

STATE OF MICHIGAN
COURT OF APPEALS

JAMES J. JOHNSON and CAROL ANN
JOHNSON,

UNPUBLISHED
October 26, 2001

Plaintiffs-Appellants,

v

No. 224891
Calhoun Circuit Court
LC No. 99-000510-AZ

CLARENCE TOWNSHIP, JOHN GRIGGS, and
SUZANNE GRIGGS,

Defendants-Appellees.

and

STEVE ROLAND,

Defendant.

Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal from an order of the trial court granting defendants John and Suzanne Griggs (hereinafter “Griggs”) summary disposition on both counts of plaintiffs’ complaint pursuant to MCR 2.116(C)(10). The trial court ruled that the Griggs’ construction of a garage did not violate the set back requirements contained in the Clarence Township Zoning Ordinance and did not violate the restrictive covenants imposed upon all of the lots within the Zebell subdivision. Plaintiffs also appeal the trial court’s dismissing defendants Clarence Township and Steven Roland. We affirm in part, reverse in part and remand for entry of an order consistent with this opinion.

I. Basic Facts and Procedural History

The relevant facts are essentially undisputed. Plaintiffs own lot thirty-nine in the Zebell subdivision. This lot provides a view of Duck Lake over the southerly portion of lot thirty-eight. The Griggs own this southerly portion of lot thirty-eight, as well as lot thirty-four. Lots thirty-four and the southerly portion of lot thirty-eight are noncontiguous parcels separated by an unnamed, private road approximately twenty feet wide.

In December, 1998 the Griggs obtained zoning and building permits to construct a garage on their southerly portion of lot thirty-eight. Convinced that the garage would almost completely obstruct their view of Duck Lake, and thus decrease the value of their property, plaintiffs attended a meeting of the township board to request the board to direct defendant Steve Roland¹ to revoke the Griggs' building permits. Rather than revoking the permits, the township board advised plaintiffs to bring the issue before the Clarence Township Zoning Board of Appeals.

Plaintiffs then filed an appeal before the Clarence Township Zoning Board of Appeals arguing that the Griggs' garage violated the setback requirements contained in the applicable zoning ordinance. Upholding the issuance of the permit, the zoning board of appeals determined that the road separating lots thirty-four and thirty-eight is not a "street" within the meaning of the zoning ordinance but is more akin to a "private drive." Thus, the board held that the ordinance delineating the setback requirements did not apply. Plaintiffs appealed this determination to the circuit court.

The trial court ruled that the meaning of the ordinance was ambiguous to the extent that the ordinance did not define the word "street," for purposes of the setback requirements. Because it found the ordinance was ambiguous, the trial court upheld the decision of the Zoning Board of Appeals finding that its decision was amply supported by competent and substantial evidence on the whole record².

One day after plaintiffs filed their appeal to the zoning board, the Griggs began construction on their garage. Plaintiffs immediately filed a complaint in circuit court for an injunction to halt the construction. Count one reiterated the plaintiffs' allegations that the setback requirements of the township's ordinance were violated by the construction of the garage. The second count further alleged that the garage violates certain restrictions imposed upon each parcel within the Zebell subdivision by the original plattor.

Plaintiffs filed a motion for partial summary disposition as to the second count of their complaint pertaining to the restrictive covenants and defendants filed their motion summary disposition on both counts. After entertaining oral argument on the competing summary disposition motions, the trial court issued a written opinion and order granting defendants' motion for summary disposition and denying plaintiffs'. The trial court ruled that the garage did not violate the setback requirements in that the zoning ordinance was ambiguous on the definition of the word "street" to which the set back requirements of the zoning ordinance apply. The trial court also found the restrictive covenants to be ambiguous. Accordingly, the court strictly construed the restrictive covenants against plaintiffs resolving the ambiguity in favor of the Griggs' unfettered use of their property. The instant appeal ensued.

