Rel: December 3, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200688

Capitol Farmers Market, Inc.

v.

Angie Ingram and Russell Ingram

Appeal from Montgomery Circuit Court
(CV-17-901470)

BOLIN, Justice.

Capitol Farmers Market, Inc., appeals from a judgment entered by the Montgomery Circuit Court in favor of Angie Ingram and Russell

Ingram, enforcing certain restrictive covenants on property owned by Capitol Farmers Market that abuts property owned by the Ingrams. This case has previously been before this Court. See Capitol Farmers Market, Inc. v. Delongchamp, 320 So. 3d 574 (Ala. 2020).[1]

Facts and Procedural History

The following was set forth in Capitol Farmers Market:

> "John Huddleston and Judith B. Huddleston owned certain real property located in Montgomery County, certain parcels of which they conveyed to other persons. In July 1982, the Huddlestons executed and recorded in the Montgomery Probate Court ('the probate court') a 'Declaration of Restrictive Covenants' ('the 1982 Declaration'). The 1982 Declaration particularly described certain of the Huddlestons' property and specifically excepted from that description those portions of the property that had been conveyed to other persons before the 1982 Declaration.
>
> "In pertinent part, the 1982 Declaration provided the following regarding the Huddlestons' property:

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[1]Cindy C. Warren Delongchamp was the original plaintiff in this case. This case previously came before this Court on appeal, and we reversed the trial court's judgment and remanded the cause. In the intervening period between the remand and this appeal, the Ingrams acquired the property owned by Delongchamp and were substituted as plaintiffs in this action. All events giving rise to this action occurred while Delongchamp was the owner of one of the subject properties, and the Ingrams are Delongchamp's successors in interest.

> "'1. The Subject Property shall not be subdivided into or sold in parcels of less than five (5) acres.
>
> "'2. Only one single-family dwelling of not less than 2,500 square feet heated and cooled shall be erected on each five-acre parcel, which dwelling shall be used solely for residential purposes. In addition:
>
> "'....
>
> "'B. No dwelling or accessory building or structure shall be located within 100 feet of the property line ....
>
> "'5. The Owners herein reserve unto themselves, their heirs and assigns, and in unanimous concert with the Grantees of other platted tracts, within this subdivision, their heirs or assigns, the right, by appropriate written instrument, to waive, release, amend or annul any one or more of the foregoing provisions.'

"In 2003, [Cindy C. Warren] Delongchamp[, the Ingrams' predecessor in interest, see note 1, supra] acquired two adjacent parcels of property ('the Delongchamp property'). The parties agree that the Delongchamp property is included within the property described by the 1982 Declaration and is, therefore, burdened by the restrictive covenants noted above. In 2015, Capitol Farmers Market acquired two parcels of property that are adjacent to one another. The parties agree that one of the parcels ('the Capitol Farmers Market property') is included within the property described by the 1982 Declaration. The Capitol Farmers Market property abuts the

Delongchamp property. It is undisputed that the other parcel acquired by Capitol Farmers Market is not subject to the restrictive covenants set out in the 1982 Declaration.

"Near the Delongchamp property and the Capitol Farmers Market property is certain property purchased by Southern Boulevard Corporation, which, the record indicates, is now known as Alfa Properties, Inc. ('Alfa'). It is undisputed that certain of the property owned by Alfa ('the Alfa property') is also burdened by the restrictive covenants set out in the 1982 Declaration.

"In September 2017, Delongchamp filed a complaint in the circuit court that, as amended, sought a declaratory judgment and injunctive relief regarding the Capitol Farmers Market property. Delongchamp alleged that Capitol Farmers Market was planning to 'subdivide the Capitol [Farmers Market p]roperty into a high density residential subdivision with proposed lots being substantially less than the required five (5) acre minimum.' Delongchamp sought a judgment declaring that the Capitol Farmers Market property was encumbered by the restrictive covenants set out in the 1982 Declaration and that Capitol Farmers Market was required to abide by the restrictive covenants on the Capitol Farmers Market property. Delongchamp also sought an injunction restraining Capitol Farmers Market from 'violating' the restrictive covenants set out in the 1982 Declaration 'to include, but not limited to, subdividing the Capitol [Farmers Market] property into lots less than five (5) acres.' Capitol Farmers Market answered Delongchamp's complaint and amended complaint and asserted a separate counterclaim; the counterclaim is not pertinent to this appeal.

