Circuit Court for Harford County
Case No. C-12-CV-19-000003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0412

September Term, 2020

MID-ATLANTIC COOPERATIVE SOLUTIONS, INC. d/b/a AERO ENERGY

v.

BATTAGLIA HOMES, LLC, et al.

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: September 15, 2022

Gablers Shore, LLC ("Developer") purchased land in Harford County to build a residential community. The Developer entered into an agreement with Mid-Atlantic Cooperative Solutions, Inc. d/b/a Aero Energy ("Aero Energy"), which provided that Aero Energy had the right to install and maintain underground tank piping and distribution systems for propane to the community.

Aero Energy filed suit against lot owners Battaglia Homes, LLC, Sandy Huntington, and Daniel A. Lose and Meghan W. Lose (collectively "Appellees"), contesting that Appellees were violating the agreement and other encumbrances on the land. The Circuit Court for Harford County granted Appellees' motions for summary judgment and dismissed Aero Energy's complaint. This appeal followed.

QUESTIONS PRESENTED

Aero Energy presents one question,[1] which we have recast into four questions as follows:

1. Did the circuit court err in concluding that the UDS Agreement and Easement are not enforceable against Appellees?

2. Did the circuit court err in concluding that the Easement was void for lack of adequate description of the servient estate?

3. Did the circuit court err in concluding that the UDS Agreement violates the Rule Against Perpetuities?

4. Does the doctrine of equitable estoppel require the UDS Agreement and Easement to be enforced as to the Battaglia Homes and Lose lots?

[1] Aero Energy presented the following question: "Did [the circuit court] err by disposing of Appellant's Declaratory Judgment Action via preliminary dispositive motions, rather than allowing the same to proceed to a full evidentiary hearing on the merits?"

We hold that the circuit court did not err in concluding that the UDS Agreement and Easement are not enforceable against Appellees and that the Easement was void. We consequently need not address the third question. We do not address the fourth question as it was not preserved. We affirm the judgment of the circuit court but remand for the court to enter a declaratory judgment consistent with this opinion.

BACKGROUND

Purchasing the Development and Initial Agreements and Easements

On January 17, 2002, Gablers Shore, LLC ("Developer") purchased land in Harford County to build a residential community, known as Gablers Shore ("Development"). On October 20, 2003, the Developer executed an Indemnity Deed of Trust and Security Agreement ("IDOT"), where the Developer granted a first-priority lien to Susquehanna Bank to secure repayment of a promissory note payable to Susquehanna Bank in the amount of $6,600,000.00. The IDOT was recorded on October 23, 2003. The IDOT included numerous representations, warranties, covenants, promises, and agreements, including procedures in the event of default:

> 3.4. FORECLOSURE. Trustees, at the option and the request of Beneficiary, are authorized and shall have the power and duty to sell . . . and Grantor hereby consents to the passage of a decree for the sale of the Trust Property, or any part thereof, at public auction . . . and (the terms of sale being complied with) Trustees shall convey in fee simple to and at the cost of the purchaser the Trust Property so sold, free and discharged of and from all estate, right, title or interest of Grantor, its successors or assigns at law or in equity . . . . If one or more Leases are entered into or recorded subsequent to the recording of this Deed of Trust, or are otherwise

> subordinate to this Deed of Trust, the Trustees, at the direction of Beneficiary, shall sell subject to any one or more of such tenancies that are designated and selected by Beneficiary.

On December 16, 2003, the Developer executed a Right of Way Agreement with the Baltimore Gas and Electric Company ("BGE") so that BGE could "construct, install, reconstruct, operate and maintain electric, gas and communication lines" for the Development. The Right of Way Agreement was recorded on January 9, 2004.

On June 14, 2005, pursuant to a Subdivision Agreement, Harford County granted the Developer the right to subdivide the Development into lots. The Subdivision Agreement was recorded on June 15, 2005. Various subdivision plats, which depicted the lots, easements, and open spaces, were also recorded.

On October 12, 2005, the Developer executed a Right-of-Way Easement with Verizon Maryland, Inc. "to construct, operate, maintain, modify, replace and remove telecommunication and electric systems" for the Development. The easement was recorded on February 17, 2006.

The UDS Agreement and Gas Utility Easement

Aero Energy is a Delaware corporation qualified to conduct business in Maryland. Aero Energy "is in the business of designing and installing localized underground tank piping and distribution systems for propane at the request of developers who wish to add such fuel amenity to a community which is not otherwise served by a natural gas distribution system," or, in other words, an Underground Delivery System ("UDS").

On December 30, 2005, Aero Energy and the Developer entered into an Agreement for Underground Tank Piping and Supply of Propane Gas Services and Security Agreement ("UDS Agreement"). The UDS Agreement was recorded on November 18, 2013. The UDS Agreement stated, in relevant part:

> B. Developer to grant and upon the request of Aero shall grant: i) an exclusive easement in perpetuity to Aero for the installation, operation, maintenance, repair and replacement of an underground distribution system for the supply of propane gas to Lots and improvements to Lots within the Development; ii) an exclusive right in perpetuity commencing December 30, 2005 of Aero to supply propane gas to Lots and improvements to Lots within the Development; and iii) an easement in perpetuity in favor of Aero to provide an area within the Development for the placement and location of propane storage tanks to supply the entire propane utility needs of the Development.

The UDS Agreement placed responsibility on the Developer to record the UDS Agreement and provide notice to purchasers:

> H. The Developer further agrees to adopt and record in the form of a Declaration of Restrictions and/or other recordable instrument upon the request of and as approved by Aero, binding provisions to run with the land which compel all property owners and/or occupants for the term of this Agreement to use, utilize and pay for the propane supplied by Aero to the individual Lots, and to pay the prevailing rates and charges for propane delivered by Aero for each Lot's consumption of propane and to prohibit homes in the Development the use or consumption of any energy source such as natural gas, oil, electricity, except propane gas, to operate or energize any heating system. Provided however, electricity is permitted for use in cooking appliances, such as ovens and stoves and cleaning appliances such as dishwashers, clothes washers and dryers.

