IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-01129

WESLEY BRELAND REALTOR, INC. — APPELLANT

VS.

NICK AMANATIDIS AND
CHERRY AMANATIDIS — APPELLEES

APPEAL FROM THE CHANCERY COURT OF LAMAR COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

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   Chancery Court Judge for Lamar County
5. Nick Amanatidis
6. Cherry Amanatidis
7. Red Oak, Inc.
8. Herbert Slay
9. Lawrence Warren

10. David Bomboy

11. Hershell Shattles

12. Shows, Dearman, and Waites

13. Wesley Breland, Realtor, Inc.

14. Wesley Breland

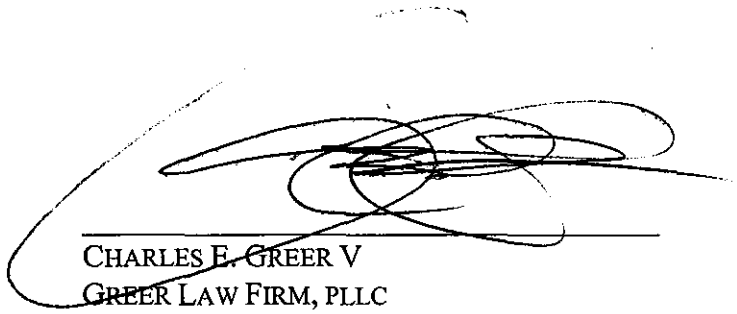

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TABLE OF AUTHORITIES CITED

Cases **Page Nos.**

Statutes

References

I. STATEMENT OF THE ISSUES

1. Whether the Chancellor erred when he found that the Restrictive Covenants at issue were applicable to the subject Reserved Lot.

2. Whether the Chancellor erred because he did not find that the owner of the subject Reserved Lot should be allowed to use it for any lawful purpose.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Complaint in this cause was filed by the Plaintiffs on August 17, 2006. (Appellant's Record Excerpts (hereinafter "R.E.") Pg. 1) The Plaintiffs were seeking a permanent injunction to preclude the Defendants from developing a Reserved Lot for commercial use within the Serene Hills Subdivision in Lamar County, Mississippi. (See Complaint) The Plaintiffs requested that the Court enter a declaratory judgment that would determine whether the Building Restrictions and Protective Covenants for Serene Hills Subdivision applied to the Reserved Lot at issue in this cause. (See Complaint) In the Alternative, the Plaintiffs pled that the Defendants should be equitably estopped from developing the Reserved Lot commercially. (See Complaint) The Defendants filed their Answer and Counterclaim on August 30, 2006. (R.E. Pg. 1) The Defendants' counterclaim was based on slander of title. (R.E. Pg. 7 and See Answer and Counterclaim) In response, the Plaintiffs filed an Answer to the Defendants' counter-claim on September 15, 2006. (R.E. Pg. 1)

The matter was tried on the merits and the Chancellor requested that the parties submit briefs on the issues presented at trial. The Chancellor entered his Final Judgment on June 28, 2007. (R.E. Pg. 3) The Chancellor found that the Court had jurisdiction over the subject matter and the parties of this cause.(R.E. Pg. 4) As to the declaratory relief sought by the Plaintiffs, the Chancellor made the following declaration: "The Building Restrictions and Protective Covenants for Serene Hills .

. . are binding on and hereby applicable to the subject reserved lot . . ." (R.E. Pg. 4) The Court further adjudged that the Defendant, Wesley Breland, Realtor, Inc. should be equitably estopped from developing the Reserved Lot commercially. (R.E. Pg. 5) Accordingly, the Court granted the permanent injunctive relief sought by the Plaintiffs that prohibited Wesley Breland, Realtor, Inc., from developing or using the Reserved Lot for any purpose other than residential and not inconsistent with the Building Restrictions and Protective Covenants for Serene Hills Subdivision. (R.E. Pg. 5) The Chancellor also dismissed the counter-claim for slander of title made by the Defendants against the Plaintiffs with prejudice and dismissed all claims made by the Plaintiffs against Wesley M. Breland, individually, with prejudice. (R.E. Pg. 5-6) On June 29, 2007, the Defendant/Appellant, Wesley Breland, Realtor, Inc., filed its Notice of Appeal. (R.E. Pg. 3)

B. STATEMENT OF THE FACTS

The idea of the development of the property that was to become the Serene Hills Subdivision began when Wesley Breland and Herbert Slay purchased a sixty acre parcel of property in Lamar County, Mississippi. (R.E. Pg. 8) Thereafter, in 1995, they brought in other individuals and formed Red Oak, Inc., which purchased the property from Wesley Breland and Herbert Slay. (R.E. Pg.8) The individual owners of Red Oak, Inc., were Wesley Breland, Herbert Slay, Lawrence Warren, David Bomboy, Herschell Shattles and Shows, Dearman, Waites. (R.E. Pg. 8) The only minutes ever prepared for Red Oak, Inc., and provided pursuant to a Subpoena to Red Oak, Inc., were the Minutes of the Organizational Meeting of the Incorporator and Board of Directors of Red Oak, Inc. (Trial Transcript (hereinafter "Tr.") Pg. 119) Those minutes specifically state that Wesley Breland and Herbert Slay had purchased the property that was to become Serene Hills and that said property

was "***suitable for the development and sale of residential lots*** by the corporation . . .and that [a]fter a full and complete discussion of the desirability of the corporation ***acquiring subject real property for residential development***, the following resolution was moved and adopted with all directors other than Herbert Slay and Wesley Breland voting for the adoption thereof." (Tr. Pg. 61, Ln. 3-5 and 15-21) The resolution that was moved and adopted in the minutes approved the purchase of the property from Wesley Breland and Herbert Slay. (Trial Exhibit (hereinafter "T.E." No. 15)

The Final Plat for the Serene Hills Subdivision (hereinafter sometimes referred to as the "Plat"), was filed for record in the Office of the Chancery Clerk of Lamar County, Mississippi on November 17, 1995. (R.E. Pg. 8) The Plat was prepared by the employees of Shows, Dearman, Waites, a part owner of Red Oak, Inc. (R.E. Pg. 8) The Plat shows that there is a lot labeled "Reserved" immediately adjacent to the lot currently owned by Nick and Cherry Amanatidis. (T.E. No. 1) (T.E. No. 13) (Tr. Pg. 15, Ln. 22-29, Pg. 16, Ln. 1-10) The lot labeled "Reserved" (hereinafter sometimes referred to as the "Reserved Lot") referenced above is the lot currently owned by Wesley Breland, Realtor, Inc., (Tr. Pg. 15, Ln. 22-29, Pg. 16, Ln. 1-10) Wesley Breland is the sole owner of Wesley Breland, Realtor, Inc., which purchased said lot from Red Oak, Inc. (Tr. Pg. 37, Ln. 7-10 and Pg. 49, Ln. 19-24, respectively)