¹ Defendant Roland is the building inspector and zoning official for defendant Clarence Township.

² On May 10, 2000, this Court denied plaintiffs' application for leave to appeal this decision for lack of merit in the grounds presented. (Docket No. 223625).

I. The Setback Requirements

Plaintiffs first argue that the trial court erred, as a matter of law, when it concluded that the applicable zoning ordinance setback requirement was ambiguous and when it concluded that the ordinance did not prohibit construction of the garage at issue. We disagree.

Interpretation of a zoning ordinance is a question of law that this court reviews de novo. *Brandon Charter Township v Tippett*, 241 Mich App 417, 421; 616 NW2d 245 (2000). Similar to statutory construction, where the language employed is clear and unambiguous, judicial interpretation is neither invited nor required. See *Id.* at 422. On the contrary, “if reasonable minds could differ regarding the meaning of the ordinance, the courts may construe the ordinance.” *Id.*

The disputed portion of Section 6.01 of the Clarence Township Zoning Ordinance entitled “Setback and Side Line Spacing,” provides in pertinent part as follows:

In “A” Agricultural Districts, “R-1” Residence Districts, “R-2” Residence Districts, and “R-3” Residence Districts (except for dwellings or structures on a lot abutting a lake, pond, stream or river), there shall be a setback from all street right-of-way lines of not less than thirty-five (35) feet for all building

Plaintiffs’ contend that the term “street” is not ambiguous and clearly encompasses private roads such as the one which abuts the southerly portion of lot thirty-eight. We disagree and affirm the trial court.

The zoning ordinance does not contain a definition of the word “street” thus subjecting the term to multiple and conflicting meanings. For instance, the word “street” could be interpreted to only include named public thoroughfares, or could be interpreted to also include unnamed private roadways. As used in the ordinance, the term “street” is ambiguous. Thus, judicial construction is necessary to give effect to the intent of the legislative body. *Brandon Charter Twp, supra* at 422.

As our Supreme Court once observed, “in cases of ambiguity in a municipal zoning ordinance, where a construction has been applied over an extended period by the officer or agency charged with its administration, that construction should be accorded great weight in determining the meaning of the ordinance.” *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). Respecting the letter of our Supreme Court’s direction, the question then becomes what meaning has the township historically attached to the word “street” in their interpretation and application of the disputed zoning ordinance.

A review of the March 2, 1999 Clarence Township Zoning Board of Appeals Meeting Minutes indicates that historically, construction occurring on lots abutting private roads have not been subject to the setback requirements contained in the ordinance. Consequently, construing the word “street” as excluding “private roads” is entirely consistent with past practice. Affording “great weight” to the zoning board’s interpretation that the setback requirements do not apply to

lots abutting private roads, the Griggs' construction of a garage on the southerly portion of lot thirty-eight did not violate any zoning ordinance. Accordingly, plaintiffs' argument that the garage constitutes a nuisance per se fails. We conclude therefore, that the trial court did not err, as a matter of law, when it held that the language employed in the zoning ordinance was ambiguous and upheld the decision of the zoning board of appeals.

II. The Restrictive Covenants

Next, plaintiffs argue that the trial court erred when it granted defendants' motion for summary disposition on the grounds that the plat restrictions were ambiguous and further holding that strictly construing the language of the restrictions against plaintiffs mandated an interpretation in favor of the Griggs' unencumbered use of their property. We agree. This court reviews a trial court's grant or denial of a motion for summary disposition de novo³. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

A. Plat Restriction Sections Two and Three

The operative provisions of the plat restrictions herein at issue are two and three respectively which provide in pertinent part as follows:

* * *

- (2) That all Lots in said plat, with the exception of said lots numbered twenty-one and sixty-one shall be residential lots only; that no trade, manufacturing, or business whatsoever, including the manufacture and sale of intoxicating liquors; shall be donducted, [sic] carried on, or permitted on any of said lots, or the buildings and premises thereon.
- (3) That no building erected on any of said lots . . . shall be used for more than single-family dwellings; that not more than one building shall be erected on any one lot . . . in said plat, *garage and boathouse excepted*, and no building shall be used otherwise than as a single-family dwelling house for private residence purposes [Emphasis added.]

