

RENDERED: APRIL 13, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002163-MR

CARL WAYNE CARRIER;
AND REGINA S. CARRIER

APPELLANTS

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 07-CI-00216

SHEILA T. KIRCHHEIMER;
THOMAS KIRCHHEIMER;
RACHEL S. CUPP; JIMMY R. CUPP;
JACK SMITH; REBECCA
R. SMITH; MICHELE AMSTUTZ;
ANN E. CLARK; CECIL
M. TAYLOR; CARLA S. LOVE;
DANNY S. NEELY; EVELYN
S. NEELY; MICHAEL J. MICHALAK;
PENNY M. MICHALAK; T. ALAN
CLAYPOOL; RALPH PENDYGRAFT;
CONNIE PENDYGRAFT; R. MICHAEL
TEPE; SHEILA J. TEPE;
ALLEN W. AMSTUTZ; AND
BEVERLY J. AMSTUTZ

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,¹
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Regina S. Carrier and Carl Wayne Carrier bring this appeal from an October 21, 2009, Findings of Fact, Conclusions of Law, and Judgment of the Breckinridge Circuit Court adjudicating a petition for declaration of rights involving certain real property. Kentucky Revised Statutes (KRS) 418.040. We reverse and remand.

The present controversy surrounds the parties' respective rights, interests, and access to a roadway known as Sandy Beach Lane. Sandy Beach Lane is located within Sandy Beach Subdivision; two other subdivisions – Sandy Beach II and Taylor's Landing – are also located in close proximity to Sandy Beach Lane. All three subdivisions are situated within rural Breckinridge County and are near Rough River Reservoir.² Sandy Beach Subdivision actually abuts Rough River.

¹ Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Sandy Beach Subdivision, Sandy Beach II Subdivision, and Taylor's Landing Subdivision are located within Breckinridge County, Kentucky, and are not subject to any planning and zoning enactments.

Several lot owners in Sandy Beach Subdivision³ (hereinafter referred to as appellees) filed a petition for declaration of rights seeking an adjudication that Sandy Beach Lane was a private roadway for the exclusive use of lot owners in Sandy Beach Subdivision and to prohibit lot owners in both subdivisions (Sandy Beach II and Taylor's Landing) and the public generally from utilizing Sandy Beach Lane. KRS 418.040. In support thereof, appellees cited to a recorded plat of Sandy Beach Subdivision depicting Sandy Beach Lane as the sole ingress and egress for lot owners therein and to oral representations that Sandy Beach Lane was a private road within Sandy Beach Subdivision.

The Carriers are the successor developers of Sandy Beach Subdivision and the developers of Sandy Beach II and Taylor's Landing.⁴ The Carriers were named as defendants in the declaration of rights action and filed an answer and counterclaim.⁵ The Carriers rejected the argument that Sandy Beach Lane was a private road. Rather, they contended that Sandy Beach Lane was a public road freely open to and readily accessible by any member of the general public.

³ Sheila T. Kirchheimer, Thomas Kirchheimer, Rachel S. Cupp, Jimmy R. Cupp, Jack Smith; Rebecca R. Smith; Michele Amstutz, Ann E. Clark, Cecil M. Taylor, Carla S. Love, Danny S. Neely, Evelyn S. Neely, Michael J. Michalak, Penny M. Michalak, T. Alan Claypool, Ralph Pendencygraft, Connie Pendencygraft, R. Michael Tepe, Sheila J. Tepe, Allen W. Amstutz, and Beverly J. Amstutz are the lot owners in Sandy Beach Subdivision that filed the declaration of rights action.

⁴ On March 26, 2002, Regina S. Carrier and Carl Wayne Carrier purchased the unsold lots in Sandy Beach Subdivision and all of the developers' rights from Sandy Beach, Inc. The Carriers also purchased land adjacent to Sandy Beach Subdivision, which was developed as Sandy Beach II and Taylor's Landing.

⁵ There were several other defendants named in the action below; however, the Carriers solely appealed the circuit court's decision.

