Petition Docket No. 0612, September Term, 2013

IN THE COURT OF APPEALS OF MARYLAND

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

Petitioners,

v.

THE JOHNS HOPKINS UNIVERSITY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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CERTIORARI IS NOT WARRANTED NOR IN THE PUBLIC INTEREST

This case involves a negotiated, bilateral contract that imposed a fifty-year restrictive covenant on property sold to Johns Hopkins University ("JHU"). The interpretation of that contract is governed by the well-settled objective theory of contracts and the rule of reasonably strict construction for restrictive covenants. But the Petition ignores these centuries-old principles of contract law and property law, and it instead proposes a "solution" where there is no problem. It asks this Court to adopt a novel rule of law that is a misfit to the facts of this case, that is unworkable, and that no other court in the United States has adopted. At its heart, the Petition's core failing is its attempt to apply the law applicable to *unilateral* gifts to a *bilateral* negotiated transaction.

There is no dispute that the sale of Belward Farm by the Banks siblings to Johns Hopkins was a *negotiated* transaction between two adverse parties at arm's length, with each side represented by counsel. (Indeed, the three Banks siblings each had slightly different interests, and negotiated with each other as well as JHU.) All parties made compromises, and no party got everything it wanted. When the deal was reached, it was reduced to a writing — a *contract* — which both parties' counsel contributed to and which included an integration clause. That contract contained a negotiated restrictive covenant that *both* parties' and their counsel reviewed, discussed and approved. As with the objective rule of contracts, the law of restrictive covenants is well settled in this State. Accepting Petitioners' arguments would seriously destabilize the law of Maryland, particularly the law of restrictive covenants.

Johns Hopkins University — and the many other universities, hospitals and charitable organizations in the State — typically receive property in one of three ways:

- First, donors *unilaterally* and without prior consultation or negotiation give funds or property to the University, for example as bequests in a will, with or without conditions attached. JHU has no prior role in determining how much is given or for what purpose; it can choose to accept the gift or, if the conditions are unacceptable, reject it. The "donor intent" principles the Petition espouses apply to this type of gift.

- Second, some donors approach JHU about making a gift for certain purposes or on certain conditions, which are then discussed or negotiated. Once the terms of the gift are acceptable to both sides, they are reduced to a *bilateral* written agreement. If a dispute later arises, the well-settled principles of contract interpretation govern.
- Third, some donors offer to convey property for less than its full value, seeking to make a tax-deductible gift while also receiving cash consideration. This case is an example of this third situation. The donors negotiate the amount of consideration and, in some cases, the conditions on which the property will be conveyed. Once the terms are acceptable to both sides, they are memorialized in a *bilateral* contract. Disputes in such cases are governed by contract law, and, as applicable here, the laws of real property and restrictive covenants.

In those second and third situations, the parties' *mutual* agreement results in a bilateral negotiated writing — a contract. Contracts in Maryland (and virtually everywhere) are interpreted according to the objective rule of contracts, where the court will look at what a reasonable person in the parties' positions would understand the language to mean. But Petitioners want this Court to apply a unilateral *subjective* rule of contract interpretation that examines only one side's intent and seeks evidence of that one-sided intent from outside the four corners of the contract. If such a rule were adopted, when would the other party ever have certainty about the terms of the transaction? Under Petitioners' proposed rule, the heirs of deceased donors may later claim, as here, based on alleged evidence outside the contract — a contract which, notably, contains an integration clause — that they "know" what their ancestors subjectively intended and that it is different than the language the actual parties to the contract actually used in their actual contract.

Petitioners' proposed rule would ignore the negotiated contract language in favor of one side's claimed intent. That rule would eviscerate both the objective law of contracts and repudiate a foundation of Maryland contract law: that those who execute an integrated agreement "will not be allowed to place their own interpretation on what it means or was intended to mean. The test in such case is objective and not subjective." *Creamer v.*

Helferstay, 294 Md. 107, 126 (1982) (citation omitted). The Petition provides no grounds for altering this time-tested and proven rule of contract interpretation.

Notably, Petitioners cite *not one* case involving a *bilateral* donation or bargain-sale scenario, either from inside the State of Maryland or outside. In every case cited by Petitioners in support of their proposed rule, the donation in question was a *unilateral* donation — a gift from parent to child, a bequest in a will, the establishment of a testamentary or eleemosynary trust, etc. That is because there already are rules that apply to transactions that are negotiated bilaterally between the donor or donor-seller and the charitable recipient — the objective rule of contracts, and, in addition in this case, the law of restrictive covenants. There is nothing wrong with those rules, either in the abstract or as applied in this case.

The Petition should be denied.

FACTUAL SUMMARY

"for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only...."

This is the eighteen-word restrictive covenant ("Restrictive Covenant") included in the bilateral real estate contract that lies at the heart of this case. Both the Circuit Court for Montgomery County and the Court of Special Appeals found that the Restrictive Covenant is unambiguous. The Restrictive Covenant was the product of lengthy discussions and negotiations between three sellers of real property and JHU. *Each* side was represented by counsel.

