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Bessie M. Decker
Clerk Court of Appeals of Maryland

**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2014

Petition Docket No.: 306

PAMELA J. BUCKENMAIER, *et al.*

Petitioners

v.

THE KEY SCHOOL

Respondent

ANSWER TO PETITION FOR WRIT OF *CERTIORARI*

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OVERVIEW

The claims of Petitioners, Pamela J. Buckenmaier, Chester C. Buckenmaier, Patricia H. Strott, and Gregory G. Strott (“Petitioners”) involve basic principles of restrictive covenant and contract law. The analysis and application involve restrictive covenants in the 1987 Declaration of Restriction on Use. There is nothing complex about the restrictive covenants in the Declaration. There is nothing unique in the legal issues that arise in applying the restrictive covenants in the Declaration. This Court unequivocally and consistently has articulated the applicable law regarding restrictive covenants.

Petitioner casts this case as,

. . . [an] opportunity to address and clarify, particularly for the benefit of those practitioners who may be called upon to draft restrictive covenants intended to outlast changes in zoning over the years, the interplay between use terminology in zoning ordinances and in the language of restrictive covenants, and the role that contemporaneous zoning ordinances should play in the legal interpretation of restrictive covenants on use.

(Pet. Cert., 3). Practitioners always have had to consider the language in current zoning ordinances and the potential for changes in zoning ordinances when drafting restrictive covenants. Further, the “interplay between use terminology in zoning ordinances and in the language of restrictive covenants” is not a novel concept, nor is there any vagueness or confusion that requires further consideration by this Court that would serve the public interest.

The trial court, sitting as the trier of fact, considered the proposed uses by Respondent, The Key School (“Key School”) to determine whether the uses were

permitted under restrictive covenants recorded in the Land Records of Anne Arundel County. The trial court concluded that Key School's proposed uses did not violate the restrictive covenants. These conclusions were derived from testimony regarding the proposed uses by Key School, a preliminary site plan that depicted Key School's proposed uses, and the plain language of the unambiguous restrictive covenants in the Declaration. These conclusions also resulted from a complete failure of Petitioners to present a *prima facie* case that required a response.

QUESTION PRESENTED

Did the lower court properly grant final judgment in Key School's favor on Petitioners' Injunctive Relief claim in Petitioners' Amended Complaint?¹

STATEMENT OF THE FACTS

Petitioners' claims involve Key School's purchase of property containing approximately seventy (70) acres of land and a golf course in (but not a part of) the Annapolis Roads Subdivision in Anne Arundel County ("Property"). The Property is located in the Annapolis Roads Community, just outside of the City of Annapolis in Anne Arundel County ("County"). As part of the Annapolis Roads Community plan, the original developer included a six-story hotel for public use. Up until the 1970's, there was a large swimming pool complex in the Annapolis Roads Community, which hosted

¹ In their Petition for *Certiorari*, Petitioners do not request that this Court review the other question presented for review to the Court of Special Appeals, which is the following: Did the lower court properly grant summary judgment in favor of The Key School ("Key School") on Petitioners' claims for Declaratory Relief (Counts I and II of Petitioners' Original Complaint)?

competitive athletic events with teams from other communities. Members of the public enjoyed unfettered access to these events. At some point, other recreational facilities, including tennis courts, were within the Property.

I. Prior Litigation.

In 1973, the owners of the Property filed suit against the Annapolis Roads Property Owners Association ("ARPOA") and each of the residents in the Annapolis Roads Community. The Property owners sought a judgment declaring that they could develop the Property as they pleased and that the homeowners of Annapolis Roads had no rights concerning the development. The proposed development involved more residential housing. On November 30, 1986, after 13 years of litigation, the Property owners and every resident in the Annapolis Roads Community entered into the Agreement of Settlement. As part of the Agreement of Settlement, the parties agreed to a Declaration of Restriction on Use (the "Declaration") on the Property, recorded in the Land Records of the County in 1987 at Liber 4362, Folio 895-903.

