Supreme Court No. 98343-7

Court of Appeals No. 79333-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CAPE ST. MARY ASSOCIATES,

Appellant,

v.

SAN JUAN COUNTY,

Respondent

RESPONDENTS-INTERVENORS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS-INTERVENORS

Respondents-intervenors are Tracy and Eric Dobmeier; Joan and Dennis Egan; Linda and Michael McReynolds; Karen and John Taylor; Jacqueline Armborst and John W. Russell; and Jane Werntz Ward. All were parties to the Court of Appeals case whose March 2, 2020 decision is the subject of the Petition for Review. All were intervenors in the Skagit County Superior Court case below. With the exception of Jacqueline Armborst and John W. Russell, all were also intervenors in the San Juan County Hearing Examiner case that was appealed to superior court.

The respondents-intervenors are owners of property within the Cape St. Mary Estates subdivision. The appellant, Cape St. Mary Associates, seeks to overturn the holding of the Court of Appeals, which affirms that Cape St. Mary Associates must obtain the signatures of all property owners in the subdivision in order to vacate or alter a parcel within the subdivision known as the Ranch Tract, pursuant to RCW 58.17.212 ("vacation of subdivision") and RCW 58.17.215 ("alteration of subdivision"). The respondents-intervenors are some of the owners whose signatures Cape St. Mary Associates must obtain.

II. ISSUE PRESENTED FOR REVIEW

The appellant frames the issue presented for review in catastrophic terms:

> Can Washington citizens rely on public property records to define the lawful use of properties they own or purchase, or are they at risk of unrecorded restrictions because government officials, decades earlier, wished to impose them?

In reality, this case does not raise any such fundamental issue of property rights. Instead, this case involves the simple question of whether a plat may incorporate restrictions by reference to another document on the face of the plat.

III. STATEMENT OF THE CASE

Cape St. Mary Estates is a 30-lot subdivision on Lopez Island, San Juan County, Washington. Appellant Cape St. Mary Associates owns the "Ranch Tract," the single largest lot in the subdivision. The Ranch Tract is an approximately 90-acre lot containing two small residences. Each of the next 28 lots is a small lot containing one residence each. The final lot is a drainfield, not relevant to this case.

The plat of Cape St. Mary Estates contains a number of restrictions on its face, numbered 1 through 14. Below these is an unnumbered restriction that says:

> For further restriction, see the Declaration of Covenants, Conditions, Easements, Liens, and Restrictions for Cape St. Mary Estates as recorded at Auditor's File No. 117735, records of San Juan County, Washington.

CP 42. (The copy of the plat in the record is nearly illegible. This restriction is quoted in the Examiner's decision. CP 577 (finding of fact 6).)[1]

The document explicitly incorporated into the plat by reference to its recording number (AF 117735) is titled: "Declaration of Covenants, Conditions, Easements, Liens, and Restrictions for Cape St. Mary Estates" (hereinafter "Declaration of Covenants and Restrictions" or "Declaration"). That recorded Declaration of Covenants and Restrictions contains a heading, "MISCELLANEOUS USE RESTRICTIONS ON THE CAPE ST. MARY RANCH TRACT." (The capitalization is in the original.) Under that heading, restriction number 1 says, "[The Ranch Tract] is to be used primarily for agricultural purposes." CP 93 (excerpt of AF 117735, showing restrictions); CP 577 (finding of fact 9).

The plat has never been amended to remove the reference to the Declaration of Covenants and Restrictions in San Juan County record AF 117735. *See* CP 577 (finding of fact 10). Accordingly, the Court of Appeals held that the record, including the recorded, cross-referenced Declaration's restriction of the Ranch Tract to agricultural purposes, applies to the plat. Decision at 8.

[1] For the court's convenience, the plat restrictions are attached to this brief as Appendix A (as they were to the petitioner's opening brief filed in the court of appeals).

Under RCW 58.17.212 and 215, if a plat is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration or vacation of the subdivision would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants agreeing to the subdivision or alteration. Therefore, the Court concluded, under RCW 58.17.212 and 215, any application to vacate or alter the Ranch Tract must include the signatures of all parties in the subdivision providing that the parties agree to the vacation or alteration. Decision at 15.

This was also the conclusion of the Skagit County Superior Court, the San Juan County Hearing Examiner, and the San Juan County land use permitting staff who first issued a land use code interpretation at the request of Cape St. Mary Associates. *See* CP 572–596 (hearing examiner); 597–598 (superior court); 27–41 (permitting staff code interpretation).

In its petition for review, Cape St. Mary Associates claims there is no way an innocent landowner, reviewing the face of the plat, could determine that the restrictions in AF 117735 apply to the subdivision. *See, e.g.,* Pet. for Rev. at 1 ("…[landowners] at risk of unrecorded restrictions because government officials, decades earlier, wished to impose them").