In 1988, faced with a looming $1.5 million front foot benefit assessment on Belward Farm, three siblings — Elizabeth Banks, Roland Banks, Jr., and Beulah B. Newell (collectively, the "Sellers" or the "Banks siblings") — "were forced to do something with the farm." E665. Over the course of two years, the Sellers and their legal counsel negotiated a bilateral real estate contract with JHU and its counsel. That contract provided for the sale of the farm to JHU and further provided mutually negotiated benefits for each side. In accordance with the contract, JHU paid $5 million to the Sellers to become the fee simple absolute title owner, assumed the $1.5 million

assessment encumbering the farm, constructed a half-million dollar residence on the farm for Miss Banks, and granted Miss Banks what essentially amounted to a life estate — she retained the right to remain on the farm and to farm the land for the remainder of her life at a nominal rent that was well below market value. E598, E601-05, E752. The Sellers then claimed a tax deduction of over $14 million, resulting in additional potential savings of millions of dollars in state and federal taxes. E814-15.

The Contract allowed JHU to develop thirty acres of the farm ("Parcel A") immediately and without restriction, while the remainder of the farm ("Parcel B") is subject to the Restrictive Covenant, lasting fifty years and limiting development "for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only." E604. No other restrictions are imposed on the development, design, or density of the agreed uses; indeed, the parties did not even discuss those issues, as Petitioners conceded in the Circuit Court. Apx. 2 ("[t]he available pre-agreement evidence reveals no numerically specific discussion between the Owners and JHU on appropriate building height and density").

Neither JHU nor the Sellers obtained everything on their respective wish lists when the final Contract was signed. As Petitioner Timothy Newell (who was not involved in the negotiations), stated: "Aunt Liz explained it to me, that, listen, you don't get everything you want." E759. Not only were the Sellers negotiating with JHU, but they were also negotiating with each other. For example, Roland Banks was "interested in getting a larger amount of money for the land" and "was not as interested in saving the land, per se, as Elizabeth was." Apx. 11. And Mr. Newell confirmed that Miss Banks, too, did not get everything that she wanted in the deal. E663. Contrary to her brother's wishes, Miss Banks's preference would have been to preserve the property as a farm. *Id*.

As described by the Court of Special Appeals:

> The Contract and Deed followed about a year-and-a-half of discussion and negotiation between Hopkins and the Family, from early 1987 through the signing of the original Contract in August 1988. *Throughout that time, the Family was represented by counsel and had numerous opportunities to review and have input in its language and substance* (such as the

> elimination of the rezoning contingency). It does not appear, however, that the terms of Paragraphs 13 through 15 were changed over the course of negotiations other than to renumber them between the Contract and the Amended Contract to track other changes. Ms. Banks's sister, Bea Newell, provided specific comments on the draft in June 1988[[1]], but the record reflects no other written proposed revisions from the Sellers. And although Mr. [Timothy] Newell recalled that counsel for the Family thought the language of Paragraph 13 "too loose," the language was never negotiated or revised: circulated drafts of the Contract contain no marked revisions to it. The Contract also contained an integration clause.

Slip Op. at 7 (Pet. Apx. at 45a) (emphasis added).

In addition to advising them that the Restrictive Covenant was "too loose," the Sellers' attorney also informed them that the language used in the parties' initial term sheet was "more specific," and that the language of the Restrictive Covenant in the draft contract was "a broader interpretation." E675. Notwithstanding this advice from their counsel, the Sellers did *not* propose any changes to the Restrictive Covenant other than requiring that it be made a covenant running with the land. E658. JHU agreed to that request. The billing records of the Sellers' counsel confirm that he participated in negotiations related to "drafting covenants to restrict development on main farm." E808.

JHU's vision for the land encompassed a world-class research and development center on par with those in existence at Stanford, MIT, and Princeton, E650-51; despite Petitioners' current claims, the Sellers knew and understood this. In his bill for legal services, Sellers' counsel noted that he participated in negotiations related to the development of a "research park," not an academic campus. E807. And JHU's current plans for the property reflect the *same* proposed uses as its original plans; the only

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[1] Specifically, after reviewing a draft contract in June 1988, Ms. Newell wrote a letter to the attorney representing her and her siblings as Sellers. E676-80; E804-06. She wanted the purchase price to be a firm $5 million, and she opposed the language making the last $2 million contingent upon successful rezoning of the farm. E804-06. Ms. Newell also requested changes to some of the language in paragraph 16, which contained the restrictive covenant in that draft, but she did *not* raise any questions about the eighteen-word restrictive covenant itself. Instead, she noted only that the paragraph needed to be edited to add her name and Roland Banks's name. E804-06.

difference is that current County development standards require a smarter use of land by concentrating the density and increasing the green spaces. Even Petitioner Timothy Newell agrees that it is "very obvious that the [JHU] real estate division had made plans for that [research park] all along, just a smaller version of what they planned now." E685.