"The circuit court entered an order appointing a special master 'to recommend a resolution of all issues.' Capitol

Farmers Market later moved for a summary judgment regarding the relief requested in Delongchamp's amended complaint. In January 2019, the special master conducted what he called 'the final hearing.' He stated: 'I will take into account the motion for summary judgment and all the arguments there. But when I rule, it will be final.' The parties presented arguments and evidence, including ore tenus testimony, to the special master at the hearing. In August 2019, the special master filed a report of his findings and his recommendation in the circuit court.

"The circuit court thereafter entered an order, providing, in pertinent part:

> "'Based upon the report and recommendations of the Special Master the Court makes the following findings and enters the Orders as set forth herein:
>
> "'The relevant facts obtained through these proceedings conclude that the property in question belonging to [Delongchamp], and the property in question belonging to [Capitol Farmers Market], as well as additional property were all subject to a set of restrictions pursuant to the [1982 Declaration] and recorded on July 7, 1982, in the [probate court].
>
> "'Delongchamp purchased her property by deed recorded on June 23, 200[3], in the [probate court]. At the time the Delongchamp [property] was encumbered by the [1982] Declaration and remains so encumbered to this date.

"'Capitol Farmers [Market] purchased its property by deed recorded in the [probate court] on July 2, 2015 .... Prior to the date of the recording of the Capitol Farmers [Market] deed, Judith B. Huddleston, as one of the original Declarants under the [1982] Declaration unilaterally executed a document purporting to be a revocation of the [1982] Declaration. Said document is recorded in the [probate court] ("the Revocation"). At the time of the Revocation, Mrs. Huddleston owned no interest in any of the properties subject to the [1982] Declaration, including but not limited to the Delongchamp [property] and the Capitol Farmers [Market property]. In fact, no property that was originally subject to the [1982] Declaration has ever been released from the encumbrance of the [1982] Declaration prior to, nor since the date of the purported Revocation. ...

"'Since the time of the execution and recording of the [1982] Declaration, substantial growth has occurred in East Montgomery and in particular along Taylor Road and Vaughn Road in the vicinity of the property in question. However, there has been no change in the use of the restricted properties. ...

"'The operative portions of the [1982] Declaration applicable to the Capitol Farmers [Market property], the Delongchamp [property], and [a] parcel ... belonging to [Alfa] provide, among other things, as follows: (i) "No dwelling or accessory building or structure shall be located within 100 feet of the property line ..."; (ii) no parcel "shall be subdivided into or sold in parcels of

> less than five (5) acres"; and (iii) any dwelling shall not be less than 2,500 square feet on the property. Section 5 of the [1982] Declaration provided that "the Owners herein reserve unto themselves their heirs and [a]ssigns, and in unanimous concert with the Grantees of other platted tracts with[in] this subdivision, their heirs and assigns, the right, by appropriate written instrument, to waive, release amend or annul any one or more of the foregoing provisions."
>
> " 'Capitol Farmers [Market] proposes to develop the Capitol Farmers [Market property] into more than twenty (20) lots with most of those lots being fifty (50) feet wide and approximately one hundred (100) feet deep. The total number of lots proposed by Capitol Farmers [Market] on the restricted parcel and the adjacent unrestricted parcel is 57....'

