IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 121728

COREY NEJATI and ROBABEH NEJATI
Appellants

v.

STEPHEN P. STAGEBERG, et al.,
Appellees

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The Appellee, Stephen P. Stageberg (hereinafter "Stageberg") largely agrees with the Appellants (hereinafter "Nejatis") Statement of the Case. Stageberg submits the following as clarification on disputed parts.

The record does not disclose that the two story apartment was built by Angstadt's company.

The record describes the portions as the Hanover Portion and the Littlepage Portion as opposed to Hanover Property and Littlepage Property. (Joint Appendix or J.A. 4, 74, 75)

The Long Survey was never submitted to the City of Fredericksburg as required by the subdivision ordinance. Neither the Littlepage Portion nor the Hanover portion exists as a legal lot. This is not under the Zoning standards but rather because the Long Survey was recorded and the

properties conveyed without complying with the subdivision ordinance. (J.A. 74, 75, 76, 133)

Upon application for Stageberg's variance, the Director of Planning and Community Development and Zoning Administrator ruled that the Hanover Portion did not exist as a legal non-conforming lot because it was created illegally through the recordation of a plat with the Fredericksburg Circuit Court. (J.A. 133)

STATEMENT OF FACTS

Stageberg largely agrees with the Nejatis' Statement of Facts. Stageberg submits the following as clarification on disputed parts.

The Long Survey attempts to divide the Whole Property by establishing a new lot line which constitutes a "subdivision" of land pursuant to the City's subdivision ordinance. That subdivision of land must be submitted to the City for

approval before recordation and the Long Survey was not. (J.A. 133)

The record describes the entire property originally purchased by Angstadt as the “Whole Property” and the portions as the Hanover Portion and the Littlepage Portion. (J.A. 4, 74, 75)

The record does not contain any evidence of why the Nejatis purchased the Littlepage Portion.

The Zoning Administrator found that the property did not exist as a legal nonconforming lot. It was not the City’s “zoning requirements” that were violated by the recording of the unapproved Long Survey. It was the City’s “subdivision ordinance” that was violated. (J.A. 133)

ARGUMENT

I. STANDARD OF REVIEW

Stageberg agrees with the Nejatis' position on the standard of review.

The facts in this case are not in dispute. To the extent they may be, the trial court's factual findings are to be given deference and viewed in the light most favorable to Stageberg. The application of the law to those facts is in dispute and the appropriate standard is de novo as is the standard in the question of statutory interpretation.

II. THE LONG SURVEY FAILED TO COMPLY WITH THE SUBDIVISION LAWS NOT THE ZONING LAWS (Assignments of Error I, II, III and IV)

This case does not involve the violation of any zoning regulation or law. The genesis of the issues is a violation of the subdivision ordinance of the City of Fredericksburg and

the provisions of subdivision statutes of the Commonwealth of Virginia.

The Zoning Administrator rendered his opinion that the Hanover Portion was not a legal nonconforming lot based upon the failure to have the Long Survey submitted to the City for approval as a condition to recordation. (J.A. 133, 134)

The requirement to submit the plat to the City for approval before recording is contained in Section 78-1304(a) (2) of the Subdivision Ordinance for the City of Fredericksburg (J.A. 144) and in Section 15.2-2254 Code of Virginia.

This case does not involve a violation of a zoning ordinance. It involves the violation of the subdivision ordinance and the resulting relation of the parties who own lots purported to be created by the illegal subdivision.

III. THE PERTINENT STATUTES AND ORDINANCES ALLOW PASSAGE OF TITLE SUBJECT TO LIMITATIONS AND REQUIREMENTS
(Assignments of Error I, II, III and IV)

Section 15.2-2254 Code of Virginia provides that:

> "After the adoption of a subdivision ordinance in accordance with this chapter, the following provisions shall be effective in the territory to which the ordinance applies:
>
> 3. No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein… However, nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." (Emphasis added)
>
> 4. Any person violating the foregoing provisions of this section shall be subject to a fine of not more than $500 for each lot or parcel of land so subdivided, transferred or sold and shall be required to comply with all provisions of this article and the subdivision ordinance… (Emphasis added)

Section 78-1304 of the Fredericksburg City Ordinance

provides that:

> (a) "No person shall:
>
> (3) Sell or transfer any land of a subdivision, before such plat has been approved and recorded …

> provided however that nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instruments.

