IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

NO. 542

PAMELA J. BUCKENMAIER, ET AL,

Appellants

V.

THE KEY SCHOOL,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY (PAUL GARVEY GOETZKE, JUDGE)
CASE NO. 02C11165665

APPELLANTS' BRIEF

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Table of Contents

Table of Citations

Cases

Maryland Rules

Anne Arundel County Code

Statement of the Case

This is an appeal from two orders of the circuit court, an interlocutory Order entered on July 24, 2012 (E 31- 32) and an order of Final Judgment entered on April 24, 2013 (E 18). The July 24, 2012 Order was accompanied by a written Memorandum Opinion (E 19 – 30). The order of Final Judgment was supported by a bench opinion, rendered at the close of trial on April 23, 2103 (E 222 – 234).

On November 2, 2011, Appellee, The Key School (hereinafter "Key") entered into a contract to purchase from George and Linda Graefe ("Graefes") an approximately 70-acre parcel of land known as the Annapolis Roads Golf Course (hereinafter "the golf course"). The golf course is burdened by certain covenants stated in a Declaration of Restriction on Use (hereinafter "the Declaration"), which was imposed by a predecessor in title to the Graefes, for the benefit of property owners in the Annapolis Roads community and the Annapolis Roads Property Owners' Association, Inc.

On November 23, 2011, Appellants Pamela J. and Chester C. Buckenmaier and Patricia H. and Gregory G. Strott ("Appellants") filed in the Circuit Court for Anne Arundel County a Complaint for Declaratory Judgment and Injunctive Relief. Named as defendants were Key, the Graefes, and Ribera Development, LLC ("Ribera"), whom Appellants believed to have an interest in the golf course.[1]

[1] Plaintiffs dropped Ribera Development LLC as a Defendant upon filing an Amended Complaint. The Graefes remained defendants through trial and the filing of this appeal, but have been dismissed by Stipulation of the parties to this appeal. *See* Order of the Court of Special Appeals, November 26, 2013.

In Count II of the Complaint, Appellants sought a declaratory judgment that uses of the golf course proposed by Key were not permitted under the Declaration.[2] Count III was for injunctive relief.

All defendants filed motions to dismiss or in the alternative for summary judgment, as well as motions for protective orders to suspend, pending a ruling on the motions to dismiss, their obligation to respond to certain discovery requests served by plaintiffs with the complaint. The motions for protective orders were granted on March 29, 2912, and the motions to dismiss or for summary judgment came on for hearing on July 9, 2012. The circuit court granted the motions to dismiss, with prejudice as to plaintiffs' ability to obtain declaratory relief, but without prejudice as to their filing an amended complaint for injunctive relief, and provided that any amended complaint must be filed within 90 days. The court also lifted the protective orders vis a vis discovery.

Following the foreshortened period of discovery allowed by the circuit court, plaintiffs filed on October 22, 2012 their Amended Complaint, for Injunctive Relief. Key and the Graefes again filed Motions to Dismiss or for Summary Judgment, which were denied by the Court without hearing

The case came on for trial on April 23, 2013. At the close of Appellants' case, Key and the Graefes moved for judgment under Maryland Rule 2-519. For reasons stated in its bench opinion, the circuit court granted the motion, and on

[2] The Complaint contained two counts for declaratory relief, but Count I was dismissed voluntarily by Appellants in their response to the motions to dismiss. (E 286).

April 24, 2013 entered its order of final judgment. Appellants timely filed their notice of appeal to this Court.

Questions Presented

1. Does Paragraph 3 of the Declaration bar the Appellants from seeking, and the court from granting, any manner of declaratory relief?

2. Did the Circuit Court err in holding that it would deny declaratory relief as a matter of discretion?

3. Does a party seeking to enforce a restrictive covenant need to show proof of irreparable injury?

4. Would Key's use of the golf course as a private school campus violate the Declaration?

5. Did the circuit court err in granting Key's motion for judgment?

Statement of Facts

Annapolis Roads is a community of several hundred homes in Anne Arundel County just south of the City of Annapolis. In the heart of the community lie 70 $\pm$ acres of land known as the Annapolis Roads Golf Course ("the golf course"). The community was laid out in the 1920s by the design firm founded by Frederick Law Olmstead, designer of Central Park in New York City (E 133) to be a community surrounding the open space of the golf course. (E 136 – 137) The entrance thoroughfare to the community, Carrollton Road, wraps around the north side of the golf course, affording residents and visitors vistas of open land.

In 1973 the then owners of the golf course filed suit against the Annapolis Roads Property Owners Association, Inc. (hereinafter "ARPOA") and each and every individual property owner in the Annapolis Roads Community. The golf course owners were seeking a judgment declaring that they could develop the land as they pleased and that the homeowners of Annapolis Roads had no rights concerning the development of the golf course. ARPOA and the homeowners objected stating that from 1927 Annapolis Roads was developed pursuant to a uniform general scheme of development wherein the original developer of the community and its successors agreed to set aside certain beaches and public parks for the perpetual use of the residents of Annapolis Roads. (Amended Complaint, Par. 8, E 304, admitted by Key, E 331).

In 1981, after attorneys for ARPOA and the lot owners had produced in discovery the evidence supporting their contentions, the attorneys for the golf course owners suggested settlement negotiations. (E135). These went on over several years, until in 1986 a proposed settlement agreement was circulated for execution by all of the property owners. The agreement committed the golf course owners to record a Declaration of Restriction on Use of the golf course, the form of which had been negotiated in the settlement and was attached to the settlement agreement. (E34). The agreement provided that by the Declaration, the use of the golf course "shall be forever restricted to one or more of, or any combination of, the following uses:

(1) A golf course, with or without a club house and/or pro shop.

