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S.C. SUPREME COURT

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

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

v.

Shoestring Retreat, LLC, ... Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

MAC Coastal Properties, Inc., Appellant-Respondent,

v.

Shoestring Retreat, LLC, Respondent-Appellant.

Appellate Case No. 2022-000545

Appeal From Georgetown County
Joe M. Crosby, Master-in-Equity

Unpublished Opinion No. 2024-UP-285
Heard June 11, 2024 – Filed July 31, 2024

AFFIRMED IN PART AND REVERSED IN PART

Tobias G. Ward, Jr. and James Derrick Jackson, both of Tobias G. Ward, Jr., PA, of Columbia; Jonathan P. Hanna of Neill Law Firm, PA, of Murrells Inlet; and Willard D. Hanna, Jr., of Hanna Law, PA, of Murrells Inlet, all for Appellant-Respondent.

Robert B. Wallace and Mary Duncan Shahid, both of Maynard Nexsen, PC, of Charleston, for Respondent-Appellant.

PER CURIAM: This is a set of cross-appeals between MAC Coastal Properties, Inc. (MAC) and Shoestring Retreat, LLC (Shoestring), over enforcement of certain restrictive covenants found in the parties' chains of title. We find that the restrictions at issue run with the land; that there was a common scheme of development for "Retreat Beach," creating reciprocal negative easements enforceable by neighboring property owners; and that Shoestring's property is subject to the "Sand Dunes Restriction." We therefore affirm the master's order in part and reverse in part.

In December 1952, roughly 330 acres in Georgetown County were transferred into a trust (the Boyle Trust). The trustees planned and recorded a plat outlining lots in Retreat Beach roughly one week after the Boyle Trust was formed.

In April 1953, the trustees granted Kate H. Wallace Lot 3 Block 2S of Retreat Beach (the Wallace Deed). The conveyance included certain covenants and restrictions that, among other things, required Wallace and her heirs to only use the property for residential purposes; disallowed subdividing or shrinking the lot without the prior written consent of the grantors; and restricted the number of buildings to one single family home.

The Wallace Deed also granted Wallace an appurtenant easement to cross over a sixty-foot strip of sand dunes that gave Wallace access to the ocean. That easement was subject to restrictions barring Wallace and her heirs and assigns from "alter[ing], tear[ing] down, defac[ing] or do[ing] any act or thing which shall or may change the contour, height[,] or width of the land or of the sand dunes thereon." The Wallace Deed also disallowed the "build[ing of] any structure or walkway, or chang[ing] or remov[ing] any of the growth . . . without [written] approval of the grantors[,]" nor could she "drive, tow, or place in any manner any motor vehicle . . . over, or across [the] . . . land." We refer to this as the "Sand Dunes Restriction" and the applicable area as the "Dunes Restricted Area."

The covenants and restrictions in the Wallace Deed were "made solely for the benefit of the grantors[,]" who retained the right to modify, release, or enforce the restrictions at any time. Later in 1953, the trustees granted Wallace a portion of Lot 2 Block 2S, and that property was combined with the previously-conveyed property subject to the original restrictions and covenants.

The record established that the substantial majority of deeds that the Boyle Trust issued for lots in Retreat Beach contained some iteration of the covenants and restrictions original to the Wallace Deed and at issue here. At trial, the parties introduced thirty-six of those deeds for the court's review. Nearly all deeds in the

record before this court barred subdivision or reconfiguration of the conveyed lots without the grantors' written consent; restricted the number of buildings to one single-family home or duplex; and barred any building upon or alteration of the dunes area. Like the Wallace Deed, these deeds reserved the power to enforce and modify the restrictions to the grantors; however, they also included a restriction against anything that could be deemed a nuisance, or "dangerous to the neighborhood."

In 1959, Thomas B. Boyle, Boyle Construction Co., and the Boyle Trust conveyed the remaining trust property to the North Litchfield Beach Company, Inc. (the North Litchfield Beach Deed). That deed excluded some individual lots in the Retreat Beach plat, including the remainder of Lot 2 Block 2S, and also excluded the Dunes Restricted Area. As to the Dunes Restricted Area, the parties agreed,

> [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.

Through a series of properly recorded conveyances that need not be detailed here, Kathryn Salley became the owner of a single property comprising a portion of Lot 2 Block 2S, all of Lot 3 Block 2S, the western portion of Lot 2 Block 2S, and all of Lot 1 Block 2S (the Salley Deed). Similarly, through a series of properly recorded conveyances and business dissolutions, mergers, and assignments, MAC became the partial owner of Lots 1 and 4 in Block 2S and a reconfigured portion of Lots 5 and 6 (now named "Lot B") in 1998. This made MAC an adjacent landowner to what is now the Shoestring property.

Salley sold a portion of her property to the Hauns in 1978 (the Haun Deed). The Haun Deed referenced that property as being "a portion of Retreat Beach prepared for [the trustees]," referenced the Dunes Restricted Area between the northern and southern plat lines of Lot 3 as a property line, and referenced the mutual restriction in the North Litchfield Beach Deed. The Haun Deed was conveyed "together with all and singular, the rights, members, hereditaments, and appurtenances to the said Premises belonging or in anywise incident or appertaining." Katharine Haun became the sole owner of the combined lot through quitclaim deed from her husband in 2004. That deed was conveyed "subject to easements and restrictions of record and otherwise affecting the property."

Haun sold her property to Shoestring "subject to all easements as well as covenants of record" and "subject to all applicable restrictions and easements of record" (the Shoestring Deed). The title identifies the property "as shown on a plat of a portion of Retreat Beach prepared for [the trustees] in 1952" and specifically references the Dunes Restricted Area, but does not list any express restrictions. Before conveying the property, however, Haun and Shoestring's owners sought to subdivide the lot into two separate lots through an application with Georgetown County. On that application, Shoestring's owners and/or Haun indicated that there were no known restrictions or covenants that could impede the county's review.

After taking possession of the property, Shoestring had the property surveyed. The first surveyor prepared a survey that identified the Dunes Restricted Area. Shoestring believed that the prohibition on building in the Dunes Restricted Area was unenforceable and sought to have the surveyor remove the notation from the survey. When the surveyor refused, Shoestring sought the services of a second surveyor. The second survey did not include the Dunes Restricted Area. Shoestring used that survey as part of its building permit application. On its building permit application to Georgetown County, Shoestring indicated that there were no restrictions on any portion of its property. Once it received the requisite permits, Shoestring tore down the Haun's former home, demolished the dunes on the eastern portion of the property, and graded the lot—including the dunes.

After receiving complaints, the county issued a stop-work order on the project. This litigation followed. MAC sought injunctive relief against Shoestring and a ruling that Shoestring was subject to the covenants and restrictions in the Wallace Deed.

The master found that the restrictions and covenants ran with the land but held they were only enforceable by the trustees, and became unenforceable when the last trustee died. The master also found Shoestring's property was subject to the Sand Dunes Restriction pursuant to the Salley Deed, ordered Shoestring to restore the dunes it had demolished, held that any building was subject to the county's setback requirements, and enjoined Shoestring from further violation of the deed restrictions.

The parties agree this is an action in equity. This conforms with precedent's treatment of similar past cases. *See, e.g.*, *Gambrell v. Schriver*, 312 S.C. 354, 356, 440 S.E.2d 393, 394 (Ct. App. 1994) (finding that appellate review of an order "declaring certain real property in a subdivision subject to a negative reciprocal easement[s.]" and for injunctive relief was equitable in nature); *Bomar v. Echols*, 270 S.C. 676, 681, 244 S.E.2d 308, 310 (1978) (stating that when there is an action

in equity, "this [c]ourt may make findings in accordance with its own views of the preponderance of the evidence"). We therefore have jurisdiction to "find facts in accordance with our own view of the preponderance of the evidence." *Gambrell*, 312 S.C. at 356, 440 S.E.2d at 394.

This case requires us to examine the language of multiple deeds. "In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well[-]settled rule of law or public policy." *Crystal Pines Homeowners Ass'n, Inc. v. Phillips*, 394 S.C. 527, 533, 716 S.E.2d 682, 685 (Ct. App. 2011) (quoting *K & A Acquis. Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009)). Also, and critically here, "[t]he rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property[] should not be applied in such a way as to defeat the plain and obvious purpose of a contractual instrument of restriction." *McDonald v. Welborn*, 220 S.C. 10, 19, 66 S.E.2d 327, 331 (1951).

South Carolina courts have held "[a] restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land." *West v. Newberry Elec. Coop.*, 357 S.C. 537, 542, 593 S.E.2d 500, 503 (Ct. App. 2004) (quoting *Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 604, 483 S.E.2d 757, 765 (Ct. App. 1997)). In the absence of express terms, restrictive covenants may rise by implication. *Bomar*, 270 S.C. at 679, 244 S.E.2d at 310. Where restrictions arise by implication, they are said to be "reciprocal negative easement[s]." *Id.* Four elements generally establish reciprocal negative easements: (1) presence of a common grantor; (2) "designation of the land or tract subject to restrictions"; (3) existence of "a general plan or scheme of restriction"; and (4) the restrictions must run with the land. *Id.* at 679–80, 244 S.E.2d at 310. "In determining whether reciprocal negative easements have been created, resort should be had not only to the language of the deeds, but 'the circumstances surrounding the origin of covenants should also be considered.'" *Id.* at 680, 244 S.E.2d at 310 (quoting *Nance v. Waldrop*, 258 S.C. 69, 72, 187 S.E.2d 226, 228 (1972), *overruled on other grounds by Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862 (1998)).

Shoestring argues that the covenants and restrictions at issue here are not enforceable and cannot be reciprocal negative easements because the trustees never intended to create a common scheme of development. Shoestring relies mainly on the trustees' reservation of authority to enforce and modify the covenants for this position. MAC argues the covenants are enforceable and that the master properly held they run with the land, but that the master erred in holding that neighboring property owners could

not enforce them. For the reasons outlined here, we agree with MAC. We accordingly affirm the master's judgment that the covenants in question are appurtenant to the property, reverse the judgment that they are not enforceable by neighboring property owners, and affirm the judgment requiring Shoestring to restore the demolished dunes.

Restrictions That Touch and Concern the Land

In *West v. Newberry Electric Coop.*, this court determined that restrictive covenants touched and concerned the land, and were therefore enforceable by subsequent property owners, where the nature of the easement was meant to restrict the manner and use of the land and the parties intended the covenants run with the land. 357 S.C. at 542–43, 593 S.E.2d at 503. There, the court reasoned that easement language dealing with the relocation of power lines in the event of later development sufficiently considered the future use of the property such that the easement ran with the land. *Id.* at 542, 593 S.E.2d at 503. The court further held that restrictive covenants touched and concerned the land where the covenant directly "affect[ed] the nature and value of the easement to both [parties]." *Id.* at 543, 593 S.E.2d at 503.

We find the original Wallace Deed covenants and restrictions touch and concern the land because they contemplate how the lots may be developed. For example, the restrictions require that the land only be used for residential purposes; require that there be no more than one single family dwelling on the property; and reserve an easement "appurtenant to the lot thereby conveyed" to cross from the property to the Atlantic Ocean. These restrictions, like the restrictions in *West*, directly affect how the land may be used, both at the time of the conveyance and in the future. Therefore, we agree with the master that the Wallace Deed restrictions touch and concern the land. *See Epting v. Lexington Water Power Co.*, 177 S.C. 308, 315–17, 181 S.E. 66, 69–70 (1935) (differentiating covenants touching the land from covenants collateral to the land).

Evidence of a Common Scheme

We further agree with the master that the lack of complete uniformity between the restrictions in the deeds granted by the Boyle Trust is not fatal to finding a common scheme of development. In *Pitts v. Brown*, our supreme court permitted neighboring landowners to enforce nonidentical restrictions against one another because "the general plan of a residential neighborhood ha[d] been maintained since its inception and . . . th[e] general understanding of use and occupancy ha[d] been accepted, relied on, and acted upon by all of the lot owners." 215 S.C. 122, 129–30, 54 S.E.2d 538,

541–42 (1949). The court further explained the fact that some lots had more or less restrictions than others "does not necessarily interfere with the integrity of a neighborhood scheme[,]" and where certain restrictions "strongly tend to fix the character of the use of the entire tract" the deviations "do[] not disrupt the general neighborhood scheme." *Id.* at 130, 54 S.E.2d at 542. That is because only "extensive omissions or variations tend to show that no scheme exists . . . ." *Id.* at 131, 54 S.E.2d at 542.

To us, this case is analogous to *Pitts*. While there are variations in the deed restrictions in the record, those variations are not extensive and the undeviating restrictions on subdivision, setbacks, and the number of homes permitted strongly tends to fix the character and use central to Retreat Beach. Here, the general purpose of the covenants and restrictions directly addresses the aesthetic and cosmetic integrity of the development. The 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 is strong evidence of a common plan for development.

Shoestring points us to the fact that the covenants specified they were designed to benefit the trustees, as opposed to neighboring property owners. This does not change our findings that the restrictions and covenants run with the land and that there was a common plan of development. The subject matter of these covenants strongly suggests a purpose of benefitting all property owners in Retreat Beach.

For these reasons, we agree with MAC that there was a common neighborhood plan, and that neither the plan, nor the enforcement rights discussed later in this opinion, evaporated when the Boyle Trust expired, especially when the plan was nearly-perfectly adhered to for over fifty years.

Shoestring's Notice of Restrictions

We additionally find that Shoestring had actual notice of the restrictions in its chain of title. "The law imputes to a purchaser of real estate notice of the recitals contained in the written instruments forming his chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained." *McDonald*, 220 S.C. at 16, 66 S.E.2d at 330 (citation omitted). "If there are circumstances sufficient to put [a purchaser] upon inquiry, he [or she] is held to have notice of everything which that inquiry, properly conducted, would certainly disclose." *Id.*

In *McDonald v. Welborn*, our supreme court found that even though the deeds at issue contained no express restrictions, the property owners were nevertheless on notice of separately recorded restrictions and thus the neighboring property owners could enforce the restrictions as part of the common scheme of development. *Id*. Like the restrictions at issue in *McDonald*, Shoestring acquired the property in question "subject to all applicable restrictions and easements of record," even though there were no express restrictions in the Shoestring Deed. But, unlike the deeds at issue in *McDonald*, the restrictions on Shoestring's property are directly referenced and recorded in its own chain of title.

Here, as in *McDonald*, the record established that the considerable majority of other individual deeds conveyed by the Boyle Trust were recorded with substantially the same restrictions found in Shoestring's chain of title. *Id.* (finding property owners were on notice of the restrictions recorded in their chain of title when deeds of other purchased properties "made reference to the restrictive covenants" and deeds of subsequent conveyance were "incorporated . . . [with] substantially the same reference to the restrictions of record"). Shoestring's title even identifies the property "as shown on a plat of a portion of Retreat Beach prepared for [the trustees] in 1952[.]" Because we find the deed language and surrounding circumstances show the grantors' plain intention to create a common scheme of development, and because we also find that the recorded deeds make sufficient reference to the restrictions in Shoestring's chain of title, and Shoestring's title expressly identifies the property as being within a recorded neighborhood plat, Shoestring is charged with being on notice of the deed restrictions. *See id.* (holding that even though the deed in question contained no express restrictions, the property was nevertheless subject to the recorded restrictions when the deed made "direct reference to the fact that the property was known as [the neighborhood] as shown by the [recorded] plat . . .").

MAC's Enforcement Rights

"[I]t is well settled in this state that where the owner of a tract of land subdivides it and sells the distinct parcels thereto to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee[.]" *Bomar*, 270 S.C. at 679, 244 S.E.2d at 310 (quoting *McDonald*, 220 S.C. at 18, 66 S.E.2d at 331). Because we agree with MAC that the restrictions run with the land and that there is a common scheme for development, we also agree that neighboring property owners may enforce the restrictions and covenants. For this reason, the master erred in finding that MAC could not enforce the subdivision, home size, and setback restrictions.

Shoestring contends that there is not a common plan of development and cites *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), as support for its argument that neighboring property owners cannot enforce these restrictions because the trustees reserved enforcement unto themselves. We respectfully disagree.

We see *Heffner* as materially distinguishable from the circumstances at issue here. *Heffner* dealt with a defendant property owner who "st[ood] simultaneously" as the original grantor and the successor grantee of the property in question. *Id.* at 450, 189 S.E.2d at 5. There, the simultaneous duality in party was material because that deed allowed parties to the original conveyance to change or modify the deed restrictions at any time. *Id*. at 449, 189 S.E.2d at 4. Our supreme court reasoned that because the restrictions specified they were for the mutual benefit of the parties to the deed and could be freely modified by them, neighboring property owners did not have standing to defeat the written instrument's expressed intention. *See id.* at 451, 189 S.E.2d. at 5 ("Mutuality of covenant and consideration, which are essential to the existence of a general scheme of development enforceable, Inter se, by the purchasers of lots in a subdivision, 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."). Because the *Heffner* grantors imposed the restrictions only for the benefit of the parties to the deed, with no intention of benefitting the entire neighborhood, the court held that there was no common scheme. *Id*.

As detailed above, we find that the restrictions imposed by the Boyle Trust were intended to benefit the entire neighborhood of Retreat Beach. 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. *See Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 463, 839 S.E.2d 879, 881 (2020) ("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. When the [deed] is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." (alteration in original) (first quoting *K & A Acquis. Grp.*, 383 S.C. at 581, 682 S.E.2d at 262; and then quoting *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976))).

Furthermore, the question in *Heffner* was not the same as the question presented in this case. The *Heffner* court concluded its opinion by reiterating that the proposed use of the property in question was "consistent with the combined recreational and residential character of the development." 258 S.C. at 452, 189 S.E.2d at 5. The

court took care to emphasize that it "[did] not intend to imply that the residents of th[e] subdivision would be without remedy against an incompatible use[,]" as "[t]hat question ha[d] not been presented [to the court]." *Id.* The crux of this case is whether Shoestring's proposed development is consistent with the character of the neighborhood, making this case directly distinguishable from *Heffner*. As previously described, there is substantial evidence of a common scheme of development, and we find the deed restrictions created reciprocal negative easements; it follows that neighboring property owners have standing to enforce them.

