STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiffs.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action no. 2021-CP-07-01655 **ORDER AND JUDGMENT FROM TRIAL**

This case involves a dispute between Sea Pines South Beach Owners' Association, Inc. (the "Association") and Plaintiff members of the Association who challenge the Association's authority to levy assessments. The case came before the Court for a bench trial on May 3, 2024. Attorneys Ian Ford and Ainsely Tillman of Ford Wallace Thomson LLC presented the case for plaintiffs/counterclaim defendants Stanley S. Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC ("Plaintiffs"). Attorneys James Elliott and Evan Carter of Richardson Plowden & Robinson, PA, presented the case for defendant/counterclaim plaintiff the Association, Inc.

Prior to trial, all parties agreed to Joint Stipulations of Facts and Evidence for Purposes of Trial (cited below as the "Stip") and to the authenticity and

admissibility of numerous exhibits that were filed with the Court and are part of the record. The parties also submitted trial briefs and responses, which are part of the record. At trial, both sides made extensive presentations and arguments, and have filed their demonstrative slides with the Court.

The core question in this case is whether the Association under its governing documents and South Carolina law may lawfully assess its members to dredge the Braddock Cove waterways, property that is owned by the State of South Carolina, not by the Association or its members. After considering the pleadings, briefs, stipulations, exhibits, relevant law, arguments of counsel, and all other materials in the record, the Court finds in favor of Plaintiffs. This Order is based on the specific facts and evidence presented at trial, the Court's assessment of the evidence and arguments, and the applicable law. The Court finds the Association may not lawfully assess Plaintiffs for costs of dredging Braddock Cove's boat channels and waterways, and the Court hereby enjoins the Association from levying assessments for this purpose. Further, the Court declares that the Association may not levy annual assessments on Plaintiffs until such time as the Association owns Common Properties, and it hereby enjoins the Association from levying annual assessments until such time as it owns Common Properties. The Association's counterclaims are denied and dismissed for the same reasons.

FINDINGS OF FACT

This Association was formed in 1969 for the single corporate purpose of "improving, maintaining and operating the common properties of the association" for the benefit of its members, property owners in the South Beach development.[1]

The authority and obligations of the Association and the rights and obligations of owners with respect to property in the South Beach development are stated in the Sea Pines Land Use Covenants filed in 1970 by the developer of South Beach, Lighthouse Beach Company (the "Declaration").[2] Plaintiffs are South Beach property owners[3] and as such are automatically members of the Association.[4]

The Declaration assigns to the Association the duty to manage "Common Properties" and the authority to levy assessments on Owners and their property to pay the costs of management of Common Properties.[5] In return, the Declaration grants Owners an easement of enjoyment in the Common Properties that is appurtenant to their land[6] and the Association's commitment to use assessments

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[1] Exhibit 4 at p. 1, Art. Fourth (Certificate of Incorporation).

[2] Exhibit 1.

[3] Stip. ¶¶ 2-4.

[4] Stip. ¶ 14; Exhibit 1, Art. III, Sec. 1.

[5] Exhibit 1, Third recital; *id.* Art. V, Sec. 2.

[6] Exhibit 1, Art. IV, Sec. 1.

"exclusively for the improvement, maintenance, and operation of the Common Properties" for Owners' benefit.[7]

> The Declaration defines "Common Properties":
>
> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are *deeded* to the Association *and* designated in said deed as "*Common Properties*" . . . All Common Properties are to be *devoted to and intended for the common use and enjoyment of the owners of the Properties*, (subject to the fee schedules and operating rules adopted by the Association).[8]

The Declaration contemplated that the developer might someday deed certain properties to the Association as "Common Properties." However, no properties were deeded to the Association by the developer and no properties have ever been deeded to the Association by anyone.[9]

In 1985, the Association obtained a quitclaim deed from Sea Pines Plantation Company (the successor of Lighthouse Beach Company, the developer of South Beach) conveying any interest that Lighthouse Beach Company had in the "waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove" to the Association (the "1985 Quitclaim Deed").[10] Because the items described in the quitclaim deed are public waters, submerged land, and tidal land, they belong to

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[7] Exhibit 1, Art. V, Sec. 2; Art. I, Sec. 1(c).

