EXHIBIT A

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SC Court of Appeals

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	CASE NO. 2016-CP-23-06923
Deborah L. Boies, Plaintiff,	)	
v.	)	**Order and Judgment**
Jacqueline J. Lanier, Defendant.	)	

This is a civil action to enforce real estate restrictive covenants. It came before the Court for nonjury trial on October 4, 2017. James G. Carpenter represents the Plaintiff, and Matthew Henriksen represents the Defendant. Both attorneys were well prepared, and presented strong and compelling arguments. The Court, having considered the evidence, the argument of attorneys, the legal authorities, and considering the totality of the circumstances, concludes that Plaintiff is entitled to judgment.

Findings of Fact and Conclusions of Law

1. Plaintiff sold Defendant tracts of real estate totaling approximately 22 acres in what is commonly known as "horse country" near Landrum in Greenville County on two occasions: first in February, 2015, and then again in 2016.

2. On each occasion, the deed conveying title to the real estate contained an attachment, Exhibit A, which was a part of the deed, and constituted the covenants and restrictions applicable to the real estate. The covenants state, among other things, the following:

> 1.4 **Walls, Fences and Hedges**. **<u>Any fence</u>** placed on any tract or parcel **<u>shall be comparable in style and constructed material</u>** to a fence presently located on the boundary of the Real Property **(<u>white vinyl fencing</u>)**. Exceptions may be granted by Grantor.

* * *

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> 2.8. **Grantor Approval of Plans**. **No** landscaping, building, fence, wall or other structure shall be commenced, erected, maintained, and all subsequent reconstruction, **modifications**, additions **or alterations** upon any Lot, **nor shall any** exterior addition to or change or **alteration therein be made until the plans and specifications** showing the nature, kind, shape, height, materials, and location of the same **shall have been submitted to and approved in writing as to harmony of external design and location** in relation to surrounding structures and topography by the Grantor.
>
> The **Grantor shall have the right to refuse** to approve any such building plans, specifications, site plants, landscaping, or grading plans which are **not suitable or desirable**, in the Grantor's sole opinion, for any reason, including **purely aesthetic reasons**.
> (Emphasis added).

3. The Plaintiff is the Grantor listed in the restrictive covenants. While there was an issue as to whether the above language was in the deeds of the other six (6) purchasers of the other tracts or was given to them at closing, it is clear that the identical covenants apply to all landowners.

4. Prior to the purchases of real estate, the Defendant had seen and was aware of the approximately two miles of white vinyl fencing around and through the 122 acres of real estate subject to the covenants. The white vinyl fencing had been installed by Plaintiff around and between the six (6) tracts as part of the establishment of the 122 acre tract. Plaintiff testified this was done to ensure an aesthetically pleasing and consistent fencing around and between the tracts within the larger 122 acre tract.

5. Defendant is an experienced and respected real estate attorney in the Greenville area and testified that her law firm handles some 900 real estate closings annually.

6. Since buying the property, Defendant has removed the white vinyl fencing around her tract. Defendant testified that she preferred dark wood fencing in that, in her opinion, the darker wood would be more aesthetically pleasing and easier to maintain. Defendant contends that the language in 1.4 only requires her to have a fence "comparable in style

and constructed material" and that dark wood complies with 1.4. She also contends that "(white vinyl fencing)" in 1.4 is used only to identify the fence is question and is not language that limits any of the owners to have only white vinyl fencing. Defendant also contends that 2.8 is overly broad and confers so much discretion in the grantor, Plaintiff, as to be unenforceable.

7. After carefully reviewing the record and the covenants, the Court finds that removing the white vinyl fencing is a "modification" or "alteration" under paragraph 2.8 of the Covenants, and that the Covenants required the Defendant to submit the plans and specifications to the Grantor and obtain the written permission of the Grantor prior to making this "modification" or "alteration." Defendant failed to do either.

8. Further, and as noted above, Defendant testified that she intended to replace the white vinyl fencing with dark wooden fencing. The Court finds that dark wooden fencing would violate 1.4 in that it would not be "comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing)."

9. Plaintiff brings this action to enforce the restrictive covenants and for injunctive relief to prevent the erection of a dark wooden fence, and to require the reinstallation of the white vinyl fencing that the Defendant tore down. The new fencing, pursuant to a previous Consent Order, has not yet been installed.

10. Plaintiff relies on *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985). In *Palmetto Dunes*, a residential and resort subdivision on Hilton Head Island filed suit to enforce its restrictive covenants to prevent Brown, a landowner, from building a house that the Architectural Review Board had rejected for "aesthetic" reasons.

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11. Like the Defendant here, Brown argued that the Palmetto Dunes covenant:

> lacks objective standards to guide the Board in its approval or disapproval of plans. Specifically, he argues that the provision allowing disapproval for "purely aesthetic considerations" is vague and ambiguous, thereby enabling Palmetto Dunes to be arbitrary in its decisions.

