

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 BONNIE WALL, individually and derivatively,)
 and WALTER B. WALL, JR.,)
)
 Plaintiffs,)
)
 vs.)
)
 JONATHAN DYE, SHAUN DYE,)
 SHELLMORE HOMEOWNERS')
 ASSOCIATION, INC., and JOHN H.)
 CHAKIDES, JR., individually and in his)
 capacity as DIRECTOR OF SHELLMORE)
 HOMEOWNERS' ASSOCIATION, INC.)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 BEFORE THE MASTER-IN-EQUITY

Civil Action No. 2020-CP-10-04185

MASTER'S ORDER GRANTING
DEFENDANTS' SUMMARY
JUDGMENT

RECEIVED
Sep 13 2021
SC Court of Appeals

THIS MATTER came before the Court on renewed motions for summary judgment filed by Defendants Jonathan and Shaun Dye (the “Dyes”) on January 25, 2021 and by Defendant Shellmore Homeowners’ Association, Inc. (“Shellmore HOA”), on January 26, 2021. Before the Court is also a renewed motion for partial summary judgment and opposition to Defendants’ motions filed by Plaintiffs Bonnie and Walter Wall (the “Walls”) on March 1, 2021. On March 18, 2021, the Dyes filed a reply in support of their motion for summary judgment and response in opposition to the Walls’ motion. A hearing on the competing motions was held on March 22, 2021. At the time of the hearing, but not yet before the Court, the Walls had filed a pending motion to compel discovery and the Shellmore HOA had filed a competing motion for protective order. Based on the Parties’ written submissions, hearing arguments, and the record in this case, this Court hereby GRANTS the Dyes’ and the Shellmore HOA’s motions for summary judgment, DENIES the Walls’ motion for partial summary judgment, and DENIES the pending discovery motions as moot for the reasons set forth below:

INTRODUCTION

This case involves a dispute over a covered dock. The Dyes received approval from their neighborhood association to construct a covered dock. That dock has now been completed. The Dyes' neighbors, the Walls, are suing to have the Dyes tear it down. The Walls have also sued the neighborhood association and one of its board members claiming the approval of the Dyes' dock was improper. The Walls claim that covered docks are prohibited by the neighborhood's restrictive covenants and that the Dyes did not receive the proper approval of the association for their covered dock. The central and determinative issues in this case are whether the restrictive covenants forbid covered docks and whether the Dyes followed the appropriate approval procedures prescribed by the covenants. As set forth below, this Court finds, as a matter of law, that covered docks are not forbidden by the restrictive covenants and that, based on the record presented to this Court, the Dyes appropriately applied for and received the proper approvals under the covenants.

FACTUAL AND PROCEDURAL BACKGROUND

Shellmore is a waterfront subdivision consisting of fourteen (14)¹ lots located in McClellanville, South Carolina.² The lots in Shellmore are subject to certain restrictive covenants set out in a Declaration of Covenants ("Declaration") dated March 18, 1975 and recorded March 19, 1975 in the Charleston County Register of Deeds Office in Book J106, Page 195.³ No amendments to the Declaration have ever been recorded.⁴ The Declaration names "Cape Romain

¹ This Court takes judicial notice of the Charleston County property records and related GIS system which show fourteen (14) lots within the Shellmore community identified by the following parcel numbers: 712-0000089, 712-0000090, 712-0000091, 712-0000092, 712-0000093, 712-0000094, 712-0000095, 712-0000096, 712-0000097, 712-0000098, 712-0000099, 712-0000100, 712-0000101, and 712-0000102. *See S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.").

² *See* Am. Compl., ¶¶ 1-2, 8-9.

³ *See* Dye's First MSJ, Ex. 1 at ¶ 4 and Ex. 1-B; Am. Compl., ¶¶ 12-14.

⁴ *Id.*

Lookout Homeowners Association, Inc., its successors and assigns”, as the “Association” having jurisdiction to enforce the restrictive covenants of the subdivision.⁵ The name of the Association was later changed to Shellmore Homeowners Association, Inc., a nonprofit corporation organized pursuant to the South Carolina Nonprofit Corporation Act.⁶

The Declaration contains restrictive covenants vesting architectural control of exterior improvements within Shellmore to the Board of Directors of the Shellmore HOA or to an Architectural Review Committee (“ARC”).⁷ Article V, Section 1 of the Declaration provides:

Architectural Control. No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.⁸

Article V, Section 8 of the Declaration deals specifically with docks:

Boat Houses, Docks, etc. No boat houses, docks, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.⁹

The Dyes own and reside at 945 Shellmore Lane within the Shellmore subdivision.¹⁰ In January of 2020, the Dyes submitted a permit application to the Office of Ocean & Coastal Resource Management (“OCRM”) and a federal permit application with the United States Army

⁵ Dye’s First MSJ, Ex. 1-B.

⁶ *Id.*, Ex. 1 at ¶ 5 and Ex. 1-C.

⁷ *See id.*, Ex. 1-B at p. 8.

⁸ *Id.*

⁹ *Id.*, Ex. 1-B at p. 11.

¹⁰ *Id.*, Ex. 2 at ¶ 3.

Corps of Engineers (“USACOE”) with plans and specifications for the construction of a proposed covered dock.¹¹ The Dyes also submitted the same plans to the Shellmore ARC which voted to approve the Dyes’ proposed dock.¹² Subsequently, the Shellmore Board of Directors considered and upheld the ARC’s vote approving the Dyes’ proposed dock.¹³ The Dyes later submitted revised plans to both OCRM and the Shellmore ARC deleting a proposed boat lift but keeping the proposed covered dock.¹⁴ Both OCRM and the Shellmore ARC approved the Dyes’ revised plans.¹⁵ In all, OCRM, USACOE, the Shellmore ARC, and the Shellmore Board of Directors approved the Dyes plans for the construction of a covered dock with OCRM and USACOE issuing the required permits.¹⁶

After OCRM issued the Dyes a permit to construct their dock, the Dyes’ immediate neighbors, Larry Fritz to the south and the Walls to the north, requested review of OCRM’s decision by the Board of Health and Environmental Control objecting to the Dyes’ proposed dock covering to which OCRM staff filed a response.¹⁷ Ultimately, the review requests were denied.¹⁸ Thereafter, the Dyes commenced construction of their dock.¹⁹

The Walls commenced this action via the filing of a summons and verified complaint on September 22, 2020 asserting claims against the Dyes for breach of the restrictive covenants, declaratory and injunctive relief, and nuisance claiming that the Dyes proposed covered dock had not been properly approved as required under the Declaration. The Walls also filed a petition for an *ex parte* temporary restraining order and a motion for temporary injunction on September 23,

¹¹ *Id.*, Ex. 2 at ¶¶ 8, 13.

¹² *Id.*, Ex. 1 at ¶¶ 10-11, Ex. 1-H, and Ex. 2 at ¶¶ 9-10.

¹³ *Id.*, Ex. 1 at ¶ 12, Ex. 1-I, and Ex. 2 at ¶ 11.

¹⁴ *Id.*, Ex. 1 at ¶ 13, Ex. 1-J, and Ex. 2 at ¶¶ 12-13.

¹⁵ *Id.*, Ex. 1 at ¶ 13, Ex. 1-J, and Ex. 2 at ¶¶ 14-15.

¹⁶ *Id.*, Ex. 2 at ¶¶ 10-15.

¹⁷ *Id.*, Ex. 2 at ¶ 16 and Ex. 2-A.

¹⁸ *Id.*, Ex. 2 at ¶ 17.

¹⁹ *Id.*, Ex. 2 at ¶ 18.

2020. On September 29, 2020, the Dyes filed a motion to dismiss the complaint and briefing in opposition to the Walls requested injunctive relief. On September 30, 2020, a hearing was held before the Hon. Roger Young, Circuit Judge, on the motions for preliminary injunctive relief. That day, Judge Young issued an order declining to issue the requested injunctive relief and referring the case to the Undersigned as Master In Equity in accordance with Rule 53, SCRCF.

A hearing on the motions for temporary and preliminary injunctive relief was held before this Court on October 1, 2020. On October 2, 2020, this Court issued an order preliminarily granting the Walls' requested injunctive relief to preserve the status quo as to the proposed roof on the Dyes' dock but denying the Walls request to halt construction of the other portions of the dock. To secure the injunction, this Court ordered the Walls to post a cash bond of \$5,000 pursuant to Rule 65, SCRCF. Additionally, based on the representations and agreement made by the Parties at the hearing, this Court ordered a briefing schedule for cross motions for summary judgment and set a hearing on those motions for November 2, 2020.

