

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0075

Appellate Case No. 2024-001817

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S.C. SUPREME COURT

MAC Coastal Properties, Inc., ..... Respondent,

v.

Shoestring Retreat, LLC, ..... Petitioner.

**PETITION FOR WRIT OF CERTIORARI**

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**CERTIFICATE OF COUNSEL**

Counsel for Petitioner Shoestring Retreat, LLC, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 9, 2024.

## QUESTIONS PRESENTED

1. Is the Court of Appeals' decision in conflict with this Court's opinion in *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), where the relevant deeds unambiguously provide that the restrictive covenants "are made solely for the benefit of the grantors" and *Heffner* holds that such language "directly precludes an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision"?
2. Is the Court of Appeals' decision in conflict with this Court's decisions in numerous cases, including *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862 (1998), and *Bomar v. Echols*, 270 S.C. 676, 244 S.E.2d 308 (1978), in finding a general plan or scheme of development, where (1) the unambiguous text of the relevant deeds reveals no "plain and unmistakable implication" of intent to create a common scheme; and (2) a common scheme could only be found by improperly looking to "surrounding circumstances" and adding language that does not appear in the deeds?
3. Did the Court of Appeals err in finding that Petitioner had notice of a common scheme of development, where Petitioner reasonably relied on the expert opinions of multiple real estate and title attorneys which, in turn, rested on settled principles of South Carolina law under which the supposed restrictions are clearly unenforceable?

## STATEMENT OF THE CASE

### I. Factual Background

Before they purchased the property at issue here, Robert and Holly McManus owned a home in North Litchfield Beach, an area they view as “a piece of heaven” and “beautiful.” (App. 341 (Day 2 Trial Tr. 21:6-8).) Desiring to “build a home” on the ocean in North Litchfield Beach “and retire and God willing just die walking down the beach,” they searched for suitable property and found what they wanted: a “beautiful piece of property” on a large, private lot. (App. 341 (Day 2 Trial Tr. 21:13-22).) Before committing to the purchase, the McManuses did their homework, obtaining copies of plats and researching the title history of the property. (App. 341-342 (Day 2 Trial Tr. 21:25-22:11).) “[V]ery early in the diligence process” the McManuses learned that a deed in their chain of title contained certain covenants and restrictions—including setback requirements, as well as restrictions on subdividing and on altering or building in an area of sand dunes between the border of the lot and the Atlantic Ocean—that were imposed “solely for the benefit of the grantors.” (App. 346, 348 (Day 2 Trial Tr. 45:12-16, 47:19-24); App. 398.) The McManuses engaged experienced local counsel, who advised that under South Carolina law, the covenants and restrictions were not enforceable.<sup>1</sup> (App. 343 (Day 2 Trial Tr. 29:5-11).) The McManuses proceeded with purchasing the property based on this advice. The property is titled to Shoestring Retreat, LLC, the Petitioner here.

#### A. The Boyle Trust

In 1952, most of the area now known as North Litchfield Beach was conveyed to the Boyle Trust via the Trust Deed. (App. 393-396.) Among other things, the Trust Deed authorizes the

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<sup>1</sup> Both Georgetown County and the Office of Ocean and Coastal Resource Management have imposed setback requirements applicable to the McManuses’ property. There has never been any claim that the McManuses have violated these setback requirements.

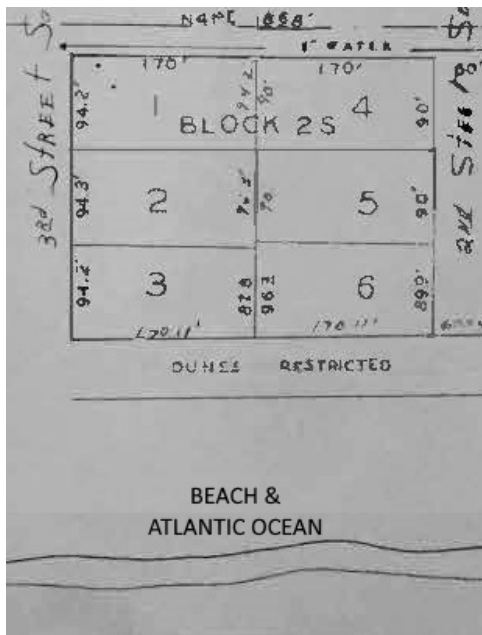
Trustees to subdivide, develop and manage the property for sale, and to sell all or part of the property on terms decided by the Trustees in their discretion, either with or without covenants and warranty (App. 395 (Trust Deed at 2).) By its own terms, the Boyle Trust terminated no later than December 3, 1973, 21 years after its execution on December 4, 1952. (*Id.*)

From 1952 to 1959, the Trustees sold portions of the Boyle Trust property to various individuals, using at least four different deed forms. Some deeds contained covenants and restrictions; others did not. (App. 431-568, 775-778.) The deeds that imposed restrictions were far from uniform: some contained a mere four restrictions, while others contained seven, nine, or thirteen restrictions. However, *every* deed containing restrictions included the same unambiguous statement of the Trustees’ intent:

[T]hese covenants, conditions and restrictions are made *solely for the benefit of the grantors*[.]

(*E.g.*, App. 398 (emphasis added).)

