

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

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

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

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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.

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RETURN TO PETITION FOR REHEARING

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In a Petition for Rehearing, Petitioners must "...state with particularity the points supposed to have been overlooked or misapprehended by the court". Rule 221(a), SCACR. Petitioners arguments were addressed seriatim in the Court's Opinion dated February 7, 2018. Nothing was overlooked. Petitioners also contend that the Court misapprehended all their arguments, but the Court is correct and the Petition should be denied.

**I. The Court correctly held that Petitioners' properties are encumbered by the 1970 Covenants and the 1973 Commercial Use Covenants.**

Petitioners argue the Court erred by refusing to read the term "sole applicable covenants" in isolation. Pet'n at 1. Petitioners' argument, however, is contrary to the basic rule of construction: "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E. 2d 862, at 863-864 (1998). Here, the recitals declare it is the intent of the 1973 Commercial Use Covenants ("1973 Commercial Covenants") to restrict commercial use properties in the environmentally sensitive areas of Hilton Head Island. (R. pp. 142-43).

The Record shows:

- Petitioners do not dispute that their properties lie within the 103-acre South Beach parcel, land that is unquestionably subject to the 1970 Covenants;
- The 1970 Covenants recognize the right of the developer to develop the South Beach parcel as it deemed most suitable, and provide for

the addition of “*complementary* additions and modifications” to the 1970 Covenants (R. pp. 74-75);

- The 1970 Covenants created Respondent Sea Pines South Beach Owners’ Association, Inc. (“the Association”) and empowered it to administer and enforce the 1970 Covenants (R. pp. 67-68);
- Petitioners’ properties are commercial properties. Consequently, they are also subject to the 1973 Commercial Covenants that govern, *inter alia*, all land within the South Beach parcel (R. pp. 80, 143);
- The recitals of the 1973 Commercial Covenants state their purpose is recognize and preserve the environment of Hilton Head Island (R. p. 142);
- The 1973 Commercial Covenants recognize the existence and continuing enforceability of the 1970 Covenants by reserving “the right to add, in Deeds of Conveyance, additional covenants in respect to properties conveyed by such deed” and by providing that “to the extent that there is a conflict between those restrictions previously recorded” and the 1973 Commercial Covenants, the latter shall prevail (R. p. 143);
- There is no dispute that the titles to Petitioners’ properties trace back to deeds stating that the properties are conveyed subject to both the 1970 Covenants and the 1973 Commercial Covenants (Resp.’s Br. at 5-6).

In light of the foregoing facts—none of which Petitioners dispute—this Court correctly affirmed the Master in Equity’s conclusion that the phrase “sole applicable covenants,” when read in the context of the 1973 Commercial Covenants as a whole, did not preclude the continuing applicability of the 1970 Covenants. As the Master in Equity explained in denying Petitioners’ motion to alter or amend the order granting summary judgment:

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The word "applicable" (which in this context means relevant) refers to any part of the 1970 covenants which would have dealt specifically with commercial properties. If the 1973 Covenants were intended to completely replace the 1970 covenants, the word "applicable" would be unnecessary, and the word "sole" could have stood alone. Likewise, the phrase "to the extent there is a conflict..." implies that the 1973 covenants were intended as a commercial covenant overlay to act in conjunction with the 1970 covenants."

(R. p. 14).

Petitioners next argue this Court misapprehended the presumption that covenants are to be interpreted in favor of the "free and unrestricted use of land." Pet'n at 2. As the Association pointed out in its brief, this argument was first raised in Petitioners' motion to alter or amend the judgment. Resp.'s Br. at 13. Consequently, the argument was not properly before this Court. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [lower] court.").

Nonetheless, the argument fails. Petitioners grasp a sentence in this Court's Opinion ("In light of these seemingly inconsistent provisions...") and argue it is a finding by the Court of a legal ambiguity. (At the same time, Petitioners state there is *no* ambiguity. *See* Pet'n at 2 n.3.) Petitioners are wrong, because the Court's language was simply a statement of the issue before it. The Court's construction of the contractual covenants is correct.

