

**IN THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY, MARYLAND**

<b>JOHN TIMOTHY NEWELL, <i>et al.</i></b>	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	<b>Civil Action No. 355237-V</b>
	:	
<b>THE JOHNS HOPKINS UNIVERSITY</b>	:	
	:	
Defendant.	:	

**PLAINTIFFS' OPPOSITION TO MOTION  
TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT**

Plaintiffs, John Timothy Newell, Frances Lucinda Newell, Karen Newell Brindley, Sharon Newell Fawcett, the Estate of Beulah Banks Newell and Elizabeth Banks Ray, through undersigned counsel, submit this Opposition to Johns Hopkins University's Motion to Dismiss, or In The Alternative, Motion for Summary Judgment ("JHU Motion"). Neither dismissal nor summary judgment is appropriate for resolution of this case at the pleading stage, and the JHU Motion should be denied.

The Complaint sets out in detail the factual predicate for plaintiffs' claim that The Johns Hopkins University ("JHU") is in violation of the use restrictions in a Contract and Deed relating to property acquired by JHU, and for plaintiffs' right to enforce those restrictions. In its motion, JHU disputes none of this; indeed, the well-pled facts in the Complaint and any reasonable inferences therefrom must be deemed conceded. Instead, JHU claims the Contract and Deed impose no constraint on the "scale and density" of what may be built or on its ability to lease the property for commercial ends during and well beyond the 50-year period it promised not to sell it.

JHU further asserts that “the bulk of the complaint should be dismissed,” because plaintiffs have presented a nonjusticiable controversy, JHU Motion 3, even as JHU asserts its entitlement to declaratory relief on “matters that are ripe.” *Id.* But JHU cannot have it both ways. There is a single controversy over future use of the land in question and two legal documents that bear on that controversy. The Complaint does not consist of multiple, potentially divisible counts, but even if it did, there is no justiciability problem, as JHU’s (erroneous) claim of entitlement to declaratory relief confirms.

Further, upon consideration of all the facts and circumstances surrounding execution of the Contract and Deed, as presented in the Complaint and in the inferences favorable to Plaintiffs, the Contract and the Deed do not unambiguously provide JHU the *carte blanche* on development and leasing of the property it asserts. Nor is there the slightest merit to JHU’s claim that the Complaint, which nowhere claims – or even implies – that JHU development efforts are unlawful under applicable zoning and planning standards and procedures, amounts to an improper “collateral attack” on any zoning decision affecting the property.

#### STANDARD OF REVIEW

JHU seeks either dismissal of the Complaint or summary judgment in its favor, in either case relying exclusively on the contents of the Complaint and attached exhibits thereto. In this context, the judicial review standard is the same for both branches of the JHU Motion:

[W]ith regard to both types of motions, we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party.

Natapa v. University of Maryland Med. Sys. Corp., 417 Md. 724, 12 A.3d 144, 148

(2011). In addition, when the question is whether to grant summary judgment,

even where the underlying facts are undisputed, if those facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact.

Charles County Commissioners v. Johnson, 393 Md. 248, 900 A.2d 753, 762 (2006).

The principal relief sought by plaintiffs is a declaratory judgment with respect to JHU's development plans for Belward Farm. JHU seeks to dismiss the Complaint, but this "is rarely appropriate in a declaratory judgment action." 120 West Fayette Street,

LLLP v. Mayor & City Council of Baltimore, 413 Md. 309, 992 A.2d 459, 487 (2010).

In this case, declaratory relief turns on the proper interpretation of the Contract and Deed.

The JHU Motion makes clear there is a dispute about the intent of the parties in connection with entering into the Contract and executing the Deed. In such a case, in determining whether it is appropriate to take the case from the trier of fact and decide it on summary judgment, as JHU alternatively requests, the Court must be mindful

[t]hat the construction of written documents is a matter of law, and is not in ordinary cases to be submitted to the jury, as a matter of fact, is true; but where the doubt is produced by the existence of collateral and extrinsic facts, not appearing upon the instrument, its consideration ceases to be a matter of mere legal construction, and **the intention of the parties is to be sought for, by a recurrence to the state of facts as they existed when the instrument was made**, and to which the parties are to be presumed to have reference. The ambiguity in such case is a latent one, which may be explained by parol evidence and submitted to the jury.

\* \* \*

The jury's function in the interpretation of documents then will arise wherever, in view of the surrounding circumstances and usages offered in evidence, the meaning of the writing is not so clear as to preclude doubt by a reasonable man of its meaning. If the meaning after taking the parol evidence, if any, into account is **so clear that no reasonable man could reach more than one conclusion** as to the meaning of the writing under the circumstances, the court will properly decide the question of fact for itself as it may any question of fact which is equally clear.

Montauk Corp. v. Seeds, 215 Md. 491, 497, 138 A.2d 907, 910 (1958) (quotations omitted; emphasis added); Consumers Life Ins. Co. v. Smith, 86 Md. App. 570, 587 A.2d 1119, 1121 (1991); 10B Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, §2730.1 at 44-49 (1998) (discussing forty federal cases applying the principle that “summary judgment will not be granted if issues are presented involving an inquiry into the state of mind of any of the contracting parties. A typical problem involving state of mind arises when the contract terms are ambiguous so that it is necessary to determine the intent of the parties to the contract.”) In this case, of course, the trier-of-fact will be the Court, not a jury, but the Court is not sitting as tier-of-fact on the JHU Motion.

It is with these principles in mind that plaintiffs review the “well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to [plaintiffs].” Natapa, supra.

## STATEMENT OF FACTS

### Sale of Belward Farm

The fee simple transfer of Belward Farm to JHU took place during 1988-89 pursuant to a Contract and Deed, copies of which are Exhibits B and C to the Complaint, the accuracy and completeness of which are undisputed. Complaint ¶¶15, 22. Also undisputed is the plaintiffs' legal status as the lawful successors in interest (“Successor

Owners”) to the three Belward Farm owners that executed the Contract and Deed (“Owners”), id., ¶¶2, 49, and that the Successor Owners have the right to enforce the terms of the Contract and Deed in this Court. Id. ¶¶49-50.

Of the three Owners, only Elizabeth Banks lived on the farm, and she operated Belward Farm as a true farm. Id. ¶8. Ms. Banks was well-known in the community for her staunch opposition to entreaties to sell Belward Farm for commercial or residential development. Id. ¶¶9, 11. Nevertheless, Ms. Banks had a big spot in her heart for JHU and thus was ultimately receptive, along with her co-Owners, to a JHU-devised plan whereby she would transfer ownership of Belward Farm to JHU, under terms where (a) it would not become the object of commercial or residential development; (b) she would be able to live the rest of her life there; and (c) the transfer would amount to a substantial gift to JHU. Id. ¶¶12-13.

Initial discussion between Ms. Banks and JHU led to a JHU presentation to Ms. Banks, on March 2, 1988, of a ten-point “Proposed Terms of Transfer” that set out in detail the “proposed terms and conditions which the senior officers of the University are prepared to recommend to the President and Trustees regarding the possible acquisition of the Banks farm....” Id. ¶14 and Exhibit A. Under the Proposed Terms of Transfer

- The main farm “will be developed and used only for academic and related purposes” (¶5);
- The eastern 30 acres “may be commercially developed in order to create revenue to support the academic activities of the Johns Hopkins University” (¶6);
- Wooded land between these two areas of the farm “will be maintained as a ‘buffer’ zone between academic and commercial activities” (¶7);

- For 50 years, JHU will not “sell or otherwise dispose of any of the property” except that JHU retained the option to sell the 30-acre eastern section if deemed “necessary or desirable.” (¶9);
- If JHU “sells or otherwise disposes of any part of the property at any time, all revenue from such sale or disposition shall be used to create or add to a memorial endowed fund established in the name of Elizabeth Banks for purposes of academic support at [JHU].” (¶10); and
- The parties mutually recognized that Belward Farm would have to be rezoned to allow the proposed uses. (¶1).