### B. Conveyance to Kate Wallace



The property at issue here is in Block 2-S as depicted in a 1952 plat of “Retreat Beach.” (App. 680.) Through two conveyances in 1953, the Boyle Trustees deeded Lot 3 and a portion of Lot 2 in Block 2-S to Kate Wallace. (App. 397-402 (collectively, the “Wallace Deed”).) The Wallace Deed imposed certain restrictions, including that the property could only be used for residential purposes limited to one single-family home and that the lot could not be subdivided or its size reduced without the Boyle

Trustees’ written consent. (*Id.*) The Wallace Deed also granted an easement to cross a 60-foot wide

area of sand dunes between Lot 3's eastern boundary line and the high water mark of the Atlantic Ocean, which was retained by the Boyle Trustees (the "Dunes Area"). (*Id.*) This easement was subject to certain conditions, including that Ms. Wallace "shall not alter, tear down, deface, or do any act or thing which shall or may tend to change the contour, height or width of said strip of land or of the sand dunes thereon." (*Id.*) Like the other conveyances from the Boyle Trust that impose restrictions, the Wallace Deed states that "these covenants, conditions and restrictions are made *solely for the benefit of the grantors*," *i.e.*, the Boyle Trustees. (*Id.* (emphasis added).)

### **C. Conveyance to North Litchfield Beach, Inc.**

In 1959, the Trustees conveyed most of the remainder of the Boyle Trust property to North Litchfield Beach, Inc. ("NLBI"), including the sand dunes area between the NLBI lots and the Atlantic Ocean. (App. 562-568 (the "NLBI Deed").) The Trustees retained certain lots. The Trustees also retained the sand dunes area between the retained lots and lots conveyed prior to 1959, including the Dunes Area adjacent to Lot 3 of Block 2-S. (App. 564.) With respect to the sand dunes areas conveyed to NLBI and retained by the Trustees, the NLBI Deed provides:

[I]t being specifically agreed, however, by and between the [Trustees and NLBI] that the area of land between the lots . . . and the Atlantic Ocean shall never be used for the purpose of erecting any building or structure by the [Trustees or NLBI], their heirs or assigns or successors.

(*Id.* (the "Sand Dunes Covenant").) Later, after NLBI began including the associated sand dunes area in conveyances to purchasers of beachfront lots, the Boyle Trustees also began conveying the sand dunes areas associated with retained and previously conveyed lots, including the Dunes Area associated with Lot 3, Block 2-S, which was conveyed to Ms. Wallace in 1964. (App. 403-406 (the "Sand Dunes Deed").) Such conveyances were made subject to the Sand Dunes Covenant. For example, the Sand Dunes Deed virtually restates the Sand Dunes Covenant: "The area of land conveyed hereby, by agreement between Grantors and North Litchfield Beach, Inc., cannot be

used for the purpose of erecting any building or structure.” (App. 403.) At the time of the conveyance, the Dunes Area was approximately 60 feet wide. (App. 307 (Day 1 Trial Tr. 168:9-19).)

**D. The Shoestring Property (183 Summertime Lane)**

Kate Wallace died in 1969. In 1974, her parcels in Block 2-S—Lot 3, the eastern portion of Lot 2, and the Dunes Area—were conveyed to Kathryn Wallace Salley as a beneficiary of Ms. Wallace’s estate. (App. 412-415.) In 1978, Ms. Salley conveyed these parcels, retaining a 30-foot-wide strip on the northern lot line for beach access, to Louis and Katharine Haun. (App. 416-419 (the “Salley-Haun Deed”).) This property became known as 183 Summertime Lane. A few days before this conveyance, the Boyle Trustees and Ms. Salley executed and recorded a *Modification of Covenants, Conditions and Restrictions*, in which the Trustees released “any and all restrictions...regarding redivision of [such property].” (App. 718-722.) Ms. Salley did not seek or obtain approval from any other property owner in North Litchfield Beach. (App. 782.) In 2004, Louis Haun quitclaimed his interest in the Shoestring Property to Katharine Haun. (App. 420-424.)

By agreement dated February 23, 2019, Holly McManus contracted to purchase the Shoestring Property from Ms. Haun. (App. 341 (Day 2 Trial Tr. 12:15-17).) After signing the Purchase Agreement, the McManuses contacted Gregory Cunningham of Parker Land Surveying to prepare a plat of the property (App. 347 (Day 2 Trial Tr. 46:1-21).) Mr. Cunningham’s draft plat depicted a sixty-foot “Sand Dune Restricted Area.” (App. 688.) As depicted on the draft plat, the “Sand Dune Restricted Area” is marked from the eastern boundary of Lot 3, rather than from the mean high-water mark of the Atlantic Ocean—which, due to accretion, is now well over 100 feet east thereof—putting the Sand Dune Restricted Area almost in the middle of the Shoestring Property. Mr. Cunningham included the “Sand Dune Restricted Area” on the draft plat based solely

on its having been depicted on prior recorded plats (App. 222 (Day 1 Trial Tr. 32:14).) Mr. Cunningham acknowledged that other surveyors do not show such a sand dunes restricted area on the plats they prepare and that several recorded plats of North Litchfield Beach properties—including plats of Block 2-S—do not depict the Sand Dune Restricted Area. (App. 229-241 (Day 1 Trial Tr. 47-59); App. 690, 723, 767.)