Miss Banks herself heard and confirmed JHU's vision for the property at a County Council hearing she attended in early 1990. At the hearing, JHU set forth its plans for a research park that included "corporate, and institutional R&D facilities," "amenities which make successful research parks tick … including … space for federal research facilities, space for private R&D headquarters," and "occupants from government and industry that might be tenants." E836; E852-53; E857-58. Immediately after the JHU presentation, Miss Banks testified in support of JHU's plans, urging the Council to "allow Johns Hopkins to carry out their plans." E860. She confirmed that her big objection was and had been to the potential for *residential* development: "[a]nd this is the thing that I am so opposed to ... I hate housing developments and everything a developer stands for." E859. Her testimony before the County Council stands in stark contrast to what Petitioners now claim was her subjective intent.

The eighteen-word Restrictive Covenant does not mention or support the additional restrictions advocated by Petitioners in these proceedings, and there is no basis to go beyond the Restrictive Covenant in parties' negotiated, bilateral contract. As the Court of Special Appeals held:

> [T]his case presents a fairly simple question of contract interpretation that the circuit court asked in the simplest, and correct, way: "If the words of the restrictive covenant are not ambiguous . . . doesn't that end it?" There is no dispute (and the Family conceded at argument [in the Court of Special Appeals]) that Hopkins seeks only to pursue "agricultural, academic, research and development, delivery of health and medical care and services, or related purposes" on the Farm — the dispute lies in whether the Contract and Deed limit the scale and density of development on the Farm (independent of any limits the County's zoning laws impose) and whether those documents require Hopkins *qua* Hopkins to own and operate the buildings and programs on the campus.
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> * * *

> And because we agree with the circuit court that the operative provisions of this Contract are not ambiguous, the inquiry ends there — not because we find that Hopkins's vision for the Farm necessarily is true to the Family's (we make no such finding), but because the unambiguous words the parties used to memorialize their agreement limits Hopkins's future development of the Farm only in terms of how it uses the Farm, not in terms of scale or density or ownership structure.
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> *Finally*, it makes no difference whether this transaction is characterized as a sale, a gift, or both. The existence (or not) of charitable intent may bear on questions related closely to that intent, such as formation of a charitable trust, *see Long Green Valley*, 432 Md. at 316-17, or whether and how to save a charitable bequest no longer capable of execution in the construction of a will, *see Gallaudet Univ. v. Nat'l Soc'y of the Daughters of the Am. Revolution*, 117 Md. App. 171, 206 (1997), but not to the pure contract interpretation question presented here.

Slip Op. at 17-18, 20, & 28-30 (Pet. Apx. at 55a-56a, 58a, 66a-68a).

ARGUMENT

I. THE "OBJECTIVE RULE OF CONTRACTS" AND THE "REASONABLY STRICT CONSTRUCTION" STANDARD APPLICABLE TO BILATERAL RESTRICTIVE COVENANTS APPLY TO THIS REAL ESTATE CONTRACT.

Implicit in Petitioners' decision to ask this Court to make new law is their concession that under the existing law — the objective theory of contracts and the "reasonably strict construction" standard applicable to restrictive covenants — they cannot prevail because the Contract is not ambiguous and because JHU's plans fully comply with the eighteen-word Restrictive Covenant the parties negotiated.

To avoid the objective law of contracts — and its underlying premise that a bilateral contract cannot be read as a unilateral document informed only by the subjective intent of just one party — Petitioners argue that this Court should put its thumb on the seller-donor's side of the scale whenever a transaction has an element of gift it in by giving additional weight to the donor's subjective intent, even where that intent is not set forth in the unambiguous contract. *E.g.,* Pet. 14. But that position is as legally unsupported and unworkable as it is evasive of the settled rules. It repudiates centuries of contract law holding that a court will not examine the adequacy of contract consideration.

And it ignores the principles set forth in the RESTATEMENT (SECOND) OF CONTRACTS § 71 and § 79 — on-point authority, not cited by Petitioners, that applies to transactions that are in part bargain and in part gift.

A. Even If The Transaction Is A Mixture Of A Bargain And A Gift, A Contract Ensues.

Petitioners first ignore the centuries-old principle that Maryland courts will not examine the sufficiency of consideration in contract negotiations. "[I]t is well settled that the [c]ourts ... will not inquire into the adequacy of the value exacted for the promise so long as it has some value." *Harford Cnty. v. Town of Bel Air*, 348 Md. 363, 383 (1998) (citations omitted). *See also Hercules Powder Co. v. Harry T. Campbell Sons Co.*, 156 Md. 346, 365 (1929) ("[w]hether the consideration was adequate is, in the absence of fraud, a matter wholly for the parties to the contract.… It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration. This rule is almost as old as the law of consideration itself") (citations and internal quotations omitted). If there is any adequate consideration then a *contract* is formed.

This principle is applied "even when it is clear that the transaction is a mixture of bargain and gift." RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (1981). Even "where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for the entire transaction." *Id*. at § 71 cmt. c. Thus, a bargain-sale transaction that partakes of both a sale and a donation is, legally, a contract supported by consideration.

