IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

MARSHALL E. BELAGER-PRICE,
AND BRENDA C. BELAGER-PRICE;
BRIAN E. PRICE, AND RETHA A. PRICE;
RICHARD TUCKER AND CAROLYN TUCKER;
AARON D. PUCKETT, JR, AND LESLIE PUCKETT;
AND MARY ANNE NARRON — APPELLANTS

V. — NO. 2008-CA-02102

RICHARD M. LINGLE AND NAOMI T. LINGLE — APPELLEES

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES RICHARD M. LINGLE AND NAOMI T. LINGLE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees, *RICHARD M. LINGLE AND NAOMI T. LINGLE*, certifies that the parties hereto and the persons listed in the "Certificate of Interested Parties" of the Brief of the Appellant and those listed herein constitute the only persons known to have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate potential conflicts of interest.

1. RICHARD M. LINGLE AND NAOMI T. LINGLE.

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STATEMENT OF THE ISSUES

Did the lower court commit manifest error in finding the restrictive covenant at issue is ambiguous and falls short of the degree of specificity and clarity necessary to impose the restrictions the Appellants seek to impose on the Appellees?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Lower Court.

The Appellees, Richard and Naomi Lingle (hereinafter referred to as the "Lingles") are in general agreement with the Course of Proceedings as outlined in the Appellants' (hereinafter referred to as the "Landowners") brief with a few notable exceptions.

The Landowners attempt to characterize Mary Ann Narron as a "homeowner in Kristen Hill Subdivision in the second paragraph of their Course of Proceedings, then admit that she was not a "homeowner in Kristen Subdivision". In fact, Ms. Narron has no standing to have brought this action since she is does not have an interest in the property covered by these protective covenants. As the Landowners stated in their Petition:

> "Kristen Hill Subdivision is the neighborhood where each of the Petitioners reside, **besides Mary Ann Narron, the developer**."

See ¶ 9 of the Landowner's Petition (CP 1-29) (emphasis added). The Landowners erroneously try to legitimize Petitioner Narron's participation in this action by describing her as a "general partner of Cherry Hill Plantation, L.P." Ms. Narron, however, joined in this action *individually* - *Cherry Hill Plantation, L.P. is not a party to this action*. See Landowner's Petition (CP 1-29).

In their fifth paragraph, ***the Landowners now for the first time on appeal ask the Court to prohibit the Lingles from even placing horses on the property***. The placing of horses on the property is irrelevant to the issue at bar: Is the restrictive covenant at issue specific and clear

enough to impose the restrictions the Landowners seek to impose on the Lingles or is the restrictive covenant ambiguous? *Prior to this appeal, the Landowners never alleged that the restrictive covenant prohibits the Lingles from having horses on their property.* **The petition filed by the Landowners did not seek to prohibit the placing of horses on the property**, but only sought a permanent injunction prohibiting the Lingles "from constructing any appurtenance whatsoever, and specifically a horse barn until such time as they have constructed a single family residence". See ¶ 16 of the Landowner's Petition (CP 1-29). Indeed, as Chancellor Zebert found, the Lingles' property is zoned "A-1" in Madison County, Mississippi and such designation allows horses. See Paragraph #5 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). According to the testimony of Petitioner Narron, one of the partners the limited partnership that developed the "Kristen Hill" development (Ms. Narron is also an attorney – See paragraph # 7 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84), the developer of the "Kristen Hill" development intended for homeowners to have horses and barns. Transcript Page 65:25-29; Paragraph #33 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). Other property owners in the area, including some of the Landowners, also have barns and detached out-buildings similar to the barn the Lingles propose to construct on their property. See Paragraph #34 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). Other property owners in the area, including some of the Landowners, have horses on their property. In fact, the Petitioners testified that the prior owner of the Lingles' property kept at least one horse on the property that is now owned by the Lingles. See Paragraph #35 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-

84). Landowner Richard Tucker perhaps said it best, "I have no objection to the barn. I think the barn - the pictures that he shows, that would add to the neighborhood. That's fine. But, if he builds the house first, then he could build the barn. I have no objection to the barn." T, p61:1-6; See also, Paragraph 31, of the Final Judgment (Emphasis added) (Appellant's Record Excerpt page 004-028; CP, p60-84).

B. Statement of Relevant Facts.

In the first paragraph under the section "Standard of Review" on page 14 of their brief, the Landowners stated, "In this appeal, the Homeowners do not challenge any findings of fact by the Chancellor." In the lower court's FINAL JUDGMENT AND FINDINGS OF FACT INCLUDING CONCLUSIONS OF LAW, entered November 13, 2008 (Appellant's Record Excerpt page 004-028; CP, p60-84), Chancellor Zebert found, among other things, the following:

> 3. On June 14, 2007, Defendants, Richard M. Lingle and Naomi T. Lingle, sometimes hereinafter referred to as the Lingles, purchased a parcel of land containing 9.26 acres, more or less, situated in Madison County, Mississippi, from John H. Lynch and Susan R. Lynch by a warranty deed (referred to herein as the "Warranty Deed"). The Warranty Deed was introduced into evidence as Exhibit #5.
>
> 4. The Lingles' Warranty Deed specifies that the following restrictive and protective covenants run with the title to the property conveyed:
>
> SUBJECT TO the following restrictive and protective covenants are hereby imposed by Grantor as a burden and encumbrance on the property herein conveyed and shall run with the title to the property herein conveyed:
>
> (1) The subject property can only be used to build and construct only one single family residence and appurtenances thereto (the term "single" family residence as used herein shall be construed to exclude among other things, hospitals, duplex houses, apartment houses, churches and schools and to exclude commercial and professional use, except a personal office in the home);

