UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0004

September Term, 2014

GLOBAL MISSION CHURCH OF GREATER WASHINGTON, SBC

v.

CHRISTOPHER J. SAPPE, ET UX.

Kehoe,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: April 7, 2015

To facilitate the construction of a church building on a parcel of land (the "Parcel") it owns in Frederick County, Global Mission Church of Greater Washington, SBC (the "Church") sought to extend a driveway from an adjoining lot ("Lot 4") to the Parcel. Christopher and Sandra Sappe, who own a neighboring lot, sought a declaratory judgment and injunctive relief to enforce restrictive covenants that, in their view, precluded the Church from extending the driveway and building two bioretention ponds. The Circuit Court for Frederick County agreed and granted summary judgment in the Sappes' favor. We agree with the Church that the circuit court misread and misapplied the covenants and reverse and remand this case for entry of a declaratory judgment consistent with this opinion.

I. BACKGROUND

On September 8, 2004, the Church acquired the Parcel, a seventy-eight acre plot of unimproved land in Frederick County, and began planning a complex of buildings– including a sanctuary, a dining hall, a gymnasium, conference space, reception areas, offices, and a music practice hall—to house its ministry and activities. In 2007, the Church also acquired Lot 4, which adjoins the Parcel and contains a house that the Church uses as a parsonage.

In 2012, the Church submitted a proposed site plan to the Frederick County Planning Commission (the "Commission"). Under the original plan, cars would enter the complex from Doctor Perry Road via a driveway onto Lot 4. After reviewing the plan, the Commission conditioned approval on amendments that either reduced the size and capacity of the proposed buildings or provided a secondary access route for emergency vehicles.

The secondary access road option also required the Church to construct two bioretention ponds and storm drains to handle stormwater runoff. The Church amended the site plan to extend the driveway across Lot 4 to the Parcel, and eventually to Old Hundred Road (Maryland Route 109); the plans noted that the extended pavement was intended "for use by public safety vehicles for emergency access only and will have a gate w/Knox box for access by Fire Marshall." The proposed construction would occur entirely on Lot 4 and the Parcel; although an access easement serving the Parcel runs along the common boundary of Lot 4 and the Sappes' lot, Lot 3, the Church's proposed design placed the access road and bioretention ponds entirely on Lot 4. The Commission approved the amended site plan on November 14, 2012.

Lots 3 and 4 are subject to restrictive covenants contained in a Declaration of Residential Use Covenants For Little Bennett's Reach and Firetower Hill Subdivisions ("Declaration"), executed on July 11, 2002; the Parcel sits outside those subdivisions and is not subject to the covenants. Among other things, the covenants require the principal improvement on each lot to be a detached single family residential dwelling and place limits on other improvements and building materials:

> B. Declarant intends to sell the Property and the Lots and expects that at some point in the future each Lot will be improved with a residential dwelling, and will be sold to individual owners, and Declarant also intends by this Declaration to establish certain residential use covenants, conditions and restrictions for the purpose of protecting the value and desirability of the Lots, and to these ends this Declaration is made and recorded and the Lots are hereby committed to the said covenants, conditions and restrictions, as set forth herein.

* * *

> [Section] 2.1. That the principal improvement to be erected on each Lot shall be one (and only one) detached single family dwelling, which said dwelling shall be used for residential purposes only; that the front line of any dwelling shall be set back at least such minimum distance as indicated on the Plat . . .
>
> * * *
>
> [Section] 2.6. The construction of a small barn, stable, shed, or any other building shall be permitted to the extent that the construction of such a building shall be compatible with the residence of said Lot. Natural wood siding is encouraged. If a concrete block wall is used in the construction of such a building or shed, such wall shall be covered with one of the exterior materials aforementioned in PARAGRAPH 2.3, hereof.
>
> * * *
>
> [Section] 2.10. No Lot or portion thereof shall be used so as to affect injuriously the use occupation or value of the Lots in the subdivision for residential purposed or so as to be or become a nuisance.

On October 4, 2012, the Sappes filed a complaint in the circuit court seeking a declaratory judgment and injunctive relief prohibiting the Church from constructing the proposed emergency access road. They alleged that the covenants limited the Lots solely to residential uses and precluded any improvements that did not serve the residence on the property. Because, in their view, the access road served only a non-residential use on an adjoining property–emergency access to the forthcoming non-residential buildings on the Parcel—the road and bioretention ponds violated the covenants.