(2) Other recreational uses.

(3) Horticultural nurseries.

(4) Conservation uses.

(5) Accessory uses, including vehicular parking, in connection with the uses in (1) through (4) above.

(6) Rights of way and/or easements to provide for access to inaccessible areas.

(7) Temporary and permanent, primary and accessory structures for the uses listed in (1) through (6) above.

(8) No use. [E 34-35]

The Settlement Agreement committed ARPOA and the individual lot owners to:

> Irrevocably disclaim, anything previously stated at anytime and in any document to the contrary notwithstanding, any right, title, interest or estate, if any, in or to the [the golf course]. [E 37-38]

The Declaration that was part of the settlement agreement further provided that:

> 3. This Declaration of Restriction on Use does not grant, convey, give or otherwise create in any person, firm, corporation or unincorporated association any right, title, interest or estate in or to the subject property EXCEPT that the Annapolis Roads Property Owners Association, Inc., its successors and assigns and/or any person or persons owning a residential lot(s) in the subdivision of Annapolis Roads may prosecute any legal proceeding to enforce this Declaration of Restriction on Use provided the only relief sought is that of an injunction against the violation of the provisions hereof. [E. 60][3]

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3 Appellants are persons owning residential lots in Annapolis Roads (E 127) and filed this litigation under the rights afforded them by this Paragraph 3 of the Declaration.

The Settlement Agreement was executed by ARPOA, all Annapolis Roads lot owners, and by the owners of the golf course. The Declaration was executed by the golf course owners and recorded among the land records in 1987 (E 59-61). (From here on in this brief, the parties to the Settlement Agreement – ARPOA, the individual lot owners in Annapolis Roads in 1986, and the then owners of the golf course – are referred to collectively as "the framers" of the Declaration.)

Following recordation of the Declaration, the golf course property was sold to the Graefes. (E 306 - Amended Complaint, par. 12; admitted, E 331). In 2004, the Graefes entered into an agreement of sale with Ribera (E 70), and in January, 2005, Ribera in turn contracted with St. Mary's Parish ("St. Mary's) for the latter's purchase of a significant portion of the golf course to provide athletic fields and facilities for the parish's private school athletic teams. (E 73). ARPOA started a campaign in opposition to the sale and proposed use of the golf course. (E 74). In March, 2005, Ribera filed suit against ARPOA in the Circuit Court for Anne Arundel County, *Ribera Development, Inc. v. Annapolis Roads Property Owners Association, Inc.*, Case No. C-05-104869. Ribera contended that ARPOA's actions in opposition to the sale and proposed use by St. Mary's constituted a repudiation or material breach of the Settlement Agreement and Declaration because the campaign violated the overall purpose of the agreement. (E 74). Although St. Mary's terminated its contract in February, 2006 (E 74), the case between Ribera and ARPOA went forward to trial in June, 2006, on Ribera's

claim that ARPOA had by its actions repudiated the Declaration and that the remedy should be removal of the restrictive covenant. (E 75)

Following trial, Judge Pamela North issued a Memorandum Opinion and Order granting ARPOA's motion for judgment. (E 70 – 82). In the Opinion, Judge North made findings with respect to the framers' intent in the Settlement Agreement and Declaration. "[T]he purpose of the Settlement Agreement and Declaration was to outline the rights of each party in the golf course, to protect the golf course from uses [ARPOA] felt were adverse to their enjoyment of that land and to maintain the character of their community." (E76 – 77). "The purpose of the covenant is today as it was in 1989. Plaintiff did not prove that the purpose of the covenant was obviated. The community still relies on the covenant to limit the possible uses of the golf course, protect the land for the community, maintain the community's character and determine property rights. No material change in the physical condition of the golf course has occurred eliminating the original reason for the restrictions . . . . The Annapolis Roads community remains a quiet residential area." (E 77)

On November 2, 2011, Key entered into a contract with the Graefes to purchase the golf course. (E 185, 261 – 276) Shortly thereafter, Key announced the intent of this purchase in online postings, which stated, *inter alia*:

> Key School will use the property for instructional purposes, specifically in support of its outdoor education, environmental studies and athletic programs. The School's administration and Board of Trustees will preserve and protect the existing natural areas to serve as outdoor classrooms for Key students who are studying the environment and to provide space for

> outdoor education activities. We will also created playing fields to be used for afterschool practices and games.
>
> Key School is currently "land-locked" on its Hillsmere campus. The School's location within the Chesapeake Bay critical area zone has put severe limitations on our ability to make additional improvements to the campus. In order to achieve some of our long-term aspirations, we needed to have the flexibility that ownership of this additional property provides.
>
> The additional property will serve as an environmental and athletic extension to Key's Hillsmere campus. [E85-86]

Key entered into the contract to purchase the golf course with full knowledge of the Declaration and that St. Mary's attempt in 2005 to purchase the property for use as private school athletic facilities had been opposed by the community. (E 184 – 185).

On January 18, 2012, Key and the Graefes rescinded the November 2, 2011 contract of sale (E 96) and simultaneously entered into a new contract of sale. (E 87 – 95)[4] Key proceeded to engage consulting architects, engineers and planners to develop their plans for the golf course, and in September, 2012 filed their preliminary plan with the County Office of Planning and Zoning to start the required County approval process for development of the property (E 97, 191-192) The plan depicts proposed development of the site to include a maintenance facility, baseball field, athletic field surrounded by a track, tennis courts, and two general purpose fields, a parking area and a pavilion structure. (E 232).

