JOHN P. GROSS and JANICE GROSS, Plaintiffs-Respondents, v. OCEAN BEACH SURF CLUB UNIT 1, Defendants-Appellants, and TOMS RIVER TOWNSHIP, CRAIG MARTIN and WILLIAM PARRETT, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-002235-23 CIVIL ACTION On Appeal from August 17, 2023 Order Granting Partial Summary Judgment to Plaintiffs and January 22, 2024 Order Denying Defendants' Motion for Reconsideration Docket No. OCN-C-000125-22 Sat Below: Hon. Mark A. Troncone, P.J. Ch.

APPELLANT OCEAN BEACH SURF CLUB UNIT 1's BRIEF

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PRELIMINARY STATEMENT

New Jersey is famous for its beaches and for good reason. They are a haven for people worldwide seeking to enjoy the sun, sand, and surf. But New Jersey's beaches did not become a popular destination overnight. Rather, the Jersey Shore became what it is today after decades of careful and deliberate property development.

In the 1940s, Edward and Marjorie Patnaude owned large tracts of land situated along the shore in what is now Toms River Township. The Patnaudes sought to create a "club" of future property owners residing on their beachfront and beach-adjacent property. The Patnaudes achieved this goal by conveying deeds with restrictive covenants to *hundreds* of purchasers. This case involves one such deed.

There is no dispute that the deed to Plaintiffs' property located at 30 East Spray Way in Toms River Township (the "Property") contains restrictive covenants originating from the Patnaudes' 1948 conveyance of the Property to the original purchaser. This "Genesis Deed" included the following restrictions running with the land: (1) "ALL property owners" must become "members of a property owner's association known or to be known as 'OCEAN BEACH CLUB,'" which has authority to implement and enforce any "rules and regulations it chooses," and all property owners must "***faithfully abide***" by those

rules; and (2) "**[n]o building**, alteration, fence or addition shall be made without the written approval of the OCEAN BEACH CO." These same restrictions are also contained within *over one thousand* other deeds to *hundreds* of parcels in the Ocean Beach section of Toms River. For the last 75 years, Ocean Beach Surf Club Unit 1 ("OBSC") has served as the "property owner's association" that has adopted and enforced the "rules and regulations" to which all property owners—including Plaintiffs—agreed by deed to "faithfully abide."

In 2020, Plaintiffs sought to rebuild their home. Pursuant to OBSC's rules, Plaintiffs submitted building plans depicting, among other things, the proposed height of the new home and sought approval from OBSC to begin construction. OBSC rejected Plaintiffs' application because the proposed height of the building exceeded the height limitation permitted in OBSC's construction rules. Plaintiffs then filed suit and moved for partial summary judgment seeking a declaration that OBSC lacks authority to implement and enforce any of its construction rules.

With one stroke of a pen, the trial court upended over 75 years of past practice and declared that OBSC has *no* authority to enforce its rules, including the construction rules at issue herein. The trial court took this remarkable step in plain disregard of the Patnaudes' intent as reflected within the Genesis Deed. Moreover, the trial court made this determination prior to the completion of

discovery, without any participation or meaningful discovery from an indispensable party, Ocean Beach Co, and without a hearing wherein testimony was given and evidence entered into the record. In its opposition to Plaintiffs' partial summary judgment motion, OBSC provided compelling evidence that OBSC is the "property owner's association" contemplated by the Genesis Deed, that the Patnaudes expected and required OBSC to regulate construction within the community, and that OBSC has been doing so for over 75 years. Rather than grant all reasonable inferences to OBSC, the trial court disregarded this evidence, substituted itself as the factfinder, and upended nearly a century of history and past practice.

Despite the trial court's stated intent to exercise "judicial restraint" by limiting the scope of its holding to just Plaintiffs' Property, if the trial court's order is permitted to stand, the Patnaudes' conveyance of beachfront property to OBSC in a separate instrument is also threatened as this conveyance was conditioned on OBSC's enforcement of the Genesis Deed's restrictions and its own rules. This Court should reverse the trial court's premature grant of partial summary judgment and preserve the character of the OBSC community until a full and complete factual record is developed and a trial on the merits occurs before a factfinder, with the inclusions of Ocean Beach Co as an indispensable party.

PROCEDURAL HISTORY

On June 15, 2022, Plaintiffs John P. Gross and Janice Gross ("Plaintiffs") initiated this litigation through the filing of a Verified Complaint and Order to Show Cause against OBSC, Toms River Township ("Toms River"), Craig Martin ("Martin"), and William Parrett ("Parrett") (collectively the "Defendants"), asserting, among other things, that OBSC does not have the authority to impose any building restrictions on Plaintiffs' Property located in the OBSC community. (Da1-34). Relevant here is Count 1, asserting *ultra vires* action by OBSC in promulgating and enforcing a rule restricting the height of buildings in the OBSC community.

On July 15, 2022, OBSC, Martin, and Parrett moved to dismiss Plaintiffs' Complaint. On August 26, 2022, the Court denied Plaintiffs' Order to Show Cause, (Da329), and granted the motion to dismiss in part and without prejudice. (Da331). In doing so, the trial court dismissed all claims against Martin and Parrett, and Counts 4 through 6 against OBSC.

Following the decision on the motion to dismiss, the parties engaged in some limited written discovery. On May 1, 2023, the trial court entered a case management order establishing deadlines for completion of written and expert discovery, but did not set a fact discovery end date. (Da338).

Prior to the conclusion of fact discovery, and before the taking of a single fact or expert deposition, Plaintiffs filed a motion for partial summary judgment on Counts 1 and 2 against OBSC. (Da339). On July 25, 2023, OBSC filed a cross-motion for partial summary judgment on the same counts, primarily raising procedural arguments that Plaintiffs had failed to name an indispensable party (Ocean Beach Co.) as a defendant and that discovery was incomplete. (Da508).

On August 17, 2023, after hearing argument,[1] the trial court granted Plaintiffs partial summary judgment as to Count 1 and declared that only Plaintiffs' Property "is not subject to the building height restrictions adopted by" OBSC "or its predecessor-in-interest and therefore the height restriction is unenforceable as to" Plaintiffs' Property. (Da853-854). In the next paragraph of the Order, however, the trial court confirmed that Plaintiffs remain subject to the restrictive covenants in the Genesis Deed. (Da854). The trial court also denied OBSC's cross-motion for summary judgment. (Da856).

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[1] "1T" refers to the transcript of the August 3, 2023 oral argument on Plaintiffs' motion for partial summary judgment and OBSC's cross-motion for partial summary judgment.

"2T" refers to the transcript of the December 15, 2023 oral argument on OBSC's motion for reconsideration of the trial court's August 17, 2023 order granting Plaintiffs' motion for partial summary judgment and denying OBSC's cross-motion for partial summary judgment.

On September 6, 2023, OBSC timely filed a motion for reconsideration and also sought a stay pending an interlocutory appeal. (Da511). The trial court denied the reconsideration motion in an Order and Opinion entered on January 22, 2024. (Da870). In doing so, the trial court applied the incorrect legal standard governing reconsideration and otherwise failed to meaningfully address OBSC's arguments. (Da873-876). On February 6, 2024, the trial court issued an Order denying OBSC's request to stay the partial summary judgment order. (Da877).

On February 12, 2024, OBSC timely filed a motion with the Appellate Division seeking leave to file an interlocutory appeal from the trial court's August 17, 2023 order granting Plaintiffs partial summary judgment on Count 1 and the trial court's January 22, 2024 order denying OBSC's motion for reconsideration. (Da887). OBSC simultaneously moved for a stay of the trial court's orders. (Da890). Subsequently, as a result of an agreement between OBSC and Plaintiffs, OBSC withdrew its stay application and Plaintiffs filed papers supporting OBSC's motion for leave to file an interlocutory appeal challenging the trial court's orders. (Da893).

On March 26, 2024, this Court granted OBSC's motion for leave to appeal the trial court's orders granting Plaintiffs partial summary judgment and denying OBSC's motion for reconsideration. (Da895).

STATEMENT OF FACTS

A. The Relevant Parties

Plaintiffs are the owners of the Property located within the OBSC community. (Da343; 341).

OBSC is a corporation formed on June 14, 1948. (Da57). OBSC was formed to, among other things, "promote and protect the general welfare and property rights of the property owner **members** in their use and enjoyment of their property at Ocean Beach." Id. (emphasis added). The 1948 OBSC certificate of incorporation also references the "by-laws of the **association**." Id.

B. Plaintiffs' Chain of Title from the Genesis Deed

On May 16, 1980, Daniel and Dorothy O'Keefe conveyed the Property to Plaintiffs "subject to covenants, conditions and restrictions contained in prior deeds of record." (Da41). The O'Keefe's acquired the Property by deed from Frank and Elizabeth Fitzpatrick on October 16, 1964, which was also subject to the "covenants, conditions and restrictions contained in prior deeds of record." (Da103). Likewise, the Fitzpatricks acquired the Property by deed from Edward and Marjorie Patnaude on February 5, 1947 (the "Genesis Deed"), which contained certain restrictive covenants running with the land. (Da53). This chain of title, and the restrictions set forth therein, are at the heart of this case.

C. The Genesis Deed's Restrictive Covenants

The Genesis Deed, drafted and conveyed in 1947, clearly expresses the intent of the Patnaudes to subject the Property, and the hundreds like it in the OBSC community, to a number of restrictions. The Genesis Deed provides, in pertinent part:

> BEACH CLUB
>
> ALL property owners in this development are required to become members of a property owners' association **known or to be known** as 'OCEAN BEACH CLUB' **and to faithfully abide by its rules**. No sale, resale, or rental of any property in Ocean Beach shall be made to any person or group of persons who are, have been, or would be disapproved for membership by the OCEAN BEACH CLUB.
>
> The use of the bathing beach is for the exclusive members of the OCEAN BEACH CLUB.
>
> BEING a private club the OCEAN BEACH CLUB shall make such rules as it deems necessary pertaining to the race, color or creed of persons eligible for membership **and any other rules or regulations it chooses**.
>
> . . . .
>
> It is not recommended but is permissible **upon special approval by the Ocean Beach Co. Developers**, to have the front of buildings including garages, etc., to total over TWENTY-FOUR (24) feet.
>
> . . . .
>
> GENERAL RESTRICTIONS
>
> . . . .
>
> **No building, alteration or addition** shall be made without the written approval of the **Ocean Beach Co.**

(Da54).

These restrictions are not limited to the Genesis Deed for the Property; rather, similar restrictions exist in over *one thousand* other deeds that the Patnaudes conveyed while implementing their desire to create a "club" of property owners adjacent to the beautiful Jersey Shore. (Da144). Currently, there are 321 units that are part of the OBSC community, and their residents are all bound by the above restrictions as dues-paying "members" of OBSC that agreed by deed to "faithfully abide" by "any" of the "rules or regulations" OBSC "chooses" to implement and enforce. (Da238).

But OBSC is not the only entity vested by the Genesis Deed with authority to regulate the use of property in the community. Rather, the Genesis Deed also grants authority to a separate entity—Ocean Beach Co.—to deny or approve in writing any "building, alteration or addition" on the Property and the hundreds like it. (Da54).

D. The Creation of OBSC and its Historical Exercise of Authority as the Genesis Deed's "Property Owners' Association."

Although the Genesis Deed references a "property owners' association known **or to be known** as Ocean Beach Club," there is only one entity that, for the last 75 years, has served that role: OBSC. For three quarters of a century, OBSC implemented and enforced the Genesis Deed's restrictions and further promulgated "rules" that applied to all "members" in furtherance of the Patnaudes' intent.

Although OBSC's formal corporate name—"Ocean Beach Surf Club, Inc."—is slightly different, OBSC was created for the sole purpose of serving as the association "to be known as Ocean Beach Club," as required by the Genesis Deed. OBSC was incorporated on June 14, 1948 and held its first organizational meeting on June 26, 1948, a little over one year after conveyance of the Genesis Deed. (Da477). During that meeting, a copy of OBSC's certificate of incorporation was entered into the minutes and OBSC adopted its first set of by-laws. (Id.). Consistent with the Genesis Deed's directive, OBSC's by-laws stated that any "person or group of persons" shall become a member of OBSC upon "the date of acquisition of title to property at Ocean Beach[.]" (Da481). The by-laws then imposed various "terms of membership," including a requirement that all members swear to abide by OBSC's "certificate of incorporation and **any subsequent regulations imposed by this Club**." Id. OBSC's first set of bylaws also created seven different "committees," including a "Grounds Committee" with specified responsibilities:

> It shall be the duty of the Grounds Committee **to pass on all building permits**; to see that all properties in the community are kept neat, well painted and in good repair; and to make all arrangements for garbage collection, street repairs, grading and other matters incident to the management of the property. (Da484).

As early as July 25, 1948 (the first regular meeting after establishment of the OBSC), the Chairman of the Grounds Committee explained to the

"members" in attendance that "any alterations made to buildings must be 1st **approved by Ocean Beach Co. and the [G]rounds Committee**. Then permission is granted to go ahead with the alteration . . . ." (Da527) (emphasis added). This is consistent with the Genesis Deed's intent that the "property owners' association" implement and enforce "rules" in conjunction with Ocean Beach Co. having authority to approve or disapprove "any alterations made to buildings[.]" (Da53).

