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Re: *RBY&CC East Side Homeowners Association, Inc. v. Patrick Beebe and Tammy Beebe*, C.A. No. 2022-0433-SEM

Dear Counsel:

This letter resolves exceptions filed to Magistrate Molina's Final Post-Trial Report (the "Final Report") dated June 9, 2023.[1] For the reasons discussed below, the exceptions are overruled.

Plaintiff RBY&CC East Side Homeowners Association, Inc. (the "Association") filed this action to enforce deed restrictions (the "Restrictions") against Defendants Patrick and Tammy Beebe (the "Homeowners"). In the Final Report, Magistrate Molina found that the Homeowners violated the Restrictions in two ways. First, the Homeowners constructed a wooden structure (the "Structure") on their property without seeking or receiving approval. Second, the Homeowners failed to grade their property according to the plan (the "Kercher Plan") submitted by the Homeowners

[1] *RBY&CC E. Side Homeowners Assoc., Inc. v. Beebe*, 2023 WL 3937932 (Del. Ch. June 9, 2023); *see also* C.A. No. 2022-0433-SEM, Docket ("Dkt.") 65 (Magistrate's Final Post-Trial Report). This decision cites to: trial exhibits (by "JX" number); the trial transcript, Dkts. 55–56 (by "Trial Tr. at" page, line, and witness); and stipulations of fact in the Pre-Trial Stipulation and Order, Dkt. 41 ("PTO").

and approved by the Association's Architectural Review Committee (the "Committee"). The Final Report recommended that the court enter an injunction requiring the Homeowners to remove the Structure and to regrade their property.[2] The Homeowners filed exceptions to the Final Report.[3] This court applies *de novo* review to the factual and legal findings of a Magistrate.[4]

The Homeowners do not meaningfully challenge the Magistrate's factual findings; they generally "accept the recitation of facts as stated in the Final Report."[5] Having reviewed the factual recitation of the Final Report, the court agrees with the Magistrate's thorough and fair factual findings. Accordingly, the court foregoes a retelling of the Magistrate's findings and incorporates them by reference.

The Homeowners do not deny that they violated the Restrictions by building the Structure without obtaining approval from the Committee.[6] Nor do they deny

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[2] *Beebe*, 2023 WL 3937932, at *20.

[3] Dkt. 66.

[4] *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

[5] Dkt. 71 ("Opening Br.") at 4. The Homeowners attack three factual findings, which do not alter the outcome of this decision. First, the Homeowners reject "the finding that Mr. Harvey's additional requirements were mere suggestions and/or a reasonable interpretation of the Restrictions." *Id.* (citing *Beebe*, 2023 WL 3937932, at *7 n.105). The Homeowners assert "they were [Committee] requirements, which were necessary for the [Committee] to approve the Beebes' construction application." *Id.* Second, the Homeowners reject the "finding that Susan Frederick concluded that the Kercher Plan failed to match the actual grading performed." *Id.* at 6 (citing *Beebe*, 2023 WL 3937932, at *10–11). Instead, the Homeowners insist Ms. Frederick "was instructed by Mr. Blancke to not review the Kercher Plan or the as-built submission." *Id.* (citing JX-29). Third, the Homeowners reject the "finding that the grading of their property materially differed from the Kercher Plan." *Id.* at 7.

[6] *Id.* at 1.

that they failed to grade their property consistent with the Homeowner-submitted, Committee-approved Kercher Plan.[7] Instead, the Homeowners advance six separate bases for exceptions addressed in turn below.

First, the Homeowners argue that the Restrictions are unenforceable due to vagueness because they vest the Association and Committee with discretionary authority to approve plans based on subjective values such as their "aesthetic" and "desirability."[8]

The Magistrate found that the Restrictions are enforceable because they contain "built-in, objective standards permitting evenhanded application."[9] The Magistrate found "[o]n the procedural side, the Restrictions provide, with specificity, what type of construction requires prior approval and how to seek such approval[,]" and on the substantive side, the Restrictions provide that "the [Committee] is charged with determining whether the plans are 'suitable or desirable, in its or their sole opinion, for aesthetic, safety, health, police or other reasons,' taking into account 'such factors which in its or their opinion would affect the desirability or suitability of such proposed improvements, erection, alteration, or change.'"[10]

The court has reviewed the Final Report and exceptions and agrees with the Magistrate—the procedural and substantive standards informing the Restrictions

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[7] *See id.* at 6–7, 41.

[8] *Id.* at 25.

[9] *Beebe*, 2023 WL 3937932, at *15.

[10] *Id.* (quoting JX-1, Ex. D ("Nov. 1975 Deed Restrictions"), art. D).

