THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Marvin H. Dukes, III, Master in Equity

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SC Court of Appeals

Case No. 2014-CP-07-1435
Ct. App. No. 2016-000637

Catwalk, LLC, Moondog, LLC, LET, LLC,
Lost Parrot, LLC, Vacation Inn, LLC, SBM, LLC,
and South Beach Swimming Pool, Inc., ... Appellants,

v.

Sea Pines South Beach Owners' Association, Inc. ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

In 1970, Lighthouse Beach Company ("Lighthouse") recorded restrictive covenants encumbering all real property within the 103-acre South Beach parcel in Sea Pines, Hilton Head Island. In 1973, Lighthouse recorded additional covenants ("the 1973 Commercial Covenants") encumbering any property owned by Lighthouse, wherever located on Hilton Head Island, intended for commercial use. Appellants' properties that are the subject of this litigation (the "Properties") lie within the 103-acre South Beach parcel and are designated for commercial use. The deeds conveying the Properties to Appellants or their predecessors recite the 1970 Covenants and the 1973 Commercial Covenants as encumbrances on the Properties. Under these circumstances, did the Master in Equity correctly conclude that Appellants' properties are governed by both sets of covenants?

STATEMENT OF THE CASE

Respondent Association adopts by reference the Statement of the Case set forth in Appellants' Initial Brief. (Appellants' Initial Br. at 2-4.)

STATEMENT OF FACTS

This litigation concerns South Beach, a 103-acre parcel of land located within Sea Pines Plantation. South Beach is a mixed use area with residential, recreational, and commercial properties.

A. The 1970 Covenants

In 1970 the entire South Beach parcel was owned by Lighthouse Beach Company ("Lighthouse"). Lighthouse developed a master plan for the development of South Beach and recorded a set of restrictive covenants in August 1970 ("the 1970 Covenants") with the Register of Deeds for Beaufort County, South Carolina. (R. __, 1970 Covenants.)

The 1970 Covenants provide that all property within the South Beach parcel "shall be held, transferred, sold, conveyed, leased, occupied, and used subject to" the 1970 Covenants. (R. __, *Id.* at Recitals; R. __, *id.* at Art. II, § 1.) The 1970 Covenants recognize Lighthouse's right to develop the South Beach parcel as it deemed most suitable. The 1970 Covenants provide for the addition of "*complementary* additions and modifications" to the covenants, either in conjunction with the addition of properties to the parcel or through amendment of the 1970 Covenants. (R. __, *Id.* at Art. VIII, § 1.)

The 1970 Covenants also established Respondent Sea Pines South Beach Owners' Association, Inc. ("the Association") as the entity responsible for, *inter alia*, "administering and enforcing the covenants and restrictions" governing the South Beach parcel and "collecting and disbursing assessments." (R. __, *Id.* at Recitals.)

The fee simple owner of a property subject to the 1970 Covenants for which there is a recorded final subdivision map is subject to annual and special assessments (R. __, *Id.* at Art. V, § 1), and shall be a "Member" of the Association. (R. __, *Id.* at Art. III, § 1.)

The 1970 Covenants contain a non-waiver provision: "failure by the Association or any Owner or [Lighthouse] to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter." (R. __, *Id.* at Art. VIII, § 3.)

B. The 1973 Commercial Covenants

In January 1973 Lighthouse recorded an additional set of covenants ("the 1973 Commercial Covenants") that restrict land designated for commercial use. (R. __, 1973 Commercial Covenants at 1.) The 1973 Commercial Covenants provide that they "shall be the sole applicable covenants restricting and affecting commercial properties conveyed by" Lighthouse. (R. __, *Id.* at 2.) However, the 1973 Commercial Covenants also recognize the existence and continuing enforceability of the 1970 Covenants.

Two provisions of the 1973 Commercial Covenants make clear that the 1970 Covenants remain applicable to commercial-use properties located within the South Beach parcel. First, the Recitals of the 1973 Commercial Covenants reserve to Lighthouse "the right to add, in Deeds of Conveyance, additional covenants in respect to properties so conveyed by such deed." (R. __, *Id.* at 2.) Second, the 1973 Commercial Covenants provide:

> [I]t is the true intent and purpose of [Lighthouse], that ***to the extent that there is a conflict between those restrictions previously recorded***, as set forth above, ***and those of the instant Declaration***, the provisions of the instant Declaration shall govern ...