The Declaration (Paragraph 1) restricted the Property to one or more of 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.

Paragraph 2 of the Declaration states,

Declarants reserve to themselves, their personal representatives, heirs, successors and assigns the sole discretion to determine (1) whether the subject property is to be used at all and if it is used (2) to which of the above listed use or uses the subject property is to be put, the use or uses made of the subject property, if any, being subject to change from time to time to some other listed use or uses and (3) *by whom the subject property may be used.*

(emphasis added). Paragraph 3 of the Declaration addressed the types of legal actions permitted to enforce its terms:

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 sub-division 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.*

(emphasis added).

Following the recordation of the Declaration, the Graefes purchased the Property. On June 3, 2004, the Graefes entered into an agreement to sell the Property to Ribera. Pursuant to the Agreement of Sale, Ribera hoped to obtain substantial changes to the Property in order to develop a residential subdivision, including “modification to the existing Covenant Restrictions, modification to the Critical Area designation for the property, modification of the existing zoning and annexation into the City of Annapolis.” On January 18, 2005, Ribera entered into an Agreement of Sale with St. Mary’s Parish in Annapolis, Maryland (“St. Mary’s”) to sell a significant portion of the Property for St.

Mary's athletic fields and team facilities. ARPOA launched a campaign in opposition to the sale and proposed use of the Property. On February 23, 2006, St. Mary's terminated its Agreement of Sale with Ribera.

On March 31, 2005, Ribera filed a Complaint for Declaratory Judgment, Injunctive and Related Relief against ARPOA in the Circuit Court for Anne Arundel County, *Ribera Development, Inc. v. Annapolis Roads Property Owners Association, Inc.*, Case No. 02-C-05-104869 (the "Ribera Case"). According to Appellants' witness, Barbara Samorajczyk, "[t]he issue in that case [Ribera] was that St. Mary's wanted to purchase the golf course to use it for recreation – to use it for school recreation purposes." However, the Ribera Case did not involve the permitted uses of the Property under the Declaration. The only issue was whether ARPOA repudiated or materially breached the Agreement of Settlement and Declaration through its opposition campaign. Ribera sought to nullify the Agreement of Settlement to pursue residential development of the Property, a use clearly precluded by the Declaration.

On July 12, 2006, the Circuit Court for Anne Arundel County issued its Memorandum Opinion and Order in the Ribera Case. The Circuit Court (Hon. Pamela L. North) dismissed Ribera's claims and held that "[n]othing in the Declaration . . . strips Defendant [ARPOA] of all its rights, or states that Defendant [ARPOA] is barred from vocalizing its objections to a planned development." In referring to the Declaration, the Court stated that "*[a]fter thirteen years of litigation, the parties made their intention and the purpose of the restrictive covenant clear.*" (emphasis added). When referring to Paragraph 3 of the Declaration, the Court stated the following:

This clause gives Defendant [ARPOA] (a non owner) standing to sue to protect the agreed upon restrictive uses, but limits Defendant's legal remedy. Defendant can *only* seek an injunction, if and only if, the restrictive use provisions are violated.²

(emphasis added).

II. Key School's Purchase.

In August 2011, Wesley Jones ("Mr. Jones"), as the President of Key School's Board of Trustees, met with members of the ARPOA Land Use Committee and officers of ARPOA to discuss the possible purchase and intended use of the Property by Key School. On November 2, 2011, Key School and the Graefes executed an Agreement of Sale of the Property. On November 9, 2011, Key School announced on its website that it had completed a contract for purchase of the Property. On November 23, 2011, Petitioners filed their lawsuit against Key School.

On January 18, 2012, Key School and the Graefes terminated the original November 2, 2011 Agreement of Sale and replaced it with a new Agreement of Sale of the Property. The purpose of the land purchase was to utilize nature trails and other conservation uses, and to create recreational facilities, including athletic fields together with accessory facilities such as a parking lot, maintenance buildings and locker rooms. The facilities would be for the benefit of Key School's students.

