The Neighborhood May Have Changed, But An Old Restrictive Covenant May Still Apply



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A recent judicial opinion demonstrates why real estate purchasers must scrutinize all easements and covenants to fully understand the permissible uses for a property of interest. The caption of the case discussed below is Frank J. Gallo et al. v. John A. Hafner, Jr., et al, Dkt. No. A-1843-23.

In 1985, a restriction was imposed on several oceanfront lots in Stone Harbor, New Jersey. The restriction prevents any construction, or landscaping exceeding four feet, in the rear fifty feet of the properties to preserve an "open view to the ocean." In 2002, the Army Corps of Engineers constructed sand dunes between the properties and the ocean that stood ten to twelve feet tall. A dispute arose over whether the restriction remained fully enforceable because the dunes obstructed the view of the ocean.

In 2018, the Defendant purchased a property that was burdened by the restriction. In the rear of the property, the Defendant constructed an embankment and planted trees on top of it. The Defendant's landscaping was several feet shorter than the dunes. The Defendant believed the restriction on landscaping height was frustrated by the dunes and that his landscaping was permissible because it did not obstruct any view of the ocean that was not already blocked by the dunes.

A neighbor believed the Defendant's trees violated the restriction and filed an action in the Superior Court of New Jersey for, among other things, a declaratory judgment that the restriction is fully enforceable. The trial court agreed, and ordered the Defendant to comply with the restriction. It reasoned that the express purpose of the restriction was to preserve the "view **to** the ocean," which includes not only views of the ocean, but also "the scenic dunes and beachscape that surrounds it." Therefore,

the trial court held that the purpose of the restriction was not frustrated by the dunes, and that the Defendant's landscaping must comply with the restriction's four foot height limit.

The Defendant appealed, and the Appellate Division affirmed. The appellate court held that the phrase "to the ocean" unambiguously referred to the beachscape looking towards the ocean from the property, not just the ocean itself, and that the purpose of the restriction remained intact. The Appellate Division further emphasized that the test to determine whether a restrictive covenant is frustrated (i.e., whether the doctrine of changed circumstances applies) is "stringent" and only applies if a restriction "would serve no useful purpose and would create unnecessary harm to the owner" of the restricted property.

A real estate transaction may be the largest acquisition a person or company ever makes. Legal review is therefore essential for buyers to understand what they can or cannot do with the property they plan on purchasing. A particularly intensive legal analysis is required to evaluate whether a restriction or covenant may no longer apply. If you are uncertain about your rights, consult with your legal representative.

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