

Erasmo Rodriguez

From: Jo Kallison [jkallison@rwlp.com]
Sent: Thursday, May 17, 2007 11:39 AM
To: Erasmo Rodriguez
Cc: sleon@powell-leon.com
Subject: Deed Restriction - "Lott Canada" property
Attachments: Beeville ISD-Memo to E Rodriguez (5-17-07).doc

Mr. Rodriguez:

At your request, attached is a Memo regarding an approach to the District's conveyance of the Lott Canada property.

To summarize, Frank Warner has confirmed that in connection with the conveyance of the Property by the District, the title company will agree to issue an Owner's Policy of Title Insurance without exception to the restrictive covenant in the Deed, provided the District can sign an Affidavit stating that the property has not been used for classroom instruction of students since the 1980-1981 school year.

Provided the District is able to execute the Affidavit required by the Title Company, the District will want to confirm that the approach works for the Community College (or other interested buyer).

If you have a chance, please give me a call before the Board meeting to discuss the Memo.

Thanks,
Jo

Jo Kallison
Rogers & Whitley, L.L.P.
2210 San Gabriel
Austin, Texas 78705
512-334-4605 (ph)
512-334-4615 (fax)

5/17/2007

Rogers & Whitley, L.L.P.

2210 San Gabriel
Austin, Texas 78705-5012

Jo Lyn Kallison
Of Counsel

Telephone (512) 334-4605
Fax (512) 334-4615
jkallison@rwllp.com

CONFIDENTIAL AND PRIVILEGED ATTORNEY CLIENT COMMUNICATION

MEMORANDUM

TO: Erasmo Rodriguez
Deputy Superintendent
Beeville Independent School District

CC: Sara Leon, Esq.

FROM: Jo Lyn Kallison

DATE: May 15, 2007

RE: Lott Canada Property

You have asked whether the restrictive covenant and right of reverter contained in the Deed conveying the "Lot Canada Property" (the "Property") from R.H. Berry and Clara L. Berry to the Trustees of the Independent School Corporation District No. I of Beeville, Bee County, Texas, dated June 2, 1908 and recorded in Volume "P-2", Pages 332-333, Deed Records of Bee County, Texas, would prevent the District from conveying the Property to an interested party. The Deed provides that the conveyance of the Property is made "upon the express condition, however, that should the Trustees of the Independent School Corporation District No. I of Beeville, Texas, or their successors in office, ever abandon the ground hereby conveyed, as a colored school house ground, that then the title to the ground hereby conveyed shall revert to and vest in us the grantors herein."

Under Texas law, the restrictive covenant in the Deed would likely be considered a condition subsequent with a right of reverter, requiring the heirs of R.H. Berry and Clara L. Berry (the "Berry Family Heirs") to bring a law suit for re-entry and termination of the District's rights to the Property if they wish to enforce the right of reverter upon a breach of the restrictive covenant. The reverter would not happen automatically. You explained that (i) the building on the Property is currently used to house special education support staff, (ii) the building was never used to educate *only* African-American students, and (iii) the building has not been used for classroom instruction since the 1980-1981 school year. It is also my understanding that the District has not received notice from the Berry Family Heirs that the restrictive covenant has been breached and the Berry Family Heirs have not tried to claim ownership of the Property under the right of reverter.

One way to offer protection to a buyer regarding the restrictive covenant is to provide an Owner's Policy of Title Insurance to the buyer upon conveyance of the Property by the District without exception for the restrictive covenant. I believe this would be an acceptable approach for most buyers. If the Policy is issued to the buyer without exception for the restrictive covenant, the buyer would have a claim under the Policy if the Berry Family Heirs subsequently tried to assert a claim against the Property owner for breach of the restrictive covenant.

I asked Frank Warner of Southwest Land Title Co. of Bee County, Inc. (the "Title Company") whether an Owner's Policy could be issued without the exception. Mr. Warner discussed this matter with an underwriter for the Title Company (Stewart Title Guaranty Company). Although I made the argument that there is only one restrictive covenant in the Deed requiring the District to use the Property for instruction of African American students only, the underwriter analyzed the restrictive covenant as two separate restrictions – one requiring the Property be used for classroom instruction and the other requiring the Property be used for classroom instruction of African-American students only.

