

STATE OF MICHIGAN
COURT OF APPEALS

BLOOMFIELD ESTATES IMPROVEMENT
ASSOCIATION, INC.,

UNPUBLISHED
March 14, 2006

Plaintiff-Appellant,

V

No. 255340
Oakland Circuit Court
LC No. 2004-056387-CH

CITY OF BIRMINGHAM,

Defendant-Appellee.

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant and denying it to plaintiff. We reverse and remand.

This case arose out defendant's proposed use of Lot 52 in the Bloomfield Estates Subdivision (BES) as an off-leash dog recreation area (dog park) that would be fenced but accessible by the public on payment of a user fee to defray operational expenses. Plaintiff sought to enjoin the dog park as a violation of a deed restriction recorded in 1915 by the Bloomfield Estates Company, as the BES owner, for the benefit of future owners of lots in the BES. The relevant language stated in part that "[e]ach lot or lots shall be used for strictly residence purposes only, and no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots." The restriction included numerous other provisions that are not relevant here.

Bloomfield Township purchased several BES lots, including Lot 52, in approximately 1928, pursuant to a voter approval of a plan to include the property in its parkland. At its June 4, 1929 regular meeting, the Bloomfield Township Board of Trustees approved the filing of a complaint "on behalf of the Township of Bloomfield to remove from lots 52-53-54 [sic] and 58 of Bloomfield Estates Subdivision, the restrictions on said lots against the use of said lots for park purposes." Apparently, the complaint was filed, but it was voluntarily dismissed for unknown reasons. The park opened later that year. Several years later, Bloomfield Township, the City of Bloomfield Hills, and defendant entered into a settlement agreement that included annexation of Lot 52 and certain other property by defendant. In 1938, Bloomfield Township and the City of Bloomfield Hills gave to defendant quitclaim deeds that included Lot 52, "subject to the building and use restrictions of record." In 1941, plaintiff was formed for, among other things, the purpose of enforcing BES deed restrictions, and it notes that it has been active in

doing so. On December 8, 1947, plaintiff's president wrote a letter to defendant's city manager regarding a road expansion south of the park, requesting, among other things, that "the restrictions" on Lot 52 "should be condemned." Defendant referred the request to its city attorney, but no other action was taken. In 1955, the Bloomfield Estates Company quitclaimed its rights to plaintiff. There is no evidence in the record that the deed restrictions were ever formally removed.

Lot 52 has been a part of a publicly accessible municipal park since it was acquired by Bloomfield Township. There is no evidence that it was ever put to any specific use within that general function until 2004, when defendant fenced off a portion of Lot 52 pursuant to the dog park project. Plaintiff filed suit to enforce the deed restriction. Defendant moved for summary disposition under MCR 2.116(C)(10), alleging that plaintiff waived its right to enforce the deed restriction through acquiescence. Alternatively, defendant argued that the dog park did not violate the deed restriction. The trial court rejected defendant's waiver claim, but determined that the deed restriction was not violated because a dog park was consistent with both a residential use and defendant's zoning ordinance.

Plaintiff argues that it, rather than defendant, was entitled to summary disposition on the question whether the deed restriction was violated. We review de novo a trial court's grant or denial of summary disposition de novo. *Nastal v Henderson & Associates Investigations, Inc.*, 471 Mich 712, 720; 691 NW2d 1 (2005). We agree with plaintiff.

In general, restrictive covenants in deeds are grounded in contract. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). "[R]estrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument." *Bastendorf v Arndt*, 290 Mich 423, 426; 287 NW 579 (1939). Unambiguous restrictions are enforced as written. *Hill v Rabinowitch*, 210 Mich 220, 224; 177 NW 719 (1920). As with any other contract, an undefined term will not make a covenant ambiguous; the term will be given its common meaning. *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002). However, the term must be read in context. *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 253-254; 222 NW 180 (1928). "Definitions, adopted for legislative purposes in housing codes and zoning ordinances, cannot be employed in interpreting or construing a restrictive covenant running with land." *Id.*, 255-256.

We first find that the trial court erred as a matter of law by considering defendant's zoning ordinance. The deed restriction contains no language indicating an intent to define residential purposes based on a municipality's permitted uses. "Zoning laws determine property owners' obligations to the community at large but do not determine the rights and obligations of parties to a private contract." *Rofe v Robinson*, 415 Mich 345, 351; 329 NW2d 704 (1982). Defendant cannot affect the operation of a restrictive covenant through a definition in a zoning ordinance. "To so consider it would be to permit the legislative authority of the city to impair the obligation of the contract entered into between the parties to the conveyance." *Phillips v Lawler*, 259 Mich 567, 570; 244 NW 165 (1932).

