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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBERT J. BONDS
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-000030
CIVIL ACTION NO. 2021-CP-07-01655

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,

RESPONDENTS,

versus

Sea Pines South Beach Owners' Association, Inc.,

APPELLANT.

FINAL APPELLANT'S BRIEF

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A. The plain and unambiguous provisions of the Covenants and the 1985 Modification permit the Association to levy special assessments for the dredging of Braddock Cove.

B. The Plaintiff Members, having had notice of the 1985 Modification to the Covenants prior to taking title to properties within the planned development, lack standing to attack the validity of the modification.

C. The Plaintiff Members' lawsuit brought in 2021 to challenge the validity of the 1985 Modification is barred by the applicable six (6) year or twenty (20) year statute of limitations.

D. The Association's members' prior approval of the levy of special assessments for the dredging of Braddock Cove and the Plaintiffs Members' failure to challenge such special assessments until 2021 ratifies the 1985 Modification and cures any alleged invalidity thereof.

E. The doctrines of laches, waiver, and equitable estoppel bar the Plaintiff Members from challenging the validity of the 1985 Modification, of which they have long had actual or constructive notice of, by a lawsuit brought in 2021.

F. The Trial Court's ruling that procedural requirements for the adoption of the 1985 Modification were not met is not supported by the evidence.

G. The terms of the 1985 Modification expanding the definition of "Common Property" to include Braddock Cove, an adjoining waterway of significant benefit to the planned development, are reasonable, definite, and harmonious with public policy.

II. The Trial Court erred in ruling that the plain and unambiguous language of the Association's Covenants did not permit the Association to levy annual assessments; further, the Plaintiff Members lack standing, are time barred, have ratified, and are precluded by the doctrines of laches, waiver, and equitable estoppel in challenging the Association's authority to levy annual assessments pursuant to the Covenants adopted in 1970.

STATEMENT OF THE CASE

This appeal stems from a dispute between Appellant Sea Pines South Beach Owners' Association, Inc. (the "Association") and Respondents 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, who are each members of the Association (collectively referred to herein as the "Plaintiff Members"), regarding the authority of the Association to levy annual and special assessments for a planned unit development community known as South Beach. In particular, the Plaintiff Members challenge the Association's ability to levy special assessments for the dredging of the Braddock Cove waterways which abut the South Beach development as well as its ability to levy annual assessments under governing covenants adopted and recorded in 1970 as later modified in 1985.

On September 13, 2021, the Plaintiff Members filed a Complaint for a declaratory judgment in the Court of Common Pleas for Beaufort County against the Association contending the above-referenced assessments being levied by the Association were improper. The Plaintiff Members sought a declaratory judgment for breach of covenants, as well as an injunction and declaratory relief for alleged *ultra vires* action by the Association. [R.pp. 73-85; Compl.]

The Association initially answered the Complaint and filed a Counterclaim on October 18, 2021, which was ultimately amended on January 30, 2023. [R.pp. 115-124; 125-139; Answer and Counterclaim; Am. Answer and Counterclaim.] The Association denied the material allegations of the Complaint and asserted as affirmative defenses, among others, lack of standing, the expiration of the statute of limitations, ratification,

waiver, and estoppel. [R.pp. 125-139; Am. Answer and Counterclaim.] By way of counterclaim, the Association sought a declaratory judgment that it is entitled to levy annual and special assessments under its governing documents and further sought money damages for due and unpaid assessments by the Plaintiff Members. [R.pp. 136-138; Id. at ¶¶ 86-92.] The Plaintiff Members filed their reply on February 8, 2023. [R.pp. 140-144; Reply.]

A non-jury trial was held before The Honorable Robert J. Bonds on May 3, 2024. [R.p. 408; Trial Tr.] Prior to trial, the parties agreed to Joint Stipulations of Facts and Evidence for Purposes of Trial and to the authenticity and admission of certain exhibits that were filed with the Trial Court. [R.pp. 145-153; Joint Stips.] The parties also submitted trial briefs and responses, as well as demonstrative slides, to the Trial Court for its consideration. [R.pp. 154-308; 1093-1184 Trial Briefs; Opposition Briefs; Slides.]

On July 22, 2024, the Trial Court issued its Order and Judgment from Trial. [R.pp. 1-31; Order.] In the Order, the Trial Court ruled the Association could not lawfully assess the Plaintiff Members for the costs of dredging Braddock Cove's boat channels and waterways and enjoined the Association from levying special assessments for such purpose. The Trial Court further declared that the Association could not levy annual assessments on the Plaintiff Members until such time that it owned certain common properties. Finally, the Trial Court denied and dismissed the Association's Counterclaim for the same reasons. [R.p. 2; Id. at p. 2.]

On August 1, 2024, the Association filed a motion pursuant to Rule 59(e), SCRCP for the Trial Court to alter, amend, or reconsider its Order and Judgment from Trial. [R.pp. 309-391; Mtn. to Reconsider.] The Plaintiff Members filed a response on October 30, 2024.

[R.pp. 392-407; Response.] A hearing on the motion to alter, amend, or reconsider was held before the Trial Court on November 5, 2024. [R.p. 483; Hearing Tr.] The Trial Court denied the motion to alter, amend, or reconsider in a formal order filed December 13, 2024. [R.pp. 32-70; Order on Reconsideration.]

The Association filed and served a Notice of Appeal to this Court on January 3, 2025.

STATEMENT OF FACTS

The Association is a non-profit corporation incorporated in 1969 for the benefit of the property owners in South Beach, a planned unit development community within the Sea Pines Resort on Hilton Head Island, South Carolina. As set forth in the Certificate of Incorporation, the stated purpose of the Association is for the improvement, maintenance, and operation of the "common properties of the association for the benefit of the health, welfare and recreation of the members of the association." [R.pp. 147; 538-539; Joint Stips., ¶¶ 8-9; Certificate of Incorporation (Joint Stips. Ex. 4).]

On June 25, 1970, Lighthouse Beach Company, the developer of the South Beach community (hereinafter, "Developer"), recorded the Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc. (the "Covenants"). [R.pp. 145; 521-532; Joint Stips., ¶ 1; Covenants (Joint Stips. Ex. 1).] The Covenants created the South Beach development and gave authority to the Association to maintain and administer the community.

In the Covenants, the Developer stated that it desired to create the South Beach development with "permanent parks, playgrounds, open spaces, lakes, boat docks, boat

channels . . . and other Common Properties for the benefit of the said community." [R.p. 521; Covenants, p. 1.] The Developer further stated in the Covenants that it desired to "provide for the preservation of the values and amenities in the said community and for the maintenance of said parks, playgrounds, open spaces, lakes, boat docks, boat channels . . . and other Common Properties." [R.p. 521; Id.]

The Association is bound by the Covenants and subject to its provisions. [R.p. 147; Joint Stips., ¶ 10.] There are also roughly five hundred (500) properties in the South Beach development subject to the terms of the Covenants. [R.p. 147; Id. at ¶ 11.]

Plaintiff Stanley Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, owns real property subject to the Covenants by virtue of a deed recorded with Beaufort County Register of Deeds on December 28, 2017. Stroup and his wife originally purchased this property in 2002 as joint tenants. [R.pp. 145-146; Id. at ¶ 2.]

