THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Allison R. Lee, Circuit Court Judge

Case No. 07-CP-40-8107
Case No. 07-CP-40-8108
Case No. 07-CP-40-8109
Case No. 07-CP-40-8110

Place on the Greene Homeowners Assoc., Inc., Respondent,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,
Eva Nell Berry, and Jeffrey O. Kenney, ... Appellants.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

These four actions were commenced with the filing on December 4, 2007, of complaints by Place on the Greene Homeowners Assoc., Inc., the respondent herein, against, respectively, W.G.R.Q., LLC, Easy Coin Laundry, Inc., Eva Nell Berry, and Jeffrey O. Kenney, the appellants herein. The respondent alleged that the appellants were owners of a total of seven condominium units of Place on the Greene, a condominium regime located on Greene Street in Columbia. The respondent further alleged that businesses were being conducted in these units in violation of restrictive covenants found in the Master Deed, prohibiting the operation of restaurants, bars, and other businesses dependent upon a volume of walk-in patrons. All four appellants admitted the operation of prohibited businesses but asserted the defenses of laches, waiver, and estoppel.

The cases were consolidated and tried before the Honorable Allison R. Lee, Presiding Judge of the Fifth Judicial Circuit, on April 9, 2009. By order dated July 1, 2011 and entered on July 6, 2011, Judge Lee rejected the defenses and enjoined further operation.

The appellants timely served notice of appeal.

STATEMENT OF FACTS

Place on the Greene is a condominium regime comprised of seventy-one units in the five-storey building at 2002 Greene Street in Columbia. Sixty-three units are one- and two-bedroom residential apartments. Seven of these are located on the southern half of the street-level floor. On the northern half of street-level, facing Greene Street, are eight commercial units, seven of which are at issue in this action. At time of trial in 2009, three of these units were leased to two restaurants, Pita Pit and Blue Cactus; three were occupied by a bar, Tavern on the Greene; and one was leased to a convenience store, the Tobacco Shop.

Place on the Greene was developed in 1983–85 by Greene Street Partnership, a

limited partnership of Security Federal Savings & Loan Association and two individuals, Beau Powell and Craig Stoneburner. When the Master Deed for the condominium regime was written, the developer included a prohibition against the operation of bars or restaurants in the commercial units, as well as any "retail shop that relies on a volume of walk-in patrons . . . ." [Master Deed, Art. X § 3, p. 13, R. 264.] The intention was to limit the use of the commercial units to professional offices and the like. [R. 141.]

In November of 1985 the developer deeded six of the eight commercial units to its limited partners — two units to Mr. Stoneburner and four to Mr. Powell. Within weeks the condominium property manager (selected by the developer) wrote to the homeowners, recommending an amendment of the Master Deed to remove the prohibition of bars and restaurants in the commercial units. [R. 159.] The property manager falsely represented that this change would be for the good of the homeowners. [Pl. Ex. 12, R. 337; R. 156; R. 158.] This effort failed. Powell and Stoneburner persisted in trying to remove the restrictions, but never succeeded. [R. 90; 151; 158; 161–62.]

Powell and Stoneburner responded to their failure to abolish the prohibitions by simply ignoring them. They first began to violate the prohibitions of the Master Deed — which they themselves had written — in 1988, when Stoneburner rented his Unit A to a 24-hour laundromat [R. 203] and his Unit B to a shoe store. [R. 205.] The board of directors of the homeowners' association — dominated by board member Powell — took no action. By 1993, a jeweler and a "tan spa" occupied two of the units (not identified in the evidence). [R. 92.] By 1995, Bo-D's restaurant occupied one of the units. [R. 93.] In 1994, breaching the restrictions of the Master Deed which he co-authored, Powell rented his Units F and G to a restaurant, the Blue Cactus. [R. 193.] Several years earlier, Powell had rented Unit F to Sub Pub restaurant and bar. [R. 120–21.] In 1999, the shoe store in Unit B was succeeded by a new bar, Tavern on the Greene, which also rented Units C and D. Thus, Tavern on the Greene occupied

three of the eight commercial units. The laundromat in Unit A closed in 2000 and was replaced by a restaurant, Pita Pit. Powell sold his commercial units in 2002 to a new owner, who continued the lease of Units G and H to the Blue Cactus restaurant, and rented Unit F to a convenience store in 2009. [R. 250.]