> I. The Developer further agrees to provide notice to prospective purchasers of, and to those who have already purchased Lots within the Development of the requirements imposed upon each Lot owner within the Development by this Agreement.

(footnote omitted). The UDS Agreement also provided for automatic transfer of the Developer's obligations and rights:

> 18. Assignment of Developer's Obligations and Rights. The rights and obligations of the Developer hereunder are automatically assigned and transferred to the individual Lot owners who acquire title to the Lots in the Development.
>
> . . . .
>
> 23. Binding Effect. This Agreement shall be binding upon the parties hereto, and on their successors and assigns. It is specifically recognized that by taking title to a unit in the Development, each Lot owner taking title to a Lot in the Development is bound to the terms and provisions of this Agreement and agrees to the terms hereof as if incorporated into the deed transferring ownership of a lot in the Development to the designated grantee.
>
> . . . .
>
> 27. Recordation. This Agreement shall be executed in recordable form. This Agreement shall be recorded in the Office of the Recorder of Deeds, in and for the County in which the Development is located, and the provisions of this Agreement shall operate as a restrictive covenant binding all lands within the Development as such lands are described in the plat of record in the County in which the Development is located, recorded in Pl[a]t Book 119 at page[s] 4-6.

On March 29, 2007, to further effectuate the supply of propane to the lots, the Developer and Aero Energy entered into a Gas Utility Easement ("Easement") for "a perpetual Easement for the purpose of delivery of [p]ropane [g]as [u]tilities to residents"

of the Development and a temporary construction easement. The Easement included a reference to "Exhibit A" for a description of the property, and to "Exhibit B" for a "specific description of the Main Utility Easement Area." Exhibit A described the property as:

> Lots Numbered 1 through 50 and common community open space [w]ithin the Subdivision known as River Landing at Gablers Shore as per plats thereof recorded among the plat records of Harford County, Maryland. Entire property referred to as Tax Map Reference: Map #66 Parcel 224.

Exhibit B was to include a "drawing attached," but no such drawing was recorded with the Easement.[2] The Easement also stated that "[t]he Main Utility Easement Area shall be located in the roads in the Subdivision as set forth on Exhibit A and such areas of the Subdivision's open space as are expressly described on Exhibit B." The Easement was recorded on November 18, 2013.

Early Conveyances and Foreclosure

From 2006 to 2008, the Developer transferred title to numerous lots within the Development.[3] On March 7, 2008, the Developer conveyed Lots 25, 26, 27, 28, and 29 to Hardy Credit Co., which was recorded on March 19, 2008.

[2] The Easement was recorded at Liber 10565 folio 462. The label for Exhibit B appears at Liber 10565 folio 468. The next page of the land records, Liber 10565 folio 469, however, is the first page of the UDS Agreement.

[3] Lots 10, 11, 14, 19, 37, 38, 45, 47, 48, 49, 50 were sold to private landowners who are not parties to this appeal.

The Developer defaulted on one or more of its obligations with Susquehanna Bank, triggering the foreclosure provisions of the IDOT. On March 10, 2009, a foreclosure action was filed in the Circuit Court for Harford County. Thirty-four unimproved lots were put up for sale at auction on July 27, 2010. The advertisement for the auction included the following information:

> The payment of all senior liens . . . which are not extinguished as a matter of law by the foreclosure sale, shall be the sole responsibility of the purchaser and shall be paid for by the purchaser at settlement. . . .
>
> The Lots are being sold in an "AS IS" condition and without any warranties or representations, either express or implied, of any kind as to the nature, condition or description of the Lots or any improvements thereon. The Lots are being sold subject to . . . (d) any senior liens, encumbrances, easements, conditions, agreements, restrictions, declarations and covenants of record affecting the Lots.

The circuit court ratified the foreclosure on September 28, 2010. Pursuant to the foreclosure sale, Daniel A. Lose and Meghan W. Lose purchased Lots 16 and 17 on October 29, 2010. The Lose deed was recorded on December 8, 2010.

The Declaration

On September 1, 2011, "Declaring Owners"[4] in the Development entered into the Perryman Pointe Declaration of Covenants, Conditions and Restrictions ("Declaration"). The Declaration was recorded on April 19, 2013.

[4] The Declaring Owners "are the owners of portions of certain real property" in the Development. The Declaring Owners, who included both individual landowners and entities, owned several open space parcels and Lots 1-9, 11-15, 20-44, and 46-50. Battaglia Homes was one of the Declaring Owners.

The Declaration "subject[ed] the real property described in Exhibit A to the covenants, conditions, restrictions, easements, charges, liens, hereinafter set forth, each and all of which are for the benefit of the said property and the subsequent owners thereof." Except for any Excluded Lots,[5] the covenants and restrictions were to "run with such real property and be binding on all parties having any right, title or interest in all or any portion of the real property." This included "an easement to the extent necessary . . . to enter upon or have a utility company enter upon any portion of the [Development] . . . to repair, replace[,] and generally maintain" the "sanitary sewer and water, storm drains, downspouts, yard drains, cable television, electricity, gas and telephone lines, etc. and facilities" that have been installed in the Development.

The Declaration also included the following relevant provisions:

> *Section 3.7.* *Prior Agreement.* Each Lot may entitled [sic] to be provided propane gas service, by Aero Energy according to the [UDS Agreement], a copy of which is in the records of the Association. Any "User fees" called for under the aforesaid agreement shall be billed directly to the individual Lot Owners. The Association shall have the power to evaluate proposed supply of propane/gas to the Community.
>
> . . . .
>
> *Section 12.17.* *Incorporation by Reference on Resale.* In the event any Owner sells or otherwise transfers any Lot, any deed purporting to effect such transfer shall contain a provision incorporating by reference the covenants, restrictions, servitudes, easements, charges and liens set forth in this Declaration.