Although Ms. Banks was adamantly opposed to **any** commercial development on Belward Farm, Complaint ¶¶9, 11-12, she relented to the extent she accepted the Proposed Terms of Transfer. *Id.* ¶15. It is reasonable to infer that her resistance was overcome by JHU entreaties that the only way JHU could develop “academic and related purposes” on the main (108-acre) farm was to “create revenue” from the commercial development of the eastern 30 acres of the farm. JHU, upon being advised by the Owners that they were in agreement with the Proposed Terms of Transfer, proceeded to convert the 10-points into a Contract of Sale, which was executed by the parties within the ensuing six months. *Id.* It is reasonable to infer that the Contract was drafted by JHU and represented by JHU to be a faithful conversion of the Proposed Terms of Transfer into contract form.<sup>1</sup>

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<sup>1</sup> In its Motion, JHU represents that the legal documents were “negotiated by counsel for both sides.” JHU Motion 2. This is not alleged in the Complaint, and plaintiffs believe discovery will reveal that in all important respects JHU authored the relevant terms. While plaintiffs are in need of discovery of JHU records of this process, records available to them reveal that discussions between JHU and Ms. Banks and her co-Owners, during the relevant March-August 1988 time period focused almost exclusively on the financial terms and tax planning considerations regarding the consideration to be paid and the valuation of the donation, all arising from the shared understanding that the consideration the Owners were to receive was far below the fair market value of the property.

The Contract of Sale, initially executed August 22, 1988, was re-executed as the “Amended and Restated Contract of Sale” on December 10, 1988. Id. ¶15 and Exhibit B (“Contract”). In the recitals to the Contract, the parties expressly acknowledged that (a) the purchase price of \$5 million for the Belward Farm did not represent the fair market value of the property, even taking into account the restrictions on future use set forth in ¶ 13 of the Contract; and (b) the difference between such fair market value and \$5 million constitutes the Owners’ donation to JHU.

The Contract identified two adjacent parcels comprising the Belward Farm: (a) a triangular-shaped parcel of approximately 30 acres outlined in green on Exhibit B thereto, a plat of the property; and (b) a generally square parcel of approximately 98 acres outlined in red on said Exhibit B. The smaller parcel was subsequently identified in the January 9, 1989 deed of transfer (the “Deed”) as Parcel “A” and as having an area of 29.3833 acres; the larger parcel was subsequently identified in the Deed as Parcel “B” and as having an area of 108.7645 acres. Id. ¶16.

As to Parcel A, the parties agreed in ¶ 13 that JHU would preserve a wooded area to serve as a buffer between the two Parcels. The Owners further agreed that there would otherwise be no limitation on JHU’s use or disposition of Parcel A, based upon JHU’s representation, in Point 6 of the Proposed Terms of Transfer and otherwise, that allowing commercial development of Parcel A would greatly facilitate JHU’s ability to build a college campus on Parcel B. Id. ¶17.

As to Parcel B, the parties agreed in ¶ 13 that JHU would be bound by the following restrictions: (a) not to dispose of its fee interest in Parcel B for fifty (50) years; (b) to limit use of Parcel B to “agricultural, academic, research and development,

delivery of health and medical care and services, or related purposes only,” with specific mention made of “development of a research campus in affiliation with one or more divisions of [JHU];” (c) to maintain the land in a well kept and attractive fashion; and (d) to ensure that the land is known as the “Belward Campus of Johns Hopkins University.” The parties further agreed in ¶ 13 that these restrictions “shall be enforced by a covenant to be contained in the deed conveying the Property to [JHU] for the benefit of [the Owners] and their descendants.” Id. ¶18.<sup>2</sup>

Also as to both Parcels A and B, the parties agreed in ¶ 15 of the Contract that the proceeds of any such sale or disposition would be used by JHU “to create or add to a fund established in the name of Elizabeth B. Banks for the benefit of [JHU].” Id. ¶20.

The parties to the Contract recognized that in order for JHU to create a college campus on the property, it would need to be rezoned from the existing R-200 zoning. Accordingly, ¶ 14 of the Contract provided that the Owners would “cooperate with and assist” JHU in applying for the necessary zoning change by the Montgomery County Council (“Council”). Id. ¶21.

The closing on the sale of Belward Farm took place on or about January 9, 1989, and the Deed reflecting the transfer of fee simple title was recorded in the land records of Montgomery County on January 10, 1989, at Liber 8649, folios 824-833. A copy of the Deed is attached as Exhibit C to the Complaint. Id. ¶22.

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<sup>2</sup> Also as to Parcel B, but not included in the use restrictions to be recorded by deed, the parties agreed that Elizabeth Banks would have the right to enter into a lease for all or a portion of the property for residential use and for continued pursuit of the current agricultural use. Such a lease was agreed to on January 9, 1989, under which Ms. Banks paid JHU annual rent of \$6000 per year, renewable for subsequent years during her lifetime, with specified rent escalation terms. Id. ¶19.

The Deed, also prepared by JHU, repeats the use restrictions on Parcel B in ¶ 13 of the Contract and specifies that they “shall constitute a covenant running with the land for the benefit of [the Owners] and their descendants....” This provision further states that “a violation of this covenant shall not result in a forfeiture or reversion of the fee simple title to the land.” Id. ¶23.

On June 30, 1989, the Owners received an appraisal of Belward Farm commissioned by JHU. The appraisal concluded that the fair market value of Belward Farm for unrestricted commercial/residential development was \$392,000 per acre. Accordingly, had the Owners elected to sell the 138-acre Belward Farm unconditionally on the open market instead of proceeding with the JHU transaction, they had the potential to realize somewhere in the range of \$54 million, rather than the \$5 million they actually received from JHU. Id. ¶24. It is reasonable to infer that the Owners did not make what both parties to the transaction regarded as a major donation to JHU (and a corresponding sacrifice of personal financial gain of the Owners), via development restrictions on Parcel B enforceable through a “covenant running with the land for the benefit of [the Owners] and their descendants....” Contract ¶ 13, if it did not mean that JHU was promising the Owners that Parcel B’s development would be significantly restricted in comparison to the allowed commercial development of Parcel A. The restrictions on Parcel B reflected the agreed understanding of the parties that Parcel B was to become the “Belward Campus of Johns Hopkins University.” Complaint ¶ 18.

In July 1990, the Shady Grove Study Area Master Plan was approved. It designated (at p. 64) Belward Farm “as a component of the R&D Village to be developed as a research campus containing R & D uses....” With this change, JHU applied for and

obtained a rezoning of Belward Farm to the R&D zone. The Owners cooperated in this effort in the expectation it would facilitate the college campus development of Parcel B that the parties had agreed to. This zoning change significantly increased the fair market value of Belward Farm. *Id.* ¶25.

### **The 1997 Preliminary Plan and Development Of Parcel A**

In March 1997, the Montgomery County Planning Board (“Board”) approved a JHU application for approval of a Preliminary Plan of Subdivision, the first step in the development of the Belward Farm, inclusive of Parcels A and B. JHU denominated the plan “The Johns Hopkins Belward Research Campus.” The approved Preliminary Plan of Subdivision (“1997 Plan”), Complaint Exhibit D, depicts the layout of proposed buildings, their square footage and number of stories, all consistent with the then-existing R&D zoning of the property. On Parcel A, six buildings of 2-4 stories, with floor areas ranging from 45,000 to 88,000 square feet were proposed, with a total square footage of 433,000 approved. On Parcel B, seventeen buildings of 2-4 stories, with floor areas ranging from 54,000 to 130,000 square feet were proposed, with a total square footage of 1,367,000 approved, along with three parking structures of three stories each. A preliminary plat of subdivision was filed with the Planning Board by JHU in accordance with the plan approval. The 1997 Plan reflects approval of a maximum amount of developed gross floor area for Parcels A and B combined of 1,800,000 square feet, a number that is about 99.7% of the maximum development allowed under the then-existing R&D zoning for the property. Complaint ¶26.