Beau Powell knew that the restaurant, bar, laundromat, and shoe store tenants to whom he and Stoneburner rented were in violation of the Master Deed restrictions which they had adopted for Place on the Greene. [R. 90.] He likewise knew that it is the duty of the board of directors of the homeowners' association — of which he was the dominant member for ten years — to enforce those covenants. Powell was able to intimidate the board into inaction. [R. 167.] He controlled and dominated the board. [R. 167; 178.] He was louder and stronger than the other board members. [R. 181.] He was knowledgeable and authoritative. [R. 181.] Most of the other board members trusted him [R. 175] or at least wanted to appease him. [R. 190–91.] He assured them that he was within his rights to rent to the Blue Cactus and that restaurants were allowed. [R. 171; 175.] They believed him. [R. 189; 178.] The only board member who opposed him was a lone voice. [R. 178–79.] Moreover, the board had more-pressing problems of a financial nature to deal with, due mainly to the stucco which Powell had convinced the developer to substitute for the architect's recommendation [R. 143], embroiling the association in stucco litigation. [R. 159–160.] Homeowners are generally reluctant to serve on such boards and often are naive about their duties and about the legalities of condominium operation [R. 175], rendering them especially vulnerable to lingering developer influence. This was clearly true of the board members who allowed Powell and Stoneburner to violate the covenants as they did.

Each of the present owners of the eight commercial units took ownership subject to the restrictions found in the Master Deed.[1] Three of the present owners

[1] Every owner has notice of the Master Deed, of course. More than that, deeds in the chain of title of every unit involved in this suit contain the following express (continued...)

acknowledged *actual* notice. The present owner of Unit A was given a copy of the Master Deed when he bought from Stoneburner in 1990. [R. 212.] He continued to operate his laundromat until 2000, when he rented Unit A to Pita Pit restaurant in violation of the restrictions.[2] The present owner of two of the three units leased to Tavern on the Greene bar was advised at closing by her attorney of the restriction against bars, but shrugged and chose to take the risk. [R. 235.] The present owner of Units F, G, and H rented Unit F to a convenience store in violation of the restrictions ***after*** this suit was brought to enjoin his violation with respect to the Blue Cactus restaurant in Units G and H.

All the problems generated by the restaurants and the bar — constant breaches of building security, noise and loud music every night until 3 a.m. or later, crowds and commotions on the sidewalk outside, excessive garbage, roaches — are the subject of constant complaints to the Association by the residents. [R. 71; 79.]

The bar in Units B, C, and D is open until 2 o'clock in the morning on Saturdays

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[1](...continued)
agreement:

> The provisions of the Master Deed . . . shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Unit, his heirs and assigns, . . . as though such provisions were recited and stipulated at length herein. By subscription to and acceptance of this Indenture Deed, Grantee acquiesces in the provisions of the Master Deed . . . .

Pl. Ex. 3, ¶ 4, R. 272, deed of Unit A dated 11/8/85 from the developer to Stoneburner; Pl. Ex. 4, ¶ 4, R. 283, deed of Unit B dated 11/8/85 from the developer to Stoneburner; Pl. Ex. 4, ¶ 4, R. 280, deed of Unit B dated 2/24/04 from Stoneburner to EHM Investments, LLC (slight, immaterial variation in language of last sentence); Pl. Ex. 5, ¶ 4, R. 305, deed of Units C and D dated 10/29/84 from the developer to Bain; Pl. Ex. 6, deed of Units F, G, and H from the developer to Powell dated 11/8/85 (apparently inadvertently omitted from Record on Appeal).

[2] The present tenant, Pita Pit, is a restaurant chain with approximately ninety franchised locations nationwide. *See* www.pitapitusa.com, last visited 6/27/12. A sophisticated tenant such as this would surely examine the restrictive covenants before leasing a condominium unit for a restaurant.

and Sundays and 3 o'clock on the other five days of the week. [R. 217.] Pita Pit restaurant is open until 3 a.m. [R. 112.] The Blue Cactus restaurant serves until 10 p.m. but its employees do not leave until midnight or 1 a.m. [R. 196.] Crowds congregate outside the bar until it closes. [R. 120.] The noise from their commotion, arguments, confrontations, and occasional fights [R. 120] can be heard throughout the building, where the residents of sixty-three apartments are trying to sleep. The residents can hear "every word they say all the way up to the fifth floor." [R. 120.] It gets louder as the night passes. "[W]hen . . . people get drunker and drunker, you're going to have — you know, the noise escalates." [R. 120.] Frequent complaints to the police have little effect. [R. 121; 124; 226, lines 2–8.]