[8] Exhibit 1, Art. I, Sec. 1(c) (emphasis added).

[9] Stip. ¶ 18.

[10] Exhibit 2.

the State of South Carolina.[11] Thus, the 1985 Quitclaim deed conveyed no property.

The Declaration further provides that the owner of any property other than the developer who desires to add it to the plan of the covenants and to subject it to the jurisdiction of the Association may file of record a Supplementary Declaration of Covenants and Restrictions "which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property."[12]

No property owner has filed a Supplementary Declaration adding its property to the jurisdiction of the Association. But, at the time the Association obtained the 1985 Quitclaim Deed, it filed a modification to the Declaration (the "1985 Modification") purporting to broaden the definition of "Common Properties" in the Declaration "to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina" ("Braddock Cove").[13] The Association has stipulated that it owns no channel markers and that the Braddock Cove boat channels, waterways, and salt marsh open space areas are owned by the State of South Carolina.[14]

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[11] Stip. ¶ 26.

[12] Exhibit 1 at p. 4.

[13] Exhibit 3 at p. 1.

[14] Stip. ¶¶ 26, 27.

After it obtained the 1985 Quitclaim Deed and recorded the 1985 Modification, the Association joined the South Island Dredging Association ("SIDA"), a voluntary association of Sea Pines property owners that organizes and contracts for dredging in the southern part of Sea Pines Plantation.[15] The Association levied special assessments on its members to pay dredging costs to remove sediment from Braddock Cove in 1999, 2013, and 2018, and committed to pay a share of those dredging costs. Certain areas of Braddock Cove, which were dredged in the past, are shown on the 2013 dredging permit materials issued by the Army Corps of Engineers.[16]

However, the Association also contends that it has no obligation to participate in dredging of Braddock Cove, and it has declined to do so at times. For example, portions of Braddock Cove were dredged in 2023, but the Association's board of directors decided not to participate in that dredging.[17]

PLAINTIFFS' CONTENTIONS

Plaintiffs contend (*inter alia*) that the Association has no authority to impose special dredging assessments on Plaintiffs, because the Braddock Cove waterways were not deeded to the Association and therefore are not "Common Properties" as the term is used in the Association's certificate of incorporation and as it is defined in the Declaration. Further, Plaintiffs contend that the Braddock

[15] Stip. ¶¶ 19, 21; *see also* Exhibit 6 (SIDA Agreement).

[16] Exhibit 7.

[17] Stip. ¶ 23.

Cove waterways (including its boat channels, waterways, and salt marsh open space areas) are not "Common Properties" because they were not added to the jurisdiction of the Association by a Supplementary Declaration by their owner, the State of South Carolina, as required by the Declaration.

In addition, Plaintiffs contend that the Association had no authority to amend the definition of "Common Properties" in the Declaration, that the Declaration does not authorize special assessments for dredging, that the 1985 Modification did not become effective because the conditions precedent for the effectiveness of amendments were not satisfied, and that the 1985 Modification is unenforceable under South Carolina law because it is unreasonable, indefinite, and against public policy.

The Association acknowledges that does not and has never owned real property.[18] Therefore, Plaintiffs contend that because the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties," the Association has no "Common Properties" to manage and that without properties to manage, the Association has no authority to levy annual or other assessments. Plaintiffs do not seek any remedy with respect to their past transactions with the Association, but only to prevent unauthorized assessments in the future.

[18] Stip. ¶ 18.

CONCLUSIONS OF LAW and APPLICATION OF THE FACTS TO THE LAW

I. The Association may not levy special assessments to dredge Braddock Cove.

A. The boat channels, waterways, and salt marsh open space areas of Braddock Cove are not "Common Properties" because they are owned by the State of South Carolina and have not been deeded to the Association.

