VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 31st *day of* July, 2015.

Melanie L. Fein, Trustee, Appellant,

against Record No. 140927
Circuit Court No. CL2007-622-01

Zand 78, LLC, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Fauquier County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the circuit court erred in ruling that the subdivision of the parcels was in compliance with the 1997 version of Fauquier County Subdivision Ordinance (FCSO) § 2-39(3)(C)(3) and did not violate the relevant restrictive covenant.

The Melanie L. Fein Management Trust (Fein) and Mehrmah Payandeh (Payandeh)[1] each own several large parcels in the Apple Manor Subdivision in Fauquier County (County). These lots are subject to restrictive covenants[2] (the Covenants). Paragraph 15 of

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[1] In June 2013, during this litigation, Payandeh transferred several of her lots to LLCs that were under the control of "Payandeh Associates," Zand 78, LLC and Demavand 9, LLC, the appellees in this case. For simplicity, this order will refer to these owners of the subdivided properties as "Payandeh," the individual, in all contexts.

[2] The restrictive covenants are set forth in the Declaration of Covenants, Conditions, and Restrictions dated February 23, 1995, as amended by a Deed dated July 27, 1995, and a Deed of Modification dated May 9, 1997.

the Covenants prohibits further resubdivision of properties in Apple Manor except "Lot numbers 4R, 7R, 8, and 9R may be resubdivided subject to the provisions of the Fauquier County Subdivision Ordinance in effect as of [May 28, 1997]." Payandeh owns lots 4R, 7R, 8 and 9R.

On September 4, 2007, Payandeh applied for County approval to subdivide Lots 7R, 8 and 9R. The County approved her request for subdivision on October 25, 2007 and recorded plats dividing Payandeh's three lots into eight lots. Subsequently, Fein filed a declaratory judgment action seeking a declaration that Payandeh was in violation of the Covenants because her new subdivision failed to comply with the subdivision and zoning ordinances in effect in May 1997.

This matter was previously appealed to this Court upon the granting of summary judgment by the circuit court. We affirmed the circuit court's judgment that the restrictive covenant did not require compliance with the 1997 Fauquier County Zoning Ordinance (FCZO), but we held that Fein sufficiently claimed that Payandeh's proposed new subdivision also violated certain provisions of the FCSO. Fein v. Payandeh, 284 Va. 599, 605-08, 734 S.E.2d 655, 658-60 (2012). Therefore, we remanded the case for consideration by the circuit court of whether the new subdivision infringed upon FCSO §§ 2-39(3)(C)(3), (4) and (5). Id. We will not recount the factual and procedural history of this case, which is well known to the parties and outlined in our previous opinion.

On remand, Fein asserted that Payandeh's new subdivision did not comply with the FCSO §§ 2-39(3)(C)(3), (4) and (5), and

therefore was in violation of the Covenants. The circuit court ultimately rejected Fein's arguments.

In its original final order after remand, the court overruled Payandeh's motion to strike the evidence but dismissed the case because it found that Payandeh's new subdivision was not in violation of the relevant FCSO. Fein asked the circuit court to reconsider, and the court changed its rulings to hold that a road maintenance agreement (RMA) created by Payandeh did not satisfy FCSO § 2-39(3)(C)(4), which requires new subdivisions to have a homeowners' association (HOA) to govern maintenance and upkeep of the subdivision's roads. However, the circuit court did not change its rulings in regards to Payandeh having satisfied the other provisions of FCSO § 2-39(3)(C).

Before the hearing to determine the relief to be granted Fein, Payandeh created an HOA to manage the maintenance of her subdivision's roads and filed a motion to dismiss arguing that the requirements of FCSO § 2-39(3)(C)(4) had been satisfied and that Fein's claim in that regard was, therefore, moot. After a hearing, the circuit court ruled that the newly created HOA was sufficient to satisfy the requirements of FCSO § 2-39(3)(C)(4), and dismissed Fein's amended complaint in its entirety. Fein appeals.

Analysis

Fein's assignments of error primarily concern whether the circuit court erred in ruling that Payandeh has satisfied the purpose requirement stated in FCSO § 2-39(3)(C) and the requirements of FCSO § 2-39(3)(C)(3) (concerning road design standards), FCSO § 2-39(3)(C)(4) (concerning establishment of an HOA) and FCSO § 2-39(3)(C)(5) (concerning approval of a highway

entrance by the Virginia Department of Transportation (VDOT)), and is therefore not in violation of the relevant covenant. Fein also claims that the circuit court erred in relying upon certain testimony from a county subdivision agent.