The historical record dating back to 1948 shows that OBSC consistently exercised the authority granted to the "property owners' association" by the Genesis Deed. This includes OBSC's implementation and enforcement—at the direction of the Developers (Da569-570; 572-573; 623)—of "rules" that regulated, among other things, building on properties located within the community. The following are just some examples:

- **July 25, 1948 OBSC Meeting Minutes** – construction noises limited to certain times of day, (Da528);
- **November 14, 1948 OBSC Meeting Minutes** – "A report was made that [property owner] is breaking ground on construction – he has not applied to grounds comm. for construction, we are to get injunction against Mr. [property owner] for breaking ground for building without a building permit. Mr. Felix made the motion to see our attorney about injunction, seconded by R. Roff, passed by majority. R. Roff is to follow up and see our attorney . . ." (Da538).
- **April 2, 1949 OBSC Meeting Minutes** – Report from Grounds Committee that letters were sent to owners regarding chimney pipes "against rules and regulations"; "an injunction had been obtained

against [property owner] and they agreed to comply with the rules and regulations of the club"; and that applications for fences were rejected "and returned to Mr. Patnaude for more information, especially on [property owner's] who are erecting buildings without approval or submitting plans." (Da541).

- **June 25 and October 14, 1950 OBSC Amended By-Laws** – Prohibiting sale or resale of any property to individuals "who are, have been, or would be disapproved for membership by Ocean Beach Surf Club, Inc. or by Ocean Beach Company," (Da551); it "shall be the duty of the Grounds Committee to pass on all building permits . . . . Any permit submitted to the Grounds Committee must be approved or disapproved with reasons stated in writing within fifteen days after receipt." (Da555).

Throughout its history as the Genesis Deed's "property owners' association" and the deliberative body of its "members," OBSC acted to implement and enforce "rules," which historically have always included the regulation of construction activities in the community. (See, e.g., Da565, Da569, Da575, Da577, Da588, Da593, Da600, Da607, Da609, Da615-17, Da620-21).

Even Toms River had recognized OBSC's authority provided under the Genesis Deed and its rules to regulate building and construction within the community. In 2017, the Toms River Township Code's land use regulations were amended, without any opposition from Plaintiffs, to require any applications for construction or zoning permits or applications to the Zoning Board of Adjustment and/or Planning Board of the Township of Toms River "shall include proof of notice to the Ocean Beach Surf Club." (Da659).

E. The Patnaudes' Recognition of OBSC as the Genesis Deed's "Property Owners' Association."

The Patnaudes, together with non-party Fred C. Pearl, were the visionaries behind the creation of the OBSC community. It started with the Patnaudes' conveyance in the mid-1940s of the Genesis Deed, and hundreds like it, requiring all future property owners to become "members" and "faithfully abide" by the "rules" of the "property owners' association." Mr. Pearl, for his part, worked closely with the Patnaudes and he too conveyed parcels of land subject to the same restrictions as the Genesis Deed. (Da625-633). Together, the Patnaudes and Mr. Pearl were the "Developers" of the community, as referenced in the Genesis Deed. (Da881-886; 569-570; 572-573; 575; 860-863)

Over the years, the Patnaudes and Mr. Pearl engaged in overt conduct plainly recognizing OBSC as the entity with authority to enforce the Genesis Deed's restrictions and implement and enforce its own rules. (Da881-886; 572-573; 593; 623).

First, on August 26, 1947, the Patnaudes conveyed in two instruments easements in perpetuity to OBSC and its members to use certain roads for ingress and egress to lots within the community, subject to the *same* restrictions as in the Genesis Deed. (Da676-85).

Second, on November 29, 1948, the Patnaudes conveyed fifteen (15) separate parcels to OBSC on the express condition that OBSC use them "as

roadways for ingress and egress by all bona fide members of said Ocean Beach Surf Club, Inc." (Da693-99). The Patnaudes' conveyance was *expressly* conditioned on OBSC enforcing the Genesis Deed's restrictions as provided in OBSC's "present by-laws . . . and provided further that no change, alteration or condition shall be made to the aforesaid Corporation by-laws, that would eliminate, cancel, or in any manner make any or all of the attached restrictions ineffective, null, void or unenforceable." (Da699).

Third, also on November 29, 1948, the Patnaudes conveyed in a separate instrument a significant "Beach Front Section" of land to OBSC. (Da704-09). The "Beach Front Section" was conveyed on the express condition that it "shall be used" by OBSC for the benefit of anyone who "qualifies for membership as defined and provided for in the constitution and by-laws" of OBSC for "bathing, sunbathing and kindred sports or pleasures and who comply with the other rules and by-laws of said association[.]" (Da704-09). The conveyance of the "Beach Front Section" was further conditioned on OBSC's enforcement of the Genesis Deed's restrictions, which were attached to the instrument. (Da706-07). This condition specifically referenced OBSC's authority to enforce the Genesis Deed's restrictions "as provided in the present by-laws" of OBSC. (Da706).

Fourth, on June 7, 1962, Mr. Pearl conveyed to OBSC a "private bathing beach," on the condition that OBSC enforce the same restrictions as in the

Genesis Deed. (Da572). Then, on November 8, 1965, Mr. Pearl conveyed three additional parcels, which were conditioned on OBSC's "enforcement" of the same restrictions in the Genesis Deed, including the requirement that "[n] o building, alteration, fence, or addition shall be made without the written approval of the Developers." (Id.).

For decades, OBSC has served as the "property owners' association" charged with the responsibility of enforcing the Genesis Deed's restrictions and further implementing and enforcing its own "rules" for the benefit of the club and in furtherance of the Patnaudes' intent. OBSC's failure to enforce the Genesis Deed's restrictions or its own rules threatened OBSC's ability to provide its members with beachfront access. Indeed, during a July 25, 1948 OBSC general meeting—one of the entity's first—

> Mr. Quinlan of the Budget Comm. summarized the growth of Ocean Beach Community. Mr. Quinlan made a report that the beach actually belongs to Mr. Patnaude; Mr. Patnaude as of today[2] deeded the beach over to Ocean Beach Surf Club indefinitely. Plot of land on Lagoon was also donated by Mr. Patnaude to build club house on. All restrictions must be followed at all times in order to have a nice community. (Da528).

[2] The July 25, 1948 minutes of the OBSC general meeting contain a notation in the margin indicating that the deed was not recorded until November 29, 1948, (see Da528), which is also consistent with the historical deeds obtained from the Ocean County Clerk's Office and discussed above. (See Da704-09).

In the early 1970's both the Patnaudes and Mr. Pearl demanded OBSC do more to enforce the Genesis Deed's restrictions and its own by-laws and rules. (Da572-573). Particularly relevant here is that the Patnaudes and Mr. Pearl *demanded* that OBSC do more to regulate construction in the community or risk reversion of the beach front property conveyances.

During a November 8, 1970 meeting of OBSC's Board of Trustees, OBSC's President made the following report:

> President's Report - Mr. Poludin reported that he has received a letter from Mr. O'Malley stating that he wants to be released as our attorney due to a conflict of interest. Since Mr. O'Malley represents Mr. Pearl and Mr. Patnaude, and due to the fact that Pearl and Patnaude are perhaps going to hold the Ocean Beach Trustees responsible for the violation of the building code, Mr. O'Malley cannot work on both sides of these issues. Mr. Poludin wrote to Mr. O'Malley requesting copies for alterations that have to be corrected on properties where violations exist. (Da570).

During that same meeting, OBSC's Grounds Committee took steps to address the concerns of the Patnaudes and Mr. Pearl and to prevent the beachfront property from reverting back to them:

> Grounds Committee – Building applications, in the future, must be submitted to the trustees and by majority vote of this body will decide whether the application will be accepted or rejected. Mr. Poludin has been notified by Fred A. Pearl and Edward J. Patnaude that the trustees have been given one year in which to correct building violations. He was informed that the trustees are responsible for corrections;

> otherwise, our beach rights will be threatened. In the future the trustees are considered the Grounds Committee when building applications are submitted for rejection or approval. (Da569).

Similarly, on April 2, 1971, counsel to Mr. Pearl wrote OBSC's President threatening reversion of the "private bathing beach" back to Mr. Pearl if OBSC did not take steps to further regulate construction in the OBSC community. According to this correspondence, Mr. Pearl, "both as a Developer of Ocean Beach Unit No. 1 and as an owner of property therein," learned that other proper owners "erected storage sheds in violation of the general restrictions." (Da573). As a result, Mr. Pearl directed OBSC's President to review "the applicable deeds and restrictions" because "it is the duty of your Club to enforce these general deed restrictions and that failing in that responsibility [OBSC] will incur forfeiture of the" private bathing beach. (Id.). The letter demanded OBSC take "immediate effective action" to ensure "compliance with the general restrictions," or Mr. Pearl would "take immediate legal action to protect his interest as Developer and the interest of all other residents of Ocean Beach Unit No. 1." (Id.).

OBSC responded to Mr. Pearl's counsel by letter dated April 23, 1971. (Da575). In doing so, OBSC represented that it would form a committee "to visit those homes which have violations." (Id.). OBSC further represented that those "who have violated the building codes will be asked to comply as soon as

possible to correct violations" and that "[i]nsofar as possible [OBSC] will comply with the instructions in your letter as soon as we possibly can." (Id.).

Finally, in April 2020, the Patnaudes' daughter executed an agreement waiving the right of reverter to the beachfront property conveyed to OBSC. (Da865). This Agreement recognized the Patnaudes, and their heirs, successors, and assigns, could exercise their right to reclaim title to the beachfront section if the New Jersey Department of Environmental Protection took 2.95 acres to create a "dune walkover." The Agreement stated: "[s]ince the easement sought by NJDEP prevents OBSC members from 'bathing, sunbathing and kindred sports or pleasures,' upon the dune area, and, persons other than just OBSC members will enjoy certain walkover dune access ways, Patnaude has a right of reverter." (Da867). Despite this right, the Patnaudes' daughter waived the right of reverter, thereby allowing the NJDEP to "take" a portion of the beach in order to create a dune. (Da867).

F. Ocean Beach Co.'s Authority to Regulate "Building" Pursuant to the Genesis Deed.

The Genesis Deed and the thousands like it expressly state that "[n]o building, alteration or addition shall be made without the written approval of Ocean Beach Co." (Da54). Elsewhere, the Genesis Deed references the "Ocean Beach Co. Developers" which, as discussed below, appeared to be initially comprised of the Patnaudes and Mr. Pearl. (Da572-573; 593; 623).

Beginning in September 1948 and continuing through this dispute, OBSC has consistently exercised its authority to regulate building permits through its rules and in conjunction with "Ocean Beach Co.'s" authority under the Genesis Deed. (Da533-34). Indeed, in the meeting minutes from September 11, 1948, the Chairman of the Grounds Committee explained that both OBSC *and* Ocean Beach Co. were required to approve any building:

> All plans and specifications for addition – alterations, etc. shall be filed in triplicate form to Ocean Beach Company for approval and signature, of which two copies shall be presented to the Grounds Committee for approval or signature. (Id.).

The history of Ocean Beach Co., the absent indispensable party, has not been developed given the absence of basic discovery—including interrogatories, document requests, requests for admission, and deposition discovery— all of which are necessary to establish that history. To the best of OBSC's knowledge, however, Mr. Patnaude did business under the name Ocean Beach Co. dating back to the late 1940's. In addition to the above, the minutes from OBSC's July 25, 1948 meeting contain a report from the Chairman of the Grounds Committee stating that "any alterations made to buildings must be 1st approved by Ocean Beach Co. and the [G]rounds Committee. Then permission is granted to go ahead with the alteration . . . ." (Da527). In these handwritten minutes, it appears Mr. Patnaude was first identified as the individual to approve building

permits; however, Mr. Patnaude's name was crossed out and replaced with "Ocean Beach Co." (Id.). Similarly, in a letter dated October 6, 1992, the President of OBSC wrote a homeowner to advise "[i]t is your responsibility to show us your final plans, the resolution from Dover Township and to speak with the Developer." (Da607).

Based on the current record, it was not until 1984 that a formal legal entity bearing the name "Ocean Beach Co." was created as a limited partnership by Mrs. Patnaude and the Patnaude Family Ocean Beach Trust. In Ocean Beach Co.'s agreement and certificate of limited partnership, it recognized Mr. Patnaude's prior work through "Ocean Beach Co.":

> The land described in Schedule A was originally owned and developed by Edward J. Patnaude, Sr. under the name Ocean Beach Co. His widow and children wish to encourage the continued ownership, management and development of the property in family hands under a partnership in family members will participate in management, profits and growth. (Da392).

Although discovery was not completed at the time of the trial court's partial summary judgment decision, OBSC was able to secure the Certification of John R. McDonough who has personal knowledge of the involvement of the Patnaudes and Mr. Pearl in developing the OBSC community. Mr. McDonough certified that the Patnaudes and Mr. Pearl were the "Developers" of the community and that they "reviewed applications to fulfill the 'genesis deed'

obligation of the Patnaude Family." (Da882). Mr. McDonough further certified that, for the last 35 years, he has worked on behalf of the Patnaudes to provide oversight to OBSC, including the "approval or denial or modification building and construction plan applications." (Da882-883). Mr. McDonough further certified that, to his knowledge, the Patnaudes, and/or their heirs, successors, or assigns, maintain their right of reverter for certain properties conveyed to OBSC if the Genesis Deed restrictions and OBSC's rules are not followed.[3] (Da884).