Sand Dunes Restriction

"A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title." *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995). We find the Shoestring parcel is subject to the Sand Dunes Restriction, that the restriction is not overly burdensome, and because the restriction is in line with South Carolina public policy, it may be enforced. *See* S.C. Code Ann. § 48-39-250(1)(a)-(d) (2008) ("The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions: (a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner; (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues; (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species; (d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.").

The language from the North Litchfield Beach Deed regarding the Sand Dunes Restriction is clear. We emphasize that we fully understand the North Litchfield Beach Deed did not convey title to the Dunes Restricted Area. The trustees retained ownership of this area; however, the conveyance explained:

> [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 assign, or successors.

Not only do we find this language is further evidence of a common plan for development, but the record makes clear that Shoestring had actual knowledge of this restriction and elected to disregard it.

Like the Wallace Deed covenants and restrictions that are readily identifiable in Shoestring's chain of title, the Haun Deed specifically references the Sand Dunes Restriction. The Hauns took the property subject to and with notice of the restriction, and the Shoestring Deed expressly identifies the Sand Dunes Restriction.

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.

Based on the foregoing analysis, the master's order is

AFFIRMED IN PART AND REVERSED IN PART.[1]

GEATHERS, HEWITT, and VINSON, JJ., concur.

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[1] We decline to address all other issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting that when resolution of an issue is dispositive, the reviewing court need not address remaining issues).

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Joe M. Crosby, Master-in-Equity

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MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

RESPONDENT-APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Respondent-Appellant Shoestring Retreat, LLC ("Shoestring"), pursuant to Rule 221, SCACR, respectfully petitions the Court for Rehearing of Respondent-Appellant's appeal in this matter. Pursuant to Rule 221(a), Respondent-Appellant petitions the Court to reconsider its decisions that a common scheme of development exists with reciprocal negative easements enforceable by MAC Coastal Properties, Inc., Appellant-Respondent ("MAC Coastal"); that Shoestring had notice that the deed restrictions could possibly be enforceable by MAC Coastal; and that Shoestring's property is subject to the "Sand Dunes Restriction."

BACKGROUND

The background of this case is set forth in detail in Respondent-Appellant's briefs filed in this appeal.

ARGUMENT

Rehearing is appropriate when the Court has overlooked or misapprehended [the appellant's] argument," *Kennedy v. S.C. Ret. Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), or when a "material fact or principle of law has been either overlooked or disregarded." *State v. Haygood*, 413 S.C. 239, 240, 776 S.E.2d 262, 263 (2015); *see Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). Here, the Court should grant rehearing on several points.

1. The Court should grant rehearing and reverse its decision that Shoestring had notice that MAC Coastal could enforce the deed restrictions.

This appeal involves relatively enigmatic and technical conveyances and deed restrictions which span more than 70 years. Within the myriad of documents, the language in the deeds consistently provides that the benefit and enforcement of the restrictions is reserved solely to the Boyle Trustees. The Trust Deed provides that the Boyle Trust terminates upon the sale of all of

the land, but no later than 21 years after its execution, which means the Boyle Trust terminated by its own terms no later than December 3, 1973.

Any reasonable purchaser of land conducting due diligence on this property would find this language in the deeds. In spite of this, the Court concluded that enforcement of the restrictions is not reserved solely to the Trustees and a common scheme of development was created with negative reciprocal easements, which Shoestring had notice of and chose to disregard. This conclusion has the effect of: (i) creating an implication of knowledge of and/or admission by Shoestring as to the enforceability of the restrictions at issue by MAC Coastal, (ii) raising a suspicion as to Shoestring's intentions with regard to the restrictions, and (iii) creating an unfair prejudice as to Shoestring's position and arguments regarding the development of the property. In short, the Court's findings imply Shoestring somehow knew or believed that the deed restrictions were enforceable by anyone other than the Boyle Trustees, and disregarded that fact. The evidence in the record shows Shoestring had no reason to suspect that anyone other than the Boyle Trustees would have the right to enforce the restrictions. The implication that Shoestring knew or believed anything to the contrary is unsupported by the record.

In its Opinion, this Court found:

> After taking possession of the property, Shoestring had the property surveyed. The first surveyor prepared a survey that identified the Dunes Restricted Area. Shoestring believed that the prohibition on building in the Dunes Restricted Area was unenforceable and sought to have the surveyor remove the notation from the survey. When the surveyor refused, Shoestring sought the services of a second surveyor. The second survey did not include the Dunes Restricted Area. Shoestring used that survey as part of its building permit application. On its building permit application to Georgetown County, Shoestring indicated that there were no restrictions on any portion of its property.

Opinion at 4. This Court also held:

> Not only do we find this language is further evidence of a common plan for development, but the record makes clear that Shoestring had actual knowledge of this restriction and elected to disregard it.

Opinion at 11. The evidence in the record, however, demonstrates that Shoestring did not disregard the restrictions, but rather acted at all times upon the advice of multiple expert real estate attorneys who advised that the restrictions were unenforceable under South Carolina law; acted only after Mr. and Mrs. McManus met with the North Litchfield Homeowners Association to determine whether the restrictions are enforceable and were advised by the HOA that it had no enforcement authority for this particular property (R. 240-241); and acted only after informing Georgetown County officials of the existence of the restrictions who advised Shoestring to indicate on the County applications that there are no restrictions which would prohibit Shoestring's intended use. R. 246, 290. Because the evidence in the record *expressly* indicates that no one other than the Trustees can enforce the deed restrictions, and there is no evidence in the record, direct or circumstantial, that anyone else has the right of enforcement, equity demands that the Court reverse its decision that Shoestring had notice that MAC Coastal possessed such rights.

Prior to Shoestring's purchase of the property at issue, the McManuses owned a home at 1 Parker Drive in North Litchfield and became interested in the subject property (R. 239, ll. 13-24). In February, 2019, Mrs. McManus signed a purchase agreement with the owners of the property, Mr. and Mrs. Haun (R. 521). The McManuses immediately began conducting due diligence for the purchase of the property (R. 244, ll. 17-22). In an abundance of caution of whether and how to proceed with a possible subdivision of the property by Mrs. Haun prior to the sale, Mr. and Mrs. McManus sought the counsel of Dan Stacey, a reputable real estate attorney and an expert in North

Litchfield property.[1] Early in their investigation and with the help of Mr. Stacy, they discovered the existence of the deed restrictions, the 1952 plat of Retreat Beach and the sand dunes restriction (R. 246) and sought additional advice from two in-house attorneys for Shoestring regarding those (R. 255-256), with a specific interest in possibly subdividing the property (R. 240). Mr. Stacy advised Mr. and Mrs. McManus that no one, including MAC Coastal, had any enforcement rights of any of the restrictive covenant including the sand dunes restrictions (R. 270).

In February, 2019, Mr. and Mrs. McManus commissioned Greggory Cunningham of Parker Land Surveying to prepare a plat of the subject property, a draft of which was done on February 26, 2019. The plat showed the existence of a 60' Sand Dune Restricted Area on a portion of the property (R. 120). Mr. and Mrs. McManus sought further advice from another real estate attorney, Mary Shahid (R. 253), an expert in coastal matters who served as Chief Counsel of the Coastal Permitting Office (which includes OCRM) for approximately ten years, and obtained an opinion letter from her advising that the restrictions were not enforceable (R. 242, 255-256). Throughout the course of their due diligence, the McManuses and their attorneys found no less than four previously recorded plats (R. 585, 618, 663 and 666), including those prepared by Samuel Harper, the "godfather" of surveys of North Litchfield who had conducted original property surveys there since the 1940's (R. 128), all of which omitted a sand dunes restricted area (R. 127-132). Based upon the foregoing due diligence and advice from four attorneys, the McManuses requested that Greggory Cunningham remove the reference to the 60' Sand Dune Restricted Area from the plat he had prepared (R. 126, 246). Mr. Cunningham declined to do so, and the

[1] Mr. Stacy served as special referee involving real estate in North Litchfield (R. 268), who held that, as to the right of reverter in the indenture deeds, it "died with the trustees" (R. 605).

McManuses therefore engaged another surveyor to prepare a plat without a sand dune restricted area, which was completed on June 6, 2019 (R. 246, 290).

To further ensure compliance with all legal requirements (R. 242), Mr. McManus informed Mr. Boyd Johnson and Judy Blankenship, the Georgetown County officials charged with approval of subdivision plat applications, of Ms. Shahid's opinion letter and asked, in light of the McManus' expert legal opinions that the restrictions are unenforceable, whether or not they should check the box "yes" or "no" on the subdivision application (R. 243). Mr. Johnson and Ms. Blankenship directed the McManuses that, if they believe that there are no restrictions of record that are enforceable, they should check the box "no" (R. 242-243).

In holding that Shoestring is charged with notice of the deed restrictions, the Court compares the present appeal to the case of *McDonald v. Welborn,* 220 S.C. 10, 66 S.E.2d 327 (1951). However, *McDonald* is a highly distinguishable case, and it also does not reach the issue of notice of enforceability. In *McDonald*, the restrictions of record were explicitly "for the benefit of all future owners of lots in the subdivision," *id.* at 13, 66 S.E.2d at 328. Therefore, the defendant in *McDonald* had notice, not only of the existence of the restrictions of record, but also that they were enforceable by any other lot owner. In this case, the restrictions explicitly reserve the benefit and enforceability solely to the Trustees, and do not put grantees on notice that they are enforceable by anyone else.

2. The Court should grant rehearing and reverse its decision on common scheme of development and reciprocal negative easements because this finding overlooks the preponderance of the evidence and applies the wrong legal standard.

The Court found that a common scheme of development was created such that MAC Coastal can enforce the deed restrictions because: "[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 is strong evidence of a common plan for development." Op. at 7, "[t]he subject matter of these covenants ***strongly suggests*** a purpose benefitting all property owners in Retreat Beach," *id.,* "the deed language and surrounding circumstances show the grantors' plain intention to create a common scheme of development," Op. at 8, and "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." Op. at 9. [Emphasis added]. The evidence in the record does not support these conclusions. The Trustees' intentions are stated expressly and unambiguously in the deeds in the record:

> IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made ***solely for the benefit of the grantors***, who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions, or restrictions by grantee, her heirs or assigns, ***the grantors shall have the right of abatement and the right to enforce compliance*** by injunction or any other appropriate legal or equitable action.

[Emphasis added] (R. 296, 299, 334, 341, 345, 349, 365, 373, 385, 391, 394, 397, 400, 403, 406, 409, 412, 421, 431, 535). In the subsequent releases, modifications and waivers, all of which were approved and signed solely by the Trustees, the Trustees referenced and reiterated the Trust was the sole beneficiary and possessed the sole right to release and modify the restrictions (R. 607, 613, 646). This Court cites *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." Op. at 13. In the present appeal, there is no ambiguity in the deeds, and no reason to look to the circumstances surrounding its execution. This language is plain and shows absolutely no intent to impart the benefit of, or enforcement authority to, anyone other than the Trustees.

Even when considering the "subject matter" of the restrictions and "surrounding circumstances," the Court's findings ignore the uncontradicted testimony of Thomas B. Boyle, a trustee of the Boyle Trust, who specifically testified that the purpose of the restrictions was to reserve the benefit solely to the Trust and to reserve the enforcement thereof solely to the Trustees:

> Q. … Now, it provides – and let me read to you. I know it's awful. But after restriction No. 10 it is provided, "It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the grantors" – **that's the Trust?**
>
> A. **Yes**.
>
> Q. -- "who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions and restrictions, their heirs or assigns have the right of abatement and the right to enforce compliance by injunction or other appropriate legal or equitable action." **Was that right reserved solely to the Trustees?**
>
> A. **Yes**.
>
> Q. All right, sir.
>
> A. **That's the purpose of it**.

(R. 676, ll. 8-25) (emphasis added). In the face of this testimony, there is no need to look to the "surrounding circumstances" to ascertain the Trustees' intent – Thomas B. Boyle explained their intent. Plainly, the Trustees intended themselves, ***and no one else***, to be the sole enforcers of the restrictions. There is simply no evidence suggesting that negative reciprocal easements arose by an express or implied intent.

Kathryn Wallace Salley, MAC Coastal's and Shoestring's predecessor in title, also considered the Trustees to be the sole enforcers. In reference to the July 7, 1978 *Modification of Covenants, Conditions and Restrictions,* allowing her to reconfigure the lots as shown on the plat of the same date, she testified:

> Q. All right. So if you want to change [the lot lines] you think you have to get permission of whoever has the right to enforce restrictive covenants?
>
> A. Well, it so happens it was the Boyle Trust.
>
> Q. That was Mr. Hinds' opinion at that time, but–

A. Well, I mean, that's the only way we got them changed.

Q. Did you go to the, for example, Litchfield Beach Company or the North Litchfield Beach Company and ask their permission?

A. **No. We were told that we had to have the Boyles permission.**

Q. **Okay. But you didn't seek the permission of anybody else?**

A. **No.**

[Emphasis added] (R. 677-678). There is no evidence in the record that any property owner in Retreat Beach believed that anyone other than the Trustees had the right to enforce the restrictions, and there is no evidence that any other property owner has ever tried to enforce the restrictions.

Additionally, the Court concludes that the surrounding circumstances and the subject matter of the restrictions "strongly suggests a purpose of benefitting all property owners in Retreat beach," but **a strong suggestion is not the legal standard by which to evaluate intent**, as established by applicable precedent.

To be enforceable, a "restriction on the use of the property must be created in express terms ***or by plain and unmistakable implication***, and all such restrictions are to be strictly construed, ***with all doubts resolved in favor of the free use of property***." *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (S.C. 2009) (emphasis added)(citing *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (S.C. 2006)). "The court is **without authority to consider parties' secret intentions**…" *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Therefore, "***words cannot be read into a deed to impart an intent unexpressed when the deed was recorded***." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020)(emphasis added)(quoting Pee Dee Stores, 831 S.C. at 241, 672 S.E.2d at 802). "The court may not limit a restriction in a deed, ***nor, on the other hand, will a restriction be enlarged or extended 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." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017)(emphasis added)(quoting *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)).

A reasonable and prudent purchaser of property in North Litchfield, including Shoestring, would not expect, rely upon, or have notice that the deed restrictions would be enforceable by anyone other than the Boyle Trustees. Even MAC Coastal did not believe it had the right to enforce the restrictions at issue as made obvious by its recording of an *Assignment of Right of Abatement and Right to Enforce Compliance with Restrictions* dated September 1, 2020, and an *Assignment of Right to Enforce Compliance with Restrictions* dated September 25, 2020, ***eight months after filing its action for an injunction***, in an apparent attempt to give MAC Coastal the standing it would have needed to enforce the restrictions in its already-pending lawsuit. (R. 562, 571, Pl.'s Tr. Exs. 25-26) As MAC Coastal itself argued and as held by the Circuit Court, "South Carolina courts have long protected the expectation rights of residential purchasers. Therefore, the focus should be on the equitable rights and remedies of the purchasers..." (R. 11). Shoestring's reasonable expectation of equitable rights, based on its thorough and extensive due diligence, is that the restrictions are enforceable only by the Boyle Trustees. Shoestring developed the property in good faith and with complete transparency based on these well-founded expectations.

This Court held that the present appeal is analogous to *Pitts* because the Boyle deed restrictions 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," they "directly address[] the aesthetic and cosmetic integrity of the development," and "the plan was nearly-perfectly adhered to for over fifty years." Op. at 7. This holding, however, neglects

that, in all of the indenture deeds, which the evidence shows are extensively varied, the benefit and enforceability are reserved solely to the Trustees, and any attempt to draw similarities among the Boyle deed restrictions and conclude that a common scheme of development was created contradicts the unambiguous language reserving the benefit and enforceability of the deed restrictions solely to the Trustees.

This Court's reliance on *Pitts* also overlooks and disregards evidence that *Pitts* is distinguishable from the present appeal. In *Pitts*, the Court found that forty-four (44) out of fifty-two (52) deeds contain the exact same restrictions and there were only three (3) "negligible" violations thereof. In the present appeal, the variation in the Boyle deed restrictions, including the sand dunes restriction, is very extensive. The Boyle Trustees did not use a uniform conveyance document and instead used at least four different deed forms with differing deed restrictions, some with four, seven, nine, or thirteen restrictions, and others with no restrictions. (R. 267, ll. 7-13; R. 160, ll. 6-12; Pl.'s Tr. Exs. 4, 5, 13, 14; Def.'s Tr. Ex. 34)

If these widely disparate deed restrictions are loosely categorized as a "plan," it was one which was not "nearly perfectly adhered to for over fifty years." There were many deviations, including by waivers, releases and modifications of the restrictions ***only from*** the Boyle Trustees ***before and even after the Trust had expired***, and not from anyone else. The Trustees consistently granted waivers and releases of restrictions, including the sand dunes restriction, to build in the sand dunes area, and allowed subdivisions including those relating to the Shoestring Property and MAC Coastal Property. (R. 607, 613, 618, 641, 646, 652, 654 (Def. Tr. Exs. 2, 3, 5, 14, 15, 16 and 17)). There was no enforcement of deed restrictions and sand dunes agreement by anyone for 67 years. (R. 277, ll. 7-25). There were repeated subdivisions of MAC Coastal's property. (R. 314, 329, 607, 613 (Pl. Tr. Ex. 9, 13, Def. Tr. Ex. 2, 3)). The Trustees' restriction against construction

in the sand dunes area was not absolute, as the restriction does not appear in any of the deeds conveyed to the beneficiaries of the Boyle Trust, even for properties adjacent to the sand dunes area. (R. 329, 658, 670 (Pl. Tr. Ex. 13, Def. Tr. Ex. 19, 34)). Other lot owners in the vicinity obtained waivers to build in the sand dunes area. (R. 641, 646 (Def. Tr. Exs. 14, 15)) The Kate Wallace deeds clearly allow construction in the sand dunes area with the Trustees' written permission. (R. 295 (Pl. Tr. Ex. 4)). Many of the deeds contain a similar clause that allows construction in the sand dunes area with the permission of the Trustees, which was granted on many occasions. (R. 337, 345, 356, 359, 373, 385, 391, 394, 406, and 421 and (Def. Tr. Exs. 2-3, 14-17)). And, many owners have subdivided restricted properties and built unchallenged in the sand dunes area. (R. 272-277). There is no evidence in the record that anyone except for the Boyle Trustees exercised enforcement authority of the restrictions, and all the evidence shows that each and every exercise of authority in the form of waivers, releases and modifications of the restrictions were performed solely by the Boyle Trustees.