> (d) … any use of any building or land which is conducted, operated or maintained contrary to any of the provisions of this division is hereby declared to be unlawful…"

> (J.A. 144)

Section 15.2-2264 in addressing subdivision plats provides:

> "Every plat … shall contain …. A statement as follows: "The platting … of the following described land …. Is with the free consent and in accordance with the desire of the undersigned owners, proprietors, and trustees, if any."

Localities have the power to regulate the subdivision of land.

County of Chesterfield v. Tetra Assocs., LLC, 279 Va. 500**,** 689 S.E.2d 647; 2010; *Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380**,** 131 S.E.2d 290; 1963.

The General Assembly, in providing for local control of land subdivision, delegated to each locality a portion of the police power of this Commonwealth. *National Realty Corp. v. City of Virginia Beach*, 209 Va. 172, 174-75, 163 S.E.2d 154, 156 (1968).

While both Section 15.2-2254 and City Ordinance Section 78-1304 direct that title is transferred as between the parties to the instrument, they are silent as to what that title is or what it is to. Neither the statute nor the ordinance validates the attempted division or the purported boundaries.

In interpreting a statute, it is to be presumed that the General Assembly acted with full knowledge of the law in the area in which it dealt. *Philip Morris USA Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007). The intent of the legislature is initially found in the

words of the statute itself." *Crown Cent. Petroleum Corp. v. Hill*, 254 Va. 88, 488 S.E.2d 345 (1997)

Where the language of a statute is unambiguous, the plain meaning of that language is controlling. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). Every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary. *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 497 S.E.2d 335 (1998).

The words “as between the parties to the instrument” are not to be considered meaningless. The language is not ambiguous. The meaning is clear. The use of that language makes it clear that the legislature did not intend that the grantees of illegal subdivision lots receive the same title they would if the conveyance were a legal approved subdivided lot.

The statute and ordinance language is specific in that the title passes only "as between the parties to the instrument." The plain meaning of these words is that title does not pass as between those not parties to the instrument. By clear extension of the statutory language, the title passing to the grantees is not perfected as against anyone else. There is therefore a limitation in what the grantee receives.

The trial court properly held that title passed as between the parties consistent with Section 15.2-2254 and Section 78-1304(a) (3) of the Fredericksburg ordinance.

The trial court also properly held that neither Nejati nor Stageberg held an estate in severalty because the description in each deed failed to give a definite designation as to the boundary line because some further action is necessary for the boundary line to become definite, that being the necessary and required approval of the City, i.e. compliance with the subdivision ordinance. (J.A. 63)

The statutes and ordinances limit the passage of title to the parties to the instruments which pass title. Section 15.2-2254 requires that before any illegal lot can be sold, the subdivision ordinance must be complied with.

The General Assembly has created a statutory scheme for the orderly subdivision of land. It has also vested localities certain power in doing the same. In doing so the legislature has set limits on what one may do in dividing property. Attempted divisions in violation of these laws are not free from consequence.

The case of *Crestar Bank v. Martin* 238 Va. 232 (1989) is not applicable. In Crestar the question for decision involving mobile homes was whether a family subdivision which was exempt from compliance with a subdivision ordinance was nevertheless subject to the land-use controls of a zoning ordinance. The quote from *Crestar* cited by Appellants is from *Leake* v. *Casati*, 234 Va. 646, 363 S.E.2d 924 (1988).

In *Leake*, the question was whether a chancellor in a partition suit, in deciding if land may conveniently be partitioned in kind, is controlled by the provisions of a local subdivision ordinance. The Court concluded that the power of a court of equity to effect partition in kind is unaffected by statutes and ordinances regulating the subdivision of land. *Id* at 651.

The case at bar is not about the Court's power to divide the land. The issue in this case is what is the parties' ownership interest in the Whole Property where the private conveyances to each of them were created in violation of the subdivision laws.