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4 The redactions that appear on the copy of the January 18, 2012 Agreement of Sale included in the Extract were made by counsel for Key before disclosure of the document in discovery. (E 187)

At trial, testimony of Marcella Yedid, Head of Key School, and Wesley Jones, then president of the Key Board of Trustees, confirmed the statement in the November, 2011 online posting that these facilities would be an extension of the Key's private school campus. Use of the golf course as planned would free up space on the Hillsmere campus for realization of Key's long range capital development plan, which includes construction of a fine and performing arts center on the Hillsmere campus. (E 176) The golf course site would be developed so as to serve the best interests of Key students. (E 177, 188) The facilities would not be available for use by members of the public, and could be used by residents of Annapolis Roads only at Key's sufferance, under whatever conditions Key might choose to impose. (E 189).

Argument

I. The Standard of Review

In *Saxon Mortgage Services, Inc. v. Harrison*, 188 Md. App. 228, 261-263, 973 A. 2d 841, 860-861 (2009), this Court summarized the standard for review of a trial court's judgment on a motion under Rule 2-519, in an action tried by the court:

> Maryland Rule 2-519(a) provides that "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of the evidence." Maryland Rule 2-519(b) provides:
>
> > When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment

> until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Unlike in a jury trial, a trial judge in a bench trial considering a Rule 2-519 motion for judgment "is not compelled to make any evidentiary inferences in favor of the party against whom the motion for judgment is made." *Bricker v. Warch*, 152 Md. App. 119, 135-36, 831 A.2d 453 (2003). Accordingly,

> [appellate review] of the decision of the trial court on the evidence is governed by the "clearly erroneous" standard set out in Rule 8-131(c) and the trial judge is "allowed to evaluate the evidence as though he [she] were the jury, and to draw his [or her] own conclusions as to the evidence presented, the inferences arising therefrom and the credibility of the witnesses testifying."

Id. (citations omitted).

A trial court's factual findings are not clearly erroneous as long as they are supported by any competent material evidence in the record. *See Figgins v. Cochrane*, 403 Md. 392, 409, 942 A.2d 736 (2008) (citations omitted). However, """[t]he clearly erroneous standard for appellate review in [Maryland Rule 8-131(c)] does not apply to a trial court's determinations of legal questions or conclusions of law based on findings of fact."" *L.W. Wolfe Enterprises, Inc. v. Maryland Nat'l Golf, L.P.*, 165 Md. App. 339, 344, 885 A.2d 826 (2005) (citations omitted). Rather, "'where the order involves an interpretation and application of Maryland statutory and case law, appellate courts must determine whether the lower court's conclusions are "legally correct" under a de novo standard of review.'" *Id.* (quoting *Walter v. Gunter*, 367 Md. 386, 392, 788 A.2d 609 (2002))

II. The Court's Holding that Appellants Are Not Entitled to Declaratory Relief Was Wrong as a Matter of Law

In its Memorandum Opinion and Order of July 24, 2012, the circuit court granted motions to dismiss, with prejudice, as to Appellants' claims for

declaratory relief.[5] The circuit court held that it was the clear intent of the Declaration that Appellants, as Annapolis Roads property owners seeking to enforce the provisions of the Declaration, were barred from seeking declaratory relief. The court further held that even if the terms of the Declaration did not bar the parties from seeking declaratory relief, the court would exercise its discretion to refuse to grant any declaratory relief. E 28-29.

A. The Framers of the Declaration Did Not Intend to Bar Declaratory Relief In Suits to Enforce the Declaration

The pertinent language of the Declaration states in its entirety:

> 3. This Declaration of Restriction on Use does not grant, convey, give or otherwise create in any person, firm, corporation or unincorporated association any right, title, interest or estate in or to the subject property EXCEPT that the Annapolis Roads Property Owners Association, Inc., its successors and assigns and/or any person or persons owning a residential lot(s) in the subdivision of Annapolis Roads may prosecute any legal proceeding to enforce this Declaration of Restriction on Use provided the

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[5] Among the several grounds for dismissal argued in defendants' motions to dismiss, the ground relied upon by the court was asserted only in the Memorandum in Support of the Graefes' Motion to Dismiss, as follows:

> Plaintiffs have sought relief in their Complaint far beyond the limited rights they enjoy under the Declaration of Restriction on Use. All claims for relief beyond ". . . an injunction against the violation of the provisions hereof" must be dismissed. [E 278].

For support of this proposition, the Graefes quoted out of context two sentences from Judge North's opinion in *Ribera Development, Inc. v. Annapolis Roads Property Owners Ass'n.*, but cited no other case law. Notably, in its Motion to Dismiss and supporting Memorandum of Law, Key did not raise or address this point as grounds for dismissal of the complaint. E 250-260. In other words, the circuit court's July 24, 2012 Memorandum Opinion was rendered without briefing by counsel for the parties of any pertinent case law.

> only relief sought is that of an injunction against the violation of the provisions hereof. [E. 60]

However, the Court did not quote this provision in its entirety, but rather paraphrased it as follows:

> Plaintiffs' allegations also demonstrate that they are attempting to enforce the Declaration's use restrictions by "prosecut[ing] . . . legal proceeding[.]" Therefore, in prosecuting these proceedings, "the only relief [Plaintiffs may seek] is that of an injunction against the violation of the provisions [t]hereof. In prosecuting these legal proceedings, Plaintiffs seek declaratory relief. Complaint, Counts I and II. To that extent, Plaintiffs have exceeded the limits of their permissible remedies. [E 28]

The court left out of its analysis the plain language of the Declaration that any property owner in Annapolis Roads "may prosecute any legal proceeding to enforce this Declaration." (emphasis added). Further, the court failed to evaluate the phrase "provided the only relief sought is that of an injunction" in the context of the entire paragraph in which it appears.

