STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF ANDERSON	**CASE NO.: 2021-CP-04-01349**
Poly-Med, Inc., Technology Drive 51, LLC, Technology Drive 52, LLC, PMI Properties, LLC, Plaintiffs, v. Research Park, LLC, Defendant.	

MEMORANDUM AND ORDER FOR JUDGMENT

Following a bench trial in the above-captioned matter, the Court finds the following facts:

I. Findings of Fact

A. Background

Plaintiffs are related parties through ownership and control. They are the owners, and in the case of Poly-Med, Inc. also the lessee, of parcels of land ("Parcels") in the Clemson University Advanced Materials Center (the "Park") in Anderson, South Carolina. The South Carolina Research Authority (the "SCRA") created the Park and subjected it to a Declaration of Covenants, Conditions and Restrictions of Clemson Research Park dated December 23, 1986, as amended ("Covenants"). The SCRA was established pursuant to a legislative act, which specifically intended "to promote the development of high technology industries and research facilities in South Carolina" and "to enhance the research capabilities of [South Carolina's] public and private universities." The purpose of the Park was "to allow the Authority [now the Defendant Research

Park, LLC] to offer parcels [in the Park] for sale to purchasers or for lease to tenants or for other development within the purview of the Act." Plaintiffs' Exhibit 5, pp. 1-2.

The SCRA declared that the Covenants would: (a) run with the land and that the Park was made subject and subordinate to the terms, provisions and conditions of the Covenants; and (b) inure to the benefit of, and would be binding upon, each and every person or entity, their heirs, successors and assigns who acquired any interest in the Park or any part thereof. *Id.* p. 2. In keeping with the intent of the SCRA and the Park, the Covenants provide that no person or entity shall be an Owner, as that term is defined in the Covenants, tenant or occupant of any Parcel or subdivision thereof unless such person or entity shall at all times maintain in its employment a minimum of 15% of its employees as scientists or engineers, as those terms are defined in the Covenants, upon the Parcel or Parcels owed or occupied by such person or entity. *Id.* pp. 9-10.

The Covenants provide that an Association, as defined in the Covenants, was to be established and every Owner of a Parcel was to be a member of the Association entitled to one vote for each full acre of the Parcel to which the member was attributable. *Id.* p. 14. The Association once created, was to manage, administer and operate the Park through its board of directors and be responsible for the operation, maintenance and repair of Park common areas (the "Common Areas") once conveyed to the Association. *Id.* p.16. The Covenants require that the Authority eventually designate portions of the Park property as Common Areas and convey them to the Association. *Id.* pp. 4-6. However, no Common Areas shall be so conveyed "until such conveyance will result in the Authority owning less than one-half of the Property so that the Authority will be entitled to less than one-half the votes in the Association." *Id.* p.7. Until the Common Areas are conveyed to the Association, the Park consists of whatever mix or Parcels and Common Areas as determined by the Authority in its sole discretion. *Id.* p.5.

The Covenant also provide that:

> Prior to the conveyance of any portion of the Property to the Association as Common Areas, each Owner shall pay the Authority a maintenance fee for maintenance and upkeep of the Park. The fee shall be computed on the basis of $300.00 per acre per annum and it shall be payable in advance in equal monthly installments. The per acre fee of $300.00 shall be for the calendar year 1986. It shall increase by 10% compounded annually each year until the Authority conveys any portion of the Property to the Association as Common Areas, after which conveyance this maintenance fee shall terminate and the Owner's sole liability and responsibility shall be to pay whatever Assessments are due the Association. In any year, the Authority may reduce this fee in its sole discretion.

Id. p.17.