On October 5, 2020, the Walls filed a Verified Amended Complaint naming the Shellmore HOA and John H. Chakides, Jr. ("Chakides"), as additional defendants and asserting claims for injunction and declaratory judgment (against the Dyes and Shellmore HOA), breach of restrictive covenants (against the Dyes and Shellmore HOA), breach of fiduciary duty claims (against the Shellmore HOA and Chakides), civil conspiracy (against Jonathan Dye, Chakides, and the Shellmore HOA), and nuisance (against the Dyes).

On October 15, 2020, the Dyes filed their motion for summary judgment and the Walls filed a motion for partial summary judgment. The Dyes filed their Answer to the Amended Complaint on October 20, 2020. The Dyes also filed a motion to dissolve the preliminary injunction on October 21, 2020 to which the Walls filed opposing briefing the next day. On

October 23, 2020, Defendants Shellmore HOA and Chakides filed their Answer and motion for summary judgment.

This Court held a hearing on the cross motions for summary judgment and the motion to dissolve the preliminary injunction on November 2, 2020. The Court took the matter under advisement and allowed the parties time to submit additional briefing for consideration. The Dyes and the Walls submitted additional briefing on November 6, 2020.

On November 19, 2020, this Court entered an order²⁰ on the then-pending motions. In the order, this Court granted the Dyes' motion to dissolve the preliminary injunction based on the Walls' failure to establish the required elements for preliminary injunctive relief.²¹ Next, the Court granted the Defendants' motions for summary judgment as to the Walls' claims for breach of fiduciary duty upon a finding that South Carolina does not impose a fiduciary duty on homeowners associations or their respective board members.²² This Court also granted the Defendants' motions for summary judgment as to the Walls' claim for civil conspiracy finding that the Walls had failed to present any evidence of special damages.²³ However, the Court denied the Parties' cross motions for summary judgment as to the Walls' remaining claims of declaratory judgment, breach of the restrictive covenants, and nuisance and directed the remaining Parties²⁴ to resolve the

²⁰ The Walls have appealed the November 19, 2020 order.

²¹ See *Scratch Golf v. DUNES WEST*, 361 S.C. 117, 122, 603 S.E.2d 905 (2004) ("For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.").

²² See *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992) ("We have never imposed the high standard of fiduciary duty on planned community organizations, such as the [b]oard, which are vested with the discretion to ensure that proposed modifications to residential property enhance the entire community. Instead, under the correct standard, the [b]oard has a duty to exercise judgment reasonably and in good faith. We hold that the master-in-equity did not err in finding that the [b]oard did not owe appellant a fiduciary duty.").

²³ See *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006) ("The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages.").

²⁴ As a result of the Court's order, all the claims against Defendant Chakides were dismissed, with prejudice. He is, therefore, no longer a party to this case.

remaining issues by mediation or by vote at the annual meeting of the Shellmore HOA to be held in January 2021.

On January 23, 2021, the Shellmore HOA held its annual meeting.²⁵ At the meeting, the HOA membership voted to approve the Dyes' covered dock.²⁶ On January 25, 2021, the Dyes filed their renewed motion for summary judgment based on their previous arguments and on the HOA membership vote. Defendant Shellmore HOA filed its own renewed summary judgment motion on January 26, 2021 incorporating the reasons set forth in the Dyes' motion. On March 1, 2021, the Walls filed a renewed motion for partial summary judgment and briefing in opposition to the Defendants' motions. On March 18, 2021, the Dyes filed a reply in support of their renewed summary judgment motion and response in opposition to the Walls' renewed motion for partial summary judgment.

On March 18, 2021, the Walls filed a motion to compel discovery and Defendants Shellmore HOA and Chakides filed a competing motion for protective order.

A hearing on the Parties' renewed motions for summary judgment was held on March 22, 2021. In considering the record before it, including extensive briefing and submissions by the Parties and arguments of counsel, this Court issues the following opinion and order granting the Defendants' renewed motions for summary judgment and denying the Walls renewed motion for partial summary judgment. The Parties' competing discovery motions, being rendered moot by the granting of summary judgment ending the case, are denied as moot.

LEGAL STANDARD

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

²⁵ See Dyes' Renewed MSJ, Ex. 4.

²⁶ *Id.*

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRC. “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” Rule 56(e), SCRC. In ascertaining whether any triable issue of fact exists, the trial court must view all evidence and all inferences that can be reasonably drawn from it in the light most favorable to the non-moving party. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

“Actions for injunctive relief are equitable in nature.” *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct.App.2001). An action to enforce restrictive covenants by injunction is in equity. *Taylor v. Lindsey*, 332 S.C. 1, 3, n. 2, 498 S.E.2d 862, 864, n. 2 (1998).

DISCUSSION

The Walls’ remaining claims for injunctive relief, declaratory judgment, breach of the restrictive covenants, and nuisance are all based on the Walls’ position that the approval and construction of the Dyes’ covered dock was in violation of the restrictive covenants found in the Shellmore Declaration. The Walls claim that the covenants unambiguously evince a common scheme of development prohibiting covered docks within the Shellmore community. As such, the

Walls argue, any purported approval of the Dyes' covered dock, as well as the construction of the Dyes' covered dock, was in breach of the restrictive covenants.

The Dyes and the Shellmore HOA counter that the unambiguous covenants do not demonstrate a common scheme of development prohibiting covered docks. Thus, the Defendants posit, the Dyes' covered dock does not violate the restrictive covenants as it was approved by the ARC, the Board, and the HOA membership.

The central and dispositive issue in this case, therefore, is whether the approval and construction of the Dyes' covered dock breached the restrictive covenants contained in the Shellmore Declaration. In addressing this issue, the Court must first determine, as a matter of law, whether the restrictive covenants are ambiguous. If the covenants are ambiguous, this Court must resolve any ambiguity or doubts in favor of the free use of property. If they are not, the Court must interpret the unambiguous covenants as a matter of law to determine whether covered docks are prohibited and whether the Dyes' covered dock was properly approved. As set forth below, this Court finds, as a matter of law, that the language in the Declaration is unambiguous, that covered docks are not forbidden by the covenants, and that the Walls have failed to adduce any admissible evidence suggesting a common scheme of development prohibiting covered docks within Shellmore or disputing that the Dyes' dock plans were submitted to and properly approved by the ARC, the Board, and the HOA membership.

I. The restrictive covenants in the Shellmore Declaration are unambiguous.

“Restrictive covenants are contractual in nature”. *Taylor*, 332 S.C. at 4. Thus, the rules of construction applicable to contracts are equally applicable to restrictive covenants. *See Snow v. Smith*, 416 S.C. 72, 88, 784 S.E.2d 242 (Ct. App. 2016) (“Restrictive covenants are construed like contracts and may give rise to actions for breach of contract.”). “A contract is ambiguous when

the terms of the contract are reasonably susceptible of more than one interpretation.” *DNR v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299 (2001) (citing *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)); *see also* 17A Am.Jur.2d Contracts § 338, at 345 (1991). “It is a question of law for the court whether the language of a contract is ambiguous.” *Id.*

Here, the Parties agree that the language of the restrictive covenants at issue in the Shellmore Declaration is unambiguous. The Parties simply disagree as to the proper interpretation of the language. After a thorough review of the Declaration, this Court agrees that the restrictive covenants at issue are reasonably susceptible of only one interpretation and are, thus, unambiguous as a matter of law.²⁷

II. Covered docks are not prohibited by the restrictive covenants and may be constructed with appropriate approval.

“[T]he construction of a clear and unambiguous deed is a question of law for the court.” *Town of McClellanville*, 345 S.C. at 623. Our Supreme Court has repeatedly set out the rules for interpreting restrictive covenants in South Carolina:

Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, *nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.* It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of the free use of the property*, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or

²⁷ This Court notes that any ambiguity or doubt as to the meaning of the relevant language in the restrictive covenants would have to be resolved in favor of the free use of property as a matter of law. *See Town of McClellanville*, 345 S.C. at 623 (“It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of the free use of the property*[.]”) (emphasis in original). In this case, the free use of property would require, as a matter of law, a ruling in favor of the Dyes’ covered dock.

more different constructions that construction will be adopted which least restricts the use of the property. *A restriction on the use of 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.

Id., 345 S.C. at 622, 550 S.E.2d at 302 (emphasis in original) (quoting *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 863-64). With these principles in mind, the Court considers the language in the Declaration.

In order for covered docks to be prohibited by the restrictive covenants, the restriction must be created “in express terms or by plain and unmistakable implication.” *Id.* At the outset, the Court notes that the Declaration does not contain any language expressly prohibiting covered docks. Certainly, there were covered docks in existence at the time the Declaration was drafted and recorded in 1975. And so, the drafter could have easily inserted language in the Declaration expressly prohibiting covered docks but did not do so. *See Town of McClellanville*, 345 S.C. at 621 (upholding decision of Master in Equity refusing “to read restrictions into the deed which [the drafter] could have effortlessly written in itself”); *Taylor*, 332 S.C. at 5-6 (refusing to index minimum home value restriction in deed to inflation where grantor “could have easily done so” but did not).

The Declaration specifically addresses the approval and construction of docks within the Shellmore community in Article V, Section 8:

Boat Houses, Docks, etc. No boat houses, docks, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.

While this language provides for the approval and construction of “docks”, the Declaration, in this or any other section, makes no distinction between covered and uncovered iterations. Moreover, Article V, Section 8 expressly contemplates the approval and construction of “boat houses” which

this Court notes are, essentially, covered docks for boats. *See Serra v. Maryland Dept. of Envir.*, 758 A.2d 1057, 1059 (Md. App. 1999) (“Boathouse means a structure with a roof or cover, or similar device placed over open water to protect a boat or other vessel.”). Thus, rather than prohibiting the approval and construction of covered docks, the restrictive covenants plainly and unmistakably imply that such structures may be constructed with appropriate approval.

The Walls argue that there exists a common scheme of development for the Shellmore community that prohibits covered docks. In support of their position, the Walls point to language in the Declaration as well as to the undisputed facts that there are currently no other covered docks within Shellmore and that prior covered dock applications by other homeowners have been denied. Considering the evidence proffered by the Walls on this point, the Court finds that the Walls have failed to identify any competent, admissible evidence demonstrating a common scheme of development prohibiting covered docks within Shellmore.

In order for a common scheme of development to be enforceable as a negative reciprocal easement, “the developer must establish the general scheme of development before any lots are sold.” *Gambrell v. Schriver*, 312 S.C. 354, 440 S.E.2d 393, 395 (Ct. App. 1993); *see also Stanton v. Gulf Oil Corp.*, 232 S.C. 148, 152, 101 S.E.2d 250, 251, (1957) (common scheme of development must be established “before any lots are sold”). Thus, in determining whether a common scheme of development exists which reciprocally restricts property, only evidence which predates the first sale is relevant. *See Gambrell*, 440 S.E.2d at 395 (“[T]he court should consider not only the language of the deeds, but also the circumstances surrounding the origin of the covenants.”).

Here, aside from the Declaration itself, the Walls have not offered or cited to any admissible record evidence which pre-dates the sale of the first lot within Shellmore. The Walls

claim that, apart from the Dyes' dock, there has never been a covered dock within Shellmore. However, that fact, even if true, provides no insight into the language of the Declaration or the circumstances surrounding its origin. Moreover, none of the verified pleadings or affidavits submitted by the Walls lay the necessary foundation to indicate the Walls, or their proffered affiants, have personal knowledge concerning whether covered docks have ever existed in Shellmore since its establishment in 1975. Even if the requisite foundational testimony had been presented, the absence of covered docks, before or after the first lot sale, provides no indication whether covered docks were prohibited by the developer or whether the subsequent purchasers simply chose not to build them.

By the same token, the Walls have failed to adduce or cite to any evidence that the developer ever denied an application for a covered dock or represented that covered docks were prohibited. The Parties do not dispute that several homeowners have previously submitted plans for the construction of covered docks which were denied by the ARC. However, all such facts presented in the record before this Court post-date the first lot sale within Shellmore and are, thus, irrelevant and inadmissible on the issue of a common scheme of development. Moreover, even considering the proffered evidence, previous covered dock denials evince nothing more than the combined exercise of discretion granted to the members of the voting body under the Declaration—whether that body is the ARC, the Board, or otherwise.

Thus, the Declaration remains the only admissible record evidence cited by the Walls on the issue of whether there is a common scheme of development prohibiting covered docks within Shellmore. As noted above, the Declaration contains no express prohibition on covered docks and, instead, anticipates approval of boat houses which unmistakably implies that approval and construction of at least some types of dock coverings are allowed. Furthermore, while Article V,

Section 1 of the Declaration lists factors in considering proposed structures, that same section provides automatic compliance with the covenants for proposed structures—regardless of their harmony with the existing neighborhood—that the Board or the ARC fails to approve or disapprove within thirty (30) days. These provisions in the Declaration, read together, point toward the conclusion that covered docks are not altogether forbidden but may be constructed with appropriate approval.

The Walls, however, argue that language found in Article V, Section 2 of the Declaration prohibits covered docks because of their effect on the view of adjoining homeowners. That section provides:

Set-Back Lines. Since the establishment of standard inflexible building setback lines tends to force construction of houses both directly behind and directly to the side of other homes with possible detrimental effects on privacy, view of the water, preservation of important trees, etc., no specific setback lines are established by these covenants. In order to assure, however, that the location of the improvements mentioned above will be staggered where practical so that the maximum amount of view and breeze will be available to each home and so that the structures will be located with regard to the topography of each individual lot, taking into consideration the location of large trees and similar considerations, the Declarant reserves unto itself, its successors and assigns, or its designated representative, the right to control absolutely and solely to decide the precise site and location of any home or other structure upon the lots subject hereto. Provided, however, that such locations shall be determined only after reasonable opportunity is afforded the lot owner to recommend a specific site.

Viewed as a whole, the language of this section allows the developer, its successor, or a designated representative complete and absolute discretion to determine the placement of structures on each lot in lieu of establishing setback restrictions. However, docks, covered or uncovered, are not located within the bounds of any lot but, instead, extend outside each lot, past the mean highwater mark; hence, the need for approval and permitting by OCRM and USACOE. Consequently, Article V, Section 2 is not applicable to docks. Even if applicable, that section grants the Shellmore

HOA, as successor to the developer, or the HOA's designated representative complete and absolute discretion to approve the structure.

Based on the clear and unambiguous language of the Declaration and the record evidence submitted in this case, this Court finds, as a matter of law, that there is no common scheme of development prohibiting the approval or construction of covered docks within Shellmore. Therefore, covered docks are not forbidden by the restrictive covenants and may be constructed with appropriate approval in accordance with Article V of the Declaration.

III. The undisputed record evidence indicates the Dyes properly submitted and received appropriate approval for their covered dock.

In their submissions to this Court, the Dyes have submitted uncontroverted admissible evidence and testimony that: they submitted the plans and specifications for their proposed covered dock to OCRM, USACOE, and the Shellmore ARC; that OCRM and USACOE approved the Dyes' plans and issued the appropriate permits, that the ARC approved the Dyes' covered dock plans via written email; that the Shellmore Board of Directors affirmed the vote of the ARC and reiterated its designation of the ARC as the Board's representative under the Declaration; and that nine (9) of the fourteen (14) members of the HOA voted to approve the Dyes' covered dock at the Shellmore HOA's annual meeting. The Walls have failed to submit or cite to any competent, admissible evidence creating a genuine dispute as to these facts. Nor, have the Walls submitted any evidence raising any other issues of fact pertaining to these approvals. Instead, the Walls raise a number of legal and other challenges to the sufficiency and appropriateness of the approvals by the ARC, the Board, and HOA membership. However, under the undisputed facts presented and the unambiguous language of the restrictive covenants, this Court finds, as a matter of law, that the Dyes' appropriately complied with the Declaration's approval requirements for their covered dock.

As indicated above, Article V, Section 8 of the Declaration requires that proposed docks must be approved by “the Association, or its designated representative.” Article I, Section 1, of the Declaration defines “Association” as the corporate entity “Cape Romain Lookout Homeowners Association, Inc., its successors and assigns.” In 1994, that corporation filed Articles of Amendment changing its name to the “Shellmore Homeowners Association, Inc.” Thus, the HOA corporate entity, and not the HOA membership as argued by the Walls, constitutes the “Association” under the Declaration. Moreover, in South Carolina, the control of a corporate entity—and, thus, the authority to act on its behalf—is vested in the entity’s board of directors, not its membership or shareholders. *See* S.C. Code § 33-31-801 (“Except as provided in this chapter . . . all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board.”); S.C. Code § 33-8-101 (“Unless otherwise provided . . . all corporate powers must be exercised by or under the authority of, and the business and affairs of a corporation must be managed under the direction of, a board of directors.”); *see also Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000) (“In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders.”). Thus, in the absence of a contrary provision in the Declaration or statute, the Shellmore Board of Directors is “the Association” for purposes of Article V of the Declaration.