Appellants submit that paragraph 3 of the Declaration, read as an entirety, expresses no intent to bar the use of declaratory relief in enforcement proceedings. Rather, the limitation of relief to injunction expressed at the end of the paragraph is simply a complement to the statement at the beginning of the paragraph that the Declaration "does not grant, convey, give or otherwise create in any person, firm, corporation or unincorporated association any right, title, interest or estate in or to the subject property." With no intent to convey any interest in the subject property, there can be no basis for any person seeking enforcement of the Declaration to claim any form of monetary damages for violation of the covenants.

Moreover, this reading of the paragraph is reflective of existing law, which the framers are presumed to have known in drawing up terms. *Louis Fireison & Associates v.* Alkire, 195 Md. App. 461, 474, 6 A.3d 945, 953 (2010). As this Court noted in *Coster v. Department of Personnel*, 36 Md. App. 523, 525, 373 A.2d 1287, 1289 (1977), "A court of equity reserves its injunctive process for the protection of property or other rights against actual or threatened injuries of a substantial character which cannot be adequately remedied in a court of law." (emphasis added). The framers simply intended that no claim for damages could be part of enforcing the covenants stated in the Declaration, and that the parties therefore were limited to the alternative remedy of injunction.

In its July 24, 2012 Memorandum Opinion and Order, the lower court in footnote 3 (E 27-28) stated that Judge North's opinion in *Ribera Development, Inc. v. Annapolis Roads Property Owners Ass'n.* "had construed the Declaration in that matter as well." To the contrary, Judge North's opinion supports Appellants' contention that this provision was simply intended to bar suits for monetary damages:

> It is worth exploring the purpose of paragraph 3 in the Declaration. The Court finds the drafters merely intended that Defendant would always have some enforcement mechanism, but it would be limited to seeking an injunction. In other words, no member of the community would be permitted to make money in any lawsuit by suing for damages in the event of a breach. That restriction is wholly consistent with the obvious purpose for the covenant, that the community be able to enforce the covenant in a court of law for the benefit of the entire community, but no individual person could profit from it.

Judge North had it right, whereas her colleague in the present case got it wrong: the framers of paragraph 3 of the Declaration were simply looking to bar suits for monetary damages and had no intent to bar future lot owners like Appellants from suing for declaratory judgments in conjunction with a suit for injunctive relief.

B. The Circuit Court Erred in its Purported Denial of Declaratory Relief as a Matter of Judicial Discretion

The circuit court below further stated:

> Even if we have . . . discretion [to grant declaratory relief] in the face of Plaintiffs' unambiguous waiver of the right to seek declaratory relief, we would not exercise it in this case. Courts enjoy a "measure of discretion to refuse a declaratory judgment." *Loveman v. Catonsville Nursing Home, Inc.,* 114 Md. App. 603, 611 [691 A 2d 693, 697] (1996). Maryland appellate courts have said that declaratory judgment is intended to supplement relief 'in a field not wholly or adequately occupied by subsisting remedies of law and equity.' *Himes v. Day*, 254 Md. 197, 206, [254 A. 2d 181, 186] (1969) (*quoting, Caroline Street Permanent Building Association No. 1 v. Sohn*, 178 Md. 434, 444 [13 A.2d 616] (1940). [E 29]

Appellants submit that the circuit court completely misread the law that it cited.

Himes actually had quoted *Schultz v. Kaplan*, 189 Md. 402, 409, 56 A.2d 17] (1947), which in turn referenced *Caroline Street Permanent* as follows:

> It was pointed out in the case of *Caroline Street Permanent Building Association No. 1 v. Sohn, supra,* 178 Md. 434, at page 444, 13 A. 2d 616, decided in 1940 under the Acts of 1939, Chapter 294, that the object of the declaratory judgment act is to supplement and enlarge procedural relief in a field not wholly or adequately occupied by subsisting remedies of law and equity. The amendment of 1945 definitely makes that act concurrent with existing remedies both at law and in equity. [emphasis added]

Earlier in the *Schultz* opinion, 189 Md. at 407, the Court emphasized that:

> The purpose and intent of Chapter 724 of the Acts of 1945 was to make the Uniform Declaratory Judgments Act concurrent with existing remedies and

> to declare that the existence of another adequate remedy at law or in equity should not preclude a judgment for declaratory relief in cases in which it was appropriate.

Thus far from stating a reason to deny declaratory relief in the present case, *Himes* reaffirmed that declaratory relief is appropriate concurrently with existing remedies, in this case the remedy of injunctive relief.

Nor does *Loveman v. Catonsville Nursing Home, Inc., supra,* suggest any reason why declaratory judgment should be denied in the present case. The full quote from *Loveman* at the page reference cited by the circuit court, 114 Md. App. at 611, is as follows:

> [Courts & Judicial Proceedings Article, Section 3-409(a)] states that a court "may" grant a declaratory judgment under the circumstances noted, not that it must. The courts have interpreted that as allowing a measure of discretion "to refuse a declaratory judgment when it does not serve a useful purpose or terminate controversy." *Staley v. Safe Deposit & Trust Co.*, 189 Md. 447, 456-57, 56 A.2d 144 (1947). The process should not be used to decide "purely theoretical questions or questions that may never arise." *Hamilton v. McAuliffe,* 277 Md. 336, 340, 353 A.2d 634 (1976).