(R. __, *Id.* at 2 (emphasis added).)

C. Appellants' Properties

Appellants own several commercial properties located in the South Beach Marina Village. Appellants admit that their properties are located within the original 103-acre parcel described in, and burdened by, the 1970 Covenants. (R. __, Resp. to Def's. Request to Admit No. 1.)

There is also no dispute that the titles to Appellants' properties trace back to deeds stating that the properties are conveyed subject to both the 1970 Covenants and the 1973 Commercial Covenants.[1] In 1984, Lighthouse (then known as The Sea Pines Company) conveyed all but one of Appellants' properties to South Beach Marina Village, a Partnership. The warranty deed ("the 1984 Deed") conveying the properties to South Beach Marina Village provides in relevant part:

> The property described herein is conveyed subject to the following restrictions, covenants, encumbrances and limitations of use:
>
> 1. Easements, restrictions, covenants, rights-of-way and non-monetary encumbrances of record, ***including, but not limited to,*** those recorded in ... Deed Book 173 at Page 203 [the 1970 Covenants], ... and in Deed Book 206 at Page 1143 [the 1973 Commercial Covenants] [.]

[1] The various conveyances underlying Appellants' present ownership of the properties are recounted in affidavits submitted in connection with the parties' cross motions for summary judgment. (R. pp. __, Affidavits.)

(R. __, 1984 Deed (emphasis added).)[2] The remaining property involved in this litigation was conveyed to Robert A. Gossett, Jr., in 1987 as part of a bankruptcy proceeding. (R. __.) The limited warranty deed ("the 1987 Deed") conveying this piece of property provides that the property is conveyed subject to, *inter alia*, the 1970 Covenants. (R. __, 1987 Deed.). Gossett subsequently conveyed the property to Appellant South Beach Swimming Pool, Inc..

D. The Litigation

Appellants own commercial property ("the Properties") located within the 103-acre South Beach parcel. They commenced this action in June 2014 seeking a declaratory judgment that: (i) the Properties are not encumbered by the 1970 Covenants, (ii) Appellants are not subject to assessments imposed by the Association, and (iii) Appellants are not members of the Association.[3] The matter

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[2] Similarly, the title insurance policies for Appellants' Properties indicate that the properties are subject to both the 1970 Covenants and the 1973 Covenants. (R. pp. __, Title Insurance Policies.)

[3] Appellants' Properties lie within the South Beach Marina Tract of South Beach, Sea Pines. The 1984 Deed that first conveyed the properties and the Plat referenced in the Deed show that the Properties are bounded on the north and east by Braddock Cove, a navigable body of water. (R. __, 1984 Deed, at __.) Braddock Cove and other navigable waters in Sea Pines require dredging from time to time. On October 4, 2013, the South Island Dredging Association, Inc. ("SIDA") entered into a contract with Orion Marine Construction, Inc.to dredge Harbour Town, Gull Point, and Braddock Cove. (R. __, SIDA Agreement.). Subsequently, on October 22, 2013, the owners and owner representatives of the beneficiaries of the dredging entered into the SIDA Agreement, which set forth the agreed-upon contributions for the dredging costs of the various stakeholders, including: Baynard Park Property Owners Association, Inc.; Harbour Town Yacht Club Boat Slip Owners Association, Inc.; Gull Point Property Owners Association, Inc.; South Beach Marina, Inc.; and Sea Pines South Beach Property Owners Association, Inc. (R. __, *Id.* at § 2).

was referred to a Master in Equity and the parties cross-moved for summary judgment. Following extensive briefing, oral argument, and post-argument briefing, the Master in Equity issued a written decision granting the Association's motion and denying Appellants'. Based on the undisputed facts, the Master in Equity determined that:

- "[T]he 1970 Covenants create a planned unit development community and give authority to the Association to maintain and administer the community";
- "The 1973 Commercial Covenants set forth design, environmental and other standards and requirements to assure that commercial property is in keeping with stated environmental and aesthetic goals"; and
- "To the extent a property in South Beach is commercial in nature, ***the 1973 Commercial Covenants complement rather than conflict with other community restrictions.***"

Seven months later, on May 27, 2014, Respondent mailed a letter to Robert A. Gossett, Jr., the principal of Appellant corporations. The letter states that the Association, in reviewing its records and outstanding dredge issues, determined that Mr. Gossett and/or his corporations owned 43 properties in South Beach which were assessable for annual dues. The letter asked that Mr. Gossett remit payment of $860, the total of the $20 annual assessment for the 43 properties. (*See* R. __, Williams Aff. ¶ 7.)