JHU made the Owners aware of the proposed 1997 Plan before it was approved by the Planning Board. The Owners did not object to the application, believing that the

1997 Plan, if implemented as a JHU-owned and operated college campus, was of a magnitude and scale consistent with the Deed restrictions and the agreed-upon rezoning, and would ensure the preservation of the farm buildings and home on Belward Farm in an appropriate historic context. Id. ¶27.

JHU did not thereafter seek to obtain final (i.e., site plan) development approvals for any of the buildings or other features depicted on the 1997 Plan. Instead, JHU transferred Parcel A to Montgomery County in exchange for certain financial benefits not detailed in the deed of transfer. Id. ¶28. Because JHU received no cash compensation from the County for Parcel A, JHU did not establish the Elizabeth B. Banks fund called for in ¶ 15 of the Contract. Id. ¶29.

Except for a dispute in 1997 over what Ms. Banks regarded as the unauthorized destruction of trees in the area of Parcel A to be protected as a wooded buffer under the Contract and the Deed, the Owners and the Owner Successors have not objected to the development of Parcel A, which has been generally consistent with what JHU proposed for that portion of the 1997 Plan, except that it is no longer under the ownership or control of JHU. Id. ¶30. Parcel A is now fully developed with approximately 390,000 gross square feet of buildings housing research and development firms. Parcel B remains an undeveloped 108 acres today except for the historic farmstead buildings. Parcel B alone is what is now generally referred to by the community, the parties, and government officials as the historic “Belward Farm.” Id. ¶31. Accordingly, in the ensuing discussion Parcel B will be referred to as Belward Farm.

**JHU Obtains A Second Rezoning, Tripling The Permitted Development Density Of Belward Farm**

After the 1990 rezoning of Belward Farm into the R&D zone, the following were among the permitted uses on the property: “research, development and related activities,” and “universities and colleges providing teaching and research facilities.” In all cases, development in the R&D zone was limited to a gross floor area of 30% of the lot area, i.e., a floor area ratio (“FAR”) of 0.3. This is a development limit that the 1997 Plan, for 1,800,000 square feet of gross floor area, came close (99.7%) to achieving. Hence, JHU could not further expand Belward Farm development without a second zoning change, and any such zoning change required that there be an explicit recommendation for it as to Belward Farm in the applicable Master Plan. Hence, JHU became actively involved in ensuring that any revision to the applicable Master Plan also recommended yet another rezoning of Belward Farm. Id. ¶34.

After 1997, despite assurances to the Owners by JHU in the course of completing the sale/donation of Belward Farm, JHU did not involve the Owners in the concept and design of any JHU plans for development of Belward Farm different from those in the 1997 Plan. In approximately 2008, the Owners or Owner Successors became aware of newly emerging JHU plans for expanded development of Belward Farm. This was at a time when there was an ongoing governmental process of public hearings on (a) an amendment to the master plan that included the Belward Farm property, ultimately known as the Great Seneca Science Corridor Master Plan (“Master Plan”), and (b) a rezoning of properties recommended for rezoning in the Master Plan. Id. ¶32.

During the Master Plan review and approval process, JHU urged that the Master Plan recommend development of Belward Farm at an FAR of 1.5. Given that the square

footage of Belward Farm is reported in the Deed to be 4,737,783 square feet, this was, in effect, a request that the County officially recognize it would be appropriate to develop Belward Farm with 7,106,675 square feet of gross floor area. By contrast, the development authorized for Belward Farm under the 1997 Plan, after deducting development on Parcel A, was 1,410,000 square feet of gross floor area, or about one-fifth as much. In its final form, the Master Plan recommended development of Belward Farm at an FAR of 1.0, or a gross floor area of 4,737,777 square feet, which is approximately 336% of the development possible for Belward Farm under the 1997 Plan. The Master Plan also recommended that this development occur in stages triggered by determinations that roads and other public facilities would be adequate to support the development. *Id.* ¶33.

JHU was also successful in its efforts to rezone Belward Farm. As finally adopted in May 2010, the Master Plan recommended that Belward Farm be placed in the LSC zone. The Council accordingly approved this rezoning on July 20, 2010, in Council Resolution No. 16-1447. This change facilitated JHU's plans because, on May 17, 2010, amendments to the LSC zone had been adopted, increasing the allowable FAR in that zone from 0.3 to 2.0. With these changes in place, JHU had cleared the major regulatory roadblocks to development of Belward Farm at a much higher level of density than was legally possible when JHU, with the cooperation of the Owners, had gotten Belward Farm rezoned to the R&D zone in 1990. *Id.* ¶35.<sup>3</sup>

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<sup>3</sup> An FAR of 2.0 is the legal upper limit of FAR in the LSC zone. Montgomery County Zoning Code §59-C-5.321, as correctly stated in ¶35 of the Complaint. Contrary to JHU's claim of error, JHU Motion 8 n.8, plaintiffs have not claimed that JHU either sought or obtained approval to develop Belward Farm at a 2.0 FAR.

The Owners or Owner Successors, acting through Successor Owner John Timothy Newell, actively participated in or monitored the JHU outreach, Master Plan, and LSC Zone amendment proceedings. In those proceedings, the Owners or Owner Successors made clear to JHU, to the Board and to the Council that they expected JHU to adhere to its obligations for Belward Farm regardless of what might be authorized for Belward Farm as a result of (a) the new Master Plan, (b) changes in the LSC Zone, (c) the further rezoning of Belward Farm, or (d) any governmental approval of any JHU development proposal or modification of the 1997 Plan on account of the changes since 1990 in the rules applicable to development of Belward Farm. *Id.* ¶36. In taking this non-proactive role, it is reasonable to infer that Mr. Newell understood from the reaction of the planning and zoning authorities that they were not going to base their recommendations and decisions for Belward Farm on development restrictions that were only enforceable privately.

#### **JHU's 2011 Plan Amendment**

On February 28, 2011, JHU filed with the Planning Board a request to amend its 1997 Plan (“the Plan Amendment.”). Under the new Master Plan, development of the area in which Belward Farm is located is to occur in four specified stages, denominated Stages 1-4. Each has prerequisites to be met before development above the gross floor area in the previously authorized Stage may occur. These prerequisites are to ensure that key public facilities are in place before the next phase of growth takes place. In light of the staging constraints, where Stage 1 allows only an additional 400,000 square feet of gross floor area over previously approved development, JHU sought immediate approval via the Plan Amendment only to build up to the 1,410,000 square feet of gross floor area

of development authorized under the 1997 Plan not previously developed on Parcel A. Id. ¶37.

JHU nevertheless also clearly indicated its intention to utilize, when allowed to do so in future Stages, the remaining approximately 3.3 million square feet of Belward Farm development recommended by the Master Plan and effectively authorized by the rezoning of Belward Farm into the LSC Zone. The amended Preliminary Plan submitted to the Board shows a conceptual layout of all buildings and roads on the Belward Farm when fully developed at the Master Plan recommended 1.0 FAR level. Id. ¶38 and Exhibit E to the Complaint.

As reflected in Exhibit E, JHU's plans for the future ultimate development of Belward Farm include 23 buildings ranging in height from 50 to 150 feet, with a total gross floor area of 4,737,777 square feet, plus three parking structures, such that parking will be provided for approximately 12,320 vehicles. The Belward Farm farmstead is to be preserved on approximately 10 acres, surrounded on three sides by buildings. The JHU projections of parking needs reveal that JHU envisions that approximately 50% of the gross floor area will be devoted to R&D/Office use; an additional 40% to life sciences use; and 10% to auxiliary retail use. Complaint ¶39.

In conjunction with the Plan Amendment, JHU submitted to the Planning Board a "Concept Plan" illustrating the anticipated development of Belward Farm in greater detail. This submission was an express requirement of the Master Plan, which (at p. 45) provides that it is to accompany JHU's first amendment to its 1997 Preliminary Plan, in order to address the detailed guidelines in the Master Plan for the ultimate development of Belward Farm at the 1.0 FAR level. Footnotes to the diagrams in the Concept Plan

state that they are only illustrative and that “[a]ctual parcel and building configurations, locations, sizes, heights, paving and roads will be determined at site plan.” The Concept Plan is nevertheless illustrative of what JHU believes can be done consistent with the Master Plan and the LSC Zone upon approval of the Plan Amendment, and can only be understood as JHU’s statement of present intention regarding future development of Belward Farm. Id. ¶40.

Page 9 of the Concept Plan, Exhibit F to the Complaint, is JHU’s illustration of its current development plans for Belward Farm. It shows 150’ high buildings of up to fifteen (15) stories facing the farmstead on the north and east sides, and a 110 feet tall building facing the farmstead on the west side. This drawing is also incorporated into the approved amended Preliminary Plan. Complaint ¶41 and Exhibit E.

As detailed in Exhibits E and F, JHU intends to construct a road across Belward Farm with a 150’ right of way, connecting at each end to the existing street grid.<sup>4</sup> Additional roadways will be constructed to link this main road to the existing road network. Under the Plan Amendment, most if not all of the new roads will be private roads that will function as if they were dedicated public roads, and create a grid-like network of public streets, as depicted on Exhibit E. Complaint ¶42.

The Plan Amendment was reviewed by Planning Board staff, who issued a Staff Report on the Plan Amendment on July 11, 2011 with a recommendation of approval with conditions. The Planning Board conducted a public hearing on the Plan Amendment

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<sup>4</sup> The Plan Amendment makes clear that this main roadway is also intended to function as part of the planned future routing of the Corridor Cities Transitway (“CCT”), a Master Planned project intended to provide a greater level of mass transit service to all of upper Montgomery County. A CCT transit stop is planned to be located midway along the roadway, as depicted on Exhibit E.

on July 21, 2011 and unanimously voted to approve the Plan Amendment. The Board's formal resolution approving the Plan Amendment, Resolution No. 11-72, adopted on October 27, 2011, is dated November 2, 2011 ("Resolution 11-72"). *Id.*, ¶43 and Exhibit G to the Complaint.

Resolution 11-72 approved the Plan Amendment substantially as sought by JHU, inclusive of all the details enumerated above. Resolution 11-72 provides, *inter alia*, (a) dedication of the 150-foot main roadway; (b) public use easements for two 70-foot right-of-way business district streets within Belward Farm; (c) there is to be no substantial modification of the lot configuration and layout of the Preliminary Plan without a formal amendment; (d) approval of the Concept Plan submitted by JHU; and (e) a favorable discussion of the eventual plan to place the greatest height (up to 150 feet) and density of buildings in proximity to the proposed CCT station location, which is in the middle of the main roadway where it is adjacent to the Belward Farm farmstead. Complaint ¶44.

Under the Plan Amendment, as reflected in the parking needs projections, it was anticipated that retail, service, and restaurant uses will be needed within these buildings to accommodate the needs of employees and visitors. Resolution 11-72 expressly notes, and thus approves, JHU's allowing its future lessees at Belward Farm to own and operate retail, service and restaurant uses within the future Belward Farm buildings "to accommodate the needs of employees and visitors." Exhibit G at 8; Complaint ¶45.

Under the Plan Amendment, JHU has expressed its intention to retain ownership of the land comprising Belward Farm. Given this statement, and numerous other public statements made by JHU concerning its development intentions for Belward Farm, and given the no-sale provision in the Deed, it is reasonable to infer that JHU has a present

intention to lease Belward Farm land to third parties for purposes of construction and occupancy of buildings, or to build and lease such buildings, or some combination of the two. Id. ¶46.

What is envisioned and planned by JHU is the substantial commercial, entrepreneurial real estate development of Belward Farm, exclusive of 10 acres for preservation of the farmstead. What is **not** envisioned and planned is what the Owners and the Owner Successors claim was understood, envisioned and planned when the Contract and Deed were executed -- a college campus consisting solely of buildings built for, and occupied by, or principally by, JHU researchers, teachers, students and supporting personnel. The overall effect of the Plan Amendment, once all phases are fully implemented, is creation not of a small, low-rise college campus, but rather a dense, high-rise commercial development, one described by the Planning Board Staff in its Report on the Plan Amendment (at p. 15) as “an urban scale network of blocks.” Complaint ¶47.

On October 6, 2011, the Board found that all the Master Plan staging requisites were met to ensure that necessary infrastructure was in place for the first stage of development in the area inclusive of Belward Farm. As a result, the Board declared Stage 1 of the Master Plan open to applications for new development in that area. This action meant that once Resolution 11-72 was formally adopted, JHU could proceed with the Plan Amendment as approved by the Board in Resolution 11-72. Id. ¶48. Shortly after Resolution 11-72 was adopted, plaintiffs initiated this action.

## ARGUMENT

### I. THERE IS NO JUSTICIABILITY IMPEDIMENT TO DECLARING THE RIGHTS OF THE PARTIES UNDER THE CONTRACT AND THE DEED

JHU claims that plaintiffs have failed to present a justiciable controversy ripe for a declaratory judgment, JHU Motion 12-14, even as it claims plaintiffs have presented certain matters that are ripe for declaratory relief. *Id.* at 17-24. But plaintiffs have not alleged multiple, divisible claims, some arguably ripe and some arguably non-ripe for declaratory relief. There is **one** Contract and **one** Deed emanating from it; there is **one** JHU development plan for Belward; and there is **one** claim that the Contract and Deed have been breached, be it actual or anticipatory. Complaint ¶¶51-63. Either plaintiffs' cause of action presents a justiciable controversy or it does not. JHU cannot divide a single cause of action into multiple, subsidiary claims and seek judicial relief as to some parts of what must be considered as a whole.

The error in JHU's splitting up of plaintiffs' claim is self-evident from a straightforward application of the Maryland Uniform Declaratory Judgments Act, §3-409, Courts & Judicial Proceedings Art., Md. Code Ann. (the "Act") to the Complaint.

The Act provides that

a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:

- (1) An actual controversy exists between contending parties;
- (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
- (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an

adversary party, who also has or asserts a concrete interest in it.

Id., §3-409(a). There is uncertainty and controversy as to all three alternatives to declaratory relief, and the time is ripe to resolve it.

In this case, plaintiffs refrained from challenging JHU's efforts to enhance the development potential of Belward Farm during the past three years preceding adoption of Resolution 11-72 because there was no definiteness during that time regarding (a) exactly what amount of enhanced development, over and above what plaintiffs had agreed to in not objecting to the 1997 Plan, would be approved by the County planning and zoning authorities; and (b) exactly what level and type of development JHU would pursue if the desired increases in "scale and density" that JHU sought were approved. But as detailed in the Complaint, JHU has now submitted and obtained the requisite approvals of a new Stage 1 development plan for Belward Farm, including approval, subject to staging constraints, for all of the development JHU has proposed for all four Stages, all being indicative of JHU's present intention for future Belward Farm development, which can begin at any time. Id., ¶¶37-48.

Further, while only illustrative plans have as yet been submitted, the Concept Plan JHU submitted to the Planning Board as a precursor to actual development was approved in conjunction with the Board's approval of the revised Preliminary Plan. Id. ¶44. It is reasonable to infer that JHU has approval to configure Belward Farm as proposed in the Concept Plan, and that, absent relief in this action, actual differences between what has been proposed today and what will ultimately be built will be insignificant to the dispute presented by this case. It is also reasonable to infer that the four Stages of development will be an interrelated whole, where what is done in Stage 1 is mindful of and dependent

upon what is to come in succeeding Stages. Hence it makes no sense, from the perspective of either party, for Stage 1 to proceed with no certainty as to the fate of Stages 2-4, which exceed the density level of the 1997 Plan. In any case, it is only with the Planning Board's approval in place that plaintiffs commenced this action, thereby obviating any colorable argument that the state of facts giving rise to the controversy are contingent or otherwise uncertain.

JHU nevertheless appears to argue that plaintiffs must await the time when JHU has gone to the expense of drawing up and obtaining approval of final development plans in order to obtain a declaratory judgment, citing as "exactly on point," JHU Motion 13, 120 West Fayette, *supra*. But it requires no imagination to note that had plaintiffs sat back quietly while JHU went to such expense, their Complaint would be greeted with a motion to dismiss on laches, waiver and equitable estoppels grounds. Indeed, the purpose of the Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It shall be liberally construed and administered." §3-402 of the Act. Further, the Act expressly empowers the Court to construe deeds and contracts, enabling a party to a deed or contract to "obtain a declaration of rights, status or other legal relations under it." *Id.*, §3-406.

In any case, JHU's reliance on 120 West Fayette, *supra*, is misplaced, as the very certainty that was lacking and obviated justiciability in that case is not lacking here, i.e., development plans sufficiently finalized to determine whether an underlying agreement was going to be violated. In that case, the allegation was that proposed plans would violate certain established Baltimore City standards, but the plans had yet to be presented to the City for approval. The Court found no justiciable controversy because "[t]he

possibility remains that [the developer] will propose, and the City will approve, plans that, in accordance with the [land disposition agreement's] requirements, conform to the [Memorandum of Agreement] and the Renewal Plans.” 992 A.2d at 489. Here, by contrast, there is no issue of violation of governmental approval standards at all; JHU has in place the approvals necessary to move forward with the first of four Stages of Belward Farm development,<sup>5</sup> along with an approved Concept Plan for Stages 2-4, each of which plaintiffs allege transgress the development constraints in the Contract and the Deed, as understood and agreed to by the parties in the 1997 Plan. There is, in short, no possibility that JHU, if left unchallenged, would limit itself to the level of development agreed to by the parties, or build a JHU-operated college campus, which, as detailed in Part III.A., is what the Owners intended and expected with their generous donation to JHU.

There is, in any event, no fixed rule, as claimed by JHU, that there can never be a declaratory judgment when development plans still have another step to final approval. JHU Motion 14. The Court must look beyond such labeling and examine the facts and circumstances to assess the “practical certainty” of a controversy. This principle is well illustrated by the seminal Maryland case on ripeness for declaratory judgment purposes, Boyd's Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987). In Boyd's, the Court of Appeals distinguished between “the practical certainty of the act or event in issue” from “remote, contingent and uncertain events that may never happen,” 526 A.2d at 602, and concluded that the land use controversy in that case was ripe for

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<sup>5</sup> While the Stage 1 plans must undergo site plan review and approval, the basic size, configuration and orientation of buildings and streets has been approved and is thus unlikely to undergo anything more than fine-tuning that will not affect the concreteness of the parties' dispute in this case.

adjudication, even though the harm was tied to a future zoning decision that had yet to take place. *Id.* at 605.

Here, there is a practical certainty that, regardless of the actual configuration, number, size or height of the buildings eventually approved for Belward Farm when a final site plan for Stage 1 is submitted, it is not going to be a JHU-administered college campus, and it is step one of an ineluctable four-step plan that is not going to be limited to an FAR of 0.3, which was the level of development contemplated by the rezoning effectively agreed to in the Contract. Indeed, on this latter point alone, the well-pled facts are that JHU intends to build – give or take a few thousand square feet at the margin – up to 336% of the density the parties agreed to in the Contract, i.e., 4,737,277 square feet instead of 1,410,000 square feet. Complaint ¶¶33, 37-39. It matters not at all to the concreteness of this controversy that the Concept Plan JHU was obliged to submit is “illustrative,” JHU Mem.14, as the details of the configuration are clearly secondary to its intended future “scale and density.” Under such circumstances, it is more than sufficient for a concrete controversy to exist that the Concept Plan JHU submitted and that the Board approved is “JHU’s statement of present intention regarding future development of Belward Farm.” Complaint ¶40.

## **II. JHU’S “UNAUTHORIZED COLLATERAL ATTACK” CLAIM IS BASELESS**

The Complaint makes extended reference to recent planning and zoning decisions affecting Belward Farm – decisions made with the aid and encouragement of JHU. Complaint ¶¶32-48. This has prompted JHU to assert that plaintiffs “could have appealed those decisions,” JHU Motion 15, and, having failed to do so, the Complaint “constitutes an improper and unauthorized collateral attack” on “land use decisions

authorizing the scale of development they challenge.” *Id.* at 16. This claim, pivotal to JHU’s attack on the Complaint, is profoundly mistaken.

Looking at the Complaint in the light most favorable to plaintiffs – and, indeed, in **any** light – it does not paint a picture of JHU failure to adhere to the standards and procedures embodied in applicable zoning and planning law. Nowhere do plaintiffs claim that JHU’s plans are, or will be, in violation of any zoning or planning standard. Rather, the picture is one of JHU **compliance** with the law, including active participation in getting the applicable law and planning and zoning criteria and standards changed to better serve its development intentions. Hence, the notion that plaintiffs “could have appealed” JHU’s punctilious compliance with the law is equivalent to saying, to borrow from Cervantes, that plaintiffs “could have tilted at windmills.”<sup>6</sup>

Plaintiffs’ acknowledgement of – or more appropriately, emphasis on – JHU’s development plans that evolved in tandem with changes in the law, is not some fatal concession, but rather an important aspect of why JHU is in breach of the Contract and the Deed. In ¶14 of the Contract, the Owners acknowledged that a change in the current zoning classification of the Property was required, and they agreed to cooperate with and assist JHU in effectuating that change. See Complaint ¶21. The language of ¶15 of the Contract is ambiguous about what zoning change was needed, but the Complaint details that the then-current zoning classification, R-200, did not include a university campus as an unrestricted permitted use. Complaint ¶10. Any uncertainty about the agreed-to

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<sup>6</sup> JHU’s reliance on cases grounded in a failure of exhaustion of administrative remedies, JHU Motion 16, is misplaced. JHU relies on Abington Center Assoc. LP v. Baltimore County, 115 Md. 580, 694 A.2d 165 (1997), but that case, like many others, makes clear there is no such requirement when, as here, there is no administrative remedy or the remedy is inadequate. 694 A.2d at 171.

rezoning was resolved within about 18 months of execution of the Contract and the Deed when JHU applied for and obtained an R&D zoning classification for all of Belward Farm with the cooperation of the Owners. Id. ¶25.

Two principles of contract interpretation underscore the pivotal importance of this Owner-endorsed change in the legal requirements applicable to the land. First,

“parties to a contract are presumed to contract mindful of the existing law and that all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them, except where a contrary intention is evident.” *Hearn v. Hearn*, 177 Md. App. 525, 535, 936 A.2d 400 (2007) (quoting *Auction & Estate Representatives, Inc. v. Ashton*, 354 Md. 333, 344, 731 A.2d 441 (1999)).

Louis Fireison & Assoc., P.A. v. Alkine, 195 Md. App. 461, 6 A.3d 945, 953 (2010).

This is a case where, to an expressly limited extent, “a contrary intention is evident,” i.e., an understanding of the need for a change in zoning classification.

Second, any doubt about what new zoning classification was intended was resolved by how the parties actually implemented the change thereafter. The operative rule is that

[i]f there is doubt as to the correct interpretation of a contract, the practical construction which the parties may give to their agreement is persuasive evidence of their intention.” *Hughes v. Thurman*, 213 Md. 169, 177, 131 A.2d 479, 483 (1957). The construction placed upon the ambiguous language before any controversy has arisen holds significant importance. *Eisenberg v. Air Conditioning, Inc.*, 225 Md. 324, 334, 170 A.2d 743, 747 (1961).

Tackney v. USNA Alumni Ass’n, Inc., 408 Md. 700, 971 A.2d 309, 319 (2009).

In keeping with these principles, the Complaint details what was contemplated by the parties to the Contract at the time the agreement was entered into, as well as how it

was implemented “before any controversy has arisen.” *Id.* Thus, the Complaint details how the agreed rezoning was accomplished in 1990, Complaint ¶25, as well as how JHU sought to implement the rezoning thereafter via submitting and obtaining approval in 1997 of a subdivision plan predicated on R&D zoning and depicting the “Johns Hopkins Belward Research Campus.” *Id.*¶26. JHU made the Owners aware of their 1997 Plan and the Owners did not object to it, believing that the 1997 Plan, if implemented as a JHU-owned and operated college campus, would be consistent with the restrictions in the Deed and “the agreed-upon rezoning.” *Id.* ¶27.

What has happened since the time in 1997 when there was no development controversy is a **second** rezoning of Belward Farm, and with it, a more than tripling of the allowed density of development. Complaint ¶¶32-36. Plaintiffs have no basis to challenge the validity of these lawfully effectuated changes under applicable zoning law; they have challenged them in this Court on an entirely separate basis. In so doing, they are acting in accordance with a legal principle established more than a half century ago by the Court of Appeals in Martin v. Weinberg, 205 Md. 519, 527-28, 109 A.2d 576, 579 (1954). Martin upheld a deed restriction that prohibited use of land for a grocery store parking lot even though it would have been allowed under the zoning code. The Court of Appeals found zoning code compliance “not relevant to the question before us.” *Id.* It reasoned as follows:

[T]here is no public policy against a fair and reasonable construction in the light of surrounding circumstances, of restrictions designed, in general, to accomplish the same beneficial purposes as zoning.

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Contractual restrictions are neither abrogated nor enlarged by zoning restrictions.

*Id.* See Mikolasko v. Schovee, 124 Md. App. 66, 720 A.2d 1214, 1224 (1998) (“Provided that private covenantal rights do not violate local governmental land use restrictions, the land use restrictions will not affect the private covenantal rights.”), *aff’d*, 356 Md. 93, 737 A.2d 578 (1999).<sup>7</sup>

**III. JHU’S CLAIM THAT THE CONTRACT AND THE DEED UNAMBIGUOUSLY PROVIDE NO LIMIT TO THE “SCALE OR DENSITY” OF BELWARD FARM DEVELOPMENT SHOULD BE REJECTED**

In this and the next section of the Argument, plaintiffs respond to JHU’s two specific claims for summary declaratory relief, and detail why the requested relief is inappropriate generally and particularly so on summary judgment. First, however, it is important to correct JHU’s fundamentally mistaken, overly narrow characterization of the dispute between the parties.

**A. Plaintiffs’ Request for Declaratory Relief on the Plan Amendment Is Premised Upon JHU’s Intention to Violate Its Commitment to a JHU-Operated Campus At Belward Farm**

JHU characterizes the declaratory relief sought by plaintiffs as “premiered not on Johns Hopkins’ intended uses for the land,” but rather solely on objection “to the scale and density of the development of the Property.” JHU Motion 10. This claim is repeated at p. 18 and again at p.21. It is flatly contradicted by the allegations in the Complaint, which repeatedly refer to JHU’s violation of use restrictions JHU has agreed to in both the Contract and the Deed. Complaint ¶¶53, 57, 58, 60. Further, the essence of the use problem presented by the Plan Amendment is set forth explicitly in the Complaint:

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<sup>7</sup> Hence, JHU’s claim that plaintiffs’ lawsuit “imperils” the Master Plan, JHU Motion 2, is inappropriate, improper, and irrelevant.

What is envisioned and planned by JHU is the substantial commercial, entrepreneurial real estate development of Belward Farm, exclusive of 10 acres for preservation of the farmstead. What is **not** envisioned and planned is what the Owners and the Owner Successors understood was envisioned and planned -- a **college campus** consisting solely of buildings built for, and occupied by, JHU researchers, teachers, students and supporting personnel.

Id. ¶47 (emphasis added).

Thus, while the Complaint's request for declaratory relief is clearly and properly directed at JHU's specific development plan for Belward Farm,<sup>8</sup> it is premised in significant part on plaintiffs' objection to any plan that would violate JHU's commitment to a JHU-operated campus at Belward Farm. Plaintiffs' objection is based upon the language of the Contract and Deed and is grounded in the following rules of contract interpretation:

"In interpreting a contract provision, we look to the entire language of the agreement, not merely a portion thereof." Weichart Co. of Maryland, Inc. v. Faust, 419 Md. 306, 19 A.3d 393, 400 (2011).

"[I]n ascertaining its true meaning, the contract must be construed in its entirety." Bayly Crossing, LLC v. Consumer Protection Div., Office of the Attorney General, 417 Md. 128, 9 A.3d 4, 12 (2010) (internal quotations omitted).

"A contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning," Weichert, supra, "or it is of doubtful meaning."

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<sup>8</sup> JHU also objects to plaintiffs' request for injunctive relief as "vague and unspecific." JHU Motion 5 n.3. But plaintiffs do not seek injunctive relief that in any way enjoins JHU beyond what may be declared to be its Belward Farm development rights under the Contract and Deed. Complaint, p.21. Moreover, the Complaint is not subject to dismissal for not particularizing the requested injunctive relief in greater detail at the outset, before the parties respective rights under the Contract and Deed are adjudicated to a declaratory judgment. In any event, in the unlikely event it is confused about plaintiffs' intentions, JHU may move for a more definite statement before answering. Md. Rule 2-322(d).

Ubom v. Suntrust Bank, 198 Md. App. 278, 17 A.3d 168, 173 (2011).

“To determine whether a contract is susceptible of more than one meaning, the court considers the character of the contract, its purpose and the facts and circumstances of the parties at the time of the execution.” Ubom, supra.

Also especially pertinent here is the previously quoted rule:

“[P]arties to a contract are presumed to contract mindful of the existing law and that all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them, except where a contrary intention is evident.” Louis Fireison & Assoc., P.A. v. Alkine, 195 Md. App. 461, 6 A.3d 945, 953 (2010) (citations omitted).

While these rules were laid down to guide the proper interpretation of contracts, they are applicable to deeds as well. Maryland Agricultural Land Preservation Foundation v. Claggett, 412 Md. 45, 985 A.2d 565,575 (2009) (“In construing the language of a deed, the basic principles of contract interpretation apply.”). When it is a deed that must be interpreted, “[t]he intention of the grantor is a question of fact, and the surrounding circumstances must be analyzed in order to truly understand an unexpressed intention.” Gunby v. Olde Severna Park Improvement Ass’n, 174 Md. App. 189, 242-43, 921 A.2d 292, 324, *aff’d*, 402 Md. 317, 936 A.2d 365 (2007).