Looking at the other side of the coin, because the Banks siblings received valuable consideration for the transfer of the farm the transaction was not a gift under Maryland law. *E.g., Park Station Ltd. P'ship, LLLP v. Bosse*, 378 Md. 122, 131 (2003) (a gift "does not involve consideration by or on behalf of the donee" and "involves no return or recompense for the thing transferred," while a sale "encompasses the receipt of something in return for the property") (citations and quotations omitted). As the Court pointed out in *Park Station*, "'[w]here all the elements of ... a sale exist, it cannot be made anything else by calling it a different name.' Likewise, where all of the elements of

a gift are present, it cannot become a 'sale' by Park Station calling it a sale." *Id*. at 131-32 (quoting *Albert v. Lindau,* 46 Md. 334, 347 (1877)). Thus, the legal rules applicable to unilateral conduct, such as a gift, do not apply.[2]

Petitioners' singular focus on what they claim one of the three siblings purportedly intended or desired for the property flatly ignores that, after two years of negotiations, JHU paid $5 million to the Sellers, assumed an obligation to pay an additional $1.5 million in real property assessments, built and maintained a new home for Miss Banks for the remainder of her life, and — centrally here — gave up for fifty years the right to unrestricted use of the land by agreeing to the Restrictive Covenant. JHU did not simply accept a property subject to certain restrictions imposed *unilaterally* by donors. This transaction occurred only after compromises by both sides, resulting in one legally significant intention — the parties' *mutual* intention as expressed in the words of the Contract and Deed.

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[2] Maryland law is consistent with the law of other states in this regard. For example, in *Fritz v. Fritz*, 767 N.W.2d 420 (table), 2009 WL 779544, at *4 (Iowa Ct. App. 2009), the court held that a valid, enforceable contract was created when a mother and father agreed to convey property to their son for less than market value:

> We agree this transaction was in some ways a hybrid of contract and gift. We also do not dispute the district court's finding that donative intent … motivated this transaction. However, regardless of donative intent, where a transaction involves a bargained-for exchange, as it did here, a contract follows.… Betty's testimony makes clear that the various covenants were obtained from John in return for transferring property to him.

Id. at *4 (citing RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c, at 174). As the *Fritz* court aptly noted, "[a]n altruistic motive may coexist with a valid legal contract, supported by consideration." *Id*. *See also Hill v. Hill*, 632 S.E.2d 600 (table), 2006 WL 2129853, at *2 (N.C. Ct. App. 2006) (purchase of land from brother for one-third its market value classified as a sale, not gift); *Schroeder v. Duenke*, 265 S.W.3d 843, 847 (Mo. App. 2008) (transfer of property from parents to son was sale, not gift, where deed recited that valuable consideration was paid); *Grimes v. Grimes,* No. 08CA35, 2009 WL 1830761, at *4 (Ohio Ct. App. June 24, 2009) (when "a deed contains a recital of … consideration received from the grantee, it is to be construed as a deed of purchase, and parol evidence may not be used to show that it was instead a deed of gift").

B. This Court Recently Rejected An Almost Identical Argument.

Petitioners claim that the treatment of contracts containing elements of both a sale and a gift "has not been decided by this Court." Pet. 2. They fail, however, to cite this Court's recent decision in *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 432 Md. 292 (2013) — a case Petitioners themselves relied on in the Court of Special Appeals[3] and which was cited by that Court in rejecting the claim Petitioners advance here. *See* Slip op. at 28-29 (Pet. Apx. at 66a-67a) (addressing this issue).

Long Green involved the State of Maryland's purchase of an "agricultural preservation easement" from a farm owner on behalf of the Agricultural Land Preservation Foundation for almost $800,000. 432 Md. at 300. The easement provided that the land would be "preserved solely for agricultural use" and could "not be used for any commercial, industrial, or residential purpose." *Id*. at 300-01. When the farm owner later proposed to construct a creamery on the farm, plaintiffs challenged the State's approval of that proposed creamery on the ground that it violated the terms of the easement. The issue on appeal was whether the plaintiffs, a community association and two of its members, had standing to challenge the State's approval of the creamery. *Id*. at 296. The plaintiffs argued that they had standing because the easement constituted the creation of a "charitable trust" and, as such, was enforceable by "interested persons" like themselves. *Id*. at 308 & n.26 (first question).

In this Court, the *Long Green* plaintiffs also directly presented the question:

> Is an easement "charitable" in nature when it is sold to the State for less than the value of the surrendered development rights and when that

[3] When this case was briefed in the Court of Special Appeals, this Court had not yet decided *Long Green*. Relying, however, on the *Long Green* opinion in the Court of Special Appeals (205 Md. App. 636) that was then under review in this Court, Petitioners argued to the Court of Special Appeals that "the reasonabl[y] strict construction doctrine [governing restrictive covenants] does not even apply" to this case and that "Maryland courts will consult extrinsic evidence of charitable intent even when such intent does not appear on the face of the unambiguous conveying instrument." Appellants' Br. in Court of Special Appeals, at 32.

> uncompensated value may be treated as a charitable contribution for state and federal income tax purposes?