The legal status of Sandy Beach Lane is further complicated by a one-foot wide strip of land that runs parallel to and directly abuts one entire side of Sandy Beach Lane.⁶ This strip of land was retained by the original developers of Sandy Beach Subdivision. This one-foot strip lies directly between Sandy Beach Lane and both Sandy Beach II and Taylor's Landing; consequently, the one-foot strip physically separates both Sandy Beach II and Taylor's Landing from Sandy Beach Lane. The legal status of the one-foot strip of land is pivotal to the parties' dispute on appeal. As successor developers of Sandy Beach Subdivision, the Carriers granted certain lot owners in Sandy Beach II and Taylor's Landing authority to build driveways over the one-foot strip for the purpose of accessing Sandy Beach Lane. In opposition, appellees claimed the one-foot strip was restricted in use and could not be so utilized.

This matter was heard by the circuit court without a jury, and the circuit court entered written findings of fact and conclusions of law in compliance with Kentucky Rules of Civil Procedure (CR) 52.04. The circuit court concluded that Sandy Beach Lane was a private road for the sole use and benefit of lot owners in Sandy Beach Subdivision. The court also held that the one-foot strip was restricted in use and could not be utilized by lot owners of either Sandy Beach II or Taylor's Landing to access Sandy Beach Lane. This appeal follows.

⁶ The land referred to as the "one-foot wide strip" is actually wider than one foot in some places. The parties and the circuit court referred to it as the "one-foot strip," and we also shall do so throughout this opinion.

We shall initially resolve the legal status of Sandy Beach Lane and then address the legal status of the one-foot strip of land.

SANDY BEACH LANE

As hereinbefore stated, Sandy Beach Lane is located within Sandy Beach Subdivision. The plat for Sandy Beach Subdivision was recorded on August 8, 1990. The plat shows Sandy Beach Lane as the only access to and from Sandy Beach Subdivision. As illustrated upon the plat, Sandy Beach Lane directly abuts all lots in Sandy Beach Subdivision and contains two cul-de-sacs. One cul-de-sac is located on the south-western tip of Sandy Beach Subdivision, and the other is located on the north-eastern tip.⁷ On the Sandy Beach Subdivision plat, Sandy Beach Lane is specifically identified as the “access road” or “30’ access.” No other description or designation of Sandy Beach Lane is found on the plat. The plat does not expressly identify Sandy Beach Lane as a private or public roadway.

On the same date the plat of Sandy Beach Subdivision was recorded in the Breckinridge County Clerk’s Office, (August 8, 1990), Lot 71 in Sandy Beach Subdivision was conveyed by deed to a third party.⁸ The deed was recorded four days later on August 12, 1990, and it specifically referenced the previously recorded plat of Sandy Beach Subdivision.

⁷ The cul-de-sac located on the south-western tip of Sandy Beach Subdivision lies between Lots 21 and 22 in Sandy Beach Subdivision.

⁸ James Franklin (Buddy) O’Donoghue, Charles L. Martin, Friedell Hinton, Barbara Hinton and Donald L. Martin conveyed Lot 71 in Sandy Beach Subdivision to Elsie R. Berry and Ralph Gordon Berry.

After the deed conveying Lot 71 was executed but before such deed was recorded, a Deed of Declaration of Restrictions for Sandy Beach Subdivision (Deed of Restrictions) was recorded on September 10, 1990. The Deed of Restrictions generally referenced Sandy Beach Lane as the “roadway” and provided that each lot owner was required to pay a forty dollar per year maintenance assessment for its upkeep. The Deed of Restrictions also stated:

In the event that a government body assumes responsibility for the maintenance of said road and utilities, the assessment shall be terminated, and all property owners shall grant such government body a forty (40) foot road easement

However, the Deed of Restrictions did not explicitly set forth that Sandy Beach Lane was a private or public roadway. Later, an Amended Deed of Restrictions for Sandy Beach Subdivision was filed but contained no significant changes relevant to our disposition in this appeal.⁹