Payandeh assigns cross error to the circuit court's decision holding that the RMA did not satisfy the requirements of FCSO § 2-39(3)(C)(4). Payandeh also assigns cross-error to the decision of the circuit court denying her motion to strike.

At the outset, it is important to note that Fein is not seeking to enforce the ordinance, but rather to enforce the Covenants that incorporate the FCSO as a standard. We review a circuit court's interpretation of a restrictive covenant de novo. Fein, 284 Va. at 605, 734 S.E.2d at 658-59. Restrictive covenants are disfavored so "the burden is on him who would enforce such covenants to establish that the activity objected to is within their terms. They are to be construed most strictly against the grantor and persons seeking to enforce them." Id. at 606, 734 S.E.2d at 659 (citation and internal quotation marks omitted). We will not disturb a trial court's factual findings on appeal unless they were plainly wrong or without evidence to support them. Zelnick v. Adams, 269 Va. 117, 123, 606 S.E.2d 843, 846 (2005).

Fein argues that the circuit court erred in finding that Payandeh's new subdivision did not have to be "for the purpose of transfer of ownership or building development."[3] Payandeh argues

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[3] The relevant FCSO has a "large lot exception," which allows

> [t]he division of a lot, tract or parcel of land into two or more parcels all of which are fifty (50) acres or

that the circuit court correctly held that the statement that a subdivision of a lot is allowed "for the purpose of transfer of ownership or building development" was only advisory and not mandatory. However, even if having such a purpose was required, Payandeh claims that she had an acceptable purpose because she claimed that the new subdivision was for estate planning, implying future transfer, and because she conveyed title to the properties to the LLCs.

We have recognized that "words in a statute should be interpreted, if possible, to avoid rendering words superfluous."

> greater for the purpose of transfer of ownership or building development provided:
>
> 1) the lots/layout conform to requirements of this Ordinance and other County Ordinances;
>
> 2) all lots are served by a right-of-way at least thirty (30) feet in width;
>
> 3) the design standards of Article 7-303.1 of the Zoning Ordinance are met, except that the right-of-way width may be reduced as provided above [i.e., at least 30 feet];
>
> 4) the homeowners association is established with covenants which provide for the maintenance and upkeep of the private street;
>
> 5) the highway entrance is approved by the Virginia Department of Transportation; and
>
> 6) all platting requirements of Chapter 10 of this Ordinance are met.

FCSO § 2-39(3)(C).

Cook v. Commonwealth, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004). Furthermore, a review of FCSO § 2-39(3) reveals that the ordinance provides three different criteria for three different purposes for which an applicant might seek a subdivision of his or her property. Indeed, the purpose of the proposed subdivision determines under which of these criteria, if any, the subdivision should be evaluated. If the purpose was irrelevant, the FCSO would not have provided different criteria for three different subjective purposes for subdividing a parcel. Thus, the circuit court erred in holding that the requirement that the subdivision be "for the purpose of transfer of ownership or building development" was non-binding and merely advisory.

However, such error was harmless because Payandeh's subdivision application stated that a purpose of the subdivision was estate planning. Estate planning implies that the resulting lots will be transferred to beneficiaries of Payandeh's estate. While such a transfer may not be immediate, there is no guarantee that a lot resulting from a standard commercial subdivision and intended for sale will be transferred immediately either. There is no immediacy requirement concerning the "transfer" or "building" which may be planned. Thus, we hold that the "purpose requirement" contained in FCSO § 2-39(3)(C) was not violated.

Fein asserts that the circuit court erred by ruling that the roads in Payandeh's subdivision do not have to meet the design standards for Type I or Type II private roads. She argues that Type III private roads, which have no minimum standards, are not allowed in large lot subdivisions because of the requirements

expressed in FCSO § 2-39(3)(C)(3). She also asserts that the circuit court erred in considering FCZO Article 7-301.

Payandeh responds that the FCZO does not define what constitutes a Type I, Type II or Type III private road, and that the subdivision plat complied with the FCSO. Thus, she asserts that the circuit court did not err in considering FCZO Article 7-301, which permits Type III roads in FCSO § 2-39(3) subdivisions.

