IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 210113

HELEN MARIE TAYLOR *et al*.,

***Appellants*,**

v.

RALPH S. NORTHAM *et al*.,

***Appellees*.**

APPELLANTS' SUPPLEMENTAL REPLY BRIEF TO PROPERTY LAW PROFESSORS' BRIEF *AMICUS CURIAE*

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STATUTES

Appellants ("Residents") submit the following in response to the brief *amicus curiae* filed by the Property Law Professors ("Professors"):

INTRODUCTION

The Professors argue at pages 7-8 of their brief that the Court should affirm the judgment of the circuit court for four reasons: (1) the restrictive covenants were not clearly created; (2) even if covenants were created, they cannot be enforced by parties who have no interest in related property[1]; (3) affirmative covenants are strongly disfavored; and (4) the covenants are contrary to public policy.

Residents respond to arguments supporting contentions (1), (3) and (4) that were not made in the Governor's brief.[2]

ARGUMENT

I. The language of the 1887 and 1890 deeds is clear.

The Professors argue that the language "does not fit the typical form that a servitude takes" and does not contain "standard covenant-creating language." Br. 9-10. Their discussion fails to acknowledge this Court's decisions citing with

[1] The second contention addresses an issue in *Gregory v. Northam,* Rec. No. 201307, as does the Professors' discussion of easements in gross at pages 11-14. All other contentions in the Professors' brief, including the Professors' free speech contention, have been previously addressed in response to the Governor's contentions in Residents' previous briefs.

[2] The Professors' brief will be referred to as "Br.," Residents' previous briefs as "OBr." and "RBr.," and the Governor's consolidated brief as "CBr.".

approval the holding in *Tulk v. Moxhay,* 11 Beavan 570, 50 Eng. Rep. 937, 2 Phillips 774, 41 Eng. Rep. 1143, 1 Hall & Twells 105, 47 Eng. Rep. 1345 (1848). *Minner v. City of Lynchburg,* 204 Va. 180, 187 (1963); *Cheatham v. Taylor,* 148 Va. 26, 37-38 (1927); *Tardy v. Creasy,* 81 Va. 553, 562 (1886). As Residents noted in their reply brief, the covenant in *Tulk* is remarkably similar to the restrictive covenants at issue here. RBr. 9-10.

Three decisions are cited in support of the Professors' contention that "standard covenant-creating language" is required to create a restrictive covenant. *Elterich v. Leicht Real Est. Co.,* 130 Va. 224 (1921); *Scott v. Albemarle Horse Show Ass'n,* 128 Va. 517 (1920); *Va. Hot Springs Co. v. Harrison,* 93 Va. 569 (1896). There is nothing in any of those three opinions to indicate that the deeds at issue there contained the same covenant-creating language, much less that such language was "standard" in a "typical conveyance".[3] Professors do not cite any authority for their argument that only "typical" language will establish a valid restrictive covenant.

II. The restrictive covenants are not donative transfers and are not against public policy or unduly vague

Raising an issue that was not litigated below, the Professors argue that the covenants "more closely resemble donative transfers" and are void because they

[3] The General Assembly has at times required the use of standard language in agreements. *E.g.,* Va. Code §38.2-2105. It has never chosen to prescribe standard language for restrictive covenants in deeds. *See generally* Va. Code, Title 55.1.

are against public policy and are "general as to time and person." Br. 11. Actually, the conveyances here "resemble" deeds containing restrictive covenants that benefit owners of lots within a dominant estate because that is what they are. *See Barner v. Chappell,* 266 Va. 277, 282 (2003) ("[T]he purpose of the restrictive covenant was to maintain…an open, green area in Pollard Park.").

In support of their argument that as donative transfers the restrictive covenants are void, they cite *Hamm v. Hazelwood,* 292 Va. 153 (2016). The *Hamm* Court quoted *Edwards v. Bradley,* 227 Va. 224, 228 (1984) that "a condition *totally* prohibiting the alienation of a vested fee simple estate or requiring forfeiture upon alienation is void." (Emphasis added). The restrictive covenants do not prohibit the Commonwealth from transferring the Lee Circle and the Monument to a third party. The Governor does not dispute that claim other than to argue that the market for such a transfer would likely be limited. CBr. 53 n. 16.