The Plat depicts the Reserved Lot as being within the boundary of the Subdivision and is titled "Serene Hills". (T.E. No.1) The Plat has a certification from the engineer hired by the developers that reads as follows: "This is to certify that I surveyed the land shown on this plat and fully described above and ***subdivided the same with lots*** and that the plat hereon is a correct representation of said survey and subdivision." (this certification was signed by the engineer, William F. Waites) (T.E. No.1) There was also an owner's certifcation that reads as follows: "This

is to certify that we, the undersigned owner of the land shown on the plat and fully described hereon, do hereby dedicate this plat to be known as Serene Hills. I also dedicate to the use of the public the streets and easements as shown on this plat and have caused the same to be subdivided as shown and have signed and delivered this plat, this the 13th day of October 1995." (T.E. No.1) (Tr. Pg. 49, Ln. 4-18) (this certification was signed by Wesley Breland as president of Red Oak, Inc.) Another certification on the Plat was as follows: "Personally appeared before me, the undersigned clerk of the Chancery Court in and for said county and state, the within named William F. Waites, A Mississippi Registered Professional Engineer, being the maker of the map of Serene Hills, a survey and plat of the herein described land, who acknowledged that he signed and delivered the within map of Serene Hills, and also further appeared before me, Wesley M. Breland, President of Red Oak, Inc., a Mississippi Corporation, who acknowledged as president of said corporation being duly authorized to do, signed, sealed and delivered this plat of Serene Hills as owner of the date therein stated." (T.E. No.1) (this certification was dated October 13, 1995 and signed by Wayne Smith, Chancery Clerk and William F. Waites, Consulting Engineer)

Prior to the development of Serene Hills Subdivision, the Board of Supervisors of Lamar County enacted a set of regulations to govern subdivision of land in Lamar County, which include definitions and the requirements for making and filing a subdivision plat in Lamar County. (hereinafter sometimes referred to herein as the "Subdivision Regulations"). (T.E. No.14) (R.E. Pg.18) The Subdivision Regulations define a "lot" as *"a tract, plot, or portion of a subdivision* ***or*** other parcel of land intended as a unit for the purpose, whether immediate or future, for transfer of ownership or for building development." (T.E. No.14) (R.E.18). In addition to the foregoing, Section 404.03-06 of the Subdivision Regulations specifically required that the developer state the

"purpose for which sites ***other than residential lots*** are dedicated or reserved." (T.E. No. 14) (R.E. Pg. 18) The reserved lot at issue is labeled "Reserved", but does not state the purpose for which it was reserved as required for non-residential lots. (T.E. No.1)

On November 17, 1995, representatives of Red Oak, Inc., Wesley M. Breland, President, and Herbert Slay, Jr., Secretary/Treasurer, executed the Building Restrictions and Protective Covenants For Serene Hills Subdivision, which were filed for record in the Office of the Chancery Clerk of Lamar County, Mississippi. (T.E. No. 2) Said document states in relevant part that the signatories, being the owners of all the surface estate and part of the mineral estate of all the lots embraced in Serene Hills Subdivision, according to the official map and plat thereof, "desiring and intending to create and affix to the lots in said subdivision, and to each of them, certain building restrictions and protective covenants, do hereby make, adopt, and promulgate the following building restrictions and protective covenants, the same to be covenants restricting the future use of said land. . ." (T.E. No. 2) The very first restriction and covenant listed in said document and the particular restriction at issue in this case is as follows: "***All*** of the ***lots*** in the said Serene Hills Subdivision shall be known, described and used as residential lots, and **no commercial building may be built thereon**." (T.E. No. 2)

On October 19, 2005, Nick and Cherry Amanatidis purchased their home in Serene Hills. (Tr.Pg.8.Ln.6-8) (R.E. .Pg.8) At that time, they took out a loan for the purchase. (Tr.Pg.8 Ln.9-10) Prior to closing on the residence Nick Amanatidis reviewed the abovementioned Plat and Covenants for Serene Hills and had the understanding that Serene Hills was a residential subdivision where all lots, including the "Reserved Lot", would also be for residential use. (Tr. Pg. 8, Ln. 19-25; Pg. 9, Ln. 15-22; Pg. 10, Ln. 2-22) (R.E. Pg. 10) Nick knew the Plat and Covenants were important and that

he needed to review them because he served as treasurer and vice-president of a homeowners association when he lived in Georgia. (Tr. Pg. 9, Ln.4-12) (R.E. Pg. 18) Nick and Cherry Amanatidis relied on the representations made on these documents as well as an examination of the property to purchase their home. (Tr. Pg. 10, Ln. 2-22) (R.E. Pg. 18) They did not have any knowledge that the defendant would attempt to develop the "Reserved Lot" at issue commercially. (Tr. Pg. 10, Ln. 2-26) Nick felt that commercial developement of the "Reserved Lot" would increase traffic flow and he worried about the safety of his children because commercial development could eventually be a bar, gas station, etc. (Tr. Pg.17, Ln. 5-29; Pg. 18, Ln. 1-2)

III. SUMMARY OF ARGUMENT

The Chancellor did not err because he followed this Court's prior dictates controlling the issues presented to him. A thorough Opinion was written which outlined the applicable law and contained sufficient findings of fact to support the Chancellor's decisions. In addition, those findings of fact and any necessary inferences were fully supported by the credible evidence.

IV. ARGUMENT

A. STANDARD OF REVIEW

There is a limited standard of review applied to appeals from chancery courts.[1] The chancellor's findings will not be disturbed by the appellate court when they are supported by substantial, credible evidence, unless the chancellor's findings are an abuse of discretion, manifestly wrong, clearly erroneous, or the result of an erroneously applied legal standard.[2] It is not the

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[1] *Harrison v. Roberts,* 2008 WL 170997 (¶ 9) (Miss.App.2008) (citing *Spence v. Scott,* 806 So.2d 296, 298 (¶ 5) (Miss.Ct.App.2001)).

[2] *Id.* (citing *Williams v. King,* 860 So.2d 847, 849 (¶ 8) (Miss.Ct.App.2003).

responsibility of this Court to redetermine questions of fact that have been resolved by the chancellor. In fact, this Court's scope of review of findings of fact is severely limited.[3] Findings of fact made by a chancellor which are supported by credible evidence, ***or reasonable inferences which may be drawn from credible evidence***, may not be set aside on appeal.[4] This is particularly true when this Court is concerned with a finding of fact substantially involving an individual's state of mind.[5] The chancellor sits as the fact finder and is the sole judge of the credibility of a witness when resolving factual disputes.[6] This Court will not reverse a chancellor's findings if they are based on substantial credible evidence found in the record. Moreover, where there are issues of fact resolution of which is essential to the judgment but with respect to which the chancellor makes no specific finding, this Court is required by its prior decisions and by sound institutional considerations to proceed on the assumption that the chancellor resolved all such fact issues in favor of the appellee.[7]

B. THE CHANCELLOR'S FINDINGS CONCERNING THE CONSTRUCTION OF THE COVENANTS AND RELATED DOCUMENTS WAS NOT REVERSIBLE ERROR

Honorable Eugene L. Fair, Jr., Chancellor in and for Lamar County, Mississippi, ruled in response to the Plaintiff/Appellee's request for declaratory relief that the Covenants at issue were

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[3] *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 205 (Miss.1984).

