17

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2377CV00857

MICHAEL L. GIKOW & another[1]

vs.

CLEARY LLC ASSOCIATES, INC. & another[2]

MEMORANDUM OF DECISION AND ORDER ON ANDOVER COMMUNITY TRUST, INC.'S MOTION FOR SUMMARY JUDGMENT (PAPER #10) AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT (PAPER #15)

INTRODUCTION

On September 7, 2023, the plaintiffs, Michael L. Gikow and Francine Fritsch Gikow (collectively, the "Plaintiffs"), filed the Complaint (Paper #1) against the defendants, Cleary LLC Associates, LLC ("Cleary LLC") and Andover Community Trust, Inc. ("ACT Inc."), asserting a claim to enforce a land use restriction imposed on certain real property (the "Subject Parcel") located in Andover, Massachusetts (Count I) and a claim for declaratory relief (Count II), pursuant to G. L. c. 231A, § 1, declaring that the restriction is applicable to the Subject Parcel and thus, no dwelling may be constructed on the Subject Parcel.[3] The Plaintiffs own and reside at property abutting the Subject Parcel.

This matter is currently before the court on Andover Community Trust, Inc.'s Motion for Summary Judgment (the "Motion") (Paper #10) and Plaintiffs' Cross-Motion for Summary

---

[1] Francine Fritsch Gikow

[2] Andover Community Trust, Inc.

[3] On January 31, 2025, Cleary LLC conveyed all of its interest in the Subject Parcel to ACT Inc. via release deed recorded at the Essex North Registry of Deeds in Book 18204 on Page 309. Thereafter, on February 19, 2025, acknowledging that Cleary LLC had "no remaining interest in the Subject P[arcel][,]" the parties filed the Stipulation of Dismissal of Defendant Cleary Associates, LLC (Paper #12). Accordingly, Cleary LLC is no longer a party to this case.

Judgment (the "Cross-Motion") (Paper #15). After hearing, review of the parties' submissions, and examination of the applicable legal authorities, for the reasons explained below, the Motion will be **DENIED** and the Cross-Motion will be **ALLOWED**.

BACKGROUND

The undisputed material facts are taken from the Joint Statement of Material Facts (Paper #10.9), the Additional Undisputed Material Facts, which are set forth in Plaintiffs' Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment (Paper #15.1), the various affidavits the parties submitted in support of the Motion and Cross-Motion, and the exhibits contained in the Joint Appendix. Certain additional facts not mentioned here may be addressed during the court's discussion of the parties' arguments.

I. Lot 61 and the Original Restriction

On August 26, 1954, Theodore Grasso sold a large tract of land in Andover, Massachusetts, to Arthur LaChance. SOF, para. 14; J.A., Ex. A. Arthur LaChance subdivided this land for a development called Shawsheen Hylands, which was divided into sections. SOF, para. 15; J.A., Ex. B. Lot 61 was located in section two of the development and described on a plan of land entitled "Plan of Section No. 2, Shawsheen Hylands, Andover Mass" (the "Shawsheen Plan"), which was dated December 1954, and recorded at the Essex North Registry of Deeds (the "Registry") on March 1, 1955, as Plan 2966. SOF, para. 15; J.A., Ex. B.

Following the recording of the Shawsheen Plan, via deed (the "Victor LaChance Deed") dated October 10, 1955, and recorded at the Registry in Book 821, on Page 381, Arthur LaChance conveyed Lot 61 to Victor T. and Beatrice LaChance. SOF, para. 16; J.A., Ex. C.

The Victor LaChance Deed contained a land use restriction (the "1955 Restriction"), which reads as follows:

> Said premises are conveyed subject to the restriction that they shall be used for no other purpose than the erection and occupancy of a single family home having a pitched roof and appurtenant private garage which may be a separate unit or attached to said dwelling; further that such dwelling and/or garage shall be set back at least thirty feet from the street line and shall not be closer than fifteen feet on either side line.

J.A., Ex. C.

On April 25, 1958, Victor T. and Beatrice LaChance conveyed Lot 61 to Howard and Ruth Bond via deed (the "LaChance Bond Deed") recorded with the Registry, in Book 872, on Page 37. SOF, para. 18; J.A., Ex. D. The LaChance Bond Deed contains the 1955 Restriction in the exact same form as set forth in the Victor LaChance Deed. J.A., Ex. D.

On June 20, 1963, Howard and Ruth Bond conveyed Lot 61 to George and Phyllis Kipps via deed (the "Bond Kipps Deed") recorded with the Registry, in Book 987, on Page 491. SOF, para. 19; J.A., Ex. E. The Bond Kipps Deed includes the 1955 Restriction, with some slight grammatical changes.[4] J.A., Ex. E.

On June 24, 1970, George and Phyllis Kipps conveyed Lot 61 to Edward Lawlor, Jr. ("Mr. Lawlor") and Jacqueline Lawlor ("Mrs. Lawlor") as tenants by the entirety via deed (the "Kipps Lawlor Deed") recorded at the Registry in Book 1154, on Page 666. SOF, para. 20; J.A.,

[4] Specifically, the restriction set forth in the Bond Kipps Deed states as follows:

> Said Premises are conveyed subject to the restriction that they shall be used for no other purpose than the erection and occupancy of a single family home having a pitched roof and appurtenant private garage which may be a separate unit or attached to said dwelling. Further that such dwelling and/or garage shall be set back at least 30 feet from the street line and no closer than 15 feet on either side line.

J.A., Ex. E.

Ex. F. The Kipps Lawlor Deed includes the 1955 Restriction in the exact same form as set forth in the Bond Kipps Deed. J.A., Ex. F.