(2) The property herein conveyed shall not be subdivided into smaller lots and shall remain as a unit;

(3) Any sewage system proposed for use and installation on the property shall be approved by the State of Mississippi and any other governmental agency with power to approve said sewage system;

(4) There shall be no trailers, shell houses, manufactured homes or mobile homes placed on the subject property (a manufactured home, used herein, mew any dwelling which as a whole or in complete components is fabricated elsewhere and removed to the lot, or is classified as a "shell house"; and no pre-existing homes, buildings of any kid or components thereof shall be placed on the subject property); and

(5) Any residential dwelling built on the subject property shall contain a minimum of three thousand five hundred (3,500) feet of heated and cooled living area. These covenants are to run with the land and shall be binding on all parties or persons owning said land or any part hereof and claiming under them for a period of twenty-five (25) years from 01/18/2007 after which time said covenant shall continue to run with the land so long as the protective covenants for Cherry Hill Plantation, Phase n, as recorded in Deed of trust Book 818 at Page 610, records in the Office of the Chancery Clerk of Madison County, shall be in farce and effect. By acceptance of delivery of this Deed, Grantees, their heirs and/or assigns, acknowledge and agree to said restrictive and protective covenants.

5. The Lingles' property is zoned "A-1" in Madison County, Mississippi. Such designation allows for a house with a barn and horses. On May 15, 2008, a Building Permit was issued to the Lingles approving construction to erect an "ACCESSORY STRUCTURE (BARN)" on the property which is the subject of this litigation. A copy of the building permit was introduced into evidence as Exhibit #10.

. . .

10. The Petitioners filed this action asking the Court to enter a permanent injunction prohibiting the Lingles "from constructing any appurtenance whatsoever, and specifically a horse barn until such time as they have constructed a single family residence.

12. The Court held a Pretrial Conference on October 8, 2008, at the law office of Pamela L. Hancock-, Esq., attorney for the Petitioners. Present at this conference was Ronald Henry Pierce, attorney for the Lingles and Mr. Lingle. After the Pretrial Conference, everyone present accompanied the Court the

Lingle's property so that the Court could view the property and the surrounding area.

. . .

23. The testimony in this case reveals that after a controversy arose over the Lingles' plans to construct a horse barn on their property, Mr. Lingle sent all of the Petitioners (except Narron who does not live in the does not live in the Kristen Hill development) a letter dated October 23, 2007. A copy of this letter was introduced into evidence as Exhibit #8. In this letter, Mr. Lingle stated, in part:

> Naomi and I would like to provide you with a complete description of our intentions in regard to the property which we purchased several months ago from Heath Lynch. We intend to build a house on the property at some point in the future. However, due to the slump in the real estate market, we cannot predict a date upon which the house will be built. We own a house in Rankin County, and one in Ridgeland; neither of which we expect to be a quick sale. In the meantime, it is our intention and desire to erect our horse barn on the property and move a couple of horses to the property as soon as possible.
>
> We have enclosed (1) a copy of the survey plat with each of our respective properties identified, (2) a photocopy of what our barn will resemble upon completion, and (3) several aerial photographs taken last week of the area with each of our properties marked and identified.
>
> We would like to point out several point of interest. First, you can plainly see that the barn which we are planning is not your typical metal building. The cost of the barn will be approximately $100,000.00 and be 38" x 48" in size. The barn will be aesthetically pleasing and will add value to the area. Just like the Tucker's barn, it will be placed below the sight level of Gluckstadt Road on the side of the hill at the rear of our residence. It cannot be seen by any of you from your individual homes with the exception of maybe the Belager-Price home. However, it will be a substantial distance from the Belager-Price home. In addition to being placed below the crest of the hill, it is placed behind the forested area of the property so as to provide the best possible visual camouflage from the Puckett property. Thus, this barn will not be readily visible from any of your homes, nor is it readily visible from Gluckstadt Road from the South or East.

24. The Petitioners acknowledged receiving Mr. Lingle's letter of October 23, 2007, and some Petitioners even considered Mr. Lingle's request to be reasonable.

25. In Mr. Lingle's letter dated October 3, 2007, Mr. Lingle stated his intent to build a residence on the property:

> "We intend to build a house on the property at some point in the future. However, due to the slump in the real estate market, we cannot predict a date upon which the house will be built. We own a house in Rankin County, and one in Ridgeland; neither of which we expect to be a quick sale."

26. There was also testimony from several Petitioners who stated Mr. or Mrs. Lingle personally told them that they intended to build a home on the property in the future.

27. Evidence of the Lingles' intent to build a residence on the property can also be gleaned from the fact that the Lingles have expanded the size of "house pad" on the property from the size of that created by the former owners, John H. Lynch and Susan R. Lynch. Evidence of this is found in Mr. Lingle's letter dated October 5, 2007 (Exhibit #8):

> Next our house pad is located on the crest of the hill and has been expanded from the size of the pad made by Heath Lynch.

Petitioners did not contest the fact that the Lingles have expanded the size of "house pad" on the property from the size of that created by the former owners.

28. Evidence of the Lingles' intent to build a residence on the property can also be gleaned from the fact that the Lingles have built a very upscale stone entrance to the property, as was also stated in Mr. Lingle's letter dated October 5, 2007 (Exhibit #8) and viewed by the Court. Petitioner Carol Tucker described the stone entrance as follows:

> They had started construction on a big driveway with a huge entrance gate, and a lot of bricks had been brought out, and road had been built from Gluckstadt Road up into the property.

Transcript at Page 43:20-23. It is difficult to believe that such an expensive stone entrance would be built for just a barn.