[4] *Id. (citing Cotton v. McConnell,* 435 So.2d 683, 685 (Miss.1983); *Culbreath v. Johnson,* 427 So.2d 705, 707-708 (Miss.1983)).

[5] *Id.*

[6] *Stokes v. Campbell*, 794 So.2d 1045 (Miss.App.2001) (citing *Murphy v. Murphy,* 631 So.2d 812, 815 (Miss.1994)).

[7] *PMZ Oil Co.*, 449 So.2d. at 205 (citing *Harris v. Bailey Avenue Park*, 32 So.2d 689, 694 (1947); *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss.1983)).

applicable to the subject Reserved Lot. In his Opinion, Chancellor Fair quoted the Mississippi Supreme Court's decision in *Andrews v. Lake Serene Property Owner's Assoc., Inc.*, 434 So.2d. 1328 (Miss.1983), in which the court recognized that:

> In construing restrictive covenants the question is primarily one of intention, and the fundamental rule is that the intention of the parties ***as shown by the agreement*** governs, being determined by fair interpretation of the entire text of the covenant. The intent must be clear. Still, clear restrictive language, manifesting a restrictive intent, and unambiguous on its face ***or*** in the factual context faced by the Court, will be enforced.
>
> These rules of construction are helpful guidelines. ***Yet in no way do they establish a precise formula*** which, when applied to a given case, mechanically produce an unassailable result. ***Our touchstone remains the covenants themselves***. For it is established in our law that clearly worded protective covenants, if lawfully made, are indeed enforceable as written. (R.E. Pg. 14)

Another case found helpful by the Chancellor was *Mendrop v. Harrell*, 103 So.2d. 418 (Miss.1958), wherein the Court recognized that:

> Rules governing the construction of covenants imposing restrictions and burdens on the use of land ***are the same as those applicable to any contract or covenant***. The language used will be read in its ordinary sense, and the restriction and burden will be construed in the light of the circumstances surrounding its formulation, with the ideal of carrying out its object, purpose and intent. They are to be fairly and reasonably interpreted according to their ***apparent*** purpose. (R.E. Pg. 14)

The Chancellor determined that reference for a final decision on the applicability of the Covenants to the subject "Reserved Lot" must be made to three documents - the Covenants, the Plat, and the Subdivision Regulations - and that if the plain meaning of those three documents shows the ***written*** intent of the developers of the subdivison, then the thoughts wandering around in their heads at the time and thereafter to the present, are irrelevant and any evidence of intent contrary to the

written intent would have no force or effect. (R.E. Pg. 16) With reference to the Covenants, the lower court found that Red Oak, Inc., the corporate owner and developer of the subdivision, filed Restrictive Covenants in the land deed records of the County, providing in part that:

> ***All*** of the ***lots*** in the said Serene Hills Subdivision shall be known, described and used as ***residential lots***, and ***no commercial building may be built thereon***. (R.E. Pg.16)

The lower court also found that the Board of Supervisors of Lamar County enacted a set of regulations to govern the subdivision of land, which was entitled the "Subdivision Regulations for Lamar County, Mississippi, of 1989" and that "[t]hey were in effect when Serene Hills was platted and filed, and the Restrictive Covenants governing it were filed." (R.E. Pg. 18) It was recognized that the Subdivision Regulations defined the term "lot" as :

> A tract, plot, or portion of a subdivision ***or*** other parcel of land intended as a unit for the purpose, whether immediate or future, of transfer of ownership or building development. (R.E Pg. 18)

It was also found that the Subdivision Regulations also provide that there is a requirement that the plat include the "purpose for which sites, ***other than residential lots***, are dedicated or reserved" and that the subject "reserved lot" in question was marked on the Plat as "Reserved", but no purpose was reflected on the Plat. (R.E. Pg. 18)

In construing the pertinent portions of the foregoing documents, the Chancellor determined that "the intent of Mr. Breland and his fellow investors, in context of regulations enacted in the public interest in favor of residential use of property not clearly designated as either residential or commercial, should be determined by what they said and not what they thought". He further found that "interpretation of the Plat is subject to the Regulations quoted above which provide that any use ***other than residential*** of a parcel of land embraced

in a Subdivision Plat must be placed on the plat. If a use ***other than residential*** is not placed on the plat then the parcel is left for residential use, which does not have to be specified under the regulations."

The Chancellor went on to recognize the general policy discussed in *Andrews* that "favors less, rather than more, restriction on what may be done with privately owned property, with ambiguity questions being resolved against restriction." (R.E. Pg. 19) However, he chose not to apply that discretionary cannon of construction and found that "when an agency of public policy, in this case the Board of Supervisors, weighs in, in an overall way, and provide interpretations which clarify interpretation of terms of restriction and seek to avoid the need for interpretation, the determinations of such agencies should be respected." (R.E. Pg. 19) The Court found that Nick and Cherry were entitled to rely on (1) the Plat of the Subdivision in which their lot is located, (2) the restrictions filed of record for the subdivision by the corporation, of which Wesley was a director and officer, and (3) the terms of the Subdivision Regulations of Lamar County, Mississippi, of 1989 cited above which give guidance to interpretation of the plat and the restrictions affecting property embraced therein. (R.E. Pg. 19)

Going even further, the Chancellor went on to support the argument that the Reserved Lot was a "lot" as contemplated by the Covenants even without reference to the Subdivision Regulations by finding that the "witnesses mostly agreed that it was a "lot" under common parlance and the Subdivision Regulations." (R.E. Pg. 19)

For the foregoing reasons, the Chancellor found that Nick and Cherry Amanatidis and those similarly situated in the subdivision were entitled to a final judgment enjoining the development of the Reserved Lot for commercial purposes and limiting its development to residential use not inconsistent with the restrictive covenants covering the other lots of the subdivision. (R.E. Pg. 20) The Chancellor's ruling was not reversible error and is further substantiated by the following argument.