This Court additionally held that "neither the plan, nor the enforcement rights discussed later in this opinion, evaporated when the Boyle Trust expired..." In this respect, the Court disregards and nullifies the Boyle Trustees' rights, express intent, and legal force of the restrictions they imposed for the benefit of the Trust. In no uncertain language, the Trust expired, at the latest, "upon the twenty-first anniversary of the execution hereof." (R. 291). The Trustees knew this because they signed it (R. 292) and knew exactly the effect of the indenture deed restrictions that they imposed (R. 676). 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. Conspicuously, nowhere in the record do the Trustees

include language or imply that any party other than the Trustees would have enforcement rights, including before or after the expiration of the Trust, or after the death of the Trustees.

In this appeal, the Court has surmised that 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 was recorded in accordance with the terms of the Boyle Trust – wherein the Trustees were authorized "[t]o manage said property; cause surveys and/or plats-to be made thereof; to cause said property to be subdivided into lots and blocks...", and which "shall cease and terminate upon the twenty-first anniversary of the execution hereof," no later than December 3, 1973, R. 292 – has little relationship to how the property was actually developed as shown on many subsequent plats of modifications, waivers and releases. *See* R. 580, 581, 582, 584, 585, 662, 663, 664, 665, 666, 667, 668, and 669. In the face of the deed language reserving the benefit and enforceability of the restrictions solely to the Trustees and testimony of Thomas B. Boyle, this Court's conclusion extends 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." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. at 583, 808 S.E.2d at 835.

3. The Court should grant rehearing and reverse its distinguishing of *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972)

In its analysis of the *Heffner* decision, this Court draws more parallels to the present appeal than distinctions. The Court's analysis relies on the fact that the respondent in *Heffner*, Litchfield, "st[ood] simultaneously" as the original grantor and the successor grantee of the property in question, that "the duality in party was material because that deed allowed parties to the original

conveyance to change or modify the deeds restrictions at any time," and that "because the restrictions specified they were for the mutual benefit of the parties to the deed and could be freely modified by them, neighboring property owners did not have standing to defeat the written instrument's expressed intention." Op. at 13. Rather than serving to distinguish *Heffner*, however, this Court shows how the Boyle Trustees stood in essentially the same position as Litchfield – they could unilaterally change or modify the deed restrictions at any time, and the restrictions specified they were solely for their benefit. In addition to these near-identical circumstances, this Court recognized that, in *Heffner*, Litchfield's reservation of the benefit of the restriction was the operative fact that "directly precludes an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision." *Id.*, 258 S.C. at 451, 189 S.E.2d at 5.

The *Heffner* Court stated simply why the appellant had no standing: "[b]ecause of the express limitation contained in the above quoted provision of the indenture ['that these covenants, conditions and restrictions are made solely for the benefit of the Grantor and Grantee herein']" *Id.* at 450, 189 S.E.2d at 5 (emphasis added). In addition to finding that the grantor did not "manifest[] [an] intention to subject the parcels conveyed to common restrictions for the benefit of all grantees," *id*. at 451, 189 S.E.2d at 5, the *Heffner* Court found that Litchfield had the **sole right** to modify the restriction. This is directly analogous to the present appeal. In our case, the Boyle Trustees reserved the benefit of the restrictions solely to themselves, who have the sole right to release, modify and enforce the same. The Boyle indenture deeds did not require an agreement with anyone to modify the restrictions, and these circumstances were equivalent in *Heffner* – Litchfield did not need an agreement with any other party to modify the restrictions. And, in any event, whether the grantor could modify the restriction on its own or by agreement with a grantee, nowhere in the *Heffner* decision does the Court reason that the creation of a common scheme of

development *depends on* the grantor's right to modify the restriction, only that the restriction "does not bar the intended use of the premises" as the result of such right of modification. *Id*. at 450, 189 S.E.2d at 5. Under *Heffner*, it is the reservation of the benefit of the restriction, not whether or how such restriction may be modified, that defeats a finding of a common scheme of development.

In the present appeal, the Court's finding that: "[t]he crux of this case is whether Shoestring's proposed development is consistent with the character of the neighborhood, making this case directly distinguishable from *Heffner*," Opinion at 10, is simply not supported by the evidence in the record or by *Heffner.* In *Heffner*, the appellant wanted to prevent Litchfield from expanding the club's tennis court area onto residential lots, and the Court held that Litchfield's proposed use "is consistent with the combined recreational and residential character of the development." *Id*. at 452, 189 S.E.2d at 5. In the present appeal, Shoestring intended to build a single-family residence in a neighborhood of single-family residences, as supported by the testimony of Wayne Rogers, Shoestring's architect who has designed approximately thirty (30) "very similar" beachfront homes in the area, including at least four specifically in North Litchfield, R. pp. 261-264, and which is otherwise consistent with the use and character of many other properties in North Litchfield.

As outlined above, all of the evidence in the record, including the language in the Boyle deeds – which is nearly identical to the language in the *Heffner* deeds – as well as the testimony of Thomas B. Boyle, expressly provides and states that the Boyle Trustees intended the benefit, as well as the right to modify, release, waive and enforce the restrictions, all be reserved exclusively to the Trustees. As such, "[b]y near unanimous authority, no enforceable general scheme of development is inferable in the face of a provision of this tenor." *Id.* at 451, 189 S.E.2d at 5.

CONCLUSION

As an action in equity, there is no evidence in the record to support the conclusion that Shoestring had notice that the indenture deed restrictions, including the sand dunes restriction, could possibly be enforced by MAC Coastal. In all of its due diligence regarding the property, Shoestring relied on the language of the deeds, the expert advice of South Carolina real estate attorneys, the North Litchfield community, its architects, surveyors, and Georgetown County officials, and acted accordingly. At no time did it disregard the restrictions of record, and no reasonable purchaser of the Shoestring property would have any reason to be on notice that the restrictions of record could be enforced by MAC Coastal. Shoestring respectfully asks the Court to grant rehearing and reverse its decision that a common scheme of development was created with reciprocal negative easements that are enforceable by MAC Coastal, that Shoestring had notice that the deed restrictions could be enforceable by MAC Coastal, and that Shoestring's property is subject to the "Sand Dunes Restriction."

Respectfully Submitted,

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The South Carolina Court of Appeals

MAC Coastal Properties, Inc., Appellant-Respondent,

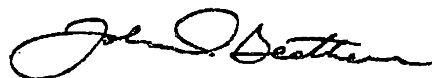
v.

Shoestring Retreat, LLC, Respondent-Appellant.

Appellate Case No. 2022-000545

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.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FILED
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The Honorable Joe M. Crosby

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0075

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

FINAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in concluding that Appellant-Respondent MAC Coastal Properties, Inc. ("**MAC Coastal**") can enforce the Indenture Deed Restrictions on any legal or equitable ground, including the existence of a common plan or scheme of development.

2. The Trial Court erred in concluding that the reference to the Sand Dunes Agreement in the Salley-Haun Deed is a restrictive covenant, that Ms. Salley created a common plan or scheme of development, and that MAC Coastal can enforce the Sand Dunes Agreement.

3. The Trial Court erred in ruling that Respondent-Appellant Shoestring Retreat, LLC ("**Shoestring Retreat**") violated the deed restrictions in grading the sand dunes in the Dunes Restricted Area.

4. The Trial Court erred in concluding that the Sand Dunes Agreement establishes an unfixed boundary of the Sand Dunes Restricted Area such that it increases in size as the beach accretes.

5. The trial court erred in concluding that Shoestring Retreat cannot claim any equitable defenses as a result of its knowledge of the Indenture Deed Restrictions and Sand Dunes Agreement prior to the purchase of the property.

6. Because MAC Coastal cannot enforce ay deed restrictions, it does not have standing to pursue its claims.

STATEMENT OF THE CASE

The issues in this appeal are whether subsequent grantees of real property can enforce certain deed restrictions appearing in the chain of title, and whether language in a different prior deed rises to the level of a restriction on the use of property or is merely a personal covenant between two parties.

The Trial Court found that MAC Coastal can enforce certain deed restrictions by virtue of negative reciprocal easements which were created by a common scheme for the benefit of subsequent grantees of the Boyle Trustees and Kathryn Wallace Salley. South Carolina law makes clear that the intent of the grantor determines the existence of a deed restriction, a common scheme, and the creation of negative reciprocal easements. In this case, the evidence in the record shows that neither the Boyle Trustees nor Kathryn Wallace Salley intended to create a common scheme.

On the contrary, the evidence demonstrates that the Boyle Trustees: (a) intended to create a personal covenant regarding the Sand Dunes Parcel with North Litchfield Beach, Inc. that does not run with the land and is not enforceable by subsequent purchasers; (b) intended to refer to that Sand Dunes Agreement in subsequent deeds and not create a new deed restriction; (c) intended to reserve the benefit and enforceability of the Indenture Deed Restrictions to themselves; and (d) intended that the location of the Sand Dunes Restricted Area extend sixty (60) feet landward from the mean high water mark of the Atlantic Ocean. The evidence is also clear that Kathryn Wallace Salley did not intend to create a common scheme, and further did not intend to create a new deed restriction in the Salley-Haun Deed.

The most compelling evidence of the Trustees' and Kathryn Wallace Salley's intent are the deeds themselves. In the Boyle Indenture Deeds, the Trustees expressly reserved the benefit and enforceability of the deed restrictions to themselves. In the case of *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), the Supreme Court of South Carolina held that when language to this effect is present, no intent to create a common scheme for the benefit of future grantees is inferable. The deed from Kathryn Wallace Salley is equally clear that no intent to create a common scheme or deed restriction is discernable from the language. Also compelling is the testimony of Thomas Boyle and Kathryn Wallace Salley, wherein they each clarify their understanding and intent. For all of these reasons, MAC Coastal does not have the right to enforce any of the deed restrictions at issue and does not have standing to bring its claims. (All capitalized terms in this Statement of the Case are defined herein below).

STANDARD OF REVIEW

This appeal arises out of the master-in-equity's final order following a two-day trial. Plaintiff's Third Amended Complaint sets forth two causes of action: (1) Declaratory Judgment

and (2) Injunction. "Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). To determine the standard of review for a cause of action filed pursuant to the Declaratory Judgment Act, the appellate courts look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought. *Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010). The main purpose of the Complaint in this case is injunctive relief. "Actions for injunctive relief are equitable in nature." *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Id*. Here, the Plaintiff's primary purpose in bringing this action was to enjoin the Defendant from building on Defendant's lot in violation of restrictive covenants it alleges it has the right to enforce. Therefore, this suit is an action in equity, and this Court may review the master-in-equity's factual findings in accordance with the Court of Appeals' own view of the preponderance of the evidence. *See Cedar Cove Homeowners Ass'n, Inc. v. Di Pietro*, 368 S.C. 254, 264, 628 S.E.2d 284, 288 (Ct. App. 2006) (holding "an action to enforce restrictive covenants by injunction is in equity" and reversing the trial court's injunction).

FACTS

(a) The Boyle Trust

On December 4, 1952, Gene Boyle Brading, William B. Boyle, Edwin Boyle, Jr., Ann Boyle Pruet, Thomas B. Boyle, Jr., and E. C. McGregor Boyle, conveyed 334.25 acres in Georgetown County (the "**County**") in trust (the "**Boyle Trust**") to William B. Boyle and Thomas B. Boyle, Jr. as Trustees for the Boyle Trust (the "**Trustees**"). **(R. pp. 291-294) ("the Trust Deed").**

The Trust Deed provides, among other things, that the Trustees had the authority and power to subdivide, develop and manage the property for sale, and to sell all or part of such property on terms which they determined in their discretion, either with or without covenants and warranty. ***Id.* at 2 (R. p. 292).**

The Trust Deed further provides that the Boyle Trust terminates upon the sale of all of the land, but no later than 21 years after its execution, which means the Boyle Trust terminated by its own terms no later than December 3, 1973. ***Id.*** Thomas B. Boyle died on September 3, 2010, and William B. Boyle died on February 20, 2013. There are no successor trustees and no assignments of enforcement rights of record. **Def.'s Tr. Ex. 1 at 5-6, (R. pp. 604-605)**; **(R. p. 268, lines 5-12)**.

The vast majority of the property comprising North Litchfield Beach derives from the Boyle Trust. From 1952 to 1959, the Trustees sold some of the Boyle Trust property in piecemeal fashion to various individuals. (**R. p. 227, lines 7-8)**. The Trustees did not use a uniform conveyance document and instead used at least four different deed forms with differing deed restrictions, some with four, seven, nine, or thirteen restrictions, and others with no restrictions. **R. p. 160, lines 6-12**; **R. p. 267, lines 7-13**; **Def.'s Tr. Ex. 34(R. pp. 670-673); Pl.'s Tr. Ex. 4, 5, 13, 14, (R. pp. 295-298, 299-300, 329-459, 460-466)**.

(b) Conveyance to Kate H. Wallace

In 1953, through separate deeds, the Trustees conveyed what is known as Lot 3 and the Eastern portion of Lot 2 of Block 2-S to Kate H. Wallace. **Pl.'s Tr. Ex. 4, 5 (R. pp. 295-298, 299-300)**. Both deeds contain certain restrictive covenants (the "**Indenture Deed Restrictions**") including restrictions against subdividing, and also provide that the benefit and enforcement of the restrictive covenants are reserved solely to the Grantors (the Trustees). Both deeds also contain a reverter clause that provides that, in the event of a violation of any of the restrictive covenants, the property shall revert to the Trustees. ***Id.***

(c) Conveyance to North Litchfield Beach, Inc.

On June 1, 1959, the Trustees conveyed a large portion of the northern section of North Litchfield Beach to North Litchfield Beach, Inc. (the "**North Litchfield Beach Deed**"). **Pl.'s Tr. Ex. 14 (R. pp. 460-466)**. The North Litchfield Beach Deed excluded certain lots that were reserved by the Grantors, the lots previously conveyed by the Grantors, including the conveyances to Kate H. Wallace, and any area of land between Front Beach and the Atlantic Ocean (the sand dunes area) adjacent to these lots (the "**Boyle Reserved Lots**"). ***Id.* at 2-3 (R. pp. 461-62)**. The North Litchfield Beach Deed also included an agreement between the Trustees and North Litchfield Beach, Inc. that provides, in relevant part:

> ...it being specifically agreed, however, by and between the Grantors and the Grantee that the area of land between the lots shown on said plat [the Boyle Reserved Lots] 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.

(the "**Sand Dunes Agreement**"). ***Id.* at 3 (R. p. 462)**. By the time MAC Coastal filed the instant action, the Boyle Trust owned no real property that was benefitted by the Indenture Deed Restrictions.

(d) Conveyance of the Sand Dunes Parcel and 183 Summertime Lane.

In 1963, the Trustees conveyed the remaining Western portion of Lot 2 to Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle, who then conveyed it to Thomas B. Boyle (individually). **Def.'s Tr. Ex. 19, 20 (R. pp. 658-659, 660-661).** Neither deed contained any restrictions.

In 1964, the Trustees conveyed the sand dunes parcel adjacent to Lot 3 (the "**Sand Dunes Parcel**") and the Eastern portion of Lot 2 of Block 2-S, to Kate H. Wallace (the "**Sand Dunes Deed**"). **Pl.'s Tr. Ex. 6 (R. pp. 301-304)**. Said Sand Dunes Deed references the Sand Dunes Agreement: "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." The Sand Dunes Deed describes the "Dunes Restricted" area as having an easterly boundary at the Atlantic Ocean and measuring sixty (60) feet landward (the "**Sand Dunes Restricted Area**"). ***Id***.

Kate H. Wallace died in 1969. In 1972, Thomas B. Boyle conveyed the Western portion of Lot 2 to Kathryn Wallace Salley, subject to certain deed restrictions which are different from the ones contained in the 1953 deeds to Kate Wallace. **Pl.'s Tr. Ex. 7 (R. pp. 305-309)**. In addition to creating materially different deed restrictions, Thomas B. Boyle's deed conveyed the lot to Kathryn Wallace Salley in his individual capacity, and not as a trustee of the Boyle Trust. ***Id.***

In 1974, Jean Wallace Blount and Kathryn Wallace Salley, as beneficiaries of the Estate of Kate H. Wallace, conveyed Lot 3, the Eastern portion of Lot 2, and the Sand Dunes Parcel to Kathryn Wallace Salley in a Partition Deed. This property became known as 183 Summertime Lane. **Pl.'s Tr. Ex. 8 (R. pp. 310-313)**.

(e) Property of Shoestring Retreat

In 1978, Kathryn Wallace Salley conveyed Lot 3, Block 2-S, the Eastern 20 feet of Lot 2, Block 2-S, and the Sand Dunes Parcel, excepting the northeastern most 30 feet from each, to Louis and Katharine Haun (the "**Salley-Haun Deed**"). This property is hereinafter referred to as the "**Shoestring Property**". **Pl.'s Tr. Ex. 9 (R. pp. 314-317)**. This 1978 conveyance subdivided the original property conveyed to Kate H. Wallace, for which Ms. Salley sought and obtained the approval of the Trustees as evidenced by the *Modification of Covenants, Conditions and Restrictions* referenced below. **Def.'s Tr. Ex. 3 (R. pp. 613-617)**. The record is devoid of any evidence suggesting Ms. Salley sought or obtained any approval from any other property owner in North Litchfield Beach.

Louis Haun quitclaimed his interest in Shoestring Property to Katharine Haun in 2004. **Pl.'s Tr. Ex. 10 (R. pp. 318-322)**.

The foregoing conveyances are shown in Figure 1 attached hereto and incorporated herein by reference.

(f) Releases to Subdivide and Waivers by Trustees

In 1972, the Trustees recorded a *Release of Reverter, Release of Right of Re-Entry and Modification of Covenants, Conditions and Restrictions* whereby they released the right of reverter and re-entry reserved to them in the Boyle Trust deeds, including the property conveyed to Kathryn Wallace Salley, and also released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 2 (R. pp. 607-612)**. In 1978, the Trustees recorded a *Modification of Covenants, Conditions and Restrictions* whereby they again released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 3 (R. pp. 613-617)**.

