

**IN THE
COURT OF SPECIAL APPEALS OF MARYLAND**

**No. 5
September Term, 2006**

LAURA N. PHELPS,

Appellant,

v.

BAY CITY PROPERTY OWNERS ASSOCIATION, INC.,

Appellee.

Appeal From The Circuit Court
For Queen Anne's County
(Thomas G. Ross, Judge)

BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

This case was filed by the Bay City Property Owners Association, Inc. (“BCPOA”) against Laura N. Phelps (“Ms. Phelps”), a homeowner in the subdivision known as Bay City, which is located on Kent Island. In this case, BCPOA seeks a declaratory judgment and injunction to enforce restrictive servitudes that limit the circumstances upon which a homeowner may cut trees on such homeowner’s lot. BCPOA contends that Ms. Phelps removed seven large mature oak trees, one mature holly tree, one large mature tree and two mature juniper trees from her property in violation of the tree removal restriction.

On January 20, 2005, BCPOA filed a two Count Complaint against Ms. Phelps. (E. 1, 18-88.) The first count was for declaratory and injunctive relief. (E. 26-27.) In the *ad damnum* clause Bay City requested the circuit court: (1) to declare that BCPOA had the right to bring suit to enforce the restrictions and conditions violated by Ms. Phelps and the improvement permit issued by BCPOA pursuant to the requirements of the deed of the common grantor; (2) to declare that Ms. Phelps violated the restrictive servitudes prohibiting un-permitted clear cutting of all of the trees on her lot; (3) to order Ms. Phelps to plant the largest trees of the same species that could be commercially ordered, transported and planted on her property to replace those cut in violation of the restrictive servitudes; (4) to order Ms. Phelps to pay attorney fees; and (5) to provide such other and further relief as the court deemed necessary and appropriate. (E. 27-28.) The second count was for breach of the duties and obligations set forth in the restrictive covenants and BCPOA bylaws which were filed with the circuit court pursuant to Maryland

Homeowner's Association Act, Title 11B of the Real Property Article of the Maryland Annotated Code and sought monetary damages, costs, attorney's fees, and such other and further relief as the Court deemed necessary and appropriate. (E. 29.)

A one day trial commenced on December 6, 2005 in the Circuit Court for Queen Anne's County. (E. 319.) Ms. Phelps did not renew any of her discovery motions at the commencement of trial. (E. 326-331.) Counsel for Ms. Phelps did not object to the introduction of any evidence offered by BCPOA on grounds that such evidence was not disclosed during discovery.¹ Prior to the presentation of evidence, counsel for Ms. Phelps noted that boxes of records of permit applications dating back to the early 1990's were produced shortly before trial and counsel advised the court that counsel had not reviewed such records. (E. 329.)² Counsel for Ms. Phelps did not request a postponement of trial and seek additional time to review such records. During trial, counsel for Ms. Phelps acknowledged that numerous permit records were produced electronically/digitally, and that counsel had not bothered to review such electronic/digital records. (E. 359, 363-365, 370.) Counsel was informed that many historical records of BCPOA in the possession of the former officers (husband and wife) of BCPOA who were under investigation for theft of BCPOA funds allegedly were destroyed by a fire that burnt the storage shed of that couple where such records allegedly were stored. (E. 120; Apx. 2)

¹ The majority of the evidence introduced by BCPOA was disclosed in the Complaint and the remainder was disclosed early in the discovery process.

² Such documents actually were hand carried to the office for counsel for Ms. Phelps approximately one month before trial and copies were made of those documents requested by counsel. Some of such documents were included in Defendant's Trial Exhibit #8.

Three witnesses testified at trial. Ray Strang, the head of the Architectural Review Board of the Architectural and Permits Committee (“APC”) of the BCPOA was the first witness to testify. (E. 334₁.)³ Mr. Strang, pursuant to the conditions and restrictions applicable to Bay City property owners, issued permits on behalf of BCPOA for the construction of improvements on property within Bay City. (*Id.*) He issued the permit for which Ms. Phelps applied in order to construct a new home on her lot in Bay City. That permit denoted the trees Ms. Phelps was allowed to cut at the commencement of construction of her new home and the trees she agreed to preserve. John McKim, a member of the Board of Directors of the BCPOA from the early 1990s to the date of trial, was the second and final witness to testify on behalf of BCPOA. (E. 382-383.) Ms. Phelps was the only witness who testified for the defense.

The Honorable Thomas G. Ross, who heard the case, held it *sub curia*, and then issued a nine page Memorandum Opinion and a one page Declaratory Judgment on February 9, 2006. In the Memorandum Opinion:

The Court finds that the [tree removal] provision’s language, specifically ‘except for the purpose of building thereon,’ is arguably ambiguous on its face; however, in looking at the documents as a whole, the Court finds the surrounding circumstances show the intent of the provision was to provide for a wooded community while still allowing reasonable construction and improvements on land. Further, the Court finds that the BCPOA has interpreted the tree removal

³ The pages in the Joint Record Extract are not properly numbered. Page 343 of the extract is followed by a second set of pages numbered 334-343. In this brief, reference to the first set of pages in the extract numbered 334-343 will be denoted by subscript no. 1 and reference the second set of pages numbered 334-343 will be denoted with a subscript no. 2. Page 433 of the extract is followed by page 444, and there are no pages numbered 434-443.

provision in a reasonable manner, i.e., defining a tree as a minimum of 6” in diameter and allowing for the removal of any tree within 15 feet of the proposed construction.

* * *

The [C]ourt finds, and will declare, that the deed and regulations, when reviewed and considered as a whole, in addition to affidavits and trial testimony, indicate that the clear purpose of the [tree removal] provision was to ensure a wooded neighborhood. Further, the Court finds no credible evidence to indicate a lack of enforcement of the provision; rather, the Court finds the testimony of Mr. Strang and Mr. John McKim credible regarding consistent enforcement. Additionally, the Court finds that the lack of a historical record is by no means the fault of the current members of the BCPOA and does not prejudice the defendant, for there was no evidence or testimony that the Court finds credible to indicate selective enforcement or a lack of enforcement of the tree removal provision.

* * *

Clearly, [Ms. Phelps] exceeded the scope of the approved permit.

* * *

Further, Ms. Phelps had discussions regarding which trees were to be removed and which were to remain and, therefore, knew the correct process to follow to obtain Board approval for tree removal. ...

The Court finds that the [BCPOA] was within its right to enforce the tree removal provision. Further, the Court finds that in cutting down additional trees, beyond those agreed to by the BCPOA, [Ms. Phelps] exceeded the scope of the permit and violated the tree removal provision of the 1952 deed. ... The Court finds, based on the testimony at trial, that [Ms. Phelps] removed a total of nine trees that were not approved by the APC and were beyond the scope of the permit issued.

(Footnotes omitted.) (E. 11, 12, 13, 15-16.) The Court denied relief under the second count of the Complaint finding that it was duplicative and that BCPOA failed to prove monetary damages. (E.10.)