"provide[] enough objectivity that the Restrictions are not unenforceable on their face."[11]

Second, the Homeowners argue the Association arbitrarily applied the Restrictions because Association President Thom Harvey was biased against the Homeowners, the requirements for a grading and drainage plan are ambiguous, and the membership of the Committee has changed over the years.[12]

The Magistrate found that although Mr. Harvey and the Homeowners had a "strained" relationship, the Homeowners failed to sufficiently prove that Mr. Harvey exercised control over the Committee.[13] The Magistrate noted that even if Mr. Harvey imposed an additional requirement—the three email questions—the Homeowners were able to respond to those questions in less than thirty minutes, and, immediately after, the plan was approved, with Mr. Harvey casting the first favorable vote.[14]

Next, the Magistrate found that the grading and drainage provisions of the Restrictions are not ambiguous because the Restrictions explicitly require the Homeowners to submit a plan "prepared by a competent residential draftsman,

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[11] *Id.*

[12] Opening Br. at 27–31.

[13] *Beebe*, 2023 WL 3937932, at *15.

[14] *Id.*

showing the . . . grading and landscaping plan of the lot to be built upon or improved."[15]

Last, the Magistrate found that the "typical turnover" of the Committee over the years "does not render the decisions of the [Committee] as constituted at the time the Homeowners applied unreasonable or arbitrary."[16] Specifically, "[t]he Homeowners were provided with clear instructions as to the documentation they needed to submit for review and how and to whom those should be submitted."[17] And those "instructions in the [Committee] Manual and from the [Committee] members tracked the Restrictions in all material respects."[18]

The court has reviewed the Final Report and exceptions and agrees with the Magistrate—the three questions posed by Mr. Harvey did not constitute an added restriction,[19] the grading and drainage provisions are not ambiguous, and the institutional knowledge (or lack thereof) of current board members does not have an effect on the clear standards set forth in the Restrictions and the related operating manual.

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[15] *Id.* (quoting Nov. 1975 Deed Restrictions, art. D).

[16] *Id.* at *16.

[17] *Id.*

[18] *Id.*

[19] The Final Report adds that Mr. Harvey's February 2021 text message "is a reasonable interpretation and enforcement of this requirement." *Id.* (citing JX-27). The court agrees.

Third, the Homeowners argue that injunctive relief is not warranted because the Structure complies with the Restrictions.[20]

The Magistrate found that even if "the Structure could have been approved if an application was timely made[,]" "it is not the material, color, or other attributes of the Structure that are at issue—the issue is that the Homeowners had adequate notice that construction of something like the Structure required prior approval and they failed to apply for that approval before construction."[21]

The Magistrate found injunctive relief was warranted because failure to seek approval prior to the installation of the Structure was done knowingly, the Homeowners "failed to show any substantial economic harm from the injunctive relief[,]" and the Homeowners "failed to quantify the cost of remediation."[22]

The court has reviewed the Final Report and exceptions and agrees with the Magistrate. The court finds the Homeowners were fully aware, having gone through the process with the primary residence, that the Structure needed to be approved by the Committee.[23] Yet they failed to seek approval and later tried to secretly add it to

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[20] Opening Br. at 32–38.

[21] *Beebe*, 2023 WL 3937932, at *16 n.228

[22] *Id.* at *16, *20.

[23] The Homeowners argue they "had no notice that their Structure or their grading would violate the Restrictions." Opening Br. at 40. But given the back-and-forth the Homeowners went through to successfully submit their plans, it is hard to believe the Homeowners were simply ignorant that the addition of the Structure and the deviation in the grading would not require further approval by the Association, or that they would potentially violate the Restrictions.

the already-approved plan.[24] Although the Committee did not determine whether the Structure would have complied with the Restrictions had it been properly submitted, the court agrees with the Magistrate that the knowing violation combined with the minimal harm to the Homeowners make injunctive relief appropriate. That is because "equity will not reward inequitable conduct, such as the knowing violation of a covenant in a deed."[25]

Fourth, the Homeowners argue injunctive relief is not warranted because their grading complies with the Restrictions.[26] The Homeowners add that the Magistrate "fail[ed] to quantify the difference between the Beebes' grading and the Kercher Plan, [the Magistrate] offer[ed] no basis to conclude the grading deviation is material or has resulted in any harm[,]"and a violation of the Kercher Plan does not translate to a violation of the Restrictions.[27]

The Magistrate found the Homeowners "failed to produce swales consistent with the Kercher Plan."[28] The Magistrate relied on "(1) the testimony of Mr.

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[24] *See* Trial Tr. at 395:19–396:14, 401:6–11 (Beebe).

[25] *Plantation Park Assoc., Inc. v. George*, 2007 WL 316391, at *3 (Del. Ch. Jan. 25, 2007) (Magistrate's Report).

[26] Opening Br. at 38–48. The Homeowners argue the relief sought by the Association is specific performance of the Kercher Plan, and that the Association should be barred from specifically enforcing the plan because it did not plead a claim for breach of contract claim. *Id.* at 43–44. This argument fails. Although restrictive covenants are creatures of contract, seeking relief for a deed violation need not be limited to a breach of contract claim.