In this Commonwealth, our Courts have long recognized the principle of common-law dedication of private property to a public purpose. *Volpenheim v. Westerfield*, 216 Ky. 157, 287 S.W. 545 (1926); *Newland v. Schriver*, 230 Ky. 304, 19 S.W.2d 963 (1929); *City of Middlesboro v. Kentucky Utilities Co.*, 237 Ky. 523, 35 S.W.2d 877 (1931); *Howard v. Barton*, 245 Ky. 87, 51 S.W.2d 977 (1932); *Cassell v. Reeves*, 265 S.W.2d 801 (Ky. 1954); *Herron v. Boggs*, 582 S.W.2d 643 (Ky. 1979); *Henry Fischer Builder, Inc. v. Magee*, 957 S.W.2d 303 (Ky. App.

⁹ Wayne and Regina Carrier, as successor developers, filed an Amended Deed of Declaration of Restrictions for Sandy Beach Subdivision on January 16, 2003.

1997); *Nash v. Campbell Co. Fiscal Court*, 345 S.W.3d 811 (Ky. 2011). A dedication of property to the public is broadly defined as “the setting aside of land, or of an interest therein, to the public use.” 23 Am. Jur. 2d *Dedication* § 1 (2002). A common-law dedication is premised upon the express or implied intent of the dedicator to devote his property to a public use and the corresponding public acceptance of such property. 11A McQuillin *Municipal Corporations* § 33.2 *Dedication* (3rd ed. 2010). And, the effect of a common-law dedication is to convey to the public an easement to utilize the dedicated property. *Bluegrass Manor v. Mall St. Matthews Ltd. Partnership*, 964 S.W.2d 431 (Ky. App. 1998).

One prevalent type of common-law dedication is dedication by estoppel. With dedication by estoppel, the intent necessary to dedicate is not the “actual intent” of the dedicator but rather is intent inferred from the actions of the dedicator:

[T]he term ‘intention’ as it is used in the context of this rule is not to be taken in the sense of an actual intent, inasmuch as the basis of a common-law dedication often rests on mere conduct of the owner of land relied on by others to their injury so as to constitute an estoppel against the owner, and effectuate a dedication notwithstanding that there was never in the mind of the owner any actual intent to dedicate, the theory being that the owner must be held to intend the reasonable and necessary consequences of his acts.

Hofgesang v. Woodbine Ave. Realty Co., 414 S.W.2d 580, 585 (Ky. 1967). Thus, the subjective intent of the dedicator is immaterial; rather, it is the objective intent as manifested by the dedicator’s conduct that controls.

A dedication by estoppel may be effectuated by subdividing land into lots and laying out streets, roads, and other open areas on a plat.¹⁰ 23 Am. Jur. 2d *Dedication* § 26 (2002); 3 *American Law of Property: A Treatise on the Law of Property in the United States* 476 (Little, Brown and Company 1952). Such dedication is commonly referred to as dedication by estoppel involving plat. With dedication by estoppel involving plat, the streets, roads, alleys, parks, and other open spaces appearing on a plat of subdivided land are considered to be offered for public use absent an express intent to the contrary appearing on the plat or other recorded instrument. *City of Middlesboro*, 35 S.W.2d 877; *Morrow v. Richardson*, 278 Ky. 233, 128 S.W.2d 560 (1939). Stated differently, the conduct of subdividing lots and setting forth roads on a plat without expressly stating whether said roads are private or public operates as an estoppel against the dedicator and constitutes an offer to dedicate said roads to the public. *Williams v. Poole*, 31 Ky. L. Rptr. 757, 103 S.W. 336 (1907); *Cassell*, 265 S.W.2d 801; *Hofgesang*, 414 S.W.2d 580; *Herron*, 582 S.W.2d 643. Such an offer to dedicate requires neither

¹⁰ The rationale underpinning of a common-law dedication by estoppel involving plat has been set forth as:

[T]he reason for that rule is stated to be that by such acts the owner and dedicator induces the purchasers of lots to believe that the public ways will be kept open for, not only his use, but for all persons whomsoever and as members of the public they may use them, “and having acted upon the faith of the grantors implied representations based upon his conduct, he is equitably estopped as well in reference to the public as to his grantees from denying the existence of the easement, and from appropriating the land so dedicated to a use inconsistent with that represented by the map upon the faith of which the lots are sold.”