The vagrants who inhabit the Five Points area are adept at slipping into the building when Pita Pit employees habitually leave the back door unlocked and ajar [R. 117]; or when the bar's employees fail to lock the door behind them when they leave the building to deposit garbage in the dumpster. [R. 116; 118–19; 125–26; 173; 207; 216.]

The seventy-one apartments of Place on the Greene have only one dumpster for their garbage and trash, insufficient in capacity for the high volume of garbage generated by the restaurants and the bar. [R. 119.] The restaurants and bar deposit waste into the dumpster far out of proportion to their number of units, making the dumpster area filthy. They roll their garbage bins through the residential hallways at any hour to reach the dumpster. Vagrants rummage through the dumpster looking especially for Pita Pit food — their favorite. "[They] leave a complete mess back there." [R. 119.] "[L]eaving it smeared all around the garbage area itself."

The roach problem in the building is inevitably magnified by the restaurants and their garbage. [R. 118.]

The condominium regime pays a single water bill for all seventy-one apartments. The residents thereby subsidize the restaurants and bar in their disproportionate use of

water. [R. 122–23.]

The owners of the commercial units testified that the value of their property would drop if the provisions of the Master Deed were enforced. They did not attempt to quantify the anticipated decrease in value with expert testimony or otherwise.[3] On the other side of that coin, there is likewise no evidence of the extent to which the value of the sixty-three residential units at Place on the Greene has been negatively impacted by the disregard for the clear restrictions which bind this condominium regime. One needs no expert evidence to conclude that the impact must have been substantial.

The Master Deed contains the following non-waiver clause:

> No waiver by Association. The failure of Association or of the owner of a unit to enforce any right, provision, covenant or condition which may be granted by this Master Deed . . . shall not constitute a waiver of the right of the Association or of the owner of a unit to enforce such right, provision, covenant or condition in the future.

ARGUMENT

The circuit court did not abuse its discretion in rejecting the defenses of laches, waiver, and estoppel since the decision is supported by evidence and is not controlled by error of law.

The covenants of Place on the Greene plainly prohibit bars and restaurants, among other businesses. *See: Heape v. Broxton,* 293 S.C. 343, 345, 360 S.E.2d 157, 158 (Ct. App.1987) ("Where the language used in a restrictive covenant is unambiguous, there is no room for construction and the language must be enforced in accordance with its plain meaning.").

"Restrictive covenants upon real estate are contractual in nature and bind the parties thereto just like any other contract." *Hynes Family Trust v. Spitz,* 384 S.C. 625,

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[3] Units F, G, and H were a small component of a mass of properties purchased from Powell by W.G.R.Q. in 2002. [*See* Pl. Ex. 6, R. 308, deed from Powell to W.G.R.Q., LLC, dated 5/24/02. The conveyance was "subject to easements, conditions and restrictions of record".] The principal of W.G.R.Q. acknowledged that his company would survive an injunction. [R. 253.]

682 S.E.2d 831, 833 (Ct. App. 2009).[4]

The duty to comply with these covenant restrictions originated in contract but is reinforced by statute. It is the public policy of this State, adopted by the General Assembly, that condominium covenant restrictions be *strictly complied with.*

> Each co-owner shall comply strictly . . . with the covenants, conditions and restrictions set forth in the Master Deed . . . . Failure to comply with any of the same shall be grounds for . . . injunctive relief . . . .

S.C. Code Ann. § 27-31-170. As was the case in *Kneale v. Bonds,* 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994):

> Both the [condominium] By-Laws and the Horizontal Property Act provide that the Master Deed should be strictly enforced.

Id. at 267, 452 S.E.2d at 842.[5]

This is not a case involving a single past event, as where an Association asks the court to order removal of an offending structure which the Association failed in a timely manner to prevent. This is a case of progressively worsening, intentional, ongoing violations of the plain prohibitions of the covenants which govern conduct in this community. Each day that the appellants continue to violate the restrictions in the Master Deed is a fresh violation of Section 27-31-170 and the Master Deed.