The Declaration states that assessments levied by the Association "shall be used exclusively for the improvement, maintenance, and operation of Common Properties . . . ."[19] "Common Properties" are defined by the Declaration to mean:

> those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."[20]

Further,

> All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties (subject to the fee schedules and operating rules adopted by the Association).[21]

The Braddock Cove waterways and the salt marsh open space areas adjacent to Braddock Cove have not been deeded by their owner to the Association, nor have they been devoted to and intended for the common use and enjoyment of members of the Association. Although the 1985 Quitclaim Deed purported to

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[19] Exhibit 1, Art. V, Sec. 2.

[20] Exhibit 1, Art. I, Sec. 1(c).

[21] *Id*.

convey these properties to the Association, it conveyed nothing because it was executed by the developer's successor, not by the owner of the properties.

The Braddock Cove waterways and salt marsh open space areas abutting them are public properties owned by the State of South Carolina, and they are dedicated by the State to the use and enjoyment of all members of the public free of charge.[22] The Court finds that the Braddock Cove properties are not "Common Properties" and the Association may not assess Plaintiffs to dredge them.

B. Only the owner of additional property may subject it to the Declaration. The State of South Carolina did not subject its waterways to the Association's jurisdiction. The 1985 Modification purporting to make them the Association's Common Properties was therefore ineffective.

Although it admits it owns no real property, the Association contends that Braddock Cove was "added" to the Association's "Common Property" by the 1985 Modification. Article II, Section 2(b) of the Declaration states the requirements to add property to the terms of the Declaration:

> the *owner* of any property other than the [developer] who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.[23]

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[22] Stip. ¶ 26; S.C. Const. art. XIV § 4; *see also Brownlee v. S.C. Dept. of Health*, 382 S.C. 129, 676 S.E.2d 116, 120-121 (2009) ("Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure . . . Navigable water is protected under state law to ensure public access.").

[23] Exhibit 1, Art. II, Sec. 2(b) (emphasis added).

Under this provision, only an owner may add property to the South Beach development and subject it to the jurisdiction of the Association. The State of South Carolina, the owner of Braddock Cove, did not file the 1985 Modification, which purports to add the State of South Carolina's boat channels, waterways, and the salt marsh open space areas abutting them to the jurisdiction of the Association.

Instead, the Association purported to subject these properties to its own jurisdiction simply by declaring them to be "Common Properties" in an agreement it made with itself. Under its theory, the Association could unilaterally subject a stranger's property to its jurisdiction and assess Association members to support that property simply by declaring it to be one of the "Common Properties." But under Article II, Section 2(b) of the Declaration, only the owner is authorized to add property to the jurisdiction of the Association. The Association's unilateral attempt to do so by filing the 1985 Modification did not comply with the requirements of Article II, Section 2 (b) of the Declaration and was ineffective. The Court finds that the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties" and the Association may not assess its members to maintain them.

C. The Declaration does not authorize special assessments for dredging.

The Association argues that the 1985 Modification's purported amendment of the Declaration to include the Braddock Cove waterways in the definition of

"Common Properties" had the additional effect of authorizing special assessments for dredging. But the 1985 Modification did not purport to change Article V, which prescribes and limits the Association's special assessment authority.

Article V, Section 4 of the Declaration states that special assessments may be levied,

> for the purpose of defraying, in whole or in part, the cost of any *construction* or *reconstruction*, *unexpected repair* or *replacement* of a described capital improvement upon the *Common Properties* . . . or *addition* to the *Common Properties*.[24]

Restrictive covenants are strictly construed and this itemized list prohibits the Association from levying special assessments for other purposes.[25] "[T]he maxim 'Expressio unius est exclusio alterius' applies here: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'"[26]

The Court has examinted the materials presented by the parties and considered the arguments at trial. Based on that, the Court finds that, in this context, the Association's arguments fail. Words used in contracts are interpreted in accordance with their ordinary meanings.[27] "'[D]redging' is the removal of

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[24] Exhibit 1, Art. V, Sec. 4 (emphasis added).

[25] *See, e.g., Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987).

[26] *Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 532 S.E.2d 876 (2000), *quoting Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933).