Mr. and Mrs. Lawlor lived together in the house on Lot 61 for almost thirty years. Then, on June 18, 1999, Mr. Lawlor died. SOF, para. 21; J.A., Ex. G. Mrs. Lawlor continued to live on the property for another ten years. Then, on May 26, 2009, she conveyed Lot 61 to Cleary LLC via deed (the "Lawlor Cleary Deed") recorded at the Registry in Book 11615, on Page 236. SOF, para. 22; J.A., Ex. H. The Lawlor Cleary Deed contains a land use restriction (the "2009 Restriction"), the language of which, although not identical, is very similar to that of the 1955 Restriction included in the Victor LaChance Deed. Specifically, the 2009 Restriction reads as follows:

> Said Premises are conveyed subject to restriction that they shall be used for no other purpose than the erection and occupancy of a single family home having a pitched roof and appurtenant private garage which may be a separate unit or attached to said dwelling. Further and no closer than 15 feet on either side line.

J.A., Ex. H.

II. Cleary LLC's Subdivision of Lot 61

Following Cleary LLC's purchase of Lot 61, it subdivided the property into Lot 61A and Lot 61B, i.e., the Subject Parcel, via a subdivision plan entitled, "Plan of Land, Mary Lou Lane, Andover, Mass" (the "Mary Lou Plan"), and dated November 5, 2009, which the Andover Planning Board endorsed on January 18, 2010, and which Cleary LLC recorded at the Registry on January 25, 2010. SOF, para. 23; J.A., Ex. I.

A. Lot 61A

On April 7, 2010, Cleary LLC conveyed Lot 61A to Moon-Joo Bae and Junwon Lee via deed (the "Bae Lee Deed") recorded at the Registry in Book 11999, on Page 3. SOF, para. 24;

J.A., Ex. J. The Bae Lee Deed does not recite any restrictions. J.A., Ex. J. Approximately six years later, on June 15, 2016, Moon-Joo Bae and Junwon Lee conveyed Lot 61A to the Plaintiffs via deed (the "Gikow Deed") recorded at the Registry in Book 14682, on Page 239. SOF, para. 28; J.A., Ex. K. Like the Bae Lee Deed, the Gikow Deed does not recite any restrictions. J.A., Ex. K. Lot 61A is addressed 9 Mary Lou Lane, Andover, Massachusetts. SOF, para. 29. The Plaintiffs own and reside in the single-family residence located at this address.

B. Lot 61B – The Subject Parcel

The Mary Lou Plan via which Cleary LLC subdivided Lot 61 includes a note that "LOT 61B IS NOT A BUILDABLE LOT." J.A., Ex. I. Nevertheless, on September 25, 2009, Cleary LLC entered into a purchase and sale agreement with ACT Inc. whereby ACT Inc. agreed to purchase the Subject Parcel. J.A., Ex. N, Ex. 7. When ACT Inc. learned about the 2009 Restriction contained in the Lawlor Cleary Deed, however, it refused to proceed with purchasing the Subject Parcel, taking the position that, given the home located on Lot 61A, a second house could not be constructed on the Subject Parcel. See J.A., Ex. BB.

As a result of ACT Inc.'s decision to back out of its purchase of the Subject Parcel, in July 2011, Cleary LLC filed two cases against it in the Massachusetts Land Court, Docket No. 11MISC450166 and Docket No. 11MISC450167. J.A., Exs. N and Q. The first requested a declaration from that court, pursuant to G. L. c. 231A, § 1, that the 1955 Restriction had expired, and that there were no other restrictions binding upon Lot 61A or the Subject Parcel. J.A., Ex. N. In response, ACT Inc. argued that the somewhat different language used in the 2009 Restriction created a new restriction that was binding for thirty years from the date of execution of the Lawlor Cleary Deed. J.A., Ex. P. The second case involved claims for breach of contract, breach of the implied covenant of good faith and fair dealing, specific performance, and unfair and deceptive acts or practices, based on the same facts and arguments. J.A., Ex. Q. On May 11, 2012, the Land Court dismissed both cases because neither Cleary LLC nor ACT Inc. appeared for a pre-trial conference scheduled for April 2, 2012. J.A., Ex. L.

Based on the record currently before the court, it is not entirely clear what was happening with the Subject Parcel between Cleary LLC's filings in the Land Court and the current litigation. It seems, however, that ACT Inc. retained some interest in acquiring the Subject Parcel, as it entered into a new purchase and sale agreement with Cleary LLC at some point in or around 2023.

In fact, following its execution of the new purchase and sale agreement with Cleary LLC, on August 14, 2023, ACT Inc. filed an application with the ZBA for a comprehensive permit, pursuant to G. L. c. 40B, to enable it to construct a single-family affordable house on the Subject Parcel. J.A., Ex. V. In response, in addition to making their opposition known to the ZBA, on September 7, 2023, the Plaintiffs filed the Complaint in this action, seeking to enforce the 2009 Restriction. On April 5, 2024, while litigation in this matter was ongoing, the ZBA voted unanimously to deny ACT Inc.'s request for zoning relief.[5] J.A., Ex. V. Notwithstanding this denial, on January 30, 2025, ACT purchased the Subject Parcel from Cleary LLC via release deed, which contained no contingencies. J.A., Ex. W.

DISCUSSION

On the one hand, in support of summary judgment in its own favor and against the Plaintiffs, ACT Inc. argues that the Plaintiffs lack standing to enforce the 2009 Restriction.

---

[5] ACT Inc. has appealed the ZBA's decision denying its request for a comprehensive permit under G. L. c. 40B, to the Housing Appeals Committee ("HAC"). The Plaintiffs and other neighbors were permitted to intervene. They have moved to dismiss ACT Inc.'s appeal, for lack of jurisdiction on the ground that, because Andover exceeds the 10% statutory minimum for affordable housing, the HAC has no authority to order the issuance of a comprehensive permit. This appeal is still pending.