IV.THE DEEDS FROM PROPERTIES BY US LLC PASSED THE TITLE OF PROPERTIES BY US IN THE RESPECTIVE PORTIONS TO STAGEBERG AND THE NEJATIS SUBJECT TO THE REQUIREMENT TO COMPLY WITH THE SUBDIVISION ORDINANCE

(Assignments of Error I, II, III and IV)

By statute, under the circumstances of this case, there is a limitation on the title that passed to the grantees.

The Nejatis argue that both they and Stageberg were deeded a distinct area in accordance with the Long Survey. The plain language of Section 15.2-2254 however is that title to those distinct areas is not good as against each other because they were not parties to each others' deeds.

Therefore Nejati cannot rely on the purported boundary line as against Stageberg. Both the Nejatis and Stageberg received title to something but until a subdivision plat is approved and recorded it is uncertain exactly what that is.

This is consistent with the language in Section 15.2-2254 requiring compliance with the subdivision ordinance before sale of the property. One grantee cannot create a subdivision in compliance with the ordinance if the other grantee's title is good as against it. One owner cannot create a complying subdivision so as to be able to sell or use his property if another owner's claim that their title is to a certain distinct area is upheld.

This interpretation is also consistent with the requirement that all owners execute the plat of subdivision. Once an illegal lot is sold, one of the parties can not comply with the subdivision ordinance without agreement, participation and signature of the other(s).

Properties By Us could convey title as between itself and the Nejatis and Stageberg. Pursuant to the deeds to each, the

Nejatis hold title to the Littlepage Portion and Stageberg holds title to the Hanover Portion. They take that title, however, subject to the requirement that the subdivision ordinance be complied with. Neither alone holds legal title to the Whole Property.

The plain meaning of the statute is that the Nejatis and Stageberg now stand in the shoes of Properties By Us and must comply with the subdivision ordinance prior to use of the property or alienation of their interest. One can take the title to a lot created illegally but they then become responsible to comply with the ordinance and therefore the boundaries of what was conveyed are unclear as they may be subject to change.

The Whole Property must be legally subdivided before the use of the property or sale of either portion. The subdivision has to be with the agreement of the owners of the separate portions.

The trial court's holding that the parties hold the Whole Property as tenants in common provides relief where the owners of illegal subdivision lots cannot, or will not, agree to comply with the ordinance. A suit for partition would lie in such an instance. In such a suit, what was attempted to be deeded to each owner would be a fact a trial court could consider in deciding if partition could be conveniently made. Partition is only available to tenants in common, joint tenants, executors with the power to sell and coparceners of real property. Section 8.01-81 Code of Virginia 1950, as amended.

The Nejatis' property interest is not being taken from them by the trial court's holding. Title as between Properties By Us and the Nejatis passed to the Nejatis. The issue is what title passed to them? Statute and ordinance limit that title. The Properties By Us title was subject to the statutory requirement to comply with the subdivision ordinance. That requirement passed to both Nejatis and Stageberg when

they purchased from Properties By Us. Until the ordinance is complied with, the boundaries purported to be set are subject to change and therefore are not distinct and definite with nothing further to be done. The parties therefore hold as tenants in common.

Equitable principals also support the trial court's holding. The trial court properly held that each party has an equitable interest in the Whole Property. At a minimum, Stageberg has an equitable interest in the Littlepage Portion based upon the statutory requirement that the parties comply with the Subdivision Ordinance for the City of Fredericksburg. Each party has an equitable title in the portion in which the other has legal title and therefore an interest in the Whole Property. This equitable title arises from the statutory requirement to comply with the subdivision ordinance and the parties' interest in and entitlement to the Whole Property to be able to have that occur. What is done with, or on, one of the portions necessarily affects the ability of the owner of

the other to comply with the statute. Equitable principals apply as to each portion.

V.THE DEED DESCRIPTIONS ARE NOT SUFFICIENTLY DEFINITE AND THE PARTIES OWN THE WHOLE PROPERTY AS TENANTS IN COMMON
(Assignments of Error I, II, III and IV)

The trial court properly found that the descriptions in each deed failed to give a definite designation as to the boundary line because it required some further action for the boundary line to become definite that being the necessary and required approval of the City.

Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivery of the deed, becomes interested in all the land embraced within the larger area, as tenant in common with his grantor…. *Hodges & De Jarnette v. Thornton,* 138 Va.