Until the conveyance of any Common Area to the Association, the sole responsibility for maintaining the Park, except for Parcels sold to Owners, is that of the Authority, and the sole obligation of Owners, other than the Authority, is to pay the maintenance fee to the Authority as provided in the Covenants. *Id.* pp. 25-26. The Association, once established, is to prepare a budget and determine the amount of Assessments to be assessed against the Park Parcels by the Association. *Id.* pp. 18-19. Assessments may be used by the Association, to pay additional "Common Expenses" beyond expenses for maintenance and upkeep of the Park. Unlike maintenance fees charged by the Authority before any Common Areas are conveyed to the Association, Assessments may be used to pay various expenses related to operation of the Park listed in the Assessments section of the Covenants and "any other expenses and liabilities which may be incurred by the Association for the benefit of all the Owners under or by reason of" the Covenants. *Id.* p. 18. The authority is limited to charging parcel owners for "maintenance and upkeep"

Defendant Research Park, LLC, acquired the Park, and took assignment of the rights, title and interest as Declarant under the Covenants, pursuant to a Notice of Assignment of Declarant's Rights effective as of October 10, 2018. Plaintiffs' Exhibits 1 & 2. Defendant is a single member

limited liability company owned by Dan Wagner. Prior to Defendant's ownership of the Park, the SCRA had conveyed the Park, including all unsold property and its developer rights, to Anderson County in 2006, who assigned it to Anderson County Development Partnership ("ACDP"). Plaintiffs' Exhibit 2. ACDP changed its name to Innovate Anderson, a South Carolina non-profit ("Innovate") in 2008. *Id.*

When it was Park Authority, Innovate periodically collected maintenance fees from Owners in the Park, including Poly-Med. Before conveying the Park to Defendant, Innovate gave Defendant a document entitled "Innovate Income and Expense Proration Estimates for Settlement." Plaintiffs' Exhibit 7. The Income and Expense Proration showed the maintenance fees collected from Park Owners at the rate of $600 per acre in the total amount of $69,645.36 per year and "Monthly Expenses" including monthly water, power and landscaping expenses in the amount of $2,333.33 per month. *Id.* Upon Innovate conveying the Park to Defendant, Innovate transferred $50,182.82 in collected and unused maintenance fees to Defendant. Defendant financed the purchase of the Park, in part, through a mortgage. Plaintiffs' Exhibit 4.

The Covenants also provide that "[n]o building, landscaping or other improvements shall be altered, placed or erected on any Parcel without approval from the Authority or its agent." Plaintiffs' Exhibit 5, p. 26. On or about June 14, 2017, before Defendant acquired the Park, Poly-Med's current Manager of Facility and IT, Jeffrey Ellis, sent an email to Burriss Nelson, Registered Agent, requesting approval to install modular office buildings ("Trailers") to serve as temporary offices at Poly-Med's Parcel at 51 Technology Drive in the Park. Mr. Ellis submitted drawings and specification with the email. He later spoke to Mr. Nelson by telephone and, in that conversation, Mr. Nelson gave his approval for the Trailers.

Beginning in 2019, Defendant began billing Owners, including Poly-Med, annual maintenance fees at the rate of $600 per acre. At the time, Plaintiffs owned 19.25 acres in the Park. Poly-Med paid $11,550 in maintenance fees that year. Plaintiffs' Exhibit 14. In October 2019, Plaintiff, PMI Properties, Inc., a wholly-owned subsidiary of Poly-Med, purchased from Defendant an additional 12.685 acres next to one of Plaintiffs' existing Parcels. Plaintiffs' Exhibit 12. PMI Properties paid $5,385.93 in maintenance fees to Defendant as part of the purchase. Plaintiffs' Exhibit 17. PMI Properties later transferred the new Parcel to Poly-Med through an unrecorded deed. Plaintiffs' Exhibit 16.

In 2020, Defendant's invoice for annual maintenance fees to Poly-Med increased to $19,161.00, due to Plaintiffs' acquisition of the additional acreage in 2019. Plaintiffs' Exhibit 13. On April 30, 2020, Poly-Med president, David Shalaby, sent a message to Mr. Wagner complaining that very little maintenance was actually being performed in the Park and asking for information on how the maintenance fees collected were being spent. Plaintiffs' Exhibit 18. After getting no response, Poly-Med counsel sent Mr. Wagner an email seeking an accounting of the fees. Plaintiffs' Exhibit 19. In response, Defendant took the position that Plaintiffs were not entitled to an accounting of the maintenance fee and refused to provide one. Plaintiffs' Exhibit 18.