Several attorneys advised the McManuses that the Sand Dunes Covenant was unenforceable as a deed restriction. (App. 343-345, 348, 361 (Day 2 Trial Tr. 29:5-11-31:9, 47:20, 60:7).) Based on this advice, the McManuses asked Mr. Cunningham to remove the Sand Dune Restricted Area from the draft plat. (App. 349 (Day 2 Trial Tr. 48:8-19).) When he declined to do so, the McManuses contacted another surveyor, who prepared a plat that did not depict the Sand Dunes Restricted Area. (App. 349 (Day 2 Trial Tr. 48:18-24); App. 387.)

In July 2019, with the help of the McManuses, Ms. Haun submitted an application to Georgetown County to subdivide the Shoestring Property into two lots, which was approved on August 26, 2019. (App. 388-392.) The application form asked if there were restrictions on the subject property prohibiting the proposed subdivision in the manner represented. The McManuses had obtained an opinion letter from Mary Shahid, an attorney experienced in coastal matters who served for approximately ten years as chief counsel of the Coastal Permitting Office (which includes OCRM), advising that the restrictions were not enforceable (App. 344 (Day 2 Trial Tr. 30:23-25).) To ensure compliance with the legal requirements in subdividing the Shoestring Property, the McManuses discussed the opinion letter with the county officials charged with approval of subdivision plat applications, specifically whether they should attach the opinion letter and check “yes” in response to the application form’s question about the existence of restrictive covenants. (*Id.*) They were directed that if they believed there were no enforceable restrictions on

the property, they should check “no” on the form. (App. 344-345 (Day 2 Trial Tr. 30:4-31:17).)

On September 16, 2019, Ms. Haun conveyed the Shoestring Property to Shoestring, subject to “all applicable restrictions and easements of record.” (App. 425-428.) On September 23, 2019, Shoestring Retreat recorded the subdivision plat in the Register’s Office for the County. (*Id.*)<sup>2</sup> After obtaining the requisite permits from the County, Shoestring Retreat demolished the existing structure on the Shoestring Property and graded the property, including in the Dunes Area, in preparation for building a single-family home for the McManuses’ retirement (App. 359-360 (Day 2 Trial Tr. 58:13-59:14).)

**E. MAC Coastal’s Property (186 Parker Drive)**

In 1963, the Trustees conveyed the western portion of Lot 2, Block 2-S (*i.e.*, the part of Lot 2 not conveyed by the Wallace Deed) to Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle, who then conveyed it to Thomas B. Boyle (individually). (App. 763-766.) Neither deed effecting these conveyances contained any restrictions. However, when Thomas Boyle subsequently conveyed this parcel to Kathryn Wallace Salley he, as grantor, imposed certain covenants and restrictions. (App. 408-409.)

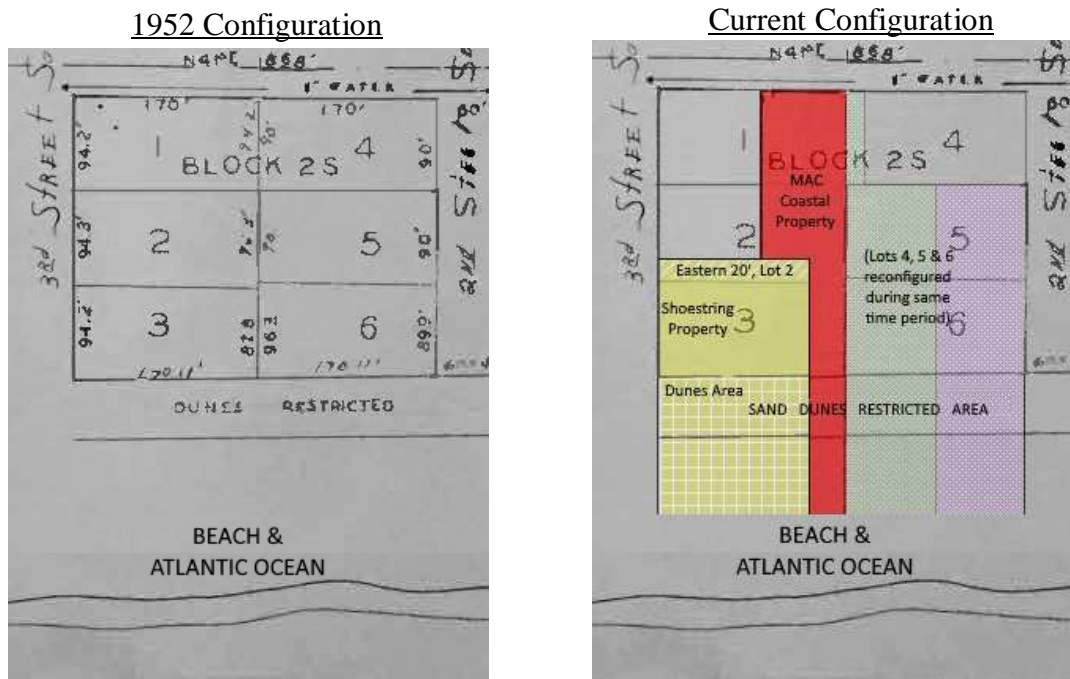
MAC Coastal owns three of thirteen interval timeshares of 186 Parker Drive, which is adjacent to the Shoestring Property in Block 2-S. (App. 724-745.) 186 Parker Drive is comprised of Lot 1, the western part of Lot 2, and the 30-foot-wide beach-access strip across the northern property line of Lots 2 and 3 and the Dunes Area, which Ms. Salley had reserved in the Salley-Haun Deed. Thus, any restrictions on MAC Coastal’s property at 186 Parker Drive were not imposed by the Boyle Trustees, but by Thomas B. Boyle individually.