In their original Complaint, Plaintiffs requested in Count II "that this Court find and declare that ball fields and other types of athletic fields, education facilities and similar extensions of a school campus would not be permitted uses under the Declaration of Restriction on Use." E 248. The question of whether Key's proposed use of the golf course would violate the Declaration had arisen and was not theoretical: Key had contracted to purchase the golf course and announced its plans for its use. Whether Key's proposed use would violate the Declaration was a matter of actual controversy between Appellants and Key. A declaratory

judgment by the lower court as to Key's right to use the property as proposed could have terminated the controversy and thereby served the useful purpose of preventing Key's expenditure of large sums in furtherance of a use that might ultimately be determined a violation of the Declaration. In sum, under the holding of *Loveman*, this was not an instance for any discretionary denial of declaratory relief.

C. There is No Requirement for a Showing Of Irreparable Injury in a Suit to Enjoin Violation of a Restrictive Covenant

In further support of its discretionary denial of declaratory relief, the circuit court suggested that affording Appellants declaratory relief "allows them to avoid the obligation of proving that they have been irreparably harmed by Key School's actions. *See, Bey Moorish Science Temple of America*, 362 Md. 339, 357 [765 A.2d 132, 141] (2000)." E 29. However, *Bey* was not a case involving an injunction to enforce a restrictive covenant. In the later case of *Chestnut Real Estate Partnership v. Huber*, 148 Md. App. 190, 811 A.2d 389 (2002), this Court considered whether the general rule of *Bey* – that a request for injunctive relief must be supported by a showing of potential, irreparable injury – is applicable in an action for injunctive relief to enforce a restrictive covenant. This Court held that the *Bey* rule "does not control where a mandatory injunction is sought to enforce a restrictive covenant." 148 Md. App. at 205, 811 A.2d at 398. This holding of *Chestnut Real Estate* has not been disturbed by the Court of Appeals in

any subsequent case. Thus the circuit court's reliance on *Bey* as reason to deny declaratory relief as a matter of discretion was completely misplaced.

In addition to *Bey*, in opining that Appellants would have to show irreparable injury in order to obtain an injunction to enforce the Declaration, the court also quoted the following from *Colandrea v. Wilde Lake Community Association*, 361 Md. 371, 381, 761 A. 2d 899, 904 (2000): "An injunction will lie to enforce a restrictive covenant with respect to the use of the land conveyed, provided proper ground therefore exists." However the "proper ground" discussed in *Colandrea* was not irreparable harm, but the distinctly different, equitable doctrine of comparative hardship. The Court of Appeals held that actual knowledge of a restrictive covenant before purchase of a property "leave[s] no room for the application of the doctrine of comparative hardship" in a case brought to enforce the covenant. 361 Md. at 398, 761 A. 2d at 912. As recounted in the Statement of Facts above, Key had actual knowledge of the covenant that Appellants seek to enforce before it purchased the golf course. Finally, *Colandrea* was one of the cases cited by this Court in *Chestnut Real Estate Partnership, supra,* in reaching its conclusion that a finding of irreparable harm is <u>not</u> required in a suit for injunctive relief to enforce a restrictive covenant.

The circuit court suggested that "a declaratory action would allow Plaintiffs to avoid the trouble and expense of filing a bond under Rule 15-503. As a result, Defendants might be exposed to unreimbursed financial loss for no legitimate reason." E 29. To the contrary, the whole intent of the Declaratory Judgment Act

is to enable courts to resolve actual controversies as soon as they are ripe, so as to avoid unnecessary expense on the part of all parties. In filing their claim for declaratory relief, Appellants were not seeking to avoid a bond, but to timely resolve their controversy with Key. A benefit of declaratory judgment early in this controversy could have been that Key would not suffer financial loss by spending funds towards plans for the golf course that might be deemed in violation of the Declaration.

In sum, to the extent that the lower court may have enjoyed any discretion to deny Appellants' claim for declaratory relief, it abused that discretion by basing its reasons for denial on misreadings or misunderstandings of applicable law.

D. At Trial, the Circuit Court Should Have Addressed Appellants' Claims for Declaratory Relief and Granted Same

In their Amended Complaint for Injunction, Appellants renewed their request for declaratory relief, as necessary to frame an appropriate order of injunctive relief. Appellants requested that the court:

> A. Find and declare that the use of the golf course property by The Key School for outdoor education, environmental studies and for student athletic facilities is an educational use of the property that is not permitted under the Declaration of Restriction on Use, and
>
> B. Find and declare that the use of the golf course property by The Key School for outdoor education, environmental studies and for student athletic facilities is not a "recreational use" of the property that is permitted under the Declaration of Restriction on Use.

At trial, Appellants proffered as Exhibit 6 Key's original online statements, that Key would use the golf course "for instructional purposes, specifically in support

of its outdoor education, environmental studies and athletic programs," E 83, and that the golf course "will serve as an environmental and athletic extension to Key's Hillsmere campus." E 86. Plaintiffs called Ms. Marcella Yedid, Head of Key School (E 168-181), who, in the words of the court, "testified that the plans of Key School were to construct recreational, athletic, and environmental uses, and I think she said maybe others. She indicated that the property would be used by the students for school purposes." E231. Appellants also called Wesley Jones , then President of the Key School Board of Trustees, who also "testified that the property would be used for the benefit of the [Key] students." E 231.

