Restrictive Covenants - Enforceability of Assessments Against Property Owners in Residential Developments - Figure Eight Beach Homeowners' Association, Inc. v. Parker

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INTRODUCTION

Historically, the legal system has favored the free and unfe
terred use of land and has strictly construed attempts to broaden
any limitations on that use.¹ This general rule has been particu-
larly applicable to private restrictive covenants incorporated into
residential deeds.² Restrictive covenants allow the granting prop-
erty owner to retain limited control over the use of the property,
which he can exercise in the event of breach by actions for dam-
ages for injunctive relief.³ The subject of these restrictions can
range from the prohibition of certain improvements on the prop-
erty,⁴ to monetary assessments for maintenance, improvements, or
quasi-governmental services.⁵ Those which establish monetary as-
sessments are actually affirmative covenants—promises to do an
affirmative act⁶—that have been included with the restrictive cove-
nants. This distinction is significant because the common law
placed a heavier burden on the running of affirmative covenants
than it placed on negative or restrictive covenants.⁷ Affirmative

¹. Long v. Branham, 271 N.C. 264, 156 S.E.2d 235 (1967); Callaham v. Aren-
². P. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 384 (rev.
³. Id. at § 385.
⁵. See Figure Eight Beach Homeowners' Ass'n. v. Parker, 62 N.C. App. 367,
⁶. Tulk v. Moxhay, 2 Ph. 774 (1848) (distinguishing negative and affirmative
covenants).
⁷. G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §
Covenants were generally construed as personal to the original grantee and therefore ceased to be enforceable upon subsequent conveyance. Both restrictive and affirmative covenants have created unique problems of enforceability.

Several recent cases involving residential development projects have questioned the enforceability of affirmative covenants requiring the payment of assessments. The seminal question posed by the earlier cases was whether the contested covenants were personal to the original grantee, or "run with the land." More recent decisions have tended to find that affirmative covenants "run with the land," but remain unenforceable because the covenants were vague as to the purpose and amount of the levied assessments.

The North Carolina Court of Appeals in Figure Eight Beach Homeowners' Association v. Parker, rejected the defendant property owner's interpretation of several earlier decisions. The property owner claimed the earlier decisions required affirmative covenants to contain some ascertainable standards by which the court could objectively determine the amount and purposes of the assessments. The Court of Appeals claimed, however, it was applying the same standards set forth in the earlier decisions regarding the enforceability of similar covenants. In essence, the court's adoption of a broader interpretation of the earlier case law validates stricter enforcement of assessment covenants by property owners' associations which seek revenues to provide services to the residential development. Why the court took this position in light of the language of its earlier decisions, as well as the impact of the decision on residential development in North Carolina, will be the

3153 (repl. 1982).
8. See Id. at § 3154.
10. See Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978);
subjects of this note. An examination of the earlier decisions interpreting similar covenants, along with similar decisions from other jurisdictions, will give a proper framework for analysis of the Figure Eight decision.

THE CASE

A property owners' association sought payment of assessments allegedly owed to it by several property owners of Figure Eight Island, a barrier island off the coast of North Carolina. In the mid-1960's, residential development of Figure Island began with the sale of individual residential lots by Island Development Co., subject to certain covenants recorded in the county registry. The original development company conveyed its island property to another company, which later conveyed and assigned its interests to Continental Illinois Realty (CIR) through a trustee in bankruptcy.

Concurrently with development of the island community, a non-profit corporation, the Figure Eight Beach Homeowners' Association, Inc., was formed. Its purposes were (a) "[t]o bring together property owners of that area . . ." and (b) "engage in any lawful activity including, but not limited to operating parks and playgrounds, fire and police departments and contracts for services which might be from time to time deemed desirable . . . ."

The by-laws of the association empowered its Board of Directors to set the amount of dues and assessments to be paid by its members, who under the restrictive covenants, were to be all purchasers of property on Figure Eight Island. By recording their deeds, purchasers agreed to be bound by the registered covenants, the charter, and by-laws of the association.