29. In January of 2007, Mr. Lingle's 17 year-old stepson died unexpectedly in their former home of Rankin County. As a result, the family moved out of their former home in Rankin County immediately and lived in an extended stay hotel for a couple of months until they bought their current

residence located at 142 Bridgewater Crossing, Ridgeland, Mississippi. The Lingles' former home in Rankin County has been on the market since 2007 and has recently been substantially discounted. The Lingles plan to build a house on the Kristen Hill property as soon as the former home sold. One of the reasons they purchased the Kristen Hill property was so that the family could have horses at the same place they live.

30. Mr. Lingle also has farm property and has claimed income and expenses on his tax returns as a farmer for years. He has not, however, claimed any of the expense related to the property or the barn at Kristen Hill as "farm expense" on his tax returns because he considers that to be a residential property.

31. The testimony in this case reveals that the Petitioners have no real objection to the appearance of the Lingles' barn or the placement of the Lingles barn on their property: the Petitioners' only take issue with the order in which the Lingles are building their barn. The Petitioners' position is perhaps best summarized by the testimony of Petitioner Richard Tucker:

> I have no objection to the barn. I think the barn — the pictures that he shows, that would add to the neighborhood. That's fine. But if he builds the house first, then he could build the barn. I have no objection to the barn.

Transcript at page 61:1-6.

32. As stated above, the Petitioners contend that the clear and unambiguous language restriction at issue requires the Lingles to construct a single-family residence before they can construct any appurtenance whatsoever on their property.

33. According to the testimony of Petitioner Narron, one of the partners the limited partnership that developed the "Kristen Hill" development, the developer of the "Kristen Hill" development intended for homeowners to have horses and barns. Transcript Page 65:25-29.

34. Other property owners in the area, including some of the Petitioners, also have barns and/or detached out-buildings similar to the barn the Lingles propose to construct on their property.

35. Other property owners in the area, including some of the Petitioners, have horses on their property. In fact, the Petitioners testified that the prior owner of the Lingles' property kept at least one horse on the property that is now owned by the Lingles.

36. The testimony conclusively established that the prior owners of the Lingles' property built and constructed a "pole barn" on the property that is now owned by the Lingles. Despite Petitioners attempts to characterize this barn as "temporary", Mr. Lingle's testimony that it was constructed of six by six posts set in concrete with new metal siding was not contradicted. Therefore, the Court finds that the barn constructed by the prior owner is not a temporary structure.

37. The testimony conclusively established that the prior owners of the Lingles' property built and constructed an expensive three-rail white plastic fence on the property that is now owned by the Lingles.

38. The testimony conclusively established that the prior owners of the Lingles' property built and constructed a gravel driveway on the property that is now owned by the Lingles.

39. The testimony conclusively established that the prior owners of the Lingles' property built and constructed a pond on the property now owned by the Lingles.

40. The testimony conclusively established that, despite their knowledge of the-prior-owner building the "pole barn" and the large white plastic or PVC fence, none of the Petitioners filed any legal action to prevent the prior owner from building the "pole barn" or the large white plastic or PVC fence on the property that is now owned by the Lingles.

41. Mr. Lingle testified that he would not have purchased the property if the restrictions were to be interpreted in the manner suggested by the Petitioners.

42. According to the testimony of Petitioner Narron, one of the partners, the limited partnership that developed the "Kristen Hill" development, hired Attorney Albert Bozeman White to draft the restrictions contained in the Lynches' deed, which are the same restrictions that are contained in Lingles' Warranty Deed.

42. Introduced as Exhibit #12 was a page from Black's Law Dictionary containing a definition of the word "Appurtenance":

> Appurtenance - That which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an outhouse, **barn**, **garden**, or **orchard**, to a house or messuage.

Joplin Waterworks Co. v. Jasper County, 327 Mo. 964, 38 S.W.2d 1068, 1076. An article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air or heat from or across the land of another. See also Appendant.

43. At this point, another look at the restriction at issue is in order:

(1) The subject property can only be used to build and construct only one single family residence and appurtenances thereto .

45. Petitioners argue that a barn is an "appurtenance" to a residence, and that you cannot have an appurtenance (i.e., a barn) without something that is appendant to (i.e., the residence). The Court agrees this is one interpretation of the restriction.

46. The Lingles argue that the term "appurtenances thereto" in their restriction is a term of description, describing the types of additional things that may be added to the land, but not the order.

47. The definition from Black's law Dictionary indicates that the term "appurtenances" may also mean things that attach to the land. For example, it says an appurtenance is "something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land" and then, as a specific example, it states that a "barn" is such an appurtenance.

48. Defining an appurtenance as something that attaches to the land is consistent with other areas of our law. For example, in *Feliciana Bank & Trust v. Manuel & Sessions, L.L.C.*, 943 So.2d 736 (Miss.App. 2006), the Court held that a deed of trust that conveyed "the land described", as well as "improvements and appurtenances now or hereafter erected on, and fixtures," which is sufficient language to cover everything that is by law part of the realty. (emphasis added).

49. Miss. Code Ann. §43-33-1(m)(Housing Authorities) defines real property as follows:

(m)"Real property shall include all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto, or used in connection therewith, and every estate, interest and right, legal or equitable, therein including terms for years and liens by way of judgment,

mortgage or otherwise and the indebtedness secured by such liens. (emphasis added)

50. Miss. Code Ann. §43-35-3 (Urban Renewal and Redevelopment) defines real property as follows:

> (m) "Real property" shall include all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto, or used in connection therewith, and every estate, interest, right and use, legal or equitable, therein, including terms for years and liens by way of judgment, mortgage or otherwise.

