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CV-1997-000085.00  
CIRCUIT COURT OF  
SHELBY COUNTY, ALABAMA  
MARY HARRIS, CLERK

IN THE CIRCUIT COURT FOR SHELBY COUNTY, ALABAMA

MARION RUTHERFORD, as Trustee of the  
*Inter Vivos* Trust created by FLORENCE L.  
RUTHERFORD, now deceased,

Plaintiff,

v.

RITA RUTHERFORD; JOSHUA LONGNECKER,  
a minor (now an adult); PHILLIP RONEL  
RUTHERFORD; TOBY ALLEN RUTHERFORD;  
TROY RUTHERFORD; HEATH RUTHERFORD;  
HEATHER RUTHERFORD; ADAM  
RUTHERFORD; a minor (now an adult), et al.,

Defendants.

v.

RITA KATHRYN RUTHERFORD, individually,  
and as virtual representative of the Estate of  
FLORENCE L. RUTHERFORD, deceased,

Counter-Claim Plaintiff,

v.

MARION RUTHERFORD, individually, and in his  
representative capacities as former Attorney-in-Fact  
for FLORENCE L. RUTHERFORD under the  
Durable Power of Attorney dated August 24, 1990,  
and Trustee of the *Inter Vivos* Trust dated  
September 5, 1990, et al.,

Counter-Claim Defendants,

v.

RITA KATHRYN RUTHERFORD, individually,  
and as virtual representative of the Estate of  
FLORENCE L. RUTHERFORD, deceased,

Cross-Claim Plaintiff,

v.

CIVIL ACTION NO.

CV-1997-085



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Shelby Cnty Judge of Probate, AL  
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12/7/10  
Mary H Harris

JOSHUA LONGNECKER, a minor (now an adult); )  
PHILLIP RONEL RUTHERFORD; TOBY )  
ALLEN RUTHERFORD; TROY RUTHERFORD; )  
HEATH RUTHERFORD; HEATHER )  
RUTHERFORD; ADAM RUTHERFORD; a )  
minor (now an adult), et al., )

Cross-Claim Defendants. )

v. )

Estate of FLORENCE L. RUTHERFORD, )  
deceased, by and through its former Personal )  
Representative, FRANK C. ELLIS, JR., )

Party added upon the Estate's removal )  
from Probate Court to this Court )  
and consolidation herewith. )

**ORDER GRANTING RELIEF**  
**UNDER RULE 60(b)(6)**

This cause came before the Court upon the Motion for Relief from Judgment Under **Rule 60(b)(6)** (the "Motion") filed on October 15<sup>th</sup>, 2010, by RITA K. RUTHERFORD ("Rita," or "Movant," as appropriate), individually, and as Trustee of the RITA KATHRYN RUTHERFORD IRREVOCABLE TRUST created under Agreement dated October 6, 1999.

The Court has reviewed the prior pleadings in the file and notes that this action was closed by entry of a Final Order entered December 28, 1999, and that no filings have been made, orders have been entered, and no other substantive activity has occurred with respect to this action since said date, with the exception of this Court's *Nunc Pro Tunc* Order of January 13, 2000.

This action was previously heard by then-Shelby County Circuit Judge, Hon. D. AL CROWSON ("Judge Crowson"), now retired. Any and all cases formerly under the jurisdiction



of Judge Crowson were transferred to the undersigned, who thus has the requisite authority to hear any post-judgment motions in this action, including the Motion.

The Court reviewed the Motion and the attached Exhibits, as well as the prior pleadings in the file. The Court considered the statements of Movants' counsel in support of the Motion, and considered the statements of parties, former parties, or counsel for those or other interested parties provided with notice and/or certificate of service copies and/or courtesy copies of the Motion.