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<sup>2</sup> MAC Coastal’s challenge of the county’s approval of the subdivision plat was denied by the trial court.

In September 2020, months after this action was initiated, Litchfield Crossing Development Co., LLC, NLBI's successor in interest, and Charles Salley, Katherine Wallace Salley's power of attorney, purported to assign to MAC Coastal their respective rights to enforce the Sand Dunes Covenant. (App. 667-679.) However, there is no evidence in the record that, when these assignments were made, either Litchfield Crossing or Ms. Salley owned any real property that would be benefitted by enforcement of the Sand Dunes Covenant.

For illustrative purposes, the original and current configurations of the Shoestring Property and MAC Coastal's property are depicted below:



## II. Procedural History

MAC Coastal filed this action on January 21, 2020, naming Georgetown County as the sole defendant. In the third amended complaint (the operative pleading at the time of trial), the only defendant is Shoestring. (App. 128-171 (Third Amended Complaint).) The case was tried before the Master in Equity for Georgetown County on April 20-21, 2021.

The Master entered a Final Order on March 23, 2022. (App. 103-121.) The Master held that:

- The restrictive covenants in the Wallace Deed were valid and ran with the land, but they terminated upon the death of the last Trustee;
- The Sand Dunes Restrictions are part of a common scheme by the Hauns and Salleys as grantors, and those restrictions could be enforced by MAC Coastal; and
- Shoestring violated the Sand Dunes Restrictions by demolishing sand dunes in preparation for building on its property.

(App. 119.) The Master enjoined Shoestring to restore the sand dunes to “as close to [their] former state as possible,” to refrain from future violations of the Sand Dunes Restrictions, and to comply with setback requirements of Georgetown County. (App. 120.)<sup>3</sup>

MAC Coastal filed a notice of appeal on April 20, 2022. Shoestring filed a notice of cross-appeal on April 26, 2022.

### **III. Court of Appeals Decision**

Following briefing and oral argument, the Court of Appeals issued a decision on July 31, 2024, affirming in part and reversing in part. (App. 1-11.) Specifically, the Court of Appeals:

affirm[ed] the master’s judgment that the covenants in question are appurtenant to the property, reverse[d] the judgment that they are not enforceable by neighboring property owners, and affirm[ed] the judgment requiring Shoestring to restore the demolished dunes.

(App. 6.) The Court of Appeals held that the Wallace Deed restrictions touch and concern the land because they “contemplate how the lots may be developed.” (App. 6.) Relying on *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949), the Court of Appeals further held that the variations in the deeds from the Boyle Trustees were “not extensive” and did not preclude a finding of a common scheme of development. (App. 6-7.) The Court of Appeals also ruled that Shoestring had notice of

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<sup>3</sup> Shoestring entered into an agreement with Georgetown County for restoration and revegetation of the sand dunes within a certain time, which has been completed.

the restrictions. (App. 7.)

With respect to MAC Coastal’s right to enforce the Wallace Deed covenants, the Court of Appeals admitted that the Wallace Deed, like all of the Boyle Trustee Deeds, unambiguously states that the restrictions were solely for the benefit of the grantors. (App. 9.) The Court further recognized that under this Court’s decision in *Heffner*, such a plainly expressed intent to limit the benefit of the covenants precludes a finding of a common scheme or plan. (*Id.*) Nevertheless, the Court of Appeals disregarded the express language of the Wallace Deed, relying instead on “the nature of the covenants, and the circumstances surrounding [their] imposition” to find that the grantors actually intended—despite clearly stating to the contrary—to “benefit the entire neighborhood.” (*Id.*)

The Court of Appeals then considered the Sand Dunes Covenant. The Court acknowledged that the NLBI Deed did not confer title to the Dunes Area. (App. 10-11.) Nevertheless, the Court found that the restriction in the NLBI Deed was “further evidence of a common plan for development,” that Shoestring had notice of the restriction, and disregarded it. (App. 10-11.)

## **ARGUMENT**

This Court should grant certiorari because the Court of Appeals’ decision undermines a core principal: that parties should be able to rely on settled legal principles in considering whether or not to enter into a transaction. Before purchasing the property, the McManuses conducted due diligence and obtained multiple legal opinions that under settled South Carolina law, the Wallace Deed restrictions were unenforceable by subsequent grantees.<sup>4</sup> The Court of Appeals essentially acknowledged that a faithful application of existing law would require a conclusion there is no

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<sup>4</sup> To be clear, there are other restrictions governing development of the property, including setback requirements imposed by Georgetown County and Coastal Zone regulations. Shoestring complied with all such restrictions.

common scheme of development and thus that MAC Coastal has no right to enforce the Wallace Deed restrictions. Nevertheless, the Court of Appeals disregarded the law and the plain language of the relevant deeds, undermining the rule of law to reach its own view of the correct result. This Court should not allow the decision to stand.