112, 120 S.E. 865 (1924) citing the cases referenced therein.

If the words of severance, whatever they may be, fail to give such definite designation of the several parts of the land that their boundaries can be located on the ground by following such designation, with the aid of such extrinsic evidence only as is admissible under the well settled rules on the subject of locating the boundaries of land conveyed by a deed, a tenancy in common will be created. *Id*.

Hodges & De Jarnette refers to several cases where descriptions in deeds and wills were considered to determine whether or not they created estates in severalty or tenants in common in the whole. The common thread in those cases is that none of the attempted descriptions to divide property were definite established lines on the ground. None of the attempted descriptions were set out such that there was

nothing left to be done or ascertained in order to make the division.

Stageberg and the Nejatis must comply with the subdivision ordinance. It is the requirement to comply that makes the description indefinite. The description in each deed is insufficient if for no other reason than that it is subject to change to create a legal subdivision. The description may be clear to pass legal title to the portions to the respective grantees, but the requirements of Section 15.2-2254 and City ordinance 78-1304(d) dictate that the descriptions are not yet definite.

The purported division line is not distinct because, given the requirement to comply with the statute; there is at least an implication that the purported boundary lines would change (or disappear completely). Therefore neither party can know with assurance, what his severalty is.

The property is zoned R-4. (J.A. 148) Section 78-1177(f) of the City Ordinance requires that subdivided lots meet the minimum size and area as set forth in Article III of the chapter (Article III being the zoning ordinance.) (J.A. 235)

Section 78-244(2) (a) of the City Ordinance requires that a conventional lot contain a minimum area of 8400 square feet. (J.A. 232)

The area of the Whole Property is only 3911.21 square feet. (J.A.91) The Whole Property cannot be subdivided under the current ordinances.

The position that the parties hold the Whole Property as tenants in common is unaffected by any potential ability to subdivide the property until such is actually accomplished. The overriding problem in this case however is that the property cannot now be subdivided in compliance with the

subdivision ordinance. While required to comply, they cannot do so.

In fact the only way for the parties to "…comply with all provisions of this article and the subdivision ordinance" as required by Section 15.2-2254(4) is for them to hold the Whole Property as tenants in common.

A tenancy in common is when two or more hold the same land, with interest accruing under different titles, or accruing under the same title but at different periods*. Price v. Simpson* 182 Va. 530, 29 S.E. 2d 394 (1944).

The infallible criterion of this species of estate is, that no one knoweth his own severalty; and hence the possession of the estate necessarily is in common until a legal partition is made. *Hodges & De Jarnette v. Thornton,* 138 Va. 112, 120 S.E. 865 (1924)(Emphasis added).

In the case at bar, no party can know with certainty and without anything further to be done, what they hold in severalty.

The Nejatis confuse fee simple title and tenancy in common.

Fee simple title refers to the title that one holds. Tenancy in common refers to how that title is held. Fee simple as an interest is as opposed to, for instance, a life estate. Tenancy in common as a manner of co-ownership is as opposed to, for instance, joint tenancy.

Fee simple title is a type of title that passes. Tenancy in common is a manner in which more than one person holds title. Tenants in common may hold their undivided interest in fee simple.

Properties By Us did not limit the title it conveyed to anything such as a life estate and so it passed fee simple

title to the separate portions, as between the parties to the deed. Upon such conveyances, the two parties hold their undivided interest in fee simple with the other as tenants in common.

VI. THE DETERMINATION OF PERCENTAGE INTEREST IS CORRECT (Assignments of Error I, II, III and IV)

The trial court was correct in determining the interest of the parties in the Whole Property based upon their contribution to the total purchase price for the Whole Property.

Tenants in common are presumed to have equal ownership in the absence of proof to the contrary. A co-tenant may rebut this presumption with evidence establishing a contrary division of ownership. *Brantley v. Karas,* 220 Va. 489 (1979)

In Virginia, interest is assigned in a resulting trust based upon the proportion one pays to the total purchase price. In order to establish a resulting trust arising from the payment

of purchase money by another, it is not necessary that the beneficiary should have furnished the whole of the purchase money. If the amount paid is certain, a trust will result with respect to an undivided share of the land proportioned to his share of the whole price. *Miller* v. *Miller*, 99 Va. 125, (1901).