Plaintiff Peter Trager owns a 4% interest in real property subject to the Covenants. Trager and his wife originally took title to this property on September 20, 1983. On August 13, 2007, however, Trager and his wife conveyed a 95% undivided interest in this property to Carolyn S. Trager, a 4% undivided interest to Peter Trager, and a 1% undivided interest to Jennifer Paige Trager Janco. [R.p. 146; Id. at ¶ 3.]

Plaintiff Vacation Inn, LLC owns real property subject to the Covenants which Vacation Inn took title to on September 20, 2003. [R.p. 146; Id. at ¶ 4.] Vacation Inn owns numerous parcels within South Beach Marina Village and has done so since 1994. [R.p. 146; Id. at ¶ 5.] Robert A. Gossett Jr. is the managing member of Vacation Inn, LLC. [R.p. 147; Id. at ¶ 6.]

Plaintiffs Stroup, Trager, and Vacation Inn are each members of the Association by virtue of their ownership of real property subject to the Covenants. [R.p. 147; Id. at ¶ 14.]

The Covenants provide for the Association's ability to levy annual and special assessments. Pursuant to Article V., Section 1 of the Covenants, "each Owner of any Lot or Dwelling Unit shall by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, be deemed to covenant and agree to all the terms and provisions of these covenants and to pay to the Association (1) Annual assessments or charges; [and] (2) Special Assessments for the purposes set forth in Section 4 of this Article, such assessments to be fixed, established and collected from time to time as hereinafter provided." [R.p. 526; Covenants, Art. V., Section 1.]

Article V, Section 2 of the Covenants sets forth the purpose of assessments, providing "[t]he 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. The Special Assessments shall be used for the purposes set forth in Section 4 of this Article." [R.p. 526; Id. at Art. V., Section 2.]

Article V, Section 4 of the Covenants provides that in addition to annual assessments, the Association may also levy special assessments "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, including the necessary fixtures and personal property related thereto or addition to the Common Properties, provided that any such assessment shall have the assent of three-

fourths (3/4) of the vote at a duly called meeting, written notice of which shall be sent to all Members at least thirty (30) days in advance and shall set forth the purpose of the meeting." [R.p. 527; Id. at Art. V, Section 4.]

When the Covenants were enacted and recorded in 1970, the term "Common Properties" was defined to mean "those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as 'Common Properties.' The term 'Common Properties' shall include any personal property acquired by the Association if said property is designated as 'Common Property'. 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." [R.p. 522; Id. at Article I., Section 1.(c).]

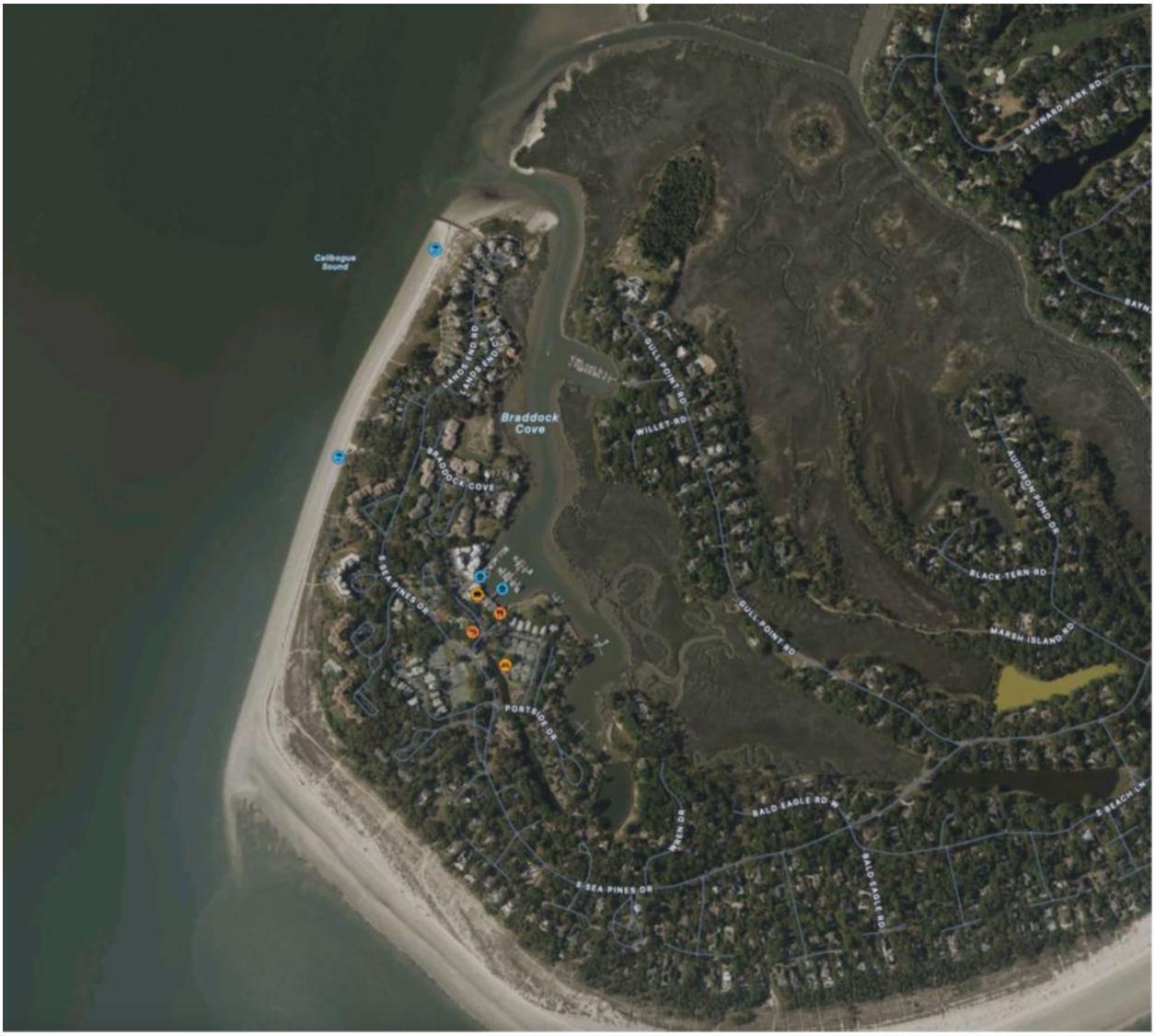
Under Article VIII, Section 1 of the Covenants, the Covenants "may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change." [R.p. 530; Id. at Art. VIII, Section 1.] Pursuant to this provision of the Covenants, on August 3, 1985, the Association voted at its annual meeting, by unanimous vote, to amend the Covenants to modify the definition of the term "Common Properties." This modification, recorded on October 22, 1985 and re-recorded on November 20, 1985 to correct the Association's name (the "1985 Modification"), expanded the definition of "Common Properties":

> "Common Properties" is herewith amended by broadening the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.
>
> 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, and recorded in the Office of the Clerk of Court for Beaufort County, South Carolina in Deed Book 433 at Page 65.

[R.pp. 536-537; 533-535; 148; 1985 Modification (Joint Stips. Ex. 3); see also Quitclaim Deed (Joint Stips. Ex. 2); Joint Stips., ¶¶ 15, 17.]

