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Case No. 4061-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD S. PUES and SHERRY K. PUES,	:	
Petitioners,	:	
v.	:	**C.A. No. 4061-VCN**
WILLIAM M. SIMPSON, CHARLES R. HARVEY, MARDELL HARVEY, DOVER MONTESSORI COUNTRY DAY ACADEMY, MARGARET KLING,	:	
Respondents.	:	

MEMORANDUM OPINION

Date Submitted: February 24, 2009
Date Decided: May 25, 2009
Revised: May 26, 2009

Alexander W. Funk, Esquire of Hudson, Jones, Jaywork & Fisher LLP, Dover, Delaware, Attorney for Petitioners.

Gregory A. Morris, Esquire of Liguori, Morris & Yiengst, Dover, Delaware, Attorney for Respondents.

NOBLE, Vice Chancellor

A parcel of land is subject to a restrictive covenant limiting its use to "residential, single-family purposes only." The question presented is whether the parcel may be used for access to a private educational facility to be built on lands not subject to the restriction. This is the Court's decision following trial.

I.

Almost two decades ago, Triarchia Partnership ("Triarchia") subdivided a farm field near Magnolia, Delaware.[1] Generally, residential lots were established along the public roads. These lots were subjected to a Declaration of Restrictions (the "Declaration").[2] Triarchia's remaining lands were not bound by the Declaration.

Petitioners Richard S. Pues and Sherry K. Pues (the "Petitioners") own Lot 3 in the Triarchia Subdivision. These lands are subject to the Declaration. The Petitioners also own approximately twelve acres, adjacent to Lot 3; this additional parcel, now used as pasture for grazing horses, was carved from Triarchia's "unrestricted" lands behind the residential lots.

Respondents Charles R. Harvey and Mardell Harvey ("the Harveys") own Lot 6 of the Triarchia Subdivision and an adjacent, approximately four-acre parcel that was also part of Triarchia's "unrestricted" lands. They have agreed to sell

[1] JX 9 (the subdivision plan).
[2] JX 7. The Declaration was duly recorded among the land records of Kent County, Delaware.

their holdings to Respondent William M. Simpson and his daughter, Respondent Margaret Kling, who intend to erect a facility for Respondent Dover Montessori Country Day Academy (the "School").[3]

Lot 6 is subject to the Declaration.[4] The four-acre parcel (the "Project Site") is not bound by the Declaration. The Buyers plan to construct the School facility on the Project Site. The sole access to the Project Site would be over Lot 6. The current designs for the School anticipates enrollment of fifty-three children initially.[5] The Buyers expect enrollment to increase over time, perhaps to one hundred fifty children in ten years. Under the current plans, the traffic count—primarily teachers and parents transporting children—would be one hundred twenty-one vehicle trips per day.[6] All traffic would access the Project Site over Lot 6 by way of a traffic aisle, twenty-five feet in width.

Although the Petitioners' Lot 3 is neither adjacent to Lot 6 nor the Project Site, their separate parcel of twelve acres is. They have horses on that parcel and, on several occasions, have expressed concerns that children at the School might

[3] JX 1 (the Real Estate Sales Contract). Mr. Simpson and Ms. Kling, who also is the director of the School, will collectively be referred to as the "Buyers." Their spouses, not parties to this proceeding, are also parties to the Real Estate Sales Contract. The Harveys, the Buyers, and the School are sometimes collectively referred to as the "Respondents."

[4] The Harveys were on notice of the earlier recording of the Declaration when they acquired their lands. See JX 11.

[5] That number may decline because of the current economic conditions.

[6] JX 13.

"spook" the horses or come into contact with them with the risk of injury. The Petitioners' opposition to the School—at least during the land use planning stage—appears to have been focused on the potential consequences from horse-child interaction and not on any potential impact of traffic over Lot 6.[7]

The Declaration, at paragraph 6, provides, "Each lot will be used for residential, single-family purposes only . . .".[8] The parties agree that the Declaration was intended to benefit the owners of Lot 3 and that, accordingly, the Petitioners, as a general matter, have a record basis for seeking to enforce the Declaration.[9]

II.

The Petitioners contend that the residential use limitation on Lot 6 precludes it from being employed as an access for the School. The Respondents contest that reading, arguing, in part, that school use occurs only on the Project Site. They also suggest that the provisions of the Declaration at issue are vague and ambiguous. In

[7] There was come concern expressed about the School's causing an increase in traffic on the public roads, but those considerations are public matters for the Delaware Department of Transportation and the Kent County Levy Court.

[8] By paragraph 8 of the Declaration, "[n]o trade, business, commerce, industry, profession, or occupation shall be conducted on any lot."

[9] The Declaration has been modified from time to time, but the changes do not appear to have any impact on this proceeding.

Most of the other lot owners who benefit from the Declaration have expressly waived any right to enforce the Declaration against the School and its intended use of Lot 6. See JX 6. In the waivers, access for the School has been made an exception to the general residential use only requirement.

addition, the Respondents argue that the Petitioners are estopped from enforcing the Declaration against Lot 6 because they and others have violated the Declaration. Finally, the Respondents suggest that the Petitioners' real concerns involve the Project Site and not the use of Lot 6 for access.

III.

Although restrictive covenants are strictly construed because of their impact on private property rights,[10] familiar principles of contract law govern their enforcement. In short, the chosen words are given their plain and ordinary meaning,[11] and, if that process admits of only one reasonable understanding, the covenant is not ambiguous[12] and conduct will be assessed within the context of the common understanding ascertainable from the language chosen by the drafter of the covenant.

The covenant at issue—"residential, single-family purposes only"—is not ambiguous.[13] It has a plain meaning, at least in this context. The School, a for-profit venture,[14] is not residential in nature. Access to it is a critical element of the

[10] *Tusi v. Mruz*, 2002 WL 31499312, at *3 (Del. Ch. Oct. 31, 2002).
[11] *Lawhon v. Winding Ridge Homeowners Ass'n, Inc.*, 2008 WL 5459246, at *6 (Del. Ch. Dec. 31, 2008).
[12] *See, e.g.*, *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003).
[13] In addition, it "serve[s] a legitimate purpose, provide[s] burdened parties with adequate notice of what constitutes proper conduct, and demonstrate[s] a clear intent to burden the property." *Lawhon*, 2008 WL 5459246, at *4.
[14] The for-profit nature may not matter; if the use is anything other than residential, e.g., a charitable institution, the use is not single-family residential.

venture's success and, thus, is part of that endeavor. Crossing a parcel with one hundred twenty-one vehicle trips per day (when the School is open) certainly constitutes as a "use of Lot 6."[15] An access road, regularly used for nonresidential establishments, thus constitutes a nonresidential use of the parcel. When the few words of the covenant are given their plain meaning, they clearly forbid the conduct proposed by the Buyers.[16]

The Respondents argue that the Petitioners should be estopped from enforcing the residential use only provision of the Declaration.[17] They point to a neighbor's boarding of horses and the use of Petitioners' home for North Light Studios. Mrs. Pues is an artist and paints in their home, but she does not sell her work in the home on Lot 3 and customers do not visit her there. These uses are minimal in terms of impact; they would be far exceeded by the open use of Lot 6 for access to the School. Of course, pervasive use that is inconsistent with residential restrictions may become so commonplace that the nonresidential use

[15] "Use" has been defined as "the act or practice of employing something." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1301 (10th ed. 1994). If the School employs Lot 6 for access, the "use" of Lot 6 is access for that facility.

[16] The question of whether an incidental or intermittent use of the lot for access for nonresidential purposes would violate the Declaration is not before the Court. It perhaps could be argued—and the Court expresses no opinion—that an occasional use is not within the meaning of "use" in the context of the Declaration. The sheer number of projected daily vehicle trips forecloses the utility of that inquiry here.

[17] There is some suggestion that standing is implicated. Although the concepts may overlap, the better analytical approach is through estoppel (or other equitable defenses, such as unclean hands) because the Petitioners—as owners of a lot subject to and benefiting from the Declaration—have standing to enforce the terms of the Declaration.

may no longer be precluded.[18] To that extent, but only to that extent, will a restriction be limited by pervasive conduct. The Respondents have not shown any nonresidential uses of such scope or magnitude.

Finally, the Respondents complain that the Petitioners are invoking a residential use restriction on Lot 6 to prevent construction of a school on the Project Site, which, of course, is not restricted and which the Petitioners could not otherwise preclude. In other words, the Respondents contend that the Petitioners are not motivated by concerns over the potential use of Lot 6 but, instead, are seeking a different path to restrict the use of the Project Site. As for why the Petitioners are pursuing this action, the Respondents may well be right. Certainly, their highest priority is stopping the school. The Petitioners, as beneficiaries of the Declaration, are entitled to enforce it—for whatever reason (except for some socially or ethically improper reasons not present here) they may have. Requiring courts resolving this type of dispute to figure out "the real reason" why the action was filed would not likely be a productive effort. In addition, as the Respondents have argued, a failure to enforce a restrictive covenant may jeopardize future enforcement. The Petitioners can plausibly worry that allowing the use of Lot 6 for nonresidential purposes might lead to the use of other lots' access to other

[18] *See, e.g., Welshire Civic Ass'n v. Stiles*, 1993 WL 488244, at *3 (Del. Ch. Nov. 19, 1993).

"unrestricted" lands behind the lots which would then be used for commercial purposes.[19]

IV.

For the foregoing reasons, the School's proposed use of Lot 6 as the only access to the School would violate the residential use provision of the Declaration. The Petitioners are entitled to a declaratory judgment to that effect, and counsel are requested to confer and to submit an implementing form of order.[20]

[19] Although preventing the School's construction on the Project Site may be the practical consequence of the Court's conclusion, the Court's decision is strictly limited to the use of Lot 6.

[20] There seems to be little risk that the Respondents would act inconsistently with any declaratory judgment. Thus, there is no present need for an injunction. When and if an injunction becomes necessary, the Petitioners may, of course, seek such relief.