B. The Parties Claims

1. Plaintiffs' Claims

In their original Complaint, Plaintiffs asserted five causes of action against Defendant: (1) breach of restrictive covenants by charging maintenance fees in excess of actual maintenance and upkeep costs; (2) conversion of maintenance fees; (3) unjust enrichment with respect to the fees; (4) an accounting of the fees collected and spent; and (5) an injunction to prevent Defendant from

selling Park Parcels to persons or entities that it not meet the science and engineering employee requirements for Park Owners. Plaintiffs seek damages with respect to the overpayment of fees, interest and an award of their costs, disbursements and reasonable attorneys' fees. The Covenants provide that:

> In any suit or action brought by the Authority, an Owner, the Association or a first lienholder or their heirs, successors or assigns to enforce any of the terms, provision or restrictive covenants of this Declaration, the prevailing party shall be entitled to his costs and disbursements and reasonable attorneys' fees in such suit or action and any appeal thereof.
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> Plaintiffs' Exhibit 5, p. 22.

2. Defendant's Counterclaims

Defendant counterclaims that Plaintiffs have "historically failed to make timely payment" of annual invoices from Defendant for maintenance fees. Defendant also alleges that Plaintiffs made improvements on their Parcel(s) without approval of Defendant or its predecessors. Defendant seeks a judgment for damages, an injunction against Plaintiffs and an award of Defendant's costs, disbursements and reasonable attorneys' fees.

C. Defendant's Expenditures of Maintenance Fees

Through discovery, and examination of Defendant's bank records, Plaintiffs learned that Defendant was using maintenance fees collected from Park Owners, including Plaintiffs, to pay its monthly mortgage payments and for expenses like accounting fees, insurance, marketing expenses and legal fees, including the legal fees incurred by Defendant in this action. See Plaintiffs' Exhibits 8 & 9. At trial, Mr. Wagner testified that he considered any fees collected in excess of expenses for maintenance and upkeep to be profits with which he could do whatever he wished. When Defendant first opened a bank account after its acquisition of the Park in 2018, it deposited only $25,000.00 of the $50,182.82 in collected maintenance fees it received from Innovate. Plaintiffs'

Exhibit 8. At various times, Mr. Wagner has withdrawn funds from the maintenance fee accounts for his personal use. Plaintiffs' Exhibits 10 & 11.

D. The Court's Earlier Orders

The parties each filed motions for summary judgment with respect to their claims and counterclaims. Following a hearing on those motions, the Court granted Plaintiffs' oral motion for an injunction, prohibiting Defendant from selling Park Parcels to persons or entities that do not meet the Covenant's Owner restrictions. Pursuant to the Court's order, the parties picked a qualified accountant, by agreement, and an accounting of the fees was prepared. Plaintiffs' Exhibit 15. Through its July 18, 2023 Order, the Court also granted an award of attorneys' fees for the Plaintiffs, in an amount to be determined after trial. Court Order dated July 18, 2023.

Defendant's claim that Plaintiffs failed to make timely payment of maintenance fees was abandoned at trial. The Court also dismissed Plaintiffs' claim that Defendants was attempting to market Parcels to persons or entities that did not meet on Ownership requirements. The respective claims were dismissed on grounds of insufficient proof.

At trial, Plaintiffs also argued that the Covenants require that the Park Authority, now Defendant, designate Common Areas and convey them to the Association. Because the Covenants do not include a specific period of time for such designation and conveyance, Plaintiffs maintain that the Court should apply a reasonable period of time. Plaintiffs contend that thirty-seven (37) years (from when the Park and Covenants were created) is beyond any reasonable period of time for Innovate or Defendant to designate Common Areas and convey them to the Association. Defendant currently owns somewhere between 118.81 acres (47.94% of the acres) and 136.40 acres (51.44% of the acres) in the Park. The Owners other than Defendant currently own somewhere between 129.04 acres (52.07% of the acres) and 128.76 acres (48.56 % of the acres)

in the Park. *See* Plaintiffs' Exhibit 30. Plaintiffs were permitted to amend their Complaint to conform to the evidence at trial with respect to their claim that Common Areas should be designated and conveyed. In their Amended Complaint, Plaintiffs requested that the Court issues an order directing Defendant to designate, as Common Areas, at least ten (10) acres of Defendant's property in the Park, or such lesser amount of acres as will result in Defendant owning less than one-half of the Park Property, so that Defendant will be entitled to less than one-half the votes in the Association, and then convey the Common Areas to an Association of Park Owners pursuant to the Covenants.