Based on the foregoing, the Court makes the following findings of fact:

1. This action pertained to certain matters related to the Estate of FLORENCE L. RUTHERFORD, deceased ("Mrs. Rutherford"), and her family members, including her daughter, Movant, and her other adult children, PHILLIP RONEL RUTHERFORD ("Phillip") and MARION RUTHERFORD ("Marion"), and their respective children (collectively, the "Parties").
2. Judge Crowson entered certain orders with regard to various matters at issue in this action, and the Parties reached a settlement of other matters at issue in this action, which settlement was approved by Judge Crowson. Those matters included the disposition of certain real property formerly owned by Mrs. Rutherford, i.e., an approximately 29-acre parcel located on Valleydale Road (the "Valleydale Road Property").
3. An additional one-acre parcel of real property located adjacent to and contiguous to certain portions of the Valleydale Road Property (the "One-Acre Parcel") had been conveyed by Mrs. Rutherford to Marion during her lifetime. The One-Acre Parcel was not at issue in this action, but its disposition was later affected by the settlement of this action and subsequent activities as the result of the Parties' settlement.



4. As the result of both the various orders entered by Judge Crowson in this case, and the settlement agreement of the Parties, the Valleydale Road Property was (i) determined to be an asset of Mrs. Rutherford's probate estate; (ii) distributed in three (3) certain parcels of approximately 9.5 acres each (the "9.5 Acre Parcels") then deeded to Movant, Phillip, and Marion, respectively, by Mrs. Rutherford's Estate in accordance with the terms of Mrs. Rutherford's Will; (iii) the respective 9.5 Acre Parcels were deeded by Movant, Phillip, and Marion to respective *Inter Vivos* Trusts created by each of them (the "Trusts," or a "Trust," as appropriate); and (iv) made subject to certain Restrictive Covenants executed by Movant, Marion, and Phillip, as Trustee of his/her respective Irrevocable Trust, recorded on March 8, 2000, in the Office of the Shelby County, Alabama, Judge of Probate as Instrument #2000-07407 (the "Restrictive Covenants").

5. The Restrictive Covenants were the result of a separate agreement made by the Parties with respect to that certain lawsuit in the Jefferson County, Alabama, Circuit Court, Case No. CV-97-387, styled, Edward M. Beck et al. v. City of Hoover, et al. (the "Zoning Action"), and specifically an agreement with the Plaintiffs in that action, EDWARD M. BECK and wife, MARY LOUISE BECK (the "Becks"), and JOSEPH NADLER and wife, LINDA NADLER<sup>1</sup> (the "Nadlers") (collectively, the "Zoning Dispute Plaintiffs"). By Marion's agreement, the One-Acre Parcel was also made subject to the Restrictive Covenants.

6. The Restrictive Covenants included certain setback and buffer requirements for the Valleydale Road Property and the One-Acre Parcel, as well as certain zoning restrictions. In this action, Judge Crowson reviewed the Restrictive Covenants and approved the Parties' settlement that resulted in the execution and recordation of the Restrictive Covenants.

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<sup>1</sup> The Motion and various pleadings or orders in the Zoning Action incorrectly referred to Mr. Nadler's wife as "Diane Nadler," rather than Linda Nadler.



7. Marion, individually, and as Trustee of Mation's Trust, later encumbered the One-Acre Parcel and his Trust's 9.5 Acre Parcel of the Valleydale Road Property, respectively, with mortgages to First National Bank of Shelby County, which mortgages were foreclosed upon, and the said parcels were sold at a foreclosure sale on January 8, 2003. Specifically, the said 9.5 Acre Parcel was sold to SHELBY RESOURCES, INC. ("Shelby Resources"), and the One Acre Parcel was sold to LARRY WEEMS ("Weems"). Shelby Resources and Weems thus succeeded to all rights, duties, and obligations pertaining to said real property that arose under the Restrictive Covenants.

8. Weems later conveyed the One-Acre Parcel to L & W VALLEYDALE, LLC, an Alabama limited liability company ("L&W"). The One-Acre Parcel is hereinafter referred to as the "Levine-Weems Parcel."

9. Shelby Resources later conveyed the 9.5 Acre Parcel formerly owned by Marion's Trust to PROVIDENCE PARK PARTNERS II, LLC ("Providence Park II"), an Alabama limited liability company.