The recorded covenants included provisions governing their applicability, reserving the right to change or modify the covenants, and dictating the nature and extent of assessments to be levied. The language of the affirmative covenant which contained

14. 62 N.C. App. at 367, 303 S.E.2d at 337.
15. Id. at 368, 303 S.E.2d at 337.
16. Id.
17. Id.
18. Id. (as stated in the documents of incorporation).
19. Id.
20. Id. The Association recorded a Declaration of Restrictive Covenants in the New Hanover County Registry.
21. The pertinent provisions of the restrictive covenants are set out at 62
the contested assessment provisions including the following statements of amount and purpose:

(b) [s]uch assessment or charge shall be in an amount to be fixed from year to year by the Company, which may establish different rates from year to year as it may deem necessary and may establish different rates for various general classifications of lots according to the use or location of said lots. The Company may levy additional assessments if necessary to meet the needs of the entire Island or portion thereof.

(c) [t]he funds arising from said assessment or charge or additional assessment may be used for any or all of the following purposes: Maintaining, operating and improving the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance and improvement of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; and, in addition, doing any other things necessary or desirable in the opinion of the Company to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island.

Amended restrictions, recorded by CIR in 1978, modified the statement of purpose for the levying of assessments and indicated the assignment of enforcement rights to the Figure Eight Beach Property Owners’ Association, Inc.

The homeowners’ association continually levied and collected assessments and dues from its members from the time of its creation in 1966, although a written assignment of the rights “to levy, collect, and expend annual and special assessments” was not made until 1979. This assignment of rights was apparently in response to attempts by the association to enforce collection of these assessments against property owners in various court actions.

Defendants purchased lots on Figure Eight Island in 1972 and 1976, subject to the terms and conditions of the recorded cove-
In 1979, defendants were billed for an annual assessment of $382.00 for residences and $255.00 for lots, and a special assessment of $275.00 per lot for construction of a new bridge to the island.

In March 1982, the trial court granted plaintiff's motion for summary judgment, denied defendants' motion for summary judgments, and entered judgment ordering defendants to pay the amounts owing on their respective assessments. Defendants' appeal advanced three questions: whether the affirmative covenant to pay assessments was unenforceable due to its vagueness, uncer-

26. 62 N.C. App. at 369-70, 303 S.E.2d at 338.
27. Id. at 373, 303 S.E.2d at 340.
28. Id. at 374, 303 S.E.2d at 340.
29. Paragraph 8 of the recorded covenants provided:

8. Assessments: (a) The owner of each residential lot shall, by the acceptance of a deed or other conveyance for such lot, be deemed obligated to pay to the Company an annual assessment or charge to be fixed, established and collected on a lot by lot basis as hereinafter provided. Said annual assessment or charge to be fixed, established and collected on a lot by lot basis as hereinafter provided. Said annual assessment or charge shall be due on January 1 of the year for which it is assessed, provided that the Company may make provision for payment thereof in installments. Each annual assessment or charge (or installment thereof) shall, when due, become a lien against the lot against which such assessment or charge is made. Upon demand, the Company shall furnish to any owner or mortgagee a certificate showing the assessments or charges, or installments thereof, due as of any given date. Each lot subject to these restrictions is hereby made subject to a continuing lien to secure the payment of each assessment or charge (or installment thereof) when due.

(b) Such assessment or charge shall be in an amount to be fixed from year to year by the Company, which may establish different rates from year to year as it may deem necessary and may establish different rates for various general classifications of lots according to the use or location of said lots. The Company may levy additional assessments if necessary to meet the needs of the entire Island or portion thereof.

(c) The funds arising from said assessment or charge or additional assessment may be used for any or all of the following purposes: Maintaining, operating and improving the bridges; protection of the property from erosion; collecting and disposing of garbage, ashes, rubbish and the like; maintenance and improvement of the streets, roads, drives, rights of way, community land and facilities, tennis courts, marsh and waterways; employing watchmen; enforcing these restrictions; and, in addition, doing any other things necessary or desirable in the opinion of the Company to keep the property in neat and good order and to provide for the health, welfare and safety of owners and residents of Figure Eight Island.

(d) Upon the failure of the owner of any lot to pay any such assess-
tainty, and failure to state an ascertainable standard, whether the covenants were enforceable by an assignee of the original grantor, and whether enforcement of the assessment covenants violated public policy. 30 The court of appeals limited its review to the first question, but found the defendants' other assertions to be without substantial merit. 31 Under a three-pronged analysis, the court concluded: 1) the assessment covenants were sufficiently definite in terms of purpose and amount, 2) the property to be maintained

ment or charge, additional assessment, or installment thereof when due, the Company shall have the right to correct the amount thereof by an action at law against the owners as for a debt, and may bring and maintain such other suits and proceedings at law or at equity as may be available. Such rights and powers shall continue in the Company and the lien of such charge shall be deemed to run with the land and the successive owners of each lot, by the acceptance of deeds therefor, shall be deemed personally to assume and agree to pay all unpaid assessments or charges or additional assessments which have been previously levied against the property, and all assessments or charges or additional assessments shall become a lien thereon during their ownership. Unpaid assessments or charges, additional assessments, or installments thereof, shall bear interest at six percent (6%) from the due date thereof, until paid.

