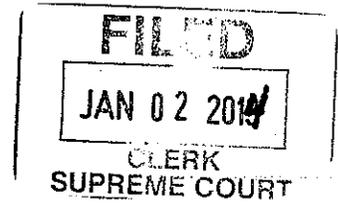




COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-00716-D  
(2009-CA-002163)



SHEILA T. KIRCHEIMER  
THOMAS KIRCHEIMER  
RACHEL S. CUPP  
JIMMY R. CUPP  
JACK SMITH  
REBECCA R. SMITH  
MICHELLE AMSTUTZ  
ANNE 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  
R. MICHAEL TEMPE  
SHEILA J. TEMPE  
ALLEN W. AMSTUTZ  
BEVERLY J. AMSTUTZ

APPELLANTS

V.

REPLY BRIEF FOR APPELLANTS

REGINA S. CARRIER  
CARL WAYNE CARRIER

APPELLEES

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**APPEAL FROM KENTUCKY COURT OF APPEALS**  
**CASE NO. 2009-CA-002163**

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**Donald W. Cottrell**  
**Clay Ratley**  
**Attorneys for Appellants**  
**30 Public Square**  
**Leitchfield, Kentucky 42754**  
**(270) 259-4052 (p)**  
**(270) 259-4804 (f)**  
**clayratley@gmail.com**

The undersigned certifies that a true and accurate copy of the foregoing was mailed via U.S. postage prepaid on this the 31 day of December, 2013 to the following:

Kentucky Court of Appeals  
360 Democrat Drive  
Frankfort, Kentucky 40601

Hon. John E. Spainhour  
Professional Building, Suite One  
200 South Buckman Street  
Shephardsville, Kentucky 40165

Judge Robert A. Miller  
516 Hillcrest Drive  
P.O. Box 245  
Brandenburg, Kentucky 40108.



**DONALD W. COTTRELL**  
**Attorney for Appellants**

## **APPELLANT'S REPLY TO APPELLEE'S BRIEF**

Comes the Appellants, by counsel, and hereby files their reply brief to the Appellee's Brief. Specifically, the Appellants contest several factual assertions made by the Appellee's and misstatements of the law regarding Sandy Beach Lane.

### **ARGUMENT**

#### **I. THE AMENDED RESTRICTIONS FOR SANDY BEACH CANNOT MODIFY PREVIOUS RESTRICTIONS FOR SANDY BEACH**

Appellants, in their brief, are apparently trying to now argue, for the first time ever, that some of the original restrictions for Sandy Beach are no longer in effect due to Amended Restrictions filed by the Carriers after their subsequent purchase. On page 2 of their brief, the Appellee's, in discussing the retention of the one-foot strip, state, "however, such language was omitted from the Amended Restrictions § 17."

The original restrictions for Sandy Beach were filed of record in the Breckinridge County Court Clerk's Office on September 10, 1990 and the Amended Restrictions were filed of record on or about May 11, 2006. Arguably, a lot owner who purchased property after the Amended Restrictions were filed of record would be subject to these later restrictions. However, to argue or even imply that the original deed restrictions and, in turn, the restrictions on the original plat can be negated by the Carriers in filing amended restriction goes against well settled law in the Commonwealth regarding real estate restrictions and common law contract doctrines.

If this Court were to adopt this rationale, then a lot owner like Mike Tempe, who testified that he has owned a lot since 1990, rights could be unilaterally altered by a subsequent developer years if not decades after he purchased his lot.

**II. FRIEDEL HINTON TESTIFIED AT THE MAY 11, 2009 HEARING IN HIS CAPACITY AS DEVELOPER OF SANDY BEACH**

Appellees, in discussing Friedel Hinton's testimony stated, "[h]is objectionable oral assertions and testimony that there would never be land developed adjacent to Sandy Beach were not made by an owner of the development, but rather the owner of a single lot who was trying to sell it to Ms. Kirchheimer." Appellee's Brief, Page 3. This is incorrect. Friedel Hinton testified as to his intentions as developer of Sandy Beach. (09:37:10-15 & 09:38:20) He specifically testified about constructing the one-foot strip of land between Sandy Beach Lane and the O'Donoghue property.

**III. THE O'DONOGHUE'S DID NOT RESERVE A 75' EASEMENT FOR THEMSELVES TO ACCESS SANDY BEACH**

Appellees stated on page 6 of their brief that, "[t]he O'Donoghue's originally reserved the right to traverse Sandy Beach Lane to themselves..." This again is another inaccurate recitation of the facts at hand in this case. As the lower court mentioned in its findings of fact, the James Franklin O'Donoghue heirs, when they conveyed the property to Sandy Beach, Inc. made the following reservation: "[t]hat the Buyers agree to establish in perpetuity, a right of way, or access to the lake (Rough River Reservoir), not less than 75' in width, **which right of way will be for the use of all lot owners**, their heirs and assigns, and for the personal family use of the Grantors which right shall not be assigned." Findings of Fact, Conclusions of Law, Page 7.

This reservation in the deed is clearly for the O'Donoghue family and the lot owners. For the Appellee's to state that the O'Donoghue's originally reserved the

right to traverse Sandy Beach Lane to themselves is completely incorrect. The reservation speaks for itself. Their next assertion that, “such obvious written indication of two separate strips in writing contemplated expanded use of Sandy Beach Lane in the future,” is an incorrect and confused understanding of the facts. Appellee’s Brief, Page 7

On the contrary, the evidence in this case is replete with conclusive proof that Sandy Beach Lane was never intended to be expanded by anyone. The original restrictions granted to the owners the right to convey to a government body an easement over Sandy Beach Lane if they assumed maintenance of it. *See* R. 440-444.

**IV. SANDY BEACH LANE IS A PRIVATE ROADWAY AND SAID EASEMENT CANNOT BE UNREASONABLY ENLARGED BY ADJACENT LOT OWNERS IN UNRELATED SUBDIVISIONS**

Appellee’s request in their brief that this Court ignore the holdings in McBrayer v. Davis, Ky., 307 S.W.2d 14 (1957); Delph v. Daly, Ky. App., 444 S.W.2d 738 (1969); Smith v. Combs, Ky. App., 554 S.W.2d 412 (1977) and Sawyers v. Beller, 384 S.W.3d 107 (Ky. 2012) all because they feel Sandy Beach Lane is a public roadway. They would have you ignore the fact that lot owners have paid a road maintenance fee for the upkeep and maintenance for Sandy Beach for years and the fact that the objective intent of the developers and the lot owners was for Sandy Beach Lane to be private. The Appellees would also have you ignore the written declaration that it was the lot owners right to grant an easement to a government body if and when it took over maintenance of the road. *See* R. 440-444.

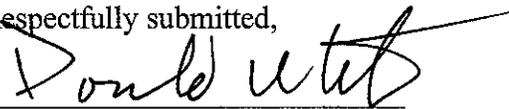
Finally, the Appellees wrongfully contend that “the burden on the roadway initially considered by the developers is not increased by the tying in of driveways

[onto Sandy Beach Lane].” Appellee’s Brief, Page 11. This act would necessarily and unreasonably burden the Appellants as numerous adjacent lot owners in unrelated developments would be allowed to install driveways and not have any responsibilities for the roads upkeep and maintenance.

Further, pursuant to Smith, the lower court has already made a finding that “additional use of Sandy Beach Road by the Defendant property owners, their licensees, invitees and guests ... would constitute an unreasonable burden on the [Appellant’s] easement and the rights to the use of Sandy Beach Lane **AND** was not contemplated by the original owner/developers...” Findings of Fact, Conclusions of Law and Judgment, Page 16.

WHEREFORE, the Appellant’s respectfully request that this Honorable Court reverse the opinion of the Court of Appeals and uphold the lower court’s ruling by finding that adjoining subdivisions cannot unreasonably enlarge the easement on Sandy Beach Lane by installing driveways and that Sandy Beach Lane is a private roadway.

Respectfully submitted,



HON. DONALD W. COTTRELL  
HON. CLAY RATLEY  
ATTORNEY FOR APPELLANTS  
30 PUBLIC SQUARE  
LEITCHFIELD, KENTUCKY 42754  
(270) 259-4052 (P)  
(270) 259-4804 (F)  
dcottrell.law@gmail.com  
clayratley@gmail.com