The Declaratory Judgment provides:

1. The Bay City Property Owners Association, Inc. has the authority to bring actions at law and in equity to enforce the requirements, restrictions and conditions of the 1952 straw deed, Amended By-Laws, and the Bay City Property Owners Association, Inc. Requirements for Approval for Construction in Bay City, including the subject provision regarding tree removal, and including any “permit” issued by the Association through its Architectural and Permits Committee.
2. The Defendant, Laura Phelps, had duties and obligations, as owner of property in Bay City, to comply with all of the requirements, restrictions and conditions set out in paragraph 1, and breached her duty and obligation by cutting down trees on the property that had not been previously identified and approved, pursuant to the permit application she submitted to the Bay City Property Owners Association, Architectural and Permits Committee.
3. Defendant shall, within 45 days of this Judgment, provide a plan to re-plant nine (9) like-kind trees, in reasonable proximity to those previously removed, to the Bay City Property Owners Association (BCPOA),⁴ and, upon written approval of the plan by BCPOA, shall have the nine trees planted within 45 days of the approval date.
4. A failure by defendant to comply with paragraph 3 shall, upon written application by BCPOA filed with the Court, require a donation by defendant to BCPOA of \$18,000.00 for the purpose of replanting trees in the common areas of Bay City to benefit all members of BCPOA, and may thereafter result in the Court imposing a judgment against

⁴The Declaratory Judgment has a footnote which provides:

The parties must act reasonably in determining what size of tree is appropriate given that which is commercially available for purchase. The defendant is not expected to be able to plant trees of the exact size and proportion as those removed; however, she must plant trees that are the largest that can reasonably be commercially purchased, transported to, and planted on the property.

defendant for reparations in the amount of \$18,000.00 if the donation is not timely made.

(E.17.)

A timely notice of appeal from the Declaratory Judgment was filed on March 6, 2006.⁵

II. QUESTIONS PRESENTED

- A. Did The Circuit Court Properly Declare That BCPOA Was Authorized To Enforce The General Restrictions And Conditions In The 1952 Deed By Bringing Actions At Law And In Equity And That Ms. Phelps Violated Those Restrictions When She Had All Of The Remaining Trees On Her Lot Cut?
- B. Was The Equitable Relief Ordered By The Circuit Court Within The Scope Of Its Equitable Authority?

III. STATEMENT OF FACTS

Bay City is a residential community formed by the subdivision of a 404 acre farm located on the western shore of Kent Island on the Chesapeake Bay in view, and immediately to the south, of the Chesapeake Bay Bridge. (E. 32, 221.) Bay City was formed on May 29, 1952, when the Bridgeside Company executed a deed (“the 1952 Deed”), duly recorded in the land records of Queen Anne’s County, that established a general scheme and plan of development for “Bay City,” and set out a number of

⁵ Ms. Phelps moved below pursuant to Md. Rule 2-602(b) for the circuit court to certify its judgment as final, suggesting th8-at an unresolved issue regarding attorneys’ fees required such action. (E. 711-12.) Ms. Phelps has the right to appeal from the declaratory judgment pursuant to Cts. & Jud. Proc. Code Ann., § 12-303(3)(i), without regard to Rule 2-602. *See Fungler v. Town of Somerset*, 244 Md. 141, 149-51 (1966). *See also Blake v. Blake*, 341 Md. 326, 338 (1996) (decision on merits is final regardless of whether fee issues remain to be adjudicated). In any event, the circuit court denied Ms. Phelps’s motion by marginal order entered on March 6, 2006, just prior to docketing her notice of appeal and amended notice of appeal. (E. 6-7, 714.)

irrevocable conditions and land use restrictions. (E. 32-36, 221-225.)⁶ The 1952 Deed refers to the Bridgeside Company as “the Corporation,” and that company served as the original developer of Bay City. *Id.*

The tree removal restriction at the heart of this case is “General Restrictions and Conditions G.6” in the 1952 Deed, and provides: “No trees shall be cut ... on the premises, except for the purpose of building thereon, and at the time when the building operations are commenced....” (E. 35.) Both Mr. Strang and Mr. McKim testified that they understood the purpose of this restriction was to preserve Bay City as a wooded community, while balancing the interest of Bay City residents to improve their properties. (E. 336₁-337₁, 385-388.) Mr. Strang, during his tenure on the APC and with the approval of the BCPOA Board of Directors, has interpreted the restriction to permit trees within 15 feet of the footprint of any building planned for construction to be cut down, while requiring a property owner to maintain any tree more than 15 feet from such building footprint. (E. 340₁-341₁, 334₂, 378-379, 381-382.) Likewise, any plant that is round and has a stem/trunk greater than six inches in diameter or any oblong plant that has a stem/trunk greater than 8 inches in diameter is considered to be a tree for purposes of the application of the tree removal restriction, while other plants do not fall under the restriction. (E.342₁-334₂.)⁷

The 1952 Deed further provides a mechanism for enforcement of the General Restrictions and Conditions by establishing the framework for a homeowner’s association

⁶ The 1952 Deed was recorded in the land records of the Circuit Court for Queen Anne’s County at Liber T.S.P. No. 5, folio 122-26 on June 9, 1952. (E. 36.)

⁷ The word “tree” is defined as “[a] usually tall, woody plant having comparatively great height and a single trunk [or as a] plant, as a shrub, resembling a tree in form and size. *Webster’s II New College Dictionary* 1174 (2001).

that is empowered to interpret and enforce the conditions and restrictions and to issue building permits before any improvements could be made within the subdivision. More specifically, the 1952 Deed provides:

WHEREAS, the said Corporation is desirous of subjecting the entire tract of land [i.e., the 404 acres] ... known as Bay City, and hereinafter called the Community, ... to certain general conditions, agreements and understandings, as herein expressed, ... for the purpose of making such general underlying uses, covenants, restrictions, dedications and reservations, and said general conditions, agreements and understandings, as hereinbefore and hereinafter referred to, and set out, run with the land binding alike on the Corporation, its successors and assigns and ... upon all of the land described herein ...,

* * *

GENERAL PROVISIONS RELATING TO THE
FORMATION OF AN ASSOCIATION BY OWNERS
AND OCCUPIERS OF LAND WITHIN THE
COMMUNITY

(13) The Corporation ... agrees to encourage, sponsor and promote the formation of an association, which shall be a body corporate, duly incorporated under the Laws of the State of Maryland ... for the administration and enforcement of the reservations, restrictions, covenants, understandings, and agreements herein contained and set forth

* * *

GENERAL RESTRICTIONS AND CONDITIONS.

G.5 No residence, dwelling, garage, or other structure appurtenant to the residence, shall be erected or built upon said lots, nor shall any addition to or alteration therein be made until the plans and specifications for such structure or alteration, and the location thereof, are submitted to and approved in writing by the Corporation, or its successors in the ownership or development of the Community, or its duly authorized agents, or by the association to be formed as hereinbefore recited, after said association is duly licensed to do so by the Corporation. Written permission must be obtained from said corporation, or its successors in the ownership or development of the Community, or in the administration of these restrictions, to

construct, or maintain fences, walls, hedges, buildings, bulk heads, and out buildings.