Due to the premature filing and grant of the Plaintiffs' motion for partial summary judgment, OBSC has been unable to meaningfully pursue additional documentary and testimonial discovery from Mr. McDonough or the heirs, successors, or assigns of the Patnaudes, including from the limited partnership and limited liability company that were formed to carry on the Patnaudes' intent. (Da61; 391).

From the information that OBSC has obtained, however, there is evidence of Mr. McDonough acting on behalf of the "Ocean Beach Developers." In an October 6, 1992 letter from the President of OBSC to a homeowner, the President advised that she spoke with Mr. McDonough "who said that we could

[3] Other than the NJDEP agreement discussed above, there is no other evidence suggesting the Patnaudes and/or Mr. Pearl otherwise compromised their (or their heirs') rights of reverter to certain properties conveyed to OBSC on the condition that it implement and enforce the Genesis Deed's restrictions and OBSC's rules and by-laws.

approve plans before he did." (Da607). Then, in a July 17, 1998 letter on behalf of the "Ocean Beach Developers," Mr. McDonough advised a property owner that the

> Developer does not have the power to change the club's by-laws nor deed restrictions. The above mentioned setbacks can be approved or disapproved as is the right of the developer per said restrictions.
>
> Furthermore, as you are aware, the club grounds committee under Article IX, Section 4 of the by-laws, must pass on all building permits. Simply put this means that any applicant seeking a building permit must obtain both the Developers' and the Club's approval. (Da623).

The trial court's premature grant of partial summary judgment to Plaintiffs deprived OBSC of the ability to seek further documentary and testimonial discovery from Ocean Beach Co., the Patnaudes, Mr. McDonough, Ocean Beach Co. Limited Partnership, Ocean Beach Co., LLC, and their respective heirs, successors, or assigns.

G. Plaintiffs' Application to OBSC and the Trial Court's Orders

In October 1989, OBSC amended its by-laws to first impose building height restrictions applicable to the Property. (Da491; 618; 642; 650-57). Relevant here are OBSC's "construction rules" that were adopted in February 2014 and which require approval from OBSC's "Building and Grounds Chairperson before any type of construction activity, including demolition

begins." (Da63). The rules also require approval from the "Developer and Toms River Township/Borough of Lavallette[.]" Id. Among other things, the rules restrict the maximum building height for properties (such as the Property) located in the "A" zone to 28 feet. (Da636).

Plaintiffs sought to rebuild their home based upon updated FEMA regulations promulgated after Superstorm Sandy. (Da243). In September 2020, pursuant to the Genesis Deed's grant of authority to OBSC, Plaintiffs submitted building plans to OBSC for construction of a new single-family residence. (Id.). OBSC denied Plaintiffs' application citing the height restrictions contained in the rules to which all OBSC members, including Plaintiffs, agreed to "faithfully abide." (Da238). Plaintiffs then filed suit.

Before the close of discovery, Plaintiffs filed a motion for partial summary judgment on Counts 1 and 2 of their Complaint against OBSC. In granting Plaintiffs summary judgment on Count 1, the trial court found, among other things, that when OBSC was formed "it did not appear that it had any enforcement powers over the restrictive covenants created by Mr. Patnaude," 1T44:16-18, and at the time of the Genesis Deed's conveyance there "was no entity formed at that time" as a "homeowners association that was part . . . of that whole development scheme." 1T47:15-23.

The trial court further found that there is no language in the Genesis Deed to place a purchaser "on notice that 'new restrictions may be imposed.'" 1T48:49. Since the Genesis Deed did not expressly include any building height restrictions, the trial court found that Plaintiffs were not subject to OBSC's rules imposing a height restriction because it was "outside the plaintiffs' chain of title." 1T49:21-24. Despite this ruling, the trial court purported to exercise "judicial restraint" and limit its ruling only to Plaintiffs without directly addressing whether OBSC "has a right to enforce any restrictions related to building within the Ocean Beach community." 1T50.

In sum, the trial court wrongly granted Plaintiffs summary judgment on Count 1 of their Complaint alleging *ultra vires* action on the part of OBSC. (Da853).

LEGAL ARGUMENT

THE APPLICABLE STANDARD OF REVIEW

This Court reviews the "trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). "That standard mandates that summary judgment be granted '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.'" Id. (R. 4:46-2(c)). A court should only deny summary judgment "where the party opposing the motion has come forward with evidence that creates 'a genuine issue as to any material fact challenged.'" Brill v. The Guardian Life Ins. Co., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)). In deciding a motion for summary judgment, this Court views the evidence "in the light most favorable to the non-moving party with all *reasonable* inferences" afforded to the non-moving party. Pantano v. New York Shipping Ass'n, 254 N.J. 101, 115 (2023).

A party opposing a motion for summary judgment before the completion of discovery must "demonstrate with some degree of particularity that further discovery will supply the missing elements of the cause of action." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2016). "A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

POINT I

THE TRIAL COURT IMPERMISSIBLY DISREGARDED THE INTENT OF THE GENESIS DEED AND SUBSTITUTED ITSELF FOR THE FACT FINDER

The "prime consideration" in interpreting a deed "is the intention of the parties." Normanoch Ass'n v. Baldasanno, 40 N.J. 113, 125 (1963); see also Hagaman v. Bd. of Ed. of Woodbridge Twp., 117 N.J. Super. 446, 451 (App. Div. 1971) ("In determining the meaning of a deed, prime consideration is the intent of the parties."). The construction of a deed "should be in conformity with the intention of the parties whenever the law will permit" and extrinsic evidence is permitted to the extent it "throws light upon the circumstances and subject-matter[.]" Lee v. Pennsylvania-Reading Seashore Lines, 129 N.J. Eq. 530, 536 (Ct. Ch. 1941); Hammett v. Rosensohn, 26 N.J. 415, 423 (1958) (stating the "primary rule of construction is that the intent of the conveyor is normally determined by the language of the conveyance read as an entirety and in the light of the surrounding circumstances.").

At the outset, it is important to note that Plaintiffs do not contend in this action that their building plans for the Property complied with the height restriction in OBSC's construction rules, or that the height restriction is somehow unenforceable because it is ambiguous. Rather, Plaintiffs' primary contention is that since the Genesis Deed does not specifically mention a height restriction or otherwise grant OBSC authority to implement construction rules, these construction rules are unenforceable as to Plaintiffs and every other member of OBSC.

The restrictive covenants contained within the Genesis Deed are contractual in nature. The "polestar of contract construction is to find the intention of the parties as revealed by the language used by them." Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div. 1997). Like any contract subject to New Jersey law, the Genesis Deed "must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express generally purpose." Tessmar v. Grosner, 23 N.J. 193, 201 (1957). "Generally, in the context of restrictive covenants, a rule of strict construction should be applied to the provisions, unless such a rule would defeat the obvious purpose of the restrictions." Homann, 296 N.J. Super. at 334. "In such a case, '[t]he precise form of a covenant is of little consequence if the intent is reasonably clear, and its apparent purpose should not be defeated by a technical construction of the language used.'" Id. (quoting Murphy v. Trapani, 255 N.J. Super. 65, 72 (App. Div.), certif. denied, 130 N.J. 17 (1992)).

Here, the trial court concluded that the Genesis Deed failed to put the Property's successors-in-interest on notice that the Property was subject to restrictions that can be "modified, added to, supplement[ed]" or "under the control of an entity." 1T47:1-23. The trial court supported this conclusion by finding as fact that, at the time of the Genesis Deed's initial conveyance, there

"was no entity formed at that time where you would have . . . a homeowners association that was part of . . . that whole development scheme" complete with a master deed and bylaws that "gave the right of the association to modify the rules, regulations. That's not the case here." 1T47:16-23. The trial court further concluded that there "is no inkling that there was any possibility that further rules and regulations and the right to modify those rules and regulations, those restrictions were reserved by Mr. Patnaude." 1T48:1-4.

The trial court's legal conclusions ignore the plain language of the Genesis Deed and the surrounding circumstances at and after the time of its conveyance, and further rest on findings of fact reached by the trial court's misapplication of the summary judgment standard.

The plain language of the Genesis Deed, and the surrounding circumstances at and after the time of its conveyance, unequivocally demonstrate that the Patnaudes intended to create a "club" of property owners who all agreed to "faithfully abide by [the] rules" of a "property owner's association" with authority to implement and enforce "any other rules or regulations it chooses." (Da54). The 75-year history of OBSC serving as the "property owner's association" with authority to implement and enforce "rules"—including building restrictions at the express direction of the Patnaudes—corroborates the Patnaudes' intent to vest OBSC with the authority

the trial court concluded it lacks. The trial court is required to interpret a contract to effectuate the intent of the parties in light of the surrounding circumstances. The trial court failed to do so here.

To the extent that there is a question as to whether OBSC is the "property owner's association" with authority to implement and enforce "rules," such a question can and should be resolved by resorting to all available extrinsic evidence and not on summary judgment. Winfield v. Saunders, 6 N.J. Misc. 833, 909 (Cir. Ct. Mon. Cnty. 1928) (permitting resort to parol evidence to ascertain the intent of a grantor). The currently-available evidence of the Patnaudes' subsequent conduct in conveying to OBSC beaches and roads—on the condition that they be used for the benefit of OBSC's "members" and so long as OBSC enforces the Genesis Deed's restrictions—demonstrates the Patnaudes' own belief that OBSC was and is the "property owner's association" contemplated by the Genesis Deed.

The trial court's conclusion that OBSC was not created at the time of the Genesis Deed's conveyance and, therefore, OBSC had no authority to implement and enforce its "rules," ignores the Genesis Deed's plain language, and quite frankly completely eviscerates the condition subsequent (the property owner's association) in the Genesis Deed contrary to basic contract interpretation principles. The Genesis Deed specifically accounted for the

possibility that the "property owner's association" may not be in existence at the time of conveyance when requiring all property owners to become members of the club "known **or to be known as**" Ocean Beach Club. (Da54). The trial court's factual conclusion that OBSC did not exist at the time of the Genesis Deed's conveyance ignores all the evidence OBSC assembled—before the close of discovery—demonstrating that the Patnaudes themselves obviously expected and intended for OBSC to implement and enforce the "rules" governing the community, which in fact happened and existed for 75 years.

The trial court's premature grant of summary judgment also ignored the building restrictions contained within the Genesis Deed. In addition to prohibiting any building without the written approval of Ocean Beach Co., the conspicuously absent indispensable party, the Genesis Deed also imposed setback requirements and limitations on where structures can be placed on lots within the community. Over the last 75 years, only OBSC, and the missing indispensable party Ocean Beach Co., have sought to enforce those restrictions. OBSC did so through its Certificate of Incorporation empowering it to "promote and protect the general welfare and property rights of the property owner members in their use and enjoyment of their property at Ocean Beach" and its by-laws, rules, and regulations. For the trial court to entirely overlook the role of Ocean Beach Co. and simultaneously conclude that OBSC has *no* authority

to regulate construction in the community—whether pursuant to the Genesis Deed or "any other rules or regulations" OBSC chose to enact—requires a complete disregard of what the Patnaudes intended to create by conveying hundreds, if not thousands, of deeds with the same restrictions to purchasers within the community. By doing so, the trial court completely ignored the plain language of the Genesis Deed requiring all property owners to "faithfully abide" by the property owner's associations rules and requiring separate approval from Ocean Beach Co. prior to any "building, alternation, or addition" on properties within the OBSC community.

The facts present herein are similar to those in Alloco v. Ocean Beach and Bay Club, 456 N.J. Super. 124 (2018). In Alloco, this Court interpreted a very similar deed vesting the Ocean Beach and Bay Club (the "Bay Club") with authority to adopt rules and regulations. Id. at 132. Like OBSC, the Bay Club's 1950 Certificate of Incorporation gave it a broad mandate "[t]o promote and protect the general welfare and property rights of the property owner members in the use and enjoyment of their property at" the Bay Club. Id. The deed and the Bay Club's bylaws, like OBSC's, required all property owners to be a member of the Bay Club and follow its rules. Id. The Bay Club, like OBSC, adopted rules restricting building heights and enforced them against a member who sought to exceed the height limitation. Id. at 133.

The Appellate Division affirmed the grant of summary judgment to the Bay Club, finding that the deed expressly permitted the implementation and enforcement of "rules and regulations," and that the business judgment rule insulated the Bay Club from liability arising out of its implementation and enforcement of those "rules and regulations." Id. at 134-35. Here, OBSC operated in much the same way and under a similar grant of authority as the Bay Club did in Alloco. The trial court's decision of both overlooking the relevant authority of Ocean Beach Co. in conjunction with stripping OBSC of its authority is inconsistent with this Court's holding in Alloco, in contravention of the Genesis Deed's broad grant of authority, and ignores the 75 years of past practice further demonstrating the Patnaudes' intent to vest OBSC with the authority that the trial court has summarily stripped away. See also Edward Hernan v. Ocean Beach Co., L, No. 69214-88[4] (upholding validity of height restrictions imposed within the Ocean Beach Unit 2 community, noting that due to the small lot sizes and density of the community these restrictions were essential to protect the character of the community).

Another case relevant to this analysis is Cape May Harbor Village & Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56 (App. Div. 2011). In that

[4] Judge Hodgson attached the Hernan trial court's opinion in correspondence directed to the parties and uploaded on eCourts on September 8, 2022, when issuing an Amended Order clarifying the trial court's original order in response to OBSC's motion to dismiss. Da 333; 337.

case, a homeowner in a regulated community challenged the validity of an amendment to the declaration of covenants prohibiting the lease of properties in a private community to third parties, arguing that she was not bound by the amendment as it occurred after she took title to her property. Both the trial court and this Court disagreed, finding that it was reasonable for the homeowners' association to amend and revise its regulations and that the homeowners' association members were bound by those regulations; even if the revised regulations prevented one owner's unique and particular needs.

