

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WESLEY BRELAND REALTOR, INC.

APPELLANT

VERSUS

CASE NO.: 2007-CA-01129

NICK AMANATIDIS and
CHERRY AMANATIDIS

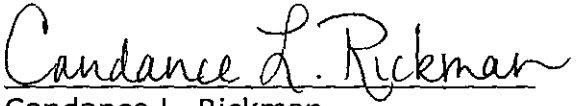
APPELLEES

ON APPEAL FROM THE CHANCERY COURT
OF LAMAR COUNTY, MISSISSIPPI

AMENDED CERTIFICATE OF INTERESTED PERSONS

1. Hon. Eugene L. Fair Jr., Chancellor
2. Charles E. Greer V, Esq., Attorney for Appellees
3. Nick and Cherry Amanatidis, Appellees
4. William E. Andrews, III, Attorney for Appellant
5. Candance L. Rickman, Attorney for Appellant
6. Wesley Breland Realtor, Inc., Appellant

So certified this the 30th day of January, 2008.


Candance L. Rickman

CERTIFICATE OF SERVICE

I, Candance L. Rickman, do hereby certify that I have this day caused to be transmitted, via hand delivery only, a true and correct copy of the above and foregoing pleading to the following at their normal and usual business address(es):

Hon. Eugene L. Fair Jr., Chancellor, Post Office Box 872, Hattiesburg, MS 39403-0872

Charles E. Greer V, Esq., GREER LAW FIRM, PLLC, 6050 U. S. Highway 49, Hattiesburg, MS 39401

SO CERTIFIED, this the 20th day of January, A.D. 2006.


Candance L. Rickman

CERTIFICATE OF INTERESTED PERSONS

1. Hon. Eugene L. Fair Jr., Chancellor
2. Charles E. Greer V, Esq., Attorney for Appellees
3. Nick and Cherry Amanatidis, Appellees
4. William E. Andrews, III, Attorney for Appellant
5. Candance L. Rickman, Attorney for Appellant
6. Wesley Breland Realtor, Inc., Appellant

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STATEMENT OF ISSUES

1. Are the Restrictive Covenants of Serene Hills Subdivision, which apply to "all lots" (i.e. Lots 1 - 71) and restrict the use of those lots to residential, applicable to an unnumbered parcel of property located within the legal description of the platted subdivision, which has been designated as "(RESERVED)" on the subdivision plat since the subdivision's initial development?
2. If it was the intent of the grantor of the property to reserve the unnumbered parcel for unrestricted use, and the parcel of property has never been designated a lot as the other lots in the subdivision numbered 1 - 71, and the location and character of said parcel is situated outside the recognized lots of the subdivision and is suitable for commercial use, then the owner of said parcel should be allowed to use the "(RESERVED)" parcel for any lawful purpose.

STATEMENT OF THE CASE

This case involves the construction or applicability of the Restrictive Covenants of Serene Hills Subdivision to a parcel of land marked "(RESERVED)" on the plat of that subdivision. The Plaintiffs assert the *DOCTRINE OF EQUITABLE ESTOPPEL* against the Defendant, Wesley Breland Realtor, Inc., and that the Covenants apply to the "(RESERVED)" parcel. The Defendant Wesley Breland Realtor, Inc., intends to use the parcel for commercial purposes. The Plaintiffs say it cannot.

On the original plat filed with the Chancery Clerk of Lamar County, Mississippi, there are 71 designated lots in Serene Hills - they are numbered 1 to 71. There are two reserved parcels - one in the Northeast corner of the plat (upon which was drawn a lagoon) and one in the Southeast corner marked "(RESERVED)". Both reserved parcels were within the legal description shown on the Plat, but the developer's intent to reserve these properties from the general plan for the subdivision is clear. The fact that the developer did not designate for what purpose the parcel was being reserved indicates that he intended to generally reserve the same without

restriction as to its use. The Appellant, Wesley Breland Realtor, Inc., contends that the restrictive covenants applied to "all lots" (i.e., Lots 1 to 71) – not to the reserved parcels. Upon learning that it was the intention of Wesley Breland Realtor, Inc., to develop the reserved parcel as commercial property, the adjoining landowners initiated the proceedings below. Feeling aggrieved by the outcome thereof, Wesley Breland Realtor, Inc., files this appeal.

