THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Clifton Newman, Circuit Court Judge

2013-001479

The SPUR at Williams Brice
Owners Association, Inc. ..... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla ..... Appellants.

FINAL BRIEF OF THE RESPONDENT

D. Reece Williams, III
Brian Lysell
Callison Tighe & Robinson, LLC
1812 Lincoln Street
Post Office Box 1390
Columbia, South Carolina 29201 (29202)
(803) 404-6900
ATTORNEYS FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in ruling that the Appellants, who are co-owners of a unit in a horizontal property regime, were bound by a restrictive covenant that the horizontal property regime's master deed contained at the time the Appellants purchased their unit and that prohibits the renting of the Appellants' unit to students at two- or four-year colleges, institutes, and universities?

2. Did the trial court err in ruling that a restrictive covenant, contained in a horizontal property regime's master deed and prohibiting a unit owner from renting his or her unit in the horizontal property regime to students at two- or four-year colleges, institutes, and universities, is valid and enforceable?

STATEMENT OF THE CASE

The Appellants have appealed the Order of the Honorable Judge Clifton Newman dated May 23, 2013 ("Order"). Judge Newman ruled that Article XIV of the Master Deed and Restrictive Covenant prohibiting renting of a condominium unit in the Spur At Williams Brice to a tenant who is currently enrolled in a two- or four-year college, institute, or university and prohibiting any tenant from having a roommate that is enrolled in a two- or four-year college, institute, or university is valid and enforceable. (R. p. 0014, lines 2–6.) The Order further enjoined the Appellants from renting to any person falling within the classification of persons covered by the Restrictive Covenant. (R. p. 0014, lines 7–10.)

The Respondent commenced its action to declare the Appellants in violation of Article XIV of the Master Deed ("Restrictive Covenant") on October 10, 2011. (R. p. 0027.) The Appellants filed their Answer and Counterclaim on November 11, 2011, (R. p. 0037), and the Respondent filed its Reply to Counterclaim on December 2, 2011. (R. p. 0040.) The parties agreed to have

the Court rule on the outstanding issues after submission of briefs and affidavits. On January 7, 2013, the Appellants filed their Brief with the Court, and on January 10, 2013, filed the Deposition of Ted O. McGee, Jr. The Respondent filed its Brief with the Court on January 15, 2013. (R. p. 0193.) Both the Appellants and Respondent submitted supporting affidavits. On January 22, 2013, the Appellants filed the Affidavit of Sunil V. Lalla, and on February 7, 2013, the Respondent filed the Affidavit of Kelly Barnhill (R. p. 0307; R. p. 0350.)

On May 23, 2013, Judge Newman issued his Order. (R. p. 0014, line 15.) The Order was entered on June 20, 2013. (R. p. 0001.) This appeal followed on July 1, 2013.

STATEMENT OF FACTS

The SPUR at Williams Brice Stadium ("Regime") is a horizontal property regime consisting of real property, condominiums, and general and limited common areas. The Regime was created by a master deed dated September 19, 2006 ("Master Deed"). The Respondent is a nonprofit corporation that was organized and exists for the purpose of administering the Regime and enforcing the Regime's Master Deed and Bylaws. The Appellants are co-owners of Unit 101 in the Regime. When the Appellants purchased Unit 101, they became subject to the provisions of the Master Deed and Bylaws. The Restrictive Covenant provides, in relevant part, the following:

> The rental of any unit to any student currently enrolled in a two (2) or four (4) year college, institute, or university is strictly prohibited. Additionally, any tenant of any Unit shall be prohibited from having any roommate that is enrolled in a two (2) or four (4) year college, institute, or university. Any tenant in violation of this Restriction

shall have their lease automatically terminated, and shall have thirty (30) days to vacate the Unit.

The Appellants, in violation of the express language of the Restrictive Covenant, rented Unit 101 to one or more college students. The Respondent notified the Appellants of this violation, but the Appellants refused to conform their rental practices to the terms of the Restrictive Covenant. The Respondent therefore sought a determination of the construction of the Master Deed regarding the Appellants' rental practices and a declaration of the rights and duties of the parties under the Master Deed and Bylaws of the Regime.