Second, it contends that, even if the Plaintiffs have standing, ACT Inc. is still entitled to summary judgment because the 2009 Restriction does not constitute an enforceable deed restriction. Rather, according to ACT Inc., the 2009 Restriction is an attempt to revive the 1955 Restriction, which expired by operation of law in 1985.

On the other hand, in support of summary judgment in their favor and against ACT Inc., the Plaintiffs argue that they have standing to seek enforcement of the 2009 Restriction as the owners of land that directly abuts the Subject Parcel. In addition, they challenge ACT Inc.'s assertion that the 2009 Restriction is an attempt to revive the 1955 Restriction; instead, they argue that the 2009 Restriction constitutes an entirely new deed restriction that is enforceable until 2039. Lastly, the Plaintiffs argue that, based on the doctrines of issue preclusion and judicial estoppel, ACT Inc. is estopped from arguing that the 2009 Restriction does not constitute a new restriction. Below, the court addresses the parties' arguments in more detail.

I. Standard of Review

"'Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.'" Barbette v. Stempniewicz, 490 Mass. 98, 107 (2022), quoting Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 330 (2021); see also Mass. R. Civ. P. 56(c). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." Scholz v. Delp, 473 Mass. 242, 249 (2015), citing Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 32 (2006).

The moving party may satisfy its burden by submitting affirmative evidence negating an essential element of the opposing party's case, or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706. 714 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Nevertheless, the opposing party cannot rest on its pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). Lastly, where the court is presented with cross-motions, as is the case with respect to the present matter, the standard of review is identical for both motions. Epstein v. Board of Appeals of Boston, 77 Mass. App. Ct. 752, 756 (2010).

II. Analysis

A. Issue Preclusion Does Not Preclude ACT Inc.'s Arguments

The Plaintiffs argue that the doctrine of issue preclusion prohibits ACT Inc. from arguing that the 2009 Restriction does not constitute a new deed restriction because this issue was finally decided by the Land Court's dismissal of the cases Cleary LLC filed against ACT Inc. in 2011. This argument is unpersuasive.

The doctrine of issue preclusion provides that, "when an issue has been 'actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or [a] different claim.'" Jarosz v. Palmer, 436 Mass. 526, 531 (2002), quoting Cousineau v. Laramee, 388 Mass. 859, 863 n.4 (1983). There are four elements—"'(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication was identical to the issue in the current adjudication;' and (4) 'the issue decided in the prior adjudication must have been essential to the earlier judgment.'" LaRace v. Wells Fargo Bank, N.A., 99 Mass. App. Ct. 316, 322 (2021), quoting Duross v. Scudder Bay Capital, LLC, 96 Mass. App. Ct. 833, 836-837 (2020). And "the party moving for summary judgment on the basis of . . . issue preclusion . . . bears the burden of establishing . . . [the necessary elements]." See TLT Constr. Corp. v. A. Anthony Tappe and Assocs., Inc., 48 Mass. App. Ct. 1, 5 (1999), citing Sarvis v. Boston Safe Deposit & Tr. Co., 47 Mass. App. Ct. 86, 98 (1999).

In the present case, even assuming that the Plaintiffs are able to establish the other elements, their argument regarding the application of issue preclusion fails because they have not demonstrated that the Land Court's dismissal of Cleary LLC's 2011 cases constituted a final judgment on the merits with respect to the issue of whether the 2009 Restriction constituted a new deed restriction.

For purposes of issue preclusion, "the term 'judgment' refers to a final determination on the merits of the proceeding." Jarosz, 436 Mass. at 533. In other words, "[a] determination is considered final when 'the parties were fully heard, the judge's decision is supported by a reasoned opinion, and the earlier opinion was subject to review or was in fact reviewed.'" Id. at 533-534, quoting Tausevich v. Board of Appeals of Stoughton, 402 Mass. 146, 149 (1988). Here, there is no record evidence even suggesting that the parties were fully heard with respect to the claims and issues before the Land Court in 2011. Or that, in dismissing Cleary LLC's cases, the judge made a reasoned decision with respect to the merits of Cleary's claims and ACT Inc.'s arguments in opposition. The Land Court dismissed Cleary LLC's two cases solely on procedural grounds, i.e., the fact that neither Cleary LLC nor ACT Inc. appeared for the scheduled final pre-trial conference. In the court's view, such a dismissal does not constitute a final judgment on the merits for purposes of issue preclusion.

B. Judicial Estoppel Does Not Preclude ACT Inc.'s Argument

Next, the Plaintiffs argue that the doctrine of judicial estoppel bars ACT Inc. from arguing that the 2009 Restriction does not constitute a new deed restriction because such an argument is directly contrary to the position it took in the Land Court cases Cleary LLC filed against it in 2011. As with the Plaintiffs' argument regarding claim preclusion, this argument is unpersuasive.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639-640 (2005). However, "[t]he application of judicial estoppel requires both that 'the position being asserted . . . [is] directly contrary to the position previously asserted,' and that 'the party must have succeeded in convincing the court to accept its prior position.'" Sandman v. McGrath, 78 Mass. App. Ct. 800, 801-802 (2011), quoting Otis, 443 Mass. at 640-641. Ultimately, "judges should use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose[,]" which "is to 'safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system[.]'" Otis, 443 Mass. at 642.

