4 CAN'T-FAIL STEPS TO AVOID DISPUTES OVER YOUR DOCUMENTS

AND

4 THINGS TO KNOW WHEN THOSE FAIL

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September 10, 2007

OVERVIEW

A private land-use arrangement -- an easement, covenant, restriction, or development agreement -- occupies that twilight area between contract and real estate law. Like a commercial contract, a private land-use arrangement should contain a clear expression of the parties' intent and a plain description of each side's duties and responsibilities. Like a real estate instrument, the arrangement can have far-reaching implications on the value and future use of a piece of ground.

And like every contract, a private land-use arrangement is fertile ground for disputes.

Watching a court -- or, worse, a jury -- trying to untangle such disputes is an unnerving education for drafters of such arrangements and for their clients. Concepts that seemed so clear during the drafting process become lost in a soup of conflicting clauses, presumed intents, terms of art, and exceptions.

But if you understand how the court will eventually decode and apply the contract, it may help in the drafting process. So, working backwards from results in litigated cases, I have distilled 4 can't-fail steps to take to make sure that your document will not wind up before a judge or jury -- and 4 things to know once it does.

THE 4 CAN'T-FAIL STEPS

The most common failings in easements and covenants -- the reasons why these agreements wind up before a judge or jury -- fall into 4 categories. Those failings are also known as **"The 4 Ps"** and they are:

1. **Purpose**
2. **People**
3. **Posterity**
4. **Procedure**

Each of the problems, and proposed solutions, are discussed below.

1. Purpose

Failing: Unclear purpose

Easements, covenants, and similar agreements are created to address site-specific purposes. Yet, frequently, the purposes are not clearly set forth in the document. This leaves open to later dispute whether the interpretation of particular contract terms is consistent with the parties' purposes.

When agreements are being drafted, everyone is in the "Let's Make a Deal" mood and not the "Truth or Consequences" mood. Clients are looking for common ground, not points of dispute. As a result, the purpose behind the easement or covenant tends to get larger, vaguer, more universal, and less site-specific. Vaguer purposes make for vaguer documents.

For easements, the general rule is that the owner of the servient estate (that is, the estate burdened by the easement) is entitled to use his property to the fullest extent consistent with the terms of the easement. The owner of the dominant estate (the estate benefited by the easement), is entitled to use the easement only in the manner fairly contemplated by the easement. *See generally Miller v. Kirkpatrick*, 377 Md. 335, 833 A.2d 536 (2003).

Therefore, the terms of the easement should be precisely tailored to meet the parties' purposes. If the parties establish an easement so that Neighbor A can drive across the property of Neighbor B to get to Neighbor A's property, is the parties' purpose really to create a driveway? An exclusive driveway? For any amount of vehicles? And what if

the existing Neighbor A house is replaced with an apartment building? Or what if Neighbor A opens a church or a dentist's office? What about parking in the easement area by Neighbor A or Neighbor B?

The books are filled with cases where the purposes of the easement are not sufficiently clear from the document itself. In one of many cases reviewing ingress and egress easements, the court in *Patterson v. Sharek*, 924 A.2d 1005 (D.C. 2007) concluded that if the deed of easement does not contain language that prohibits encroachments in the easement area, then the owner of the servient estate (Neighbor B) retained a right to park in the easement area, so long as that parking did not unreasonably interfere with the dominant estate (Neighbor A) right of way for access.

And in *Brown v. Smith*, 173 Md. App. 459, 920 A.2d 18 (2007), the court found that the deed term "conjointly" nevertheless was insufficient to constitute a grant of mutual easements.

The same problem arises in the context of restrictive agreements and development agreements. In *Barner v. Chappell*, 266 Va. 277, 585 S.E.2d 590 (2003), a restrictive agreement (restrictive covenant) stated that no structure could be built on a particular lot within a subdivision. Sixty-five years later, the question arose whether that restriction was still enforceable or whether the purpose of the covenant had lapsed. One side argued that the restriction was intended to facilitate a then-existing sewer line route, a purpose which no longer stood in the way of development. The other side argued that the purpose was to preserve the natural, green character of the subdivision by preventing development on the lot. The court agreed with the latter position and allowed the neighbors to enforce the restriction.

Even as seemingly simple a concept as a restriction of use for "residential purposes only" continues to generate litigation if the document does not specifically exclude rentals. *See Scott v. Walker*, 645 S.E.2d 278 (Va. 2007)("residential purposes" is an ambiguous term regarding short-term rentals and the covenant would be construed to allow short-term rentals); *Lowden v. Bosley*, 395 Md. 58, 909 A.2d 261 (2006)("residential purposes" is an unambiguous term and allows for short-term rentals).

In all these agreements, the problem appears to be that the documents are trying to carry too much water. The parties dump into the agreements all manner of purposes, including inconsistent purposes, or purposes that have not in fact been agreed to by the parties.

Fix: Make the contract smaller and simpler.

2. People

Failing: Uncertainty about parties

The identification of who has the final say regarding obligations is a frequent problem, particularly in declarations of covenants, conditions and restrictions.

For example, when the declaration for a townhouse community grants to each unit owner a "right and easement of enjoyment" in the common areas, the community association's board does not have the right to adopt regulations which assigned to each unit specific parking spaces. In *White v. Boundary Association, Inc.*, 271 Va. 50, 624 Sl.E.2d 5 (2006), the court held that the grant of the easement could not be trumped by the association's regulations (absent a vote as set forth in the declaration). Thus, the declaration created common areas and created a homeowners' association, but did not vest the association with control over the common areas.

Fix: Make it clearer

3. Posterity

Failing: Not accounting for successors

Does a restriction once observed -- or once breached -- continue to apply to successors-in-title?

Generally, a restrictive agreement cannot be modified or terminated except by agreement of all of the parties entitled to enforce the covenant. The covenant may establish a way by which the parties agree the covenant can be modified or terminated. *See Hening v. Maynard*, 227 Va. 113, 313 S.E.2d 379 (1984). But do the terms of the agreement extend to new parties as well?

In *Barris v. Keswick Homes, LLC*, 268 Va. 67, 597 S.E.2d 54 (2004), the grantor created a subdivision of 17 lots, with a deed of dedication that stated that there could be no resubdivision of the lots without the written consent of "three-fourths of the then owners of lots in said subdivision." At one point, three-fourths of the then-owners entered into agreements allowing subdivisions of a number of the lots but also singled out Lot 7 as being "released" from the covenant. When the owner of new Lot 7A sought further resubdivision, the neighbors sued to enforce the three-fourths consent requirement.

The court held that the covenant's language allowing resubdivision of a lot with the consent of three-fourths of the then-owners was not the equivalent of a right of three-fourths of the owners to modify the covenant itself. That right was not expressly granted

in the covenant and would not be implied by the three-fourths consent provision since the test under the covenant was three-fourths of the "then owners," meaning the owners at the time of the resubdivision request. New Lot 7A was subject to the restriction and, as the court noted, now there were even more neighboring lot owners that had to consent since th subdivision had grown from 17 lots to 27 lots. Finally, the owners who had consented to "releasing" Lot 7 from the restriction permanently were not estopped to argue that their consent was needed today.

Fix: Make the exercise of rights certain

4. Procedure

Failing: Not following the rules

If the agreement requires that the grantor or declarant perform an act before an agreement can be given effect, that rule must be followed. Restrictions on the use of land are generally construed narrowly so as to promote the free use of property. *See Scott v. Walker*, 645 S.E.2d 278 (Va. 2007). Therefore, a party seeking to take advantage of the restriction needs to dot the i's.

For example, in *Miller v. Bay City Property Owners Ass'n, Inc.*, 393 Md. 620, 903 A.2d 938 (2006), the deed creating the residential development included a reservation by the grantor of the right to create a community harbor upon the filing of a plat showing the location. No plat was recorded before the lot in question was transferred to the community association. The association purported to declare certain lots in three different locations in the development as subject to the reservation for the harbor. But, still, they did not file a plat as required by the original reservation. The association later sold one of the lots to a third party, and sought to hold that third party to the harbor reservation.

The *Miller* court held that since the original deed required that a plat be recorded in order to fix the location of the harbor, and no plat had ever been recorded, the community association could not deny the now-owner the right to build. The court also held that the community association could not expand the harbor reservation from a single harbor to three noncontiguous lots. The court rejected the argument that the association's declaration of certain lots was a sufficient substitute for the deed's requirement of recordation of a plat.

Fix: Follow the rules

4 THINGS TO KNOW ABOUT COURT

Westlaw and Lexis are crammed with cases about easements, restrictive agreements, and similar contracts. But there are 4 issues that occur again and again when these matters are litigated.

1. Difference between ambiguous and unambiguous.

It is well-established that the source of evidence regarding the intent of the parties to an agreement or deed is the words actually used by the parties. The court decides whether the agreement is ambiguous and that is a question of law. An agreement is ambiguous if the words are reasonably susceptible of more than one meaning. *Gunby v. Olde Severna Park Improvement Ass'n, Inc.*, 174 Md.App. 189, 921 A.2d 292 (2007).

If the court determines that the easement or covenant is unambiguous, it applies the terms of the document as written. Other than the need to provide context for the contract or transaction, the parties do not submit, and the court does not consider, evidence about what the parties "intended" because they are deemed to have intended the plain meaning of the words on the paper. *See Lowden v. Bosley*, 395 Md. 58, 909 A.2d 261 (2006).

If the court determines that the agreement is ambiguous -- that is, it is susceptible of more than one meaning -- it considers extrinsic evidence to resolve the ambiguity. *Id.*

In Virginia, a restrictive agreement of "substantial doubt or ambiguity" must be interpreted in favor of free use of the property and against restriction. *Scott v. Walker*, 645 S.E.2d 278 (Va. 2007).

2. Extrinsic evidence vs. parol evidence.

"Extrinsic evidence" is evidence outside the four corners of the agreement which provides context, history, custom and practice, and other information from which the court can help glean what reasonable parties in the position of the contracting parties intended to accomplish by their agreement. Extrinsic evidence can be oral or written.

"Parol evidence," by contrast, is evidence which would tend to vary or conflict with the terms of a written integrated agreement. Parol evidence is not admissible to establish what a contract means or the circumstances surrounding the creation of a clear and unambiguous contract. *See VEPCO v. Northern Virginia Regional Park Auth.*, 270 Va. 309, 618 S.E.2d 323 (2006); *Forster v. Hall,* 265 Va. 293,576 S.E.2d 746 (2003). Parol evidence may be admissible on the question of whether the parties formed a contract.

3. Standing

A party seeking to defend an easement or restriction in litigation should always carefully scrutinize the standing of the person challenging the agreement. The specific rules regarding standing should be reviewed to ensure that the plaintiff has the requisite standing.

For example, to enforce a restrictive covenant in Virginia, a landowner has to establish horizontal and vertical privity and a party who does not meet both elements does not have standing to challenge it. *See Barner v. Chappell*, 266 Va. 277, 585 S.E.2d 590 (2003).

4. Changed circumstances

The party seeking to annul a restrictive agreement bears the burden of demonstrating that the continuing validity of the covenant cannot further the purpose for which it was formed in light of changed circumstances. *See City of Bowie v. MIE Properties, Inc.*, 398 Md. 657, 922 A.2d 509 (2007); *Barner v. Chappell*, 266 Va. 277, 585 S.E.2d 590 (2003).

The test has variously been stated as evidence that conditions have changed "so substantially that the essential purpose of the covenant is defeated," *see Barner*, or that there has been a "dramatic" or "radical" change in the neighborhood, causing the restrictions to outlive their usefulness. *See City of Bowie*.

Other factors can lead a court to block enforcement of a covenant, including when the covenantee no longer exists or when there has been a pattern of refusal to enforce the restriction against others and it would be inequitable to enforce the restriction against one owner.