51. As stated previously, it appears to the Court that the rules on construction applicable to private restrictive covenants require that the Court construe the restrictions in favor of the Lingles, the landowner being restricted. The rules on construction also require the Court to construe the restrictions against the drafter of the restrictions, Petitioner Narron. Finally, as stating previously, the Mississippi Supreme Court has long held that protective covenants must be written in clear and unambiguous language and "[t]he intent must be clear." *Andrews v. Lake Serene Property Owners Ass'n, Inc.*, 434 So.2d 1328 (Miss. 1983).

52. Based on the evidence presented in this case, the Court finds that reasonable minds can reach different conclusions as to the meaning of the restriction at issue as it applies to the question presented in this lawsuit.

53. Construing the restrictions in favor of the Lingles, the landowner being restricted, and in view of the rules on construction applicable to private restrictive covenants, the Court finds that the language of the restrictive covenant at issue falls short of the degree of specificity and clarity necessary to impose the restrictions the Petitioners sought to impose on the Lingles. Compare, Andrew v. Lake Serene Property Owners Ass'n, Inc., 434 So 2d at 1333.

54. If the Petitioners' interpretation of the restriction is upheld, this would result in an unfair position for the Defendants and impose an undue restraint upon the Lingles' use of their private property. If the Lingles cannot build or construct "any appurtenance" until after the residence is completed, this would mean that the Lingles could not:

a. Build a fence until their house was completed;
b. Build any retaining walls until their house was completed;
c. Build a paved driveway until their house was completed;

d. Build a tool shed until their house was completed;
e. Or any other appurtenance until their house was completed.

55. In ruling on this matter several issues were and must be considered by the Court:

. . .

B.

. . .

2. The barn, according to the pictures shown and admitted into evidence, will cost approximately $100,000.00 and made with logs and stone exterior and will, in this Court's opinion, not detract from the value of their homes and property and is no way detract from the theme of the surrounding homeowners.

3. While all of the Plaintiffs that testified that their property would be devalued, there was not a shred of evidence submitted to support this issue.

. . .

5. It is also noted that Mr. Lingle stated through testimony that he found no legal prohibition to him getting a headstart on the building of his home by starting the building of a barn which he did have the money to complete.

6. The building site in question cannot be viewed in the same manner as a house in a small subdivision which could very well have been a different set of circumstances than lots 5.5 to 9 acres in size.

7. This Court, as mentioned previously on its own with attorneys from both sides present, viewed the land in question which was helpful.

8. Two cases were relied on by Plaintiffs which need to be briefly discussed: *Gast v. Ederer*, 600 So.2d 204 (Miss. 1992), and *Sterling Realty Co. v. Trednnich*, 319 Mass. 153 (1946). The *Gast* case dealt with a defendant who wanted to build a boathouse, where his covenants provided that no building could be erected on any lot other than a single family dwelling and a private car garage. This is not a comparative case. (Emphasis added.)

The Sterling Realty Co. v. Trednnich Mass. Case, the restrictions clearly stated "not more than one building may be erected, placed or maintained". (Emphasis added). Not a comparative case either.

However, it does show how you can clearly set forth exacting restrictions to eliminate ambiguous requirements.

9. It is difficult for this Court to believe Mr. Lingle is expending $100,000.00 to build an immaculate barn and then not build a house to go with such an investment.

10. Mr. Lingle gives a valid reason as to why he was unable to finish his building project.

    a. Economical/credit lending issues.
    b. The inability of selling his home in Country Place in Rankin County with having it on the market for one year and more and reducing the sale price by $75,000.00 to no avail. This effort to sell was not refuted.

11. This Court finds no cases in the Mississippi Laws that would be determinative of the issue now before the Court. There are several cases in other states that were studied carefully but not found to be definitive.

12. There are several options that could have been considered when drafting the restrictive covenants originally that would have solved this issue.
    a. Provide an architectural overseeing of all building projects on said property.
    b. Specify a scheduling sequence of each building phase supervised by professional or county official.

13. It appears to this Court that the Plaintiffs are certainly prejudging the Lingles with regard to whether or not they intend to build a single family dwelling on the 9.5 acre tract. Mr. Lingle's letter to each of the homeowners states he is going to build a home as quickly as possible. The Court is aware that there is testimony from some stating he is not going to build a house, however, the Court finds that Mr. Lingle intends to build a home as planned.

14. To further show that the Lingles intend to build the $100,000.00 barn in compliance with the pictures showing a log exterior, Mr. Lingle has purchased logs, costing some $65,000.00 which is now present on said property, and appeared to the Court to have been there for quite some time, and is under a cover for protection from the rain and weather conditions.

56. Construing the restriction in favor of the Lingles, the landowner being restricted and in view of the rules on construction applicable to private restrictive covenants, the Court finds that the language of the restrictive covenant at issue falls short of the degree of specificity and clarity necessary to impose the restrictions the Petitioners sought to impose on the Lingles. Compare, *Andrews v. Lake Serene Property Owners Ass'n, Inc.*, 434 So.2d at 1333.

57. Over twenty-six (26) years ago, the Mississippi Supreme Court stated in *Schaeffer v. Gaffing*, 137 So.2d 819, 820 (1962)

> "If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, by placing a minimum on the floor space for a residence, or by prohibiting temporary residences."

137 So.2d at 820.

58. Similarly, in the case of the restrictions contained in the Lingles' Warranty Deed, if Petitioner Narron or her partnership had desired to prohibit the construction of a horse barn before the completion of a residence, this could have easily been accomplished by drafting a clear prohibition in the restrictive covenants.

IT IS, THEREFORE, ORDERED AND ADJUDGED by this Court that the Petitioners' request for relief is denied.

See the FINAL JUDGMENT AND FINDINGS OF FACT INCLUDING CONCLUSIONS OF LAW as entered by Chancellor Zebert on November 13, 2008 (Appellant's Record Excerpt page 004-028; CP, p60-84).

