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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAPOCAS MAINTENANCE CORPORATION and ALAPOCAS MAINTENANCE CORPORATION BOARD OF DIRECTORS, Defendants Below, Appellants, v. WILMINGTON FRIENDS SCHOOL, INC., Plaintiff Below, Appellee.	No. 294, 2022 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2021-0655-SG

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This dispute arises out of Plaintiff Below-Appellee Wilmington Friends School, Inc.'s ("WFS") desire to unify its Lower School with its geographically separate Middle and Upper Schools. To this end, WFS agreed to sell the parcel where its Lower School currently sits (in another portion of the Alapocas neighborhood) to Incyte Corporation ("Incyte"), intending to build a new Lower School on the lot occupied by its Middle and Upper Schools (the "Lower School Project").

WFS has always been a "neighborhood school," located on a large parcel in the Alapocas neighborhood specifically set aside for school use. The Alapocas neighborhood is governed by a set of deed restrictions initially put in place by Woodlawn Trustees, Inc., to which Defendant Below-Appellant Alapocas Maintenance Corporation is the successor (the "Deed Restrictions").

On October 8, 2020, consistent with its plan to unify its schools, WFS submitted a proposal for its Lower School Project to the Defendant Below-Appellant Alapocas Maintenance Corporation Board of Directors (the "AMC Board" and together with Alapocas Maintenance Corporation, "AMC"). WFS's proposal was submitted under the provision of the Deed Restrictions (Paragraph 3) that applies to approval of school buildings. In a January 7, 2021 letter, the AMC Board declined

to approve WFS's Lower School Project proposal. The AMC Board's denial relied on a different provision (Paragraph 5) of the Deed Restrictions.

On July 27, 2021, after attempting to negotiate an acceptable resolution with AMC, WFS filed a Verified Complaint for Declaratory Judgment and Injunctive Relief in the Court of Chancery (the "Complaint"). In Count I of its Complaint, WFS sought a declaration that Paragraph 3, not Paragraph 5, of the Deed Restrictions applies to WFS. Alternatively, to the extent that Paragraph 5 applies, as AMC contends it does, Count II of the Complaint sought a declaration that the Deed Restrictions applied to WFS's proposal were invalid because they lacked any objective criteria. On August 18, 2021, AMC answered the Complaint. Consistent with 10 *Del. C.* § 348(c), the parties attempted to resolve their dispute in two mediation sessions with the late Justice Holland, but were ultimately unsuccessful.

At the suggestion of AMC (and then the Court), the parties agreed to proceed with dispositive motions under Rule 12(c). WFS argued that Paragraph 3, not Paragraph 5, applies to proposals submitted by WFS and that the AMC Board had no basis under Paragraph 3 to deny the Lower School Project proposal.

On December 17, 2021, Defendants cross-moved for judgment on the pleadings. Defendants argued, *inter alia*, that Paragraph 5 applies to WFS's proposals and that the AMC Board's application of the Deed Restrictions did not lack any objective criteria.

On February 8, 2022, the Court held oral argument on the parties' motions. On June 14, 2022, the Court issued a letter opinion finding in WFS's favor (the "Letter Opinion"). Dkt. 11 ("Op. Br."), Ex. A ("Letter Op."). In its Letter Opinion, the Court of Chancery assumed without deciding that Paragraph 5 applied to the WFS proposal but held that AMC's attempt to enforce an "open space" requirement through a Deed Restriction regarding harmony was unenforceable.

On August 19, 2022, AMC filed its Notice of Appeal. On September 28, 2022, AMC filed its original Opening Brief in this Court. On October 6, 2022, AMC filed its corrected Opening Brief.

As explained below, the Court's Letter Opinion correctly concludes that the AMC's invocation of a "harmony" restriction to enforce an open space requirement lacked any objective criteria and was not enforceable. This Court can affirm on that basis alone. But this Court can alternatively affirm on the grounds that Paragraph 3, not Paragraph 5, applies to building proposals submitted by WFS and that there is no basis under Paragraph 3 to deny WFS's Lower School Project proposal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly concluded that AMC's attempt to enforce an open space requirement through a "harmony" restriction was unenforceable. Letter Op. at 9. The Court of Chancery's finding is consistent with this Court's recognition that "the settled policy of the law … favors the free use of land." *Gammons v. Kennett Part Dev. Corp.*, 61 A.2d 391, 397 (Del. 1948). Delaware courts have also routinely held that deed restrictions are enforceable only "if they present clear, precise, and fixed standards of application." *Lawhon v. Winding Ridge Homeowners Ass'n, Inc.*, 2008 WL 5459246, at *5 (Del. Ch. Dec. 31, 2008). The Court of Chancery's Letter Opinion did not adopt an unduly narrow view of Delaware law, but rather performed an analysis entirely consistent with Delaware's long-held principles regarding the free use of land.

2. Denied. The Court of Chancery's Letter Opinion did not resolve any factual issues and was properly made under Rule 12(c). Having cross-moved for judgment on the pleadings on Count II, AMC conceded that the parties' dispute could appropriately be resolved at that procedural posture.

3. Denied. The Court of Chancery did not fail to consider any of AMC's fairly raised arguments. AMC points to four pages where the issue was raised, but "outlook" was mentioned only once and not analyzed separately. A291. Regardless, AMC's arguments all hinged on open space and were properly rejected.

4. Alternatively, this Court may affirm the judgment of the Court of Chancery on the ground that Paragraph 3 of the Deed Restrictions applies exclusively to the Lower School Project proposal and that AMC had no basis to deny the proposal under that paragraph.