Braddock Cove is a navigable tidal creek that meanders for about a mile from Calibogue Sound along properties owned by some of the members of the Association, as well as other private properties not within the Association area. [R.p. 147; Joint Stips,. ¶ 12.] Maps and aerial photographs were submitted to the Trial Court for the demonstrative purpose of showing the area of Braddock Cove. [R.pp. 728; Joint Stips., Ex. 20.] For the Court's reference, the following is one of the aerial photographs depicting Braddock Cove:



[R.p. 1122.]

The parties do not dispute that Braddock Cove is owned by the State of South Carolina and not the Association. [R.p. 149; Joint Stips., ¶¶ 26-27.]

The membership area of the Association includes all properties, both residential and commercial, in the area starting at Scaup Court on the east side and South Beach Villas on the west and continuing to and including Lands End as depicted in Exhibit 8 submitted to the Trial Court:

[R.p. 683; South Beach December 2020 Newsletter, p. 1 (Joint Stips. Ex 8).]

The 1985 Modification created the right of the Association to levy, upon 75% voter approval as set forth in Article V., Section 4 of the Covenants, special assessments for the dredging of Braddock Cove. [R.p. 527; Covenants, Art. V, Section 4.] This right to self-impose an assessment for the dredging of the waterways of Braddock Cove is a significant right for the overall well-being of the South Beach development. [R.p. 685; 2020 Newsletter, p. 3.]

Navigability of Braddock Cove is of immense importance to Association members. To maintain adequate depths in Braddock Cove, the creek must be dredged periodically to remove pluff mud, which naturally moves in with the tides. [R.p. 694; South Beach Fall 2021 Newsletter, p. 7 (Joint Stips. Ex. 9).] Without dredging, the creek silts in and becomes a mud flat, awash only at high tide. The use of the waterways becomes severely limited in that that instance, and limited use of the waterways would cause Association property values to plumet. In 2011, the Sea Pines Waterways Task Force studied the adverse effects of not dredging as soon as possible the waterways of Sea Pines, including Braddock Cove,

and determined there would be significant adverse effects on the values of the homes through the Sea Pines area. [R.pp. 865-866; Joint Resolution (Joint Stips. Ex. 32).]

When dredging is neglected for ten years, Braddock Cove looks as depicted:

[R.pp. 772-782; 729-730; 1077-1080; Essential Fish Habitat Assessment for Braddock Cove, pp. 33-42 (Joint Stips. Ex. 25); see also August 23, 2013 Board resolution to vote on assessment (Joint Stips. Ex. 21) and 2013 Meeting Notice referencing the above-conditions (Joint Stips. Ex. 38).]

In 2001, 2013, and 2017, the Association members voted by an average of over 86% to approve special assessments for the dredging of Braddock Cove. The assessments were used to pay the Association's agreed share of costs for such dredging. [R.pp. 149; 698-715; Joint Stips., ¶ 22; Joint Stips. Exs. 11-15 (Minutes).]

The Association made payment to the South Island Dredging Association, Inc. ("SIDA"), a non-profit South Carolina corporation created to dredge Harbor Town Yacht Basin, Baynard Creek, and Braddock Cove. SIDA has secured the regulatory permits over

the years and has contracted with various dredge contractors for the work. SIDA receives payment for the work from the entities/communities receiving the dredge services based on funding formulas agreed upon by the participants. The Association was a party to the SIDA Agreement. [R.pp. 148; 546; 694; Joint Stips., ¶¶ 19, 21; SIDA Agreement, p. 4 (Joint Stips. Ex. 6); Fall 2021 Newsletter, p. 7.]

The Plaintiff Members participated in the Covenants' democratic process for approving the levying of special assessments for the dredging of Braddock Cove by submitting their proxies and/or voting during the 2001, 2013, or 2017 assessment votes.

More specifically, on November 23, 2001, 283 members of the Association were present to vote on a special assessment to dredge Braddock Cove. The special assessment passed by a vote of 239 in favor to 35 against, which represented 85% in favor. The year of 2001 occurred sixteen (16) years after the 1985 Modification. [R.pp. 698-700; Nov. 23, 2001 Minutes (Joint Stips. Ex. 11).] Robert Gossett, the managing member of Plaintiff Vacation Inn, and Plaintiff Trager lived on or owned property at South Beach at that time **but took no action** to challenge the 1985 Modification or to contest the validity of the 2001 special assessment.

Two years after the 2001 dredge special assessment vote, Plaintiff Stroup purchased his property in the South Beach development. [R.pp. 145-146; Joint Stips., ¶ 2.] Stroup bought with actual and constructive notice of the 1985 Modification and the 2001 dredge special assessment. Entities controlled by Robert Gossett also bought many properties in the South Beach development after 1985 with notice of the 1985 Modification. [R.p. 147; Id. at ¶ 7.]

The second special assessment for a dredge occurred in 2013, and the meeting was held September 28, 2013. Per the sign in sheet for the meeting, Tami Horstman attended for Robert Gossett, controlling member of Vacation Inn which owns 1732 Bluff Villa. [R.pp. 146; 703; Joint Stips., ¶ 4; Sept. 28, 2013 Special Meeting Sign In Sheet (Joint Stips. Ex. 13).] The special assessment to dredge passed with 287 votes in favor, 40 against, and 6 no opinion, passing by over 86% of the voters present representing a quorum. [R.pp. 701-702; 705-713; Sept. 28, 2013 Minutes (Joint Stips. Ex. 12); Vote Composite for 2013 Meeting (Joint Stips. Ex. 14).] Plaintiffs Trager, Stroup, and Vacation Inn participated in the vote, with Stroup **actually voting in favor** of the dredge. [R.p. 707; Vote Composite for 2013 Meeting, p. 3.]

The third special assessment vote to pay for the dredging of Braddock Cove was held on July 8, 2017. The members voted to assess themselves for the dredge by a vote of 282 of the 316 votes cast, an 89% approval rate. [R.p. 715; July 8, 2017 Minutes, p. 3 (Joint Stips. Ex. 15).]

In 2021, thirty-six (36) years after the passage of the 1985 Modification, the Plaintiff Members brought this lawsuit to challenge the validity of the 1985 Modification amending the term "Common Properties" to include Braddock Cove which permitted the Association to levy special assessments for the dredging of Braddock Cove. The Plaintiff Members also challenge the authority of the Association to levy annual assessments as set forth in the Covenants adopted in 1970.

STANDARD OF REVIEW

The Plaintiff Members brought an action for a declaratory judgment seeking, among other things, a declaration that the 1985 Modification is void and unenforceable and

further declaring that the Association cannot levy special assessments for the dredging of Braddock Cove, as well as annual assessments. The Plaintiff Members additionally sought an injunction prohibiting the Association from levying such special and annual assessments.

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 82, 781 S.E.2d 115, 120 (Ct. App. 2015) (internal citation omitted). The Plaintiff Members seek, in part, for the court to construe the Covenants and the 1985 Modification. An action to construe a contract is an action at law. Duncan v. Little, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009). "Where a contract is unambiguous, the matter becomes one of law and the parties' intent as clearly set forth in their agreement must be given effect." Id.

"In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." Id. at 425, 682 S.E.2d at 790 (internal citation omitted). The appellate court, however, reviews de novo the trial court's legal conclusions in an action at law. Wilson v. Gandis, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020).