It bears repeating that the Landowners have never alleged that prior to this appeal, the restrictive covenants prohibit the Lingles from constructing a barn OR having horses on their property. According to the testimony of Petitioner Narron, one of the partners the limited partnership that developed the "Kristen Hill" development, the developer of the "Kristen Hill"

development intended for homeowners to have horses and barns. Transcript Page 65:25-29; Paragraph #33 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). Other property owners in the area, including some of the Landowners, also have barns and detached out-buildings similar to the barn the Lingles propose to construct on their property. See Paragraph #34 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). Other property owners in the area, including some of the Petitioners, have horses on their property. In fact, the Petitioners testified that the prior owner of the Lingles' property kept at least one horse on the property that is now owned by the Lingles. See Paragraph #35 of the Final Judgment (Appellant's Record Excerpt page 004-028; CP, p60-84). The Landowners simply contend that the restrictive covenants require the Lingles to build a single family residence before they can construct any appurtenances. Landowner Richard Tucker perhaps said it best, "***I have no objection to the barn***. I think the barn - the pictures that he shows, that would add to the neighborhood. That's fine. But, if he builds the house first, then he could build the barn. ***I have no objection to the barn.***" T, p61:1-6; See also, Paragraph 31, of the Final Judgment (Emphasis added) (Appellant's Record Excerpt page 004-028; CP, p60-84).

As by Chancellor Zebert found, the prior owner made several improvements or "appurtences" to the property prior to the purchase of the property by the Lingles on June 14, 2007 (Trial Exhibit 5), including (a) a "permanent" pole barn (b) a fence around the property with three-rail PVC white fencing, (c) a pond, and (c) a gravel drive-way into the property. The Lingles continued the process of building "appurtenances." The Lingles built an elaborate and decorative entrance to the property complete with stone and iron work, improved the entrance

drive-way, and expanded the house pad for their future house. All of these can be visually seen from the Exhibits entered at trial (Exhibit 8 - letter with photos attached of the premises) and were personally seen by the Chancellor when he view the premises. (Paragraph 55(B)7, and Paragraph 12 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84). Petitioner Carol Tucker described the stone entrance as follows:

> They had started construction on a big driveway with a huge entrance gate, and a lot of bricks had been brought out, and road had been built from Gluckstadt Road up into the property.

Transcript at Page 43:20-23. As Chancellor Zebert found "It is difficult to believe that such an expensive stone entrance would be built for just a barn." Final Judgment at paragraph 28 (Appellant's Record Excerpt page 004-028; CP, p60-84).

At no time (less and except in the Landowners most recent brief) have the Landowners contested the presence of horses or other animals on the property (Transcript Page 65:25-29; Paragraph 34-35, page 13 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84). In fact, at trial, the Landowners and Lingles' protective covenants are not the same. In its development, or at the present time, Kristen Hill Subdivision does not have a uniform or universal set of protective covenants. Each deed is separate and distinct from the other property owners in the subdivision. For example, the Lingles protective covenants call for a minimum heated and cooled square footage of 3,500 square feet (Exhibit 5). The minimum heated and cooled square footage for the Belaga-Price property is only 2,500 square feet (Exhibit 1). The Puckett property which is adjacent to the Lingle property does not have any specific protective covenants whatsoever (Exhibit 2). ***The Tucker property is blessed with the protective covenants***

of a completely different subdivision, Cherry Hill Plantation, Phase II (Exhibit 6) (Emphasis added). The Price property protective covenants are similar to the Belagar-Price property in as much as they require a minimum heated and cooled square footage of 2,500 (Exhibit 7), ***not the 3,500 as required in the Lingle deed.***

It is clear that while the Landowners claim to be protecting their investment or the continuity of the Kristen Hill Subdivision no one seems to care that none of the protective covenants are the same. Different obligations and restrictions are placed on the various owners with no particular degree of care. Or, to put it bluntly, the protective covenants applicable to various lots of Kristen Hill Subdivision are clear as mud. The Landowners seek to apply a different and more harsh set of rules on Lingle that they would operate under themselves.

The Landowners claim in their brief that they are concerned about "this non-conforming use and how it would affect the neighborhood as a whole and their own property values in particular." (Page 9, paragraph 4 of the Landowners' Brief). ***However, only 2 out of 5 even have the same covenants.*** It is clear that Lingles intended purpose for the property is to be their residence (Final Judgment and Findings of Fact including Conclusions of Law, Paragraph 55(B)13, Page 23, Appellant's Record Excerpt page 004-028; CP, p60-84). Even the Landowners concede this point (Landowners' Brief, footnote 5, Page 11). All of the appurtenances which exist on the Lingles property provide for some function or use. They are all incident to home ownership. Certainly, a fence would be acceptable. Certainly, a gated entrance would suffice. The existing barn that was on the property prior to the Lingles purchase is an acceptable appurtenance. All of these appurtenances are incidental to the ownership of the

residential property in question and serve the property in some way that is consistent with its intended use as a residence. If horses were contemplated by the developer and originator of the protective covenants, then certainly a barn for the horse would be contemplated (transcript Page 65:25-29). The Landowners do not get to choose which appurtenances are acceptable unless specific, clear and unambiguous language creates such a restriction.

Summary of the Argument

It is has long been the public policy of this state that:

> . . . ordinarily that minuscule portion of this planet's soil as a person owns may be put to such use as that person desires.