II. Legal Analysis

A. Maintenance Fees

"Restrictive covenants are contractual in nature." *Hardy v. Aiken,* 369 S.C. 160, 166 (2006). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it *at the time of execution.*" *Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc.*, 412 S.C. 387, 396 (Ct. App. 2015), *aff'd*, 419 S.C. 162 (2017) (quoting *Hardy*, 369 S.C. at 166) (emphasis added). Indeed, "the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* (citing *Taylor v. Lindsey,* 332 S.C. 1, 4 (1998).

"[N]oncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it, and that there exists in every contract an implied covenant of good faith and fair dealing." *Com. Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366–67, 147 S.E.2d 481, 484 (1966).

To the extent the Covenants do not *expressly* provide that maintenance fees collected by the Authority (now Defendant) may only be used, and may only be collected to the extent

necessary, for the maintenance and upkeep of the Park, given the language used in the Covenants, the intent of them and of the original Authority (SCRA) and the covenant of good faith and fair dealing, such a limitation may be certainly implied.

The question then becomes what constitutes "maintenance and upkeep" under the Covenants. When a term is not defined within a contract, "evidence of its usual and customary meaning is competent to aid in determining its meaning." *Hanold,* 412 S.C. at 397 (citing *Anderson v. Buonforte*, 365 S.C. 482, 490 (Ct. App. 2005).[1]

If South Carolina courts have not expressly defined a term in the context of restrictive covenants, interpretations in cases from other jurisdictions may also provide support. *See id.* at 397-98 (review of cases from other jurisdictions dealing with the term "developed" in the context of restrictive covenants confirmed that "develop" connotes conversion into an area suitable for use or sale). Although "maintenance fee," "maintenance," and "upkeep" are not defined in the Covenants, standard methods of contract interpretation and a review of other jurisdictions' interpretations provide that "maintenance" connotes a state of physical repair, upkeep, and preservation, and does not include administrative expenditures. *Saphir v. Neustadt*, 177 Conn. 191, 204-05, 413 A.2d 843, 851 (1979). In *Saphir*, the Supreme Court of Connecticut addressed a similar issue where the defendant developer collected funds from the plaintiff-property owners pursuant to a covenant that was to "be applied to the maintenance . . . of the roads." *Id.* at 203, 850. However, the defendant developer argued that the maintenance funds collected encompassed expenses including real estate taxes, legal fees, state fees, insurance, fire department contributions,

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[1] "When a [contract] does not define a term, the term should be defined according to the usual understating of the term's significance to the ordinary person." Hutchinson -v- Liberty Life Ins. Co., 393 SC 19, 24, 709 SE 2d 130,134 (Ct App 2011). Dictionary can be useful staring points for interpreting terms in a [contract]. Hutchinson, id, "Merriam-Webster" dictionary defines "maintenance" as "to keep in an existing state (as of repairs, efficiency, or validity), preserve from failure or decline."
"Merriam-Webster" dictionary defines "upkeep" as "the act or cost of maintain in good condition; maintenance".

signs, and a guardhouse. *Id.* at 203, 851. In affirming the trial court's finding that "maintenance" did not include authorization of such expenditures, the *Saphir* court noted:

