For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

JAMES PAVEL and BONNIE PAVEL, Appellants/Plaintiffs, v. **ESTATES OF JUDITH'S FANCY OWNERS' ASSOCIATION, INC.,** Appellee/Defendant.	)	**S. Ct. Civ. No. 2018-0023** Re: Super. Ct. Civ. No. 260/2017 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: November 13, 2018
Filed: June 19, 2019

Cite as: 2019 VI 23

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Appellants James and Bonnie Pavel ("the Pavels") appeal from the Superior Court's January 31, 2018 memorandum opinion and order granting appellee Judith's Fancy Owners Association's ("JFOA") converted motion for summary judgment. They argue that the Superior Court erred in its interpretation of certain provisions of the Declaration Establishing Restrictive Covenants ("Declaration") requiring a twenty-foot building setback from any boundary line for plots in Estate Judith's Fancy. The Pavels also argue that the court erred in failing to conclude that the doctrine of merger bars application of the Declaration's setback provision to the boundary line between their two, adjacent plots. Because the Declaration unambiguously requires a twenty-foot setback from any boundary line, unless two or more adjacent plots are combined within one ownership *and title*—in which case the relevant boundary lines are the outer boundaries of the combined plots—the doctrine of merger is inapplicable, and consequently the Superior Court's judgment based on its memorandum opinion and order is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 This case arises from the Pavel's plans to develop their two adjacent plots in Estate Judith's Fancy—Plot 65, where the Pavel's residence is located, and Plot 64, a vacant lot—by building a detached garage on Plot 64 within 20 feet of the boundary line with Plot 65. However, the JFOA Declaration specifically states that no "outbuilding shall be constructed within twenty (20) feet of any boundary line." Although the Pavels requested a waiver of the setback provision based upon their common ownership of the adjacent lots, JFOA Board of Directors ("the Board"), in its discretion, denied the request and suggested that if the Pavels wished to construct a garage in the location selected, they could either redraw the boundary lines between the plots, or combine the plots into one title in accordance with the relevant provisions of the Declaration. Subsequently, the Pavels filed a complaint in the Superior Court seeking declaratory judgment to determine the

proper construction of the relevant provision of the Declaration, and further seeking damages for breach of contract for the JFOA's denial of the Pavel's construction permit application.

¶ 3 On July 24, 2017, JFOA filed a motion to dismiss, which the Superior Court converted into a motion for summary judgment. Following supplemental briefing from the parties, the court granted the converted motion by memorandum opinion and order entered January 31, 2018. The Pavels timely filed their notice of appeal on March 2, 2018.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 4 We have jurisdiction over this appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which provides that "[t]he Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." *See also* 48 U.S.C. § 1613a(d). Because the Superior Court's January 31, 2018 memorandum opinion and order granting summary judgment in favor of JFOA conclusively adjudicated all disputes between the parties, it is a final order within the meaning of 4 V.I.C. § 32(a). We exercise plenary review over the Superior Court's grant of summary judgment. *Thomas v. V.I. Bd. of Land Use Appeals*, 60 V.I. 579, 585 (V.I. 2014).

III. DISCUSSION

¶ 5 On appeal, the Pavels essentially argue that we must look past the plain language of the provisions of the Declaration and conclude that, under the common law doctrine of merger, the restrictive covenant requiring a twenty-foot setback from all boundary lines within the subdivision was extinguished as to the boundary between plots 64 and 65 when those two plots came into the Pavel's common ownership. Because we find that the language of the Declaration clearly and unambiguously forecloses this conclusion, we disagree and affirm the judgment of the Superior Court.

A. Interpretation of Restrictive Covenants

¶ 6 Although this Court has had little occasion to address the law of servitudes, and no opportunity to address the specific issue of servitudes contained in the declarations of common-interest communities such as Judith's Fancy, certain basic principles are well established.[1] "We start with the proposition that private persons, in the exercise of their constitutional right of freedom of contract, may ordinarily impose whatever restrictions upon the use of land which they convey to another that they desire to impose." *Grubel v. MacLaughlin*, 6 V.I. 490, 507 (D.V.I. 1968). However, the law does not favor such restrictions upon the free use of land. Indeed, we have upheld the majority rule that, in cases of ambiguity, "restrictive covenant[s] will be strictly construed against limitations on the free use of land," with "[a]ll doubts [to be] resolved in favor of the unfettered use of land." *Thomas*, 60 V.I. at 593 (citing *White v. McGowen*, 222 S.W.3d 187, 189 (Ark. 2006)).