Kinchen v. Layton, 457 So.2d 343, 345 (Miss.1984). "A logical outgrowth of this public policy has been the established rule of construction that restrictive or protective covenants, where ambiguous, are construed strongly against the person seeking enforcement." *Kinchen v. Layton*, 457 So.2d at 345. Restrictive covenants must be written in clear and unambiguous language and "[t]he intent must be clear. *Andrews v. Lake Serene Property Owners Ass 'n, Inc.* 434 So. 2d 1328 (Miss. 1983). Such covenants are subject to a strict construction and in the case of ambiguity, restrictive covenants are construed most strongly against the person seeking the restriction and in favor of the person being restricted. *Id.*

The Landowners in the case at bar assert that the "clear and unambiguous language" of the restriction at issue require the Lingles to construct a single-family residence before they can construct any appurtenance whatsoever on their property. As a result, the Landowners initially sought a permanent injunction prohibiting the Lingles "from constructing any appurtenance

whatsoever, and specifically a horse barn until such time as they have constructed a single family residence".

While the Landowners argue that the language of the Lingles protective covenants is clear and unambiguous, they now (for the first time on appeal) also argue that the Lingles should be prevented (1) from having horses on the property (Page 25, paragraph D(1) of the Landowners' Brief), (2) they ask the Court to establish a time frame in which construction on the dwelling house must begin (Page 25, paragraph D(2), footnote 10 of the Landowners' Brief), and (3) argue for the removal of one appurtenance to the land, i.e. the new barn, while not complaining of the other appurtenances that existed prior to Lingles' purchase of the property or other appurtenances that the Lingles affixed to the property since their purchase (Page 25, paragraph D of the Landowners' Brief). Yet, the Lingles protective covenants do not contain ANY LANGUAGE regarding these matters. The only thing clear and unambiguous about the Landowners demands on the Lingles is that NO SUCH LANGUAGE EXISTS IN THE LINGLES' RESTRICTIVE COVENANTS (Trial Exhibit 5) to support them.

If the Landowners' interpretation of the restriction is upheld, this would result in an unfair position for the Defendants and impose an undue restraint upon the Lingles' use of their private property. If the Lingles cannot build or construct "any appurtenance" until after the residence is completed, this would mean that the Lingles could not:

a. Build a fence until their house was completed;
b. Build any retaining walls until their house was completed;
c. Build a paved driveway until their house was completed;
d. Build a tool shed until their house was completed;
e. Or any other appurtenance until their house was completed.

Under the Landowners' view, any activity, short of living on the property, would be a "use other than residential" and be a violation of the Lingles restrictive covenants. Thus, if the Lingles were avid bird watchers, merely watching the birds fly on the property would be a violation of the Lingles' restrictive covenants unless the Lingles had not first constructed a dwelling house on the property. This view is, of course, absurd. As the Chancellor correctly determined, the restriction at issue is ambiguous and must be construed against the Landowners and in favor of the Lingles.

It is patently obvious that reasonable minds can reach different conclusions as to the meaning of the restriction at issue as it applies to the question presented in this lawsuit and therefore the language of the restrictive covenant at issue falls short of the degree of specificity and clarity necessary to impose such restrictions on the Lingles. Compare, *Andrew v. Lake Serene Property Owners Ass'n, Inc.*, 434 So 2d at 1333.

It should also be remembered that even though the protective covenant specifically restricts the minimum size of the future home to be at least 3,500 square feet of heated and cooled space, nowhere is there a restriction regarding the order of construction of any building, time for start or completion of any building, the number of permitted buildings, or activities that may or may not be conducted prior to the construction of the dwelling house. The Lingles protective covenants are silent in that respect and subject the Lingles to speculation, conjecture and random enforcement attempts as to the protective covenants force and effect. Such characteristics cause those portions of the protective covenants to be unenforceable as a matter of law. *Compare, Andrew v. Lake Serene Property Owners Ass'n, Inc.* 434 So.2d at 1333. It is

clear that the developer, or their attorney, knew how to word specific restrictions. As this Court stated in *Schaeffer v. Gatling*, 137 So.2d 819 (1962):

> "If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, by placing a minimum on the floor space for a residence, or by prohibiting temporary residences"

Schaeffer v. Gatling, 137 So.2d at 829. Or, as the Chancellor stated in this case at bar, "Similarly, in the case of the restrictions in the Lingles' Warranty Deed, if Petitioner Narron or her partnership had desired to prohibit the construction of a horse barn before the completion of a residence, this could have easily been accomplished by drafting a clear prohibition in the restrictive covenants" (Paragraph 58, page 24 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84). Or, at a minimum set forth one (1) set of protective covenants for the Kristen Hill Subdivision instead of four (4) separate and different sets for the total of five (5) lots.

The lower court correctly held that the protective covenants at issue is ambiguous in regard to whether a landowner must first build a "single family residence" before constructing any "appurtenances".

Argument

A. **Standard of Review**

As counsel for the Landowners aptly states, a chancellor's finding of fact will not be disturbed on appeal unless the chancellor was manifestly wrong, or clearly erroneous, questions of law are reviewed *de novo*. What counsel for the Landowners neglects to point out, however, is **that if a contract (such as a restrictive covenant) is determined to be ambiguous, the**

chancellor's determinations are reviewed on appeal under a substantial evidence/manifest error standard. *Wesley M. Breland Realtor, Inc. v. Amandatidis*, 996 So.2d 176 ¶ 14 (Miss. App.2008).

B. <u>The lower court's did not commit manifest error in finding the restrictive covenant at issue is ambiguous and falls short of the degree of specificity and clarity necessary to impose the restrictions the Appellants seek to impose on the Appellees.</u>

It is has long been the public policy of this state that:

> . . . ordinarily that minuscule portion of this planet's soil as a person owns may be put to such use as that person desires.