The property owners, whether Mr. Gossett or the Appellants, did not pay the assessments. Rather, two weeks later Appellants filed this lawsuit seeking a declaration that their properties were not encumbered by the 1970 Covenants, that Appellants were not Association members, and that Appellants were not obligated to pay the $20 assessments per property.

The respective payments by the stakeholders for the 2013 dredging are not at issue in this case. Those contributions were agreed upon and paid. The SIDA dredging contract and the SIDA Agreement for funding were fully performed. There is no dispute about the SIDA Agreement. Appellants' reference to the amounts paid by some of the parties to the SIDA Agreement, therefore, are irrelevant.

(R. __, Order at 8 (emphasis added).) Based on these determinations, the Master in Equity concluded that "as a matter of law [Appellants'] properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants. Accordingly, [Appellants] are members of the Association, with all rights and obligations of membership." (R. __, Order at 8.)

This appeal followed.

SUMMARY OF ARGUMENT

Appellants admit that the Properties are part of the 103-acre South Beach parcel governed by the 1970 Covenants. In arguing that those covenants no longer apply to their properties, Appellants focus myopically on a single phrase from the 1973 Commercial Covenants, stating that the 1973 covenants "shall be the sole applicable covenants restricting and affecting commercial properties." But the law is clear: restrictive covenants are contractual in nature and, like contracts, must be construed as a whole. Therefore, Appellants err in encouraging the Court to consider a single phrase in isolation from the remainder of the 1973 Commercial Covenants.

When construed as a whole, as the law requires, the 1973 Commercial Covenants clearly recognize the continued existence and enforceability of the 1970 Covenants. Moreover, Appellants' properties were conveyed pursuant to deeds that explicitly incorporated the 1970 Covenants *and* the 1973 Commercial Covenants—a circumstance contemplated, and authorized, by the 1973 Commercial Covenants. Finally, the 1970 Covenants recognize that development of the South Beach parcel

might necessitate future supplementation or amendment of the covenants and made clear that any such supplementation or amendment should not be construed as a revocation or rescission of the 1970 Covenants.

In light of the undisputed facts and the unambiguous language of the covenants, the lower court correctly held (1) that Appellants' properties remain subject to the 1970 Covenants to the extent those covenants are not directly contradicted by the 1973 Commercial Covenants, and (2) that pursuant to the 1970 Covenants, uncontradicted by anything in the 1973 Commercial Covenants, Appellants are members of the Association and their properties are subject to annual and special assessments. Accordingly, this Court should affirm.

ARGUMENT

I. THE MASTER IN EQUITY CORRECTLY RULED THAT APPELLANTS' PROPERTIES ARE ENCUMBERED BY BOTH THE 1970 COVENANTS AND THE 1973 COMMERCIAL COVENANTS.

A. Applicable Law

1. *Standard of Review*

When reviewing an order granting or denying summary judgment, the appellate court applies the same standard as that which governed the [master-in-equity] under Rule 56(c), SCRCP. *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citing *Quail Hill, LLC v. Cnty. of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)). Pursuant to Rule 56(c), SCRCP, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

2. *Construction of Restrictive Covenants*

Restrictive covenants, like the covenants at issue in this case, "are contractual in nature and bind the parties thereto in the same manner as any other contract." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (internal quotation marks omitted). The words of a restrictive covenant will be construed according to the plain and ordinary meaning attributed to them at the time of their execution. *See Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863–64 . (internal quotation marks omitted). 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).