In its bench opinion, the circuit court cited all of the foregoing testimony and evidence. E 230-231. The court acknowledged Appellants' request that the court "find and declare that the use of the golf course property by the Key School for outdoor education, environmental studies, and for student athletic facilities is an educational use of the property that is not permitted under the Declaration of Restrictions on use." E 224. However, the court proceeded to render no opinion as to whether use of the property so described would constitute not merely a recreational use of the property, but rather, overall a use as a private school, educational campus that would violate the Declaration. As discussed *infra*, this issue was placed squarely before the court by the relief requested in the Amended Complaint, by the testimony and evidence proffered by Appellants, and by the law cited in Appellants' Trial Memorandum (E 354 – 363). Yet the court declined to

render any declaration as to the right of Key to use the golf course for expansion of its private school campus.

The circuit court's bench opinion is not a picture of clarity, but it appears that the court was somewhat hamstrung by its July 24, 2012 holdings, that Appellants could not by the terms of the Declaration obtain any declaratory relief and that even if they could, the court as a matter of discretion should decline to grant any such relief. The court noted that requests for relief A & B in the Amended Complaint "seem to request a Declaration, which the Court has already addressed." E 223. The court quoted Appellants' request for a declaration that Key's proposal was for an educational use of the property that is not permitted under the Declaration, E 224, but then proceeded to ignore that issue entirely. The court limited its consideration to whether the Declaration precludes a use depicted on Exhibit 8, Key's preliminary plan for the athletic complex to be constructed on the golf course property. E 227. The court stated, "my decision here today is only with request [sic] for an injunction based upon that document [exhibit 8]." E 228. "And the question becomes are those items [depicted on Exhibit 8] recreational uses or other uses permitted by the Declaration?" E 232.

The circuit court limited its ruling to the physical structures suggested on Exhibit 8: "the Court finds that there is no use depicted on Exhibit 8 that is precluded by the Declarations. The injunction is denied." E 233. This was not a declaratory ruling on the respective rights of the parties. The circuit court's disposition of this case did nothing to resolve or terminate the controversy

between Appellants and Key as to whether use of the golf course as an extension of the Key campus violates the Declaration. The Declaration remains in place, and as Key's use of the golf course in various ways related to school activities evolves over coming years, the prospect of further litigation looms.

In short, Appellants submit that the circuit court erred in not addressing the requests for declaratory relief that Appellants at trial placed squarely before it.

III. Key's Use of the Golf Course as an Extension of Its Private School Campus Would Violate the Declaration

A. The Analytical Framework for Construing a Restrictive Covenant

When the issue before the trial court is interpretation of a deed of restrictive covenant, the court must engage in a sequential analysis, as recently referenced by this Court, in *South Kaywood Community Association v. Long*, 208 Md. App. 135, 144-146, 56 A. 3d 365, 371-372 (2012):

> In *Lowden v. Bosley,* 395, Md. 58, 65-67, 909 A.2d 261 (2006), the rules that govern our analysis of the covenant at issue were set forth, *viz*:
>
> > This Court on numerous occasions has set forth the principles governing the interpretation and application of restrictive covenants. *See, e.g., Miller v. Bay City Property Owners Ass'n.* 393 Md. 620, 903 A.2d 938 (2006); *Roper v. Camuso*, 376 Md. 240, 829 A.2d 589 (2003); *County Commissioners v. St. Charles*, 366 Md. 426, 784 A.2d 545 (2001); *Belleview v. Rugby Hall,* 321 Md. 152, 157, 582 A.2d 493, 495 (1990);T*urner v. Brocato*, 206 Md. 336, 111 A.2d 855 (1955); *Himmel v. Hendler,* 161 Md. 181, 155 A. 316 (1931); *Maryland Coal Co. v. Cumberland and Penn. RR.*, 41 Md. 343 (1875); *Thruston v. Minke,* 32 Md. 487 (1870).
>
> > As Judge Cathell for the Court emphasized in *Miller v. Bay City Property Owners Ass'n, supra*, where the language of an instrument

containing a restrictive covenant is clear with regard to the controversy before the court, there is no occasion to consider extrinsic evidence concerning the intent reflected in the restriction. The Court in *Miller* explained (393 Md. at 637, 903 A.2d at 948, quoting *Maryland Coal Co. v. Cumberland and Penn. R.R., supra.* 41 Md. at 352):

In determining the intent of the parties we must begin with the actual language used in the [instrument]: 'If the intention of the parties is plainly manifest upon the face of the instrument, there is no room for interpretation and there is nothing left for the courts but to carry into effect the intention of the parties so ascertained, unless prevented from doing so by public policy or some established principle of law.'"

Moreover, a lack of ambiguity in the application of the restrictive covenant may be gleaned or reinforced by other language in the instrument. *Miller*, 393 Md. at 638, 903 A.2d at 948 ("It is also useful to look at the language used in the other sections of the . . . deed").

It is only where the restrictive covenant is ambiguous that courts venture beyond the text of the instrument and consider extrinsic evidence. *Miller*, 393 Md. at 634-637, 903 A.2d at 946-948; *County Commissioners v. St. Charles, supra*, 366 Md. at 445-448, 784 A.2d at 557. In construing ambiguous restrictive covenants, this Court at one time held that "a strict construction standard was applicable to promote the free alienability of land," that "the courts were to hold the restriction to its narrowest limits," and that the ambiguity should be resolved in favor of the unrestricted use of the property. *St. Charles*, 366 Md, at 445-446 and n. 17, 784 A.2d at 556-557 and n. 17. More recently, however, "Maryland courts no longer apply a pure strict interpretation or construction, but apply rather, a reasonably strict construction when construing covenants." *St. Charles*, 366 Md. at 447, 784 A.2d at 557. The "reasonably strict construction" principle was explained in *Belleview v. Rugby Hall, supra*, 321 Md. at 157-158, 582 A.2d at 495:

"If the meaning of the instrument is not clear from its terms, 'the circumstances surrounding the execution of the instrument should be considered in arriving at the intention of the parties, and the apparent meaning and object of their stipulations should be gathered from all possible sources.'"