In reality, there is no confusion about the restrictions that apply to the Ranch Tract. The face of the plat has always directed the reader to a

recorded document (AF 117735 – the Declaration of Covenants and Restrictions) "for further restrictions." Within the Declaration of Covenants and Restrictions, the restriction of the Ranch Tract to agricultural purposes is listed under a large, all-capitalized heading of "MISCELLANEOUS USE RESTRICTIONS ON THE CAPE ST. MARY RANCH TRACT." CP 93. There is no danger of confusion here, even for a reader unfamiliar with the plat. All the reader of the plat must do is consult the document explicitly cross-referenced with a specific recording number on the face of the plat as a source of further restrictions.

Even more remote is the possibility that Cape St. Mary Associates (the appellant) was confused about the restriction, because Stuart and Ilse Oles (identified as members of Cape St. Mary Associates at CP 16) were among the parties that applied for the plat and also among the parties that recorded the agricultural use restriction in the Declaration of Covenants and Restrictions. *Compare* CP 77 (signatories of plat) *with* CP 98 (signatories of Declaration). In fact, all of the signatories of the Declaration were also signatories of the plat. *Id*.

As the hearing examiner noted, Cape St. Mary Associates did not willingly restrict the Ranch Tract to agricultural use. They were compelled to do so when the County informed them that the proposed subdivision would only be approved if the 90-acre Ranch Tract were included in the

subdivision to lower the overall density of the subdivision. *See* CP 579 (hearing examiner findings of facts 14 and 15). To effectuate the goal of reducing the subdivision's density, the County insisted that the Ranch Tract be restricted to "agricultural use, not residential." *See* CP 584–588 (findings 30–50). Cape St. Mary Associates was unhappy with the County's requirement but ultimately acceded to it. *See* CP 587 (finding 43). Thus, any purported confusion on the part of Cape St. Mary Associates about the meaning and purpose of the use restriction in AF 117735 is only a fiction.

In the decades since the plat was recorded, Cape St. Mary Associates never sought to remove the reference to AF 117735 from the face of the plat. Instead, in 1985, four years after the plat was recorded (with the reference on its face to the Declaration of Covenants and Restrictions in AF 117735), Cape St. Mary Associates recorded a new, amended set of covenants for the subdivision. In these amended covenants, the restriction on the Ranch Tract was changed from "primarily agricultural" to "The Tract is to be used for agricultural or residential purposes." *See* CP 593 (finding 72); CP 248–269 (amended covenant) at CP 262 ("Miscellaneous Use Restrictions on the Cape St. Mary Ranch Tract"). Those amended restrictions were recorded under a different auditor's file number, AF 85135021. *See* CP 577, 593 (findings 10 and 72); CP 255 (amended covenant AF 85135021). However, as the hearing examiner noted, the plat was never amended. CP 577 (finding

of fact 10). The plat has always referenced AF 117735 and no other document. The amended covenants are not referenced or mentioned on the plat.

The Court of Appeals (and every other tribunal that has reviewed this case) concluded that the plat unambiguously incorporates AF 117735 by reference on the face of the plat and that such incorporation by reference was valid:

> "The common law doctrine of incorporation by reference has general usage in civil law and is recognized in Washington." The doctrine applies to government decisions when a public document "is adequately identified 'so that there is no uncertainty as to what was adopted.'" [2]
>
> The plat explicitly identifies a specific document, recorded CC&Rs, as the source of additional applicable restrictions. This language is not uncertain. It is specific rather than general boilerplate language referring to external covenants and restrictions.

Decision at 9–10.

The Court of Appeals was aware of the private covenant amendment in 1985 that changed the restriction to "agricultural or residential purposes." But the Court of Appeals noted that this amendment of the private covenants

[2] Citing, *inter alia*, *State v. Ferro*, 64 Wn. App. 195, 198, 823 P.2d 526 (1992); *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 31, 578 P.2d 1292 (1978); *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801, 225 P.3d 213 (2009).

did not amend the plat's reference to AR 117735 (the original Declaration). Decision at 4.

Because the plat to this day includes, on its face, an unambiguous incorporation of AF 117735, the Court of Appeals concluded that, under RCW 58.17.170(3)(b), the subdivision is "governed by the terms of approval of the final plat," which includes the restriction on the Ranch Tract in the original Declaration of Covenants and Restrictions recorded at AF 117735. Decision at 13–14.