The Plaintiff Members also seek 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). The appellate court reviews "factual findings and legal conclusions in an equitable action de novo," and "[t]herefore . . . may find facts according to [its] own view of the preponderance of the evidence." Wilson, 430 S.C. at 290, 844 S.E.2d at 635 (internal citations omitted).

ARGUMENT

I. The Trial Court erred in ruling that the Association's Covenants and 1985 Modification did not permit the Association to levy special assessments for the dredging of Braddock Cove which adjoins the property development governed by the Covenants.

The Trial Court ruled that under the Covenants, including the 1985 Modification, the Association was not permitted to levy special assessments for the dredging of Braddock Cove. The Trial Court's Order is based upon several fundamental errors of law and violations of the principles of equity. First, the Trial Court failed to construe the Covenants and the 1985 Modification according to their plain and unambiguous language. Second, the Trial Court failed to recognize that the Plaintiff Members, each who had actual or constructive notice of the provisions of the 1985 Modification when each took title, lacked standing to challenge its validity. Third, the Trial Court failed to apply the applicable statute of limitations to the Plaintiffs Members' challenge to the validity of the 1985 Modification. Fourth, the Trial Court failed to apply the doctrine of ratification. Fifth, the Trial Court failed to recognize that the principles of laches, waiver, and equitable estoppel apply to prohibit the Plaintiffs Members' challenge to the validity of the 1985 Modification. Finally, the Trial Court failed to recognize that the 1985 Modification is procedurally valid and does not contain terms that are unreasonable and indefinite or terms which violate public policy.

A. The plain and unambiguous provisions of the Covenants and the 1985 Modification permit the Association to levy special assessments for the dredging of Braddock Cove.

Restrictive covenants are contractual in nature. Therefore, "the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown,

287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (internal citation omitted). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

"A restriction on the use of 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." Taylor, 332 S.C. at 5, 498 S.E.2d at 864 (citation and quotation marks omitted). However, this rule of strict construction "'should not be applied so as to defeat the plain and obvious purpose of the instrument.'" S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (quoting Taylor, 332 S.C. at 4–5, 498 S.E.2d at 863–64).

The plain language of the Covenants and the 1985 Modification authorize the levy of special assessments by the Association for the dredging of Braddock Cove, and the Trial Court erred as a matter of law in construing the Covenants and Modification otherwise. Shipyard Prop. Owners' Ass'n, 307 S.C. at 308, 414 S.E.2d at 801 ("Where an action presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law.")

Under Article V, Section 4 of the Covenants, the Association is authorized to levy special assessments "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." [R.p. 527; Covenants, Art. V, Section 4.] Under the 1985 Modification, the definition of the term "Common Properties" as used in the Covenants was expressly broadened to "include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove[.]" [R.p. 536; 1985 Modification.]

Because Braddock Cove is designated as a "Common Property" under the Covenants, the Association may levy special assessments for the cost of any construction or reconstruction of improvements to Braddock Cove. Dredging is a type of construction or reconstruction. To "construct" means "to build; erect; put together; *make ready for use*." Taylor, 332 S.C. at 5, 498 S.E.2d at 864 (citing *Black's Law Dictionary* 312 6th ed. (1990)) (emphasis added). To "dredge" means to "dig, gather, or pull out with or as if with a dredge." *Dredge*, https://www.merriam-webster.com/dictionary/dredge. Furthermore, 13 C.F.R. § 121.201, setting forth North American Industry Classification System codes, classifies dredging as "Heavy and Civil Engineering Construction." 13 C.F.R. § 121.201 (2014).

Moreover, the permits from both the Department of the Army and the South Carolina Department of Health and Environmental Control ("DHEC") for the dredging of certain waterways, including Braddock Cove, refer to dredging as "construction" throughout their respective permits and refer to the people and companies doing the work as contractors. [R.pp. 571-682; Dep't of Army and DHEC Permits (Joint Stips. Ex. 7) (word search of the 112 pages shows construction is mentioned 86 times and contractor is mentioned 15 times).] The DHEC permit for the subject dredging indicated dredging falls within marine class construction:

> The S.C. Contractor's Licensing Act of 1999, enacted as § 40-11-5 through 430, requires that all **construction** with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for **marine class construction**, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.

[R.p. 612; Permit, p. 42 (emphasis added).]

Because dredging is considered construction by both the federal and state governments, and the activities associated with dredging comport to the definition of "construction," it is readily apparent that dredging **is** construction. Therefore, the levying of a special assessment for the dredging of Braddock Cove is an appropriate action of the Association under Article V., Section 4 of the Covenants.

In ruling that the Covenants and the 1985 Modification did not authorize the Association's levying of special assessments for the dredging of Braddock Cove, the Trial Court erroneously imposed conditions not required by the Covenants and the 1985 Modification.

1. Common Property as defined in the Covenants and the 1985 Modification is not limited to deeded property.

The Trial Court first ruled that Braddock Cove could not constitute a "Common Property" as defined under the Covenants and the 1985 Modification because Braddock Cove has not been deeded to the Association. The Trial Court's ruling ignores the express language of the 1985 Modification amending and broadening the definition of "Common Properties" to include Braddock Cove. After the adoption of the 1985 Modification, the definition of "Common Properties" was expanded to include both (1) "those areas of land

with any improvements thereon which are deeded to the Association and designated in said deed as 'Common Properties'"; and (2) "all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina." [R.pp. 522; 536; Covenants, Art. I, Section 1.(c); 1985 Modification.]

Under the modified definition of "Common Properties," both deeded property and Braddock Cove are included. The modified definition of "Common Properties" does not require that Braddock Cove also be deeded to the Association. There is no rule or requirement, and the Plaintiff Members cannot cite one, which mandates that the definition of "Common Property" be limited to deeded property. The terms of the Covenant do not require it. The Association, with the requisite approval of its members, is free to define "Common Property" as it desires.

The Association's authority to amend the definition of "Common Property," upon required approval, is further supported by S.C. CODE ANN. § 33-31-302 which sets forth the general powers of a nonprofit corporation. Unless otherwise provided in a corporation's articles of incorporation, "every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power . . . (3) to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation; . . . (10) to conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this State; . . . (17) to carry on a business; [and] (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

The Official Comments to § 33-31-302 state, in part, that the statute should be broadly interpreted and gives all nonprofit corporations "unbridled power" to further their activities and affairs in any necessary or convenient matters consistent with the law. Section 33-31-302 does not limit the ability of the Association to define "Common Property" and in fact supports its authority to do so in a manner it wishes.

Here, the waterways of Braddock Cove are an integral part of the Association community and the South Beach development. Even though Braddock Cove is a public property, it nevertheless can be commonly used and enjoyed by the property owners within the Association. To preserve the property values within the South Beach development, the Association has a strong interest in maintaining the navigability of Braddock Cove. Designating Braddock Cove as a "Common Property" for which the Association will contribute to its improvement, maintenance, operation, and construction of fulfills the purpose of the Association with respect to the "preservation of the values and amenities" and the maintenance of "boat channels" in the South Beach development. [R.pp. 521; 526; 527; Covenants, p. 1 (providing purpose of Covenants); Art. V., Section 2. (purpose of annual assessments for improvement, maintenance, and operation of Common Properties); Art. V., Section 4 (purpose of special assessments for construction and reconstruction of Common Properties).]