City of Middlesboro v. [Kentucky Utilities Co.](#), 237 Ky. 523, 35 S.W.2d 877, 881 (Ky. 1931).

formal public acceptance nor general use by the public; rather, a dedication by estoppel involving plat may be consummated by the selling of a lot with reference to the plat. *Volpenheim*, 287 S.W. 545; *Cassell*, 265 S.W.2d 801; *Houghland v. Perdue*, 361 S.W.2d 291 (Ky. 1962); *Banks v. Wilhoite*, 508 S.W.2d 580 (Ky. 1974). See also *3 American Law of Property: A Treatise on the Law of Property in the United States* 476 (Little, Brown and Company 1952). It must be emphasized that “a dedication effected by platting plus the sale of lots by reference thereto is a complete and irrevocable dedication.” *3 American Law of Property: A Treatise on the Law of Property in the United States* 477 (Little, Brown and Company 1952).

A number of Kentucky cases have accepted application of common-law dedication by estoppel involving plat:

It is a settled principle that when a map or plat of a subdivided tract of land is exhibited or recorded and conveyances are made of the lots by reference thereto, the plat becomes a part of the deeds, and the plan shown thereon is regarded as a unity. And, nothing else appearing, it is held that all the streets, alleys, parks or other open spaces delineated on such map or plat have been dedicated to the use of the purchasers of the lots and those claiming under them as well as of the public.

Cassell, 265 S.W.2d at 802. See also *City of Middlesboro*, 35 S.W.2d 877.

In the case *sub judice*, it is uncontroverted that the plat of Sandy Beach Subdivision depicts Sandy Beach Lane as the sole means of access to and from Sandy Beach Subdivision. The plat does not expressly set forth whether Sandy Beach Lane is a public or private road; it simply identifies Sandy Beach Lane as an

“access road.” In fact, no written instrument expressly delineates whether Sandy Beach Lane is a private or public road. And, it is undisputed that several lots within Sandy Beach Subdivision were sold, and their respective deeds referenced the recorded plat of Sandy Beach Subdivision. The record specifically discloses that Lot 71 was conveyed to a third party in the early 1990s, and the deed of conveyance specifically referenced the plat of Sandy Beach Subdivision.

Based upon the above, we hold that Sandy Beach Lane is a public roadway.¹¹ In so holding, we are convinced that Sandy Beach Lane was dedicated by estoppel to public use through the recording of the Sandy Beach Subdivision plat showing Sandy Beach Lane thereupon and through the selling of lots by reference to the plat. By these two collective acts, the original developers of Sandy Beach Subdivision displayed an objective intent to dedicate Sandy Beach Lane to public use, and such offer was consummated by the selling of lots in which the deeds referenced the Sandy Beach Subdivision plat. These acts constitute a “complete and irrevocable dedication” of Sandy Beach Lane to the public; notwithstanding, the subjective intent of the original developers of Sandy Beach Subdivision.¹² *3 American Law of Property: A Treatise on the Law of Property in the United States* 476 (Little, Brown and Company 1952). Accordingly, the public

¹¹ We observe that a road may be a public road although it is not a county road. Under KRS 178.010, a county road is a public road that has “been formally accepted by the fiscal court of the county as part of the county road system.”

¹² One of the original developers and several lot owners in Sandy Beach Subdivision testified that Sandy Beach Lane was originally intended to be a private road.

enjoys a right of way easement over Sandy Beach Lane that naturally includes an unfettered right to utilize Sandy Beach Lane and its two cul-de-sacs.

ONE-FOOT STRIP

As previously described, a one-foot wide strip of land runs parallel to and directly abuts one entire side of Sandy Beach Lane and physically separates both Sandy Beach II and Taylor's Landing from Sandy Beach Lane. The one-foot strip is illustrated on the Sandy Beach Subdivision plat and referenced in both the Original and Amended Deed of Restrictions for Sandy Beach Subdivision. On the Sandy Beach Subdivision plat, it is specifically noted that the developer "retains" the one-foot strip. The Deed of Restrictions and Amended Deed of Restrictions referenced the one-foot strip; the original Deed of Restrictions specifically provided that the developer retains the one-foot strip.