Despite Fein's argument in this appeal, this Court did not hold in the opinion issued on the first appeal that the circuit court could not consider any portion of the FCZO not expressly incorporated into the FCSO. "It is well established that [an enactment] should be read and considered as a whole, and the language of [an enactment] should be examined in its entirety to determine the intent of the [legislative body] from the words contained in the [enactment]." Department of Med. Assistance Servs. v. Beverly Healthcare, 268 Va. 278, 285, 601 S.E.2d 604, 607-08 (2004). Accordingly, the circuit court did not err in considering other provisions of the FCZO when construing Article 7-303.1.

However, the basis for the circuit court's ruling regarding Payandeh's compliance with FCSO § 2-39(3)(C)(3) is incorrect. FCSO § 2-39(3)(C)(3) requires that "the design standards of Article 7-303.1 of the Zoning Ordinances are met, except that the right-of-way width may be reduced" to 30 feet. In the circuit court's July 23, 2013 opinion letter, it stated that FCZO Article 7-303.1 authorized Type I, Type II and Type III roads. That is not the case. FCZO Article 7-303 has two subparts: Subpart 1 mentions

only Type I and Type II roads; Subpart 2 mentions Type III roads.[4] Only FCZO Article 7-303.1 is referenced in FCSO § 2-39(3)(C)(3), to the exclusion of Article 7-303.2. Article 7-303.1 states, "Types I and II - Such facilities shall be designed to meet minimum applicable requirements as contained in" the FCSO.[5] Because Type III roads are referenced only in Article 7-303.2 and FCSO § 2-39(3)(C)(3) incorporates only Article 7-303.1, to the exclusion of Article 7-303.2, Type III roads do not fulfill the requirements of the FCSO.

Although the circuit court correctly observed that FCZO Article 7-301.1 states that Type I, Type II and Type III private roads are permitted in subdivisions created under the exceptions provided in FCSO § 2-39(3), where one provision appears to conflict with another provision and one provision is specific and the other general, the specific provision will prevail. Virginia Dep't of Health v. Kepa, Inc., 289 Va. 131, 142, 766 S.E.2d 884, 890 (2015); Covel v. Town of Vienna,, 280 Va. 151, 161-62, 694 S.E.2d 609, 615-16 (2010). While FCZO Article 7-301.1 may allow all three types of roads in FCSO § 2-39(3) subdivisions generally, FCSO § 2-39(3)(C) creates a specific requirement for the kind of subdivision at issue

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[4] There is no Article 7-303.1 of the FCZO in the sense of, for example, Code § 8.01-670.1, where the ".1" designates a new statute between Code §§ 8.01-670 and 8.01-671. There is no article between Article 7-303 and Article 7-304. The ".1" in Article 7-303.1 therefore can only mean Subpart 1 of Article 7-303, as, for example, the "(A)" in Code § 8.01-670(A) would refer to Subsection A of Code § 8.01-670.

[5] Those standards are set out in Section 5 (Streets, General Standards and Design) of the FCSO.

in this case, the large lot subdivision. FCSO § 2-39(3)(C)(3) requires private roads in large lot subdivisions to comply with FCZO Article 7-303.1, which imposes the design requirements for Type I or Type II roads. FCSO § 2-39(3)(C)(3) does not permit private roads to comply with Article 7-303.2. FCSO § 2-39(3)(C)(3) is the more specific provision and it prevails in its application over Article 7-301.1.[6]

The subdivision agent cannot simply decide that Payandeh need not comply with a requirement imposed by the FCSO. The General Assembly does not even permit a governing body to do so.[7] Accordingly, the circuit court erred to the extent it ruled that the approval of the roads by the subdivision agent constituted a waiver of, or was otherwise conclusive regarding, compliance with the requirements imposed by FCSO § 2-39(3)(C)(3). Thus, Payandeh has failed to satisfy FCSO § 2-39(3)(C)(3), and her subdivision is in violation of the Covenants. Therefore, Fein should have been afforded relief.

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[6] FCSO § 2-39(3) creates exceptions to the definition of the word "subdivision," thereby removing subdivisions created under the exceptions from the scope of the rest of the ordinance and most of its more onerous requirements. By incorporating FCZO Article 7-303.1 into FCSO § 2-39(3)(C)(3) by reference, the FCSO essentially is re-imposing the Type I and Type II road requirements upon large lot subdivisions.