STATEMENT OF FACTS

A. THE PARTIES

WFS is a private school founded in 1748 that offers a college preparatory curriculum based on Quaker values. A17-18 ¶ 5. As part of its mission, WFS challenges students to seek truth, to value justice and peace, and to act as creative, independent thinkers with a conscious responsibility to the good of all. A18 ¶ 10. Currently, WFS's Lower School is situated on a different campus in Alapocas than the Middle and Upper Schools. A16 ¶ 1; A19 ¶¶ 11-12. WFS entered into an agreement to sell the Lower School parcel to Incyte. A19 ¶ 11.

Alapocas Maintenance Corporation is the homeowners' association of the Alapocas neighborhood. *See* A18 ¶¶ 6-7. At the time the AMC Board denied the Lower School Project proposal, the Board members were Will Bowden, Barbara Butterworth, Gary Camp, Patricia Conrad, Eileen Smith Dallabrida, James Green Jr., David Ley Hamilton, Anne Martelli, and Alan Moretti. A35-39.

B. THE RESTRICTIVE COVENANTS AND PRIOR APPROVALS

The Deed Restrictions governing the Alapocas neighborhood were created through an indenture between Woodlawn Trustees, Inc. and Reuben Satterthwaite, Jr., dated December 10, 1936, and they have been in effect ever since. A27-33. The restrictive covenants were slightly modified by amendment through a Consent to Amendment to Declaration of Restrictions, executed September 15, 1972, and were

later assigned to AMC pursuant to an Assignment of Rights and Easements, executed February 2, 1973. A17 ¶ 2.

The Deed Restrictions contain a special definition for the 21-acre WFS property: "The name 'Friends School Tract' as used herein refers to the tract of land shown on said plot of Alapocas bounded by Alapocas Drive, Lenox Place, Dogwood Road, Norris Road and School Road." A30. Paragraph 11 makes clear that the WFS property is to be treated differently:

> If, and when, the land known as Friends School Tract shall no longer be used for school purposes and shall be used for residential purposes, said land shall be subject to all the limitations, reservations, restrictions and conditions herein contained.

A32. Paragraph 1 reinforces that the primary focus of the Deed Restrictions is the residential lots:

> The lots, except as hereinafter provided, shall be used for private residential purposes only, and no buildings of any kind shall be erected or maintained thereon except private dwelling houses and such outbuildings as are customarily appurtenant to residence[s], each house being detached and being designed for occupancy by a single family, together with a private garage for the exclusive use of the respective owner or occupant of the lot upon which such garage is erected.

A30.

In addition to these provisions, the Deed Restrictions contain provisions requiring advance approval for certain construction projects. Paragraphs 3 and 5 contain such provisions and are primarily at issue in this appeal. Paragraph 3 provides as follows:

> Buildings to be used for schools, churches, libraries, or for recreational, educational, religious or philanthropic purposes may be erected and maintained in locations approved by said Woodlawn Trustees, Incorporated, provided the design of such building be approved by said Woodlawn Trustees, Incorporated, and further provided there has been filed in the office of the Recorder of Deeds, in and for New Castle County, an Indenture or other Instrument of Writing executed by the said Woodlawn Trustees, Incorporated, approving the location, design, and limiting the uses to which such buildings may be put.

A30. Paragraph 5 provides as follows:

> No building, fence, wall or other structure shall be commenced, erected or maintained, nor shall any addition to or change or alteration therein be made, until plans and specifications, plot plan and grading plan, or satisfactory information shall have been submitted to and approved in writing by said Woodlawn Trustees, Incorporated. The said Woodlawn Trustees, Incorporated, shall have the right to refuse to approve any such plans or specifications which in its opinion are not suitable or desirable; and in so passing upon such plans and specifications the said Woodlawn Trustees, Incorporated, may take into consideration the suitability of the proposed building or other structure and of the materials of which it is to be built, to the site upon which it is proposed to erect same, the harmony thereof with the surroundings and the effect of the building or other structure as planned on the outlook from the adjacent or neighboring properties.

A31.

On at least three prior occasions, WFS applied for additions and expansions to its property, evidencing that the parties had an established practice. A172-93; A21 ¶ 18. In approving each prior project, the AMC Board followed the procedure outlined in Paragraph 3 and, following such approval, filings were made with the Recorder of Deeds consistent with Paragraph 3. A173; A180; A185. Each of those

filings contained language that mirrored the language of Paragraph 3; none of them made reference to Paragraph 5. A172-93.

C. WFS SUBMITS THE LOWER SCHOOL PROJECT PROPOSAL TO THE AMC BOARD

On October 11, 2019, WFS issued a letter announcing the Lower School Project. A140-44. In that letter, WFS explained that it had just entered into an agreement to sell its Lower School property to Incyte and would be relocating the Lower School to the main campus. A141. WFS also emphasized that it wanted the Lower School Project to be "collaborative, with all voices having the opportunity to be heard and considered." A142. WFS vowed to "keep an open dialogue with, and seek input from, all of [its] constituents." *Id.* In that spirit, WFS held or attended at least 16 meetings over the course of the next year, 6 of which specifically involved the Alapocas community and/or the AMC Board. A72.