"The circuit court's order included lengthy analyses addressing the issues presented. Based on its analyses, the circuit court's order concluded, in relevant part:

> " '1. The [1982] Declaration and the terms and restrictions contained therein are not ambiguous, or if ambiguous, the requirements to waive, amend, release or annul such restrictions require the consent of all parties burdened and benefitted by the [1982] Declaration;
>
> " '2. The present owners and properties benefitted and burdened by the [1982] Declaration are [Delongchamp], [Capitol Farmers Market,] and [Alfa] and the Delongchamp [property], the Capitol

> Farmers [Market property,] and the properties belonging to [Alfa];
>
> "'3. The attempted waiver of the [1982] Declaration by [Capitol Farmers Market] and ... one of the original "Grantors" was insufficient to waive the application of the restrictions contained in the [1982] Declaration;
>
> "'4. [Delongchamp] purchased the Delongchamp [property] in reliance upon the benefits and burdens of the restrictions contained in the [1982] Declaration;
>
> "'5. There exists no change in condition or use of any of the properties encumbered by the [1982] Declaration which would prohibit or preclude the enforcement of the restrictions against the Capitol Farmers [Market property] or any of the other properties encumbered by the [1982] Declaration;
>
> "'6. The [1982] Declaration continues to encumber the Capitol Farmers [Market property] and the Delongchamp [property] and may be enforced by either party against the property of the other described in the [1982] Declaration ....'

"Capitol Farmers Market thereafter filed a motion, asserting that the circuit court had improperly entered its order without affording Capitol Farmers Market sufficient time and a hearing to object to the special master's recommendation, as contemplated by Rule 53(e)(2), Ala. R. Civ. P. The circuit court granted Capitol Farmers Market's motion and set the matter for a hearing. Capitol Farmers Market thereafter filed objections to the special master's findings and

> recommendations. In September 2019, the circuit court modified its earlier order to dispose of Capitol Farmers Market's counterclaim, which, as noted above, is not pertinent to this appeal. Capitol Farmers Market appeals from the circuit court's final judgment."

320 So. 3d at 575-78. In this opinion, we use the same defined terms and designations we used in this excerpt from Capitol Farmers Market.

This Court held in Capitol Farmers Market that Alfa was a necessary party to the action because it owned property located near the properties owned by Capitol Farmers Market and Delongchamp that was also burdened by the restrictive covenants set out in the 1982 Declaration. Accordingly, this Court reversed the judgment of the circuit court and remanded the case with directions to join Alfa as a necessary party to this action, if feasible, in accordance with Rule 19, Ala. R. Civ. P. Capitol Farmers Market, 320 So. 3d at 583.

On remand, Capitol Farmers Market, on January 5, 2021, moved the circuit court to join Alfa as a party to this action. On January 19, 2021, the circuit court entered an order joining Alfa as a defendant to this action. On March 17, 2021, the Ingrams amended the complaint to add Alfa as a defendant. See note 1, supra. On May 17, 2021, Alfa filed a

notice of consent to be bound by the circuit court's amended final order of September 23, 2019, so that an appeal of that order could be perfected. On May 18, 2021, the circuit court entered an order reinstating the amended final order of September 23, 2019. This appeal followed.

Standard of Review

In an action tried before a special master "without a jury the [circuit] court shall accept the master's findings of fact unless clearly erroneous." Rule 53(e)(2), Ala. R. Civ. P.

> "[A] court accepts a master's findings of fact in non-jury actions unless clearly erroneous; and to the extent the trial court has adopted the findings of a master, this same standard applies to an appellate review of these findings. ... In essence, a master's report is accorded the same weight as a jury verdict and, therefore, is not to be disturbed unless it is palpably and plainly wrong."

Burgess Mining & Constr. Corp. v. Lees, 440 So. 2d 321, 327 (Ala. 1983).

Discussion

I. Whether the Restrictive Covenants are Ambiguous

As stated in the circuit court's final order, Judith Huddleston, one of the original declarants under the 1982 Declaration, unilaterally executed a document purporting to be a revocation of the 1982

Declaration. However, the circuit court determined that, at the time of the purported revocation, Huddleston owned no interest in any of the properties subject to the 1982 Declaration, including the Delongchamp property and the Capitol Farmers Market property.

Capitol Farmers Market initially argues that the revocation provision contained in the 1982 Declaration is ambiguous. Capitol Farmers Market contends that because the revocation provision contained in the 1982 Declaration is ambiguous, the entire 1982 Declaration is void and unenforceable and Judith Huddleston's purported revocation of the 1982 Declaration must be enforced.