Like the deeds in Alloco, Hernan, and Cape May, the Genesis Deed broadly granted OBSC authority to implement and enforce "any other rules and regulations it chooses." It was plainly the intent of the Patnaudes to vest OBSC with this authority and, for decades, OBSC consistently implemented and enforced its "rules and regulations," including the height restriction at issue here. Despite all of this historical evidence—and the absence of any evidence to the contrary—the trial court summarily concluded before the close of discovery, that in effect neither OBSC nor Ocean Beach Co. ever, since 1948, held any authority granted by the Patnaudes to regulate construction—despite 75 years of doing so. Like in Hernan, OBSC's construction rules are intended to preserve the character of the neighborhood scheme long enjoyed by everyone in the OBSC community. With the stroke of a pen, the trial court's partial

summary judgment decision will upend both the character of the Ocean Beach community and the Patnaudes' intent. This Court should reverse the trial court's orders to ensure that the Patnaudes' intent is not so easily vitiated, and, at minimum, afford OBSC the opportunity to take further discovery and otherwise mandate the inclusion of Ocean Beach Co. as an indispensable party to this litigation.

A. The Trial Court's Orders Threatens the Very Fabric of the OBSC Community (Raised Below: Da508; 879).

Not only did the trial court's partial summary judgment order disregard the Patnaudes' intent, but it also threatens a key purpose of the OBSC community: to provide its members with access to one of the Jersey Shore's most pristine beaches. If, as the trial court summarily concluded, OBSC lacks authority to enforce its own "rules or regulations" and the Genesis Deed's restrictions, then the Patnaudes conveyance of the "Beach Front Section" is threatened by a right of reverter. Only a few months after conveyance of the Genesis Deed, the Patnaudes conveyed to OBSC, the "Beach Front Section" on the condition that it be used for the benefit of OBSC's members and that OBSC enforce the Genesis Deed's restrictions, along with the its own "present by-laws." (Da706). Notably, the "present by-laws" in effect at the time of this conveyance required all members to "swear to abide by the provisions of the Certificate of Incorporation of the Club, these by-laws, and any subsequent

regulations imposed by this Club." (Da481). These by-laws—first implemented in 1948—plainly put the Property's successors-in-interest on notice that they were subject to OBSC's current rules "and any subsequent regulations imposed" by OBSC in the future. (Id.).

The trial court's partial summary judgment decision necessarily means that the Patnaudes can exercise their right to reverter of the "Beach Front Section." Had the trial court interpreted the Genesis Deed in a manner effectuating the Patnaudes' intent, this would not be an issue; however, because the trial court plainly ignored the Patnaudes' intent, OBSC's ability to "promote and protect the general welfare and property rights of the property owner members in their use and enjoyment of their property at Ocean Beach" pursuant to its Certificate of Incorporation is threatened. Despite the trial court's claimed exercise of "judicial restraint" in limiting its holding only to Plaintiffs and not the larger OBSC community, the fact remains that the very purpose of the OBSC community—enjoying a certain neighborhood scheme at the Jersey Shore—can be completely and irreparably destroyed if the Patnaudes, or their successors-in-interest, exercise their right to reverter if OBSC can no longer enforce the Genesis Deed or its own rules and regulations. This further underscores the trial court's error in disregarding the intent of the Genesis Deed and the creation of the OBSC generally.

B. The Trial Court's Order is Internally Inconsistent and Was Issued Without Any Discovery or Involvement from an Indispensable Party, Ocean Beach Co. (Raised Below: Da879).

The trial court's order granting Plaintiffs partial summary judgment provides that Plaintiffs are not required to obtain any form of approval from OBSC or anyone else prior to constructing their new home. The order, however, also confirms that Plaintiffs are bound by the Genesis Deed's restrictions. Such a ruling is internally inconsistent, effectively rewrites the Genesis Deed, and improperly impairs the rights of a non-party, Ocean Beach Co., that should have been added as an obvious indispensable party in this litigation by the Plaintiffs.

If Plaintiffs remain bound to the Genesis Deed's restrictions, then they are bound to "faithfully abide" by any "rules or regulations" the "property owner's association" chooses to enact. Despite this, the trial court found that the Plaintiffs do not have to abide by the height restrictions set forth within the OBSC construction rules. This ruling is internally inconsistent and the trial court's order cannot be squared with the Genesis Deed's intent and OBSC's historical past practice of passing upon building permits pursuant to its rules and regulations.

If Plaintiffs remain bound to the Genesis Deed's restrictions, then they are also required to obtain "written approval from Ocean Beach Co." before beginning any "building, alteration," or "addition." By ruling that Plaintiffs

need not obtain any form of approval—other than zoning approval—the trial court impermissibly impaired Ocean Beach Co.'s rights without it being named as a party to this litigation and without any meaningful discovery from it. Pursuant to N.J.S.A. 2A:16-57, "[n]o declaratory judgment shall prejudice the rights of persons not parties to the proceeding," and, pursuant to N.J.S.A. 2A:16-56, when "declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding."

Ocean Beach Co. is an indispensable party and the trial court's premature grant of partial summary judgment has impaired its rights. A party is "indispensable" if it "has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Jennings v. M&M Transp. Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969). Indispensability is usually determined from the point of view of the absent party and in consideration of whether or not his rights and interests will be adversely affected." LaMar-Gate, Inc. v. Spitz, 252 N.J. Super. 303 (App. Div. 1991).

Whether OBSC has authority to regulate buildings on the Property or not, the trial court's order prejudiced Ocean Beach Co.'s express rights under the Genesis Deed and the Plaintiffs should be required to add Ocean Beach Co. as

an indispensable party to this action before any decision impacting the rights of Ocean Beach Co. is rendered. Ocean Beach Co.'s absence as a party in this matter further underscores the need for additional discovery in this matter and the prematurity of the trial court's summary judgment decision. While OBSC presented some evidence to the trial court regarding its constant coordination with Ocean Beach Co. dating as far back as the 1940's, there is more evidence to uncover. Indeed, the Certification of John McDonough underscores the need for additional discovery. Mr. McDonough certified that, for the last 35 years, he assisted the Patnaudes, Mr. Pearl, and Ocean Beach Co. in reviewing and passing upon all building plans in the OBSC community pursuant to the Genesis Deed. (Da881-886). Given the lengthy history and the statements in Mr. McDonough's certification, there *must* be additional documentary evidence supporting Ocean Beach Co.'s exercise of authority pursuant to the Genesis Deed, but OBSC was precluded from exploring this discovery because of the premature grant of partial summary judgment.

Summary judgment is generally inappropriate prior to the completion of discovery. Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529, 541 (App. Div. 2019). "A party opposing a motion for summary judgment on the grounds that discovery is incomplete, however, must 'demonstrate with some degree of particularity the likelihood that further discovery will supply the missing

elements of the cause of action." Id. (citation omitted). The numerous gaps in the historical factual record, discovery remaining open, and the lack of participation from a necessary party whose rights were prejudiced by the trial court's order require this Court's reversal of the trial court's premature grant of partial summary judgment.

POINT II

THE TRIAL COURT APPLIED THE INCORRECT STANDARD IN ITS REVIEW OF OBSC'S MOTION FOR RECONSIDERATION

Before seeking leave to pursue an interlocutory appeal from this Court, OBSC asked the trial court to reconsider its decision granting Plaintiffs partial summary judgment. OBSC emphasized how the trial court's decision undermined the Patnaudes' intent, the prematurity of the decision with discovery remaining open, and the absence of any meaningful discovery or participation from an indispensable party, Ocean Beach Co. In denying the OBSC's reconsideration motion, the trial court applied the R. 4:49-2 standard, which only applies to a "judgment or final order", rather than the R. 4:42-2(a) standard.

Pursuant to R. 4:42-2(a), when a "partial summary judgment is awarded," it only becomes a "judgment" if the "trial court certifies that there is no just reason for delay of" enforcement. Here, the trial court did not so certify and, therefore, this Court's Order did not "terminate the action as to any of the claims" and it is "subject to revision at any time before the entry of final

judgment in the sound discretion of the court in the interest of justice." R. 4:42-2(a). The "interest of justice" standard is "far more liberal" than the standard in Rule 4:49-2 and OBSC meets it here because there remain significant claims between the parties and this Court rendered its decision without a complete factual record and despite the existence of genuine disputes of material fact. See Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Notably, during the argument below, Plaintiff conceded that R. 4:42-2(a) was the correct standard of review. 2T6:12-24.

The trial court's decision on OBSC's motion for reconsideration applied the far more stringent standard found in R 4:49-2 rather than the "interest of justice" standard mandated by this Court in Lawson. Under the "far more liberal" standard, the trial court should have granted reconsideration and permitted the development of a complete factual record, especially since many of Plaintiffs' claims against OBSC remain pending and this case implicates more than seven decades of history.

CONCLUSION

For the foregoing reasons, the Court should grant OBSC's Motion seeking reversal of the trial court's August 17, 2023 and January 22, 2024 Orders.

Respectfully submitted,
Dilworth Paxson LLP
Counsel for Defendant,
Ocean Beach Surf Club Unit 1

By: */s David A. Clark*
David A. Clark

Dated: May 16, 2024

JOHN P. GROSS and JANICE GROSS,	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
Plaintiffs-Respondents,	
	DOCKET NO. A-002235-23
Vs.	
	CIVIL ACTION
OCEAN BEACH SURF CLUB UNIT 1,	
	ON INTERLOCUTORY APPEAL
Defendants-Appellants,	FROM AUGUST 17, 2023 ORDER GRANTING PARTIAL SUMMARY
and	JUDGMENT TO PLAINTIFFS
	AND JANUARY 22, 2024 ORDER
TOMS RIVER TOWNSHIP, CRAIG MARTIN and WILLIAM PARRETT,	DENYING DEFENDANT'S MOTION FOR RECONSIDERATION
Defendants.	DOCKET NO. OCN-C-000125-22
	SAT BELOW:
	HON. MARK A. TRONCONE, P.J.CH

RESPONDENT'S BRIEF ON BEHALF OF JOHN AND JANICE GROSS

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I. PRELIMINARY STATEMENT

This matter arises out of a dispute over property rights and the imposition of deed restrictions. Plaintiffs' challenge below was premised on two arguments. First, Plaintiffs established that the Genesis Deed contained *no height restriction* and second, OBSC had no authority to change, alter, or amend the existing building restrictions. The trial judge agreed, and as a matter of judicial restraint, limited his ruling to Plaintiffs' premises alone. The Judge, therefore, saw no need to rule on Plaintiffs' broader second argument which challenged the validity of construction rules based upon lack of uniform and reciprocal application as well as self-dealing. We submit on appeal that in the unlikely event this Court reverses the court's ruling below, the matter would then have to be remanded for consideration of Plaintiffs' second point of abandonment.

After Summary Judgment was granted on August 17th, 2023, Plaintiffs were granted township permits to construct. OBSC only challenges Plaintiffs' construction based upon the *height* which, as planned, is lower than the 35' feet permitted by Township ordinance. (Db 22-24)

Plaintiffs established below that the 1947 Genesis Deed does not confer any power to OBSC to change, alter, or amend the building restrictions. OBSC did not even exist in 1947 when the Genesis Deed was conveyed. Plaintiffs' Genesis Deed requires, however, the owner to abide the *rules* of the "Ocean Beach Club". The trial

court did not disturb the application of *general* club rules. Plaintiffs do not claim to be "above" the application of the general club rules; however, from a legal standpoint, they cannot be held to obey rules which were not contemplated at the conveyance of the deed. The gravamen of Defendant's argument is that the Genesis Deed developer intended for the beach association to have unbridled control over building restrictions affecting the entire community, essentially acting as a quasi-zoning board. The Genesis Deed bears out the exact opposite intent whereby building restrictions are specifically separated by paragraph and heading and, furthermore, are specifically reserved to the developer. (Da53) The reservation of development rights is further corroborated by subsequent conveyances by the developer of the street beds to OBSC. *See*, Plaintiff's title expert, Joseph A. Grabas, CTP, NTP in his report dated (Da141) *See also*, Grabas Exhibits 1-13 (Da149).

OBSC did not even exist until 1948, one year *after* Plaintiffs' predecessor took title. *See*, OBSC 1948 Certificate of Formation (Da125)**,** *See* also 1947 Genesis Deed **(**Da53)**.** The developer did not confer any rights for this club to change, amend, or alter any building restrictions. In fact, the club historically approved plans only *after* the Township issued a building permit. This process changed in 1989 when the OBSC amended its by-laws to include a height restriction and in 1992, when they enacted a multitude of building and zoning restrictions. Eventually, the OBSC amended its by-laws to mandate that a homeowner must first submit plans to them

prior to Township application. Toms River amended its ordinance in 2018 to require "homeowner association" approval as a prerequisite for Township review. The OBSC effectively operates as a preliminary building and zoning office and engages engineers for plan review. Prior to 1989, all homeowners in Ocean Beach abided Township building and zoning. There is no record of the OBSC taking any action to alter or amend any of the developer's building restrictions until 1989. (Db22).