Id. (quoting the second question presented in the *Long Green* Petition for Certiorari). This Court stated it did not need to "decide directly" this second question because it decided the question indirectly by applying "the established rules of construction when interpreting an instrument that creates an easement." *Id.* at 314. In doing so, the *Long Green* Court specifically cited *City of Bowie v. MIE Props., Inc.,* 398 Md. 657 (2007) — a case that applied the rule of "reasonably strict construction" to restrictive covenants like the one in this case and that was relied on by both the Circuit Court and the Court of Special Appeals below. The *Long Green* Court gave effect to the intention of *both* parties at the time the contract was made:

> The intention of the parties at the time the easement was granted is the North Star guiding our interpretation of it. Therefore, our focal point is "the language of the agreement itself[,]" seeking to discern "'what a reasonable person in the position of the parties would have meant at the time it was effectuated.'"
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> Where the instrument includes clear and unambiguous language of the parties' intent, we will not sail into less charted waters to interpret "'what the parties thought that the agreement meant or intended it to mean.'" Rather, we resort to extrinsic evidence in constructing an easement only "when the intent of the parties and the purpose of a restrictive covenant cannot be divined from the actual language of the covenant in question[.]"

Long Green, 432 Md. at 314 (citations omitted). This Court therefore held that a land use restriction is not "charitable" in nature simply because it is sold for less than market value and may generate a charitable contribution tax deduction. The mere existence of a donative element in a transaction — such as in the *Long Green* and Belward Farm transactions — does not warrant a court's departure from the usual and primary rules of deed and covenant interpretation.[4]

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[4] Relying in part on Maryland law, the District of Columbia Court of Appeals has reached the same conclusion in case involving restrictive covenants associated with donated real estate interests. *See Found. for the Pres. of Historic Georgetown v. Arnold*, 651 A.2d 794 (D.C. 1994). There, a homeowner in the Georgetown area of Washington

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C. Every Case Cited By Petitioners Involves A Unilateral Gift.

To our knowledge, no court — and certainly none cited by Petitioners — has ever held that the one-sided donor intent principles applicable to gifts and charitable bequests are relevant to bilateral bargain-sale transactions negotiated by counsel, supported by consideration, and reduced to a fully integrated written contract. Every case Petitioners cite to support their position that donor intent should used in interpreting the parties' contract, see Pet. 15-18, involves a unilateral gift or bequest that was not negotiated and for which no consideration was paid. But such cases give paramount import to donor intent because there is, in those instances, no other party's intent to consider.

All of the Maryland cases cited by Petitioners fall into this category. In Maryland, as in other states, a vast body of law has developed for the construction of wills and other unilateral donative documents that are not clear on their face or that cannot be carried out as drafted. As Petitioners point out, courts apply various doctrines — including *cy pres*, reformation, deviation, and substantial compliance — to construe such documents and give effect to the unilateral testator's or donor's intent when that intent cannot otherwise be discerned. For example, when a charitable bequest cannot be carried out as drafted,

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donated a preservation easement to the Foundation for the Preservation of Historic Georgetown. When the homeowner made certain changes to the house, the Foundation filed suit to enforce its view of the easement. Even though the easement had been donated and even though the landowner had claimed a charitable tax deduction, the District of Columbia court, citing Maryland law, applied the usual rules of deed construction:

> Dispositive of this case … is the well-recognized rule of construction that restrictions on land use should be construed in favor of the free use of land and against the party seeking enforcement. *See Moses v. Hazen*, 63 App. D.C. 104, 106, 69 F.2d 842, 844 (1934); *Belleview Constr. Co. v. Rugby Hall Community Ass'n*, 321 Md. 152 (1990). The Foundation would limit application of this rule to restrictive covenants, as distinct from what it terms the negative easement in dispute here. But this distinction is vague and unconvincing …."

651 A.2d at 797.

courts apply the doctrine of *cy pres* to evaluate the donor's intent and carry it out as nearly as possible. *E.g., Home for Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 369 Md. 67 (2002) (to salvage a bequest that was illegal under Maryland law); *Inasmuch Gospel Mission, Inc. v. Mercantile Trust Co.*, 184 Md. 231 (1945) (testator left part of her estate to a charity that was misidentified in her will and that subsequently filed for bankruptcy); *Gallaudet Univ. v. Nat'l Soc'y of the Daughters of the Am. Revolution*, 117 Md. App. 171 (1997) (testator left part of her estate to nursing facility that did not exist). Similar doctrines allow Maryland courts to alter the terms of a donative document in order to correct a mistake or to give effect to the testator's or settlor's tax objectives. *E.g., Liberty Trust Co. v. Weber*, 200 Md. 491 (1952) (reforming charitable trust that contained a mathematical error so that trust proceeds would be distributed evenly among settlor's children). These cases — and every other Maryland case cited by Petitioners, Pet. 17-18 — involve wills, trusts, or gifts unilaterally drafted by the donor, not negotiated, bilateral contracts. The legal principles such cases adopt and apply are not appropriately applied to matters of bilateral contract interpretation.