[5] "Excluded Lot(s)" included "lots 10, 16 (which includes old lot 17), 19 and 45 as depicted on the Development Plan."

. . . .

> *Section 12.19. Perpetuities.* If any of the covenants, restrictions, or other provisions of this Declaration shall be unlawfully void, or voidable for violation of the rule against perpetuities, then such provision shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England.

Execution pages for several of the Declaring Owners were "set forth in separately executed documents entitled Joinder of Lot Owner To Declaration" ("Joinder"). Via the Joinder, the Declaration was incorporated into the Declaring Owners' deeds. The Joinder provided, in pertinent part:

> C. LOT OWNER acknowledges that it was provided with a draft of [the] Declaration . . . that was to encumber LOTS in the DEVELOPMENT, but the draft Declaration was not executed and recorded prior to LOT OWNER closing upon the LOT. LOT OWNER and other owners of LOTS in the Development have finalized the [Declaration], dated as of September 1, 2011 to which this JOINDER is attached . . . and intend to record such DECLARATION among the Land Records of Harford County.
>
> D. LOT OWNER desires to subject his LOT to the provisions of the DECLARATION and become a member of the ASSOCIATION, such that the LOT will be subject to and encumbered by the provisions of the DECLARATION, and this JOINDER is executed and delivered for such purposes.
>
> . . . .
>
> Section 3. Miscellaneous. This JOINDER: (a) shall be binding upon and shall inure to the benefit of the LOT OWNER, the parties to the DECLARATION, and their respective heirs, executors, administrators, personal and legal representatives, successors, and permitted assigns . . . .

Battaglia Homes was one of the Declaring Owners under the Declaration. On December 9, 2011, 84 Financial L.P. f/k/a Hardy Credit Co. conveyed Lots 25, 26, 27, 28, and 29 to Battaglia Homes. The deed was recorded on January 4, 2012. Battaglia Homes signed the Joinder on March 16, 2012, which was recorded with the Declaration.

Battaglia Homes conveyed several of its lots to various property owners. On December 10, 2012, Battaglia Homes conveyed Lot 27 to Sandy Huntington. The deed was recorded on April 22, 2013. On August 7, 2014, Battaglia Homes conveyed Lot 25 to Mark Varady and Christine Varady, which was recorded. Battaglia Homes also conveyed Lot 29 to Ryan Thomas Farrell and Lauren Battaglia Farrell on March 16, 2015. The Farrells subsequently conveyed Lot 29 to Charles Rajca and Valerie A. Rajca on January 17, 2017, which was also recorded. Ms. Huntington, the Varadys, the Farrells, and the Rajcas were not Declaring Owners, and there was no evidence in the record that they signed the Joinder.

The Loses were also not Declaring Owners under the Declaration, and there was no evidence that the Loses signed the Joinder. Instead, the Loses' lots, Lots 16 and 17, are listed among the Excluded Lots. The Declaration further describes the property rights of the owners of Excluded Lots:

> *Section 3.9. Excluded Lots; Possible Future Participation.*
> (a) At the time of the execution of this Declaration, the owners of the Excluded Lots have not signed this Declaration and, accordingly, the Excluded Lots are not bound or benefitted by the provisions of this Declaration, nor are they members of the Association, nor are they entitled to use Common Areas. . . .

In December 2016, Bob Ward New Homes at Harford County, LLC took title to 31 lots[6] and open space parcels within the Development.

Procedural History

On April 1, 2019, Aero Energy filed an amended[7] complaint in the Circuit Court for Harford County against defendants Battaglia Homes, Ms. Huntington, the Loses, the Varadys, and the Rajcas. The crux of Aero Energy's complaint was that the UDS Agreement was a covenant that ran with the land and that the UDS Agreement bound each defendant.

The amended complaint alleged two counts. Count I sought a declaratory judgment against Battaglia Homes, Ms. Huntington, the Varadys, and the Rajcas. In Count I, Aero Energy alleged that Lots 25, 26, 27, 28, and 29 "are all encumbered by, and subject to . . . the UDS Agreement, Easement[,] and [Declaration]" and that the lots had been improved in violation of the encumbrances. Aero Energy asked the court for a declaratory judgment to declare that the Lots are bound by the encumbrances and to order Battaglia Homes, Ms. Huntington, the Varadys, and the Rajcas to take all actions to remedy the violations. Count II similarly sought a declaratory judgment against the Loses. Aero Energy alleged that Lots 16 and 17 were encumbered by the UDS Agreement and the Easement and requested that the court declare that the Lots were bound by the encumbrances.

[6] The 31 lots included Lots 1-9, 12, 15, 18, 20-24, 30-36, 39-44, and 46.

[7] The initial complaint sought to quiet title and damages for breach of contract.

Ms. Huntington, the Rajcas, and the Varadys each filed a motion to dismiss.[8] Battaglia Homes, Ms. Huntington, the Loses, the Varadys, and the Rajcas each filed motions for summary judgment. Collectively, the defendants argued the following: (1) "that the UDS agreement [was] not enforceable [because] it violates the Rule Against Perpetuities," (2) "that Aero [did] not have standing to enforce the [Declaration]," (3) that the Easement was "void for lack of an adequate description of the servient estate," and (4) "that their lots are not bound by the UDS Agreement or the . . . Easement."

On June 5, 2019, the circuit court conducted a hearing and held the matter sub curia. On May 20, 2020, the court issued its order and accompanying opinion. The circuit court found that there was no genuine dispute of material fact and that the defendants were entitled to judgment as a matter of law. First, the court found that the UDS Agreement and Easement were not enforceable because "Maryland's recording statutes accord a higher priority to the [d]efendants' deeds." The court reasoned that, for a restrictive covenant to be enforceable, Maryland law requires: (1) a restrictive covenant to touch and concern the land; (2) the parties to intend the covenant to run with the land; (3) privity of estate; and (4) the covenant to be in writing. The court determined that although the UDS Agreement and Easement fulfilled three requirements, the parties did not have privity of estate. Pursuant to Real Property §§ 3-201 and 3-203, "every purchaser [must have] notice of the deed" and priority is granted to the first recorded

[8] Ms. Huntington also filed a counter claim, which was later dismissed with prejudice.

deed. The court stated that the effective date that would put the defendants on notice of the UDS Agreement and Easement was November 18, 2013;[9] the defendants, however, did not have notice because each purchased their lots and recorded their deeds before November 18, 2013. The court also rejected Aero Energy's contention that the defendants were on notice by Section 3.7 of the Declaration.