Accordingly, OBSC's actions are *ultra vires,* as they have no enabling power or authority from the original developer to adopt or change any of the deed restrictions as imposed by the original developer. Secondly, Plaintiffs assert that, even *assuming arguendo* that OBSC has "enabling" authority from the developer, the OBSC restriction as to height is unenforceable to the extent that the restriction has not been uniformly applied to all property owners, a number of which have exceeded the height restriction at issue. Other restrictions, likewise, have not been uniformly adhered to or applied on equal terms to members of the OBSC. Plaintiffs also assert that there has been self-dealing amongst certain trustees in connection with certain approvals which are not in compliance with their own construction rules, and that self-dealing effectively estoppes the Defendant from enforcement. *See*, Cert. of John Gross (Da835).

II. PROCEDURAL HISTORY

We take no heavy issue on procedural history other than to address inaccuracies and clarification.

On July 15, 2022, OBSC, Martin, and Parrett moved to dismiss Plaintiffs' Complaint. (Db4). They asserted failure to name "indispensable parties", namely the 320 other members of OBSC. The Defendant did not claim that the developer was indispensable.

The defense claims that "[f]ollowing the decision on the motion to dismiss, the parties engaged in some limited written discovery". (Db4). The parties engaged in heavy written discovery which is why the appendix exceeds 800 pages of Minutes, letters and back title. Plaintiffs also provided two expert reports.

On May 1, 2023, the trial court entered a case management order establishing deadlines for completion of written and expert discovery, but did not set a fact discovery end date. (Da338).

On June 15, 2022, Plaintiffs provided an expert report of John A Grabas. Defendant never provided any expert report. (Da141).

Defendant never sought to depose Plaintiffs' title expert.

On July 31st, 2022, Plaintiff provided a Certification of John Gross, P.E. and Curriculum Vitae and identified him as an expert engineer. (Da835)(Da849).

Defendant never served any expert reports nor any engineer certification in response to Plaintiffs' certification.

Defendants further claim that "On September 6, 2023, OBSC timely filed a motion for reconsideration….the trial court applied the incorrect legal standard governing reconsideration and otherwise failed to meaningfully address OBSC's arguments." (Da873-876)(Db6). Plaintiffs do not concede this. *See,* Argument II below.

On February 6, 2024, the trial court issued an Order denying OBSC's request to stay the partial summary judgment order. (Da877).

On February 13th, 2024, the Defendant filed a Motion to file an Interlocutory Appeal and a Motion to Stay Construction.

By settlement between the parties, Plaintiffs consented to the Motion for Interlocutory Appeal without prejudice to the arguments advanced in support of same. In consideration, defendant withdrew its Motion to Stay Construction. Plaintiff agreed to complete construction by June 15th, 2024, abiding, without prejudice, to OBSC's prohibition on construction during the summer months. Plaintiffs home has now been constructed and is pending a Certificate of Occupancy.

III. COUNTERSTATEMENT OF FACTS

For brevity's sake, Plaintiffs will rely upon the Statement of Material Facts. (Da341-370). We also submit that the Court's factual recitation commencing on page 42 of the August 3rd transcript provides a fairly accurate overview. Notwithstanding the foregoing, for easy reference, we are providing the Court with a recitation of the relevant restrictive covenants as contained in the Genesis Deed as well as our commentary:

A. Plaintiff's Genesis Deed Contains Six (6) Restrictive Covenants

The 1947 Genesis Deed contains a specific set of restrictive covenants entitled "OCEAN BEACH RESTRICTIONS" and the said restrictions are segregated and enumerated into six separate categories, namely, 1) Beach Club; 2) Building Restrictions (Lots other than Ocean Front); 3) Building Restrictions (Ocean Front Lots); 4) General Restrictions; 5) Storage; and 6) Utilities. See, Plaintiffs' Genesis deed. (Da53).

(1) The Genesis Deed restrictions governing the ***Beach Club*** read as follows:

BEACH CLUB

> All property owners in this development are required to be members of a property owners' association known or to be known as "OCEAN BEACH CLUB" and to faithfully abide by its rules. No sale, resale, or rental of any property in Ocean Beach shall be made to any person or group of persons who are, have been or would be disapproved for membership by the OCEAN BEACH CLUB.

> THE use of the bathing beach is for the exclusive use of members of the OCEAN BEACH CLUB.
>
> Being a private club the OCEAN BEACH CLUB shall make such rules as it deems necessary pertaining to the race, color, or creed of person eligible for membership and any other rules or regulations it chooses. (Da53)

There is no record of the entity "Ocean Beach Club" ever being formed. A separate entity, the "Ocean Beach Surf Club" ("OBSC") was incorporated on June 5, 1948. (Da125) OBSC was not in existence at the time of conveyance of the 1947 Genesis Deed. (Da53). Of note, the beach club restrictions make no mention of any height restriction or any rules concerning building restrictions, nor do they make any mention of the developer conveying development rights to the OCEAN BEACH CLUB or the OBSC.

(2) Genesis Deed restrictions ***governing building restrictions*** provide:

> **BUILDING RESTRICTIONS (LOTS OTHER THAN OCEAN FRONT)**
>
> No building shall be built or placed closer that TWO (2) feet to front lot line, THREE (3) FEET to rear lot line, or TWO (2) FEET to side lot line.
>
> It is not recommended, but is permissible upon special approval by the Ocean Beach Co. Developers, to have the front of buildings including porches, garages, etc., to total over TWENTY-FOUR (24) feet. All buildings must be erected on the left side of lots when viewed from road. Vacant space on right side of lot when viewed from the road. (Da53).

The building restrictions above establish building setback lines, building locations and front building widths. The building restrictions above do not contain any height restrictions affecting the subject premises. The building restrictions above do not contain any mention of future building restrictions to be imposed or changed by the developer. The building restrictions above do not contain any mention of future building restrictions to be imposed or changed by the Ocean Beach Club. The building restrictions above do not contain any mention of future building restrictions to be imposed or changed by OBSC.

(3) The Genesis Deed also contains restrictions governing ***Building Restrictions for Oceanfront Lots*** which provide:

> **BUILDING RESTRICTIONS (OCEANFRONT LOTS)**
>
> No building, alteration, addition, or structure of any kind shall be erected closer than THIRTY-FIVE (35) FEET to the front or easterly side of an ocean front lot; nor closer than FOUR (4) FEET to side lines. (Da53)

The building restrictions above do not contain any height restrictions affecting the subject premises. The building restrictions above do not contain any height restrictions affecting the ocean front lots. The subject premises is not an Oceanfront lot, so these restrictions do not apply to Plaintiffs' property but are relevant to show that these building restrictions have, likewise, not been uniformly applied by OBSC.

(4) The Genesis Deed also contains ***General Restrictions*** as follows:

GENERAL RESTRICTIONS

> All toilets and plumbing shall be modern and sanitary. No cesspools are permitted. Septic tanks shall be used. All electric wiring shall be approved first by the inspectors of the fire underwriters [property insurance carriers]. No building, alteration, fence or addition shall be made without the written approval of the ***Ocean Beach Co***. (Da53) (emphasis ours)

Ocean Beach Co. did not exist in 1947, the year of our Genesis Deed. Ocean Beach Co. was formed on December 31, 1984 as a Limited Partnership by Edward J. Patnaude, Jr. and Marjorie L Patnaude. (Da391). Ocean Beach Co. was later transformed into a Limited Liability Corporation (LLC) owning the Property described in Schedule A, and of the Liability Company on October 5, 1999. (Da39)

Finally, the only two remaining restrictions are (5) Utilities and (6) Storage. We dispense with recitation here as those restrictions have no bearing on the case.

B. From 1948 thru 1989 OBSC Never Passed Any Rules Govern Construction.

The Defendant's claim that "[w]ith one stroke of a pen, the trial court upended over 75 years of past practice and declared that OBSC has no authority to enforce its rules, including the construction rules at issue herein." (Db2) First, the decision below only prevents the club from imposing "construction" restrictions. Second, it is important to note that the Defendant is disingenuously claiming that the club has been *imposing construction rules* for *75 years*. (Db8,9,13,16,23,24,28,30). They

have not. The Defense's reference to 75 years is a red herring. OBSC never drafted nor imposed any construction rules or restrictions from 1948 thru 1989. Defendants concede that "[i]n October 1989, OBSC amended its by-laws to *first* impose building height restrictions applicable to the Property." (Db22). (Da491; 618; 642; 650-657). (emphasis ours)

Further, Defendant cannot point to any height restriction as contained in the Genesis Deed. In 1989, the club created numerous restrictions including those pertaining to height. The club went on to subsequently and illegally record a series of "deed restrictions" in 2011. (Da91). *See also*, Plaintiffs' SOMF(Da0137). Further amendment was imposed in 2014 which served as the basis for denial on Plaintiffs' plans. (Da636).

Defendant suggests that *both* the developer and OBSC had the power to pass upon all building alterations. (Da525-526). (Db7). Let us assume that this fact is true. The practice referred is the mere passing upon or approving plans which serves to assure that deed restrictions have been adhered. It does not empower the developer, nor the club, to *change or alter* those deed restrictions. There are no facts reflecting that OBSC was given carte blanche to take over the developer's role[1] and even assuming same, there are no facts or document which suggest that OBSC had any

[1] Defendant, OBSC, claims "It is clear from the face of the Genesis Deed that the Patnaudes intended to vest a "property owners' association" with authority to implement and enforce any "rules or regulations it chooses." (Db17)

power to alter or amend any deed restrictions. In fact, neither party would have the ability to impose new restrictions as John McDonough[2] admits same in a letter, dated July 17th, 1998, which states: "I would like to point out that the Developer does not have the power to change the club's by-laws nor deed restrictions". (Da622) This is also consistent with law. *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18 (Ariz. 2022) (Da 464) (Discussed at length below)

It makes sense that the developer would want to pass upon all building alterations because there are some deed setback restrictions from the developer. This power was never intended, nor can it be legally construed, to allow for the imposition of entirely new building restrictions on the property.

The Defense proffers that OBSC has been religiously enforcing its own rules and that the lower court's ruling is destroying the very fabric of the community; however, the *facts* tell us a different story. Simply put, the *actual* status quo in Ocean Beach is the consistent approval by OBSC of homes with heights well in excess of what Plaintiffs are now constructing. Furthermore, 1948 to 1989, the club *never* sought to impose *any* construction rules, and specifically no height restrictions. There is no sore thumb argument here. The status quo is not disrupted nor upended,

2 McDonough has no relation to the developer but has assumed a "developer" role on behalf of Ocean Beach Co. (Da741). Plaintiffs have challenged his authority as well any authority of Ocean Beach LLC to act as a developer or as successor to Ocean Beach Co. See, Plaintiffs' response to Defendant's SOMF (Da813-815).

as Plaintiffs' as-built house conforms with the 35 neighboring properties as previously approved by OBSC at similar or greater heights. *See*, Chart/Table of Excess Heights (441), Gross Cert.. (Da835) Plaintiffs' SOMF #118-170 (Da362-370).[3] Since the ruling below is limited to Plaintiffs' property, OBSC is free to impose its rules on other members of the community and Plaintiffs, likewise, remain bound to adhere to all other OBSC rules. Whether OBSC seeks to impose *ultra vires* rules is their prerogative and risk.

For all practical purposes, one can understand that Plaintiffs' predecessor, the Fitzpatricks, upon taking title, would expect that the beach club would pass club rules such as prohibitions on alcohol use or dogs on the beaches, rules related to the operation of the recreational facilities, etcetera. However, it is unfathomable that the Fitzpatricks would have contemplated that the beach club would impose construction rules and height restrictions on building.

Defendant also claims error in failing to name an indispensable party, namely the developers, Mr. and Mrs. Patnaude, and Ocean Beach Co. Ocean Beach Company is referenced as developer in the deed, but this company was never incorporated. Another real estate holding company with that name was formed in

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[3] OBSC never challenged Plaintiffs' engineering calculations or documentation showing 35 properties as approved exceed the club height restriction. They denied these statements of fact based upon boilerplate technical objections. (Da798-810). Plaintiffs, on reply brief, submitted an additional 32 of 52 homes west of 35 South that exceeded the single-story restriction showing a total of 67 homes within the community approved as excess heights. *See*, Chart of Excess Heights (Da441), *See also*, Cert. Of Gross (Da835)

1989 with no relationship or legal ties to OBSC. The formation of this LLC appears to be limited to a real estate holding company on the remaining parcels of the original developer, but they do not convey any original development rights over Plaintiffs' property (Da391) (Da39). The Plaintiffs have no claim against the Patnaudes, as they are deceased. No claim is presented against the Ocean Beach Company, as they have not imposed any restrictions on Plaintiffs' deed which give rise to challenge. The Defendant here is not the original developer and has no assignment of development rights from the developer.

IV. LEGAL ARGUMENT

POINT I: THERE IS NO DOCUMENTARY EVIDENCE REFLECTING A HEIGHT RESTRICTION IN PLAINTIFFS' GENESIS DEED.

A. Deed Restrictions are to be Strictly Construed.

Deed restrictions are strictly construed. Ambiguous restrictions, therefore, are not enforceable. *Cooper River Plaza East, LLC v. Briad Group,* 359 *N.J. Super*. 518, 532-3 (App. Div. 2003).

An ambiguous restriction will not be enforced in equity so as to impair the alienability or use of property. *Caullett v. Stanley Stilwell & Sons, Inc.,* 67 *N.J.Super.* 111, 115, 170 *A.*2d 52 (App.Div.1961). As stated there:

> It must be remembered that a restrictive covenant is in its inception a mere contract, subject to the interpretative doctrines of contract law which focus on the parties' mutual purpose.... A purported contract so obscure that no one can be sure of its meaning is incapable of remedy at

> law or equity for its alleged breach ... and therefore cannot constitute a valid impediment to title.

