 217.] Pita Pit restaurant is open until 3 a.m. [R. 112.] Crowds congregate outside the bar until it closes. [R. 120.] The noise from their commotion, arguments, confrontations, and occasional fights [R. 120] can be heard throughout the building, where the residents of sixty-three apartments are trying to sleep. The residents can hear "every word they say all the way up to the fifth floor." [R. 120.] It gets louder as the night passes. "[W]hen . . . people get drunker and drunker, you're going to have — you know, the noise escalates." [R. 120.] Frequent complaints to the police have little effect. [R. 121; 124; 226, lines 2–8.]

The vagrants who inhabit Five Points are adept at slipping into the building when Pita Pit employees habitually leave the back door unlocked and ajar [R. 117]; or when the bar's employees fail to lock the door behind them when they leave the building to deposit garbage in the dumpster. [R. 116; 118–19; 125–26; 173; 207; 216.]

The seventy-one apartments of Place on the Greene have only one dumpster, insufficient in capacity for the high volume of garbage generated by the restaurants and the bar. [R. 119.] The restaurants and bar deposit waste into the dumpster far out of proportion to their number of units, making the dumpster area filthy. They roll their garbage bins through the residential hallways at any hour to reach the dumpster. Vagrants rummage through the dumpster looking especially for Pita Pit food — their favorite. "[They] leave a complete mess back there." [R. 119.] "[L]eaving it smeared all around the garbage area itself."

The roach problem in the building is inevitably magnified by the restaurants and their garbage. [R. 118.]

The condominium regime pays a single water bill for all seventy-one apartments. The residents thereby subsidize the restaurants and bar in their disproportionate use of

water. [R. 122–23.]

All the problems generated by the restaurants and the bar — constant breaches of building security, noise and loud music every night until well after midnight, crowds and commotions on the sidewalk outside, excessive garbage, roaches — are the subject of constant complaints to the Association by the residents. [R. 71; 79.]

The owners of the commercial units testified that the value of their property would drop if the provisions of the Master Deed were enforced. They did not attempt to quantify the anticipated decrease in value with expert testimony or otherwise. On the other side of that coin, there is likewise no evidence of the extent to which the value of the sixty-three residential units at Place on the Greene has been negatively impacted by the disregard for the clear restrictions which bind this condominium regime. One needs no expert evidence to conclude that the impact must have been substantial.

The Master Deed contains the following non-waiver clause:

No waiver by Association. The failure of Association or of the owner of a unit to enforce any right, provision, covenant or condition which may be granted by this Master Deed . . . shall not constitute a waiver of the right of the Association or of the owner of a unit to enforce such right, provision, covenant or condition in the future.

On these facts the circuit court enjoined further violation of the restrictive covenants.

The Court of Appeals reversed. The Court failed to identify the standard of review — abuse of discretion — and failed to rule upon the validity of the non-waiver provision in the Master Deed.

## ARGUMENT

### **The Court of Appeals erred in reversing the circuit court's rejection of the defense of laches.**

The Court of Appeals could not have reached the decision which it did if it had identified and applied the correct standard of review — abuse of discretion. Having effectively tried the case *de novo*, the Court of Appeals failed to address the validity and effect of the non-waiver provision of the Master Deed — a matter of first impression in South Carolina. The Court failed to acknowledge the statutory public policy of the State demanding strict enforcement of condominium restrictive covenants. The Court gave weight to the fact that those violating the restriction would suffer financial loss in the future if the restriction were enforced, when of course **every** enforcement of such a restriction will result in future loss of profit to the violator. The Court found that the covenant violators would not have “entered into obligations” if the restriction had been enforced earlier, where the evidence on that score, if any, was skimpy at best and was rejected by the circuit court. The Court failed to acknowledge the fact that a fresh violation of the restriction occurs each day that these bars and restaurants operate, thereby distinguishing this case from those where the violation consisted of a single event which was allowed to happen without objection. None of the three cases relied upon by the Court of Appeals involved an ongoing violation of condominium restrictive covenants, and in all three the appellate court correctly applied the abuse-of-discretion standard of review. The Court of Appeals penalized the homeowners’ board for its “general lack of initiative,” failing to acknowledge that the restriction at issue can be enforced at any moment by a new purchaser of any of the residential units, who could not possibly be found guilty of laches.

The Court of Appeals decision is wrong for all these reasons, but one in particular makes this decision worthy of further review, your petitioner submits. The Court of Appeals failed to address a matter of first impression in South Carolina — the validity and effect of a non-waiver clause in condominium restrictive covenants. The Supreme Court will write

on a blank slate if it reviews this decision. So far as your petitioner knows, such non-waiver provisions in condominium master deeds have been uniformly upheld in other jurisdictions, foreclosing the defense of laches in cases of ongoing violations.