B. The 1970 Covenants encumber all land within the 103-acre South Beach parcel, including Appellants' Properties.

Under the legal premises described above, the plain language of the 1970 Covenants makes clear that all property in South Beach "shall be ... subject" to the covenants, and that the owner of any lot for which there is a recorded final subdivision map is subject to assessments and *"shall be a member of the Association."* (R. __, 1970 Covenants Art. II, §1; *id.* at Art. III, § 1 (emphasis added).) Further, the 1970 Covenants unambiguously apply to the entirety of the 103-acre South Beach parcel.

Appellants *admit* that their Properties lie within the South Beach parcel. (R. __, Pls.' Resp. to Def.'s Request to Admitt No. 1.) Moreover, the deeds conveying the Properties to Appellants or their predecessors specifically list the 1970 Covenants (as well as the 1973 Commercial Covenants) as encumbrances. (R. __, 1984 Deed at 2; 1987 Deed at 500.) The 1984 Deed, which conferred title to all but one of the Properties, provides:

> The property described herein is conveyed subject to the following restrictions, covenants, encumbrances and limitations of use:
>
> 1. Easements, restrictions, covenants, rights-of-way and non-monetary encumbrances of record, ***including, but not limited to,*** those recorded in ... Deed Book 176 at Page 203 [the 1970 Covenants], ... and in Deed Book 206 at Page 1143 [the 1973 Commercial Covenants] [.]

(R. __, 1984 Deed at 2 (emphasis added).) Similarly, the 1987 Deed, which conveyed the other of the Properties, provides:

> d) Declaration of Rights, Restrictions, Easements, set back lines, rights-of-way, options, conditions, etc. as recorded in Office of the Register of Mesne Conveyance in Beaufort County, South Carolina in Deed Book 176 at Page 203 [the 1970 Covenants] ... .

(R. __, 1987 Deed at 500.). Under South Carolina law, a restrictive covenant recited in a deed conveying property is binding and enforceable against the grantee. *See, e.g.*, 26A C.J.S. *Deeds* § 445 ("A grantee of land subject to restrictive covenants may be bound by the restrictions where he or she has at least constructive notice thereof, by reason of the deed containing a covenant putting him or her on inquiry. A grantee who accepts the deed and records it, with knowledge of restrictions therein, is deemed to have consented thereto." (footnotes omitted)).

Thus both the unambiguous text of the 1970 Covenants and applicable South Carolina law establish that Appellants' Properties are encumbered by the 1970 Covenants.[4]

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[4] Additionally, the title insurance policies for Appellants' Properties, which identify exceptions to coverage including covenants, conditions, easements, and

C. Appellants' arguments against application of the 1970 Covenants are without merit.

Attempting to avoid the unavoidable, Appellants maintain that the 1970 Covenants do not apply to the Properties for two reasons: (1) because the record contains no evidence that the sales contracts for the Properties "included any notice that the 1970 Covenants would be added as an encumbrance to the property" as contemplated in the 1973 Commercial Covenants; and (2) because the 1970 Covenants were not made applicable to Appellants' Properties through a Supplementary Declaration of Covenants, as contemplated in the 1970 Covenants. Appellants' Initial Br. at 20. The Court must reject these arguments because Appellants failed to preserve them for appellate review.

It is a settled rule of South Carolina law that "an appellate court cannot address an issue unless it was raised to and ruled upon by the [lower] court." *Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009). Appellants first raised the arguments recited above in their motion to alter or amend the judgment under Rule 59, SCRCP. (R. __, Notice of Motion and Motion to Alter or Amend Under Rule 59, SCRCP, at 10-11.) This was too late. "[A] party may not raise an issue in a motion to reconsider, alter or amend a judgment that could

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affirmative obligations as shown on recorded instruments applicable to the insured property, state that Appellants' Properties are subject to the 1970 Covenants. (R. pp. __, Title Insurance Policies.) Each policy: (1) relates to property in South Beach owned by Appellants; (2) identifies the covenants, conditions, easements, and affirmative obligations for that property; (3) identifies the 1970 Covenants and the 1973 Commercial Covenants as encumbrances on the property; and (4) was prepared by the same counsel or firm representing Appellants in this appeal. (R. pp. __, *id.*)

have been presented prior to the judgment." *Kiawah Prop. Owners Gp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004).