## **I. Applicable Law**

This Court has long recognized that in determining whether a restrictive covenant runs with the land, the grantor's intent as expressed in the deed is controlling. "The paramount and cardinal rule of construction of a deed is to ascertain the intention of the grantor as expressed by him in the deed and then to give effect to that intention if it can be done without violating an established rule of law." *Phipps v. Hardwick*, 273 S.C. 17, 23, 253 S.E.2d 506, 509 (1979). "The construction of a clear and unambiguous deed is a question of law for the court. The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987) (citation omitted).

This Court has repeatedly and consistently articulated the law applicable to restrictive covenants, common schemes of development, and negative reciprocal easements. *See, e.g., Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956); *Bomar v. Echols*, 270 S.C. 676, 244 S.E.2d 308 (1978); *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972). These cases establish the principles that should have controlled the Court of Appeals' decision, including the rule that "restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restriction" *Edwards*, 228 S.C. at 519, 90 S.E.2d at 909 (citing 26 C.J.S. *Deeds* § 163); *see Bomar*, 270 S.C. at 680, 244 S.E.2d at 310 (quoting *Edwards*)..

A restrictive covenant that runs with the land, which binds and may be enforced by subsequent grantees, "must be created in express terms or by plain and unmistakable implication."

*Edwards*, 228 S.C. at 521, 90 S.E.2d at 910. “In the absence of express language,” the law recognizes a presumption that “when the owner of realty sells a portion of his land and imposes use restrictions upon the portion conveyed, such restrictions are presumed to be imposed for the benefit of the retained land.” *Charping v. J.P. Scurry & Co.*, 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct. App. 1988). Essential to the determination of the grantor’s intent is the language of the deed itself. “In determining the grantor’s intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.” *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009) (internal quotation marks omitted).

## **II. The Court of Appeals’ Decision Conflicts with this Court’s Decision in *Heffner***

*Heffner* articulates a simple and clear rule: negative reciprocal easements “may be implied *only* when the common grantor manifests his intention to subject the parcels conveyed to common restrictions for the benefit of *all* grantees.” *Heffner*, 258 S.C. at 451, 189 S.E.2d at 5 (emphasis added). In *Heffner*, the Court held there could be no such implication because the restrictions benefited only the parties to the conveyance of each lot. *Id.* This limitation “directly preclud[ed] an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision.” *Id.*

*Heffner* is controlling here, and the Court of Appeals erred in disregarding it. As the Court of Appeals admitted, the plain language of the deeds at issue here states that the restrictions were imposed solely for the benefit of the grantor. (App. 9.) Nothing in the deeds “manifests [an] intention” to benefit *any* grantee, much less *all* grantees.<sup>5</sup> Under *Heffner*, the unambiguous deed language “directly preclude[s]” an implied negative reciprocal easement.

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<sup>5</sup> Thus, the circumstances of this case weigh even more strongly against implication than the circumstances of *Heffner*, where the deeds indicated that at least the grantee of a particular lot benefitted from the restrictions.

The Court of Appeals attempted to distinguish *Heffner* on the basis that “the nature of the covenants . . . strongly suggests an intention to benefit the entire neighborhood.”<sup>6</sup> (App. 9.) However, the same could be said of the restrictions in *Heffner*. The covenants in *Heffner*, similar to the restrictions in the Boyle Trustee Deeds, restricted lots “to residential use” and otherwise “impos[ed] limitations on the use of the lot conveyed.” *Heffner*, 258 S.C. at 449, 189 S.E.2d at 4. If the “nature of the covenants” were a relevant consideration, *Heffner* would have been decided differently.

This Court’s decisions are clear: what a court thinks a grantor *might* have done, *could* have done, or even *should* have done cannot override an unambiguous statement in a deed reflecting the grantor’s intent. In *Taylor v. Lindsey*, for example, this Court refused to construe covenants in a deed as prohibiting mobile homes when the grantor could have specifically prohibited them but did not. 332 S.C. 1, 4-5, 498 S.E.2d 862, 864 (1998). As discussed below, in reaching this holding, the Court overruled its prior decision in *Nance v. Waldrop*, 258 S.C. 69, 73, 187 S.E.2d 226, 228 (1972), which held that the nature of restrictive covenants “indicate[d] an intent” to prohibit mobile homes. *See Taylor*, 332 S.C. at 4, 498 S.E.2d at 864.

The Court of Appeals also attempted to distinguish *Heffner* on the grounds that this case, unlike *Heffner*, did not involve the question of “whether [the] proposed development is consistent with the character of the neighborhood.” (App. 10.) *Heffner* is not distinguishable on this basis because Shoestring proposed to build a single-family residence on the property—a use that is self-evidently consistent with the character of the neighborhood.

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<sup>6</sup> The Court of Appeals also mentioned “the circumstances surrounding the imposition of the restrictions” but did not specify what those circumstances were. (App. 9.)