The restriction requiring the Property be used for the instruction of African-American students only is void under Texas law (Property Code §5.026) as a discriminatory provision. Because the Property has not been used for classroom instruction since August 1, 1981, the underwriter is requesting that the District sign an Affidavit so stating. The underwriter will agree to the deletion of the restrictive covenant from the Policy if the District can sign such an affidavit based on the underwriter's position that the Berry Family Heirs would have had to bring a lawsuit to re-enter and take title to the Property under the right of reverter in the Deed within 25 years after the purported violation (failure to use the Property for classroom instruction) first occurred. Since no court action was ever brought by the Berry Family Heirs, the underwriter and Title Company are comfortable that the heirs can no longer assert any rights under the Deed regarding a violation of the restrictive covenant because the statute of limitations on such a claim has run.

It is important to understand that the underwriter and Title Company are making a business decision based on underwriting risks. They are not necessarily reaching the same result a court would reach in analyzing and enforcing the restriction. In this situation, with the Affidavit from the District, the Title Company and underwriter are willing to assume the risk of insuring title to the Property without exception for the restrictive covenant.

If the District agrees to sign the Affidavit required by the underwriter, it will be necessary for us to prepare a draft for the underwriter's review. I would be happy to prepare the draft if you would like me to do so.

Please let me know if you have any questions regarding this matter.

State of Texas)

County of Bee) Know all men by these Presents:- That we, R.H.Berry and Clara L. Berry, (husband and wife) on Bee County, Texas, on consideration of the sum of One Dollar, to us in hand paid by B.W.Klipstein, W.H.Ferguson, Thos Craven, R.A.Partain, J.T.Ballard, R.H.Gillett and E.H.Nielsen, Trustees of Independent School Corporation District No One (I) of Beeville, Bee County Texas, thereceipt of which is hereby acknowledged, and other good and valid reasons us there unto moving , have Granted, sold and conveyed and by these presents do Grant, sell and convey unto the said B.W. Klipstein, W.H.Ferguson, Thos Craven, R.A.Partain, J.T.Ballard, R.H. Gillett and E.H.Nielsen, Trustees as aforesaid, for thee use and benefit of said Independent School Corporation District No. One (I) of Beeville, Bee County, Texas, (for a colored school ground), all that certain tract or parcel of land in BEE County, Texas, being all that portion of Block No Ten (10) of Jones Western addition to the town of Beeville, Texas, within a wire fence enclosing the Colored School house, and a part of a 17,422,185. square vara survey in the name of Antonio Curvier, with metes and bounds as follows:

Beginning at a fence corner post for the southeast corner of this survey, whence a point in the eastern bdy of said Block No.10, bears N63 E. 6 1/2 feet, and from said point the Southeast corner of said Block #10, bears S.27 E. 2 feet; Thence S.64 17 W. with a fence for the southern bdy of this survey 293 1/2 feet to a stake for the Southwest corner of this survey, Thence N. 27 W. following a fence for the western bdy of this survey 351 feet to a fence corner post for the Northwest corner of this survey. Thence N.63 E. following a fence for the Northern bdy line of this survey 293 1/2 feet to a fence corner post for the northeast corner of this survey. Thence S.27 E. with a fence 357 1/2 feet to the place of beginning. as per survey made by Jno S.Fenner, surveyor on the 27th day of May 1908

To have and to hold, the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said B.W.Klipstein, W.H.Ferguson, Thos Craven, R.A.Partain, J.T.Ballard, R.H. Gillett and E.H.Nielsen, Trustees as aforesaid and to their successors in office (for a colored school house ground) forever, upon the express condition, however, that should the said Trustees of Independent School Corporation District No. I, of Beeville, Texas, or their successors in office , ever abandon the ground hereby conveyed, as a colored school house ground, that then the title to the ground hereby conveyed shall revert to and vest in us the grantors herein, and we do hereby bind ourselves, our -- heirs, executors and administrators, to Warrant and Forever defend all and singular the said premises unto the said B.W.Klipstein, W.H.Ferguson, Thos Craven, R.A.Partain, J.T.Ballard, R.H. Gillett and E.H.Nielsen, Trustees as aforesaid, and their successors in Office (subject to the limitation hereinbefore set out) against every person whomsoever lawfully claiming or to claim the same or any part thereof

In Testimony whereof, we have hereunto set out hands this 2nd day of June 1908

R H. Berry

Clara L. Berry.

WJD
B.10
R.H.B. sh
Ind 8/10#
Jones West
100 etc
6.2.08
6.2.08