Indeed, the Declaration explicitly vests the Board of Directors or its designated ARC with architectural control over all structures within the Shellmore community, including docks, in Article V, Section 1, which provides in pertinent part:

Architectural Control. No building, fence, wall or *other structure* shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall

have been submitted to and approved in writing . . . by *the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board*. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this *Article* will be deemed to have been fully complied with.

(emphasis added). Thus, the Declaration plainly and unmistakably grants the Board the authority to approve or disapprove of any “structure” in Shellmore or to designate an ARC with the same power. *See also Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 272, 363 S.E.2d 891, 895 (1987) (holding general language in restrictive covenants subjecting all exterior structures to prior approval by architectural review board included items such as a flagpole, jacuzzi, and satellite dish). Section 8 of that same Article V simply clarifies that the authority of the Board and/or the ARC over “other structure[s]” includes docks.

Article V, Section I of the Declaration also explicitly authorizes the Board to appoint an ARC as its “designated committee” for the consideration and approval of proposed structures. Interpreting Sections 1 and 8 of Article V together, this Court finds, as a matter of law, that the reference to a “designated representative” in Section 8 refers to the Board’s “designated committee”, the ARC, indicated in Section 1. The Defendants have presented admissible evidence, uncontroverted by the Walls, that the Board appointed the ARC with delegated authority to consider and approve structures within Shellmore, including the Dyes’ covered dock. This Court finds, as a matter of law, that the Board’s appointment of the ARC for this purpose was authorized under the Declaration and legally valid.

The Walls claim that the Association’s failure to record its Bylaws with the Register of Deeds office by the deadline set out in S.C. Code § 27-30-130(A) invalidated the Board’s appointment of the ARC. However, the Bylaws only refer to the ARC in Article IX which states that “[t]he Association shall appoint an Architectural Control Committee, as provided in the

Declaration”. As discussed above, the Declaration—which was recorded in the Register of Deeds office and which the Bylaws and the Parties recognize as controlling—plainly provides for appointment of the ARC by the Board. Consequently, the Bylaws—enforceable or not—are of no consequence to the Court’s determination of this issue.²⁸

The Walls further argue that the ARC’s appointment is invalid under the South Carolina Nonprofit Corporation Act because the ARC members are not Board members and because of an alleged conflict of interest on the part of board member Chakides. As to the first issue, the Walls point to S.C. Code § 33-31-825(a) which allows the Board of Directors to create “committees of the board and appoint members of the board to serve on them.” S.C. Code § 33-31-825(a). Under S.C. Code § 33-31-801(c), however, “[t]he articles” or, in the case of a homeowners association, the restrictive covenants, “may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board.” S.C. Code § 33-31-801(c); *see also Seabrook Island Prop. Owners Ass’n v. Marshland Tr., Inc.*, 358 S.C. 655, 663, 596 S.E.2d 380, 384 (Ct. App. 2004) (recognizing architectural review board’s authority granted by restrictive covenants); 17 S.C. Jur. Covenants § 88 (“Restrictive covenants often authorize the creation of a homeowners’ association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges.”). The Declaration plainly authorizes the Board of Directors to appoint non-board members to the ARC and, thus, the Board’s appointment of the ARC complies with S.C. Code § 33-31-801(c) of the South Carolina Nonprofit Corporation Act.

The Walls’ claims that the appointment of the ARC suffers from some impropriety or a conflict of interest are also without merit. It is undisputed that Defendant Chakides has no

²⁸ This Court notes that the Bylaws were subsequently recorded in the Charleston County Register of Deeds Office on January 25, 2021 at Book 0953, Page 790.

ownership interest in the Dyes' property. Thus, Defendant Chakides had no direct interest in the approval or disapproval of the Dyes' dock by the ARC. Moreover, the Walls have submitted no evidence that Chakides was involved in any entity standing to benefit from the approval of the Dyes' dock. Thus, under S.C. Code § 33-31-831, there is no conceivable conflict of interest which would preclude Defendant Chakides from participating in the vote to appoint members to the ARC or to ratify the ARC's approval of the Dyes' dock. Thus, the Walls' conclusory allegations of impropriety are unsupported by the record before this Court.

