IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HERON BAY PROPERTY OWNERS ASSOCIATION, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 5617-ML
COOTERSUNRISE, LLC, HERON BAY ASSOCIATES, LLC, SHARP ENERGY, INC. and SHARPGAS, INC.,	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: March 15, 2013
Draft Report: June 17, 2013
Final Report: June 27, 2013

K. William Scott, Esquire of Scott and Shuman, P.A., Bethany Beach, Delaware; Attorney for Plaintiff Heron Bay Property Owners Association, LLC.

James D. Griffin, Esquire, of Griffin and Hackett, P.A., Georgetown, Delaware; Attorney for Defendant Cooter Sunrise, LLC.

Samuel J. Frabizzio, Esquire of Samuel J. Frabizzio, Attorney at Law, Wilmington, Delaware; Attorney for Defendant Heron Bay Associates, LLC.

William A. Denman, Esquire of Parkowski, Guerke & Swayze, P.A., Dover, Delaware; Attorney for Defendants Sharpgas, Inc. and Sharp Energy, Inc.

LEGROW, Master

This case is the culmination of a crusade by the sole member and manager of a limited liability company that operates for the purpose of holding title in a residential investment property in Sussex County. The member has fought valiantly against a deed restriction that governs the property. This crusade defies rationality from an economic perspective, and instead appears motivated by the member's genuinely and stridently held aversion to purchasing propane from any company other than the one owned by her family. Although that conviction may be understandable, her insistence that the holding company is not bound by the plain language of the publicly recorded deed restriction is not. As is often the unfortunate result of a moral crusade that is not properly grounded, this action has had outsized economic consequences to the crusader.

This action was filed by the plaintiff, Heron Bay Property Owners Association, Inc. (the "Association") to enforce certain covenants and restrictions contained in the Declaration of Covenants, Conditions, and Restrictions (the "Restrictions"), which governs a subdivision known as Heron Bay. The Association contends that defendant Cooter Sunrise, LLC ("Cooter"), who owns property in Heron Bay, violated the Restrictions by installing on Cooter's property a 325 gallon propane tank. The Association contends that the Restrictions prohibit the installation of tanks larger than 20 pounds. Cooter, on the other hand, contends that the restriction against propane tanks larger than 20 pounds is unenforceable for a variety of reasons. For the reasons set forth below, I conclude that Cooter had constructive notice of the Restrictions, including the prohibition against propane tanks with a capacity in excess of 20 pounds, and that the Restrictions are clear, reasonable, and enforceable. This is my post-trial final report.

FACTUAL BACKGROUND

A. Heron Bay and the Restrictions

Heron Bay is a development consisting of 324 single family residential lots in Sussex County, Delaware. Heron Bay initially was developed by an entity known as HM Properties-Route 23, LLC ("HM Properties"). The Restrictions were recorded in the Office of the Recorder of Deeds in and for Sussex County on March 7, 2005.[1] The plot plan for the property was recorded by HM Properties in June 2005, and provided that each lot would be subject to the Restrictions.[2]

The Restrictions contain several sections that the parties argue are implicated in this case. First, the Restrictions state that HM Properties

> has or will negotiate and enter into contracts with such utility company or companies, or governmental agencies, as [HM Properties] may deem appropriate for the purpose of supplying utilities to said subdivision, including, but not necessarily limited to telephone service, electric service, water, sewer, cable television and any other utility which is deemed desirable by [HM Properties] on behalf of the individual lot owners and residents of the Heron Bay and Heron Bay Property Owners Association, Inc. The individual lot owners and residents of Heron Bay and Heron Bay Property Owners Association shall be bound by such contracts and shall pay all such fees, assessments, charges, rates, or tariffs required by such contracts.[3]

In addition, the Restrictions prohibit certain "Storage Receptacles" from being installed on the property (the "Storage Receptacles Restriction"):

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[1] Plaintiff's Trial Exhibit (hereinafter "PX") 2. The Restrictions were amended on June 24, 2005 and August 23, 2006, but those amendments do not relate to the issues presented in this case. *See* PX 3, 4.
[2] PX 5.
[3] PX 2 at 33.

> No fuel tanks, propane tanks and cylinders in excess of 20 pounds capacity or similar storage receptacles shall be installed in any dwelling or accessory building or permitted on any lot; smaller tanks may be installed within the main dwelling, or within an accessory building or buried underground or properly screened from view, in accordance with the Heron Bay Architectural Standards.[4]

Finally, the Restrictions require homeowners to obtain approval from the Heron Bay Architectural Review Committee ("HBARC")[5] before making certain improvements or alterations on their property (the "ARC Approval Restriction"):

> No building, structure, fence, wall or other erection shall be commenced, erected, maintained, or used, nor shall any addition to or change or alterations therein, or in the use thereof, be made upon any of the Lots which are the subject matter of the Restrictive Covenants, no matter for what purpose or use, until complete and comprehensive plans and specifications showing the nature, kind, shape, height, materials, floor plans, exterior architectural scheme, location and frontage on the Lot, approximate cost of such building, structure or other erection, the grading and landscaping of the Lot to be built upon or improved, the location of the driveway and the type of driveway material, which shall be hot-mix asphalt, and such other required information shall be submitted to and approved in writing by [HBARC] or its successors.[6]

At the time this case was tried, approximately 192 of the lots in Heron Bay had been purchased and gone to settlement.[7]

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[4] *Id.* at 23, Section 11.
[5] In what appears to be a typo, the Restrictions refer to this committee by the acronym "SCARC."
[6] *Id*. at 20.
[7] *Heron Bay Property Owners Assoc., Inc. v. Cooter Sunrise, LLC, et al.*, C.A. No. 5617-ML at 41 (November 14, 2012) (TRIAL TRANSCRIPT) (hereinafter "Tr.").

B. The Community Gas System

As noted above, Article VII, Section 10 of the Restrictions permits HM Properties to enter into contracts to provide utilities to properties within the subdivision. Exercising its authority under that Section, HM Properties entered into an agreement with Sharp Energy, Inc. ("Sharp") for the construction and maintenance of a Community Gas System within Heron Bay (the "CGS").[8] The agreement governing the CGS was memorialized in a series of documents: the confidential Energy Services Agreement – CGS (the "ESA") dated July 12, 2005,[9] a first amendment to the ESA dated July 12, 2005,[10] an Easement Agreement dated July 12, 2005, which granted Sharp an easement and right-of-way for the purpose of constructing and maintaining "distribution mains" and "propane facilities" within Heron Bay (the "Easement Agreement"),[11] and a Propane Facilities Easement Agreement dated August 1, 2005 (the "Propane Facilities Easement Agreement"), which granted Sharp an exclusive easement to install propane storage tanks and related equipment on Lot 297 within Heron Bay.[12] Although the ESA is designated as a confidential document and was not recorded, the Easement Agreement specifically refers to the ESA, and notes that under that agreement "[HM Properties] has contracted

[8] In the joint pre-trial order, Cooter appeared to dispute that HM Properties had the authority to enter into this agreement, noting that the issue of whether Sharp is a public utility company was a factual issue in dispute. *See* Pre-Trial Stipulation and Order dated November 2, 2012 (hereinafter "Pre-Trial Order") ¶¶2(J), 3(A). No testimony was elicited at trial on this issue, and Cooter did not raise the argument in its post-trial briefs. The argument therefore has been waived. *See Gould v. Gould*, 2012 WL 3291850, at *7, n. 41 (Del. Ch. Aug. 14, 2012); *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *14 (Del. Ch. Apr. 30, 2012).
[9] PX 8.
[10] PX 9.
[11] PX 7.
[12] PX 6.

with [Sharp] to provide propane gas service to [Heron Bay] … ."[13] The Propane Facilities Easement Agreement also refers to Sharp as the "exclusive provider of propane services to [Heron Bay]."[14] The Easement Agreement and the Propane Facilities Easement Agreement were recorded on July 22, 2005 and August 3, 2005, respectively.