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[4] *Accord: Taylor v. Lindsey,* 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998); *RV Resort and Yacht Club Owners Assoc. v. BillyBob's Marina, Inc.,* 386 S.C. 313, 320, 688 S.E.2d 555, 559 (2010); *Hardy v. Aiken,* 369 S.C. 160, 631 S.E.2d 539 (2006); *Sea Pines Plantation Co. v. Wells,* 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) (restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy); *Houck v. Rivers,* 316 S.C. 414, 450 S.E.2d 106 (Ct. App. 1994) (same); *Seabrook Island Property Owners Assoc. v. Pelzer,* 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.") (citing *Palmetto Dunes Resort v. Brown,* 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985)).

[5] The "strict enforcement" by-law found in *Kneale v. Bonds* is materially identical to Art. XIX, § 1 of the Master Deed of Place on the Greene. Pl. Ex. 1, p. 22, R. 265.

A. The circuit court did not abuse its discretion in rejecting the defense of laches.

The Association's failure to act when these violations began was due to the self-interested dominance of one of the developers on the board for the first ten years of its operation. [R. 160.] If the Association had sued Mr. Powell or Mr. Stoneburner for these violations while they still owned the units in question, the court would not have heard these developers to claim laches. As in *Maxwell v. Smith,* 228 S.C. 182, 195, 89 S.E.2d 280, 286 (1955):

> [The developer], as the author of the covenant he was violating, should not be heard to insist that immediate resort to the courts is prerequisite to the enforcement of [the covenant].

The same is true of the developers' successors in interest, who inherit the unclean hands of their grantors.

After the developers had gotten away with their initial violations, a succession of unpaid, non-professional owners, serving one-year terms on the board, mistakenly regarded the early precedents as legitimate and binding.

Laches is an affirmative defense which must be pled and proved. Rule 8(c), SCRCP; *Mack v. Edens,* 306 S.C. 433, 412 S.E.2d 431 (Ct. App.1991). The determination of whether laches has been established is largely within the sound discretion of the trial court. *Emery v. Smith,* 361 S.C. 207 603 S.E.2d 598, 602 (Ct. App. 2004), *citing Brown v. Butler,* 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001), *and Gibbs v. Kimbrell,* 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App.1993); *Grossman v. Grossman,* 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963).

> 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. County Council for Lee County,* 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Hallums v. Hallums,* 296

> S.C. 195, 199, 371 S.E.2d 525, 528 (1988). When [circuit court] declines to make a finding of laches, that decision will not be disturbed absent an abuse of discretion. *Brown v. Butler,* 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001); *Premium Inv. Corp. v. Green,* 283 S.C. 464, 473, 324 S.E.2d 72, 78 (Ct. App.1984).

King v. James, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010).

The standard of review is abuse of discretion. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon,* 381 S.C. 448, 673 S.E.2d 448 (2009). *Accord: Mazloom v. Mazloom,* 382 S.C. 307, 675 S.E.2d 746 (Ct. App. 2009); *Siau v. Kassel,* 369 S.C. 631, 632 S.E.2d 888 (Ct. App. 2006).

> An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. McClinton, 369 S.C. 167, 169, 631 S.E.2d 895, 896 (2006).[6]

Since this action sounds in equity, this Court of Appeals may find the facts *de novo*. The facts, however, are not materially in dispute.[7] Authority to find the facts anew is not the same as authority to substitute the discretion of the appellate court for the discretion of the court of common pleas. The authority to decide whether to issue an injunction on these facts is confided in our system to the discretion of the court of common pleas. The standard for appellate review is abuse of discretion, not trial *de novo*. Only if the defenses of the appellants have been proved *as a matter of law* may

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[6] In the case of *Appeal of Brown,* 288 S.C. 530, 535, 343 S.E.2d 649, 652 (Ct. App.1986), the lower courts' finding of no laches was affirmed because not "manifestly erroneous."

[7] *See: Cedar Cove Homeowners Assoc., Inc. v. DiPietro,* 368 S.C. 254, 628 S.E.2d 284, 286 (Ct. App. 2006) ("The resolution of this appeal, however, turns not on a credibility assessment, but on the application of largely undisputed facts to unambiguous restrictive covenants.").

they prevail here. Unless the only reasonable conclusion is that the Association has waived the right to complain of these continuing violations, or is guilty of laches to the prejudice of the appellants, or is estopped, this appeal must fail.

