RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001608-MR

CHERRYWOOD DEVELOPMENT, LLC;
GREER DEVELOPMENT, INC.; and
FIVE STAR SOUTH, LLC APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CIVIL ACTION NO. 00-CI-02139

JAMES WILLIAM ATKINS, JR.;
CLARA E. ATKINS, Individually
and as Trustee of the Trust
created under the will of
FRANK ALLEN ATKINS APPELLEES

and NO. 2001-CA-001676-MR

JAMES WILLIAM ATKINS, JR.;
CLARA ATKINS, Individually
and as Trustee of the Trust
created under the will of
FRANK ALLEN ATKINS CROSS-APPELLANTS

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
CIVIL ACTION NO. 00-CI-02139

CHERRYWOOD DEVELOPMENT, LLC CROSS-APPELLEE

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, Judge: Cherrywood Development, LLC, Greer Development, Inc. and Five Star South, LLC appeal from a summary judgment in favor of James William Atkins and Clara E. Atkins,[1] finding that a deed restriction and vendor's lien were triggered when the portion of the Atkins property to which Cherrywood acquired title was rezoned P-1 (general office use), i.e., became legally available for commercial use, and awarding the Atkins an additional $50,000.00 per acre pursuant to the terms of those provisions. In the same judgment, the circuit court declined to award the Atkinses prejudgment interest on their award, thus prompting their cross-appeal.

The Atkins family owned an 82-acre tract of land located on Tates Creek Road in Lexington/Fayette County, Kentucky. On April 19, 1994, the Atkinses entered into an agreement to sell the property to Jeffrey C. Ruttenberg, a Lexington developer. At the time, the property was zoned for agricultural uses but the agreement authorized Ruttenberg to seek to have the property rezoned at his expense prior to the closing. Ruttenberg attempted to do so in order to allow for residential development and operation of a major retail center called a "hyper-mart," which is only permissible in an area zoned B-1 (neighborhood business), B-3 (highway commercial) or B-6P (planned shopping center) under the

[1] Individually and as trustee of the trust created under the will of Frank Allen Atkins.

Lexington/Fayette Urban County Government's zoning ordinance. His obligation as purchaser and its rationale are acknowledged in the preamble of the agreement which, in relevant part, provides as follows:

> WHEREAS, the parties hereto stipulate and agree that said real estate will have a higher market value if zoned for commercial use; and
>
> WHEREAS, Purchasers herein agree to use all reasonable and diligent efforts to have as much as thirty-five (35) acres (more or less) of the said real estate which is shown as Tract III and labeled "Proposed Commercial Zoning" on Exhibit "A" rezoned for commercial use . . . .

Paragraph 2 of the agreement references the contemplated course of action with the following language: "Zoning: Purchaser agrees to make all reasonable and diligent efforts to have as much as thirty-five (35) acres (more or less) of the real estate which is shown as Tract III and labeled 'Proposed Commercial Zoning' on Exhibit 'A', rezoned for commercial use. Commercial Zoning shall be defined as B1, B3, or B6-P."

Paragraph 9 contains the deed restriction at issue which, in significant part, provides: "None of the property conveyed herein, nor any portion thereof, shall be used for any commercial purpose whatsoever without the express written permission of [the Atkinses] or their heirs . . . ." By its terms, the section "shall attach to and run with the land and shall be binding upon the Grantee, his heirs . . . ." However, that provision is immediately

followed by section 9A which sets forth the conditions under which the restriction will be released:

> Release of Restriction: Sellers agree to Release the Restriction above immediately upon payment by Purchaser to Sellers of the additional sum of FIFTY-THOUSAND DOLLARS ([$]50,000) per acre (for a total payment of $100,000 per acre) for an acre which is rezoned for commercial use or becomes legally available for any commercial use whatsoever.[2]

As with the restriction itself, the release provision explicitly runs with the land: "The terms and conditions of this paragraph survive the closing of the purchase of all the properties."

Section 9A also includes a vendor's lien which is retained by the Atkinses, pursuant to which the Atkinses secure the "bonus payment" of $50,000.00 per acre "[i]n the event that all or any portion of the property conveyed herein shall be used for any commercial purpose whatsoever . . . on all such property used for any commercial purpose whatsoever to [the Atkinses], their heirs . . . ." The lien "shall attach to and run with the land and shall be binding upon the Grantee, his heirs, executors, administrators or assigns as the case may be, and all persons and entities claiming under them." Upon receipt of an additional $50,000.00 per "each acre or fraction thereof which is rezoned for commercial use

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[2] Both paragraph 5 (purchase price) and paragraph 7 (payment after closing) provide that, in the event that any portion of the real estate which is the subject of the agreement is "rezoned for commercial use or becomes legally available for any commercial use whatsoever" within five years of the closing date, the "bonus payment" provision applies.

or becomes legally available for any commercial use whatsoever," the lien "shall be released by the aforementioned."

Ruttenberg was unsuccessful in his attempt to obtain "commercial zoning" for a portion of the property prior to the closing. Thus, when he took title to the property on August 18, 1997, it was zoned only for residential uses, specifically, R-3 (multifamily residential), and he purchased the property for $50,000.00 per acre. Each of the deeds by which the Atkinses transferred title to Ruttenberg contains a restriction and vendor's lien identical to those found in the agreement.

On August 19, 1997, Ruttenberg conveyed all of the property to Ball Homes, Inc. which, in turn, contracted to sell the 15.66 acre tract in question here to Cherrywood on August 19, 1999. Both transfers were effectuated by general warranty deeds with the former being subject to the same restriction and expressly referencing the vendor's lien retained by the Atkinses and the latter subject to restrictions of record.

In February 1998, Cherrywood succeeded in having 14.12 acres of the subject property rezoned as P-1 (general office use). Contemporaneously with the rezoning of the property, the Lexington Public Library announced that it would acquire a portion of the land (1.81 acres) for use as a branch library; that conveyance took place on September 13, 1999. Cherrywood's approved development plan reflected that allocation along with the designation of other portions of the property for types of development consistent with the P-1 categorization. According to the plan, specifically identified sections of the property were reserved as dedicated

public rights-of-way, designated sinkhole areas and tree preservation areas.[3]

After the zoning change was finalized, the Atkinses claimed entitlement to an additional $50,000.00 per acre for all property which was zoned P-1, with the exception of the public library site, on the theory that the permitted uses constitute "commercial use" under the terms of the Ruttenberg agreement and the deeds which followed. When Cherrywood refused to accede to this demand, the Atkinses filed suit seeking a declaration of rights establishing their entitlement to the claimed amount.

In time, both parties filed motions for summary judgment. On March 13, 2001, the court granted the Atkinses' motion but rejected their demand for prejudgment interest on the sum owed. In so doing, the court held that the provisions of the restriction and vendor's lien are clear and unambiguous, emphasizing that the critical phase is "used for any commercial purpose whatsoever." The court interpreted "commercial use or purpose," agreeing that it is defined as one that "exists in an activity with an emphasis on 'salability, profits or success' when applying the ordinary meaning to the terms." In reaching that conclusion, the court said that "such a determination depends on the use of the property,"

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[3] On September 15, 1998, Cherrywood obtained a conditional use permit from the Lexington Fayette Urban-County Government Board of Adjustment by virtue of which it constructed and operates two parking lots in an R-3 zone on portions of the former Atkins property for the benefit of the adjoining restaurant and pharmacy which are Greer and Five Star South's tenants. First Security Bank of Lexington, Inc. is presently operating a branch bank on a lot that is part of the subject property.

rejecting the notion that it depends on specific zoning classifications as argued by Cherrywood.

Inasmuch as the court viewed the definition of "commercial use" found in Paragraph 2 of the Ruttenberg agreement to be in conflict with the unambiguous terms of the deed, it determined that the parol evidence rule was applicable and operated to bar any reference to the agreement. With respect to the vendor's lien, the court concluded that the doctrine of merger by deed does not apply as the parties' intent to have Paragraph 9A survive the deed is evidenced by its "survival language" which is absent from Paragraph 2. As a result of the P-1 zoning for commercial use, the court found that "all of the property has become legally available for commercial use," and therefore, the vendor's lien has attached and the amounts secured by that lien are now due and payable. On appeal, Cherrywood contends that substantial portions of the property that the court determined is subject to the vendor's lien due to being zoned for "commercial use" cannot be developed and, consequently, an evidentiary hearing is warranted to ascertain "the precise P-1/R-3 boundary, the acres in the P-1 lots, and the acres and zoning of the rights-of-way, tree reservation areas and sinkholes."

The Atkinses cross-appeal asserting that they are entitled to prejudgment interest at the rate of 8% per annum, compounded annually, from March 26, 1998, the date that the rezoning was approved, until the date of judgment, and to post-judgment interest at the rate of 12% per annum, compounded annually, on both the award itself and prejudgment interest. As

support for this contention, the Atkinses assert that the "$50,000.00 per acre specified in the vendor's lien and the 10.76 acres are liquidated amounts that became fixed upon the approval of the rezoning on February 19, 1998."

* * * * *

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[4] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[5] The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[6] "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."[7]

On appeal, we review a summary judgment to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was

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[4] Steelvest, Inc. v. Scansteel Service Ctr., Ky., 807 S.W.2d 476, 480 (1991).

[5] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

[6] Steelvest, supra, n. 4.

[7] Id.

entitled to judgment as a matter of law."[8] No deference to the trial court is required since factual findings are not at issue.[9]

In the present case, the outcome turns on the intended meaning of the critical phrase, "used for any commercial purpose whatsoever,"[10] as the language was used to define the scope of both the restriction and the vendor's lien, the applicability of which is the dispositive issue.

It is axiomatic that words will be construed in the sense that they are employed by the parties, and unless a contrary intention appears, they will be assigned their ordinary meaning.[11] Kentucky's highest court has said that "[n]on-technical words generally are to be understood in their ordinary and popular sense, unless the intent of the parties to use them otherwise is shown clearly from the context."[12] However, by way of clarifying these principles of construction, the Court has also said that "when the parties have made an express contract which will admit of but one interpretation, the court must give effect to it, since courts

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[8] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996)(citations omitted).

[9] Id.

[10] As previously noted, the vendor's lien also contains another variation of the language in question, that being, "which is re[-]zoned for any commercial use whatsoever or becomes legally available for any commercial use whatsoever." For present purposes, "commercial use" is the common thread and remains the operative phrase.

[11] Black Star Coal Corp. v. Napier, 303 Ky. 778, 199 S.W.2d 449, 451 (1947).

[12] Bradford v. Billington, Ky., 299 S.W.2d 601, 604 (1957).

cannot make a new contract between the parties but must enforce the one the parties have made."[13]

Here, the circuit court properly applied these tenets in determining that the language of the restriction and vendor's lien at issue is clear and unambiguous and adopting the definition of "commercial use or purpose" offered by the Atkinses. The court agreed with the Atkinses that: "[Commercial is defined] as 'pertaining to or characteristic of commerce, engaged in commerce or prepared, done or acting with emphasis on salability, profit or success.'[14] The term 'commerce' is defined as 'the exchange or the buying of goods, commodities, property or services.'"[15] These definitions reflect the common or ordinary meaning attributed to the terms.

Citing Berry v. Hemlepp,[16] the circuit court concluded that the question of whether a use is commercial depends on the purpose for which the property is being used rather than zoning classifications. The approach adopted in Berry is particularly appropriate: "It does not appear necessary to become too deeply immersed in legal refinements and subtle meanings or words or omissions . . . . All that is needed in the present case is a fair and common-sense approach to the objective sought by the language

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[13] Schwartz Amusement Co. v. Independent Order of Odd Fellows, Howard Lodge, No. 15, 278 Ky. 563, 128 S.W.2d 965, 968 (1939).

[14] The Random House College Dictionary (1st ed. 1973).

[15] Merriam-Webster Dictionary of Law (1996).

[16] Ky., 460 S.W.2d 352 (1970).

used."[17] Applying that logic here, the definition of "commercial use or purpose" adopted by the court is both fair and consistent with the overall scheme evidenced in the documents at issue.

Contrary to Cherrywood's assertion, it is unnecessary to consult the zoning categories in order to determine the meaning of the words in the present context. The Atkinses could have easily limited the imposed restriction to specific zoning categories just as they required Ruttenberg to seek particular categories of zoning in Paragraph 2 of the initial agreement. Instead, they declined to reference zoning categories, opting to employ the broad concept of "any commercial purpose whatsoever." Such a deliberate choice is susceptible to but one interpretation, that the Atkinses were aware of the potential implications, i.e., increase in value, that would result from their former property being used for a commercial purpose and, as such, used the most liberal terms possible to ensure that they shared in the wealth. Further evidence of this reasoning is found in the triggering phrase of the vendor's lien, "or becomes legally available for any commercial use whatsoever." By consistently using expansive language, the Atkinses left no doubt as to their intention to have the lien attach in the event that the property became available for such use, regardless of whether it was actually being so used. Again, the zoning categories are not mentioned.

According to Cherrywood, the phrase "commercial use" cannot be accurately defined without consulting the Ruttenberg agreement. Under the parol evidence rule, consideration of

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[17] Id. at 353.

extraneous evidence is impermissible when interpreting a contract or deed if said evidence varies with or contradicts the agreed upon terms as memorialized in the written document being interpreted.[18] Such is the case here. Paragraph 2 of the agreement implicitly defines "commercial" by referencing three zoning classifications, namely, B-1, B-3 and B6-P, in clarifying what constitutes "commercial zoning" for purposes of the agreement. Noticeably absent from Paragraph 2, however, is the requisite survival language of the release provision encompassed in Paragraph 9A, i.e., "[t]he terms and conditions of this paragraph survive the closing of the purchase of all the properties," as is the similar language contained in the restriction itself, i.e., "This restriction shall be binding upon the Grantee . . . ." Those omissions, coupled with the lack of ambiguity in the language of the deed render the parol evidence rule applicable, and it operates to bar introduction of this conflicting version of the terminology in question. In sum, the terms of both the restriction and the

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[18] The Supreme Court, quoting from Bryant v. Troutman, Ky., 287 S.W.2d 918, 920 (1956), has said that;

> The rule is that parol testimony is not admissible to vary the terms of a writing. When the negotiations are completed by the execution of the contract, the transaction, so far as it rests on the contract, is merged in the writing. But false and fraudulent representations made by one of the parties to induce the other to enter into the contract, are not merged in the contract. Parol evidence is admissible to show that the making of the contract was procured by fraudulent representations. This does not vary the terms of the contract.

Hanson v. American National Bank & Trust Co., Ky., 865 S.W.2d 302, 308 (1993). There is no allegation of fraud in the instant case. See also, Department of Revenue v. McIlvain, 302 Ky. 558, 195 S.W.2d 63 (1946).

vendor's lien - "any commercial use whatsoever" - were expressed with clarity and must therefore be enforced in accordance with their plain meaning and without regard to an unrelated provision of the Ruttenberg agreement which failed to survive the conveyance of the property.

In a related argument, Cherrywood contends that the court erred in determining that the doctrine of merger by deed does not apply in the present context, arguing that there is a conflict between the terms of the restriction, i.e., "shall be used for any commercial purpose whatsoever," and the language contained in the vendor's lien itself, i.e., the lien will be released upon payment of an additional $50,000.00 per acre for any portion which is "rezoned for commercial use or becomes legally available for any commercial use whatsoever." According to Cherrywood, "[t]he conflict in these provisions is obvious and remains unresolved unless the key phrases are defined by reference to Paragraph 2 of the agreement." Cherrywood misunderstands the implications of the doctrine in the instant case.

The "merger doctrine" has been defined as follows:

> In the absence of fraud or mistake, and in the absence of collateral contractual provisions or agreements which are not intended to be merged in the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, and thereafter the deed regulates the rights and liabilities of the parties.
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> * * *

> Evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed. Where there is no mistake or fraud, a deed executed subsequent to the making of an executory contract for the sale of land is generally regarded as conclusive evidence of a previous modification of the executory contract.[19]

There is language in the restriction at issue which explicitly provides that it is to run with the land. Likewise, the language of the release provision unequivocally expresses the parties' intent to have the "terms and conditions" of Paragraph 9 "survive the closing of the purchase of all the properties." No credible argument can be made that the deed restriction and vendor's lien contained in Paragraph 9 of the Ruttenberg agreement were merged into the deeds. Had the parties intended for Paragraph 2 to be read in conjunction with the deeds, they would have inserted similar language; they did not. That being the case, the court properly held that Paragraph 2 of the agreement, in defining commercial by reference to zoning categories, contradicts the unambiguous terms of the deeds and not only fails to survive the closing, i.e., it was not merged into the deeds, but was not intended to be as evidenced by the lack of survival language. Under Paragraph 2, Ruttenberg was required to "make all reasonable and diligent efforts" to have as much as 35 acres rezoned for "commercial use" as defined in that section; he fulfilled his

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[19] 77 Am Jur 2d Vendor and Purchaser § 286 (1997)(citation omitted).

obligation and is not a party to this action. Paragraph 2 has no relevancy beyond that circumstance. Consistent with that reasoning, the court also properly found that the doctrine of merger by deed is not applicable to Paragraph 9, with the necessary implication being that the deed must be construed in light of its provisions, giving ordinary meaning to its terms and conditions.

In Humana Inc. v. Metts,[20] this Court applied the doctrine of merger by deed to bar the application of a provision in a purchase contract which permitted the developer to "change, relieve or lift the use restriction." We said that: "The objective is to ascertain the intent of the parties. What did the parties mean by what they said? The terms, conditions, provisions and restrictions of the contract for purchase were merged into the deed for conveyance. Any conflict between the two must be construed in favor of the latter."[21] That is what the circuit court did.

In distinguishing between mercantile business and professional office use for the purpose of interpreting the restrictive covenant at issue, the Court in Metts said:

> The phrase "professional office use" means just what it says, office use by a professional person, not a commercial undertaking. The evidence discloses that the pharmacy is being operated with very little difference from the usual and ordinary pharmacy or drug store prevalent throughout this area. Ostertag and Southern Optical, although possibly having a professional person

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[20] Ky. App., 571 S.W.2d 622 (1978).

[21] Id. at 625.

in attendance, present themselves to the general public as retail merchandisers. The sale of merchandise can and usually is made by any clerk without any specialized training or professional ability.[22]

Ultimately, we found that the restrictive covenant in the deed had been violated by Humana, Inc. and permanently enjoined it from operating "optical dispensing and similar business operations," a drug store and pharmacy and "any and all other uses, specifically including the exercise club presently in operation."[23] Relying on the foregoing definition, Cherrywood argues that, because none of the property in question has been zoned to permit retail sales of merchandise, it is not being nor can it be used for a "commercial undertaking" as defined in Metts.

We are unpersuaded by this application of the Metts decision. In determining that the uses listed above did not comply with the restrictive covenant mandating that the property conveyed be used strictly for "hospital, extended care nursing home facilities and for professional office use only," we interpreted the latter phrase to exclude commercial undertakings, determining that the businesses in question qualified as commercial in nature rather than professional. Such an interpretation is consistent with the conclusion that the uses for which the property at issue here is being utilized constitute "commercial" uses/undertakings. This case requires construction of the inclusive phrase "any

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22 Id. at 626.

23 Id. at 626-627.

commercial purpose whatsoever," as opposed to the restrictive phrase "for professional office use only." While the two phrases were intended to accomplish opposite results, the definition of commercial remains unchanged.

Cherrywood next argues that even if we find in favor of the Atkinses as to the substantive issue, it is entitled to an evidentiary hearing because there are genuine issues of material fact as to the actual location of the P-1 zoning line and the exact amount of acreage which is being used for or is legally available for any type of commercial use. We, however, agree with the circuit court which said that:

> Cherrywood Development, LLC ("Cherrywood") acquired 15.66 acres ("Former Atkins Property") as shown on the Non-Building Minor Subdivision Plat, Atkins Property, 3711 Tates Creek Road of record in Plat Cabinet K, Slide 82 of the Fayette County Clerk's Office subject to a deed restriction and a vendor's lien in favor of the Plaintiffs as more fully set forth in the court's prior opinions. At Cherrywood's request, the Lexington Fayette Urban-County Government approved the rezoning of portions of the Former Atkins Property from R-3 (multifamily housing) to P-1 (professional office use). The rezoning is reflected in Ordinance No. 49-98 and 50-98. Subsequently, Cherrywood conveyed 1.81 acres of the Former Atkins Property to the Lexington Public Library by virtue of the Corrected Minor Amended Subdivision Plat of the Atkins Property Unit 2-A of record in Plat Cabinet K,

> Slide 974 of the Fayette County Clerk's Office. The Court determines that Lots 3, 6 and 8 of the Former Atkins Property, comprising 3.09 acres, are zoned R-3 and shown as being unbuildable on the Final Record Plat Atkins Property Unit 2B, Section 1 of record in Plat Cabinet L, Slide 244 of the Fayette County Clerk's Office. The remainder of the Former Atkins Property, consisting of 10.76 acres, is being used or is available for commercial use. Thus, in accordance with the Court's prior decisions, the Atkins[es] are entitled to judgment against Cherrywood in the amount of $538,000.00 representing the remainder of the Former Atkins Property, consisting of the 10.76 acres that is either actually being used or is available for commercial use multiplied by the $50,000.00 per acre set forth in the vendor's lien in the deeds to the Former Atkins Property.

All 15.66 acres conveyed by the Atkinses to Cherrywood are subject to the deed restriction and vendor's lien. Cherrywood's argument ignores the fact that most lots have areas that are not "useable" because of easements, rights-of-way, tree reservations, sinkholes, set-back lines, open space requirements and other conditions. Although restricted, many such areas can still be used in the literal sense and in reality, are often necessary components of the property which benefit the "useable" portions and enhance the overall value of the land. At worst, they are necessary evils which accompany land development.

In essence, Cherrywood is advocating a piecemeal application of the lien which is not supported by its terms. If the parties had intended such a result, they could have so provided. "It is not for the Court to make a contract for the parties. It is not for the Court to ascertain what the parties meant to say. It is for the Court to determine what the parties meant by what they did say."[24] Here, there is no question that the Atkinses contemplated the "bonus payment" provision being triggered with respect to any of the property that was "rezoned for commercial use or became legally available for any commercial use whatsoever"; there is no mention of it being selectively applied. We agree with the circuit court's assessment of this issue: "The individual Lots cannot be divided without materially impairing the value of same or the value of the interest of the parties." Because the final record plats reviewed by the court are the best evidence of what acreage is available for commercial use and those plats clearly show the number of acres that are available, there is no genuine issue of material fact as to how much land is properly subject to the lien. An evidentiary hearing is not warranted.

In their cross-appeal, the Atkinses claim that they are entitled to prejudgment interest on the award pursuant to Kentucky Revised Statutes (KRS) 360.010 and 360.040. Prejudgment interest may be awarded "where justified by the facts of a particular case."[25] "If an item of damages is fixed or ascertainable with

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[24] Metts, supra, n. 20, at 626.

[25] State Farm Mut. Auto Ins. Co. v. Reeder, Ky., 763 S.W.2d (continued...)

reasonable certainty and is not contested and the defendant fails or refuses to timely pay it unconditionally, or at least tender it into court where it may be withdrawn unconditionally, he should be charged with interest on that item in the judgment."[26] Here, there is no genuine dispute as to the number of acres to which the "bonus payment" provision applies or the dollar amount ($50,000.00) by which it is to multiplied once the restriction has been implicated, nor is there any question as to the time period involved (the date on which the rezoning became effective). In the event that the claim is "definite as to both time and amount," or a liquidated demand, interest runs as a matter of right,[27] while in the case of an unliquidated claim, the responsibility for balancing the "undisputed facts and equities and deciding whether to award interest" is a discretionary matter left to the court.[28] As the present claim is liquidated, the result is dictated by the foregoing guidelines. Accordingly, the Atkinses shall be awarded prejudgment interest at the statutory rate in accordance with KRS 360.010 from the effective date of the rezoning, February 19, 1998.

That portion of the judgment which denies recovery of prejudgment interest is reversed and this case is remanded to Fayette Circuit Court to award such interest at the rate of 8% per

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[25] (...continued)
116, 119 (1988).

[26] Id.

[27] Middleton v. Middleton, 287 Ky. 1, 152 S.W.2d 266, 268 (1941).

[28] Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136, 144 (1991).

annum (simple interest, not compounded) as hereinabove set forth. In all other respects, the judgment is affirmed.

BUCKINGHAM, Judge, CONCURS.

GUIDUGLI, Judge, CONCURS IN PART AND DISSENTS IN PART.

GUIDUGLI, Judge, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority in all aspects except as to the cross-appeal and the awarding of prejudgment interest. I do not believe that the damages in the case can be deemed "liquidated" in that there was no certainty as to the amount of damages to be awarded. The majority states that there "is no genuine dispute as to the number of acres to which the 'bonus payment' provision applies." I disagree. The number of acres to which the "bonus payment" applied was a primary issue in dispute and ultimately determined by the trial court to be less than originally bargained for. I do not believe the Atkins family was entitled to prejudgment interest and as such, would have affirmed the Fayette Circuit Court's judgment in its entirety.

BRIEF AND ORAL ARGUMENT FOR APPELLANT IN NO. 2001-CA-001608-MR AND CROSS-APPELLEE IN NO.2001-CA-001676-MR CHERRYWOOD DEVELOPMENT, LLC, AND APPELLANTS IN NO. 2001-CA-001608-MR GREER DEVELOPMENT, INC. AND FIVE STAR SOUTH, LLC:

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ON BRIEF:
Steven B. Loy

BRIEF AND ORAL ARGUMENT FOR APPELLEES IN NO. 2001-CA-001608-MR AND CROSS-APPELLANTS IN NO. 2001-CA-001676-MR:

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