For the uninitiated, among which I could count myself before presiding over the trial in this action, a community gas system is a network of underground pipes that is fed by propane contained in a central storage facility.[15] The storage facility and pipelines service a designated community, typically a newly constructed subdivision, and each resident who wishes to receive propane has his or her property connected to the system.[16] Each residence is separately metered and regularly billed based on the amount of gas consumed.[17] The CGS at Heron Bay consists of ten underground storage tanks and associated equipment installed on Lot 297, along with underground piping throughout the subdivision.[18] Community gas systems are governed by a number of safety regulations and are monitored by the Delaware Public Service Commission.[19] The regulations call for, among other things, annual "critical valve testing" and "corrosion testing," along with inspections performed annually and leak surveys performed every five years.[20]

[13] PX 7 at 1.
[14] PX 6 at 4, § 5.3.
[15] Tr. at 176:15-177:5.
[16] *Id*. at 177:3-5.
[17] *Id*. at 177:6-13.
[18] *Id*. at 177:18-178:12.
[19] *Id*. at 188:10-189:3, 210:23-211:7.
[20] *Id*.

The ESA governs the terms of the CGS and provides that Sharp will install, at its sole expense, a community gas system to service Heron Bay. In exchange for the installation and maintenance of the system, which involved an upfront cost to Sharp of approximately $400,000, Sharp received the "exclusive right to connect propane gas service for [Heron Bay] [r]esidents" during the term of the ESA.[21] HM Properties agreed to maintain that exclusivity by guaranteeing that the "rules and regulations associated with [the subdivision] will restrict [Heron Bay] [r]esidents from installing or storing propane tanks and cylinders with capacity in excess of twenty (20) pounds of propane gas during the term of [the ESA]" and that at least 90 percent of the buildings and facilities in the subdivision would use propane gas as the primary source of heating and water heating.[22] The parties' agreement extends for an initial period of 36 years, beginning on July 12, 2005.[23] After that period, the agreement continues from year to year unless terminated.

The ESA also limits the rates that may be charged to Heron Bay residents who utilize propane gas through the CGS.[24] The particulars of how those rates are calculated are not material to the issues in dispute in this case. Combined with the 36 year term and the 90 percent usage guarantee, the rates allow Sharp to recover its initial investment and profit from the CGS. It is notable that the rates charged by Sharp under the ESA are comparable to the rates paid by Cooter on the propane delivered to the tank on Cooter's

[21] Tr. at 181; PX 8 at 3, § 3C.
[22] PX 8 at 5, § 8.
[23] *Id*. at 5-6, § 9.
[24] *Id*. at 19-20.

property.[25] Sharp also is required to maintain liability insurance during the term of the ESA, including comprehensive general liability insurance with a minimum limit of at least $2,000,000 per occurrence, and excess liability insurance with a limit of $3,000,000 in excess of the comprehensive general liability insurance limit.[26]

In exchange for the Easement Agreement and the Propane Facilities Easement Agreement, Sharp also agreed to pay HM Properties a "Variable Franchise Fee" equal to eight cents for each gallon of propane sold through the CGS.[27] In October 2005, HM Properties sold Heron Bay to Heron Bay Associates, LLC ("HBA" or the "Developer"). With the consent of Sharp Energy, Inc., HM Properties assigned to HBA all of its rights and obligations under the ESA and the First Amendment to the ESA (the "Assignment Agreement").[28] The Variable Franchise Fee is paid to HBA, not to the Association.[29] The amount of the Variable Franchise Fee paid to HBA in the last four years has been less than $14,000 total.[30]

Although Cooter works to portray the CGS as a system that provides substantial benefits to the developer and the propane supplier, while being of no benefit to the

[25] It is difficult to compare the rates on an "apples-to-apples" basis because the rate paid by Cooter reflected a $0.40 per gallon discount that Baker Petroleum grants to customers who have customer-owned tanks on their property. Tr. at 149:10-21. Conversely, the ESA allows Sharp to charge customers a service charge of $7.95 per month. PX 8 at 19. In general terms, however, the rate paid by Cooter on September 24, 2009, exclusive of the discount, was $2.35 per gallon. The rate charged by Sharp on that date, exclusive of the monthly service charge, was $2.04 per gallon. Likewise, the rate paid by Cooter on September 20, 2012, exclusive of the discount, was $2.49 per gallon, while the rate charged by Sharp on that date, exclusive of the monthly service charge, was $2.14 per gallon. *See* PX 18; Tr. at 149:1-150:14, 209:2-15.
[26] PX 8 at 7, § 11.
[27] PX 9 at 26-27.
[28] PX 10.
[29] Pre-Trial Order ¶2(CC).
[30] Pre-Trial Order ¶2(EE).

residents of the subdivision, witnesses called by the Association and Sharp testified about the benefits that a community gas system offers to residents. The existence of the CGS, and its location within the subdivision, eliminates the need for propane trucks to deliver gas to each individual home within Heron Bay. This is significant because the plot plan recorded by HM Properties provides that the roads within Heron Bay are private streets that ultimately will be maintained by the Association.[31] The CGS propane tanks are located on a lot at the perimeter of the subdivision, which is accessible by a public road, without the need to access any of the private roads within the development.[32] The property manager for Heron Bay testified that road maintenance is one of the most expensive costs undertaken by a homeowner's association, and that the use of heavy equipment on the roads increases wear and tear and the need for repairs.[33] The gross weight of a propane delivery truck is 33,000 pounds.[34] Assuming four deliveries per year[35] to each of the more than 300 lots in the subdivision, the use of the CGS substantially reduces the volume of heavy equipment on the private roads within Heron Bay.

C. Cooter Purchases A Lot At Heron Bay

At some point in 2008 or 2009, Frances and Wayne Baker began considering purchasing a lot in Heron Bay, which they intended to use as a home for their daughter,

[31] PX 5.
[32] Tr. at 35:20-37:3.
[33] Tr. at 36:2-22.
[34] Tr. at 156:20-22.
[35] The record showed that the propane tank installed by Cooter received 4 deliveries a year. *See* PX 18.

