

STATE OF MICHIGAN
COURT OF APPEALS

JAMES F. URBANICK and BARBARA A.
URBANICK,

UNPUBLISHED
October 23, 2003

Plaintiffs-Appellees,

v

TOWNSHIP OF GROSSE ILE,

No. 238531
Wayne Circuit Court
LC No. 01-123360-AA

Defendant-Appellant.

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order reversing defendant's Board of Trustee's ("the Board") decision denying plaintiff's request for a permit to install a swimming pool on their property. We affirm.

I. Facts and Procedure

On May 17, 1993, defendant's Planning Commission granted a tentative preliminary plat approval for a piece of real property in the Township of Grosse Ile, contingent on several restrictions, including a sixty-foot woodland buffer area along the side of the property facing Meridan Road.¹ The site plan for the property, which was drafted by the developer, included reference to the woodland buffer. However, the developer recorded a declaration of restrictions for the property, which did not include reference to the woodland buffer. On August 11, 1994, defendant sent a letter to the developer, informing it that the Board had granted preliminary plat approval. This letter mentioned the woodland buffer.² However, the final plat, which was approved by the Board and recorded with the register of deeds in 1995, did not contain any reference to the woodland buffer.

¹ The woodland buffer restriction was not required by a local zoning ordinance, but was approved by the Planning Commission as being a restrictive condition for the property at issue.

² The letter stated, in pertinent part, "Administrative discretion for homes constructed between Meridan and Rivard to be as reasonably close to Rivard as possible in order to maximize protection of the 60 foot wooded buffer along Meridan."

In October 2000, plaintiffs purchased the property by warranty deed from the developer. The deed referred to the recorded plat in describing the property. The deed also stated that the property was subject to “[b]uilding and use restriction and easements of record, if any.” After purchasing the property, plaintiffs applied for a permit to install a swimming pool, but this permit was denied because the proposed pool would encroach on the designated woodland buffer area. Plaintiffs applied for a variance to defendant’s Zoning Board of Appeals, but decided to withdraw their application after it was determined that only the Board of Trustees had the authority and jurisdiction to review the issue of the woodland buffer restriction. Plaintiffs resubmitted their application to install the pool to the Board, which the Board denied. Despite the fact that the woodland buffer was not included in the property’s final plat or recorded with the register of deeds, the Board denied plaintiff’s application because the woodland buffer was in existence at the time plaintiffs applied for the permit and had been approved as a “condition of record.” The Board also concluded that the time for plaintiffs to request a variance had passed because the final preliminary plat had been approved. Therefore, plaintiffs could not install the pool in an area that would encroach on the woodland buffer. On appeal, the circuit court reversed the Board’s decision and ordered defendant to issue any permits required by plaintiffs to install their pool. The circuit court reasoned that the final approved plat did not contain any reference to the woodland buffer, so plaintiffs were not on notice of the restriction and could not be held to it.

II. Standard of Review

In *Michigan Ed Ass’n Political Action Committee (MEAPAC) v Secretary of State*, 241 Mich App 432, 443-444; 616 NW2d 234 (2000), this Court explained the standard of review for an administrative agency decision:

An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Ansell v Dep’t of Commerce (On Remand)*, 222 Mich App 347, 354; 564 NW2d 519 (1997). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. See *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). This Court’s review of the circuit court’s decision is limited to determining whether the circuit court “applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency’s factual findings.” *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In other words, this Court reviews the circuit court’s decision for clear error. *Id.* A decision is clearly erroneous when, “on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made.” *Id.* at 235.

This Court must give due deference to an agency’s regulatory expertise and may not invade the agency’s fact-finding duties. *Gordon v City of Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994).

III. Analysis

Defendant argues that the circuit court erred in holding that the woodland buffer requirement, which was omitted from the final recorded plat of plaintiffs' property, could not be enforced against plaintiffs. We disagree. In reversing the Board's decision to disallow plaintiffs' installation of a pool, the circuit court relied on *Allen v Bay Co Drain Comm'r*, 10 Mich App 731; 160 NW2d 346 (1968). In *Allen*, *supra* at 732, the defendant drain commission obtained an easement for drain purposes from the owners of property in 1917. The easement was recorded at the drain commissioner's office, but was not recorded in the register of deeds office. *Id.* The plaintiffs subsequently purchased the property and filed an action to enjoin the defendant from constructing a new drain and to quiet title. *Id.* at 733. This Court held that an easement that is "not recorded with the register of deeds office is void against subsequent purchasers in good faith." *Id.* at 733-734. This Court determined that the trial court did not clearly err in finding that the plaintiffs did not have actual or constructive notice of the portion of the easement at issue and affirmed the trial court's determination that the easement was void against the plaintiffs. *Id.* We conclude that the reasoning in *Allen* is applicable to the present case. Although the woodland buffer was approved as a condition of the land rather than an easement,³ both are burdens on the property. We conclude that the rationale in *Allen* also applies to land use restrictions on the property and that a restriction that is not recorded with the register of deeds office is void against subsequent purchasers in good faith.