- A. *The non-waiver provision of the Master Deed is unambiguous. It coincides with our statutory public policy. Accordingly, it applies here.*

The Master Deed provides that a failure by the Association to enforce its provisions shall not constitute a waiver of the right to enforce those provisions in the future.

No waiver by Association. The failure of Association or of the owner of a unit to enforce any right, provision, covenant or condition which may be granted by this Master Deed or other above-mentioned documents shall not constitute a waiver of the right of the Association or of the owner of a unit to enforce such right, provision, covenant or condition in the future.

Master Deed, Art. XIX § 4, p. 23, R. 265. The Court of Appeals did not acknowledge the existence of the non-waiver provision, which the circuit court had deemed conclusive.<sup>2</sup>

Non-waiver provisions of this kind have been applied as written in other jurisdictions. To do otherwise would be to re-write the contract which binds these owners. Non-waiver provisions of this nature have been accepted and applied in cases where a condominium homeowners' association delays in seeking relief from covenant violations. A leading case is *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (Ct. App. 2004). The court observed:

Unambiguous provisions in restrictive covenants will generally be enforced according to their terms. . . . The non-waiver provision, by its plain language, is intended to prevent a waiver based on prior inaction in enforcing the Restrictions. To hold otherwise would render the non-waiver provision meaningless and violate the expressed intention of the contract among the property owners.

87 P.3d at 86. *Accord: College Book Centers, Inc. v. Carefree Foothills Homeowners*

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<sup>2</sup> None of the respondents challenged the circuit court's detailed rejection of their defenses by post-judgment motion. In particular, the respondents did not challenge the finding that the non-waiver clause is valid and applicable. *See: AJG Holdings LLC v. Dunn*, 392 S.C. 160, 166, 708 S.E.2d 218, 222 (Ct. App. 2011); *Cullen v. McNeal*, 390 S.C. 470, 492, 702 S.E.2d 378, 389 (Ct. App. 2010); *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011).

Ass'n, 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010).

The Indiana court in *Johnson v. Dawson*, 856 N.E.2d 769 (Ind. App. 2006), observed that unambiguous non-waiver clauses in restrictive covenants are routinely upheld:

[E]nforcement of the nonwaiver clause in the multiparty context allows prospective purchasers of property to rely on recorded restrictions and covenants. See *Simms v. Lakewood Village Property Owners Ass'n*, 895 S.W.2d 779,786-87 (Tex. App. 1995). Again, restrictive covenants are permissible under Indiana law so long as they are unambiguous and their enforcement is not adverse to public policy. . . . [This clause] is an unambiguous nonwaiver clause, and its enforcement is not adverse to public policy. As such, [the defendants] are barred from raising the defense of acquiescence.

856 N.E.2d at 775. Accord: *Speedway Woods Community Ass'n, Inc. v. McVey*, 925 N.E.2d 6 (Ind. App. 2910); *Lebamoff v. Twin Eagles Neighborhood Ass'n, Inc.*, 909 N.E.2d 521 (Ind. App. 2009); *Drener v. Duitz*, 883 N.E.2d 1194 (Ind. App. 2008).

The Arizona court's characterization of the Master Deed as a *contract* among the property owners is reminiscent of the language found in deeds in the chain of title of all seven units involved in this action.

The provisions of the Master Deed . . . shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Unit, his heirs and assigns, . . . as though such provisions were recited and stipulated at length herein. By subscription to and acceptance of this Indenture Deed, Grantee acquiesces in the provisions of the Master Deed . . . .

See footnote 1, above. "Restrictive covenants upon real estate are contractual in nature and bind the parties thereto just like any other contract." *Hynes Family Trust v. Spitz*, 384 S.C. 625, 682 S.E.2d 831, 833 (Ct. App. 2009).<sup>3</sup>

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<sup>3</sup> Accord: *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998); *RV Resort and Yacht Club Owners Assoc. v. BillyBob's Marina, Inc.*, 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010); *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) (restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy); *Houck v. Rivers*, 316 S.C. 414, 450 S.E.2d 106 (Ct. App. 1994) (same); *Seabrook Island* (continued...)

The validity of such non-waiver clauses is reinforced by statute. It is the statutory public policy of this State that condominium covenant restrictions be *strictly complied with*.

Each co-owner shall comply strictly . . . with the covenants, conditions and restrictions set forth in the Master Deed . . . . Failure to comply with any of the same shall be grounds for . . . injunctive relief . . . .