Dawn. The Bakers met with sales associates representing HBA on several occasions to discuss the potential purchase,[36] and in June 2009 Frances Baker signed a Contract of Sale to purchase Lot 260 in Heron Bay (the "Property").[37]

During trial, the Bakers testified that they did not directly discuss the Restrictions with any of the sales associates and never were provided with a copy of the Restrictions. That does not, however, mean that they were not aware that the Property was subject to deed restrictions. Indeed, Mr. Baker testified that he assumed that there were deed restrictions associated with the subdivision, but he "did not know" and he "did not ask."[38] The Contract of Sale signed by Frances Baker on June 20, 2009 specifically noted that the title would be conveyed subject to "restrictions of record and existing easements."[39]

The Bakers claim, however, that notwithstanding the Restrictions, they believed they would be able to install a propane tank on the Property, and that if they had known that installation of the propane tank was prohibited by the Restrictions they would not have purchased the Property.[40] The basis for that belief is an alleged conversation that Mr. Baker recalls having with Tom Minio, an HBA sales agent.[41] Mr. Baker testified that he specifically inquired whether a propane tank could be installed on the Property and that Mr. Minio indicated that a tank could be installed.[42] Mr. Baker testified to that conversation over the valid hearsay objections lodged by the Association and HBA, and

[36] Tr. at 125:8-12.
[37] PX 12.
[38] Tr. at 125:13-21.
[39] PX 12 at 3, ¶ 18.
[40] Tr. at 92:3-7, 93:8-18.
[41] Tr. at 82:11-83:14.
[42] Tr. at 108:1-8, 127:20-128:10.

despite admonitions from the Court that he should not testify to such out-of-court statements.[43] In addition, the Bakers apparently continued to rely on Mr. Minio's purported representation despite the fact that the Contract of Sale signed by Mrs. Baker provided that

> Buyer[] and Seller[] understand[] that [b]rokers and [a]ny [a]gents, [s]ubagents or employees of [b]rokers are not at anytime authorized to make any representations about this Contract or the [P]roperty other than those written in this Contract. … By signing this Contract, Buyer[] and Seller[] acknowledge[] that they have not relied on any representations made by [b]rokers or any [a]gents, [s]ubagents or employees of [b]rokers, except those representations written in this Contract.[44]

In signing the Contract of Sale, Mrs. Baker also agreed that she understood that HBA was not bound by any representations not contained in the written agreement:

> This Contract and any addenda hereto contain the final and entire Contract between the parties and may not be modified or changed except by written agreement signed by all parties. The parties agree that neither they nor their [a]gents shall be bound by any terms, conditions, statements, warranties, or representations, oral or written, not contained herein. [45]

The curious reader might be wondering why the Bakers were so interested in installing their own propane tank on the Property, or why they feel so strongly that they should not be required to purchase propane through the CGS. The answer, quite simply, is that Mr. Baker owns Wilson Baker Incorporated, a full service petroleum company that

[43] Tr. at 90:20-92:16, 126:21-128:1. When asked, Cooter's lawyer did not argue that the testimony fit within one of the exceptions to the hearsay rule, and instead withdrew the questions. *See id.* Mr. Minio was not called to testify at trial.
[44] PX 12 at 3, ¶ 19.
[45] PX 12 at 5, ¶ 29.

sells, among other things, propane.[46] The company was started by Mr. Baker's father in 1952, and Mr. Baker has worked for the company throughout his career.[47] I note this fact simply because it sheds light on decisions that otherwise would seem to defy logic. Although Mr. Baker's unwillingness to rely on propane service from another company is understandable, it is only of limited importance in resolving this case.

After Mrs. Baker signed the Contract of Sale, and before the closing, the Bakers decided that the Property should be purchased through a limited liability company. According to the Certificate of Formation filed with the Delaware Secretary of State, Mrs. Baker is the Manager of the LLC, and she testified that she also is the sole member of the company.[48]

Before the closing, HBA sent a letter to Mrs. Baker dated July 20, 2009. The letter noted that Mrs. Baker should contact HBA to obtain a copy of the Restrictions.[49] Mrs. Baker does not recall receiving this letter, although she concedes that it was addressed to her home.[50] The evidence and the testimony at trial also demonstrates that Sharp sent a letter to Mrs. Baker before closing, noting that Sharp was the propane supplier for the Property, and enclosing a copy of the Sharpgas, Inc. Community Gas Delivery System Agreement (the "CGS Delivery Agreement") and an Application for

[46] Tr. at 110:18-111:5, 144:7-15, 165:13-24.
[47] *Id.*
[48] PX 16; Tr. at 110:6-17. To satisfy idle curiosity, the company was named after Mrs. Baker's favorite horse. Tr. at 89:8-13.
[49] PX 19.
[50] Tr. at 116:13-117:5.

Service (the "Delivery Application").[51] Again, Mrs. Baker did not recall receiving this document, but the Sharp employee who prepared the document credibly testified about her typical practice for preparing and mailing these notices,[52] and it strains credulity to conclude that Mrs. Baker repeatedly did not receive these notices, along with later notices sent by the Association.[53]

The Bakers' willful blindness to the Restrictions, and their decision not to investigate for themselves whether the Restrictions prohibited the installation of propane tanks on the Property continued at closing. Cooter or the Bakers retained the law firm of Wilson, Halbrook & Bayard, PA to represent Cooter and perform a title search on the Property.[54] At the closing on September 9, 2009, HBA delivered to Cooter's attorney a deed executed by HBA and conveying title to Cooter. The deed specifically noted that the Property was conveyed to Cooter subject to the Restrictions, the Easement Agreement, and the Propane Facilities Easement Agreement.[55] Likewise, the title insurance purchased by Cooter included within the "exceptions from coverage" the Restrictions, the Easement Agreement, and the Propane Facilities Easement Agreement.[56]

Although the Bakers testified that they did not receive a copy of the deed or the title insurance from Cooter's attorney, there is no dispute that the deed was presented to Cooter's attorney by HBA in a timely manner and was recorded by Cooter's attorney.

[51] DX 1; Tr. at 242:5-246:18.
[52] *Id*.
[53] *See* page 15-16, *infra.*
[54] Tr. at 107:8-24; PX 20.
[55] PX 1at 2.
[56] PX 14, Schedule B, ¶¶ 10, 14, 16.

Notably, Mr. Baker also asked Cooter's attorney at closing whether there were any deed restrictions against propane tanks, and Cooter's attorney responded that he did not know the answer to that question.[57] Despite that uncertainty, Cooter proceeded with the closing and purchased the Property, without further investigating the Restrictions.