On October 8, 2020, WFS submitted its final plans to the AMC Board for approval, consisting of multiple diagrams and renderings of the proposed new Lower School. A64-139. As shown in the proposed site plan, multiple existing open spaces will remain, with certain additions and modifications. A79. The baseball field will be moved offsite. A85. However, two additional existing athletic fields, including a full-size football field, will remain. A79. One set of tennis courts will remain, with another being moved closer to the existing courts. *Id.* A wooded area along Edgewood Road will remain untouched, and the current entrance and attendant green

space along School Road are also untouched. *Id.* The design also includes new open spaces, such as an academic quad and new outdoor play areas. *Id.*

On December 2, 2020, the AMC Board conducted a neighborhood meeting by Zoom to discuss WFS's proposal. A21 ¶ 19. On January 7, 2021, the AMC Board sent WFS a letter denying the Lower School Project application. A34-39. For the first time, the AMC Board asserted that Paragraph 5 of the Deed Restrictions applied to WFS. *Id.* The AMC Board also cited some of the factors listed in Paragraph 5 (e.g., "harmony") as reasons for the denial. A37. In addition, the AMC Board cited factors that do not appear anywhere in the Deed Restrictions (e.g., preserving "the simplicity, peace, integrity, sense of community, and openness that has always epitomized our neighborhood"). A38. At oral argument, counsel for AMC clarified its position: "I think our position, and it's clear from the January 7th denial letter, is that the proposal, and the vastness of the proposal and the consequences of that proposal, would be inharmonious with its surroundings because it would decrease the open, green space at the heart of the campus and the neighborhood." A346:15-20.

D. THE PARTIES ATTEMPT TO REACH AGREEMENT

On February 11, 2021, WFS responded to the AMC Board's letter. A40-44. WFS highlighted that the AMC Board's denial was inconsistent with the parties' longstanding practice, purported to apply inapplicable portions of the Deed

Restrictions, and cited no objective criteria. A41-44. But WFS nonetheless emphasized that, as a member of the Alapocas community, it wanted to "keep an open door" and engage in a dialogue with AMC to reach an acceptable resolution. A42. Those discussions, unfortunately, were not successful.

E. THE COURT OF CHANCERY LITIGATION

On July 27, 2021, WFS filed a four-count Complaint. A16-26. In Count I, WFS sought declaratory judgment that the AMC Board had no basis to deny WFS's building plans based on the Deed Restrictions and that the plans were consistent with all applicable Deed Restrictions. A23 ¶ 29. In Count II, WFS sought declaratory judgment that the Deed Restrictions are invalid because the AMC Board's application of them lacked any objective criteria. A23 ¶ 32; A24 ¶ 36. In Count III, WFS sought an injunction enjoining AMC from interfering with WFS's construction of the Lower School Project. A24 ¶ 42. Finally, in Count IV, WFS sought attorneys' fees and court costs pursuant to 10 *Del. C.* § 348(e). A24 ¶ 44. On August 18, 2021, AMC answered the Complaint. A45-63. On September 28 and November 5, 2021, the parties engaged in mediation pursuant to 10 *Del. C.* § 348(c), but that mediation was unsuccessful. A155.

On November 17, 2021, the Court held a teleconference on which the parties and the Court of Chancery discussed the procedure for cross-motions for judgment on the pleadings. A5, Dkt. 16. On November 29, 2021, WFS moved for judgment

on the pleadings on Count I of its Complaint. A148-68. On December 17, 2021, Appellants cross-moved for judgment on the pleadings on Counts I-IV of the Complaint. A194-233, A216-31. Briefing on the parties' cross-motions was complete as of January 25, 2022. A11, Dkt. 32.

On February 8, 2022, the Court held oral argument on the parties' motions. A12, Dkt. 33.

F. THE COURT OF CHANCERY FINDS IN FAVOR OF WFS

The Court of Chancery issued its Letter Opinion finding in favor of WFS on June 14, 2022. A13, Dkt. 39. The Letter Opinion noted that AMC confirmed at argument that its focus in its denial was on a loss of open space. Letter Op. at 3. Accordingly, the Court focused its analysis on whether the AMC Board had arbitrarily applied the "harmony" provision of Paragraph 5, a paragraph that the Court assumed, without deciding, applies to WFS. *Id.* at 4-5. The Court ultimately decided in the affirmative, *id.* at 10, and, accordingly, ruled in favor of WFS. The Court did not address the primary argument advanced in WFS's motion—namely, that Paragraph 3 provided an independent basis on which the AMC Board could have (and should have) approved WFS's proposal.

On July 20, 2022, the Court entered its Order and Final Judgment. Op. Br., Ex. B. On August 19, 2022, AMC filed its notice of appeal. Dkt. 1. On September 28, 2022, AMC filed its Opening Brief. Dkt. 9. Finally, on October 6, 2022, AMC

filed its corrected Opening Brief. Dkt. 11. This is WFS's answering brief in support of affirmance.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE DEED RESTRICTIONS ARE UNENFORCEABLE AGAINST WFS.

A. Question Presented

Whether the Court of Chancery correctly concluded as a matter of law that the AMC Board's attempt to impose an open space requirement through a "harmony" deed restriction was unenforceable as a matter of law. This issue was preserved at A346-47; Letter Op. at 6-8, 10.

B. Scope of Review

This Court reviews "*de novo* the Court of Chancery's grant of a motion for judgment on the pleadings." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 925 (Del. 2017). In its analysis, "the court must accept all well-pleaded allegations in the complaint as true, and assume that evidence would be presented to support those allegations." *Brooks-McCollum v. Emerald Ridge Bd. of Dirs.*, 2011 WL 4609900, at *2 (Del. Oct. 5, 2011).