Accordingly, the southerly portion of lot thirty-eight, whereupon the Griggs constructed their garage, is subject to reciprocal restrictive covenants burdening all of the lots within in the

³ In its written opinion and order, the trial court did not specify upon which subsection of MCR 2.116(C) it relied to grant defendants' motion for summary disposition. Because the trial court granted defendants' motion primarily on the grounds that the language in the restrictions contained ambiguity counseling for a decision in defendants' favor, we presume that the court granted the motion pursuant to MCR 2.116(C)(10), the court rule cited in plaintiff's motion for partial summary disposition. See *Village of Diamondale v Grable* 240 Mich App 553, 564; 618 NW2d 23 (2000).

Zebell subdivision unless otherwise specified. As our Supreme Court recognized long ago, owners of lots subject to restrictions within a particular subdivision have “a right in the nature of a negative easement in every other lot.” *Austin v Van Horn*, 245 Mich 344, 346; 222 NW 721 (1929). Indeed, a negative easement “is a valuable property right” vesting in its owner the right to seek enforcement of the restrictions in equity “regardless of the extent of his damages.” *Id.*

According to these equitable precepts, plaintiffs have an enforceable negative easement on lot thirty-eight, as do all of the other landowners in the Zebell subdivision, to enforce the restrictions adopted and set forth by the original plat. In *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997) our Supreme Court noted that, “negative covenants . . . are grounded in contract . . . [and] the intent of the drafter controls.” Generally, “where no ambiguity is present, it is improper to enlarge or extend the meaning [of a restrictive covenant] by judicial interpretation. *Webb v Smith (Aft Rem)*, 204 Mich App 564, 572; 516 NW2d 124 (1994). It is axiomatic that restrictive covenants are strictly construed against those that seek to enforce them and any uncertainties are resolved to ensure the “broad freedom to make legal use of [one’s] property.” *O’Connor v Resort Custom Builders, Inc.*, 459 Mich 335, 343; 591 NW2d 216 (1999).

A review of the restrictions at issue exposes no ambiguity. The language in restriction three is clear, “no building erected on any of said lots . . . shall be used for more than single-family dwellings; that not more than one building shall be erected on any one lot . . . *garage and boathouse excepted.*” [Emphasis added.] The trial court ruled that the exception for “garage and boathouse” was subject to two separate, albeit logical, interpretations thus rendering the restriction ambiguous and subject to judicial interpretation. We do not agree. The restriction does not say “garages and boathouses excepted.” The words in the restriction do not appear in their plural format. On the contrary, they appear in singular form. Any other reading of those words would impermissibly “enlarge or extend the meaning by judicial interpretation.” *Webb, supra* at 572.

Pursuant to the plain and ordinary language⁴ of the restriction, a lot could potentially have three structures; a single-family dwelling, a garage and where appropriate, a boathouse⁵. A garage was already located on lot thirty-eight. By constructing a garage on the southerly portion of lot thirty-eight, that lot now contains two garages. Clearly, this second garage is a structure or “building” that is something other than a single-family dwelling which is strictly prohibited by section three of the plat restrictions. We find that the court erred in holding that the restrictive

⁴ In *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982), the court stated that “the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense.”

⁵ We employ the phrase “where appropriate” to underscore the difference between a garage and a “boathouse.” Although not at issue herein, one could not construct a second garage on any of the parcels contained in the Zebell subdivision and call it a “boathouse” to come within the purview of the restrictions. By definition, a “boathouse” is “a building or shed, built partly over water, for sheltering boats.” *Random House Webster’s College Dictionary*” (2d ed. 1997.) Rather difficult therefore, to have a “boathouse” on a lot that does not abut the lake.

covenants did not prohibit the construction of the garage on the southerly portion of lot thirty-eight.