The Court of Appeals also concluded that any attempt to vacate or alter the Ranch Tract would violate the restriction in the original Declaration, which requires inclusion of the Ranch Tract in the subdivision, not the removal of the Ranch Tract or the reduction of the Ranch Tract into smaller tracts. Therefore, under RCW 58.17.212 and 215, any application to vacate or alter the Ranch Tract requires the agreement signed by all members of the subdivision. Decision at 15-16.

The Court of Appeals correctly recognized that Cape St. Mary Associates' appeal is actually an "indirect attack on incorporation by reference, an issue we have resolved." *See* Decision at 14. The Decision correctly rejected the overwrought contention that "Washington property rights will be thrown into confusion" if purchasers must look to the face of their plats to discover use restrictions. *Id.* This is the same contention Cape

St. Mary Associates makes in its Petition for Review; this Court should reject it as well.

IV. ARGUMENT FOR WHY REVIEW SHOULD BE DENIED

Cape St. Mary Associates asks this Court to decide whether the Court of Appeals' decision is:

> contrary to multiple decisions of the Washington Supreme Court and it raises a critical issue for property owners and purchasers across the state: can they rely on public property records to state the lawful uses of property, or are they subject to the unrecorded and unilateral wishes of long-gone officials?

Petition at 2.

In reality, the Court of Appeals' decision does not conflict with any Supreme Court decision or any other source of law. It is a straightforward application of the doctrine of incorporation by reference, which has been upheld by the Supreme Court many times in many contexts, as cited above.

Likewise, this case does not present any issue of substantial public interest. As the hearing examiner noted, "Some plats contain [conditions, covenants, and restrictions]. Many do not." CP 583 (finding 28). The plat of Cape St. Mary Estates happens to be a plat that does include restrictions, which were put there at the County's insistence. But the details of this particular plat, and how its restrictions came to be imposed, are of interest to no one other than the members of the subdivision and the County. As the

hearing examiner noted, while it might have been easier "if each and every word of a particular condition or restriction was written on the face of the plat document itself," there was nothing ambiguous about the restrictions that apply to this plat through its incorporation by reference of AF 117735. *See* CP 582–583 (findings 19–26). Nothing in the details of the Cape St. Mary Estates plat implicates the public interest.

Cape St. Mary Associates claims the Court of Appeals decision violates the holding in *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 269, 273, 714 P.2d 1170 (1986) that, in construing a plat, the intention of the dedicator controls. On the contrary, the Court of Appeals both cited and correctly applied this rule. As the Court of Appeals explained, the restriction on the Ranch Tract was incorporated to reduce the subdivision's density. The intent to reduce density is the intent that controls. The Court correctly determined that the agricultural use restriction in Declaration of Covenants and Restrictions is aimed at reducing density.

Cape St. Mary Associates appears to be arguing that the density reduction was only the County's intent, not also their intent as dedicators of the plat. This argument is false. While Cape St. Mary Associates was not happy at being forced to include the Ranch Tract to reduce density, it ultimately acceded to the County's demands and agreed to reduce the subdivision's density. *See, e.g.,* Opening Brief of Appellant (Mar. 25, 2019)

at 1 (the "owners of the Ranch Tract agreed to add [Ranch Tract] to [Cape St. Mary Estates] under certain defined conditions"). To effectuate that purpose, it was Cape St. Mary Associates which restricted the Ranch Tract by recording AF 117735. Had it not done so, it would not have obtained approval for the subdivision at all, as it admitted. *See* CP 586–587 (findings 41–43). Thus, the intent of the dedicator was to obtain plat approval by reducing density by incorporating AF 117735 onto the face of the plat. The dedicator's "hurt feelings and disappointment" at having to include the Ranch Tract in the subdivision (*see* CP 581, finding 18) are not relevant to the question of the dedicator's intent, which was to reduce density, however unhappy about it the dedicator may have been.

Cape St. Mary Associates also claims the Court of Appeals decision violates the holding in *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) that the permissible use of extrinsic evidence does not include evidence that would show an intention independent of the instrument. This is the so-called "context rule," as articulated in *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (and cited in *Hollis* as applicable in the context of covenants):

> Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the

> reasonableness of respective interpretations advocated by the parties.

But the Court of Appeals did not use extrinsic evidence to find any intent contrary to the plat. The plat itself contained a reference to AF 117735 as a source of "further restrictions." The Court of Appeals correctly recognized that the Examiner first found that the plat unambiguously incorporated AF 117735 by reference and then noted that, even "if the plat was ambiguous, a consideration of the extrinsic evidence presented by the parties would produce the same result." Decision at 11.