C. Merits of the Argument

Contrary to AMC's arguments, the Court of Chancery's Letter Opinion was consistent with Delaware law concerning the enforceability of deed restrictions and did not unduly limit or narrow that precedent. Deed restrictions, such as those at issue here, are enforceable only "if they articulate a clear, precise and fixed standard the reviewing body must apply." *Wild Quail Golf & Country Club Homeowners'*

Ass'n, Inc. v. Babbitt, 2021 WL 2324660, at *2 (Del. Ch. June 3, 2021) (Master's Final Report) (citations omitted), *adopted*, 2021 WL 2497646 (Del. Ch. June 17, 2021). The Court of Chancery's holding that the AMC Board's desire for open space is not appropriately enforced under the rubric of "harmony" was proper. Letter Op. at 6.

The Court of Chancery did not improperly resolve any factual issues in ruling on the parties' cross-motions for judgment on the pleadings. Indeed, AMC does not identify any factual issue the Court resolved, and the Court expressly stated, "[I]t falls to me to decide the legal issues presented; the facts are not in dispute." Letter Op. at 2. The Court of Chancery's decision is both legally and procedurally sound.

1. The Court of Chancery Correctly Rejected AMC's Position and Found the Harmony Restriction Unenforceable.

The Court of Chancery's Letter Opinion properly found, under the correct legal standard, that the AMC Board's attempt to impose an "open space" requirement based on the harmony language in the Deed Restrictions was unenforceable. The Court of Chancery's holding is consistent with Delaware's long history of respecting property rights and viewing any restrictions on the free use of property narrowly.

When analyzing the express language of a deed, "restrictions … are to be taken most strongly against the grantor, and where the meaning of a restriction is doubtful, the doubt shall be resolved in favor of the grantee." *Gibson v. Main*, 129

A. 259, 260 (Del. 1925). "[R]estrictive covenants affecting real property, such as the deed restrictions at issue here, are strictly construed and should not be enlarged by implication by the courts." *Mendenhall Village Single Homes Ass'n v. Dolan*, 1994 WL 384579, at *2 (Del. Ch. July 13, 1994), *aff'd*, 1995 WL 33740 (Del. Jan. 24, 1995). Indeed, "restrictive covenants must be construed in accordance with their plain meaning in favor of a grantee and against the grantor, or one who enforces in the grantor's place." *Id*. With respect to architectural review covenants specifically, "restrictions based on abstract aesthetic desirability are impermissible." *Lawhon*, 2008 WL 5459246, at *5. Provisions regarding harmony are enforceable when a "community possesses a 'sufficiently coherent visual style' enabling fair and even-handed application." *Id.* (citations omitted). "The demand that architectural review decisions be tied to fixed standards renders them more administrative, and thus less discretionary, in nature." *Id.* The requirement of fixed standards also ensures that parties have adequate notice—that is, an understanding of the "demands of compliance," of any restrictions placed on their land. *Id.*

AMC has not, and cannot, demonstrate that it sought to enforce sufficiently fixed objective standards on WFS.[1] To the contrary, AMC still has not identified the "sufficiently coherent visual style" it seeks to enforce. AMC concedes that the

[1] Indeed, at argument, counsel for AMC made the circular assertion that "the objective criteria [sic] is harmony." A346:23-24.

appearance, location, and materials of the Lower School Project proposal are not the basis for the AMC Board's denial. Letter Op. at 5; Op. Br. at 23; A35-39; A346-347; A381-382. AMC expressly admits that WFS affirmatively "tried to keep [the school's architectural style] harmonious." A381. And there can be no doubt that the Deed Restrictions, through Paragraphs 3 and 11, are intended to treat the WFS property differently.

Instead of identifying a sufficiently coherent visual style, AMC concedes that its concerns with the Lower School Project proposal are related to open space. A346-47. AMC's desire for open space is not based on any express requirement in the Deed Restrictions, such as a setback or a limitation on development, but rather on an alleged lack of harmony. The impropriety of attempting to enforce an open space requirement under the rubric of "harmony" is highlighted by the fact that the Deed Restrictions address both setbacks (Paragraph 6) and side yard requirements (Paragraph 7). A31. AMC does not argue, nor could it, that those portions of the Deed Restrictions will be violated by WFS.

As the Court of Chancery correctly held, AMC's approach does nothing more than attempt to impose the AMC Board's "open space is better" aesthetics on WFS. Letter Op. at 9. As the Court of Chancery observed: "What portion of its land may the School develop, consistent with AMC's understanding of 'harmony?' No one can say. Where can the School locate additional buildings? There is no way to tell,

other than to rely on an arbitrary decision from AMC." *Id.* at 10. Even now, AMC does not attempt to answer these questions, arguing instead that its failure to answer is not "fatal." Op. Br. at 22, n.3. AMC is incorrect. Its failure to articulate a clear, objective standard that it purported to apply to WFS renders the Deed Restrictions unenforceable. The Court of Chancery's Letter Opinion should be affirmed.

2. The Court of Chancery Applied the Proper Legal Standard.

The Court of Chancery's Letter Opinion does not hold as a matter of law that harmony restrictions can be enforced only in communities with distinctive architectural styles. AMC's suggestion that the Court did so is incorrect for several reasons.

First, citing page 7 of the Letter Opinion, AMC argues that the Court departed from precedent by allegedly limiting its harmony analysis to communities with distinct architectural styles. Op. Br. at 18. But page 7 of the Letter Opinion contains no such express statement of law. On that page, the Court merely concluded that *Dolan* did not support AMC's position. Although AMC criticizes the Court of Chancery's focus on *Dolan*, calling it the "lynchpin" of the Court's holding (Op. Br. at 18), it was AMC that cited the case heavily to the Court of Chancery both in briefing and argument to support its position. Letter Op. at 6. In further distinguishing *Dolan* and other cases pressed by AMC, the Court of Chancery noted that "[t]hese cases all involve restrictions on residential lots made objective by visual

reference to other such lots." Letter Op. at 7, n.23. AMC has cited no express statement by the Court of Chancery limiting enforcement of deed restrictions to distinctive architectural styles because the Letter Opinion contains no such statement.