A compilation of decisions in other jurisdictions leads to the same conclusion.

The presumption (that tenants in common take equally) is applicable only in the absence of evidence to the contrary and where the co tenancy property is acquired by purchase and there is evidence as to the proportion of the total purchase price paid by each tenant in common, such evidence may be determinative of the issue. *American Jurisprudence 2d* Vol. 20 Cotenancy and Joint Ownership Section 118 page 216.

This is also an equitable result. The court found that neither the Littlepage Portion not the Hanover Portion has any value separate from the other but together the market value of the Whole Property is $290,000. (J.A. 75, 148, 151)

Assuming that value, Stageberg's 28.57% interest would equate to $82,853.00. This is a 31% loss in value from the $120,000 he paid. (J.A. 130)

The Nejatis' 71.43% interest equates to a $207,147.00 value. This is also a 31% loss in value from the $300,000 they paid. (J.A. 97)

The best, most reliable and equitable determinant of each side's interest is the proportion each contributed to the total purchase price.

The Nejatis blame Stageberg and argue he should suffer a total loss for failing to "do his research and homework

before buying a parcel that was not properly approved for the development he had planned." That however, is exactly what the Nejatis did as well. It is important to note that the trial court found that there was never any valid subdivision of the Whole Property. (J.A. 62) Neither portion is a legal lot.

Neither side is getting what they contemplated they would when they went to the settlement table. The Nejatis however would have the Court find that the illegal division which created the Littlepage Portion is good; that they are not required to comply with the subdivision laws and that they should be able to use their portion of the land in violation of law while preventing Stageberg from complying.

CONCLUSION

The trial court did not err when it held that Stageberg's purchase of the Hanover Portion resulted in a tenancy in common with the Nejatis. The trial court was correct in holding that the parties hold the Whole Property as tenants in common.

The Circuit Court for the City of Fredericksburg upheld the Zoning Administrator's decision that the purported subdivision plat by which Stageberg and Nejati received their interests did not create a subdivision of the whole.

The deeds to both Stageberg and Nejati are sufficient to transfer the interest of Properties By Us LLC to each. However, due to the clear statutory requirement to comply with the subdivision ordinance, the attempted descriptions are not such that there is nothing left to be done or ascertained in order to make the division. Even if possible to subdivide, it has not been done at this point. Unless and

until such time as it has, Stageberg and the Nejatis are tenants in common.

The trial court did not hold that Section 15.2-2254 constitutes a restraint on alienation of real property. The trial court found that title passed from Properties By Us to both the Nejatis and Stageberg.

Section 15.2-2254 and the Fredericksburg City Ordinance do however place limitations on what title passes and place requirements and restrictions on the use of illegal lots.

The trial court did not err in ruling that the descriptions in both the Nejati and the Stageberg deeds fail to give a definite designation as to the boundary line as it requires some further action for said boundary line to become definite. The requirement to comply with the subdivision ordinance creates at least an implication that the line may

change. In this particular case, the line must disappear to allow compliance.

The trial court did not err in the assignment of ownership interest. Neither side got a 100% interest in a legally subdivided lot. What they have is not that which they sought. However, given the particular characteristics of this case, this is what they received when the conveyances took place.

RELIEF REQUESTED

WHEREFORE, Appellee, Stephen P. Stageberg, respectfully requests that the findings, holdings and order of the trial court be affirmed.

STEPHEN P. STAGEBERG

_____
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Certificate

This is to certify that on April 30, 2013, I caused to be mailed, by first class mail postage prepaid, three true copies, along with one electronic version in pdf format by email, of the foregoing to:

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I have sent fifteen printed copies of the brief for filing in the office of the Clerk of this Court by Federal Express overnight delivery, sent on April 30, 2013. I have filed one electronic version of the brief in pdf format to the Clerk of this Court at scvbriefs@courts.state.va.us on April 30, 2013.

This is also to certify that I have complied with Rule 5:26 as applicable to Briefs of Appellees under Rule 5:28.

_____
John J. Billingsley