The Chancellor did not err because he followed this Court's prior dictates governing the construction of covenants imposing restrictions and burdens on the use of land. The "[r]ules governing the construction of covenants imposing restrictions and burdens on the use of land are the same as those applicable to any contract or covenant.[8] This Court has recognized that "[i]n construing restrictive covenants the question is primarily one of intention, and the fundamental rule is that the intention of the parties ***as shown by the agreement governs***, being determined by fair interpretation of the entire text of the covenant.[9]

A three-tiered approach to contract/covenant interpretation has been adopted by our courts.[10] The first tier is where the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement[11] and that court must look to the "four corners" of the [contract/covenant] whenever possible to determine how to interpret it.[12] Courts should also "read the [contract/covenant] as a whole, so as to give effect to all of its clauses."[13] The reviewing court's "concern is not nearly so much with what the parties may have intended as it is what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and

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[8]*Mendrop v. Harrell*, 103 So.2d 418 (Miss.1958).

[9]*Id.* at 1331-32., *citing A.A. Home Imp. Co. v. Hideaway Lake*, 393 So.2d 1333 (Miss.1981)(emphasis added).

[10]*Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So.2d 107, 111 ¶ 7 (Miss.2005) (citing *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 351-53 (Miss.1990).

[11]*Id.* (citing *Pursue Energy Corp.*, at 352 and *Pfisterer v. Noble*, 320 So.2d 383, 384 (Miss.1975)).

[12]*Id.* (citing *McKee v. McKee*, 568 So.2d 262, 266 (Miss.1990).

[13] *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss.1992).

accuracy."[14] The court must ascertain the meaning of the language actually used, and not "some possible but unexpressed intent of the parties."[15] The parties obviously disagree over that meaning, but that fact alone does not render the instruments ambiguous.[16]

The "four corners" doctrine calls for construction through application of "correct English definition and language usage."[17] When construing the language of a contract/covenant it "must be read in its ordinary sense"[18] and the reviewing court must "give the words of the document their commonly accepted meaning . . . and if no ambiguity exists, [the Court should] accept the plain meaning of the instrument as the intent of the parties."[19] [20] Accordingly, the "courts are not at liberty to infer intent contrary to that emanating from the text at issue."[21]

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[14]*Simmons v. Bank of Mississippi,* 593 So.2d 40, 42-43 (Miss.1992); *quoting UHS-Qualicare v. Gulf Coast Comm. Hosp.,* 525 So.2d 746, 754 (Miss.1987)(emphasis added).

[15]*Simmons,* 593 So.2d at 42-43.

[16]*Id.*

[17]*Thornhill,* 523 So.2d at 1007 (Robertson, J., concurring in denial of petition for reh'g); *see also Knox v. Shell Western E & P, Inc.,* 531 So.2d 1181, 1189 (Miss.1988) (Robertson, J., concurring).

[18]*Lake Castle Lot Owners Association, Inc. v. Litsinger*, 868 So.2d 377, 380 ¶ 11 (Miss.2004) (citing *City of Gulfport v. Wilson*, 603 So.2d 295, 299 (Miss.1992).

[19]*Fradella v. Seaberry,* 2007 WL 852097, pg. 6, ¶ 16 (Miss.2007) (citing *IP Timberlands Operating Co. v. Denmiss Corp.,* 726 So.2d 96, 108 (Miss.1998); and *Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975)).

[20]One of the accepted rules of interpretation is that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field." *See Restatement (second) of Contracts* § 202(3)(b) (1981).

[21]*Id.*

If the reviewing court is unable to translate a clear understanding of the parties' intent, the court should then move to the second tier and apply the discretionary "canons" of construction.[22] Finally, if the contract/covenant continues to evade clarity as to the parties' intent, the court should move to the third tier of the approach which is to consider extrinsic or parol evidence. It is only when the review of a covenant reaches this point that the reviewing court looks at the circumstance surrounding the covenants formulation.

The language contained in the Covenants in this case restricting "all of the lots" to residential use is clear and unambiguous and this Court need not look beyond the "four corners" of the document. The pertinent language of the covenant is not complicated or convoluted. The covenant specifically states that "***All*** of the ***lots*** ***in*** the said Serene Hills Subdivision shall be known, described and used as residential lots, and no commercial building may be built thereon." Nothing in the foregoing language places a limit on the specific types of "lots" to be restricted. To the contrary, this language indicates that "***All*** of the **lots**" shall be restricted, which would include the Reserved Lot at issue. The drafter could have chosen to limit the restriction to "numbered lots", but chose to include all of the modifications of the word lot in the restriction by choosing to state "***All*** of the lots . . .***in*** the said Serene Hills Subdivision . . ."

Webster's Dictionary defines the term "lot" as a "plot of ground"[23] and the term "plot" as "a small area of ground." The term "lot" is defined by Black's Law Dictionary as "a tract of land, esp. one having specific boundaries or being used for a given purpose."[24] It becomes crystal clear that there is no ambiguity in the covenant when you insert either one of the foregoing "***commonly accepted***" definitions for the word

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[22] *Pursue Energy Corp.*, 558 So.2d at 352.

[23] *Webster's New World Dictionary*, 349 (1990).

[24] *Black's Law Dictionary*, 958 7th Edition (1999).

"lot" into the covenant in place of the word "lot". For each respective definition, the covenant would read as follows:

- All of the ***[small areas of ground]*** in the said Serene Hills Subdivision shall be known, described and used as residential . . . and no commercial building may be built thereon.

- All of the ***[tracts of land having specific boundaries or that are to be used for a specific purpose]*** in the said Serene Hills Subdivision shall be known, described and used as residential . . . and no commercial building may be built thereon.

After having looked at the protective covenants and giving the words contained therein their commonly accepted definitions, it becomes obvious that the covenant at issue is clear and unambiguous.

The Appellant claims that Wesley Breland and his partners in Red Oak, Inc. did not actually intend to restrict the use of the reserved lot at issue. However, that intent cannot be discerned from the building restrictions and protective covenants that Mr. Breland and Mr. Slay executed on behalf of Red Oak, Inc. In interpreting the Building Restrictions and Protective Covenants For Serene Hills, this Court should not be as concerned with what Mr. Breland and Mr. Slay ***may*** have intended as it should be with what they said.[25] The reasoning behind this set of priorities is that ***the words employed in the agreement are the best resource for ascertaining intent*** and assigning meaning with ***fairness and accuracy***.[26] Furthermore, it is the intention of the parties ***as shown by the agreement governs***, being determined by fair interpretation of the entire text of the covenant.[27] Accordingly, this Court is not at liberty to infer intent contrary to that which

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[25] *Facilities, Inc.*, 908 So.2d at (¶ 6).