D. The Installation Of The Tank On Cooter's Property

When Mr. and Mrs. Baker visited the Property after closing, they found a notice on the door from Sharp, and realized for the first time that Sharp had installed the CGS at Heron Bay. Mr. Baker claims to have contacted a Sharp representative, who "hinted" that Sharp was the exclusive provider of propane to the subdivision, and who for the first time sent a copy of the CGS Delivery Agreement and the Delivery Application.[58] Again, Mr. Baker contends that neither he nor Mrs. Baker received that letter before closing, but the testimony at trial and application of logic indicate otherwise. The CGS Delivery Agreement was signed by a Sharp representative on July 20, 2009 and dated to take effect on the original closing date for the Property, which later was postponed.[59] Sharp's witness testified that the company sends those documents when Sharp receives a settlement notification from HBA, and does not retain a copy of the draft agreement in Sharp's file.[60] The testimony of Sharp's witness, that she sent the letter and agreements

[57] Tr. at 157:7-16. ("Q: Now, at the closing, which was attended by you, your wife, and [Cooter's attorney], isn't it a fact that you asked [Cooter's attorney] if there were any restrictions on propane tanks at Heron Bay at the closing. A (by Mr. Baker): I did. Q: Okay and he told you he didn't know, correct? A: That's correct. Q: Okay. And notwithstanding that, you proceeded with the closing? A: Yes.")
[58] Tr. at 134:10-135:15; DX 1.
[59] DX 1; Tr. at 244:10-245:6.
[60] Tr. at 243:22-244:16; 249:23-250:13.

marked as Defendant's Exhibit 1 to Mrs. Baker in late July 2009, and did not send another copy to the Baker's after the closing, is credible. It appears that the only copy of that exhibit was the document produced by the Bakers. No other copy was produced by Sharp, and the logical conclusion to be drawn is that Sharp did not retain one in their records. I therefore conclude that Defendant's Exhibit 1, including the CGS Delivery Agreement and the Delivery Application, was sent to the Bakers in late July 2009, not in September 2009 as Cooter contends.

While on the topic of the CGS Delivery Agreement, I note that one of the issues raised by Cooter in support of its contention that the Restrictions are unenforceable is the language in the CGS Delivery Agreement purporting to limit Sharp's liability for certain events. Specifically, the CGS Delivery Agreement provides that:

> Sharp shall not be liable to Customer, in any manner, for the consequences of an inadequate supply of propane gas, including liability for the life or health of persons, plants, animals, or fowls, or for the losses or interruption of service due to equipment malfunction. Sharp shall not be liable for physical damage to property (frozen pipes, water damages, sooting, or appliance damage due to improper operation) as a result of an inadequate supply of propane gas. Title to the propane shall pass to the Customer on the outlet side of the vapor meter. [Sharp] shall not be liable for malfunction or condition of Customer's gas piping or appliances located after the outlet side of the vapor meter.[61]

Cooter argues in this action that this limitation on liability is contrary to public policy, and that the Restrictions that require homeowners to execute this contract therefore are void. Notably, Cooter never attempted to discuss the offending provisions

[61] DX 1, "Delivery System Agreement," ¶ 7.

with Sharp or HBA.[62] Nor did Cooter investigate whether an interruption in service was likely to occur in the CGS. Cooter's concerns about the limitation on liability were not raised until this litigation.

Ignoring the communications from Sharp, Cooter proceeded on September 22, 2009 to install a 325 gallon propane tank on the Property.[63] The tank is buried underground, and a lid that is approximately one or two feet tall is visible above the ground.[64] Significantly, the tank was installed by Wilson Baker, Inc., and the invoice provided by the company states that "[t]he company assumes no responsibility for any damage to person or property caused by operation of any heating plant after serviceman leaves premises [,] except that resulting from [the company's] sole negligence."[65] This limitation on liability appears on every invoice provided by Mr. Baker's company for service work, deliveries, and equipment installation.[66]

The property management company promptly contacted Cooter to notify them that the propane tank was not permitted under the Restrictions. The property management company called Mrs. Baker and followed up with a letter dated September 28, 2009.[67] Continuing the pattern of "lost mail," Mrs. Baker does not recall receiving either that phone call or the letter from the property management company. The Association's

[62] Tr. at 233:3-7.
[63] PX 15.
[64] Tr. at 59:3-14.
[65] PX 15.
[66] Tr. at 163:13-21, 164:9-15.
[67] Tr. at 57:19-58:19; PX 21.

attorney sent a second letter dated December 9, 2009, indicating that if the violation was not cured within thirty days, a lawsuit would be filed against Cooter.[68]

E. The Litigation

The Association filed its original complaint on July 2, 2010.[69] The action was filed against Cooter under 10 *Del. C.* § 348, seeking to enforce the Restrictions and to require Cooter to remove the propane tank from the Property. In September 2010, this Court granted Cooter's motion under Rule 19(a) to add HBA, Sharp Energy, Inc. and Sharpgas, Inc. as additional parties. In February 2011, Cooter filed a cross-claim against HBA, Sharp Energy, Inc., and Sharpgas, Inc., in which Cooter argued that the Restrictions were unenforceable and the ESA contradicted public policy and therefore was void. Cooter argued that the deed issued to Cooter for the Property should be rescinded and the Association, HBA, Sharp Energy, Inc. and Sharpgas, Inc. should be required to pay Cooter's costs and expenses associated with its purchase and improvement of the Property.

LEGAL ANALYSIS

With that background in mind, I turn to the legal issues raised by the parties. In a nutshell, the Association, HBA, and Sharp contend that the Restrictions are enforceable, and that Cooter's installation of the propane tank on its Property violated the Restrictions. The Association therefore seeks an order requiring Cooter to comply with the restrictions by, among other things, removing the propane tank from the Property and connecting the

[68] PX 22.
[69] An amended complaint was filed on February 15, 2011.

home to the CGS. The Association and HBA also seek their attorneys' fees incurred in this action.

Cooter maintains that the Restrictions are unenforceable for a number of reasons. First, Cooter argues that to the extent the Storage Receptacles Restriction and the ARC Approval Restriction prohibit the installation of propane tanks larger than 20 pounds on the Property, the Association and HBA are estopped from enforcing that restriction against Cooter because of the representation made to Cooter by Tom Minio. Second, Cooter argues that the same restrictions are vague and ambiguous and the ambiguity must be construed against the Association and HBA. Third, Cooter contends that the Storage Receptacles Restriction and ARC Approval Restriction are unreasonable and arbitrary, and therefore are unenforceable. I will address each of these arguments in turn.

I. The Association Is Not Estopped From Enforcing The Restrictions Against Cooter

It is settled law in Delaware that, "while the law favors the free use of land and frowns on restrictive covenants," restrictive covenants and deed restrictions are recognized and enforced as long as the intent of the parties is clear and the restrictions are reasonable.[70] Cooter argues, however, that the Association and HBA[71] are equitably estopped from enforcing the Storage Receptacles Restriction and the ARC Approval Restriction in a manner that precludes the installation of Cooter's propane tank, because

[70] *Chambers v. Centerville Tract No. 2 Maintenance Corp*, 1984 WL 19485, at *2 (Del. Ch. May 31, 1984); *Mendenhall Village Single Homes Assoc. v. Harrington*, 1993 WL 257377, at *2 (Del. Ch. June 16, 1993).

[71] Either the Association or HBA are empowered to enforce the terms of the Restrictions. *See* PX 2, Art. VII, § 2.

during the sale of the Property to Cooter, HBA's sales agent represented that a propane tank could be installed on the property.