2. Braddock Cove is not required to be added by Supplementary Declaration to be designated as "Common Property."

The Trial Court further ruled that to be added as "Common Property," the Covenants require under Article II, Section 2(b) that "the owner of any property . . . 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." [R.pp. 523-524; Covenants, Article II, Section 2(b).]

Article II, Section 2(b) refers to property which is added as member property and subject to assessments imposed by the Association. This particular provision of the Covenants is not applicable to Braddock Cove because the 1985 Modification did not add Braddock Cove as property subject itself to assessments. In fact, under the Covenants, "Common Property" is exempt from assessments, charges, and liens. [R.pp. 528-529; Id. at Article V, Section 11(c).] As stated above, there is no rule prohibiting the Association, with the requisite approval of its members, from defining the term "Common Property" to include Braddock Cove. Accordingly, the Trial Court erred in imposing non-existent conditions upon the amendment of the term "Common Properties." This Court should reverse and give effect to the plain and unambiguous language of the Covenants and the 1985 Modification designating Braddock Cove as a "Common Property" for which the Association can levy special assessments.

B. The Plaintiff Members, having had notice of the 1985 Modification to the Covenants prior to taking title to properties within the planned development, lack standing to attack the validity of the modification.

The plain language of the Covenants clearly authorizes the Association to levy special assessments for the dredging of Braddock Cove. Nevertheless, the Plaintiff Members argued below, and the Trial Court agreed, that the 1985 Modification did not become effective because (1) it was purportedly not recorded at least sixty (60) days before its effective date; and (2) the Association members were purportedly not given at least thirty (30) days' written notice of the proposed modification before acting on it. The

Plaintiff Members also argued, and the Trial Court agreed, that the 1985 Modification was invalid because its terms were unreasonable, indefinite, and violated public policy.

In making these rulings, the Trial Court disregarded the Plaintiff Members' lack of standing to procedurally challenge the validity of the 1985 Modification. Plaintiff Stroup, Plaintiff Vacation Inn, and Robert Gossett, the managing member of Vacation Inn, did not acquire their interests in the South Beach development subject to the Covenants until 2002, 2003, and 1994 respectively. [See R.pp. 145-147; Joint Stips., ¶¶ 2, 4-7.] Plaintiff Trager, while initially taking title to property in the South Beach development in 1983, transferred his property right therein under a new deed recorded in 2007. Trager's claims against the Association in this lawsuit derive from his property interest acquired in 2007. [R.p. 146; Id. at ¶ 3.]

Therefore, each of the Plaintiff Members took title to their properties upon which they base this suit **after** the adoption of the 1985 Modification and thus with actual or constructive notice of its existence and terms. Because the Plaintiff Members had such notice of the 1985 Modification when taking title, they cannot complain about any perceived procedural irregularities regarding adoption of the modification or the validity of the modification itself.

"Standing to sue is a fundamental requirement in instituting an action." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013). This Court has observed that "[s]tanding refers to a '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (quoting *Black's Law Dictionary* 1413 (7th ed.1999)). Further, standing is a "'concept of justiciability that is concerned with whether a particular person

may raise legal arguments or claims.'" Powell ex rel. Kelley, 379 S.C. at 444, 665 S.E.2d at 241 (quoting 1A C.J.S. *Actions* § 101 (2005)).

The Plaintiff Members have no standing to make claims regarding the validity of the 1985 Modification. Each Plaintiff Member willingly took title with either actual notice or constructive notice of the recorded modification to inquire further as to its terms and validity. This is akin to a subsequent purchaser having notice of a prior recorded interest in the real property; the prior interest is valid as against that subsequent purchaser who took with notice. See S.C. CODE ANN. § 30-7-10; MI Co. v. McLean, 325 S.C. 616, 623-26, 482 S.E.2d 597, 601-03 (Ct. App. 1997) (holding fraudulent mortgage satisfaction was properly set aside, notwithstanding subsequent purchaser's contention that it would be inequitable to do so, given more than five-year delay by mortgagee in enforcing note and questionable nature of related transactions, inasmuch as subsequent purchaser acquired property after mortgagee filed notice of *lis pendens* in foreclosure action, and thus had at least constructive notice of litigation involving property and thus could not attack the litigation to set aside the fraudulent satisfaction); Akasa Holdings, LLC v. 214 Lafayette House, LLC, 177 A.D.3d 103, 109 N.Y.S.3d 17 (2019) (concluding plaintiff acquired real property with constructive notice of an easement and lacked standing to void it).

The Plaintiff Members had the opportunity to simply not purchase their properties if the 1985 Modification was objectionable. Allowing subsequent purchasers to attack or challenge long-standing covenants of a property owners' association even though such purchasers had actual or constructive notice of the covenants prior to purchase would disrupt the orderly administration of the Association's business. If subsequent purchasers are permitted to purchase properties within a planned development with notice of the

existing covenants and then challenge such covenants once they become owners, a property owners' association will never have clarity and finality of its authority under the covenants.

Accordingly, the Trial Court erred in failing to rule that the Plaintiff Members lacked standing to challenge the validity of the 1985 Modification.

C. The Plaintiff Members' lawsuit brought in 2021 to challenge the validity of the 1985 Modification is barred by the applicable six (6) year or twenty (20) year statute of limitations.

In a similar vein to the Plaintiff Members' lack of standing to challenge the validity of the 1985 Modification, the Plaintiff Members are also barred by the statute of limitations[1] from contesting the validity of the modification. S.C. CODE ANN. § 15–3–530(1) (1976) provides "an action upon a contract, obligation, or liability, express or implied" must be brought within six (6) years.[2] S.C. CODE ANN. § 15-3-520(b) further provides that "an action upon a sealed instrument" must be brought within twenty (20) years.

Therefore, any claim by the Plaintiff Members attacking the validity of the 1985 Modification had to be brought, using the greater limitations period of 20 years if the 1985 Modification qualifies as a seal instrument, by 2005. See Hilton v. Pearson, 208 So.3d 108, 110 (Fla. 1st DCA 2016) ("[A] suit challenging the validity of an amendment to restrictive covenants must be filed within five years [the applicable statute of limitations in

[1] While the Plaintiff Members have brought an equitable claim for injunctive relief for which the statute of limitations will not generally apply, the Plaintiff Members have also brought a breach of covenants claim subject to the statute of limitations. Maher v. Tietex Corp., 331 S.C. 371, 376, 500 S.E.2d 204, 207 (Ct. App. 1998).

[2] This statute was amended in 1988 to reduce the limitations period from six years to three years. Because this action is based upon a 1985 contractual provision, the six year limitation period applies. Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995).

Florida] of the date that the amendment is recorded even if the suit alleges that the amendment was void because it was not properly enacted."); Harris v. Aberdeen Prop. Owners Ass'n, 135 So. 3d 365, 368 (Fla. 4th DCA 2014) (holding, in a lawsuit challenging a property owners' association's amendment to its governing documents, that the statute of limitations still began to run from the date on which the amendment was recorded in the public records notwithstanding that plaintiff landowner did not acquire her property until after the amendment).

The Plaintiff Members did not bring their challenge to the validity of the 1985 Modification until 2021 - at least sixteen (16) years too late. One policy served by the statute of limitations is "the protection of a defendant from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable. . . . It affords defendants an opportunity to gather evidence while facts are still fresh." Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989), overruled on other grounds by, Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995). As this Court has observed:

> Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

The failure to timely challenge the 1985 Modification's validity is of significant concern here where the Plaintiff Members contend, among other things, that proper notice of the proposed amendment was not given in 1985. Because thirty-six (36) years passed before the Plaintiff Members brought their action, the Association faces each of the difficulties for which the statute of limitations is designed to protect against – lost evidence, inability to locate witnesses, and faded memories.