In September 2012, Key School submitted its preliminary site development plan to the County Office of Planning and Zoning. As reflected on the preliminary plan (the only

² The issue of whether a proposed use rather than a violation created a justiciable controversy was not raised by the parties or considered by the trial court. Key School wanted a ruling before proceeding.

plan submitted by Appellants at trial), Key School intends to create multipurpose athletic fields for lacrosse, soccer and field hockey, as well as a baseball diamond, tennis courts, exercise and nature trails, and accessory structures for locker rooms, maintenance and administration.

STANDARD OF REVIEW

Section 12-203 of the Courts and Judicial Proceedings Article sets forth the appropriate standard of review on appeal:

If the Court of Appeals finds that review of the case described in § 12-201 of this subtitle is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

MD. CODE ANN., CTS. & JUD. PROC. § 12-203. The *certiorari* procedure provides for a discretionary appeal. *Walston v. Sun Cab Co.*, 267 Md. 559, 298 A.2d 391 (1973). That Court's discretion is applied when the Court determines a review of the issues presented is desirable and in the public interest. *Id.* Specifically, the Court exercises its discretion to correct confusion in the law, to clarify the law in the absence of definitive precedent, and to expand or limit the law to conform to the public interest. *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 561, 870 A.2d 168, 184 (2005).

The trial court analyzed the facts and used well-established correct legal standards in applying the Declaration's restrictive covenants to Key School's proposed use of the Property. The trial court had ample evidence and was not clearly erroneous in its

evaluation of the evidence. It applied basic legal tenets that are clear and unequivocal. In its *de novo* review of the trial court's denial of Petitioners' injunction claim, the Court of Special Appeals determined that the trial court was legally correct in awarding judgment in favor of Key School. The Court of Special Appeals unanimously affirmed the trial court's finding that the Declaration does not preclude Key School's proposed uses of the Property. Both the trial court and the Court of Special Appeals applied the well-established legal principles relating to restrictive covenants and contract law, including a plethora of decisions that recite the law of contract interpretation. Petitioners fail to demonstrate any lack of clarity or confusion in the law and fail to provide any reason why further review would be desirable or in the public interest.

ARGUMENT

Petitioners argue that Key School's uses are not permitted under the Declaration. Petitioners' reasoning is that the zoning laws applicable to the Property in 1987 are pertinent to the legal interpretation of the Declaration and that the Declaration does not authorize primary use of the Property for all or any part of a private school. (Pet. Cert., 10 – 12).³ The Court of Special Appeals disagreed with Petitioners and unanimously held that: 1) Key School's proposed structures and uses on its preliminary site plan are permissible under the Declaration; 2) the construction of nature trails for purposes of facilitating Key School's environmental studies and outdoor education programs are

³ Petitioners fail to address the absence of any reference in the Declaration to zoning laws and fail to present any reason the trial court should have considered zoning law to resolve any purported ambiguity in the agreement.

permissible; and 3) Key School's status as an educational institution does not, by itself, prohibit it from engaging in uses otherwise permitted under the Declaration. (Op., 23).

Petitioners' question presented to this Court is unremarkable; the law regarding interpretation of unambiguous restrictive covenants remains settled and clear. Despite the plain meaning of the Declaration's language and its unambiguity, Petitioners continue to interject the "framers' intent" into the restrictive covenant language.⁴ This is contrary to the principles of construing restrictive covenants. As the Court of Special Appeals noted in its Opinion,

Our task is to examine the agreement the parties did sign, not the agreement that one or the other now wishes they had negotiated instead. And although it may seem cold to hang our decision on rules of construction, certainty in contracts is important too, especially when the language of the contract is unambiguous

(Op., 24) (quoting *Newell v. Johns Hopkins Univ.*, 215 Md. App. 217, 242 (2013), *cert. denied*, 437 Md. 424 (2014)).

I. Construing Unambiguous Restrictive Covenants.

The trial court concluded that the restrictive covenants in the Declaration, specifically the phrase, "recreational use," as applied to Key School's proposed uses is plain and unambiguous. The intermediate appellate court affirmed holding ". . . extrinsic evidence is irrelevant to our determination." (Op., 22).

⁴ Petitioners have argued "framers' intent" throughout these proceedings, but they failed to present any evidence at trial regarding intent. Thus, the issue was not preserved on appeal.

A court must give effect to the restrictive covenants in the Declaration if they are clear and unambiguous. *See, e.g., County Comm'rs. of Charles County v. St. Charles Assocs. Ltd. P'ship*, 366 Md. 426, 784 A.2d 545 (2001). "The clear and unambiguous language of an agreement will not give way to what a party thought [or now thinks] the agreement meant or was intended to mean." *Id.* There is no room for contract interpretation when the intent of the parties is plainly manifest upon the face of the instrument. *Id.*

In its ruling, the trial court performed the sequential analysis as mandated in *South Kaywood Cmty. Ass'n. v. Long*, 208 Md. App. 135, 56 A.3d 365 (2012) to construe the terms of a restrictive covenant. The trial court found that the language was unambiguous and, as a result, it did not need to consider extrinsic evidence. The trial court ruled, as the Court of Appeals stated in *Miller*, that ". . . the intention of the parties [to the Declaration] is plainly manifest upon the face of the instrument." *See Miller v. Bay City Prop. Owners Ass'n.*, 393 Md. 620, 637, 903 A.2d 938, 948 (2006). In its ruling, the trial court did not rely upon any extrinsic evidence. It considered the *Webster's Dictionary* definition, applicable case law, and the County Code.

The Declaration restricts the Property to several uses and each of the uses is unrestricted as to size, location or user. The interpretation of the Declaration is based as much upon language the parties did not include as upon the language they did include. There is no statement, or even suggestion, in the Agreement of Settlement that there are any limitations as to use (or the user) other than those enumerated in (1) through (8).

There is no limitation as to the scope of each such use. There is also no reference to zoning law.

Webster's Dictionary, Third Edition, defines "recreational" as follows: "of or relating to recreation < a ~ area with cinder track, tennis courts, and practice fields." *Webster's New International Dictionary* (3d ed. 2002). The trial court appropriately applied the ordinary and plain meaning of (1) through (8) in the Declaration to the uses proposed by Key School. In determining whether some of Key School's proposed uses are "conservation uses" under the Declaration, the Court of Special Appeals consulted the *Black's Law Dictionary* definition of "conservation." (Op., 20).

Courts frequently have consulted and relied upon the dictionary to determine if a word or phrase has a "plain and ordinary meaning." See *Harvey v. Marshall*, 389 Md. 243, 261 n. 11, 884 A.2d 1171, 1181 (2005). The dictionary definition juxtaposed to Key School's proposed uses should be the beginning and end of the analysis. The Court of Special Appeals agreed with the trial court's approach in construing the unambiguous restrictive covenant language and applied settled principles of law repeatedly articulated by this Court. E.g., *County Comm'rs. of Charles County*, 366 Md. 426 (2001).

II. Application of Prior and Current Zoning Code.

Contrary to Petitioners' contention, the trial court did not err in considering in its ruling the current Anne Arundel County Code definition of "recreational use." As the trial court explained, "the County Zoning Code is not determinative of my decision, but it is helpful to it." (Op., 21). The consideration of matters outside of the restrictive covenant to support a finding is not inconsistent with the ultimate determination that the

language is clear. In *South Kaywood*, the court also considered the terms of the current zoning law to assist in its construction of a restrictive covenant from 1961. *Id.* at 136, 150 – 52, n. 4. Neither the trial court nor the Court of Special Appeals relied on the current version of the Code. A court’s consideration of current zoning law to confirm or support its interpretation of unambiguous restrictive covenant language is proper and does not create a novel appellate issue for this Court.

Petitioners contend that the limited uses permitted in “open space” zoning at the time the Declaration was drafted must be applied when interpreting the restrictive covenant language. (Pet. Cert., 2, 11). The contention lacks legal authority and it lacks support from the Declaration’s language. The Declaration does not indicate that the phrase, “recreational uses,” is synonymous with the Code’s provisions as of 1987 concerning “open space.” (Op., 22). As the Court of Special Appeals stated, “because ‘open space’ uses were defined in the Code at the time the Declaration was formulated, the parties easily could have used the term ‘open space’ or referenced the zoning code if they so desired, but they did not.” (*Id.*, 22). The failure to include in the Declaration the specific “open space” uses in the Code as of 1987 lacks any semblance of an issue that provides a novel question of law or would concern the public.

III. Key School’s Proposed Uses Are Permitted Regardless of Its Status As A School.

Petitioners do not contend Key School’s proposed uses are contrary to the restrictive covenants. The evidence presented at the trial court clearly demonstrates that the proposed uses are either recreational or conservation in nature. Petitioners contend

that the Declaration does not permit Key School's proposed uses because "other recreational uses" involve a school. Petitioners contend:

[t]here is nothing in the terms of the Declaration, which expressed a clear intent to restrict future uses of the property, to suggest to a reasonable person that the phrases "conservation uses" and "other recreational uses" were intended to authorize primary use of the property for all or any part of a private school campus.

(Pet. Cert., 10). The intention of the parties is not the proper test. *See Slice v. Carozza Properties, Inc.*, 215 Md. 357, 368, 137 A.2d 687, 693 (1958). As stated by the Court of Special Appeals, the plain language in the Declaration enumerates the uses and does not limit the users.

The Declaration does not preclude an educational institution from engaging in any of the enumerated uses. To the contrary, Paragraph 2 of the Declaration states:

Declarants [the Property owners and their successors-in-interest] reserve to themselves . . . the sole discretion to determine (1) whether the subject property is to be used at all and if it is used (2) to which of the above listed use or uses the subject property is to be put, the use or uses made of the subject property, if any, being subject to change from time to time to some other listed use or uses and (3) *by whom the subject property may be used.*

(emphasis added). Key School is permitted to use the Property for a part of its educational purposes as long as the use is recreational, or one of the other enumerated uses (e.g., conservation). Because the analysis must focus on the use, not the user, and given the specific language of the Declaration, whether a student uses tennis or basketball courts is immaterial to determine "other recreational uses" under the Declaration.

As stated by the Court of Special Appeals, the purposes of Key School's recreational and conservation use of the Property, which are to improve the quality of the

athletic and educational programs of the school, are of no consequence. (Op., 20). There is no public interest in this Court reviewing the trial court's and Court of Special Appeals' consistent and appropriate application of the plain language in the Declaration to the uses proposed by Key School.

CONCLUSION

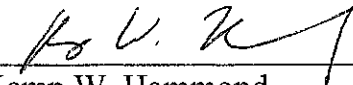
Petitioner has failed to demonstrate any need for further appellate review. There is nothing unique or compelling that requires this Court to clarify, narrow or further define the existing case law regarding interpretation of unambiguous restrictive covenants and contract law.

The case law as to contract interpretation and the application of that law in this case are consistent with the trial court's ruling and the unanimous affirmation by the Court of Special Appeals. For these reasons, Respondent, The Key School, respectfully requests that this Honorable Court deny the Petition for Writ of *Certiorari* filed by Petitioners, Pamela J. Buckenmaier, Chester C. Buckenmaier, Patricia H. Strott, and Gregory G. Strott.

Respectfully submitted,



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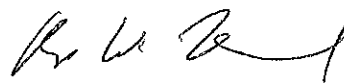
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 2014, two copies of
Petitioner's Answer were mailed first-class, postage prepaid, to:

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Kemp W. Hammond