Plaintiff offered no evidence and the record contains no evidence of either the Trustees or anyone else ever having attempted to enforce any of the Indenture Deed Restrictions. On numerous occasions, the Trustees recorded waivers or consents of variations to the restrictions contained in various grantees' deeds for the purpose of, for example, approval of resubdivisions as evidenced in the Release and Modification described above, as well as allowing construction in the Sand Dunes Restricted Area. **Def.'s Tr. Ex. 2, 3, 14, 15, 16, and 17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653 and 654-657)**. In each of these instruments, the Trustees recorded waivers or consents to variations of the very restrictions MAC Coastal seeks to enforce. Conversely, there is no record of any actions filed by the Trustees seeking to enforce any of the Indenture Deed Restrictions.

(g) Property Owned by MAC Coastal

MAC Coastal owns three of the thirteen interval timeshares of the property located at 186 Parker Drive, which is adjacent to the Shoestring Property. MAC Coastal's title derives from the

Salley Family Partnership, as well as Charles W. Salley, Mark H. Salley and Julian A. Salley, Jr., to whom Kathryn Wallace Salley conveyed the property in 1991. **Pl.'s Tr. Ex. 15 (R. pp. 467-520)**. In 1999, MAC Coastal recorded a *Declaration of Covenants, Conditions and Restrictions* whereby the property was subdivided into thirteen interval timeshares. **Def.'s Tr. Ex. 13 (R. pp. 619-640)**.

The Covenants Conditions and Restrictions on MAC Coastal's lot derive in part from a different grantor and were imposed twenty years after those on the Shoestring Property. MAC Coastal's lot is comprised of all of Lot 1, Block 2-S, the remainder of Lot 2, and a portion of Lot 3 from the 1978 re-subdivision. Thomas Boyle owned Lot 1 and the remainder of Lot 2 from 1964 to 1972, free of any restrictions. Thomas Boyle, individually, imposed certain restrictive covenants in the deed conveying Lot 1 and the remainder of Lot 2 to Kathryn W. Salley. In addition to being imposed 20 years after Kate Wallace's lot restrictions, the covenants, conditions, and restrictions imposed by Thomas Boyle individually are substantially different in number and nature from those described in the Indenture Deed Restrictions.

(h) Purchase, Subdivision and Grading

By agreement dated February 23, 2019, Holly H. McManus contracted to purchase the Shoestring Property from Katharine Alden Haun. **(R. p. 239, lines 15-17)**. After signing the Purchase Agreement, Mrs. McManus contacted Greggory Cunningham of Parker Land Surveying to prepare a plat of the property. **(R. p. 245)**. Mr. Cunningham prepared a draft plat on February 26, 2019, said plat depicting a sixty foot "Sand Dune Restricted Area." **Pl.'s Tr. Ex. 15 (R. pp. 467-520)**. Mr. Cunningham testified at trial that his reason for including the "Sand Dune Restricted Area" on said plat was solely based on such depiction appearing on prior recorded plats. **(R. p. 120, line 14)**. Mr. Cunningham testified he is aware of other surveyors who do not show such a sand dunes restricted area on the plats they prepare. **(R. p. 127, line 8)**. Further, Mr. Cunningham

acknowledged several recorded plats of North Litchfield Beach properties which do not include or show a sand dunes restricted area at all, including plats of the Shoestring Property. **(R. pp. 127-139)**; **Pl.'s Tr. Ex. 38 (R. p. 585)**; **Def.'s Tr. Ex. 5, 22, 25, 31 (R. pp. 618, 663, 666, 667).** Finally, Mr. Cunningham testified that he does not have an opinion on whether the Sand Dunes Restricted Area is restricted or whether there is an enforceable restriction involved. **(R. p. 140, line 1)**. In addition to those about which Mr. Cunningham testified, the trial court admitted into evidence numerous recorded plats of beachfront properties, the title of which derives from the Boyle Trust, which do not include or depict a sand dunes restricted area at all, including plats of the Shoestring Property. **Def.'s Tr. Ex. 21, 23, 24, 32, and 33 (R. pp. 662, 664, 665, 668 and 669)**.

Upon the advice from several attorneys that the Sand Dunes Agreement was unenforceable as a deed restriction, **(R. pp. 241, lines 5-11; pp. 242-43; p. 246, line 20; p. 259, lines 4-9)**, Mr. and Mrs. McManus requested that Mr. Cunningham remove the "Sand Dune Restricted Area" from the plat. **(R. p. 247, line 18)**. When he declined to do so, the McManuses contacted Kenneth Crawford of G3 Surveying to prepare a plat of the property, which he did on June 6, 2019, said plat did not depict the "Sand Dunes Restricted Area" **Pl.'s Tr. Ex. 1 (R. pp. 600-606)**; **(R. p. 247, lines 18-24)**.

On or about July 19, 2019, Ms. Haun submitted an application to the County to subdivide the Shoestring Property into two lots, which was approved on August 26, 2019. **Pl.'s Tr. Ex. 2 (R. pp. 286-290)**. On September 16, 2019, Ms. Haun conveyed the Shoestring Property to Shoestring Retreat. The deed of conveyance does not contain any restrictions but is subject to "all applicable restrictions and easements of record." On September 23, 2019, Shoestring Retreat recorded the subdivision plat in the Register's Office for the County. **Pl.'s Tr. Ex. 11 (R. pp. 323-329)**.

In late 2019, Shoestring Retreat obtained the requisite permits from the County and demolished the structure located on the Shoestring Property and graded the property, including in the sand dunes area, in preparation to build a single-family home for the McManus' retirement. **(R. p. 257, line 13—p. 258, line 14)**.

(i) Assignments to MAC Coastal Properties, Inc.

On November 11, 2009, The Litchfield Company of South Carolina Limited Partnership conveyed various properties to Litchfield Crossing Development Co., LLC incidental to its liquidation of assets. In conjunction with that transaction, The Litchfield Company of South Carolina Limited Partnership recorded a Quit Claim deed purporting to convey to Litchfield Crossing Development Co., LLC any remaining easements, appurtenances, and interests in land owned by the grantor in the County. **Pl.'s Tr. Ex. 22 (R. pp. 544-547)**.

On September 1, 2020, Litchfield Crossing Development Co., LLC recorded an *Assignment of Right of Abatement and Right to Enforce Compliance with Restrictions* whereby it purports to assign to MAC Coastal its right to enforce the restrictive covenants contained in the Sand Dunes Deed and the Sand Dunes Agreement. **Pl.'s Tr. Ex. 26 (R. pp. 571-574)**.

On September 25, 2020, Charles Salley, having Kathryn Wallace Salley's power of attorney, recorded an *Assignment of Right to Enforce Compliance with Restrictions* whereby he purports to assign to MAC Coastal her right to enforce the Sand Dunes Agreement that is referenced in the Sand Dunes Deed, the Partition Deed, the Salley-Haun Deed, and the Haun Quitclaim Deed. **Pl.'s Tr. Ex. 25 (R. pp. 562-570)**. There is no evidence in the record that, at the time of the Assignment from Salley, Ms. Salley owned any real property that would be benefitted by the enforcement of any covenant or restriction or the Sand Dunes Agreement.

(j) Procedural History

On January 21, 2020, MAC Coastal filed a Verified Complaint in the Court of Common Pleas for the 15th Judicial Circuit of South Carolina for Declaratory Judgment and Injunction against Georgetown County. Upon Motion to Intervene filed on February 6, 2020, Shoestring Retreat, LLC was added as a Defendant by Consent Order. On February 28, 2020, MAC Coastal filed an Amended Complaint, along with Yancey A. McLeod, III as additional Plaintiff, against Georgetown County and Shoestring Retreat, LLC. On March 5, 2020, the case was referred to the Master in Equity for Georgetown County by consent order. On May 22, 2020, the parties filed a Stipulation of Dismissal Without Prejudice as to Defendant Georgetown County and as to Plaintiff Yancey A. McLeod, III. On June 3, 2020, Shoestring Retreat, LLC filed its Answer to the Amended Complaint. On September 3, 2020, MAC Coastal filed a Second Amended Complaint against Shoestring Retreat, LLC. On September 29, 2020, Shoestring Retreat, LLC filed its Answer to the Second Amended Complaint. On October 7, 2020, MAC Coastal filed a Third Amended Complaint against Shoestring Retreat, LLC, and on October 19, 2020, Shoestring Retreat, LLC filed its Answer to the Third Amended Complaint. Following a full trial on the merits on April 20-21, 2021, the Trial Court entered a Final Order entered on March 23, 2022.

ARGUMENT

I. The Trial Court erred in concluding that MAC Coastal can enforce the Indenture Deed Restrictions on any legal or equitable ground, including the existence of a common plan or scheme of development.

a. No Common Scheme of Development and No Reciprocal Negative Easements Exist Which Would Give MAC Coastal Enforcement Rights

The Trial Court erred in finding that the Trustees intended to create a common plan or scheme in the Indenture Deeds, and in finding that such a common scheme exists at all. Specifically, the Trial Court incorrectly concluded that the Trustees intended by implication to

create a common scheme, notwithstanding the plain language in the Trust Deed, and it erred in finding the existence of a common scheme that creates negative reciprocal easements enforceable by MAC Coastal.

On numerous occasions, the Supreme Court of South Carolina has articulated the laws of restrictive covenants, common schemes of development and negative reciprocal easements. Of particular relevance are the cases of *Edwards v. Surratt,* 228 S.C. 512, 90 S.E.2d 906 (1956), *McDonald v. Welborn,* 220 S.C. 10, 66 S.E.2d 327 (1951), *Bomar v. Echols,* 270 S.C. 676, 244 S.E.2d 308 (1978), *Charping v. J.P. Scurry & Co., Inc.,* 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988), *Gambrell v. Schriver,* 312 S.C. 354, 440 S.E.2d 393 (Ct. App. 1993), and importantly, *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972). These cases formed and established the guiding principles relevant to the present appeal. Such principles include the standard that, in South Carolina, "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. The Court in *Edwards* held the intent of the grantor is *pivotal* in the determination of whether an enforceable restrictive covenant exists in the context of a common scheme: "the court will have recourse to every aid or canon of construction to ascertain the intention of the parties." *Id.* (citing 26 C.J.S., Deeds, § 163); see also *Charping,* 296 S.C. at 312, 372 S.E.2d at 120. "In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (citing *Wayburn v. Smith*, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977)).

In particular, where an intent to create a **common scheme** can be ascertained, such restriction on the use of property must be created in express terms or by plain and unmistakable implication. *Edwards,* 228 S.C. at 519, 90 S.E.2d at 910 (citing 14 A.J., 1955 Cum.Sup. Sec. 196; *Starmount Co. v. Greensboro Memorial Park*, 233 N.C. 613, 65 S.E.2d 134, 25 A.L.R.2d 898 (1951)). In the absence of an express intent, the Court must determine whether or not a grantor intended, **by plain and unmistakable implication**, to create a common scheme, and the burden of proof is on the subsequent grantee to show the grantor's intention to create a common scheme. *Charping,* 296 S.C. at 314, 372 S.E.2d at 121. In any event, "[c]ovenants, expressed or implied, restricting the free use of land are not favored and must be strictly construed," and "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction." *Gambrell*, 312 S.C. at 357-358, 440 S.E.2d at 395 (citing *Bomar,* 270 S.C. at 676, 244 S.E.2d at 308).

Essential to the determination of whether intent by the grantor arises by plain and unmistakable implication 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,* 672 S.E.2d at 583, 381 S.C. at 192 (citations omitted). In addition, "[i]n determining whether reciprocal negative easements have been created, resort should be had not only to the language of the deeds, but 'the circumstances surrounding the origin of covenants should also be considered.'" *Bomar*, 270 S.C. at 680, 244 S.E.2d at 310 (citing *Nance v. Waldrop*, 258 S.C. 69, 72, 187 S.E.2d 226, 228 (1972); accord, *Arrants v. Rankin*, 268 S.C. 567, 571, 235 S.E.2d 135, 136 (1977)).

In looking to the language of the deed itself, where a deed expressly limits the benefit of a restrictive covenant to the grantor and grantee in the deed, the Court in *Heffner v. Litchfield Golf*

Co., 258 S.C. 447, 189 S.E.2d 3 (1972), held that no enforceable common scheme is created among the subsequent grantees, and a remote grantee does not have standing to enforce such restrictions.

In *Heffner*, the deed at issue contained certain restrictions along with the following provision:

> It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the Grantor and Grantee herein and may be changed at any time by mutual consent in writing of the parties hereto, their heirs, successors or assigns.

Id. at 449, 189 S.E.2d at 4. The Supreme Court held that the suit brought by the remote grantee to enforce the deed restrictions "must fail unless it is supported by the doctrine of reciprocal negative easements by implication," *Id.* at 450, 189 S.E.2d at 4. The Court then explained the doctrine of reciprocal negative easements by implication as follows:

> Where a common grantor opens a tract of land to be sold in lots and blocks, and before any lots are sold inaugurates a general scheme of improvement, and thereafter sells each lot subject to such scheme of improvement, mutuality of covenant and consideration exists among the various purchasers of the lots, and they each have an interest in the negative equitable easement thus created.

Id. at 451, 189 S.E.2d at 5 (citing *Stanton v. Gulf Oil Corporation*, 232 S.C. 148, 152, 101 S.E.2d 250, 251-252 (1957). This holding is consistent with the rule set out in *Bomar*, 244 S.E.2d at 310, 244 S.E.2d at 679: "Where they arise by implication, the restrictions are said to create a reciprocal negative easement." (citing 20 Am.Jur.2d Covenants, Conditions and Restrictions, § 173 (1965)).

Of key importance, however, the *Heffner* Court held:

> Mutuality of covenant and consideration, which are essential to the existence of a general scheme of development enforceable, Inter se, by the purchasers of lots in a subdivision, ***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***. By the express terms of the twentieth provision, uniformly included in the Litchfield deeds, ***the benefit of the restrictions in each is limited to the parties thereto***, who reserve the right to modify or abrogate by mutual assent. ***This directly precludes an implication that the***

> ***grantor intended to create restrictions for the benefit of all purchasers in the subdivision. By near unanimous authority, no enforceable general scheme of development is inferable in the face of a provision of this tenor.***

Id. at 451, 189 S.E.2d at 5 (emphasis added). The rule articulated here by the Court is that no implied intent exists and no negative reciprocal easements arise where the grantor has expressly reserved the benefit of the deed restrictions to itself.

i. The Deeds from the Boyle Trust show an Intent by the Trustees ***Not*** to Create a Common Plan or Scheme

In the present appeal, the 1953 deeds to Kate H. Wallace contain the following provision:

> IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made ***solely for the benefit of the grantors***, who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions, or restrictions by grantee, her heirs or assigns, ***the grantors*** shall have the right of abatement and the right to enforce compliance by injunction or any other appropriate legal or equitable action.

Plf. Tr. Ex. 4 at 2, 5 at 2 (R. p. 296, p. 300) [emphasis added]. This deed from the Boyle Trust uses nearly identical language as the *Heffner* deed, *supra*. As a result, as in *Heffner*, it is clear that the Boyle Trustees did not intend to subject the parcel to common restrictions for the benefit of all grantees. The Trustees expressly limited the benefit of the deed restrictions therein and reserved the enforceability thereof solely to themselves.

In its analysis, the Trial Court incorrectly relies on the termination of the Trust as leaving the door open for the existence of a common scheme of development. The Trial Court held:

> If the Trustees had still owned Shoestring's lot and decided to subdivide the lot, they could have done so over the objections of MAC. The Court agrees with this point but it does not alter the determination that the Trust is defunct and MAC cannot enforce the Covenants as a Trustee. The now extinguished power of the Trust to make changes is not fatal to the existence of a common plan or scheme of development.

Final Order at 11, ¶55 (R. p. 11, ¶55). The extinguished power of the Trust to make changes such as subdividing property it owns may or may not be fatal to the existence of a common plan; however, what *is certainly* fatal to the existence of a common plan or scheme of development is that the Trustees *expressly* reserved the benefit and enforceability of the deed restrictions to themselves. According to the *Heffner* Court, "no enforceable general scheme of development is inferable in the face of a provision of this tenor." *Id.*

The Trial Court's reliance on *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993) is similarly misplaced, when it held that:

> the remedy of mutual reciprocal negative easements is equitable and was created to protect the expectation and reliance interests of purchasers in a subdivision or common plan. Therefore, the focus should be on the equitable rights and remedies of the purchasers and not a developer (or in this case trustees who conveyed away all property interest.)

Final Order at 11-12, ¶56 (R. pp. 11-12, ¶56). This conclusion misstates the holding of *McLeod* and contradicts the holding of *Heffner*. The issue in *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834, was whether "respondent (trustee), the original grantor of a restrictive covenant, has standing to enforce that covenant against a remote grantee when the trust no longer owns any real property which would be benefitted by its enforcement." *Id*. at 246-247, 433 S.E.2d at 834. The *McLeod* Court noted that "a person seeking to enforce a covenant must be benefitted by that act," and that "the trustee lacked standing to enforce this covenant against appellants since the trust no longer owns any real property which would benefit from the covenant's enforcement." *Id*. The only relevance of the *McLeod* decision in the present appeal is that even the original Trustees would lack standing to enforce the Indenture Deed Restrictions because the Trust no longer owns any real property which would be benefitted by their enforcement. Nowhere in the *McLeod* decision does the Court address the theory of reciprocal negative easements or the expectations of a remote

grantee, and the proposition that MAC Coastal should have such a right, simply because it hopes to, is completely unfounded. The Court in *Edwards* makes clear that it is the intent of the *grantor* that is the controlling factor, and in accordance with the *Heffner* decision, no intent to create a common scheme can be found where the grantor clearly and expressly reserves the benefit of the deed restrictions to itself.

ii. The Circumstances Surrounding the Creation of the Indenture Deed Restrictions Show No Intent of the Trustees to Create a Common Scheme.