### III. The Court of Appeals' Decision Conflicts with this Court's Decision in *Taylor v. Lindsey*

The Court of Appeals cited *Nance*, 258 S.C. at 72, 187 S.E.2d at 228, for the proposition that “the circumstances surrounding the origin of covenants” may be relevant in determining the existence of a common scheme of development. (App. 5.) It then misapplied this principle, using it as authority for side-stepping the unambiguous language used by the Boyle Trustees:

It is true that the deeds speak of benefitting the grantor—the Boyle Trust—but we find that the nature of the covenants, and the circumstances surrounding the imposition of the restrictions, strongly suggests an intention to benefit the entire neighborhood.

(App. 9.) In *Nance*, this Court considered the circumstances surrounding the origin of a covenant restricting the use of property to residential purposes in determining whether the grantor intended to prohibit mobile homes on the property. *Nance*, 258 S.C. at 73, 187 S.E.2d at 228. Here, the Court of Appeals improperly relied on *Nance* to disregard the unambiguous language used by the Boyle Trustees and to look instead to the surrounding circumstances to determine whether the Boyle Trustees intended to create a common scheme of development.

However, this Court overruled *Nance* in *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 864. In *Taylor*, this Court directly refuted the reasoning at the heart of the *Nance* decision and reiterated that: (i) the language of a deed restriction is determinative of the parties' intent; (ii) a court may not extend a restriction beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written; (iii) restrictions on the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property; and that (iv) a restriction on the use of property must be created in express terms or by plain and unmistakable implication. As the Court held, “if the grantor had wanted to restrict mobile homes, he could have done so.” *Taylor*, 332 S.C. at 5, 498 S.E.2d at 864.

In overt error, the Court of Appeals relied on *Nance* in its decision, including only a note that it was “overruled on other grounds” by *Taylor*. (App. 5.) *Nance* was not overruled on other grounds, however, but rather on the very grounds for which the Court of Appeals cited it, namely, that the grantor’s unambiguous language may be disregarded based on factors such as “[t]he character of the restrictions, the recording of the plat map before the Boyle Trust ever conveyed any property, and the fact that development in Retreat Beach has not materially deviated from the restrictions”; “[t]he subject matter of [the] covenants”; and the “surrounding circumstances.” (App. 7-9.)

The Court of Appeals also cited *Bluestein v. Town of Sullivan’s Island*, 429 S.C. 458, 463, 839 S.E.2d 879, 881 (2020), for the proposition that “[w]hen the [deed] is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent.” (App. 13.) *Bluestein* is irrelevant here, however, because the Boyle Trustees’ language is unambiguous:

IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made *solely for the benefit of the grantors*.

(*E.g.*, App. 398 (emphasis added).) Like this Court held in *Taylor*, if the Boyle Trustees had wanted to give grantees the right of enforcement, they could have done so.

#### **IV. The Court of Appeals’ Decision Conflicts with Settled Law on Implication of Negative Reciprocal Easements**

In holding that the differing restrictions imposed among the Boyle Trustees’ deeds did not negate a common scheme of development, the Court of Appeals held that this case is analogous to *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949). The Court reasoned that the restrictions appearing in the numerous Boyle Trust deeds are not extensively varied and are “undeviating” on “subdivision, setbacks and the number of homes” which “strongly tends to fix the character and use central to Retreat Beach.” (App. 7.) The Court of Appeals further reasoned that, regardless of

the unambiguous text of the deeds themselves, the Boyle Trustees' intent to create a common scheme could be inferred because "the general purpose of the covenants and restrictions directly addresses the aesthetic and cosmetic integrity of the development," and "the plan was nearly-perfectly adhered to for over fifty years." (*Id.*)

These conclusions are not supported by the facts in the record. The restrictions in the Boyle Trust deeds, including those applicable to the Dunes Area, are extensively varied and substantially deviating. For example, the Boyle Trustees made conveyances using at least four different deed forms with differing deed restrictions, some with four, seven, nine, or thirteen restrictions, and others with no restrictions. (App. 369 (Day 2 Trial Tr. 82:7-13); App. 262 (Day 1 Trial Tr. 84:6-12); App. 397-402, 431-568.) This case is thus markedly different from *Pitts*, however, where 44 out of 52 deeds contained *identical* restrictions, and there were only three "negligible" violations of those restrictions.

Moreover, even if these widely disparate deed restrictions here could be characterized as a "plan," it was one which was not "nearly perfectly adhered to for over fifty years," as the Court of Appeals erroneously stated. (App. 7.) To the contrary, the Boyle Trustees routinely allowed lots to be subdivided, including both the Shoestring Property and the MAC Coastal property. (App. 416, 431, 712, 718, 723, 746, 751, 757, 759.) Likewise, the prohibition of construction in the sand dunes areas was far from absolute. To begin, the prohibition does not appear in any of the deeds to beneficiaries of the Boyle Trust (App. 431, 763, 775.) And, at least twice the Trustees granted waivers allowing other lot owners to build in the sand dunes areas. (App. 746, 751.) Finally, the record contains no evidence that the Trustees ever attempted to enforce any restriction or covenant. (App. 379 (Day 2 Trial Tr. 131:7-25).)