In any event, these arguments are without merit. Appellants' first assertion, that the 1970 Covenants do not apply because they were not listed in the contracts of sale, rests on a provision of the 1973 Commercial Covenants stating, "[Light-house] reserves in each instance the right to add, in Deeds of Conveyance, additional covenants with respect to said properties so conveyed by such Deed ... Notice of such additional covenants, will, in all cases, be set forth in the contract of sale relating to such property." (R. __ , 1973 Commercial Covenants at 2). This argument fails because South Carolina recognizes the merger-by-deed doctrine, under which "a deed made in in full execution of a contract of sale of land merges the provisions of the contract therein." *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957); *see also Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 133 (Ct. App. 1984) ("A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract ..." (internal quotation marks omitted)). Thus, regardless of whether the contract of sale referenced the 1970 Covenants, that contract merged into the 1984 Deed which does incorporate the 1970 Covenants.

Appellant's second assertion, that a Supplementary Declaration of Covenants was necessary to subject the Properties to the 1970 Covenants, relies on a misreading of those covenants. Under the 1970 Covenants, if Lighthouses sought to encumber additional properties—beyond the 103-acre parcel that included

Appellants' Properties—in future stages of the development, any such additions would have to be filed as a Supplementary Declaration of Covenants. (R. __, 1970 Covenants at Art. II, § 2.) This argument is nonsensical. Appellants admit that their Properties lie within the original, 103-acre South Beach parcel governed by the 1970 Covenants. Necessarily, then, Appellants' Properties are not "additional property" necessitating a Supplemental Declaration of Covenants.

II. THE 1973 COMMERCIAL COVENANTS DO NOT ABROGATE THE 1970 COVENANTS WITH RESPECT TO APPELLANTS' PROPERTIES.

The 1973 Commercial Covenants provide "that to the extent that there is a conflict between those covenants and constrictions previously recorded ... and those of the instant Declaration, the provisions of the instant Declaration shall govern." (R. __, 1973 Commercial Covenants at 2.) The Master in Equity correctly determined that the 1973 Commercial Covenants complement, rather than conflict with, the 1970 Covenants. When construing restrictive covenants, "the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor*, 323 S.C. at 4, 498 S.E.2d at 863-64. Moreover, although doubts regarding covenants should be resolved in favor of the free use of property, this rule of strict construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." *Id.* at 4-5, 498 S.E.2d at 863-64. Additionally, "[e]very term contained in a contract must be considered and given effect if possible." *Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist.*, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995).

Appellants ask the Court to ignore these principles and construe the 1973 Commercial Covenants in a manner that ignores the purpose of the covenants as gleaned from the whole instrument. Appellants argue that the terms "sole applicable covenants" in the Recitals of the 1973 Commercial Covenants preempt or exclude all others covenants. (Appellants' Initial Br. at 13-17.) This argument, taken to its logical conclusion, means that any commercial entity whose title may be traced back to Lighthouse Beach Company is not subject to any other covenants, not just those relating to South Beach and the Association, but in the case of Appellants, all other applicable Sea Pines covenants.[5]

"It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952). As set forth in its recitals, the 1973 Commercial Covenants encumber all retail commercial property on Hilton Head Island, wherever located, owned at the time of recording by Lighthouse Beach Company. (R. __, 1973 Commercial Covenants at 1) (stating that the Company desires to "make, publish and record a declaration of restrictive covenants affecting certain properties designated for commercial use.") Moreover, as acknowledged by the Master in Equity, the recitals demonstrate that the purpose of the 1973 Commercial Covenants was to address the "environmentally sensitive

[5] In addition to the 1970 Covenants and the 1973 Commercial Covenants, the 1984 Deed lists six additional sets of covenants which encumber the properties. The 1987 Deed lists eleven additional encumbrances.

nature" of Hilton Head Island by ensuring that commercial properties are "developed pursuant to an orderly plan which contemplates among other things the environmental impact." (R.__, *Id.* at 1.) In this vein, the 1973 Commercial Covenants set forth, as examples, limitations on building size (R. __, *id.* at 3-4), conditions for signage (R. __, *id.* at 6), parking (R. __, *id.*), and sewerage requirements (R.__, *id.* at 7).