There is no evidence in the record that would show an intent by the Trustees to create a common plan or scheme. To the contrary, the testimony of Kathryn Salley and Tom Boyle (a Trustee) both agree that the Trustees were the sole enforcers of the covenants, conditions and restrictions. In transcript testimony admitted by the Trial Court, Kathryn Salley testified that the Boyle Trust, and no one else, had the power to modify and to enforce:

> Q. Now, you don't believe that Ms. Boyle has a right to come in and change your lot lines, do you, on your property?
>
> A. No. She – no I do not believe she has a right to come change my lot lines, but if I want to change my lot lines myself, I do feel like I have to ask her.
>
> Q. All right. So if you want to change it you think you have to get permission of whoever has the right to enforce restrictive covenants?
>
> A. Well, it so happens it was the Boyle Trust.
>
> Q. That was Mr. Hinds' opinion at that time, but --
>
> A. Well, I mean, that's the only way we got them changed.
>
> Q. Did you go to the, for example, Litchfield Beach Company or the North Litchfield Beach Company and ask their permission?
>
> A. No. We were told that we had to have the Boyles permission.
>
> Q. Okay. But you didn't seek the permission of anybody else?
>
> A. No.

Def.'s Tr. Ex. 37 at 19:2-23 (R. p. 677, lines 2-23). Later, Mrs. Salley again testified that the Boyle Trust was the sole source of permission for subdivision:

Q. And did Mr. Hinds attempt to record the plat?

A. It's my -- let me just explain to you exactly what I remember because I remember that he called and said that I could not -- that he could not get the plats recorded at the courthouse as such unless I had the permission of the Boyles.

Q. Okay. As a result of what Mr. Hinds told you, okay, what did he have -- what did he do for you?

A. Well, at that point, I called Tom Boyle and he said to talk to Gene Pruet. And Gene had the Trustees to sign an agreement that I could do that.

Def.'s Tr. Ex. 37 at 32:13-24 (R. 678, lines 13-24). The record includes evidence that other property owners sought and obtained consents or waivers of these restrictive covenants. **Def.'s Tr. Ex. 2-3, 14-17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653, 654-657)**.

Tom Boyle's testimony confirms the "grantors" referenced in the reservation language were the Trustees:

Q. … Would you publish paragraph one [of the deed restrictions]?

A. "This lot shall be restricted to residential purposes only and shall not be subdivided or reduced in size by the grantee, their heirs or assigns, without the written consent of the grantors, their successors and assigns."

Q. And you and Bill Boyle were the grantors in this deed?

A. Yes.

Def.'s Tr. Ex. 36 at 16:2-10 (R. p. 675, lines 2-10). Mr. Boyle testified more specifically that the rights in the deed restrictions were reserved solely to the Trustees:

Q. … Now, it provides – and let me read to you. I know it's awful. But after restriction No. 10 it is provided, "It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the grantors" – that's the Trust?

A. Yes.

Q. -- "who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions and restrictions, their heirs or assigns have the right of abatement and the right to enforce compliance by injunction or other appropriate legal or equitable action." **Was that right reserved solely to the Trustees?**

A. Yes.

Q. All right, sir.

A. That's the purpose of it.

Def.'s Tr. Ex. 36 at 19:8-25 (R. p. 676, lines 8-25) (emphasis added). In summary, the Trustees intended themselves, ***and no one else***, to be the sole enforcers of the restrictions. MAC Coastal's predecessor in title, Kathryn Salley, considered the Trustees to be the sole enforcers. The circumstances surrounding the origin of the covenants, as considered in light of *Bomar*, as outlined above and including that the Trustees used many different forms of deeds and not a uniform one, indicate no intent by the Trustees to create a common scheme. Of key importance, because the reservation language does not mention other owners or future purchasers or heirs or assigns, there can be no implied right of enforcement in favor of MAC Coastal under *Heffner.* As the Court held in *Gambrell*, 312 S.C. at 358, 440 S.E.2d at 395, "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction."

II. The Trial Court erred in concluding that the reference to the Sand Dunes Agreement in the Salley-Haun Deed is a restrictive covenant, that Kathryn Wallace Salley created a common plan or scheme of development, and that MAC Coastal can enforce the Sand Dunes Agreement.

The Trial Court's conclusion that Kathryn Wallace Salley created a deed restriction by referring to the Sand Dunes Agreement in the Salley-Haun Deed is in error. The record demonstrates not that Ms. Salley "exacted this restriction for the benefit and protection of that land," as the Trial Court held, **Final Order at 9, ¶46 (R. p. 9, ¶46)**, but that, in preparing the deed, the law offices of Grimes, Hinds & Cowan of Georgetown, S.C. copied that language referencing the Sand Dunes Agreement from prior deeds in the chain of title into the metes and bounds description of the Salley-Haun Deed. This does not evidence an intent to create a restriction, and there is no evidence anywhere in the record of such intent by Ms. Salley.

Furthermore, the actions of Ms. Salley in assigning her purported enforcement rights to MAC Coastal in September, 2020, undermine the Trial Court's conclusion that she intended to create a common scheme, since such an assignment would have been unnecessary if she intended or believed that she had so intended to create an enforceable scheme. The Trial Court's conclusion is at odds with there being 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, and "words cannot be read into a deed to impart an intent unexpressed when the deed was recorded." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020).

The Trial Court's finding that Kathryn Wallace Salley intended to create a common scheme is further in error. **Final Order at 11-12, ¶¶51, 57 (R. pp. 11-12, ¶¶51, 57).** Neither MAC Coastal nor Shoestring Retreat argued this conclusion, and there is no evidence in the record, express or implied, that Ms. Salley intended to create a common scheme that would give rise to negative reciprocal easements.

a. The Reference to the Sand Dunes Agreement in the Salley-Haun Deed is a Personal Covenant between the Trustees and North Litchfield Beach, Inc., Not a Restrictive Covenant.

As made clear in South Carolina case law, the intent of the Trustees and the intent of Kathryn Wallace Salley are central to the issues in this appeal. The Sand Dunes Agreement and other evidence in the record clearly demonstrate that the Trustees intended to create a personal covenant with North Litchfield Beach, Inc., that does not run with the land and is not enforceable by subsequent purchasers. As evidenced by the original Indenture Deeds, the Trustees knew how to create restrictive covenants if that is what they intended. However, what the record demonstrates is that the Trustees intended to refer to the Sand Dunes Agreement in subsequent deeds and *not* 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*. (citing *Cheves v. City Council of Charleston*, 140 S.C. 423, 138 S.E. 867 (1927)). 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.

To be enforceable, a "restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (S.C. 2009) (citing *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (S.C. 2006)). "A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose . . . ." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). "The court is without authority to consider parties' secret intentions…" *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Therefore, "words cannot be read into a deed to impart an intent unexpressed when the deed was recorded." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020) (quoting *Pee Dee Stores,* 831 S.C. at 241, 672 S.E.2d at 802). "The intention of the grantor must be found within the four corners of the deed." *Williams v. Tamsberg*, 425 S.C. 249, 259, 821 S.E.2d 494, 500 (Ct. App. 2018).

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended 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." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)).

In the present appeal, 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 the Trustees' deeds in the record, the Trustees established a course of practice in both the placement and specific language used when creating restrictive covenants in deeds. For example, in the original deed to Ms. Wallace, after and separate and apart from the metes and bounds description of the property and the derivation clause, is the following language:

> 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:

with a list of the specific conditions, covenants and restrictions following. **Pl. Tr. Ex. 4 at 1 (R. p. 295)**. Regardless of the number of conditions, covenants and restrictions contained in the various forms of deeds, this language was used routinely by the Trustees.

In the North Litchfield Beach Deed (**Pl. Tr. Ex. 14 (R. pp. 460-466)**), however, the Trustees did not include this or similar language and did not otherwise create a restriction, but rather memorialized an agreement between the parties:

> [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.

Pl. Tr. Ex. 14 at 3 (R. p. 462). This language (the Sand Dunes Agreement) created a personal covenant between the parties regarding the Sand Dunes Restricted Area that does not run with the land and which subsequent purchasers cannot enforce.

Here, as in *Charping*, there is no indication in the North Litchfield Beach Deed that the Sand Dunes Agreement should ***benefit*** the parties' heirs, successors and assigns. The Sand Dunes Agreement limits the use of the Sand Dunes Restricted Area by the parties' "heirs or assigns, or successors," but it expresses *no intent that it 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,"[1] and there is no evidence in the record in support thereof. The Sand Dunes Agreement therefore does not run with the land and is not enforceable by subsequent purchasers.

The language used by the Trustees in conveying the Sand Dunes Parcel 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.

Pl. Tr. Ex. 6 at 1 (R. p. 301) (emphasis added). As a matter of course for the Trustees, this language does not create a new covenant or restriction because the Boyle Indenture Deeds already contained such a restriction at Paragraph No. 12, a through c. **See Pl.'s Tr. Ex. 4 at 2 (R. p. 296)**. 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 Agreement, and the mere recitation of a

[1] *Charping*, 296 S.C. 312 at 314, 372 S.E.2d at 121, (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956)); *Stegall v. Housing Authority of Charlotte*, 278 N.C. 95, 178 S.E.2d 824 (1971) (burden of showing restrictions in a deed are covenants running with the land is upon the party claiming the benefit of the restriction); *Traylor v. Holloway*, 206 Va. 257, 142 S.E.2d 521 (1965) (the party who seeks to enforce a covenant restricting free use of land has the burden of proving it prohibits the acts of which he complains).

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 Agreement. 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. **(R. p. 116, line 7—p. 118, line 16)**.

Additionally, Kathryn Wallace Salley did not create a new or "additional" restriction on the Sand Dunes Parcel in the Sally-Haun Deed, and there is no evidence in the record that she did. The language in the Salley-Haun Deed simply references the Sand Dunes Agreement. In 1974, Kate Wallace's daughters Jean Wallace Blount and Kathryn W. Salley, by partition deed, conveyed the Sand Dunes Parcel to Kathryn W. Salley. That deed, **Pl. Tr. Ex. 8 (R. pp. 310-313)**, contains the following language:

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

Pl. Tr. Ex. 8 at 3 (R. p. 312). This language is *identical* to the language in the prior deed to Ms. Wallace. The record is devoid of evidence of any agreement between Ms. Blount and Kathryn Salley as grantors and North Litchfield Beach, Inc. so the language quoted above cannot be anything other than a reference to the Sand Dunes Agreement. The deed from Mrs. Salley to the Hauns contains identical language, with the important exception that, rather that referring to an agreement between *grantor* and North Litchfield Beach Inc., it refers to an agreement between "*Grantor's predecessor in title* and North Litchfield Beach, Inc.". **Pl. Tr. Ex. 9 at 2 (R. p. 315)** (emphasis added). This language is the antithesis of a clear, unmistakable intention by Ms. Salley to create a "new" restriction in the deed to the Hauns. Rather than expressing a current intention

to restrict the property, it specifically references the Sand Dunes Agreement entered into by her predecessor in title.

Given the language of the Sand Dunes Agreement, 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. There is No Evidence in the Record that Kathryn Wallace Salley or the Hauns Intended to Create a Common Plan or Scheme.

The Trial Court erred in concluding that Kathryn Wallace Salley and the Hauns intended to create a common plan or scheme. **See, e.g., Final Order at 11, ¶51, and at 17, ¶79 (R. p. 11, ¶51, and p. 17, ¶79)**. This conclusion was not advanced as a legal theory by either party, and it is not supported by the evidence in the record. It appears that the Trial Court may have conflated the conveyances by the Trustees and the conveyance by Kathryn Wallace Salley in finding the existence of a common scheme. The record contains no evidence of such intent of either Mrs. Salley or Ms. Haun in their respective deeds.

As held in the case law cited above, the grantor's intent to create a common scheme is determinative to its existence. Here, there is absolutely no evidence that Kathryn Wallace Salley intended to create a common scheme, and in fact did not even intend to create a new or additional restriction. The Trial Court infers that Ms. Salley intended to create a deed restriction, **Final Order at p 9, ¶46 (R. p. 9, ¶46)**; however, such a conclusion, in the absence of express intent, must be based upon a *plain and unmistakable* implication. *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988). Such implication simply does not exist in the record. In the face of such an unmet threshold, the Trial Court nevertheless goes on to conclude that, not only is the reference to the personal covenant memorialized in the Sand Dunes Agreement

a deed restriction, Ms. Salley additionally intended to create a common plan by which such restriction is enforceable by all grantees. **Final Order at 12, ¶57 (R. p. 12, ¶57).** Again, as there is no factual basis upon which to assert such a conclusion, neither party made this argument even as a possible theory. The evidence in the record shows that Ms. Salley copied the identical language from the Sand Dunes Deed into the metes and bounds description in the Salley-Haun Deed. The language does not contain any reference to it being for the benefit or enforceable by subsequent grantees, heirs, assigns or, in fact, anyone. It merely refers to the Sand Dunes Agreement.

III. The Trial Court Erred in Ruling that Shoestring Retreat, LLC Violated the Deed Restrictions in Grading the Sand Dunes in the Sand Dunes Restricted Area.

The Trial Court's ruling in para. 84 of the Final Order that "Shoestring violated the deed restrictions 'demolishing' the sand dunes in the Dunes Restricted Area to prepare for building" is in error. The provision that the Court enforced, pursuant to its finding of a common scheme, arose from the Sand Dunes Agreement: "The area of land conveyed hereby, by agreement between Grantor's predecessor in title and North Litchfield Beach, Inc., cannot be used for the purpose of erecting any building or structure." **Pl. Tr. Ex. 9 at 1 (R. p. 314)**. For the reasons stated above, this language does not create a deed restriction that is enforceable by MAC Coastal. Even assuming the language creates an enforceable restriction, as the Trial Court held, the actions of Shoestring Retreat, LLC did not violate the plain and ordinary meaning of the language. Shoestring Retreat did not erect or build any structure in the Sand Dunes Restricted Area. The grading of a portion of the sand dunes is simply not restricted or prohibited. As referenced above, "The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended 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." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C.

575, 583, 808 S.E.2d 831, 835 (Ct. App. 2017) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)). In the present case, as a matter of law, the Trial Court cannot extend the clear meaning of the deed provision to accomplish what the parties might or might not have desired, and Shoestring Retreat's actions have not violated the clear language in the deed. The Trial Court erred in ruling that Shoestring Retreat violated the restriction, and it erroneously ordered Shoestring Retreat to restore the sand dunes to their previous condition.

IV. The Trial Court erred in concluding that the Sand Dunes Agreement establishes an unfixed boundary of the Sand Dunes Restricted Area such that it increases in size as the beach accretes.

The language in the Sand Dunes Deed indicates that the Trustees intended to create the Sand Dunes Restricted Area as a fixed area with static boundaries. Specifically, the boundary of the Sand Dunes Restricted Area is described as extending 60 feet landward of the Atlantic Ocean, and nowhere in the description is there an indication that that is subject to change. The Trial Court expanded the Sand Dunes Restricted Area well beyond the original intent of the Trustees.

The language of the deeds, coupled with the testimony of Dan Stacy, show that the Sand Dunes Restricted Area extends 60 feet landward from the mean high water mark of the Atlantic Ocean. Tom Boyle himself specifically testified confirming the Trustees' intent. **Def. Tr. Ex. 36 at 8, ll. 3-13 (R. p. 674, lines 3-13).** As Mr. Stacey testified, over the last 67 years, the Sand Dunes Restricted Area moved eastward with the mean high water mark as the beach accreted over the decades. **(R. p. 278, line 24—p. 280, line 9)**. MAC Coastal, by contending the 60-foot sand dunes area has not moved but has expanded in size, has created an ambiguity in the interpretation of the instruments regarding the location of the area subject to restriction. When such an ambiguity exists, all doubts are to be "resolved in favor of free use of the property." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

The Kate Wallace deeds describe the Sand Dunes Restricted Area as "the strip of land presently measuring sixty (60) feet, more or less, in width, shown on the aforementioned plat, ***which runs along the Atlantic Ocean and is bounded on the East by the high water mark…***" **Pl. Tr. Ex. 4, pp. 1-2, ¶12 (R. pp. 295-96, ¶12)** (emphasis added). This description in the restriction does not mention the western boundary. The description is identical in many of the indenture deeds MAC Coastal entered in the record. *See, e.g.,* **Pl. Tr. Ex. 13, pp. 6-7, 10, 14, 18, 22, 24, 27, 30, 36 (R. pp. 337, 341, 345, 349, 353, 356, 359)**. The sand dunes restricted area in the North Litchfield Beach Deed is similarly described as "…the area of land between the lots shown on said plat ***and the Atlantic Ocean***…" **MAC Coastal Ex. 14 at 3 (R. p. 462)** (emphasis added), which is referenced in the 1964 deed of the sand dunes area from the Trustees to Kate Wallace **Pl. Tr. Ex. 6 at 1 (R. p. 301**), all of which clearly illustrate the Trustees' intent to restrict only the property immediately adjacent to the mean high water mark.

Perhaps most illuminating is Tom Boyle's own testimony, as relied on by Dan Stacy, which corroborates the location of the Sand Dunes Restricted Area and makes explicit the Trustee's intent. Mr. Boyle testified as follows:

> Q. All right, sir. Now, while I've got you, did you reserve on this map an area called "dunes restricted"?
>
> A. Yes, sir.
>
> Q. And describe where it is so that the record will reflect that?
>
> A. The dunes restricted area was ***the 60 foot strip beginning at the mean high water mark*** running parallel with the beach.
>
> Q. How far back did it go?
>
> A. 60 feet.
>
> Q. It ran 60 feet. Did it basically about the lots on Exhibits 8, 9 and 10?
>
> A. Yes, sir.

Def. Tr. Ex. 36 at 8, ll. 3-13 (R. p. 674 , lines 3-13)(emphasis added). The Trustees' intent could not be more clear. Tom Boyle's sworn testimony evidences the Trustees' intent to locate the Sand Dunes Restricted Area ***60 feet from the mean high water mark***. This testimony was given in 1995, after Hurricane Hugo destroyed the sand dunes, the Litchfield Beach Property Owners Association and other owners rebuilt the dunes, and at a time when accretion of the beach had occurred and was widely known.

The movement of the Sand Dunes Restricted Area with the mean high water mark is consistent with the law of accretion. When the Trustees conveyed the Sand Dunes Parcel to Kate Wallace in 1964, they conveyed the land from Lot 3 all the way to the Atlantic Ocean, "it being the intention of the Grantors to convey by this deed all of the property from the easterly side of Lot 3, Block 2S, to the Atlantic Ocean…" **Pl. Tr. Ex. 6 at 1 (R. p. 301)**. Since that time, the beach has accreted significantly, which South Carolina courts recognize as benefiting the land owner:

> "South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to. … Conversely, lands gradually encroached upon by water cause to belong to the former riparian or littoral owner. … The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring."