* * *

> "If an ambiguity is present, and if that ambiguity is not clearly resolved by resort to extrinsic evidence, the general rule in favor of the unrestricted use of property will prevail and the ambiguity in a restriction will be resolved against the party seeking its enforcement."

Id. at 65-67. (Emphasis added).

With respect to the appropriate standard of review of a trial court's construction of a deed, "At least initially, the construction of a deed is a legal question for the court, and on appeal, it is subject to *de novo* review." *Calvert Joint Venture #140 v. Snider*, 373 Md. 18, 25, 816 A . 2d 854, 865 (2003). Both a trial court's construction of a restrictive covenant at the first analytical step, i.e. based solely on the clear language of a deed or, and its determination of the necessity to move to the second step of analysis because that language in the deed is ambiguous, are legal determinations subject to *de novo* review.

If the trial court correctly determines that the meaning of the deed is not clear, i.e. that an ambiguity is present, then the court must consider any extrinsic evidence proffered by the parties concerning the circumstances surrounding the execution of the instrument, to arrive at the intention of the parties. *South Kaywood, supra,* at 145-146. Review of the court's factual findings based upon this evidence is under the clearly erroneous standard, per *Saxon Mortgage Services, supra.* However, the ultimate construction of the deed based on those findings remains a legal determination, subject to *de novo* review.

B. Key's Use of the Golf Course as
An Extension of its Private School
Campus is Not Permitted Under
Paragraph I of the Declaration

The issue placed before the lower court by Appellants in their Amended Complaint was whether Key's proposed use of the golf course property for outdoor education, environmental studies and for student athletic facilities overall is a private school use of the property that is not permitted under the Declaration. Appellants submit that this issue could and should have been determined by the circuit court under the first step of the analytical framework described above, construing the terms of the Declaration according to their plain, self-evident meaning. There is no ambiguity as to this issue and no need for the aid of extrinsic evidence in determining the intent of the Declaration.

Testimony and evidence proffered by Appellants at trial established, and the lower court found, that "Key School will use the property for instructional purposes, specifically in support of its outdoor education, environmental studies, and athletic programs," E 230, that "the plans of Key School were to construct recreational, athletic, and environmental uses", "that the property would be used by the students for school purposes," and "for the benefit of the students". E 231. However, the court then failed entirely to construe the Declaration and determine whether these uses in their totality were permitted under paragraph 1 of the Declaration. These findings were supported by the testimony and evidence and

were not clearly erroneous. The findings clearly show that the overall use that Key intends to make of the golf course is not just a "recreational use" of the property, but rather is, as Key announced in its November, 2011 online posting, an extension of Key's private school campus.

In *Anderson v. Associated Professors of Loyola College*, 39 Md. App. 345, 385 A.2d 1203(1978), Loyola, a private college, had purchased two off-campus buildings in a residential zone and was using one for the college president's official residence and one for administrative offices. Colleges and universities were a permitted use in that residential zone, but neighbors contended that because the houses being used by the college were off campus, they were not a permitted "college" use. The court held that notwithstanding their location off campus, "The 'primary or dominant use' of the Millbrook Road properties by Loyola is for education purposes. As such, they are indubitably permitted uses in an R-1 District." 39 Md. App. at 350. In reaching this conclusion, the Court noted:

> A college is more than its classrooms, laboratories, and study halls. It is an undertaking that involves, in today's world, athletic fields, gymnasiums, libraries, faculty and student lounges, school newspaper offices, administrative offices, chapels, and ofttimes faculty residences. A residence for the president of the institution is not unusual.

Moreover, the Court in *Anderson* cited in support of its conclusion the case of *Yancey v. Heafner,* 268 N. C. 263, 150 S.E.2d 440 (1966), in which "the Supreme Court of North Carolina held that the erection of a concrete, 4,000 seat, lighted athletic field was permitted in a single-family residential zone in which schools and colleges were allowed." 39 Md. App. at 350. It was only because the off

campus athletic field in *Yancey* was recognized to be a subpart of the larger school use of property that it was deemed a permitted use. Thus under *Anderson,* it is the law of Maryland that a private school use of property is defined by the whole of the school operation, not one or more of its component parts.

The trial court did not construe the Declaration in light of Key's overall purpose to expand its private school campus. However, it is clear that paragraph 1 of the Declaration was intended to restrict use of the golf course to only the uses specified therein, none of which is a private school campus. Exercising *de novo* review, as well as the authority granted by Maryland Rule 8-131(a), this Court should apply the plain meaning of paragraph 1 of the Declaration to Key's stated intent to use the golf course as an extension of its private school campus and hold that this use is not permitted under the Declaration.

IV. The Judgment of the Trial Court Must be Reversed

Rather than construing the Declaration with respect to Key's total planned use of the golf course, the trial court for some reason felt constrained to limit its consideration to the facilities shown on Key's preliminary site plan. (E 232-233). For the reasons already discussed, this was wrong, and the circuit court's grant of the motion for judgment proffered by Key at the close of Appellants' case should be reversed.

Moreover, even assuming for sake of argument only that this was a proper characterization of Key's intended use of the golf course, the court erred in several

respects in determining whether paragraph 1 of the Declaration authorized these uses.