STANDARD OF REVIEW

Whether a suit for declaratory judgment is an action at law or in equity "is determined by the nature of the underlying issue." *Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An action to enforce restrictive covenants by injunction is an action in equity. *South Carolina Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

ARGUMENT

I. The trial court did not err in holding that the Appellants were bound to the Restrictive Covenant

Because the Appellants voluntarily agreed to the terms of the Master Deed, including the Restrictive Covenant, the trial court was correct to rule that the Appellants were bound to the Restrictive Covenant. The law governing the

enforceability of covenants restricting the use of real property is well-established in South Carolina: A restrictive covenant is a voluntary contract between the parties and shall be enforced if the party seeking enforcement shows "that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication." *Buffington*, 383 S.C. at 392, 680 S.E.2d at 291 (2009). As voluntary contracts, restrictive covenants will be enforced according to their terms unless they are indefinite or contravene public policy. 17 S.C. Juris. *Covenants* § 100 (1993) (citing *Sea Pines Plantation Co. v. Wells,* 294 S.C. 266, 363 S.E.2d 891 (1987)).

In an action for declaratory judgment, the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a preponderance of the evidence. *Martin v. Cantrell*, 225 S.C. 140, 144, 81 S.E.2d 37, 38–39 (1954). As with any other action on a contract, the burden is on the Respondent to prove that the Appellants intended to create a covenant. *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988).

The trial court properly ruled that the Respondent met its burden of proof as to the creation of a restrictive covenant binding on the Appellants. The Appellants admitted in their Answer that they are owners of a unit in the Regime and that they are subject to the provisions of the Master Deed and Bylaws. (R. p. 0030, lines 20–22; R. p. 0035, lines 15–16.) Pursuant to the Master Deed, "[e]ach and every Condominium . . . shall be, and is hereby declared to be, subject to the restrictions, easements, conditions, and covenants prescribed and

established herein governing the use of said Condominium . . . and setting forth the obligations and responsibilities incident to ownership of each Condominium." (R. p. 0209, lines 26–30.) The Bylaws of the Regime further provide that "[a]ll present or future owners, tenants, future tenants or their employees . . . that might use the Regime or any of the facilities thereof in any manner are subject to the regulations set forth in these Bylaws and in said Master Deed." (R. p. 212, lines 21–24.) Moreover, the South Carolina Horizontal Property Act states that "[e]ach co-owner shall comply strictly with the bylaws . . . and with the covenants, conditions and restrictions set forth in the master deed." S.C. Code Ann. § 27-31-170 (2007). Accordingly, the trial court correctly ruled that when the Appellants became owners of a unit in the Regime, they voluntarily and intentionally bound themselves by the restrictive covenants barring the rental of any unit to college students who are unrelated to the unit's owner.

II. The trial court did not err in holding that the Restrictive Covenant was valid and enforceable

Upon a showing by the Respondent that the restrictive covenant is binding on the Appellants, the Appellants bore the burden of asserting affirmative defenses to the Restrictive Covenant's enforceability. *Circle Square Co. v. Atlantis Dev. Co.*, 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976). The trial court correctly ruled that the Restrictive Covenant did not contravene public policy; that it did not unconstitutionally discriminate; that it did not violate the statutory laws of either the United States or the State of South Carolina; that a change in market condition is not a valid defense to the enforceability of a restrictive covenant; and that the Respondent did not waive its right to enforce the Restrictive Covenant.

Furthermore, the trial court did not rule on the Appellants' argument that South Carolina should adopt a reasonableness test with respect to determining the enforceability of a restrictive covenant contained in a master deed at the time of a condominium unit's purchase.

a. The trial court correctly ruled that the Restrictive Covenant does not contravene public policy

The trial court properly ruled that the Restrictive Covenant does not violate public policy because it does not contravene the United States Constitution, the South Carolina Constitution, federal or state statutory law, or judicial decisions of this Court. In South Carolina, "courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); *Batchelor v. Am. Health Ins. Co.*, 234 S.C. 103, 107 S.E.2d 36 (1959). The Appellants claim that the Restrictive Covenant is impermissibly discriminatory pursuant to Article I, Section 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution. They further assert that the Restrictive Covenant violates the South Carolina Fair Housing Law and the Federal Fair Housing Act. The Appellants have admitted that the enforceability of a restrictive covenant of this kind is a case of first impression for South Carolina courts.