The 1970 Covenants established a planned unit development community and authorized the Association to maintain and administer the community. The 1973 Commercial Covenants set forth design, environmental and other standards and requirements to assure that commercial property is in keeping with stated environmental and aesthetic goals. Thus, the owner of commercial property in South Beach is also encumbered by the 1973 Commercial Covenants which complement rather than conflict with other community restrictions. To interpret the 1973 Commercial Covenants otherwise would contravene the intended purpose of the covenants which was to primarily address the environmentally sensitive nature of Hilton Head Island.

Moreover, the errors of Appellants' arguments are shown by the terms of the 1973 Commercial Covenants. First, the language immediately before the "sole applicable covenants" provision upon which Appellants rely, provides that "[Lighthouse] reserves in each instance the right to add, in Deeds of Conveyance, additional covenants in respect to said properties so conveyed by such Deed, or to limit therein the application of the uniform covenants contained herein."

Lighthouse recorded the 1970 Covenants for South Beach and recorded its Commercial Covenants in 1973. In 1984, 11 years later, Lighthouse (at that point known as Sea Pines Plantation Company) sold for the first time the properties that would later be owned by Appellant. And the 1984 deed identified the 1970 Covenants and the 1973 Commercial Covenants as encumbrances on the properties.

Appellants' second fallacy is found in the Recitals as well: "[I]t is the true intent and purpose of Lighthouse Beach Company, that to the extent that there is a conflict between those restrictions and covenants previously recorded ... the provisions of the instant Declaration shall govern and restrict commercial properties." (R. __, 1973 Commercial Covenants at 2.) If, as Appellants claim, the 1973 Commercial Covenants are the only covenants applicable to the Properties, no conflict with other covenants and restrictions is possible. Thus, the text of the 1973 Commercial Covenants acknowledges that other covenants and restrictions exist and apply. Therefore, the 1973 Commercial Covenants do not negate or override the 1970 Covenants. *See Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958) ("Contracts should be liberally construed so as to give them effect and carry out the intention of the parties.").

III. THE 1970 COVENANTS CONTAIN A NON-WAIVER PROVISION THAT APPELLANTS DO NOT DISPUTE.

The 1970 Covenants include an enforceable non-waiver provision which precludes Appellants from claiming that the Association waived its right to enforce the 1970 Covenants. South Carolina courts have long held that non-waiver provisions are recognized and enforceable. *See Cobb & Seal Shoe Store v. Aetna Ins.*

*Co.*78 S.C. 388, 397 58 S.E. 1099, 1101 (1907) ("The non-waiver agreement should be given full effect as the contract of the parties."); *see also Crotts v. Fletcher Motor Co.*, 219 S.C. 210, 64 S.E.2d 540 (1951); *Tilley v. Pacesetter Corp.*, 333 S.C. 508, 508 S.E.2d 16 (1998). The non-waiver provision in 1970 Covenants states:

> Article VIII, Section 3. Enforcement. Enforcement of these covenants and restrictions shall be by any proceeding at law or in equity against any person or persons violating or attempting to violate or circumvent any covenant or restriction, either to restrain violation or to recover damages, and against the land to enforce any lien created by these covenants, and *failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce the same thereafter.*

(R. __, 1970 Covenants at Art. VIII, § 3 (emphasis added).)

In this case, Appellants do not challenge the terms of the 1970 Covenants, including the non-waiver provision, nor do Appellants argue that the 1970 Covenants are ambiguous. When a covenant is clear and unambiguous, it is given its plain meaning. *See Taylor v. Lindsey*, 332 S.C. 1, 4,498 S.E.2d 862, 864 (1998): *RV Resort and Yacht Club Owners Ass'n* v. *BillyBob's*, 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010). Appellants do not assert that the 1970 Covenants are indefinite or contravene public policy. *Queens Grant II,* 368 S.C. at 362, 628 S.E.2d at 913. As a matter of law, under these circumstances the non-waiver provision is enforceable by

its plain meaning and therefore Appellants' Properties are subject to the 1970 Covenants.[6]

IV. SECTION 15-3-380 OF THE SOUTH CAROLINA CODE DOES NOT APPLY BECAUSE RESTRICTIVE COVENANTS DO NOT CREATE POSSESSORY INTERESTS IN PROPERTY.