[27] *See, e.g., McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220 (Ct. App. 2020); *Cullen v. McNeal*, 702 S.E.2d 378, 390 S.C. 470 (Ct. App. 2010) ("A clear and explicit

sediments and debris from the bottom of lakes, rivers, harbors, and other water bodies."[28] In contrast, the activities for which special assessments may be levied under the Declaration, relate to activities that are conducted on dry land. Dredging is not among them. None of the specified processes for which special assessments may be levied ("*construction* or *reconstruction*, *unexpected repair* or *replacement*" or "*addition* to the Common Properties") include dredging (emphasis added). "Construction" means "the process, art, or manner of building something."[29] Building something, unlike dredging, is not the removal of something. "Replacement" in the context of the Declaration means "to put something new in the place of."[30] Dredging removes something. It does not replace anything. "Repair" means "1 a.: to restore by replacing a part or putting together what is torn or broken: FIX b.: to restore to a sound or healthy state: RENEW."[31] Although it may be argued that "dredging" is a type of repair that "renews" a waterway, the Declaration's authorization of special assessments for repairs is limited to "unexpected repairs." Dredging is not unexpected. It is a

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contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.").

[28] *See, e.g.*, NOAA, *What is Dredging?*, National Ocean Service Website https://oceanservice.noaa.gov/facts/dredging.html, 03/07/2021.

[29] "Construction," *Merriam-Webster.com Dictionary,* 02/21/2022.

[30] "Replacement," *Merriam-Webster.com Dictionary,* 02/21/2022.

[31] "Repair," *Merriam-Webster.com Dictionary,* 02/21/2022.

process required periodically to remove sediment from tidal waterways. The Association recognized this in its Fall 2021 South Beach Newsletter, which stated:

> To maintain adequate depths for boat navigability in Braddock Creek and its marinas they must be dredged periodically to remove pluff mud, which naturally moves in with our tides. The next dredge will be next year, the fall of 2022. The South Island Dredging Association (SIDA), of which our association is a founding member, will initiate the dredge by soliciting bids from dredge contractors, coordinate with federal and state regulators and develop a funding plan.[32]

The Court finds that dredging is not an "unexpected repair." "Addition" in the context of the Declaration is "a part added (as to a building or residential)."[33] Dredging removes sediment and debris, rather than adding material.

In summary, restrictive covenants must be strictly construed with all doubts resolved against the restriction.[34] In interpreting the Declaration the term "dredging" must be given its common meaning. The Court finds that, in this context, "dredging" is not "construction," "replacement," "unexpected repair," or "addition" and that the Declaration does not authorize special assessments to pay for dredging.

D. The Declaration states that amendments do not become effective unless (i) they are recorded at least 60 days before their effective date, and (ii) Association members are given at least 30 days' notice of proposed amendments before acting on them. Neither of these conditions was satisfied with respect to the 1985 Modification and therefore it did not become effective.

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[32] Exhibit 9, *South Beach Newsletter, Fall 2021* at page 7.

[33] "Addition", *Merriam-Webster.com Dictionary*, 02/21/2022.

[34] *See, e.g., Sea Pines Plantation v. Wells, supra.*

Real property restrictive covenants must be amended according to the procedure for amendment set in their governing documents or the resulting amendment is without effect.[35] In *Queen's Grant II v. Greenwood Development Corp.*,[36] the South Carolina Court of Appeals held that to exercise a reserved right to amend restrictive covenants running with the land, a developer "must strictly comply with the amendment procedure as set forth in the declaration of covenants…."[37] Here, the Association as the developer's designee purported to amend the Declaration,[38] but it failed to strictly comply with the amendment requirements of the Declaration. To become effective, amendments to the Declaration must satisfy the two conditions precedent stated in Article VIII. The first condition is,

> The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change. Provided, however, that no such agreement to change shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change . . . .[39]

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[35] *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (amendment provisions must be strictly followed or resulting amendment is unenforceable), *citing Brown v. Bass*, 277 S.E.2d 480, 276 S.C. 211 (1981).

[36] 368 S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006)

[37] *Id.* at 907.

[38] Exhibit 3, recitals.

[39] Exhibit 1, art. VIII.