(e) The monies collected by virtue of the assessments or charges or additional assessments, of the lien provided by this section, shall be paid to the Company to be used in such manner and to the extent as the Company may determine, in accordance with paragraph 8(c) hereof, for the benefit of the residents of Figure Eight Island. The judgment of the Company in the making of assessments or charges or additional assessments and the expenditure of funds shall be final.

(f) The Company shall not be obligated to spend in any one calendar year all of the sums collected during said year by way of assessments or charges or additional assessments and may carry forward to surplus any balance remaining. The Company shall not be obligated to apply any such surplus to the reduction of charges in the succeeding year.

(g) The Company shall have authority, in its discretion, to borrow money to expend for the purposes set forth in paragraph 8 (c) hereof upon such terms and security and for such periods as it may determine, and to repay said borrowings and the interest thereon from the assessments or charges or additional assessments provided for in this paragraph 8.

(h) It is contemplated that the Company may, in its discretion, assign to the Figure Eight Island Homeowners' Association, its successors or assigns, the right to make and collect assessments, to expend such funds as may be collected, and to otherwise be substituted for the Company under this paragraph.

30. 62 N.C. App. at 374, 303 S.E.2d at 340.

31. Id.
was described with particularity, and 3) there was no question as to which properties and facilities the association sought to maintain with the assessments. The court found no genuine issue of material fact and affirmed the trial court’s granting of summary judgment.

BACKGROUND

The law governing the enforceability of restrictive covenants requiring the payment of monetary assessments for maintenance or improvements in residential developments was generally non-existent in North Carolina up until the last decade. Prior to Figure Eight, developers or property owners’ associations received little support from the judiciary in their attempts to collect money from property owners in the form of levied assessments.

Courts applied the general rule of construction for restrictive covenants in North Carolina as stated in the 1967 decision of Long v. Branham:

Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.

Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain

32. Id. at 376-77, 303 S.E.2d at 342.
33. Id. at 377, 303 S.E.2d at 342.
34. The first case that considered the enforceability of assessment covenants was Beech Mountain Property Owners’ Ass’n v. Current, 35 N.C. App. 135, 240 S.E.2d 503 (1978).
36. 271 N.C. 264, 156 S.E.2d 235 (1967).
and obvious purposes of a restriction.\textsuperscript{37}

Until June 1983, it appeared the North Carolina courts would refuse to enforce \textit{any} assessment covenant no matter how detailed or carefully the developer drafted the recorded restrictions for the development.\textsuperscript{38} Such a policy was disastrous for real estate developers and residential developments which relied on the private assessments for maintenance and upkeep of the common areas in the development.

Prior decisions involving such covenants presented few guidelines to developers or their attorneys for drafting covenants that would withstand the challenge of individual property owners who refused to pay the levied assessments. The two basic issues addressed in the early decisions were usually: whether the covenant ran with the land, which would allow its enforcement against subsequent grantees,\textsuperscript{39} and whether the present holder of the right to enforce the assessment was in fact the real party in interest to assert such rights.\textsuperscript{40} The typical case involved conflicts over the enforcement of the assessments covenants between successors in interest of the original grantee and the original grantor or his assigns.\textsuperscript{41}

The 1978 case of \textit{Beech Mountain Property Owners’ Association v. Current}\textsuperscript{42} was the first North Carolina case in which the court was presented with the issue of assessment covenants against property owners in a residential development. The defendant claimed the covenant was unenforceable as written,\textsuperscript{43} but the court refused to rule on the substantive issue opting instead to hold that the plaintiff lacked capacity to assert any claim to the assessment because the restrictive covenant provided that only owners of

\textsuperscript{37} Id. at 268, 156 S.E.2d at 239 (citing 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 187 (1965)).

\textsuperscript{38} See generally, Beech Mountain Property Owners’ Ass’n v. Seifart, 48 N.C. App. at 287-90, 269 S.E.2d at 179-80 (1980). (Beech Mountain Property Owners’ Association recorded three sets of “Declarations of Restrictions,” and detailed Articles of Incorporation).