"Delay alone in the assertion of a right, without injury to the adversary, does not constitute laches." *Gibbs v. Kimbrell,* 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App.1993). The defense fails unless prejudice flows from the delay. *See: Wall v. Huegenin,* 305 S.C. 100, 102, 406 S.E.2d 347, 349 (1991) ("A mere delay in time does not constitute laches. Rather, the determination must be made in light of the specific facts of each case, taking into consideration whether the other party has been prejudiced by the delay.") (holding the failure for thirteen years to exercise an option to purchase land was not unreasonable and laches did not apply); *Grossman v. Grossman,* 242 S.C. 298, 309, 130 S.E.2d 850, 855 (1963) (a delay of over seven years was reasonable where there was no prejudice to the defendant).

The appellants made no effort to demonstrate the nature or extent of any financial loss they might incur if they are required to abide by the covenants. Three of the four appellants own six of the seven commercial units in question. They are not the lessees who operate the bar, the restaurants, or the convenience store in those units.[8] The appellants did not claim to have made improvements to their units in reliance upon non-enforcement of the covenants, or that such improvements — if any — were not amortized long ago or could not be salvaged. Since these actions were brought in 2007, the appellants have continued for five years to profit from the conduct of prohibited businesses in their units. Appellant Easy Coin renewed the expiring lease of the restaurant in Unit A three years after this action began. Appellant W.G.R.Q. leased Unit F to a convenience store long ***after*** this action was commenced. The appellants offered no expert evidence of diminution in value of their units if the covenants are

[8] Appellant Kenney owns one of the three units occupied by the bar which he runs.

enforced.[9] *See: Buffington v. T.O.E. Enterprises,* 383 S.C. 388, 393, 680 S.E.2d 289, 291 (2009) ("In our view, it would be inequitable to consider Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property.").

The defenses raised by the appellants would be unavailable to them if the party seeking injunctive relief were a new owner of any one of the sixty-three residential units. Any of these owners could seek injunctive relief, with or without the participation of the Homeowners' Association. Section 27-31-170 authorizes an action for injunctive relief ". . . in a proper case, by an aggrieved co-owner." The Master Deed confers the same right. Pl. Ex. 1, Art. XIX, § 1, p. 22, R. 265. Now that the Master Deed restrictions — and their flagrant violation — have become generally known in the community of owners, it is inevitable that one or probably many new apartment owners would seek injunctive relief themselves if this action by the Association were deemed to be barred. In all likelihood, reversal of this judgment would only postpone, and not prevent, enforcement of the restrictions of the Master Deed. Neither our court system nor the parties to this controversy would be well-served by such a course.

B. The circuit court did not abuse its discretion in rejecting the defense of waiver.

1. *Waiver is an intentional relinquishment of a known right. Early on, most of the unpaid, non-professional board members were misled by the developer into believing that they could do nothing. Later on, their successors mistakenly assumed that any commercial operation was permitted because the precedent had been set. There was no waiver.*

The question is not whether the Association should have acted earlier to enforce the covenants of the Master Deed. The question is whether the Association's failure to act earlier was a waiver of the right ***ever*** to act.

The first business to open — a hair salon in Units C and D [R. 142] — was not in

[9] Nor is there any evidence of the damage done to the value of the 63 residential units by the progressively more-obnoxious use of the commercial units, but the inevitability of that damage is obvious.

violation of the covenants because such businesses operate by appointment and do not cater to "a volume of walk-in patrons". [Master Deed, Art. X § 3, R. 264.] Violations of the covenant by the developers began soon thereafter, and have gotten progressively worse in their consequences. The first violation of the covenant restrictions was a laundromat in Stoneburner's Unit A. Laundromats typically do not generate the kinds of objectionable behavior described in the record of this case. After a shoe store, a jeweler, and short-lived restaurants, Powell rented Units F and G to the Blue Cactus restaurant in 1994. Although in violation of the covenants, the Blue Cactus closes at 10:00 p.m.

This progression culminates today with a second restaurant in Unit A and a bar in Units B, C, and D. Both of these are open until the wee hours and both generate a whole new level of obnoxious conduct, incompatible with residential use of the other sixty-three apartments. If the appellants can get away with this level of objectionable use of their units, there is nothing to stop all eight of the commercial units being converted to all-night bars and restaurants.