The 1985 Modification did not satisfy this condition to amendment. It was signed and "made" October 18, 1985, recorded October 22, 1985, and purported to amend the Declaration "herewith."[40]

Express conditions to the effectiveness of an amendment are strictly construed and literally applied.[41] The Court finds that the 1985 Modification did not become effective because a condition precedent to its effectiveness was not satisfied.

Article VIII, Section 1 of the Declaration contains a second condition precedent which states that an agreement to amend does not become effective,

> unless written notice of the proposed agreement is sent to [members of the Association] at least thirty (30) days in advance of any action taken.[42]

The plain text of the 1985 Modification shows that this mandatory condition precedent to effectiveness was not satisfied. The language purportedly added to the Declaration by the 1985 Modification to show and describe the Braddock Cove properties is incorporated by reference from the 1985 Quitclaim Deed. The 1985 Modification purports to amend the Declaration to state:

> Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985 . . . .[43]

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[40] Exhibit 3 at p. 1.

[41] *See, e.g., Coastal Seafood Co. v. Alcoa*, 381 S.E.2d 502, 298 S.C. 466 (Ct. App. 1989).

[42] Exhibit 1, p. 14.

[43] Exhibit 3, p. 1.

The language purportedly incorporated in the Declaration was incorporated by reference from a quitclaim deed executed July 15, 1985. The quitclaim deed referred to was executed 19 days before Association members voted on August 3, 1985, to incorporate its language in the 1985 Modification. It is not possible to give 30 days' advance notice of a meeting to approve an amendment that incorporates language from a document that did not exist until 19 days before the meeting was held. The face of the 1985 Modification shows that the 30-day notice condition precedent was not satisfied. Therefore, the 1985 Modification did not become effective.

The Association's failure to satisfy the Declaration's condition precedent that at least 30 days' prior written notice is required for an amendment to become effective also failed to satisfy a condition imposed by South Carolina law that "the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law . . ."[44] Giving 19 days' notice when at least 30 days' notice is required is not strict compliance with the Declaration and does not satisfy a condition for effectiveness imposed by *Queen's Grant II*. The Court finds that the 1985 Modification did not become effective because the notice requirement for amendments required by the Declaration was not strictly followed.

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[44] *Queen's Grant II v. Greenwood Development*, 628 S.E.2d 902, 907, 368 S.C. 342 (Ct. App. 2006) (emphasis added).

The court in *Queen's Grant II* also conditioned the effectiveness of covenant amendments on satisfying the requirements that "the new or amended covenants must not be unreasonable, indefinite, or contravene public policy." These requirements are discussed next.

E. The 1985 Modification is invalid and unenforceable because it is unreasonable, indefinite, and contravenes public policy.

The *Queen's Grant II* Court stated that amendments to restrictive covenants are unenforceable if they are "unreasonable, indefinite, or contravene public policy."[45] If the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove's boat channels and waterways, it is ineffective and unenforceable under *Queen's Grant II* and other applicable law.

1. Unreasonable

The 1985 Modification is unreasonable because it is inconsistent with the plan of administration established by the Declaration. The Declaration established a plan based on reciprocal contractual and property law rights and obligations between the Association and Owners with respect to the Common Properties. The Declaration provided that the Association would own and operate the Common Properties "for the common use and enjoyment of the owners of the Properties"[46]

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[45] *Queen Grant II*, 628 S.E.2d at 907.

[46] Exhibit 1, Art. I § 1(c).

and authorized the Association to assess Owners to pay the expenses of operating these properties.[47]

In return, Owners were granted easements of enjoyment in the Common Properties that were appurtenant to their land,[48] and the Association's corresponding commitment to maintain the Common Properties.[49]

The reciprocal property and contract law relationships between the Association and Owners established by the Declaration with respect to Common Properties disappear under the Association's reading of the 1985 Modification. Under its reading, the Association may levy special assessments to pay for dredging on property it does not own, property it has no obligation to dredge except the obligation it voluntarily assumes from time to time by participating in the South Island Dredging Association's dredging projects, and property that is not devoted to the "common use and enjoyment" of Owners.[50] Owners' rights to enjoy Braddock Cove derive from the State of South Carolina, not the Association, and are rights belonging to all members of the public

The Association's reading of the 1985 Modification would eliminate with respect to Braddock Cove all contractual and property law connections the

[47] Exhibit 1, Art. V § 1.