* * *

G. 15 The provisions herein contained shall run with and bind the land and shall inure to the benefit of and be enforceable by the Corporation, or the owner of any land included in said Community, their respective personal representatives, heirs, successors and assigns, and failure by the Corporation or any land owner to enforce any restriction, condition, covenant or agreement contained herein shall, in no event, be deemed a waiver of the right to do so thereafter to one occurring prior or subsequent thereto; and the declared invalidity of any one or more of the provisions herein shall not affect the validity of the others.

(E. 33, 34, 35, 36.)

Currently, there are over 720 properties in Bay City. (E. 404.) As the community began to grow, the developer formed a homeowners association. The Bay City Improvement Association, Inc. (“BCIA”), an association of property owners and the predecessor of BCPOA,⁸ was formed as a Maryland non-stock corporation in 1963. (E. 104.) BCIA was reformulated as the BCPOA in November of 1992. (E. 165.)

Bay City is a wooded community. Mr. McKim, the current president of BCPOA’s Board of Directors, has lived in Bay City since 1990. (E. 383.) He testified, without contradiction, to the following:

We’ve always valued trees in our community and we have consistently – [in] my experience, have consistently tried to preserve trees . . . Your Honor, we are a wooded community. Trees provide protection for our community. When we don’t have – I live on the bay. So when we get 100 knot winds and we do get – we’ve got 120 knot winds documented in our community. The trees collectively reduce the wind effects, so

⁸ *Miller v. Bay City Prop. Owners Ass’n*, No. 131, September Term, 2005 slip op. at 4, 2006 Md. LEXIS 470 *7 (July 31, 2006).

we really value those. In the area in contest, we have very mature old trees and when the trees are missing, there's more damage to the neighborhood.

E. 385-86.

Ms. Phelps bought her lot in Bay City, 634 Bayside Drive, in January or February 2004. (E. 8, 410.) Her plans at the time of purchase were to demolish the rancher on the lot and build a new home. (E. 410-411.) Numerous fully mature oak trees and other mature trees were located on the property at the time Ms. Phelps purchased the lot. (E. 69, 78-79, 235-240.) The plans submitted by Ms. Phelps denoted 18 mature trees on her lot, seven of which were within the footprint of the new home that she planned to construct. (E. 69, 78-79.) Those seven trees, which were to be removed to make room for her new home, were clearly marked, as were the 11 remaining trees that she was required to preserve. *Id.*⁹

Demolition of the rancher commenced in May 2004. (E. 335₂.) As soon as demolition commenced and trees began to be cut, Mr. Strang told the contractor to stop cutting trees because a BCPOA permit was required before such work continued. (E. 336₂, 411.) Mr. Strang requested the contractor to have the owner contact him in order to obtain the required permit from BCPOA. *Id.*

The contractor promptly contacted Ms. Phelps, who arranged to meet with Mr. Strang shortly thereafter. (E. 335₂-336₂, 411-412.) Prior to the meeting, Mr. Strang

⁹ The diagram has nine trees circled for removal, but Mr. Strang testified that only the circled trees near the proposed foundation were to be removed pursuant to the initial permit, while two circled trees in the area where Ms. Phelps planned to build a swimming pool were left for a future permit. (E. 337₂-338₂.)

faxed the Bay City Application for Approval and Permit to Ms. Phelps, so that she could prepare her permit application in advance and gather all of information that had to be submitted in conjunction with the application. (E. 336₂, 412, 433-446, 53-64, 65-78.)

The Bay City Application for Approval and Permit is a four page document. (E. 231-234, 53-56, 65-68.) The General Restrictions and Conditions contained in the 1952 Deed, including the tree removal restriction, are set forth virtually verbatim in the application. (*Compare* E. 233-234 with E. 224, 55-56.) Ms. Phelps had several hours if not several days to read and consider the restrictions. (E. 433-446.) Ms. Phelps met with Mr. Strang for over two hours to discuss her permit application and the applicable conditions. (E. 336.) Ms. Phelps took her time to review the application and she had ample opportunity to ask Mr. Strang any questions she had about the requirements and restrictions. (E. 444-445.)

When Mr. Strang and Ms. Phelps met, Ms. Phelps clearly recalled that Mr. Strang told her she could not cut all of the trees on her lot. (E. 412.) Mr. Strang testified that Ms. Phelps showed him the Wye Tree Experts letter (E. 68-69) and that they discussed which trees could be cut during construction of her planned new home and which trees had to be retained. (E. 336₂-338₂.) While Ms. Phelps did not have any present recollection at trial of a conversation about the Wye Tree Experts letter, she did not deny that it was part of her application or that it was discussed with Mr. Strang at their initial meeting. (E. 446.) Mr. Strang informed Ms. Phelps that only trees within 15 feet of the foundation/footprint of her new home could be cut and explained that all other trees, which were shown on the Wye Tree Experts sketch (E. 69) and the Jupitz location

drawing (E. 77-78) had to be retained. (E. 338₂.) There was no question in Mr. Strang's mind that at the conclusion of their initial meeting, Ms. Phelps knew which trees could be cut and which had to be preserved. (*Id.*)

Additional testimony evinced that Ms. Phelps unequivocally knew prior to November 2004, when she cut all of the remaining trees on her lot without obtaining BCPOA permission, that she needed another permit and BCPOA permission before cutting such trees. Mr. Strang testified that Ms. Phelps clearly understood that she would need additional permits for additional projects, such as the swimming pool. (E. 336₂.) Ms. Phelps testified that she applied for additional permits for the construction of a pool and the installation of a fence prior to the November cutting of her remaining trees, further evincing her clear understanding of the permit requirement and the permit process. (E. 449-450.) Ms. Phelps, nevertheless, did not request permission from BCPOA to cut the mature trees remaining on her property in November 2004 and never informed BCPOA of her intention to cut the trees that she previously agreed to preserve, prior to cutting them all down in one day. (E.450.)

In June 2004, two juniper trees were among other plants in the critical areas buffer of Ms. Phelps' lot that Ms. Phelps was supposed to retain, but cut. When such cutting was observed, Mr. Strang, on behalf of the BCPOA wrote the following letter, which he posted on Ms. Phelps lot:

When we met on May 11, 2004 to process your application for a permit to construct a new home, you provided a tree clearing plan indicating which trees you would need to remove in order to construct your house. A Building Permit was issued based upon that plan, and you were reminded of the portions of the Covenants that forbid removal of trees

without permit. We also discussed the fact that much of the lot was in the Critical Areas Buffer, which provided additional limitations on clearing. I explained to you that, in addition to the clear dictates of the Covenants, the wooded area of our neighborhood is considered to have great value to every Property Owner in Bay City. That is why the removal of trees outside the footprint of your house was forbidden.