An organization such as the Association must be able to conduct its activities with confidence in its reliance upon governing documents that have been in place and unchallenged for almost fifty (50) years (the Covenants) and thirty-six (36) years (the 1985 Modification). The Association's actions have been guided by the correct conclusion that the 1985 Modification is valid. Actions have been taken over the past three decades in reliance upon that conclusion, including the levying of special assessments for the dredging of Braddock Cove. Property owners have moved to the South Beach development over the last 36 years with the belief that their community is creek side, not located on a mud flat. The community can only remain a creek side property with dredging.

The Plaintiff Members may argue that they were not around in 1985 to challenge the modification (although Plaintiff Trager did have an initial interest in the development property in 1983). [See R.p. 146; Joint Stips., ¶ 3.] But, just as with the issue of lack of standing, the Plaintiff Members' recourse could have been to simply not purchase any property in the development if they found the recorded 1985 Modification, of which they had actual or constructive notice, unfavorable. To allow new property owners purchasing with notice of the Covenants and the 1985 Modification to bring challenges to the validity of the provisions of such documents long after their adoption undermines not only the

purpose of the statute of limitations, but the ability of the Association to conduct its business. Accordingly, the Plaintiff Members' challenge to the validity of the 1985 Modification and related Covenant provisions is barred by the statute of limitations.

D. The Association's members' prior approval of the levy of special assessments for the dredging of Braddock Cove and the Plaintiffs Members' failure to challenge such special assessments until 2021 ratifies the 1985 Modification and cures any alleged invalidity thereof.

As a separate and independent ground for the enforceability of the 1985 Modification, even if it is not valid due to procedural flaws or otherwise, which the Association disputes, the members of the Association ratified any defects or invalidity by their express approval of the Association's levy of special assessments in 2001, 2013, and 2017 for the dredging of Braddock Cove. The acts by the members of the Association in approving special assessments for the dredging of Braddock Cove based upon the 1985 Modification ratifies the 1985 Modification and cures any purported invalidity thereof.

"To ratify is to sanction or affirm, to give validity to something done for one by another . . . ." Brazell Bros. Contractors v. Hill, 245 S.C. 69, 75, 138 S.E.2d 835, 837 (1964). Under South Carolina law, ratification is "the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." Barber v. Carolina Auto Sales, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960); see also Brazell Bros., 245 S.C. at 74-75, 138 S.E.2d at 837 ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent.").

Ratification proceeds upon the assumption that there has been no prior authority. See 2A C.J.S. *Agency* § 53 (2013). "However, once a ratification has occurred, it is

equivalent to original, prior, or previous authority." Id. Three essential elements are necessary to prove ratification: (1) acceptance by the principal of the benefits of the agent's acts; (2) full knowledge of the material facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

The circumstances here support the Association's members' ratification of the 1985 Modification. The 1985 Modification has been recorded since October 22, 1985. [R.p. 148; Joint Stips., ¶ 15.] The Association's members have been on actual or constructive notice of the 1985 Modification's terms since then and have also had the ability since that time to have inquired as to the modification's passage. No member ever challenged the terms of the 1985 Modification until this suit filed in 2021.

Based upon the 1985 Modification, the members of the Association then voted to approve by "the assent of three-fourths (3/4) of the vote at a duly called meeting" the levy of special assessments for the dredging of Braddock Cove in 2001, 2013, and 2017. [R.pp. 149; 527; Joint Stips., ¶ 22; Covenants, Art. V., Section 4.] By these votes, the members accepted the 1985 Modification's inclusion of Braddock Cove as "Common Property" for which special assessments could be levied. The members accepted the benefits of the dredging of Braddock Cove for the South Beach development.

No member, including any Plaintiff Member, has ever challenged the approval of the 2001, 2013, and 2017 special assessments for the dredging of Braddock Cove. These circumstances establish an affirmative election by the Association's members to adopt the terms of the 1985 Modification and its inclusion of Braddock Cove as "Common Property," despite any purported invalidity of the modification. Accordingly, the Trial Court erred in

failing to apply the doctrine of ratification to find that the Association's power to levy special assessments for the dredging of Braddock Cove is authorized by the Covenants and the 1985 Modification.

E. The doctrines of laches, waiver, and equitable estoppel bar the Plaintiff Members from challenging the validity of the 1985 Modification, of which they have long had actual or constructive notice of, by a lawsuit brought in 2021.

The doctrines of laches, waiver, and equitable estoppel further each preclude the Plaintiff Members from challenging the validity of the 1985 Modification.

Under the doctrine of laches, "if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. Cty. Council for Lee Cty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Laches "connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." Id. at 421, 434 S.E.2d at 281. In determining whether a party is barred by laches, "the circumstances of each case should be considered, including whether the delay has worked injury, prejudice, or disadvantage to the other party." Id.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right," and may be "expressed or implied by a party's conduct." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391(1994). The doctrine of waiver does not require that "the party asserting waiver has been misled to his prejudice or into an altered position." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992). Both laches and waiver require a party to have known of a right, and known that

the party was abandoning that right. Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470-71 (2007).

"Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker, 313 S.C. at 487, 443 S.E.2d at 391. A party may be equitably estopped from asserting a claim even if there was "no intention by the party to relinquish or change any existing rights." Id. The essential element of estoppel is prejudice to the party raising the defense. Id. "It is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006).

The elements of equitable estoppel as related to the party being estopped are: "(1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped." Strickland, 375 S.C. at 84-85, 650 S.E.2d at 470.

"[T]he distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult

to determine the exact point where one doctrine ends and the other begins." Janasik, 307 S.C. at 344, 415 S.E.2d at 387-88. Whether a party is barred by either waiver or estoppel is determined "in light of the circumstances of each case." Id. at 344, 415 S.E.2d at 388. The doctrines of laches and equitable estoppel may also be "similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment." Strickland, 375 S.C. at 86, 650 S.E.2d at 471.

Each of these doctrines is applicable on the present facts. The Plaintiff Members' conduct conveyed the impression that they had no objection to the terms of the 1985 Modification or the Association's levy of special assessments for the dredging of Braddock Cove. The Plaintiff Members took title to property in the South Beach development with record notice of the terms of the Covenants and the 1985 Modification. The Plaintiff Members were not heard to complain about the 1985 Modification or the issuance of such special assessments until 2021.

The record further reflects the Association's members voted on special assessments for the dredging of Braddock Cove in 2001, 2013, and 2017, with Plaintiff Members participating in all or some of the voting on such assessments. The Plaintiff Members never raised any objection to the provisions of the 1985 Modification or the levy of special assessments for the purpose of dredging Braddock Cove. Certainly, the Plaintiff Members were aware or could have been aware of any rights to object to either the terms of the 1985 Modification or the levy of such special assessments long prior to 2021. Yet, the Plaintiff Members never seasonably asserted such rights, and their conduct manifested an intent to abandon any such rights.