The court stated, "The questions becomes are those items recreational uses or other uses permitted by the Declaration?" (E 232) The Court did not quote or specify by reference which provision(s) of the Declaration it was construing, but presumably, it was looking at item (2) in paragraph 1 of the Declaration, "Other recreational uses." The court offered no discussion or conclusions about the sequential analysis for construing the terms of a restrictive covenant, as mandated by *South Kaywood, supra,* and the numerous Court of Appeals decisions cited therein. Specifically, the court stated no conclusion as to whether the phrase "Other recreational uses" standing alone had such a clear meaning that there was no need to consider it in the context of other language in the Declaration (although the lack of discussion of any other language would seem to indicate that such was the court's view).

Nor did the circuit court state any conclusion that "Other recreational uses" is ambiguous. However, the court turned to certain extrinsic aids in construing the phrase. Noting that "the County Zoning Code is not determinative of my decision, but it is helpful to it," (E 232), the court cited to County Code, Section 18.1.101 for the definitions therein of "recreational use, active" and recreational use, passive". However, as proved by an exhibit that had been introduced to the court during the motions hearing on July 9, 2012, County Bill No. 15-12 (E 98 – 103), these definitions had only been added to the Code by that bill in 2012. They are

definition numbers (77) and (78) in Section 18-1-101, and Bill No. 15-12 clearly states that one of its purposes was "adding [Sec.] 18-1-101(78) and (79)."

Definitions added to the County Code in 2012 have no legal bearing in construing what the framers may have intended in using the phrase "Other recreational uses" in Paragraph 1 of the Declaration. The only relevant code provisions would be those in existence at the time the Declaration was framed in 1986. *Griffith v. Scheungrab*, 219 Md. 27, 33, 146 A.2d 864 (1959) ("It is familiar principle often applied in the cases that "* * * the laws which subsist at the time and place of making a contract enter into and form a part of it." *Emphasis added*). Appellants introduced at trial Exhibits 3 and 4, the Anne Arundel County Code provisions concerning Open Space zoning that were applicable to the golf course property at the time the Declaration was framed in 1986.[6] (E 62-69) These give a clear indication as to what "recreational uses" meant at the time: community, regional and subdivision recreational facilities accessible by members of the public, boating, swimming, fishing, hunting, golf courses, ice skating, nature study, picnic areas, play areas, and stables. However, the trial court made no mention of this, the law that subsisted at the time the Declaration was framed.

Assuming again for sake of argument only that the recreational facilities depicted on Key's plan comprised the entire "use" to be assessed under paragraph 1 of the Declaration, the lower court construed "Other recreational uses" under an

[6] Exhibits 3 and 4 are two versions of substantively identical provisions. The County Code underwent a recodification during the pendency of negotiations on the Declaration .

inapposite, 2012 provision of the County Code, and failed to consider at all the 1986 County Code provisions that were placed into evidence by Appellants.

Thus even if the trial court were deemed to have characterized correctly the use by Key at issue in the request for injunctive relief, the court was clearly erroneous as to facts and wrong as a matter of law in failing to address the evidence before it and in failing to apply the proper legal analysis for construing the Declaration. The court's grant of the motion for judgment must be reversed, even in the context of the court's limited view of Key's planned use of the golf course.

Conclusion – Relief Requested

Appellants respectfully request this Court to:

Hold that paragraph 3 of the Declaration does not bar the Appellants' claims for declaratory relief;

Hold that the circuit court erred in declining as a matter of discretion to entertain Appellants' claim for declaratory relief;

Overrule the circuit court's opinion in its Interlocutory Order of July 24, 2012 that proof of irreparable injury would have to be shown to support a claim for injunctive relief to enforce the Declaration;

Reverse the circuit court's Interlocutory Order of July 24, 2012;

Under Maryland Rule 8-131(a), hold and declare that Key's planned use of the golf course would be for a private school campus and would violate paragraph 1 of the Declaration;

Reverse the circuit court's judgment for Key at the conclusion of trial; and

Remand this matter to the circuit court with directions to issue appropriate injunctive relief consistent with this Court's opinion.

Respectfully submitted,

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Statement Required by Rule 8-504(a)(8)

This brief was prepared using the Times New Roman font, type size 13.

Certificate of Service

I hereby certify that on this 2nd day of January, 2014, two copies of the foregoing Brief of Appellants and of the accompanying Record Extract were served by hand upon counsel for Appellee, Rignal W. Baldwin, Esquire and Kemp P. Hammond, Esquire, Baldwin, Kagan & Gormley, LLC, 112 West Street, Annapolis, MD 21401.

Thomas A. Deming

Appendix of Statutes and Rules

Maryland Rules

Rule 2-519. Motion for judgment

(a) Generally. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(b) Disposition. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

(c) Effect of denial. A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

(d) Reservation of decision in jury cases. In a jury trial, if a motion for judgment is made at the close of all the evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury. For the purpose of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered.

Rule 8-131. Scope of review

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

§ 18-1-101. Definitions.

Unless defined in this article, the Natural Resources Article of the State Code, or COMAR, words defined elsewhere in this Code apply in this article. The following words have the meanings indicated:

(77) "Recreational uses, active" means recreational activities, other than golf courses, that require special facilities, fields, or equipment, such as playgrounds, ice skating rinks, running tracks, and athletic facilities, including playing fields for athletic events, tennis courts, basketball courts, and swimming pools.

(78) "Recreational uses, passive" means recreational activities that require minimal changes to the site and preserve natural features, such as nature areas, picnic areas, walking or hiking areas, fishing areas, hunting areas and bird or wildlife watching areas.