> Implicit in the court's findings and conclusions is a restrictive definition of the word "maintenance" in the covenant contained in the plaintiffs' deeds, one that would limit permissible use of the "road fund" to the physical upkeep of the road, excluding use of the funds for administrative or managerial expenses. This construction of "maintenance" is both consistent with meanings given to similar covenants relating to road maintenance, and with the parties' intentions concerning the payments made by the plaintiffs. *"Maintenance" in relation to property has been defined as "the upkeep or preservation of the condition of property"; Black's Law Dictionary; and "making repairs and otherwise keeping premises . . . in good condition";* Ballantine's Law Dictionary. It connotes a state of physical repair, upkeep, and preservation. *Frye v. Angst*, 28 Wis.2d 575, 582, 137 N.W.2d 430 (1965); 54 C.J.S. Maintenance, p. 905. *It does not, in common parlance, encompass the expenditure of funds for the administrative or managerial purposes of a corporation.* If the covenant here in question had been intended to authorize expenditures other than those related to the physical upkeep and repair of the roads, it could easily have so stated. *See Neptune Park Assn. v. Steinberg*, 138 Conn. 357, 361, 84 A.2d 687 (1951).
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> *Saphir,* 177 Conn. at 205, 851 (emphasis added).

Here, as in *Saphir*, Defendant is attempting to expand the ordinary meaning of the words "maintenance and upkeep" to include expenses for mortgage payments, attorney fees, accounting fees, management expenses, insurance premiums and marketing expenses. The plain and obvious meaning of "maintenance and upkeep" does not support Defendant's interpretation.

The Covenants provide that the Authority may collect "a maintenance fee for maintenance and upkeep of the Park." Plaintiffs' Exhibit 5, p.17. Had the Authority intended to authorize expenditure of the fees for anything other than the physical upkeep of the Park's common areas, it could have easily so stated in the Covenants, would not have used the language it did ("*for* maintenance and upkeep") and would not have called the fee a "maintenance" fee. *See id.* at 205. Indeed, the Covenants *do contemplate* a much wider array of expenditures in the subsequent paragraph governing "Assessments" paid to the Association (instead of a maintenance fee to the

Authority) after any portion of the Park is conveyed to the Association as Common Areas. Plaintiffs' Exhibit 5, p. 18 (emphasis added). When describing the scope of allowable charges by the Association, the Covenant provides a list of estimated expenses including, among other things:

> [E]xpenses of management; taxes and special assessments; premiums for all insurance that the Association is required or permitted to maintain hereunder; repairs and maintenance; wages for Association employees; including fees for a Manager (if any); utility charges; legal and accounting fees; any deficit remining from a previous period; creation of a reasonable contingency reserve, surplus, and/or sinking fund; and any other expenses and liabilities which may be incurred by the Association for the benefit of all of the Owners or by reason of this Declaration. Such expenses shall constitute the Common Expenses.
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> *Id.*, p. 18.

The inclusion of these various items under allowable expenses for Assessments is evidence that the Covenants do not intend for such expenses to be included as part of the maintenance fees chargeable by the Authority. The Covenants could have easily included this same list of expenses in the maintenance fee section, but did not. Including a list of expenses in one part of the Covenant and not in the other is evidence of the original parties intention that the ordinary and common understanding of "maintenance and upkeep" is limited to ordinary physical repairs to keep the common areas in good condition.

The accounting showed all the maintenance fees collected by Defendant as well as all of Defendant's expenditures from the bank account(s) in which the fees were deposited. Plaintiffs' Exhibit 15. The Court finds that the only expenses actually used "for maintenance and upkeep of the Park" incurred by Defendant since it took ownership of the Park, and became Park Authority in October 2018, were expenses for water, power and landscaping. For the years 2019 to 2023, Poly-Med paid $93,579.93 in maintenance fees. *See* Plaintiffs' Exhibit 15 & 30. During those years, Plaintiffs' share of maintenance expenses (water, power and landscaping) based on its percentage ownership of Park Property (not owed by Defendant) was $27,855.70. *Id.* Plaintiffs

were overcharged by $74,001.41 in the years 2019 to 2023. Plaintiffs' Exhibit 30. [The $65,724.23 in damages in this Court's Form 4 order reflect only the amounts Plaintiffs overpaid in the years 2019 to 2023. The Order does not reflect overpayments in 2018, though Defendant received $50,182.82 in collected maintenance fees from Innovate when it purchased the Park in that year. For the total period of Defendant's Park Ownership, from 2018 to 2023, Poly-Med paid $101,902.25 in maintenance fees (including Plaintiffs' share of the $50,182.82) while its share of maintenance expenses during the period was only $27,900.84. *Id.* pp. 3. For the total period 2018 to 2023, Poly-Med was overcharged by a total of $74,001.41. *Id.* pp. 3-4.