¶ 7 But where the language of a restrictive covenant—and, in particular, the language of a restrictive covenant outlined in the declaration of a common interest community—is plain and unambiguous, it is well established that ordinary principles of contract interpretation apply. *See, e.g., U.S. Home Corp. v. Michael Ballesteros Tr.*, 415 P.3d 32, 36 (Nev. 2018) ("The proposition that [declarations] create contractual obligations, in addition to imposing equitable servitudes, is widely accepted. . . . By accepting the deed or other possessory interest in a unit, the homeowner manifests his or her assent to the [declarations].") (citations omitted) (collecting cases); *see also, Cantonbury Heights Condo. Ass'n Inc. v. Local Land Dev., LLC*, 873 A.2d 898, 904 (Conn. 2005) ("Because the declaration operates in the nature of a contract, in that it establishes the parties' rights

[1] We note at the outset that neither party disputes the validity of the restrictive covenants set forth in the Declaration.

and obligations, we apply the rules of contract construction to the interpretation of [the declaration]. . . . Where the language is unambiguous, we must give the contract effect according to its terms."). Thus, the rule of strict construction must not be used to defeat a restrictive covenant that is clear on its face. *See, e.g., 600 N. Frederick Rd., LLC v. Burlington Coat Factory of Maryland, LLC*, 19 A.3d 837, 857 (Md. 2011); *Hill v. Lindner*, 769 N.W.2d 427, 430 (N.D. 2009) ("Although restrictive covenants are strictly construed in favor of free use of land and against those who seek enforcement, the rule of strict construction will not be employed to defeat the obvious purpose of a restrictive covenant.") (citing 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* §§ 12–17, 168); *see also Long v. Branham*, 156 S.E.2d 235, 239 (N.C. 1967) ("Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.").

¶ 8 Indeed, the law governing the interpretation of restrictive covenants may be succinctly summarized as follows:

> Rules governing the construction of covenants imposing restrictions on the use of land are generally the same as those applicable to any contract or covenant, including the rule that where there is no ambiguity in the language used, there is no room for construction, and the plain meaning of the language governs. Primarily, the question is one of intention, subject to the further principle that restrictive covenants are strictly construed in favor of the free use of property.

20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 169 (internal footnotes omitted).

¶ 9 Both generally, and specifically in the context of common-interest communities and planned subdivisions, "restrictive covenants are designed to be binding conditions of mutual benefit to the grantor and grantee of land, both seeking to enhance the value and marketability of the property." *DeWolf v. Usher Cove Corp.*, 721 F. Supp. 1518, 1526 (D.R.I. 1989). In planned

communities, these covenants are often "intended to preserve the aesthetic and residential nature of the subdivision." *Bates v. Webber*, 257 S.W.3d 632, 638 (Mo. Ct. App. 2008). As explained by the Supreme Court of North Carolina:

> Developers of subdivisions and other common interest communities establish and maintain the character of a community, in part, by recording a declaration listing multiple covenants to which all community residents agree to abide. Lot owners take their property subject to the recorded declaration, as well as any additional covenants contained in their deeds. Because covenants impose continuing obligations on the lot owners, the recorded declaration usually provides for the creation of a homeowners' association to enforce the declaration of covenants and manage land for the common benefit of all lot owners, thereby preserving the character of the community and neighborhood property values.

Armstrong v. Ledges Homeowners Ass'n, Inc., 633 S.E.2d 78, 86 (N.C. 2006) (internal citations omitted).

B. Application of the JFOA Declaration's Setback Provision

¶ 10 Section III-3 of the JFOA Declaration provides, in relevant part:

> No single family dwelling, facility (except driveways/parking areas and/or utility monuments/poles for underground utilities,) or outbuilding shall be constructed within twenty (20) feet of any boundary line. Where two or more adjacent plots are combined *within one title and ownership*, then the reference to the boundary lines herein shall be to the perimeter or outside boundaries of the combined plots.

(emphasis added). The Pavels do not dispute that their proposed plans for building a garage within twenty feet of the boundary line between Plots 64 and 65 would violate the plain language of the Declaration if the two plots were owned by two different parties. Instead, they argue that despite the language quoted above, the restrictive covenant establishing the twenty-foot setback, as applied to the boundary between the two plots, has been extinguished by the common law doctrine of merger because the two adjacent plots have come into common ownership.