1. The trial court correctly ruled that the Restrictive Covenant does not contravene the United States or South Carolina Constitutions

In general, the private acts and agreements of individuals do not implicate the Equal Protection Clauses of the South Carolina and United States Constitutions. Both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution guarantee that the State shall not deny any person the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. 1, § 3. By their terms, these mandates apply to state, and not private, action. However, when judicial officers of the State participate in their official capacities in the enforcement of an impermissibly discriminatory restriction, that participation "is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 (1948). Thus, for a restrictive covenant to be judicially enforceable, it must not discriminate on the basis of a classification that, if applied by the State, would contravene either state or federal Equal Protection Clauses.

Use of a classification will be declared unconstitutional under the Equal Protection Clause only if its repugnance to the Constitution is clear beyond a reasonable doubt. *Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998). As a general rule, state action is presumed to be constitutional despite the fact that, in practice, some inequality results. *McGowan v. State of Md.*, 366 U.S. 420, 425–26 (1961). Accordingly, unless a classification warrants some form of heightened review because it jeopardizes a fundamental right or

categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification be rationally related to a legitimate purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Hendrix v. Taylor*, 353 S.C. 542, 549, 579 S.E.2d 320, 323 (2003). An inherently suspect classification is one whose members have faced a long history of discrimination, *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), are a discrete and insular minority who would otherwise be unheard by the political process, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), or which is drawn according to an immutable trait acquired at birth. *See Frontiero v. Richardson*, 441 U.S. 677, 686 (1973). Because college students have not faced a long history of discrimination and are not an insular minority, and because college admission is not a characteristic with which any person is born and is one that most people eventually shed, classifications based on a person's status as college student are not inherently suspect. Moreover, the Appellants have not implicated any fundamental right that the classification of college students would affect. Thus, rational basis review is appropriate to determine the constitutionality of enforcing the restrictive covenant in Article XIV of the Master Deed.

Challengers of the validity of state action "have the burden to negate every conceivable basis which might support it." *Lee v. S. Carolina Dept. of Natural Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000); *see also F.C.C. v. Beach Commc'ns Inc.*, 508 U.S. 307, 315 (1993). Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the

challenged distinction actually motivated" its creation. *Lee*, 339 S.C. at 470 n.4, 530 S.E.2d at 115 n.4.

A classification bears a rational relationship to its purpose as long as there is some evidence that it will further a legitimate purpose. *Nordlinger*, 505 U.S. at 10; *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 323. Thus, a classification will remain constitutional under rational basis review even if it is underinclusive, *see Ry. Exp. Agency v. People of the State of N.Y.*, 336 U.S. 106, 109–10 (1949) (stating that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none"); overinclusive, *see New York Transit Auth. v. Beazer*, 440 U.S. 568, 592–94 (1979) (holding that the exclusion of participants in methadone maintenance programs from employment with the Transit Authority was constitutionally permissible despite the fact many in such programs would be able to perform the requisite job functions safely); or both. *See Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (holding that a mandatory retirement age was constitutional even though it was underinclusive in failing to remove from employment some younger individuals who were not qualified to continue working and overinclusive in removing from employment those who were older but still capable). Only if the use of a classification is arbitrary will it be deemed to be not rationally related to its asserted purpose. *McLaughlin v. State of Fla.*, 379 U.S. 184, 190 (1964); *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009).

The trial court correctly determined that the purpose of the Restrictive Covenant is to insure the comfort and safety of all residents and to protect the

investment of all owners. (R. p. 0008, lines 12–13.) The Restrictive Covenant is rationally related to its purpose because it bars from the possible pool of renters the substantial part of a population that has been shown by empirical evidence to manifest a tendency to engage in certain behaviors that are dangerous to themselves and disruptive to those around them. For example, college students tend to binge drink alcohol at a rate that is higher than among the general population. A report by the Substance Abuse and Mental Health Services Administration ("SAMHSA") of the U.S. Department of Health and Human Services found that the rate of binge drinking among college students was 36.9% in the year 2011. (R. p. 0266, lines 2–7.) By comparison, the rate of binge drinking in the total population was only 22.6%. (R. p. 0262, lines 24–25.) This amounts to a rate of binge drinking among college students that is 63.3% greater than it is in the rest of the population. College students also tend to use illegal drugs at a higher than average rate, and they have a higher than average rate of drug and alcohol addiction. SAMHSA reported that while the rate of illicit drug use among the total population was 8.7%, (R. p. 0244, lines 23–26), the rate among college students was 22%. (R. p. 0254, lines 29–32.) This represents a rate among college students that is more than 153% of the national rate.