[27] *Id.* at 41; Dkt. 75 ("Reply Br.") at 30–31.

[28] *Beebe*, 2023 WL 3937932, at *17. The Magistrate attributed this result as the product of the Homeowners' failure to provide the individual hired to grade the

[Matthew] Schlitter, who confirmed that the swales depicted in the Kercher Plan were not present when he was at the Property, and (2) the Ziegler Report, which concluded that the Property's front elevations were materially different than those contemplated by the Kercher Plan."[29] That failure, the Magistrate found, resulted in "materially different grading."[30]

The Magistrate found injunctive relief was warranted because failure to follow the Kercher Plan was done knowingly, the Homeowners "failed to show any substantial economic harm from the injunctive relief[,]" and the Homeowners "failed to quantify the cost of remediation."[31]

The court has reviewed the Final Report and exceptions and agrees with the Magistrate. By placing the swales on the sides of the property and not at the right-of-way, the Homeowners did not follow the Kercher Plan, which, coupled with the installation of the three stone beds (also not depicted in the Kercher Plan), had the effect of conveying water to the wrong location. The court finds this constitutes a

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property with the Kercher Plan, "nor instructed [him] to follow the grading outlined therein." *Id.* at *9 (citing Trial Tr. at 329:17–19 (Beebe)).

[29] *Id.* at *17.

[30] *Id.* at *17 & n.231.

[31] *Id.* at *20.

material difference between the Kercher Plan and the what the Homeowners did.[32] And that material difference is a violation of the Restrictions.[33]

Because the Homeowners were fully aware of the Kercher Plan, that knowing action, along with the minimal harm to the Homeowners, makes injunctive relief appropriate.

Fifth, the Homeowners argue injunctive relief is excessive because there is no loss of enforcement rights for the Association.

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[32] *See Material*, Black Law Dictionary (2019) (defining material to be "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"); *Metro Storage Int'l LLC v. Harron*, 2019 WL 3282613, at *8 n.5 (Del. Ch. July 19, 2019) (applying *Black's* materiality definition).

[33] In their reply brief, the Homeowners point to Article D of the Restrictions and state that the right of the Association to inspect construction to ensure it is "in accordance with the approved plan for said dwelling and not violative of these restrictions[,]" means that both noncompliance with the approved plan and, separately, a violation of the Restrictions, are required before bringing an enforcement action. Reply Br. at 12–13 (quoting Nov. 1975 Deed Restrictions, art. D). In that respect, the Homeowners assert that noncompliance with an approved plan is not automatically a violation of a Restriction, and to interpret that otherwise turns a Restriction enforcement action into a specific performance of a plan action. The Homeowners add that this requirement also means that only substantial Restriction violations are enforceable. *Id.* at 13. This argument was first raised in the reply brief and is therefore waived. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived." (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)). It also fails on the merits for a few reasons. First, the Restrictions do not distinguish between process violations and substantive violations—a violation is a violation. Second, the Magistrate found, and the court agrees, the difference between the Kercher Plan and what happened was *materially* different such that it violated the Restrictions. The Restrictions require a plan before certain construction can be completed. Perhaps a minor difference might not constitute a violation of the restrictive covenant; the court need not reach that issue, because the differences here were material. There might as well have been no plan at all.

The Magistrate applied the injunctive relief standard and found that the Association proved those elements and therefore injunctive relief was warranted.

The court has reviewed the Final Report and exceptions and agrees with the Magistrate that injunctive relief is warranted here. To the extent that the Homeowners argue that breach of the social contract or erosion of the sanctity of the covenant only occurs when a substantive, as opposed to a process, violation occurs, the Homeowners cited case law does not make such a distinction.[34] And to the extent the Homeowners argue that injunctive relief for, what the Homeowners call, process failures is draconian, the court notes that if homeowners under a deed restriction adopted a mentality of build-first, ask-later, the deed restrictions and the explicit processes they lay out would be frustrated.

Sixth, the Homeowners argue the final report erred by awarding fees and costs to the Association.

The Magistrate found that fees and costs should be shifted in the Association's favor as the prevailing party.

Because the court finds in favor of the Association, under 10 *Del. C.* § 348(e), the Association is entitled to fee and cost shifting.

For the foregoing reasons, the Homeowners' exceptions to the Magistrate's Final Report are overruled.

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[34] The Homeowners cite to *Slaughter v. Rotan* for the proposition that injunctive relief is only warranted for a violation of what they call a "substantive Restriction." *See* Opening Br. at 48 (citing 1994 WL 514873 (Del. Ch. Sept. 14, 1994)). The court in *Slaughter* made no such distinction. 1994 WL 514873, at *2–3.

Counsel shall submit a form of order implementing this decision.

Sincerely,

/s/ Kathaleen St. Jude McCormick
Chancellor

cc: All counsel of record (by *File & ServeXpress*)