Second, the court found that the UDS Agreement violated the rule against perpetuities. The court concluded that the UDS Agreement was void and unenforceable because it provided "an exclusive easement in perpetuity" and Aero Energy's "interest ha[d] no time limit." Third, the court found that the Easement was "void for lack of an adequate description of the servient estate" as required by Real Property § 4-401(a)(1), which provides that "a description of the property [must be] sufficient to identify it with reasonable certainty." Aero Energy did "not provide[] any facts to dispute the [d]efendants' claim that a search of plat records . . . shows there is no . . . subdivision as described" by the Easement. Therefore, the court found that the description failed the requirements in § 4-401 and was void and unenforceable. Accordingly, the court granted Battaglia Homes', the Loses', Ms. Huntington's, the Varadys', and the Rajcas' motions for summary judgment and dismissed Aero Energy's amended complaint with prejudice.

[9] The court wrote the effective date in its opinion as November 13, 2018. This was a typographical error and does not affect the analysis.

Aero filed a second notice of appeal on July 2, 2020.[10] The Rajcas and the Varadys are not parties to this appeal.

STANDARD OF REVIEW

"The standard of review of a trial court's grant of a motion for summary judgment . . . is de novo." *Messing v. Bank of Am.*, 373 Md. 672, 684 (2003). We "independently [review] the record to determine whether the parties generated a dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law." *Hogan v. Hogans Agency, Inc.*, 224 Md. App. 563, 568 (2015) (quoting *Hamilton v. Kirson*, 439 Md. 501, 522 (2014)). "We review the record in the light most favorable to the non-moving party." *Hogan*, 224 Md. App. at 568. "To defeat a properly supported motion for summary judgment, . . . the non-moving party must produce admissible evidence demonstrating a dispute." *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 31 (2021). "[A]n appellate court ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court." *Bailey v. City of Annapolis*, 252 Md. App. 83, 120 (2021) (alteration in original) (quoting *Ashton v. Brown*, 339 Md. 70, 80 (1995)). In this case, there are no genuine disputes of material fact and we decide all issues as a matter of law.

[10] Aero Energy's first notice of appeal was premature because, at the time, Ms. Huntington's counter claim had not been resolved. Once the counter claim was dismissed with prejudice, Aero Energy filed its second notice of appeal.

DISCUSSION

I. THE UDS AGREEMENT AND EASEMENT ARE NOT ENFORCEABLE AGAINST APPELLEES.

Aero Energy argues that the UDS Agreement is a covenant that runs with the land and thus "binds all subsequent lot purchasers regardless of whether, when, or if it, or some other memorandum, was recorded in the land records." Accordingly, Aero Energy asserts that Appellees' lots are subject to the UDS Agreement. Aero Energy also contends that Battaglia Homes' execution of the Joinder to the Declaration obligates Battaglia Homes, and, in turn, Ms. Huntington, to comply with the encumbrances because the Declaration incorporated the UDS Agreement and Easement by reference.

Conversely, Appellees argue that the UDS Agreement and the Easement are unenforceable pursuant to Maryland's recording statutes. They contend that each of their deeds were recorded prior to and that they did not have record notice of the UDS Agreement and the Easement. Appellees also assert that they did not have actual notice of the unrecorded UDS Agreement or Easement. Separately, Ms. Huntington and Battaglia Homes contend that the Declaration and Joinder do not obligate them to comply with the UDS Agreement or Easement.

A. Covenant Running With the Land

For a covenant to run with the land, the following four elements must be met: "(1) the covenant 'touch[es] and concern[s]' the land; (2) the original covenanting parties intend the covenant to run; and (3) there [is] some of privity of estate and that (4) the covenant is in writing." *Cnty. Comm'rs of Charles Cnty. v. St. Charles Assocs., LP*, 366

Md. 426, 450 (2001) (quoting *Mercantile Safe-Deposit & Tr. Co. v. Mayor & City Council of Balt.*, 308 Md. 627, 632 (1987)). "[C]ovenants creating restrictions are construed strictly in favor of the freedom of land, and against the person in whose favor they are made." *Piney Orchard Cmty. Ass'n v. Piney Pad A, LLC*, 221 Md. App. 196, 206 (2015) (quoting *McKenrick v. Sav. Bank of Balt.*, 174 Md. 118, 128 (1938)).

We, however, need not address whether the UDS Agreement is a covenant running with the land because it is not enforceable pursuant to Maryland's recording statutes as discussed in the next section. *See Cnty. Comm'rs of Charles Cnty.*, 366 Md. at 457 (determining that recorded covenant ran with the land, but noting that an unrecorded contractual agreement was not a covenant running with the land); *Gunby v. Olde Severna Park Improvement Ass'n*, 174 Md. App. 189, 249-50 (2007) (citing *Cnty. Comm'rs of Charles Cnty.*, 366 Md. at 443) (recognizing that where parties intended a covenant to run with the land, "a court will effectuate that intent as to all purchasers with constructive notice of the restrictions").

B. Recording Statutes and Actual Notice

The purpose of Maryland's recording statutes is to provide "notice to purchasers, mortgagors, lien holders and the like, of the prior conveyances of, or encumbrances on, the property of a particular person." *Greenpoint Mortg. Funding, Inc. v. Schlossberg*, 390 Md. 211, 230 (2005). Real Property § 3-201 provides:

> The effective date of a deed[11] is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgement, if any, or the date stated on the deed, whichever is later. Every deed, *when recorded*, takes effect from its effective date as against the grantor, his personal representatives, *every purchaser with notice of the deed*, and every creditor of the grantor with or without notice.