In the present case, as in *Allen*, the circuit court found that plaintiffs did not have actual notice of the burden. The evidence does not establish that the trial court clearly erred in making this finding. The warranty deed conveyed to plaintiffs when they bought the property states that the property was subject to "[b]uilding and use restriction and easements *of record*, if any." (Emphasis added.) The woodland buffer requirement was not recorded anywhere with the register of deeds. The developer recorded a declaration of restrictions for the property on November 1, 1993, which did not include reference to the woodland buffer. Additionally, the final recorded plat contained no reference to the woodland buffer. Although defendant submitted evidence that the woodland buffer was contemplated by defendant's Planning Commission, the Board, and the developer, and that the Board had approved a preliminary plat that included the woodland buffer restriction, none of the documents making reference to the woodland buffer were recorded with the register of deeds. Therefore, because the woodland buffer restriction was not "of record," the clause in the deed regarding restrictions of record did not give plaintiffs notice of the woodland buffer.

Furthermore, the warranty deed conveyed to plaintiffs referred to the recorded plat in describing the property. The final recorded plat did not contain reference to the woodland buffer. The purchasers of parcels of property disposed of by reference to an official plat have the right to rely on the reference to the plat though it may be erroneous. *Mumaugh v McCarley*, 219 Mich App 641, 649; 558 NW2d 433 (1996). Therefore, even if defendant erroneously omitted the woodland buffer from the plat, plaintiffs had a right to rely on the actual final plat as written, which contained no reference to the woodland buffer.

³ "An easement is the right to use the land of another for a specified purpose." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997).

Defendant also argues that the recorded plat is not conclusive and other evidence may be considered to show that the final recorded plat was meant to include a woodland buffer. In support of this argument, defendant cites *Cleveland v Detroit*, 276 Mich 443, 446; 267 NW 874 (1936), where our Supreme Court held that while the true character of property may be shown by contrary evidence, much importance will be attached to the name given to a roadway on a plat. In the present case, the evidence shows that the Planning Commission had included the woodland buffer in the tentative preliminary plat approval and that defendant informed the developer that the woodland buffer had been included in the preliminary plat approval. The site plan drafted by the developer showed that it was aware of the woodland buffer. However, for whatever reason, the final plat contained no reference to the woodland buffer. This final plat was approved by defendant and recorded with the register of deeds. We decline to read into defendant's intentions for the final plat and will assume that defendant intended to include what was actually written and recorded. The evidence submitted by defendant does not conclusively show that the true character of the property is anything other than what was included in the final recorded plat. Additionally, as discussed, the warranty deed conveying the property to plaintiffs contained no reference to the woodland buffer and plaintiffs purchased the property without notice of the woodland buffer. Even if the woodland buffer was inadvertently omitted from the recorded plat, plaintiffs had the right to rely on the recorded plat. *Mumaugh, supra* at 649. Because the woodland buffer restriction was not recorded with the register of deeds and plaintiffs purchased the property without notice of the restriction, the woodland buffer restriction is void against plaintiffs. *Allen, supra* at 733-734.

Defendant also argues that the circuit court should not have ruled on plaintiff's appeal without a trial and a hearing regarding the amendment of the recorded plat. "The circuit court may, as provided in sections 222 to 229 vacate, correct, or revise all or part of a recorded plat." MCL 560.221. However,

[t]o vacate, correct, or revise a recorded plat or any part of it, a complaint shall be filed in the circuit court by the owner of a lot in the subdivision, a person of record claiming under the owner or the governing body of the municipality in which the subdivision covered by the plat is located. [MCL 560.222.]

No complaint was filed in the present case to revise the recorded plat. The circuit court had no obligation to conduct a trial concerning a claim that had never been filed. Moreover, even if defendant brought a successful action to revise the plat to include a woodland buffer, plaintiffs' status as a good faith purchaser of the property with no prior notice of the restriction would remain unchanged. Therefore, the circuit court did not err in failing to conduct a trial regarding a revision of the plat under MCL 560.226 before ruling on plaintiffs' appeal from the Board.

Next, defendant argues that allowing plaintiffs to install a pool in the woodland buffer area would adversely affect the neighboring property owners who rely on the woodland buffer restriction. However, as discussed, the woodland buffer restriction was not recorded and is void against plaintiffs. Furthermore, there is no evidence that plaintiffs' neighbors relied on the woodland buffer restriction on plaintiffs' property or were opposed to plaintiffs' installation of the proposed pool in the woodland buffer area. Therefore, defendant's argument lacks merit.

Next, defendant argues that, regardless of the fact that the recorded plat did not contain any references to the woodland buffer, plaintiffs were required to conform to defendant's zoning

ordinances. We agree that, even in the absence of a woodland buffer, plaintiffs must comply with local zoning ordinances in order to obtain a permit to install a pool. However, defendant's ordinances permit installation of a private swimming pool in the rear yard. The woodland buffer is not required by defendant's zoning ordinances, but was merely a restrictive condition approved by the Planning Commission in the tentative preliminary plat and the Board in the preliminary plat. Defendant does not point to any section of the zoning ordinance that would prohibit plaintiffs from installing the proposed pool in the rear yard. Defendant may not prohibit plaintiffs from installing the pool as long as they comply with the local ordinances or obtain a variance if necessary.

Finally, defendant argues that, instead of appealing to the circuit court, plaintiffs' proper course of action would have been to file a complaint in the circuit court under MCL 560.222 to correct the improperly recorded plat. Conversely, however, it is *defendant* who should have filed a complaint to revise the plat to include the omitted woodland buffer restriction. Plaintiffs properly appealed the Board's final order, which is permitted by Const 1963, art 6, § 28.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra