FRANK J GALLO and AMY M GALLO,

Plaintiffs-Respondents,

v.

JOHN A HAFNER,

Defendant-Appellant,

and

BOROUGH OF STONE HARBOR,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1843-23

CIVIL ACTION

On Appeal From:

CAPE MAY COUNTY:
CHANCERY DIVISION
Docket No.: CPM-C-6-23

Sat Below:
Hon. Michael Blee, A.J.S.C.

BRIEF OF DEFENDANT-APPELLANT JOHN A. HAFNER

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Date: August 26, 2024

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PRELIMINARY STATEMENT

Appellant John Hafner owns a beachfront home in Stone Harbor. His neighbors, Respondents Frank and Amy Gallo, own the home next to Mr. Hafner's, which is one lot removed from the beach. The Gallos sued Mr. Hafner primarily to force Mr. Hafner to prune vegetation on Mr. Hafner's lot next to its border with the Gallos' lot. The Gallos rely on a restrictive covenant inserted by a former owner of Mr. Hafner's property into a 1985 deed (the "1985 Deed Restriction") granted to another predecessor in interest. The 1985 Deed Restriction's reference to "an open view to the ocean" as well as significant extrinsic evidence indicates that the restriction's purpose was to preserve a view in which the ocean is actually visible from what is now the Gallos' lot. However, it is now impossible to see the ocean from the ground level of the Gallos' property, regardless of any vegetation. That is because the Army Corps of Engineers has since constructed large sand dunes that block an "open view to the ocean" from the ground level of either party's lot. As such, the 1985 Deed Restriction has failed of its essential purpose.

Nevertheless, the trial court granted a preliminary injunction against Mr. Hafner in June 2023 and then granted summary judgment and issued a permanent injunction against Mr. Hafner in January 2024. The crux of the trial court's decision was that the term "open view to the ocean" in the 1985 Deed

Restriction *unambiguously* means the same thing as merely "toward the ocean." However, the trial court's interpretation is not even the most reasonable interpretation of the restriction's language, let alone the only reasonable interpretation. Despite that, the trial court determined it unnecessary to consider the extrinsic evidence that Mr. Hafner submitted.

Not only did that evidence at least create a genuine dispute of fact about the meaning of the deed restriction, it also undermined the credibility of the Gallos' key witness. In particular, the Gallos had submitted a certification by the lawyer who drafted the 1985 Deed Restriction. However, discovery revealed significant inconsistencies among versions of that certification and between the final certification and the actual facts. If this case is remanded, the trial court should allow additional, limited discovery into the circumstances of the certification's drafting.

When originally drafted, the deed restriction ensured that what became the Gallos' lot had an "open view to the ocean" at the expense of privacy of what became Mr. Hafner's lot. That protected view is now gone, with or without the shrubbery at issue. The only effect of the restriction at this point is to impair Mr. Hafner's use of his property and his privacy. The trial court erred by disregarding these changed circumstances on the basis of a faulty interpretation of the deed restriction.

Finally, the trial court made another unusual decision that requires correction. After the Gallos filed this lawsuit, they filed an amended complaint adding the Borough of Stone Harbor as an additional defendant. Surprisingly, the Borough allied itself with the Gallos. The Borough even sought, and obtained, a declaration that it has independent standing to enforce the 1985 Deed Restriction. The Gallos joined in the Borough's motion and argued in favor of the Borough's position at the summary judgment hearing. It is unclear what interest the Borough has in enforcing a private deed restriction, and there is a notable absence of precedent supporting the Borough's authority to do so. This Court should reverse the trial court's declaration of standing to prevent the Borough from pursuing future intrusive and unjustified enforcement action.

PROCEDURAL HISTORY

On February 20, 2023, Plaintiffs the Gallos filed a Verified Complaint against Defendant Mr. Hafner and an Order to Show Cause. (Da1). The Gallos sought injunctive relief compelling Mr. Hafner to prune bushes in his backyard to a height of no more than four feet from the "natural grade" or "normal grade." (Da11-12). The Gallos also sought that the bushes be pruned so as not to "connect with each other in the formation of a fence[.]" (Da12).

On March 2, 2023, the Gallos filed an Amended Verified Complaint and an Amended Order to Show Cause adding the Borough of Stone Harbor as a

Defendant, but reasserting their prior allegations and evidence and requesting the same relief. (Da13, Da131). Mr. Hafner filed an opposition to the Order to Show Cause on March 27, 2023. (*See* Da149, Da185). Then, on March 29, 2023, Mr. Hafner filed an Answer and Counterclaim against the Gallos. (Da200). The Counterclaim sought a judgment removing the deed restriction based upon a change of circumstances, specifically, the construction of a dune by governmental authorities, which entirely obstructs a view to the ocean from the ground level of Gallos' property. (Da215-18).[1] On March 23, 2023, the Borough filed a motion to compel an inspection of Mr. Hafner's property. (Da147). In light of its apparent desire to actively enforce the deed restriction and enter upon his property, Mr. Hafner then filed a motion to dismiss the Borough on April 3, 2023. (Da221).

The trial court heard argument on the pending motions on June 7, 2023.[2] The trial court ruled from the bench, granting the Gallos temporary injunctive relief and ordering Mr. Hafner to abide by the 4-foot restriction and to prune the existing bushes back. Applying what it described as "a common-sense

[1] There is no dispute that the ocean is visible from the Gallos' second floor deck. (Da796 at 86:6-87:25).

[2] Transcripts are designated as follows: 1T: June 7, 2023; 2T: August 25, 2023; 3T: October 25, 2023; 4T: December 1, 2023.

approach" to the words used in the restriction, the trial court explained that the word "to" is generally defined as "in a direction forward." (1T 77:2-17). The trial court accordingly reasoned that the restriction was clear in protecting a view merely in the direction of the ocean. The trial court declined to consider conflicting extrinsic evidence of the restriction's meaning, instead finding the restriction to be unambiguous on its face. (1T 78:4-11). Adding a requirement that does not appear in the 1985 Deed Restriction, the trial court's order specifically provided that the height of any "shrubbery and trees" was to be "measured from natural elevation." (Da321-22).

The trial court employed similar reasoning to reject Mr. Hafner's argument that changed circumstances precluded enforcement of the 1985 Deed Restriction. (1T 80:12-83:10). The trial court also denied Mr. Hafner's motion to dismiss the Borough, despite the Borough's acknowledgment that "the borough is not inherently opposed to being relieved as a defendant from the lawsuit" and "[s]hould Your Honor make the determination this is a purely private deed restriction, we will be merrily on our way." (1T 96:9-18).

The case proceeded, and on October 25, 2023, the Gallos moved for summary judgment on their claim against Mr. Hafner and on Mr. Hafner's counterclaim and requesting permanent injunctive relief. (Da330). On October 27, 2023, despite its previous ambivalence about remaining in the case and the

fact that it had never filed a claim against Mr. Hafner, the Borough filed a Motion for Summary Judgment "adjudicating its standing and right to enforce the deed restriction[.]" (Da633). The Gallos joined the Borough's motion. (Da642).

Mr. Hafner opposed both motions for summary judgment and filed a cross-motion for summary judgment seeking dismissal of the Borough. (Da755-872, Da873-904). In the meantime, he also continued discovery. In particular, Mr. Hafner's counsel deposed former attorney Paul Dare,[3] who had drafted the 1985 Deed Restriction and upon whose certification the Gallos had relied on throughout the litigation. (Da659). Mr. Dare's testimony and the documents he produced revealed inconsistences among various drafts of his certification, which had been drafted by the Gallos' counsel. Accordingly, on November 15, 2023, Mr. Hafner filed a motion to compel a deposition of the Gallos' counsel who had drafted the certification and to extend the discovery end date to December 15, 2023. (Da643).

The trial court heard argument on December 1, 2023, and on January 9, 2024, the trial court granted summary judgment in favor of the Gallos and the Borough. (Da925, Da928-29). With respect to the deed restriction, the trial

[3] Mr. Dare was disbarred in 2004. *See In re Dare*, 180 N.J. 114 (2004).

court reprised its reasoning from the Order to Show Cause hearing. In particular, it concluded that "the plain language of the deed restriction" was "clear and unambiguous on its face" and not only "restricts all construction" but also prohibits "shrubbery over 4 feet that impairs a view to the ocean." (Da938-39). Referring to its previous finding, the trial court determined that "to the ocean" means the same thing as "to or toward the ocean." (Da940). Although it opined that it "need not consider extrinsic evidence", the trial court was also "unpersuaded" by Mr. Hafner's position "[e]ven if the Court did look at extrinsic evidence." (Da940-41). That conclusion was based primarily on the trial court's review of online dictionaries, some of which it did not identify. (Da941). The trial court separately held that the doctrine of changed circumstances did not apply, based largely on its interpretation of the language of the restrictive covenant, as well as its unsupported conclusion that dunes are "transient" and "migratory." (Da944). Finally, the trial court denied Mr. Hafner's motion to compel and extend discovery, and it granted the Borough's motion to declare its independent standing to enforce the 1985 Deed Restriction. (Da945-47). Mr. Hafner timely appealed on February 22, 2024. (Da949; *see also* Da955 (amended notice)).

STATEMENT OF FACTS

I. This dispute involves a nearly four-decade old restrictive covenant protecting an "open view to the ocean."

Mr. Hafner owns a beachfront property at 1-107th Street in Stone Harbor, which comprises Lot 10 on Block 107.1. (Da333 ¶ 2; Da755 ¶ 2). His next-door neighbors, the Gallos, own a home one lot inland from Mr. Hafner, at 7-107th Street in Stone Harbor, which comprises Lot 14 on Block 107.1. (*Id.*) The Gallos purchased 7-107th Street on May 28, 2015. (Da335 ¶ 9; Da756 ¶ 9; Da62-64). Mr. Hafner purchased 1-107th Street on October 5, 2018. (Da337 ¶ 14; Da756 ¶ 14). He replaced the house that was then present on the property with a new one that was finished in October 2020. (Da337-38 ¶¶ 14, 17; Da340 ¶ 24; Da756 ¶¶ 14, 17, 24).

This dispute involves the 1985 Deed Restriction, which is contained in a 1985 deed to Mr. Hafner's predecessor in interest. In particular, on November 2, 1985, Michael R. DeCavalcante and Virginia DeCavalcante transferred Lots 9.2, 10, 11.2, and 12.1 on Block 107.1 to a partnership known as "Land Ho." (Da333 ¶ 1; Da755 ¶ 1; Da30). The deed provided that the transfer was:

> UNDER AND SUBJECT to a certain restriction that there shall be no construction of any kind in the rear Southwesterly fifty (50) feet of the premises known as Lots 9.2, 10, 11.2 and 12.1 of Block 107.1 as set forth on a Plan of Subdivision of Block 107.1, Lots 9.2, 10, 11.2, 12.1, 13.2, 14, 15.2, 16, 18, and 20 prepared by Kona-Thomas & Associates dated September 1, 1984

> and filed in the Clerk's Office of Cape May County as Map #2941. This restriction shall apply to all construction, including a swimming pool either above ground or in ground, except an open wood fence with openings of at least three (3) inches between the individual slats, that shall not exceed four (4) feet in height **and shall also prohibit the planting or maintaining of any tree, shrub, bush or other living thing that exceeds four (4) feet in height and does not provide <u>an open view to the ocean</u>** from Lots 11.3, 12.2, 13.2, 14, 15.2, and 16.1 of Block 107.1. This restriction shall run with the land and is specifically imposed for the benefit of Lots 11.3, 12.2, 13.2, 14, 15.2, and 16.1 of Block 107.1, Borough of Stone Harbor Tax Map.

(Da30; Da333 ¶ 3; Da755 ¶ 3) (emphasis added). Although the trial court ultimately granted an injunction measuring the height of Mr. Hafner's trees "from natural ground elevation" (Da926), the 1985 Deed Restriction contains no such specification.[4]

II. The 1985 Deed Restriction was not a condition of the subdivision's approval.

The 1985 Deed Restriction does not appear on a 1984 Preliminary Final Major Subdivision Application submitted by the DeCavalcantes, (Da259-63; Da755 ¶ 4), and the DeCavalcantes' 1985 Final Major Subdivision Application was not produced in discovery (Da755 ¶ 4). The 1984 Planning Board

[4] In fact, the elevation of Mr. Hafner's lot was designed specifically to comply with requirements of runoff regulations. (*See* Da195 ¶ 57; Da505 at 54:22-55:20, 56:12-19; Da510 at 73:25-74:6).

Resolution does not mention the restriction (Da256-57), and the deed restriction is noted only in summary form on the subdivision plat, noting only a "50' area to be deed restricted to prevent construction." (Da349; Da873 ¶ 3). No mention is made of any restriction on trees, shrubbery, or landscaping. Mr. Dare represented the DeCavalcantes in connection with the Planning Board application and also drafted the deed restriction. (Da334 ¶ 7, Da755 ¶ 7; Da355).

The Borough of Stone Harbor Planning Board held a hearing on October 28, 1985 on the subdivision application's final approval. (Da351). The discussion before the Board referenced the deed restriction and noted that it was on the recorded plan. (Da361-62). However, nothing in the discussion indicated that the deed restriction was a prerequisite of approving the subdivision (*id.*), and the Plaintiffs have taken the position that it was included by the DeCavalcantes "voluntarily." (Da334 ¶ 4). Similarly, the Stone Harbor Tax Map references the deed restriction but contains little description of its substance. (Da376) (referencing a "SOUTHWESTERLY 50' 'DEED RESTRICTION' D.B. 1616, PG. 828").

III. The 1985 Deed Restriction protected "an open view to the ocean" that no longer exists.

Mr. Hafner submitted evidence in opposition to the Gallos' Rule to Show Cause, which he expressly referred to in opposing summary judgment,

describing the conditions at the time the deed restriction was drafted in 1985. (Da758 n.1, Da759 n.2). That included the declaration of Brian Murphy, P.E., the Municipal Engineer for the Borough of Stone Harbor from 1993 to 2003. (Da149, Da759 n.2). Through that declaration, Mr. Murphy testified regarding a 2002 beach fill and dune construction project by the Army Corps of Engineers. (Da149-50 ¶ 3-4). Until the 2002 project, "the Borough, like many other coastal communities, utilized a bulkhead and rock revetment system along the ocean front. This system consisted of a wooden bulkhead which was backfilled on the landward side and was abutted by a large rock boulder oceanward." (Da150 ¶ 8). For instance, a 1993 engineering diagram makes clear that "there was no dune in the area." (Da151 ¶ 11). The diagram indicates that in the area "immediately adjacent to" Mr. Hafner's current property, "there were 220 linear feet of bulkhead" and that "there was no dune in this area of Stone Harbor in 1993." (Da151-52 ¶¶ 12-15). Indeed, "[i]f there was a dune in the area during this time, the bulkhead would have been buried under dune sand and vegetation and it would have been impossible to view and inspect the bulkhead . . ." (Da152 ¶ 16).

Mr. Murphy subsequently undertook a 1997 inspection of the bulkhead in the area. (Da153 ¶ 20). A photograph included with the report "clearly" shows "that there is no dune in this area and that the bulkhead and rock

revetment are fully exposed." (Da153 ¶ 22). In addition, aerial photographs of the area from 1987, 2002, 2011, 2014, 2015, 2019, and 2021 demonstrate that there was a bulkhead but no dune in 1987. (Da155-56 ¶¶ 31-35). The 2002 photograph depicts a "young dune" after the 2002 Corps of Engineers Project, and subsequent photos show a more established dune, as evidenced by increased vegetation. (Da156 ¶¶ 35-40). That is also corroborated by a 2006 report of the Stockton College New Jersey Beach Profile Network, which shows the beach profile at 90th Street in 1986 to 2006. (Da158 ¶¶ 49-50).

In addition, testimony before the Planning Board near the time of the deed restriction affirmed that there was an "open view to the ocean" at that time. For instance, former Judge Raymond Batten testified at a July 25, 1983 hearing before the Planning Board that

> Vickie Woll [a neighbor] indicated that they sit in the back, that she and her mother sit in the back yard and they enjoy the breezes and the view. We all do . . .
>
> [W]ith respect to the view . . yes, there would be a de minimis effect upon the ocean view; but quite frankly, we would suggest that back yards are not the only place on that block where ocean views can be obtained. And frankly, because of the size of the lots, ocean views should still be capable of obtaining in that rear yard.

(Da850-51).[5] Other residents at that hearing testified about the existence of a view at the time. (Da842 at 22:15; Da847 at 27:14-22, Da848 at 28:10-23).

IV. The Gallos relied on non-credible evidence of conditions in 1985.

The Gallos' pleadings cited a certification from Mr. Dare relating to his recollection of the purpose of the 1985 Deed Restriction:

> I was directed by the DeCavalcantes to include a Restrictive Covenant to protect and preserve the views in the direction of the ocean from what is now 7-107th Street. . . I thus used the words "to" the ocean rather than "of" the ocean because the intent was to have nothing interfere with a viewscape of the natural environment such as the dunes that then existed.

(Da334 ¶ 7; Da34). Mr. Dare also testified through his certification that "[a]t the time I prepared the Deed, the area in front of [Mr. Hafner's house] is represented by [a] photograph" that was attached to Mr. Dare's certification and certified that "[t]hat is the view the DeCavalcantes wanted to safeguard without interference . . ." (Da34 ¶ 3, Da40). The Gallos' counsel cited Mr. Dare's certification at the Rule to Show Cause hearing, (1T at 32:13-33:2, 56:10-13), including its statement regarding "the dunes that then existed" (1T at 32:20-23).

[5] Judge Batten submitted an affidavit in this case that was inconsistent with his 1983 testimony in that it stated the ocean was not visible from the DeCavalcantes' property in 1983. (Da266).

In discovery, Mr. Dare was deposed about his certification. (Da660). That testimony and related documentary evidence established that prior versions of Mr. Dare's certification were inconsistent with the version that was eventually submitted to the Court. The documentary evidence established that the Gallos' counsel emailed Mr. Dare on August 9, 2019 with a proposed certification, which the Gallos' counsel had drafted. (Da698). The August 9, 2019 certification stated that the deed restriction was intended to preclude in the restricted area:

> "construction of any kind . . . including a swimming pool either above ground or in ground" without regard to any impairment of view of or to the Ocean because my clients wanted to make certain the owners of the contiguous parcel known as 7 107th Street enjoyed the general aesthetics of not having to look at any site improvements in their rear yard (short of low shrubs and an open fence), peace and tranquility, all independent of the preservation of their view of the beach.

(Da699).

Mr. Dare made edits to the draft. Within his signed August 13, 2019 certification, Mr. Dare certified that his former clients "wanted to preserve the free flow of air from the East and what views they had of the Atlantic Ocean and beach." (Da704). This language did not appear in the August 9, 2019 draft certification. (Da699).

A year later, on or about August 31, 2020, the Gallos' counsel emailed Mr. Dare:

> I am re-visiting the Restriction you carefully drafted some time ago. Attached is the Certification you signed last year. Since then, an issue may arise concerning what the word "to" means in defining the intended viewscape. The word "to" is variously defined as being of a directional nature, that is, it is synonymous with the word "towards". So we construe the Restriction as preserving the view "toward the ocean" rather than just "of" the Ocean, such as the beach or, **as since appeared** the dunes.

(Da707) (emphasis added).

The revised certification following that email deleted the language stating that Mr. Dare's clients "wanted to preserve the free flow of air from the East and what views they had of the Atlantic Ocean and beach" and is replaced with

> and what views they had to, that is, towards as distinct from merely of the Ocean. It is for this reason I crafted the deed with the use of the word "to" in referring to the Ocean rather than the word "of" for the viewscape to be preserved was to be toward, that is directional of, the ocean, including but not limited to the beach itself.

(Da708-09).

On January 31, 2023, the Gallos' counsel emailed Mr. Dare stating the certification needed to be revised again. (Da711). Mr. Dare then signed the February 1, 2023 certification which was attached to the Verified Complaint stating for the first time:

> I thus used the words "to the ocean" rather than "from the ocean" because the intent was to have nothing interfere with a viewscape of the natural environment such as the dunes that then existed.

(Da713).

At his deposition, Mr. Dare also admitted that he did not know when the photo referenced in his certification was taken or who took it, and that he knew it was a picture of the back of 1-107th street only because the Gallos' counsel "told me it was." (Da665 at 24:12-14). When asked if "this could be a house that's not even in Stone Harbor" Mr. Dare replied "[i]t could be in Avalon." (Da667 at 29:6-8). Indeed, Mr. Murphy, the engineer, had testified through his certification that the photo, which shows mature dunes with established vegetation, does not depict conditions in 1985 when there was no dune at all. (Da156-57 ¶¶ 41-46). In fact, the photo was taken after Mr. Hafner purchased his home because it depicts a line that he painted on the ground. (Da457 at 25:7-21 (testimony of Frank Gallo); Da787 at 50:20-51:23 (testimony of Amy Gallo); Da187 ¶¶ 12-16 (affidavit of Mr. Hafner)).

ARGUMENT

I. Genuine disputes of material fact precluded summary judgment concerning the effect of changed circumstances on the deed restriction. (Da931-32).

A. Standard of Review

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" *Friedman v. Martinez*, 242 N.J. 449, 472 (2020) (alteration in original) (quoting *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 480 (2016)). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Rios v. Meda Pharm., Inc.*, 247 N.J. 1, 13 (2021) (quoting *Brill*, 142 N.J. at 540).

Appellate courts review a trial court's grant or denial of summary judgment *de novo* and apply the same standard as the trial court. *Samolyk v. Berthe*, 251 N.J. 73, 78 (2022). A trial court's interpretation of a contract is reviewed *de novo*. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018); *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011). "[D]ecisions relating to injunctive relief are normally reviewed for abuse of discretion" but this Court's "review is *de novo* where the disputed issue is a question of law." *Stoney v. Maple Shade Twp.*, 426 N.J. Super. 297, 307 (App. Div. 2012).

B. The trial court misapplied the doctrine of changed circumstances.

Under the doctrine of "changed circumstances," relief from a deed restriction is available where "it has become 'impossible as a practical matter to accomplish the purpose for which' a servitude or restrictive covenant was created." *American Dream at Marlboro, LLC v. Planning Bd. of the Tp. of Marlboro*, 209 N.J. 161, 169 (2012) (quoting *Citizens Voices Ass'n v. Collings Lakes Civic Ass'n*, 396 N.J. Super. 432, 446 (App. Div. 2007) (quoting Restatement (Third) Property: Servitudes § 7:10(1) (2000))); *see also Leasehold Estates, Inc. v. Fulbro Holding Co.*, 47 N.J. Super. 534, 564 (App. Div. 1957) (commenting that equity will allow a court to terminate a restrictive covenant "which can no longer do the land intended to be benefited thereby any good."); *Perelman v. Casiello*, 392 N.J. Super. 412, 423-24 (App. Div.

2007) (reversing grant of summary judgment and remanding for whether consideration of changed circumstances defeated purposes of deed restriction); *Citizens Voices Ass'n*, 396 N.J. Super. at 446 (noting that, on remand, the trial court may "modify the covenants restricting increasing" a maintenance charge "if there were a material change in circumstances").

The trial court rejected the defense of changed circumstances based primarily on its interpretation of the 1985 Deed Restriction. In particular, the trial court concluded that "an open view *of the landscape* to the ocean is the intended purpose of the deed restriction and therefore, a remaining purpose of the restriction is still in effect." (Da944) (emphasis added). "Thus," the trial court found, there were "no changed conditions under the plain meaning of the deed restriction." (*Id.*) However, as described below, the trial court erred both in its conclusion that the 1985 Deed Restriction is unambiguous as the trial court interpreted it and with respect to its ultimate conclusion about the restriction's meaning. If the 1985 Deed Restriction's reference to an "open view to the ocean" is properly interpreted as protecting a view in which the ocean is actually visible, there is no dispute that purpose can no longer be accomplished.

In addition, the trial court found, without citation to evidence, that Mr. Hafner has not demonstrated "undue" hardship to justify terminating the 1985

Deed Restriction. (Da944). The trial court's focus on a lack of "undue" hardship is error, as a matter of law. The main inquiry under the doctrine of changed circumstances is whether "the purpose of the servitude can no longer be accomplished" and, when the doctrine applies, "it is ordinarily clear that the continuance of the servitude would serve no useful purpose and would create unnecessary harm to the owner of the servient estate." *American Dream*, 209 N.J. at 169. However, that is not the standard that the trial court appeared to rely upon. Instead, the trial court found that Mr. Hafner did not demonstrate "undue hardship" or that he "did not receive the benefit of [his] bargain in building a home of [his] choosing." (Da944). That is a more restrictive standard than merely demonstrating that the restrictive covenant creates "unnecessary harm."

C. The trial court erred as a matter of law in holding that the 1985 Deed Restriction unambiguously protects a view merely toward the ocean.

The key issue in this case is the meaning of the 1985 Deed Restriction which, by its terms, "prohibit[s] the planting or maintaining of any tree, shrub, bush or other living thing that exceeds four (4) feet in height and does not provide an open view to the ocean . . ." (Da30). The cornerstone of the trial court's ruling – both in granting preliminary injunctive relief and in its final order – was that the restriction is unambiguous on its face and is intended to

preserve not "an open view to the ocean" in which the ocean is actually visible, but even a view merely *toward* the ocean. (*See* Da940-41). On the basis of that erroneous conclusion, the trial court declined to consider evidence establishing that the purpose of the restriction was, in fact, to preserve "an open view to the ocean" from the property's ground level (which existed at the time), and that the deed restriction is no longer enforceable because that purpose is rendered impossible by sand dunes that have been constructed since. (*See* Da940-43). The trial court's interpretation of the 1985 Deed Restriction was wrong as a matter of law, and the extrinsic evidence that it failed to consider establishes at least a genuine dispute of material fact about what the deed restriction intended to accomplish and whether it remains enforceable.

In construing a restrictive covenant, a court's "primary objective 'is to determine the intent of the parties to the agreement.'" *Bubis v. Hassin*, 184 N.J. 612, 624 (2005) (quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 810 P.2d 27, 28 (Wash. App. 1991)). "Generally, in the context of restrictive covenants, a rule of strict construction should be applied." *Id.* (quoting *Homann v. Torchinsky*, 296 N.J. Super. 326, 335 (App. Div. 1997)). That is consistent with the long-standing principle that "[r]estrictions on the use to which land may be put are not favored in law because they impair

alienability. They are always to be strictly construed, and courts will not aid one person to restrict another in the use of his land unless the right to restrict is made manifest and clear in the restrictive covenant." *Cooper River Plaza East, LLC v. Briad Grp.*, 359 N.J. Super. 518, 526 (App. Div. 2003) (quoting *Bruno v. Hanna*, 63 N.J. Super. 282, 285 (App. Div. 1960)).

It follows that "only a restriction that is clear on its face can be enforced against . . . a stranger to the initial purchase and sale transaction." *Cooper River*, 359 N.J. Super at 526. The rule of strict construction "exists, not only because restrictions impair the public's right to alienate and fully use property, 'but also because restrictions, in the framing of which a subsequent purchaser has had no voice, ought to be so clear that by the acceptance of the deed that declares them he may reasonably be deemed to have understood and acceded to them.'" *Id.* (quoting *Fortesque v. Carroll*, 76 N.J. Eq. 583, 586 (E. & A. 1909)). If "ambiguity remains" after considering "the language of the document itself . . . it cannot be resolved, as would be the case if the initial signatories disputed an ambiguous term, by resort to extrinsic evidence[.]" *Id.* at 527-28. A contrary rule would both violate "principles of contract law" as well as "the central public policy underlying New Jersey's Recording Act: that 'a buyer . . . of real property should be able to discover and evaluate all of the .

. . restrictions on the property' from a review of the public record." *Id.* at 527 (quoting *Aldrich v. Schwartz*, 258 N.J. Super. 300, 307 (App. Div. 1992)).

Deed restrictions are "regarded in New Jersey as a contract" and are to be interpreted "in accordance with the principles of contract interpretation, which include a determination of the intention of the parties as revealed by the language used by them[,]" with the caveat that ambiguous deed restrictions may not be enforced against subsequent purchasers. *Id*. Whether contract language is ambiguous "is a question of law." *Id*. at 528 (quoting *Assisted Living Assocs. of Moorestown, LLC v. Moorestown Twp.*, 31 F. Supp. 2d 389, 398 (D.N.J. 1998)).

"An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations." *Id.* (quoting *Assisted Living*, 31 F. Supp. 2d at 398). Accordingly, in *Cooper River*, this Court held that there was ambiguity in a deed restriction providing that "[n]o structure is to be erected on the premises adjacent to the premises forming the subject matter of this Deed . . . forward of the present building line of the building presently situate on said adjacent premises." *Id.* at 522. This Court agreed that the restriction "as a matter of law . . . created an ambiguity that could not be resolved by reference to any other language in the deed" since it was unclear what "line" it referred to. *Id.* at 598. In other words, the Court's

reasoning illustrates that a deed restriction is ambiguous where it could have multiple meanings and where the intended meaning is not clear from other language in the instrument.

In this case, the language of the 1985 Deed Restriction indicates that its intention is to preserve an "open view to the ocean." (*See* Da30). Based only on its own view of "common sense and attendant circumstances," the trial court concluded that "the restrictive deed is clear on its face and the court need not consider extrinsic evidence." (Da940). It found—without citation to any record evidence—that "[t]he context of the restrictive deed is valuable property by the ocean in scenic Stone Harbor, New Jersey" and reasoned that "[i]t would cut against common sense of the original owners to preserve only a view of the ocean and not the scenic dunes and beachscape that surrounds it." (*Id*.) In drawing that conclusion, the trial court considered no evidence of what the dunes currently look like or what value, if any, that view has. Moreover, the trial court's appeal to "common sense" was misplaced given that a view in which the ocean itself is visible has significant value to a beachfront property. *See, e.g., Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 414 (2013) ("A willing purchaser of beachfront property would obviously value the view and proximity to the ocean.") It is hardly "common sense" that a buyer or renter of

a property advertised as having an "open view to the ocean" would be satisfied with a view of dunes instead.

The trial court's conclusions are not apparent from the language of the deed itself. Instead, the 1985 Deed Restriction only evinces an intent to preserve "an open view to the ocean." (*See* Da30). The trial court's reasoning is predicated on its assumption that the definition of "to the ocean" also includes "toward the ocean" or, perhaps, in the direction of the ocean. (*See* Da940-41, Da936 (trial court concluding that "the restriction was clear in its meaning in that the restriction protects the view 'to or toward the ocean,' rather than protecting the view specifically of the Atlantic Ocean itself.")). At the risk of stating the obvious, "to" and "toward" are different words and have different meanings. That the prepositions have different meanings is evident from the trial court's own statement – it claimed that the deed restriction "protects the view 'to or toward the ocean.'" (Da940). If "to" and "toward" mean the same thing, then it would have been unnecessary to say "to *or toward*." (emphasis added)[6]

[6] When he described the 1985 Deed Restriction at his deposition, even the Borough's representative said it proscribes vegetation that "does not provide an open view *of* the ocean[,]" which is consistent with Mr. Hafner's (and the commonsense) reading of the restriction. (Da727 at 33:13-17).

The only qualifier in the language of the restriction itself is that the protected "view to" the ocean is an "open" view. That supports Mr. Hafner's interpretation, because it is not reasonable to interpret an "open view" as including a view obstructed by dunes. If anything, that important qualifier in the restriction renders Mr. Hafner's interpretation the *only* reasonable one, making it unambiguous in his favor. Instead of recognizing that limitation, however, the trial court improperly broadened the scope of the restriction by holding that it preserves an "open view *of the landscape* to the ocean." (Da944) (emphasis added). Nowhere does the 1985 Deed Restriction reference a view "of the landscape", and the trial court's expansion of its intent violates the well-established principle that deed restrictions are to be strictly construed.

Even if the trial court's interpretation of the 1985 Deed Restriction were reasonable, it is not the only reasonable interpretation, making the restriction at best ambiguous. Accordingly, it was not enforceable against Mr. Hafner at all as a subsequent purchaser, as described above. *See Cooper River*, 359 N.J. Super. at 529. At the very least, the trial court erred by attributing to the deed restriction one of multiple possible reasonable interpretations based only on its own view of "common sense" without consideration of record evidence and without regard for the well-established maxim that restrictive covenants are to be narrowly construed. To the extent the 1985 Deed Restriction is enforceable

as written against Mr. Hafner at all, the trial court should have considered all of the record evidence to determine its meaning and to determine whether changed circumstances have rendered its purpose unattainable. As described in the next section, the trial court failed to do so and therefore failed to recognize that genuine disputes of material fact preclude summary judgment.

D. Extrinsic evidence demonstrates at least a genuine dispute of material fact precluding summary judgment.

Despite its conclusion that the 1985 Deed Restriction is unambiguous, the trial court went on to note that "[e]ven if the Court did look at extrinsic evidence to determine the plain meaning, the Court is unpersuaded by Defendants[']s interpretation of the deed" citing a limited selection of the record evidence that was available to it. (Da941). However, the trial court overlooked important extrinsic evidence that supports Mr. Hafner's interpretation of the deed restriction. In so doing, the trial court failed to apprehend that there are disputes of fact that precluded its grant of summary judgment.[7]

[7] The trial court erred by granting summary judgment as to any aspect of the 1985 Deed Restriction, including its reference to construction. That is because there is at least a genuine dispute of material fact about whether changed circumstances preclude enforcement of any part of the restriction. Indeed, Paul Dare's certification states that protecting the view motivated the prohibition on not only "trees, plants or shrubs over 4 feet in height" but also "the other items set forth in the Restrictive Covenant." (Da34 ¶ 3).

As an initial matter, to the extent the 1985 Deed Restriction is enforceable as written against a subsequent purchaser, the trial court should have considered extrinsic evidence to determine its meaning since the plain language is unclear. The Supreme Court considered a similar question two decades ago in *Bubis v. Kassin*, 184 N.J. 612 (2005), which remains a leading decision on contract interpretation in the real property context. There, the court considered a question similar to the one here – in that case, whether a sand "berm" was precluded by a municipal ordinance and restrictive covenant that prohibited the construction of a "fence" more than four feet high. *Id.* at 616. The Supreme Court ultimately held that the berm qualified as a fence and therefore violated the restrictive covenant and the zoning ordinance. *Id.* Although that resolution was specific to the facts of that case, the Supreme Court's methodology is instructive.

In particular, in *Bubis*, the Supreme Court recognized that "[b]ecause neither the restrictive covenant nor the zoning ordinance defines the term 'fence,' we must rely on other sources in deciding whether this berm is indeed a fence." *Id.* at 620. The Court then went on to consider extrinsic evidence of the text's meaning, including several dictionary definitions, which revealed that "there is no single construct for the word fence." *Id.* at 621. Nevertheless, the Supreme Court determined based on the definitions it reviewed that a fence

is "defined primarily by its function, not by its composition" and concluded that a berm could therefore qualify as a fence. *Id.* The Court did not stop at that general statement but went on to apply its definition of "fence" to the specific berm at issue and concluded that it was precluded by the covenant and ordinance. *Id.* at 622-23.

In other words, unlike the trial court in this case, the Supreme Court in *Bubis* did not rely on its own view of "common sense" but rather specific extrinsic evidence applied to the particular deed restriction at issue. Significantly, the Supreme Court in *Bubis* considered extrinsic evidence even without a prior finding of ambiguity. Moreover, relying on *Bubis*, this Court has held that extrinsic evidence may be "properly admitted to establish the plain and ordinary meaning" of a term, although not "to resolve an ambiguity." *Rabbitt v. Greed*, 2021 N.J. Super. Unpub. LEXIS 606, at *21 (N.J. App. Div. April 12, 2021). As such, even if the trial court were somehow correct that the deed restriction in this case were not ambiguous, it still would have erred by not considering all the relevant extrinsic evidence before it.

Despite that, the trial court selectively considered only certain record evidence that supported the Gallos' interpretation of the deed, and it ignored extrinsic evidence establishing a genuine dispute of material fact. To start, the trial court selected two dictionary definitions of the word "to" that it reasoned

supported its interpretation of the deed restriction. (Da941). It claimed that "[s]imilar directional definitions can be found upon a cursory view of various other dictionary websites" but did not identify what those are. (*Id.*) The trial court also ignored evidence submitted by Mr. Hafner describing what the conditions were in 1985 when the deed restriction was drafted, which tend to show its purpose. That included Mr. Murphy's detailed certification describing how the current dunes, which did not exist in 1985, came to be. (Da149). It also included testimony before the Planning Board in 1983 confirming that an open view to the ocean was available from the properties. (Da850-51).

In addition, in concluding that the doctrine of changed circumstances did not apply, the trial court found that "dunes, by their inherent nature are transient and migratory as evidenced by New Jersey's Coastal Rules at N.J.A.C. 7:7-9.16(e)." (Da944). In so holding, the trial court accepted the Gallos' invitation that it take judicial notice of the "transitory" nature of dunes. However, the condition of sand dunes adjacent to Mr. Hafner's property is not an appropriate topic for judicial notice. *See* N.J.R.E. 201; *RWB Newton Associates v. Gunn*, 224 N.J. Super. 704 (App. Div. 1988) ("The rules regarding judicial notice are designed solely to provide a speedy and efficient means of proving matters which are not in genuine dispute."). The Coastal Rules that the trial court cited provide only that "dunes are a natural

phenomenon" that have been subject to "extensive destruction." N.J.A.C. 7:7-9.16(e). They say nothing about how long it takes to build up or wear down dunes generally, much less the specific ones at issue here. Indeed, Mr. Murphy's certification establishes that the dunes at issue here were developed over a significant period of time as part of a deliberate and significant engineering process. That is in keeping with the Coastal Rules, which specify that "engineered dunes are designed to a specific height, width, slope, and length, in accordance with a dune design template." N.J.A.C. 7:7-9.16(e). At the very least, there is a dispute of fact over just how "transient" and "migratory" the dunes are.[8]

The Gallos attempted to brush aside these factual disputes by stipulating for purposes of their summary judgment motion—but not for any trial—that dunes did not exist in 1985, and the trial court recognized that stipulation. (*See* Da943). In so conceding, the Gallos acknowledge that there has been a change in factual circumstances since the 1985 Deed Restriction. Moreover, their concession does not eliminate a factual dispute that precludes summary judgment. First, despite the Gallos' stipulation, the trial court gave little consideration to the stipulated fact that there were no dunes in 1985 in

[8] Mr. Dare likewise testified that some dunes are natural but some are manmade, such as by the Corps of Engineers. (Da664 at 20:7-10).

interpreting the 1985 Deed Restriction. (*See* Da943-44 (stating in passing that its "interpretation assumes the dunes did not exist at the time of the deed restriction and the Plaintiffs property had a full view of the ocean in 1985")). In particular, the trial court failed to explain how the language of the 1985 Deed Restriction could be unambiguous in light of that important concession.

In addition, Mr. Dare's certification was relevant not just to show whether dunes existed in 1985, but what the expressed intention of his clients was and how the language of the deed restriction effectuated that intent.[9] Although the existence of dunes is relevant to that issue, it is not the same. Mr. Dare's testimony is not limited to establishing the existence of sand dunes in 1985. It also relates to the DeCavalcantes' stated intention in including the 1985 Deed Restriction. As described above, in the August 13, 2019 version of his certification, Mr. Dare stated that a "secondary" purpose of the restriction "was that my former clients wanted to preserve the free flow of air from the

[9] It is unclear whether the trial court considered Mr. Dare's certification in its interpretation of the 1985 Deed Restriction. At argument, the trial court indicated that it would not consider his certification. (4T at 36:2-13; *see also* 1T at 78:4-11). In its opinion, the trial court cited and quoted from Mr. Dare's certification and proceeded to state that it "is not relying upon the testimony given by Paul Dare during the November 8, 2023, deposition." (Da942). To the extent the trial court did rely on Mr. Dare's certification but nevertheless declined to consider his deposition testimony (which calls into question the credibility of that certification), that was an abuse of the trial court's discretion.

East and what views they had of the Atlantic Ocean and beach." (Da704). Given that Mr. Dare has held himself out as knowledgeable about the parties' intent in 1985, his recollection of their intent is relevant to interpret the restriction.

Further, whether or not dunes existed in 1985 does not resolve disputes concerning the transitory nature of dunes in general or the supposed hardship that enforcement of the deed restriction causes to Mr. Hafner, both of which the trial court relied upon in holding that the doctrine of changed circumstances does not apply.

II. The trial court should have permitted limited, additional discovery into the drafting of Mr. Dare's certification. (Da643, Da934)

A. Standard of Review

A trial court's discovery rulings are generally reviewed for abuse of discretion. *See Hollywood Café Diner, Inc. v. Jaffee*, 473 N.J. Super. 210, 216 (App. Div. 2022). However, this Court "review[s] legal determinations based on an interpretation of our court rules de novo." *Id.* at 216 (quoting *Occhifinto v. Olivo Constr. Co., LLC*, 221 N.J. 443, 453 (2015)). "In that regard, '[this Court] appl[ies] the same canons of construction to a court rule that [it] appl[ies] to a statute." *Id.* at 217 (quoting *Cadre v. Proassurance Cas. Co.*, 468 N.J. Super. 246, 263 (App. Div. 2021)).

B. The trial court applied the wrong standard to evaluate the discovery motion.

The trial court's order denying Mr. Hafner's motion to extend discovery was wrong, as a matter of law, because the trial court incorrectly applied an "exceptional circumstances" rather than the more lenient "good cause" standard that this Court has held applicable where a trial date has been set while discovery remains ongoing. Motions for extension of discovery are governed by *Rule* 4:24-1(b), which provides that absent consent, a request to extend discovery is made by motion "made returnable prior to the conclusion of the applicable discovery period." If "good cause is . . . shown, the court shall enter an order extending discovery." *Id.* The rule also provides that "[n]o extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." *Id.*

Despite the text of the Rule, this Court has held that the more lenient "good cause" standard applies to a motion to extend discovery that is filed before the discovery end date where the trial court already fixed a trial date while discovery remained pending. *See Hollywood Café Diner*, 473 N.J. Super. at 219-20. In so concluding, this Court recognized that, as a practical matter, the "good cause" standard could be "render[ed] meaningless" simply by a trial court's decision to set a trial date early in discovery. *Id.* at 218. The trial court also reasoned that applying an "exceptional circumstances" standard in cases

like this would undermine the intention behind *Rule* 4:36-2, which provides that "[t]he court shall send a notice to each party to the action [sixty] days prior to the end of the prescribed discovery period" and that the notice "shall advise that if an extension of the discovery period is required, application therefor must be made prior to the expiration and that if no such application is made, the action shall be deemed ready for trial." It would contradict the intention behind the required notice—which advises parties that they may move for an extension of discovery if necessary—if a trial court's imposition of a trial date could unilaterally impose a more rigorous "exceptional circumstances" standard. In addition, this Court found persuasive Judge Pressler's comments that the 2000 Rule Amendments "were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to 'secure a just determination.'" *Id.* at 220 (quoting *Tucci v. Tropicana Casino & Resort, Inc.*, 364 N.J. Super. 48, 53 (App. Div. 2003)).

Here, the motion to compel was filed on November 15, 2023. (Da643). Pursuant to the Court's June 12, 2023 Supplemental Case Management Order, that was also the last day of discovery. (Da323). However, the trial court had already set a trial date of January 17, 2024 by order entered on August 30, 2023, which was four-and-a-half months before the end of discovery. (Da327). In its opinion, the trial court denied the motion on the basis that Mr. Hafner's

argument "falls short of exceptional circumstances," identifying that as the applicable standard on the basis of the text of *Rule* 4:24-1. (945a). Under this Court's teaching in *Hollywood Café Diner*, that was error. The trial court should have applied the "good cause" standard, which this Court has recognized "is 'more lenient' and 'flexible . . .' without a fixed or definite meaning." *See Hollywood Café Diner*, 473 N.J. Super. at 217. The limited additional discovery sought by Mr. Hafner was justified under that standard given its importance at a future trial, the fact that its necessity became evident only because of Mr. Dare's deposition near the end of discovery, its limited scope and the fact that it would not delay trial, and the lack of prejudice to the Gallos, as described more in the next section.

The Gallos may argue that the *Hollywood Café* rule should not apply here because Mr. Hafner filed his motion on the last day of discovery, so it was not "returnable" by the discovery end date. *See Rule* 4:24-1(c). In two unpublished decisions, this Court declined to apply the *Hollywood Café* rule to motions to extend discovery that were not returnable before the discovery end date. *See Cordero v. Bogopa W. N.Y.*, 2023 N.J. Super Unpub. LEXIS 1111 (N.J. App. Div. 2023); *Zengel v. Cnty. of Middlesex*, 2023 N.J. Super. Unpub. LEXIS 521 (N.J. App. Div. 2023). As unpublished decisions, neither has precedential value, and in this case, the *Hollywood Café* rule should apply for

several reasons. *See R.* 1:36-3. First, there was good reason that Mr. Hafner could only file his discovery motion when he did. Its necessity was only evident upon taking Mr. Dare's deposition on November 8, 2023. By that time, it would have been impossible to file a motion "returnable" by the end of discovery on November 15, 2023. Second, the docket does not reflect that the trial court sent a 60-day reminder of the discovery end date, which is required under *Rule* 4:36-2 and which this Court recognized as important in *Hollywood Café.* Moreover, the case management order that provided that November 15, 2023 was the discovery end date simultaneously provided that "[d]epositions are to be completed within [180] days", i.e., by December 9, 2023, and that expert depositions were to be completed "during the month of November 2023", making it unclear whether discovery was even complete for all purposes on November 15, 2023. (*See* Da323).

C. The trial court erred by denying Mr. Hafner's motion for additional discovery.

If this case is remanded, this Court should extend discovery for the limited purpose of allowing a deposition of the Gallos' counsel regarding the drafting of Mr. Dare's affidavit. The trial court denied the motion to compel on the basis of its conclusion that "[t]he language of the restrictive covenant is clear on its face based on common sense and attendant circumstances" and because "[w]hether or not dunes existed in 1985 does not change the Court[']s

analysis that the purpose of the restrictive covenant was meant to include landscape leading to the ocean." (Da945-46). However, as described above, the trial court erred in finding that the deed restriction is unambiguous as the trial court interpreted it.

The Gallos have relied upon Mr. Dare's certification to establish the intent of the previous owners of Mr. Hafner's property in deciding to include the 1985 Deed Restriction, and Mr. Dare is in a unique position as scrivener to offer such testimony. He will presumably be a key witness for the Gallos at trial. That is evident from the fact that the Gallos have refused to stipulate for purpose of trial that no dunes existed in 1985, and have limited that concession to their motion for summary judgment. Indeed, Mr. Hafner has previously offered to drop his request for a deposition if the Gallos would stipulate for all purposes that no dunes were present in 1985 and withdraw Mr. Dare's certification, but the Gallos have been unwilling to do so. (4T at 48:15-18, 4T at 96:11-15).

The unique circumstances of this case justify taking counsel's deposition in relation to Mr. Dare's certification. This Court has held that several factors are relevant to "evaluat[e] the propriety and need for the deposition of the opposing attorney[:]"

> (1) the relative quality of the information purportedly in the attorney's knowledge, and the extent to which the

> proponent of the deposition can demonstrate the attorney possesses such information
>
> (2) the availability of the information from other sources that are less intrusive to the adversarial process, i.e., the extent to which all other reasonable alternatives have been pursued to no avail
>
> (3) the extent to which the deposition may invade work product immunity or attorney-client privilege; and
>
> (4) the possible harm to the party's representational rights by its attorney if called upon to give deposition testimony[.]

Kerr v. Able Sanitary & Envt'l Servs., Inc., 295 N.J. Super. 147, 159 (App. Div. 1996).

The first and second elements, relating to the quality and availability of the information, are satisfied. If this case proceeds to trial, the Gallos' stipulation that view-obstructing dunes did not exist in 1985 will no longer apply. Accordingly, what the view looked like in 1985 will be a central issue. The testimony of the Gallos' counsel will be important for two reasons. First, his role in developing Mr. Dare's certification is directly related to the credibility of Mr. Dare's testimony. Second, his statement "as since appeared the dunes" indicates that he may have factual information that Mr. Hafner is entitled to probe at trial. (*See* Da707).

Given Mr. Dare's testimony, it is insufficient to observe, as the trial court did, that "Defense counsel has taken testimony of Paul Dare" and assume

that "any further information from Plaintiffs' counsel regarding Dare will prove immaterial." (Da945). Although Mr. Dare testified that he reviewed and made changes to various drafts of his certification, there is no dispute that they were initially authored by the Gallos' counsel, including key language relating to the purpose of the deed restriction. (Da698, Da707, Da711).

It was the Gallos' counsel who deleted language that Mr. Dare had added to a version of the certification providing that the DeCavalcantes "wanted to preserve the free flow of air from the East and what views they had of the Atlantic Ocean and beach" and replaced it with language referring to a "viewscape" that "includ[ed] but [was] not limited to the beach itself." (*See* Da707; *Cf.* Da704 *with* Da709). It was also the Gallos' counsel who wrote, in an explanatory email to Mr. Dare, that "we construe the Restriction as preserving the view 'toward the ocean' rather than just 'of' the Ocean, such as the beach or, *as since appeared the dunes.*" (Da707) (emphasis added). If the dunes have, in fact, "since appeared," that is evidence of a significant change of circumstance that will be highly relevant at trial. Moreover, that statement contradicts the final version of the certification, which refers to "the dunes that then existed." (Da34). The Gallos cannot deny the significance of Mr. Dare's testimony in his certifications, given their reliance on it in this litigation and their counsel's repeated suggestions that it be revised.

With respect to the third element, a deposition of the Gallos' counsel could proceed without invading attorney client privilege or work product protection. A deposition would focus on drafts of Mr. Dare's certification that were drafted by the Gallos' counsel as well as communications between the Gallos' counsel and Mr. Dare. Those documents and communications are already part of the discovery record, and the Gallos did not object to Mr. Dare's production or testimony about them. To the extent that the Gallos' counsel believes that any particular questions at a deposition invade the privilege, he may assert an appropriate objection at that time. Finally, given the limited scope of a deposition, it would not "affect attorney preparation or participation on behalf of the client." *Kerr*, 295 N.J. Super. at 159.

III. The Borough lacks standing to enforce the 1985 Deed Restriction. (Da882, Da933)

A. Standard of Review

A party seeking to enforce a deed restriction has the burden of proving that it is the intended beneficiary of the covenant. *See Roehrs v. Lee*, 178 N.J. Super. 399, 405 (App. Div. 1981). The party seeking to enforce a deed restriction must demonstrate "that the covenant was intended for his benefit and that defendants were aware of its existence and of its purpose to benefit" the party seeking to enforce the restriction. *See id.* Here, the express terms of the 1985 Deed Restriction state that it is made for the benefit of particular lots

in the subdivision. The trial court erred in finding that the 1985 Deed Restriction also confers that benefit on the general public and the Borough because a restriction for the public benefit was not a condition to the subdivision approval, and the general public did not and cannot rely on the restriction. As such, the trial court erred in denying Mr. Hafner's motion to dismiss the borough, or, at the very least, in granting the Borough's motion to declare its standing.

B. A private deed restriction noted on a plan of subdivision does not confer an interest in the public or standing on the Borough.

The trial court erred as a matter of law in concluding that the Borough has standing to enforce the 1985 Deed Restriction, reasoning that "when a planning board grants a major subdivision approval on a number of conditions placed into a deed restriction, the restriction creates a right in the public." (*See* Da946) (citing *Soussa v. Denville Township Planning Board*, 238 N.J. Super. 66, 68 (App. Div. 1990)).

First, the trial court misplaced its reliance on *Soussa*. In *Soussa*, the plaintiffs submitted a major subdivision approval to the Township Planning Board. By resolution, the Board granted approval of the subdivision, subject to the condition that the remaining land owned by the plaintiffs be unavailable for future subdivision and that the plaintiffs place restrictive covenants in the

deeds limiting construction so "'that there would be adequate protection *afforded the township and the general public*.'" *Soussa*, 238 N.J. Super. at 68 (emphasis added). The court therefore held that the "public . . . was thus the intended third party beneficiary of the covenant in the deed and is not only entitled to maintain an action to enforce it but is a necessary party to any action to lift the restriction." *Id.* at 69. In other words, because the resolution granting approval specifically provided as a condition to approval that the owner record a restrictive covenant to provide "adequate protection" to the general public, the public was a third party beneficiary of the deed restriction.[10]

Here, the resolution granting subdivision approval was not conditioned on a similar requirement that the 1985 Deed Restriction be recorded for the benefit of the general public. (*See* Da257 (October 22, 1984 Resolution No. 50-1984 of the Borough of Stone Harbor Planning Board describing conditions

[10] The *Soussa* court stated that in an action instituted in the Chancery Division to remove the restriction, "[t]he pivotal consideration for the court will be to determine exactly what benefit the covenant was meant to bestow on the public and whether it would be equitable to enforce the covenant in light of present day realities." *Soussa*, N.J. Super at 68. Here, the trial court did not determine what benefit the 1985 Deed Restriction was meant to bestow on "the public." The covenant itself makes clear the benefit is for the specific lots enumerated in the covenant; it is clear the covenant does not provide any benefit to the general public.

for preliminary and phased final subdivision approval); Da731-32 at 52:23-54:23 (Borough representative testifying that resolution did not reference the 1985 Deed Restriction)). The resolution did not contain a condition that a deed restriction be recorded. Nor did the Planning Board's October 28, 1985 resolution approving Phase 2 of the final subdivision contain any such requirement. (*See* Da367). Neither does the restriction itself refer to Planning Board approval, as was the case in *Soussa*.

At no point did the Planning Board condition approval of the subdivision on the recording of a deed restriction to benefit the public. Nor does the 1985 Deed Restriction mention the general public as its beneficiary. Rather, the deed restriction recites that it "is specifically imposed for the benefit of Lots 11.3, 12.2, 13.2, 14, 15.2, and 16.1 of Block 107.1, Borough of Stone Harbor Tax Map." (Da30). Therefore, the holding in *Soussa* is distinguishable, and the general rule that deed restrictions are private contracts between the benefitted and burdened properties applies. *See Perelman*, 392 N.J. Super. at 419; *see also Pumo v. Mayor & Council Ft. Lee*, 4. N.J. Misc. 663 (1926).

Indeed, the transcript from the 1985 Hearing on the final subdivision approval for Phase II of development makes clear the private nature of the deed restriction:

> A VOICE: We don't get involved in deed restriction. That's not our

	requirement, that's the requirement of the present owner.
A VOICE:	Yes, deed restriction relative to this—
A VOICE:	50 foot area—
A VOICE:	—50 foot area to be—to prohibit construction.
A VOICE:	That's not a planning board requirement, that's private.
MR. DARE:	It was deemed approved with that on it. It passed.

(Da361). This discussion between members of the Planning Board clearly establishes that the deed restriction is private and the requirement of the present owner. At the very least, when viewed in the light most favorable to the non-moving party, this discussion creates an inference that the deed restriction was not meant to be, and indeed was not, a condition of approval. *See Brill*, 142 N.J. at 540; *see also Friedman*, 242 N.J. at 472.

Additionally, the original subdivision was approved by right, as established in the resolution approving the subdivision, which states "the proposed new lots comply with the Borough of Stone Harbor Zoning and Subdivision Ordinances." (Da257 ¶ 9). Under the Municipal Land Use Law (the "MLUL"), "[t]he planning board *shall*, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the

subdivision." N.J.S.A. 40:55D-48(b) (emphasis added). The planning board therefore did not have discretion to approve or disapprove the application—it was approved because it complied with the ordinance.

Nevertheless, the trial court held that "by noting the deed restriction in the Plat that formed the basis of the Subdivision Application and then recording the Plat, a property right has been created and relied upon by surrounding property owners." (Da947). This is so, according to the trial court, because "the surrounding property owners have been notified and relied on the contents of the applications." (*Id*.) That conclusion disregards the express terms of the 1985 Deed Restriction, which specifies the lots that are benefitted by the restriction, and effectively creates an unintended property right for members of the public that it assumes were notified of the 1985 hearing.

In fact, being notified of a hearing does not entitle property owners to the benefits of a deed restriction. Section 40:55D-12 of the MLUL requires that any property owner within 200 feet of the subject property of an application must be notified of a hearing. N.J.S.A. 40:55D-12(b). However, such notification does not automatically make the surrounding property owners "interested parties" for the purposes of challenging an approval of the board. *See Cherokee LCP Land, LLC v. City of Linden Planning Board*, 234 N.J. 403, 419 (2018). Such notification is also ineffective to confer the benefits of a

deed restriction on surrounding property owners because subsequent purchasers of the servient estate would lack notice of their standing. In this case, the twenty surrounding property owners were only mentioned in the board meeting minutes. Those meeting minutes are not recorded in any document and do not appear in the chain of title and therefore cannot bind an innocent purchaser. *See Cooper River Plaza*, 359 N.J. Super. at 527-28 (quoting *Aldrich v. Schwartz*, 258 N.J. Super. 300, 308 (App. Div. 1992)). Moreover, even if the twenty surrounding property owners in 1985 somehow obtained standing to enforce the 1985 Deed Restriction, that would not confer such a right on the general public. The trial court cited no precedent to support that leap in its reasoning, which is unsupported by the law.

Additionally, the trial court erred by relying upon the opinion testimony included in the certification of Arthur Ponzio, a "licensed land surveyor and professional planner" who was not certified as an expert witness and who did not claim to have any personal knowledge of the planning board's approval in this case. (Da946). "Except as otherwise provided by Rule 703 (bases of opinion testimony by experts), a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *State v. Hyman*, 451 N.J. Super. 429, 442 (App. Div. 2017) (*quoting* N.J.R.E. 602); *see also* N.J.R.E. 701(a) (requiring

lay opinion be based on witness' perception); *see McCarter & English, LLP v. Moerae Matrix, Inc*., 2021 WL 3160438, *7 n.13 (App. Div. July 27, 2021) (unpublished opinion).

Here, the certification of Arthur Ponzio was offered to prove the ultimate legal conclusion that the deed restriction was a condition to the subdivision approval. (*See* Da264-65). Mr. Ponzio claims no personal knowledge of the subdivision approval; rather the trial court based its reliance on the certification because of Mr. Ponzio's history of "reviewing thousands of land surveys and subdivision plats[.]" (Da946). Mr. Ponzio's certification offers a general statement of the law based upon his experience as a land surveyor. His opinion about the intention of the Planning Board in this case is speculation and improper opinion from a lay witness without any personal knowledge. Such an opinion is an impermissible expert opinion.

C. The Municipal Land Use Law does not confer standing on a municipality in an action to enforce a private deed restriction.

The trial court also incorrectly held that the Borough has standing because N.J.S.A. 40:55D-18 requires the Borough to enforce rights of the public. However, the MLUL does not confer standing on a municipality to enforce a deed restriction that is noted on a subdivision plan. *See* N.J.S.A. 40:55D-18 (providing that "[t]he governing body of a municipality shall enforce *this act and any ordinance or regulation made and adopted*

hereunder.") (emphasis added). This Court has previously stated that it "do[es] not consider a site plan approval as the equivalent of 'any ordinance or other regulation.'" *River Vale Planning Bd. v. E & R Office Interiors, Inc*., 241 N.J. Super. 391, 399 (App. Div. 1990). Nor is a subdivision approval an ordinance or regulation. If the legislature intended to include subdivision and site plan approvals as the subject of this enforcement power, it would have so provided.

Moreover, the statute specifically provides that a governing body may enforce the act, ordinances, and regulations by "requir[ing] the issuance of specified permits, certificates or authorizations as a condition precedent" to certain construction, occupancies, and subdivisions. N.J.S.A. 40:55D-18. It imposes no right or obligation on a municipality to enforce property rights of the public through civil litigation. If the statute imposed such an obligation on municipalities, the specific enforcement mechanism that it does contain would be superfluous. *See* N.J.S.A. 1:1-1 (statutes are to be read giving full effect to all their parts); *Tagmire v. Atlantic City*, 35 N.J. Super. 11, 20 (App. Div. 1995); *Macysyn v. Hensler*, 329 N.J. Super. 476, 485 (App. Div. 2000).

CONCLUSION

For the above reasons, this Court should: (1) Vacate the trial court's Order to the extent it granted summary judgment in favor of the Gallos, enjoined Mr. Hafner, and dismissed Mr. Hafner's counterclaim; (2) Reverse

the trial court's Order to the extent it denied Mr. Hafner's motion to extend discovery; declared that the Borough has standing to enforce the 1985 Deed Restriction; and denied Mr. Hafner's motion to dismiss the Amended Complaint as to the Borough; and (3) Remand for further proceedings consistent with its opinion.

Respectfully submitted,

August 26, 2024

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FRANK J. GALLO and AMY M. GALLO,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiffs-Respondents,	**DOCKET NO. A-1843-23**
v.	**CIVIL ACTION**
JOHN A. HAFNER,	**On Appeal From:**
Defendant-Appellant,	**CAPE MAY COUNTY CHANCERY DIVISION**
and	**Docket No. CPM-C-6-23**
BOROUGH OF STONE HARBOR,	**Sat Below: Hon. Michael Blee, A.J.S.C.**
Defendant-Respondent	

BRIEF OF PLAINTIFFS-RESPONDENTS, FRANK J. GALLO and AMY M. GALLO

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PRELIMINARY STATEMENT

Following Plaintiffs' successful, post-discovery summary judgment motion in this action instituted against their contiguous oceanfront neighbor, Defendant appeals from the trial court's enforcement of a plainly worded, recorded and subdivision-imposed deed restriction.

Within a 50-foot portion of the Defendant's rear yard of his newly completed, restriction-compliant home, the first portion of the deed restriction twice prohibits "construction of any kind" and "all construction"—regardless of height, view impairment or other consequence—evinced by the specific banning of even an in-ground pool. Dichotomously, the restriction secondly forbids shrubbery over 4 feet in height that impairs Plaintiffs' "**open** view **to** the ocean," which, judged by the surrounding circumstances, commonsense, and definition, includes the beachscape, and not just an open view only "**of**" the ocean alone.

Proclaiming himself to be "a top financial advisor in the United States", Defendant acknowledges his pre-purchase legal representation, close study of the restriction, care-free assumption of risk, demolition of his restriction-compliant house, construction of a new, likewise deed restriction-compliant home, and his utter lack of any hardship, indeed, his functional use and love for the restricted area literally as "the nicest rear yard on the island".

While Defendant advances collateral arguments, such as the judge's alleged error in denying his untimely, ill-purposed Motion to extend discovery to take Plaintiffs' counsel's deposition, his main contentions that follow render them academic.

First, despite the deed restriction's unconditional, dual prohibitions against any and all construction, no matter the consequence, Defendant contorts the meaning as precluding construction only if it is over 4-feet high and impairs Plaintiffs' ground level, rear-yard, open view of the ocean alone, notwithstanding Plaintiffs' continued picturesque beachscape view with its natural plantings and wildlife.

Next, Defendant challenges the trial judge's interpretation of the deed restriction's second, quite different and independent limitation imposed upon shrubbery, once again alleging this portion of the restriction intends only the view preservation of the ocean alone, and not, as well, the safeguarding of Plaintiffs' beachscape views. Based upon this repeated faulty premise, Defendant asserts that since a ground-level, rear-yard view of the ocean that existed when the restriction was created—an allegation Plaintiffs have assumed only for purposes of summary judgment—"changed conditions" bar enforcement because a ground-level, rear-yard view of the ocean itself, as

distinct from Plaintiffs' continued view of the beachscape and wildlife, no longer exists due to the presence of transient dunes.

Finally, Defendant contends Stone Harbor lacks standing despite the deed restriction having been voluntarily proposed by one of Defendant's predecessors as part of a major subdivision Application that was noticed to and relied upon by 21 property owners, stated to be a subdivision-imposed requirement both by the predecessor's and the Defendant's predecessors' attorneys, then recorded and noted on the Borough's tax map.

Unhinged from his numerous, unsuccessful profit-motivated attempts to buy his way out of the deed restriction, Defendant's appeal is deserving of the retort in the classic Rolling Stones' song: "You can't always get what you want".

PROCEDURAL HISTORY

Plaintiffs join in Defendant's recitation of the procedural history save for his inaccurate factual allegations that otherwise have no place in a procedural history. **R**. 2:6-2(a)(4). However, because Defendant's procedural history is also incomplete, we add the following omitted pleadings and Orders.

An April 13, 2023 Order set a September 30, 2023 discovery end-date and a December 11, 2023 trial date. (Da280-82). A June 12, 2023, Supplemental Case Management Order extended the discovery end-date until November 15

2023. (Da323). On March 23, 2023 Stone Harbor filed an opposed Motion to permit its inspection of the Defendant's Restricted area that was granted on June 12, 2023. (Da324-25). A June 20, 2023 Order, without prejudice, denied Defendant's April 3, 2023 Motion to dismiss the Borough as a party for want of standing. (Da326). An August 30, 2023 Management Order extended the December 11, 2023 trial date to January 17, 2024. (Da329). An August 31, 2023 Order denied Defendant's June 27, 2023 Motion to reconsider the June 7, 2023 Order granting injunctive relief and, without prejudice, denied Plaintiffs' July 3, 2023 Cross-Motion to amend and expand the June 7, 2023 Order. (Pa54). Finally, on September 29, 2023, Plaintiffs filed a Motion to compel the deposition attendance of, and to set a contempt hearing for, John Vizzard ("Vizzard") (Pa2), Defendant's close friend and realtor, that resulted in a November 13, 2023 Order, holding, in part, that Vizzard had lied to the Court and counsel about his inability to attend. (Pa54)

STATEMENT OF FACTS

Following their October 28, 1985 final major subdivision approval, on November 2, 1985, Michael R. and Virginia DeCavalcante (the "DeCavalcantes") conveyed Stone Harbor Lots 9.2, 10, 11.2 and 12.1 on Block 107.1 (the "DeCavalcante Lots") to "LAND HO, a partnership" ("Land Ho").

(Da30). The DeCavalcante Lots encompassed what is now Defendant, John A. Hafner Jr.'s ("Hafner" or the "Defendant") oceanfront lot known as 1-107th Street (the "Hafner Property") together with what is now Plaintiffs, Frank J. and Amy M. Gallos' (the "Gallos" or "Plaintiffs"), lot known as 7-107th Street (the "Gallos' Property") located to the rear of, and contiguous with, Hafner's Property. (Da424-3;66-68;Pa60-62).

The DeCavalcantes' recorded Deed to Land Ho (the "DeCavalcantes' Deed") contains the following restrictive covenant:

> **"[T]here shall be no construction of any kind in the rear Southwesterly fifty (50) feet of the premises** known as Lots 9.2, 10, 11.2 and 12.1 of Block 107.1 **as set forth on a Plan of Subdivision** of Block 107.1, Lots 9.2, 10, 11.2, 12.1, 13.2, 14, 15.2, 16, 18 and 20, **prepared by Kona-Thomas & Associates dated September 1, 1984** and filed in the Clerk's Office of Cape May County as Map #2941. **This restriction shall apply to all construction, including a swimming pool either above ground or in ground**, except an open wood fence with openings of at least three (3) inches between the individual slats, that shall not exceed four (4) feet in height **and shall also prohibit the planting or maintaining of any tree, shrub, bush or other living thing that exceeds four (4) feet in height and does not provide an open view to the ocean from** Lots 11.3, 12.2, 13.2, 14, 15.2 and 16.1 of Block 107.1. This restriction **shall run with the land** and is specifically imposed for the benefit of Lots 11.3, 12.2, 13.2, 14, 15.2 and 16.1 of Block 107.1,

> Borough of Stone Harbor Tax Map. (the "Restriction") [emphasis added] (Da30)

The reference in the DeCavalcantes' Deed to the Restriction imposed upon Lots 9.2, 10, 11.2 and 12.1 on Block 107.1 now collectively compose the Hafner Property known as 1-107th Street, while the benefits imposed by the Restriction upon Lots 11.3, 12.2, 13.2, 14, 15.2 and 16.1 on Block 107.1 now collectively compose the Gallos' Property known as 7-107th Street. (Da42-43;375)

Hafner's and the Gallos' contiguous, back-to-back Properties respectively have frontage of 60 and 70 feet along 107th Street and an identical depth of 125 feet running north to south (Da90-91). The Restriction covers the rear or most southerly 50-foot portion of Hafner's 125 feet of beach frontage that precisely aligns with the Gallos' 50-foot rear yard, in-ground pool and lounging area that affords them the Restriction's scenic benefits Hafner seeks to destroy. (Pa97-98;Da315)

The genesis of the Restriction is a 1984 major subdivision Application, jointly filed by the DeCavalcantes and their then contract-buyer, Land Ho, resulting in an October 22, 1984 Borough Planning Board Resolution #50-1984 granting preliminary major subdivision approval, Notice of which was sent to 21 surrounding property owners. (Da256-257;261). The Application voluntarily

proposed, and the Board approved, the September 1, 1984 Kona-Thomas & Associates' Plan (the "Kona-Thomas Plan") shortly thereafter referred to in the DeCavalcantes' Deed. (Da256)

While no record exists of the preliminary hearing, at the October 22, 1985 final major subdivision approval hearing a question was raised regarding whether the Restriction was personal or, instead, a public or subdivision-imposed requirement. In response—and sadly missing from Defendant's brief—a critical portion of the colloquy between the Board's and the DeCavalcantes' attorneys makes clear **both** agreed the Restriction was subdivision-imposed. (Da361). Following the Board's approval, the approved Kona-Thomas Plan was recorded, and the location of the Restriction placed on the Borough's tax map where it remains. (Da376). Notably, the DeCavalcantes' and Land Ho's subdivision Application, presented by attorney, Paul Dare ("Dare"), who also prepared the DeCavalcantes' Deed, came on the heels of an earlier, July 25, 1983, unsuccessful subdivision Application presented by then attorney (later Superior Court Judge), Raymond Batten ("Batten"). That 1983 Application did not propose any deed restriction and was riddled with public objections due to loss of views although from another block and locations other than along the Gallos' and Hafner's 107th Street. (Da893-95;842-844;846)

On May 28, 2015, induced by the obvious benefits of the Restriction that was incorporated, word-for-word, in their deed, the Gallos purchased their home.(Da64). At the time of their purchase, the rear 50 feet of what now is the Hafner Property was Restriction-compliant—barren and filled only with pea stone and grasses less than 4 feet in height as it also was at the time of Hafner's purchase. (Pa97-98;Da310;312-313;315;547-558)

A college graduate, Hafner not only touts himself as "a top financial advisor in the United States" but, as well, "one of fifty 'Wealth Partners' at J.P. Morgan, servicing the ultra-high net worth populations". (Da185;495). **Before** signing the August 9, 2018 attorney-prepared agreement of sale, Hafner unsuccessfully attempted to have his purchase contingent upon his ability to rid himself of the Restriction. (Pa79). The executed agreement excused Hafner's performance if any recorded agreement "unreasonably limit[ed] the normal use of the property" (Pa74) which Hafner never contended was the case. Hafner not only "absolutely" knew about but about but "researched" the Restriction, knew the height of the dunes impaired the Gallos' ground-level, rear-yard view of the ocean but not the beach landscape, tried unsuccessfully to convince Mr. Gallo to terminate or modify it, and consulted with an architect to determine what he could build, but in the end did not care about the Restriction because he

determined he could build to the maximum size zoning permitted, even with a pool and a built-in cabana. (Da549;495-498;554)

With the use of his close friend and realtor Vizzard (Da559), and with the aid of his legal counsel, fully aware of the Restriction, Hafner closed title on October 5, 2018, paying $5,300,000.00 for a house he intended to demolish. (Da82-83;496;499)

Following closing, Hafner demolished the existing home and spent $3,127,000.00 to build a new, Restriction-compliant house and swimming pool, for a total investment of at least $8,127,000.00. (Da620;557). Evincing the subdivision-imposed nature of the Restriction, Hafner's architectural plans and construction permit both recited the Restriction word-for-word. (Da383). Even Hafner's general contractor instructed the landscaper to comply with the Restriction. (Da249)

After closing title but before demolishing his home, Hafner again unsuccessfully attempted to have the Gallos modify the Restriction, on this occasion by meeting with Mr. Gallo in Philadelphia (Da508). Then, on March 6, 2019, through Hafner's Philadelphia attorney, Hafner offered the Gallos $75,000.00 if, instead of having his in-ground pool located under an upper deck, he could have it located within the area of the Restriction. Hafner alternatively

offered $150,000.00 if he could have both the pool and a cabana there. (Da93-94;500-01). Not willing to sell at any price, the Gallos rejected both offers. Despite Hafner's counsel's April 2, 2019 email sent to the Gallos that acknowledged Hafner's understanding the Gallos would not change the Restriction "in any way for any price" (Da98;501), Hafner relentlessly continued to exert the following unsuccessful efforts:

- On May 1, 2019, Hafner offered the Gallos $300,000.00 to have a pool and $400,000.00 for a pool and cabana in the Restricted area, and $600,000.00 for cancellation of the Restriction. (Da;100;501)
- On May 3, 2019, Hafner sent the Gallos appraisals of their home, valued with and without Restriction, in still a further effort to change their minds. (Da502)
- At 8:20 pm on a Saturday evening, July 30, 2022, after his home was almost completed, while socializing with Vizzard, Hafner told Vizzard to text Stephan Frame, a real estate broker, to see if Hafner could buy the Gallos' home. (Da502;406-09). The Gallos steadfastly declined all offers to sell. (Da406-409)

During construction, Hafner placed footings in the Restricted area which, in acknowledgment of the subdivision-imposed nature of the Restriction, he removed at the direction of Stone Harbor's zoning officer. (Da511)

Shortly before his new home was completed in or about October 2022, unwilling to accept the Gallos' refusals to modify or terminate the Restriction, or sell their home, Hafner—supposedly not for privacy purposes (Da425;549)—evasively created a 2-foot-high berm in the area of the Restriction on top of which he planted six (6) wavy leaf Japanese Privet trees, noted to be the type of trees to block views by forming a fence. (Pa99-101;206). Although compliant when planted, by November 23, 2022 the Gallos' surveyor, Paul Koelling ("Koelling"), prepared a sketch plat and took photographs that illustrated the Gallos' open view impairment of the beachscape due to tree height of 8 feet from natural elevation. (Pa66). Koelling's later, February 7, 2023 photographs and measurements, disclosed one of the 6 trees had grown to a height of 9 feet. (Pa68). When the Gallos' pleas for Hafner to simply prune the trees fell on deaf ears, provoked by Hafner's counsel's invitation to sue (Da123), on February 22, 2023 the Gallos filed a Verified Complaint and Order to Show Cause followed by a March 2, 2023 First Amendment adding Stone Harbor as a party. (Da1;Pa83)

Exhibit "W" to both Complaints contained color photographs of Hafner's trees impairing the Gallos' open view of the beachscape. (Pa99-101;Da125-130). In addition to their submission of an expert report of renowned coastal scientist, Dr. Stewart Farrell, establishing that in 1984 a view of the ocean did not exist from what is now the Gallos' rear yard (Da46), the Gallos' submissions included (i) Dare's Certification reciting the DeCalvantes' direction to him in preparing the Restriction that he "protect and preserve the views [from the Gallos' rear yard] in the direction of the ocean" which was to include "a viewscape of the natural environment such as the dunes that then existed", (Da34); (ii) Koellings' Certification regarding his findings (Da242); (iii) a flash drive demonstrating the spiteful nature of the Privet trees Hafner planted (Pa206); (iv) Batten's Certification recalling that in mid-1983 he was unable see the ocean standing in the rear yard of what is now the Gallos' Property (Da266); and (v) surveyor and planner Arthur Ponzio's ("Ponzio") Certification establishing the subdivision-imposed nature of the Restriction. (Da264).

In defense of the Order to Show Cause, Hafner signed two Certifications, neither one of which disputed Ponzio's Certification or contained an iota of evidence disputing the substantive inaccuracy of Koelling's findings regarding the height or impact of his six (6) trees, failing even to submit his own

photographs or measurements. (Da185). Instead, Hafner's Certification mainly focused only upon whether a view of the ocean existed in 1984.

Aware of Hafner's video home surveillance cameras, in defense of Hafner's allegation that Koelling had trespassed to take his photographs and measurements, on March 22, 2023, the Gallos' counsel forwarded Hafner's counsel notice—that would be ignored—requesting the preservation of "all evidence related to Plaintiffs' claims...including but not limited to...video recordings..." (the "Spoilation Notice"). (Pa80)

The June 7, 2023 Order

Convinced by the undisputed measurements and photographs illustrating the impairment of Hafner's' trees upon the Gallos' open beachscape views, in a June 7, 2023 Bench decision, Assignment Judge Michael J. Blee, adhering to a **Crowe v. DeGoia**, 90 N.J. 126 (1982) analysis, entered a preliminary, mandatory injunction compelling Hafner to merely prune—not remove—the 6 trees to a height of no more than 4 feet from natural elevation, that is, exclusive of the 2-foot-high artificial berm Hafner had created to evade the Restriction's shrubbery proscription (Da322). The judge reasoned, without consideration of Dare's or Batten's Certifications or for that matter any other extrinsic evidence, save for dictionary definitions defining the word "to", that (i) dictionary

definitions and plain meaning of the Restriction's phrase "to the ocean" as well as the surrounding circumstances intend a directional meaning, inclusive not just of the ocean alone but of the dunes and scenic beachscape; (ii) given the resultant view impairment Hafner's violation of the Restriction *ipso facto* constituted irreparable harm; (iii) regarding Hafner's changed conditions defense, the purpose of the Restriction had not been frustrated or neutralized in that the Gallos continued to enjoy ground-level, rear-yard views of the dunes, beachscape and wildlife that possess important scenic value; and (iv) without, on balance, creating any hardship upon Hafner resulting from the mere pruning of his trees. (2T60-83)

The judge then considered Hafner's **R**. 4:6-2 (e) Motion to dismiss the Borough as a party for want of standing, triggered by Hafner's outright refusal to permit the Borough's zoning officer merely to enter his rear yard to measure natural grade and the height of his trees. In denying the Motion, the judge reasoned, in part, that the Restriction was illustrated on the Kona-Thomas Plan that accompanied the DeCavalcantes' subdivision Application, that it was approved and recorded as such, and actually referenced in the DeCalvancantes's

deed to Land Ho.[1] The Court also considered Hafner's failure to submit evidence disputing the Gallos' submission of Ponzio's April 5, 2023 Certification. (2T109)

Hafner's Motion to Reconsider

Hafner's June 27, 2023 Motion to reconsider—filed despite the fact that after the June 7 Order he removed rather than pruned his trees—was premised on the notion that the judge was not being honest when he stated on 8 occasions in his June 7th decision he had not relied upon Dare's or Batten's Certifications (3T16-12-25;17-1-22). On August 25, 2023, the judge denied Hafner's Motion, making clear (i) in construing the Restriction he had not considered any extrinsic evidence other than dictionary definitions; and (ii) that under **Bubis v. Kassin**, 184 N.J. 612 (2005)("**Bubis**") it was proper for the Court to have considered extrinsic evidence solely in the nature of dictionary definitions in construing the meaning of the word "to". (3T25-20-25;26-36)

Then, without prejudice to the right to renew following discovery, on the same day, pending further discovery, the judge denied the Gallos' Cross-Motion to strike Hafner's defense of changed conditions, declaring the Gallos' argument

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[1] At the time of oral argument, the final major subdivision hearing recording had not yet become available.

regarding the need for permanency of condition as "persuasive". (3T48-13-25;49-52-6-11)

Hafner's' unclean hands during the litigation

During the litigation, Hafner repeatedly acted in bad faith. For example, in his deposition Hafner swore he had read his quite unorthodox, scurrilous Answer in which he denied any pre-purchase actual or constructive knowledge of the Restriction. (Da204). Yet, after being confronted with contrary evidence in his deposition, Hafner confessed and then his counsel stipulated his pre-purchase knowledge. (Da495-96;507). Moreover, regarding Hafner's contention that Koelling had trespassed to secure his results, after Koelling's denial (Da243;Pa64), Hafner admitted having no actual knowledge and attributed the allegation to "advice" he had obtained. (Pa507). Hafner similarly blamed his attorney, Michael Donohue, for not advising him of the Gallos' Spoilation Notice before allowing his video recordings to purportedly lapse—recordings that would have established Koelling never had trespassed. (Da507)

Moreover, the deposition testimony of Hafner's general contractor, Matthew Pappas ("Pappas"), and the conduct of Vizzard, Hafner's good friend (Da505), due to Hafner's obvious complicity, also evince Hafner's unclean hands. Indeed, the intensity of Hafner's friendship with Vizzard is demonstrated

by (i) Vizzard's appearance, despite having his office and his residency elsewhere, before Stone Harbor's governing body with caselaw in hand to protest the Borough's participation in this litigation (Da509), and (ii) his presence in Court with Hafner during the June 7 Order to Show Cause hearing. (Da537;539-541;543-544;550;566;575). As a result, Vizzard, falsely claiming he had Covid, failed to appear for his subpoenaed deposition, that, in turn, triggered the Gallos' Motion to compel his attendance. During service of the Motion, Vizzard physically threatened the process server, later stalked his wife and then lied to the judge that he had Covid, resulting in an Order declaring his falsehood and disrespect for both the Court and counsel. (Pa2-54)

Finally, because by October of 2022 Hafner had listed his home for sale with Vizzard for $13,500,00.00, to establish the tremendous profit he could reap if he accepted an already tendered but refused third-party offer of $16 million (Da503;409)—and thus the absence of any hardship—Pappas' deposition subpoena requested the production of Hafner's construction contract. However, Pappas refused to produce it due to what he swore was Hafner's explicit instruction. (Da621)

Hafner's acknowledged love for the Restricted area

Hafner's declared love for the Restricted area renders frivolous any assertion of hardship or other inequity.

It bears repetition that when his house was completed, Hafner decided to sell it for $13,500,000.00 (Da552), only to later turn down a $16 million offer. (Da428;559). Then, a handful of months later, in January of 2023, Hafner signed a listing agreement with Vizzard for $17 million. (Da558;561-62).

Hafner's wife swore she liked her home "very much", that "it's a beautiful home", that she does not know what she would change, how much she is in "love" with their Restricted rear yard, and that even though their pool is under an upper deck she is happy with the location which she feels "looks very nice". (Da413;417;427).

However, dispositive of the so-called "hardship" issue is Hafner's own acknowledgments that he now has a better pool house built into the ground floor of the house rather than having one in the Restricted area, that his Restricted backyard area is "beautiful", "maybe the nicest backyard on the island", the "nicest back yard...around", and that he and his wife "sit in chairs" there because it is a "good place to sit." (Da508;510)

Vizzard, who ultimately complied with his attorney's instruction to honor his deposition subpoena before being ordered to do so, acknowledged Hafner wanted the Restriction modified to achieve a larger pool just to increase the value of his property for future sale (Da554), that his home is built to the maximum size zoning permits, and that if the Restriction had not existed Hafner's purchase price of $5,300,000 "would [have] be[en] greater." (Da549-550).

The Final Judgment

In a January 9, 2024 Final Judgment, the judge concluded the Restriction is to be read dichotomously, that its prohibition against construction applies "regardless of whether its height interferes with Plaintiffs' views to the ocean", and, once again, without considering Dare's Certification or other extrinsic evidence save for dictionary definitions, that the Restriction's use of the words "to the ocean" is not intended to preserve only a view of the ocean itself but, as well, "the surrounding beachscape in the direction towards the ocean as seen from [the Gallos'] property."(Da928-948). The Court thus rejected Hafner's changed conditions defense not only due to his interpretation that the Restriction's purpose has not been frustrated or neutralized because the purpose also includes safeguarding existing scenic beachscape views, but additionally

because Hafner lacks any hardship and because a changed conditions defense, unlike dunes, requires permanency of condition. (Da938-44)

In addition, the judge denied Hafner's untimely Motion to extend discovery that was sought to depose the Gallos' counsel simply because of Hafner's unhappiness with Dare's deposition testimony. In denying the Motion, the judge reasoned there was an absence of "exceptional circumstances" and that, in any event, the discovery sought related to the immaterial issue of whether, when the Restriction was put in place, a view of the ocean itself could be seen from what is now the Gallos' rear yard. (Da945-46)

Finally, the judge upheld the Borough's standing, finding critical the Restriction was noted on the Kona-Thomas Plan that accompanied the Application, that it was relied upon by neighbors who were noticed, agreed by the Board's and DeCavalcantes' counsel as subdivision-imposed, and thereafter recorded and placed on Stone Harbor's tax map. (Da946-7)

Hafner's appeal followed. (Da949)

LEGAL ARGUMENT

Pertinent standards for summary judgment review

Plaintiffs see no need to dwell upon the oft-cited standards governing post-discovery summary judgment motions, save to emphasize that resistance cannot

be based upon immaterial fact allegations. **Brill v. Guardian Life Ins. Co. of Am.**, 142 N.J. 520, 529 (1995). We add, however, that summary judgment is particularly appropriate in deed restriction cases because a deed restriction is a contract, the interpretation of which is purely a question of law. **Shields v. Ramslee Motors**, 240 N.J. 479, 487 (2020). Indeed, our courts have never been reluctant to grant summary judgment to enforce deed restrictions where, as here, there are no disputed material facts. See, e.g., **Bubis,** supra; **Cherry v. Hadaya**, 2021 WL 5022727 (N.J. App. Div. October 29, 2021) (Pa102); **Roche v. Ocean v. Beach and Bay Club**, 2019 WL 5544036 (N.J. App. Div. October 28, 2019) (Pa110); **Citizen Voices Association v. Collins Lakes Civic Association**, 396 N.J. Super. 432 (App. Div. 2007); and **Enos v. Anacker**, 2023 WL 4772427 (N.J. App. Div. July 27, 2023) * 2 (Pa129)(motion to dismiss granted against remote buyer asserting ambiguity and changed conditions who, like Hafner, confessed they "were willing to assume the risk of attempting to remove the deed restriction after closing").

1. **The Restriction is clear in language and explicit in purpose.**

Plaintiffs acknowledge the general common law rule that restrictive covenants are disfavored and restrictively construed when ambiguous. **Cooper River Plaza E., LLC v. Briad Grp.**, 359 N.J. Super. 518, 526 (App. Div. 2003)

("**Cooper River**"). However, this canon is tempered by the equally well-settled, countervailing principles that deed restrictions, nonetheless, must be interpreted "in accord with justice and common sense," **Homan v. Torchinsky**, 296 N.J. Super. 326, 334 (App.Div.1997), "realistically in light of the circumstances under which they were created," **Caulett v. Stanley, Stilwell & Sons, Inc.**, 67 N.J. Super. 111, 114-115 (App.Div.1961), and, like any other contract, "from the perspective of the surrounding facts". **Wagenheim v. Willcox**, 105 N.J. Super. at 263, 265 (Ch. Div. 1969). In short, even for remote buyers, the canon of strict construction "has its limitations". **Bubis**,184 N.J. at 624.

Relevant here are distinctly different, commonly understood meanings and dictionary definitions of the words "to" and "of", the Restriction's stated purpose, and the surrounding circumstance of the Gallos' Property being situate to the rear of Hafner's oceanfront home, thereby both previously and currently affording them abounding scenic views of the beachscape with its natural plantings and wildlife. (Pa61-62;98)

Because Hafner's *ad damnum* provision in his Counterclaim requested a judgment interpreting the Restriction to permit construction under the same conditions as shrubbery (Da218), we first focus upon the Restriction's plain, dichotomous meaning.

The first portion of the Restriction broadly addresses "construction of any kind" and "all construction". (Da30). The fact that this portion of the Restriction is not conditioned upon height, nature, view impairment or other resultant consequence is illustrated by its proscription against "a swimming pool either above ground ***or in ground***...." [emphasis added]. Thus, hinged upon plain meaning alone, the Restriction imposes an outright, unconditional ban upon all construction, no matter the nature, impact or effect. **Steiger v. Lenoci**, 323 N.J. Super. 529,531 (App. Div. 1999) (upholding deed restriction prohibiting "outbuildings of any kind or character" without regard to any stated or implied purpose); **Porreca v. City of Millville**, 419 N.J. Super. 212,233 (App. Div. 2011) (contracts should not be read in a way that renders any provision meaningless). Accordingly, regarding this initial construction portion of the Restriction it is unnecessary to address any consequences of construction.

Independent of the proscription against any type of construction is the Restriction's second, dichotomous portion, imposing a different, prohibitive category regarding shrubbery. This independent category of curtailment is evinced by the collective facts that: (i) shrubbery is obviously not an example of "construction"; (ii) the use of a comma after the words, "all construction" is significant; and (iii) the Restriction's phraseology "and shall also" refers back

to the words "This restriction". While "[p]unctuation marks [such as the use of a comma] are rarely, if ever, an infallible token of intention", they are "not to be entirely ignored" and are to be viewed in conjunction with the entire language used, "the situation of the parties and surrounding circumstances." **Casriel v. King**, 2 N.J. 45, 50 (1950).

Accordingly, the phrase "This Restriction shall apply to all construction", when read in conjunction with the phrase "and shall also prohibit the planting or maintaining of any tree, shrub, bush or other living thing ..." [emphasis added], must be understood to be in the disjunctive. **Howard v. Harwood Restaurant Co.**, 25 N.J. 72, 88 (1957) (whether the word "and" should be read in the conjunctive or disjunctive depends primarily upon intent); **State v. N.T.**, 461 N.J. Super. 566, 571(App. Div. 2019)(noting the stand-alone, disjunctive significance of a comma). "Courts interpret 'and' in the disjunctive sense to prevent an absurd or unreasonable result." **Weinberg v. Waystar, Inc.**, 294 A.3d 1039,1044 (Del. S.Ct. 2023). Moreover, the definition of "also" primarily means "and in addition", **Webster's II New College Dictionary**, while synonyms include "besides", "further", "furthermore", and "moreover", **Merriam-Webster Thesaurus**; **Brody v. Cigna Properties & Casualty Companies**, 334 N.J. Super. 649, 657 (App.Div.2000)("A thesaurus can be an

appropriate source to ascertain the ordinary, plain and usual meaning of terms when they are undefined in a [contract]").

Deed restrictions regulating shrubbery are both common and regularly sustained. See **Bubis** (berm with vegetation is the functional equivalent of a fence, precluding views of ocean **and beachscape**) and 13 ALR 4th 1346 (1982), Annotation: "**Validity, construction and effect of restrictive covenants as to trees and shrubs**"("Such covenants are entered into for the purpose of guaranteeing the preservation of a particular view for adjoining landowners"). The interpretive issue regarding the Restriction's shrubbery proscription concerns the surrounding circumstances of preserving the Gallos' views of the scenic beachscape, and the meaning of the word "to" within the context of the Restriction's phraseology prohibiting "the planting or maintaining of any tree, shrub, bush or other thing that exceeds four (4) feet in height and does not provide an open view to the ocean." Blindfolded to the surrounding circumstance of the Gallos' existing view of the scenic beachscape—as if it were somehow without significant aesthetic value—Hafner's contention is that the word "to" really means "of" and that a view "to" the ocean requires that the ocean actually be seen allegedly because the ocean is purportedly the sole purpose of the Restriction. However, this contention attempts to re-write the

Restriction by not only ignoring the meaning of the word "to", universally defined as "towards" or "in the direction of," but, as well, by ignoring the attendant circumstances given the Gallos' picturesque view of the beachscape. See **Bubis**, 184 N.J. at 622-623, 625, where, in determining the intent of the word "fence" in a deed restriction similarly burdening a beachfront parcel, our Supreme Court noted that while "the record d[id] not reveal evidence of the precise intent of the drafters...common sense suggest[ed] that the drafters most likely intended that such a limitation would enable nearby residents and passers-by to view **both** the seascape **and the landscape of the beach**", reasoning that "**natural scenic value is normally associated with sand dunes**". [emphasis added]. Also see *N.J.A.C.* 7:7-9.16(c) and **Biehl v. N.J. Dep't of Envtl. Prot.**, 2000 WL 266399 (N.J. Admn. Feb. 28, 2000), 2000 WL 34342105 (Final Decision) (N.J. Admn. May 19, 2000) (Pa129), cited in **Bubis**, holding "dunes are an irreplaceable physical feature of the natural environment possessing outstanding...scenic...value". Here, of course, even more persuasive than in **Bubis**, the purpose of the Restriction is, indeed, literally expressed, thus eliminating the need to resort to common sense or implication.

As in **Bubis**, given the attendant circumstances of the Gallos' existing, unimpeded rear-yard view of the beachscape, it was appropriate for the trial

judge to resort to extrinsic evidence in the form of dictionary definitions to ascertain the meaning of the word "to," universally defined in an identical fashion. See **Websters New Collegiate Dictionary II** (1995 ed.) (primarily defining "to" as "In a direction forward"); ***The Compact Oxford English Dictionary*** 1947 (2d ed. 1993)(defining "to" as "in the direction of something"; "towards something"); ***Collins English Dictionary*** (defining "to" as "points at" and explaining the meaning of words "view of" as "you can see it."); **Thesaurus.com** ("to" means "directed toward", "facing" and "toward"). Our Courts have regularly referred to these lexicons. See **Manalapan Realty L.P. v. Tp. Comm. of Tp. of Manalapan**, 140 N.J. 366, 384 (1995)(citing **Oxford English Dictionary**); **Pruent-Stevans v. Tp. of Toms River**, 30 N.J. Tax, 200, 215 (Tax. Ct. 2017) (citing **Collins English Dictionary**), reversed for other reasons, 458 N.J.Super.501(App. Div. 2019). Cf., **Roehrs v. Lee**, 178 N.J. Super. 403, 406, 410 (App. Div. 1981) (view "of" ocean equated with an actual ocean view).

In referring to dictionary definitions of the word "to", the Gallos rely further upon **Rabbitt v. Greed**, 2021 WL 1342913 (N.J. App. Div. April 21, 2021), certif. den. 248 N.J. 2 (2021)(Pa180). There, Judges Ostrer and Vernoia affirmed Judge Blee's interpretation of a deed-imposed setback restriction,

finding "no error in [his] admission of extrinsic evidence—in the form of the testimony of the parties' respective experts—establishing the plain and ordinary meaning of the [restriction's use of the undefined] term '15th Street' "referenced in the restriction as the point of setback". Here, Judge Blee repeatedly made clear he never considered any extrinsic evidence other than dictionary definitions, making it unnecessary to consider the impact of **Bubis** on **Cooper River** regarding whether any other type of extrinsic evidence may be considered where the servient estate is owned by a remote party to the restriction. But see **McGrath v. Edwards**, 2009 WL2382302 (N.J. App. Div. May 20, 2009)*4, certif. den. 200 N.J. 550 (1990) (Pa191), where, while "reject[ing] the position of the trial judge that...**Bubis** implicitly overrules **Cooper River**," the court found no reversible error in the judge's "inquiry into the drafter's original intent" in taking testimony from the original grantor and grantee "because the testimony thus elicited was consistent with the sensible and thoughtfully conceived outcome reached..."

Of course, the Restriction's inclusion of the word "open" makes clear there should be no shrubbery obstructions whatsoever on Hafner's Property impairing the Gallos' views in a direction facing the ocean. See **Marlborough-Blenheim**

v. Atlantic City, 98 N.J. Eq. 129,133 (1925) (deed restriction providing land should remain "open" construed to mean "clear from obstructions").

Accordingly, the trial judge was correct in compelling Hafner to prune his trees, uncontested as being 8 and 9 feet in height from natural ground level, photographs of which demonstrated the obstruction of the Gallos' rear-yard, open view of the beachscape. (Da125-130;Pa99-101). Quite obvious in this regard is the evasive purpose of the 2-foot high dirt berm Hafner created—that exists nowhere else on his Property—on top of which Hafner planted the 6 trees. Indeed, we are unaware of any authority, nor has Hafner cited any, excusing Hafner's compliance—even assuming Stone Harbor required the berm for drainage—based upon Hafner's election to demolish the existing home and build a new one. Indeed, allowing such an artificially created height would render meaningless—completely undermining—the Restriction's height and impact proscriptions.

We now focus upon why the trial judge must be affirmed even if the purpose of the Restriction is contorted to singularly mean the safeguarding of a view only of the ocean rather than the beachscape as well.

2. Hafner's defense of "changed conditions" fails as a matter of law.

Only in rare instances will equity permit a court to modify or terminate a deed restriction where, due to drastic changes in conditions, the covenant can no longer serve **any** of its purposes. **Leasehold Estates, Inc. v. Fulboro Holding Co.**, 47 N.J. Super. 534, 564-565 (App. Div. 1957). In analyzing the issue of changed conditions, New Jersey courts follow the **Restatement (Third) of Property** ("*Servitudes*"), sec. 7.10 (2000) (the "**Restatement**"). **Perlman v. Casiello**, 392 N.J. Super. 412, 419 (App. Div. 2007). "Of the many changed-conditions cases that have produced appellate decisions, few result in modification or termination of a servitude." **Restatement,** comment (a); **Citizens Voices Association,** supra, 396 N.J. Super. at 446 ("Courts apply the changed-conditions doctrine with caution...") (citing the **Restatement**).

The **Restatement** requires that for changed conditions to defeat the enforcement of a deed restriction they must: **(i)** be of such a magnitude, that is, so radical as to make it "impossible as a practical matter to accomplish the purpose for which the servitude was created", **and (ii)** result in "unnecessary harm to the owner of the servient estate." **American Dream at Marlboro, LLC v. Planning Board of Tp. of Marlboro**, 209 N.J. 161,169 (2012) (explaining the doctrine of changed conditions is "narrowly applied" and "the test is

stringent"). "[I]f use of the servient estate can still be made within the confines of the servitude and the purpose of the servitude can still be accomplished, there are no grounds for judicial modification or termination." **Restatement**, Comment (b). See **Old Taunton Colony Club v. Medford Township Zoning Board of Adjustment**, 2013 WL 2420354 (N.J. App. Div. January 5, 2013) (Pa137)(injunction issued precluding construction of a garage closer to street than deed restriction allowed, rejecting changed conditions defense, emphasizing the absence of hardship under ***American Dream*** and the **Restatement**). Thus, changed conditions that frustrate less than the entire purpose of a deed restriction are insufficient to defeat enforcement.

In application of the **Restatement's** first criterion requiring the total destruction of purpose, see, e.g., **Old Taunton Colony Club**, supra, (continued purpose of covenant served); **Solky v. Smith**, 129 Nev. 162 (S. Ct. 2013) fn. 1 (conditions "had not fundamentally changed " because the original purpose of the deed height restriction still existed to protect the view from the subject property even though some of the views no longer existed); **Sandstrom v. Larsen**, 583 P.2d 971(Haw.1978)(construction of 13 story condominium on land outside of subdivision that only partly obstructed views from within subdivision did not constitute sufficient changed conditions to neutralize the

benefits of the height restriction and destroy its purpose); **Exchange Nat'l Bank v. City of Des Plaines**, 336 N.E. 2d 8 (Ill. Ct. App. 1975)(testimony of lot owners that they relied on covenant in purchasing their property and abrogation would harm their property values showed that covenant had not outlived its purposes).

Guided by **Bubis** and commonsense, indeed, based alone upon the Gallos' outright rejection of Hafner's incessant monetary offers to terminate or modify the Restriction—or purchase their Property—it is clear the Gallos continue to benefit from the Restriction that affords them spectacular scenic views. Moreover, it bears repetition that the deed restriction in **Bubis**, unlike the Restriction here, failed to express its purpose. Yet, due to aesthetics inherent in the scenic beachscape, our Supreme Court implied its intent when it said while "the record does not reveal evidence of the precise intent of the drafters when they incorporated a height restriction in the covenant... common sense suggests that such a limitation would enable nearby residents and passers-by to view **both the seascape and the landscape of the beach**." **Bubis**, 184 N.J. at 62 [emphasis added]. In implying the deed restriction's purpose, the **Bubis** Court not only based its conclusion upon commonsense but also upon N.J.A.C. 7:7-9.16(c), a regulation promulgated under New Jersey's Coastal Area Facility Review Act,

N.J.S.A. 13:19-1 et seq., recognizing dunes possess "outstanding...scenic value..." Here, not based upon mere implication but by express provision, a fundamental purpose of the Restriction remains intact: to preserve and protect open views of the beachscape with the beauty of its natural grasses and wildlife.

We next address the **Restatement's** and **American Dream's** second requisite for a successful changed conditions defense: the need for Hafner to experience undue hardship or some other inequity.

The absence of Hafner's hardship

Significantly, Hafner never asserted hardship before the trial judge. To the contrary, he not only acknowledged he built his home and pool to the maximum size local zoning permits and that the Restricted area "has a beautiful garden" and "looks nice", but, in addition, twice stated the Restricted area is "maybe the nicest backyard on the island" and is the "nicest backyard around." (Da508;510). His wife concurred. (Da413;427). These confessions alone render featherbrained any contention of hardship. Indeed, despite the inherent nature of the trees, Hafner contended he does not seek privacy but, instead, his goal is merely to reposition his pool, now located under one of his upper decks, and relocate it in the Restricted area to increase his sale value. (Da510;415;413;554). Finally, there is the lower purchase price Hafner paid because of the

Restriction's limitations. (Da549). See **Independent American Real Estate v. Davis**, 735 SW 256 (Tex. App. 1987)(fact that removal or modification of a deed restriction would render a property more valuable is no basis for relief). For that matter, see **Gladstone v. Gregory**, 95 Nev. 474,480 (1979) (landowners who had actual notice of deed restriction barred from invoking equitable doctrine of relative hardship).

Hafner's Unclean Hands

Although the trial judge failed to consider Hafner's unclean hands as a further bar to relief, Plaintiffs nonetheless request this Court affirm on this basis as well. See **Chimes v. Oritani Motor Hotel Inc**.,195 N.J. Super. 435,443 (App.Div.1984) (a cross appeal is not required by a respondent to argue any point to sustain the trial court's judgment).

Under **American Dream**, supra, 209 N.J. at 170, a successful changed conditions defense requires the proponent must not act with unclean hands. Yet, in Paragraph 13 of Hafner's very unorthodox, indeed, scurrilous Answer, which Hafner swore he read, (Da200-212;507), Hafner denied "actual or constructive notice of the restriction". Hafner's outright denial, knowing full-well otherwise, constitutes unclean hands, underscored by his and his counsel's eventual admission that he was, indeed, very much aware of the Restriction prior to

signing his agreement of sale. (Da495-496;4T45-21-22). So too was Hafner's wife. (Da417).

In addition, to establish the violative nature of Hafner's spite trees, which Hafner and his wife both swore were not planted to secure privacy (Da510;420), the Gallos hired surveyor Koelling to take measurements and photographs that resulted in a finding the trees twice exceeded the 4-foot height limit and interfered with the Gallos' open view to the ocean. However, instead of supplying his own measurements or just honestly confessing to their height, Hafner baselessly asserted that on November 23, 2022 and February 7, 2023, Koelling trespassed upon his property to secure his measurements and thus his findings should not be considered. But see **Perel v. Brannan**, 267 Va. 691,706 (S.Ct.2004) (refusing to apply the unclean hands doctrine to a party who allegedly trespassed upon the lands of the burdened property owner to take photos to establish a violation of a deed restriction). Although present in Court with Vizzard on June 7 while his counsel contended Koelling's surveys and photographs were illegally secured (2T47-8-13), in his deposition Hafner confessed he had no knowledge of any trespass, instead attributing the allegation to unidentified third party "advice or knowledge". (Da506-07), When the Gallos requested production of Hafner's rear yard security videos to prove no trespass

occurred, Hafner claimed the videos were deleted after 60 days, blaming his attorney for not timely advising him of Plaintiffs' March 22, 2023 Spoilation Notice (Da506-507;Pa80) with which, had there been compliance, would have demonstrated Koelling never trespassed. This, of course, is tantamount to spoilation and thus unclean hands. See **State v. Richardson,** 452 N.J. Super. 124 (App. Div. 2017) (failure to preserve surveillance video).

In addition, there is Hafner's instruction to his general contractor not to produce his construction contract at his deposition (Da619-620), and his obvious complicity in having his good friend, Vizzard, contemptuously ignore his deposition subpoena and then lie to the Gallos' counsel and to the judge. (Pa54)

On balance, evinced by the Gallos' refusal either to sell their home to Hafner or to accept "any amount" to modify or terminate it, the Restriction heavily influenced their purchase since which time, for the last 9 years, they have enjoyed its benefits. See **Bubis**, 184 N.J. at 62 ("Bubis... relied on the covenant when she and her late husband purchased the property".., "she has enjoyed her property and the benefits of the covenant" and "[s]he now faces an obstruction that runs counter to both her reasonable reliance and the likely intent of the drafters who created the covenant"); **Frick v. Foley**,102 N.J. Eq. 430, 434

(Ch.1928)(there is a presumption "each purchaser has paid an enhanced price for his property in reliance on [a deed restriction])."

Accordingly, not only does enforcement fail to result in any hardship to Hafner but the failure to do so would be terribly inequitable to the Gallos. Yet, several other reasons remain why Hafner's defense of changed conditions fails.

The Importance of Hafner's Pre-Purchase Knowledge

Having lived across the street from his new home for 6 years, Hafner admitted he was aware dunes precluded the Gallos' view of the ocean from ground-level. (Da495-96). At the very least, this is an important equitable factor in evaluating a changed conditions defense. See ***Pancho Realty Co., Inc. v. Hoboken Land & Improvements Co.***, 132 N.J. Eq. 15, 20 (E. & A. 1942), holding in an unsuccessful challenge to a deed restriction prohibiting the sale of liquor intended to limit competition, that diminished business conditions "started more than twenty years ago and presumably complainant was aware...when he purchased its property, for one contemplating the acquisition of business property does not actually purchase without inquiry or investigation..."). Also see ***Traeger v. Lorenz***, 749 S. W. 2d 249-250 (Tex. App. Ct.1988); **Wood v. Dozier**, 464 So.2d. 1168 (Fla.1985), appeal after remand, 529 So.2d 1236 (Fla. App. 1988), and most recently by the Nevada

Supreme Court in ***C&A Investments v. Jiangron Duke, LLC***, 518 P. 3d 484 (Nev. 2022), all holding that even if changed conditions would otherwise be sufficient to grant relief from a deed restriction, the fact that the challenging party is on notice of those conditions at the time of purchase precludes reliance upon the defense.

The need for changed conditions to be permanent

- Finally, even if radical in nature and oppressive to the burdened property, changed conditions must also be permanent to thwart the enforcement of a deed restriction. However, the dunes—which are the **sole** basis of Hafner's claim of changed conditions—by their inherent nature are migratory and thus transient. This is but another fact Hafner now nakedly disputes but is barred from asserting having never presented any contrary evidence below. (Db7). **North Haledon Fire Co. No.1 v. Borough of North Haledon**, 425 N.J. Super. 615 (App. Div. 2012). Indeed, counsel's mere argument that a fact issue existed regarding whether dunes are migratory (4T31-14) does not constitute evidence. **MEMO v. Sun National Bank**, 374 N.J. Super. 556, 563 (App. Div. 2005), appeal dismissed, 217

N.J. 591 (2006) (unsupported, "fanciful arguments" cannot defeat summary judgment).

Contrary to Hafner's contention that the trial judge's conclusion of transiency was unsupported, the fluid and migratory nature of dunes is a proper matter for judicial notice under N.J.R.E. 201(b)(3) in that it concerns "specific facts ...capable of immediate determination by resort to sources whose accuracy cannot reasonable be questioned". See, e.g., New Jersey's Coastal Management Rules provide at **N.J.A.C**. 7:7-9.16(e) ("dunes are a natural phenomenon" which have been the subject of "[e]xtensive destruction...along much of the coast") and **Borough of Harvey Cedars v. Karan**, 214 N.J. Super. 384,390 (App. Div. 2013) (dune nourishment is required); **Middlesex Transp. Co. v. Pennsylvania R. Co.**, 82 N.J. Eq. 550, 554 (Ch. 1913) (judicial notice proper regarding the seasons and their natural influences). Regarding the legal need for the permanency of changed conditions, see **Austin v. Van Horn**, 222 N.W. 721 (Mich. S. Ct. 1929); **Bueno v. Foirgeleski**, 180 Conn. App. (2018) (purpose must be "permanently frustrated"); **Hill v. Ogrodnik**, 83 R.I. 138, 143 (S.Ct.1955)("by the great weight of authority" changed conditions must be both radical "and permanent" in order to afford relief). Commentators are also in accord. 3 **Tiffany Real Prop**. s.875 (3d ed.).

Accordingly, assuming the Restriction has as its sole purpose a view of the ocean itself and not the scenic landscape of the beach, once the dunes inevitably either dissipate by migration or destruction, in whole or in part, thereby permitting a literal view of the ocean from ground-level in the Gallos' rear yard, the Gallos should not be burdened with the costly and time-consuming task of again and again seeking enforcement.

3. Hafner's Motion to extend discovery was properly denied.

On the discovery end-date of November 15, 2023, despite an initial December 11, 2023 trial date, extended by an August 30, 2023 Order until January 17, 2024, Hafner untimely filed a Motion to seek evidence on the immaterial issue of whether a view of the ocean existed when the Restriction was put in place. Worse yet was the oppressive nature of the discovery sought.

Once a trial date has been set, **R**. 4:24-1 (c) imposes a strict extension policy by requiring that unless a motion to extend is filed and made returnable before the discovery end-date, an applicant must demonstrate "exceptional circumstances". Regarding the issue of "exceptional circumstances", see **Pondon v. Pondon**, 374 N.J. Super.1, 10 (App.Div.2004), certif. denied, 183 N.J. 212 (2005) (noting the importance of a set trial date because "*raison d'etre*" of the Rule amendments is "to render trial dates meaningful"); **Vitti v. Brown**,

359 N.J. Super. 40,54 (Law Div. 2003) ("applications to extend the time for discovery should be the exception and not the rule"); **Rivers v. LSC Partnership**, 378 N.J. Super. 67,78 (App. Div. 2005) ("Although the rule does not provide a specific definition of 'exceptional circumstances," in **Vitti** the court likened the term to "extraordinary circumstances..."). While we acknowledge the holding in **Hollywood Café Diner, Inc., v. Jaffee**, 493 N.J. Super. 210 (App. Div. 2022) that a "good cause" rather than an "exceptional circumstances" standard applies where a trial date has been set before a discovery end-date, Hafner agrees, without distinguishing them, that two unpublished appellate decisions by separate Panels make clear that **Hollywood** does not apply where, like here, a motion to extend is not made returnable before the discovery end-date. (Db 36; 962;999). See **Cordero v. Bogopa W. N.Y.**, 2023 WL 4310721 (N.J. App. Div. July 3, 2023) (Judges Vernoia and Firko) (Da962) and **Zengel v. Cnty. Of Middlesex**, 2023 WL 2849214 (N.J. App. Div. April 10, 2023) (Judges Geiger and Byrne). (Da999).

Finally, **R**. 4:36-2, providing that "[t]he court shall send notice to each party...60 days prior to the end to the end of the prescribed discovery period," only applies where the end-date is set by the court's automatic case management system and not, as here, where there were 2 specific Orders setting the end-date.

Regarding the purpose of the extension sought, **O'Donnell v. Ahmed**, 363 N. J. Super. 44 (Law Div. 2003), frequently cited for its informative principles, **Rivers**, supra, 378 N.J. Super. at 80, explains that "merely advising the court in conclusory terms that the attorney and the client have hectic schedules does not qualify" as exceptional circumstances, that "[a]dvising the court in factual detail about how and why a schedule has prevented discovery would be a place to start," and that the failure to do so is "fatal". **Id**. at 51. Absent such proof, our courts have repeatedly barred untimely requests for extensions. See, e.g., **Szalontai v. Yazbo's Sports Café**, 183 N.J.386, 396-97 (2005); **Huszar v. Greate Bay Hotel & Casino, Inc**., 375 N.J. Super. 463, 471-74 (App. Div. 2005), reversed on other grounds, 185 N.J. 290 (2005); **Smith v. Schalk**, 360 N.J. Super. 337, 344-46 (App. Div. 2003); **Zadigan v. Cole**, 369 N.J. Super. 123,132-34 (Law.Div.2004); **Montiel v. Ingersoll**, 347 N.J. Super. 246,248-55 (Law Div. 2001).

Informed by these principles, Hafner's motion fell way short of the mark. Indeed, his counsel's argumentative Certification in violation of **R**. 1:6-6, only recited his purported purpose of the discovery sought without a single reason for the delay in obtaining it. (Da645-651)

Further, as we have said, the additional discovery sought focused solely upon the immaterial issue of whether a view of the ocean existed from the Gallos' ground-level, rear yard in 1985—an issue which the Gallos' stipulated did not exist solely for purposes of summary judgment.

Even more troubling was Hafner's attempt to take the deposition of the Gallos' counsel. Motions to depose opposing counsel are strongly restricted. See, e.g., **Kerr v. Sanitary and Envtl. Servs., Inc**., 295 N.J. Super. 147, 154 (App. Div. 1996) (assuming the existence of good cause for a protective order and requiring the proof sought is "unlikely to be available by less oppressive means"); **Rogers v. Gray**, 2021 WL 1713290 (N.J. App. Div. February 1, 2021)(Pa146)("depositions of opposing counsel are disfavored due to the inherent likelihood of 'delay, disruption, harassment and even disqualification of the attorney from further representation of the client' in the underlying litigation."); **Borough of Seaside Park v. Sadej**, 2009 WL 2059903 (App. Div. July 17, 2009)(Pa158)(denying motion to depose opposing counsel arising out of his **own** certification). **Kerr**, at 295 N.J. Super. 157, explicitly adopts the reasoning of **Shelton v. American Motors Corp**., 805 F.2d 1323,1330 (8th Cir. 1986) ("[t]aking the deposition of opposing counsel not only disrupts the

adversarial system and lowers the standards of the profession, but it also ... detracts from the quality of client representation."

Simply put, being dissatisfied with a non-party witness's deposition miserably fails to justify taking the deposition of an adverse party's attorney who happens to have prepared the deponent's prior certification. Here, as the Court can determine from Dare's video-taped deposition (Pa204),which we respectfully implore the Court to view, Dare made clear that while the Gallos' attorney prepared his Certification, Dare agreed with the content, that he had not been paid for his participation, that he didn't even know the Gallos and that while he spoke with the Gallos' attorney shortly before his deposition, counsel told him only "to tell the truth". (Da667-668;674;Pa204).