(emphasis added). In addition, Real Property § 3-203 provides:

> Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:
>
> (1) Accepted delivery of the deed or other instrument:
>
> (i) In good faith;
>
> (ii) Without constructive notice under § 3-202;[12] and
>
> (iii) For a good and valuable consideration, and
>
> (2) *Recorded the deed first*.

(emphasis added).

"[O]ne who purchases real property without notice of prior equities is protected as a bona fide purchaser for value." *Wash. Mut. Bank v. Homan*, 186 Md. App. 372, 394 (2009) (quoting *Frederick Ward Assocs. v. Venture, Inc.*, 99 Md. App. 251, 256 (1994)). A bona fide purchaser is one who (1) gave value for the property, (2) acted in good faith, and (3) did not have "notice or knowledge of any infirmity in the title." *Wash. Mut.*

[11] The UDS Agreement and the Easement qualify as a "deed" under § 3-201, which "includes any deed, grant, mortgage, deed of trust, lease, assignment, and release, pertaining to land or property or any interest therein or appurtenant thereto, including an interest in rents and profits from rents." Md. Code Ann., Real Prop. § 1-101(c).

[12] Real Property § 3-202 provides: "If a grantee under an unrecorded deed is in possession of the land and his possession is inconsistent with the record title, his possession constitutes constructive notice of what an inquiry of the possessor would disclose as to the existence of the unrecorded deed."

Bank, 186 Md. App. at 395 (quoting *People's Banking Co. of Smithsburg v. Fid. & Deposit Co.*, 165 Md. 657, 664 (1934)). "[A]n easement is not binding on a subsequent bona fide purchaser of the servient estate if he purchases without notice, either actual or constructive, of the easement." *Kiler v. Beam*, 74 Md. App. 636, 641 (1988).

When an instrument is recorded, it "provides third parties with constructive notice of the [encumbrances on] the property and establishes priority of such interests based on the date of recordation." *Shelter Senior Living IV, LLC v. Baltimore Cnty.*, 251 Md. App. 129, 142-43 (2021) (citing Md. Code Ann., Real Prop. §§ 3-201, 3-203); *see also McClure v. Montgomery Cnty. Plan. Bd. of Maryland-Nat'l Cap. Park & Plan. Comm'n*, 220 Md. App. 369, 384 (2014) ("[C]onstructive notice exists where he would be 'bound by every express encumbrance on his property which he could have found in the records, even if it [were] not in the direct chain of title.'" (second alteration in original) (quoting *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 177 n.12 (2011))). "For purposes of [Maryland's] recording statute[s], an easement must be recorded among the land records of the county in which the land affected is located." *Beins v. Oden*, 155 Md. App. 237, 243 (2004) (concluding that a restrictive covenant not recorded in the direct chain of title to the servient estate, but recorded in the chain of title of the dominant estate, was enforceable against a subsequent purchaser). "Constructive notice is notice presumed as a matter of law." *Windesheim v. Larocca*, 443 Md. 312, 327 (2015).

"[I]f a purchaser has actual knowledge of 'prior equities or unrecorded interests' on a property, . . . the purchaser is not entitled to bona fide purchaser status, and takes the

property subject to the unrecorded prior equities." *Sharp v. Downey*, 197 Md. App. 123, 164-65 (2010) (quoting *Fertitta v. Bay Shore Dev. Corp.*, 266 Md. 59, 72-73 (1972)), *vacated on other grounds*, 428 Md. 249 (2012). Actual notice exists where the purchaser "would be directly aware of an encumbrance of his property." *McClure*, 220 Md. App. at 384; *see, e.g.*, *Turner v. Brocato*, 206 Md. 336, 355-56 (1955) (concluding that actual notice existed where appellee drove by sign posted on the property, which advertised the development as a highly restricted development, several thousand times). "Actual notice is either express or implied." *Windesheim*, 443 Md. at 327. "[E]xpress notice 'is established by direct evidence' and 'embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated.'" *Id.* (quoting *Poffenberger v. Risser*, 290 Md. 631, 636-37 (1981)). Implied notice, or inquiry notice, "is notice implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" *Id.* (quoting *Poffenberger*, 290 Md. at 637). In other words, "inquiry notice is 'circumstantial evidence from which notice may be inferred.'" *Id.* (quoting *Poffenberger*, 290 Md. at 637).

The UDS Agreement and the Easement are unenforceable against Appellees because each Appellee was a bona fide purchaser, and their deeds have a higher priority pursuant to § 3-203. While the effective dates of the UDS Agreement (December 30, 2005) and the Easement (March 29, 2007) are prior to the effective dates of Appellees'

deeds,[13] the UDS Agreement and the Easement do not take priority because Appellees' deeds were recorded first:

1. The Loses' deed was recorded on December 8, 2010.
2. Battaglia Homes' deed was recorded January 4, 2012.
3. Ms. Huntington's deed was recorded April 22, 2013.
4. The UDS Agreement and the Easement were both recorded on November 18, 2013.

Because the UDS Agreement and the Easement were not recorded until November 18, 2013, Appellees did not have constructive notice of the encumbrances.