Second, in arguing that the Court "departed from precedent," AMC misinterprets the case it cites as support for this alleged departure. On page 18 of AMC's Opening Brief, AMC cites a portion of the *BBD Beach* case that provides examples of where courts have "upheld a reviewing authority's imposition of restrictions under deed restrictions similar to the Harmony Standard." *BBD Beach, LLC v. Bayberry Dunes Ass'n*, 2022 WL 763466, at *6 (Del. Ch. Mar. 10, 2022) (Master's Final Report). The excerpt AMC relies upon is exemplary and does not set forth the legal standard. Instead, just prior to the excerpt from *BBD Beach* that AMC cites, the Court of Chancery provided the following legal standard:

> The Harmony Standard, however, may be permissible if Bayberry Dunes possesses a "sufficiently coherent visual style [to enable] fair and even-handed application," and if the Standard provides a "reasoned, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community."

Id. (citations omitted). Indeed, in its Letter Opinion, the Court of Chancery articulated the same standard: "harmony restrictions, like the one here, have only been found enforceable when that community possesses a 'sufficiently coherent visual style' enabling fair and even-handed application." Letter Op. at 9 (*citing Civic*

Ass'n of Surrey Park v. Riegel, 2022 WL 1597452, at *13 (Del. Ch. May 19, 2022 (Master's Final Report)). It is AMC, not the Court of Chancery, that has misstated the law with respect to deed restrictions.

Third, AMC's heavy reliance on *Christine Manor* is misplaced: there is no similarity between the "commercial, barn-like" structure in *Christine Manor* being found out of place as a residential garage and AMC's complaint that WFS is building additional school buildings on land expressly reserved for a school.[2] AMC focuses on the language in *Christine Manor*, stating that "[the] garage is so different from the balance of the neighborhood that the CMCA's opposition to it is reasonable and should be enforced." Op. Br. at 21 (*citing Christine Manor Civic Ass'n v. Gullo*, 2007 WL 3301024, at *2 (Del. Ch. Nov. 2, 2007)). But AMC ignores the reasons underlying the decision to deny the garage in *Christine Manor*. There, the committee denied an application to build a garage in a residential lot for being "(1) [t]oo big to be in harmony with surroundings[;] (2) [t]oo commercial or agricultural

[2] AMC cites *Alliegro* for additional support, Op. Br. at 21, but that decision does not help AMC either. The *Alliegro* court affirmed the defendant's denial of the plaintiff's building plans based solely on objectively measurable features of the proposed home as directly compared to the remaining homes in the neighborhood. *Alliegro v. Home Owners of Edgewood Hills, Inc.*, 122 A.2d 910, 549-50 (Del. Ch. 1956) (basing its ruling "solely on the conclusion that defendant acted reasonably insofar as it rejected defendant's plans on the basis of insufficient floor and cubic areas"); *see also id.* at 547-48 (noting that a proposal must be reviewed according to "fixed standards and made to hinge on whether submitted plans meet enumerated precise requirements").

for a residential area[;] (3) [b]arn-like as opposed to garage-like for home vehicles[; and] (4) [a]esthetically dissimilar to Gullo's house structure." *Christine Manor*, 2007 WL 3301024, at *2 (cleaned up). The court in *Christine Manor* concluded that it "is not a reasonable structure for a residential neighborhood" and "its deviation from all other ancillary structures in the subdivision are not in doubt." *Id.* at *2 n.11. As the Court of Chancery noted below, and as the above passage confirms, *Christine Manor* involved "restrictions on residential lots made objective by visual reference to other such lots." Letter Op. at 7 n. 23. AMC has never identified any such objective standards nor how they could be applied to the WFS property expressly reserved for school use.

The Court of Chancery applied the appropriate legal standard and the AMC Board's denial fails to meet that standard.

3. The Court of Chancery's Decision Was Procedurally Proper.

In addition to incorrectly attacking the legal standard the Court applied, AMC argues that the Court should not have made its decision at the pleadings stage. AMC seemingly posits that the Court of Chancery could have ruled in its favor on the present record (i.e., by finding that it applied objective criteria) but that it could not decide in WFS's favor on the present record. As the Court of Chancery correctly noted, "[I]t falls to me to decide the legal issues presented; the facts are not in

dispute." Letter Op. at 2. The Court of Chancery's decision was procedurally proper.

AMC is the party that initially sought to proceed on the basis of early dispositive motions despite the statutorily expedited trial afforded WFS under 10 *Del. C.* § 348. WFS did not object. The Court of Chancery agreed and the procedure was established in a teleconference with the Court. A5, Dkt. 16. Consistent with its own actions in moving for judgment on the pleadings, AMC continually urged the Court of Chancery to make these determinations as a matter of law:

- AMC argued that WFS's argument that the Deed Restrictions lack objective criteria "fails as a matter of law." A228-229, A231.
- In supporting its argument, AMC made multiple references to its January 7 letter to support its argument that it relied on "multiple objective criteria." A229-230.
- In again criticizing WFS's argument that the Deed Restrictions lack objective criteria, AMC argued that it "mischaracterizes Defendants' position and is incorrect as a matter of law." A292.
- AMC argued that "[w]hile WFS may disagree with the result, the notion that the AMC Board's denial was deficient fails as a matter of law." A298.