Contrary to the impression sought to be conveyed by JHU, Maryland courts no longer construe restrictive covenants as narrowly as possible in a manner “much more strict than that commonly employed with respect to ordinary contracts.” JHU Motion 20 (citing 1942 precedent that has been effectively overruled). The modern rule is one where any ambiguity in the meaning of the deed is resolved, if possible, as follows:

[T]he circumstances surrounding the execution of the instrument should be considered in arriving at the intention

of the parties, and the apparent meaning and object of their stipulations should be gathered from all possible sources.

Lowden v. Bosley, 395 Md. 58, 909 A.2d 261, 266 (2006) (citations omitted).

Assessing the Contract and Deed under these principles, the Contract and the Deed specify that the development of Belward Farm (Parcel B in the Deed) “shall be known as the Belward Campus of The Johns Hopkins University.” Contract ¶13, Complaint Exhibit B; Deed p.2, Complaint Exhibit C. This agreed upon title for the ultimate finished development of Belward Farm makes clear that what was agreed to was a JHU “Campus,” not a JHU-leased office park for third-party R&D enterprises. Turning to a dictionary reasonably contemporary with the time when the Contract and Deed were executed (1988-89), “campus” is defined as “the grounds and buildings of a university, college or school.” Webster’s New Collegiate Dictionary 158 (1980). Even as late as 2000, the American Heritage Dictionary of the English Language (4<sup>th</sup> Ed. 2000), defined “campus” as “the grounds of a school, college, university or hospital.” It is only in recent years that “campus” has acquired a secondary meaning in ordinary discourse, linking it to what JHU now has in mind: “5. A large, usably suburban, landscaped business or industrial site.” (<http://dictionary.reference.com/browse/campus>) (referencing Random House Dictionary 2011).<sup>9</sup> But “campus” must be interpreted the way the term was commonly understood in 1988-89, not 2011. As made clear in Zurich America Ins. Co. v. Uninsured Employers Fund, 197 Md. App. 290, 13 A.3d 98, 104 (2011), “Maryland

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<sup>9</sup> A 1997 Random House dictionary is consistent with the meaning of “campus” in the cited 1980 and 2000 dictionaries. Random House Webster’s College Dictionary 190 (2<sup>nd</sup> Ed. 1997) (“Campus: 1. The grounds often including the buildings, of a college or other school. 2. A college or university.”). Courts routinely refer to this kind of widely used and accepted abridged dictionary to determine the ordinary meaning of words. E.g., Auction & Estate Repts., Inc. v. Ashton, 354 Md. 333, 731 A.2d 441, 446 (1999); B&P Enterprises v. Overland Equip. Co., 133 Md. App. 583, 758 A.2d 1026, 1043 (2000).

courts give the words of the contract their ordinary and accepted meaning, looking to the intention of the parties from the instrument as a whole.”

Hence, the pivotal issue in this case is likely to be how the single word “campus” in the Contract and Deed is to be interpreted. Plaintiffs regard this as an unambiguous reference to a JHU-operated “school, college, university or hospital.” American Heritage Dictionary, supra, but are not before the Court on a cross-motion for summary judgment because they recognize that the intention of the parties and the words used must be resolved with reference to “the facts and circumstances of the parties at the time of execution,” Ubom, supra, and this case of course has yet to proceed to discovery.

Even if the Court ultimately finds “campus” to be an ambiguous term in 1988, however, plaintiffs fully expect the available evidence to be fatal to JHU’s view of the term, in that the evidence will show that at no point did JHU make aware to the Owners that JHU had in mind the broader concept of “campus” that is now inherent in its Motion 22 years later. See United States v. Stuart, 489 U.S. 353, 367 n.7 (1989) (“It is hornbook contract law that the proper construction of an agreement is that given by one of the parties when ‘that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.’ Restatement (Second) of Contracts §201(2)(b)(1981).”). See 17A Am Jr 2d Contracts §358 (2004).

In the same vein, plaintiffs expect to show that although in the recent past “campus” has been used in the broader context now employed by JHU, this was not a generally prevailing meaning in 1988-89, and contract interpretation is an exercise in determining “from the language of the agreement itself, what a reasonable person would

have meant at the time it was effectuated....” Aetna Cas. & Surety Co. v. Insurance Comm’r, 293 Md. 409, 445 A.2d 14, 19 (1982) (citing other cases, emphasis added). See Restatement (Second) of Contracts §202(3)(1981) (“Unless a different intention is manifested, (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning.”).

**B. There Is No Merit To JHU’s Unlimited Scale and Density Claim and Summary Declaratory Relief Should be Denied**

JHU argues that because the Contract and Deed are unambiguously “silent” on the scale and density of development allowed on Belward Farm, the Court can and should, on summary declaratory judgment, rule that the Contract and Deed impose no restrictions on JHU’s development of Belward Farm. JHU Motion 17-21. When this argument is assessed under the standard principles of contract and deed interpretation enumerated above, it is clear JHU is not entitled to summary relief. The Contract and Deed are anything but “silent” on the “scale and density” of development of Belward Farm by JHU. As previously explained, the operative presumption is that “scale and density” were controlled by the law in existence and applicable to Belward Farm at the time of execution of the Contract and Deed in 1988-89, “except where a contrary intent is evident.” Louis Fireison & Assoc., P.A., supra. The parties addressed this very issue in ¶14 of the Contract, which under ¶22(a), survives execution and delivery of the Deed. There is, unquestionably, ambiguity about exactly what size and scale of rezoning was agreed to for Belward Farm in ¶14. But this ambiguity was subsequently eliminated by the actions of the parties in the consensual rezoning of all the Property (the original 138 acres of Belward Farm) from R-200 to R&D, with an FAR of 0.3. Complaint ¶¶21, 25-27, 34. This rezoning, and the Board-approved submission by JHU of a Preliminary Plan

for a low-rise (2-4 story) “Johns Hopkins Belward Research Campus,” consistent with the .3 FAR “scale and density,” constitute “persuasive evidence of [the parties’] intention.” Tackney, supra, 971 A.2d at 319.

Indeed, if summary declaratory judgment were appropriate on just the “scale and density” issue in this case – and plaintiffs are not claiming such entitlement – it would be that upon examination of the entire agreement and the facts and circumstances of its execution, the parties to the Contract and Deed intended a “scale and density” not to exceed the maximum allowed by the agreed-upon rezoning, i.e, an FAR of 0.3 or about 1,800,000 square feet, for the entire 138-acre farm. Complaint ¶26. Today, however, plaintiffs, the successors of the Owners, are confronted with a proposed scale and density for Belward Farm over **three times** the level the parties contemplated, made possible only by virtue of a recent further change in the zoning of the Property and, indeed, a contemporaneous change in the law authorizing a more than threefold increase in the scale and density of development for Belward Farm in that new zone (the LSC Zone) over what possibly could have been in the contemplation of the parties in 1988-89. Id. ¶¶32-35, 38.

In sum, considering the well-pled facts and allegations in the Complaint in the light most favorable to plaintiffs and all reasonable inferences therefrom, there can be no doubt that JHU is not entitled to summary declaratory relief on its unlimited-scale-and-density claim.

**IV. JHU'S CLAIM THAT THE CONTRACT AND DEED UNAMBIGUOUSLY PERMIT JHU TO LEASE THE PROPERTY ENTIRELY FOR COMMERCIAL DEVELOPMENT MUST BE REJECTED**

JHU also argues that because the Contract and Deed preclude only sale, but not leasing of Belward Farm, the Court can and should, on summary declaratory judgment, rule that leasing of Belward Farm does not violate the Contract or Deed. JHU Motion 22-24. But the principles that obviate JHU's entitlement to summary judgment on its unlimited-scale-and-density claim also obviate summary declaratory relief on this claim as well.