\textsuperscript{39} Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904.

\textsuperscript{40} Id.

\textsuperscript{41} In Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978), the original developer, the Ervin Company, sold its interests in the development to ARDC Franciscan Terrace, Inc., which sought to enforce the assessment covenants under its new corporate name, Raintree Corporation.

\textsuperscript{42} 35 N.C. App. 135, 240 S.E.2d 503 (1978).

\textsuperscript{43} Id. at 136, 240 S.E.2d at 505.
property would have the right of enforcement. The association, as a separate corporate entity, lacked standing because it held no property in the development under its own name.

The court held inapplicable a similar New York case, Neponsit Property Owners' Association v. Emigrant Industry Sav. Bank, which held that the assignee-association was a real party in interest to bring an action for enforcement of the assessment. The court noted the distinction in the Neponsit covenant which “expressly conferred a right of action on the grantor's 'assigns,' which expressly included the property owners' association.” The language of the Beech Mountain covenant made no express provision for assignment; therefore, under strict construction, the court refused to allow the association to enforce the covenant.

In Raintree Corporation v. Rowe, the court again refused to enforce covenants to pay assessments because the corporate plaintiff was not the proper party to collect the assessments under the recorded covenant. Interestingly, country club dues were also held uncollectible because they lacked the status of a real covenant. The court cited as three requirements to create an enforceable real covenant: 1) the intent of the parties as can be determined from the instruments of record; 2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, 3) there must be privity of estate between the parties to the covenant. As personal covenants between original grantor and defendants, the club dues requirement could not be assigned or enforced by any other party. The court did not indicate whether it considered such covenants as enforceable as assignable contract rights.

The 1980 case of Beech Mountain Property Owners' Association v. Seifart involved the same covenants as the 1978 deci-

44. Id. at 138-39, 240 S.E.2d at 506-07.
45. Id. at 139, 240 S.E.2d at 507.
46. 278 N.Y. 248, 15 N.E.2d 793 (1938).
47. Id. at 254, 15 N.E.2d at 794-95.
48. 35 N.C. App. at 139, 240 S.E.2d at 507 (1978).
49. Id.
51. Id. at 668, 248 S.E.2d at 907.
52. Id. at 670-71, 248 S.E.2d at 908-09.
53. Id. at 669, 248 S.E.2d at 908.
54. Id. at 671, 248 S.E.2d at 909.
55. 48 N.C. App. 286, 269 S.E.2d 178 (1980).
sion, but prior to instituting this suit, the property owners’ association acquired property at Beech Mountain and several individual property owners were also joined as plaintiffs.7 The court held that the covenants upon which the association relied to make assessments were not “sufficiently certain and definite to be enforceable.”58 “[C]ovenants purporting to impose affirmative obligations on the grantee [should] be strictly construed and not enforced unless the obligation [is] . . . imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application.”59 Comparing similar decisions60 from other jurisdictions which advocate some “ascertainable standard contained in the covenant,”61 the court arrived at a three-pronged analysis to examine the enforceability of the Beech Mountain covenants. First, “[n]one of the covenants identified with particularity the property to be maintained.”62 Secondly, “there is nothing in the covenant which can guide the court should it be called upon to review the determination by the Property Owners’ Association as to what particular roads and trails it elects to maintain.”63 Finally, “there is no clearly defined limiting standard by which the court can determine whether the assessment made in any particular year against any particular property owner is authorized both as to amount and purpose by the covenant applicable to his property.”64 Although lauding the desirable function of the association and the enhancement of property values its activities provide, the court found this an insufficient basis upon which to enforce the covenants.65 The court did not offer any explanation for its pronouncement which in effect invalidated many of the assessment covenants already in place in residential developments throughout North Carolina.

57. 48 N.C. App. at 287 n.1, 269 S.E.2d at 179.
58. Id. at 294, 269 S.E.2d at 182.
59. Id. at 295, 269 S.E.2d at 183.
61. 48 N.C. App. at 295, 269 S.E.2d at 183.
62. Id.
63. Id. at 296, 269 S.E.2d at 183.
64. Id. at 297, 269 S.E.2d at 184.
65. Id.
Under the same analysis, the court in *Snug Harbor Property Owners Association v. Curran* held similar restrictive covenants unenforceably vague. Even though a specific dollar amount of annual dues was stated in the covenant, "the property to be maintained was described with even less particularity [than in Beech Mountain], and there [was] no standard by which the maintenance [was] to be judged."  