- At oral argument, AMC took the position that "given the harmony requirement is not *per se* unenforceable under Delaware law, we would suggest that the as-applied challenge raises a legal question." A385-386.
- At argument, AMC again emphasized that the Court should grant its motion regarding Paragraph 5 of the Deed Restrictions "as a matter of law." A396.
- AMC also argued at the hearing: "[W]e would respectfully submit that there's no reasonable conclusion other than, as a matter of law, that this goes too far, and it should be—and that the board's judgment, and good-faith judgment, denying that should be upheld, lest the school be left with unchecked powers to build whatever, whenever, without any restriction." A408-409.

Consistent with these statements to the Court of Chancery, AMC concedes in a footnote that it moved for judgment on the pleadings, recognizing that it had consented to (and indeed even suggested) the procedure. Op. Br. at 31, n. 7.[3] AMC's

[3] AMC's only argument for its reversal of course seems to be an attack on WFS's pleadings, but AMC did not move to dismiss under Court of Chancery Rule 12(b)(6). And after criticizing the Court of Chancery for not relying on AMC's January 7 letter, AMC entirely ignores WFS's February 11 response, attached to and incorporated into the Complaint, which provides additional detail as to WFS's position. A41-44. AMC attempted to highlight this alleged pleading defect at the

citation to *Desert Equities*[4] does not change the result. AMC should not be heard to criticize the Court of Chancery for resolving the issues on the basis of the cross-motion it filed.

Regardless, AMC's arguments do not raise any factual issues, but instead simply continue to take issue with the Court of Chancery's conclusion that a desire for open space does not contain any objective criteria that allows a harmony restriction to be enforced.[5] AMC does not even acknowledge the numerous undisputed facts that were before the Court of Chancery, including: (1) the Deed Restrictions specifically reference the Friends School Tract and that it is to be used for school purposes (A30, 32); (2) AMC has previously, on three separate occasions, allowed expansions of WFS (A173-193); (3) AMC concedes that WFS tried to keep the proposed new Lower School "harmonious" (A381:18-20); and (4) significant open space that currently exists on the WFS property will remain once the new

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hearing on the parties' cross-motions, but the Court pointed out that the lack of objective criteria statement was true. A380-382.

[4] *Desert Equities* stands for the unremarkable proposition that, in reviewing a motion for judgment on the pleadings, a court is required to view the facts in the light most favorable to the non-moving party. *Desert Equities*, 624 A.2d 1199, 1205 (Del. 1993). However, *Desert Equities* does not address the situation here, where the parties filed cross-motions.

[5] AMC's criticisms of the *Riegel* case (Op. Br. at 31-32) are unavailing. In *Riegel*, the community's failure to prove coherence is unlike AMC's failures here. AMC has not shown, either below or in its Opening Brief, that it has attempted to enforce any sufficiently coherent visual style. Instead, AMC has sought to enforce an open space requirement that has no objective standards.

Lower School is built, including sizeable athletic fields, wooded areas, and green space near the front entrance (A79). And despite providing some "examples" of the Court of Chancery's improper fact finding (Op. Br. 32-34), AMC has not identified any disputed material fact that was improperly resolved against it.

AMC first complains about the Court of Chancery's observation that "AMC simply wants to maintain the green and pleasant aspect of much of the Property as an amenity of Alapocas." Op. Br. at 32. But AMC's desire to maintain green space is not disputed. AMC conceded as much in its January 7 letter: "In short, our decision seeks to preserve the simplicity, peace, integrity, sense of community, and openness that has always epitomized our neighborhood." A38. And its counsel confirmed as much at argument: "And so this was front and center from the beginning, this open, green space character, which really forms the basis of the harmony concerns that animated the AMC's denial." A345-346. The Court of Chancery merely echoed what AMC itself had said many times.

AMC likewise disputes the Court's statement that "no other Alapocas property is subject to use restriction simply because such use would decrease open space," Op. Br. at 26, but fails to identify how this was meaningful to the Court of Chancery's analysis. Letter Op. at 8. Moreover, the Court of Chancery's observation was unsurprising: the Deed Restrictions already contain setback and side yard restrictions for residences. A31. There is nothing more to enforce under a

"harmony" restriction with respect to the residences in Alapocas. Finally, AMC disputes any suggestion that Alapocas lacks a "coherent visual style." Op. Br. at 33. But throughout this litigation, AMC has never argued nor attempted to show that it sought to enforce a coherent visual style as the law would require.

AMC chose the procedure of cross-motions for judgment on the pleadings and should not now be heard to complain about that procedure simply because it does not like the outcome. The Court of Chancery's decision was procedurally proper.

4. Policy Considerations Support Affirmance.

None of the policy considerations advanced by AMC, many of which were not raised below,[6] are sufficient to overcome the legal deficiencies in its position. Indeed, many of them conflict with the overarching principles, recognized under Delaware law, regarding the free use of land. The legal principle favoring the free use of land is fittingly described as an "ancient legal doctrine." *Point Farm Homeowner's Ass'n., Inc. v. Evans*, 1993 WL 257404, at *2 (Del. Ch. June 28,

[6] In particular, AMC argues that the "narrow view of harmony adopted by the Court in the Letter Opinion likely will have broader ramifications for many other common interest communities in Delaware" and provided those communities' deed restrictions in the Appendix. Op. Br. at 38; A417-A477. None of those deed restrictions were included in the record below and should not be considered by this Court. *Shrewsbury v. The Bank of New York Mellon*, 160 A.3d 471, 474 n. 2 (Del. 2017) ("Under Delaware Supreme Court Rule 9, we hear an appeal on the record created in the trial court."). Regardless, none of those communities are alleged to contain the same unique tract of land reserved for a school that is present in Alapocas.