[*Id.* at 115-16, 170 *A.*2d 52.]

Strictly construed, our deed unambiguously contains no height restriction. As to any suggestion that OBSC was conferred some power to impose rules on building and zoning, that creates an untenable ambiguity which makes the OBSC building rules unenforceable. It would allow for substantial, unforeseen, and unlimited amendments, and would alter the nature of the covenants to which the homeowners originally agreed. That is exactly what happened starting in 1989 when OBSC first began imposing zoning and building codes, some 40 years after they were formed. (Da491)(Db22).

Under New Jersey's well-established common law, restrictive covenants are generally disfavored. *Cooper River Plaza E., LLC, supra*, at 526. "Restrictions on the use to which land may be put are not favored in law because they impair alienability." *Bruno v. Hanna*, 63 *N.J. Super*. 282, 285 (App. Div. 1960). Accordingly, enforcement of provisions by one person restricting another in the use of his land occurs when "the right to restrict is made manifest and clear in the restrictive covenant." *Ibid.* (citing *Hammett v. Rosensohn*, 46 *N.J. Super*. 527 (App. Div. 1957)). OBSC's restrictions on Plaintiffs' construction relative to other properties is an impairment on alienability to the extent that Plaintiffs' property use

is diminished while others are enhanced. This translates into differing market values to Plaintiffs' detriment.

Despite the premise of strict construction, our courts have upheld a restrictive covenant if it is found in the chain of title. *See, Pearson v. DMH 2 LLC*, 449 *N.J. Super*. 30, 50 (Ch. Div. 2016) (citations omitted); see also *Olson v. Jantausch*, 44 *N.J. Super*. 380, 388 (App. Div. 1957). Here, the only restrictive covenants that appear of record in the chain of title to the subject premises are the ones contained in the Genesis Deed. They impose ***no height restriction***, nor do they confer any power to alter or amend the restrictions by the developer, his successors or assigns. (Da53)(Da141-149). Once Patnaudes conveyed title, they no longer possessed the authority to further encumber the subject premises with restrictive covenants; nor could he, therefore, assign such authority to OBSC.

B. Assuming Arguendo that Patnaudes Intended to Impose Height Restrictions, They Would and Could Have Expressly Done So.

The trial court need only look to the deed restrictions and the plain language of the Genesis Deed to determine the developers' intent. First, the developers specifically imposed a certain width and side yard setback requirements. (Pb10)(Da53). The developers also imposed a single-story height restriction for properties west of Route 35 South. *Id*. The developers could have done the same for properties east of Route 35 South. One can only surmise that perhaps the developers sought to protect the sunset views whereas the eastern side slopes upward to an ocean

front dune and height restrictions were not needed. We have no explanation, but we do not need one. The fact remains that the developers specifically imposed certain building restrictions and left out any height restrictions on properties east of Route 35 South. The common law principle of gleaning legislative intent applies here, namely, *expressio unius est exclusio alterius.* The developers expressed certain building restrictions and excluded height restrictions. *Imbrie v. Marsh*, 3 *N.J.* 578 (1950). This evidences clear knowledge and intent on the developers' part. More importantly, neither the developers, Patnaudes, nor Ocean Beach Company ever sought to amend, modify, or alter the deed restrictions on Plaintiffs' property. In fact, nobody ever sought to impose any construction or building rules until the club did so in 1989. These new building rules were never sanctioned by the developers.[4]

C. Neither the Developers nor the Club has Power to Change the Deed Restrictions. *Kalway v. Calabria Ranch HOA* (Case on Point)

The defense erroneously claims that "[t]he plain language of the Genesis Deed, and the surrounding circumstances at and after the time of its conveyance, unequivocally demonstrate that the Patnaudes intended to create a "club" of property owners who all agreed to "faithfully abide by [the] rules" of a "property owner's association" with authority to implement and enforce "any other rules or regulations

[4] An exhaustive review of the OBSC minutes (Da523-663) reveals no communication from the developer regarding the 1989 amendments which first imposed a height restriction. (Da618-620). In fact, there is no mention of the term "height" until 1989. (Da618)

it chooses." (Da54). (Def. Brf. p.28). The defense admits, however, that no building rules came into effect until 1989. *Id* at 22.

The defense appears to be conflating the issue to cause confusion. This Court must distinguish, as we do, between, 1) the power to impose *general club rules,* and 2) the power to change and impose *new building restrictions*. We take no issue with the general club rules, and likewise, the trial court, did not impair those rules. However, the building restrictions are separately designated in the deed and specifically are reserved to the developer. It is here that the trial court correctly concluded "[t]here was no scheme other than what Mr. Patnaude put in the chain of title. There is no inkling that there was any possibility that further rules and regulations and the right to modify those rules and regulations, those restrictions were reserved by Mr. Patnaude." 1T47:25-25 through IT48:1-4. The defense has unwittingly admitted this fact. The defense asserts that John McDonough is the acting agent for the developer. "Mr. McDonough certified that, for the last 35 years, he assisted the Patnaudes, Mr. Pearl, and Ocean Beach Co. in reviewing and passing upon all building plans in the OBSC community pursuant to the Genesis Deed. (Da881-886)" (Db38). However, the record below reveals a letter, dated July 17th, 1998, wherein John McDonough states: "I would like to point out that the Developer does not have the power to change the club's by-laws nor deed restrictions". (Da622).

Although exhaustive research has yielded no case on point in New Jersey; a highly persuasive case from the Arizona Supreme Court provides excellent guidance on a very similar issue. *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18 (Ariz. 2022). The trial court found this case highly persuasive and consistent with New Jersey State law. 1T.49:5-20. (Da464) The defense failed to address this case in their brief. In *Kalway*, the court was asked to decide the extent to which a homeowners' association ("HOA") may rely on a general-amendment- power provision in its covenants, conditions, and restrictions ("CC&Rs") to place restrictions on landowners' use of their land. Like New Jersey, Arizona construes restrictive covenants narrowly and held that "a general-amendment-power provision may be used to amend *only those restrictions for which the HOA's original declaration has provided sufficient notice. Id.* at par 1. (Emphasis ours).

Calabria Ranch Estates is a residential subdivision comprised of five lots located east of Tucson. *Kalway* owned nearly twenty-three acres. The lots were subject to Covenants, Conditions and Restrictions (CC&Rs), first recorded in the original declaration in 2015, to "protect[] the value, desirability, attractiveness and natural character of the Property," as stated in the CC&Rs' general-purpose statement. According to the original declaration, the CC&Rs could be amended "at any time by an instrument executed and acknowledged by the [m]ajority [v]ote of the owners" under the general-amendment-power. *Id.* at Par 3.

After *Kalway* had purchased his lands, the other property owners amended the CC&Rs by majority vote without *Kalway's* consent or knowledge. Among other things, the new restrictions were amended to limit the owners' ability to convey or subdivide their lots, restricting the size and number of buildings permitted on each lot, and reducing the maximum number of livestock permitted on each lot. *Id*. at par. 4. *Kalway* brought action against Calabria Ranch and the Other Owners, seeking a declaratory judgment to invalidate the zoning and building amendments to the CC&Rs. The parties filed cross-motions for summary judgment, which the superior court granted in part and denied in part. The court invalidated two sections in their entirety and partially invalidated two more sections of the amended CC&Rs. The court further found the invalid provisions severable from the rest of the CC&Rs. *Id.* at par. 5.

On appeal, the Supreme Court affirmed in part holding that an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations. CC&Rs form a contract between individual landowners and all the landowners bound by the restrictions, as a whole. *Id.* at par. 14, *citing, Powell v. Washburn, 211 Ariz. 553, 555–56 ¶ 8 (2006);* (*quoting Restatement (Second) of Contracts* § 211 cmt. f (Am. L. Inst. 1981)).

> The notice requirement relies on a homeowner's reasonable expectations based on the declaration in effect at the time of purchase—in this case, the

> original declaration. Under general contract law principles, a majority could impose any new restrictions on the minority because the original declaration provided for amendments by majority vote. But allowing substantial, unforeseen, and unlimited amendments would alter the nature of the covenants to which the homeowners originally agreed. *See, Dreamland Villa Community Club, Inc. v. Raimey, 224 Ariz. 42, 51 ¶ 38 (App. 2010) Thus, "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." (Emphasis ours)*

Kalway, *supra* at par. 15 citing *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994).

The *Kalway* court went on to state that:

> "To determine whether the original declaration gave sufficient notice of a future amendment, we must look to the original declaration itself. 'Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties' with any doubts resolved against the validity of a restriction. *Armstrong v. Ledges Homeowners Ass'n*, 633 S.E.2d 78, 85 (N.C. 2006) (emphasis omitted). We apply an objective inquiry to determine whether a restriction gave notice of the amendments at issue. *See* 1 *Williston on Contracts* § 3:4 (4th ed. 2021) ('Whether there is mutual assent to the terms of a contract is determined by an objective test, rather than the subjective intentions of the parties.')". *Id*. at par.16. The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way. *See Armstrong*, 633 S.E.2d at 87. But future amendments cannot be "entirely new and different in character," untethered to an original covenant. *Lakeland Prop. Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984). Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants.
>
> *Kalway*, *supra* at par. 16.

The *Kalway* case is on all fours, the Genesis Deed restrictions here provide for no height restriction nor is there sufficient notice that the building restrictions can be changed or altered. After two years of litigation and document production, Defendant cannot point to any height restriction in Plaintiffs' Genesis Deed. Nor can they point to any language that clearly and manifestly provides authority to the OBSC to impose new building restriction forty years after the beach club was created.

The trial judge was correct in assessing *Kalway* as persuasive and consistent with New Jersey law. (1T:49).

***D. Allocco, Hernan* and *Cape May* are Distinguishable.**

On page 31 of Defendant's brief, they cite *Alloco v. Ocean Beach Club*, 456 *N.J.Super*. 124 (App Div 1988) asserting a "similar club" which passed upon rule concerning height restrictions. (Db31). *Alloco* has no application here for several reasons.

First, the issue of the club's authority to impose building restriction was not before the *Alloco* court since Plaintiffs resolved and dismissed counts one and two prior to appeal. This narrowed the issue, leaving the court to decide the case premised upon the business judgement rule. *Id*. at 133.

Second, the *Alloco* deed provided that "no[] more than one residence nor more than [a] one-story one- family dwelling shall be allowed on any lot,". *Id*. at

131. The Gross deed does not contain this restriction. (Db53). This single-story restriction only applies to properties west of Route 35 South. It has absolutely no application in this case, as Plaintiffs' property is east of Route 35 South.

Thirdly, the deed in *Alloco* "allowed the Club to adopt rules and regulations concerning the construction and modification of homes in the community." (emphasis ours) *See*, *Alloco* at 132. The Gross Genesis Deed contains no such language and does not grant any authority to OBSC1 to alter or amend the building restrictions. (Da53).

Next, the defense relies upon an unpublished Law Division case of *Hernan v. Ocean Beach* L-69214-88. (Db32) The property in that case is referenced as being on Melody Lane, which is *west of Route 35 South.* We do not have the deed, but we know the developer did, in fact, impose a single-story restriction on properties *west of Route 35 South*. *See,* for example, Parrett Deed (Da147) Notwithstanding same, the *Hernan* case has no binding authority on this Court, it applies to the recorded single-story neighborhood and its reasoning is of little persuasive value.

Finally, the defense raises *Cape May Harbor Village and Yacht Club Ass'n, Inc. v. Sbraga,* 421 *N.J. Super*. 56 (2011) (Def. Brf. at 32). (where both the trial court and Appellate Division rejects the argument that a homeowner in a private housing community was not regulated by amendments to the declarations of

covenants adopted after they took title and instead determined that the reasonableness test would be applied to these amendments).

Unlike our case*, Cape May Harbor* pertains to an amendment to a duly recorded Declaration of Covenants and Restrictions (Declaration). The Declaration, executed by the initial developer of the community, was filed in the Cape May County Clerk's office in 1995. *Id.* at 61. *Sbraga* and her husband purchased a vacant lot in the community in June 2000. In its original form, the Declaration contemplated the leasing of homes and boat slips and the covenants imposed certain restrictions on leasing. *Id*. at 62. By its terms, the Declaration could be amended only by a vote of at least 67% of all members of the Association. *Id*. at 63. By the summer of 2009, *Sbraga* asked the association if she could lease her home for the summer season on a weekly basis. This prompted the association to meet and ultimately amend the declaration to prohibit seasonal leasing in September 2009. *Id*. at 63. The Court found that the amendment did not constitute an impermissible restriction on the alienation of a fundamental property right, satisfied the test of reasonableness, and was enforceable against the aggrieved homeowner.

Because these dedications were duly recorded *prior* to purchase and they provided for amendments with notice and 67% approval, the court analyzed the case based upon a "reasonableness standard." The trial in the case at bar, Judge

Troncone, correctly distinguished this case. "In the case of OBSC, the Court distinguishes this situation from that in *Cape May* for a variety of reasons. Most importantly being that the 1947 Genesis Deed in this case was purely speculative, and had no set procedures, rules, or regulations. In *Cape May*, the Court had to determine whether or not the amendment was reasonable. These rules and regulations were in existence at the time in which the property was purchased. There is nothing equivalent to that in the 1947 Genesis Deed." (Da837). (T. 26:2-28:9) (32:14-37:25)

E. The Trial Court's Order Poses No Harm to the OBSC Community.

On page 34 of Defendant's brief, they claim harm to the community. First, they mischaracterize the Court's ruling below as having summarily concluded that OBSC lacks authority to enforce its own rules and regulations. We know the ruling is limited to imposing any *construction rules* on the property. (1T50) We remind the Court that from 1948 thru 1989, Defendant never imposed any construction rules on the members and there was no harm to the community.