Kinchen v. Layton, 457 So.2d 343, 345 (Miss.1984) (quoting *Andrews v. Lake Serene Property Owners Association, Inc.*, 434 So.2d 1328, 1331 (Miss.1983). "A logical outgrowth of this public policy has been the established rule of construction that restrictive or protective covenants, where ambiguous, are construed strongly against the person seeking enforcement." *Kinchen v. Layton*, 457 So.2d at 345. The Mississippi Supreme Court has long held that restrictive covenants must be written in clear and unambiguous language and "[t]he intent must be clear. *Andrews v. Lake Serene Property Owners Ass 'n, Inc.* 434 So. 2d 1328 (Miss. 1983). Such covenants are subject to a strict construction and in the case of ambiguity, restrictive covenants are construed most strongly against the person seeking the restriction and in favor of the person being restricted. *Id.*

In *Andrews*, construing the restrictions in favor of the landowner being restricted, and in view of the rules on construction applicable to private restrictive covenants, the Court found that the language of the restrictive covenant at issue fell "far short of the degree of specificity and

clarity necessary" to impose the restrictions the Plaintiffs sought to impose on the defendant. *Andrews v. Lake Serene Property Owners Ass 'n, Inc.*, 434 So. 2d. at 1333. Similarly, in *Kinchen*, after applying the rules of construction, the Court held:

> In summary, when strictly construed against the parties seeking enforcement, these covenants simply are not sufficient to proscribe the placement and use of the structure in question on Lot 10 of the Briarwood West-First Addition subdivision of Harrison County, Mississippi.

Kinchen v. Layton, 457 So.2d at 347.

The Landowners in the case at bar assert that the "clear and unambiguous language" of the restriction at issue require the Lingles to construct a single-family residence before they can construct any appurtenance whatsoever on their property. As a result, the Landowners initially sought a permanent injunction prohibiting the Lingles "from constructing any appurtenance whatsoever, and specifically a horse barn until such time as they have constructed a single family residence". See ¶ 16 of the Landowner's Petition (CP 1-29). In response, the Lingles assert:

a. The restriction is not written in clear and unambiguous language;

b. The restriction at issue is indeed, as Chancellor Zebert found, ambiguous in regard to whether a landowner must first build a "single family residence" before constructing any "appurtenances".

c. The restriction at issue is ambiguous and subject to more that more interpretation and therefore must be strictly construed against the parties seeking enforcement and in favor of the Lingles.

d. In fact, there were a number of appurtenances already constructed on the property by the prior owner before they purchased the property;

e. The restriction falls far short of the degree of specificity and clarity necessary to impose the interpretation of the restriction that the Landowners seek to impose upon the Lingles;

f. The Landowners' interpretation of the restriction is absurd and would result in the Lingles not being able to construct fences, retaining walls, paved driveways, gravel driveways, permanent entranceways or any other "appurtenance" until they completed their residence;

g. The Landowners' interpretation of the restriction would result in an undue restraint upon the Lingles use of their land; and

While the Landowners argue that the language of the Lingles protective covenants is clear and unambiguous, they now (for the first time on appeal) also argue that the Lingles should be prevented (1) from having horses on the property (Page 25, paragraph D(1) of the Landowners' Brief), (2) they ask the Court to establish a time frame in which construction on the dwelling house must begin (Page 25, paragraph D(2), footnote 10 of the Landowners' Brief), and (3) argue for the removal of one appurtenance to the land, i.e. the new barn, while not complaining of the other appurtenances that existed prior to Lingles' purchase of the property or other appurtenances that the Lingles affixed to the property since their purchase (Page 25, paragraph D of the Landowners' Brief). Yet, the Lingles protective covenants do not contain ANY LANGUAGE regarding these matters. The only thing clear and unambiguous about the Landowners demands on the Lingles is that NO SUCH LANGUAGE EXISTS IN THE LINGLES' RESTRICTIVE COVENANTS (Trial Exhibit 5) to support them.

Under the Landowners' view, any activity, short of living on the property, would be a "use other than residential" and be a violation of the Lingles restrictive covenants. Thus, if the Lingles were avid bird watchers, merely watching the birds fly on the property would be a violation of the Lingles' restrictive covenants unless the Lingles had not first constructed a dwelling house on the property. This view is, of course, absurd. As the Chancellor correctly

determined, the restriction at issue is ambiguous and must be construed against the Landowners and in favor of the Lingles.

The Landowners put forth the case of *Gast v. Ederer*, 600 So.2d 204, 207 (Miss.1992) in support of its position. In *Gast*, the restriction in question clearly stated "no buildings could be erected on any lot other than a single-family house and private car garage". (Emphasis added) In the case of *Sterling Realty Co. v. Trednnich*, 319 Mass.153 (1946), the restriction clearly stated, "not more than one building may be erected, placed or maintained" (Emphasis added). Additionally, the Landowners cite *Sutherland v. Bock*, 688 P.2d 157 (Wyo.1984). And finally, the Landowners cite *McGuffie v. Duckworth*, 208 So.2d 179 (Miss.1968). *McGuffie*, *Sutherland*, *Sterling*, and *Gast*, all stand for the fact that a restriction that has sufficiently clear and specific language can be used and enforced. **Each of these cases had a clear and specific prohibition that was violated.** This is not the case with the matter before the Court today. Additionally, while a review of case law from other states may be useful at times, for as the Mississippi Supreme Court observed in *Kinchen*,

> In the end, however, these matters little inform today's decision, for under our law properly drafted protective covenants may ban from property to which they are applicable the most modern, most aesthetically pleasing "manufactured home" ever built. On the other hand, the shabbiest, most dilapidated mobile home may be placed upon property where that use has not been prohibited. Our question then is whether the use to which the Laytons have put Lot 10 of the Briarwood West-First Addition is one prohibited by the applicable covenants when those covenants are properly construed.

Kinchen, at 347. Likewise, "in the end, however," those cases little inform today's case question under Mississippi's law: Is the restrictive covenant at issue ambiguous? If so, it must be construed against the Landowners.

As Chancellor Zebert explained, the Landowners argued that a barn is an "appurtenance" to a residence, and that you cannot have an appurtenance (i.e., a barn) without something that is appendant to (i.e., the residence). The Lingles argued that the term "appurtenances" in their restriction is a term of description, describing the types of additional things that may be added to the land, but not the order. The definition from Black's law Dictionary indicates that the term "appurtenances" may also mean things that attach to the land. For example, it says an appurtenance is "something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land" and then, as a specific example, it states that a "barn, garden, or orchard" is such an appurtenance.

The rules of construction applicable to private restrictive covenants, however, that require that such restrictive covenants to be written in clear and unambiguous language and "[t]he intent must be clear." *Andrews v. Lake Serene Property Owners Ass'n, Inc.*, 434 So.2d 1328 (Miss. 1983). It is patently obvious that reasonable minds can reach different conclusions as to the meaning of the restriction at issue as it applies to the question presented in this lawsuit and therefore the language of the restrictive covenant at issue falls short of the degree of specificity and clarity necessary to impose such restrictions on the Lingles. Compare, *Andrew v. Lake Serene Property Owners Ass'n, Inc.*, 434 So 2d at 1333.

It should also be remembered that even though the protective covenant specifically restricts the minimum size of the future home to be at least 3,500 square feet of heated and cooled space, nowhere is there a restriction regarding the order of construction of any building, time for start or completion of any building, the number of permitted buildings, or activities that

may or may not be conducted prior to the construction of the dwelling house. The Lingles protective covenants are silent in that respect and subject the Lingles to speculation, conjecture and random enforcement attempts as to the protective covenants force and effect. Such characteristics cause those portions of the protective covenants to be unenforceable as a matter of law. *Compare, Andrew v. Lake Serene Property Owners Ass'n, Inc.* 434 So.2d at 1333. It is clear that the developer, or their attorney, knew how to word specific restrictions. As this Court stated in *Schaeffer v. Gatling*, 137 So.2d 819, 829 (1962),

> "If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, by placing a minimum on the floor space for a residence, or by prohibiting temporary residences"

Or, as the Chancellor stated in this case at bar, "Similarly, in the case of the restrictions in the Lingles' Warranty Deed, if Petitioner Narron (who is also an attorney – See paragraph # 7 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84) or her partnership had desired to prohibit the construction of a horse barn before the completion of a residence, this could have easily been accomplished by drafting a clear prohibition in the restrictive covenants (Paragraph 58, page 24 of the Final Judgment, Appellant's Record Excerpt page 004-028; CP, p60-84). Or, at a minimum set forth one (1) set of protective covenants for the Kristen Hill Subdivision instead of four (4) separate and different sets for the total of five (5) lots.

Conclusion

In their initial petition, the Landowners only sought an injunction prohibiting the Lingles "from constructing any appurtenance whatsoever, and specifically a horse barn until such time as

they have constructed a single family residence". See ¶ 16 of the Landowner's Petition (CP 1-29). The Landowners now **for the first time on appeal** ask the Court (1) to prohibit the Lingles from having horses on the property (Page 25, paragraph D(1) of the Landowners' Brief), (2) to establish a time frame in which construction on the dwelling house must begin (Page 25, paragraph D(2), footnote 10 of the Landowners' Brief), and (3) argue for the removal of one appurtenance to the land, i.e. the new barn, while not complaining of the other appurtenances that existed prior to Lingles' purchase of the property or other appurtenances that the Lingles affixed to the property since their purchase (Page 25, paragraph D of the Landowners' Brief). The more arguments the Landowners make, the more it is patently clear that the restrictive covenants at issue are ambiguous. The only thing clear and unambiguous about the Landowners demands on the Lingles is that NO SUCH LANGUAGE EXISTS IN THE LINGLES' RESTRICTIVE COVENANTS (Trial Exhibit 5) to support the Landowner's claims.

If the Landowners' interpretation of the restriction were upheld, this would result in an unfair position for the Defendants and impose an undue restraint upon the Lingles' use of their private property. If the Lingles cannot build or construct "any appurtenance" until after the residence is completed, this would mean that the Lingles could not:

a. Build a fence until their house was completed;
b. Build any retaining walls until their house was completed;
c. Build a paved driveway until their house was completed;
d. Build a tool shed until their house was completed;
e. Or any other appurtenance until their house was completed.

The Chancellor did not err in his rulings under review in this case. Applying the appropriate law, weighing the evidence and testimony presented at trial, his visual inspection of

the premises, and his learned discretion, the Chancellor properly concluded that the restrictive covenants contained in the Lingles' Warranty Deed fall short of the degree of specificity and clarity necessary to impose the restrictions the Landowners sought to impose on the Lingles. The Chancellors Final Judgment and Findings of Fact and Conclusions of Law should be affirmed.

Respectfully submitted, this the 28th day of August, 2009.

RICHARD M. LINGLE AND
NAOMI T. LINGLE, APPELLEES

BY: _____

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CERTIFICATE OF SERVICE

I, Ronald Henry Pierce, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing to:

The Honorable Thomas L. Zebert
Chancery Court Judge
Post Office Box 1437
Brandon, Mississippi 39043

S. Craig Panter
PANTER & STUTZMAN, PLLC
Post Office Box 2310
Madison, Mississippi 39130-2310

THIS, the 28th day of August, 2009.

_____
RONALD HENRY PIERCE