1993), (*citing Gammons*, 61 A.2d 391 at 397). It is well settled under Delaware law that there exists a common-law right to the free use of land, permitting an owner to use its property as it sees fit. *See Leon N. Weinger & Assocs., Inc. v. Krapf*, 623 A.2d 1085, 1088 (Del. 1993). And as the Court of Chancery noted in its Letter Opinion, even the emergence of zoning laws has not displaced the general policy favoring private control. *See* Letter Op. at 3 ("[P]rivate limitations on the full use of property, via deed restrictions, while enforceable, are construed narrowly in favor of the landowner.").

AMC repeats at least twice that the Court should be comforted that any unreasonableness on the part of a neighborhood association "can always be challenged in court." A36; A39. However, many such challenges involve a single homeowner seeking to overcome an insured and better-equipped homeowner's association. To set up a system that requires a homeowner to resort to litigation is neither efficient nor appropriate. Indeed, AMC itself has recognized that, due to this litigation, "an unwelcome tension has arisen that has never before existed in the neighborhood." A38.

None of the policy considerations advanced by AMC are sufficient to overcome Delaware's long respect for property rights and the limited view taken of private deed restrictions.

II. THE COURT OF CHANCERY DID NOT ERR IN ITS CONSIDERATION OF AMC'S OUTLOOK ARGUMENT.

A. Question Presented

Whether the Court of Chancery correctly concluded that outlook did not provide a basis to deny WFS's Lower School plans. This issue was preserved at A334; Letter Op. at 5.

B. Scope of Review

This Court reviews "*de novo* the Court of Chancery's grant of a motion for judgment on the pleadings." *Chi. Bridge*, 166 A.3d at 925. In its analysis, "the court must accept all well-pleaded allegations in the complaint as true, and assume that evidence would be presented to support those allegations." *Brooks-McCollum*, 2011 WL 4609900, at *2.

C. Merits of the Argument

The Court of Chancery correctly concluded that "AMC concedes that the only one of the criteria set out in Paragraph 5 that is *not* unenforceable is 'harmony … with the surroundings.'" Letter Op. at 5. Based on AMC's briefing and oral argument, the Court of Chancery's conclusion was proper. As an initial matter, during oral argument, AMC represented to the lower court that the sole basis of its denial was open space. A346; A381-82. In support of its assertion that this argument was preserved, AMC points to its briefing below. Op. Br. at 41 (*citing* A228-230, A291). AMC barely mentions outlook on these pages and has no independent

argument on outlook, instead merely stating that "the AMC Board focused on the 'harmony' criteria in its January 7 letter, while also considering 'the outlook from adjacent properties.'" A291. AMC did not meaningfully advance an outlook argument before the Court of Chancery.

Even if the outlook argument had been presented, Delaware courts have repeatedly found outlook provisions unenforceable. AMC's assertion that "outlook is less well-established than harmony as an independently deed restriction criteria" is overstated. Op. Br. at 41. Indeed, "'outlook' has no built-in, objective standards…." *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 270 (Del. Ch. 1986), *aff'd*, 538 A.2d 1113 (Del. 1988) (TABLE). Considering language similar to the Deed Restrictions here, the *Riegel* court recently found that such a restriction is "vague, imprecise, and lends itself to arbitrary application; as such it is unenforceable as written." *Riegel*, 2022 WL 1597452, at *12.

Indeed, by attempting to raise outlook before this Court, AMC demonstrates the infirmities in its harmony position. AMC has been clear that its denial was motivated by one concern: the loss of open space. AMC apparently contends that open space can be enforced either through an outlook provision or a harmony provision. AMC is wrong, and any attempt to enforce an open space requirement lacks objective criteria and is unenforceable.

The Court of Chancery's decision as it relates to outlook should be affirmed.

III. IN THE ALTERNATIVE, PARAGRAPH 3 APPLIES EXCLUSIVELY TO THE LOWER SCHOOL PROJECT PROPOSAL, AND THE AMC BOARD HAD NO BASIS TO DENY THE PROPOSAL UNDER PARAGRAPH 3.

A. Question Presented

Whether judgment of the Court of Chancery can be affirmed on the alternative ground that Paragraph 3 of the Deed Restrictions exclusively applies to the Lower School Project proposal and that the AMC Board had no basis to deny the proposal under that paragraph. This issue was preserved at A165-66; A243-48.

B. Scope of Review

This Court may affirm a judgment based "on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court," and, accordingly, "may affirm the judgment of the Court of Chancery on the basis of a different rationale." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

C. Merits of the Argument

In its motion for judgment on the pleadings, WFS argued that Paragraph 3 of the Deed Restrictions provides the exclusive basis on which its Lower School Project proposal could have (and should have) been approved. Although the Letter Opinion did not address this argument, it provides an alternative basis on which this Court can affirm the judgment below.