[26] *Id.*

[27] *Id.* at 1331-32., *citing A.A. Home Imp. Co. v. Hideaway Lake*, 393 So.2d 1333 (Miss.1981)(emphasis added).

emanates from the [covenant][28] and is required to ***accept the plain meaning of the instrument as the intent of the parties.***"[29]

As previously stated, this Court must also look at the entire text of the document that contains the protective covenant. The title of the instrument at issue is as follows: Building Restrictions and Protective Covenants For Serene Hills Subdivision. The title chosen by the drafters clearly infers that the intent was to have building restrictions and protective covenants for Serene Hills Subdivision. Since it is not disputed that the reserved lot is within the legal boundary of the subdivision, it is quite easy to infer that when the drafter titled the instrument he was intending to place restrictions on the entire Serene Hills Subdivision, including the Reserved Lot at issue.

The application of the "four corners" test shows that the protective covenant at issue is not ambiguous. The intent that emanates from the text of the Covenants is an intent to bind "***All*** of the **Lots**". . . "***in*** the Serene Hills Subdivision" to the restrictions contained therein, which would include the Reserved Lot at issue.

In *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, the Mississippi Supreme Court confined their review of the instrument at issue in that case to the "four corners" and found that it was not ambiguous.[30] Since the instrument was not found to be ambiguous, the Supreme Court held that "there is no justification in proceeding beyond the "four corners" of the document to interpret the intent of parties."[31] Accordingly,

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[28] *Id.*

[29] *Fradella v. Seaberry,* 2007 WL 852097, pg. 6, ¶ 16 (Miss.2007) (citing *IP Timberlands Operating Co. v. Denmiss Corp.,* 726 So.2d 96, 108 (Miss.1998); and *Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975)).

[30] *Facilities, Inc.,* 908 So.2d at (¶ 26).

[31] *Id.*

there is no justification in proceeding beyond the "four corners" of the document to interpret the intent of parties in this case since the protective covenant is not ambiguous.

The applicable cannons of construction infer that the intent was for the reserved lot to be restricted. The second tier of judicial construction is the application of the ***discretionary*** cannons of construction.[32] The reviewing court "***may*** utilize the canons of [contract/covenant] construction ***at [their] discretion.***"[33] The most common of all cannons of construction is that "uncertainties should be resolved against the party who prepared the instrument."[34] In other words, "where a [contract/covenant] is doubtful or ambiguous, any ambiguity can be construed against the drafter."[35] Another cannon of construction applicable in the context of restrictive covenants is that when the covenant is found to be ambiguous "construction is ***usually*** most strongly against the person seeking the restriction and in favor of the person being restricted."[36]

The cannons of construction are discretionary for a reason and some should clearly not be applicable in every case. Florida courts have a cannon of construction similar to that of Mississippi which states that covenants should be construed in favor of the free and unrestricted use of real property[37], however, in *Coffman v. James*[38], the Florida Supreme Court offered an opinion on a substantially similar issue that is presented in the present case. The appellant plaintiffs in that case brought suit against the owners of a parcel

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[32]*Pursue Energy Corp.*, 558 So.2d at 352.

[33]*Id.*

[34]*Clark v. Carter,* 351 So.2d 1333, 1334 & 1336 (Miss.1977).

[35]*Banks v. Banks,* 648 So.2d 1116, 1121 (Miss.1994).

[36]*Sullivan v. Kolb*, 742 So.2d 771, ¶ 15 (Miss.1999).

[37]*Wilson v. Rex Quality Corp.*, 839 So.2d 928, 930 (Fla. 2d DCA 2003) (citing *Moore v. Stevens*, 90 Fla. 879, 106 So. 901, 903 (1925)).

[38] 177 So.2d 25 (Fla.1965).

of land alleged to be a part of a subdivision to enjoin the construction thereon of an apartment complex in violation of restrictive covenants alleged to apply to the parcel in question. The restrictive covenants at issue in that case provided in pertinent part: "no lot shall be used except for residential purposes . . ."[39] Chapter 177, Florida Statutes, F.S.A., relating to recorded maps and plats, provides in pertinent part:

> (e) '177.08 Drawing specifications for map or plat. * * *
>
> ***All lots shall be numbered*** either by progressive numbers, or if in blocks, progressively numbered in each block, and the blocks progressively numbered or lettered, except that blocks in numbered additions bearing the same name shall be numbered consecutively throughout the several additions. ***Excepted parcels must be marked "Not included in this plat".***[40]

The Court stated that the statute at issue was designed to inform the public, and especially innocent purchasers of property in the subdivision, of the facts.[41] The ***plat should be construed against the developer*** who created it and chose words with reference to it.[42] The same is to be interpreted according to the ordinary usage of the words, signs and symbols thereon, coupled with statutory provisions governing the same.[43] To hold that excepted parcels need not be marked [as required by statute]"Not included in this plat" would defeat the purpose of F.S. 177.08, F.S.A.[44] The court went on to find that in "[c]onsidering the plat as a whole.....***the plat did not put purchasers of property on notice that the unnumbered lot of the***

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[39] *Id.* at 30.

[40] *Id.* at 29.

[41] *Id.* at 30.

[42] *Id.*

[43] *Id.* (citing *Servando Building Company v. Zimmerman*, 91 So.2d 289 (Fla.1956)).

[44] *Id.* (citing *Beebe v. Richardson,* 156 Fla. 559, 23 So.2d 718 (1945)).

defendants was excluded from the area subdivided and ***there is nothing in the recorded restrictions having that effect***."[45] The specific description of the property embraced in the subdivision, as shown by the plat, cannot be modified by ex parte acts or secret intentions of those who by the public records are shown to be bound by the restrictive covenants.[46] Purchasers of property covered by lawful restrictive covenants running with the land, as here involved, may not be summarily divested of their rights.[47] As hereinabove noted, F.S. 177.08, F.S.A. requires excepted parcels to be marked on the plat "Not included in this plat."[48] The ***parcel here involved is not so marked*** and there is ***nothing on the plat*** or ***in the recorded restrictions*** by which ***to place a purchaser of property in the subdivision on notice*** that the subject parcel is excepted therefrom.[49] Under the circumstances of the case, the court found that it was ***immaterial*** to the equities ***that the defendants and the surveyor who prepared the plat did not intend, as they have testified, to include said parcel in the subdivision or to have the restrictive covenants apply thereto.***[50] The ***plaintiffs were entitled to rely on the public records*** and are ***not bound by such secret intentions of which they had no knowledge***.[51] For these reasons, the court reversed the decision of the chancellor and found an injunction to be necessary under the circumstances and remanded the cause for further proceedings.[52]

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 31.