*Four Seasons Homeowners Association v. Sellers,* a 1983 case, upheld the assessments levied against property owners in the residential development. Although defendants improperly excepted to the findings of fact in the appeal, the court, in *dicta,* indicated that the covenants were enforceable under the *Raintree* decision because they ran with the land. Defendants did not contend that the covenants were unenforceably vague under the three-pronged analysis of *Beech Mountain*; therefore, the court did not address this issue.

In summary, prior to *Figure Eight* the North Carolina Court of Appeals had consistently refused to enforce assessment covenants if challenged as to the purpose and amount of the claimed assessment. The three-pronged analysis of *Beech Mountain* appeared to be an insurmountable hurdle for the enforcement of most affirmative covenants applicable to residential development, which created havoc in real estate developments which relied on the assessments as a form of private taxation to fund the maintenance and upkeep of the community.

67. For the language of the applicable *Snug Harbor* restrictions, see 55 N.C. App. at 200-02, 284 S.E.2d at 753-54.
68. 55 N.C. App. at 204, 284 S.E.2d at 755.
69. Id.
71. Id. at 207, 302 S.E.2d at 850.
72. 38 N.C. App. 664, 248 S.E.2d 904. See also supra text accompanying notes 46-50.
73. 62 N.C. App. at 210-11, 302 S.E.2d at 852-53.
74. 48 N.C. App. 286, 269 S.E.2d 178.
76. 48 N.C. App. 286, 269 S.E.2d 178.
ANALYSIS

In Figure Eight, the court upheld the granting of plaintiff's motion for summary judgment because under the three-pronged analysis established in Beech Mountain, the assessment covenant was not unenforceably vague. First, the court found the language of the restriction "sufficiently definite in its terms that the purpose and amount of the annual and special assessments in question clearly 'fell within the contemplation of the covenant.'" Under the terms of the restriction, there was a sufficient standard against which to measure the property owners' liability. Second, the court found that the property to be maintained by the association was described with particularity in the restriction which was duly recorded in the county registry. The map of the entire island including roads, lots, and other improvements, registered with the Declaration of Restrictive Covenants, provided support for the trial court's conclusion. Last the court found no question as to which properties and facilities the association was to maintain and improve with revenues from the property assessments. The court refused to accept the interpretation by defendants of the Beech Mountain decision that "restrictive covenants must provide the reviewing court with a standard by which it can objectively determine the amount of the assessment." The covenants were found to be sufficient to guide the trial court in reviewing the assessments claimed by the association.

The significance of the Figure Eight decision lies not in its application to this particular residential development, but in the implications this decision has in light of the line of cases affirming the unenforceability of similar assessment covenants. In Figure Eight, the court seems to have re-examined its strict inter-

77. 62 N.C. App. 367, 303 S.E.2d 336.
78. 48 N.C. App. 286, 269 S.E.2d 178.
79. 62 N.C. App. at 377-78, 303 S.E.2d at 342.
80. Id.
81. Id. The Court, however, does not explain how the trial court is to determine or measure liability under this standard.
82. Id.
83. Id.
84. Id.
85. 48 N.C. App. 286, 269 S.E.2d 178.
86. 62 N.C. App. at 376, 303 S.E.2d at 342.
87. Id. at 377, 303 S.E.2d at 342.
88. See supra text accompanying notes 39-65.
pretation of the language in assessment covenants governing their purpose and amount and derived an analysis which allows property owners' associations to more easily enforce its assessments, in order that the development as a whole might benefit. The court rejected the view that restrictive assessment covenants must contain "some ascertainable standard ... by which the court can objectively determine both that the amount of the assessment[s] and the purpose for which [they are] levied fall within the contemplation of the covenant." 