¶ 11 The Pavels urge us to adopt the common law doctrine of termination of servitudes by merger as provided in the Restatement (Third) of Property: Servitudes, which reads in relevant

part: "A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefited or burdened parcel into separate ownership does not revive a servitude terminated under the rule of this section." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 (2000). Although we ultimately conclude, for the reasons discussed below, that the merger doctrine is not applicable on the facts of this case, because we have not previously had occasion to consider the doctrine of merger and in the interest of judicial economy, we find that this case presents an appropriate opportunity to offer guidance to the Superior Court on this area of the law. *See Frett v. People*, 58 V.I. 492, 512–513 (V.I. 2013) (deciding to reach issue to guide the Superior Court). Accordingly, we must determine: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands." *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)).

¶ 12 Although it appears that no court in the Virgin Islands has expressly considered or adopted the doctrine of termination of servitudes by merger, the merger rule, as expressed in § 7.5 of the Restatement, is nearly universally accepted in other jurisdictions nationwide. *See, e.g., Will v. Gates*, 680 N.E.2d 1197, 1200 (N.Y. 1997) ("[W]hen the dominant and servient estates become vested in one person, the easement terminates."); *Cheever v. Graves*, 592 N.E.2d 758, 762 (Mass. App. Ct. 1992) ("[I]n order to extinguish an easement by merger, a unity of title must have come into existence in the same person. . . . [An owner] cannot have an easement in its own estate in fee."); *Boorom v. Rau*, 640 A.2d 963, 964 (R.I. 1994) ("[I]n order to extinguish a right-of-way, there must be unity of ownership between the servient estate and every dominant [e]state."). The Superior Court cited the Supreme Court of Oregon's decision in *Witt v. Reavis*, 587 P.2d 1005 (Or.

1978) noting that "[t]he effect of merger is usually held to be a complete destruction of the easement, but some states, notably Pennsylvania, have held that sometimes the easement is only suspended." *Id.* at 1008. Under the Pennsylvania rule, "an easement may remain unaffected by unity of estates, or viewed differently, revive upon separation, if a 'valid and legitimate purpose' will be subserved thereby." *Schwoyer v. Smith*, 131 A.2d 385, 387 (Pa. 1957). This "exception" to the merger doctrine applies "only where there is a strong equity, and circumstances giving ground for the clear inference that the parties intended to preserve [or revive] the easement." *McClure v. Monongahela S. Land Co.*, 107 A. 386, 388 (Pa. 1919).

¶ 13 However, as the Supreme Court of Oregon observed, "it appears that the minority Pennsylvania rule has simply grafted the rules of implied easements onto those for extinguishment by merger." *Witt*, 587 P.2d at 1008. For example, in an early case, the Supreme Court of Pennsylvania explained that "[s]ervitudes which are extinguished by unity of title, do not in general revive upon severance; but where they are apparent and obviously continuous, they do." *Kieffer v. Imhoff*, 26 Pa. 438, 443 (1856). This rule—which the Supreme Court of Pennsylvania characterizes as an exception to the merger doctrine—is nearly identical in substance to the rule expressed in Restatement (Third) of Property: Servitudes § 2.12 governing servitudes implied from prior use.[2]

[2] Section 2.12 provides:

> Unless a contrary intent is expressed or implied, the circumstance that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.
>
> The following factors tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use:
>
> (1) the prior use was not merely temporary or casual, and
>
> (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and
>
> (3) existence of the prior use was apparent or known to the parties, or
>
> (4) the prior use was for underground utilities serving either parcel.

And while this Court has not had occasion to consider the applicability of § 2.12 of the Restatement, the Superior Court has conducted the requisite *Banks* analysis and adopted § 2.12 as the soundest rule of law for the Virgin Islands. *See SBRMCOA, LLC v. Morehouse Real Estate Investments, LLC*, 62 V.I. 168, 190 (V.I. Super. 2015). Indeed, courts in the Virgin Islands have consistently invoked the rules governing the creation of implied easements expressed in the Restatement. *See, e.g., Brodhurst v. Frazier*, 57 V.I. 365, 369-70 (V.I. 2012) (assuming without deciding that the rule articulated in Restatement (Third) of Property: Servitudes § 2.13 governs the creation of servitudes implied from map or boundary references in the Virgin Islands); *and Underwood v. Streibich*, 2019 WL 948417, at *3 (V.I. Super. 2019) (applying Restatement of the Law: Property § 476 in analyzing creation of easement by necessity).

¶ 14 Thus, like the Supreme Court of Oregon, "[w]e see nothing to be gained by adopting the Pennsylvania rule and, instead, follow the Restatement rule that an easement once extinguished is gone forever." *Witt*, 587 P.2d at 1008. The Pennsylvania approach achieves nothing that is not already accomplished by other rules governing the creation of implied easements. Moreover, as the court observed in *Witt*, "[w]here merger is established, this rule will enable the parties to focus on the separate issue of whether a new easement was thereafter created by implication and will, we hope, avoid confusion as to the precise issues involved in such cases." *Id.* Accordingly, we conclude that the rule expressed in the Restatement (Third) of Property: Servitudes § 7.5 governing the termination of servitudes by merger represents the soundest rule of law for the Virgin Islands.

¶ 15 Having established that § 7.5 represents the soundest rule of decision, we next consider how this rule applies to the facts of this case. Both in the Superior Court and in their brief on appeal, the Pavels concede that "when property is subject to subdivision covenants and servitudes, each lot in the subdivision enjoys the benefit of the servitudes imposed on every other property in

the development."[3] Indeed, as the Superior Court noted, the comments to § 7.5, which the Pavels urge us to adopt today, address this very issue:

> Because merger takes place only when all the benefits and burdens of the servitude come into a single ownership, subdivision covenants and servitudes in other developments with reciprocal servitudes are rarely terminated by merger. Since each lot, unit, or parcel enjoys the benefit of the servitudes imposed on every other property in the development, . . . the occasion for merger can arise only when the entire development is acquired by a single owner.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.5 cmt. c. The Pavels further acknowledge that the Declaration itself unambiguously states that "uniformity within the residential areas of Estate Judith's Fancy" constitutes a "benefit to all present and future owners of the subdivided plots."

¶ 16 Nevertheless, the Pavels contend that the second sentence of section III-3 of the Declaration—"[w]here two or more adjacent plots are combined within one title and ownership, then the reference to the boundary lines herein shall be to the perimeter or outside boundaries of the combined plots"—clarifies "that the benefit of uniformity is not infringed if the lots are combined and the boundary becomes the outside perimeter of the combined lots." "Thus," they assert, "the adjacent lot owners affected by the [restrictive covenant] are the true beneficiaries," and not all owners in the subdivision. According to the Pavels, the Superior Court erred by focusing on the phrase "combined within one title and ownership," and by limiting its analysis to the general rule while failing to take into account the intent of the clause…to protect adjacent landowners." We disagree.

[3] As the Superior Court noted, courts in the Virgin Islands have long recognized that restrictive covenants affecting planned subdivisions inure to the benefit of all owners in the subdivision. *See, e.g., Neal v. Grapetree Hotels, Inc.*, 8 V.I. 267, 277 (D.V.I. 1971) (explaining that restrictions that are "part of the overall plan of development, were to inure to the benefit of all of the parcelists in the five estates in question").

¶ 17 Even to the extent that the Pavels are correct that section III-3 may be read to indicate that "the benefit of uniformity is not infringed if the lots are combined," the plain and unambiguous language of the Declaration clarifies that the restrictive covenant establishing a twenty-foot building setback from the boundary line between adjacent lots is only terminated if the lots are combined, not merely in ownership, but also in title. Given this specific language, we cannot conclude, as the Pavels contend, that the relevant provisions of the Declaration indicate that only the adjacent plot owners, rather than all owners of plots in the subdivision, are beneficiaries of the setback provision. Nor can we conclude that the benefit of uniformity is not infringed when adjacent plots are combined solely in ownership, but not in title, as required by the Declaration. Thus, even though the doctrine of termination of servitudes by merger represents the best rule of law for the Virgin Islands, it is inapplicable in this context as all the benefits and burdens of the restrictive covenant have not come into a single ownership.

¶ 18 In effect, the Pavels ask us to ignore and omit from our consideration the plain language of the Declaration providing for an exception to the setback requirement only where adjacent plots are combined in both ownership *and title*. However, in this case, "there is no ambiguity in the language used, there is no room for construction, and the plain meaning of the language governs." *See* 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 169. Accordingly, we conclude that the Superior Court did not err in granting JFOA's converted motion for summary judgment and affirm the court's January 31, 2018 judgment.

IV. CONCLUSION

¶ 19 Because all of the benefits and burdens of the setback provision of the JFOA Declaration have not come into single ownership, we conclude that the doctrine of termination of servitudes by merger is not applicable to this case. And because the plain and unambiguous language of the

Declaration provides for an exception to the twenty-foot building setback requirement for boundaries between adjacent plots only where the adjacent plots are combined in both ownership and title, the Superior Court's memorandum opinion and order granting summary judgment in favor of JFOA is affirmed.

Dated this 19th day of June, 2019.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court