The failure to enforce these deed restrictions against a laundromat or a shoe store is not a waiver of the right to put a stop to all-night bars and restaurants.

2. *The non-waiver provision of the Master Deed is unambiguous and does not contravene public policy. Accordingly, it applies here.*

The Master Deed provides that a failure by the Association to enforce the provisions of the Master Deed shall not constitute a waiver of the right to enforce those provisions in the future.

> No waiver by Association. The failure of Association or of the owner of a unit to enforce any right, provision, covenant or condition which may be granted by this Master Deed or other above-mentioned documents shall not constitute a waiver of the right of the Association or of the owner of a unit to enforce such right, provision, covenant or condition in the future.

Master Deed, Art. XIX § 4, p. 23, R. 265.

Non-waiver provisions of this kind are uniformly applied as written. To do otherwise would be to re-write the contract to which these parties are bound. Non-waiver provisions of this nature have been accepted and applied in cases where a condominium homeowners' association delays in seeking relief from covenant violations. A leading case is *Burke v. Voicestream Wireless Corp. II,* 207 Ariz. 393, 87 P.3d 81 (Ct. App. 2004). The court observed:

> Unambiguous provisions in restrictive covenants will generally be enforced according to their terms. . . . . The non-waiver provision, by its plain language, is intended to prevent a waiver based on prior inaction in enforcing the Restrictions. To hold otherwise would render the non-waiver provision meaningless and violate the expressed intention of the contract among the property owners.

87 P.3d at 86.[10] *Accord: College Book Centers, Inc. v. Carefree Foothills Homeowners Ass'n,* 225 Ariz. 533, 241 P.3d 897 (Ariz. App. 2010).

The Indiana court in *Johnson v. Dawson,* 856 N.E.2d 769 (Ind. App. 2006), observed that unambiguous non-waiver clauses in restrictive covenants are routinely upheld:

> [E]nforcement of the nonwaiver clause in the multiparty context allows prospective purchasers of property to rely on recorded restrictions and covenants. *See Simms v. Lakewood Village Property Owners Ass'n,* 895 S.W.2d 779,786-87 (Tex. App. 1995). Again, restrictive covenants are permissible under Indiana law so long as they are unambiguous and their enforcement is not adverse to public policy. . . . [This clause] is an unambiguous nonwaiver clause, and its enforcement is not adverse to public policy.

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[10] The Arizona court's characterization of the Master Deed as a *contract* among the property owners is reminiscent of the language found in deeds in the chain of title of all seven units involved in this action.

> The provisions of the Master Deed . . . shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Unit, his heirs and assigns, . . . as though such provisions were recited and stipulated at length herein. By subscription to and acceptance of this Indenture Deed, Grantee acquiesces in the provisions of the Master Deed . . . .

See footnote 1, above.

> As such, [the defendants] are barred from raising the defense of acquiescence.

856 N.E.2d at 775. *Accord: Speedway Woods Community Ass'n, Inc. v. McVey,* 925 N.E.2d 6 (Ind. App. 2910); *Lebamoff v. Twin Eagles Neighborhood Ass'n, Inc.,* 909 N.E.2d 521 (Ind. App. 2009); *Drenter v. Duitz,* 883 N.E.2d 1194 (Ind. App. 2008).

The non-waiver clause should be applied as written.[11]

C. The circuit court did not abuse its discretion in rejecting the defense of estoppel.

> 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 v. Strickland, 375 S.C. 76, 84-85, 650 S.E.2d 465, 470 (2007).

This defense fails in every particular.

The Association made no false representation to any of the appellants. The Association made no representations of any kind. The fact that the Association had not theretofore taken action to enforce the covenants with respect to earlier violations in the units being purchased by the appellants was not a representation of anything.

The appellants cannot show lack of knowledge, and the means of knowledge. On the contrary, they knew that restaurants, bars, and convenience stores were prohibited activities in the units which they intended to purchase. They were obliged to

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[11] None of the appellants challenged the detailed rejection of their defenses by post-judgment motion. *See: AJG Holdings LLC v. Dunn,* 392 S.C. 160, 166, 708 S.E.2d 218, 222 (Ct. App. 2011); *Cullen v. McNeal,* 390 S.C. 470, 492, 702 S.E.2d 378, 389 (Ct. App. 2010); *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640 (2011). In particular, there was no challenge to the finding that the non-waiver clause is conclusive on that issue.

know that the law of this State admonishes strict compliance with restrictive covenants such as these and authorizes injunctive relief in case of violation. They took a calculated risk that no effort would be made to enforce those restrictions and that they could continue to violate the restrictions in the future with impunity. They relied upon no "conduct" of the Association but took their own risk, knowing what they were doing.