SUMMARY OF ARGUMENT

The Chancellor erred in determining that the "(RESERVED)" parcel should be restricted to residential use for three reasons:

1. The plat of the subdivision clearly indicates that this parcel of property mostly fronting on King Road, was "(RESERVED)", and although the purpose was not specified, it places the public on notice that it is for some use different than that of the subdivision generally.
2. The Restrictive Covenants of the subdivision clearly indicate that there are 71 lots in Serene Hills, which will be restricted to residential development only.
3. The definition of "lot" and the requirement that a plat include the purpose of reserved parcels in the County Subdivision Regulations are not applicable to this case because the plat with the 71 numbered lots and the unspecified reserved parcel was approved by the Board of Supervisors and that decision in *res judicata*.

If upon reviewing the subdivision regulations, plat, and restrictive covenants, there is some ambiguity as to the intention of the grantors, then the law requires that the ambiguity be interpreted against the party seeking the restriction. Appellant,

Wesley Breland Realtor, Inc., contends that the intent of the grantors to exclude this parcel from the lots and the restrictive covenants is clear.

The owner/developer of property may determine the use of reserved parcels, and therefore Wesley Breland Realtor, Inc., should be allowed to use the parcel of land, which was generally reserved, for any lawful purpose.

ARGUMENT

The grantors of Serene Hills subdivision reserved two parcels of property located within the legal description of the development. One reserved parcel is located on a back corner of the development and was reserved for a lagoon. The second reserved parcel is on a front corner of the development and was generally reserved by the owner/developer by designation on the subdivision plat "(RESERVED)". See Exhibit A.

Wesley Breland Realtor, Inc., is the owner of the front "(RESERVED)" parcel and Wesley Breland, the sole owner of Wesley Breland Realtor, Inc., was also one of the initial developers of Serene Hills. It was his testimony that it was not his intention for the front "(RESERVED)" parcel to be a residential lot within the subdivision. (Transcript p. 51). The engineer partner among the developers, Raymond Dearman, agreed that discussion had taken place regarding the "(RESERVED)" parcel being used for office space for Wesley Breland Realtor, Inc., or other commercial use because of its frontage on King Road. (Transcript p. 106). The "(RESERVED)" parcel has no frontage on Serene Hills Drive, which serves all the other properties in the subdivision. See Exhibit A and also Plaintiff's Trial Exhibits 5, 6, and 8, which are attached hereto. With the erection of the fence, the parcel in question appears to be separate and distinct from the Serene Hills subdivision altogether.

Webster's Dictionary defines the word reserve as "to hold back or set aside for

special or future use. To arrange for ahead of time; have set aside for one's use. To hold back or delay the determination or disclosure of." The word "Reserved" on the plat for Serene Hills clearly indicates a reservation of the parcel for a use other than residential and clearly reflects the reserved parcels were not governed by the Protective Covenants. If the reserved parcel was to be residential the developer would have numbered it "Lot 72". In the suit of *Modling vs. Bailey Homes and Ins.*, 490 So. 2d 887 (Miss. 1986), adjoining landowners contended that by marking on the plat of a subdivision "Reserved by City for Drainage Control" that the use of the property by a developer would violate the Reservations and Protective Covenants. The Court ruled otherwise. The Court held that use of the word "reserved" shows a reservation for a use to be determined by the owner / developer.

