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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III,
Master-in-Equity

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc…….Respondent,

v.

Estate at Westbury Owners Association, Inc…….Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This dispute involves two adjacent communities in the Hilton Head area that were developed beginning in 1998. Respondent Westbury Park Residential Association, Inc. ("Westbury Park" or "Park") is the larger community that consists primarily of single-family houses. Appellant Estate at Westbury Owners Association, Inc. ("Estate at Westbury" or "Estate") is smaller and consists mainly of multi-family buildings that were originally apartments and now are condominiums.

This lawsuit focuses on the developer's master plan for developing the communities. By design, Estate at Westbury has access through Westbury Park along Kensington Boulevard, which is the only way Estate residents can enter or leave their homes. Over the course of twenty years, Estate at Westbury paid assessments to the developer totaling $1.3 million, which the developer shared with Westbury Park. The basis for this assessment payment was a covenant between the developer and Estate at Westbury. The assessment covenant terminated by design in 2018.

On January 24, 2020, Westbury Park filed the summons and complaint alleging causes of action for injunction, declaratory judgment, terminations of easement (multiple), and unjust enrichment. (R. p. 13). Among other things, Westbury Park demanded that Estate residents—whom Park finds undesirable—stop using Kensington Boulevard:

> [Park demands] an order terminating the use agreement and/or alleged easement enjoyed by the Estate at Westbury over and through the property of Westbury Park, and compelling the Estate at Westbury to plan and build alternative access to its property other than over and through the property of Westbury Park . . . .

(R. p. 27: Complaint ¶ 60). Westbury Park also alleged that Estate at Westbury was obligated to pay exorbitant assessments to it, in perpetuity, based on its claimed unilateral extension of a covenant to which Westbury Park was not a party.

On March 18, 2020, Estate at Westbury filed an answer and counterclaims alleging causes of action for breach of contract, breach of fiduciary duty and accounting, nuisance, declaratory judgment for express appurtenant easement, easement by necessity, easement by prescription, quantum meruit, and accounting. (R. p. 76). Among other things, Estate requested an accounting of the $1.3 million that Estate paid over the years, which was supposed to be used only for Estate's share of maintenance of Kensington Boulevard. Westbury Park replied to the counterclaims on April 13, 2020. (R. p. 133).

With its complaint, Westbury Park also filed a motion for preliminary injunction. (R. p. 138). On May 21, 2020, Estate at Westbury filed a motion for partial summary judgment. (R. p. 142). Both sides filed memoranda in opposition to the other's respective motions (R. pp. 145, 150, 155, 293, 430).

The Master in Equity held an in-person hearing on September 16, 2020, on the two motions. At that hearing, Westbury Park had two witnesses testify on Park's behalf (Phil Matteo, Park's president, and Karen Parks, Park's treasurer), and Estate at Westbury cross-examined those witnesses. Westbury Park also examined Estate at Westbury's manager, Jeanette Prinsen, on a limited basis. Both sides argued their motions. (R. p. 501: transcript).

The Master in Equity issued his Order on September 21, 2020. (R. p. 5). In that Order, he denied Westbury Park's motion for temporary injunction on the grounds that

it did not meet the requirement for irreparable harm and that it sought relief which compels non-parties to act or abstain from activities (meaning, Estate residents, who are not parties to the lawsuit). (R. p. 5).

With regard to Estate at Westbury's motion for partial summary judgment, the Master in Equity made numerous rulings, including the following which led to this appeal:

> I find that the easement is an express appurtenant Easement and that the renewal of the term was intended to be unilateral under 9.01. I find that the term was properly extended by the filing of the extension as contemplated under 9.01. I do not see a conflict between 9.01 and 9.02. 9.01 deals with term and 9.02 deals with "…this Declaration, or any provision hereof, or any covenant, condition or restriction contained herein…"
>
> Further, the assessment provision (8.02) of the Declaration agreement (as further modified by paragraph 4 of the 2005 amendment), calls for a sum certain in payments. The obligation of the Estate is to pay the contracted sum and the obligation of Park is to maintain the easement. Had the proportional maintenance cost exceeded the actual revenue received under the assessment provision, Park would have suffered a loss. Estate has no right of accounting and there is no right by Estate to direct how the funds are used. So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations.

(R. p. 5).

This ruling decided many of the core issues in the case.