In the circumstances of this case, the court declines to exercise its discretion to apply judicial estoppel. While there can be little dispute that ACT Inc.'s position before the Land Court was contradictory to the position it takes in the current matter, there is no evidence that ACT Inc. succeeded in convincing the Land Court to accept its prior position, since, as explained above, the Land Court dismissed the two cases Cleary LLC filed against ACT Inc. solely on procedural grounds, without considering the merits of either Cleary LLC's claims or ACT Inc.'s arguments in opposition. The element of success cannot be met if there has been no adjudication of the contention in issue. See East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996) (noting that judicial estoppel is not applicable where party did not achieve success in prior proceeding); see also Fay v. Federal Nat'l Mortg. Ass'n, 419 Mass. 782, 788 (1995). Thus, the application of judicial estoppel is not warranted in the circumstances of this case.

C. The Plaintiffs Have Standing to Seek Enforcement of the 2009 Restriction

Next, assuming it constitutes a valid deed restriction, the parties disagree about whether the Plaintiffs have standing to seek enforcement of the 2009 Restriction. Upon review, the court is persuaded that, pursuant to the applicable statutory provisions and the case law interpreting those provisions, the Plaintiffs have standing to seek enforcement of the 2009 Restriction.

Restrictions that were imposed after December 31, 1961, such as the 2009 Restriction, are governed by G. L. c. 184, § 27 ("Section 27"). Section 27(a) provides that an individual may only seek enforcement of a restriction if the person "(1) is a party to the instrument imposing the restrictions and it is *stated to be for his benefit* or is entitled to such benefit as a successor to such a party, or (2) is an owner of an interest in benefited land which either adjoins the subject parcel at the time enforcement is sought or is described in the instrument imposing the restriction and is stated therein to be benefited." G. L. c. 184, § 27(a) (emphasis added). In enacting Section 27 the legislature intended to remove "obstacle[s] to the optimal use of land" that "impaired marketability" by providing clearer and more definitive rules for the enforcement of restrictions. Brear v. Fagan, 447 Mass. 68, 73-74 (2006).

For the above reasons, in Brear, the Supreme Judicial Court ("SJC") held that Section 27(a)(1) was to be interpreted strictly according to its terms, meaning that only parties who are expressly named in the subject restriction as beneficiaries may enforce it. Id. at 74-75. Contrary to the rule at common law, no one, not even the grantor of a restriction, can be inferred to be a beneficiary. Id. at 75 ("with respect to the identification of the beneficiaries of land restrictions, [Section 27(a)(1)] requires specificity and supplants the common-law rule that allowed identification to be a matter of inference"). Thus, in Brear, the SJC held that no party was eligible to seek enforcement of the subject restrictions because the original instrument imposing the restrictions failed to clearly identify any land or person to be benefited by the subject restrictions. Id. at 75.

The SJC left open the interpretation of Section 27(a)(2). Id. at 73 n.5 (noting that "[d]ue to the lack of punctuation" Section 27(a)(2) was "arguably ambiguous with respect to the requirements for land that adjoins the restricted land[,]" but also that this was not an ambiguity the Court needed to resolve). Later, in Rosenfield v. Zoning Bd. of Appeals of Mendon, 78 Mass. App. Ct. 677 (2011), the Appeals Court resolved this open question, holding that Section 27(a)(2) should be interpreted to mean "that an owner of land that adjoins the restricted land is entitled to enforce a deed restriction, whether or not the instrument imposing the restriction contains an express statement that the adjoining land is intended to benefit from the restriction." Id. at 682. Thus, a party who, at the time enforcement is sought, owns property abutting land subject to a deed restriction is entitled to enforce the restriction, even if the original instrument imposing the restriction failed to explicitly name that party as a beneficiary of the restriction. Id. at 683 ("while the overarching purpose of the statute was to modify the common law in order to provide greater clarity and certainty on the question of who is entitled to seek enforcement of restrictions on the use of land . . . conferring enforcement rights on owners of adjoining parcels at the time enforcement is sought . . . does not derogate from that purpose, since the identification of parcels adjoining any parcel of restricted land at any time of attempted enforcement is susceptible of certain determination").

Applying the above principles to the current matter, there can be little dispute that the Plaintiffs have standing to seek enforcement of the 2009 Restriction, since they own Lot 61A, which directly abuts the Subject Parcel, i.e., land subject to restriction. Any arguments to the contrary are unavailing.

D. The 2009 Restriction Constitutes an Entirely New Restriction

ACT Inc. argues that the 1955 Restriction expired in 1985; that the 2009 Restriction included in the Lawlor Cleary Deed, was intended to mirror exactly the 1955 Restriction and the fact that it did not was the result of a scrivener's error; and that, pursuant to the Appeals Court's holding in Zide v. McNiff, No. 10-P-01496, 81 Mass. App. Ct. 1111, 2012 WL 264214, at *4 (Jan. 31, 2012) (Unpublished Rule 1:28), Mrs. Lawlor could not revive the expired restriction or create a new restriction merely by repeating the restrictive language contained in the Victor LaChance Deed in the Lawlor Cleary Deed. Below, the court addresses each of these points.

1. The 1955 Restriction Expired in 1985

ACT Inc. argues that the 1955 Restriction expired in 1985. The Plaintiffs do not argue otherwise, and the court agrees.

General Laws c. 184, § 23 ("Section 23"), provides, in pertinent part, that, "[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the terms of thirty years after the date of the deed or other instrument . . . creating them[.]" Here, the 1955 Restriction was created via the Victor LaChance Deed, which was executed on October 10, 1955, and it contains no time limitation. Thus, in accord with Section 23's plain language, the 1955 Restriction expired thirty years from its imposition, on October 10, 1985. See Jones v. Murphy, 60 Mass. App. Ct. 1, 2-3 (2003) ("since the passage of [Section] 23, 'Massachusetts law has imposed a thirty-year time limitation on land use restrictions that do not themselves contain an express limitation on duration'"), quoting Stop & Shop Supermarket Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285, 288 (2001).