S.C. Code Ann. § 27-31-170. As was the case in *Kneale v. Bonds*, 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994):

Both the [condominium] By-Laws and the Horizontal Property Act provide that the Master Deed should be strictly enforced.

*Id.* at 267, 452 S.E.2d at 842.<sup>4</sup>

Condominium communities cannot function harmoniously unless their restrictive covenants are honored, as this case shows. The non-waiver provision of the Master Deed and the statutory admonition to enforce restrictive covenants both serve this policy.

*B. The Court of Appeals inserted its judgment in place of that of the circuit court, failing to apply the correct standard of review. There was no abuse of discretion by circuit court.*

This is not a case of a structure built in violation of a restriction, with no further violations. This is not a case where relief is denied to a party who watches silently while a single violative event unfolds. This is a case of ongoing, fresh violations of the Master Deed and of State law each day that these bars and restaurants operate. Each day brings a fresh violation of the restrictive covenants with fresh deleterious consequences to the condominium community. This is a case of progressively worsening, intentional, ongoing violations of the plain prohibitions of the covenants which govern conduct in this

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<sup>3</sup>(...continued)

*Property Owners Assoc. v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) (“Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.”) (citing *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985)).

<sup>4</sup> The “strict enforcement” by-law found in *Kneale v. Bonds* is materially identical to Art. XIX, § 1 of the Master Deed of Place on the Greene. PI. Ex. 1, p. 22, R. 265.

community. Weighing the equities, the circuit court enjoined further violation.

The Court of Appeals failed to identify the scope of its review of the circuit court's decision. The Court could not have reached the decision which it did if the Court had applied the proper standard — abuse of discretion. Having failed to identify its limited scope of review, the Court then substituted its judgment for that of the circuit court on the question of laches. The issue before the Court of Appeals was not whether that Court would sustain the defense if the Court were to try the case *de novo*. The issue was whether the circuit court abused its discretion in rejecting the defense, an entirely different question.

The determination of whether laches has been established is largely within the sound discretion of the trial court, not the appellate court. *Emery v. Smith*, 361 S.C. 207 603 S.E.2d 598, 602 (Ct. App. 2004), *citing Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001), and *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993); *Grossman v. Grossman*, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963).

When [circuit court] declines to make a finding of laches, that decision will not be disturbed absent an abuse of discretion. *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001); *Premium Inv. Corp. v. Green*, 283 S.C. 464, 473, 324 S.E.2d 72, 78 (Ct. App. 1984).

*King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 448, 673 S.E.2d 448 (2009). *Accord: Mazloom v. Mazloom*, 382 S.C. 307, 675 S.E.2d 746 (Ct. App. 2009); *Siau v. Kassel*, 369 S.C. 631, 632 S.E.2d 888 (Ct. App. 2006).

An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

*State v. McClinton*, 369 S.C. 167, 169, 631 S.E.2d 895, 896 (2006). *Accord: Appeal of*

*Brown*, 288 S.C. 530, 535, 343 S.E.2d 649, 652 (Ct. App.1986) (lower courts' finding of no laches affirmed because not "manifestly erroneous"). See: *Cedar Cove Homeowners Assoc., Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284, 286 (Ct. App. 2006) ("The resolution of this appeal, however, turns not on a credibility assessment, but on the application of largely undisputed facts to unambiguous restrictive covenants.").

C. *The violators gambled that the restriction would never be enforced. The loss of that bet does not result in prejudice in the sense of the law of laches. Even if it were otherwise, there is no satisfactory evidence of loss if the restriction is enforced.*

The Association's failure to sue Powell and Stoneburner while they owned the units is not counted in the calculus of laches. As the Court stated in *Maxwell v. Smith*, 228 S.C. 182, 195, 89 S.E.2d 280, 286 (1955):

[The developer], as the author of the covenant he was violating, should not be heard to insist that immediate resort to the courts is prerequisite to the enforcement of [the covenant].

The Court of Appeals disregarded this just precept and figured the period of delay from the first violation by Mr. Stoneburner. Mr. Powell continued his violations until 2002, when he sold. This action was brought in 2007. See: *Wall v. Huegenin*, 305 S.C. 100, 102, 406 S.E.2d 347, 349 (1991) ("A mere delay in time does not constitute laches. Rather, the determination must be made in light of the specific facts of each case, taking into consideration whether the other party has been prejudiced by the delay.") (holding the failure for thirteen years to exercise an option to purchase land was not unreasonable and laches did not apply); *Grossman v. Grossman*, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963) (delay of over seven years was reasonable where there was no prejudice to the defendant).