Meanwhile, the Association, never having any notice that any member objected to the terms of the 1985 Modification or the levy of special assessments for the dredging of Braddock Cove, proceeded to act with authority under the Covenants and the 1985 Modification to pay for dredging by special assessments and entered into the SIDA Agreement in October 2013 to participate in the dredging of Braddock Cove with other community associations. [R.pp. 543-570; SIDA Agreement.] The Association conducted its business for many years in this manner without objection to the validity of the 1985 Modification or the issuance of special assessments for dredging. New property owners have since purchased property within the South Beach development governed by the Covenants with dredging of Braddock Cove having occurred as a benefit to the community.

The Plaintiff Members' long delay in asserting an objection to the validity of the 1985 Modification and the issuance of special assessments for dredging unreasonably disturbs the ability of the Association to conduct its activities and plan for the future in reliance on provisions of its Covenants and the 1985 Modification which have been uncontested for thirty-six (36) years. If the Plaintiff Members disagreed with the levy of special assessments for the dredging of Braddock Cove, they had the opportunity to participate in the democratic process of voting upon such special assessments as provided for in the Covenants. [R.p. 527; Covenants, Art. V, Section 4.] What the Plaintiff Members cannot do is sit idly by for years without objection and only now try to impose their will upon the Association's members who have relied upon the validity and interpretation of the Covenants and the 1985 Modification for 36 years.

The elements of each laches, waiver, and equitable estoppel are thus present in this case, and it was error for the Trial Court to ignore the overwhelming evidence that the

Plaintiff Members unreasonably delayed in asserting any objections to the 1985 Modification and special assessments, waived their rights to assert any such objections, and are estopped from challenging the validity of the 1985 Modification and the authority of the Association to levy special assessments for the dredging of Braddock Cove upon approval of its members as set forth in the Covenants. For these additional reasons, this Court should reverse the Trial Court's order enjoining the Association's levy of special assessments for the dredging of Braddock Cove.

F. The Trial Court's ruling that procedural requirements for the adoption of the 1985 Modification were not met is not supported by the evidence.

Assuming for argument's sake that the Plaintiff Members have the ability to challenge any procedural irregularities with respect to the adoption of the 1985 Modification, the Plaintiff Members failed to present sufficient evidence that the adoption of the 1985 Modification was procedurally improper. The Trial Court ruled the 1985 Modification did not become effective because, pursuant to the conditions of the Covenants, the modification (1) was not made and recorded sixty (60) days in advance of the effective date of such change, and (2) written notice of the proposed amendment was not sent to every owner at least thirty (30) days in advance of any action taken.

Where the members of a property owners' association adopt an amendment, the amendment is presumed valid unless the opposing party can show otherwise. Pandharipande v. FSD Corp., 679 S.W.3d 610, 630 (Tenn. 2023). The Association members met and voted upon the 1985 Modification at its annual meeting on August 3, 1985 and approved of the modification by unanimous vote. [R.pp. 536-537; 1985 Modification.] The 1985 Modification was then initially recorded over sixty (60) days later on October 22, 1985. [R.p. 148; Joint Stips., ¶ 15.] The 1985 Modification did not contain

an express effective date, but from the record it was not applied until the vote on the 2001 special assessments for the dredging of Braddock Cove. [R.p. 149; Id. at ¶ 22.] Therefore, the 1985 Modification was not applied in less than sixty (60) days from either its adoption or recording. The Trial Court's ruling that the 1985 Modification was not made and recorded sixty (60) days in advance of its effective date is not supported by the evidence in the record.

Second, the Trial Court merely speculated, with no actual proof, that written notice of the proposed amendment was not sent to each owner thirty (30) days in advance of any action taken. The Trial Court based its speculation on the fact that a quitclaim deed executed on July 15, 1985 transferring any interest in Braddock Cover from the Developer to the Association was not made thirty (30) days prior to the Association's August 3, 1985 vote on the modification. But the date of this quitclaim deed does not prove that the owners were not given 30 days' notice of the proposed terms of the amendment and related property transaction or that the owners did not waive notice. It is very possible the owners were given the terms of the proposed amendment as well as the draft of the quitclaim deed.

There is no record of any owner ever objecting to the lack of notice until the 2021 lawsuit. The Plaintiff Members have presented no witness who has averred that proper notice was not provided. Of course, the lengthy delay - thirty-six (36) years - by the Plaintiff Members in challenging whether the 1985 Modification was procedurally valid hinders the Association's ability to prove whether 30 days' notice was given. The burden should rest upon the Plaintiff Members in showing that notice was not properly given for a modification that has been in existence for 36 years without objection. It was error for the

Trial Court to instead allow the 1985 Modification to be voided based upon sheer speculation.

G. The terms of the 1985 Modification expanding the definition of "Common Property" to include Braddock Cove, an adjoining waterway of significant benefit to the planned development, are reasonable, definite, and harmonious with public policy.

The Trial Court also ruled that the 1985 Modification is unreasonable, indefinite, and contravenes public policy. Assuming for argument's sake that the Plaintiff Members are permitted to challenge the enforceability of the 1985 Modification which existed for thirty-six (36) years without objection, the record in this case shows that the 1985 Modification adding Braddock Cove to the definition of "Common Properties," in conjunction with other provisions of the Covenants, is consistent with the purpose of the Association, provides notice of any expected obligations of the owners, and promotes public policy.

"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 primary purpose of the Association as stated in the preamble of the Covenants is to provide for the "preservation of the values and amenities" in the South Beach development and for the maintenance of such amenities including "boat channels." [R.p. 521; Covenants, p. 1.] Braddock Cove is the waterway immediately abutting the South Beach development and the only nearby boat channel for which the Covenants would have been referencing. [R.p. 443; Trial Tr., p. 35, ll. 9-12.] The ability to navigate Braddock Cove and keeping Braddock Cove free of unsightly silt, mud, and other debris is essential to maintain the attractiveness of the South Beach development and preserve the values of the properties therein. [R.pp. 865-866; Joint Resolution.]

Defining Braddock Cove as "Common Property" as was done in the 1985 Modification, upon unanimous vote, is perfectly reasonable and consistent with the Association's purpose of protecting the property values of the development and is further reasonable in light of the nature and character of the community – one adjoining a waterway in which it is expected that community members would want to enjoy. As stated in Section I.A. hereof, there is no rule, whether derived from the Covenants themselves or statutory law, prohibiting the Association from defining the term "Common Property" in a manner consistent with its purpose.

The 1985 Modification also does not fail for being indefinite. The "obligation" of a covenant should "be imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." Beech Mountain Prop. Owners' Ass'n, Inc. v. Seifart, 269 S.E.2d 178, 183 (N.C. Ct. App. 1980). The 1985 Modification expressly broadens the definition of "Common Properties" to include "all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort, South Carolina." It is not ambiguous as to what is included. When the Plaintiff Members accepted their deeds, they could determine from the express language of the 1985 Modification what was included in as "Common Properties" and what they would be required to maintained.

Furthermore, the Covenants do not allow the Association to indefinitely require owners to pay future assessments in whatever amount to be used for whatever purpose the Association might from time to time deem desirable. Instead, the Association must either use annual assessments levied "for the improvement, maintenance, and operation of the Common Properties" or levy special assessments "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." [R.pp. 526-527; Covenants, Art. V., Sections 2 and 4.] Significantly, these special assessments can be levied only if 75% of the vote at a duly called meeting votes to approve. [R.p. 527; Id. at Art. V., Section 4.] The members, by their vote, control whether special assessments are passed. Any obligation imposed by the 1985 Modification is not indefinite.