[7] The General Assembly has permitted subdivision ordinances to provide for variances or special exceptions from the general requirements imposed by the FCSO "in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship." Code § 15.2-2242(1).

In her assignment of cross error, Payandeh asserts that the circuit court erred by ruling that FCSO § 2-39(3)(C)(4) requires an HOA to conform to the definition of a "Property Owners' Association" as used in the Property Owners' Association Act, Chapter 26 of Title 55. She notes that the court was required to construe the Covenants against Fein as the party seeking to enforce it, and that the RMA that Payandeh put in place should have been found sufficient to satisfy the requirements of FCSO § 2-39(3)(C)(4).

When a statute or ordinance is unambiguous, courts will interpret it to mean what it says. CVAS 2, LLC v. City of Fredericksburg, 289 Va. 100, 111, 766 S.E.2d 912, 916 (2015). Undefined terms are given their common, ordinary meaning in light of the context in which they are used. Virginia Marine Res. Comm'n v. Chincoteague Inn, 287 Va. 371, 384, 757 S.E.2d 1, 8 (2014). FCSO § 2-39(3)(C)(4) says "homeowners association." The RMA failed to establish any such organization. A legislative body is presumed to choose the words it uses in an enactment with care. Simon v. Forer, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003). The circuit court did not err in ruling that the RMA created by Payandeh was not an HOA, and it did not err in denying Payandeh's motion to strike.

Fein asserts that the circuit court erred in ruling that Payandeh's 2013 HOA declaration made the issue of the creation of an HOA moot. In this case, Fein is not seeking to enforce an ordinance but to enforce the Covenants. The remedy for violation of a covenant is to enjoin the violation. The relief the circuit court has authority to render is an injunction compelling

compliance. Thus, it seems clear that Fein could be entitled to an injunction enjoining Payandeh to comply with the requirements of the FCSO that have not yet been met. However, once those requirements are met, Payandeh is no longer in violation of the Covenants. The circuit court did not err in that regard.

Fein asserts that the circuit court erred by ruling that Payandeh's subdivision roads did not require VDOT approval. She acknowledges that none of the roads in Payandeh's subdivision intersect with a public highway. Rather, they only intersect with existing private roads in Apple Manor. However, she argues that the subdivision will increase traffic on Apple Manor roads (as Payandeh stipulated), thereby increasing traffic at Apple Manor Road's intersection with State Route 688. She claims such additional traffic at that intersection would put it out of compliance with VDOT regulations. Payandeh responds that the circuit court correctly ruled that VDOT approval was not required because none of the new subdivision's roads intersect with a public highway, so there was nothing to approve.

FCSO § 2-39(3)(C)(5) requires that "the highway entrance [be] approved by Virginia Department of Transportation." The term "highway" is not defined in the FCSO. However, VDOT has authority over public highways, not private roads. See Cline v. Dunlora South, LLC, 284 Va. 102, 109 n.6, 726 S.E.2d 14, 18 n.6 (2012). Payandeh's subdivision has no public highway entrance, and the private roads within it do not intersect any public highways, so there is nothing concerning the private roads in the subdivision within VDOT's authority to approve or disapprove.

Further, although FCSO § 4-19 requires all lots within a subdivision to front on a public street or a street dedicated for public use and maintained by VDOT, this section expressly excludes subdivisions created under the exceptions provide in FCSO § 2-39(3). Therefore, the FCSO does not require Payandeh's subdivision or the lots therein to have a highway entrance that would be subject to VDOT regulations.

To the extent that the new subdivision will increase the amount of traffic on Apple Manor's roads, possibly making their intersections with public highways non-compliant with VDOT regulations, that is not a circumstance contemplated by the FCSO or the Covenants. Neither the FCSO nor the Covenants addresses the indirect effect on Apple Manor roads that may result from the creation of a new subdivision within Apple Manor. Because Payandeh's subdivision has no highway entrance subject to VDOT's jurisdiction, the circuit court did not err in ruling that the subdivision did not violate FCSO § 2-39(3)(C)(5).

Conclusion

The circuit court erred in ruling that the roads in Payandeh's new subdivision comply with the requirements of FCSO § 2-39(3)(C)(3). This matter is remanded to the Circuit Court of Fauquier County with the direction that it enjoin Payandeh's

violation of the Covenants and that it provide such other relief as it deems proper in light of this order.

A Copy,

Teste:

Pat L Harrington

Clerk