10. Thus, L&W and Providence Park II (and any subsequent assignee, transferee, or grantee of either of them) also succeeded to all rights, duties, and obligations that arose under the Restrictive Covenants pertaining to the One-Acre Parcel and the 9.5 Acre Parcel formerly owned by Martion and Marion's Trust, respectively.

11. Paragraph 18 of the Restrictive Covenants included certain language, as follows:

This instrument is to be interpreted under the laws of the State of Alabama. These covenants are enforceable by (i) the owners of all adjoining property (including their heirs, successors and assigns to their respective interests in the Property); (ii) the owners of the Property (including their heirs, successors and assigns to their respective interests in the Property); (iii) anyone owning property within 500 feet of the Property (including their heirs, successors and assigns to their respective interests in the Property); and (iv) the City of Hoover.

(Referred to herein as the "Paragraph 18 Enforcement Language").

12. After L&W acquired title to the Levine-Weems Parcel, in order to develop same in a commercially reasonable manner, L&W negotiated with the Nadlers and WILLIAM E. ALLEN and wife, MALORIE P. ALLEN (collectively, the "Allens") (successors in title to the Becks) to obtain a reduction of the setbacks and buffers burdening the One-Acre Parcel. Those negotiations resulted in the Amendment to Declaration of Restrictive Covenants (the "Amended Restrictive Covenants"), executed by L&W, the Nadlers and the Allens (the "Amended Restrictive Covenants"). The Amended Restrictive Covenants were recorded on June 3, 2010, in the Office of the Shelby County, Alabama, Judge of Probate as Instrument #2010-0603000175360.

13. The Amended Restrictive Covenants amended the Restrictive Covenants so that section 5 thereof was replaced in its entirety to state as follows:

Exclusive of that portion of the Property shown on Exhibits C-1, C-2, and C-3, there shall be a forty (40) feet wide undisturbed buffer along the entire length of the southern border of the Property, and an additional ten (10) feet wide planted buffer shall adjoin such forty (40) feet wide undeveloped buffer. Provided, however, that for the portion of the Property shown in Exhibit 2010B – the "Levine/Weems Parcel" – the aforesaid forty (40) feet and ten (10) feet wide buffers and undisturbed/undeveloped areas are inapplicable to the Levine/Weems Parcel; instead, the Levine/Weems Parcel is burdened by the buffers and setbacks set forth in Exhibit 2010B which requirements shall burden the Levine/Weems Parcel in perpetuity, shall run with the land and shall inure to the benefit of the [former Plaintiffs in the Zoning Action Dispute and/or their heirs and assigns] owners of the real properties shown on the attached Exhibit 2010B-1. The 100 feet wide buffer on the Levine/Weems Parcel shown on Exhibit B is no longer a valid encumbrance thereon, as it is replaced with the restrictions set forth hereinabove.

14. The only part of said section 5 different from section 5 contained in the Restrictive Covenants was the setbacks and buffers burdening the Levine/Weems Parcel



(specifically, reducing the 100-foot wide buffer on the Levine/Weems Parcel as shown on Exhibit B of the Restrictive Covenants, to the setbacks and buffers set forth in Exhibit 2010B-1 of the Amended Restrictive Covenants).

15. The Amended Restrictive Covenants stated the following in its final unnumbered paragraph:

By signing this instrument, the undersigned make no alterations to the Covenants other than those set forth herein. The ongoing efficacy of the Covenants is affirmed by all of the undersigned. The undersigned agree that this fully executed document shall be recorded in the Office of the Judge of Probate of Shelby County, Alabama. This document is deemed to be drafted equally by both parties with no bias (as per construction) against any party signing this instrument.

16. L&W also sought and obtained a variance from the City of Hoover Board of Zoning Adjustments as to certain uses and purposes permitted under the City of Hoover's zoning for the One-Acre Parcel (i.e., C-P zoning for "preferred commercial district"). Such a variance was obtained after notice was given to the landowners adjacent to the Levine/Weems Parcel pursuant to pertinent regulations of the City of Hoover Board of Zoning Adjustments.