Assessing the Contract and Deed at arm's length with a fine-tooth legal comb, JHU asserts that even though sale of Belward Farm is prohibited, JHU can lease it to anyone for **ninety-nine years if it wishes**, as this was not expressly prohibited, and the law distinguishes between a leasehold interest and a fee simple interest. *Id.* Indeed, on the Complaint and its reasonable inferences – which JHU does not attempt to dispute as to leasing – the Court should conclude that plaintiffs face the prospect of Belward Farm entirely leased out for ninety-nine years to third-party entrepreneurs under circumstances where JHU will exert negligible operational control over the land.<sup>10</sup>

JHU argues that the Contract and Deed do not unambiguously **prohibit** long-term leasing of Belward Farm to third parties. JHU Motion 22. But they do not unambiguously **permit** such long-term leasing, either. Hence, the proper approach is to

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<sup>10</sup> In rejecting this claim for the reasons that follow, plaintiffs will refrain from reliance on the point that the legal artifice employed in JHU's Motion in 2011 (a 99-year lease is not a sale in fee) effectively means its 1988 promise to Ms. Banks not to sell Belward Farm for a mere 50 years was an empty, hollow illusion, once she departed. Indeed, the Successor Owner's sense of JHU's betrayal of the Owners' donative intent extends well beyond JHU's latter-day resort to its 99-year lease stratagem.

consider the intention of the parties in light of “the entire language of the agreement,” Weichart, *supra*, and apply the modern rule for evaluating land use restrictions, as set forth in Lowden, *supra*, and in County Comm’rs of Charles County v. St. Charles Assoc., LP, 336 Md. 426, 784 A.2d 545 (2001) (both cases relied upon by JHU):

*“In interpreting words used to create restrictions, the court should endeavor to ascertain the real purpose and intention of the parties and to discover the purpose from the surrounding circumstances at the time of the creation of the restriction, as well as from the words used. In endeavoring to arrive at the intention, the words used should be taken in their ordinary and popular sense, unless it plainly appears from the context that the parties intended to use them in a different sense, or that they have acquired a peculiar or special meaning in respect to the particular subject-matter.”*

784 A.2d at 558 (emphasis in original).

When JHU’s unlimited leasing claim is evaluated in this framework, the term “campus” is once again a pivotal consideration. The Contract and Deed were entered into at a time when “campus” did **not** mean “landscaped business park.” Hence, the Contract and Deed did not need an express prohibition on leasing for it to be clear that the parties did not intend that JHU was to have unrestricted entitlement to lease Belward Farm long-term to others. A “Belward Campus of The Johns Hopkins University,” by **definition**, is a JHU-owned and operated “school, college, university or hospital.” The use restrictions in the Contract and the Deed closely track the ordinary and then-accepted meaning of campus, enlarging it only slightly to include “agricultural uses,” as Belward Farm was then-used (and might continue to be partly used, with the farmstead preserved) and “research and development,” which was further described as “development of a research campus in affiliation with one or more of the divisions of [JHU].” Complaint

¶18. Hence, considering the Contract and Deed from the perspective of “the entire language of the agreement, not merely a portion thereof,” Weichert, supra, and its “purpose and the facts and circumstances of the parties at the time of execution,” Ubom, supra, JHU’s claim to unrestricted leasing freedom on Belward Farm must be rejected, if not conclusively, at least with respect to summary declaratory relief.<sup>11</sup>

JHU’s claim of an unrestricted leasing right fails from a second, equally compelling perspective. Both the Contract and the Deed distinguish sharply between how JHU may use or develop Parcels A and B of the overall 138-acre farm. Complaint ¶¶16-18. More precisely, ¶13 of the Contract provides that the use restrictions imposed on Parcel B – the residual Belward Farm that is the subject of this action -- would not be applicable to Parcel A. Id. Given Ms. Bank’s long-established – and, indeed, notorious – opposition to commercial development of her property, Complaint ¶¶9, 11, it is a reasonable inference that she was not inclined to permit any part of the farm to be commercially developed, and plaintiffs fully expect the evidence at trial to show exactly that, including initial opposition to commercial development of Parcel A, the eastern 30 acres of the farm. But as detailed in the Complaint ¶14, JHU sought, with ultimate

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<sup>11</sup> For the Court to conclude, summarily or ultimately, that JHU does not have unrestricted leasing freedom on Belward Farm does not mean all possibility of leasehold interests in the development of Belward Farm is foreclosed. These are not obverse sides of the same coin, and plaintiffs are not seeking declaratory relief that would preclude any and all manner of leasing on Belward Farm. For example, at trial the evidence might show that one or more aspects of typical development and utilization of a university-operated campus would involve leased premises for a particular piece of land, building or part of a building – e.g., a skating rink concession or other student recreations. The only declaratory relief plaintiffs seek is that JHU may not implement its current vision for Belward Farm, which is, as best can be determined to this point, the entrepreneurial development of Belward Farm into a commercial R&D office park with a scale and density far beyond what the law would allow when the Contract and Deed were agreed to.

success, to persuade Ms. Banks that allowing JHU to commercially develop Parcel A would “create revenue to support the academic activities of JHU.” *Id.* In other words, JHU sold Ms. Banks on the idea that it needed the income from this commercial development to fund the non-commercial development of the “Belward Campus of The Johns Hopkins University” on Parcel B. *Id.*, ¶18. But the source of the revenue could not be the sale of Parcel A; if there were such a sale, which was not prohibited by the Contract or Deed, those funds were to be used “to create or add to a fund established in the name of Elizabeth B. Banks for the benefit of The Johns Hopkins University.” Contract ¶15, Complaint Exhibit B. Hence, the “revenue” that JHU persuaded Ms. Banks it needed to create the “campus” on Parcel B must have been commercial lease revenue from Parcel A.

In short, the Owners agreed that Parcel A could be subjected to the kind of unlimited leasing right now asserted for Parcel B by JHU. Indeed, more generally, the use restrictions imposed on Parcel B, if read as JHU now wishes to interpret them, are effectively indistinguishable from Parcel A’s unrestricted use. But it could hardly be more clear, from the essentially donative purpose inherent in the Contract as expressly provided therein, Complaint ¶15, and from “the facts and circumstances of the parties at the time of execution,” *Ubom, supra*, that a meaningful difference between how Parcels A and B would be developed and used was both understood and agreed to. JHU’s assertion of an unlimited leasing right on Parcel B, in order to develop it as a real estate entrepreneur into a commercial office park is tantamount to the complete negation of what was intended by the parties in the Contract and Deed in 1988-89. JHU’s claim to

unrestricted leasing freedom on Belward Farm must be rejected, if not conclusively, at least with respect to summary declaratory relief.

**CONCLUSION**

For the foregoing reasons, JHU's motion to dismiss or motion for summary judgment shall be denied. A proposed order of denial is attached.

Respectfully submitted,

  
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Attorneys for Plaintiffs

January 3, 2012

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this 3<sup>rd</sup> day of January 2012, a true and correct copy of Plaintiffs' Opposition To Motion To Dismiss Or, In The Alternative, For Summary Judgment, and a proposed Order, were mailed, first class, postage prepaid to:

James H. Hulme, Esq.  
Leah C. Montesano, Esq.  
Arent Fox, LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036

  
David W. Brown

**IN THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY, MARYLAND**

**JOHN TIMOTHY NEWELL, *et al.***

Plaintiffs,

v.

**THE JOHNS HOPKINS UNIVERSITY**

Defendant.

:  
:  
:  
:  
: **Civil Action No. 355237-V**  
:  
:  
:  
:

**ORDER**

**UPON CONSIDERATION** of Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment, and Plaintiffs' opposition thereto, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by the Circuit Court for Montgomery County, hereby

**ORDERED**, Defendant's motion is hereby **DENIED**.

**SO ORDERED.**

\_\_\_\_\_  
JUDGE, Montgomery County  
Circuit Court

Copies To:

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