2. The 2009 Restriction was Not the Product of a Scrivener's Error; Rather, the 2009 Restriction is an Entirely New Deed Restriction

Next, ACT Inc. contends that the 2009 Restriction was intended to be a mirror image of the 1955 Restriction, which was included, in the same basic form with some minor grammatical changes, in each deed transferring Lot 61 between 1955 and 1970, and that the change in the language used between the 1955 Restriction and the 2009 Restriction was the result of a scrivener's error.[6] In response, the Plaintiffs argue that Act Inc. has no reasonable expectation of

---

[6] There are some insignificant grammatical changes between the 1955 Restriction originally included in the Victor LaChance Deed and the restriction set forth in the Bond Kipps Deed, which was executed in 1963. The restriction included in the Kipps Lawlor Deed through which Mr. and Mrs. Lawlor obtained Lot 61 is identical to the restriction in the Bond Kipps Deed. It reads as follows:

> Said Premises are conveyed subject to the restriction that they shall be used for no other purpose than the erection and occupancy of a single family home having a pitched roof and appurtenant private garage which may be a separate unit or attached to said dwelling. Further that such dwelling and/or garage shall be set back at least 30 feet from the street line and no closer than 15 feet on either side line.

J.A., Ex. E. The 2009 Restriction is the same as the restriction included in the Kipps Lawlor Deed, except that it omits the phrase "that such dwelling and/or garage shall be set back at least 30 feet from the street line" from the last sentence. Thus, the 2009 Restriction reads as follows:

> Said Premises are conveyed subject to the restriction that they shall be used for no other purpose than the erection and occupancy of a single family home having a pitched roof and appurtenant private garage which may be a separate unit or attached to said dwelling. Further and no closer than 15 feet on either side line.

J.A., Ex. H.

being able to prove that the changes between the language used in the 1955 Restriction and the 2009 Restriction were the result of a scrivener's error. Instead, according to them, the summary judgment record establishes that the 2009 Restriction is an entirely new restriction, which the parties negotiated for at the closing on Cleary LLC's purchase of Lot 61 from Mrs. Lawlor. The court is persuaded that the Plaintiffs are correct.

A deed that does "not embody within its terms the clear intent of the parties" due to an error by the scrivener, so that the deed does "not accurately express the conveyance that the scrivener was directed by the parties to prepare," may be reformed. Franz v. Franz, 308 Mass. 262, 266 (1941). The fact that the person for whom the instrument was drafted has died "should not foreclose relief." Berman v. Sandler, 379 Mass. 506, 510 (1980) (involving mistake in amendment to trust). Nevertheless, both the intent of the parties and the scrivener's error must be established by clear and convincing proof. Covich v. Chambers, 8 Mass. App. Ct. 740, 747 (1979). In determining whether this standard has been met, the court must look at the deed as a whole, the circumstances known at the time of execution, extrinsic evidence such as the affidavits of a drafting attorney, and other documents. Dwyer v. Dwyer, 452 Mass. 1030, 1031 (2008); see also Pond v. Pond, 424 Mass. 894, 897 (1997).

In this case, ACT Inc. has no reasonable expectation of proving, by clear and convincing evidence, that the differences between the language used in the 1955 Restriction and the 2009 Restriction were the result of a scrivener's error and that it was not Mrs. Lawlor's intent to create a new restriction. See Adoption of Lisette, 93 Mass. App. Ct. 284, 293 n.14 (2018) ("[c]lear and convincing evidence is evidence that is 'strong, positive and free from doubt'"), quoting Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975). ACT Inc.'s only evidence that the

2009 Restriction was the result of a scrivener's error is the fact that it omitted language included in the 1955 Restriction; however, it is entirely possible that this omission was intentional.

ACT Inc. points to the Affidavit of John F. Troy ("Troy") (the "Troy Affidavit") (Paper #9.2) to support its position. Therein, Troy avers that he has been a title examiner since 1994, Troy Aff., para. 3, and that "it appears" that the language used in the 2009 Restriction "was not an attempt to impose a new restriction but was instead an unsuccessful attempt to recite the same restriction language found in the [Kipps Lawlor Deed]," which is essentially the same as the 1955 Restriction. Troy Aff., para. 22. Troy was not, however, involved in the negotiations pertaining to, or present at the closing on, Cleary LLC's purchase of Lot 61 from Mrs. Lawlor. Troy never spoke with Mrs. Lawlor, and he was not involved in drafting the Lawlor Cleary Deed via which Lot 61 was conveyed to Cleary LLC; thus, Troy has no basis to make averments about Mrs. Lawlor's intent.

On the other hand, the Plaintiffs offer undisputed evidence that Mrs. Lawlor specifically intended to include the 2009 Restriction in the Lawlor Cleary Deed as a new restriction, and that she would not have proceeded with selling Lot 61 to Cleary LLC if the 2009 Restriction had not been included in the Lawlor Cleary Deed.

First, in the Declaration of Leonard J. Degnan, Jr. ("Degnan") (the "Degnan Declaration"), which was signed under the pains and penalties of perjury on December 22, 2023, Degnan avers that Mrs. Lawlor was his aunt; that, in 2009, she granted him a power of attorney to sell the house on Lot 61, known as 9 Mary Lou Lane; that, on the morning of the closing, he was advised through counsel that Cleary LLC wanted the 2009 Restriction removed from the Lawlor Cleary Deed; that Mrs. Lawlor instructed him not to proceed with the closing unless the 2009 Restriction was included in the Lawlor Cleary Deed; that, through counsel, he informed

Cleary LLC that the 2009 Restriction could not be removed from the Lawlor Cleary Deed; that, at the closing, he observed the attorney for the bank show Cleary LLC's now deceased principal, William P. Cleary ("Mr. Cleary"), the Lawlor Cleary Deed, specifically pointing out the 2009 Restriction; and that Mr. Cleary deemed the Lawlor Clearly Deed acceptable. J.A., Ex. T.