On September 22, 2020, Estate at Westbury timely filed its notice of appeal. Westbury Park filed a motion to dismiss the appeal on October 12, 2020, arguing that the order is not appealable. Estate at Westbury filed an opposition on October 16, 2020. On November 11, 2020, this Court denied Park's motion to dismiss.

In this appeal, Estate at Westbury requests that this Court reverse the Order of the Master in Equity and hold that Westbury Park's unilateral extension of the contract at issue is legally invalid and not binding on Estate at Westbury, as a matter of contract language, of contract law of South Carolina, and of property law of South Carolina.

STANDARD OF REVIEW

This case involves the interpretation of the unambiguous terms of a contract, and mistakes of contract and property law by the Master in Equity. As such, the standard of review is de novo. *See Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667 (2018) ("We review questions of law de novo. . . . Because the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous."); *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("[T]his Court reviews questions of law de novo."); *Laser Supply v. Orchard Park Associates*, 676 S.E.2d 139, 382 S.C. 326 (S.C. App. 2009) ("When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court.").

FACTUAL BACKGROUND

I. The Westbury Communities

This dispute germinates from the developer's design of two separate communities on the same tract of land. Although Estate at Westbury and Westbury Park are neighbors, they are governed by entirely different sets of restrictive covenants, imposed by the developer on each of them, individually. (R. p. 190, R. p. 207). Estate at Westbury is landlocked from access to outside roads, with the exception of an express, perpetual easement through Westbury Park along Kensington Boulevard (marked in **red**, below).

The developer granted this easement to Estate prior to its subsequent development of Westbury Park. It did so within a set of now-obsolete covenants,[1] which governed the relationship between the developer and the Estate. (R. p. 190) (the "Apartment Declaration"). Westbury Park is not a party to those covenants.

The Apartment Declaration required Estate to pay an annual assessment to the developer for a term of twenty years. The developer was supposed to escrow that money for maintenance of Kensington Boulevard. The amount of the assessment far exceeded any conceivable actual cost of maintenance and repair to Kensington Boulevard. For example, when the assessment expired in November 2018, Estate's *monthly* payment to Park was $7,200. (R. p. 751: transcript p. 213, line 10). Over two decades, Estate paid about $1.3 million for its share of that maintenance. (R. pp. 663, 762, 765). The assessment is a covenant between the Estate and the developer: "The [Estate] . . . is deemed to covenant and agree to pay an assessment ("Assessment") to Declarant [the developer] . . . " (R. p. 198, § 8.01).

The Apartment Declaration clearly and unambiguously states that the assessment covenant had a twenty-year term:

> 9.01 Term: This Declaration, every provision hereof, and every covenant, condition, and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. . . .

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[1] Within the declaration of covenants, the Estate is referred to as the "Apartment Parcel." (hence it is referred to as the "Apartment Declaration.") However, in 2005 the apartments were transformed into a horizonal property regime (the Estate at Westbury). The original Apartment Declaration terminated by design in 2018, and its restrictions have been replaced by a condominium Master Deed. (R. p. 313).

(R. pp. 79, 111-112). For those twenty years, Estate faithfully paid the exorbitant amounts, knowing the assessment covenant would end when the twenty years expired.

The requirement for Estate to pay the assessment ended, as intended, in November 2018. Indisputably, the perpetual easement along Kensington Boulevard remains in place, and remains the only access to the Estate at Westbury community.

Kensington Boulevard is a straight, simple, asphalt street. It simply needs to be repaved every 10-20 years, and maintained from time to time, but is not particularly complex or expensive. The developer unambiguously intended for Westbury Park to maintain Kensington Boulevard.[2]

We do not know whether the developer always shared with Westbury Park the assessment payment that it collected from Estate. If the $1.3 million had been escrowed and managed properly, as intended, it would have paid for maintenance of Kensington Boulevard far, far into the realistic future.

In 2015, the developer agreed to permit Westbury Park (along with another entity) to collect the assessment directly from Estate. (Payment Division Agreement) (R. p. 288). The assessment apparently became a type of "slush fund" for Park. For example, Park took to using the money for (among other things) mowing, trimming, and leaf removal of the front yards of *all* single-family and townhome lawns throughout Westbury Park. (R. p. 303: Westbury Park, ROA, Board of Directors Memorandum, 3/17/2020). When

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[2] "The reasonable care and replacement of [Kensington Boulevard] shall remain the responsibility of the Westbury Park . . . " (Ex. 2, Estate Motion for Summary Judgment) (R. p. 455); "all streets, specifically including [Kensington Boulevard] shall be the responsibility of [Westbury Park] and shall be maintained in good condition" (Ex. 4, § 7.2(b)) (R. p. 228).

the assessment obligation expired, Park appears to have gone into financial shock and rage (no more free lawn care for everyone!). In this lawsuit, Park seeks to punish Estate and its residents because they stopped paying the assessment after the twenty-year term expired.

II. Park's unilateral "Extension" of the Assessment

The assessment is the heart of this appeal. Estate anticipated the covenants' termination after twenty years, as set forth in its agreement with the developer. But, with the twenty-year assessment expiring in November 2018, Westbury Park scrambled for a way to keep the gravy train rolling. On October 23, 2018, Westbury Park unilaterally drafted and recorded what it purports to be an "extension" of the assessment, titled "NOTICE OF EXTENSION OF THE DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, AND EASEMENTS FOR PALMETTO LAKES APARTMENTS AT WESTBURY PARK." (R. p. 284: the "Extension"). In the Extension, Park purports to unilaterally move the goal posts for Estate for another ten years. And Park claims the right to *continue* to move the goal posts, at its sole discretion, each ten years, forever.

In its counterclaim, Estate at Westbury challenged the Extension, including because (a) Park had no power to extend the assessment, (b) the Extension violated the renewal requirements of the contract itself, (c) the Extension violated contract law in general, and (d) the Extension violated property law. Estate argued that a core provision of the contract is that any extension must be joint, *not* unilateral:

> 9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition, or restriction contained herein, **may**

> **only be** terminated, **extended**, modified, or amended, as to the whole of said Property or any portion thereof by **the Declarant and Owner jointly**. . . .

(R. p. 112 (emphasis added)).

In his Order, the Master in Equity upheld Park's unilateral Extension. This was despite the fact that Westbury Park had not filed a motion seeking such a ruling (the only motion Park had pending was for a preliminary injunction to stop Estate residents using the easement, which was denied).[3] Without a motion so requesting, the Master in Equity *sua sponte* found that renewal of the assessment was intended to be unilateral under § 9.01 and that the assessment was "properly extended." The Order also finds that Estate has an obligation to continue paying the "contracted sum," and has no right to an accounting and no right to direct how the funds are used. In short, the Order finds that Park can continue extending, collecting, and using its slush fund for whatever it wants, forever, if Park so chooses. And the Order imports that Estate is indentured to pay whatever Park wants, for as long as Park wants. This Court should reverse.

[3] As such, the Master in Equity's Order was procedurally improper, and should be revered for that reason as an independent ground.

ARGUMENT

The core of this appeal is Westbury Park's unlawful, unilateral Extension of the assessment, and the Master in Equity's Order which upholds and encrusts that Extension with the force of law. The Master erred in interpreting the plain and unambiguous language of the covenant to permit unilateral extension. Under South Carolina law, the Park could not unilaterally extend the assessment covenant for at least three reasons. First, and importantly, because Park does not have any interest in the Estate parcel. Second, because Park has not complied with the Declaration's unambiguous requirements for its extension. Third, because unilateral extension of the assessment payment would violate contract and property law in South Carolina.

I. The Master erred in finding Park could unilaterally extend covenants to which it was a stranger in title.

As a threshold matter, Park cannot lawfully extend the assessment because it has no power to do so: Park is not the declarant, Park is not a party to the declaration, and Park has no legal ability to extend the declaration's covenants.

The assessment is a covenant within the Apartment Declaration. The Apartment Declaration binds two actors: the "Declarant" and the "Owner." Section 1.01 defines the Declarant: "Declarant is the owner of the approximately twenty (20) acre parcel of real property in Bluffton . . . more fully described on attached Exhibit 'A' (the 'Property.')." (R. p. 190: S.J. Memo. Ex. 2, p. 1, § 1.01). The Owner is the predecessor to the Estate at

Westbury. The Apartment Declaration appertains to the "Property," which is the parcel of land on which the Estate sits.