On May 29, 2013, the parties filed cross-motions for summary judgment. The circuit court held a hearing and, in a memorandum opinion issued on August 14, 2013,

granted the Sappes' motion and denied the Church's[1]. After determining that the Declaration was unambiguous, the court ruled that "the restrictive covenants [contained in the Declaration], when read in concert, permit only the construction of a road that would serve the single family dwelling [located on Lot 4, and because the Church's] proposed access road across the encumbered Lot 4 serves only a structure outside the encumbered property, it violates the restrictive covenants limiting use of the property to a single family dwelling and structures compatible to that residential dwelling." And because the bioretention facilities were "contemplated only to serve the [proposed] secondary access road," the court found that the covenants prohibited them too.[2] This timely appeal followed.

II. DISCUSSION

The facts are undisputed, so this appeal boils down to the covenants, and specifically whether they prohibit the Church from using portions of Lot 4—land it indisputably owns and that is subject to an access easement serving the Parcel—for the secondary access road

---

[1] It does not appear that the court entered a separate declaratory judgment in the Sappes' favor, but we will exercise our discretion to overlook this non-jurisdictional defect and address the merits. *See, e.g., Comptroller of the Treasury v. Zorzit*, No. 885, Sept. Term 2013 (Jan. 30, 2015), slip op. at 18 n.16.

[2] The circuit court also awarded the Sappes summary judgment on the alternative grounds that the construction of the proposed access road would constitute an "unreasonable use" of an easement established for the benefit of the Parcel. This ruling was predicated entirely on the circuit court's finding that the "proposed construction of the secondary access road [would] be in violation of the [Declaration]," so our analysis of the covenants applies equally to this ruling.

and bioretention ponds.[3] The Church contends that although the covenants require the *principal improvement* on Lot 4 to be a single family dwelling, they do not require *every improvement* on Lot 4 to serve the residence on the property, as the circuit court held. So long as the *principal improvement* on Lot 4 is a single-family dwelling, the Church argues, the covenants do not prohibit it from erecting *other* structures on the lot that serve non-residential purposes. For their part, the Sappes have no quarrel with the driveway contained in the Church's original site plan or the access from Doctor Perry Road to Lot 4, but object to any improvements on Lot 4 that serve the Parcel. Although they acknowledge that the Declaration never says so expressly, they read its recitals and covenants

---

[3] The Church presents the following questions in its brief:

> 1. Whether the circuit court erred in interpreting a restrictive covenant, which required the "principal improvement" on a subdivision lot to be a dwelling used "for residential purposes only," as prohibiting the property owner from extending the existing home's driveway to the adjoining parcel, particularly when the extension is limited to providing secondary access exclusively to emergency personnel to the parcel?
>
> 2. Whether the circuit court erred in interpreting a restrictive covenant, which provides that the construction of any building is permissible on the encumbered lot so long as it is "compatible" with the residence of the lot, as prohibiting bioretention ponds and storm drains, which serve a secondary access driveway to an unencumbered, adjoining parcel?
>
> 3. Whether the circuit court erred in holding that the extension of a driveway over a subdivision lot, for the benefit of the property owner's adjoining parcel, constituted a violation of the subdivision's record plat as an unreasonable use of the plat's non-restrictive easement over the lot?

collectively to restrict Lots 3 and 4 to purely residential uses and to preclude improvements that serve outside properties.

Our task in reviewing the grant of a motion for summary judgment is to determine "whether the trial court's grant of the motion was legally correct." *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-53 (2008) (citations omitted). A motion for summary judgment is properly granted if "there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). When "the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party." *Laing*, 180 Md. App. at 153 (citations omitted).

In interpreting the Declaration, we *first* must ascertain whether its contents are ambiguous, *i.e.*, susceptible to more than one interpretation by a reasonable person. *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 53 (2013). We bear in mind that the Declaration "must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that [we] will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Id.* at 52 (citations omitted). We also recognize the general policy interest in favor of the unrestricted use of property, and thus that we are to construe restrictive covenants strictly:

> It is also a fundamental rule that, since restrictions are in derogation of conveyances and repugnant to trade and commerce, restrictive covenants are not favored by the courts, but should be strictly construed against the parties seeking to enforce them. A restrictive covenant should not be extended

> by implication beyond its original intent to include anything not clearly expressed in the conveyance, and, if there is ambiguity in its meaning, any doubt should be resolved in favor of the unrestricted use of the property, if it reasonably can be done. The burden rests upon the party relying on a restrictive covenant to bring himself within its terms.

Miller v. Bay City Prop. Owners Ass'n, Inc., 393 Md. 620, 634 (2006) (quoting *Balt. Butchers Abattoir & Live Stock Co. v. Union Rendering Co.*, 179 Md. 117, 123 (1941)).

If we determine the language is unambiguous, we will "simply give effect to that language" and the Declaration's "unambiguous language will not give way to what the parties thought [it] meant or intended it to mean at the time of execution." *Dumbarton Imp. Ass'n, Inc.*, 434 Md. at 51-53 (citations omitted). On the other hand, if we determine that the language is ambiguous, we will resort to extrinsic evidence to divine the purpose of the covenant and the intent of the parties. *Id.* at 54.