In addition, Aero Energy did not present evidence to generate a genuine dispute of material fact that Appellees had actual notice of the encumbrances to survive summary judgment. In its brief's Statement of Facts, Aero Energy suggests that Appellees had inquiry notice of the encumbrances and cites to the subdivision plat establishing the community, which was recorded prior to Appellees' deeds. Aero Energy contends that "[t]he area that would be designated as [Aero Energy]'s community propane storage tank farm is depicted on the Plat at the entrance of the community along the only means of

[13] Aero Energy asserts that "there was a material dispute of fact regarding the effective dates[s]" of the UDS Agreement, Easement, and Declaration. We disagree. Pursuant to Real Property § 3-201, the effective date is "presumed to be the date of the last acknowledgement, if any, or the date stated on the deed, whichever is later." Accordingly, the effective date of the Loses' deed was October 29, 2010, Battaglia Homes' deed was December 9, 2011, and Ms. Huntington's deed was December 10, 2012. The effective dates, however, are irrelevant because priority is established by the date the document is recorded. *See* Real Prop. §§ 3-201, 3-203.

ingress and egress, to wit: Marina Avenue." Aero Energy's counsel added the words "tank enclosure" on the subdivision plat for "clarity." Without citing to the record, Aero Energy also states that every lot owner is required to drive by a fenced area of 4,000 square feet and displays a sign that reads "Perryman Pointe Station Aero Energy." In Aero's view, "[i]t is simply inconceivable that any of the Appellees could credibly claim that they did not, at least, have inquiry notice of [Aero Energy]'s tank farm which served their community."

First, the subdivision plat does not depict a "propane storage tank farm." Aero Energy's counsel added the words "tank enclosure" for "clarity" in an empty rectangle that is otherwise nondescriptive. This purported description by Aero Energy's counsel is not supported by any evidence in the record. And there is no evidence that the area contained a propane tank at the time Appellees purchased their lots.

Second, there is no evidence in the record to support Aero Energy's claim that a 4,000 square foot fenced area with a sign stating "Perryman Point Station Aero Energy" existed when Appellees purchased their lots. In Ms. Huntington's Response to Aero Energy's First Request for Admissions, Ms. Huntington admitted that "there is a small fenced area on Marina Avenue," which is not near her property, but when she purchased her lots, she "did not know what the fenced area was or what it was used for, nor could she fully see inside the fenced area." There is no evidence of the fenced area's dimensions or even a picture of the fenced area. In the Loses' Response to Aero Energy's First Request for Admissions, the Loses also admit the fenced area exists but

that it is not near their lots. In their response, the Loses also stated that "the sign appeared approximately 2–3 years ago" in either 2016 or 2017, which was after Appellees purchased their lots. Aero Energy did not admit any evidence that the sign existed on the fenced area before or when Appellees purchased their lots.

Furthermore, Ms. Huntington denied knowledge of the UDS Agreement, Easement, and Declaration in her affidavit. The Loses similarly denied knowledge of the UDS Agreement in their Response to Aero Energy's First Request for Admission. As to Battaglia Homes, Aero Energy alleged in its amended complaint that it "advised Battaglia [Homes] of its violations of the UD[S] Agreement and demanded that it immediately rectify such violations and refrain from future violations." In a letter, dated August 20, 2013, Aero Energy informed Battaglia Homes that the "development is deed restricted" and Battaglia Homes was violating the encumbrances. This letter, however, is not sufficient to raise a dispute of fact regarding actual notice because the letter is dated after Battaglia Homes purchased its lots. Aero Energy does not direct us to any other evidence suggesting that Appellees had actual knowledge of the UDS Agreement or Easement when they purchased their lots.

Each Appellee accepted their deeds in good faith, purchased their property without notice and for valuable consideration,[14] and recorded their deeds first. Therefore, the

[14] Appellees paid the following sums as consideration: Battaglia Homes paid 84 Financial LP $300,000, Ms. Huntington paid Battaglia Homes $100,000, and the Loses paid the trustees $100,000.

court did not err by concluding that the UDS Agreement and the Easement were not enforceable against Appellees.[15]

C. The Declaration and Joinder

The circuit court concluded that the Joinder "is not sufficient to defeat the requirement of § 3-203(2)[,] which gives priority to a deed recorded first in time." Aero Energy argues that it was legally incorrect for the circuit court to conclude that the Joinder did not subject Battaglia Homes' lots, and, in turn, Ms. Huntington's lots, to the UDS Agreement and Easement. Without citing to the record or any supporting law, Aero Energy contends that "the UDS Agreement and Easement were incorporated by reference" into the Declaration.[16] According to Aero Energy, Battaglia Homes is bound by the UDS Agreement and Easement because (1) the Joinder subjects Battaglia Homes' lots to the Declaration and (2) the Declaration and Joinder were recorded prior to Battaglia Homes' deed. Aero Energy also asserts that Ms. Huntington had constructive notice of the UDS Agreement and Easement because the Declaration was also recorded prior to her deed.

[15] As an alternative to the argument regarding Maryland's recording statutes, the Loses argue that the foreclosure sale extinguished all restrictions that the UDS Agreement and Easement imposed on their lots. Because we conclude that the court did not err in granting summary judgment based on the recording statutes, we need not consider the foreclosure argument.

[16] We note that it is not this Court's job to "(1) search the record on appeal for facts that appear to support a party's position, or (2) search for the law that is applicable to the issue presented." *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 618 (2011).

Battaglia Homes and Ms. Huntington dispute Aero Energy's arguments about the applicability of the Declaration and the Joinder. Both Battaglia Homes and Ms. Huntington argue that the Declaration "does not obligate any party to comply with the UDS Agreement or to the Easement" and merely provides that each lot "may" be "entitled to be provided propane gas service." Ms. Huntington additionally argues that the Declaration does not incorporate the UDS Agreement and the Easement.

In construing an agreement, we follow the objective law of contract interpretation. *Garfink v. Cloisters at Charles, Inc*., 392 Md. 374, 392 (2006). A court "must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Id*. (quoting *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985)). Language in an agreement "is ambiguous if it is susceptible to more than one meaning to a reasonably prudent person." *Arthur E. Selnick Assocs., Inc. v. Howard County*, 206 Md. App. 667, 682 (2012). If the "language is clear and unambiguous on its face, the plain meaning of the words used shall govern without the assistance of extrinsic evidence." *Id.* (quoting *Drolsum v. Horne*, 114 Md. App. 704, 709 (1997)).