By its express terms, the Declaration does not run with any other land outside the 20-acre parcel. **This is significant, because in no way does the Park have any property interest whatsoever in the bound property**. Indeed, after its conveyance of the 20-acre parcel to the Owner, the *developer* did not have any property interest in the bound parcel, either.

The Declaration contains the assessment covenant. It is a promise by the Owner/Estate to pay money to the developer for the term of the Declaration. The Estate, bound by this promise because it ran with the Estate's land, faithfully did so for twenty years. The Declaration expired in 2018.

Among other problems, the Master-in-Equity's holding that Westbury Park could unilaterally renew the Declaration wrongly presupposed that Westbury Park was the "Declarant" identified in the covenants. This is incorrect as a matter of law. As defined by the covenants, the "Declarant" is the owner of the 20-acre apartment parcel (referred to as the "Property"). Westbury Park does not own the "Property" defined by the covenants. A developer loses its right to enforce covenants once it conveys all its interest in the subject property. *AJG Holdings LLC v. Dunn*, 708 S.E.2d 218 (Ct. App. 2011), *aff'd.* by *AJG Holdings, LLC v. Dunn*, 410 S.C. 346, 764 S.E.2d 912 (2014). "[W]hen a subdivision developer is divested of all interest in the subdivision, a reserved right to amend restrictive covenants is extinguished." *Queen's Grant v. Greenwood Development*, 628

S.E.2d 902, 368 S.C. 342 (Ct. App. 2006), *citing Armstrong v. Roberts*, 254 Ga. 15, 325 S.E.2d 769 (Ga. 1985).

Westbury Park argues it was somehow assigned declarant rights within an unrecorded, undated, unnotarized "Estate Payment Division Agreement and Assignment." (R. p. 288) ("Payment Agreement"). This argument fails as a matter of law. As a matter of law, the developer never assigned all of its declarant rights to Westbury Park.[4]

As an initial matter, at the time the developer entered into the Payment Agreement, it did not have any ownership whatsoever in the 20-acre Property. Nonetheless, the developer purported to assign *some* of its rights to Westbury Park *and* another entity, Westbury Park Commercial Center Proper Owners' Association, Inc. (the "Westbury Commercial Property Association"). In particular, the developer assigned to *both* Park and to Westbury Commercial Property Association—which is not a party to this lawsuit and did not sign the Extension—the particular right to *collect* the assessment funds, which they did, until the assessment term expired in November 2018. (R. p. 288: "Payment Agreement").

The Payment Agreement was not recorded with the register of deeds, which further demonstrates that it was not a complete conveyance of all declarant rights, which would have been a real property interest that would bind the property itself. *See* S.C. Code § 30-7-10 ("all instruments in writing conveying an interest in real estate" are

[4] This point was briefed to the Master in Equity, and can be found at pages 167–169 of this Record. (R. pp. 167–169: S.J. Memo. pp. 13-15).

subject to South Carolina's recording act). Indeed, having divested itself entirely of the Property, the developer had no power to convey any interest in it. The Payment Agreement does not purport to convey any title whatsoever to the Apartment Declaration—and particularly not the right to amend the covenants. Instead, the clear purpose of the Payment Agreement is that Westbury Park and Westbury Commercial Property Association divide the developer's assessment by an 80/20 split. (R. p. 288). It is a personal contract between three entities, which does not touch and concern the land.

Therefore, (1) Westbury Park does not hold all of the developer rights, and so is not the "Declarant," and (2) for Westbury Park to exercise the limited rights it does hold, it also requires the written consent of Westbury Commercial Property Association, which was not obtained on the Extension.

Because Westbury Park is a stranger to the Apartment Declaration, the Master in Equity erred in finding Park could amend it—unilaterally or otherwise.

II. The Order misinterprets the language of the contract.

Even assuming, *arguendo*, that Park had any declarant authority, Park did not comply with the Declaration's unambiguous requirements for its extension. The declarations constitute a contract, and their interpretation is reviewed de novo by this Court.[5] Restrictions on property are to be strictly construed, with all doubt resolved

[5] "Restrictive covenants are contractual in nature and bind the parties thereto in the same way as any other contract." *Seabrook Island Property v. Berger*, 616 S.E.2d 431, 365 S.C. 234 (2005) (internal citations omitted). The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Similarly, the determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). "In construing

against the party seeking to enforce them.[6]

The Master was construing two provisions of the Apartment Declaration, sections 9.01 and 9.02. Section 9.01 sets forth the term of the covenants (20 years) and contemplates that the then-declarant could renew the Declaration, under certain circumstances. Section 9.02 sets forth the mechanism for any extension, modification, or amendment of the covenants. Here are the two sections, which are intended to be read together:

> 9.01 Term: This Declaration, every provision hereof and every covenant, condition and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. This Declaration may be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term.
>
> 9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition, or restriction contained herein, may only be terminated, **extended**, **modified**, or **amended**, as to the whole of said Property or any portion thereof by **the Declarant and Owner jointly.** No such termination, extension, modification or amendment shall be effective until a proper instrument in writing has been executed and

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a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Id*. (internal citations omitted).

[6] "[T]he settled principle that '[r]estrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use property and against restrictions.'" *Cedar Cove Homeowners Ass'n v. DiPietro*, 628 S.E.2d 284 n.3, 368 S.C. 254 n.3 (S.C. App. 2006) (quoting and citing *Sprouse v. Winston*, 212 S.C. 176, 184, 46 S.E.2d 874, 878 (1948), and 26 C.J.S. Deeds § 163); *see also Hardy v. Aiken*, 631 S.E.2d 539, 542, 369 S.C. 160 (2006) ("'[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.'. . . ." (internal citations omitted).

> acknowledged and recorded in the Office of the Register of Mesne Conveyance for Beaufort County South Carolina.

(R. pp. 198-199) (emphasis added).

A developer who desires to reserve to itself a right to amend restrictive covenants must meticulously adhere to their amendment provisions. *Queen's Grant*, 628 S.E.2d at 907 ("the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants."). Even if Westbury Park was the "Declarant,"[7] it failed to strictly comply with Section 9.02 when it unilaterally extended the term of the assessment covenant.

A. The assessment cannot be unilaterally extended by Westbury Park.

As a recap, on the eve of the 20-year term's expiration, Westbury Park recorded a "Notice of Extension," in which it purported to extend the term of the obsolete Apartment Declaration by another ten years. (S.J. Memo, Ex. 6) (R. p. 284). But Section 9.02 mandates that extensions, particularly of covenant provisions, can only be done jointly. Extensions cannot be effected unilaterally. The relevant provision is:

> 9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition or restriction contained herein, **may only be** terminated, **extended**, modified or amended, as to the whole of said Property or any portion thereof **by the Declarant and Owner jointly**.

(R. p. 199) (emphasis added). There is no dispute that Estate at Westbury did not consent to the Extension of its covenant. (R. pp. 6, 669).

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[7] Yet another reason that Westbury Park's argument that it is the "Declarant" fails is because <u>if</u> (*arguendo*) the developer (which no longer owned any interest in the Estate) somehow assigned its declarant rights in the Estate Property (which it did not own) via the Payment Agreement, then those rights are held jointly by Park and another entity and could *not* have been exercised solely by Park.

Importantly, the assessment covenant had been modified once before. On November 1, 2005, the then-declarant and the owner *jointly* modified the declaration, in compliance with the declaration's required method of modification in § 9.02. (R. pp. 80, 161, 204: S.J. Memo., Exhibit 3, ¶¶ 4-6: Amendment to Declaration). That modification, by joint agreement, increased the amount of the assessment from $17,500/year to $7,200/month. In other words, both the words of the declaration and the past practices of its parties establish that the assessment could only be extended or modified jointly.

B. The Master in Equity's Order errs when it holds that the assessment can be unilaterally extended.

The Master in Equity's Order erred when it held that:

> the renewal of the term was intended to be **unilateral** under 9.01. I find that the term was properly **extended** by the filing of the **extension** as contemplated under 9.01.

(R. p. 5: Order p. 1 (emphasis added)). The Master in Equity's interpretation of the contact language was legally in error for several reasons.

Section 9.02 requires joint consent to *extend* "any provision" of the contract. (R. p. 199). *Black's Law Dictionary* defines "extension" as: "The continuation of the same contract for a specified period. Cf. Renewal." *Black's Law Dictionary* p. 728 (11th ed. 2019) ("extend"). Westbury Park continuing the assessment for another ten years clearly constitutes extending (or modifying, or amending) the contract. Indeed, the Extension uses the word "extension" at least four times, in its title and text (and in its file name: "estates at westbury\notice of extension") (R. pp. 284–287). The Extension is clearly an extension, requiring joint consent under § 9.02.