Petitioners' reliance on the RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) and the RESTATEMENT (THIRD) OF TRUSTS is similarly unavailing. These Restatements do not cover — or even purport to cover — bilateral transactions that result from counsel-assisted negotiations and involve the payment of consideration. In the Introduction, the RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) explains that it "presents a comprehensive treatment of the American law of wills, … gifts, present and future interests, and other matters generally considered to be within the topic, including the construction of donative documents," and it "covers the rules pertaining to the gratuitous disposition of family property." Similarly, the RESTATEMENT (THIRD) OF TRUSTS applies to "trusts that are created by will or other written instrument." RESTATEMENT (THIRD) OF TRUSTS § 1 (2003), cmt a. Petitioners urge the Court to adopt principles from these inapplicable Restatements, yet ignore the

Restatement sections that actually apply— the RESTATEMENT (SECOND) OF CONTRACTS § 71 and § 79, both of which address transactions that are in part bargain and in part gift.[5]

D. Public Policy Favors Continued Adherence To The Well-Settled Principles Related To Restrictive Covenants.

Petitioners' proffered doctrine would destabilize Maryland contract and real estate law. Petitioners baldly ask this Court to afford no weight to the intentions of JHU in acquiring the property, even though JHU paid valuable consideration and assisted Miss Banks with living on the farm for the remainder of her life.

There are, of course, *two* parties to every bilateral agreement. In Petitioners' view, the "intent" of *one* of those parties should be given special weight when the bilateral agreement includes an element of charity. But what about the intent of the consideration-paying charity, expressed to the seller-donor as part of the negotiations over the combined sale/gift? What about the recipient's ability to rely on the *contractual* language it negotiated with the seller-donor? The receiving charity will rely on that language in developing its plans, as JHU did here in evaluating what uses it could make of the property, by looking to the written agreement executed with the Banks siblings. Is the receiving charity to be required to get the approval of the seller-donor's descendants each time it wants to make use of the property? Is a court called into a use dispute decades later to rely on those descendants' hearsay view of what their ancestors "would have wanted" — to the exclusion of simply reading the contemporaneous contract that

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[5] Petitioners also cite cases from other jurisdictions for a "more flexible approach." Pet. 16-17. For example, Petitioners contend that other jurisdictions apply legal principles applicable to gifts when a transaction has "elements of a gift." Pet. 17, citing *Burnett v. Burnett,* 471 S.E.2d 649 (N.C. Ct. App. 1996), and *Kiel v. Brinkman*, 668 S.W.2d 926 (Tex. App. 1984). Neither case is relevant; both cases involve divorce proceedings where the courts were required to ascertain whether a conveyance of property to one of the marriage partners was a gift (and thus separate property) or a sale (and thus marital property). In both, the courts examined whether consideration was paid, determined that consideration was *not* paid, and classified the conveyances as gifts. Similarly, none of the other out-of-state cases cited by Petitioners involved payment of any consideration at all, and none of them apply the legal principles applicable to interpretation of unilateral gift documents to a transaction involving consideration.

the original donor and the receiving charity negotiated? Even when the bilateral contract is not ambiguous under the objective rule of contracts?

Petitioners' proposed doctrine is as unworkable as it is unfair.

II. THE RESTRICTIVE COVENANT IS NOT AMBIGUOUS; THUS, THE LOWER COURT PROPERLY CONSTRUED IT WITHOUT RESORT TO EXTRINSIC EVIDENCE.

As Petitioners apparently recognize, if this case is treated under the law applicable to restrictive covenants, this is not a close case. The Restrictive Covenant at issue here was negotiated, drafted, and signed under the capable guidance of counsel for each side. This was a major transaction for each side, and both sides, advised by counsel, paid careful attention to every word and phrase. Moreover, the contract contains an integration clause declaring that it represents "the final and entire agreement between the parties and neither they nor their agents will be bound by any terms, conditions or representations not herein written." E607-08. This integration clause "is indicative of the intention of the parties to finalize their complete understanding in the written contract …." *Pumphrey v. Kehoe*, 261 Md. 496, 505 (1971). *See also Creamer v. Helferstay*, 294 Md. 107, 126 (1982) ("if a contract has been integrated, it may not be varied by parol in the absence of mutual mistake, nor will it be rescinded or redrafted by the Court if one of the parties finds that he has …become dissatisfied with its provisions"). That this case involves a real property transaction provides an even stronger basis to restrict the use of parol evidence to vary the terms of the Restrictive Covenant. "A rigid enforcement of the parol evidence rule should occur in cases involving the sale of an interest in land in which the Statute of Frauds ... requires that the contract be evidenced by a writing, signed by the party to be charged, in order to be enforced." *Calomiris v. Woods*, 353 Md. 425, 444 (1999) (citation omitted).

A. The Unambiguous, Eighteen-Word Restrictive Covenant Governing Uses Does Not Impose The Detailed Architectural Design Restrictions Claimed By Petitioners.

Under the Restrictive Covenant negotiated by the parties and reviewed by their counsel, Parcel B is to be used "for agricultural, academic, research and development,

delivery of health and medical care and services, or related purposes only …." E604. And if these eighteen words were not clear enough, the parties added to these words a 24-word explanation providing that the "uses may specifically include *but not be limited to* development of a research campus in affiliation with one or more divisions of the Buyer [JHU]." *Id.* (emphasis added).