In reviewing the clearing of trees on site, I note that a large number of healthy, mature trees that were not included in your [sic] permit have been removed, as well as substantial damage having been done to existing buffer vegetation. Since this grossly exceeds the letter and intent of your Building Permit, I am forced, on the advice [sic] of our Council [sic], to suspend your Building Permit and require that you cease and desist [sic] all construction related activities on site immediately [sic].

E. 270.¹⁰ Ms. Phelps claimed that she never received this letter.¹¹ (E. 418.) Mr. McKim testified that although BCPOA's Board of Directors was aware of the illegal juniper cutting, the Board did not authorize suit at that juncture, as junipers grow rapidly and can be easily replaced. (E. 401.)

On November 2, 2004, the seven mature remaining oak trees ranging in diameter from over 15 inches to over 40 inches, the other mature tree with a diameter of approximately 18 inches and the holly tree with a diameter of 6 inches were cut to the ground in one day. (E. 348.) At that time, construction of Ms. Phelps Home was substantially complete, *i.e.*, the foundation was poured, the house was framed, the trusses for the roof were placed, the exterior cladding and Tyvek insulation were installed, the exterior siding was installed, the windows were installed, the roof was shingled, and most

¹⁰ It appears that Mr. Strang became increasingly agitated as he was typing the letter to Ms. Phelps, throwing orthography to the wind.

¹¹ Because BCPOA failed to prove that it delivered the letter to the address Ms. Phelps provided in her permit application, the Court refused to award relief to BCPOA for the destruction of the two juniper trees. (E. 15.)

of the exterior trim and soffetry was installed. (E. 214, 244, 261-262, 395-397; Apx. 4-5.) It was unnecessary to cut any additional trees in November 2004 to complete construction of Ms. Phelps' new home.

Upon returning home from work on November 2, 2004, Messrs. McKim and Strang went to Ms. Phelps lot, confronted her, and surveyed and recorded the destruction that occurred that day when all of the remaining trees on Ms. Phelps' lot were cut to the ground. (E. 344-345.) Mr. Strang testified that when he questioned Ms. Phelps about cutting all of the remaining trees, her only response was to the affect that, "you know those tree cutters, once you get them going you just can't stop them." (E. 345.) The next day, BCPOA issued a stop work order and posted it on the premises. (E. 262, 344.)¹² That order was promptly removed, either by Ms. Phelps' or by her workers. (E. 344-45.) Ms. Phelps' willful and deliberate violation of the tree removal restriction, coupled with her refusal to offer any meaningful remediation therefore, lead to the filing of this lawsuit.

IV. STANDARD OF REVIEW

In a declaratory judgment action tried before a judge, this Court reviews the case on both the law and the evidence. *Chesapeake Bank of Md. v. Monroe Muffler/Brake, Inc.*, 166 Md. App. 695, 705 (2006) (citing Md. Rule 8-131(c)¹³). The factual

¹² By that time, most of the work on the Phelps house had been completed. (E. 214; Apx. 5.) In the opinion of McKim, "[t]here was no discernable need to cut the trees that were cut on November 2, 2004 in order to complete the construction of the new home." *Id.*

¹³ Maryland Rule 8-131(c) provides:

determinations of the circuit court are afforded substantial deference on review and will not be reversed unless clearly erroneous. *Id.* Where there is any competent and material evidence to support a factual finding of the circuit court, such finding will be upheld. *Id.* Legal determinations of the circuit court will be upheld if legally correct. *Id.*

V. ARGUMENT

Ms. Phelps blatantly violated the tree removal restriction in November 2004 and she has no factual or legal defense that excuses such blatant violation. She tried to contend that the tree removal restriction was ambiguous, but the circuit court properly ruled that the meaning of the restriction, when considered in light of the other provisions in the 1952 Deed, was clear and readily discernable. Moreover, the court ruled that the construction applied to the restriction by the BCPOA is imminently reasonable and effectuates the clear and unequivocal intent of the restriction and the covenants as a whole. Having no facts and no law that support her knowing and deliberate violation of the tree removal restriction, Ms. Phelps, in this appeal, argues that the failure of BCPOA to document the enforcement history of the tree removal restriction from 1952 to the present precludes enforcement of the restriction. The argument has no traction. The circuit court properly recognized that the undisputed evidence overwhelmingly established that the restriction has been consistently enforced. The pictures of the community introduced by Mr. McKim depict a wooded community where the trees on

When an action has been tried without a jury, the appellate court will review the case on both the law and evidence. It will not set aside the judgment of the trial court unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of witnesses.

every visible lot tower over the homes thereon and dominate the landscape.¹⁴ (E. 386-388; Apx. 10-12.) There could be no more unequivocal evidence that the restriction has been consistently administered and enforced over the life of the subdivision, and the testimony of Messrs. McKim and Strang to the same effect was mere surplusage. Ms. Phelps did not testify that Bay City was not a wooded community and, had she so testified, such testimony would do nothing but further dilute her credibility in light of the overwhelming physical evidence to the contrary. Ms. Phelps, on cross examination of Mr. Strang, introduced photographs of trees that were cut on other properties within Bay City. (E. 354-359.) She offered no explanation of the circumstances leading to the removal of such trees and she did not call any witness to establish that such trees were cut under circumstances even roughly approximating the circumstances under which she cut the trees on her lot in blatant violation of the tree removal restriction. On redirect, Mr. Strang explained in each case the circumstances surrounding the removal of the tree in question and how such was done consistent with the tree removal restriction and the manner in which it had been historically administered in accordance with the guidelines approved by the BCPOA Board of Directors. (E. 368-376, 378-379, 381-382; *see* E. 404-405.) Ms. Phelps has wholly failed to identify any error of law or any unsupported factual determination of the circuit court.

¹⁴ (*See* E. 214) (“Most of the lots in Bay City have many mature trees that provide shade, add a bucolic charm to the subdivision, and, in my opinion, and the opinion of the [BCPOA] Board, enhance the air quality and add charm and value to the properties in Bay City.”)

A. The Circuit Court Properly Declared That BCPOA Had the Right To Sue At Equity And At Law To Enforce The General Restrictions And Conditions In The 1952 Deed, And That Ms. Phelps Breached Her Duty To Comply With Them When She Cut Down Trees Without The Permission Of BCPOA And After Her New Home Was Substantially Completed.

1. *The 1952 Deed expressly provides enforcement power to BCPOA.*

Paragraph 13 of the 1952 Deed provides for the creation of a homeowners association “for the administration and enforcement of the reservations, restrictions, covenants, understandings and agreements ... set forth [in the 1952 Deed].” (E. 34.) Paragraph 15(a) of the 1952 Deed expressly confers on such homeowners association the power “to administer and enforce ... from time to time or forever, all of the reservations, restrictions, covenants, agreements and provisions ... contained [in the 1952 Deed].” *Id.* BCPOA is the homeowners association for Bay City and is composed of the owners and occupants of the lots within Bay City. (E. 30-31, 37-41.) Ms. Phelps did not contest that BCPOA has the right to enforce the restrictions and covenants in the 1952 Deed.