Horry County v. Woodward, 282 S.C. 366, 370, 318 S.E.2d 584, 586 (1984). "Generally, a riparian owner enjoys the right to any lands formed by accretion." *Hilton Head Plantation Property Owners' Assoc., Inc. v. Donald*, 375 S.C. 220, 224, 651 S.E.2d 614, 617 (Ct. App. 2007). Unquestionably, Shoestring Retreat, as the littoral owner, has the right to the additional property

created by accretion, and as the lot line moves with the Atlantic Ocean, so too does the Sand Dunes Restricted Area. This conclusion is also consistent with survey guidelines of the Bureau of Land Management, which include guidelines for mapping property boundaries based on ambulatory descriptions (which are descriptions that contain reference to described limits that do not have fixed positions but are subject to change over time) such as mean high tide or mean high water. *See generally* United States Department of Interior, Bureau of Land Management, *The Manual of Surveying Instructions* (2009). It is also consistent with the State of South Carolina's management of the coastal zone and primary oceanfront sand dune system – the area from the mean high-water mark to the setback line as established pursuant to S. C. Code Section 48-39-280. The setback lines are not fixed or static but are established based on staggered establishment cycles.

The intent of the Trustees to protect the beachfront by prohibiting building in the Sand Dunes Restricted Area is accomplished by maintaining a 60-foot restricted area. This was, in actuality, the express original intent and size of the Sand Dunes Restricted Area. The 60-foot area was the expression of and did accomplish what the Trustees intended. Yet, the Trial Court's ruling makes the Sand Dunes Restricted Area more than 200 feet and potentially growing. **See Pl. Tr. Ex. 36 (R. p. 583)**. As held in *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 808 S.E.2d 831 (Ct. App. 2017), the role of the Court is to ascertain and give effect to the Trustees' intent, which we know to be a 60-foot area:

> The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended 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.

Cmty. Servs. Assocs., Inc., 421 S.C. at 583, 808 S.E.2d at 835. Subsequent regulatory measures such as the OCRM lines and Georgetown County ordinances were put in place for the exact same

purpose, which supports the argument here that extending the Sand Dunes Restricted Area from the mean high water mark to Shoestring Retreat's adjacent property line is not necessary, does not serve the Trustee's intended purpose, and results in a very burdensome restriction on the use of the property well away from the OCRM setback line.

Based on all of the evidence, including the testimony of Tom Boyle, the description of the sand dunes in the Indenture Deeds, and the North Litchfield Beach Deed, the location of the Sand Dunes Restricted Area logically moves with the mean high water line. An example is shown on a recorded plat of Lot 4, Block 3S, which lies across Summertime Lane from Shoestring's lots (**Def.'s Tr. Ex. 25 (R. p. 666)**), where, as Dan Stacy testified, the reserved dunes area adjacent to Lot 4, Block 3S has remained adjacent to the mean high water mark of the Atlantic Ocean as Lot 4 has significantly accreted. **(R. p. 278, line 24—p. 280, line 9)**.

Lastly, it is important to remember the Trustees' restriction against construction in the Sand Dunes Restricted Area was not absolute. The restriction does not appear in any of the deeds conveyed to the beneficiaries of the Boyle Trust, even for properties adjacent to the sand dunes area. *See* **Pl. Tr. Ex. 13**; **Def.'s Tr. Ex. 19, 34 (R. pp. 329-459, 658-659, 670-673)**. Additionally, other lot owners in the vicinity obtained waivers to build in the sand dunes area. *See, e.g.*, **Def.'s Tr. Ex. 14, 15 (R. pp. 641-645, 646-651)**. The Kate Wallace deeds also clearly allow construction in the Sand Dunes Restricted Area with the Trustees' written permission. **Pl. Tr. Ex. 4 (R. pp. 295-298)**. Many of the deeds entered in the record contain a similar clause that allows construction in the sand dunes area with the permission of the Trustees, *see* **Pl. Tr. Ex. 13, pp. 9, 17, 28, 31, 45, 57, 63, 66, 78, and 93 (R. pp. 337, 345, 353, 356, 369, 377, 381, 385, 388, 400, and 415)**, which was granted on many occasions. ***See*** **Def.'s Tr. Ex. 2-3, 14-17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653, 654-657).**

V. The Trial Court Erred in Concluding that Shoestring Retreat Cannot Claim Any Equitable Defenses as a Result of its Knowledge of the Indenture Deed Restrictions and Sand Dunes Agreement Prior to the Purchase of the Property.

The Trial Court erred in ruling that Shoestring Retreat cannot claim any equitable defenses. On the basis that Shoestring Retreat had knowledge of the "restrictive covenants, deed restriction and Sand Dunes Restricted Area prior to the purchase of the property and application for subdivision of the lot with Haun," (**Final Order at 75 (R. p. 16, ¶75)**), the Trial Court held that "One who seeks equity must do equity and this court concludes that Shoestring cannot claim any equitable defenses." (**Final Order at 76 (R. p. 16, ¶76)**). This is a misapplication of the law of unclean hands and is internally inconsistent with other provisions of the Trial Court's Final Order.

South Carolina case law has established the doctrine of unclean hands as a bar to equitable relief by a *plaintiff* who comes to court having acted unfairly or in bad faith. "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009).

In the present case, Shoestring Retreat raised several equitable defenses before the lower court, not claims upon which it demands relief. These included waiver, acquiescence and abandonment, laches, unclean hands of MAC Coastal, and change of conditions. The substance of

these defenses, when evaluated relative to the claims of MAC Coastal, operate to bar such claims on the respective bases for which they are designed. That is, Shoestring Retreat's defense that the Trustees relinquished their enforcement rights of the Indenture Deed Restrictions due to waiver, acquiescence and abandonment should not be cast aside based on the unrelated fact that Shoestring Retreat had knowledge of such restrictions. Shoestring Retreat acted, as the record demonstrates, not unfairly or in bad faith, but upon the advice of counsel that such restrictions are unenforceable – a conclusion with which the Trial Court itself agrees:

> The covenants and restrictions in the deed from the Trustees to Wallace (P.4) were valid and enforceable covenants running with the land and would be binding on Shoestring if MAC was a legitimate assignee of the Trustees. However, all Trustees are deceased and ***those restrictions terminated with the passing of the last Trustee***."

Final Order at 78 (R. p. 17, ¶78) (emphasis added).

The Trial Court appears to rely on the testimony of Greggory Cunningham and the testimony of Mr. McManus that, upon Mr. Cunningham declining to remove the Sand Dunes Restricted Area from the draft plat he had prepared and Mr. McManus then engaging Ken Crawford to prepare a plat that does not show the Sand Dunes Restricted Area, Mr. McManus' actions constitute an unfair or bad faith act. However, not only had Mr. McManus acted upon the advice of counsel that the reference to the Sand Dune Agreement in the Sand Dunes Deed and Salley-Haun Deed was not a valid and enforceable restriction, Mr. Cunningham himself testified that he does not have an opinion as to its enforceability and acknowledged that many recorded plats including those of the Shoestring Property do not, in fact, show such a Sand Dunes Restricted Area. This is not indicative of unfair or bad faith actions, but those resulting from a careful examination of the title and past practices during due diligence in preparation to purchase the real estate.

For the reasons stated above, MAC Coastal cannot enforce the deed restrictions at issue, and Shoestring Retreat should not equitably be punished for its informed belief at the time it purchased the property. Shoestring Retreat's equitable defenses should therefore not have been summarily dismissed, and the record is replete with evidence that MAC Coastal's claims are barred by: (i) the defense of waiver because the Trustees consistently granted waivers and releases of restrictions, including the Sand Dunes Agreement, to build in the Sand Dunes Restricted Area, and allowing subdivisions including those relating to the Shoestring Property and MAC Coastal Property, **Def.'s Tr. Ex. 2-3, 14-17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653, 654-657)**.; (ii) the defense of acquiescence because over the years there has been unchallenged building in the sand dunes area by other owners and subdivisions of restricted properties **(R. p. 272, line 5—p. 277, line 25)**; (iii) the defense of abandonment because there has been a lack of enforcement of deed restrictions and Sand Dunes Agreement for 67 years **(R. p. 277, lines 7-25)**; (iv) the defense of laches because of the undue, unreasonable and unexplained lapse of time in enforcement of deed restrictions (60+ years), the opportunity to attempt to enforce, and neglect thereof **(R. p. 277, lines 7-25)**. *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007); *Ramantanin v. Poulos*, 240 S.C. 13, 124 S.E.2d 611 (1962); *Babb v. Sullivan*, 43 S.C. 436, 21 S.E. 277 (1895). MAC Coastal's enforcement after such delay would work injury, prejudice and disadvantage to Shoestring. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E.2d 357 (Ct. App. 1984); (v) the defense of unclean hands because of the repeated subdivisions of MAC Coastal's property (**Pl.'s Tr. Ex. 9, 13; Def.'s Tr. Ex. 2, 3 (R. pp. 314-317, 329-459, 607-612, 613-617)**); and (vi) the defense of change of conditions because of the movement of the mean high water mark by natural and man-made beach accretion, the establishment of the OCRM lines, and the Georgetown County ordinances **(R. p. 278, line 24—p. 280, line 9)**.

VI. Because MAC Coastal Cannot Enforce the Deed Restrictions it Does Not Have Standing to Pursue its Claims.

For the foregoing reasons, and for the reasons appearing in the record, MAC Coastal lacks standing to enforce any of the Indenture Deed Restrictions or the Sand Dunes Agreement referenced in the Salley-Haun Deed at issue. Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*, 346 S.C. 298, 302-303, 551 S.E.2d 588, 590 (Ct. App.2001); see also *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). The injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000). An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In the case at bar, MAC Coastal has failed to produce any evidence describing or quantifying any concrete, particularized injury or damages.

CONCLUSION

The law in South Carolina is clear that the intent of the grantor defines the existence of a deed restriction and a common scheme. The evidence in the record shows absolutely no intent, express or implied, by either the Trustees or Kathryn Wallace Salley to create a common scheme that would give rise to negative reciprocal easements enforceable by MAC Coastal. The record also shows that the Trustees intended for the Sand Dunes Restricted Area to extend 60 feet from

the mean high water mark of the Atlantic Ocean. Finally, the record shows that the Trustees put the reference to the Sand Dune Agreement in the Sand Dune Deed, and that Kathryn Wallace Salley included the reference to the Sand Dunes Agreement in the Sally-Haun Deed, not as an additional, superfluous deed restriction, but as notice to grantees of the agreement among the Trustees and North Litchfield Beach, Inc. The Trial Court erred in concluding that: the Trustees created a common scheme; the reference to the Sand Dunes Agreement in the Salley-Haun Deed created a new deed restriction; Kathryn Wallace Salley created a common scheme; the size of the Sand Dunes Restricted Area is greater than a 60-foot setback from the Atlantic Ocean; Shoestring Retreat has violated a deed restriction by grading in the sand dunes area; and that MAC Coastal has standing. Shoestring Retreat prays that this Court REVERSE the Trial Court's decision for the reasons set forth herein.

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I, Bruce Wallace, certify to the best of my knowledge, this brief complies with SCACR 211(b).
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December 6, 2022

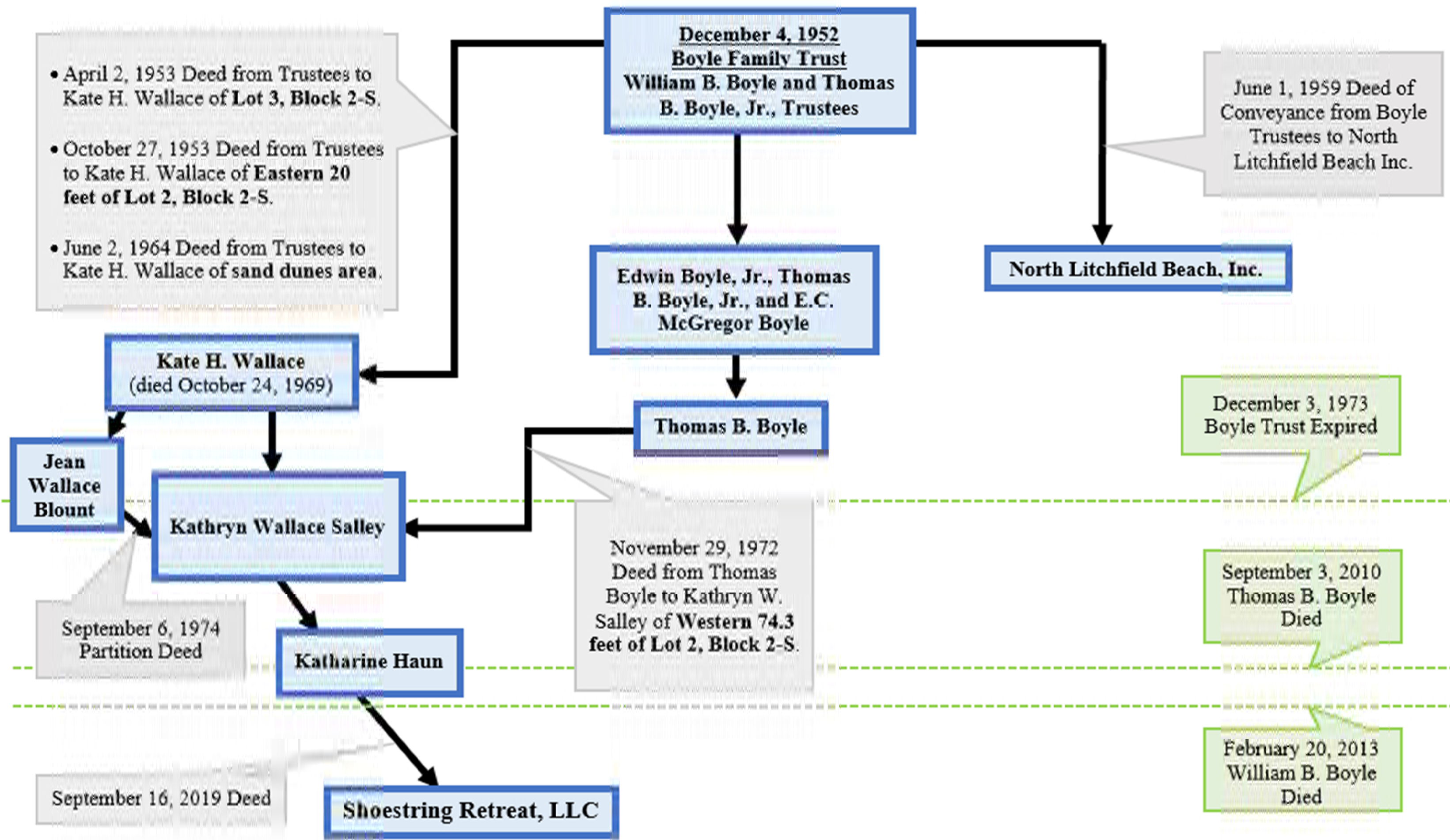

Fig. 1

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In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0075

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

CERTIFICATE OF SERVICE

I certify that the foregoing **FINAL BRIEF OF RESPONDENT-APPELLANT** was served on Appellant-Respondent on December 6, 2022 was served on Appellant-Respondent on December 6, 2022 by emailing a copy of the same to the following counsel of record using the primary email address listed in the Attorney Information System:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0072

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MAC Coastal Properties, Inc., Appellant-Respondent,

v.

Shoestring Retreat, LLC, Respondent-Appellant.

FINAL RESPONDENT BRIEF OF APPELLANT-RESPONDENT

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The Appellant-Respondent, MAC Coastal Properties, Inc. ("MAC") adopts and incorporates by reference the Statement of Issues, Statement of the Case, Standard of Review and Facts set forth in its Appellant-Respondent's Initial Brief.

MAC notes that the Statement of the Case by Respondent-Appellant Shoestring Retreat, LLC ("Shoestring") violates Rule 208(c) SCACR by including contested matters.

ARGUMENT

I. THE MASTER CORRECTLY CONCLUDED THAT MAC CAN ENFORCE THE DEED RESTRICTIONS BECAUSE OF A COMMON PLAN OR SCHEME.

a. There is ample support in the record of a common plan or scheme by the grantor (trustees).

It is well settled in this state that where the owner of a tract of land subdivides it and sells the distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by *any grantee against any other grantee*, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created. *McDonald v. Welborn*, 220 S.C. 10, 18-19, 66 S.E.2d 327, 331 (1951) (emphasis added) (*citing Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949); 26 C. J. S., *Deeds*, § 167).

The rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property, should not be applied in such a way as to defeat the plain and obvious purpose of a contractual instrument of restriction. *McDonald, 220* S.C. at 19, 66 S.E.2d at 331.

"Subsequent cases have identified the following four elements needed to establish mutual negative equitable easements: Ordinarily, four elements must be established to show a reciprocal negative easement: (1) There must be a common grantor; (2) There must be a designation of the land or tract subject to restrictions; (3) There must be a general plan or scheme of restriction in

existence for the designated land or tract; and (4) The restrictive covenants must run with the land. If the above elements are satisfied, the restrictions are enforceable against the grantor and subsequent grantees of lots in the restricted area who take with actual or constructive notice of the restrictions." *Bomar v. Echols*, 270 S.C. 676, 679-80, 244 S.E.2d 308, 310 (1978) (*citing* 20 Am.Jur.2d *Covenants, Conditions and Restrictions*, § 173 (1965).

In this case, each of these elements are satisfied: (1) the Boyle Trustees were a common grantor; (2) they specifically identified the land subject to the covenants (see various plats showing subdivision blocks and lots which were subsequently conveyed by Trustees), Pl.'s Tr. Ex. 30-34 (R. pp. 574-581), and in Indentured Deeds, Pl.'s Tr. Ex. 13 (R. pp. 329-459); and (3) there was general scheme of restrictions in the Indentured Deeds used by the Trustees.