The Sappes don't contend that the Declaration is ambiguous, but that the language compels us to affirm the circuit court's reading. They begin by placing considerable weight on the Declaration's recitals, which provide, among other things, that the Declaration is intended "to establish certain residential use covenants, conditions and restrictions for the purpose of protecting the value and desirability of the Lots." In the circuit court's view, these recitals suggested that the Declaration was "intended to establish and protect residential development through the imposition of residential use covenants, conditions and restrictions," and the court read the language of the covenants themselves against that backdrop. But recitals are not text. *See, e.g.*, *Walton v. Washington Cnty. Hosp. Ass'n*, 178 Md. 446, 452 (1940) ("[W]here one part of a contract . . . consists of a recital of

premises, while another part contains the actual obligations to be performed, an incidental recital is not controlling over the direct provisions of the obligatory part." (citation omitted)); *Hardy v. Brookhart*, 259 Md. 317, 329 (1970) ("We are not here dealing with any variation between the recitals and the *operative part* of the contract . . ." (emphasis added)); *Steffen v. Herr*, 231 Md. 479, 482 (1963); *see also Atlantic Mut. Ins. Co. v. Metron Eng'g & Constr. Co.*, 83 F.3d 897, 899 (7th Cir. 1996) ("[I]ntroductory language or recitals are not binding obligations 'unless so referred to in the operative portion of the instrument as to show a design that they should form a part of it."' (citation omitted)); *Grynberg v. FERC*, 71 F.3d 413, 416 (D.C. Cir. 1995) ("[I]t is standard contract law that a [prefatory] Whereas clause, while sometimes useful as an aid to interpretation, 'cannot create any right beyond those arising from the operative terms of the document."' (quoting *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985))). Moreover, even if we were to accord them substantive value, and we don't, a desire to establish "*certain* residential use covenants, conditions and restrictions" stops short of articulating a categorical residential use limitation. (emphasis added) These recitals state only a broader notion that the lots would be subject to certain limitations designed to preserve their residential character and value. They cannot be read to broaden the operative language of the covenants that follow.

Among the substantive covenants, only Sections 2.1 and 2.10 of the Declaration potentially bear on the proposed access road and bioretention ponds, and neither precludes otherwise permissible uses on Lot 4 from serving the Parcel. Section 2.1 provides that the "principal improvement to be erected on each Lot shall be one (and only one) detached single family dwelling, which said dwelling shall be used for residential purposes only."

This Section imposes no limitation on other improvements to the lot, nor does it (or any other provision) suggest that lesser improvements must have a purely residential purpose or serve only the lot itself. Section 2.10 states a general principle, that "[n]o Lot or portion thereof shall be used so as to affect injuriously the use occupation or value of the Lots in the subdivision for residential purpose[s] or so as to be or become a nuisance." But again, this restriction is framed only in terms of injury to the use or value of other lots, not in terms of a use's service to another parcel. The circuit court never reached the question of whether the Church's proposed uses of Lot 4 injuriously affected the Sappes' ability to use their lot for residential purpose or rose to the level of a nuisance. Instead, the court hinged its summary judgment ruling on the premise that the Declaration writ large imposed a categorical residential use limitation and precluded uses that served another lot, a premise that the unambiguous language of the covenants does not support.

The Sappes then point us to two cases, *Eisenstadt v. Barron*, 252 Md. 358 (1969) and *Namleb Corp. v. Garrett*, 149 Md. App. 163 (2002), that, in their view, compel us to interpret the Declaration to preclude the Church's proposed construction. In *Eisenstadt*, a buyer purchased a lot encumbered by a covenant requiring that the lot "shall be used for residential purposes only, and no structure shall be erected . . . thereon except a single dwelling." 252 Md. at 359-60. He then constructed a driveway and water line across his own lot to serve an apartment building that he owned on an adjacent lot was not a part of the subdivision (and not subject to the covenant). *Id.* at 361. Mr. Barron, his seller and a neighbor, sued to enjoin the construction. The Court of Appeals acknowledged that "it might be argued that since the Eisenstadt use is a residential use and the roadway is

incidental to such residential use such use is not precluded by the restriction." *Id.* at 369. But the Court read the restrictions as a whole and found that "it was the intent of the restriction to permit erection on the premises only of a dwelling calculated to accommodate a single family unit." *Id.* Although the restrictions could accommodate roads or other structures "incidental to the use of such single dwelling," the Court concluded that because the road in question was going to serve more than one residence, "the use of the property as a means of access to an apartment house or apartment houses on adjoining land not within the subdivision is not a use permitted under the restriction." *Id.*