Second, at her deposition, Deborah Nowell ("Nowell"), the attorney who attended the closing on behalf of Northmark Bank, the entity that was providing Cleary LLC with the financing necessary to purchase Lot 61, testified that, prior to the scheduled closing, she received a draft deed; that the draft deed contained the 2009 Restriction, as well as a misspelling of Mrs. Lawlor's name; and that she (Nowell) typed up a new deed, which corrected the spelling error and removed the 2009 Restriction but, at the closing, Mrs. Lawlor "insisted" that the deed prepared by her attorney, which contained the 2009 Restriction, be used. J.A., Ex. Z, Nowell Dep., pp. 43-45. Thereafter, Nowell testified that Mr. Cleary attended the closing, that she "talk[ed]" to him about the 2009 Restriction, that he "accepted" the Lawlor Cleary Deed, and that he did not refuse to proceed with the closing.[7] J.A., Ex. Z, Nowell Dep., pp. 46-47.

Third, there is evidence that, some months after the closing, on October 26, 2010, Cleary LLC's lawyer, Donna J. Boggs ("Boggs"), sent Mrs. Lawlor's attorney, James Landy ("Landy"), a letter asking that he have Mrs. Lawlor sign the enclosed "CONFIRMATORY DEED," which did not include the 2009 Restriction. J.A., Ex. CC. In this letter, Boggs explained that Cleary LLC wanted the 2009 Restriction "removed" from the Lawlor Cleary Deed because, according to Cleary LLC, it had "expired" and its inclusion in the Lawlor Clear Deed "could be construed as

[7] When questioned, Nowell also testified that it was her belief that the difference in the language used in the 1955 Restriction and the 2009 Restriction was the result of a typo, J.A., Ex. Z, Nowell Dep., pp. 45-46, and that, at the time of the closing, she did not understand Mrs. Lawlor "to want a new restriction," J.A., Ex. Z, Nowell Dep., p. 102. She, however, offered no basis for her belief, other than the fact that the 2009 Restriction was similar to the 1955 Restriction, except for the omission contained within the final sentence.

adding a private restriction to the conveyance." J.A., Ex. CC. Landy replied to Boggs letter via facsimile, stating "Mrs. Jacqueline Lawlor will NOT! sign confirmatory deed as requested." J.A., Ex. DD.

Based on the record evidence, the court concludes that ACT Inc. has no reasonable expectation of proving, by clear and convincing evidence, that the 2009 Restriction was the product of a scrivener's error. ACT Inc. relies entirely on the limited changes in the language used in the 1955 Restriction and the 2009 Restriction, and the Troy Affidavit to support its contention. This is not sufficient. First, as stated above, it is entirely possible that the changes between the 1955 Restriction and the 2009 Restriction were purposeful; certainly, ACT Inc. offers no clear evidence to the contrary.[8] Second, as explained above, whatever his averments in the Troy Affidavit, it is undisputed that Troy never spoke to Mrs. Lawlor, and that he was not involved in her conveyance of Lot 61 to Cleary LLC. On the other hand, as the Plaintiffs contend, the record evidence is sufficient, as a matter of law, to establish that Mrs. Lawlor intended, and negotiated, to include the 2009 Restriction in the Lawlor Cleary Deed, and that it constitutes a new restriction, entirely separate from the 1955 Restriction.

3. This Case is Distinguishable from Zide v. McNiff

ACT Inc. argues that, even if Mrs. Lawlor intended to create a new restriction with the 2009 Restriction, under the Zide case, her attempt fails because you cannot create a new restriction merely by repeating language contained within an expired restriction; instead, something more is required. 2012 WL 264214, at *4. In the court's view, ACT Inc.'s reliance on Zide is somewhat misplaced.

[8] As the Plaintiffs point out, ACT Inc. offers no authority in support of its contention that the 2009 Restriction cannot constitute a new restriction merely because it is similar in language and intent to the 1955 Restriction, which expired many years prior in 1985.

First, Zide was issued pursuant to Massachusetts Appeals Court Rule 1:28, the precursor to the current Massachusetts Appeals Court Rule 23.0. These decisions are primarily addressed to the parties and may not fully address the facts of the case or the issuing panel's rationale. For this reason, while Zide may be relied upon for its persuasive value, it does not constitute binding precedent for this court.

Second, and more significantly, Zide is factually distinguishable from the present case. There, Henry and Ellen Nichols (the "sellers") engaged Nancy J. Winslow ("Nannie") to sell residential property they owned in Essex. Id. at *1. They had taken title to this property in 1969, pursuant to a deed that contained restrictions whereby the titleholder agreed not to subdivide the parcel, not to use the parcel for any purpose other than a single-family residence, and not to construct any buildings on the parcel within fifty feet of any boundary line. Id. at *2. The sellers eventually entered into a purchase and sale agreement (the "P&S") with Karen McNiff ("McNiff"). Id. at *1. The P&S provided that the deed would be encumbered by restrictions contained in the 1969 deed, and thereafter, the deed to McNiff repeated the exact same restrictive language as was used in the 1969 deed. Id. at *3. Significantly, the record evidence established that the sellers did not realize that the restrictions set forth in the 1969 deed had expired in July 1999; rather, there was evidence that they thought and intended that the restrictions in the 1969 deed would continue in perpetuity. Id. There was also record evidence that McNiff always planned to subdivide the property, and that she believed, based on her own experience buying and selling real estate, that the restrictions in her deed had likely expired. Id.