Appellants' argument that S.C. Code Ann. § 15-3-380 shields them from the 1970 Covenants, Appellants' Br. at 21-22, is simply wrong. Section 15-3-380 provides:

> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

It is well settled law that covenants, restrictions, and easements are contractual, not possessory interests. *See Taylor*, 332 S.C. at 4, 498 S.E. 2d at 863-64 (noting that restrictive covenants are contractual in nature); *Queen's Grant II*, 368 S.C. at 361, 628 S. E. 2d at 913 (holding that restrictive covenants are construed like contracts); 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 149 (2016) (stating that restrictive covenants are contractual in nature creating rights that run with the land and affecting rights and obligations upon the property's transfer or

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[6] Furthermore, while Appellants asserted claims for waiver, estoppel and abandonment, they made no suggestion that they could demonstrate any prejudice or reliance, or that the Association intended to relinquish a known right. *See e.g.*, *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007). The lower court correctly dismissed Appellants' alternative causes of action for waiver, estoppel, and abandonment. (R. __, Order at 8.)

sale). Covenants neither limit the fee nor give rise to any right of possession. *See, e.g., Douglas v. Med. Investors, Inc.* 256 S.C. 440, 446, 182 S.E.2d 720, 724 (1971) (stating that an easement created by a reservation in a deed did not create an estate in the lands affected but only reserved a joint right to use the driveway); *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 266-67, 628 S.E.2d 284, 290 (Ct. App. 2006) (stating that the rights as defined by the restrictive covenant only extended to common use and enjoyment of the area and did not create a right of possession). Because a restrictive covenant is not a possessory interest in property, § 15-3-380 is irrelevant to this litigation.[7]

CONCLUSION

The Master in Equity correctly concluded that (1) the plain and clear language of the 1970 Covenants, the 1973 Commercial Covenants, the 1984 Deed, and the 1987 Deed demonstrate that Appellants' Properties are encumbered by the 1970 Covenants and the 1973 Commercial Covenants; (2) the 1970 Covenants contain a non-waiver provision, which Appellants did not

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[7] Alternatively, even if § 15-3-380 applied it would not help Appellants. The only restriction on the Properties that could even remotely be considered an "interest therein" is the obligation to pay assessments, and it has been less than forty years since the Properties became subject to assessments under the 1970 Covenants. *See Dreher v. SCDHEC*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (holding that "an appellate court may affirm the lower court's decision for any reason appearing in the record"). The 1970 Covenants provide that the "Owner" of a "Lot" is subject to assessments and define "Lot" as any "any improved or unimproved plat of land shown on any recorded final subdivision map." (R. __, 1970 Covenants at Art. I, § 1(d).) The 1984 Deed refers to a plat recorded in 1980, and the 1987 Deed refers to a plat recorded in 1987. (R. __, 1984 Deed; R. __, 1987 Deed.) Thus the earliest that anyone owning any of the Properties could be obliged to pay assessments was 1980, only 36 years ago.

challenge the presence or propriety of this provision, and it is given effect as a matter of law; and (3) S.C. Code Ann. § 15-3-380 is inapplicable because a restrictive covenant is not a possessory interest in property.

Wherefore, the Association respectfully asks the Court to affirm the decision of the lower court.

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July 11, 2016
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Hon. Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-1435
Ct. App. No. 2016-000637

Catwalk, LLC, Moondog, LLC, LET, LLC,
Lost Parrot, LLC, Vacation Inn, LLC, SBM, LLC,
and South Beach Swimming Pool, Inc., ... Appellants,

v.

Sea Pines South Beach Owners' Association, Inc. ..... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matter upon Appellants by depositing a copy via U.S. Mail on July 11, 2016, to counsel of record listed below.

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July 11, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Catwalk, LLC, et al. v. Sea Pines South Beach Owners' Association*
Appellate Case No. 2016-000637

Dear Ms. Kitchings:

Regarding the above-referenced case, enclosed please find the original and 2 copies of Respondent's Initial Brief and Designation of Matter, as well as the Proof of Service. Please file the original and return a file-stamped copy in the enclosed, postage-paid envelope. By copy of this letter, I have served counsel for Appellants, as indicated in the Proof of Service.

Sincerely,

Kirsten E. Small

KES/vgp

cc: Counsel of Record

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