The revocation provision contained in the 1982 Declaration provides as follows:

> "The Owners herein reserve unto themselves, their heirs and assigns, and in unanimous concert with the Grantees of other platted tracts within this subdivision, their heirs or assigns, the right, by appropriate written instrument, to waive, release, amend or annul any one or more of the foregoing provisions."

Capitol Farmers Market argues that the use of the capitalized term "Grantees" creates an ambiguity. Capitol Farmers Market argues that the Huddlestons, the original grantors who executed the 1982 Declaration,

went to great lengths to use capitalized first letters when referring to defined terms in the 1982 Declaration, such as, for example, "Owners," "Subject Property," and "Bank." Capitol Farmers Market states that the absence of a definition for the term "Grantees" is inconsistent with the remainder of the 1982 Declaration and creates an ambiguity.

Capitol Farmers Market has provided this Court with no authority demonstrating that the failure to define in a legal instrument a term beginning with a capitalized first letter creates an ambiguity. In fact, the use of an undefined term in a restrictive covenant has been held not to create an ambiguity. Grove Hill Homeowners' Ass'n v. Rice, 43 So. 3d 609, 614 (Ala. Civ. App. 2010). Further, "when the language of a restrictive covenant is not 'of doubtful meaning and ambiguous,' the language of that covenant 'is entitled to be given the effect of its plain and manifest meaning.' " Maxwell v. Boyd, 66 So. 3d 257, 261 (Ala. Civ. App. 2010)(quoting Laney v. Early, 292 Ala. 227, 231-32, 292 So. 2d 103, 107 (1974)). Giving the word "Grantees" its plain and ordinary meaning, it is clear that the word refers to persons to whom the Huddlestons or their successors conveyed parcels of property from the Huddlestons' original

tract of property. Thus, we conclude that no ambiguity is created by the use of the undefined term "Grantees" in the revocation provision of the 1982 Declaration.

Capitol Farmers Market next argues that the phrase "Grantees of other platted tracts within this subdivision" creates an ambiguity because, at the time the 1982 Declaration was executed, there were no platted tracts within a subdivision. The circuit court addressed the issue as follows:

> "It is without question that the property in question was not at the time platted or subject to a recorded plat. Further, Capitol Farmers [Market] further argues that the reference to the word 'subdivision' is ambiguous as the property has not been subdivided, at least not in terms of filing a plat or map that takes the total restricted property and divides it into various parcels. However, it is without question that the property covered by the [1982] Declaration has been subdivided into various parcels and various owners. Capitol Farmers Market does not consider alternate meanings that could give all the words application within the context of the paragraph. Capitol Farmers [Market] then concludes that the language is therefore ambiguous and should be totally disregarded. In place of the language Capitol Farmers [Market] concludes that the restrictions can be amended with the sole consent of the Declarant and the particular property owner of the parcel seeking to be released from the restrictions. The more consistent interpretation is that the language is not ambiguous but has meaning within the context

> of the paragraph in question. The words 'subdivision' and 'plat' are clearly referring to all of the property restricted by the Declaration. The requirement that the Declarant have the unanimous approval of all the owners in the subdivision then would require the consent of the owners of each and every parcel within the restriction."

We agree with the circuit court's analysis and assessment of this issue. Although the property subject to the 1982 Declaration had no "platted tracts within [a] subdivision" when the 1982 Declaration was executed, the Huddlestons' property had been subdivided into various parcels and conveyed to other owners. "[W]here there is a choice between a valid construction and an invalid construction the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms." Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000). Accordingly, we construe the phrase "Grantees of other platted tracts within this subdivision" to include those owners who had been conveyed parcels of property that are burdened by the restrictive covenants contained in the 1982 Declaration.

Based on the foregoing, we conclude that the revocation provision contained in the 1982 Declaration is not ambiguous and does not render

the 1982 Declaration, in its entirety, void and unenforceable. Assuming that Judith Huddleston was a proper party to attempt to revoke the restrictive covenants contained in the 1982 Declaration, even though she no longer had an interest in the properties in question, it is clear from the revocation provision contained in the 1982 Declaration that Huddleston would have had to have obtained the approval or consent of the owners of each and every parcel of property burdened by the restrictive covenants. It is undisputed that Huddleston unilaterally purported to revoke the restrictive covenants without the approval or consent of each owner of a parcel of property burdened by the restrictive covenants. Accordingly, the circuit court did not err in finding Huddleston's purported revocation of the restrictive covenants ineffective.