Initially, we note that Aero Energy's claim that the Declaration and Joinder were recorded prior to Battaglia Homes' deed is incorrect. Battaglia Homes signed the Declaration on September 1, 2011 and signed the Joinder on March 16, 2012; both were recorded on April 19, 2013. Battaglia Homes signed its deed on December 9, 2011 and

recorded it on January 4, 2012, which was prior to when the Declaration and Joinder were recorded on April 19, 2013.

The Declaration and Joinder do not subject Battaglia Homes' lots to the UDS Agreement or Easement. The Joinder does not reference the UDS Agreement or Easement. Aero Energy cites to Paragraphs C and D and Section 3 of the Joinder, which instead refer to the Declaration. Paragraph C states that Battaglia Homes acknowledged that it was provided with a draft of the Declaration, which had yet to be executed and recorded, and Paragraph D states that Battaglia Homes' lots "shall be subject to and encumbered by all of the provisions of the DECLARATION." Section 3 states that the Joinder "shall be binding upon and shall insure to the benefit of [Battaglia Homes], the parties to the DECLARATION, and their respective heirs, . . . successors, and permitted assigns."

The Declaration does not mention the Easement. Instead, the Declaration binds the parties to the "covenants, conditions, restrictions, easements, charges, liens, hereinafter set forth." It reserved easements, unrelated to the Easement at issue, for lot owners and the homeowners association. For example, such easements included an easement related to common areas and an easement to repair, replace, or maintain already installed water and sewer, electricity, gas, cable television, or telephone lines.

While the Declaration mentions the UDS Agreement, it does not obligate Battaglia Homes to comply with the UDS Agreement. Section 3.7 of the Declaration provides that "[e]ach Lot *may* [sic] entitled to be provided propane gas service, by Aero Energy

according to the 'Agreement For Underground Tank Piping And Supply Of Propane Gas Services And Security Agreement,' [i.e., the UDS Agreement,] a copy of which is in the records of the Association." (emphasis added). The use of "may" does not create an obligation, but an option; a reasonable person would not consider "may" binding. *See Bd. of Physician Quality Assurance v. Mullan*, 381 Md. 157, 166 (2004) (stating that the "[t]he word 'may' is generally considered to be permissive, as opposed to mandatory, language"). Thus, the Declaration and Joinder do not obligate Battaglia Homes to comply with the UDS Agreement or Easement.

And while the Declaration was recorded prior to Ms. Huntington's deed, Ms. Huntington did not have constructive notice of the UDS Agreement and Easement as contended by Aero Energy. Ms. Huntington's deed and chain of title do not reference the Declaration.[17] And, as previously discussed, the UDS Agreement and Easement were recorded after Ms. Huntington's deed; thus, they are not binding on her property.

[17] Aero Energy additionally asserts that Battaglia Homes was required to provide any subsequent purchasers, i.e., Ms. Huntington, with a copy of the Declaration pursuant to § 11B-107 of the Real Property Article and contends that "whether, and to what extent Ms. Huntington had, or reasonably should have had notice of the Encumbrance Documents was a factual determination that should not have been resolved via summary judgment." We disagree. "[T]o defeat a defendant's motion for summary judgment, the opposing party must show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence." *Davis v. Regency Lane, LLC*, 249 Md. App. 187, 203-04 (2021) (alteration in original) (quoting *Hamilton*, 439 Md. at 522). "There must be evidence upon which the jury could reasonably find for the plaintiff." *Id.* (quoting *Hamilton*, 439 Md. at 523). Here, Aero Energy, as the party opposing summary judgment, did not present evidence that there was a material fact in dispute as to actual notice. Aero Energy did not present evidence as to whether Battaglia Homes provided Ms. Huntington with a copy of the Declaration when she purchased her

D. Declaratory Judgment

Aero Energy further contends that "[r]arely is it appropriate for the lower court to grant summary judgment in regard to a complaint for declaratory relief" and that it could only issue a declaratory judgment after a full evidentiary hearing, which did not occur. We disagree.

In Maryland, "a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty giving rise to the proceeding." Md. Code Ann., Cts. & Jud. Proc. § 3-409(a). Declaratory relief should not be granted if it will not terminate a controversy or if another remedy is "more effective or appropriate." *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 485 (2004) (quoting *Haynie v. Gold Bond Bldg. Prods.*, 306 Md. 644, 651 (1986)); *see also GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 254 Md. App. 638, 663 (2022) (noting that a court should dismiss a claim for a declaratory judgment "only when the plaintiffs have no right to a declaration at all—even a declaration that they are wrong," such as where the issue is not justiciable or the plaintiff lacks standing).

Contrary to Aero Energy's contentions, it is well established that courts are permitted "to resolve matters of law by summary judgment in declaratory judgment actions." *Piney Orchard Cmty. Ass'n*, 221 Md. App. at 206 (quoting *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 651-52 (2012)) ("[I]t is wholly

lots or any other evidence to dispute Ms. Huntington's statement in her affidavit that she was not aware of the Declaration, UDS Agreement, or Easement.

appropriate for a trial court to grant a declaratory judgment at the summary judgment stage."). The court must, however, "define the rights and obligations of the parties or the status of the thing in controversy" in a separate written document. *Catalyst Health Sols., Inc. v. Magill*, 414 Md. 457, 472 (2010). "This requirement is applicable even if the action is not decided in favor of the party seeking the declaratory judgment." *Id.* We note that "[t]he failure to enter a proper declaratory judgment is not a jurisdictional defect," *Lovell Land, Inc. v. State Highway Admin.*, 408 Md. 242, 256 (2009), and this Court may "review the merits of the controversy and remand for entry of an appropriate declaratory judgment by the circuit court." *Id.* (quoting *Bushey v. N. Assurance Co. of Am.*, 362 Md. 626, 651 (2001)).