The consequences of these behaviors also have been documented. High risk drinking among college students affects those in the community in which college students live. The communities in which college students who binge drink live are more likely to experience such negative secondhand effects as litter, vandalism, noise disturbances, violence, and sleep disturbances. (R. p.

0292, lines 35–38.) Binge drinking and other high-risk drinking are also associated with increased rates of sexual assault and rape, (R. p. 0293, lines 10–18), and a greater tendency for the drinking individual to be injured in fights and suicide attempts. (R. p. 0292, line 31).

Limiting the rental of units to individuals who have a higher incidence of engaging in the foregoing patterns of behavior protects the value of the investment that other owners have made in the Regime. Neighborhoods and communities that experience a higher rate of crime and nuisance are less valuable to prospective owners who are looking to make a stable investment. Moreover, the current owners of units in the Regime purchased their property with the knowledge and expectation that the Restrictive Covenant would be enforced. For them, the preservation of property values that the Restrictive Covenant helps to achieve is a material part of the bargain they struck with their purchase. To invalidate the Restrictive Covenant at this time would be tantamount to depriving the current owners of the benefit of their bargain.

While the Restrictive Covenant might be overinclusive to the extent that it bars college students who do not drink heavily or do not use illegal drugs and underinclusive in that it allows the children and grandchildren of owners, as well as non-college-student binge drinkers and illicit drug users, to rent units, neither of these facts undermines the Restrictive Covenant's reasonable relation to the purpose it seeks to achieve. As noted above, the fact that college students have the propensity for engaging in behaviors that can be both dangerous to themselves and disruptive to those around them is recognized. The trial court,

therefore, was correct to rule that the Restrictive Covenant is rationally related to maintaining the safety, comfort, and investment of owners in light of that recognition and so violated neither the United States nor South Carolina Constitution.

2. The trial court was correct to rule that the Restrictive Covenant does not contravene federal or state statutory law

The trial court also properly ruled that the Restrictive Covenant did not violate federal or state statutory law. Both the federal government and the State of South Carolina prohibit certain kinds of discrimination in the housing market, including the market for rentals. Under the federal Fair Housing Act and the South Carolina Fair Housing Law, "it is unlawful to refuse to . . . rent, . . . to negotiate for the . . . rental of . . . , or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2012); S.C. Code Ann. § 31-21-40(1) (2007). Within both statutes, familial status "means one or more individuals who have not attained the age of eighteen years and are domiciled with: (i) a parent or another person having legal custody of the individual; or (ii) the designee of the parent or other person having the custody, with the written permission of the parent or other person." 42 U.S.C. § 3601(k); S.C. Code Ann. § 31-21-10(6)(a). Thus, discrimination in housing on the basis of familial status implicates the refusal to sell or rent to an individual because that individual is the parent or has legal custody of a child that would live in the dwelling. *See Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301, 310 (S.D.N.Y. 1990) (holding, under the Fair Housing Act, that refusing to rent to a person because one of the

persons in the household was a child is unlawful discrimination on the basis of familial status). In order to successfully raise a violation under either the state or federal fair housing statute, the Appellants must show that the Respondent "discriminated on the basis of race or some other prohibited factor, not that . . . they just disliked" the Appellants' tenants. *Harrison v. Darby*, No.: 2:08-3874-PMD, 2009 WL 936469, at *5 (D.S.C. Apr. 7, 2009), *aff'd,* 333 F. App'x 801 (4th Cir. 2009).

The Restrictive Covenant does not discriminate on the basis of any factor prohibited by federal or state law. Neither on its face nor in its application does the Restrictive Covenant prevent any person from renting because of their race, color, religion, sex, familial status, or national origin. Rather, the classification on which the restriction relies—status as a student at a two- or four-year college, institution, or university—is wholly unrelated to the classifications that the state and federal statutes protect. The restriction does not claim to apply, and does not in fact apply, because a person is white or black; Hindu or Catholic; male or female; with, without, or of child; Belgian, Bajan, or Cajun. Instead, it applies because a person is a college student who is not related to the unit's owner. That classification bears no relation to a person's race, color, religion, sex, familial status, or national origin, and a restrictive covenant that discerns among potential renters on the basis of that classification violates neither the South Carolina Fair Housing Law nor the federal Fair Housing Act.