The Master in Equity's legal error stems from a misreading of the contractual language:

- First, § 9.01 clearly applies to the period when the Declarant was the only stakeholder in the Westbury project (the formative years of the development). During that period, the Declarant could renew the declaration in its entirety. There were no other stakeholders whose consent was needed, at that time. Those days indisputably have passed.
- Second, § 9.01 allows that the contract "may" be renewed as a whole ("This Declaration may be renewed" by the original Declarant only), whereas § 9.02 explains *how* any provision may be terminated, extended, modified or amended—by joint consent only.
- Third, the Extension identifies itself as . . . an extension. At the top, it says "NOTICE OF EXTENSION." (R. p. 284) It does not identify itself as "Notice of Renewal." Extensions indisputably fall under § 9.02, requiring joint approval.
- Fourth, the Master in Equity's order itself identifies the Extension as an "extension." (R. p. 5: "I find that the term was properly **extended** by the filing of the **extension** as contemplated under 9.01.") As an extension, joint approval is required under § 9.02 and the plain language of the contract.

Even if Westbury Park somehow had declarant rights over property in which it had no ownership interest, it failed to strictly comply with the covenant's procedure for amendment. *See Snow v. Smith*, 416 S.C. 72, 90, 784 S.E.2d 242, 251 (Ct. App. 2016) ("the developer must strictly comply with the amendment procedure as set forth in the

declaration of covenants . . . .") (internal quotations and citations omitted). The Master's Order erred when it entirely ignored § 9.02 to find that the contract allows unilateral extension under § 9.01. This Court should reverse.

III. The Order upholding the unilateral extension violates contract law of South Carolina.

The Master in Equity's Order allowing unilateral extension of the contract violates South Carolina contract law, as well. Contract law is clear that a contract can only be altered by the parties to the contract, not by one party alone. *See Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 ("[O]ne party to a contract may not unilaterally alter its terms."); *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161 (S.C. 2003) ("We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established that '[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract,'" *quoting Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)).

Here, Estate at Westbury and its members undertook the express contractual obligation to pay assessments, totaling more than $1.3 million dollars, for an understood, mutually-agreed upon, finite term of twenty years. It is unlawful and unenforceable for Westbury Park (even as a purported assignee of the developer, which it was not) to

attempt to unilaterally amend and alter fundamental, material terms[8] that were the basis of the bargain. It also was unlawful and unenforceable for the Master in Equity's Order to uphold the Extension as a matter of law, and in doing so to rewrite the contract to link the assessment to the easement.[9]

In sum, Westbury Park was, as a matter of contract law, powerless to unilaterally extend Estate's obligation to pay an assessment, and the Order was in error to hold that unilateral extension was binding on Estate at Westbury.

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[8] Time and price are recognized as material terms to contracts. *See Rose Elec., Inc. v. Cooler Erectors of Atl., Inc.*, 418 S.C. 424, 794 S.E.2d 382 (S.C. App. 2016) ("Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty.") (internal quotations omitted).

[9] "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry v. Charleston Southern Univ.*, 656 S.E.2d 775, 781, 376 S.C. 399 (S.C. App. 2008). "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense. . . . Thus, [t]his court is without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 429 S.C. 30, 39, 837 S.E.2d 662, 667 (S.C. App. 2019) (internal citation and quotations omitted).

IV. The Order upholding unilateral extension violates property law of South Carolina.

The Estate at Westbury has a real property interest in the covenants—and their 20-year term—which runs with the parcel on which its horizontal property regime sits. That interest could not have been substantially affected by Park without due process of law. "Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014) (*quoting Queen's Grant II*, 368 S.C. at 361, 628 S.E.2d at 913 (citation and quotation marks omitted)). "Restrictive covenants affecting real property cannot be properly and fully understood without resort to property law." *Id*. (emphasis added).

As further set forth above and in the Record (R. pp. 157–169: S.J. Memo. pp. 3-15), the developer recorded with the register of deeds the Declaration, which was intended to govern the relationship between the developer and the original owner of the apartment parcel (*i.e.*, before it became a horizontal property regime) ("Owner"). The recorded declaration had a finite term of twenty years, which could only be extended by mutual agreement between the parties. (R. p. 199: § 9.02).