17. In the Motion, Movant avers that, on or about September, 2010, she discovered that certain questions have arisen as to the intent of the parties who entered into the Restrictive Covenant with respect to the Paragraph 18 Enforcement Language, namely, the interpretation and application of the Paragraph 18 Enforcement Language as to the legal effect of the Amended Restrictive Covenants. Movant avers it was not intended that any persons or entities other than the parties to the Zoning Action (i.e., the Nadlers, the Allens [as successors to the Becks], and the City of Hoover) would have the right to enforce the Restrictive Covenants so as to prevent L&W, the Nadlers, and the Allens from changing the setbacks and buffers as to the real property

described in the Amended Restrictive Covenants (i.e., the Levine/Weems Parcel), which only burdens the Levine/Weems Parcel and not any part of the Valleydale Road Property.

18. Given the foregoing, Movant seeks relief under **Rule 60(b)(6)** of the *Alabama Rules of Civil Procedure*, requesting that this Court exercise its equity jurisdiction to construe by written order the Restrictive Covenants, and in particular the Paragraph 18 Enforcement Language, as (i) not preventing the actions of the Nadlers, the Allens and L&W in the making of the Amended Restrictive Covenants, and (ii) approving and confirming that the Amended Restrictive Covenants were lawfully accomplished and of full and complete legal effect for all purposes.

19. Movant has now requested an order that alters or amends certain relief previously granted in the Court's Final Order entered December 29, 1999, namely, the approval by Judge Crowson at hearing on December 13, 1999, of the Restrictive Covenants as referenced in said Final Order.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

A. That, after due consideration of **Rule 60(b)(6)**, and the Restrictive Covenants and the Amended Restricted Covenants, the Court has determined that the Motion is well taken, and that no additional notice of this Motion and any hearing on same is required to be provided to any parties other than to those counsel for Parties that were listed on the Motion's certificate of service, and the list of counsel reflected on such certificate as having been provided with courtesy copies of the Motion. The Court specifically takes judicial notice of the Waivers of Notice/Consents to relief sought filed in this proceeding by the Nadlers, the Allens, and L&W (with the qualified waiver of notice by the Nadlers and the Allens). Moreover, the Court finds



that no additional notice of the Motion or any hearing on same is required to be provided to any landowner adjacent to or in proximity to the Valleydale Road Property and/or the Levine/Weems Parcel.

B. The Court finds that Paragraph 18 Enforcement Language of the Restrictive Covenants did not prevent the actions of the Nadlers, the Allens and L&W in the making of the Amended Restrictive Covenants.

C. The Final Order entered December 29, 1999, in this action (a copy of which is attached hereto and incorporated herein by reference as **Exhibit A**) is hereby amended as follows:

(1) The Restrictive Covenants (a copy of which is attached hereto as **Exhibit B**) are approved and confirmed in all respects, retroactively to December 29, 1999;

(2) The Amended Restrictive Covenants (a copy of which is attached hereto as **Exhibit C**) were lawfully accomplished and of full and complete legal effect for all purposes, and are hereby approved and confirmed in all respects;

(3) The setbacks and buffers set forth in section 5 of the Restrictive Covenants were and are at all times hereafter replaced by the setbacks and buffers set forth in the Amended Restrictive Covenants; and

(4) The Restrictive Covenants, except as altered by the Amended Restrictive Covenants (specifically, section 5 only), are hereby otherwise ratified in all respects, thus preserving their ongoing efficacy.

D. A copy of this Order, together with its **Exhibits A, B, and C**, shall be placed of record in the Office of the Judge of Probate of Shelby County, Alabama. Said Exhibits B and C shall have affixed to each of them a legend to the effect that same were recorded previously in

the Office of the Judge of Probate of Shelby County, Alabama, but that a copy of same is being re-recorded in connection with the recording of this Order.

E. This Order is a final judgment pursuant to **Rule 54(b)** of the *Alabama Rules of Civil Procedure*.

F. Costs to be taxed to the Movant.

DONE AND ORDERED this 2<sup>nd</sup> day of December, 2010.

  
Hon. HEWITT L. CONWILL, Circuit Judge

cc: J. Sanford Mullins, III, Esquire  
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