II. The Applicability of the Change-In-The-Neighborhood Test

Capitol Farmers Market next argues that it should be relieved from the burdens of the restrictive covenants based on the "change-in-the-neighborhood" test, because the area in the immediate vicinity of the properties encumbered by the restrictive covenants has changed

drastically over the years due to high-density residential and commercial development.

We initially note that "restrictive covenants are not favored in the law and will therefore be strictly construed by this Court. All doubts must be resolved against the restriction and in favor of free and unrestricted use of the property." Lange v. Scofield, 567 So. 2d 1299, 1301 (Ala. 1990). Under the change-in-the-neighborhood test, "a restrictive covenant will not be enforced if the character of the neighborhood has changed so radically that the original purpose of the covenant can no longer be accomplished." AmSouth Bank, N.A. v. British W. Florida, L.L.C., 988 So. 2d 545, 550 (Ala. Civ. App. 2007). See also Lange, 567 So. 2d at 1301. "'A change in character of the neighborhood sufficient to defeat a restrictive covenant must have been so great as to clearly neutralize the benefits of the restriction to the point of defeating the object and purpose of the covenant.'" Laney, 292 Ala. at 233, 292 So. 2d at 108 (quoting Thompson on Real Property § 3174, p. 20 (1972 Supp.)). Such a change in the nature and condition of the neighborhood "must be determined based on a comparison of its present character with its character when the

restrictive covenants were created ...." AmSouth Bank, 988 So. 2d at 551. When the original purposes of the covenants can be effectuated, changes outside the restricted area should not be allowed to defeat the purposes of the restriction. Laney, 292 Ala. at 233, 292 So. 2d at 108 (citing Centers, Inc. v. Gilliland, 285 Ala. 593, 596, 234 So. 2d 883, 886 (1970). The burden of proof is on the party seeking to remove the restrictive covenants pursuant to the "change-in-the-neighborhood" test. Laney, supra.

In reaching its conclusion that the restrictive covenants continue to encumber the properties in question and may be enforced by either party against the property of the other, the circuit court reasoned as follows:

> "[I]n Maxwell v. Boyd, 66 So. 3d 257, 258 (Ala. Civ. App. 2010), a property owner sought injunctive relief against an adjacent property owner with respect to construction of a garage based on a setback in a restrictive covenant. The restriction did not apply to other lots but rather only to the Maxwell's and the Boyd's lots -- the lots in question at trial. In addressing the claim that the restrictive covenant should be equitably removed based on the changes to the lots across from the property at issue, the court held that 'the homes across the street from the [lots at issue] are not subject to the restrictions contained in the covenant document, and, thus, under Laney, are not material to the change-in-conditions inquiry.' Id. (citing Laney v. Early, [292 Ala. 227,] 292 So. 2d 103 (Ala. 1974)).

Even though the property across the street had changed its character, it was irrelevant to how the character of the Maxwell's and the Boyd's lots had changed. Id. The court also noted that, '[t]o the extent that Laney may conflict with AmSouth Bank[, N.A. v. British W. Florida, L.L.C., 988 So. 2d 545 (Ala. Civ. App. 2007),] or any other case decided by this court as to the pertinent geographic scope of the changed conditions to be considered, we are, of course, bound by Laney.' Id. at 263, n.5.