The limitation on extension and modification in § 9.02 of the Declaration makes sense, and it is required by property law. The Apartment Declaration, once recorded, affected and created real property interests, and those interests were part and parcel of

the bundle of rights of purchasers of the Estate property.[10] *See* S.C. Code § 27-7-10 (easements and other servitudes are some of the "rights, members, hereditaments, and appurtenances to said premises belonging," which convey with the fee). It is hornbook law that a person cannot be divested of his real property interests without due process of law—and certainly not without his knowledge and consent. South Carolina law is clear that vested property interests, including those in the nature of servitudes, cannot be unilaterally altered without the consent of those whose property is affected. *See, e.g.*, *Corbin v. Cherokee Realty*, 229 S.C. at 24, 91 S.E.2d 542, 546 ("The Florenza Company could not without the consent of [the owner] change the location or width of [the easement]."); *See Goodwin v. Johnson*, 357 S.C. 49, 54, 591 S.E.2d 34 (Ct. App. 2003), *citing* 28A C.J.S. Easements § 157 (1996) ("As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect."). In this case, the covenants were reciprocal agreements, requiring mutuality of assent for their modification.

The Apartment Declaration is based in the law of real property. It is duly executed, under seal, notarized, probated, and recorded. It is bound to a parcel of land. The rights and interests it contains are property rights and interests. As such, those rights and interests cannot be affected without adherence to the necessary formalities of transfer of

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[10] The bound property is now owned by 320 individual unit holders, who are not party to this lawsuit, and who each have an interest in the 20-year term of the declaration, as well as in the provisions for the modification or extension of that term.

title to real property. For this reason, the developer could not have conveyed declarant rights to Westbury Park by way of an unsealed document that was not recorded, did not refer to the Property, and gave no notice to the Estate owners. It is also for this reason that the Declaration expressly acknowledges the power of the Owner, who is defined as the fee owner of the Property, to approve of any extension or modification that would fundamentally affect ownership rights and obligations. (Declaration § 9.02) (R. p. 199) (extension can only be accomplished "by Declarant and Owner[11] jointly" by way of a duly recorded written instrument.). Lastly, it is nonsensical to think that anyone other than the Owner could alter *the Owner's* covenant.

For these reasons, in addition to the others set forth above, Westbury Park was without power to unilaterally alter the substantial property right of Estate to the assessment covenant's termination after twenty years. This Court should reverse the Master in Equity.

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11 *N.b.* that "Owner," defined by the declaration in § 2.03 as the owner of the fee interest in the property, went from being a single entity to being the 320 fee holders of individual condominium units in the Estate, as well as the Estate at Westbury (as to common areas). Once the solitary Owner began to convey condominium units (as was specifically contemplated by the amended declaration), as a matter of law and under the plain language of the declaration, *each* unit holder's execution and acknowledgement would be necessary in order to extend or modify the declaration. This has never occurred.

V. The Order erred in holding that Estate at Westbury was not entitled to an accounting.

The Master in Equity's Order holds that "Estate has no right of accounting and there is no right by Estate to direct how the funds are used." (R. p. 5). Within the declaration, as amended, the developer covenanted that the Estate's assessments were for the Estate's "share of the costs for maintenance of the Required Streets and landscaping along the Required Streets . . . ." (R. p. 198: S.J. Memo., Ex. 2, § 8.01; Ex. 3). This promise created a fiduciary duty on the part of the developer to use the assessment for that express purpose. The developer subsequently assigned to Park (and to Westbury Commercial Property Association) the right to collect the assessment, pursuant to the terms of the declaration. (R. p. 288: *id.* Ex. 5). Westbury Park therefore inherited the developer's duty to use the assessment for the Estate's share of the maintenance of the street that is the subject of this litigation. Under the clear language of the contract at issue, Estate is entitled to an accounting of Park's use of the assessment funds that it collected, and the Order is in error ruling that no such right exists under the contract and under the law.

CONCLUSION

For these reasons, the Court should (a) reverse the Order of the Master in Equity and (b) hold that the Extension is invalid and not binding on Estate at Westbury, as a matter of contract language and of contract and property law of South Carolina.

Respectfully submitted,

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