B. Plat Restriction Section Six

The Griggs alternatively argue that their purchase of the southerly portion of lot thirty-eight merged with their prior ownership of lot thirty-four to create one larger lot. However, we note that approximately thirty-three years ago, lot thirty-eight was improperly split and a portion thereof improperly conveyed to the Griggs. Since lot thirty-eight extends neither the northern nor the southern boundaries of thirty-four, that conveyance was in direct contravention of the sixth restriction which states in pertinent part that:

(6) [N]o lot . . . shall be sold . . . other than as an entire parcel, *except as the same shall be necessary to alter or change the north or south boundaries of any lot . . .* in which event that part of any lot so conveyed . . . to make the part of one lot a part of another lot shall, with the lot to which it shall be added, be subject as an entirety to all of the covenants, conditions, restrictions and reservations pertaining to said plat, the same if it had originally been one lot according to the original of said Zebell Plat.

If the Griggs were conveyed an interest in two contiguous parcels, that extended either the northern or southern boundary of their existing lot, then according to the plain and ordinary language of the sixth restriction, the combined lot would be subject to all other covenants and restrictions as if they had initially acquired both lots in one single conveyance. If this were the case, according to the sixth enumerated restriction, the Griggs could only erect a single-family dwelling, a garage, and where appropriate, a boathouse.

Nonetheless, in the case *sub judice*, the Griggs acquired an interest in the southerly portion of lot thirty-eight, a *non-contiguous* parcel of land that extended their *western* boundary by an improper conveyance. Because the conveyance was in derogation of a restrictive covenant, lot thirty-four and the southerly portion of lot thirty-eight *never* became one combined lot. In other words, lot thirty-eight never lost its autonomy. As a result, all of the restrictions apply to lot thirty-eight as if it remained in tact. Because lot thirty-eight already contains a garage, then erecting another “building” thereupon that is something *other* than a “single-family dwelling” would violate the letter of section six of the plat restrictions.

III. Remedy

Finally, plaintiffs submit that if the garage is found to be in violation of the restrictive covenant, the only available remedy is removal of the structure. We agree. Respecting the precept that “[r]estrictive covenants . . . enhance and preserve the value of real estate,” *Lakes of the North Ass’n v TWIGA Ltd Partnership*, 241 Mich App 91, 99; 614 NW2d 682 (2000) the Griggs’ violation, by definition, diminishes the value of plaintiffs’ property. The restrictive covenants at issue herein were to preserve the residential character of Zebell subdivision. When collectively considering the second, third and sixth restrictive covenants permitting defendants’ garage to remain on the southerly portion of lot thirty-eight would, to some extent, destroy the character of that parcel as a “residential lot.” Although the Griggs maintain that they are using

the garage in conjunction with their own dwelling ostensibly for “residential purposes,” that does not vitiate their violation of the applicable restrictive covenants.

Since the Griggs have already erected the garage, we note that they did so with full knowledge of the judicial proceedings pertaining to that construction. To the extent that they elected to proceed during the pendency of these proceedings and in derogation of plaintiffs’ negative easement upon lot thirty-eight, they did so at their own peril. *Webb v Smith (After Remand)*, *supra* at 573. The Griggs thus assumed the risk that a court may ultimately order them to demolish the structure so constructed. *Webb v Smith (After Second Rem)*, 224 Mich App 203; 214; 568 NW2d 378 (1997). Although bound to the result herein, we note that “the parties still have an opportunity to reach a private agreement more palatable to each side” that may allow for something less than complete demolition. *Id.* That, however, is not for this court to decide.

Affirmed in part, reversed in part and remanded to the trial court for entry of an order consistent with this opinion.

/s/ Kirsten Frank Kelly

/s/ Michael J. Talbot