In conducting the three-pronged analysis established under the 1980 Beech Mountain decision, the court looked first to the language of paragraph 8 of the Declaration of Restrictive Covenants. The court found that "any reading ... of paragraph 8 (c) would provide a standard against which to measure the property owner's liability." Yet accompanying the report of the court's opinion are both the original, and an amended paragraph 8(c), which contains the additional terms of: "replacing the bridges; ... and "paying ... indebtedness of the Association, insurance premiums, governmental charges of all kinds and descriptions." Although these terms mention specific purposes for the assessments, the mere fact that the affirmative covenants have been amended indicates an indefiniteness as to the extent of the maintenance obligation to be borne by the property owners under the assessments covenants. The degree of variance in the possible uses of the assessed funds appears to negate any definite limit on a property owner's liability. Secondly, the court examined the covenant to determine if the "property to be maintained [was] described with particularity." The court concluded that given the recorded map of the Island along with the Declaration of Restrictions, the trial

89. See 62 N.C. App. at 373, 303 S.E.2d at 340. The Court mentions that assessments were levied for construction of a new bridge, which was "the only land based transportation access to the island." Id.
91. Id.
92. See text of paragraph 8 at supra note 28.
93. 62 N.C. App. at 377, 303 S.E.2d at 342.
94. See id. at 371, 303 S.E.2d at 339.
95. See id at 373, 303 S.E.2d at 340.
96. Id.
97. Id. at 377, 303 S.E.2d at 342.
98. The restrictive covenants were recorded by the Figure Eight Island Company in Book 933, at Page 286 of the New Hanover County Registry, Wilmington,
court could not have reached any conclusion other than that the property was sufficiently described.99 Again, as noted above, amendments to the restrictions, although allowed under the modification provisions of the covenants, indicate significant faults in the description of the property to be maintained. Under paragraph 8(c), it is unclear whether the association could use the assessment funds for such specialized purposes as to protect individual lot owners from the damages of erosion. The phrase "any other things necessary or desirable in the opinion of the Company . . ."100 would appear to allow any property to be maintained regardless of the particularity requirement.

Finally, the court found "no question as to which properties and facilities the [Homeowners' Association] [determined] to maintain with the contested assessments."101 Based on the references in defendants' deeds to the map and the restrictive covenants, the court concluded that defendants had notice of all properties to be maintained.102 Because there were no after-acquired properties or facilities maintained by the association, the court indicated that the referenced property could sufficiently guide the court in reviewing the assessments.103 This statement indicates a willingness on the part of the court to adopt a wait-and-see attitude for this prong of the Beech Mountain test. The decision leaves open the question of whether the restriction would have been enforceable if the association had acquired more property of significantly improved facilities on the Island. Under the reservation provision of the covenants,104 the Company, solely within its judgment, can alter or redesignate facilities. The lack of any limitation concerning defendants' liability of assessments on future acquisitions of property or facilities offers little guidance to defendants on the financial feasibility of continued ownership of property on the island. If, under the court's interpretation of the language in the Figure Eight covenant, the association could agree to

North Carolina. Id. at 370, 303 S.E.2d at 338.


100. See paragraph 8(c). 62 N.C. App. at 373, 303 S.E.2d at 340.

101. 62 N.C. App. at 377, 303 S.E.2d at 342.

102. Id.

103. Id. The Court did not consider the planned construction of a new bridge to constitute after acquired property.

104. See paragraph 3. 62 N.C. App. at 370, 303 S.E.2d at 338.
open new roads or waterways, then it would seem the covenant was no more definite than the Beech Mountain covenant which was unenforceably vague.

The court in Figure Eight appears to have abandoned the strict constructionist view it seemed to adopt under Beech Mountain, in favor of a less rigid approach which allows the court to uphold the enforcement of residential assessment covenants. In considering the beneficial functions—security, maintenance, and sanitation—the property owners' associations provide to the residential community, the court seems to conform its judgment to the best interest of the association. By affirming the trial court's decision, the North Carolina Court of Appeals sends a signal to individual property owners that claims of vagueness in assessment covenants will no longer provide an easy way out of paying assessments. Of course, this assumes that such covenants are drafted in language consistent with those in Figure Eight. In the end however, the opinion of the court fails to contribute significant clarity to the primarily factual determination under the three-pronged Beech Mountain test.

Under the Beech Mountain test, the key elements are but enigmatic standards within themselves. The court does not clearly indicate what standard is sufficient to measure the liability for assessments, nor what particularity is needed for a sufficient description of property to be maintained. Finally, it is unclear how the trial court is to review the determination of the association as to which facilities to maintain. Under the Figure Eight interpretation, there seems to be no limitation or guiding standard to aid developers or their attorneys in drafting enforceable covenants. By using the Beech Mountain test to reach a seemingly contrary result in an almost identical factual situation, the court only "muddied the waters" for future cases.