In its judgment, the circuit court concluded that the one-foot strip was restricted in use and that the Carriers could not grant lot owners in either Sandy Beach II or Taylor's Landing permission to cross it. Yet, there appears no written instrument expressly restricting the use of the one-foot strip. It is important to stress that no deed, plat, restrictive covenant, or contract expressly restricting use of the one-foot strip is found in the record on appeal. The only evidence of such restriction consisted of oral testimony from witnesses. These witnesses essentially testified that the one-foot strip was intended to be restricted in use by the original developer of Sandy Beach Subdivision and was limited in use as it could not be

crossed or built upon by anyone. According to their testimony, the one-foot strip was intended to act as a “buffer between Sandy Beach Lane and any future development.”

It is well-settled that real property may be restricted or limited in use through a restrictive covenant.¹³ A restrictive covenant is a negative covenant in that it “refrain(s) [the covenantee] from doing something” and is generally defined as a limitation on the “permissible uses of land.” Restatement (Third) of Property § 1.3 (2000). A restrictive covenant may be created in a variety of ways, including by express agreement, implication, and estoppel. *Black v. Birner*, 179 S.W.3d 873 (Ky. 2005); Restatement (Third) of Property § 2.1 (2000). And, a restrictive covenant may operate to bind subsequent purchasers of the burdened real property.

To bind subsequent purchasers of real property in this Commonwealth, legal precedent requires subsequent purchasers to have notice of the restrictive covenant which would customarily be found in a title search of the burdened property.¹⁴ In *Oliver v. Schultz*, 885 S.W.2d 699 (Ky. 1994), the Supreme Court held that a subsequent purchaser was bound by a restrictive covenant if it was reduced to writing and recorded so as to place a reasonable attorney performing a title search

¹³ Under Restatement (Third) of Property § 1.2 (2000), it is pointed out that no basic difference exists between a restrictive covenant and a negative easement.

¹⁴ Restatement (Third) of Property § 7.14 (2000) noted that “Kentucky has recently moved from following the majority rule to a modified minority-rule position” and cited as authority *Oliver v. Schultz*, 885 S.W.2d 699 (Ky. 1994). See also *Dukes v. Link*, 315 S.W.3d 712 (Ky. App. 2010).

on notice. Actual notice of the restriction or restrictive covenant was specifically declared insufficient. *Id.* See also *Dukes v. Link*, 315 S.W.3d 712 (Ky. App. 2010). Hence, it is generally understood that an unwritten and unrecorded restriction upon real property will not bind a subsequent purchaser and is only enforceable between the original contracting parties. See *Oliver*, 885 S.W.2d 699; Restatement (Third) of Property § 7.14 (2000).

In the case sub judice, it is uncontroverted that no written or recorded instrument evidencing a restriction of use upon the one-foot strip is found in the record. Rather, the only evidence demonstrating the existence or terms of such restriction consisted of merely oral testimony. Under these facts, any purported restriction on the one-foot strip is presently unenforceable against the Carriers as no such restriction was recorded within the property's chain of title.¹⁵ See *Oliver*, 885 S.W.2d 699.

In sum, we hold that Sandy Beach Lane is a public roadway and that the one-foot strip of land is not restricted in use.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Judgment of the Breckinridge Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

¹⁵ *Oliver*, 885 S.W.2d 699, was limited to prospective application only. Therein, the Court stated that “upon transfer of the property in dispute, the rule of law established by this opinion shall govern.” *Id.* at 702. As the one-foot strip has obviously been transferred, we view *Oliver* as controlling. *Id.*

BRIEFS FOR APPELLANTS:

John E. Spainhour
Shepherdsville, Kentucky

BRIEF FOR APPELLEES:

Donald W. Cottrell
Clay Ratley
Leitchfield, Kentucky