In the instant case, the developer was required to state the purpose for which any site, ***other than a residential lot***, was to be dedicated or reserved. Section 404.03-06 of the Subdivision Regulations for Lamar County that were in effect at the time the Final Plat for Serene Hills was created specifically required the developer to state the "purpose for which sites ***other than residential lots*** are dedicated or reserved." The Reserved Lot at issue is labeled "Reserved", but does not state the purpose for which it was reserved as required for non-residential lots. As such, the ***"plat should be construed against the developer***" as well as the successor in title, Wesley Breland, Realtor, Inc., that took title not only with constructive notice of the Subdivision Regulations, the Plat and the Covenants, but also participated in, by and through its sole owner and officer, Wesley Breland, in the circumstances surrounding the formation of the Covenants and Plat. In addition, to hold that it is unnecessary to state the purpose for which sites ***other than residential lots*** are designated or reserved would ***defeat the purpose of Section 404.3-06*** of the Subdivision Regulations for Lamar County. The plat at issue in this case does not state the purpose for which the Reserved Lot was in fact reserved as required for non-residential lots, there is nothing in the recorded plat or the restrictive covenants at issue that would put potential purchasers of lots within the subdivision ***on notice*** that the Reserved Lot would be used for anything ***other than a residential lot*** or that it would be excepted from the Covenants. It is ***immaterial*** that Wesley Breland and his fellow investors testified that they intended to reserve the Reserved Lot for commercial purposes and did not intend for the Covenants to apply. The plaintiffs are ***entitled to rely on the public records*** and are ***not bound by such secret intentions of which they had no knowledge***.

As indicated above, there is a strong public policy concern that residents in subdivisions should be able to rely on the public record in making the most important purchases they will make, the purchase of a home. This is especially true where these individuals are considered to have constructive notice of these

documents and are bound by them when they purchase their home. As indicated by the Chancellor in this case, the right to rely on the public record should clearly override the public policy which would promote the unrestricted use of land.

In addition, Wesley Breland signed and approved the protective covenants in this case on behalf of Red Oak, Inc. This Court should consider that Wesley Breland is the sole owner and officer of Wesley Breland, Realtor, Inc. and that knowledge of all deficiencies and ambiguities should be imputed to Wesley Breland, Realtor, Inc. In addition, Wesley Breland, Realtor, Inc. purchased the subject reserved lot with constructive notice of the Subdivision Regulations for Lamar County, the Final Plat for Serene Hills and the Building Restrictions and Protective Covenants for Serene Hills. For the foregoing reasons, the cannon of construction that construes the covenant against the one seeking the restriction should not be considered. Instead, as the Chancellor found in his discretion, the Plaintiffs and the residents of Serene Hills have a right to rely on the public record, which Wesley Breland helped to create. Accordingly, this second tier of construction further infers that the drafters intended to bind the reserved lot by the protective covenant at issue.

However, in his discretion he chose not to apply it, but chose to apply a strong public policy concern that Appellee/Plaintiffs and other residents in subdivisions should be able to rely on the public record - the Plat, the Covenants, and the Subdivision Regulations - in making the most important purchases they will make, the purchase of a home.

The circumstances surrounding the drafting of the protective covenants infer an intent to restrict the use of the reserved lot to residential use. The Minutes of the Organizational Meeting of the Incorporators and Board of Directors of Red Oak, Inc. (hereinafter referred to as Organizational Minutes) were admitted into evidence and are the only minutes for Red Oak, Inc. that were produced by the Defendants and the only

corporate minutes claimed by the defendants to exist. The Organizational minutes have a section titled "Acquisition of Real Property". In this section of the Organization Minutes it states that Wesley Breland and Herbert Slay had purchased 60 acres of land "that would be ***suitable for the development and sale as residential lots*** by the corporation". The Organizational Minutes further stated that "[a]fter a full and complete discussion of the desirability of the corporation ***acquiring subject real property for residential development***, the following resolution was moved and adopted.....[resolution went on to approve the purchase]." These Organizational Minutes were "read and approved" by the entire meeting and were signed by James F. McKenzie, Incorporator; Wesley M. Breland, Chairman and Director; Raymond M. Dearman, Secretary and Director; and David W. Bomboy, Director. It is clear from the only ***documented*** **intent** of Red Oak, Inc. was an intent to acquire the subject real property for "***residential development***".

William Waites was the engineer that prepared the Plat of Serene Hills Subdivision for Red Oak, Inc. He testified at trial that in following his general practice he would have inquired as to the developers intended purpose for any parcels within the Serene Hills Subdivision if the purpose was other than residential. However, he did not remember any discussions of the intended use of the reserved lot at issue He also testified that some of the possible uses for "reserved" areas are residential lots, green space or common areas. Since a purpose was not listed as required for non-residential development, the most reasonable inference for intent would be that the developers were intending the reserved lot to be a residential lot or were reserving it for a use that is incidental to a residential purpose such as a "common area" or "green space".

As previously discussed, there is no notice in the public record to the residents of Serene Hills Subdivision that any part of the subdivision would be used for any purpose other than residential. The Building Restrictions and Protective Covenants for Serene Hills state "***All*** of the ***lots in*** the said Serene Hills

Subdivision shall be known, described and ***used as residential lots***, and ***no commercial building may be built thereon***" and there is nothing in this document that excepts the reserved lot or indicates that commercial development was contemplated within the subdivision. Furthermore, the Final Plat for Serene Hills did not state the purpose for which the Reserved Lot was in fact reserved as required by the Subdivision Regulations for Lamar County. In addition, the Lamar County Planning Commission Minutes and the Board of Supervisor Minutes admitted into evidence do not show any intent to use the reserved lot as commercial.

The Appellants claim that Red Oak, Inc. had an intent to develop the reserved lot at issue commercially. However, the only evidence they have introduced is the testimony of the defendant, Wesley Breland, and some of his business partners in Red Oak, Inc. This testimony is biased and unreliable because these individuals are relying on their memories from over thirteen years ago, they are directly associated with Wesley Breland and his solely owned company, Wesley Breland, Realtor, Inc., in business, and as part owners of Red Oak, Inc. may have a future interest in the reserved lot according to testimony at trial.

The only documented records from Red Oak, Inc. and the public record speak for themselves, are reliable and are unbiased. These reliable indications of the surrounding circumstances infer a clear intent to restrict the use within the subdivision to residential purposes. For these reasons, it is apparent from the surrounding circumstances that the intent was for the subdivision to be developed as a residential subdivision and that the Reserved Lot at issue was either intended as a residential lot or was reserved for a use that is incidental to a residential purpose such as common area or green space, both of which would comply with the protective covenants for Serene Hills Subdivision.