Chuck Salley testified based on his review of the 36 deeds conveyed out by the Trustees, Pl.'s Tr. Ex.13 (R. pp. 329-459), that the number one restriction in each of the deeds was that "[t]he property shall be used for residential purposes only and shall not be subdivided or reduced in size without the written consent of the grantor." Salley Test. at 83-84 (R. pp. 159-160). The Plaintiff's expert, Jimmy Moore noted that it was not essential to establish a common plan or scheme that all the restrictions be identical. Moore Test. at 139-140 (R. pp. 176-177). "There are cases from multiple jurisdictions which hold that they don't have to be identical, but it is important that they be relatively uniform, and the deeds at North Litchfield -- I think Mr. Wallace has referred to this, that there are a couple of different sets, but they're almost identical." Moore Test. at 139:25-140:6 (R. p. 176, line 25-p. 177, line 6).

"Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots is essential to the existence of a neighborhood scheme." *Pitts v. Brown*, 215 S.C. 122, 130, 54 S.E.2d 538, 542 (1949). Moore further specifically testified in his

professional opinion that there was a common scheme of development, and that the Plaintiff had the right to enforce the restrictions. Moore Test. at 138-141 (R. pp. 175-178). The restrictive covenants run with the land. The master already concluded the covenants run with the land. Final Order ¶ 43, March 23, 2022 (R. p. 9, ¶ 43).

b. The reservation of rights to modify by grantor is not fatal to a common plan or scheme where the grantors no longer have any interest in the development and *Hefner* is distinguishable.

Shoestring argues that since the trustees included language in the conveyance deeds reserving unto themselves the right to change or modify the restrictions that this precludes the finding of a common plan or scheme. A developer's reservation of rights is a common way that a developer retains control *while developing a subdivision.* However, this argument presupposes that the developer will always retain an interest in the development and be available to modify and enforce common restrictive covenants. It ignores cases like this one – and no doubt several others – where a developer conveys all its property (after changing and modifying the lots to suit the developer's needs). This is not dissimilar to the case of where a developer develops a subdivision with common restrictions but reserves the right to modify them. Subsequently, the developer either conveys all the property but fails to create an HOA or goes out of business. Does this then mean the property owners no longer have the right to enforce restrictions they relied upon when they purchased? The court's answer to this question could have a profound impact on developments throughout the state where developers reserve unto themselves the right to enforce and develop subdivision restrictions during development, but then fail to provide a subsequent means of enforcement.

This issue was addressed in *Richmond v. Pennscott Bldrs., Inc.*, 43 Misc.2d 602, 251 N.Y.S.2d 845 (Sup. Ct., Queens Cnty. 1964), a case cited by the South Carolina Supreme Court

in a summary opinion where they granted certiorari in *AJG Holdings, LLC v. Dunn*, 410 S.C. 346, 764 S.E.2d 912 (2014).[1]

In *Richmond*, "the Kew Gardens Corporation, the common grantor, not only disposed of its sole remaining parcel after it had completed the development of its tract as shown on the filed maps, but it voluntarily dissolved on January 22, 1953, and has since owned no property, real or personal." 43 Misc.2d at 606.

Like the present case, the Defendants argued that the grantor's reservation of rights made the covenant personal and that a subsequent grantee could not enforce the covenants. The court stated, "While the Kew Gardens Corporation reserved the right to waive or modify the restrictions by written consent, it was held in *Elliston v. Reacher* ([1908] 2 Ch. 665), cited favorably in *Booth v. Knipe* (225 N.Y. 390, 397, 122 N.E. 202, 203, *supra*), that a common grantor's reservation of such a power is not fatal to the existence of a common plan or scheme of development. The [*Elliston*] court noted that 'it is altogether exceptional not to see some power reserved to the vendor to abstract certain property from the scheme' (p. 672) and that such power was 'one element to consider and assist the Court in arriving at the conclusion of fact whether there was or was not a scheme, and nothing more than that' (p. 674)." *Richmond*, 43 Misc.2d at 608.

Shoestring bases this argument on the case of *Heffner v. Litchfield Golf Co.,* 258 S.C. 447, 189 S.E.2d 3 (1972); however, this case is distinguishable.

In *Heffner*, the lot owner bought property in a subdivision that surrounded a golf course. *Id.* at 449, 189 S.E.2d at 4. All the lots contained use limitations and were restricted to residential

[1] This opinion also shows that the court will protect the investment of owners in a subdivision from arbitrary deviations from the covenants by imposing conditions on a developer who reserves in their sole discretion the right to amend the covenants.

use. *Id.* A later provision stated that restrictions were made solely for the benefit of the grantor and a grantee and could be changed at any time by mutual consent in writing by the parties or their successors. *Id.*

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

First, the golf company, as an original grantor and successor grantee, reserved the right to modify the lot restrictions. *Id.* Here, if the Trustees had still owned Shoestring's lot and decided to subdivide the lot, they could have done so over the objections of MAC. However, Shoestring is not an original grantor, and the Trustees no longer own any property in the subdivision.

Second, the covenant in *Heffner* was already mutual, providing modification by mutual consent of the grantor and grantee, thus there could be no implied mutuality. *Id.* at 451, 189 S.E.2d at 5. The same is not true in this case, and once the Trustee's conveyed all their property and could no longer modify the restrictions, the implied mutuality of the common plan or scheme should control.

Finally, the Supreme Court noted the following in the last paragraph of *Heffner*: "We add that the use to which Litchfield proposes to put these lots is consistent with the combined recreational and residential character of the development. We do not intend to imply that the residents of this subdivision *would be without remedy against an incompatible use*. That question has not been presented." *Id.* at 452, 189 S.E.2d at 5 (emphasis added).

This court should hold that when a developer reserves a right to modify and enforce the covenants but then conveys away all its property and no longer has an interest that the covenants can be enforced under a common plan or scheme by the grantees in the subdivision.

c. The remedy of mutual reciprocal negative easements is equitable and was created to protect the expectation and reliance interests of purchasers in a subdivision or common plan.

South Carolina courts have long protected the expectation rights of residential purchasers. Therefore, the focus should be on the equitable rights and remedies of the purchasers and not a developer (or in this case, Trustees who conveyed away all property interest). *See McLeod v. Baptiste*, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) (holding developer grantor can no longer enforce covenants once developer no longer owns any property benefited by the covenant[2]).

Shoestring misconstrues the court's use of the *McLeod* case by stating the court misstates the holding. *McLeod* is an example, like the *Richmond* case, where an overzealous developer continued to try and control property long after it to no longer had any interest in the development.[3] The point is that the owners in the subdivision should be the ones enforcing the covenants, not a remote developer with no interest.

This court should continue its protection of the rights of residential purchasers.

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[2] This was one of the issues in the *Richmond* case where the developer was in effect selling waivers of restrictions after it had sold all the property.

[3] The owners were trying to build a play platform in the woods for their children, and the remote developer sought to enforce architectural design rights.

II. THE MASTER CORRECTLY HELD THAT SHOESTRING COULD NOT BUILD IN THE DUNES RESTRICTED AREA

a. Dunes Restricted Area

As part of their development of Retreat Beach, the Trustees created a strip of land labeled as "Dunes Restricted." This strip is shown on several early plats. Pl.'s Tr. Ex. 30, December 12, 1952 (R. p. 575); Pl.'s Tr. Ex. 31, August 15, 1956 (R. p. 576); Pl.'s Tr. Ex. 32, October 2, 1956 (R. p. 577). The strip is shown on all the plats as running 60 feet from the eastern border of the lots adjacent to the Atlantic Ocean. On the December 13, 1952, plat, the eastern border of the strip coincides with the "Mean High Water Mark." Pl.'s Tr. Ex. 30 (R. p. 575).

In the initial conveyance of Lot 3 to Kate Wallace, the Trustees included among the restrictive covenants that "If the lot hereinabove described borders on the strip of land presently measuring sixty (60') feet, more or-less, in width, shown on the aforementioned plat, **which run along the Atlantic Ocean and is bounded on the East by the high water mark**, the grantee, her heirs and assigns, herein shall have, and is/are hereby granted, the right and privilege, **appurtenant to the lot** hereby conveyed, to cross over said strip of land for the purpose of ingress, and egress to the ocean for swimming, sunbathing and fishing, subject to the following conditions." Pl.'s Tr. Ex. 4, ¶ 12 (R. pp. 295-296, ¶ 12) (emphasis added). The conditions restricted from building any structure on the strip and from doing 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." (R. p. 296, ¶ 12a).

When the Trustees decided to get out of the land development business and sell the rest of the property to North Litchfield Beach, both the Trustees and North Litchfield realized the importance of maintaining the beaches and dunes in the area. For that reason, they mutually covenanted and agreed in the deed of conveyances from the Trustees to North Litchfield Beach, Inc. "that the area of **land between the lots** shown on said plat **and the Atlantic Ocean** shall never

be used for the purpose of erecting any building or structure by the Grantors or the Grantee herein, **their heirs or assigns, or successors**." Pl.'s Tr. Ex. 14 (R. p. 462) (emphasis added). Prohibiting construction in this area was important for two reasons: "First of all, the restriction that prohibits building in the dunes restricted area is to preserve those dunes both from an aesthetic standpoint, but also we all know today that sand dunes protect property from hurricane damage and storm damage in the event of a flood and high water coming to shore. Restrictive covenants like that also protect property values because it prohibits somebody from building out in front of his neighbor and blocking the view." Moore Test. at 147:20-148:5 (R. p. 184, line 20-p. 185 line 5).

After agreeing to limit construction on the land between the front ocean lots and the Atlantic Ocean, the Trustees thereafter conveyed the Dunes Restricted property to Wallace as follows:

> All that certain piece, parcel or lot of, land situate, lying and being in the County of Georgetown, State of South Carolina, in Township No. 7, and being shown and delineated on plat of property of William B. Boyle and Thomas B. Boyle, Jr., dated August 15, 1956, and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina, in Plat Book L, at page 29, as that portion of the area marked "Dunes Restricted" on said plat between the northern and southern side lines of Lot 3, Block 2S, as shown on said plat, **extended to the Atlantic Ocean**, said piece of property being bounded and measuring as follows: on the northerly side by a portion of the property marked "Dunes Restricted' on said plat, and measuring therein, along the northern side line of Lot 3, Block 2S extended to the Atlantic Ocean, a distance of Sixty (60') Feet, more or less; on the easterly side **by the Atlantic Ocean** and measuring thereon One Hundred Seventy (170') Feet, more or less; on the southerly side by a portion of the property marked Dunes Restricted on said plat, and measuring thereon, along the southerly side of Lot 3, Block 2S, **extended to the Atlantic Ocean**, a distance of Sixty· (60') Feet, more or less; and on the west by Lot 3, Block 2S, and measuring thereon One Hundred Seventy (170') Feet, more or less; it being **the intention of the Grantors to convey by this deed all of the property from the easterly side of Lot 3, Block 2S, to the Atlantic Ocean between the northerly and southerly side lines of Lot 3, Block 2S, extended**.
>
> 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. Pl.'s Tr. Ex. 6, book 60, p. 379 (R. p. 301) (emphasis added).

This language prohibiting building in the Dunes Restricted Area was included in the partition deed from Kate Wallace to Kathryn Salley, Pl.'s Tr. Ex. 8 (R. pp. 310-313), and in the deed from Kathryn Salley to Louis and Katherine Haun (Shoestring's predecessor in title), Pl.'s Tr. Ex. 9 (R. pp. 314-317). It was conspicuously absent in the Deed from Haun to Shoestring. Pl.'s Tr. Ex. 11 (R. pp. 323-328).

i. The covenant not to build in the Dunes Restricted Area is a real (not personal) covenant which runs with the land and is binding on the heirs, successors and assigns of the Trustees.

Shoestring argues that the express covenants in its chain of title which prohibit building in the Dunes Restricted area is a mere personal covenant between the Trustees and North Litchfield Beach, Inc. that does not run with the land and is not enforceable by subsequent purchasers. This conclusion is contrary to the facts and the law.

First, as to intent to create a restrictive covenant, the Trustees included the restrictive area in its earliest deeds to Kate Wallace and gave the owners an *appurtenant* right to cross this area for ingress and egress under certain conditions. Pl.'s Tr. Ex. 4 (R. pp. 295-298). The conditions restricted from building any structure on the strip and from doing 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." (R. p. 296, ¶ 12a). If the covenant was intended to be personal, why did the Trustees include it with grantees prior to its conveyance to North Litchfield Beach, Inc.? Second, as discussed above, the Trustees conveyed the Dunes Restricted Area to Wallace and others after the conveyance to North Litchfield and expressly included the restrictive language of the covenant. If the covenant was merely personal and not intended to run with the land, this would not have been necessary. Third, in their conveyance, North Litchfield and the Trustees expressly made the covenant binding on the "Grantors or Grantee herein, their heirs or assigns, or successors." Pl.'s Tr. Ex. 14, book 33, p. 285 (R. p. 284).

The application of the law also supports the construction that the Dunes Restricted Area covenant runs with the land. "[A] covenant is personal when it has no relation to the land conveyed (*Howard Manufacturing Co. v. Water Lot Co.*, 53 Ga. 689; *Wells v. Benton*, 108 Ind. 585, 8 N.E. 444, 9 N.E. 601); or is not connected with the title" *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 320, 181 S.E. 66, 71 (1935). In contrast, "In order to run with the land (the covenant) must respect the thing demised, and the act covenanted to be done or omitted must concern the land, or the estate conveyed." *Id.* at 317, 181 S.E. at 71. "If a covenant is such that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises, it is not a mere personal covenant, but one that runs with the land and binds assignees of the covenantor as well as the covenantee and his personal representative." *Id* at 318, 181 S.E. at 70 (string citations omitted). Here, the covenant not to build on the land obviously touches and concerns the land and the act covenanted concerns the land. Therefore, it is a real (not personal) covenant which runs with the land.

Shoestring relies on *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988) in support of its argument that the Dunes Restrictive Covenant is personal; however, that case is distinguishable on its facts. In *Charping*, the grantor Townsend made no reference to the covenant in the deed to Charping who later wanted to enforce it. *Id.* at 313, 372 S.E.2d at 121. The court held, "Charping has failed to produce any evidence of Townsend's intent as would constitute a genuine issue of fact. The stipulated facts indicate Charping entered into the contract to purchase in ignorance of the restriction." *Id.* at 316, 372 S.E.2d at 122. In this case, in contrast, and as discussed above, there is ample evidence that both the Trustees and North Litchfield intended the restriction to be binding on their heirs, successors and assigns.

MAC further notes that Judge Gardner gave a vigorous dissent in *Charping*, based on *Epting*. *Id.* at 316, 372 S.E.2d at 123.

This court should hold that the Dunes Restricted Covenant runs with the land and is binding on Shoestring.

ii. MAC does not argue that Kathryn Salley and the Hauns intended to create a common plan or scheme, nor did they need that to enforce the real covenants running with the land.

MAC agrees with Shoestring that the Sand Dunes Restriction was not intended by Sally-Haun as part of a common plan or scheme because, as discussed in the previous arguments, that is an equitable remedy for the enforcement of covenants. However, it was never necessary for Salley-Haun to invoke that remedy as the Sand Dunes Restriction was an express, appurtenant covenant in their chain of title, binding on them, their successors, and assigns. Shoestring wants to have it both ways. On the one hand, Shoestring wants this court to hew to the deeds to express the grantor's intent, but when it comes to provisions Shoestring does not like (like the Dunes Restricted Covenant), it argues the law firm is copying language from prior deeds. Shoestring cannot have it both ways.

III. THE MASTER CORRECTLY HELD THAT SHOESTRING BREACHED THE DUNES RESTRICTED AREA COVENANT BY DEMOLISHING THE EXISTING SAND DUNES IN THE RESTRICTED AREA.

Shoestring inexplicably argues that it did not violate the Dunes Restricted Area covenant by leveling the sand dunes so it can build its massive house. Shoestring argues that since the restriction in the agreement with North Litchfield beach provides the land "cannot be used for the purpose of erecting any building or structure," that somehow bulldozing the dunes is permitted. This, of course, ignores the following language from the Trustees' deed to Wallace, and in Shoestring's chain of title:

Grantee, her heirs and assigns, 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. Pl.'s Tr. Ex. 4, ¶ 12a (R. p. 296, ¶ 12a).

Not only did Shoestring violate these restrictions, but it also violated the Georgetown County Sand Dune Protection ordinance (Georgetown, S.C., Municipal Code, Ch. 5.5, Art. IV) [4]. Final Order ¶¶ 32-33, March 23, 2022 (R. p. 7, ¶¶ 32-33). As noted by McManus in his testimony, Georgetown County issued a stop work order after complaint by MAC that Shoestring was violating the ordinance. McManus Test. at 67 (R. p. 260).

The ordinance provides in relevant part: [5]

> (a) *Sand dunes.* It shall be unlawful for any person, firm, corporation or private authority <u>in any manner</u> to damage, destroy, remove, or <u>redistribute sand dunes</u> or to alter, interfere with, do or perform any act which tends to lessen the protection afforded by the dunes, without first having obtained a permit from the building inspector of Georgetown County, South Carolina.
>
> (b) *Vegetation.* It shall be unlawful for any person, firm, corporation or private authority in any manner to kill, destroy, remove or alter the form of any trees, shrubbery, plants, grass or other natural form of vegetation or to interfere with, do or perform any act which tends to lessen the protection and natural purpose of such vegetation without first having obtained a permit for such action from the building inspector of Georgetown County, South Carolina.
>
> (d) *Guidelines for issuance of development permits.* Any activity that will disturb the dune or dune vegetation requires a development permit from Georgetown County. The following guidelines are established for dune and dune vegetation protection:
>
> (1) Sand dunes shall not be altered in any form <u>unless there is no feasible alternative such as relocation, realignment or reduction in size of the proposed construction</u> or alteration.

Georgetown, S.C., Municipal Code, Ch. 5.5, Art. IV § 5.5-54 (emphasis added).

Shoestring subsequently applied for and received a development permit from Georgetown County. I suppose it is better to ask forgiveness rather than permission.

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[4] MAC requested the court take judicial notice of the ordinance.

[5] This is independent of the requirements of the Dunes Restricted Area covenant.

This court should affirm the Master's conclusion that Shoestring violated the Dunes Restricted Area and his order that "Shoestring shall take immediate action to remediate its violation of the Dunes Restricted Area by restoring the sand dunes to as close to its former state as possible." Final Order ¶ 85, March 23, 2022 (R. p. 18, ¶¶ 85).

IV. THE MASTER CAREFULLY EVALUATED THE DIFFERING VIEWS REGARDING THE BOUNDARIES OF THE DUNES RESTRICTED AREA AND PROPERLY HELD IT EXTENDS FROM THE ORIGINAL EASTERN BORDER OF THE PROPERTY TO THE ATLANTIC OCEAN.