The Court of Appeals also contradicted settled law as established by this Court in holding

that “neither the plan, nor the enforcement rights discussed later in this opinion, evaporated when the Boyle Trust expired.” (App. 7.) This holding disregarded and nullified the Boyle Trustees’ unambiguous declaration providing that the Trust would expire no later than “the twenty-first anniversary of the execution hereof.” (App. 393.) The Court’s characterization of the enforcement rights as not “evaporating” undermines the Boyle Trustee’s express intent and rights to develop the property as they saw fit on behalf of, and in accordance with, the Trust—that enforcement of the restrictions would, in fact, sunset upon the Trust’s expiration.

The Court of Appeals surmised that despite their explicit statements to the contrary in multiple deeds, the Boyle Trustees must have intended to create a common scheme of development with negative reciprocal easements merely because they recorded a plat titled “Retreat Beach” and restricted the development of the properties to single-family dwellings. This static portrayal of the property ignores the undisputed facts of how the property was actually developed, as shown on many subsequent plats of modifications, waivers, and releases. (App. 685-687, 689-690, 767-774.) It also ignores testimony by a Trustee and a grantee from the Trust.<sup>7</sup> Thus, the Court of Appeals erroneously extended enforcement of the restrictions “by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.” *Community Serv. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017) (internal quotation marks omitted).

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<sup>7</sup> Defendant’s Trial Exhibit 36 is an excerpt of sworn testimony by Trustee Thomas B. Boyle, who testified that the purpose of the “solely for the benefit of the grantors” language was to reserve the right of enforcement “solely to the Trustees.” (App. 781.)

Defendant’s Trial Exhibit 37 is an excerpt of sworn testimony by Kathryn Wallace Salley, who testified that she had to have the permission of the Boyle Trustees, but not anyone else, to subdivide her property. (App. 782-783.)

**V. Shoestring Did Not Have Notice of the Applicability of the Sand Dunes Covenant**

The Court of Appeals held that because “the Haun Deed specifically references the Sand Dunes Restriction,” Shoestring had actual notice of the restriction and that the restriction was “further evidence of a common plan for development.” (App. 11.) Further, the Court of Appeals held:

Because the Sand Dunes Restriction runs with the Dunes Restricted Area, per a mutually binding agreement under the North Litchfield Beach Deed, and because Shoestring was readily on notice of the restriction in its chain of title, the restriction is enforceable by neighboring property owners.

(*Id.*) This holding is contrary to both the record evidence and the applicable law.

**A. The “Sand Dunes Restriction” Is a Personal Covenant**

Nothing in the record supports the Court of Appeals’ finding that the Sand Dunes Covenant “is evidence of a common plan for development.” (App. 11.) The “Sand Dunes Restriction” and other evidence in the record demonstrate that the Trustees intended to create a personal covenant with NLBI that does not run with the land and is not enforceable by subsequent grantees. As evidenced by the Boyle Trust Deeds, the Trustees knew how to create restrictive covenants if that is what they intended. However, what the record demonstrates is that neither the Trustees nor NLBI intended to personally develop the dunes area between the eastern boundary of their lots and the Atlantic Ocean, which is the reason for the inclusion of the Sand Dunes Covenant in subsequent deeds and *not* an intention to create a new restriction.

The Court of Appeals held in *Charping*, 296 S.C. at 315, 372 S.E.2d at 120, that, for a subsequent purchaser to enforce a restriction limiting the use of real property, as opposed to a personal covenant which is enforceable only by the parties thereto, such a restriction must (a) touch and concern the land, and (b) “there must also be an indication that the parties intended for the covenant to run with the land.” *Id.* The Court in *Charping* found that because the covenant at issue

did not indicate that it should benefit the grantor's heirs, successors and assigns, it did not express such an intention for it to run with the land and therefore the subsequent purchaser had no right of enforcement. *Id.*; see also *Wall*, 421 S.C. at 583, 808 S.E.2d at 835.

The record is clear that the Trustees neither expressed an intent to create a covenant that runs with the land, nor is there a plain and unmistakable implication of the Trustees' intent to do so. In the vast majority of their deeds in the record, the Trustees established a course of practice in both the placement and specific language used when creating restrictive covenants. For example, the Wallace Deed expressly states:

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:

(App. 397.) Regardless of the number of conditions, covenants and restrictions contained in the various forms of deeds, this language was used routinely by the Trustees. Such language is notably absent from the NLBI Deed, which instead memorializes the Sand Dunes Covenant:

[I]t 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.

(App. 564.) This language created a personal covenant between the parties regarding the Dunes Area that does not run with the land and which subsequent purchasers cannot enforce.

Here, as in *Charping*, nothing in the NLBI Deed indicates that the Sand Dunes Covenant should *benefit* the parties' heirs, successors and assigns. The Sand Dunes Covenant limits the use of the Dunes Area by the parties' "heirs or assigns, or successors," but it expresses *no intent that this restriction should accrue to their benefit*. MAC Coastal has the burden of proving that the Trustees had a "clear intention to create a covenant that would run with the land," *Charping*, 296

S.C. at 314, 372 S.E.2d at 121 (citing *Edwards*, 228 S.C. at 522, 90 S.E.2d at 911), and there is no evidence in the record in support thereof. The Sand Dunes Covenant therefore does not run with the land and is not enforceable by subsequent purchasers.

