Case No. 1861, September Term 2012

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

JOHN TIMOTHY NEWELL,
FRANCES LUCINDA NEWELL,
KAREN NEWELL BRINDLEY,
SHARON NEWELL FAWCETT,
ELIZABETH BANKS RAY,
ESTATE OF BEULAH BANKS NEWELL,

Appellants,

v.

THE JOHNS HOPKINS UNIVERSITY,

Appellee.

On Appeal from the Circuit Court for Montgomery County
Case No. 355237-V (Rubin, J.)

BRIEF OF APPELLANTS JOHN TIMOTHY NEWELL, ET AL.

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STATEMENT OF THE CASE

This case requires the Court to determine whether The Johns Hopkins University ("JHU" or "Johns Hopkins") is free to lease and to build high-density commercial facilities on a large and valuable parcel of land conveyed to it by a charitable donor who was famously opposed to just the sort of high-density, commercial development that JHU now pursues. That donor manifested her opposition to development and her desire that JHU directly use the land in express restrictions in the deed and contract conveying the land, together with a multi-year course of negotiations in which JHU successfully pursued and secured her gift on the basis that JHU itself would use the land as a "campus of Johns Hopkins University" only for "academic" and related purposes, preserving the property in an open, park-like setting.

In 1989, Elizabeth B. Banks ("Banks") and her siblings conveyed 138 acres of prime real estate, located in the heart of suburban Montgomery County, to JHU. The property, Belward Farm, had been in the siblings' family for generations, and Banks for decades had rebuffed offers by private and public developers, expressing her desire to protect the farm's beauty. The property's value was estimated between $15 million and $54 million. At the time of the transaction, the siblings received $5 million from JHU, and the parties expressly recognized in their contract that the massive difference between Belward's fair market value and that $5 million constituted a gift to the University.

In the contract and deed, the parties divided Belward into two lots, Parcel A and Parcel B, and included several restrictions on Johns Hopkins' use of Parcel B designed to protect Parcel B's natural beauty and ensure that JHU used the land as a university campus, rather than leasing it to third parties. In the contract, JHU promised that it would dedicate Parcel B to "its use" and would develop Parcel B only lightly, if at all.

For several years Johns Hopkins largely complied with the contract and deed. The first rezoning of Belward, in 1997, permitted only limited development. But after Elizabeth Banks' death in 2005, the University secured regulatory approval of a plan far different than any of the parties contemplated in 1989. Under the new plan, Parcel B will

be developed as a high-density, commercial research park leased to third parties rather than a low-density Johns Hopkins campus.

Plaintiff John Timothy Newell and other successors in interest to Elizabeth Banks and her siblings brought suit in Montgomery County Circuit Court seeking a declaratory judgment that the contract and deed barred Johns Hopkins' planned use. JHU moved to dismiss the complaint and for summary judgment. Circuit Judge Savage denied the motion, ruling that the contract and deed were at least ambiguous on the question whether the University's proposed development was permitted. After discovery and special assignment of the case to a new judge, Johns Hopkins renewed its motion for summary judgment, and plaintiffs cross-moved. On October 31, 2012, Circuit Judge Rubin granted Johns Hopkins' motion and implicitly denied plaintiffs' motion, and on November 9, 2012, he entered a declaratory judgment in JHU's favor. He analyzed the transaction as a "sale" rather than a gift and on that basis found, despite Judge Savage's decision to the contrary, (i) that the contract and deed unambiguously permitted Johns Hopkins' proposed use, and (ii) even if the instruments were ambiguous, the extrinsic evidence did not overcome a presumption against restrictive covenants on the use of land. Plaintiffs timely appealed on November 14, 2012.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Circuit Court erred by predicating its analysis on a finding that the siblings' conveyance of Belward Farm to Johns Hopkins was "largely … a sale," where the farm's value was at least three times the purchase price and the parties explicitly recognized in their contract that the difference between the purchase price and the farm's fair market value constituted a "gift" to Johns Hopkins?

II. Whether the Circuit Court erred by concluding that the contract and deed unambiguously permitted Johns Hopkins to develop Parcel B as a high-density, commercial research park and to lease Parcel B to third parties where the contract and deed explicitly provide that any use of Parcel B must be by Johns Hopkins and the text of the contract and deed, together with the facts and circumstances of the conveyance, indicate that the parties intended to subject Parcel B to only light development?

III. Whether the Circuit Court erred by failing to give effect to the mutually-agreed intent of the parties, as evidenced by communications between the parties and their conduct both before and after the conveyance, that Parcel B was donated to function as a low-density "campus" to be used by Johns Hopkins, not a high-density commercial research park to be leased to third parties?

IV. Whether, even if the contract and deed did unambiguously permit Johns Hopkins' contemplated development and use, the Court nevertheless erred by failing to consider extrinsic evidence of the grantors' charitable intent?

STATEMENT OF FACTS

I. Elizabeth Banks' Efforts To Protect Her Farm from Development

When Johns Hopkins first approached Elizabeth Banks to discuss acquiring Belward Farm ("Belward" or "the Farm"), she had already attained local fame for her staunch opposition to suburban development. Lori Aratani, *Johns Hopkins Sued Over Plans for Belward Farm*, Wash. Post, Jan. 31, 2012, http://articles.washingtonpost.com/ 2012-01-31/local/35441834_ 1_belward-farm-satellite-campus-elizabeth-beall-banks. Belward had been in her family for generations. E423, E858. While other old family farms around Belward became victims of development, Banks continued to farm her ancestral 138-acre parcel. E423, E548. She had an abiding commitment to protect Belward from development so that it would "stand for something important for future generations." E858. For this reason she rejected proposals from developer after developer—even, so local lore has it, chasing off one developer with a shotgun. E858, E454; Aratani, *supra*, *Johns Hopkins Sued*. Montgomery County, in particular, sought to acquire Belward to turn it into a research park, but Banks turned the County down three times. E381. Banks' niece remembered that Montgomery County was her aunt's "nemesis" and that she "spent most of her life fighting road construction and development that infringed upon her property." E425; *see also* E440-41.

Banks wanted Belward to remain a farm in perpetuity. E632, E662. However, in the early 1980s, Montgomery County levied two road assessments, totaling some $1.5 million, against the property. E406. Banks and her two siblings (both were minority

owners of Belward; collectively "the Owners") could not pay the assessments and thus had no choice but to begin the process of selling Belward. E406.

Banks nonetheless still refused to see the Farm become simply part of suburban sprawl. She turned down repeated offers from a developer, affiliated with Montgomery County, who wanted to establish a research park on the property. E381; E492. Eventually, John Dearden, the director of the Office of Sponsored Projects at JHU, approached Banks to propose that JHU acquire Belward for "academic uses" as a "JHU college campus." E407; E492.

In contrast to her rejection of other proposals to acquire Belward, Banks was receptive to Dearden's overtures. Like most Americans in 1989, Banks envisioned a "campus" as the almost idyllic site of an institution of higher learning, *see infra* at 22; accordingly, JHU's use of Belward as a campus would protect it from heavy commercial development. Banks also "had a longstanding older association with Hopkins." E632. Her mother had been treated for cancer at a JHU medical facility, and Banks herself received care from JHU doctors. E533-34, 538. Banks had also attended numerous JHU alumni events with former Senator and JHU alumnus George Radcliffe. E534. And, Banks was a lifelong educator, teaching in Rockville schools for over 30 years. E499. Given her understanding of what a university campus looked like, her longstanding association with JHU, and her commitment to education, Banks was "not averse to seeing the farm used as … a site for Hopkins." E632.

Banks was willing to consider conveying Belward to JHU only because she believed JHU would maintain at least the bulk of the Farm as an open, green space, just as she had fought to keep it throughout her life. E439, E460, E469. John Timothy Newell ("Newell"), Banks' nephew and confidant who was closely involved in the negotiations between JHU and the Owners, E382-83, stated that Banks believed the proposed deal with JHU would "allow[] her to have the satisfaction that [Belward] would be preserved as a

small college campus and not be commercially developed," E407.[1] Banks understood that, as a result of the Owners' agreement with JHU, Belward would be subject to a scale of development similar to JHU's Homewood campus, E385-86, E442, which JHU itself describes as "a peaceful place of green grass, wide-spreading trees … and interconnecting walkways that combine to create a comfortable country atmosphere," Johns Hopkins Univ., *Johns Hopkins Homewood Campus*, http://webapps.jhu.edu/jhuniverse/information_about_hopkins/campuses/homewood_campus/ (last visited Apr. 12, 2013). She was also inspired by the University of Virginia's "Jeffersonian brick campus" and envisioned a similar low-development campus erected on Belward. E427-29. Banks' siblings were drawn toward conveying Belward to JHU because "they shared [her] values and her goal of preserving the Property from commercial development." E407; *see also* E423-24, E458, E469.