While the Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was $300 per acre compounded 10% annually, for maintenance and upkeep, Defendant was required by the implied covenant of good faith and fair dealing, and possibility had a fiduciary duty to use the monies charged for the purpose of maintenance and upkeep. The fees charged for maintenance and upkeep were not intended to be a profit-making mechanism. The Court finds that Plaintiff [Poly-Med] is entitled to damages in the amount of $74,001.41. This amount represents the difference in what Defendant charged Plaintiff[s] for maintenance and upkeep and the amount defendant actually spent on maintenance and upkeep from the time defendant took ownership of the property to present.

B. Designation of Common Areas and Conveyance to the Association

Further, the Court finds that when taking the Covenants into consideration as a whole, Defendant is under no obligation or requirement to convey Common Areas over to the Association. Based on the Covenants, the conveyance of Common Areas to the Association is discretionary.

C. The Poly-Med Trailers

The Court also finds that the Poly-Med Trailers that were once considered temporary structures in accordance with the Covenants, have gone past the time period in which they can reasonable be considered temporary. As such, these trailers are in violation of the Covenants. As a result, the Trailers are ordered to be removed within a reasonable time to be determined by the court following briefing by the parties.

[D. Award of Attorney's Fees

Under the terms of the Covenants, the prevailing party in this action is entitled to an award of "costs and disbursements and reasonable attorneys' fees." Plaintiffs' Exhibit 5, p. 22. The "prevailing party" is "the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention is the one in whose favor the decision or verdict is rendered and judgment entered." *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990)(quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)); *Seckinger v. Vessel Excalibur,* 326 S.C. 382, 388, 483 S.E.2d 775, 778 (Ct. App. 1997)

Because Plaintiffs succeeded on their claim for an accounting at the hearing on the parties' motion for summary judgment, this Court ruled that an award of attorney's fees was granted in an amount to be determined after trial. Court Order dated July 18, 2023. Given the parties respective motions for summary judgment, the accounting prepared and the evidence and testimony at trial, the vast majority of this case and time at trial has been devoted to Plaintiffs' claims that Defendant breached the Covenants by collecting maintenance fees in annual cost maintenance and upkeep of the Park. Plaintiffs clearly prevailed on the main issue at trial and are, therefore, "the prevailing party."

III. Order

Judgment shall enter in favor of Poly-Med and against the Defendant on Plaintiffs claim for breach of the Covenants in Count I, and for conversion in Count II, of Plaintiffs' Amended Complaint, in the amount of $74,001.41, plus cost and Attorney fees. Within fourteen (14) days of the date of this Order, Plaintiffs shall submit proof of their costs and disbursements and reasonable attorneys' fees, the amount of which shall be subject to challenge by Defendant.

Counts III of Plaintiffs' Amended Complaint for unjust enrichment was dismissed at trial as Plaintiffs have a remedy at law. Judgment shall enter in favor of Defendant on Plaintiffs' claim for breach of the covenants in County I (to the extent that action is based on a violation of ownership restrictions). Conversion in Count II and for an injunction in Count V of the Amended Complaint.

Defendant's counterclaim for failure to make timely payments of maintenance fees was abandoned at trial. Judgment is entered in favor of Defendant's as to its remaining counterclaim, Plaintiffs are ordered to remove the Trailers at 51 Technology Drive within a reasonable period of time. The parties shall attempt to agree upon what constitutes a reasonable time and upon motion of any party, that the parties are unable to agree, the court shall determine what constitutes a reasonable time.

IT IS SO ORDERED.

R. LAWTON MCINTOSH
lmcintoshsc@sccourts.org
Judge, Tenth Judicial Circuit

2-23, 2024
Anderson, South Carolina