The effect of restrictive covenants must be analyzed on a case-by-case basis under the unique circumstances presented. *O'Connor v Resort Custom Builders, Inc.*, 459 Mich 335, 343; 591 NW2d 216 (1999). "No clear and definite line can be drawn as to residential use of premises." *Wood v Blancke*, 304 Mich 283, 288; 8 NW2d 67 (1943). "A restriction allowing

residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses.” *Beverly Island Ass’n v Zinger*, 113 Mich App 322, 326; 317 NW2d 611 (1982).¹ However, reference to dictionary definitions shows that the restriction did not contemplate using the property as a park.²

“Residential” was at the time of the deed restriction, and still is, commonly defined as pertaining to residence. *Random House Webster’s College Dictionary* (2001); *Webster’s Revised Unabridged Dictionary* (1913). “Residence” referred to “[t]he act or fact of residing, abiding, or dwelling in a place for some continuance of time” or “[t]he place where one resides; an abode; a dwelling or habitation; esp., a settled or permanent home or domicile” or “[t]he place where anything rests permanently.” *Webster’s Revised Unabridged Dictionary* (1913). The definition has not materially changed in nearly a century. See “reside” and “residence,” *Random House Webster’s College Dictionary* (2001). A contemporary legal dictionary emphasized that “residence” entails some degree of permanence of personal presence in a fixed abode. *Bowvier’s Law Dictionary and Concise Encyclopedia* (8th ed, 1914). Indeed, the same deed restriction notes that the only permissible building on the property is “a single dwelling house and the necessary out-buildings.” A restrictive covenant limiting construction to a dwelling house has been defined as meaning a building designed as a single dwelling for use by one family. *Nerrerter v Little*, 258 Mich 462, 465-466; 243 NW 25 (1932). The restriction goes to the use of the premises and the building’s character. *Id.*, 466.

When read in context and as a whole, the intent of the deed restriction was to ensure that Lot 52 would be used only for a single family to live on. Some amount of deviation from this use is permissible where it is primarily being used for residential purposes and the deviation is incidental and harmless. *Wood, supra* at 289, citing *Moore v Stevens*, 90 Fla 879, 887; 106 So 901, 904 (1925). Here, Lot 52 is part of a municipal park that apparently includes or included such features as a golf course, a baseball diamond, and other recreational activities where the public is invited to come on the property for relatively short-lived entertainment purposes and then return home. This is not a residential purpose. It is irrelevant whether any other lots or lot owners in the subdivision have been harmed thereby. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997). Use of Lot 52 as part of a municipal park violates the deed restriction irrespective of whether part of it is fenced off as a dog park. Further, the deed restrictions apply to defendant as they would to any other private property owner, irrespective of defendant’s status as a public authority. *Allen v City of Detroit*, 167 Mich 464, 473; 133 NW 317 (1911).

¹ We note that the restriction here does not contain the additional express prohibitions against commercial, industrial, or business uses that distinguished the restriction in *Terrien* from the restriction in *Beverly Island Ass’n*. See *Terrien v Zwit*, 467 Mich 56, 61-64, n 4; 648 NW2d 602 (2002).

² The Bloomfield Township Board of Trustees’ authorization to seek removal of “the restrictions on said lots against the use of said lots for park purposes,” and plaintiffs’ suggestion that the restrictions should be condemned, also constitute evidence that the parties understood the restriction as a facial prohibition against using Lot 52 as a publicly accessible park.

However, finding the deed restrictions applicable and finding defendant in violation thereof does not end our inquiry. The record unambiguously shows that it was public knowledge even before Bloomfield Township purchased the lots that they would be used as a park. Indeed, they were acquired pursuant to voter approval of a park project. Lot 52 has been used for a non-residential purpose for at least 75 years. All involved parties were aware of this use, and they were apparently also aware that it violated the deed restriction. The parties have for several generations clearly acquiesced in defendant's use of Lot 52 as part of a municipal park. To that extent, equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use. See *Cherry v Bd of Home Missions of Reformed Church in US*, 254 Mich 496, 504; 236 NW 841 (1931).

However, plaintiff is only estopped from challenging the use to which it has acquiesced, because "estoppel can go no farther than the consent." *Davison v Taylor*, 196 Mich 605, 616; 162 NW 1033 (1917). Plaintiff may challenge more serious or more extensive violations. *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625, 629-630; 227 NW 772 (1929). In *Boston-Edison Protective Ass'n*, our Supreme Court presumed that the lot owners in a residence-only subdivision had acquiesced to another owner's long-running practice of using his home as a doctor's office. However, although they might be estopped from challenging that practice, they could still challenge the doctor's construction of an additional office building attached to the rear of his residence for the purpose of accommodating his increasing business. We find the situation analogous. A publicly-accessible, fee-supported, fenced-in area for off-leash dog recreation, which common sense and everyday experience suggests will generate more predictable noise and traffic than merely being a component of a larger park, is a more serious violation of the deed restrictions for residential use. Plaintiff may not challenge the general use of Lot 52 as a park. Plaintiff may challenge the use of Lot 52 as a dog park.

Because the dog park is a violation of the deed restriction, and plaintiff is not precluded from challenging it, the trial court's order granting summary disposition to defendant and denying it to plaintiff must be reversed. We remand this case to the trial court for entry of an order of summary disposition in favor of plaintiff under MCR 2.116(I)(2) with respect to defendant's violation of the deed restriction. However, we do not now decide what remedy might be appropriate. Deed restrictions may generally be enforced by injunctions, *Webb, supra* at 211, but injunctive relief is an extraordinary remedy that we review for an abuse of discretion. *Kernen v Homestead Development Co*, 232 Mich App 503, 509-510; 591 NW2d 369 (1998). The trial court has not yet had the opportunity to consider whether injunctive or other relief is appropriate. Therefore, the trial court should do so on remand.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ Alton T. Davis