III. The obligations created by the restrictive covenants are largely negative

The Professors argue that the 1887 and 1890 deed covenants are affirmative obligations that are "too vague to be enforceable." Br. 20. They rely on *Snug Harbor Prop. Owners Ass'n v. Curran,* 55 N.C. App. 199, 284 S.E.2d 752 (N.C. Ct. App. 1981). However, the 1887 Deed covenant (to hold the Lee Circle "as a site for the Monument to General Robert E. Lee…and only for the said use") is negative, not affirmative. JA 239. "Easements are described as being 'negative'

when they convey rights to demand that the owner of the servient tract refrain from certain otherwise permissible uses of his land." *U.S. v. Blackman,* 270 Va. 68, 70 (2005). The 1890 deed covenants, which require the statue, pedestal and circle be held for the purpose to which they are devoted and guarded and protected, are largely negative. Any affirmative obligation is straightforward and unambiguous. JA 255. To comply with those covenants, all the Commonwealth must do is not use Lee Circle for anything other than the Lee Monument and to protect it against damage and defacement.

In contrast to the clear requirements in the covenants, the covenant language in *Snug Harbor* required "[m]aintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks." On its face, the covenant was open-ended. 55 N.C. App. at 201-02. The North Carolina Court of Appeals determined that these requirements were unenforceably vague because the property to be maintained was not described with particularity and that there was no standard by which the required maintenance and improvement were to be judged. *Id.* at 204. In this case, the property is described with great particularity (*i.e.,* the statue, pedestal and circle of land), and the maintenance obligation is limited to guarding and protecting the Lee Monument against damage. Unlike the covenants in *Snug Harbor,* a court can easily determine what is required to be maintained by the 1887 and 1890 deed covenants and to what degree. *Id.* at 205.

IV. The deed covenants touch and concern Residents' land

The circuit court specifically found that the deed covenants "touch and concern the land." JA 82. The Professors apparently agree that the covenants touch and concern Lee Circle, but they contend, as the Governor did not in the court below or in his consolidated brief, that the covenants do not also touch and concern the land owned by the Allen Addition Residents. Br. 21-23. When the covenants to use Lee Circle for the Lee Monument were created, they clearly concerned, and were intended to benefit, the remainder of the Allen Addition. JA 153, 161, 203. As the Commonwealth recognized in 2006, the Lee Monument is an "urban amenity" of "outstanding artistic quality and design." JA 176, 178. It cannot credibly be argued that in 1890 the deed covenants did not touch, concern and benefit the land retained by the Allen family as depicted on the plats attached to the 1887 and 1890 deeds. The fact that the Allen Addition subdivision is now owned, not by a single family, but by individual owners of Allen Addition lots does not change the analysis.[4] Nothing has happened since 1890 that has caused the deed covenants to no longer touch and concern the lots in the Allen Addition.

[4] *Four Seasons Homeowners Ass'n, Inc. v. Sellers,* 302 S.E.2d 848, 852 (N.C. App.1983) ("Defendants argue that the covenant does not touch and concern the land because some of the recreational facilities, which are financed by the maintenance fees, are several blocks away from defendants' lots. The covenant, however, runs with each lot in the entire subdivision of which defendants' lots are but a small part. The recreational facilities are in the subdivision, for the use of all the people who live in the subdivision. It does not matter that the facilities are not

In another argument not previously raised by the Governor, the Professors contend that the Allen Addition Residents benefit from the existence of the Lee Monument as members of the public. Br. 23. The same argument could be made with respect to any park, green space, view or other amenity protected by a restrictive covenant. The fact that the covenants also benefit members of the public does not make their benefits to the Residents less real. Nor does the fact that other people who live in the Allen Addition may consider the presence of the Lee Monument as detrimental affect the enforceability of the covenants by the Residents. No doubt some who live near public parks wish the parks were not here because of noise, litter and crime. That does not change the status of the parks as amenities or invalidate any restrictive covenants to which they are subject.

The Professors rely heavily on two New York cases. *Eagle Enterprises, Inc. v. Gross,* 39 N.Y.2d 505, 384 N.Y.S.2d 717, 349 N.E.2d 816 (N.Y. Ct. of App. 1976) and *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank,* 278 N.Y. 248, 15 N.E.2d 793 (N.Y. Ct. of App. 1938). Br. 19, 21-23. Neither concerned a covenant similar to the deed covenants in this case. In *Neponsis,* the court held that a covenant requiring landowners in a subdivision to pay an annual charge "devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes" was enforceable because it touched and concerned the

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adjacent to each lot, it is sufficient that they touch and concern the entire subdivision.").

land of the defendant and its burden should run with the land. N.E.2d at 794, 797. *Eagle Enterprises* involved a covenant that required a lot owner to purchase water from the developer for part of the year for a specified fee. 384 N.Y.S.2d at 718. The court determined that the obligation to receive water did not relate to any significant degree to the ownership rights of the lot owners and other property owners in the subdivision; therefore, the obligation did not touch and concern the land. *Id.* at 720. The court distinguished *Neponsit* on the basis that "[t]he landowners in Neponsit received an easement in common to utilize public areas in the subdivision; this interest was in the nature of a property right attached to their respective properties." *Id.* For some inexplicable reason, the Professors contend that a covenant requiring the sale and purchase of water more closely resembles the 1887 and 1890 deed covenants that an easement in common to utilize public areas in a subdivision. Br. 22. This is exactly backwards. The deed covenants, which give the Allen Addition Residents the right to continue to enjoy a public amenity in the subdivision in which they live, are much more similar to an easement in common to utilize public areas than to an agreement to sell and purchase water.

The Professors also rely on *Reed v. Dent,* 194 Va. 156 (1952). Br. 22. Contrary to their argument, the "touch and concern" issue was not addressed in that case. The court determined that the servitude in question was an easement in gross and "that it was not contemplated or intended that it remain as a burden in

perpetuity upon the full use and enjoyment of the lot conveyed." 194 Va. at 162. Accordingly, the court remanded the case to determine the duration of the deed restriction, essentially taking for granted that the restriction touched and concerned the land.

The Professors also argue that the covenant requiring the Commonwealth to guard and protect the Lee Monument resembles a personal, contractual promise because, "[a]fter all, the guarding and maintaining of statues are routinely the subject of contracts." That is true but irrelevant. Covenants in deeds to guard and maintain statues have also been legally enforceable, at least since *Tulk v. Moxhay.*

V. The covenants are not contrary to existing public policy and the Court should decline to establish a new public policy

The Professors aggregate a number of official actions, including commission reports and specific legislation unrelated to the Lee Monument (Br. 26-29), that differ for the actions identified by the Governor (CBr. 60-65) in an attempt to demonstrate that the Commonwealth's public policy regarding the Lee Monument has changed since 1889. Br. 26-29. Such combinations of actions cannot establish the public policy of the Commonwealth and certainly not its policy regarding the Lee Monument, which none of the actions specifically addresses. *Tvardek v. Powhatan Vill. Homeowners Ass'n,* 291 Va. 269, 280 (2016) ("[T]he legislature, not the judiciary, is the sole 'author of public policy.'"). The express position of the Commonwealth regarding the Lee Monument announced in the 1889 Joint

Resolution cannot be repealed by implication. *See Sexton v. Cornett,* 271 Va. 251, 257 (2006) (presumption that prior legislative enactment remains in effect unless expressly repealed). The Professors simply assume that the 2020 Budget Amendment was constitutionally enacted without addressing the challenges raised by Residents. Br. 5, 25, 32.[5]

The Professors argue further that the covenants are invalid because they are inconsistent with Code § 36-96.6, which declares racially restrictive covenants to be void. Br. 9, 27. The record clearly refutes that argument. JA 715-833 (title report on 1833 Monument Avenue and on 403 Allen Avenue). The 1887 and 1890 deed covenants are not racially discriminatory; moreover, there is no evidence that there have ever been racial restrictions associated with the Allen Addition subdivision. The Governor attempted at trial to link a 1927 newspaper advertisement for lots in a subdivision that is miles away from the Allen Addition. The advertisement announced that the sale of lots described in the advertisement could not be sold or rented to persons of African descent. JA 685. That subdivision has no relationship with the Allen Addition subdivision. JA 607-08. Nor is there

[5] The Professors also fail to address the Court's decisions in *Ault v. Shipley,* 189 Va. 69 (1949), on which Residents have relied and which held that a legislative act of adopting a zoning ordinance did not invalidate a restrictive covenant. *See RECP IV WG, LLC v. Capitol One Bank (USA), NA.,* 295 Va. 268, 289 (2018); *River Heights Assoc. P'ship. v. Batten,* 267 Va. 262, 274 n. 9 (2004) (adopting the *Ault* rationale that a legislative act in the form of a zoning ordinance cannot constitutionally relieve land from a lawful restrictive covenant).

evidence, including in the testimony of the Governor's experts, to support of the Professors' contention that the Lee Monument is a "symbol of racial superiority." Br. 27.

CONCLUSION

Residents request that the Court reject the contentions of the Professors on the merits.

Respectfully submitted,

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CERTIFICATE

I certify that on May 19, 2021, I emailed a true copy of the foregoing Opening Brief of Appellants to Toby J. Heytens, Solicitor General, at *theytens@oag.state.va.us*.

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I have complied with Rule 5:26 of the Rules of the Supreme Court of Virginia.

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