**II. The Court correctly ruled that S.C. Code Ann. § 15-3-380 does not apply.**

Petitioner next argue that the Court erred in rejecting their convoluted argument for the application of S.C. Code Ann. § 15-3-380, which applies to actions for adverse possession. Petitioners maintain that the 1970 Covenants constitute an “interest in land,” rendering § 15-3-380 relevant. In rejecting this argument, this Court correctly recognized that “[n]o South Carolina case suggests an ‘interest’ in property includes the type of claim at issue in this case.” Op. at 2; *see* Resp.’s Br. at 20-21.

The Court correctly held that no South Carolina case holds that a contractual covenant becomes is an interest in property as the term is used in S.C. Code Ann. § 15-3-380. Petitioners offer no authority, from South Carolina or anywhere else, to the contrary. Petitioners rely on *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (1935), and *In re Daufuskie Island Properties, LLC*, 431 B.R. 612 (Bankr. D.S.C. 2009), for the proposition that “if the 1970 Covenants do not create an interest in real property, then [they] are a mere personal covenant, not binding on successors in interest to the real property.” Pet’n at 5 n.10. In the first place, this is a new argument, raised for the first time in the petition for rehearing, and is not properly before the Court. In any event, Petitioners misread the cases they cite. Both *Epting* and *Daufuskie* recognizes distinguish personal covenants (which do not relate to the land and thus do not run with it) from real covenants (which touch

and concern real property and thus run with it). Further, *Epting* explicitly recognizes that a covenant to pay assessments runs with the land.

Additionally, these properties were first conveyed in 1984 and the deeds of conveyance state the properties are encumbered by the 1970 Covenants, the 1973 Commercial Use Covenants, and other covenants of record. (R. pp. 85-88, 160-165.)

In addition, even if § 15-3-380 were applicable, 40 years have not passed. *See* Resp.'s Br. at 20-21.

Petitioners also argue that non-waiver provision of the 1970 Covenants does not apply to S.C. Code Ann. § 15-3-380. Pet'n at 5. This misreads the Court's Opinion. The Court found there was no law supporting the argument that a covenant is an interest in property as the term is used in § 15-3-380. That being the case, the non-waiver provision controls.

### **III. The Court correctly affirmed summary judgment for Respondent.**

Petitioners set forth a laundry list of "undisputed facts" that they claim are contrary to the Court's affirmance. Pet'n at 8-10. These "facts," however, amount to no more than a rephrasing of arguments already considered, and properly rejected, by the Court.

### **IV. Petitioners improperly request the Court to grant them summary judgment.**

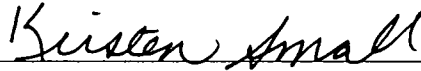
Petitioners maintain that the Court failed to address the lower court's rejection of their estoppel-based arguments and denial of their motion for

summary judgment. Pet'n at 10 n.19. As this Court correctly recognized, however, "the denial of summary judgment is not directly appealable." Op. at 2 n.1).

### CONCLUSION

For these reasons, Sea Pines South Beach Owners' Association, Inc. respectfully asks the Court to deny the Petition for Rehearing.

Respectfully submitted,



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March 1, 2018  
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
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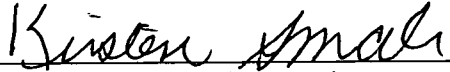
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**PROOF OF SERVICE**

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I certify that I have served the Return to Petition for Rehearing upon Petitioners by depositing a copy via U. S. Mail on March 1, 2018, to counsel of record listed below.

Curtis L. Coltrane  
Coltrane & Wilkins, LLC  
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Kirsten E. Small, Esquire

# NEXSEN | PRUET

**Kirsten E. Small**  
Member  
Admitted in SC, NC, MD

March 1, 2018

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211-1629

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

Dear Ms. Kitchings:

Regarding the above-referenced case, enclosed please find the original and seven copies of Respondent's Return to the Petition for Rehearing, as well as the Proof of Service. Please file the original and return a file-stamped copy in the enclosed, postage prepaid envelope. By copy of this letter, I have served counsel for Appellants/Petitioners, as indicated in the Proof of service.

Charleston

Charlotte

Columbia

Greensboro

**Greenville**

Hilton Head

Myrtle Beach

Raleigh

Sincerely,



Kirsten E. Small

cc: Counsel of Record

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