Petitioners have not identified a single ambiguity *within these words* about the *uses* to which the property may be put that necessitates resort to extrinsic evidence. And the ambiguity must be in *these* words, not elsewhere. "[O]ne may not argue ambiguity in one contractual term or clause in order to gain the admittance of extrinsic evidence to contradict other terms or clauses in the contract that are unambiguous." *Calomiris*, 353 Md. at 441. Petitioners' argument fails on this basis alone.

Entirely missing from Petitioners' analysis is any recognition that the covenant at issue is entirely about *uses*. The Petition, *e.g.,* Pet. 4-5, 8, is replete with efforts to transmogrify simple words about *use,* like "research and development," into detailed *architectural* and design theories about the appropriate amount of green space between buildings, and the number of floors that should be built on the property, despite the absence of any such detailed design limitations in the actual covenant about *uses*.

As this Court only recently reiterated, however, restrictive covenants in real estate deeds are to be evaluated under the usual approach embodied in the objective rule of contracts:

> Courts in Maryland apply the law of objective contract interpretation, which provides that "[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding." *Slice v. Carozza Properties, Inc.*, 215 Md. 357, 368 (1958). *See also Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 166-67 (2003)…. As such, "[a] contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution." *Sy–Lene of Washington*, 376 Md. at 167.

Dumbarton Improvement Ass'n, v. Druid Ridge Cemetery Co., 434 Md. 37, 51-52 (2013).

And *Dumbarton* is crystal clear that this objective rule of contracts applies equally to restrictive covenants, like the one in this case:

> Likewise, covenants, a species of contracts, are to be enforced according to the objective intent of the original parties. *See Live Stock Co. v. Rendering Co.,* 179 Md. 117, 122 (1941) ("It is a cardinal principle ... that the court should be governed by the intention of the parties as it appears or is implied from the instrument itself."); *MIE Properties, Inc.,* 398 Md. at 682 n.13 ("Restrictive covenants ... are a species of contract. Thus, they are interpreted in a like manner as other types of contracts.").

See id. at 52.

This Court has, similarly, already determined that the language of a covenant similar to the Restrictive Covenant in this case is unambiguous, as noted by the circuit court in its opinion. E190. In *City of Bowie v. MIE Props., Inc*., 398 Md. 657 (2007), the covenant at issue restricted development of the subject property to fourteen related uses, including "office buildings for science, technology, research, and related issues," "research, development and testing laboratories, including testing facilities and equipment, and the manufacture and/or fabrication of the same incidental to such research and development," " bio-medical laboratories," "institutional uses of an educational, medical, religious or research nature," or "public and quasi-public uses of an educational or recreational nature." *Id.* at 669-71. This Court found that "[t]he intent of the parties and the purpose of the Covenant is clear: to develop a research park, with or without the involvement of the University of Maryland." *Id*. at 683.

> Had … MIE's predecessors in title, wished to protect themselves … in order to account for certain contingencies (such as the withdrawal of the University of Maryland from the project or future unfavorable market conditions), they could have done so by including safeguards in the language of the Covenants. For whatever reason, no such precautions were undertaken …. We may not invalidate a plainly written covenant to save a party from what may prove to be a poor business decision.

Id. at 683; *see also id.* at 696 ("The original parties to the covenants … could have structured those instruments to permit the list of allowable uses to expand or contract …. They did not. We may not add to the instruments that which the consenting parties neglected to bargain for in the course of their dealings."). Similarly here, if the Banks

siblings had wished to control the *design* of JHU's project as well as the *uses* to which JHU would put the land, they could have done so by making provisions for a limited height or density, for example, in the Restrictive Covenant, but they did not do so.

Lowden v. Bosley, 395 Md. 58 (2006), also involves an unambiguous use restriction that this Court construed without resort to extrinsic evidence in the face of arguments substantially similar to those Petitioners raise here. In *Lowden*, the plaintiffs claimed that short-term leasing of homes at Deep Creek Lake was a commercial activity that violated a restrictive covenant that building lots "be used for 'single family residential purposes only.'" 395 Md. at 60. This Court, however, held that the covenant was not ambiguous because the covenant "*on its face* does not prohibit the short-term rental of a defendant's home to a single family which resides in the home." *Id*. at 67 (emphasis added). The *use* was still a "residential" one. As in *Lowden*, the Restrictive Covenant here does not — "on its face" — impose any of the architectural or design restrictions now claimed by Petitioners. There is no ambiguity about that. The lack of any textual basis for importing the additional design restrictions sought by Petitioners into the Restrictive Covenant is fatal to their claims.

B. None of the Language Relied Upon By Petitioners Creates Any Ambiguity.

Neither does any of the other language in the Contract relied upon by Petitioners create any ambiguity.