2. *Ms. Phelps failed to obtain permission to cut the trees at issue as required by the 1952 Deed.*

Paragraph G.5 of the 1952 Deed requires any person who constructs a new “residence, dwelling, garage, or other structure appurtenant to the residence” to submit “the plans and specifications” therefore “and the location thereof” to BCPOA and have them “approved in writing” before commencing construction.” (E. 35.) Ms. Phelps acknowledges that she understood this requirement and submitted three sets of plans to BCPOA for different construction projects: plans for her new home, plans for her

swimming pool, and plans for a fence. She admits that she never submitted plans for cutting the nine trees that she stripped from her front yard on November 2, 2004, never obtained BCPOA approval before cutting those trees, and did not need to cut most of those trees for the driveway and walkways that she constructed around her new home. The plans for her new home that Ms. Phelps had approved by the BCPOA expressly showed that the nine trees in question would not be cut by Ms. Phelps. The undisputed evidence establishes that Ms. Phelps breached the requirements of Paragraph G.5 of the 1952 Deed.

3. *The tree removal restriction is not ambiguous and was correctly interpreted by the circuit court.*

Paragraph G.6 of the 1952 Deed provides: “No tree shall be cut, and no excavation shall be made on the premises, except for the purpose of building thereon, and at the time when the building operations are commenced....” (E. 35.) One of the several fallacies inherent in Ms. Phelps theory of the case is that by seeking a declaratory judgment, BCPOA was somehow conceding the ambiguity of this covenant. *See* Brief of Appellant at 4. BCPOA’s election to file a declaratory judgment action in addition to a breach of covenant action as alternative theories upon which to seek enforcement of the tree removal covenant is irrelevant to the question of whether the covenant is ambiguous. BCPOA could have elected to file an action for breach of contract. *See Whalen v. Baltimore & Ohio R.R. Co.*, 112 Md. 187, 197 (1910). The theory of relief has nothing to do with the issue of ambiguity. In any event, BCPOA has steadfastly maintained that the covenant is unambiguous and plainly prohibits removal of trees except at the

commencement of construction and to the extent reasonably necessary to build a house or other structure per the written approval of the APC. Since BCPOA has the undisputed authority to approve or disapprove all building plans, and since tree removal may occur only at the commencement of construction and after building plans have been approved in writing by BCPOA, tree removal without BCPOA's permission is not allowed by the covenants.

While Ms. Phelps posits that this restriction is ambiguous, nowhere does she state how it is ambiguous. "An ambiguity does not exist simply because a strained or conjectural construction can be given to a word." *Belleview Constr. Co. v. Rugby Hall Cmty. Ass'n*, 321 Md. 152, 159 (1990). Ms. Phelps did not offer one scintilla of testimony about what language, if any, in the restriction was ambiguous. She did not testify to what, if anything, caused her to believe that she could cut down the nine mature trees on her lot on November 2, 2004. Ms. Phelps admits that she reviewed the restriction, which appears verbatim in the Bay City Application for Approval & Permit that she completed and executed on June 1, 2004, and did not ask any question about the meaning of the restriction even though she met with Mr. Strang for over two hours to discuss this permit application and was told she was not allowed to cut many of the trees on her lot. There is nothing ambiguous about the restriction, particularly when coupled with the other restrictions in the 1952 Deed, which are set forth virtually verbatim in the

Bay City Application for Approval & Permit provided to, and reviewed and executed by, Ms. Phelps.¹⁵

The Maryland Court of Appeals recently reiterated that the strict rule of construction standard applicable prior to 1955, which suggested that such covenants be construed against the party enforcing them and in favor of the free and unfettered alienability of land, has been replaced by a rule of reasonableness. *Miller v. Bay City Prop. Owners Assoc., Inc.*, __ Md. __, __ (2006) (citing *County Comm'rs v. St. Charles Assoc. Ltd. P'ship.*, 366 Md. 426 (2001)). In construing such restrictions, a court should first employ the cardinal principal that the covenant should be construed to affect the intention of the parties as it appears and/or may be implied from the instrument creating the restriction. *Bellevue Constr. Co.*, 321 Md. at 157; *Himmel v. Hendler*, 161 Md. 181, 187-188 (1931); *Markey v. Wolf*, 92 Md. App. 137, 153 (1992). This is accomplished by

¹⁵ Ms. Phelps' suggestion that the trial court's reliance on the *Restatement (Third) of Prop: Servitudes* (2000), somehow warrants reversal, *see* Brief of Appellant at 10, is absurd. The Circuit Court relied on the following: "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, *or* the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created." E. 11 (n.14) (quoting *Restatement*, § 4.1(1); emphasis by trial court). The Reporter's Note to § 4.1 cites not only to *Bellevue*, *supra*, but also to this Court's decisions in *Bright v. Lake Langanore Ass'n*, 104 Md. App. 394, (1995), and *Markey v. Wolf*, 92 Md. App. 137, (1992). *See* § 4.1, R.N. to cmt. a. In *Bellevue Constr. Co.*, the Court of Appeals stated that "[t]he rule of strict construction should not be employed . . . to defeat a restrictive covenant that is clear on its face, *or* is clear when considered in light of the surrounding circumstances." 321 Md. at 158, 582 A.2d at 496 (emphasis supplied). *See also* *Markey*, 92 Md. App. at 156, 607 A.2d at 92 (quoting same passage in *Bellevue Constr. Co.* and emphasizing disjunctive phrase; opinion for this Court by Cathell, J.). Although Ms. Phelps relied heavily on the *Markey* case below (*see, e.g.*, E. 328) its citation is notably absent from her brief in this Court, because *Markey* is entirely consistent with the passage in the *Restatement* of which she disapproves.

viewing the language of the instrument creating the restriction as a whole and examining the circumstances and conditions of the parties and the property at the time the restriction was made. *Id.* Every part of a deed creating restrictions should be given effect, if possible, and a construction that nullifies the meaning of certain provisions of a deed should be avoided whenever possible and, instead, the provisions should be harmonized. *Adams v. Parater*, 206 Md. 224, 231, 233-234 (1955) (harmonizing the specific restrictions in a deed with a general clause therein and refusing to interpret the general provision such that it nullified the two specific restrictions).

The circuit court correctly examined the 1952 Deed as a whole and the circumstances at the time of its execution, then ruled that the intent of the tree removal restriction was to provide a wooded community while still allowing for reasonable construction and improvements on land. (E. 11.) General Restriction and Condition G.5 precludes any construction until a lot owner has submitted a plan showing the location of the proposed improvement and BCPOA has approved the proposed improvement in writing. General Restriction and Condition G.6 does not allow any trees to be cut except during the commencement of construction. When those two General Restrictions and Conditions are read together and harmonized, they clearly preclude a lot owner from cutting any trees on said lot absent the written permission of BCPOA. A lot owner always is required to obtain permission before constructing an improvement, and because trees only may be cut at the commencement of construction, no trees can be cut until approval has been conferred. Approval cannot be unreasonably denied when said lot owner proposes to cut said trees in conjunction with the commencement of construction

of a building that otherwise is in conformity with the other General Restrictions and Conditions. The Court's ruling on the meaning of the tree removal restriction is in accord with the express language of the General Restrictions and Conditions in the 1952 Deed.