The doctrine of equitable estoppel may be invoked when a party, by his statements or conduct, intentionally or unintentionally causes another, in reliance on those statements or conduct, to change position to his detriment.[72] "The doctrine is applied cautiously and only to prevent manifest injustice."[73] To establish estoppel, the party invoking the doctrine must prove that (1) he lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) he reasonably relied on the conduct of the party against whom the estoppel is claimed; and (3) he suffered a prejudicial change of position as a result of his reliance.[74] The standards for establishing this defense are "stringent;"[75]as the party asserting the defense of equitable estoppel, Cooter bears the burden of proving each of these elements by clear and convincing evidence.[76]

As a preliminary matter, I note that Cooter's entire argument relies on a hearsay statement by a witness who, although apparently available,[77] was not called by Cooter to testify. When the other parties raised objections to the Bakers' attempts to testify regarding Mr. Minio's alleged statement, Cooter's attorney withdrew the question and did not argue that the statement was admissible. Hearsay is not admissible except as

[72] *See Haveg Corp. v. Guyer*, 226 A.2d 231, 234 (Del. 1967); *Wilson v. American Insur. Co.*, 209 A.2d 902, 904 (Del. 1965); *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 142 (Del. Super. 1979).
[73] *Eluv Holdings (BVI) Ltd. V. Dotomi, LLC*, 2013 WL 1200273, at *12 (Del. Ch. Mar. 26, 2013) (quoting *Pilot Point Owners Ass'n v. Bonk*, 2008 WL 401127, at *2 (Del. Ch. Feb. 13, 2008)).
[74] *Waggoner v. Paster*, 581 A.2d 1127, 1136 (Del. 1990).
[75] *Pilot Point Owners Ass'n*, 2008 WL 401127, at *2.
[76] *Id*.
[77] *See* Tr. at 83:6-17 (Mr. Minio presently is an employee of the company that constructs the homes within Heron Bay).

provided by law or by the rules of evidence.[78] Hearsay is admissible, usually under a specific exception listed in the rules of evidence, only where the declaration has some theoretical basis making it inherently trustworthy.[79] Absent some special indicia of reliability and trustworthiness, hearsay statements are inadmissible and are not entitled to any weight.[80] Cooter has not offered any explanation, either at trial or in post-trial briefing, to demonstrate the reliability and trustworthiness of the statement, and Cooter therefore is not entitled to rely on the statement to establish its estoppel argument.

Even if the hearsay statement by HBA's sales agent was admissible and entitled to evidentiary weight, Cooter has failed to establish by clear and convincing evidence either of the first two elements of equitable estoppel. First, Cooter has not demonstrated that it lacked knowledge or the means of obtaining knowledge about the existence of the Storage Receptacle Restriction or the ARC Approval Restriction. To the contrary, Cooter was on notice of the Restrictions, including the particular restrictions at issue here, because the Restrictions were recorded and were referenced in both the Contract of Sale signed by Cooter's sole member and in Cooter's deed. Under Delaware law, a party is on constructive notice of deed restrictions that are properly recorded before a conveyance and are referenced in a deed.[81] Cooter argues, however, that constructive notice cannot relieve a party of the consequences of a fraudulent representation or concealment of a

[78] Del. Unif. R. Evid. 802.
[79] *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).
[80] *Id*.
[81] *Mendenhall*, 1993 WL 257377, at *2-3.

material fact. Although that may be an accurate statement of the law,[82] it does not assist Cooter in this case because Cooter received more than mere constructive notice. The Contract of Sale signed by Mrs. Baker referenced the Restrictions, and several other pieces of evidence indicate that the Bakers had actual knowledge of the existence of the Restrictions, even if they were not specifically aware of the Storage Receptacles Restriction.

The Bakers were given several opportunities to investigate the Restrictions, and did not do so. Mr. Baker conceded at trial that he assumed that there were deed restrictions applicable to the Property, but he "did not ask." As set forth above, Mrs. Baker's inability to recall receiving letters from HBA and Sharp that reference the Restrictions and specifically reference the CGS does not change the fact that those letters were sent. Finally, Cooter retained an attorney to perform a title search on the Property, and that attorney was aware of the Restrictions, which were referenced in both the deed and the title insurance procured by the attorney. The knowledge of Cooter's attorney is imputed to the company.[83] As such, Cooter had the means of obtaining knowledge about the Storage Receptacles Restriction and the ARC Approval Restriction, and its willful blindness to the Restrictions is not equivalent to clear and convincing evidence that it lacked the means to obtain knowledge of the true facts.

Second, Cooter has not demonstrated that its reliance on the alleged statement by Mr. Minio was reasonable. In order to satisfy this second element of estoppel, the

[82] *See Holley v. Jackson*, 158 A.2d 803, 807 (Del. Ch. 1959).
[83] *Id*. ("It is the ordinary rule that when a lawyer in examining a title discovers a cloud on it he thereby imposes notice upon his employer.").

reliance must be both reasonable and justified under the circumstances.[84] Cooter has not shown by clear and convincing evidence that its continued reliance on Mr. Minio's statements after being presented with the Contract of Sale, receiving correspondence from HBA and Sharp, and hiring an attorney to conduct a title search, was reasonable or justified. First, by signing the Contract of Sale, Mrs. Baker specifically acknowledged that sales agents were not authorized to make representations about the Property to potential purchasers, and that she was not relying on any such purported representations in purchasing the Property. Mrs. Baker further acknowledged that HBA was not bound by any representations not contained in the Contract of Sale. Second, after she signed the Contract of Sale but before closing, HBA sent Mrs. Baker a letter specifically referencing the Restrictions and inviting her to contact HBA for a copy of the Restrictions. Sharp also sent Mrs. Baker a letter and set of form contracts that would have prompted a reasonable person to inquire about the reliability of Mr. Minio's statement that propane tanks were permitted on the Property. Finally, Cooter retained its own attorney to perform a title search on the Property, and at closing Mr. Baker specifically asked the attorney whether there were any restrictions against propane tanks. The attorney responded that he did not know the answer to that question. Rather than investigate further, however, the Bakers proceeded to closing. In light of Mrs. Baker's agreement that she was not relying on any purported representations by an HBA agent, and in light

[84] *Eluv Holdings*, 2013 WL 1200273, at *12 (quoting *Pilot Point Owners Ass'n*, 2008 WL 401127, at *2).

of the additional information made available to Mrs. Baker before closing, Cooter's continued reliance on Mr. Minio's statement was not justified.

Although Cooter likely could demonstrate by clear and convincing evidence that it changed position to its detriment, its failure to establish either of the first two elements of equitable estoppel is fatal to its argument. Accordingly, I conclude that the Association and HBA are not estopped from enforcing the Restrictions against Cooter.

II. The Storage Receptacles Restriction is Neither Vague Nor Ambiguous

Cooter next contends that, even if the Association is not equitably estopped from enforcing the Restrictions against Cooter, the Restrictions are not enforceable because, when read as a whole and in conjunction with related agreements, the Storage Receptacles Restriction and the ARC Approval Restriction are vague and ambiguous. The Association, HBA, and Sharp predictably argue that both of the restrictions at issue are perfectly clear and therefore enforceable. Although I agree with Cooter that the plain terms of the ARC Approval Restriction do not prohibit the installation of an underground propane tank, that issue does not assist Cooter because the Storage Receptacles Restriction unambiguously prohibits tanks with a capacity larger than 20 pounds.