Likewise, Banks and her siblings were willing to enter into negotiations with JHU on the understanding that Belward would be used only as a JHU campus. As a "life-long teacher," Banks thought a "[u]niversity campus" on Belward "would be a perfect legacy." E433. She and her siblings envisioned a "campus that would be solely operated [by] and in the name of Johns Hopkins." E427; *see also* E447-48, E460-63. The prospect of a JHU campus on Belward motivated the Owners to make the enormous financial sacrifice that their bargain sale of the property entailed. E426. JHU's John Dearden confirmed his understanding that Banks "saw [Belward] as comprising … a Hopkins academic presence of some sort." E482.

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[1] Judge Rubin struck from the record below certain statements of the "descendants of the grant[ors]" which he deemed inadmissible. E153. He excluded from that order "statements that are both relevant and admissible under Maryland Rule 5-803(b)(3)," which permits admission of "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition" that would otherwise qualify as inadmissible hearsay. Md. R. Evid. 5-803(b)(3); E153. All evidence of Banks' and the other Owners' state of mind herein cited is both relevant and admissible under Rule 5-803(b)(3) and hence does not fall within the scope of Judge Rubin's order to strike. In the alternative, if any evidence cited herein is deemed to fall within that order's terms, the order to strike was error insofar as that evidence is concerned.

JHU was acutely aware, from the outset of the negotiations, of Banks' strong desire to protect Belward from suburban development and understood that satisfying that desire was essential to securing such a valuable gift. After meeting with Montgomery County contacts who suggested that JHU acquire Belward, Dearden wrote that Banks was "opposed to commercial or residential development" of the Farm. E548; *see also* E491-92. JHU likewise understood that Banks wanted Belward used as a "park-like or campus-like setting" for "academic use," rather than "commercial development." E552; *see also* E476-77 (confirming that Dearden understood that "the three owners of the Banks Farm property agree[d] that they want[ed] to see the … farm eventually used as a campus or for campus[-]like activities"). As JHU officials grew to know Banks, they came to appreciate the intensity of her desire to keep Belward pristine. Stephen Martin, Executive Director of Institutional Development, wrote to JHU President Muller, "If there is one overriding concern to Miss Banks it is that development of her property be accomplished so as to leave it relatively open and spacious with attention to the beauty of the environment." E559. University officials realized that Banks' decision to convey Belward to JHU depended on JHU's commitment to maintaining Belward's light development as well as Banks' high regard for the University, E538, and that JHU would be obligated by its agreement with Banks to maintain a campus on Belward, E557; *see also infra* at 27-28 (discussing JHU's understanding that it would have to operate a university campus on Belward).

JHU reassured Banks that it would fulfill her wishes for Belward. Before his meeting with her, President Muller was urged to "emphasize the Hopkins commitment to doing things right and maintaining" Belward in an appropriate state. E559. And JHU officials emphasized just that to Banks throughout the negotiations. According to Newell, "[d]uring the two-year period of discussion and negotiation that led to the completion of the transfer of the Property to JHU, JHU's representatives always represented their intention to be to develop a JHU-owned and operated campus" on the Farm that was consistent with the "size and scope of a satellite campus." E409-10; *see also* E637 (statement by Dearden that discussions between Banks and JHU were "always in the

context of Hopkins [e]nterprises"); E427 (describing JHU's assurances that the Farm would become a "Jeffersonian brick campus"). In letters to Banks' siblings, John Dearden expressly noted that "the terms [of the proposed deal] only allow the thirty acre wooded section of the property to be used for commercial, revenue-generating purposes"; the rest of Belward was to remain free of commercial development. E544, E546.

In March of 1988, after several months of negotiation, JHU sent Banks and her siblings a document entitled "Proposed Terms of Transfer." E753-54. The document proposed that Belward "be sold in part and deeded in part *as a gift*." E754 (emphasis added). The proposed terms provided for JHU to give the Owners $3 million at the time they conveyed Belward to the University, with another $1 million to be paid over to them at the time Belward was "rezoned to allow the uses contemplated" by the parties. E754. The parties understood that this $4 million—which was needed in part to provide Banks "funds to live on" in her old age, E454—did not represent anything close to the market value of Belward Farm. *See, e.g.*, E492 (JHU document indicating that "projected revenues [from Belward] indicate comparative investment value … in excess of triple" the eventual $5 million purchase price); E489 (statement by Dearden that JHU "received [Belward] at much lower than what the land could have been marketed for").

The proposed terms sought Belward's division into two parcels. JHU proposed that the eastern parcel of approximately 30 acres ("Parcel A") could be "commercially developed in order to create revenue to support the academic activities of" JHU, whereas the western parcel ("Parcel B"), comprising roughly 100 acres, would "be developed and used only for academic and related purposes." E754. Under the proposed terms, JHU could alienate Parcel A, but it was forbidden to dispose of Parcel B for 50 years. E754. Banks did not like creating two parcels for different treatment—she wanted all of Belward to become a JHU campus—but she acquiesced to JHU's asserted need to use Parcel A's revenue to fund the use of Parcel B as a JHU campus. E-388-89, E405.

II. The Contract and Deed

On August 22, 1988, the Owners and JHU executed a contract of sale for Belward Farm. E781. The contract documented the Owners' intent that Parcel B "be reserved for

academic, research and development, delivery of health and medical care and services, or related purposes." E781. It recognized that "the purchase price recited herein does not represent the fair market value of the Property," and that "[t]he difference between the actual fair market value … and the recited purchase price … *constitutes a gift* from the Sellers to the Buyer from which Sellers may derive certain income tax advantages." E783 (emphasis added). The purchase price for the property was $5 million, $3 million of which was to be paid at closing and $2 million of which was to be paid within three years, regardless of whether JHU had succeeded in getting Belward rezoned. E783.

Building on the Proposed Terms of Transfer, the contract imposed a series of restrictions on JHU's use of Parcel B only. JHU could not alienate the parcel for 50 years.[2] E793. If after 50 years JHU alienated Parcel B—or if JHU alienated Parcel A (which was not subject to Parcel B's restrictions)—JHU was required to use the proceeds of such alienation "to create or add to a fund established in the name of Elizabeth B. Banks for the benefit of The Johns Hopkins University." E794.

During the 50-year period, the contract required that JHU put the land to "its use … if any use thereof is made," and confirmed that the contract's restrictions were limitations on "Buyer's use of the property."[3] E793. JHU was limited to using Parcel B "for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only." E793. During that 50-year period, JHU was required to "maintain [Parcel B] in a well kept and attractive fashion," as well as "preserve … an appropriate wooded buffer area between" Parcels A and B. E793. Parcel B would be named the "Belward Campus of The Johns Hopkins University." E793.

The contract also addressed the process by which JHU would obtain the rezoning it needed to create a JHU campus on Parcel B; by its terms the contract restricted JHU to a

[2] An additional clause was added to save the contract from the rule against perpetuities. E793.

[3] The contract contained a single, explicit exception to its mandate that only JHU use Parcel B: It permitted Elizabeth Banks to continue to reside on and farm the property. E794.

single zoning change. It specified that "the use of the Property contemplated by the Buyer will require *a* change in the current zoning classification" and guaranteed the Owners' cooperation in "the prosecution of *the* application for *the* zoning change and any appeals taken in accordance with this paragraph." E794 (emphases added).

On January 10, 1989, the parties executed an "Amended and Restated Contract of Sale" ("Contract") to "clarify[] Seller's intent to make a charitable contribution to the Buyer" as well as to make other changes not relevant here. E596. The purchase price and language of intent remained the same, and the provisions governing use restrictions, zoning changes, and the use of proceeds of disposition of the property remained substantially identical.[4] E596-97, E603-05. The Contract provides for its survival even after "settlement and the execution and delivery of the deed to the Property." E608. Essentially contemporaneously with the execution of the Contract, the Owners executed a deed ("Deed"), which conveyed Belward to JHU and contained the restrictions found in the first paragraph of the "Use Restrictions" section as a "covenant running with the land for the benefit of the Grantors and their descendants," ensuring the continuation of the restrictions beyond the Owners' lifetimes. E616-17.

III. Post-Execution Conduct

After the execution of the Contract and Deed, JHU continued to demonstrate its understanding of Belward Farm as a generous gift. Less than a year after the conveyance, the University hosted a dinner to thank the siblings "for [their] magnificent gift of Belward Farm to Johns Hopkins." E504. At the dinner, JHU made Banks an honorary JHU alumna "[i]n grateful recognition of her steadfast devotion and splendid generosity to Johns Hopkins," and her siblings received certificates of appreciation. E506-08. Banks received "letters [and] telephone calls, many from strangers, thanking [her] for themselves and their children," E859, and the Maryland Senate voted her a certificate of appreciation in recognition of her generosity, E499.

[4] The clause governing Banks' right to lease part of the property throughout her life was modified in a manner not relevant here. *Compare* E794 *with* E604-05.

JHU also treated Belward as a gift in internal communications. Immediately after acquisition, JHU entered a gift value of $10,500,000 for the Farm on its books, because it had paid $5 million and estimated the Farm's value at $15.5 million. E494. JHU later revised its estimate of Belward's gift value upward to $14.7 million.[5] E527. JHU memoranda consistently referred to the value of Belward beyond the $5 million purchase price as a gift. *See, e.g.*, E533 ("Miss Banks, with her brother Roland and sister Beatrice Newell, made the largest gift to the Campaign for Johns Hopkins. Their bargain sale of Belward Farm had a combined gift value of approximately $15 million."); E537.

JHU also continued to recognize that the Owners' generous gift was motivated by their desire to keep Belward free from heavy development. For instance, in a memorandum written to prepare new JHU President Brody to meet Banks, a JHU official explained that Banks "has a great love for the land and despises what developers have done to property all around Belward. [She] entertained a number of options for the ultimate disposition of the farm and chose Hopkins once she was convinced that the 'controlled development' of the property which we proposed was the best option available." E538. Internal JHU documentation made clear that Belward was given to the University "because JHU would preserve as much open space as possible in a campus-like setting." E561. And, a letter from President Brody to Banks assured Banks that he "underst[ood] your deep commitment to the land" and "view[ed] the fact that [Banks] chose Johns Hopkins as [her] partner in its long-term development as evidence of a special trust and your expectation that this institution will use it for worthwhile purposes." E543.

JHU's initial effort to seek rezoning for Parcel B clearly conveyed its intent to make Parcel B a green, spacious, low-density campus of JHU. For instance, at a 1990 County Council hearing on a new zoning master plan for the Belward region (a hearing at which Banks was present), a JHU official represented that JHU intended to construct "a major Hopkins research center" as the "keystone of the western upper campus quadrangle" on Parcel B. E852. A letter from JHU President Steven Muller to Montgomery County

[5] Other estimates ranged as high as $54 million. E706.

Council President William Hanna contained the same promise. E834. And, JHU represented to County authorities that the University did not intend the land to become "another office park." E373.

After achieving a favorable master plan, JHU sought approval of its preliminary plan of subdivision, which it received in 1997 ("1997 Plan"). While the master plan permitted development with a floor area ratio ("FAR") of up to .5, JHU requested a FAR of only .3.[6] E287. Under the 1997 Plan, the tallest buildings on Parcel B would be 50 feet, or four stories, in height. E287.

Despite repeatedly promising to abide by the development conditions so important to Banks and the other Owners, JHU eventually disregarded those restrictions. The first clear breach of the Contract and Deed came in 1997, when the University donated Parcel A to Montgomery County in exchange for the County's agreement to fit Parcel A with infrastructure and provide JHU with a portion of the income arising from the sale of lots in the parcel. E571-72. Under the Contract, proceeds from this arrangement should have been "used to create or add to a fund established in the name of Elizabeth B. Banks for the benefit of The Johns Hopkins University." E605. This was never done. E113 n.7. JHU's donation of Parcel A to the County, Banks' longtime "nemesis" in her fight to preserve Belward, "completely shook her confidence in the deal [with JHU], and … she rapidly started regretting her decision after that." E407-08.

Even so, the University's effort to violate the very heart of the restrictive covenant so important to Elizabeth Banks did not become clear until after she died in 2005. E409. After her death, JHU began to exert its influence to increase vastly the development potential of Parcel B. Even though the 1997 approval of its preliminary plan of subdivision "allowed JHU to proceed forward with [its] plans to develop [Parcel B] without the submission of site plans or further … review," JHU chose not to do so. E286.

[6] The floor area ratio measures the relationship between the amount of floor space permitted and the area of the real property in question. *Permanent Fin. Corp. v. Montgomery Cnty.*, 308 Md. 239, 253 (1986).

Instead, it influenced the County to rezone Belward under a newly-created zone, which permitted much higher-density development than previously. E287.

After achieving this goal, JHU amended its 1997 Plan to permit much denser development of Parcel B. For instance, under the amended preliminary plan ("2011 Plan"), JHU can construct buildings 150 feet in height, with a gross floor area of 4,737,777 square feet, more than three times as much floor space as permitted by the 1997 Plan. E288. The 2011 Plan contemplates the creation of "an urban scale network of blocks" on Belward Farm, with several more buildings than envisioned under the 1997 Plan. E288. And, instead of a JHU campus, Belward will now host a "mixed-use" research park that "brings together university, government, and private research," Johns Hopkins Univ., *Belward*, http://web.jhu.edu/ MCC/belward.html (last visited Apr. 12, 2013), achieved through leasing out all or part of Parcel B. E907.

IV. Procedural History

On November 10, 2011, John Timothy Newell, Frances Lucinda Newell, Karen Newell Brindley, Sharon Newell Fawcett, Elizabeth Banks Ray, and the Estate of Beulah Banks Newell (all successors in interest to one or more of the Owners and collectively "plaintiffs") sued JHU in Montgomery County Circuit Court, claiming that the University intended to put Parcel B to a use forbidden by the Contract and Deed and seeking a declaration that JHU's 2011 Plan violated the terms of the Contract and Deed. E20-22, E41. They also sought permanently to "enjoin JHU from any action that would impair the [plaintiffs'] rights under the Contract and the Deed." E41.

JHU moved to dismiss on ripeness grounds and for summary judgment on the basis that the Contract and Deed contain no "scale/height/density restrictions" or "restriction on Johns Hopkins' right to lease its property." E42-43. Judge Savage denied the motion. Judge Savage carefully analyzed the text of the Contract and Deed and concluded that ambiguities in the instruments precluded summary judgment for JHU.[8] She found that the

[8] Because plaintiffs did not cross-move for summary judgment at the time, Judge Savage had no occasion to consider whether the Contract and Deed unambiguously supported plaintiffs' position.

fact that "references to the zoning change" contemplated by the parties "are all made in the singular" indicated that the parties may have had in mind a particular zoning change that JHU would seek and did not contemplate multiple rezonings. E125. She also concluded that designation of Parcel B as a "campus," along with the differentiation of Parcel B from Parcel A by means of a wooded buffer and the requirement that JHU maintain Parcel B (but not Parcel A) "in a well kept and attractive fashion," E604, indicated that the parties may have intended Parcel B to be developed as a traditional university campus rather than a commercial research park. E126-29. And, she found that the requirement that JHU not alienate Parcel B for 50 years, taken together with the possibility that the Contract and Deed required JHU to operate Parcel B as a traditional campus, raised the question whether restrictions exist on JHU's ability to lease out all or part of Parcel B. E129.1. Accordingly, Judge Savage denied JHU's motion for summary judgment. E129.2.

After discovery and special assignment of the case to Judge Rubin, JHU renewed its motion for summary judgment, and plaintiffs cross-moved for summary judgment.[9] In a decision running only three-and-a-half transcript pages, Judge Rubin granted JHU's motion from the bench and by implication denied plaintiffs' cross-motion. E189-192. Judge Rubin initially concluded that "the transaction at issue is both a sale and a gift, but largely was a sale with substantial monetary consideration flowing from Johns Hopkins to the grantors." E189. Relying, as a result of this conclusion, on cases construing bargained-for restrictive covenants, Judge Rubin concluded that "the language of the restrictive covenant contained both in the amended contract and in the deed is unambiguous. It is clear and plain. It was a bargain for [sic] exchange." E190. Despite Judge Savage's conclusion to the contrary, Judge Rubin found that the use of the singular in referring to the zoning change contemplated by the parties unambiguously did not implicate "the number of zoning applications that the owner in fee simple absolute could make." E190. Likewise, he concluded that the requirement that Parcel B be

[9] JHU also moved to strike certain portions of plaintiffs' evidence. The court granted the motion in part and denied it in part. E153-55.

known as the "Belward Campus of The Johns Hopkins University" formed no "part of the restrictive covenant language," and that the limitation on alienation had no impact on JHU's permissible use of the property. E191. In the alternative, Judge Rubin held, without elaboration, that "any ambiguity has not been resolved by evidence put forth by the plaintiffs," and therefore the "general rule in favor of the unrestricted use of property," as articulated in cases involving bargained-for restrictive covenants, controlled. E191-92.

Judge Rubin entered an order granting JHU's motion for summary judgment and implicitly denying plaintiffs' motion on October 31, 2012. E261. On November 9, 2012, he entered an order declaring that the Contract and Deed impose no restrictions on JHU's ability to develop Parcel B as densely as it would like or to lease out the entirety of Parcel B to third parties for as long as it wished. E262-64. Plaintiffs timely appealed on November 14, 2012. E938.

SUMMARY OF ARGUMENT

The orders below failed to give effect to the plain terms of the contract of conveyance and deed at issue or to give appropriate weight to both a charitable donor's intent and JHU's repeatedly expressed commitment to accommodate that intent to secure a valuable gift. The errors extended as well to misapplication of rules regarding the facts and circumstances surrounding the contract, the construction of land use restrictions in the charitable context, the proper use of extrinsic evidence, and to the mistaken assessment of what that extrinsic evidence clearly shows. These errors were especially profound because they arose in the course of the court's granting JHU's summary judgment motion, because the non-movant plaintiffs received none of the presumptions and favorable inferences due them.

In particular, the Circuit Court erred when it concluded that the Contract and Deed unambiguously contain no relevant development or lease restrictions and instead permit JHU to lease out Parcel B entirely to third parties unaffiliated with the University and to develop the parcel as heavily as it would like. To the contrary, those documents unambiguously *forbid* JHU to lease out Parcel B or to subject it to anything but light development. The parties expressly provided that for the first 50 years after conveyance,

JHU must put Parcel B to "its use" if any use of the property is made. To the same effect is the provision naming Parcel B the "Belward Campus of The Johns Hopkins University"—clearly indicating the parties' understanding that JHU, rather than third-party lessees, would use Parcel B. Likewise, the Contract and Deed, especially when read in light of the facts and circumstances surrounding the conveyance, unambiguously prevent JHU from subjecting Parcel B to the heavy development Banks and her siblings so despised. For instance, the Contract limits JHU to use the property only for university-related purposes and to a single rezoning of the property, which governing law at the time of contracting would only have permitted to be rezoned for low-density use. The parties' choice to deem Parcel B a "campus," which in 1989 bore only its traditional meaning of a spacious, low-rise site of an educational institution, further confirms how the parties agreed that JHU would only lightly develop Parcel B, as do the provisions of the Contract and Deed that limit the property's use to JHU's own use (rather than use by government and commercial entities associated with dense development).

Even if the Contract and Deed did not unambiguously favor plaintiffs' construction, those instruments are *at least* ambiguous in light of the several contractual provisions that support plaintiffs' view and especially given the presumptions and inferences due plaintiffs in addressing JHU's summary judgment motion. This makes highly relevant the extrinsic evidence submitted by the parties—especially the evidence of the Owners' charitable donative intent, which is accorded special weight under governing cases.

The Circuit Court erred for multiple reasons in holding that this evidence failed to support plaintiffs' arguments and failed to overcome the presumption against restrictions on the use of land. *First*, the extrinsic evidence very clearly establishes that the parties meant just what they said in the Contract and Deed: JHU must itself use Parcel B, and may subject it only to light, non-commercial development. JHU promised Banks and her siblings to use Parcel B as a university campus and to protect it from the heavy development they hated, and the Owners took JHU at its word in deciding to make such a significant gift. Extrinsic evidence also demonstrates that JHU itself believed the

Contract and Deed obligated it to create a low-density university campus on Parcel B. Even if JHU believed otherwise, it never voiced this understanding to the Owners.

Second, while this evidence would clearly overcome any presumption against restrictions on the use of land, the Circuit Court erred in invoking that doctrine when Maryland courts have never held the doctrine to apply in cases of charitable giving, and when extending the doctrine to such cases undermines important Maryland public policy concerns.

Finally, even if the Contract and Deed somehow unambiguously favor JHU's reading, the extrinsic evidence of donor intent submitted by the parties is still relevant, because Maryland law requires the examination of such extrinsic evidence in cases involving charitable giving. The Circuit Court's decision to the contrary ignores governing cases and fails to give effect to the State's longstanding recognition of the importance of encouraging and giving effect to charitable donations.

STANDARD OF REVIEW

Whether "a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal." *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012). This Court reviews the Circuit Court's legal conclusions *de novo* and reviews the record "independent[ly] to determine whether the parties properly generated a dispute of material fact." *Id.* In determining whether a dispute of material fact exists that makes a grant of summary judgment inappropriate, "[t]he record is reviewed in the light most favorable to the non-moving party." *Id.*

ARGUMENT

I. The Contract and Deed Unambiguously Prevent JHU from Leasing Parcel B or Subjecting It to High-Density, Commercial Development.

"Maryland applies an objective interpretation of contracts." *Weichert Co. of Md. v. Faust*, 419 Md. 306, 317 (2011). "[A] court, in construing an agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Anne Arundel Cnty. v. Crofton Corp.*, 286 Md. 666, 673 (1980). Where a contract is not "susceptible of

more than one meaning" when "read by a reasonably prudent person," this Court will "give effect to its plain meaning." *Weichert*, 419 Md. at 317. "In interpreting a contract provision, [this Court] look[s] to the entire language of the agreement, not merely a portion thereof. When interpreting a contract's terms, [the Court] consider[s] the customary, ordinary and accepted meaning of the language used." *Id.* "The determination of whether language is susceptible of more than one meaning includes a consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Calomiris v. Woods*, 353 Md. 425, 436 (1999).

The "customary, ordinary and accepted meaning of the language" used by the parties in several provisions of the Contract and Deed, *Weichert*, 419 Md. at 317, along with "a consideration of the character of the contract, its purpose, and the facts and circumstances at the time of execution," *Calomiris*, 353 Md. at 436, prohibit JHU from leasing or heavily developing Parcel B. At the very least, and contrary to Judge Rubin's holding (but consistent with Judge Savage's earlier conclusion), they make the Contract and Deed ambiguous. Either conclusion requires reversal of the Circuit Court's summary judgment ruling.

A. The Contract and Deed Unambiguously Prohibit Leasing Parcel B.

Banks and her siblings conveyed Belward to JHU, rather than another charitable or educational institution, because of Banks' long and amicable association with the University. As explained above, Banks' mother had received treatment at JHU medical facilities during her battle with cancer, and Banks herself received medical care from JHU physicians. E533-34, E538. Banks frequently attended JHU functions such as homecoming. E534. She selected JHU to receive Belward—as JHU was well aware—because of her "high regard for" the University and her desire that Belward become part of the institution she so admired. E538. Furthermore, Banks envisioned a university campus the same way most Americans did in 1989—as a low-rise complex serving the educational mission of the university. *See infra* at 22. She wanted JHU itself to use Parcel B because she believed that this was a way to ensure that the parcel remained

free of the heavy development she loathed. *See* E427 (describing Banks' belief, based on JHU assurances, that Parcel B would become a "Jeffersonian brick campus").

To guarantee that Belward would indeed become an integral part of JHU, the parties to the Contract and Deed prohibited anyone but JHU from using Parcel B. Section 13 of the Contract, entitled "Use Restrictions," provides that JHU "shall … limit *its* use of [Parcel B], *if any use thereof is made*," to agricultural, academic, research and development, delivery of health and medical care and services, or related uses. E604 (emphases added). The deed contains identical language. E613. Under the terms of the Contract and Deed, any time "any use" is made of Parcel B, JHU must be the entity using it.[10] If the parties had intended instead for JHU to be free to lease Parcel B to tenants who would use the land for any of the five delineated purposes, they could have simply required that the "use of [Parcel B] be limited." Likewise, if the parties meant to impose only a requirement that JHU force its tenants to use Parcel B for the permitted purposes but did not intend that JHU be the one to use it, they could have simply omitted the word "its," requiring that JHU "shall limit use of [Parcel B], if any use thereof is made…." The parties' deliberate use of the word "its" in section 13 demands that JHU, not a third-party lessee, use Parcel B for the entire 50-year restrictive period.

JHU argued, and the Circuit Court agreed, that JHU can lease out all or part of Parcel B as long as the tenants confine their activities to the designated uses. E907, E263. But this contention contradicts well-established Maryland case law. The Court of Appeals has long made clear that, when a landlord leases out property subject to use restrictions, the tenant's use of the land for a purpose permitted by the restrictions does not make the landlord's use of the land as a rental property fit within the restrictions. In

[10] The Contract expressly addresses the single permissible departure from the command that JHU be the one to use Parcel B: It explicitly provides for Elizabeth Banks' continued residence on the property. E604-05. The Contract's express treatment of the one exception discussed by the parties, E754, to the requirement that Parcel B be used by JHU strongly suggests that the parties contemplated no other exceptions. *See, e.g.*, *Leppo v. State Highway Admin.*, 330 Md. 416, 423 (1993) ("[T]he expression of one thing is the exclusion of another.").

Keseling v. City of Baltimore, 220 Md. 263 (1959), zoning ordinances required residential use of the Keselings' property and prohibited business use. *Id.* at 266, 268. The Keselings sought to rent out portions of their property as lodgings. *Id.* Even though the tenants used the property for "residential" purposes, *see Lowden v. Bosley*, 395 Md. 58, 68 (2006), the *landlords*' use of the property still amounted to a prohibited business use, *Keseling*, 220 Md. at 270. Just as in *Keseling*, JHU's tenants' use of Parcel B for one of the five uses contemplated by the Contract and Deed does not mean that *JHU's* use of Parcel B as rental property qualifies as one of these five uses.[11] Indeed, *Keseling* shows that the leasing activity is a separate use, and is one the Contract and Deed forbid.

Furthermore, the Contract refers to section 13's use restrictions as "restrictions on *Buyer's* use of the Property." E604 (emphasis added). Had the parties anticipated that lessees would be permitted to undertake activities on Parcel B, section 13's restrictions would have been styled simply as "restrictions on use of the Property." Construing section 13 as permitting anyone to use Parcel B as long as he or she uses it for one of the five delineated purposes would read the word "Buyer's" out of the Contract. But Maryland courts "construe the contract as a whole, giving effect to every clause and phrase, so as not to omit an important part of the agreement." *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 497 (2005) (citation omitted). To give effect to the entire phrase "restrictions on Buyer's use of the Property," the Contract must be interpreted as forbidding leasing Parcel B to third parties.

Plaintiffs' reading of the Contract and Deed is further confirmed by section 13's requirement (repeated in the Deed) that "the Buyer shall maintain [Parcel B] in a well kept and attractive fashion and shall preserve on [Parcel B] an appropriate wooded and fenced

[11] *Lowden v. Bosley*, 395 Md. 58, relied on by the Circuit Court, E179, E189-90, merely held that when property was restricted to residential use, but the restrictions did not specify whether that use must be by a landlord or a tenant, 395 Md. at 61, the landlord's derivation of income from renting the property did not prevent the tenant's residence on the property from qualifying as residential use, *id.* at 69. *Lowden* simply did not address the principle, articulated by *Keseling*, that a tenant's use for a particular purpose does not make the landlord's leasing activity a use for the same purpose.

buffer area between [Parcels A and B]." E604, 613. This provision requires JHU itself to maintain Parcel B and preserve the buffer area; it does not permit the University to delegate this task to lessees. If JHU could lease Parcel B out to third parties, the primary responsibility of maintaining the property and preserving the buffer would necessarily rest on the lessees who control the premises. Mandating that JHU itself undertake the maintenance and preservation called for by section 13 makes sense only if the parties contemplated that JHU, not JHU's lessees, would use Parcel B.

Additional confirmation of the lease restriction comes from the requirement of the Contract and Deed for Parcel B to be named the "Belward Campus of The Johns Hopkins University." E604, E613. A reasonable person would understand that the Contract and Deed require Parcel B to be called a campus of JHU because *JHU* would use it as a campus. *See Anne Arundel Cnty.*, 286 Md. at 673 ("[A] court, in construing an agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time it was effectuated."). That is, the parties agreed that any use of Parcel B, the "Belward Campus of The Johns Hopkins University," would be JHU's use, consistent with the use restriction directed to "its use." By contrast, Parcel A was not designated as the "Belward Campus of The Johns Hopkins University," in keeping with the lack of leasing restrictions on that parcel. E604.

The Circuit Court erred in concluding that this provision (the "campus provision") was merely "a naming requirement" and did "not form any part of the restrictive covenant language." E191. The campus provision appears in section 13 of the Contract, entitled "Use Restrictions," and is wedged amidst a discussion otherwise inarguably addressed to the limited use JHU may make of Parcel B. E603-04. Furthermore, the Contract itself refers to the campus provision, along with the other requirements contained in section 13, as "restrictions on Buyer's use of the Property." E604. The parties themselves thus viewed the campus provision as an integral part of the contractual restrictions limiting use of Parcel B to JHU.

Even if the campus provision did not form part of the Contract's and Deed's restrictive covenant (though it does), Maryland case law is clear that, "[i]n interpreting a

contract provision, [courts] look to the entire language of the agreement, not merely a portion thereof." *Weichert*, 419 Md. at 317. That the parties agreed to call Parcel B the "Belward Campus of The Johns Hopkins University" at the very least indicates that the parties intended, through the other contractual provisions discussed above, to prevent third parties from using Parcel B.

B. The Contract and Deed Unambiguously Prohibit High-Density Development.

Elizabeth Banks' primary passion was to protect Belward from development so it would "stand for something important for future generations." E858. For this reason she turned down offer after lucrative offer from developers and, as JHU's John Dearden recognized, "battle[d] (and that is a most appropriate word) the Federal, State and County governments." E491. Banks' siblings also "shared [her] values and her goal of preserving the Property from commercial development." E407. As JHU well knew, Banks and her siblings conveyed Belward to the University at a steeply-discounted price—between one quarter and one tenth of the Farm's actual worth—only because they believed JHU's "development of [Belward would] be accomplished so as to leave it relatively open and spacious with attention to the beauty of the environment," E559; *see also* E538, E527, E706, just as Banks saw at JHU's open, green Homewood campus, E385-86, E442.

Yet JHU argued below—and Judge Rubin agreed—that the "Contract and Deed do not impose restrictions on Johns Hopkins University related to the scale or density of its development of Parcel B." E263. On JHU's reading, the parties crafted a detailed restrictive covenant addressing the use permitted on Parcel B, the parcel's name, and even the disposition of funds resulting from Belward's sale, but failed to address the single overriding concern that had driven Banks to ward off developers for decades and prompted her to convey Belward to JHU: the desire to keep the land free of heavy development. In light of these facts and circumstances confronting the parties at the time of contracting, JHU's reading of the Contract and Deed is completely implausible—certainly not, as the

Circuit Court found, unambiguously correct. *See, e.g., Arthur E. Selnick Assocs. v. Howard Cnty.*, 206 Md. App. 667, 685 (2012) ("[T]he basic principles of contract interpretation" used to determine whether a contract is ambiguous include "consideration of … the facts and circumstances of the parties at the time of execution.").

The Contract's terms, unsurprisingly, manifest the parties' agreement that JHU would develop Parcel B only lightly. For example, the parties documented their agreement that JHU would only lightly develop Parcel B by naming the parcel the "Belward Campus of The Johns Hopkins University." E604. At the time of contracting, the term "campus" had a single meaning: the grounds of a university. *See* 2 Oxford English Dictionary 815 (J.A. Simpson et al., eds, 2d ed. 1989) (defining "campus" as "[t]he grounds of a college or university; the open space between or around the buildings; a separate part of a university"); Webster's 9th New Collegiate Dictionary 200 (Frederick C. Mish, ed., 1987) (defining "campus" as "the grounds and buildings of a university, college, or school"); Cassell Concise English Dictionary 188 (Betty Kirkpatrick, ed., 1992) (defining "campus" as "the buildings and grounds of a university or college"); *see also Aetna Cas. & Sur. Co. v. Ins. Comm'r*, 293 Md. 409, 420 (1982) ("[A] court … must first determine from the language of the agreement itself[] what a reasonable person in the position of the parties would have meant at the time it was effectuated."). Even if reasonable people might, in 1989, have viewed the word "campus" in isolation as potentially referring to an office park (they would not), any such potential evaporates in light of the modification of the term "Campus" by the phrase "of The Johns Hopkins University," E604: A reasonable person would understand a "campus" of a specified university only as a college campus. The parties' agreement to name Parcel B the "Belward Campus of The Johns Hopkins University" thus enshrined their intention for Parcel B to share the open spaces and light development of traditional college campuses, such as JHU's Homewood, Johns Hopkins Univ., *Johns Hopkins Homewood Campus*, http://webapps.jhu.edu/jhuniverse/information_about_hopkins/campuses/homewood_campus/ (last visited Apr. 12, 2013), and the "Jeffersonian" campus of the University of Virginia, E427-29. They did not intend "an urban scale network of blocks." E288.

The related requirements that Parcel B be limited to use by JHU itself, discussed *supra* at 17-21, are further terms of the Contract and Deed that serve to restrict intensive development. As a university, JHU conducts its activities on academic campuses such as Homewood, *supra*. That the parties expected JHU itself to use Parcel B confirms that the land would be put to similar uses as a lightly-developed university campus. The prohibition of third-party lessees excluded the type of intensive development that is frequently incidental to government and commercial lessees.

In addition, section 14 of the Contract sets forth the parties' "agree[ment] that the use of the Property contemplated by the Buyer will require *a* change in the current zoning classification of the Property," and the Owners' willingness to assist JHU "in the prosecution of *the* application for *the* zoning change" JHU needed. E605 (emphases added). The parties realized that "open-ended freedom to rezone could produce something very different from what a person in 1988 would expect a 'campus' in a non-urban environment … to look like." E416; *see also* E483 (Dearden explaining that rezoning "was a one-time event"). Accordingly, they deliberately used the singular to refer to the zoning modification JHU would seek, thus limiting JHU to changing the zoning applicable to Belward only once.

Due to the scope of permissible zoning changes at the time of contracting, the parties contemplated that the single zoning change JHU would seek would permit only light development on Belward. The Gaithersburg Vicinity Master Plan, in effect at the time of the conveyance, "confirm[ed] the existing low-density zoning" for Belward, which was eligible only for residential development. E271, E295. The plan anticipated that Belward's ultimate use would be determined by a subsequent plan amendment, which would "examine the option of preserving [Belward] as open space and encouraging continued farming of the land," or in the alternative could approve Belward for such low-density uses as "community services, cultural facilities, clubs, and the like." E295. In light of the Gaithersburg Vicinity Master Plan, the parties believed that JHU's single request for rezoning would result only in the designation of Belward for low-density

development.[12] The Court should give effect to this common understanding, rooted as it is in the governing law at the time of contracting. *See, e.g.*, *Hearn v. Hearn*, 177 Md. App. 525, 535 (2007) ("Parties to a contract are presumed to contract mindful of the existing law, … [which] must be read into the agreement of the parties just as if expressly provided by them."). In fact, heavy development of Parcel B did not become legally possible until 2010, with the enactment of a third master plan, displacing the ones adopted in 1990 and earlier. E287. The parties simply could not have anticipated the heavy development made possible in 2010 when they contracted for the conveyance of Belward in 1988-89.

Finally, interpreting the Contract and Deed as precluding heavy commercial development of Parcel B makes sense of the requirement to maintain a "wooded and fenced buffer" between Parcel A and Parcel B. E604. E613. Because the Contract and Deed do not subject Parcel A to development restrictions, JHU could develop that parcel as densely as it wanted. E604, E613. The Owners, as JHU knew, wanted to shield the green, open campus on Parcel B from the anticipated heavy commercial development on Parcel A. E754, E481. Indeed, the Proposed Terms of Transfer explicitly recognized that the buffer is designed to separate the "academic and commercial activities" occurring on Parcels A and B, respectively. E754. Under JHU's reading, though, it could develop Parcel B in just the same way as Parcel A, and the wooded buffer zone between the two parcels would simply serve no point. Plaintiffs' reading gives effect to the parties' intent in erecting the "wooded and fenced buffer" between the parcels.

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[12] Even if the parties could have anticipated the changes reflected in the Shady Grove Study Area Master Plan ("SGSAMP") enacted in 1990, after the Contract was signed, they would have continued to believe that Belward would be only lightly developed. The SGSAMP changed Belward's recommended zoning from residential to the newly-created "R&D" zone. E355. The R&D zone was intended as a "low-density[] research and development zone," with a FAR of .3 and a maximum building height of 50 feet under ordinary circumstances. E311-12, E274-75. After JHU achieved rezoning of Belward under the SGSAMP in 1997, the university received permission to develop Parcel B with 1,410,000 square feet of floor space—well less than a third as much as JHU's current development plans contemplate. E287-88.

In short, Banks and the other Owners did not leave the protection of their single most important goal—saving Belward from the suburban sprawl they detested—to JHU's unfettered discretion. They included language in the Contract and Deed mandating that JHU develop Parcel B as a low-density campus, not a high-density office park, and the facts and circumstances surrounding the Contract's formation confirm this result. *Calomiris*, 353 Md. at 436.

II. Extrinsic Evidence Clearly Demonstrates the Parties' Agreement That Parcel B Would Host a Low-Density Campus Operated by JHU.

Even if the Contract and Deed did not unambiguously require that JHU itself use Parcel B and that the parcel be developed only lightly, those documents are at least ambiguous on these points. Ambiguity exists where different provisions of a contract favor conflicting interpretations. *See, e.g.*, *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 108 (1983). Here, as detailed above, several provisions throughout the Contract and Deed support plaintiffs' position, requiring a conclusion that the Contract is at least ambiguous.

With little elaboration, Judge Rubin concluded that the Contract and Deed unambiguously favored JHU's contention that it may develop Parcel B as heavily as it would like and may lease the entirety of the parcel to third parties unrelated to the University. E190. For the reasons outlined *supra* at pp. 16-25, that conclusion ignored the plain text of the Contract and Deed as well as the facts and circumstances underlying the Owners' charitable transfer of Belward to protect it from development. Judge Rubin's conclusion also disregarded a previous finding *by another Circuit Court judge* that the instruments are susceptible of multiple meanings. *See* E125-129.1 (Judge Savage's finding of contractual ambiguity). That another judge on the Montgomery County Circuit Court found the Contract and Deed ambiguous powerfully suggests that "a reasonably prudent person" could find the instruments "susceptible of more than one meaning." *Weichert*, 419 Md. at 317; *see also Sullins v. Allstate Ins. Co.*, 340 Md. 503, 518 (1995) ("[I]f other judges have held alternative interpretations of the same [contract] language to be reasonable, that certainly lends some credence to the proposition that the language is

ambiguous…."). Furthermore, Judge Rubin failed to draw all reasonable inferences in plaintiffs' favor from such facts as Banks' acknowledged hatred of development and JHU's well-documented pledges to use Belward in accord with Banks' wishes. *See Todd v. Mass Transit Admin.*, 373 Md. 149, 155, (2003). In any event, under Maryland cases, the Circuit Court should have considered extrinsic evidence of charitable donor intent despite its conclusion that the Contract and Deed were unambiguous. *See infra* Part III.

For all these reasons, the Contract and Deed are at least ambiguous, presenting the issue whether plaintiffs adduced extrinsic evidence creating "genuine issues of fact respecting the contract's proper interpretation." *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 308 n.18 (2007). For that determination, evidence of the Owners' intent is especially important in light of Maryland's strong commitment to encouraging charitable giving. *See Inasmuch Gospel Mission, Inc. v. Mercantile Trust Co. of Balt.*, 184 Md. 231, 235 (1945) (Charitable giving, "because of [its] lofty motivation and the general benefits [it] confer[s], should be strongly favored by the courts."); *infra* at 34 (discussing various contexts in which Maryland courts pay special attention to charitable donative intent).

The Circuit Court, as an alternative to its primary holding that no ambiguity existed, held that "any ambiguity has not been resolved by [extrinsic] evidence put forth by the plaintiffs." E191-92. It provided no analysis supporting this conclusion and did not address the special solicitude Maryland courts give to the charitable intent of donors. In fact, as shown below, extrinsic evidence clearly establishes that the parties agreed, in the Contract and Deed, that Parcel B would become a JHU campus and that JHU would develop the parcel only lightly, maintaining it as a university campus.

A. Extrinsic Evidence Clearly Demonstrates That the Contract and Deed Require JHU to Maintain a JHU Campus on Parcel B.

Extrinsic evidence establishes that the parties meant what they said when they provided that JHU had to restrict Parcel B to "its [JHU's] use" and referred to the Contract and Deed's restrictive covenant as "restrictions on Buyer's use of the Property." E604. As detailed above, Banks had a "longstanding older association with Hopkins." E632. Both she and her mother had received medical care from JHU personnel, and Banks had

attended many JHU events as a guest of former Senator and JHU alumnus George Radcliffe. E533-34, E538-39. Banks testified before the Maryland County Council that she was "so proud and grateful that [she] was able to entrust [Belward] and its future to a great institution like Johns Hopkins," E858-59, and wrote privately to JHU President Steven Muller how "proud" she was "to be a member of the Johns Hopkins family," E517. As John Dearden recognized, Banks' special affection for JHU was a *sine qua non* of her willingness to convey Belward to the University, enabling her to reconcile herself to the reality that Belward would not remain a working farm once conveyed to JHU. E632.

Banks also believed the restrictive covenant in the Contract and Deed would obligate JHU to operate a JHU campus on Parcel B. She formed this belief on the basis of her negotiations with JHU, which were "always in the context of Hopkins [e]nterprises" occurring on Parcel B. E637. She understood that the terms of the Contract and Deed limited use of Parcel B to "Hopkins academic, Hopkins R&D, [and] Hopkins delivery of health, medical care and services." E578. She believed that, as a result of the Contract and Deed, Parcel B would host a "campus that would be solely operated and in the name of Johns Hopkins," E427; *see also* E448, E460, E482, which she felt "would be a perfect legacy" in light of her decades-long experience as a teacher, E433. The knowledge that Parcel B would become a JHU campus, not just a money-making asset, motivated Banks and the other Owners to make the enormous financial sacrifice reflected in their gift of most of Belward's value. E426.

JHU knew that Banks' "high regard for Hopkins" motivated her to convey Belward to the University principally as a gift. E538. And, it shared her understanding that, as a result of the Contract and Deed, JHU would be obligated to operate a campus on Parcel B. E557 ("[T]he University, if it proceeds [to acquire Belward], will commit itself to establish a sizable satellite campus at some distance from Baltimore" and to undertake "particular educational activities on the site."); *see also* E578 (statement by JHU's Dearden that he was "sure [Banks] expected Hopkins to be using the property for its own academic purposes"). After the Contract was signed, a JHU representative asserted at a Montgomery County zoning hearing (which Banks attended) that JHU intended to

construct a "major Hopkins research center" as the "keystone of the western upper campus quadrangle" on Parcel B. E852; *see also* E834 (letter from JHU President to Montgomery County Council President promising the same).

All this evidence clearly demonstrates that the parties understood the Contract's and Deed's restrictive covenant to require the operation of a JHU campus on Parcel B, *see City of Bowie v. Mie Props., Inc.*, 398 Md. 657, 679 (2007), and would readily have enabled a reasonable jury to find in plaintiffs' favor, *Todd*, 373 Md. at 168. Banks' longstanding affection for JHU, combined with testimony that she understood the Contract and Deed to require that JHU itself use Parcel B, certainly supports the inference—which the Circuit Court was required to draw in plaintiffs' favor—that she believed the instruments did indeed mandate the operation of a JHU campus on Parcel B. And JHU's representations to Banks and Montgomery County, discussed above, permit—if not compel—the reasonable inference that JHU shared Banks' understanding, as does JHU's entire course of conduct in courting the gift of Belward by acknowledging and accommodating Banks' wishes for the land's use. Furthermore, JHU knew of Banks' belief that the Contract and Deed would result in a JHU campus operating on Parcel B, because JHU itself fostered that understanding throughout the negotiations, which occurred, as JHU's Dearden admitted, "always in the context of Hopkins [e]nterprises" taking place on Parcel B. E637. Even if JHU privately believed, at the time of contracting, that the Contract and Deed would not necessarily bar it from leasing out Parcel B or declining to operate a campus there, "[a] court of equity will not permit one party to take advantage of and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct." *Gross v. Stone*, 173 Md. 653, 666 (1938); *see also* Restatement (Second) of Contracts § 201(2)(a) (1981). At a minimum, and contrary to the Circuit Court's conclusion, plaintiffs adduced evidence creating an issue of material fact whether the parties understood the Contract and Deed to prohibit leasing out Parcel B.

B. Extrinsic Evidence Clearly Establishes That the Contract and Deed Permit Only Low-Density, Non-Commercial Development of Parcel B.

JHU knew well of Banks' "overriding concern … that development of her property be accomplished so as to leave it relatively open and spacious with attention to the beauty of the environment," E559, and knew that her belief that JHU would keep Belward green and open lay behind her decision to convey the land to JHU at a bargain price, making the bulk of the transaction purely a charitable gift, E538. Banks' siblings also "shared [her] values and her goal of preserving the Property from commercial development." E407. The record is clear that Banks believed her agreement with JHU would preserve Belward from heavy, commercial development, E407, and that she specifically understood section 14's authorization of only a single rezoning to eliminate the "open-ended freedom to rezone [that] could produce something very different from what a person in 1988 would expect a 'campus' in a non-urban environment … to look like," E416. JHU has never suggested, at any point in this litigation, what could have motivated Banks and the other Owners to enter into a contract with JHU that failed to protect their "overriding concern" that Parcel B remain free of development that Banks frequently condemned. E559. JHU would not own Belward if not for the Owners' belief, fostered by JHU, that the University would protect Parcel B from heavy, commercial development. E409.

Abundant record evidence establishes that the University shared Banks' understanding, at the time of execution, that the Contract and Deed prohibited it from densely developing Parcel B—and, more to the point, understood that they would receive such a valuable gift only by agreeing to implement Banks' understanding. *See, e.g.*, E548 (Dearden reporting, in 1987, that Banks was "opposed to commercial or residential development" of Belward); E538 (JHU internal memorandum noting Banks "chose Hopkins once she was convinced that the 'controlled development' of the property which we proposed was the best option available"); *see also supra* at 6-7. JHU knew, at the time of execution, that Banks believed the Contract and Deed prohibited heavy development of Parcel B. Officials at the highest levels of JHU were aware of Banks' "overriding concern" that Parcel B remain "relatively open and spacious with attention to the beauty of

the environment," and they made clear to her that JHU would honor her desires. E559. During the negotiations, JHU consistently represented to Banks that it would develop Parcel B "with the size and scope of a satellite campus, not a commercial office park." E410; *see also* E544, E546 (letters to Banks' siblings noting that "the terms [of the proposed deal] only allow [Parcel A] to be used for commercial, revenue-generating purposes"). Because JHU knew of Banks' belief that the Contract and Deed prohibited heavy, commercial development on Parcel B, it cannot now rely on any alleged private understanding, not shared with Banks, that the instruments of conveyance did not prohibit such development. *See Gross*, 173 Md. at 666.

In addition, the month after the execution of the instruments, JHU officials attended a hearing on proposed new zoning laws that would apply to Belward. E274. At the hearing JHU sought a FAR of .5, which would permit only half the floor space JHU currently plans to build on Parcel B. E307, E274. Montgomery County acceded to JHU's request in part, creating a new "R&D" zone that permitted development at .3 FAR with developers permitted to build at .5 FAR after receiving approval of a site plan. E274-75.

After achieving a favorable master plan and sectional zoning map amendment, E282-84, JHU sought and received approval of its preliminary plan of subdivision in 1997, E286-87. JHU sought approval to develop Belward with a FAR of only .3—permitting it to build less than a third of the floor space it now plans for Parcel B, E287—even though it could have elected to file a site plan and develop Parcel B with a FAR of .5, E286-87.[13] Likewise, JHU sought approval only for buildings 50 feet or less in height, even though it could have planned for buildings up to 75 feet in height if it had chosen to file a site plan. E275, E287.

[13] JHU's decision to seek approval of a site plan, required to build at .5 FAR, would not have delayed its ability to begin developing Parcel B, since Banks' continuing residence on Parcel B in 1997 precluded immediate development of the parcel anyway. E409, E537-38.

When a contract is ambiguous, the parties' "practical construction" of it, as evidenced by their conduct, "is of great importance," *Walker v. Associated Dry Goods Corp.*, 231 Md. 168, 179 (1963), especially if that conduct occurs "before any controversy has arisen," *Tackney v. U.S. Naval Acad. Alumni Ass'n*, 408 Md. 700, 717 (2009). Here, JHU acted for years as if the Contract and Deed prohibited it from heavily developing Parcel B. The University sought zoning laws that permitted, at most, development half as dense as that which it currently proposes. And, it requested and received approval of a preliminary plan of subdivision under which it would have developed Parcel B less densely still. It did not deviate from the low-density 1997 Plan until 2010, five years after Banks' death, when it began to encourage the County to enact a new master plan that permitted heavier development on Parcel B. E287. Thus, for more than two decades after the execution of the Contract and Deed, JHU acted just as if its understanding was identical to Banks' and the other Owners' understanding: that the Contract and Deed prevented the University from covering the Farm in heavy commercial development. JHU's post-execution conduct, conforming to the dictates of the Contract and Deed as Banks understood them, permits the logical inference—which the Circuit Court was required to draw in plaintiffs' favor—that JHU and Banks both believed the provisions of the instruments in question forbade heavy development of Parcel B.

C. The "Reasonable Construction" Doctrine Does Not Apply.

Finding the conveyance here to be "largely a sale" and thus relying on cases involving sales of real estate, Judge Rubin applied the "reasonable construction" doctrine to conclude, without discussion, "that any ambiguity has not been resolved by evidence put forth by the plaintiffs." E191-92. The reasonable construction doctrine favors unrestricted property use when "an ambiguity is present [in an instrument] and … that ambiguity is not clearly resolved by resort to extrinsic evidence ." *City of Bowie*, 398 Md. at 679.

For the reasons set forth at length above, the text of the Contract and Deed are not ambiguous, and in any event the extrinsic evidence clearly resolves any ambiguity

regarding the lease and development issues. So the reasonable construction doctrine, even if it applied in a case such as this, would not favor JHU or support the order below.

But, the reasonable construction doctrine does not even apply in this context, where the vast bulk of the value of the conveyed real estate was in the form of a gift for charitable purposes.[14] Neither this Court nor the Court of Appeals has ever held that the reasonable construction doctrine applies in cases involving the charitable giving of real estate. This is for good reason: Maryland public policy strongly favors charitable giving "because of [its] lofty motivation and the general benefits [it] confer[s]." *Inasmuch Gospel Mission*, 184 Md. at 235. Accordingly, Maryland courts liberally construe instruments conferring charitable gifts so as to effectuate their purposes. *See, e.g.*, *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 662, *cert. granted*, 428 Md. 543 (Sept. 21, 2012). For example, Maryland courts will consult extrinsic evidence of charitable intent even when such intent does not appear on the face of the unambiguous conveying instrument. *See id.* at 679. In contrast, the "general rule in favor of the unrestricted use of property" is comparatively weak. *City of Bowie*, 398 Md. at 679. Maryland courts have "recognized that there is no public policy against" covenants restricting property use. *Id.* A court will enforce such a covenant if the conveying instrument unambiguously creates it or if extrinsic evidence clearly demonstrates the covenant's existence. *Id.*

The reasonable construction doctrine has no place in this case. Maryland public policy values effectuating a grantor's charitable purpose over preventing covenants restricting property use, as demonstrated by courts' willingness to consult extrinsic evidence despite an unambiguous instrument to find a grantor's charitable intent, but not to find an intent to maintain the unrestricted use of property. *Compare Long Green Valley*, 205 Md. App. at 679, *with City of Bowie*, 398 Md. at 679. In a case like this one, where at least three quarters of the value of the land conveyed by the Owners was in the form of a

[14] The Circuit Court implicitly recognized that the doctrine has no role to play in charitable gift cases when it (erroneously) found that "the transaction at issue is both a sale and a gift, but largely was a sale" before applying the cases articulating the doctrine. E189-92.

gift to help JHU achieve its important educational and related charitable aims, E527, Maryland's public policy imperative of effectuating a grantor's charitable purpose should prevail over the weaker presumption favoring the unrestricted use of property.

Furthermore, invocation of the "reasonable construction" doctrine is especially inappropriate here, because JHU drafted the use restrictions in section 13 of the Contract. E567. Under Maryland law, "where an ambiguity exists in a contract, the ambiguity is resolved against the party who made it … because that party had the better opportunity to understand and explain his meaning." *Anderson Adventures, LLC v. Sam & Murphy, Inc.*, 176 Md. App. 164, 179 (2007). Rather than applying the reasonable construction doctrine after finding ambiguity and evaluating extrinsic evidence, the Circuit Court should have acknowledged that JHU, as the drafter of section 13, "had the better opportunity to understand and explain [its] meaning" and thus should have construed the use restrictions in plaintiffs' favor. *Id.*

In sum, the "reasonable construction" doctrine does not apply in this case, and the evidence submitted on summary judgment should be reviewed simply to determine whether that evidence, with all inferences drawn in plaintiffs' favor, would support a reasonable jury's conclusion that the Contract and Deed require JHU itself to use Parcel B as a low-density, JHU campus, which it clearly does. *See, e.g.*, *Todd*, 373 Md. at 155, 168.

III. Extrinsic Evidence Would Have To Be Considered Even If the Contract and Deed Did Facially Favor JHU.

Even if the Contract and Deed were somehow found to unambiguously favor JHU's interpretation, the foregoing evidence of donor intent would still be relevant and require a ruling in plaintiffs' favor. Maryland courts have long recognized the special attention due a donor's intent in the context of charitable giving. The Circuit Court, by treating the charitable gift and partial sale of Belward as simply another commercial transaction, failed to take account of this consideration, which requires examination of extrinsic evidence even absent contractual ambiguity when a donor's charitable intent is at issue.

As detailed above, Maryland public policy strongly favors charitable giving. *See, e.g., Inasmuch Gospel Mission*, 184 Md. at 235. Ascertaining donative intent is uniquely

important in the context of charitable giving, because a donor who does not believe an institution will effectuate that intent will be reluctant to make a donation. Several high-profile cases in recent years illustrate the harmful effect that a university's faithlessness to donor intent has on university-donor relations. *See*, *e.g.*, Am. Council of Trustees and Alumni, *The Intelligent Donor's Guide to College Giving* 20 (2d ed. 2011), http://www.goacta.org/images/download/ intelligent_donors_guide.pdf (describing suit by children of donors to wrest control of $1 billion endowment from Princeton University on grounds that university no longer followed donors' intent).

Recognizing the importance of donative intent in the charitable giving context, Maryland courts have considered extrinsic evidence without an initial finding of ambiguity when doing so was necessary to ascertain donor intent. For instance, when determining whether a settlor has manifested a general charitable intent for purposes of creating a charitable trust, courts will consider extrinsic evidence simultaneously with the language of the conveying instrument, without first finding the instrument ambiguous. *See Long Green Valley*, 205 Md. App. at 678. Likewise, when determining whether to invoke the *cy pres* doctrine to save a charitable bequest no longer capable of execution, Maryland courts consider extrinsic evidence of donative intent whether or not the language of the instrument is ambiguous. *Gallaudet Univ. v. Nat'l Soc'y of the Daughters of the Am. Revolution*, 117 Md. App. 171, 206 (1997). And, courts consider extrinsic evidence simultaneously with the text of the donative instrument in formulating a substitute plan for a charitable bequest after deciding to apply the *cy pres* doctrine. *Id.* at 204.

Evaluating plaintiffs' strong extrinsic evidence of donative intent, even apart from how the Contract and Deed support their position, is even more fitting here than in the foregoing types of cases. In a case involving crafting a substitute plan for a charitable bequest under the *cy pres* doctrine, for example, the court consults extrinsic evidence to "surmise" what the donor would have intended had she known her "actual intent" would prove impossible to execute. *Id.* at 207. Here, by contrast, plaintiffs seek to use extrinsic evidence to show what the Owners "actual[ly] inten[ded]." *Id.* And there is no doubt that that intent required JHU itself to use the property and do so for a low-density campus.

See supra at 25-33. Consulting extrinsic evidence is thus more likely to effectuate donative intent here than when a court considers such evidence in the *cy pres* context.

Likewise, consideration of extrinsic evidence to define the terms of a charitable trust such as the one here is more warranted than use of that evidence to determine whether a donor possessed charitable intent. Charitable intent constitutes a necessary element of a charitable trust. *See Long Green Valley*, 205 Md. App. at 678. In this case, however, the Owners indisputably possessed charitable intent, because they said so in the Contract. *See* E596 ("[T]he Sellers and Buyer now desire to amend and restate [the August 1988 contract] for the purpose of clarifying Seller's intent to make a charitable contribution to the Buyer."); E597 ("The Sellers desire that [Parcel B] … be reserved for academic, research and development, delivery of health and medical care and services, or related purposes."); *see also Long Green Valley*, 205 Md. App. at 678-79 (listing purposes considered "charitable" under Maryland law, including "the advancement of education," "the promotion of health," and "other purposes the accomplishment of which is beneficial to the community").[15] If consideration of extrinsic evidence is appropriate when the donor *may have* intended to make a charitable donation, *see id.* at 678, it is even more so when the fact of the donor's charitable intent appears in the text of the donative instrument itself and the court must simply determine what that intent was.

In short, even if the Contract and Deed somehow unambiguously failed to bar JHU's leasing and proposed development, extrinsic evidence of the parties' intent would still require a ruling in plaintiffs' favor because it makes abundantly clear the original understanding that JHU would itself operate a low-density JHU campus on Parcel B.

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[15] Likewise, the text of the Contract and Deed establishes the other four elements of a charitable trust: "(1) a fiduciary relationship, (2) duties of trustees, (3) trust property, [and] (4) manifestation of intention." *Long Green Valley*, 205 Md. App. at 671; *see also id.* at 672 ("A charitable trust may be created although the settlor does not use the word 'trust' or 'trustee.'"). The Contract and Deed created a fiduciary relationship by imposing on JHU duties to use Parcel B only for select purposes and to maintain it in an attractive state; they conveyed a trust property; and they manifested the intent to create a charitable trust by reserving Parcel B for specified charitable uses.

CONCLUSION

For the foregoing reasons, the Circuit Court's orders granting JHU summary judgment and declaratory judgment should be reversed and the case remanded for entry of summary judgment and declaratory judgment in Plaintiffs' favor. In the alternative, if the Court were to conclude that the Contract and Deed do not unambiguously favor plaintiffs' interpretation, the Circuit Court's order granting declaratory judgment should be vacated, the order granting summary judgment reversed, and this matter remanded for further proceedings.

April 17, 2013

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STATEMENT OF COMPLIANCE

This brief complies with the typeface requirements of Md. Rule 8-112 because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 13 font.

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CERTIFICATE OF SIGNING ATTORNEY WITH OUT-OF-STATE OFFICE PURSUANT TO MARYLAND RULE 1-313

I HEREBY CERTIFY, on this 17th day of April, 2013, that I am specially admitted to practice law in the State of Maryland for the limited purpose of appearing and participating in this case as co-counsel with David W. Brown, Knopf & Brown, pursuant to this Court's order of February 1, 2013.

_____
Carter G. Phillips

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 17th day of April, 2013, a true and correct copy of Appellants' Opening Brief and Record Extract were hand-delivered to:

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