4. *The circuit court correctly ruled that BCPOA reasonably applied the tree removal restriction.*

The circuit court properly found "that the BCPOA has interpreted the tree removal provision in a reasonable manner, i.e., defining a tree as a minimum of 6" in diameter and allowing for the removal of any tree within 15 feet of the proposed construction." (E.11.) Messrs. Strang and McKim testified that the BCPOA Board of Directors approved applying the tree removal restriction in such manner that a lot owner is permitted to cut any tree within 15 feet of the footprint of an improvement permitted by the APC in accordance with the other General Restrictions and Conditions in the 1952 Deed, absent a variance granted by the Board of Directors pursuant to its variance procedure. The Board of Directors also approved applying the tree removal restriction to any round plant with a stem/trunk with a diameter of 6 inches or any oblong plant with a stem/diameter of 8 inches. Mr. Strang testified that during his three year tenure as the head of the APC, he applied the tree removal restriction in accordance with the fifteen foot rule and the 6 inch/8 inch rule approved by the Board of Directors when he reviewed permit applications for the construction of improvements. Those rules are reasonable on their face. Fifteen feet is ample room to maneuver the types of equipment and erect any scaffolding necessary to construct the type of residences, detached garages, and other buildings and improvements permitted to be constructed pursuant to the 1952 Deed. Any

plant with a trunk/stem greater than 6 to 8 inches in diameter reasonably qualifies as a tree. The BCPOA has reasonably applied the tree removal restriction.

5. *Ms. Phelps violated the tree removal restriction.*

On November 2, 2004, Ms. Phelps had seven oak trees with diameters of 24 inches, 15 inches, 20 inches, 20 inches, 20 inches 40 inches and 18 inches, a holly tree with a diameter of 6 inches and another tree with a diameter of 18 inches cut and removed from her lot at 634 Bayside Drive. Construction of her new home had commenced in May 2004 and was substantially completed. It was not necessary to cut any of those trees in order to construct the new home or any other improvement that BCPOA granted Ms. Phelps permission to construct. The trees were not cut during the commencement of construction, they were cut at the conclusion of construction. The trees were cut in violation of the express terms of the written approval and tree removal restriction.¹⁶

6. *The failure of BCPOA to produce historical records from 1952 to date of the enforcement of the tree removal restriction was not grounds for the circuit court to decline to hear the case.*

Preliminarily, every record requested by Ms. Phelps that was within the possession custody and control of BCPOA was produced and there is no contention to the contrary. Mr. McKim, on behalf of BCPOA, readily admitted that BCPOA did not have historical records from 1952 to date concerning the enforcement of the tree removal restriction or

¹⁶ See *Restatement, supra*, § 8.3 cmt. d (reasonableness of parties' action prior to litigation factor to be considered in award of attorneys' fees).

the permitting of improvements within Bay City. Mr. McKim produced all the records in that regard that currently were in the possession of BCPOA. He further explained that many BCPOA records allegedly were destroyed when the storage shed of the husband and wife who formerly were officers of BCPOA, and who were being criminally investigated by the Queen Anne County State's Attorney for theft from BCPOA, was mysteriously burned to the ground. The records, therefore, were not deliberately or negligently withheld from Ms. Phelps. Any records that were not produced simply do not exist.

The burden of showing a lack of enforcement, an affirmative defense, rests with Ms. Phelps. “[T]he burden of proof of the issue on which suit is brought rests with the plaintiff, [but] when the defendant sets up an affirmative defense, he is required to offer legally sufficient evidence of the facts upon which he relies. . . .” *Crowther v. Hirschmann*, 174 Md. 100, 109 (1938). “An affirmative defense is one which directly or indirectly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail because he is precluded for some other reason.” *Armstrong v. Johnson Motor Lines*, 12 Md. App. 492, 500 (1971). Ms. Phelps has failed to set forth any precedents which establish, under the facts and circumstances of this case, that the lack of historical enforcement would entitle her to deliberately violate the General Restrictions and Conditions of the 1952 Deed. (See Part V.A.7 & V.A.8, *infra*.)

For the sake of argument and setting aside her failure to cite supporting precedent, Ms. Phelps had numerous alternative vehicles through which she could have established

the historical lack of enforcement. She failed to avail herself of any such alternatives. For example, Ms. Phelps could have taken pictures of any of the over 720 lots within Bay City to show that they are not wooded and deposed and/or subpoenaed the owners/occupants thereof to elicit testimony to the effect that their lots were without trees due to the failure of Bay City to enforce the tree removal restriction. She made no such effort to obtain such evidence.

The evidence introduced by BCPOA makes evident that any such attempt would have been futile. Mr. McKim testified that he had lived in Bay City since 1990 and served on the Board of BCPOA since shortly after moving to the community. The Board, to his knowledge and recollection, always had enforced the tree removal provision and issued building permits. Ms. Phelps, during her cross examination of Mr. Strang, introduced a number of pictures of trees that were cut on other lots. She never attempted to introduce any evidence of the circumstances under which such trees were cut. On redirect examination, Mr. Strang explained the circumstances under which each such tree was cut, *e.g.*, the lot owner submitted the statement of a landscape architect, a forester or an arborist that the tree was dying and could not be saved; the tree was planted four feet from the foundation of the home and was destroying the foundation, therefore permission, under the 15 foot rule, was granted to cut the tree; the utility company, not the lot owner, cut the tree, because it was interfering with a utility line.

Under the foregoing circumstances, the circuit court did not abuse its discretion when it ruled:

[T]he Court finds no credible evidence to indicate a lack of enforcement of the provision; rather, the Court finds the testimony of Mr. Strang and Mr. John McKim credible regarding consistent enforcement. Additionally, the Court finds that the lack of a historical record of enforcement is by no means the fault of the current members of the BCPOA and does not prejudice [Ms. Phelps], for there was no evidence or testimony that the Court finds credible to indicate selective enforcement or a lack of enforcement of the tree removal provision.

(Footnotes omitted.) (E. 12.) An appellate court must “give due regard to the opportunity of the trial court to judge the credibility of the witnesses . . . [and] consider the evidence in the light most favorable to the prevailing party.” *Colandrea v. Wilde Lake Cmty. Ass’n*, 361 Md. 371, 394 (2000).¹⁷ Ms. Phelps has not, and cannot, cite to one case that suggests, under circumstances such as exist in this case, that a trial court abused its discretion in allowing a plaintiff to present plaintiff’s case.