As set forth above, restrictive covenants are enforceable under Delaware law only if the parties' intent is clear and the restrictions are reasonable.[85] Deed restrictions are

[85] *Mendenhall*, 1993 WL 257377, at *2; *Chambers*, 1984 WL 19485, at *2.

contractual agreements and, as such, ordinary principles of contract law govern the interpretation of the Restrictions.[86]

Delaware subscribes to the "objective theory of contacts." Under that theory, a contract should be construed as it would be understood by an objective, reasonable third party.[87] Contracts are read as a whole, and each provision and term should be given effect, where possible, so as not to render a part of the contract mere surplussage.[88] When a contract is clear and unambiguous, the plain meaning of the contract's terms should be given effect.[89]

Cooter argues that the Storage Receptacles Restriction and the ARC Approval Restriction are ambiguous, and that under the doctrine of *contra proferentum* the agreement should be interpreted against the drafting party (here, HBA and the Association). Although that doctrine is recognized in Delaware, it applies only if there is an ambiguity in the contract.[90] Thus, I must first determine whether the restrictions at issue are ambiguous. The parties' disagreement over the interpretation of the restrictions

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[86] *Goss v. Coffee Run Condominium Council*, 2003 WL 21085388, at *7 (Del. Ch. Apr. 30, 2003); *see also Chambers*, 1984 WL 19845, at *2.
[87] *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *Emerging Europe Growth Fund, L.P. v. Figlus*, 2013 WL 1250836, at *4 (Del. Ch. Mar. 28, 2013).
[88] *Osborn*, 991 A.2d at 1159; *Emerging Europe Growth Fund*, 2013 WL 1250836, at *4; *One Virginia Avenue Condominium Assoc. of Owners v. Reed*, 2005 WL 1924195, at *6 (Del. Ch. Aug. 8, 2005).
[89] *Osborn*, 991 A.2d at 1159-60; *Emerging Europe Growth Fund*, 2013 WL 1250836, at *4.
[90] *Osborn*, 991 A.2d at 1160. Emerging *Europe Growth Fund*, 2013 WL 1250836, at *4. *See also Chambers*, 1984 WL 19485, at *2 ("Because of the inherent and special nature of land, the Court must, in construing the meaning of a restrictive covenant, resolve any doubts as to meaning in favor of free use of land. If two constructions of meaning are possible, the construction which limits the effect of the restrictions must be followed.").

does not alone render the language ambiguous. Instead, a contract is ambiguous if a court "reasonably may ascribe multiple and different interpretations" to it.[91]

To reiterate, the Storage Receptacles Restriction provides that:

> No fuel tanks, propane tanks and cylinders in excess of 20 pounds capacity or similar storage receptacles shall be installed in any dwelling or accessory building or permitted on any lot; smaller tanks may be installed within the main dwelling, or within an accessory building or buried underground or properly screened from view, in accordance with the Heron Bay Architectural Standards.[92]

Cooter first argues that the Storage Receptacles Restriction does not clearly prohibit the installation of an underground storage tank because it only prohibits propane tanks in excess of 20 pounds "*on* any lot," and according to Cooter's proffered interpretation of the Restriction, the 325 gallon tank buried under Cooter's Property is not "on" the Property, but, rather, under it. This rather absurd reading of the restriction fails for a number of reasons.

First, the argument contradicts one of the facts to which Cooter stipulated in the Pre-Trial Order. In the Pre-Trial Order, Cooter stipulated that the Restrictions prohibit "the installation on the [Property] of propane tanks and cylinders in excess of 20 pounds capacity," and that "Cooter installed a [325 gallon] propane tank *on* its lot without submitting any information to the HBARC and without receiving approval to do so."[93] Those stipulated facts to which Cooter agreed directly contradict Cooter's contention that the fact that the propane tank is buried underground means it is not "on" the Property.

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[91] *Osborn*, 991 A.2d at 1160.
[92] PX 2 at 23, Section 11.
[93] Pre-Trial Order ¶¶ 2(F), 2(G) (emphasis added).

Second, the argument that the word "on" should be read narrowly to apply only to things placed on top of the ground would render a portion of the Storage Receptacles Restriction meaningless. The second half of that restriction provides that tanks not in excess of the 20 pound limit "may be installed within the main dwelling, or within an accessory building *or buried underground* or properly screened from view, in accordance with the Heron Bay Architectural Standards." If there was no limitation on the size of tanks that could be buried underground, there would be no need to specify in the Storage Receptacles Restriction that tanks with a capacity of 20 pounds or less could be buried underground.

Third, even if the phrase "on the [Property]" could be read in this context to mean "on top of the ground," a portion of the tank on Cooter's lot indisputably is on top of the ground. Although the bulk of the tank is buried, the lid, which is approximately 12 to 24 inches in height, extends above the surface of the ground. Any underground tank likely would have a similar feature, because it allows the tank to be filled as necessary. Accordingly, even under Cooter's unreasonable interpretation of the Storage Receptacles Restriction, Cooter's tank violates the Restrictions.

Cooter also argues that the Association's interpretation of the Storage Receptacles Restriction is unreasonable because the Association interprets the restriction as prohibiting underground tanks in excess of 20 pounds, but concedes that the restriction does not preclude a homeowner from installing multiple 20 pound tanks on their lot. The fact that the Storage Receptacles Restriction literally could be read to permit multiple 20 pound propane tanks to be buried underground or otherwise concealed from view,

allowing the homeowner to store the same amount of propane that would be held in a large propane tank, does not render the restriction vague or ambiguous. The fact that a homeowner could pursue that option in theory (Cooter having introduced no evidence that such an option would be feasible in reality) does not make the language of the Storage Receptacle Restriction any less clear. The language plainly provides that propane tanks in excess of 20 pounds are not permitted on the Property.

Having concluded that the Storage Receptacles Restriction unambiguously prohibits the tank that Cooter installed on its Property, I need not address the issue of whether the ARC Approval Restriction also prohibits the installation of the tank without approval from the HBARC. For the sake of efficient judicial review, however, I will note that, unlike the Storage Receptacles Restriction, the ARC Approval Restriction does not unambiguously prohibit the installation of the propane tank on Cooter's Property.