4. Stone Harbor has standing to enforce the Restriction.

Relying upon **Soussa v. Denville Township Planning Board**, 238, N.J. Super. 66,68 (App. Div. 1990), in distinguishing **Pumo v. Mayor & Council of Ft. Lee**, 4 N.J. Misc. 663 (1923), and for several other reasons, Judge Blee properly determined the Borough had not only the right but the obligation to enforce the Restriction. (Da947). See *N.J.S.A.* 40:55D-18 ("a municipal governing body shall enforce [the Municipal Land Use Act]").

In **Soussa**, unlike in **Pumo** where only a private covenant was involved, a planning board granted major subdivision approval upon the conditions there be no future division of the land, that only a single residence be constructed and that both conditions be incorporated in a deed. Some years later the plaintiffs sought a further subdivision based upon purported changed conditions. In affirming the trial judge, this Court ruled the conditions created "a property right in the public" because of which the Township was an "intended beneficiary of the covenant in the deed" and a "necessary party to any action to lift the restriction." **Id**., at 68. Here, unlike the 1983 Application that proposed no deed restriction that was denied due to public outcry based upon view obstruction, the DeCavalcantes' and Land Ho's subdivision Application wisely proposed the Restriction, reflected in the later submitted, approved, and recorded Kona-Thomas Plan incorporated by reference in the Board's Resolution.

The fact that the Board's Resolution itself did not recite the voluntarily proposed Restriction is meaningless because the Restriction was shown on the approved Kona-Thomas Plan that accompanied the Application and thus, contrary to Hafner's contention at Db9, was as much a part of the Application as the contents within the form Application itself. Indeed, if land use boards were compelled in their resolutions to recite every aspect of a development

shown on accompanying plan, the preparation of the resolution would not only be a duplicitous, onerous task but very likely to result in the omission of one or more aspects.

In addition, the 1984 Application itself was forwarded to 21 surrounding property owners who are presumed to have relied upon the Plan. (Da261-63). See **Perlmart v. Lacey Township Planning Board**, 295 N.J. Super. 234, 237-238 (App. Div. 1996) (noting the importance of public notice to allow the public to "at least, look more closely at the plans and other documents on file"). Most telling is the colloquy that occurred between the Board's and the Decavalcantes' attorneys at the final hearing. We confess great disappointment that in citing that colloquy, Hafner elected to exclude the critical statement of Board counsel, with which Dare concurred, that "It [the Restriction] was on the plan and it was recorded, **so it now exists**." [emphasis added] (Da361).

Nor does the fact that the Restriction states it was specifically imposed for the benefit of what now is the Gallos' Property derogate from the right of the 21 neighbors who received notice, including the owners of Lots 18 and 20 whose lots were part of the subdivision, all of whom presumably examined the Kona-Thomas Plan to rely upon it. Judge Blee was also correct in relying upon the

undisputed Certification of planner and surveyor, Arthur Ponzio who opined based upon his lengthy experience that whenever a Restriction is noted on an approved subdivision plan it constitutes an inherent part of the approval. (Da946). Having failed to challenge Ponzio's Certification below, as in the instance of the migratory nature of dunes, Hafner cannot do so now. (Pa207;Db 47-48). **North Haledon Fire Co. No. 1 v. Borough of North Haledon**, supra.

Summary

Based upon commonsense, plain meaning, dictionary definitions and surrounding circumstances, the breadth of the Restriction's purposes dichotomously include an outright ban upon any construction, above or below ground, regardless of any consequential impact, and as to landscaping, view preservation, measured from natural elevation, not merely of the ocean itself but also of open views of the scenic landscape of the beach, inclusive of the dunes. Hafner's continued, oppressive, and ironic[2] insistence upon the right to prove by extrinsic evidence that a view of the ocean existed in 1985 assumes **Bubis** no

---

[2] The irony lies in Hafner's contention the judge, contrary to **Cooper River**, improperly relied on Dare's and Batten's Certifications as extrinsic evidence yet, as a major part of his brief contends the judge should have considered Hafner's own extrinsic evidence regarding the immaterial issue of whether views of the ocean existed in 1985. (Db10-16;27-33)

longer controls and that the Gallos are left, for example, with views of a brick wall rather than significant aesthetic, scenic views of the beachscape.

However, there are additional reasons why Hafner's changed conditions defense fails. First, under **American Dream** and the **Restatement**, in addition to total frustration of purpose, a changed conditions defense **also** requires the servient estate suffer hardship. Here, to the contrary, Hafner and his wife both confessed their enjoyment of the Restricted area, declared by Hafner as perhaps the nicest rear yard on the entire island. Further, Vizzard, Hafner's close friend, acknowledged Hafner's objective in voiding the Restriction was to secure a higher sales price. Then, of course, there is Hafner's failure to dispute the migratory nature of dunes and his unclean hands during this litigation. All of this, on balance, is to be measured against the Gallos' reasonable expectation of having the lifelong beachscape views for which they dearly paid and have so long enjoyed.

CONCLUSION

For the reasons set forth, the trial court's judgment should be affirmed in all respects, with costs assessed.

Respectfully submitted,
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September 20, 2024

By: _____
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September 24, 2024

Via eCourts
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970

Re: Frank J. Gallo and Amy M. Gallo, Plaintiffs-Respondents v. John A. Hafner, Defendant - Appellant and Borough of Stone Harbor, Defendant-Respondent
Docket No.: A-1843-23
Reply Brief of Defendant- Respondent Borough of Stone Harbor
On Appeal From: Cape May County, Chancery Division
Docket No: CPM-C-6-23
Sat Below: Hon. Michael Blee, A.J.S.C.

Dear Honorable Judges:

This office represents the defendant Borough of Stone Harbor (the "Borough") in connection with the above-referenced matter. Please accept this letter brief pursuant to N.J. Court Rule 2:6-4(a) in lieu of a more formal submission in response to Defendant John Hafner's Appeal. For the reasons more fully set forth below, the Borough respectfully requests that the trial court's ruling that the Borough has standing to enforce the deed restriction be affirmed.

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TABLE OF JUDGMENTS

PROCEDURAL HISTORY

On February 20, 2023, Plaintiffs, Frank and Amy Gallo, filed a Verified Complaint against Defendant, John Hafner as well as an Order to Show Cause. Da1. Plaintiffs sought a declaratory judgment to enforce a deed restriction as well as an injunction requiring Defendant to cut back bushes to the four-foot height permitted in the restriction, maintain the bushes so they do not connect with each other in the formation of a fence, and to continue to maintain the bushes at the heigh permitted by the restriction. Da12.

On March 2, 2023, Plaintiffs filed an Amended Verified Complaint and an Amended Order to Show Cause adding the Borough of Stone Harbor as a Defendant. Da13, Da131. Plaintiffs reasserted their allegations and requested the same relief. Da13, Da131. On March 21, 2023, the Borough filed an Answer to Plaintiffs' Amended Complaint. Da139. On March 23, 2023, the Borough filed a Motion requesting permission for the Borough to access and inspect Defendant's property. Da147. On March 27, 2023, Defendant filed an opposition to Plaintiffs' Order to Show Cause. Da149, Da185. Subsequently, on March 29, 2023, Defendant filed an Answer and Counterclaim against Plaintiffs seeking a judgment declaring the deed restriction void. Da200, Da218. On April 3, 2023, Defendant filed an opposition motion to dismiss the Borough from this action.

In early April, Plaintiffs filed an Answer to Defendant's Counterclaim (filed April 3, 2023), a Reply in Support of their Order to Show Cause (filed April 4, 2023), and an Opposition to Defendant's Motion to Dismiss the Borough. Da225, Da230, Da253. Subsequently, on April 10, 2023, the Borough filed Opposition to the Defendant's Motion to Dismiss the Borough. Da268. Thereafter, on April 25, 2023, Defendant filed a sur-reply in support of his motion. Da296. Finally, on May 15, 2023, the Plaintiffs filed a brief in response to Defendants Sur-Reply Brief. Da304.

On June 7, 2023, the trial court heard arguments on the pending motions. By order dated June 7, 2023, the trial court granted injunctive relief requiring the Defendant to abide by the four-foot restriction and prune the existing bushes back to the allowable height. Da321. By order dated June 12, 2023, the trial court required Defendant to allow the Borough to access and inspect the property that forms the basis of this action. Da324. By order dated June 20, 2023, the trial court denied Defendant's Motion to Dismiss Plaintiff's complaint against the Borough finding that the Borough had standing. Da326.

On October 25, 2023, the Plaintiffs moved for summary judgment on their claim against the Defendant and on the Defendant's counterclaim and requested permanent injunctive relief. Da330. The Borough then filed a Motion for Summary Judgment concerning its standing and right to enforce the deed restriction, which was joined by the Plaintiff. Da633, Da642. Thereafter, Defendant opposed both

Summary Judgment Motions and filed a Cross-Motion for Summary Judgment seeking dismissal of the Borough. Da755, Da873. On November 27, 2023, Plaintiffs opposed Defendant's Motion for Summary Judgment to Dismiss the Borough and the Borough filed a reply in support of its Summary Judgment Motion. Da29, Da915. Defendant also filed a Motion to Compel Discovery and Extend Discovery End Date, which was opposed by the Borough. Da643, Da905.

The trial court heard argument on December 1, 2023, and entered an order on January 9, 2023, granting Summary Judgment in favor of the Plaintiffs and the Borough. Da925. The court found that the Borough had standing to enforce the deed restriction and denied Defendant's cross-motion to dismiss the amended complaint as to the Borough. Da925. The trial court also denied Defendant's Motion to compel and extend discovery. Da925. On February 22, 2024, Defendant appealed. Da949, Da955.

COUNTERSTATEMENT OF FACTS

In 1984 and 1985, Michael and Virginia DeCavalcante, in their capacity as contract sellers and in conjunction with their contract buyer, Land Ho, a partnership, applied to Stone Harbor's Planning Board for preliminary and final major subdivision to create two (2) residential lots which presently comprise 7-107th Street, now owned by Plaintiffs Frank J. and Amy M. Gallo, and 1-107th Street, now owned

by Defendant John A. Hafner. Da29, Da255, Da61. Notice of the Preliminary Subdivision Application was forwarded to twenty-one (21) property owners. Da255, Da261. Furthermore, the subdivision application contained a Subdivision Plan/Plat, prepared by Kona-Thomas & Associates, which noted the proposed "deed restriction" on what now is Defendant's 1-107th Street oceanfront home. Da41, Da29. Plaintiffs' 7-107th Street home is contiguous with, and to the rear of, Defendant's oceanfront parcel. Da41.

Following the October 22, 1984 hearing requesting Preliminary Subdivision Approval, the Planning Board, in Resolution No. 50-1984, approved the DeCavalcantes' identical Subdivision Plat submitted with the Application, finding in Paragraph 2:

> "The plans submitted and identified as 'Exhibit A-1' were adequate to define the nature of the proposed subdivision…"

(Da256). The approved Subdivision Plat that accompanied the Application was recorded in the Cape May County Clerk's office on November 2, 1984. (Da41, Da349). A final hearing regarding Final Major Subdivision approval was conducted on October 28, 1985, where the public nature of the deed restriction was discussed by the Board's legal counsel, Mr. Gaver, and Paul Dare, counsel for the DeCavalcantes. A question was raised about whether the deed restriction was a

Board requirement or of just private concern in response to which the following colloquy occurred:

> Mr. Gaver: "That's private? It was on the plan and it was recorded, so it now exists."
>
> Mr. Dare: "It was deemed approved with that on it. It passed."
>
> Mr. Gaver: "The plan as it's recorded, it may be argued that that relates to phase 2, so that's going to finalize as soon as this plan gets recorded."
>
> Mr. Dare: It's going to be done by deed book. Let me assure you, that will be done by deed.
>
> Mr. Gaver: "Immediately record this – you are going to record this?"
>
> Mr. Dare: "Yes."
>
> Mr. Gaver: "As a major, so it's going to have the plan **and the deed.**" (emphasis added).
>
> Mr. Dare: "With great specificity."

(Da362). It is the custom and habit of planners and surveyors in the preparation of Subdivision Plats never to note the existence of restriction unless it is proposed to be part of the subdivision application itself or is subsequently imposed by the land use board as a requirement or condition of subdivision approval. (Da264).

On November 6, 1985, the Deed Restriction was recorded as part of the DeCavalcantes' Deed to Land Ho and in accordance with Major Subdivision Approval. (Da30). Following recordation of the Major Subdivision Plat, the existence of the deed restriction became noted and still exists upon the Borough's official tax map. (Da90-Da92). The Deed Restriction was spelled out word-for-word

on Defendant's construction permit and during the construction of his home, he adhered to the Borough Zoning Officer's mandate to remove all construction that had been placed in the area of the Deed Restriction. (Da19, Da383).

LEGAL ARGUMENT

I. The Borough has standing to enforce the Deed Restriction as it is an inherent part of the subdivision approval. (Da633, Da915, Da925)

The Deed Restriction was a condition of the Planning Board's Major Subdivision approval. In fact, it was more than just a condition, it was more fundamental than that as the very Plat that was presented to and approved by the Board and later recorded, was the same one that accompanied the actual Application itself. Therefore, to determine if standing exists, the issue is whether the Deed Restriction constituted part of the approved and recorded Subdivision Application.

A. A Deed Restriction noted on a filed and approved plan of subdivision confers standing on the Borough and an interest in the public.

The Borough properly relies on *Soussa v. Denville Township Planning Board*, 238 N.J. Super. 66 (App Div 1990) which found that when a Deed Restriction is part of a major subdivision approval granted by a planning board, the restriction creates a right in the public. *Id*. at 69. In *Soussa*, the deed "specifically recited that the restriction was imposed in reliance on the resolution of the planning board." *Id.* Similarly, here the deed itself (referencing the subdivision), the statements made by the Planning Board Solicitor at the 1985 Hearing, and the Plat of the approved

subdivision (with deed restriction noted) all show that the restriction was part of the approved subdivision application. The deed provides:

> There shall be no construction of any kind in the rear Southwesterly fifty (50) feet of the premises known as Lots 9.2, 10, 11.2, and 12.1 of block 107.1 **as set forth on a Plan of Subdivision** of Block 107.1, Lots 9.2, 10, 11.2, 12.1, 13.2, 14, 15.2, 16, 18, and 29 prepared by Kona-Thomas & Associates dated September, 1984 and filed in the Clerk's Office of Cape May County as Map #2941. (emphasis added)

Furthermore, the transcript of the 1985 Planning Board states:

> A Voice: We don't get involved in Deed Restrictions. That's not our requirement, that's the requirement of the present owner.
>
> A Voice: A Deed Restriction relative to this –
>
> A Voice: 50 foot area—
>
> A Voice: --50 foot area to be—to prohibit construction.
>
> A Voice: That's not a planning board requirement, that's private.
>
> Mr. Gaver: **That's private? It was on the plan and it was recorded, so it now exists. (emphasis added)**
>
> A Voice: Well—
>
> Mr. Dare: It was deemed approved with that on it. It passed.

(Da361). Defendant cites this discussion but neglects to include the most important statement bolded above and instead contends that this exchange establishes that the Deed Restriction was private. However, the omitted statement, made by the Borough Planning Board Solicitor, makes it unequivocally clear that the restriction is part of the recorded subdivision and therefore not a private restriction. In fact, the Board Solicitor questions if the restriction is private and then notes, "It was on the plan and

it was recorded so it now exists." (Da361). It is clear based on the planning board transcript, the filed and approved subdivision application, and the deed itself that the intent was for the restriction to be part of the approved subdivision application.

Defendant also suggests that the trial court erred by relying on the testimony included in the Certification of Arthur Ponzio. (Da946). However, the court's reliance is immaterial. Even without the Certification of Arthur Ponzio, the Deed Restriction is clearly still part of the approved application for all the reasons set forth above. Therefore, the Borough has standing to enforce the Deed Restriction.

Defendant attempts to distinguish *Soussa* on the grounds that there the Planning Board resolution contained language stating, "the restriction was required so 'that there be adequate protection afforded the township and the general public.'"" *Soussa,* 238 N.J. Super 66, 69 (App. Div. 1990). Defendant argues that no similar language was contained here. The Planning Board is an administrative body of the Borough and exists to ensure proper development within the Borough for the ultimate benefit of Borough residents. It then follows that if the restriction was part of the approved subdivision plan, the Borough has the obligation to enforce it. In essence it is irrelevant if the Board resolution explicitly states that the restriction is for the benefit of the public, the fact that it is part of the approved application means it is for the benefit of the public.

B. A Deed Restriction noted on a filed and approved plan of subdivision confers an interest in the public that the Borough has an obligation to enforce.

The Borough is aware that the deed provides the restriction is "specifically imposed for the benefit of Lots 11.3, 12.2, 13.2, 14, 15.2, and 16.1." (Da30). However, by noting the existence of the Deed Restriction in the Plat that formed the basis of the Subdivision Application and by then recording that Plat, the restriction became an inherent part of the Approval. Accordingly, the Borough has the obligation to enforce the restriction regardless of who might benefit from it. See N.J.S.A. 40:55D-18, which provides that, "The governing body of a municipality **shall** enforce this act…"(emphasis added). The court found that "[t]he Borough, as a governing body of a municipality, is obligated under N.J.S.A. 40:55D-18 to enforce rights of the public." Da925. Defendant suggests that the court improperly relies on N.J.S.A. 40:55D-18 to confer standing on the Borough. However, the court's finding is based on the fact that the Deed Restriction was included in the approval and confirmed in the planning board meeting minutes. The court looks to N.J.S.A. 40:55D-18 for the premise that the Borough is <u>obligated to enforce the rights of the public</u> not to confer standing on the Borough. Also §560-61 and §560-64 of the Stone Harbor Code, charges the Borough Zoning Officer with enforcing Planning Board decisions, which includes decisions regarding subdivision approval.

Additionally, the surrounding 21 property owners who were notified of and relied upon the contents of the Application had every reason to rely upon the Plat accompanying the certification. Importantly, just because the restriction is for the specific benefit of 7-107th Street, does not mean it is for their exclusive benefit. See *Aldreich vs. Schwartz*, 258 N.J. Super 300, 308 (App. Div. 1992) ("[N]eighbors and neighborhoods may have relied for their own development and living plans on the existence of conditions imposed by board of adjustments).

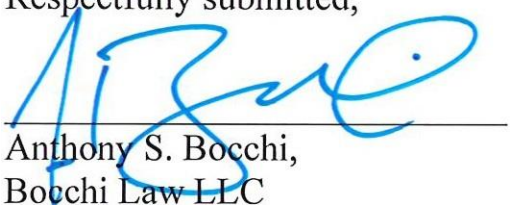
Moreover, no doubt in granting the Major Subdivision approval the Planning Board considered the need for "open space", defined in relevant part in the Municipal Land Use Law at N.J.S.A. 40:55D-5 as "any parcel or area of land…essentially unimproved and set aside… designated or reserved…for private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space."

Conclusion

For the reasons set forth here, it is respectfully requested that this court should affirm the ruling of the trial court finding that the Borough has the requisite standing and authority to enforce any violation of the Deed Restriction contained in a certain deed dated November 2, 1985 between Michael R. DeCavalcante and Virginia B. DeCavalcante, as grantors, and Land Ho, a partnership, as the grantee, regarding real

property known as l-107th Street, Stone Harbor, New Jersey, recorded in Cape May County Book of Deeds, Book 1616, page 828-830, on November 6, 1985.