We had the opportunity to apply *Eisenstadt* three decades later, in *Namleb*, to a situation in which the owner of a lot sought to build a road to provide access to lots in an adjoining subdivision. 149 Md. App. at 166-67. The owners of neighboring lots sued to enjoin the construction of the road, citing a restrictive covenant providing that "[n]o lot shall be used except for residential purposes [and] [n]o residence other than one detached single-family dwelling shall be erected on any one lot in said subdivision." *Id.* We held, relying on *Eisenstadt*, that because the "proposed access road would serve more than one residence, all of which would be located outside of the subdivision," the covenant precluded the construction. *Id.* at 170. In reaching this conclusion, we found *Eisenstadt* controlling because "the proposed road in *Eisenstadt* and the proposed road [at issue] were intended to serve multiple residences and, in both instances, outside of the subdivision." *Id.*

To be sure, *Eisenstadt* and *Namleb* stand for the principle that restrictive covenants are enforceable as written. But that principle undercuts the Sappes' arguments here

because the language of the covenants in those cases unambiguously precluded non-residential or servient uses. Here, they don't. The covenants in those cases expressly limited the use of the encumbered *lots* to residential purposes only, whereas this Declaration restricts the *principal improvement* on the encumbered lots to a residential dwelling and is silent about improvements that serve other parcels.

The Sappes also direct our attention to *Martin v. Weinberg*, 205 Md. 519 (1954), a case not expressly relied upon by the circuit court. In that case, the owners of a tract of land sued to enjoin the owners of two adjoining lots from constructing a parking lot. *Id.* at 522-23. The restrictive covenants prohibited the building of "more than one dwelling house, with the necessary outbuildings incident thereto, . . . all of which said dwelling houses shall be used for residence purposes only." *Id.* at 526. After losing in the circuit court, the owners appealed, arguing that the restrictive covenants were unenforceable and, in any event, did not prohibit the parking lot. *Id.* at 524-26.

The Court of Appeals held that the restrictive covenants were enforceable, then noted that although they should be construed strictly, "this does not mean that language must be so narrowly construed as to defeat its general purpose." *Id.* at 526-27. Applying this principle, the Court held that while the restrictive covenants did not expressly "refer to the land itself . . . obviously, a use of the land for 'open-air' parking or other commercial use . . . would defeat the general purpose to limit the use of the dwellings contemplated, to residence purposes only." *Id.* at 527. In reaching this conclusion, the Court also observed that "there is no public policy against a fair and reasonable construction, in the light of surrounding circumstances, of restrictions designed, in general, to accomplish the same

beneficial purposes as zoning." *Id.* Because, in the Court's view, the restrictions were designed to, in effect, "zone" the lots as residential, the Court declined to construe the covenants strictly. *Id.*

Martin is readily distinguishable. Unlike the deed restriction in *Martin*, the Declaration contains no restrictive expression that requires that any improvement on the encumbered lots must be incidental to that lot's dwelling. In stark contrast to *Martin*, a secondary access road crossing Lot 4 does not defeat the general purpose of these restrictive covenants (a *primary* access road open to all traffic might, but that's not what the Church proposed or the County approved). To the contrary: on the same day the declarants executed the Declaration, they executed an access easement across Lots 3 and 4 *specifically to serve the Parcel*, so access to unencumbered and adjoining lots was a conscious part of the original owner's vision. Unlike the parking lot in *Martin*, the proposed access road does not preclude Lot 4 from being used in the manner the declarants intended (*i.e.*, to serve a single-family dwelling), especially since the secondary access road will be gated to limit access only to emergency vehicles. And as such, this secondary access road cannot be an injurious use, and the Sappes do not contend (and offered no evidence in the circuit court) that the access road or the bioretention ponds would constitute a nuisance.

In sum, the Declaration does not prohibit the Church from constructing improvements on Lot 4 that serve the Parcel so long as the Church complies with Section 2.1's requirement that the "primary improvement" take the form of a residential dwelling. And it has: the gated secondary access road and bioretention ponds are lesser improvements consistent with the Declaration itself and the overall development scheme,

which specifically included an access easement across Lots 3 and 4 in favor to serve the Parcel. For the same reason, the emergency access road and bioretention ponds cannot be considered injurious uses for the purposes of Section 2.10, and the record contains no allegation or evidence that they would qualify as a nuisance. We reverse the circuit court judgment and remand this case to the court so that it can enter a declaratory judgment in favor of the Church consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY REVERSED AND THIS CASE IS REMANDED TO IT FOR ENTRY OF A DECLARATORY JUDGMENT IN FAVOR OF APPELLANTS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.