The ARC Approval Restriction provides, in pertinent part, that, "[n]o building, structure, fence, wall or other erection shall be commenced, erected, maintained, or used, nor shall any addition to or change or alterations therein, or in the use thereof, be made upon any of the Lots which are the subject matter of the Restrictive Covenants," without the approval of the HBARC. The installation of an underground tank on the Property does not fall within the plain and ordinary meaning of that restriction. To the contrary, installing an underground tank does not amount to the commencement, erection, maintenance, or use of a "building, structure, fence, wall, or other erection." Even witnesses called by the Association and HBA conceded that an underground propane tank

did not qualify as a "building, structure, fence, wall, or other erection."[94] In their post-trial briefs, however, the Association and HBA argue that the restriction also prohibits additions to or changes or alterations in the Property or in the use thereof.[95] That interpretation is not consistent with the terms of the restriction. The restriction prohibits "any addition to or change or alterations *therein*, or in the use *thereof* … ." The words "therein" and "thereof" refer back to the earlier portion of the sentence, *i.e.* to a "building, structure, fence, wall, or other erection," not to the Property itself, which is mentioned later in the sentence. Because the Association and HBA concede that the underground propane tank is not a building, structure, fence, wall or other erection, the ARC Approval Restriction does not apply to Cooter's tank. Again, however, that issue is of no moment, because the tank unambiguously is prohibited by the Storage Receptacles Restriction.

III. The Storage Receptacles Restriction Is Not Unreasonable or Arbitrary

Cooter next argues that the Storage Receptacles Restriction is unenforceable because it is unreasonable and because its application as urged by the Association would be arbitrary. This Court will not enforce deed restrictions that are unreasonable. At the same time, however, "[r]estrictive covenants that are applied to all lots of a residential area are not to be ignored by a court unless through desuetude they no longer serve the purpose for which they were designed."[96]

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[94] Tr. at 55:21-56:5.
[95] Post-Trial Answ. Br. of the Association, et al., at 9-10.
[96] *Mendenhall*, 1993 WL 257377, at *2 (internal quotation omitted).

Cooter advances two reasons that it contends support the argument that the Storage Receptacles Restriction is unreasonable. First, Cooter asserts that the CGS and the associated Storage Receptacles Restriction do not provide any benefit to property owners within Heron Bay, and only were intended as a financial boon to Sharp and HBA. Second, Cooter contends that the enforcement of the Storage Receptacles Restriction would require Cooter to execute the CGS Delivery Agreement, including the limitation on liability contained therein, which Cooter claims is contrary to public policy. As will be seen, neither of these arguments is persuasive.

First, there is ample evidence that the CGS provides a benefit to property owners within Heron Bay. It is not incumbent on this Court to weigh the benefits of the restriction against the benefits the property owners might receive if the restriction were not in place, nor is it my conclusion that one method of obtaining propane is better than the other. It is plain from this proceeding that Cooter and the Bakers believe strongly that it would be more beneficial and desirable to allow property owners to have their own propane tanks on their property. Although that may be true, that is not the question before this Court. Rather, the restriction only will be deemed unenforceable if it provides no benefit to the property owners. Cooter cannot make that showing. The Association, HBA, and Sharp presented evidence at trial of the benefits provided by the CGS. Among other things, the CGS saves property owners the expense of installing and maintaining their own propane tanks on their own property. In addition, property owners benefit by having one system over which insurance is maintained at no additional cost to the property owners. Finally, the presence of the CGS reduces the traffic within the

subdivision that would be necessary if propane deliveries were made to each lot. Because the Association is required to maintain the roads within the subdivision, and the Association is funded by the property owners, it is reasonable to conclude that reducing the number of heavy trucks on the roads within the subdivision benefits the property owners.

Cooter's alternative argument is equally unavailing. Cooter contends that requiring property owners to execute the limitation on liability contained in the CGS Delivery Agreement would be contrary to public policy, and that the restriction therefore is unreasonable. As set forth above, the CGS Delivery Agreement provides that Sharp shall not be liable for the consequences of an inadequate supply of gas in the CGS, including liability for the life or health of persons or damage to property.[97]

Having heard the testimony at trial, and after evaluating that testimony and the record evidence, I am not persuaded that Cooter's objection to the limitation on liability contained in the CGS Delivery Agreement is anything other than a tactic contrived for purposes of the litigation. In reaching that conclusion, I note the following facts. First, Cooter made its decision not to participate in the CGS without discussing the limitation on liability with the Association or Sharp, and without attempting to allay its concerns or revise the offending language.[98] Indeed, Cooter did not even mention this issue to the Association or Sharp until well after this litigation commenced. Had Cooter done so, its concern that Sharp could let the propane supply run out without consequences may have

[97] DX 1, "Delivery System Agreement," ¶ 7.
[98] Tr. at 232:16-233:7.

been assuaged. As Sharp's representatives testified at trial, the supply in the CGS is regulated by the Delaware Public Service Commission, and cannot fall below 30% at any time.[99] A Sharp representative inspects the system at least once a week during the winter months to ensure adequate supply.[100] None of the 65 community gas systems run by Sharp has had an inadequate supply of propane to date, and Sharp is incentivized to avoid an interruption in supply, because there would be substantial costs associated with any such interruption.[101] If this information did not address Cooter's concerns, Cooter could have asked Sharp to remove that language from the Agreement. Having avoided either course of action, Cooter's complaint about the language appears pretextual.

The waiver contained in the CGS Delivery Agreement is limited to interruptions in service, and in that respect is rather narrow. It is notable that the invoice routinely used by Mr. Baker's company contains its own limitation on liability, which exculpates the company from "any damage to person or property caused by the operation of any heating plant" after the company's serviceman leaves the property, except for damage resulting from the company's "sole negligence."[102] The presence of that language further convinces me that Cooter's decision not to connect to the CGS had no relation to the limitation on liability contained in the CGS Delivery Agreement.

Third, Sharp sent Cooter a copy of the CGS Delivery Agreement before closing. Although Mrs. Baker contends that she never received a copy of that correspondence, the

[99] Tr. at 234:6-15.
[100] Tr. at 189:4-20.
[101] Tr. at 189:21-24; 233:16-234:10.
[102] PX 15.

evidence is to the contrary. Mrs. Baker may not have read her mail, but the fact remains that she received a copy of the CGS Delivery Agreement well before closing, and could have raised her concerns at that time, before the Property was purchased. Mrs. Baker's decision to move forward with the purchase of the Property after she received a copy of the Agreement is significant and not without consequences.

Cooter argues that the limitation on liability in the CGS Delivery Agreement is a contract of adhesion and violates public policy. Whether, or the extent to which, the limitation on liability operates to excuse Sharp from its own negligent conduct[103] it not an issue before this Court. It is apparent from the evidence that Cooter's objection to the limitation on liability is a litigation tactic developed to justify Cooter's decision not to connect to the CGS, which decision was driven by the fact that the Bakers did not want to buy propane from any company other than their own. This tactic does not serve as a means by which the Court can or should invalidate the Storage Receptacles Restriction as unreasonable.