Respectfully submitted,



Anthony S. Bocchi,
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FRANK J GALLO and AMY M GALLO,

Plaintiffs-Respondents,

v.

JOHN A HAFNER,

Defendant-Appellant,

and

BOROUGH OF STONE HARBOR,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1843-23

CIVIL ACTION

On Appeal From:

CAPE MAY COUNTY:
CHANCERY DIVISION
Docket No.: CPM-C-6-23

Sat Below:
Hon. Michael Blee, A.J.S.C.

REPLY BRIEF OF DEFENDANT-APPELLANT JOHN A. HAFNER

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Date: October 9, 2024

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ARGUMENT

I. Genuine disputes of material fact precluded summary judgment concerning the effect of changed circumstances on the deed restriction.

A. A genuine dispute of fact exists with respect to the meaning of the deed restriction.

Mr. Hafner's interpretation of the restriction is *at least* as reasonable as the Gallos' (and is actually the only reasonable interpretation of the restriction). Therefore, even if the Gallos' interpretation were reasonable (which it is not), the restriction would at least be ambiguous. The Gallos acknowledge that "restrictive covenants are disfavored and restrictively construed when ambiguous." (Pb21). Indeed, ambiguous restrictive covenants are generally not enforceable against remote purchasers at all – another proposition that the Gallos do not dispute, and which should be dispositive. (*See* Db22, 26-27). Finally, the Gallos do not dispute that an ambiguous restrictive covenant requires extrinsic evidence to resolve. (*See* Db26-33).

Nevertheless, the Gallos still insist that an "open view to the ocean" refers merely to a view "toward" or "in the direction of" the ocean. (Pb26). One fatal defect in the Gallos' argument is its focus on current conditions instead of those that existed when the 1985 Deed Restriction was drafted. In particular, the Gallos insist that "[t]he interpretive issue regarding the Restriction's shrubbery proscription concerns the surrounding circumstances

of preserving the *Gallos' views* of the scenic beachscape" and criticizes Mr. Hafner for being "[b]lindfolded to the surrounding circumstance of the Gallos' *existing* view of the scenic beachscape[.]" (Pb25 (emphasis added)). They also claim that extrinsic evidence was relevant "given the attendant circumstances of the *Gallos' existing, unimpeded rear-yard view* of the beachscape[.]" (Pb26-27 (emphasis added)). However, current site conditions are not instructive as to the parties' intentions in 1985. Instead, the extrinsic evidence that the trial court should have but failed to consider was extrinsic evidence of the conditions as they existed in 1985. (*See* Db29-33).

As the Gallos acknowledge, "restrictive covenants as to trees and shrubs" are "entered into for the purpose of guaranteeing the preservation of *a particular view* for adjoining landowners." (Pb25 (citing 13 A.L.R. 4th 1346 (1982) (emphasis added)). But that supports Mr. Hafner's argument: Here, the *particular view* that existed in 1985—one in which the ocean itself was visible—was the view that the 1985 Deed Restriction was intended to protect. That view is no longer available, with or without the shrubbery at issue.

Moreover, it is the Gallos' interpretation of the 1985 Deed Restriction that contradicts the restriction's "literal[] express[ion]" (*See* Pb26).[1] Put

[1] The Gallos insist that it is unnecessary to "resort to common sense" to decipher the deed restriction – even though the trial court expressly based its interpretation on its own "common sense." (*See* Pb26, Da940). That only

simply, an "open view to the ocean" is not the same as a mere view "in the direction of" the ocean. If one says that they are walking "to the ocean", one would expect that they intend to arrive there, not just that they will walk a while in the direction of the ocean and then stop. Similarly, if one says that they expect a view "to the ocean", they expect to see the ocean, not just something in the ocean's general direction. Put differently, the Gallos' argument mandates the absurd conclusion that view depicted below—which is the view that currently exists from Mr. Hafner's yard—constitutes an "open view to the ocean" *as a matter of law*. (Da295).

The Gallos' interpretation of the phrase "open view to the ocean" in the 1985 Deed Restriction is particularly incoherent. The Gallos insist the word "open" means that "there should be no shrubbery obstructions whatsoever *on*

---

illustrates that there is at least a dispute of material fact as to the meaning of the restriction to the extent it is enforceable against Mr. Hafner at all.

Hafner's Property impairing the Gallos' views in a direction facing the ocean." (Pb28-29 (emphasis in brief) (citing *Marlborough-Blenheim v. Atlantic City*, 98 N.J. Eq. 129, 133 (1925)). However, the Court's reasoning in *Marlborough* actually proves Mr. Hafner's point. The Court in that case explained that a covenant providing that the "lands should remain open" was "so that the view oceanward from the public walk should not be obstructed." *Marlborough-Blenheim*, 98 N.J. Eq. at 131. In other words, an "open" view toward the ocean is a view in which the ocean is visible.

Significantly, the Gallos stipulated for purposes of the summary judgment motion that no dunes existed when the 1985 Deed Restriction was drafted. (*See* Db31 (citing Da943)). Accordingly, it is irrelevant that a supposedly "renowned coastal scientist" claimed that an ocean view did not exist in 1984 (Pb12); that Mr. Dare certified (inconsistent with a previous draft of his affidavit) that dunes existed in 1985 (*id.*); that Mr. Batten certified that he was unable to see the ocean in mid-1983 (also inconsistent with his previous testimony) (*id.*); and that in unrelated cases dealing with unrelated facts, courts have alluded to natural features of beaches and dunes. (Pb26 (citing *Bubis v. Kassin*, 184 N.J. 612 (2005) and *Biehl v. N.J. Dep't of Envtl. Prot.*, 2000 WL 266399 (N.J. Admn. Feb. 28, 2000) (Pa129))). Even if it were

somehow relevant, the evidence that the Gallos cite at most establishes that there were factual disputes that precluded summary judgment.

Finally, the Gallos misunderstand why factual issues precluded summary judgment with respect to the 1985 Deed Restriction's provision relating to "construction." (*See* Pb2). The purpose of that provision was the same as the provision relating to shrubbery, (Db27 n.7), so there is at least a dispute of fact about whether either provision's purpose can still be accomplished.

B. A genuine dispute of fact exists with respect to changed circumstances.

Plaintiffs concede that the party asserting changed circumstances must demonstrate "unnecessary harm to the owner of the servient estate" – not a more rigorous "undue" hardship standard that the trial court applied. (*See* Pb30 (citing *American Dream at Marlboro, LLC v. Planning Bd. of Tp. of Marlboro*, 209 N.J. 161, 169 (2012)). The trial court wrongly focused on the magnitude of the harm as opposed to whether the harm remains "necessary" in light of the restriction's continued viability. (*See* Db19-20). The Gallos fail to address this distinction.

The Gallos do not deny that circumstances have changed since the 1985 Deed Restriction was drafted. Nor could they – the Gallos stipulated for purposes of summary judgment that no dunes existed in 1985. (Pb43, Db31, Da943; *see also* Db15). The appearance of dunes that completely block an

open view to the ocean, where before there were no dunes at all, is obviously a significant change in circumstances relative to a deed restriction whose purpose is to protect a particular view from the dominant estate.

Nevertheless, the Gallos insist that circumstances have not changed *enough* to preclude enforcement of the 1985 Deed Restriction because it still protects a view of the dunes. However, there was at least a genuine dispute of fact about whether *any* purpose of the 1985 Deed Restriction was to preserve a view of the beach or future dunes, as opposed to a view of the ocean. The Gallos identify no evidence that would have allowed the trial court to make that conclusion as a matter of law. The Gallos argue that because they have refused Mr. Hafner's offers to purchase their property, that "it is clear [they] continue to benefit from the Restriction[.]" (Pb32). But the fact that the Gallos now perceive some benefit to the restriction—whether, as they claim, because it affords them a "spectacular" view of sand dunes or because of spite—does nothing to establish the intention of the restriction's drafters in 1985. (*See id.*)

Similarly, the fact that the Supreme Court in a completely unrelated case found that one purpose of a height restriction was to afford passersby a beach view[2] (in addition to an ocean view) does not establish the meaning of the

[2] As the picture above indicates, in this case even a beach view is blocked by dunes.

restriction here as a matter of law. (*See* Pb32-33 (citing *Bubis*).) Language in regulations promulgated under the New Jersey Coastal Area Facility Review Act, N.J.A.C. 7:7-9.16(c), which has no relation whatsoever to restrictive covenants like the one at issue here, is equally irrelevant to the drafters' intent. (*See* Pb32-33). In short, the Gallos offer no record evidence *from this case* to support their assertion that "a fundamental purpose of the Restriction" was to preserve a view "of the beachscape" – much less evidence that forecloses any genuine factual dispute. (*See* Pb33).

The Gallos are also wrong that there is no dispute of fact regarding Mr. Hafner's hardship. (*See* Pb33-34).[3] The restriction impairs Mr. Hafner's use of his property and his family's privacy and prevents him from making full use of his back yard. For example, the restriction (or, at least, the potential for an expensive dispute over its requirements) affects Mr. Hafner's options for landscaping and runoff management, and even caused Mr. Hafner to reposition certain pilings during his home's construction at substantial expense. (*See* Da503-04 at 48:16-49:9, Da505 at 55:2-20). Mr. Hafner has also been precluded from building a pool or pool house in the area, which would afford

[3] Moreover, the out-of-state authority cited by the Gallos does not support the proposition that a diminution in value does not constitute unnecessary hardship because in those cases, the primary issue was whether there was a change in circumstance at all. (*See* Pb34).

both parties privacy. (*See* Da416 at 27:4-24). The Gallos have "even objected to a typical fire-ring sitting area." (Da193).

The Gallos also cite no authority holding that an owner's pre-purchase knowledge necessarily precludes application of the doctrine of changed circumstances. (*See* Pb37-38). In *Pancho Realty Co., Inc. v. Hoboken Land & Improvements Co.*, 132 N.J. Eq. 15, 20 (E. & A. 1942), the Court of Chancery declined to grant relief from a deed restriction for a litany of reasons, observing among other things that the purchaser was presumably aware of changes to the neighborhood before purchasing the property. It did *not* hold that such knowledge would have foreclosed relief as a matter of law. The Gallos' out-of-state authority is also unavailing. In *Traeger v. Lorenz*, 749 S.W. 2d 249 (Tex. Ct. App. 1988), the Texas Court of Appeal cited a 1961 precedent of that court that is distinguishable because, unlike here, the purpose underlying a restriction could still be accomplished. *See Lebo v. Johnson*, 349 S.W.2d 744 (Tex. Ct. Civ. App. 1961). The same is true with respect to the Nevada Supreme Court's decision in *C&A Investments, LLC v. Jiangson Duke, LLC*, 518 P.3d 484 (Nev. 2022). Likewise, in *Wood v Dozier*, there is no indication that – unlike here – the purpose motivating the restrictive covenant was rendered impossible by the changes at issue. 464 So. 2d 1168 (Fla. 1985). Moreover, there is at least a dispute of fact concerning the extent of Mr.

Hafner's understanding of the restriction given its ambiguity. (*See* Da512 at 82:7-19).

Finally, without citation to any New Jersey precedent, the Gallos assert that "changed conditions must also be permanent to thwart the enforcement of a deed restriction." (Pb38). However, the Gallos cite no evidence from this case suggesting that the dunes are anything other than permanent – much less that they are temporary or transient as a matter of law. Moreover, evidence to the contrary included Mr. Murphy's declaration, which detailed the dunes' construction and maintenance. (Db10-12, 30-31). It is evident that the dunes have been in existence since 2002 and are maintained to be permanent fixtures, not "transient." By contrast, the Gallos rely entirely on a section of the New Jersey Coastal Management Rules and case law that bears no relationship to the facts or context of this case. (*See* Pb39 (citing N.J.A.C. 7:7-9.16(e) and *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 390 (2013)).

C. The remaining evidence that the Gallos cite is irrelevant to the issues on summary judgment.

The Gallos spend significant time developing facts that have nothing to do with the trial court's summary judgment opinion. These include the conduct of a third-party witness, John Vizzard (*see* Pb16-17); Mr. Hafner's supposed failure to preserve evidence relating to a third-party survey of his property (Pb16); another third-party witness's supposed failure to produce a document

(Pb17); and Mr. Hafner's testimony about a fact that was ultimately stipulated to (Pb16). None of those issues has anything to do with how to interpret the 1985 Deed Restriction or is otherwise relevant.

The Gallos insist that these random supposed facts demonstrate Mr. Hafner's unclean hands. (Pb16-17). They are wrong. First, a defense of unclean hands is fact specific and committed to the trial court's discretion. *See, e.g., Borough of Princeton v. Bd. of Chosen Freeholders*, 169 N.J. 135, 158 (2001). The trial court made no finding that Mr. Hafner acted with unclean hands, and this Court should decline to do so in the first instance.[4]

Second, if this Court were inclined to weigh the equities, it would have to consider whether the Gallos have unclean hands. In particular, the Gallos' complaint was predicated upon there being dunes in existence when the 1985 Deed Restriction was drafted, and Mr. Hafner was required to spend significant time and money debunking that assertion. Even at this point, the Gallos apparently intend to argue, in the event of any trial, that dunes existed

[4] The Gallos make at least one more irrelevant factual assertion – that Mr. Hafner constructed a berm on the border separating his property from the Gallos' to evade the height limit in the 1985 Deed Restriction. (Pb11, 13, 29.) The trial court made no finding about the berm, and the Gallos' mischaracterization of its purpose is irrelevant. Moreover, as Mr. Hafner testified, the berm is mandated by municipal runoff requirements. (Da510 at 73:22-74:6). As such, to the extent it is relevant at all, there is at least a genuine factual dispute about the berm's purpose.

when the deed restriction was drafted. (*See* Db38 (citing 4T at 48:15-18, 4T at 96:11-15)). However, as described in Mr. Hafner's opening brief, that position was based upon, among other things, a declaration that the Gallos' counsel drafted and that evolved over multiple versions, significantly impacting its credibility, and is contradicted by significant reliable evidence. (Db13-17; *see also* Da769 (Letter to Gallos' counsel from Mr. Hafner's former counsel)).

II. The trial court should have permitted limited, additional discovery regarding Mr. Dare's certification.

Mr. Hafner explained in his opening brief why this Court should apply its rule from *Hollywood Café Diner*, requiring a showing of good cause for an extension of discovery, as opposed to subsequent unpublished authority that applied the exceptional circumstances standard. (Db34). The trial court here did not serve a 60-day notice of the end of discovery; and in fact, the court's case management order did not make clear whether discovery was even complete by the time that Mr. Hafner's motion to extend discovery was filed. (Db36-37.) The Gallos' only response is to claim that Rule 4:36-2 "only applies where the end-date is set by the court's automatic case management system." (Pb41.) However, there is simply no such limitation in the rule, which provides without exception that "[t]he court shall send a notice to each party to the action 60 days prior to the end of the prescribed discovery period."

The Gallos are also wrong that the discovery at issue is "immaterial" because they conceded that there were no dunes when the 1985 Deed Restriction was drafted. (Pb43). The Gallos expressly declined to extend that stipulation to any proceedings beyond summary judgment, so the additional discovery that Mr. Hafner seeks will be relevant if this case is remanded for trial. (*See* Db38). Finally, although the Gallos insist that "[m]otions to depose opposing counsel are strongly restricted," they make virtually no substantive response to Mr. Hafner's argument that the factors governing depositions of counsel are satisfied. (Pb43; *see* Db38-41).

III. The Borough lacks standing to enforce the 1985 Deed Restriction.

It remains unclear what interest the Borough has in asserting independent standing to enforce a private deed restriction, and why it would incur the expense of doing so, given its previous ambivalence on the issue. (*See* Db5 (quoting 1T at 96:9-18)). In any event, the Gallos' and the Boroughs' arguments are unavailing.

First, the Borough is wrong that it is "irrelevant if the Board resolution explicitly states that the restriction is for the benefit of the public" because "the fact that it is part of the approved application means it is for the benefit of

the public." (Bb11).[5] The Borough ignores that in *Soussa*, the deed restriction created a public right *because* the municipality required the restriction as a condition of approval *to protect the public*. *See Soussa v. Denville Twp. Planning Bd.*, 238 N.J. Super. 66, 68-69 (App. Div. 1990). The Gallos advance a straw argument by suggesting that it would be "duplicitous" and "onerous" for land use boards to "recite every aspect of a development." (Pb45-46). In fact, they do not have to recite every aspect of a development – just those that are intended to create public rights subject to future public enforcement.[6]

Second, the Gallos are wrong to suggest that the proceedings before the Board evince an intention to make the deed restriction public. (*See* Pb46). Undersigned counsel acknowledges that a line of testimony was inadvertently omitted from a block quote in Mr. Hafner's opening brief. However, the missing line ("That's private? It was on the plan and it was recorded, so it now exists.") is ambiguous and consistent with the following testimony that was included in Mr. Hafner's brief. ("It was deemed approved with that on it. It passed.") (Da361; *see* Db45). Taken as a whole, the testimony does not establish an intent to make the restriction public and, at best, demonstrates

[5] For clarity, references to the Borough's brief begin with "Bb".

[6] Additionally, the 1985 Deed Restriction expressly provides that it is for the benefit of *specific* lots (Da30).

confusion on the issue. Moreover, because the 1985 hearing was on a final approval, it could not have changed the terms and conditions of the original approval, *see* N.J.S.A. 40:55D-49(a), -50(b), and there is no evidence that the preliminary approval was conditioned on the deed restriction.

Third, the Borough misplaces its reliance on the Borough's tax map. (*See* Bb8). In fact, a municipality's tax map must note that "'[t]he areas, boundaries and dimensions shown on this tax map are derived from ground surveys, aerial surveys, and recorded plans, maps, deeds, wills, and *are to be used for assessment purposes only'*[.]" N.J.A.C. 18:23A—1.6(a)(13) (emphasis added). Accordingly, the tax map is not evidence of whether the 1985 Deed Restriction was a condition of the subdivision's approval.

Fourth, the Borough has argued that the Planning Board conditioned its approval on the 1985 Deed Restriction because it wanted to preserve "open space." (Bb13). However, "open space" is a term of art specifically defined in the Municipal Land Use Law as land "set aside, dedicated, designated or reserved for public or private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space[.]" N.J.S.A. 40:55D-5 (emphasis added). That definition makes clear that the deed restricted area is not open space; it has not been set aside, dedicated, designated or reserved for public or private use or enjoyment or for the owners

and occupants of adjoining land. Moreover, nothing in the resolution approving the final subdivision plan refers to open space, nor do the meeting minutes of final approval, and uncompensated open space set asides are only proper in the context of planned developments, not subdivisions. *N.J. Shore Builders Ass'n v. Twp. of Jackson*, 401 N.J. Super 152, 168 (App. Div. 2008).

CONCLUSION

For the above reasons, this Court should: (1) Vacate the trial court's Order to the extent it granted summary judgment in favor of the Gallos, enjoined Mr. Hafner, and dismissed Mr. Hafner's counterclaim; (2) Reverse the trial court's Order to the extent it denied Mr. Hafner's motion to extend discovery; declared that the Borough has standing to enforce the 1985 Deed Restriction; and denied Mr. Hafner's motion to dismiss the Amended Complaint as to the Borough; and (3) Remand for further proceedings consistent with its opinion.

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Respectfully submitted,
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