The Appellant cites two cases for their position on the applicability of the Covenants. The first is *Modling v. Bailey Homes and Ins.*, 490 So.2d 887 (Miss.1986). The Appellant has claimed that the court

in *Modling* held that Protective Covenants did not apply to a parcel "reserved by the city for drainage control." (App. Br. Pg. 7) However, the only assignments of error presented to the Mississippi Supreme Court in that case were as follows:

> 1. The court erred in failing to grant summary judgment in favor of appellants in that there was no genuine issue of material fact that appellee Bailey's title to the subject is void for the following reasons: (a) the conveyance is an illegal attempt to convey city property dedicated to a public use, i.e., drainage purposes; and (b) the conveyance does not conform to mandatory requirements of the ordinances of the City of Gulfport and the laws of the State of Mississippi;
>
> 2. In the alternative, the court erred in granting summary judgment in favor of the appellees in that there exists a genuine issue of material fact whether the conveyance to appellee Bailey by the city is void for the foregoing reasons.[53]

Clearly, the issue of the applicability of protective covenants was not presented to the court and the court made no analysis as to whether protective covenants applied. Accordingly, *Modling* is not controlling or compelling on the issue of the applicability of protective covenants to a reserved parcel.

The primary issue in *Modling* was whether the City of Gulfport could convey the property at issue to the developer. In order to make a determination on that issue the court had to come to a decision as to whether the property was dedicated for a public use (***not to be confused with designated on the plat***) or merely reserved when it was labeled on the plat as "Reserved by City for Drainage Control". If the Court found the property at issue to be dedicated to a public use, it would then be the property of the public and could not be sold by the city. The Court stated that there was a general rule that "where a reservation of private land for a specified purpose is made on a map or plat, a reservation to the private use of the owner is implied rather than a dedication to the public. The holding of the court was that the use of the word "reserved" "appeared to negative any intent-implied or express- to dedicate the property to a public use."

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[53]*Modling,* 490 So.2d at 887 (Miss.1986).

The court also stated that such an indefinite expression as . . . "the word "reserved," may operate, in the light of circumstances under which it is used, to show a dedicatory intention." However, the Appellees in the present case are not claiming that the reserved lot at issue was dedicated to a public use. In fact, the plaintiffs do not want to strip the defendant of the right to use the subject property for residential purposes as long as that use is within the parameters of the Building Restrictions and Protective Covenants for Serene Hills. In addition, the construction of the word "Reserved" as used on the Plat in this case is subject to the rules of interpretation set forth by the Subdivision Regulations that raise the presumption that any lot labeled "Reserved" without the purpose for which it is reserved is a residential lot.

The second case cited by the defendants is *Andrews v. Lake Serene Property Owners Ass'n*, 434 So.2d 1328 (Miss.1983). This case is apparently cited for the Court's construction of the word lot as used in the protective covenants at issue in that case. In *Andrews,* the plat at issue was filed for record in April 1965 and the original protective covenants were filed on June 3, 1965. *Id.* at 1329. The issue before the court was whether the appellants re-subdivided lots were "lots" as contemplated by the covenants where the word "lot" was not specifically defined in the covenants and the covenants did not prohibit the re-subdivision of the original lots. The Court found that "[w]hen formally approved and placed of record on June 3, 1965, the original . . .protective covenants provided . . .that no lot could be used except for the construction of a dwelling" and that "***[a]t that time [1965]*** the only reasonable construction of the word "lot" was by reference to those lots designated formally on the only existing plat."*Id.* at 1332. Based on that finding, the Court held that "[t]he term lot in the original protective covenants ***in this case*** should be given no static definition - for it has been given none by its draftsmen" and that the term "lot" refers to "whatever was and is a lawfully designated "lot" on the day the definition is sought." *Id.* Since the lots in question

were legally re-subdivided, the court found that the re-subdivided lots were "lots" as contemplated by the covenants.

The Appellant would have this Court believe that numbered lots and designated lots are the same. However, the Court's decision in *Andrews* precludes that comparison. The original numbered lots in *Andrews* were lots 83 and 84 of Lake Serene Unit Two and those lots were subsequently re-subdivided into fifteen smaller lots which made up the Lakeview Subdivision. The Court disregarded the numbered lots 83 and 84 and found that a "lot" should be "whatever was legally designated as a lot the day the definition is sought," meaning the legally re-subdivided lots not the original numbered lots 83 and 84. The word designate, when referring to land or property, is defined as "To mark out and make known; as, to designate the boundaries of a country." *Wikipedia Online Dictionary* (2007). It has also been defined as "to mark out or show". *Webster's New Twentieth Century Dictionary, Unabridged, Second Edition* pg. 493 (1979). Designation has been defined as "the act of pointing or marking out; as, the designation of an estate by boundaries." *Webster's New Twentieth Century Dictionary, Unabridged, Second Edition* pg. 493 (1979). The Court in *Andrews* was obviously not referring to numbered lots when it referred to legally designated lots, but instead was referring to any lot that is legally "marked out" or "shown" on a legally filed plat that falls within the legal boundaries of the Lake Serene Unit Two, which is bound by the protective covenants. To say it another way, the Court in Andrews construed the term lot as used in the protective covenants at issue in that case as a ***plot of ground with legally designated boundaries***.

In the present case, the Reserved lot is specifically and legally designated by being "marked out" and "shown" on the Plat of Serene Hills with specific directional and distance calls. There is no question that the reserved lot is "designated" on the plat.

Obviously, the construction of any word in a protective covenant can be different from case to case, but one concern with the use of the Court's construction of the term "lot" in *Andrews* is that the Court stated that on June 3, 1965 the only reasonable construction of the word "lot" was by reference to those lots designated formally on the only existing plat. However, in 1965 there were no Subdivision Regulations and there were certainly not any subdivision regulations which mandated what a "lot" was and is within a subdivision in Lamar County. If there were any justification for using any meaning for the term "lot" other that its common and everyday meaning, then the definition provided by the Subdivision Regulations for Lamar County that were in effect when the plat of Serene Hills was created and filed would clearly control what is a lot within a subdivision in Lamar County. That definition is as follows: "a tract, plot, or portion of a subdivision or other parcel of land intended as a unit for the purpose, whether immediate or future, of transfer of ownership or for building development." It was not disputed at trial that the Reserved Lot is within the legal description of Serene Hills. Moreover, testimony at trial showed that the Reserved Lot was to be transferred and developed. Clearly, the reserved lot falls within the Lamar County Subdivision Regulations definition of the word "lot".

Also worthy of mention is the fact that Wesley Breland, on behalf of Red Oak, Inc., signed a certification on the Plat of Serene Hills stating in relevant part that they had "caused the same to be subdivided as shown." In conjunction, the engineer for Red Oak, Inc. who signed off on the plat for Serene Hills subdivision gave a certification that said "This is to certify that I have surveyed the land shown on this plat and fully described above (referring to the legal description of Serene Hills) and have subdivided the same with ***lots*** and that the plat hereon is a correct representation of the said survey and subdivision." This is a good indication that the reserved lot at issue was and is in fact a "lot" as contemplated by the Covenants.