[48] Exhibit 1, Art. IV § 1.

[49] Exhibit 1, Art. V § 2.

[50] Exhibit 1, Art. I § 1(c).

Declaration establishes between the land burdened and the land benefitted by assessments, except the Owners' obligation to pay dredging assessments.

Under the Association's reading, the "covenant" to pay dredging assessments is not a real covenant at all. It is an obligation imposed on dissenting property owners by the Association to pay to dredge property in which Owners have no devoted legal interest. An amendment that would eviscerate the rights of Owners in Common Properties established by the Declaration is unreasonable.

The problem is, as the court stated in *Armstrong v. Ledges Homeowners' Association,*[51]

> Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain.

The amendment at issue in the *Armstrong* case would have enlarged substantially the list of activities that homeowners could be assessed to support. The court held that an amendment that extended the association's assessment authority far beyond that contemplated by the original declaration was unreasonable and

[51] *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87, 360 N.C. 547 (N.C. 2006), *cited with approval by Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 298, 792 S.E.2d 240, 249 (S.C. Ct. App. 2016).

unenforceable, concluding, "every amendment must be *reasonable* in light of the contracting parties' original intent."[52]

Here, the original intent was to create a plan of real covenants under which South Beach property owners shared the responsibility to pay to maintain common properties in which they also shared ownership. The Association's interpretation of the 1985 Modification would eliminate the shared-ownership requirement, but extend the shared-obligation requirement by allowing the Association to force dissenting Owners to pay to support the property of a stranger. The 1985 Modification as interpreted by the Association would drastically change the original deal and is unreasonable and unenforceable. Indeed, the Declaration itself prohibits unreasonable amendments to its covenants. Article II, Sections 2(a) and (b) both state that a Supplementary Declaration adding property to the plan of the Declaration may modify covenants, but only "as are not inconsistent with the Plan of this Declaration."[53]

2. Indefinite

The second requirement for effectiveness of an amendment to a restrictive covenant stated by *Queen's Grant II* court is that the amendment must not be indefinite.

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[52] *Id.*(emphasis in original).

[53] Exhibit 1, Art. II §§ 2(a)–(b).

Affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application."[54] It is the duty of courts to interpret standards established by the parties, not to create standards for the parties.

The 1985 Modification purports to create categories of property: water, tideland, and submerged land, which are different from the category created by the Declaration—dry land. The 1985 Modification purported to amend the definition of "Common Properties" to include the Braddock Cove waterways and salt marsh open space areas. But it did not add anything to the assessment terms of the Declaration to state the Association's and its members rights and obligations with respect to the waterways. As interpreted by the Association, the 1985 Modification imposed no obligation to maintain Braddock Cove, but authorized the Association to assess dissenting Owners for any amount, allocated in any way it chose to help pay for maintenance dredging. The Association's argument, that the amendment of a *definition* (1) eliminated the requirement that "Common Properties" must be properties deeded to the Association, and (2) had the effect of authorizing the Association to levy assessments to maintenance dredge Braddock Cove at its option, for any amount, and on any basis approved by three quarters of a quorum of its members, eliminates the certainty and predictability of obligation inherent in the Declaration's original design. The "modified"

[54] *Beech Mountain Prop. Owners' Ass'n v. Seifert*, 269 S.E.2d 178, 183, 48 N.C. App. 286, 294 (N.C. 1980).

Declaration fails to explain the Association's and its members' rights and obligations with respect to Braddock Cove and, consequently, its assessments for maintenance dredging are unenforceable. As the court stated in *Lovering v. Seabrook Island Property Owners' Association*,[55]

> In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined. . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.

The Association has no obligations to Owners or third parties with respect to Braddock Cove unless it chooses from time to time to assume them. The Association has no right to regulate the use of Braddock Cove unless it is granted rights by the State of South Carolina. The 1985 Modification gives no guidance as to obligations the Association may assume or the rights it may seek with respect to the Braddock Cove waterways.