1. WFS's Lower School Project Proposal Should Have Been Approved Under Paragraph 3 of the Deed Restrictions.

As discussed above, Delaware law favors the free use of land and views deed restrictions narrowly. As a result, deed restrictions must be construed in accordance with their plain meaning and in favor of a grantee over the grantor. *Mendenhall*, 1994 WL 384579, at *2. Deed restrictions should be read as a whole so as not to render a term meaningless, illusory, or mere surplusage. *Wild Quail*, 2021 WL 2324660, at *3 (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)); *see also Monigle v. Darlington*, 81 A.2d 129, 131 (Del. Ch. 1951) (noting that the court must avoid construing two restrictive covenants in a way that would make one "largely useless because unnecessary"). Indeed, in *Estate of Red Lion*, the Court of Chancery noted that it was "bound by unambiguous terms, strictly construed against the grantor in the deed restriction context. If the developer wished to include appendages or attachments, it could have and should have done so at the drafting stage; I cannot now alter the clear and unambiguous terms … to impose greater restrictions on the homeowners." *Ests. of Red Lion Maint. Corp. v. Broome*, 2022 WL 2349631, at *4 n.47 (Del. Ch. June 28, 2022) (Master's Final Report), *adopted*, 2022 WL 2775065 (Del. Ch. July 14, 2022).

AMC agrees that Paragraph 3 applies to WFS—as it must, given its reference to procedures for approval of "[b]uildings to be used for schools." Op. Br. at 10 (noting that AMC relied on Paragraphs 3 and 5). But reading the Deed Restrictions

as a whole, this Court should conclude that Paragraph 3 alone applies to WFS. If Paragraph 3 alone applies, AMC has no independent basis to support its denial. A286-289 (arguing that Paragraph 5 applies through Paragraph 3).

First, Paragraph 11 confirms that the Deed Restrictions have limited applicability to WFS. This provision states, "If, and when, the land known as Friends School Tract shall no longer be used for school purposes and shall be used for residential purposes, said land shall be subject to all the limitations, reservations, restrictions and conditions herein contained." A32 ¶ 11. This provision makes clear that the WFS property was to be treated differently and specifically excluded from the "limitations, reservations, restrictions and conditions" in the Deed Restrictions. In order for Paragraph 11 to have meaning, there must be some recognition of the special treatment given to the Friends School Tract.

Second, the plain language of Paragraph 1 of the Deed Restrictions sets forth that the lots subject to the Deed Restrictions shall be used for private residential purposes. A30 ("The lots, except as hereinafter provided, shall be used for private residential purposes only…."). Accordingly, Paragraph 1 makes clear that the Deed Restrictions are largely intended to provide restrictions on the residential lots. This is consistent with the language of Paragraph 11. Paragraph 5 (in contrast to Paragraphs 3 and 11) does not mention schools or the Friends School Tract.

Therefore, a plain and holistic reading of the Deed Restrictions leads to the conclusion that Paragraph 5 does not apply to the Friends School Tract.

Finally, Paragraph 3 specifically addresses the approval process for school buildings, whereas Paragraph 5 is a general provision, applying to all buildings and other structures. When a specific provision and a general provision are both present, the specific provision should prevail; otherwise, it is superfluous. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 254 (Del. 2017) (concluding that a contractual provision imposing a specific standard of care applied in lieu of a provision imposing a general standard of care because "settled rules of contract interpretation[] requir[e] that the court prefer specific provisions over more general ones"); *Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 2021 WL 305741, at *7 (Del. Ch. Jan. 29, 2021) (quoting *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005)) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."); *id*. (quoting *NAMA Hldgs., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 2008 WL 571543 (Del. Mar. 4, 2008) (TABLE)) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."). AMC's solution to this issue is to argue that Paragraph 3 must incorporate the criteria from Paragraph 5.

However, there is no textual link between Paragraph 3 and Paragraph 5 that would allow the criteria from Paragraph 5 to be imported into Paragraph 3. Stretching Paragraph 3 to include Paragraph 5 is not only textually incorrect, but it is not based on a narrow reading of the Deed Restrictions as required by law.

Analyzing the Deed Restrictions as a whole, the Court should find as a matter of law that Paragraph 5 does not apply to WFS and, therefore, affirm the judgment on this independent basis.

2. The Parties' Prior Practice Confirms Paragraph 3 Alone Applies to WFS.

AMC acknowledges that it has previously approved plans presented by WFS. Op. Br. at 9. Each of WFS's past building applications have followed the procedure contemplated by Paragraph 3. A172-93. Under that procedure, a building proposal that fits into one of Paragraph 3's specifically enumerated "uses" (e.g., "schools") may be "erected and maintained" if the AMC Board approves its "location[]" and "design." A30. The AMC Board must memorialize its approval in an "Indenture or other Instrument of Writing" "approving the location, design, and … uses to which such building[] may be put." *Id.* Finally, that instrument must be "filed in the office of the Recorder of Deeds, in and for New Castle County." *Id.*

The AMC Board followed this procedure in approving WFS's prior proposals. The form of Declaration of Approval included with each proposal constituted an "Indenture or other Instrument of Writing," and each contained Paragraph 3

language. A174 ("approves of the erection and maintenance, use and design"); A181 (same); A186 (same). Each was filed with the New Castle County Recorder of Deeds. A173; A180; A185. And none contained Paragraph 5 language. The only reasonable inference to draw from this past practice is that WFS proposals are subject to review under Paragraph 3, not Paragraph 5.

This past practice lends further support to the plain reading of the Deed Restrictions. For these reasons, this Court may affirm the judgment of the Court of Chancery on the alternative ground that Paragraph 3 applies to WFS's Lower School Project proposal and that the AMC Board articulated no independent basis to deny that proposal under Paragraph 3.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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Dated: October 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, true and correct copies of the foregoing ***Appellee's Answering Brief*** were served in the manner indicated upon the following attorneys of record:

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