In addition, when Wesley Breland, Realtor, Inc. had the Reserved Lot surveyed, the engineer, Nicholas Connolly, described it as "All of a Reserved Lot in the Serene Hills Subdivision". (Tr. Pg. 64)

There is only one case from any jurisdiction that is directly on point on the issue of the applicability of protective covenants to parcels labeled "reserved" on the plat and that case is *Regency Construction Company, Inc. v. Gwinnett County*, 227 Ga. 798 (1972). The dispute in that case was "whether two tracts in question, shown on a subdivision plat and marked "Reserved," are subject to covenants restricting the lots therein to single family residences only." *Id.* at 799. The Georgia Supreme Court in that case found that the "trial court was authorized to find that the tracts were subject to such covenants." *Id.* at 799. Unfortunately, there is not much analysis in the court's decision, but this case clearly contemplates the restriction of reserved lots where all the lots of a subdivision are to be restricted.

The Appellee would also like to clarify any misunderstandings that may occur as a result of the Appellants statements in its brief that "the Restrictive Covenants of the subdivision indicate that there are 71 lots in Serene Hills, which will be restricted to residential development only". (Appellant's Brief Pg. 5 and Pg. 9) There is no reference in the Covenants to numbered lots and in fact, there is no modification of the word lot in that document - it simply says "***All*** of the ***Lots***".

For the foregoing reasons, whether the common and ordinary meanings for the term lot are used or if the court finds some reason to look beyond those common and ordinary meanings it is clear that the Reserved Lot at issue should be bound by the Building Restrictions and Protective Covenants for Serene Hills.

C. EQUITABLE ESTOPPEL PREVENTS THE DEVELOPMENT OF THE RESERVED LOT COMMERCIALLY

Equitable Estoppel Prevents the Defendants From Using the Reserved Lot for Commercial Purposes. The Chancellor found that Wesley Breland, Realtor, Inc., which Wesley Breland has sole ownership and control over, is equitably estopped from developing the Reserved Lot in any manner other than residential. (R.E. Pg. 19-20) The Chancellor found helpful in making his decision, *PMZ Oil Co. v. Lucroy*, 449 So.2d 201 (Miss.1984). He quoted this case for its holding that "fraudulent intent is not required to involve the doctrine in a decision in which one party relied on apparent representations of another." (R.E. Pg. 20) The Court in *PMZ Oil* held that it is sufficient that the party to be estopped, although made without subjective intent to mislead, were, objectively speaking, calculated to mislead, and did mislead.[54] The Court noted that "Nick testified that he relied on the terms of the restrictive covenants and the plat in deciding to buy his home and the lot 39 on which it is located." (R.E. Pg. 20) The Chancellors findings are further substantiated by the following argument.

A party asserting equitable estoppel must show (1) that he has changed his position in reliance upon the conduct of another and (2) that he has suffered detriment caused by his change of his position in reliance upon such conduct.[55] Subjective intent to mislead is unnecessary, so long as the acts of the party sought to be estopped, viewed objectively, were calculated to and did mislead the other party.[56]

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[54] *PMZ Oil Co.*, 449 So.2d at 207.

[55] *Id.* at 206.

[56] *Id.* at 206-07.

Wesley Breland, Realtor, Inc., by and through its sole owner and officer, Wesley Breland, was able to participate in the drafting of the Plat and Covenants. Those documents were approved and executed by Wesley Breland and make the following represntations:

From an objective standard, it is easy to infer on Wesley Breland, Realtor, Inc. and its business partners, an intent to deceive the potential purchasers of lots within the subdivision. Objectively speaking and as found by the Court in *PMZ Oil*, "it is a matter of common sense that home buyers should reasonably be expected not only to rely on representations regarding protective covenants but to insist upon such covenants before undertaking the substantial investment that a residence involves in this day and time."[57] As discussed previously, there is nothing in the public record to suggest a commercial use of the reserved lot and now after the subdivision is developed, the Appellant is attempting to make an end run around the Covenants. From the testimony of Nick Amanatidis, it is clear that he had an opportunity to view both the Plat and Covenants prior to the purchase and that they did in fact purchase the home. Nick did rely on the representations made in the Plat and Covenants to make the decision to purchase the home. He relied on these statements to his detriment, because he is now facing commercial development within the subdivision, which will ruin the residential nature of the subdivision. For the foregoing reasons, the Chancellor's finding that the Appellant should be equitably estopped from developing the reserved lot as commercial property is not reversible error.

D. EFFECT OF *RES JUDICATA*

The Appellant claims that *res judicata* precludes the plaintiffs from "complaining" that the developer did not comply with the subdivision regulations. However, the Appellee is not asking this court to make a determination as to whether the developer followed the regulations, nor is the Appellee challenging

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[57] *Id.* at 207.

whether the plat should have been filed. The trial court was only making a determination as to what effect labeling a lot "reserved" has on the owners ability to develop the Reserved Lot commercially when the presumption from the Subdivision Regulations is that the lot is residential unless the purpose is stated. As previously stated, the Subdivision Regulations require the developer to state the "purpose for which sites, ***other than residential lots***, are dedicated or reserved" on the final plat of the subdivision. Labeling a lot "Reserved" without stating the purpose for which it is reserved does not in and of itself fail to meet the requirements of the Subdivision Regulations - it just raises the presumption that the lot is residential. It is abundantly clear from the minutes of both the Lamar County Planning Commission and the Lamar County Board of Supervisors that they were not making any decision as to what the potential uses for the reserved lot could be. In fact, the only way that the Planning Commission and the Board of Supervisors could find that the developer had met the requirements of the Subdivision Regulations would be to find that the reserved lot was a residential lot. For these reasons, assuming but not conceding that res judicata did apply to the issue of whether the developers met all the requirements of the Subdivision regulations, the presumption must be that the lot labeled "reserved" is a residential lot because it does not state any other purpose. Especially, where the Planning Commission and Board of Supervisors would have based their finding on that presumption. Moreover, regardless of any action taken by the Planning Commission and the Board of Supervisors, the Appellant is still entitled to draft covenants to restrict the use of their property. Since the construction of the Covenants was clearly not determined by the Planning Commission or the Board of Supervisors, that determination was left for the trial court in this matter to decide. For the foregoing reasons, res judicata can have no effect on the Chancellor's use of the Subdivision Regulations to interpret the Plat in this case.

V. CONCLUSION

The Chancellor's findings as well as reasonable inferences therefrom should not be disturbed because they are supported by substantial credible evidence in this case. The Opinion drafted by the Chancellor was thorough and set forth the applicable law and made findings of fact with regard thereto. Consequently, the Final Judgment entered by the Court below was appropriate and should be affirmed.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a true and correct copy of the above and foregoing document by United States Mail, postage prepaid, or some other more expeditious form of delivery to the following:

William E. Andrews, III ([redacted]
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Honorable Eugene Fair
Chancery Court Judge for Lamar County
P.O. Box 872
Hattiesburg, MS 39403-0872

This, the 29th day of April, 2008.

CHARLES E. GREER V, MSB[redacted]