After closing, McNiff began rehabbing the residence located on the property. Id. Once that project was complete, she began the process of subdividing the property. Id. The plaintiff-abutters filed suit, seeking to enforce the restrictions set forth in the 2004 deed transferring the property to McNiff. Id. They argued that, by including the restrictions in the 2004 deed, the sellers intended to impose "new" restrictions. Id. at *4. The Appeals Court rejected this argument. Id.

According to the Court, the record was "simply devoid of evidence the sellers intended to impose 'new' restrictions." Id. And, "[e]ven if that had been their intent, they failed to communicate . . . [that intent] to Nannie or to McNiff." Id. Ultimately, on this basis, the Court concluded that "[t]he sellers had to do more than merely repeat the same language contained in the 1969 deed in order to create new enforceable restrictions." Id.

In the present case, as described above, unlike in Zide, there is significant record evidence demonstrating that Mrs. Lawlor specifically negotiated for and intended to include the 2009 Restriction in the Lawlor Cleary Deed, and that she would not have gone through with the sale of Lot 61 to Cleary LLC without inclusion of the 2009 Restriction. There is also record evidence that, at the time of closing, the 2009 Restriction was specifically pointed out to Mr. Cleary, and that he deemed the Lawlor Cleary Deed acceptable. These facts are undisputed and weigh heavily in favor of finding that the 2009 Restriction was intended to be a new deed restriction.

Second, unlike the restriction at issue in Zide, the 2009 Restriction is not merely an exact repetition of the 1955 Restriction. While there can be little dispute that there are significant similarities between the 1955 Restriction and the 2009 Restriction, there is at least one noteworthy difference. In particular, the 2009 Restriction omits the requirement that the dwelling be setback thirty feet from the street line. And, as mentioned above, ACT Inc. cannot meet its burden to establish, by clear and convincing evidence, that this omission was the result of a scrivener's error. Thus, the court concludes that the holding in Zide does not require judgment in favor of ACT Inc. in this case.

E. The 2009 Restriction Constitutes an Enforceable Deed Restriction

Lastly, given the conclusions reached above regarding Mrs. Lawlor's intention to create a new deed restriction that be included in the Lawlor Clear Deed, the court must address whether the 2009 Restriction constitutes a valid enforceable deed restriction.

"A 'restriction on land' is a right to compel the person entitled to possession of the land not to use it in specified ways." Patterson v. Paul, 448 Mass. 658, 663 (2007), quoting Labounty v. Vickers, 352 Mass. 337, 347 (1967). Generally, such restrictions "are disfavored." Stop & Shop Supermarket Co., 433 Mass. at 290; see also Donoghue v. Prynnwood Corp., 356 Mass. 703, 707 (1970) ("[r]estrictions of this type[,] [which limit land use] will be strictly interpreted in favor of limiting the restraint on use of the granted premises"). Nevertheless, "as with any other contractually bargained-for agreement[]," land use "restrictions . . . are often beneficial and valuable." Stop & Shop Supermarket Co., 433 Mass. at 290. Thus, "[t]here is no superseding public policy between the somewhat differing general principles that, on the one hand, disfavor land use restrictions, and, on the other hand, uphold contractually bargained for restrictions that permit landowners to use their land in certain ways." Id. at 292. Nevertheless, to be enforceable, a deed restriction must comply with G. L. c. 184, § 30 ("Section 30"). See Blakeley v. Gorin, 365 Mass. 590, 593 (1974).

The legislature adopted Section 30 "to promote the 'reasonable use of land for purposes for which it is most suitable,' [G. L.] c. 184, § 30(4), as well as to increase the marketability of real estate which may be impaired by obsolete restrictions." Id. at 599. It provides that no restriction shall be enforced unless it is determined to be "of actual and substantial benefit to a person claiming rights of enforcement," and, even then, the provision provides that "[n]o restriction determined to be of such benefit shall be enforced or declared to be enforceable, except . . . by award of money damages" if any of several enumerated conditions are found to exist. G. L. c. 184, § 30.

As interpreted by case law, an "actual benefit" under Section 30 is different from a "substantial benefit." An "actual benefit" is one that arises "from the existence and enforceability of the restriction." Garland v. Rosenshein, 420 Mass. 319, 321 (1995). This sort of benefit is distinguished from one associated with the "hold up price" of the restriction, i.e., the price the holder of the restriction could wrangle from the person who is subject to the restriction as compensation for ignoring or waiving the restriction, or an advantage not otherwise associated with land that expressly benefits from the restriction. Id. ("[t]o be 'actual,' the benefit must come from the existence and enforceability of the restriction, rather than from the price of releasing the restriction").

Here, the Plaintiffs, as owners and residents of Lot 61A, will realize an actual benefit from enforcement of the 2009 Restriction. The 2009 Restriction helps protect the investments the Plaintiffs have made in their property, as it helps control the density of their neighborhood and assists in maintaining the character thereof. See, e.g., Blakeley, 365 Mass. at 603-604 (finding restriction that public alley should "be kept open," thereby providing light and air to benefited parcels, was of actual and substantial benefit to owners of those parcels); Gulf Oil Corp. v. Fall River Hous. Auth., 364 Mass. 492, 500 (1974) (stating that restriction, which was intended "to assure the orderly and mutually beneficial development" of land, was of actual and substantial benefit); Connaughton v. Payne, 56 Mass. App. Ct. 652, 657 (2002) (stating that restriction limiting development to four single family homes was of actual and substantial benefit to abutters for those whose benefit the restriction was originally imposed and who sought to maintain "the ecosystem that currently thrives" on their property); Atwood v. Walter, 47 Mass. App. Ct. 508, 513 (1999) (restrictions on construction in single-family subdivision "are of actual and substantial benefit to the plaintiff by ensuring that the quality and unique character of [the subdivision] is maintained"); Maddalena v. Brand, 7 Mass. App. Ct. 466, 470 (1979) (enforcing restrictions in seventy-eight-lot subdivision that were "obviously intended to maintain the aesthetic qualities of the property and its waterfronts" were of actual benefit); and Tonsberg v. Lanza, No. 19-P-01465, 98 Mass. App. Ct. 1120, 2020 WL 7051936, at *2-3 (Dec. 2, 2020) (stating that restriction banning swimming pools along golf course was of actual and substantial benefit to nearby landowner).