In addition to arguing that the Storage Receptacles Restriction is unreasonable, Cooter asserts that its enforcement would be arbitrary and therefore should not be sanctioned by this Court. Cooter first contends that the restriction is arbitrary because even the Association concedes that a homeowner would be allowed to have multiple 20 pound propane tanks on the Property, and it would be "irrational" to prohibit a large underground tank but permit multiple, smaller tanks, whether buried underground or

[103] Sharp argued in its post-trial brief that the limitation on liability did not excuse it from liability for negligence. Post-Trial Op. Br. of the Association, et al., at 17.

otherwise concealed. Cooter argues that this purported irrationality demonstrates that the purpose of the restriction was neither safety nor aesthetics, but rather ensuring that homeowners would use the CGS. That argument, however, misses the point. The Association has not argued that the purpose of the Storage Receptacles Restriction was for safety or aesthetics (other than the portion of the restriction that requires 20 pound tanks to be properly concealed). Cooter is correct that the primary purpose of the Storage Receptacles Restriction is to require residents to use the CGS for heating their homes or operating appliances, while allowing residents to use small tanks for outdoor grills and related recreational uses. That does not, however, render the restriction arbitrary. Rather, the restriction is narrowly tailored to make it impracticable for residents to use another source of propane for anything other than occasional recreational uses. Having concluded that the CGS is not unreasonable, it stands to reason that a restriction designed to make the CGS operative is not arbitrary.

Cooter also argues that enforcement would be arbitrary because it did not have prior notice of the restriction or how it would affect the Property.[104] As set forth above, however, I already have concluded that Cooter had constructive notice of the Restrictions. Although Cooter may not have understood the effect of the Storage Receptacles Restriction, it is charged with notice of the Restrictions, and therefore application of the Restrictions against Cooter's Property is not arbitrary.

[104] Cooter also argues that enforcement of the ARC Approval Restriction would be arbitrary. Because I have concluded that the ARC Approval Restriction does not apply to Cooter's installation of the underground propane tank, I need not further address this argument.

IV. The Association Is Entitled To Its Attorneys' Fees Under 10 *Del. C.* § 348

The Association and HBA also have applied for reimbursement of their fees and costs under 10 *Del. C.* § 348. It is here that the "outsized consequences" mentioned at the outset come into play. Section 348(e) provides that "[t]he nonprevailing party at a trial held pursuant to the provisions of this section must pay the prevailing party's attorney fees and court costs, unless the court finds that enforcing this subsection would result in an unfair, unreasonable, or harsh outcome."

Cooter does not dispute that this case falls under Section 348, and although it contends that charging Cooter with the fees and costs incurred by the opposing parties would be unfair, unreasonable, or harsh, it does not take pains to elaborate on that argument other than a general appeal to the "facts and circumstances placed on the record."[105] Although it is likely that the costs and fees the Association incurred in maintaining this action are substantial in comparison to what many might perceive as the importance of the issues at hand, I cannot conclude that charging Cooter with those fees and costs would be unfair, unreasonable, or harsh. To the contrary, Cooter chose to litigate this case with "guns blazing," and it presumably did so aware of the consequences of losing the case. In any event, litigation over deed restrictions frequently is uneconomic in the traditional sense, and the fee-shifting portion of the statute appears designed to alleviate the associated burden on the prevailing party. I therefore conclude that Cooter is required to pay the court costs and fees incurred by the Association in this action.

[105] *See* Cooter's Answ. Post-Trial Br. at 23.

HBA also seeks its fees and costs under Section 348(e). Cooter added HBA to this action through a third-party complaint filed in February 2011, in which Cooter asked this Court to: (1) dismiss the Association's action against Cooter; (2) declare the Storage Receptacle Restriction as unenforceable; (3) declare the ESA void; and (4) rescind the deed conveying the Property to Cooter. Although HBA argued in its opening post-trial brief that it was entitled to attorneys' fees under Section 348, Cooter did not respond to that argument. I therefore am left to interpret Cooter's position in something of a vacuum.

Section 348 applies to disputes or actions "involving the enforcement of deed covenants or restrictions."[106] Although Section 348(e) refers to the prevailing "party" and the non-prevailing "party" in the singular, there is nothing in the statute that suggests an intent to limit the statute to only one plaintiff and one defendant. Cooter apparently viewed HBA as a necessary party because (1) it is one of the parties expressly entitled to enforce the Restrictions,[107] and (2) it was HBA's sales agent who allegedly made the representation that formed the basis of Cooter's equitable estoppel argument. Because Cooter elected to bring HBA into this proceeding, and HBA's involvement in the proceedings was directly related to the enforcement of the Restrictions, I conclude that HBA also is entitled to its fees and costs under the statute.

[106] 10 *Del. C.* § 348(a)(1).
[107] PX 2, Art. VII, § 2.

V. The ESA Should Remain Confidential

Finally, at the trial in this action, Sharp asked that Exhibits 8 and 9 be submitted to the Court on a confidential basis.[108] I granted that motion in order to allow trial to proceed, and indicated to the parties that I would give further consideration to the issue in my post-trial report.

Sharp argues that the ESA (Exhibit 8) and the first amendment to the ESA (Exhibit 9) should remain under seal because they are trade secrets.[109] Although Sharp does not object to either Cooter or this Court quoting specific portions of those agreements, Sharp contends that the entirety of the agreements should not be publicly available, because that would place Sharp at a competitive disadvantage among its peers who operate community gas systems or who are looking to enter that market. At trial, Sharp's representatives testified that the ESA is the starting point for every community gas system agreement that Sharp negotiates, that Sharp expended a substantial amount of time and money developing the ESA, and that if competitors were able to obtain a complete copy of the agreement, they would be able to capitalize on Sharp's investment without expending similar resources.[110]

A trade secret is "information, including a formula, pattern, … method, technique or process," that "(a) derives independent economic value … from not being generally known to, and not being readily ascertainable by proper means by, other persons who can

[108] Tr. at 6:11-8:6.
[109] In its post-trial submission on this topic, Sharp refers to Exhibits 9 and 10, rather than Exhibits 8 and 9, but that appears to be a typo. The exhibits that were designated as confidential during trial were Exhibits 8 and 9.
[110] Tr. at 219:12-220:8; 234:16-235:6.

obtain economic value from its disclosure or use" and (b) is the subject of reasonable efforts to maintain its secrecy.[111] A trade secret has independent economic value if "a competitor cannot produce a comparable product without a similar expenditure of time and money."[112] The focus of this inquiry is whether a party would lose value and market share if a competitor could enter the market without substantial development expense.[113] This Court previously has concluded that a form contract, which was developed with the assistance of an attorney, constituted a trade secret.[114]

The evidence at trial demonstrated that the ESA derives independent economic value from being kept confidential, and that Sharp has gone to great lengths to maintain the confidentiality of the ESA. I therefore conclude that the ESA and the first amendment thereto are trade secrets entitled to confidential protection under Court of Chancery Rule 5.1.

[111] 6 *Del. C.* § 2001(4).
[112] *Miles Inc. v. Cookson America, Inc.*, 1994 WL 676761, at *10 (Del. Ch. Nov. 15, 1994).
[113] *Id*.
[114] *NuCar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *9 (Del. Ch. Apr. 5, 2005).

CONCLUSION

For the foregoing reasons, I recommend that the Court enter an order requiring Cooter to remove the 325 gallon propane tank from its property and to pay the fees and costs incurred by HBA and the Association in this action. I further recommend that the Court enter an order allowing for the continued sealing of Exhibits 8 and 9. This is my final report and exceptions may be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery