[J-11-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

VERNON TOWNSHIP VOLUNTEER FIRE DEPARTMENT, INC., A NON-PROFIT PENNSYLVANIA CORPORATION, Appellee v.	:	No. 33 WAP 2003 Appeal from the Order of the Superior Court entered December 23, 2002, at No. 246WDA2002, reversing the Judgment of the Court of Common Pleas of Crawford County entered February 26, 2002, at Nos. AD2000-123 and AD2000-857.
WILLIAM E CONNOR AND BARBARA J. SANDERS, CARMIN E. GRASSO, CARMIN E. GRASSO EXECUTOR OF THE ESTATE OF BARBARA L. GRASSO, DECEASED, DONALD J. DUNBAUGH AND VIVIAN J. DUNBAUGH, WILLIAM B. BARR AND PATRICIA D. BARR, Appellants	:	ARGUED: March 2, 2004
VERNON TOWNSHIP VOLUNTEER FIRE DEPARTMENT, INC., A NON-PROFIT PENNSYLVANIA CORPORATION, Appellee v.	:	
VICKI R. KURT, RUSSELL E. BRIGGS, RITA H. BRIGGS, ROBERT W. GRASINGER, JENNIFER L. ROSE, LINDA SUE HARRIS, MICHAEL W. YOCINA AND SCOTT E. YOCINA, Appellants	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: AUGUST 19, 2004**

I agree with the Superior Court that the character of the neighborhood surrounding appellees' tracts has been altered to the extent that the restrictive covenant has been rendered a nullity and would, therefore, affirm its judgment. Accordingly, I respectfully dissent.

As the Majority notes, it has long been the law in Pennsylvania that a restrictive covenant can be discharged where the original purpose of the covenant is materially altered or destroyed by changed conditions and there is no longer a substantial benefit to be derived from the restriction. Daniels v. Notor, 133 A.2d 520 (Pa. 1957); Henry v. Eves, 159 A. 857 (Pa. 1932). When determining whether conditions have changed to such an extent as to invalidate the restriction, courts must look to the immediate neighborhood, which includes adjoining tracts of land. Id. See also Deitch v. Bier, 333 A.2d 784 (Pa. 1975).

The Majority, like the trial court, focuses on the fact that there are presently no establishments with liquor licenses within the specific confines of the Culbertson Subdivision and dismisses the presence in the immediately adjoining neighborhood of two bars and the Fire Department's existing social hall, which is located a mere 2,000 feet from the parcel on which the Fire Department seeks to build its new truck room and social hall. The Majority concedes that these three alcohol-serving establishments are located within the immediate neighborhood of the Culbertson Subdivision, "but outside of the restricted tract," then concludes that these three establishments do not impair the utility of the restriction to the owners of the restricted properties. Slip Op. at 14. In one breath, the Majority states that it must consider not only the restricted tract but also the surrounding neighborhood and notes that three other alcohol-serving establishments exist in the

immediate neighborhood. Then, in the next breath, the Majority essentially determines that the presence of those other establishments is irrelevant to its inquiry because the only relevant area is the Culbertson Subdivision itself.

The Superior Court, on the other hand, set forth the same legal principles and applied them in a more straightforward fashion. That court found that the trial court record did not support a finding that the Culbertson Subdivision owners experienced none of the effects of alcohol sales, given that the record established the presence of three alcohol-serving establishments located within two miles of the subdivision. Thus, the Superior Court held that the immediate neighborhood had changed with the introduction of the three establishments, and that the trial court erred in restricting consideration of the immediate neighborhood to the restricted tracts. This finding, in my view, establishes the first prong of the test for discharging a restrictive covenant, i.e., that the original purpose is materially altered by changed conditions.

Moving to the second prong, the Superior Court held that the restriction no longer possessed significant value to the subdivision owners based upon the fact that 68 of the 77 owners agreed to execute a release of the covenant, that three additional owners chose not to defend themselves in this action, and that all of the appellees who refused to sign the release testified and admitted that they had not relied upon the covenant when purchasing their properties. I would find that the Superior Court properly concluded that this record evidence establishes that the covenant lacks significant value to the owners of the restricted tracts.

Because restrictive covenants interfere with property owners' free use and enjoyment of their property, such covenants are not favored by courts. Mishkin v. Temple Beth El of Lancaster, 239 A.2d 800 (Pa. 1968). Thus, in an appropriate case, our courts will invalidate restrictive covenants that have outlived their usefulness, which is what I believe the record demonstrates has occurred in this case. I agree with the Superior Court

that the existence of three alcohol-serving establishments in close proximity to the Culbertson Subdivision constitutes a material alteration or change of the original purpose of the restrictive covenant. That 71 of the 77 purportedly affected owners find no value to the covenant and the other six did not rely upon the covenant in purchasing their properties is a clear signal that the covenant lacks significant value to the subdivision owners at this time. Anachronisms need not persist for their own sake. Accordingly, I would affirm the Superior Court's decision discharging the restrictive covenant in this case.