"To contrast, in AmSouth Bank v. British West Florida, L.L.C., the bank sought to enforce the restrictions applied to nine single dwelling beach front lots which had become surrounded by hotels, condominiums, and other commercial structures. 988 So. 2d at 548. When the restrictions were applied between 1955 and 1967, the area surrounding the nine lots was bare, with no commercial structures within a few miles of the lots. Id. Such structures were built in the surrounding area on unrestricted lots after 1979. Id. Because the defendants failed to argue to the contrary, the court defined the neighborhood as a two mile stretch of road where the nine lots were situated somewhere in the middle as opposed to strictly the restricted properties. Id. at 551. In arguing that the character of the neighborhood had not changed, the defendants failed to cite 'any legal authority holding that a change in the use of the property subject to the restrictive covenants must have occurred in order to satisfy the requirements of the change-in-the-neighborhood test.' Id. at 552. As a result, because of the court's definition of [the] neighborhood as a two mile strip along a busy highway, and because the defendants cited no proposition of law stating that the change must have occurred within the restricted area, the court held that the restrictions were no longer enforceable. Id. at 554.

"In the case at hand, the Delongchamp and Capitol Farmers [Market] Parcels abut one another with both properties abutted by high density residential areas to their North and South. The Capitol Farmers [Market] and Delongchamp Parcels have a restrictive covenant placed against them forbidding the sale or splitting up of the property into parcels of less than five acres, among other restrictions. Under Lange [v. Scofield, 567 So. 2d 1299 (Ala. 1990),] and its progeny, in order to terminate the restrictive covenant for a change in the neighborhood's condition, the neighborhood must have changed so radically that the original purpose of the covenant can no longer be accomplished. Moreover, any changes outside the restricted area are immaterial in defeating the purpose of the restriction. The present restriction encumbered both the Delongchamp Parcel and the Capitol Farmers [Market] Parcel and the Southern Guaranty property dating back to 1982. The changes to the property nearby are primarily the addition of high-density residential subdivisions to the North and South of the properties in question, but not on the properties themselves. Under Laney and Centers[, Inc. v. Gilliland , 285 Ala. 593, 234 So. 2d 883 (1970),] any changes to the surrounding property (i.e., the high-density residential subdivisions) cannot serve as a basis for assessing any change in character of the encumbered properties. The character of both restricted properties has not changed since the restriction was placed on the properties in 1982. Given that the character of the restricted properties has not changed, it cannot be said that the conditions of the property have changed to such a significant degree that enforcing the restriction defeats the purpose of the restrictions. Furthermore, Cindy Delongchamp stated in her affidavit that she relied upon the restrictive covenant and the benefits it brought when purchasing the property in 200[3]. Because Delongchamp was led to buy the property, at least in part, by reason of the restrictive covenant, she should be entitled to

have her property 'preserved for the purpose for which [she] purchased it.' Gilliland, [285 Ala. at 596,] 234 So. 2d at 886.

"Although the Capitol Farmers [Market] Parcel holders have relied on AmSouth Bank, their reliance is misplaced. As stated in Maxwell, 'to the extent that Laney may conflict with AmSouth Bank or any other case decided by this court as to the pertinent geographic scope of the changed conditions to be considered, we are, of course, bound by Laney.' 66 So. 3d at 262, n.5. Because Laney is the controlling law rather than AmSouth, only changes to the restricted properties can serve as a basis for changes in the neighborhood. Therefore, the changes in the use of properties in the vicinity of the Delongchamp Parcel and Capitol Farmers [Market] Parcel cannot serve as a basis for changing conditions to the neighborhood.

"For a restrictive covenant to be unenforceable, the character of the property must have changed so much that the purpose of the covenant is rendered ineffective. Additionally, surrounding property which is not subject to the restriction cannot serve as a basis for a change in character. Furthermore, if an individual purchased the property based on the restriction then they are entitled to enjoy the property maintained in the manner in which it was purchased. Presently, the property within a one mile radius has changed, but the restricted property itself has not changed in character since the restriction was placed on the property. As such, the changes to the surrounding area will not serve as a basis for changes to the restricted property. Finally, Delongchamp stated that she purchased the property relying on the restrictive covenant. Delongchamp is entitled to keep her property in the manner and subject to the terms, conditions and restrictions burdening and benefitting the Delongchamp Parcel.