The Plaintiffs here contend the parcel in dispute is a "lot" and subject to the Covenants. The term "lot" means each area of land designated as a lot on the day the definition is given. *Andrews v. Lake Serene Property Owners Ass'n.*, 434 So.2d 1328 (Miss. 1983). The owner of Serene Hills Subdivision numbered the lots. There are lots numbered 1 to 71. The reserved areas were not given a lot number and were clearly not designated as lots.

In reviewing similar cases on permitted uses of subdivided lands, the intent of the grantor, whether implied or expressed, seems to be the determining factor.

Plaintiffs now want to complain that the developer (here) did not comply with the subdivision regulations. They cannot, at this time, be heard on that issue. Both the Lamar County Planning Commission and the Lamar County Board of Supervisors approved the Plat of Serene Hills Subdivision for filing. The action of the Board of

Supervisors is presumed to be valid. Action of the Board of Supervisors is also conclusive. *Taquino v. City of Ocean Springs*, 253 So. 2d 854 (Miss. 1971). There was no appeal from the action of the Board of Supervisors within 10 days as required by § 11-51-75 Miss. Code Ann. (1972), as amended. The action of the Board of Supervisors is *res judicata* of compliance with the Subdivision Regulations. The failure to appeal the action of the Board of Supervisors in a timely manner is a jurisdictional bar to a claim to defeat the action taken. *McPhail v. City of Lumberton*, 832 So. 2d 489 (Miss. 2002). *Res Adjudicata* or *Collateral Estoppel* preclude re-litigation of administrative decisions. *A & F Properties, LLC, v. Madison Co. Bd. of Supervisors*, 933 So. 2d 296 (Miss. 2006).

The Plaintiffs also assert that they should prevail based on *Equitable Estoppel*. *Equitable Estoppel* rests on a fraud.

The act or acts to be estopped must have been done or made with the intent to mislead or, objectively speaking, calculated to mislead, and did mislead. *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201 (Miss. 1984).

This is not the case here. By the reserved parcel not being numbered as a lot one should have been on notice that the use of the parcel was not residential.

To establish *Equitable Estoppel* one must show that he has changed his position in reliance upon the conduct of another and that he has suffered to his detriment by the change of his position.

A reasonable person should have been on notice that marking the reserved parcel as such was indication of an intent to reserve the land for some use other than residential.

CONCLUSION

The parcel of land in question is included in the legal description of the Serene Hills subdivision, but is clearly marked on the plat thereof as "(RESERVED)". The restrictive covenants of the Serene Hills subdivision restrict lots numbered 1-71 to residential development, but do not restrict the reserved parcels. The Lamar County Board of Supervisors approved the plat of Serene Hills subdivision without requiring that the reserved parcel be designated for any particular purpose, and therefore that issue is *res judicata* and cannot be an issue in this case. The location of the "(RESERVED)" parcel, fronting on King Road and not on the road servicing the remaining Serene Hills properties, supports the testimony that this "(RESERVED)" parcel was intended by the grantors to be used for purposes other than residential.

The law is that the draftsmen of the original covenants have the power to determine the definition of the lots of the subdivision. *Andrews v. Lake Serene Property Owners Ass'n.*, 434 So.2d 1328 (Miss. 1983). The restrictive covenants of Serene Hills define the lots as numbered 1 - 71, which does not include the "(RESERVED)" parcel.

The Chancellor erred in his opinion that the restrictive covenants requiring residential development only of the numbered lots of Serene Hills was also applicable to the property now in question, which was clearly intended by grantors herein to be excluded therefrom. The Chancellor's decision should therefore be reversed and this Court should render Judgment in favor of the Appellant, Wesley Breland Realtor, Inc., allowing him to develop this parcel as commercial property or any other lawful use.

RESPECTFULLY SUBMITTED on this, the 25th day of January, A.D. 2008.

WESLEY BRELAND REALTOR, INC.

SERENE HILLS

EXHIBIT
Plants
S

Block

EXHIBIT
Plant, NJ
6



EXHIBIT
Plan 1/18
B