Trial judges are given a great deal of discretion in applying sanctions for failure to adhere to discovery rules. *See Mason v. Wolfing*, 265 Md. 234, 236 (1972); *Williams v. Williams*, 32 Md. App. 685, 691 (1976). A trial judge’s invocation of a penalty for a discovery violation “cannot be disturbed on appeal without a clear showing that this discretion was abused.” *Williams*, 32 Md. App. at 691.¹⁸ Included in the trial court’s arsenal of available remedies for discovery violations are orders to compel at one extreme, and dismissal of the case at the other. The “gravest sanction” is reserved for

¹⁷ Quoting *Urban Site Venture II v. Levering Assoc.*, 340 Md. 223, 230 (1995) (quoting Md. Rule 8-131(c)).

¹⁸ Quoting *Mason, supra*, 265 Md. at 236.

only the most egregious and repeated violations of court orders. *See Williams*, 32 Md. App. at 691-95 (collecting authorities).

There is no Maryland case sanctioning dismissal where all documents in existence were produced, and historical records that were destroyed through no fault of the party, and not in anticipation of litigation, no longer were available for production. Reasonable alternatives existed through which Ms. Phelps could discover the nature and extent of the historical enforcement of the General Restrictions and Conditions. Ms. Phelps' failure even to attempt to avail herself of such alternative evidence underscores that there was historical enforcement and that her discovery argument is nothing more than a ploy to divert the Court's attention from her irrefutable and inexcusable breach.

In *Mason*, the defendant failed to comply with an order to file supplemental answers to interrogatories, failed to attend a deposition, and failed to file an answer to a motion for judgment by default. *See* 265 Md. at 235-36. In *Williams*, this Court stated that the "ultimate sanction" is imposed in the "presence of contumacious or dilatory conduct or when the noncomplying party had disobeyed a direct order of the court to depose, or to show cause, to answer interrogatories, or to respond to his opponent's motion for dismissal or default judgment." 32 Md. App. at 695. In both cases, sanctions were sought through contemporaneous objections during the introduction by the opposing party of evidence that was not produced during discovery. BCPOA did not attempt to introduce any evidence not produced during discovery. Ms. Phelps did not make any contemporaneous objections or requests for postponement predicated on a failure to

produce evidence introduced at trial during discovery. The cases relied on by Ms. Phelps simply are inapposite.

7. *There was, and could be, no waiver of the tree removal restriction.*

The General Restrictions and Conditions in the 1953 Deed, by their express terms, could not be waived by inaction. General Restrictions and Condition E. 15 provides: (“[F]ailure by the Corporation or any land owner to enforce any restriction, condition, covenant or agreement contained [in the 1952 Deed] shall, in no event, be deemed a waiver of the right to do so thereafter. . . .”). (E.36.) Other jurisdictions have held that where violations of a restrictive servitude have occurred and not been acted upon, similar non-waiver provisions do not preclude the enforcement of the servitude upon subsequent violators. *Adams v. Lindberg*, 610 P.2d 75, 76 (Ariz. App. 1980) (citation omitted) (holding failure to act against prior violations did not preclude enforcement of restriction of subsequent violation due to express non-waiver provision in the instrument creating the restrictive servitude).¹⁹ *See Delaporte v. Preston Square, Inc.*, 680 S.W.2d 561, 565 (Tex. App. 1984) (failure to object to trivial violations not waiver of enforcement; terms of deed contained provision “that the failure of the association to maintain an action

¹⁹*Adams* was relied upon by the Arizona intermediate appellate court in *Burke v. Voicestream Wireless Corp.*, 87 P.3d 81 (Ariz. App. 2004), a case which suggests that under certain circumstances not herein relevant or comparable, a total lack of enforcement of all covenants could render a non-waiver provision ineffective. *See* 87 P.3d at 87.

against violations does not constitute a waiver of their right to do so”).²⁰ Evidence regarding any alleged lack of enforcement, therefore, is immaterial and irrelevant.²¹

Ms. Phelps did not deny the existence of the tree-cutting covenant, or her breach thereof. Her defense, in part, is that BCPOA could not enforce the restriction, due to estoppel or waiver, or the doctrine of comparable hardship. The burden, however, of showing a lack of enforcement, an affirmative defense, rested with Ms. Phelps. “[T]he burden of proof of the issue on which suit is brought rests with the plaintiff, [but] when the defendant sets up an affirmative defense, he is required to offer legally sufficient evidence of the fact upon which he relies, in order to sustain his position. . . .” *Crowther v. Hirschmann*, 174 Md. 100, 109, 197 A. 868, 872 (1938). “An affirmative defense is one which directly or implicitly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail because he is precluded for some other reason.” *Armstrong v. Johnson Motor Lines*, 12 Md. App. 492, 500 (1971) (Powers, J.). Estoppel, waiver, and comparable hardship are affirmative defenses to the enforcement of a restrictive covenant. Ms. Phelps, not BCPOA, had the burden of producing evidence of non-enforcement. As previously discussed, *see* Part V.A.6, *supra*, there were many ways other than BCPOA documents through which non-enforcement could be proved, if in fact BCPOA had not historically and consistently enforced the tree removal restriction.

²⁰ *Delaporte* was overruled on other grounds in *Pitt v. Bradford Farms P’ship*, 843 S.W.2d 705 (Tex. App. 1992).

²¹ Judge Karwacki appeared to believe that BCPOA could not prove consistent enforcement in the absence of a paper trail. (*See* E. 311-12.) As the photographic evidence and testimony offered by BCPOA reveal, Judge Karwacki was mistaken.

The only evidence of a lack of enforcement of the tree removal restriction offered by Ms. Phelps was BCPOA's forbearance in not filing suit immediately when Ms. Phelps breached the covenant by cutting two juniper trees in June of 2004. Ms. Phelps offers no case which suggests that a five month forbearance, under circumstances similar to those in this case, constitutes a waiver of an express servitude that runs with the land.²² BCPOA most certainly did not acquiesce in the destruction of all of the remaining trees on the Phelps lot in November. Mr. Strang confronted Ms. Phelps in person, and when she gave him a disingenuous answer (E. 345), APC promptly issued a stop work order. When that order was ignored, suit was filed on January 20, 2005. The circuit court found that BCPOA filed suit in a reasonably prompt manner, given the intervening holiday season. (E. 15.)