Id. 287 S.C. 1, 4-5, 336 S.E.2d 15, 17-18.

12. The Court of Appeals rejected Brown's argument, and went to great lengths to explain its reasoning:

> Rejecting similar arguments, **courts have upheld covenants that provide *no* criteria** to guide the approving authority in deciding upon the suitability of proposed construction. *See Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P.2d 361 (1969); *Hannula v. Hacienda Homes, Inc.*, 34 Cal.2d 442, 211 P.2d 302, 19 A.L.R.2d 1268 (1949); *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957). **Other courts** confronted with similar arguments have **upheld covenants** whose criteria for approval can hardly be said to be more specific than the "**aesthetic considerations**" criterion involved here. *See Snowmass American Corp. v. Schoenheit*, 524 P.2d 645 (Colo.App.1974) (stated purpose of all covenants was to establish and maintain mountain residential area "of the **highest possible quality**" and protect its "**value, desirability and attractiveness**"); *Winslette v. Keeler*, 220 Ga. 100, 137 S.E.2d 288 (1964) (covenant required building to be in "**conformity and harmony of external design and general quality** with the existing standards of the neighborhood"); *Normandy Square Association, Inc. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982) (covenant required plans to be approved "**as to the harmony of external design and location in relation to the surrounding structures and topography**"); *Syrian Antiochian Orthodox Archdiocese v. Palisades Associates*, 110 N.J.Super. 34, 264 A.2d 257 (1970) (covenant allowed disapproval of plans "which are **not suitable or desirable** in [grantor's] opinion").
>
> Our Supreme Court has held that to be valid and enforceable a restrictive covenant must, among other things, "not be too indefinite." *Vickery v. Powell*, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976). "Restrictive covenants are contractual in nature," so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974); *Easterby v. Heilbron*, 26 S.C.L. (1 McMul.) 462 (1840).
>
> Applying these principles, we find **the "aesthetic considerations" clause is not indefinite**. Its settled intent, viewed in relation to the entire document, is to vest in Palmetto Dunes the authority to disapprove plans

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based upon its judgment of their **aesthetic suitability** within Palmetto Dunes Resort. Brown displayed his understanding of this by proposing to make cosmetic changes to the house following the initial rejection. **The parties voluntarily bound themselves to this arrangement**, which they had the right to do. *See Winslette v. Keeler,* 220 Ga. 100, 137 S.E.2d 288; *Kirkley v. Seipelt,* 212 Md. 127, 128 A.2d 430.

Brown urges that the phrase "aesthetic considerations" is ambiguous so that we must apply the rule of construction that requires ambiguities in a restrictive covenant to be strictly construed against the party seeking to enforce it. *See Donald E. Baltz, Inc. v. R.V. Chandler and Co.,* 248 S.C. 484, 151 S.E.2d 441 (1966). **We conclude, however, that this rule is not applicable here**. "[T]his rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument." *Davey v. Artistic Builders, Inc.,* 263 S.C. 431, 436, 211 S.E.2d 235, 237 (1975).

The covenant, by making no attempt to set forth objective "aesthetic considerations," implicitly recognizes, as do we, that **it is impossible to establish absolute standards to guide a judgment of taste. But this does not compel the conclusion that the covenant is ambiguous**. We agree with the trial judge that although people may reasonably differ as to whether a house is aesthetically appropriate, **the covenant is unambiguous in leaving this solitary judgment to Palmetto Dunes**. The plain and obvious purpose of the covenant is to **vest this discretion in Palmetto Dunes**, which **is constrained only to exercise its judgment reasonably and in good faith**. *See Kirkley v. Seipelt,* 212 Md. 127, 128 A.2d 430.

Palmetto Dunes Resort v. Brown, 287 S.C. 1, 5-7, 336 S.E.2d 15, 18-19 (footnotes omitted, emphasis added).

13. This Court finds the holding and analysis of *Palmetto Dunes* is on point and controlling.

14. Furthermore, the Covenants give the Grantor (the Plaintiff herein) "the right to refuse . . . plans which are not suitable or desirable, . . . for any reason, including purely aesthetic reasons." Under the rationale of *Palmetto Dunes*, this standard is valid and enforceable.

15. While being sympathetic to Defendant's position and desire to have dark wood fencing that she believes to be more aesthetically pleasing, nonetheless the Court finds the same is prohibited by the covenants that were in existence at the time she purchased the tracts.

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CONCLUSION

Under the covenants, Plaintiff is entitled to exercise aesthetic judgment and enforce the requirement of white vinyl fencing.

WHEREFORE, the Court grants Judgment to the Plaintiff, and Orders that the Defendant shall replace, within 90 days of this Order being filed, the fencing that she removed with fencing that is "comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing)."

JUDGE'S ELECTRONIC SIGNATURE FOLLOWS

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Greenville Common Pleas

Case Caption: Deborah L Boies vs. Jacqueline J Lanier

Case Number: 2016CP2306923

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

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