> "Because the conditions of the restricted properties in question have not changed so drastically that the benefits of the restriction are neutralized; because the changes to the surrounding area have no basis in defeating the purpose for a restriction; and because Delongchamp relied on the benefits of the restrictive covenant and is entitled to enjoyment of those benefits, this court finds that the terms and restrictive covenants contained in the [1982] Declaration remain effective against the Capitol Farmers [Market] Parcel and the Delongchamp Parcel."

Capitol Farmers Market again relies on AmSouth Bank and argues that, because there have been "drastic" changes to the area within a one-mile radius of the restricted properties at issue, the restrictive covenants are unenforceable and it should be relieved from the burdens of the restrictive covenants. At issue in AmSouth Bank were nine contiguous beachfront lots that were restricted in use to only single-family dwellings. The westernmost lot abutted a parcel of property on which British West Florida, L.L.C. ("BWF"), was building a condominium complex. The easternmost lot abutted a parcel of property on which a hotel was located. The evidence indicated that, since 1979, the area within a one-mile radius of the nine lots had become a major resort and tourist area and over 2,000 hotel and condominium units had been constructed within that one-mile

radius. The beachfront within that one-mile radius was dominated by multistory hotels and condominiums, and very few single-family dwellings remained in the area. Two of the owners of the burdened beachfront lots testified at trial that the influx of people and traffic since 1979 had adversely affected their ability to enjoy their property. Those owners stated that strangers frequently trespassed on their property and that they had to deal with the increased traffic in the area resulting from the construction of the 2,000 hotel and condominium units nearby. Another owner of one of the burdened beachfront lots testified that the construction of condominiums on the beachfront and the influx of large numbers of people had drastically changed the beachfront in the area, although he admitted that the changes had not made it physically impossible to use the nine beachfront lots for single-family dwellings.

All the owners of the burdened beachfront lots entered into contracts with BWF to sell the nine lots to BWF, which planned to build two multistory condominiums on the lots. BWF's obligation to purchase the nine lots was contingent on an adjudication that the restrictive covenants limiting the use of the lots to single-family dwellings were unenforceable.

The owners of the burdened beachfront lots and BWF sued a number of defendants that had an ownership interest in the surrounding properties that benefited from the restrictive covenants, seeking a judgment declaring the restrictive covenants unenforceable. The trial court concluded that the restrictive covenants should be declared unenforceable on the basis that there had been a change in neighborhood.

In affirming the trial court's judgment, the Court of Civil Appeals stated:

> "The defendants first argue that the trial judge erred in concluding that the evidence met the requirements of the change-in-the-neighborhood test because, they say, the evidence indicated that there has been very little change in the neighborhood. In support of that argument, the defendants point out that the Island House Hotel immediately east of the nine lots; the commercial marina, boat-storage facility, and small shopping center directly across Highway 182 from the Island House Hotel; and the church and gas station directly across Highway 182 from the nine lots have all been in their present locations since 1992 and that the subdivision has been in its location north of the church and the gas station 'for decades.' However, this argument ignores the fact that the Island House Hotel, the commercial marina, the boat-storage facility, the small shopping center, the church, and the gas station themselves constitute a change in the neighborhood that has occurred since the restrictive covenants were created in the 1950s and the 1960s -- the parcels of land now occupied by the Island House Hotel, the commercial marina, the

boat-storage facility, the small shopping center, the church, and the gas station were either vacant or devoted to single-family dwellings when the restrictive covenants were created. The change in the character of the neighborhood must be determined based on a comparison of its present character with its character when the restrictive covenants were created in the 1950s and the 1960s rather than its character in 1992. See Johnson v. H.J. Realty, 698 So. 2d 781, 784 (Ala. Civ. App. 1997) ('[W]e conclude that the trial court did not err in finding that fundamental and substantial changes had occurred since the restrictive covenants were originally imposed on the property.' (emphasis added)).

"Moreover, the defendants' argument ignores the drastic changes in the use of the other land located within a one-mile radius of the nine lots, such as the construction of over 2,000 hotel and condominium units on the beachfront and the establishment of numerous commercial establishments along Highway 182. In Johnson v. H.J. Realty, this court affirmed a trial court's judgment declaring restrictive covenants unenforceable under the change-in-the-neighborhood test when the trial court considered changes within a one-mile radius of the property that was subject to the restrictive covenants. 698 So. 2d at 784. Accordingly, we find no merit in the defendants' first argument.