In this case, the circuit court was permitted to decide Aero Energy's declaratory judgment claims on a motion for summary judgment. While the court opined that the UDS Agreement and Easement were not enforceable against Appellees, the court did not enter a declaratory judgment to that effect but merely granted the motions for summary judgment and dismissed Aero Energy's amended complaint. We agree with the court's determination, but we shall remand the case for entry of a proper declaratory judgment in conformance with this opinion.

II. THE EASEMENT IS VOID AND UNENFORCEABLE BECAUSE IT DOES NOT DESCRIBE THE PROPERTY WITH REASONABLE CERTAINTY.

Aero Energy contends that the court erred in determining that the Easement "was void for lack of an adequate description of the servient estate." Aero Energy concedes that Exhibit A to the Easement contains numerous typographical errors, including that

"the Easement mistakenly contained the words 'River Landing @ Gablers Shore' instead of 'Gablers Shore'" and that the tax map reference meant to say "Parcel 244" instead of "Parcel 224." It, however, argues that these mistakes "are immaterial because there is only one Gablers Shore planned unit community in Harford County."

Appellees argue that the court correctly found that the Easement was not enforceable because it does not describe the servient estate with reasonable certainty. First, they assert that no subdivision known as "River Landing at Gablers Shore" exists, making it "impossible to clearly identify the parcel to which the easement attaches." Ms. Huntington additionally argues that there is no tax map reference of Map 66, Parcel 224, and that without "an accurate tax map reference, the Easement does not describe the servient estate with reasonable certainty."

Express easements may generally be created "in the mode and manner prescribed by the recording statutes." *Emerald Hills Homeowners' Ass'n v. Peters*, 446 Md. 155, 162-63 (2016) (quoting *Kobrine, LLC v. Metzger*, 380 Md. 620, 636 (2004)). Pursuant to the recording statute, Real Property § 4-101(a)(1), the instrument creating an easement must contain "the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted." *Bacon v. Arey*, 203 Md. App. 606, 638, 642 (2012) (citing *Kobrine*, 380 Md. at 363). Section 4-101(a)(1) requires that the servient estate be described with reasonable certainty. *USA Cartage Leasing, LLC v. Baer*, 429 Md. 199, 212 (2012); *see, e.g.*, *Emerald Hills*, 446 Md. at 168-69 (concluding that plat's legend, which described the

interest conveyed as an access easement, was "a sufficient description of the nature of the right of way" and did not need to specify whether the easement was for pedestrians, traffic, or both); *cf. Kobrine, LLC*, 380 Md. at 636-37 (concluding that the nature of the interest conveyed was unclear where the plat neither identified the grantor nor the lot owners to be benefitted, the plat and deeds did not specify the use that lot owners were to make of the interest, and landmarks referenced in the deeds' language did not exist).

We conclude that the Easement does not describe the property to identify it with reasonable certainty. Exhibit A to the Easement provides a "description of the grantor's property," which is the servient estate. Exhibit A names the subdivision "River Landing at Gablers Shore," and includes the "[e]ntire property referred to as Tax Map Reference: Map #66 Parcel 224." First, the name of the subdivision is not accurate as there is no such subdivision in the plat records of Harford County. In Ms. Huntington's motion for summary judgment, she attached a search of the plat records using the search term "River Landing at Gablers Shore," which shows that no such subdivision exists in Harford County. Second, there is no tax map reference of Map 66, Parcel 224. As evidenced by a search using the SDAT tax map database, which was attached to Ms. Huntington's motion for summary judgment, there is no tax map reference to Map 66, Parcel 224. Moreover, Aero Energy concedes that the Easement's description contained errors and mistakenly transposed the wrong subdivision name and parcel number. While it contends that these mistakes are immaterial, Aero Energy did not provide any evidence to dispute

the Appellees' claim that the property is not identifiable. Consequently, the Easement does not describe the servient estate with reasonable certainty.

Aero Energy, however, argues that it provided a diagram of the piping system in reference to each Lot.[18] While it acknowledges that the diagram "was inadvertently not recorded" with Exhibit B of the Easement, it contends that the diagram "matched the subdivision plat perfectly" and that "[a] record subdivision plat is a sufficient description of the servient estate." The diagram, however, was not recorded with the Easement. In fact, Exhibit B does not contain a drawing of the "Main Utility Easement Area." And Aero Energy presented no evidence that the diagram was provided to Appellees or any other evidence authenticating the drawing. The diagram, which was not recorded with the Easement, cannot describe the property with reasonable certainty. The circuit court did not err in concluding that the description falls short of the certainty required by § 4-401, thus the Easement is void and unenforceable against Appellees.

III. THE RULE AGAINST PERPETUITIES

Because we affirm the circuit court's grant of summary judgment on the grounds that the UDS Agreement and the Easement were unenforceable based on Maryland's recording statutes and that the Easement is void for lack of an adequate description of the servient estate, we decline to address whether the UDS Agreement violates the Rule Against Perpetuities.

[18] We note that Aero Energy inserted the diagram directly after the recorded Easement in its complaint and the Record Extract, which makes it appear as though the diagram is part of the recorded Easement. It is not.

IV. AERO ENERGY'S EQUITABLE ESTOPPEL CLAIM IS NOT PRESERVED.

Aero Energy lastly argues that the doctrine of equitable estoppel requires the enforcement of the UDS Agreement and the Easement. It contends that it would not have designed and installed the underground gas distribution system if it believed that lot owners would refuse to honor the encumbrances. Ms. Huntington and the Loses argue that the doctrine of equitable estoppel was not preserved. Even if the issue was preserved, Appellees argue that equitable estoppel does not apply.

Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Aero Energy did not file any pleadings or motions in the circuit court raising the doctrine of equitable estoppel and did not raise the issue in the motions hearing. Instead, Aero Energy raised its claim that the doctrine of equitable estoppel makes the UDS Agreement and Easement enforceable against Appellees for the first time on appeal. The issue was not preserved for appellate review. Accordingly, we shall not address it.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; CASE REMANDED WITH DIRECTIONS TO ENTER A DECLARATORY JUDGMENT CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.