Secondly, they claim "… the Patnaudes conveyance of the 'Beach Front Section' is threatened by a right of reverter." This would only be true if the Defendant did not abide by the terms of the common area deeds and has nothing to do with the Plaintiffs' case. Only a few months after conveyance of the Genesis Deed, the Patnaudes conveyed to OBSC, the 'Beach Front Section' on the

condition that it be used for the benefit of OBSC's members and that OBSC enforce the Genesis Deed's restrictions, along with the its own "present by-laws."(Da706). (Db34) That deed, however, is dated November 29th, 1948. The by-laws of that "present day" contained no height or any other building restrictions. The only thing they cannot enforce now are the constructions rules adopted in 1989, the amendment to those rules.

The defense claims that "[t]hese by-laws—first implemented in 1948—plainly put the Property's successors-in-interest on notice that they were subject to OBSC's current rules "and any subsequent regulations imposed" by OBSC in the future. (Db35) However, the club did not exist when the Fitzpatricks took title in 1947. (Da125)(Da52). Second, even if the Fizpatricks are charged with knowledge of the by-laws and subsequent changes, "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Kalway*, *supra* at par. 15 citing *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994). Had the restrictions provided that grantee is subject to the changes in the building setback and height restriction as may be changed by the club, we have a different case. No such language exists. To the contrary, the development rights are specifically reserved to the Patnaudes or Ocean Beach Company. (Da53).

Next, the defense argues that the trial court's partial summary judgment decision necessarily means that the Patnaudes can exercise their right to reverter of the "Beach Front Section." As the "… the trial court plainly ignored the Patnaudes' intent, OBSC's ability to "promote and protect the general welfare and property rights of the property owner members in their use and enjoyment of their property at Ocean Beach". (Db35). In effect, Defendant is claiming that the deceased developer, Patnaude, or perhaps the Ocean Beach Co., will file a claim of reverter because OBSC is not enforcing *newly* adopted deed restrictions and a new height restriction which the developer never sought to impose nor adopted. First, reverter only arises if the Club was specifically charged with enforcement of development rights and second, the club could only enforce those deed restrictions of record. There is no clear charge by the developer nor are there any violations of developer deed restriction except to the extent that the Club has unilaterally altered same. OBSC has not enforced the individual genesis and common area deed restrictions.

F. Defendant's Assertion that Developer Must be Named as an Indispensable Party is without Merit.

On page 37 of Defendant's brief, they cite *N.J.S.A*. 2A:16-57, "[n]o declaratory judgment shall prejudice the rights of persons not parties to the proceeding," and, pursuant to *N.J.S.A*. 2A:16-56, when "declaratory relief is

sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." It is critical to understand here that Plaintiffs have not challenged the original deed restrictions imposed by the developer so there is no relief sought which affects or prejudices the developer.

Additionally, even if the developer *were* an indispensable party, Defendant effectively waived the defense of indispensable party. They did not raise the developer as an indispensable party. When the litigation commenced in June of 2022, Defendant claimed on dismissal motion that all 320 plus landowners were indispensable parties. (Da331)[5] Interestingly, Defendant failed to claim Ocean Beach Co. as an indispensable party. The claim that Ocean Beach Co. is an indispensable party was never asserted until summary judgment motions a year later. This defense was never raised in any case management conferences and only surfaced in opposition to Plaintiffs' motion for summary judgment in 2023. Furthermore, John McDonough's certification bears out a close relationship with the club. If, in fact, McDonough has "development rights" he could assign those rights to the Defendant or intervene to protect those rights. Neither has occurred.

Plaintiffs did not name Ocean Beach Company as a party because there is no claim against the developer. Plaintiffs take no issue with the Genesis Deed

[5] The Court dismissed some of Plaintiffs' claims but no dismissal was granted for failure to name an indispensable party.(Da331)

restrictions. Plaintiffs' issue is with OBSC imposing new building restriction. Plaintiffs have no claim or cause as against the "developer" even if such an entity was of legal existence. Plaintiffs do not seek to change or alter the terms of the deed, there is no need to have the developer as a party. In fact, Plaintiffs accept the developer's restrictions as imposed. The developer has never done anything to the Plaintiffs that would trigger any claim against them. OBSC is a third party who has sought to illegally impose deed restrictions without authority. They are the only party necessary for resolution of that issue.

Patnaudes were the developers and are now deceased. A company with the same name, Ocean Beach Co. was not formed until 1984. (Da125) Ocean Beach Co., LLC was later formed in 1999 ostensibly as a real estate holding company which did not include any development rights over Plaintiffs' property. (Da63). So, we are left with deceased developers, Patnaudes, and a 1989 Ocean Beach Co., which was not formed until 40 years after conveyance. Having no claims against the developers, it was not feasible or practical to add the developers. Moreover, a fair reading of Court Rule 4:28-1 does not require joinder of persons if relief can be had amongst the parties before the court in the absence of such person. Ocean Beach Co., as formed, never conveyed development rights to Ocean Beach Co., LLC when that entity formed in 1999. (Da63) Subsection(b) of the rule sets forth the factors.

> The factors to be considered by the court include: first, the extent to which a judgment rendered in the person's absence might be prejudicial to that person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

First, the feasibility of naming Ocean Beach Co. is problematic since it did not exist in 1947 when the Genesis Deed was conveyed. Ocean Beach Co. was formed on December 31, 1984 as a Limited Partnership by Edward J. Patnaude, Jr. and Marjorie L Patnaude. (Ocean Beach Co. was later transformed into a Limited Liability Corporation (LLC) owning the Property described in Schedule A, on October 5, 1999. (Da391)(Da39).

Moreover, the formation documents for Ocean Beach LLC fail to confer any development rights over Plaintiffs' property. In fact, the 1984 formation document, Article III Section 3.1, sets forth the "[P]urpose of the Partnership. The business of the Partnership shall consist of owning the Property described in Schedule A, and of leasing, operating, developing and managing the Property in a businesslike fashion with the intent of producing profits." (Da391). Plaintiffs' property is not mentioned in "Schedule A". Furthermore, there is no evidence that Ocean Beach Co. was ever the Developer of this subdivision. There is no evidence that Patnaudes conveyed or assigned any development rights to this Ocean Beach Co. prior to the 1947 Genesis Deed. There is no evidence that Patnaudes conveyed or assigned any development

rights to this Ocean Beach Co., LLC.

Finally, assuming *arguendo* that Ocean Beach Co., LLC retains development rights, they are not prejudiced by the ruling which only pertains to the club. If there is a developer in existence retaining rights, that developer would have had constructive notice of the litigation and could have sought intervention. In addition, feasibility is an issue where the developers, Patnaudes, are deceased, leaving no assignment nor successorship. "When this comprehensive joinder cannot be accomplished ... the case should be examined pragmatically, and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons and dismissing the action." *See*, Advisory Committee notes to Ct. R. 4-28-1.

The Advisory Comments to the Court Rule lend further guidance:

> Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action.

See, Advisory Committee comments to Court Rule 4:28-1.

The Court below already considered the matter and did precisely what the Advisory Committee recommended by properly adjudicating the matter as between Plaintiffs and the Defendant, OBSC, as the offending actor.

POINT II: THE TRIAL COURT APPLIED THE CORRECT STANDARD OF REVIEW ON RECONSIDERATION

This argument has no merit as Plaintiffs conceded at oral argument that the Court should use the standard as pressed by the defense. (Recons T.6:12-24) Although we believe the Judge below to have understood the proper standard at oral argument, he obviously did not reference same in the Court's subsequent written opinion. That opinion contains a boilerplate or generic reference to Court Rule 4:49-2. We view this as a minor inadvertence on the part of the trial court. This can be corrected on appeal and does not warrant grounds for remand.

If a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the decision is simply not subject to the usual deference. *Summit Plaza Assocs. v. Kolta*, 462 *N.J. Super*. 401, 409 (App. Div. 2020); *Alves v. Rosenberg*, 400 *N.J. Super*. 553, 563 (App. Div. 2008). In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided. *State v. Lyons*, 417 *N.J. Super.* 251, 258 (App. Div. 2010); *State v. Steele*, 92 *N.J. Super*. 498, 507 (App. Div. 1966); *Kavanaugh v. Quigley,* 63 *N.J. Super.* 153, 158 (App. Div. 1960). We trust the judge understood the correct standard as was conceded at oral argument. The letter opinion inadvertently references the incorrect standard under Court Rule 4:49-2. We submit that any such error can be cured *de novo* on appeal for

reconsideration was not warranted even under the lower standard since same was not required in the interest of Justice.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request this Court affirm the lower court's grant of partial summary judgment and remand the matter so Plaintiffs can proceed on the remaining claims pending.

Respectfully submitted,

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By: *Philip G. Mylod, Esq*
Philip G. Mylod, Esquire

Dated: June 17th, 2024

JOHN P. GROSS and JANICE GROSS, Plaintiffs-Respondents, v. OCEAN BEACH SURF CLUB UNIT 1, Defendants-Appellants, and TOMS RIVER TOWNSHIP, CRAIG MARTIN and WILLIAM PARRETT, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-002235-23 CIVIL ACTION On Appeal from August 17, 2023 Order Granting Partial Summary Judgment to Plaintiffs and January 22, 2024 Order Denying Defendants' Motion for Reconsideration Docket No. OCN-C-000125-22 Sat Below: Hon. Mark A. Troncone, P.J. Ch.

APPELLANT OCEAN BEACH SURF CLUB UNIT 1's REPLY BRIEF

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Ocean Beach Surf Club Unit 1 ("OBSC"), respectfully submits this reply brief in support of its appeal seeking reversal of the trial court's August 29, 2023 order granting Plaintiffs partial summary judgment and the January 22, 2024 order denying OBSC's motion for reconsideration.

LEGAL ARGUMENT

I. Neither the Genesis Deed Nor the Construction Rules Are Ambiguous and the Doctrine of Strict Construction Still Requires the Court to Ascertain the Intent of the Patnaudes.

Plaintiffs devote pages of their brief reciting general principles of law governing interpretation of ambiguous contractual provisions and the rule of strict construction for restrictive covenants in deeds. Despite Plaintiffs' recitation of these general principles, they fail to articulate how the Genesis Deed or the Construction Rules are ambiguous. "A contract is ambiguous if its terms are 'susceptible to at least two reasonable alternative interpretations.'" Capparelli v. Lopatin, 459 N.J. Super. 584, 604 (App. Div. 2019).

The Genesis Deed clearly and unequivocally states that, upon purchasing the Property, Plaintiffs and all other similarly situated property owners, were required to become "members of a property owner's association" and must "faithfully abide" by any "rules and regulations it chooses" to implement. One such "rule and regulation" that OBSC implemented was the unambiguous 29-foot height restriction at issue here. Notably, Plaintiffs do not argue that the

height restriction itself is ambiguous. Moreover, there is no dispute that Plaintiffs' proposed construction plans failed to comply with the height restriction.

Plaintiffs do not offer a reasonable, alternative interpretation of the Genesis Deed's broad grant of authority to the "property owner's association" to implement and enforce "any rules and regulations it chooses" to which all property owners, including Plaintiffs, were required to "faithfully abide." The only argument Plaintiffs offer is that OBSC was not in existence at the time of the Genesis Deed's conveyance. That reality is of no legal significance because the Patnaudes specifically accounted for this possibility in the Genesis Deed by specifying that the "property owner's association" would be "known ***or to be known*** as 'OCEAN BEACH CLUB.'" (Da54). The slight difference in the name between the Genesis Deed's "Ocean Beach Club" and OBSC is also of no legal significance given that OBSC is the *only* entity, for over the last 75 years, operated as the "property owners' association" contemplated by the Genesis Deed. This fact is supported not only by the historical record—compiled before the close of discovery—demonstrating the Patnaudes and their business partner (Frank Pearl) viewed OBSC as the "property owners' association," but by Plaintiffs' very own recognition that OBSC is the "club" with authority to implement and enforce rules governing things such as alcohol or dogs on the

beach. (Pb12). Plaintiffs' implicit recognition that OBSC is the "property owners' association" contemplated by the Genesis Deed and, therefore, vested with authority to implement and enforce "any rules and regulations it chooses" is fatal to Plaintiffs' position. To get around the incompatibility of this position, Plaintiffs argue that the rule of strict construction requires this Court find OBSC lacks authority to implement and enforce the "Construction Rules."

While restrictive covenants in deeds are to be "strictly construed," that rule does not permit Courts to dispense with the clear intent of the contracting parties. The central component of contract construction is ascertaining the intent of the parties; "technical nicety of expression is not the determinative. The precise form of a covenant or agreement is of no consequence if the intention is reasonably clear. The obvious purpose should not be defeated by a narrow and technical construction of the language used." Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 236 (1944); Murphy v. Trapani, 255 N.J. Super. 65, 72 (App. Div.), certif. denied, 130 N.J. 17 (1992); Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div. 1997) ("Generally, in the context of restrictive covenants, a rule of strict construction should be applied to the provisions unless such a rule would defeat the obvious purpose of the restrictions.").