In *Schlict v. Wengert*, 178 Md. 629 (1940), failure to enforce a restrictive servitude precluding the operation of a bar/package store in a residential community was held insufficient to constitute waiver of the provision when residents of the community subsequently sought to enforce the covenant against a second establishment opened in the community. In *Schlict*, the Schlicts, who were owners of the dominant property, had a friend next door, Gerber, who sold beer on the premises, despite a covenant prohibiting saloons in the development, which bordered on Stony Creek in Anne Arundel County. Gerber was in business for only a few months. Although Mr. and Mrs. Schlict did not

²² BCPOA does not concede the correctness of Judge Ross' decision with regard to the junipers. The Strang letter (E. 270) like the letter in *Jaggers*, "was a timely assertion of [BCPOA's] right to enforce the covenants." *Chevy Chase Vill. v. Jaggers*, 261 Md. 309, 319 (1971). The same reasons for not suing over two junipers (*see* E. 401) militated against a cross-appeal by BCPOA.

approve of this enterprise, Mr. Schlict occasionally bought his beer from Gerber. 178 Md. at 633. The defendants, Mr. and Mrs. Wengert, ran one tavern for about a year. Although the Schlicts complained regarding the Wengert saloon to the Anne Arundel County Liquor License Board, and Mr. Schlict consulted an attorney, they took no further action. Mr. Schlict had also vouched for the character of one Rinehart, when Rinehart had applied to the Board for a liquor license some years earlier. *Id.*

A few years later, Wengert and his wife opened their second tavern, again in violation of the anti-saloon covenant. Mr. Schlict registered his disapproval: “He told Wengert he did not object so much to a saloon, but he did object to the noise.” 178 Md. at 634.²³ The Court of Appeals, speaking through Chief Judge Bond, declined to find waiver or estoppel, ruling:

Such acquiescence by Schlict and wife as appears from the evidence in no way induced action by Wengert and wife, so that an estoppel might prevent assertion of rights under the covenant now. And the toleration of violations, out of friendship or lack of inclination, until incidental annoyances grew to make the Schlicts feel a grievance, could not be construed as surrender of those rights. They refrained from a contest until experience with the particular violation stirred them to enforcement; and they might do so without loss of rights from it.

Id. at 636-37(citations omitted).

Cutting down all of the trees remaining on her lot in November, like the Wengerts’ second saloon, was the final outrage that forced BCPOA’s hand. On these facts, there can be no estoppel or waiver of enforcement of the covenant.²⁴

²³ Mrs. Schlict objected to the saloon, period. *Id.*

²⁴ See also *Restatement, supra*, § 8.3 cmt. f (“[A] servitude beneficiary who fails to seek enforcement against one violation does not waive the right to enforce against violations

Judge Karwacki erred when he failed to grant BCPOA's motion for summary judgment because he felt there were disputed facts with respect to the issue of waiver, estoppel and comparative hardship. Ms. Phelps failed to meet her burden when opposing BCPOA's motion for summary judgment. Her only opposition was the frivolous assertion that summary disposition was inappropriate in an action for declaratory judgment, and that she was prejudiced by BCPOA's alleged failure to provide discovery. (E. 299-300.) Her opposition was not supported by an affidavit alleging a lack of enforcement. In any event, the non-waiver clause in the 1952 Deed renders such an affidavit immaterial. Ms. Phelps has never challenged the non-waiver provision. Although BCPOA's motion for summary judgment was not granted, because there is no factual basis to predicate a defense of waiver, estoppel or comparative hardship, the motion should have been granted. The the trial court may be affirmed for any reason apparent from the record. (Citation omitted). *Pope v. Board of School Comm'rs*, 106 Md. App. 578, 591 (1995) (ruling that "an appellate court will affirm a circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised").

that have a different or greater impact on the beneficiary's interests."). *Cf. Schlosser v. Creamer*, 263 Md. 583, 593 (1971) (neighbors could not enforce set-back restriction where house built in violation of restriction in existence for forty years).

8. *Ms. Phelps cannot rely on the doctrine of comparable hardship because she knowingly violated the tree removal restriction and, therefore, knowingly and voluntarily created and assumed any hardship she must endure as the result of her violation.*

Ms. Phelps suggests that more discovery on the enforcement history of the tree removal restriction would afford her the opportunity to raise the doctrine of comparative hardship in her defense. (Appellant's Br. at 10.) Under the doctrine of comparative hardship, a court may decline to issue an injunction where the hardship and inconvenience that would result from an injunction is greatly disproportionate to the harm to be remedied. *Liu v. Dunnigan*, 25 Md. App. 178, 193 (1975). The defense is unavailable for several reasons. First, Ms. Phelps knowingly violated the tree removal restriction. (See E.13.) *Amabile v. Winkels*, 276 Md. 234, 241-242 (1975) (ruling that if the defendant's act is committed with knowledge of the plaintiff's right, the courts will refuse to balance the equities or conveniences and will grant the equitable relief sought and holding that defendant had to demolish the apartment building purchased and restore the easement for ingress and egress); *Chevy Chase Vill.*, 261 Md at 320 (opining that a doctor who knowingly breached a restriction against home offices did not make an innocent mistake and was not positioned to benefit under the doctrine of comparative hardship). Therefore, she was the cause of any hardship that she might endure as a result of the court's order. Second, Ms. Phelps has failed to offer any evidence of any hardship she might endure beyond the costs of remedying her knowingly wrongful acts. Third, any inconvenience in not being able to landscape her lot precisely as she desires, if she elects to replant trees for those that she destroyed instead of paying for trees to be planted in the

common area, is de minimus. BCPOA's substantial interest in maintaining a wooded community is not outweighed any interest of Ms. Phelps. In any event, the doctrine is inapposite because Ms. Phelps did not make an innocent mistake; she knowingly and purposefully violated the General Restrictions and Conditions.

B. The Equitable Remedy Of The Court Was Proper

Judge Ross's remedy is a fair and reasonable solution, well within the trial court's equitable discretion. As the Third Restatement of Property, Servitudes suggest:

Judges have wide discretion in selecting remedies to provide full and appropriate relief to an injured party, and in states with merged law and equity jurisdictions, may mix remedies formerly exclusive to law or equity. Appropriate remedies may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. In selecting an appropriate remedy, the nature and the purpose of the servitude are important.

Restatement (Third) of Prop.: Servitudes, § 8.3 cmt. b (2000).

The purpose of the tree removal restriction is to preserve Bay City as a wooded community. No value can be placed on the trees that were removed. Mature oak trees that are over 40 feet tall and from 15 to over 40 inches in diameter cannot be purchased, transported, or planted. The value of such trees for timber and firewood could be established, but such value has no relationship to the injury suffered by the community as a result of their removal. The equitable remedy ordered by the circuit court is to replant the largest like-kind trees reasonably available for commercial purchase in reasonable proximity to where such trees were located prior to being cut. The order requires much less than the extent of damage inflicted by Ms. Phelps wrongful act.

The monetary component of the order is alternative only. It applies only if Ms. Phelps refuses to plant the largest like kind trees that can be commercially purchased in rough proximity to the trees she wrongfully removed. It is in the nature of an equitable penalty for her wrongdoing that is triggered only in the event Ms. Phelps refuses to plant replacement trees as ordered. In essence, it is more than fair to Ms. Phelps, because it allows her to suffer nothing but a minor monetary penalty and otherwise benefit from her wrongful conduct by maintaining her lot in a condition that suits her personal preferences and that violates the tree removal restriction. The Court's equitable remedy is more than fair. There was no abuse of discretion.

VI. CONCLUSION

For all these reasons, Appellee, BCPOA, prays that the judgment of the Circuit Court for Queen Anne's County is affirmed, and for such other and further relief as the nature of Appellee's cause may require.

Respectfully submitted,

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