Finally, the 1985 Modification does not violate any public policy of this State. A covenant that requires property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties are deemed to touch and concern land and therefore "run with the land." See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 357 n.10, 628 S.E.2d 902, 911 n.10 (Ct. App. 2006) (citing Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 102, 459 S.E.2d 860, 862 (Ct. App. 1995)). Moreover, "[w]hether a covenant will or will not run with the land does not depend so much on whether it is to be performed thereon as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is used or occupied." Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S.E. 66, 70 (1935). Even if a covenant relates to adjoining land, it can be for the benefit of, and run with, the land demised. Id.

As repeatedly discussed throughout this brief, special assessments for the dredging of Braddock Cove have a beneficial effect on the value of the owners' properties in the South Beach development governed by the Covenants as Braddock Cove runs along and borders properties within the Association. The dredging of Braddock Cove enhances the value of the properties within the development. It is not a violation of public policy for the

Association to have the ability to levy special assessments, upon 75% approval of the vote at a duly called meeting as set forth in the Covenants, for the dredging of the adjoining waterway to the development which adds a great benefit to the development. See also Queen's Grant II, 368 S.C. at 357 n.10, 628 S.E.2d at 911 n.10 (observing owners' obligations to pay for maintenance of common areas beyond their property regime can run with the land if there is a beneficial effect on the value of the owners' properties).

As the Trial Court recognized, all members of the public are entitled to use and enjoy public waters. [R.p. 61; Order on Reconsideration, p. 30.] This includes the Association and its members. If the Association and its members, upon required approvals as set forth in the Covenants, voluntarily want to include Braddock Cove as property for which they assist in taking care of, there is no detriment to public policy and nothing forbidding the members from doing so. [R.p. 447; Trial Tr., p. 39, ll. 17-21.] If the Plaintiff Members found such a covenant objectionable, they were free to not purchase any property within the development. Their opposition does not mean that it is objectionable to the majority of the Association members who want to assist in dredging Braddock Cove for the enhancement of property values within the development. The 1985 Modification did not violate any public policy, and the Trial Court erred in finding it did.

II. The Trial Court erred in ruling that the plain and unambiguous language of the Association's Covenants did not permit the Association to levy annual assessments; further, the Plaintiff Members lack standing, are time barred, have ratified, and are precluded by the doctrines of laches, waiver, and equitable estoppel in challenging the Association's authority to levy annual assessments pursuant to the Covenants adopted in 1970.

In addition to ruling that the Association was not authorized to levy special assessments for the dredging of Braddock Cove, the Trial Court further determined that the Association was not permitted to levy any annual assessments at all since it had no

"Common Property." The Trial Court's ruling essentially renders the Association and the Covenants a nullity. The Association is now left with no means to conduct business.

First, the Trial Court's ruling ignores that the express language of the Covenants under which each owner covenanted and agreed to pay to the Association "(1) Annual assessments or charges." [R.p. 526; Covenants, Art. V, Section 1.] The owners further agreed that such annual assessments, "with such interest thereon and costs of collection therefor as hereinafter provided, shall be a charge and continuing lien on the land and all the improvements thereon against which each such assessment is made," and further that "[e]ach such assessment, together with such interest theron and cost of collection as hereinafter provided, shall also be the personal obligation of the person who was the owner of such property at the time when the assessment fell due." [R.p. 526; Id.]

The right of the Association to collect annual assessments is unqualified under the express language of the Covenants. The Trial Court wrongly conflated the right to collect annual assessments with the purposes for which such assessments can be used. There is no limitation on the right to collect, only on its use. "Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Contracts are to be interpreted so as to give effect to all of their provisions. Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997). "As voluntary contracts, restrictive covenants will be enforced according to their terms . . . .' Id. at 210, 494 S.E.2d at 467.

The Trial Court further erred in determining that the Association had no "Common Properties" on which annual assessments could be used. As argued herein, the 1985

Modification properly extended the term "Common Properties" to apply to Braddock Cove. Therefore, the Association can use annual assessments for the "improvement, maintenance, and operation" of Braddock Cove. [R.p. 526; Covenants, Art. V, Section 2.] Because Common Property does exist for which the Association can use the levied annual assessments, it was error for the Trial Court to rule otherwise.

The Trial Court's order enjoining the Association from levying annual assessments until such time as it has Common Property also places the Association in a no-win situation. Under the Trial Court's injunction, the Association cannot levy annual assessments pursuant to its authority under Article V., Section 1 of the Covenants until it has Common Property (which, as stated above, the Association disputes because the 1985 Modification adds Braddock Cove as Common Property). But the Association cannot add to Common Property under the Trial Court's injunction unless it has funds from annual assessments to acquire any such property, including the exercise of a right of first refusal to purchase property from Community Services Associates, Inc.[3] [R.p. 859; CSA Covenants, ¶ 10 (Joint Stips. Ex. 31).]

The Trial Court's construction of the Covenants defeats the entire purpose of the Covenants – creating a planned unit development community with an Association to preserve the values of such community. "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Mishoe v. Gen. Motors

[3] The Association opposed the commercial development of an undeveloped parcel in South Beach and urged Sea Pines manager of common properties, Community Service Association ("CSA"), to preserve the parcel through purchase. CSA did so and granted a right of first refusal to purchase such land to the Association. [R.p. 859; CSA Covenants, ¶ 10.] Today, the parcel serves as a park for South Beach. [R.p. 685; December 2020 Newsletter, p. 3.]

Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958). A construction leading to an absurd result should be avoided. Id. at 188-89, 107 S.E.2d at 47; see also Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.") (internal citation omitted). The Trial Court's construction of the Covenants violates these fundamental principles of contract construction. As such, this Court should reverse the Trial Court's interpretation of the Covenants and its resulting injunction prohibiting the collection of annual assessments.

Finally, as an additional basis for reversal of the Trial Court's injunction prohibiting the Association's levying of annual assessments pursuant to its authority under the Covenants, the Association incorporates herein the arguments set forth in Section I.B-E of this brief that the Plaintiff Members lack standing, are time barred, have ratified, and are barred by the doctrines of laches, waiver, and equitable estoppel from challenging the Association's authority to levy annual assessments. The Plaintiff Members each took title with notice of the Covenants' provisions, adopted in 1970, providing for the authority of the Association to levy annual assessments and paid such annual assessments for years with no objection or challenge. The Association has operated in reliance upon the members' payment of annual assessments since the beginning of the Association. The failure of any member to timely object has sanctioned any alleged impropriety in the Association's levy of annual assessments [which the Association does not concede]. For these additional reasons, the Trial Court's order enjoining the Association from levying annual assessments should be reversed.

CONCLUSION

For the reasons set forth herein, the Association respectfully requests this Court to reverse the Trial Court's declaratory judgment and accompanying injunction prohibiting the Association from (1) levying special assessments for the dredging of Braddock Cove; and (2) levying any annual assessments. The Association requests this Court to further reinstate its Counterclaim and remand for further proceedings.

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November 17, 2025.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellant's Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant Sea Pines South Beach Owners' Association, Inc., do hereby certify that I have this date served the foregoing Final Appellant's Brief, dated November 17, 2025, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Amended Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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