The Walls further claim that a vote of the HOA membership—rather than the ARC or the Board—was required for the approval of the Dyes' covered dock based on two different theories. First, the Walls claim that reference to the "Association" in Article V, Section 8 means the HOA membership and not the Board. As discussed above, the term "Association" is defined in the Declaration as the HOA corporate entity which, under the unambiguous language of Declaration and well-established law, is governed by the Board of Directors unless a membership vote is expressly required. The Declaration, in numerous places, requires votes of the HOA "members" on various issues. However, the Declaration does not mention any vote of the "members" for the approval of docks. The Declaration language simply does not require a vote of the HOA membership on this issue.²⁹ The Walls first argument fails.

Second, the Walls argue that either the aforementioned common scheme of development or a 2016 vote of the membership was effective to prohibit docks within Shellmore and, thus, a

²⁹ Even if such a vote was required, the Dyes' have presented uncontroverted evidence that the HOA membership voted to approve the Dyes' covered dock at the HOA's annual meeting. The Walls have argued that the membership vote was ineffective because it occurred after the Dyes' completed construction of their covered dock. In doing so, the Walls request this Court order the Dyes' to tear down the dock only to reconstruct the dock to comply with the Walls' proposed timing argument. The Walls' requested relief is inequitable, futile, and arbitrary. *Anderson v. Marion*, 274 S.C. 40, 43, 260 S.E.2d 715 (1979) ("[A] court of equity should seek to do equity."); *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798, 801 (2008) ("[I]t is well-settled that equity will not require the doing of a futile task."). Regardless, because it finds that a membership vote is unnecessary, the Court does not reach this issue.

seventy-five percent (75%) vote of the membership was required to amend the covenants to allow covered docks. As already discussed, the Walls have failed to provide any evidence of a common scheme of development prohibiting covered docks within Shellmore. Moreover, while the parties agree that the 2016 vote occurred, no evidence has been submitted to this Court showing that the 2016 vote met the seventy-five percent (75%) threshold for amending the covenants nor has any evidence been submitted that the Declaration, recorded in 1975, has ever been amended. Consequently, based on the record before this Court, the 2016 vote was ineffective to prohibit covered docks in Shellmore. The Declaration, which does not forbid covered docks, controls.

Consequently, the Board was authorized under the plain and unambiguous language of the Declaration to act for the Association and designate the ARC as its representative for the consideration and approval of the Dyes' covered dock. The Walls have not presented any competent, admissible evidence disputing the fact that the Dyes submitted their proposed plans for a covered dock to the ARC or the fact that the duly appointed ARC voted to approve the Dyes' covered dock and, thereafter, the ARC vote was ratified by the Board. Thus, this Court finds, as a matter of law, that the Dyes' took the appropriate steps to apply for approval of their covered dock as outlined in Article V of the Declaration. The Court further finds, as a matter of law, that under the unambiguous language of the Declaration, both the vote of the ARC and the ratification of the ARC by the Board were independently sufficient for the valid approval of the Dyes' covered dock. Approval of proposed structures by the HOA membership is not required under the Declaration.

CONCLUSION

After careful consideration of the Parties submissions, the arguments of counsel, and the record before this Court, the Dyes' renewed motion for summary judgment is GRANTED, the Shellmore HOA's renewed motion for summary judgment is GRANTED, and the Walls' renewed

motion for partial summary judgment is DENIED. The Walls' remaining claims for declaratory and injunctive relief, breach of the restrictive covenants, and nuisance are hereby dismissed WITH PREJUDICE and this order ends the case. The Walls' and the Shellmore HOA's pending discovery motions are DENIED as moot.

IT IS SO ORDERED

Hon. Mikell R. Scarborough
Master In Equity, Charleston County

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Walter B Wall Jr , plaintiff, et al VS Jonathan Dye , defendant, et al

Case Number: 2020CP1004185

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062