1. Petitioners attempt to make much of the word "its" that precedes the use restriction. E604 ("Buyer shall … limit its use ... for agricultural, academic, research and development," etc.). According to Petitioners, that word means that if any use is made of Parcel B, JHU must be the entity using it. Therefore, they argue, JHU is prohibited from leasing Parcel B or subjecting it to commercial uses.

But the word "its" cannot carry the weight Petitioners would have it bear. A fee simple owner of real estate may "use" it in many ways, one of which is leasing it. *Cf., MIE Props.,* 398 Md. at 703-04 (affirming non-joinder of tenant whose use was non-conforming; covenantee could bring suit to abate non-conforming use against

covenantor-landlord because tenant's use was covenantor's use). More importantly, the Restrictive Covenant itself explicitly addresses the issue, and explicitly contemplates that the uses "may specifically include *but not be limited to* development of a research campus in affiliation with one or more divisions of" JHU — meaning, of course, that the use might be unaffiliated with one or more divisions of JHU.

2. Neither does the word "campus" carry the freight Petitioners would assign to it. The naming provision in the Contract requires Parcel B to be called "Belward Campus of The Johns Hopkins University," E604, but that provision does not restrict how the property is to be *used*. The circuit court agreed, E191:

> I conclude that the naming requirement contained in the two paragraphs that we have been discussing is a naming requirement and does not form any part of the restrictive covenant language contained in either the amended contract or the deed.

This ruling is manifestly correct. The clause simply dictates the name of the property. *Accord MIE Props.*, 398 Md. at 682-83 (contract providing that center is to be called University of Maryland Science and Technology Center did not indicate a requirement that the property "be developed in conjunction exclusively with the University of Maryland"). The plain language of the Restrictive Covenant does, of course, indicate that an "academic" use is permissible, but other uses — agricultural, research and development, delivery of health and medical care and services, *or* related purposes — are permissible as well. Thus, when the Sellers and JHU agreed that Parcel B would be called "Belward Campus of The Johns Hopkins University," they understood that this name could apply to a variety of uses. The eighteen-word Restrictive Covenant and the naming clause have different purposes and subject matters, but there is no conflict between them. One regulates use, and the other specifies the name. That they both exist in the Contract does not render either provision ambiguous.

III. EVEN IF THE COURT ADOPTS PETITIONERS' PROPOSED RULE, PETITIONERS STILL WOULD NOT PREVAIL BECAUSE THE EXTRINSIC EVIDENCE DOES NOT SUPPORT THEIR INTERPRETATION OF THE RESTRICTIVE COVENANT OR THE DONORS' ALLEGED INTENT.

Petitioners do not even address the alternative ruling of the Circuit Court: it found that even if the Restrictive Covenant were ambiguous, those ambiguities were not "clearly resolved" by the Petitioners' extrinsic evidence as required by the substantive law, and thus the unrestricted use of land would prevail:

> I conclude that even if the restrictive covenant language is held by an appellate court to be ambiguous, I conclude nonetheless that there is no genuine issue of material fact and that the defendant is still entitled to judgment of a matter of law.
>
> Under the principle of reasonable construction as explicated in both *Lowden*, *City of Bowie* and other cases, I conclude that any ambiguity has not been resolved by evidence put forth by the plaintiffs, any extrinsic evidence. This, in my judgment, then triggers the general rule in favor of the unrestricted use of the property. In that event, as discussed in the *City of Bowie* case, the covenant should be read to promote the free alienability and use of land. I stress that's an independent holding, only in the event that it is concluded that the language is ambiguous.

E191-92.

This alternative ruling was eminently correct. During this litigation, Petitioners have offered numerous, inconsistent, and imprecise variations of how the Restrictive Covenant supposedly limits JHU's development. *See*, *e.g.*, E932-37 (compendium of the heirs' numerous and varying statements about what the Sellers allegedly intended). In other words, Petitioners have not even clearly resolved the extrinsic evidence in their own mind, let alone on the record. If anything, the extrinsic evidence demonstrates that, from the earliest negotiations and continuing through to the present, JHU's intended use of the land has not changed. Miss Banks knew about JHU's plans and *supported* them, and understood that the range of uses in the Restrictive Covenant would enable JHU to carry out its plan. If there were an ambiguity, which there is not, the extrinsic evidence, if anything, "clearly" resolves it in JHU's favor.

CONCLUSION

Petitioners ask this Court to do what no other court has done — abandon centuries of law governing the sufficiency of consideration, the objective theory of contracts, and the rule of reasonably strict construction of restrictive covenants. In their place, Petitioners seek a new rule of unilateral "donative intent." Such a rule for bilateral, negotiated transactions is unwarranted, unworkable, and unfair. The trial court correctly ruled that the language of the Restrictive Covenant is clear and unambiguous and, alternatively, that any ambiguity has not been resolved by evidence put forth by the Petitioners. No issue of public interest is raised by the Petition. Accordingly, the Petition should be denied.

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CERTIFICATE OF SERVICE

On January 22, 2014, Johns Hopkins University served two copies of its Answer to Petition for Writ of Certiorari to Petitioners' counsel via first-class U.S. mail, postage prepaid, upon the following:

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