The language used by the Trustees in conveyances of the sand dunes area, including the conveyance of the Dunes Area associated with Lot 3, Block 2-S, does not contain restrictive covenants such as their other deeds. It contains no “subject to,” “restricted by” or other similar language. It merely states, at the end of the metes and bounds description:

The area of land conveyed hereby *by agreement between Grantors and North Litchfield Beach, Inc.* cannot be used for the purpose of erecting any building or structure.

(App. 403 (emphasis added).) As a matter of course for the Trustees, this language does not create a new covenant or restriction because other deeds by the Trustees already contained such a restriction at Paragraph No. 12(a)-(c). (App. 398 (Wallace Deed at 2).) This obviates the need for an additional restriction. The language in the Sand Dunes Deed is clearly a reference to the personal, non-reciprocal Sand Dunes Covenant, and the mere recitation of a covenant or agreement contained in a prior deed does not create a new covenant where there is no intent by the grantor to create a new restriction. This recitation solely puts the other party on notice of the Sand Dunes Covenant. As Mr. Stacy testified, in his opinion, this notice is analogous to the Oceanfront Property Disclosure Statement found in many deeds conveying oceanfront property in Georgetown County today, which provides notice to the purchaser that the property may be subject to regulation under The South Carolina Coastal Zone Act. (App. 218-219 (Day 1 Trial Tr. 28:7-29:16).)

Additionally, Kathryn Wallace Salley did not create a new or additional restriction on the Dunes Area in the Salley-Haun Deed. The 1974 partition deed conveying that parcel to Kathryn Wallace Salley refers to the Sand Dunes Covenant, using the *identical* language as in the prior deed from the Trustees to Ms. Wallace, but it is devoid of evidence of any agreement between the

grantors and NLBI (App. 414), so the above language can only be a reference to the Sand Dunes Covenant, *i.e.*, the agreement between the Boyle Trustees and NLBI. And, the deed from Mrs. Salley to the Hauns also references the Sand Dunes Covenant, with a notable change in the language. Rather than referring to an agreement between *grantor* and NLBI, it refers to an agreement between “*Grantor’s predecessor in title* and [NLBI].” (App. 417 (emphasis added).) This language is the antithesis of a clear, unmistakable intention by Ms. Salley to create a “new” restriction in the Salley-Haun Deed.

Given the language of the Sand Dunes Covenant, the customary use of metes and bounds descriptions, the past practices of the Trustees in crafting restrictive covenants, and the different language used in the Salley-Haun Deed, there no evidence in the record of a clear intent to create an additional restrictive covenant.

#### **B. Shoestring Did Not Violate the Sand Dunes Covenant**

The Court of Appeals further erred in concluding that Shoestring disregarded the Sand Dunes Covenant and “demolished” the dunes. Shoestring graded—and later fully restored—a portion of the sand dunes in preparation for construction, which simply is not restricted or prohibited. In the present case, as a matter of law, the Court of Appeals cannot extend the clear meaning of the deed provision to accomplish what the parties might or might not have desired, and Shoestring’s actions have not violated the clear language in the deed. *See Wall*, 421 S.C. at 583, 808 S.E.2d at 835. The clear purpose of the restriction is to protect the sand dunes, a goal that is accomplished by Georgetown County ordinances and the OCRM regulations, all of which Shoestring has complied with at all times. The Court of Appeals thus erred in ruling that Shoestring Retreat violated the restriction, and it erroneously ordered Shoestring to restore the sand dunes to their previous condition.

## CONCLUSION

Certiorari is necessary here because the Court of Appeals' decision undermines a core principle: that potential purchasers should be able to rely on well-established laws when considering whether to purchase property in South Carolina. This Court has long recognized certain fundamental rules: that where restrictive covenants are at issue (a) the grantor's expressed intention is controlling; (b) covenants restricting the free use of the land are not favored and must be strictly construed; (c) restrictive covenants must be created in express terms or by plain and unmistakable implication; and (d) where the language is unambiguous, "surrounding circumstances" should not be considered. All of these fundamental rules and the cases establishing and reiterating them were ignored by the Court of Appeals.

The result is a Court of Appeals' decision that creates more ambiguity and confusion than it resolves about the enforceability of the Boyle deed restrictions. The Court of Appeals found, based on the surrounding circumstances of the Boyle deed restrictions and not the actual language in the deeds, that a common scheme of development exists for the benefit of the Boyle grantees, which includes a substantial number of properties in North Litchfield. At the same time, the Court held that its Opinion has no precedential value and should not be cited or relied upon as precedent. This gives Petitioner no more clarity about its property rights and, consequently, creates more uncertainty about what those rights may be, *i.e.* whether it, too, can selectively enforce any deed restrictions. The contradiction that the Court of Appeals has created is that a common scheme of development exists, but only insofar as it confers enforcement rights on one specific property owner. Such a result is an inequitable, arbitrary and capricious application of the law.

As properties in 1950s-era communities across South Carolina are inherited and sold with more frequency, it is crucial that this Court reiterate the rules of construction of deed restrictions and emphasize that the rules of *Heffner*, *Taylor*, *Charping*, *McDonald*, *Bomar*, *Edwards*, *Gambrell*

and the other cases cited above are still the law of South Carolina that its residents, real estate purchasers and courts can and must rely upon.

Respectfully submitted,

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