Because the Restrictive Covenant is neither unconstitutionally discriminatory nor violates the laws of the United States or the State of South

Carolina, it does not violate public policy and the trial court was correct to deem it valid and enforceable.

3. Appellants' claims of error as to the reasonableness test are not preserved for appellate review

Where the trial court fails to rule on an issue that the appellant has raised before it, and the appellant fails to seek consideration of that issue pursuant to Rule 59, the issue is not preserved for appellate review. *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003); *Talley v. S. Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986).

The Appellants raised before the trial court their argument that the law of South Carolina should incorporate a reasonableness test with respect to determining the enforceability of restrictive covenants in the master deeds of horizontal property regimes. (R. pp. 0042–0047.) While the trial court addressed the Appellants' contentions that the Restrictive Covenant contravenes public policy in that it is unconstitutionally discriminatory and violates the statutory laws of the United States and South Carolina, (R. pp. 0005–0010), and that the Restrictive Covenant should fail because of a change in conditions and because the Respondent waived its right to enforce them, (R. pp. 0010–0012), the trial court did not rule on whether the Restrictive Covenant failed under the reasonableness test that the Appellants proposed. The Appellants, for their part, did not move the trial court pursuant to Rule 59 for consideration of their unaddressed issue. Accordingly, the question of whether South Carolina should incorporate a reasonableness test regarding the enforceability of restrictive

covenants in the master deeds of horizontal property regimes has not been preserved for appellate review.

4. Appellants' reasonableness test is just another name for rational basis review

The reasonableness test that the Appellants propose for this Court's adoption uses the same standard as constitutional rational basis review, and because the trial court properly ruled that the Restrictive Covenant did not contravene the United States or South Carolina Constitution, the trial court was correct not to apply this new test. In *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013), the South Carolina Supreme Court held that "[a] classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." *Id.* at 69, 742 S.E.2d at 367.

The Appellants reasonableness test contains the same essential elements as applied in *Bodman*: The first question in applying Ohio's reasonableness test "is whether the decision or rule was arbitrary or capricious," which requires "that there be some rational relationship of the decision or rule to the safety and enjoyment of the condominium." *Worthinglen Condominium Unit Owners' Ass'n v. Brown*, 57 Ohio App. 73, 76, 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989). "The second question is whether the decision or rule is discriminatory or even-handed." *Id.* "The third question is whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium." *Id.* at 76, 566 N.E.2d at 1278. Because Appellants'

reasonableness test uses the same basic analysis applicable under rational basis review, and because the reasonableness test, in the context of the Appellants' challenge, is therefore redundant, the trial court was correct not to apply it. Moreover, had the trial court applied the reasonableness test, it necessarily would have concluded that the Restrictive Covenant survived that test in the same way and to the same extent that it survived rational basis review under the Appellants' equal protection challenge.

b. Change in market conditions is not a valid defense to the enforceability of the Restrictive Covenant

The Appellants further assert that the trial court erred in concluding that a change in the economy and the real estate market was not a basis for the discharge of the Restrictive Covenant. The trial court, however, was correct to rule that this defense was not applicable. First, the trial court properly ruled that South Carolina does not recognize a change in market conditions as a basis for extinguishing a restrictive covenant. The cases that discuss a change in circumstances address themselves to changes in the character of the neighborhood or other area immediately surrounding the restricted or servient estate. *See Dunlap v. Beatty*, 239 S.C. 196, 207, 122 S.E.2d 9, 14 (1961); *Inabinet v. Booe*, 262 S.C. 81, 84, 202 S.E.2d 643, 645 (1974); *Martin v. Cantrell*, 225 S.C. 140, 146, 81 S.E.2d 37, 40 (1954); *Pitts v. Brown*, 215 S.C. 122, 133, 54 S.E.2d 538, 543 (1949); *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006); *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). None of these cases provides for the termination of a restrictive covenant on the

basis of a change in market conditions.

Even if the trial court had applied the doctrine of change in circumstances to the market conditions surrounding the Appellants' purchase of the unit, it was correct to rule that the extent of those changes did not merit the termination of the Restrictive Covenant. To defeat enforcement of a restrictive covenant, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants. *Mangiaracina,* 307 S.C. at 308, 414 S.E.2d at 801. "The determinative factor is whether the object of [such] a covenant has been so nearly destroyed by changed conditions as to render its enforcement inequitable or oppressive." *Holling v. Margiotta*, 231 S.C. 676, 680, 100 S.E. 2d 397, 399 (1957). Where, notwithstanding the changed character of the neighborhood, the purpose of the covenant may still be accomplished, the defense will be denied. *Circle Square Co. v. Atlantis Dev. Co.*, 267 S. C. 618, 230 S. E. 2d 704 (1976).

In this case, the trial court found that the purpose of the Restrictive Covenant is to ensure the comfort and safety of all residents and to protect the investment of all owners. (R. p. 0008, lines 12–13.) The Restrictive Covenant furthers this purpose by barring from the possible pool of renters in the Regime a large portion of a population that binge drinks alcohol and uses illegal drugs at a higher than average rate and that has a higher than average rate of drug or alcohol addiction. Rather than protecting the investment of all of the owners, termination of the Restrictive Covenant would diminish the value of their investment by depriving the Respondent of one means of controlling the level of

binge drinking and illicit drug use within the Regime. Controlling these behaviors is necessary to maintaining the value of the unit owners' investment because these behaviors are often accompanied, as noted above, by conduct that has effects throughout the community, such as higher levels of noise disturbance, litter, and vandalism. If the incidence of these behaviors were to increase, those owners who purchased their units in reliance on the protection the Restrictive Covenant promised would be denied the benefit of their bargain. The fact that the market for real estate, and the economy in general, is in a worse condition than it was at the time that the Appellants purchased their property has no effect on the need to maintain the safety, comfort, and protection of those who own units in the Regime. Because the change in conditions asserted by the Appellants does not destroy the purpose that the Restrictive Covenant was created to address, the trial court was correct to disregard the Appellants' defense of change in market conditions.

c. The Restrictive Covenant does not fail for waiver

The trial court was correct to rule that the Respondent did not waive its right to enforce the Restrictive Covenant. Waiver is an intentional relinquishment of a known right. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). Waiver may be either express or implied. *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 118, 276 S.E.2d 296, 299 (1981). An implied waiver is one that arises "from conduct of the party against whom the doctrine is invoked from which voluntary relinquishment of his known right is reasonably inferable." *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 552, 148 S.E.2d 369, 371 (1966).

The party claiming waiver must show that its opponent possessed, at the time of the waiver, actual or constructive knowledge of his rights or of all the material facts upon which those rights depended. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992).

The Appellants did not show the trial court, and still have not shown this Court, that the Respondent had sufficient knowledge of the Appellants' violation such that the Respondent waived its right to enforce the Restrictive Covenant. On this matter and despite the fact that they bear the burden of proof, the trial court properly ruled that the Appellants produced no credible evidence. Because the Appellants have failed to produce such evidence, the trial court properly disregarded their defense of waiver.

The trial court's disregard of the Appellants' waiver defense was also appropriate because the Appellants did not show conduct that would allow the trial court to infer that the Respondent voluntarily relinquished a known right. The evidence cited by the Appellants in their Final Brief indicates that when the Respondent was put on notice of violations of the Restrictive Covenant, it took action to enforce the Restrictive Covenant. The Appellants' Final Brief asserts the Respondent received notice of student rentals on June 3, 2010, and some time thereafter, but before June 22, 2010, contacted its attorney regarding enforcement. On July 6, 2010, the Respondent sent notice to each owner that renting to students was prohibited and that any owner renting to students had until May 31, 2011, to terminate said lease. (R. p. 0350, lines 12–13; R. p. 0309, lines 10–11.) On May 25, 2011, Respondent notified owners in writing of the

coming deadline for the termination of any nonconforming student leases. (R. p. 0350, lines 14–16; R. p. 350; R. p. 0310, lines 10–14.) The Respondent initiated this action against the Appellants on October 10, 2011. (R. p. 0027.)

The foregoing evidence indicates that, from the time it was put on notice of the Restrictive Covenant's violation, the Respondent engaged in continuous action to compel owners to come into compliance with the Restrictive Covenant. In light of this continuous action, the trial court was correct to rule that the Respondent's conduct did not give rise to the inference that it voluntarily relinquished its right to enforce the Restrictive Covenant.

d. The trial court did not err when it enjoined the Appellants from continuing to breach the Restrictive Covenant

Finally, the trial court did not err when it permanently enjoined the Appellants from renting or continuing to rent to any tenant who is a student currently enrolled in a two- or four-year college, institute, or university or any tenant who has a roommate that is enrolled in a two- or four-year college, institute, or university.

The right to enforce a restrictive covenant is not limited to mere preventive action but can extend to requiring a defendant, by mandatory injunction, to repair any injury already done. *Kneale v. Bonds*, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1995). A party seeking injunctive relief "must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman v. City of Columbia*, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010). The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that

discretion. *City of Columbia v. Pic–A–Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520–21 (2000). The Respondent, in this case, did succeed in fact on the merits of the underlying action regarding the Restrictive Covenant's enforceability, and, as noted above, the trial court was correct to so rule.

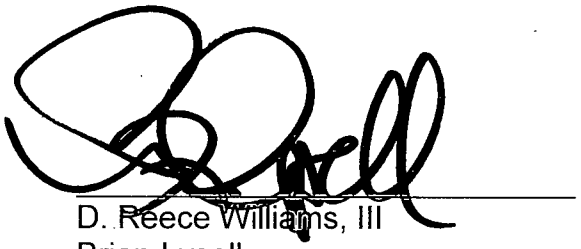
The trial court also properly determined that the harm the Respondent would suffer if the Appellants were allowed to continue to violate the Restrictive Covenant would be irreparable. Permitting the Appellants to violate the Restrictive Covenant would embolden others in the Regime to engage in similar violations. Additional violations of a similar nature would cause an increase in the Regimes' population of college students and in the incidence of behavior that would disrupt other owners and tenants, both of which would result in a loss of the Regime's goodwill, a decline in the value of its units, and a loss of tenants and owners.

Moreover, the trial court correctly ruled that the legal remedy for a violation of a restrictive covenant—money damages—fails to provide an adequate remedy. First, the nature of the damage that the Regime experiences because of the Appellants' violation of the Restrictive Covenant is not susceptible to quantification with sufficient certainty to render a money damages award. The damage that violation of the Restrictive Covenant does is to the safety and comfort of the Regime's other owners. These are intangible benefits that emanate from the Restrictive Covenant and are not usually the subject of monetary damages. Because only performance under the Restrictive Covenant, and not damages, can restore to the owners in the Regime the benefit of their

bargain, there is no adequate legal remedy.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the trial court's ruling.



D. Reece Williams, III
Brian Lysell
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Suite 200
Columbia, South Carolina 29201
T: 803-404-6900
F: 803-404-6902
reecewilliams@callisontighe.com
brianlysell@callisontighe.com

ATTORNEYS FOR THE RESPONDENT

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Clifton Newman, Circuit Court Judge

2013-001479

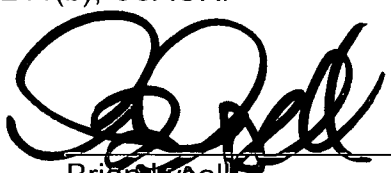
The SPUR at Williams Brice
Owners Association, Inc..... Respondent,

v.

Sunil V. Lalla and Sharon W. Lalla.....Appellants.

COUNSEL FOR THE RESPONDENT'S CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

I, Brian Lysell, counsel for the Respondent, hereby certify that the Final Brief of the Respondent complies with Rule 211(b), SCACR.



Brian Lysell
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Suite 200
Columbia, South Carolina 29201
T: 803-404-6900
F: 803-404-6902
reecewilliams@callisontighe.com
brianlysell@callisontighe.com

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Clifton Newman, Circuit Court Judge

Case No. 2011-CP-40-6704

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PROOF OF SERVICE

I, Katie Minton, an employee of Callison Tighe & Robinson, LLC, certify that I have served the FINAL BRIEF OF THE RESPONDENT on the Appellants herein, by causing copies of same to be placed in the United States Mail, first-class postage affixed, to its attorneys of record S. Jahue Moore, Esquire and John C. Bradley, Jr., Esquire, Post Office Box 5709, West Columbia, South Carolina 29171, on December 20, 2013.

Katie K. Minton

Katie Minton

December 20, 2013