A new owner of any of the sixty-three residential units could have brought an identical action at any time, in which case the appellants would have no possible defense of estoppel (or laches or waiver, for that matter).

Moreover, the non-waiver clause applies with equal force to the defense of estoppel when the estoppel is based upon inaction — what the appellants call passivity. "Where an implied waiver is involved, the 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 v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992), quoting 28 AM.JUR.2D *Estoppel and Waiver* § 158 (1966). *Accord: Parker v. Parker,* 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994); *Strickland v. Strickland,* 375 S.C. 76, 86, 650 S.E.2d 465, 471 (2007). The appellants' claims of waiver and estoppel are two sides of the same coin, and the non-waiver provision applies equally to both.

D. On balance, the equities favor the Association and the sixty-three residential owners damaged by these ongoing violations.

As the final step in the process, the circuit court weighed the equities and found that the balance favored the Association.[12]

The appellants say that because they were allowed to get away with these plain

[12] "[U]pon a finding that a restrictive covenant has been violated, a court may not enforce the restrictive covenant as a matter of law. Rather, the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." *Buffington v. T.O.E. Enterprises,* 383 S.C. 388, 394, 680 S.E.2d 289, 292 (2009).

violations for years, the residential owners deserve this punishment and more on a permanent basis. What began with a fairly innocuous laundromat has degenerated into drunks spilling onto the sidewalks at three o'clock in the morning to smoke their cigarettes and have their arguments and fights, with the bar's sound system blasting all the while. The appellants portray themselves as the victims here. On the contrary, they have gotten away with these plain violations — and the profits which came with them — for years at the expense of the other 89% of the owners.

The appellants' principal reliance is upon the case of *Rabon v. Mali,* 289 S.C. 37, 344 S.E.2d 608 (1986). In that case a commercial building was situated on two lots which were free of restriction, but encroached upon a third lot — Lot 50 — restricted to residential use. After twenty-five years of commercial use of the building, subdivision residents sought to enjoin commercial use of the portion of the building encroaching upon Lot 50. The court found that laches barred the action. In weighing the equities, the court noted five aspects of the facts. First, the new owner of the building had spent $43,000 on improvements. An injunction would cause "grave hardship and financial detriment" to the building owner. Second, commercial use of the portion of the building encroaching upon Lot 50 had no impact upon the residential character of the subdivision since vacant Lot 51 served as a buffer between Lot 50 and the residences of the subdivision. Third, most of the building was situated on lots not restricted to residential use but fronting on a busy four-lane boulevard. Fourth, the character of the surrounding neighborhood was changing because of the influx of businesses. Fifth, an injunction would confer "no substantial benefit or value" upon the residential owners of the subdivision.

The case at bar has nothing in common with *Rabon v. Mali.* In particular, an injunction in the *Rabon* case would have rendered the portion of the building on restricted Lot 50 entirely useless. By contrast, the injunction here only limits the commercial units to the uses allowed by the Master Deed.

The benefit of this injunction to the overwhelming majority of the owners far outweighs any detriment to the appellants in being required to comply with their contracts and with the statutory law of the State.

CONCLUSION

The appellants gambled that the court system would not hold them to their contracts and would not put a stop to their wilful, continuing violations. So far, they have been wrong. Unless this Court of Appeals finds that the court of common pleas *abused its discretion* in putting a stop to these continuing violations, the judgment must be affirmed.

Since the circuit court did not abuse its discretion in rejecting the defenses, nor in determining that the balance of equities lay with the Association, the respondent urges the Court to affirm this judgment.

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September 24, 2012.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Case No. 07-CP-40-8107

Place on the Greene Homeowners Assoc., Inc. . . . Respondent,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,
Eva Nell Berry, and Jeffrey O. Kenney, ... Appellants.

CERTIFICATE OF COUNSEL

I certify that respondent's final brief complies with Rule 211(b), SCACR.

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October 8, 2012.