And although the property of some Owners borders Braddock Cove, the property of many does not. The 1985 Modification provides no objective standard for allocating the burden of dredging assessments among Owners and, indeed, provides no objective standard for determining whether the Association will participate in maintenance dredging at all.

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[55] 344 S.E.2d 862, 866, 289 S.C. 77 (Ct. App. 1986), *aff'd as modified*, 352 S.E.2d 707, 352 S.E.2d 707, 291 S.C. 201 (1987).

For example, in 2023, the Association's board decided not to participate the maintenance dredging of Braddock Cove for purely subjective reasons. As it said in its Fall 2022 Newsletter to Owners:

> This Board did not feel that residential members should be required to contribute the same percentages as the commercial members which obtain significantly greater financial benefit from the navigable waterway of Braddock Cove. While we certainly recognize that the dredge of Braddock Cove is a benefit to all of South Beach, and indeed to all of Sea Pines and the Town of Hilton Head, we felt that the residential members were being asked to pay a disproportionate amount, relative to the benefit received. As a result, Braddock Cove will largely be dredged but, as noted, the Upper Creek will not be included. . . .[56]

Decisions based on feelings are not decisions based on an ascertainable standard. As the court stated in *Beech Mountain Property Owners' Ass'n v. Seifert*,[57]

> Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.

The Court finds that the 1985 Modification is indefinite and unenforceable.

3. Public policy

The third requirement for the effectiveness of an amendment of a restrictive covenant stated by the *Queen's Grant II* court is that it must not violate public policy.

a. Touch and concern

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[56] Exhibit 35, p. 4 (South Beach Newsletter, Fall 2022).

[57] 269 S.E.2d at 183.

In the preamble to S.C. Code § 27-1-70, the statute that invalidated restrictive covenants that imposed transfer fees on the sale of real property, the South Carolina General Assembly affirmed the public policy of the State concerning restrictions on the transfer of property, stating:

> the public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property . . . .[58]

The purported assessment obligation to dredge Braddock Cove does not touch and concern Owners' land because no legal interest in Braddock Cove—the property benefitted by the assessment—is attached to Owners' property. Burdens that do not touch and concern the burdened land are against the public policy of South Carolina.

b. Real covenant

To touch and concern the land, a covenant must be a real covenant. A real covenant by definition is an agreement between landowners respecting the use of their land, burdening the land of one, and benefitting the land of the other.[59] South Carolina appellate cases dealing with real covenants have involved an exchange of promises between the owner of the land burdened by the promise and the

[58] S.C. Code § 27-1-70(B)(1).

[59] 5 *Powell on Real Property* ¶ 670.

owner of the land benefitted by the promise, or their predecessors in title.[60] In this case, the Declaration is built on real covenants.[61]

A real covenant may be enforced only by the owner of the dominant estate. As the court stated in *Stegall v. Housing Authority*,[62]

> One who seeks to enforce a restrictive covenant "must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder."

Here, there is no real covenant at all because there is no agreement between the Association as representative of the owners of the land burdened by the covenant, and the State of South Carolina, the owner of the land benefitted by the covenant. The State of South Carolina has no statutory, contractual, or property law right to require the Association to dredge Braddock Cove, and the Association has no obligation to the State to dredge Braddock Cove. The Association's obligation to dredge is not attached to the property benefitted by the dredging in any way. Instead, it is simply a contractual obligation to a dredging company that Association has sometimes assumed voluntarily.

Although packaged in the container of a property owners' association and clothed in the language of real covenants, the 1985 Modification as interpreted by

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[60] *See, e.g., Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) ("Restrictive covenants, sometimes referred to as 'real covenants,' are agreements to do, or refrain from doing, certain things with respect to real property.") (internal quotations omitted).

[61] Exhibit 1, Art. I § 1(c); Art. II §§ 1 & 2; Art. IV § 1; Art. V §§ 1 & 2; Art. VIII § 1.