The Plaintiffs will also gain a "substantial benefit" from the enforcement of the 2009 Restriction. "The substantial benefit requirement is a quantitative one: will the person seeking enforcement realize more than a trivial benefit if the restriction is enforced?" Tonsberg, 2020 WL 7051936, at *3; see also Blakeley, 365 Mass. at 603 (stating restriction against bridging an alleyway was of "substantial benefit" to abutter who showed that shadows from proposed bridge would have more than a "de minimis effect" on abutter's property); Connaughton, 56 Mass. App. Ct. at 657 (stating plaintiff substantially benefitted from limit on number of nearby houses where evidence showed that development would affect wildlife on plaintiff's property). Here, enforcement of the 2009 Restriction will provide the Plaintiffs with more than a de minimis benefit, as there is record evidence that any construction on the Subject Parcel will raise health and safety concerns for the Plaintiffs. J.A., Ex. V. More specifically, as to health, there is record evidence that removal of the mature trees and other vegetation currently located on the Subject Parcel and construction of any dwelling and driveway would exacerbate the seasonal flooding that already occurs on the Plaintiffs' property. J.A., Ex. V. As to safety concerns, there is record evidence that any construction on the Subject Parcel would impede driver sight lines for the Plaintiffs, as well as others in the neighborhood. J.A., Ex. V.

Next, Section 30 states that, even a restriction of actual and substantial benefit, will not be enforced when any one of several enumerated conditions is present. These conditions are set out in the third sentence of Section 30.[9] However, "[a] party who seeks under the third sentence of [Section] 30 to avoid a restriction's bite has the burden of proving that the sentence applies." Tongsberg, 2020 WL 7051936, at *12, citing Cogliano v. Lyman, 370 Mass. 508, 512 (1976); Walker v. Sanderson, 348 Mass. 409, 414 (1965). Here, ACT Inc. has failed to demonstrate that any of the conditions enumerated in sentence three of Section 30 apply in this case, so as to

---

[9] In full, sentence three of Section 30 states as follows:

> No restriction determined to be of such benefit shall be enforced or declared to be enforceable, except in appropriate cases by award of money damages, if (1) changes in the character of the properties affected or their neighborhood, in available construction materials or techniques, in access, services or facilities, in applicable public controls of land use or construction, or in any other conditions or circumstances, reduce materially the need for the restriction or the likelihood of the restriction accomplishing its original purposes or render it obsolete or inequitable to enforce except by award of money damages, or (2) conduct of persons from time to time entitled to enforce the restriction has rendered it inequitable to enforce except by award of money damages, or (3) in case of a common scheme the land of the person claiming rights of enforcement is for any reason no longer subject to the restriction or the parcel against which rights of enforcement are claimed is not in a group of parcels still subject to the restriction and appropriate for accomplishment of its purposes, or (4) continuation of the restriction on the parcel against which enforcement is claimed or on parcels remaining in a common scheme with it or subject to like restrictions would impede reasonable use of land for purposes for which it is most suitable, and would tend to impair the growth of the neighborhood or municipality in a manner inconsistent with the public interest or to contribute to deterioration of properties or to result in decadent or substandard areas or blighted open areas, or (5) enforcement, except by award of money damages, is for any other reason inequitable or not in the public interest.

G. L. c. 184, § 30.

allow it to avoid enforcement of the 2009 Restriction. Thus, the court concludes that ACT Inc. has no reasonable expectation of proving that it is entitled to avoid the 2009 Restriction via application of any of the conditions listed in sentence three of Section 30.

Given the conclusions made herein, the Plaintiffs are entitled to summary judgment, and the court shall enter a declaration, pursuant to G. L. c. 231A, § 1, that the 2009 Restriction is applicable to the Subject Parcel and thus, no dwelling may be constructed on the Subject Parcel.

CONCLUSION AND ORDER

For the reasons explained above, it is hereby **ORDERED** that:

1. Andover Community Trust, Inc.'s Motion for Summary Judgment (Paper #10) is **DENIED**; and
2. Plaintiffs' Cross-Motion for Summary Judgment (Paper #15) is **ALLOWED**.

Accordingly, pursuant to G. L. c. 231A, § 1, the court **ORDERS** and **DECLARES** that:

1. the 2009 Restriction included in the Lawlor Cleary Deed, dated May 26, 2009, and recorded at the Essex North Registry of Deeds in Book 11615, on Page 236, constitutes an enforceable deed restriction, pursuant to G. L. c. 184, § 30; and
2. pursuant to the 2009 Restriction, no dwelling may be constructed on Lot 61B, which is identified on the subdivision plan entitled "Plan of Land, Mary Lou Lane, Andover, Mass[,]" dated November 5, 2009, and recorded at the Essex North Registry of Deeds on January 25, 2010, as Plan 16207.

SO ORDERED.

Elizabeth A. Dunigan

Dated: October 1, 2025

Elizabeth A. Dunigan
Justice of the Superior Court