"The defendants also argue that the trial judge erred in concluding that the evidence satisfied the change-in-the-neighborhood test because, they say, there has been no change in the use of the nine lots themselves since the restrict[ive] covenants were created. However, the defendants have not cited any legal authority holding that a change in the use of the property subject to the restrictive covenants must have occurred in order to satisfy the requirements of the change-in-the-neighborhood test. In Johnson v. H.J. Realty,

> this court affirmed a judgment declaring restrictive covenants unenforceable under the change-in-the-neighborhood test in the absence of any change in the use of the property subject to the restrictive covenants. Moreover, to hold that such a change is necessary in order to satisfy the change-in-the-neighborhood test would give the owners of land subject to restrictive covenants an incentive to violate the restrictive covenants."

AmSouth Bank, 988 So. 2d at 551-52.

Capitol Farmers Market argues that it is clear that since the execution of the 1982 Declaration containing the restrictive covenants at issue in this case, there have been drastic changes to the area within a one-mile radius of the subject properties. When the restrictive covenants were first implemented, the surrounding neighborhood consisted of farmland or large estate lots. Although the original developers sought to preserve the complexion of the lots by requiring lots of five or more acres, the rapid growth in the area forced a change in the neighborhood. Capitol Farmers Market points to evidence contained in the record indicating that at least 910 single-family residential lots comprising substantially less than five acres have been built in the surrounding area since the implementation of the covenants in 1982. There have also been numerous

commercial lots, retail developments, office parks, malls, and high-density apartments constructed in the area since the implementation of the restrictive covenants. Capitol Farmers Market states that the subdivision containing less than five-acre lots that it proposes would be more consistent with the character of the surrounding area than the current use of its property as a large undeveloped tract of land. Capitol Farmers Market argues that, because of the dramatic change in the surrounding area, the circuit court erred in failing to find the restrictive covenants unenforceable in this case. We disagree.

The evidence indicates that substantial residential and commercial growth has taken place within a one-mile radius of the subject properties, causing the character of the area to change considerably since 1982. The changes to nearby properties consist primarily of the addition of high-density residential subdivisions and commercial properties to the north of the subject properties. Frank Garrett, Capitol Farmers Market's own expert, testified that the properties located to the west, south, and east of the subject properties had not changed in character since 1982. Evidence was presented indicating that single-family dwellings on lots of

five acres or more still existed less than a half mile from the subject properties. No evidence was presented indicating that the Delongchamp or Capitol Farmers Market properties themselves had changed in character. Garrett further testified that nothing had changed in the area that would prevent the requirement that lots contain a minimum of five acres from being complied with.

James Monk, a licensed land surveyor, completed a survey of the subject properties. Monk testified that there had been no changes to the subject properties since 1982. Monk further testified that the purpose of the restrictive covenants can be complied with on the subject properties.

Because the properties to the west, south, and east of the subject properties, and the subject properties themselves, have remained unchanged since 1982, we cannot say that the change in the character of the property to the north of the subject properties is "'so great as to clearly neutralize the benefits of the restriction to the point of defeating the object and purpose of the covenant.'" Laney, 292 Ala. at 233, 292 So. 2d at 108 (quoting Thompson on Real Property § 3174). Further, because the evidence in the record indicates that the character of the subject

properties themselves has not changed and that the purpose of the restrictive covenants, including the five-acre minimum requirement, can still be complied with on the subject properties, changes outside the restricted area should not be allowed to defeat the purposes of the restrictions. Laney, 292 Ala. at 233, 292 So. 2d at 108 (citing Gilliland, 285 Ala. at 596, 234 So. 2d at 886). Accordingly, we affirm the circuit court's determination that the restrictive covenants contained in the 1982 Declaration remain effective against the Capitol Farmers property and the Delongchamp property.

Conclusion

Based on the foregoing, we affirm the circuit court's judgment upholding the restrictive covenants found in the 1982 Declaration.

AFFIRMED.

Parker, C.J., and Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.