[62] *Stegall v. Housing Authority of City of Charlotte*, 178 S.E.2d 824, 829, 278 N.C. 95 (N.C. 1971).

the Association is nothing of the sort. Here, the Association is not acting as the owner of a dominant estate to enforce an assessment obligation against servient estates under a real covenant, but as a fundraiser to raise money to dredge Braddock Cove. It is using the coercive authority of a property owners' association, in the guise of enforcing a real covenant, to force dissenting Owners to contribute to a cause that three quarters of a quorum of the Association's members sometimes decide to support.

When a property owners' association ceases to use its assessment authority to support property in which it and its members have a common property interest, it ceases to be a property owners' association and becomes a fundraiser for a cause. The Association may not use assessment authority based on shared interests in property to coerce dissenting property owners to support its chosen cause.

Legally, paying dredging costs is a gratuitous act by the Association for the benefit of the land of a stranger. Under the Association's interpretation of the 1985 Modification, the coercive authority of the Association can be used not only to enforce real covenants, but also to force dissenting members to contribute to a cause supported by a super-majority of members simply because the dissenters happen to own property in the same development.

c. Public property

The Braddock Cove waterways are public property. As the court stated in *McQueen v. South Carolina Coastal Council*,[63]

> Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.

And the water itself is public property. Article XIV, Section 4 of the South Carolina Constitution states,

> All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . .[64]

All members of the public are entitled to use and enjoy public waters. Members of the Association have no special rights to use Braddock Cove. The rights they have with respect to Braddock Cove are derived from the State of South Carolina, not the Association. The Association has no obligation to dredge Braddock Cove. Its occasional decisions to dredge are gratuitous. The Association is a private organization, established for the private purpose of managing private property for the benefit of private property owners. The Court finds that the 1985 Modification is against public policy, and unenforceable.

II. The Association has no "Common Properties" and therefore has no authority to levy annual assessments.

[63] *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116 (2003).

[64] S.C. Const. art. XIV § 4.

South Carolina's Braddock Cove waterways, boat channels, and salt marsh open space areas are not "Common Properties for the reasons stated above. Further, the Association does not own any real property.[65] The Association's corporate power is limited by its certificate of incorporation to "improving, maintaining and operating the *common properties* of the association."[66] But the Association has no common properties to improve, maintain, or operate. Consequently, there is no authorized purpose for the annual assessments the Association imposes. Without common properties to manage, the Association's levy of annual assessments violates its certificate of incorporation and is *ultra vires.*

Consistent with the limitation on its corporate power contained in its certificate of incorporation, Article V, Section 2 of the Declaration expressly limits the authority of the Association to levy both annual and special assessments:[67]

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

[65] Stip. ¶ 18.

[66] Exhibit 4 (emphasis added).

[67] Exhibit 1, Art. V § 2.

The Association owns no Common Properties**.** Annual assessments are currently used primarily to pay legal fees, insurance premiums, buy office supplies, and to fund the circular administrative process of collecting next year's annual assessments.[68]

With no Common Properties to manage, it is not possible for the Association to use annual assessments for the sole purpose for which they are authorized: to pay for the management of Common Properties. The Court finds that annual assessments without common properties to manage are *ultra vires* under the Association's certificate of incorporation and beyond its authority under Article V, Section 2 of the Declaration.[69]

CONCLUSION

After careful consideration, based on the specific factual context presented at trial, the Court finds: (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways, and enjoining the Association from levying assessments for this purpose; and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties. The Association's counterclaims are denied and dismissed for the same reasons.

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[68] Exhibit 34, Association financials.

[69] *See* S.C. Code § 33-31-304 (ultra vires acts); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 605, 538 S.E.2d 15 (Ct. App. 2000) ("acts beyond the scope of the powers so granted are ultra vires. . . .").

So ordered this ___ day of _____, 2024.

Robert J. Bonds
Circuit Court Judge

[Electronic signature appears on next page]

Beaufort Common Pleas

Case Caption: Stanley S Stroup , plaintiff, et al VS Sea Pines South Beach Owners Association Inc

Case Number: 2021CP0701655

Type: Order/Judgment and Form 4

So Ordered

s/ Robert Bonds, 2770