Although the court in Beech Mountain did not expressly adopt the view in other jurisdictions\(^\text{106}\) which stress "the necessity for some ascertainable standard contained in the covenant by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant,"\(^\text{106}\) it did indicate a need for

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105. See supra note 59.
some sufficient standard. The courts of several jurisdictions have required that assessments contain a “formula for the calculation of the amount of the assessment.” A New Jersey court, in Peterson v. Beekmere, Inc., noted that the lack of a formula for calculating assessments or any limitation on the duration of the covenant, bound property owners to unspecified obligations. In Rodruck v. Sand Point Maintenance Commission, a Washington decision, the court upheld enforcement of a covenant under which “the amounts of the individual assessments are governed by a set standard.” By upholding the Figure Eight covenant without establishing some criteria for objectively judging the amount and purpose of the assessment within the terms of the covenant, the court left review of enforceability to the caprice of the trial court.

If the court in Figure Eight, had analyzed the contested covenants by noting why these covenants met the standards for enforceability and those in the Beech Mountain and Snug Harbor did not, developers and individual property owners would have some basis for drafting more definite and binding restrictive covenants in their residential developments. From the decision, it might be assumed that assessment covenants drafted in the Figure Eight format would be adequate to justify enforcement in other residential developments, but the lack of more objective standards of review seems to weaken their usefulness under this decision.

Under the Figure Eight covenants, the only limitations are those imposed by agreement among the members of the property owners’ association. The majority in the association could not alter the covenants without the approval of the minority, but under the Figure Eight covenant, the majority could significantly increase the amount of the annual assessments, thereby adversely affecting the minority. The individual’s only ultimate remedy would

107. Id.
110. Id. at 175, 283 A.2d at 922.
111. 48 Wash. 2d 565, 295 P.2d 714 (1956).
112. Id. at 580, 295 P.2d at 721.
113. 48 N.C. App. 286, 269 S.E.2d 178.
114. 55 N.C. App. 199, 284 S.E.2d 752.
115. The property owners’ association was made up of all property owners within the development. Under the provisions of the assignment of interest to the association, the assessment covenants would be enforced under the terms of the articles of incorporation of the association.
appear to be the sale of his property interests in the development, perhaps at a greatly deflated price. If the covenants provided some specific monetary or durational limitations on the assessment of funds from property owners, the community would benefit in that a calculable source of funds would be available for the association’s activities, and at the same time, the individual property owner would be protected from unreasonable assessments. By upholding enforcement of the Figure Eight covenants, the court would appear to endorse this lack of protection for the individual property owner. The court obviously assumes that in order to protect the individual’s interests, he would be well advised to actively participate in the decision-making process of the association.

Since the Figure Eight decision did not enumerate any “ascertainable” standard of enforceability, the court has left open the door for further litigation on the enforceability of residential assessment covenants. Before Figure Eight, it was relatively clear that the court opposed enforcement of assessment covenants under broad statements of the purpose and amount of such assessments. Now, although it appears the court sees value in enforcing such assessments, it is unclear which of the court’s views to apply in any particular factual situation. Admittedly, there are two competing views which the court must address. On the one hand, the developer and typically, a majority of the property owners in the development, rely on the covenants to provide the authority for the necessary “private taxation” to fund the maintenance of the private real estate development. This form of assessment allows for internal control of the development and the exclusion of governmental or public influence from the development. Under this view, it would only seem fair that lot purchasers with notice of the assessment covenants should be estopped to deny the enforceability of the assessments. However, the court also must consider the view of the property owner who is justifiably disturbed when the property owners’ association tripled the annual assessment from one year to the next. The court of appeals realized in Figure Eight that the strict interpretation under Beech Mountain against the development’s interests, unfairly burdened one view, even though the covenants legitimately sought to benefit the interests of all the property owners in the community.

**Conclusion**

*Figure Eight* upheld the enforceability of assessment covenants in a residential development, finding the covenants suffi-
ciently certain and definite in that they provided a standard against which to measure a property owner's liability for assessments and sufficiently described the properties and facilities to be maintained and improved with revenues from the assessments. Under the three-pronged analysis of *Beech Mountain*, the Court held for the first time that a residential assessment covenant was not unenforceably vague. The benefits provided to the development by the property owners' association appears to have out-weighed the infringement the levied assessments place on the individual property owner. The fault with the decision is its lack of ascertainable standards for reviewing enforceability of similar assessment covenants. The next case in this area will likely rest upon the subjective determination of the trial judge in his attempt to strictly construe covenants with the flexible ruler of *Figure Eight*.

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