THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

Clifton Newman Presiding Judge

2013-001479

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

v.

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

APPELLANTS' REPLY BRIEF

S. Jahue Moore, Esquire
John C. Bradley, Jr., Esquire
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, South Carolina 29171
(803) 796-9160
ATTORNEYS FOR THE APPELLANTS

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

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ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANTS WERE BOUND BY THE RESTRICTIVE COVENANT.

A. THE RESTRICTIVE COVENANT WAS INVALID AND UNENFORCEABLE

i. The restrictive covenant is arbitrary, not rationally related to its intended purpose.

To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. *D.W. Flowe & Sons, Inc. v. Christopher Constr. Co.,* 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997). A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it. *Kizer v. Clark,* 360 S.C. 86, 93, 600 S.E.2d 529, 533 (2004).

> Under contemporary equal protection doctrine, the test of whether a classification is arbitrary is whether the difference in treatment between [earlier and later purchasers] rationally furthers a legitimate state interest. A *legitimate* state interest must encompass the interests of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation and one that we may reasonably presume to have motivated an impartial legislature. That a classification must find justification outside itself saves judicial review of such classifications from becoming an exercise in tautological reasoning.

Nordlinger v. Hahn, 505 U.S. 1, 33-34 (1992) (internal citations omitted). In addition, the classification must treat "all persons similarly circumstanced" the same. *Johnson v. Robison,* 415 U.S. 361, 374-75 (1974).

The reasoning put forth by the Respondent is not logical. In its brief, the Respondent states that the reason for the classification is that it will "ensure the comfort and safety of all residents" by preventing college students from renting. The Respondent states that college

students "manifest a tendency to engage in certain behaviors that are dangerous to themselves and disruptive to those around them."

This argument fails for three reasons. First, the difference in treatment does not further a legitimate interest, because the banning of renting to college students does not encompass the interests of the members of the disadvantaged class. The purpose is not independent of the direct effect of the legislation. The Respondent cites a report by the Substance Abuse and Mental Health Services Administration to support the proposition that college students have higher rates of binge drinking and drug use. However, the Respondent failed to note that the report also indicates that "[a]mong young adults aged 18 to 25, an estimated 58.1 percent of females and 63.3 percent of males were current drinkers in 2011" and "whites in 2011 were more likely than other racial/ethnic groups to report current use of alcohol." (Respondent's Brief, Exhibit D, p.33). If the purpose was to ensure safety by not renting to prospective drinkers, then a ban on renting to white males would be appropriate. In addition, the ban on renting to college students does not apply to ALL college students. The HOA *does* allow units to be rented to college students as long as those students are a child or grandchild of an owner. Further, this college student may have an unrelated roommate who is a college student. (Affidavit of Sunil V. Lalla, Exhibit 10; R. 340-342). There is no report cited by the Respondent that would indicate that children or grandchildren of condo owners are less likely to "engage in certain behaviors that are dangerous to themselves and disruptive to those around them." Since the standards are not applied equally to all owners and tenants, the purpose of the restriction is not legitimately related to the restriction itself.

ii. The restrictive covenant contravenes public policy.

Restrictive covenants will not be enforced according to their terms if they contravene public policy and are to be strictly construed against the persons seeking to enforce them. *Sea Pines Plantation Co. v. Wells,* 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); *Craig v. Bossenbery,* 351 N.W.2d 596, 599 (1984); *Vickery v. Powell,* 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976).

The HOA has the burden of proving this restriction is worthy of enforcement by a state court by proving a rational and reasonable basis. The HOA must also prove its actions are non discriminatory and do not contravene public policy.

"Today, education is perhaps the most important function of state and local governments." *Kizer v. Dorchester Cnty. Vocational Educ. Bd. of Trustees,* 287 S.C. 545, 549, 340 S.E.2d 144, 146-47 (1986), *citing Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Denying students the right to housing because of their educational status would have a chilling effect on this policy by potentially preventing some students from attending college. Affordable, convenient housing is necessary for all students.

This restriction is blatantly arbitrary, capricious, and discriminates against college students of any age by denying them the right to choose where they will live simply because they are enrolled in college. It is unenforceable. The Trial Court's Order enforcing this restriction should be reversed by this Court.

II. THE TRIAL COURTS ERROR IN NOT APPLYING A REASONABLENESS TEST WAS PRESERVED FOR APPELLATE REVIEW, SINCE A REASONABLENESS TEST IS INHERHENT IN THE TEST USED BY THE TRIAL COURT.

The court used a rational basis review to determine if the classification was constitutional under the Fourteenth Amendment. The order stated that a "classification bears a rational relationship to its purpose as long as there is some evidence that it will further a legitimate

purpose," and that the restriction in this case was rationally related to its purpose. Order, p. 6. Part of this rational basis review requires the court to examine the reasonableness of the classification. "Compliance with the equal protection clauses of the Constitutions requires that any classification be not arbitrary *and bear a reasonable relation to the legislative purpose* sought to be effected, and that all members of each class be treated alike under similar circumstances.... [T]his Court has recognized that a *reasonable basis* for the different treatment was essential to the constitutionality thereof"" *U.S. Fid. & Guar. Co. v. City of Newberry,* 257 S.C. 433, 439-40, 186 S.E.2d 239, 241-42 (1972) (internal citations omitted); *see also Johnson v. Robison,* 415 U.S. 361, 374-75, 94 S. Ct. 1160, 1169, 39 L. Ed. 2d 389 (1974) ("*A classification must be reasonable*, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"); *Gary Concrete Products, Inc. v. Riley,* 285 S.C. 498, 504, 331 S.E.2d 335, 338-39 (1985) ("Although the classification may not be arbitrary and there must be a reasonable relationship between the classification and a proper legislative purpose, a classification will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it"). Because an examination of "reasonableness" was inherent in the court's examination of rationality, the issue was preserved for appellate review.

III. THE TRIAL COURT ERRED IN DETERMINING THE CHANGE-IN-CONDITIONS TEST DID NOT APPLY.

"Aside from certain general guiding principles, no hard-and-fast rule describes when changed conditions have defeated the purpose of restrictions. Each determination must be made on the basis of a unique set of facts and decided according to the equities of the particular situation presented." 76 A.L.R.5th 337 (Originally published in 2000).

> The standard applicable to the defendants' claim of change in circumstances ... is that [w]hen presented with a violation of a restrictive covenant, the court is obligated to enforce the covenant unless the defendant can show that enforcement would be inequitable.... Change in circumstances, such as use of the benefited property for purposes other than those contemplated by the original covenant, may justify the withholding of equitable relief to enforce a covenant.... Such a change in circumstances is decided on a case by case basis, and the test is whether the circumstances show an abandonment of the original restriction making enforcement inequitable because of the altered condition of the property involved.

Grady v. Schmitz, 16 Conn.App. 292, 301–302, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988) (Citations omitted; internal quotation marks omitted.).

South Carolina has recognized that a change in circumstances in the surrounding neighborhood will effect the enforceability of a restrictive covenant. (See cases cited in Order of the Honorable Clifton Newman, page 9; R. 1). There is no hard and fast rule as to when changed circumstances may have defeated the purpose of a covenant. *Inabinet v. Boone,* 262 S.C. 81, 84, 202 S.E.2d 643, 645 (1974). Each case must turn on the facts and equities as they are presented. *Double Diamond Props, LLC v. BP Prods. NA*, 277 F. App'x 312, 318 (4th Cir. 2008). The Trial Court's Order recognizes whether or not a change in market conditions will affect or alter the enforceability of a restrictive covenant is a question of first impression in South Carolina. (Order of the Honorable Clifton Newman; R.1). Courts of other jurisdictions have held that a change in market circumstances may invalidate a restrictive covenant. *See In re TOUSA, Inc.,* 393 B.R.920, 923-24 (S.D. Fla. 2008).

In the case before the Court, the value of the Appellants condo has plummeted due to the economy. Appellants have not been able to sell their unit. The only way they can hold their own is to rent to college students. It is inequitable to require that the Lallas forfeit this rental income and suffer the losses that will result from this vacancy. The HOA has no provision to provide the

Lallas with reimbursement for their income loss if the restriction is enforced. The equities of this situation favor an order holding the restrictions invalid. The Court erred in ruling otherwise.

IV. THE TRIAL COURT ERRED IN RULING THAT THE RESPONDENT DID NOT WAIVE THE RESTRICTIVE COVENANT.

Waiver has been defined as the intentional relinquishment of a known right. *Gibbs v. Kimbrell,* 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct.App.1993). "Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots is essential to the existence of a neighborhood scheme." *Pitts v. Brown,* 215 S.C. 122, 130, 54 S.E.2d 538, 542 (1949). However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. *Id.* If a restriction has been inconsistently enforced, the restriction is waived. *Arcadian Shores Single Family Homeowners Ass'n, Inc. v. Cromer*, 373 S.C. 292, 301-02, 644 S.E.2d 778, 783 (Ct. App. 2007).

The HOA failed to monitor the rental of units by college students and therefore has waived any objections it may have to these students. The HOA Board's own minutes indicate that:

> Management brought to the attention of the Board a comment form completed by an owner. The commend card stated that the Association is allowing the condominium to turn into a dormitory. The card also recommended that the Board contact USC and sale [sic] the property to USC for its students. After discussing the comment card to [sic] the Board a motion was made to consult with drafters of the Master Deeds as it pertains to rentals. The motion was made to clarify the parameters of student rentals with the attorney- find out if a moratorium for students to rent can be placed immediately; motion was carried unanimously. The SPUR HOA Board Minutes, June 3, 2010. (Affidavit of Sunil V. Lalla; R. 307)(Defendant's Brief, R. 50)

The Board took no affirmative action to evict students as evidenced by the Board Minutes for April 10, 2011: "Student Rentals—A concern with regard to student rentals was addressed

by several owners. The Board informed the membership that concern will be evaluated." (R.307). Again the Board addressed rentals at their July 14, 2011 board meeting:

> Two largest issues are identifying renters who are attending a 2 or 4 year school and then how to proceed after they have been identified. To identify renter who are [sic] attending a 2 or 4 year school, all owner [sic] must have potential renters complete a Spur application and forward that application to the board for approval. The board will look at these applications once a month... The Board will also **start** (emphasis added) enforcing the Rules and Regulations concerning renting units.
>
> At the November 26, 2011, board meeting, the Lallas' rental was discussed.
>
> Board discussed the response sent from the Lalla's [sic] owners of 101. Mr. Williams will send a response to Lalla's [sic] counterclaim and prepare any paperwork to move forward with the judgment (R 51).

The Board has singled out the Lallas for student rental rather than suing all owners who rent to students. Because the Board failed to previously enforce the restriction, the Board has waived its right to current enforcement of only a selected group of condo owners.

The Trial Courts order ignores the evidence in the record that Respondent has allowed students to live in the Spur. Further, the evidence demonstrates that Respondent was at best selective in its enforcement of the restrictions. The Respondent has waived their right to enforce these restrictions and the Trial Court erred by failing to find and rule that Respondent waived its right to enforce the restrictions against Appellants.

V. THE TRIAL COURT ERRED IN ENJOINING THE APPELLANTS FROM RENTING THE UNIT TO THEIR CURRENT TENANTS.

> In an action for removal or relaxation of restrictions the issues are not the same as in one seeking to enforce them by enjoining breach thereof, and the judgment is more drastic....Such a proceeding differs from a suit to enjoin a breach of the restrictions. There equity might refuse an injunction and remit a plaintiff to an action at law for damages, basing the refusal on the ground that an

> injunction would do great injury to the defendant and be of little value to the plaintiff.

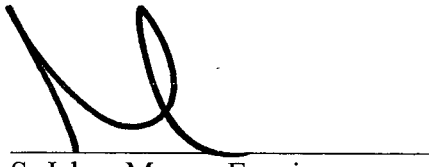
Dunlap v. Beaty, 239 S.C. 196, 208, 122 S.E.2d 9, 15 (1961) (internal citations and quotations omitted). In a dispute regarding restrictions, a court does not automatically issue a mandatory injunction if it finds a restrictive covenant has been violated. The court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no relief should be granted. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274, 363 S.E.2d 891, 896 (1987); *Hunnicutt v. Rickenbacker*, 268 S.C. 511,515-16, 234 S.E.2d 887, 889 (1977).

The Lallas presented ample evidence of their inability to sell their condo and that they would suffer great harm if they are required to evict their tenants. (Affidavit of Sunil V. Lalla, R 307). Respondent failed to establish any harm to the other property owners would result if the tenants are allowed to stay: Property values would benefit by having an occupied condo. The loss of rental income would prohibit the Lallas from maintaining the condo and making repairs. It is impossible to know how long it would take the Lallas to find suitable non student tenants. It is also inequitable to require these students find other housing. They have done nothing wrong requiring them to vacate the premises. Respondent failed to present any evidence of any complaints made against the Appellants' tenants.

Property owners are currently protected by other restrictions prohibiting offensive behaviors. All property owners have recourse through law enforcement and the courts to stop any offensive behavior, making this restriction unnecessary and unreasonable. The Trial Court erred in finding and ruling that Respondent met their burden with respect to the enforceability of these restrictions.

CONCLUSION

Based on the foregoing, the restriction is unreasonable and violates public policy and this court should reverse the order of the trial court.



S. Jahue Moore, Esquire
John C. Bradley, Jr. Esquire
MOORE, TAYLOR, & THOMAS, PA
Post Office Box 5709
West Columbia, SC 29169
(803)-796-9160
ATTORNEYS FOR APPELLANTS

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PROOF OF SERVICE

I certify that I have served the Appellants' Reply Brief by mail, to D. Reece Williams, III, Esquire, and Brian M. Lysell, Esquire, Callison, Tighe & Robinson, Post Office Box 1390, Columbia, South Carolina 29202-1390, on December 13, 2013.

S. Jahue Moore, Esquire
John C. Bradley, Jr. Esquire
MOORE, TAYLOR, & THOMAS, PA
Post Office Box 5709
West Columbia, SC 29169
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