"Restrictive covenants should be construed in accordance with the intent of the language used by the parties imposing them, and in the light of the circumstances existing at the time; if the covenants or restrictions are vague or ambiguous, then against the covenant or restriction." Wilson v. Ocean Terrace Garden Apartments, 139 N.J. Eq. 376, 380 (N.J. Ch. Ct. 1947). The Genesis Deed's grant of broad authority to a "property owner's association" to implement and enforce any "rules and regulations it chooses" is neither vague nor ambiguous. The "Construction Rules" implemented and enforced by the "property owners' association"—OBSC—are neither vague nor ambiguous. And the intent of the Patnaudes to vest OBSC with this broad authority, and insisting on enforcement of construction rules, unequivocally demonstrates that OBSC possesses the authority the trial court summarily stripped before the close of discovery.

The existence of "rules and regulations" is made "manifest and clear" in the Genesis Deed and the hundreds like it. Bruno v. Hanna, 63 N.J. Super. 282, 285 (App. Div. 1960). The absence of a specific height restriction within the four corners of the Genesis Deed does not matter because the clear and unequivocal reference to "rules and regulations" implemented and enforced by the "property owners' association" provides the requisite notice to future owners in the chain of title. Plaintiffs' argument that the Patnaudes could have

incorporated a specific height restriction in the Genesis Deed misses the mark because the Patnaudes plainly intended to vest authority over the entire community in the "property owners' association," i.e., OBSC. This historical fact—reached before the close of discovery—is well-documented in OBSC's opening merits brief and Plaintiffs fail to cite contrary evidence. As the non-moving party, OBSC was entitled to all reasonable factual inferences in its favor; but the trial court did just the opposite in concluding OBSC lacks authority to implement and enforce the "rules" to which Plaintiffs agreed to "faithfully abide."

Plaintiffs' argument that "no building rules came into effect until 1989" misconstrues the incomplete historical record. OBSC cited evidence demonstrating OBSC's exercise of authority, through its "Grounds Committee", to regulate construction in the community dating back to 1948. Moreover, the Genesis Deed puts future owners in the chain of title on notice that there is a "property owners' association" with authority to implement and enforce "any rules and regulations it chooses." It is the *intent* behind this broad grant of authority, coupled with the historical record, that undermines Plaintiffs' argument that a "strict construction" of the Genesis Deed, and the absence of a specific building height restriction therein, mandates victory. Rather, the plain language of the Genesis Deed and the record undermines the trial court's

conclusion and Plaintiffs' arguments on appeal that there was "no scheme other than what Mr. Patnaude put in the chain of title."

Furthermore, it does not matter exactly *when* a height restriction was first imposed; what matters is whether OBSC possessed the authority to impose such restrictions. The plain language of the Genesis Deed and the historical record demonstrate that partial summary judgment was improperly granted to Plaintiffs.

Plaintiffs' and the trial court's reliance on Kalway v. Calabria Ranch HOA, LLC, an out-of-jurisdiction, non-binding authority from the Arizona Supreme Court, is misplaced. 506 P.3d 18 (Ariz. 2022). In Kalway, the Arizona Supreme Court considered a homeowners' association's authority to amend its "covenants, conditions, and restrictions" pursuant to a declaration empowering the association to amend them by "majority vote of the owners." Id. at 22. The association amended the restrictions, without the plaintiff's knowledge, and limited his ability to convey or subdivide his lot, among other things. Id. at 23. The Arizona Supreme Court concluded that a homeowners' association "cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." Id. at 24. The court recognized that "contracts are generally enforced as written"; however, in "special types of contracts" an Arizona court will not enforce

"'unknown terms which are beyond the range of reasonable expectation.'" Id. Therefore, the court held that the original declaration governing the scope of the homeowners' association's authority provided insufficient notice that a majority vote could amend the restrictions and "allowing substantial, unforeseen, and unlimited amendments would alter the nature of the covenants to which the homeowners originally agreed." Id.

The crux of the decision in Kalway was the lack of notice in the original declaration that property owners would be subject to future restrictions and, in the absence of such notice, whether the amended restrictions were otherwise reasonable. Here, rather, the Genesis Deed plainly put Plaintiffs on notice that the property owners' association had the authority to implement and enforce "any rules and regulations it chooses." Plaintiffs, like every other property owner subject to similar restrictions, were required to "faithfully abide" by these "rules and regulations." Plaintiffs, unlike the plaintiff in Kalway, were plainly on notice of OBSC's existence and authority, and its ability to implement and enforce any "rules and regulations it chooses." And, unlike the plaintiff in Kalway, Plaintiffs here do not challenge the reasonableness of the height restriction, other than arguing that it has been inconsistently enforced, an issue that is not currently before this Court.

Kalway is not "on all fours" with this case; the language in the Genesis Deed is more clear than the declaration at issue in Kalway; the Genesis Deed, unlike the declaration in Kalway, put Plaintiffs on specific notice that the "property owners' association" had its own "rules and regulations" to which Plaintiffs were contractually obligated to "faithfully abide"; and Plaintiffs do not claim lack of knowledge or notice of OBSC's "rules and regulations," including the height restrictions.

The intent of the Genesis Deed was to create a "club" of homeowners collectively bound to "faithfully abide" by OBSC's "rules and regulations." Plaintiffs do not argue that the height restriction was ambiguous or that the Patnaudes did not intend to vest OBSC with authority to implement the "rules and regulations." This Court should reverse the trial court's grant of partial summary judgment to Plaintiffs and remand this matter for additional discovery and proceedings.

II. The Trial Court's Partial Summary Judgment Order Was Reached on an Incomplete Record and Prejudices Ocean Beach Co., an Indispensable Party.

Throughout their brief, Plaintiffs repeatedly recognize that the Genesis Deed "reserves" to the "developer" rights to regulate building on the Property and the hundreds like it. (Pb2, Pb17, Pb25). Furthermore, Plaintiffs acknowledge that, under the Genesis Deed, the "developer" has the right to "pass

upon" building permits within the community. (Pb11). The Genesis Deed specifically references "Ocean Beach Co." as having authority to "pass upon" building permits within the community, and the incomplete historical record is nonetheless replete with evidence from which a reasonable factfinder could conclude that Mr. Patnaude was the "developer" operating through the name "Ocean Beach Co." (Da527; 607; 391-2; 882-4). In fact, the 1984 certificate of limited partnership for Ocean Beach Co., Mr. Patnaude's widow and children expressly recognized that Mr. Patnaude conducted business under the name "Ocean Beach Co." (Da392).

Plaintiffs claim that the relief they seek in this action does not prejudice Ocean Beach Co. "because there is no claim against the developer" and because "Plaintiffs accept the developer's restrictions as imposed." If Plaintiffs "accept the developer's restrictions as imposed," however, they are still required by the Genesis Deed to obtain the written approval from Ocean Beach Co. prior to beginning construction. This did not occur, Plaintiffs filed suit against only OBSC, and the trial court's order granting them partial summary judgment declared that Plaintiffs need not obtain any form of approval other than zoning. (Da853).

The stated purpose of the declaratory judgment act "is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other

legal relations." N.J.S.A. 2A:16-51. For that reason, when "declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration should be made parties to the proceeding." N.J.S.A. 2A:16-56. In Garnick v. Serewitch, a case involving a request for a declaratory judgment of a restrictive covenant, the Chancery Division exhaustively underscored the need for joining *all* parties who have, or may have, an interest in the requested declaration. 39 N.J. Super. 486, 499-500 (Ch. Div. 1956) (noting that the court is "more concerned with substantial justice and the end of litigation than bargain basement costs" in discussing the need to add interested parties).

Here, Plaintiffs want to build a new home. Ocean Beach Co. and/or the "developer" has rights in the Genesis Deed to approve (or disapprove) in writing all building plans. Plaintiffs' action implicates the rights of Ocean Beach Co. and, as the Court in Garnick stated, it is not sufficient to avoid naming Ocean Beach Co., the "developer," or their successor-in-interest, as a party merely because it may be difficult. The trial court declared the rights and obligations under the Genesis Deed without a party that has an interest in the very subject matter of this dispute: building on the Property within the OBSC community. Moreover, Plaintiffs recognize that there are thousands of other deeds with the same restrictions yet, instead of naming the other property owners as Plaintiffs

or members of a class, instead chose expediency. Plaintiffs' litigation tactics, and the trial court's acceptance of Plaintiffs' arguments, undermine the purpose of the Declaratory Judgment Act and prejudices the rights of necessary and indispensable parties, along with OBSC's.

The trial court's grant of partial summary judgment to Plaintiffs threatens to upend over 75 years of history. The trial court took this step without the participation of Ocean Beach Co. or its successors-in-interest and, even worse, without any meaningful discovery from it. The absence of any meaningful discovery from Ocean Beach Co. or its successors-in-interest allows Plaintiffs to argue, for example, that there "is no evidence that Ocean Beach Co. was ever the Developer of this subdivision. There is no evidence that the Patnaudes conveyed or assigned any development rights to this Ocean Beach Co. prior to the 1947 Genesis Deed. There is no evidence that Patnaudes conveyed or assigned any development rights to this Ocean Beach Co., LLC."

These arguments about "no evidence" are only possible because no discovery has been taken from Ocean Beach Co., Ocean Beach Co., LLC, or the successors-in-interest to the Patnaudes. "A party opposing a motion for summary judgment on the grounds that discovery is incomplete, however, must 'demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Branch v.

Cream-O-Land Dairy, 459 N.J. Super. 529, 541 (App. Div. 2019). OBSC has done so here and in its opening merits brief. At most, Ocean Beach Co. or its successors-in-interest are necessary and indispensable parties that must be named in this matter. At a minimum, the trial court's grant of partial summary judgment to Plaintiffs was premature because there is likely a litany of additional historical evidence about the workings of Mr. Patnaude through Ocean Beach Co., the scope of authority he intended to retain through the Genesis Deed, and the scope of authority he intended to confer upon OBSC as the "property owner's association." The trial court's failure to allow for additional discovery, inclusion of indispensable parties, and a hearing on the Genesis Deed's intent are all reversable errors, which should be cured by this Court in the interests of justice.

III. OBSC's Height Restriction Is Not Capricious.

A fundamental flaw in Plaintiffs' contentions and the trial court's decision is that it is based upon a single property, and, incredibly, ignores the neighborhood scheme enjoyed by more than 300 other homes in the OBSC community. Restrictions to properties situated in community associations in which living conditions are close and limited, as they are in Appellant's community, obviously require oversight to maintain a quality of life, in this case one enjoyed for 75 years, by monitoring development and, most importantly,

from preventing overdevelopment. The Appellate Division has recognized the importance and need for property restrictions in a community association. See Cape May Harbor Village and Yacht Club Association, Inc. v. Sbraga, 421 N.J.Super. 56, 70-72 (App. Div. 2011); Fulton Bank of New Jersey v. Casa Eleganza, LLC, 473 N.J.Super. 387, 395-396 (App. Div. 2022).

No analysis was done by the trial court as to the reasonableness of construction limitations on the building height in Appellant's community. The lack of analysis, as a matter of law, mandates reversal of the court's order granting Respondents summary judgment. Sbraga at 71 - 72. Certainly, as a general proposition, the higher the building the more people, pedestrians, cars, and undesirable congestion it brings along with it. OBSC's regulations minimize congestion and maximize emergency response access on narrow private roads, and, enhance tranquility and traditional shore quality of life. The absence of the Court finding that the Appellant's building height restriction was capricious, imposed for spite or malice and did not benefit the community belies the obvious truth, namely, Appellant's building height restriction was not capricious, was not imposed for spite or malice and did, for a very long time, benefit the community. Declaring that Appellant's building height restriction invalid does not benefit the community and is, quite frankly, obviously preposterous.

A constraint is not capricious if it is "founded on a rational basis, a legitimate concern of the Association members, and in accordance with the past practices and customs in the community . . . [and if] the restraint applies equally and uniformly to all homeowners in the community." Sbraga at 74. Applying this standard, Appellant's building height restrictions, on the record now before this Court, coupled with no analysis of these factors by the trial court, clearly mandates reversal of partial summary judgment.

IV. The Trial Court Misapplied the Reconsideration Standard.

Plaintiffs conceded before the trial court, and now on appeal, that the correct standard governing OBSC's motion for reconsideration is set forth in Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Despite the agreement of the parties before the trial court, the written statement of reasons denying OBSC's motion for reconsideration heavily relied upon the Rule 4:49-2 standard that only applies to a "judgment or final order." While Plaintiffs brush this off as a "minor inadvertence on the part of the trial court," OBSC should not be forced to accept that explanation at face value.

Under the "far more liberal" interest of justice standard that applied, the trial court should have granted OBSC's motion for reconsideration for additional proceedings, including, but not limited to, additional discovery from Ocean Beach Co. or the "developers." Indeed, the trial court's decision outright

ignored the historical record evidence and agreed with Plaintiffs that there was "no evidence" of OBSC having authority to implement construction rules. Such a decision can only be reached by misapplying the summary judgment standard that requires all reasonable inferences in favor of the non-moving party, and was doubled-down upon by application of the incorrect reconsideration standard.

CONCLUSION

The Court should reverse the trial court's August 17, 2023 premature grant of partial summary judgment and vacate the January 22, 2024 order denying OBSC's motion for reconsideration.

Respectfully submitted,
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By: */s David A. Clark*
David A. Clark

Dated: July 1, 2024