"Delay alone in the assertion of a right, without injury to the adversary, does not constitute laches." *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App.1993). As to prejudice, the Court of Appeals found that the respondents "entered into obligations they would not have otherwise if the HOA had timely enforced the restrictive

covenants” but failed to identify any such obligations. There is no testimony or other evidence that the respondents entered into any obligations of any kind. The only conduct which could possibly constitute detrimental reliance was the respondents’ purchase of their respective units in the first place. None of the respondents testified that they would not have purchased their units if the covenants had been enforced earlier.

There was no expert or lay testimony that the respondents or any of them paid more than fair market value for their units. Fair market value is always based upon the assumption that any and all applicable restrictions will be enforced in the future. In particular, the respondent W.G.R.Q. purchased its three units as a small part of a purchase of numerous pieces of property for an undifferentiated lump sum. No value was assigned to the purchase price of the three units at issue.

The only detriment claimed by the respondent Kenney was that he would suffer financial loss if his bar were to be closed. This is simply another way of saying that future violation of the restriction is expected to be as profitable as past violation. This does not constitute detrimental reliance upon past failure to enforce the restriction.

The respondent Easy Coin claimed that it would lose a “verbal contract” for the sale of its unit if the restriction were enforced. This respondent failed to present any evidence that the “verbal contract” sales price exceeded fair market value, or even the amount of the alleged sales price.

The respondents made no effort to demonstrate the nature or extent of any financial loss they might incur if they are required to abide by the covenants. See: *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 393, 680 S.E.2d 289, 291 (2009) (“In our view, it would be inequitable to consider [the violator’s] financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property.”). Three of the four respondents own six of the seven commercial units in question. They are not the lessees who operate the bar, the restaurants, or the convenience store in those

units.<sup>5</sup> The respondents did not claim to have made improvements to their units in reliance upon non-enforcement of the covenants, or that such improvements — if any — were not amortized long ago or could not be salvaged. With a welcome amendment to the Master Deed, these units could be converted to residential use, the same as all the others.

Since these actions were brought in 2007, the respondents have continued for six years to profit from the conduct of prohibited businesses in their units. Respondent Easy Coin renewed the expiring lease of the restaurant in Unit A three years after this action began. Respondent W.G.R.Q. leased Unit F to a convenience store long **after** this action was commenced. So far from being the victims of detrimental reliance, the respondents have profited unfairly from the unlawful operation of businesses in their units for the entire time that the covenants were not enforced, and for another six years after this action was brought.

The defense of laches would be unavailable to the respondents if the party seeking injunctive relief were a new owner of any one of the sixty-three residential units. Any of these owners could seek injunctive relief, with or without the participation of the Homeowners' Association. Section 27-31-170 authorizes an action for injunctive relief “. . . in a proper case, by an aggrieved co-owner.” The Master Deed confers the same right. Pl. Ex. 1, Art. XIX, § 1, p. 22, R. 265. Now that the Master Deed restriction has become generally known in the community of owners, it is inevitable that one or probably many new apartment owners would seek injunctive relief themselves if this action by the Association were deemed to be barred. In all likelihood, reversal of circuit court's judgment will only postpone, not prevent, enforcement of the restriction. Neither judicial economy nor the parties to this controversy would be well-served by such a course.

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<sup>5</sup> Respondent Kenney owns one of the three units occupied by the bar which he runs.

## CONCLUSION

The respondents gambled that the court system would not hold them to their contracts and would not interfere with their wilful, continuing violations. Since the court of common pleas did not abuse its discretion in putting a stop to these continuing violations, the judgment of that court should be reinstated.

For these reasons the petitioner asks the Court to grant the writ.

Respectfully submitted,

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CERTIFICATION

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The undersigned certifies that a petition for rehearing was made and denied by the Court of Appeals on August 22, 2013.

  
James B. Richardson, Jr.  
Attorney for Petitioner.

September 18, 2013.

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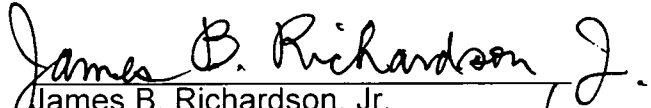
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CERTIFICATE OF SERVICE

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I certify that I served a copy of the petition of Place on the Greene Homeowners Assoc., Inc., for a writ of certiorari by first class mail, postage prepaid, addressed to respondents' attorneys at their addresses of record, namely:

Blake A. Hewitt, Esq.  
John S. Nichols, Esq.  
Bluestein Nichols Thompson Delgado  
P. O. Box 7965  
Columbia, SC 29202

  
James B. Richardson, Jr.  
Attorney for Petitioner.

September 18, 2013.