Finally, Cape St. Mary Associates claims the reference to AF 117735 was nothing more than a general warning that private covenants existed, not an additional source of restrictions on the plat. In support, Cape St. Mary Associates cites *Shaffer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 274, 883 P.2d 1387 (1994). However, *Shaffer* is not a blanket holding that restrictions or covenants can never be adopted by the plat's explicit reference to a specific document. The plat in *Shaffer* contained only a bare warning that private covenants existed to which buyers would be subject. The plat did not purport to incorporate other covenants by reference. In contrast, the Cape St. Mary Estates plat explicitly and unambiguously incorporated by reference a specific set of

restrictions, identified by a specific recording number, as a source of "further restrictions."

V. CONCLUSION

The Court of Appeals reached the correct decision in finding that the plat of Cape St. Mary Estates incorporates by reference the restrictions in AF 117735, including the restriction that the Ranch Tract be used for agricultural purposes. The Court's decision does not conflict with Supreme Court precedent or any other source of law. On the contrary, the decision is firmly grounded in case law. This case does not present an issue of substantial public interest, but only the interpretation of one specific plat's restrictions. Therefore, this Court should deny review.

Dated this 14th day of April, 2020.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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APPENDIX A

RESTRICTIONS

1. If any private deed restrictions are in conflict with the restrictions which appear on the face of this plat, the more restrictive provisions shall govern. However, the County shall not be party to any private restrictions.

2. This subdivision has been approved by the responsible County officials on the premise that Lots 1 thru 29 will be occupied by no more than one single-family dwelling and related outbuildings. No lot shall be otherwise occupied or divided unless the lot owner can first demonstrate to the County's satisfaction that the provisions for water supply, sewage disposal, circulation, lot size and related planning considerations are adequate to serve the proposed use. Compliance with this provision shall be effected through written application to the Plat Administrator who shall be responsible for coordinating and approving the review of such requests.

3. All structures shall be set back a minimum of twenty (20) feet from the edge of any private right-of-way, and a minimum of fifty (50) feet from the centerline of any public right-of-way.

4. Lots in this subdivision shall not be further divided, including division by short platting, except in accordance with County and State laws pertaining to replatting, providing such division of property is consistent with the Shoreline Master Program and all other official land use regulations. Under any replat which further divides any lot, the plat road(s) shall be constructed to comply with the currently adopted minimum standards and specifications for subdivision roads; and, such reconstruction shall begin at the point of connection with the County Road and run to and completely serve that area replatted.

5. The lot owners shall have joint responsibility for the maintenance of the road shown on the face of the plat as ELIZA DRIVE. Maintenance of the two access road easements listed in the dedication shall be the responsibility of the owners of lots erved by said easements.

6. The owners of Lots 7 through 14 will have the responsibility of operating and maintaining a sewage collection system and drainfield in Lots 20 and 21, or such other location as may be determined satisfactory and acceptable to the appropriate public health officials.

7. Water will be supplied by the Cape St. Mary Water Company in accordance with the terms and conditions of the water rights agreement as recorded at Auditor's File No. 117734.

8. Building setback line: All residences and other structures shall be located upland of the building setback line as shown on the face of the plat.

9. Mooring Structures: All applications for mooring structures in this subdivision shall be subject to the provisions of the County's Shoreline Master Program.

10. No cutting of trees except for safety reasons shall be allowed within the 30-foot wide strip of land abutting Sperry Road (County Road No. 121) in Lots 1 and 29 as shown on the face of the plat.

11. No access shall be allowed across the one-foot wide strip of land abutting Sperry Road (County Road No. 121) in Lots 1 and 29 as shown on the face of the plat.

12. Tree restriction: No trees with a trunk diameter greater than 18 inches at breast height shall be removed between the building line and shoreline. Thinning and topping is allowed only when necessary to enhance the view.

13. No building, clearing and construction in general will be allowed from January 15 to July 1 of each year between the 330 foot and 660 foot radius lines around the Eagle's Nest as shown on the face of the plat, and no building or clearing will be allowed within the 330-foot radius line at any time.

14. The owners of Cape St. Mary Ranch tract shall be restricted from constructing, maintaining or allowing to be constructed or maintained within 100 feet of the well, as shown on the face of the plat any of the following: cesspools, sewers, privies, septic tanks, drainfields, manure piles, garbage of any kind or description, barns, chicken houses, rabbit hutches, pigpens, or other enclosures or structues for the keeping or maintenance of fowls or animals, or storage or use of liquid or dry chemicals, herbicides, or insecticides, as long as said well is operated to provide water for public or private water consumption.

15. The Easterly lot lines of Lots 18 and 19 shall be fenced within six months of final approval of this plat.

For further restrictions, see the Declaration of Covenants, Conditions, Easements, Liens, and Restrictions for Cape St. Mary Estates as recorded at Auditor's File No. 117735, records of San Juan County, Washington.

BRICKLIN & NEWMAN, LLP

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