Shoestring in an effort to maximize the buildable area for it home subscribes to the conveyor belt theory of the area covered by the Dunes Restricted Area. Under this theory, the area is a 60' fixed strip that moves with the high-water mark of the Atlantic Ocean ever eastward as the property accretes. However, this view is contrary to a plain reading and construction of the restrictive language in the deeds and the clear intent of the trustees and North Litchfield Beach to protect the sand dunes and the parties' views of the ocean.

As part of their development of Retreat Beach, the Trustees created a strip of land labeled as "Dunes Restricted." This strip is shown on several early plats. Pl.'s Tr. Ex. 30, December 12, 1952 (R. p. 575); Pl.'s Tr. Ex. 31, August 15, 1956 (R. p. 576); Pl.'s Tr. Ex. 32, October 2, 1956 (R. p. 577). The strip is shown on all the plats as running 60 feet from the eastern border of the lots adjacent to the Atlantic Ocean. On the December 13, 1952, plat, the eastern border of the strip coincides with the "Mean High Water Mark." Pl.'s Tr. Ex. 30 (R. p. 575).

In the initial conveyance of Lot 3 to Kate Wallace, the Trustees included among the restrictive covenants that "If the lot hereinabove described borders on the strip of land presently measuring sixty (60') feet, more or-less, in width, shown on the aforementioned plat, which run along the Atlantic Ocean and is bounded on the East by the high water mark, the grantee, her heirs and assigns, herein shall have, and is/are hereby granted, the right and privilege,

appurtenant to the lot hereby conveyed, to cross over said strip of land for the purpose of ingress, and egress to the ocean for swimming, sunbathing and fishing, subject to the following conditions." Pl.'s Tr. Ex. 4, ¶ 12 (R. pp. 295-296, ¶ 12). The conditions restricted from building any structure on the strip and from doing 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." (R. p. 296, ¶ 12a).

When the Trustees decided to get out of the land development business and sell the rest of the property to North Litchfield Beach, both the Trustees and the North Litchfield realized the importance of maintaining the beaches and dunes in the area. For that reason, they mutually covenanted and agreed in the deed of conveyances from the Trustees to North Litchfield Beach, Inc. "that the area of **land between the lots** shown on said plat **and the Atlantic Ocean** shall never be used for the purpose of erecting any building or structure by the Grantors or the Grantee herein, **their heirs or assigns, or successors**." Pl.'s Tr. Ex. 14 (R. p. 462) (emphasis added). Prohibiting construction in this area was important for two reasons: "First of all, the restriction that prohibits building in the dunes restricted area is to preserve those dunes both from an aesthetic standpoint, but also we all know today that sand dunes protect property from hurricane damage and storm damage in the event of a flood and high water coming to shore. Restrictive covenants like that also protect property values because it prohibits somebody from building out in front of his neighbor and blocking the view." Moore Test. at 147:20-148:5 (R. p. 184, line 20-p. 185, line 5).

After agreeing to limit construction on the land between the front ocean lots and the Atlantic Ocean, the Trustee's thereafter conveyed the Dunes Restricted property to Wallace as follows:

> All that certain piece, parcel or lot of, land situate, lying and being in the County of Georgetown, State of South Carolina, in Township No. 7, and being shown and

> delineated on plat of property of William B. Boyle and Thomas B. Boyle, Jr., dated August 15, 1956, and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina, in Plat Book L, at page 29, as that portion of the area marked "Dunes Restricted" on said plat between the northern and southern side lines of Lot 3, Block 2S, as shown on said plat, **extended to the Atlantic Ocean**, said piece of property being bounded and measuring as follows: on the northerly side by a portion of the property marked "Dunes Restricted' on said plat, and measuring therein, along the northern side line of Lot 3, Block 2S extended to the Atlantic Ocean, a distance of Sixty (60') Feet, more or less; on the easterly side **by the Atlantic Ocean** and measuring thereon One Hundred Seventy (170') Feet, more or less; on the southerly side by a portion of the property marked Dunes Restricted on said plat, and measuring thereon, along the southerly side of Lot 3, Block 2S, **extended to the Atlantic Ocean**, a distance of Sixty· (60') Feet, more or less; and on the west by Lot 3, Block 2S, and measuring thereon One Hundred Seventy (170') Feet, more or less; it being **the intention of the Grantors to convey by this deed all of the property from the easterly side of Lot 3, Block 2S, to the Atlantic Ocean between the northerly and southerly side lines of Lot 3, Block 2S, extended**.
>
> 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. Pl.'s Tr. Ex. 6, book 60, p. 379 (R. p. 301) (emphasis added).

The parties presented differing views as to what property is subject to the restrictive covenant in the Salley/Haun deed given the accretion that has taken place on the beach. One view is that there is a "strip" which is measured from the eastern lot line and extends 60 feet as shown on the early plats and also as shown on subsequent plats including Haun's plat, Pl.'s Tr. Ex. 37, July 7, 1978 (R. p. 584) and the initial subdivision plat prepared for Shoestring (McManus) by Gregory Cunningham Pl.'s Tr. Ex. 36, February 26, 2019 (R. p. 583). Cunningham testified that the strip affected the land and showing the strip was required. Cunningham Test. at 33 (R. p. 121). He also testified that he would not remove the 60-foot strip despite McManus request that he do so. Cunningham Test. at 37-38 (R. pp. 125-126). The Plaintiff's expert, Jimmy Moore, also expressed this view that the 60 foot is measured from the easternmost property boundary line and did not move. Moore Test. at 242 (R. p. 237).

The second view, expressed by the Defendant's expert, Dan Stacy, relying on the use of the term "presently" and the landmark of the mean high-water mark in Plaintiff's Trial Exhibit 30, (R. p. 575), testified that this 60-foot strip moved (presumably with the high-water mark). Moore Test. at 165 (R. p. 202).

However, there is a third view which the Master adopted and included in his order that is consistent with rules of construction for deeds: the Dunes Restricted Area expanded with the high-water mark thus extending its border eastward to the Atlantic Ocean. Final Order ¶¶ 61-68, March 23, 2022 (R. pp. 12-15, ¶¶ 61-68). This view is consistent with the intent of the Trustees to protect and preserve the dunes aesthetically and as protection from hurricanes and storms. Also, this is consistent with Trustees intent to protect property values by preventing somebody from building out in front of his neighbor and blocking the view. Moore Test. at 147-148 (R. p. 184-185), and consistent with the December 4, 1952, Deed of Trust, authorizing Trustees to "record such restrictions and/or restrictive covenants relating to the said property as they may deem necessary and proper to maintain, preserve and protect the value of the said property." Pl.'s Tr. Ex. 3, ¶ 2 (R. p. 292, ¶ 2). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). "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).

Here the language in the deed supports the construction that the restriction goes to the high-water mark of the Atlantic Ocean. As indicated in the highlighted language above, the

original deed to Kate Wallace refers to the strip being bounded on the East by the high-water mark. The covenant with North Litchfield, Inc. by the Trustees refers to the "land between the lots and the Atlantic Ocean." Pl.'s Tr. Ex. 6, book 60, p. 379 (R. p. 301). The deed conveying the Dunes Restricted area to Wallace refers to the property being "extended to the Atlantic Ocean" and noting: "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." Pl.'s Tr. Ex. 6, book 60, p. 379 (R. p. 301).

This view is also consistent with the rule of construction that a natural boundary takes precedence over course and distance. "In locating lands, the following rules are resorted to, and generally in the order stated. (1.) Natural boundaries; (2.) Artificial marks; (3.) Adjacent boundaries; (4.) Course and distance." *Smith v. Du Rant*, 236 S.C. 80, 92, 113 S.E.2d 349, 356 (1960).

Two things are clear from the Salley/Haun deed: (1) the area of land conveyed has the Atlantic Ocean as its eastern boundary, and (2) all the property conveyed is subject to the restriction. There is absolutely nothing in the deed to indicate that a portion of the property conveyed would be free from the restriction.

Stacy's view that the 60' strip moved with the high-water mark is not plausible for several reasons. First, it defeats the primary intent of the Grantor Trustees to protect the existing dune structures as witnessed by what has already happened in this case with Shoestring demolishing the dunes. If the 60' strip moves down to the current high-water mark, the existing dunes would not be protected. Second, it ignores the language in the deed extending the area to the Atlantic Ocean. As noted by Stacy, the deed to Kate Wallace states, "presently measuring sixty (60') feet, more or-less…" Pl.'s Tr. Ex. 4, ¶ 12 (R. p. 295, ¶ 12). Thus, the sixty (60') feet is

just a unit of measure for describing the distance to the high-water mark, it is not a limitation on the area covered by the restriction which moves. Third, Stacy's view would ignore the plain language prohibiting building in the area conveyed which included "all of the property from the easterly side of Lot 3, Block 2S, to the Atlantic Ocean between the northerly and southerly side lines of Lot 3, Block 2S, extended." Pl.'s Tr. Ex. 6, book 60, p. 379 (R. p. 301). Finally, Stacy's view would create a building "arms race" to build structures closer to the ocean so your neighbor would not obstruct your view.

For all these reasons, this court should find that the Master correctly concluded that Trustees intended to and did covenant to protect the property from the eastern lot lines to the Atlantic Ocean and that building in this Dunes Restricted area then and now is prohibited.

V. THE MASTER CORRECTLY HELD THAT SHOESTRING WAS BARRED FROM HIS AFFIRMATIVE EQUITABLE DEFENSES BY ITS UNCLEAN HANDS AND IN ANY EVENT THESE DEFENSES LACK MERIT.

The Master specifically addressed the affirmative defenses of change of conditions and release, but held the other equitable defenses were barred because one who seeks equity must do equity. The Master further held these defenses lacked merit. Final Order ¶¶ 75-77, March 23, 2022 (R. pp. 16-17, ¶¶ 75-77).

Shoestring argues this was a misapplication of the doctrine arguing the doctrine is limited to barring claims by a *plaintiff.* In *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005), the court stated, "However, if a *party* has unclean hands, the party is precluded from recovering in equity. A *party* will have unclean hands where the party behaves 'unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'" (*quoting Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000)) (emphasis added). In that case, a group of neighbors (Anderson was one) sued an owner in the subdivision arguing a building they were constructing violated their restrictive covenants.

Anderson, 365 S.C. at 487-88, 617 S.E.2d at 753. They also argued the defendant could not claim equitable relief. The court stated, "We conclude the Buonfortes did not have unclean hands such that they are precluded from the aid of equity, as they have not acted unfairly to the prejudice of the Neighbors. " *Id.* at 495, 617 S.E.2d at 757. This is an example of the doctrine being applied to a Defendant. Other jurisdictions apply the doctrine to Defendants as well. Unclean hands is an equitable defense to equitable claims. *See, e.g., PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488 (2d Cir. 2004); Under New York law, the doctrine of unclean hands may bar a party from raising an equitable defense, just as it may prevent a party from asserting an equitable claim. *Matter of Uciechowski v. Ehrlich*, 221 A.D.2d 866, 634 N.Y.S.2d 251 (3d Dept. 1995) (laches defense).

The Master specifically noted that, "It is undisputed that Shoestring and McManus had knowledge of the restrictive covenants and Dunes Restricted Area prior to his purchase of the property and application for subdivision of the lot with Haun." Final Order ¶ 75, March 23, 2022 (R. p. 16, ¶ 75). Despite this knowledge, Shoestring and McManus represented on their application with Haun that they had no knowledge of restrictive covenants which would prohibit the subdivision of the lot and changed surveyors to remove the Dunes Restricted Area and references to restrictive covenants from his plat. This was before submitting it for consideration by planning commission staff. See Pl.'s Tr. Ex. 1, 5 (R. pp. 285, 299-300). One who seeks equity must do equity and the court properly concluded that Shoestring cannot claim any equitable defenses. However, even if Shoestring could claim equitable defenses, the court properly concluded they lack merit.

a. Shoestring Claims and Defenses[6]

iii. Changed Conditions

Shoestring has argued that changed conditions in the area over the years preclude the enforcement of the covenants. "To defeat enforcement of covenants restricting the use of land, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants." *Shipyard Property Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1991) (*citing Pitts v. Brown,* 215 S.C. 122, 54 S.E.2d 538 (1949)).

In this case, most, if not all of the alleged changes occur outside the 36 deeds in the subdivision. Litchfield by the Sea is an example of this. Moore testified that within the subdivision he saw only two or three encroachments out of 30 some lots and that these were minor deviations. Moore Test. at 151-152 (R. pp. 188-189). Hardly, the radical changes necessary to practically destroy the objects of the restrictions.

iv. Estoppel/Waiver/Acquiescence

Although there are technical differences in the doctrine of laches, waiver, and estoppel, as applied in equitable actions for enforcement of restrictive covenants, all are affirmative defenses, and the burden of proof to establish the elements necessary to give rise to a defense of laches, estoppel or waiver is on the party who seeks to be protected by such a defense. *See Wallace v. Timmons*, 232 S.C. 311, 101 S.E.2d 844 (1958); *Frady v. Smith*, 247 S.C. 353, 147 S.E.2d 412 (1966). The essential difference arises in whether the affirmative defense is based on passivity (laches) or an affirmative act (waiver or estoppel). In this case, as in the case of *Circle Square Co. v. Atlantis Dev. Co.*, 267 S.C. 618, 230 S.E.2d 704 (1976), the Defendant has neither alleged nor proved any affirmative act by MAC but bases its alleged defense on the alleged acquiescence or

[6] The Master specifically addressed "Release" and "Change of Conditions" in his order (paragraphs 69-74).

abandonment of the covenants by MAC and the Trustees. Therefore, the defenses of waiver and estoppel simply do not apply here.

The court should also note MAC's rights of enforcement are separate and distinct from the developer/trustees. Even if there was an act which could constitute a waiver, a party's waiver of the right to object to a minor violation of a covenant does not result in waiver of his right to object to a subsequent and more substantial violation. *See Holling v. Margiotta*, 231 S.C. 676, 682, 100 S.E.2d 397, 400 (1957). The case law holds that restrictive covenants will not be enforced if substantial changes have occurred in the restricted area. "To defeat enforcement of covenants restricting the use of land, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants." *Shipyard*, 414 S.E.2d at 801, 307 S.C. at 308 (*citing Pitts,* 215 S.C. 122, 54 S.E.2d 538).

Here the Trustees modified or amended the restrictive covenants as necessary to redivide (as opposed to subdivide) some of the lots sold and may have given themselves some preferential treatment for lots which they owned; however, the trustees consistently maintained that the covenants remained. Further, modification or changes of property not part of the conveyances by the trustees as part of their development should not be considered (See above *iii. Changed Conditions*). The court should conclude, if not barred, the actions of the trustees is not a waiver of enforcement of the covenants, nor does it demonstrate acquiescence or abandonment of the covenants.

v. Laches

Laches is the negligent failure to act for an unreasonable period of time. *Gray v. S.C. Pub. Serv. Auth.*, 284 S.C. 397, 400, 325 S.E.2d 547, 549 (1985). A court of equity will refuse to protect a party's rights if the party's unreasonable delay has resulted in injury to his adversary. Delay alone in the assertion of a right, without injury to the adversary, does not constitute laches. *Grossman v.*

Grossman, 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963). The record reflects that as soon as MAC learned about Shoestring's actions in subdividing its property it took immediate action to contest Georgetown County's approval of the subdivision plat by letter and appeal. MAC also filed the present action to enforce the restrictive covenants and protect the Dunes Restricted Area. MAC did not unreasonably delay in enforcing the covenants. Furthermore, even if MAC allegedly did delay or not enforce the covenants, this did not injure Shoestring. Shoestring knew full well about the restrictive covenants and the Dunes Restricted Area before purchasing and starting to develop the property but deliberately chose to proceed without a determination of those rights.

vi. Unclean Hands

Shoestring alleges MAC has unclean hands in seeking enforcement of the covenants because of its "repeated subdivision" of its property. This argument lacks merit. MAC has not subdivided its property. MAC has divided its ownership of the property into 13 intervals of which MAC retains 3 shares. Shoestring also claims that MAC built in the Dunes Restricted Area. This claim too lacks merit. Most if not all the owners constructed boardwalks across the dunes to access the beach and the record reflects that the Boyles did not consider a walkway to be a violation. Thomas Boyle, Jr. specifically testified the following answers: "Q. All right, sir. Is the walkway over the dunes restricted area consistent with this restriction? A. Yes. Q. In fact, did the Trust build some wooden walkways over the dunes restricted area? A. Yes, yes." Def.'s Tr. Ex. 36, 58:2-7 (R. p. 676, lines 2-7).

VI. MAC HAS STANDING TO ENFORCE THE DEED RESTRICTIONS AND ENFORCE ITS CLAIMS.

In the final argument in its appeal, Shoestring argues that MAC does not have constitutional standing to bring its claims and enforce the restrictive covenants. Shoestring notes that MAC must have suffered or be in danger of suffering an injury which is personal in nature

and is not in common with the general public. MAC meets these tests. Shoestring has subdivided its property in violation of the covenants and plans to build in the Dunes Restricted Area, also in violation of restrictive covenants. As the Master concludes in his order, "MAC has a personal stake in this lawsuit and is a real party in interest as a predecessor in interest, its property borders Shoestring's property on two sides and MAC also owns property in the Dunes Restricted Area. The court concludes Mac has standing." Final Order ¶ 40, March 23, 2022 (R. p. 8, ¶ 40). The court further shows through the various subheadings in its order the multiple ways MAC has standing to enforce the restrictive covenants: enforceable as grantee of covenants running with the land, enforceable as covenant in Salley-Haun deed, and enforceable as a mutual covenant in a common plan or scheme. The court did not find, but MAC asserts as an additional sustaining ground and as argued in its appeal, enforceable by express grant and assignment. This court should affirm the master's conclusion that MAC has standing.

CONCLUSION

For the reasons set forth herein and in MAC's Appellant brief, this court should affirm the holdings of the master as modified by MAC's appeal and deny Shoestring any relief.

RESPECTFULLY SUBMITTED,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0072

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., Appellant-Respondent,

vs.

Shoestring Retreat, LLC, Respondent-Appellant.

CERTIFICATE OF COUNSEL

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

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