STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. SGRICCIA, PAUL T. SGRICCIA, and PHILIP J. SGRICCIA,

Plaintiffs-Appellees,

v

JAMES A. WELSH and JEAN M. WELSH,

Defendants-Appellants.

UNPUBLISHED
March 24, 2022

No. 355074
Antrim Circuit Court
LC No. 19-009177-CH

Before: CAVANAGH, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

In this property dispute involving neighbors in a subdivision located along Grand Traverse Bay, defendants, James and Jean Welsh,[1] appeal as of right the trial court's bench trial judgment in favor of plaintiffs, David, Paul, and Philip Sgriccia,[2] and requiring defendants to move the portion of their home that the court determined to be in violation of the restrictive covenant prohibiting a landowner from building a home beyond the "timber line." For the reasons explained in this opinion, defendants' claims are without merit. Therefore, we affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

This case arises out a dispute involving defendants' construction of a home in the Woodcreek subdivision located in Kewadin, Michigan. The Woodcreek subdivision consists of 26 lots. Each lot's western border is Grand Traverse Bay and each lot's eastern border is Joe Marks Trail (the road used to access the subdivision). Plaintiffs' family has owned lot 21 since the 1960s. Defendants own lot 22, which is directly north of plaintiffs' lot. Defendants purchased their lot in 1994, but they did not begin to build a home on the property until the summer of 2019.

[1] James and Jean Welsh were married. James died in October 2020, after trial was completed.

[2] David, Paul, and Philip Sgriccia are brothers.

Vernon Converse III, operating as Grand Bay, Incorporated, developed the Woodcreek subdivision in 1966. As a part of the development process, Grand Bay issued a declaration of covenants to run with the land. Pertinent to this appeal, ¶ 4 of the list of covenants provides:

> No buildings shall be constructed closer to the shore than the *timber line* along Grand Traverse Bay and not closer to Joe Marks Trail than fifty feet. Further, no building shall be constructed closer to the side lot than fifteen feet.

The declaration further provided, at ¶ 15:

> No buildings shall be erected until the plans and specifications with the proposed site thereof identified have been submitted to and approved by Grand Bay, Inc., or their successors.

Vernon's brother, Gordon Converse, constructed Joe Marks Trail. Gordon was the founder and operator of Wanigan Builders, a residential construction company. Wanigan Builders built between 8 to 10 of the original homes in Woodcreek, including an addition to the existing cabin that was on lot 21 when plaintiffs' parents originally purchased the property. Vernon died in 1997, and his company, Grand Bay, was dissolved in 1999.

In 2018, defendants finalized plans to build a home on lot 22. After a survey crew staked the footprint for the new house, plaintiffs sent defendants a letter expressing their concerns in regard to the placement of the house. Specifically, plaintiffs believed that the planned home was too close to the bay, in violation of ¶ 4 of the covenants. Plaintiffs sent another letter expressing concern in regard to the home's placement in May 2019, after David discovered that defendants obtained a building permit.

After construction officially started in July 2019, plaintiffs filed a complaint seeking a preliminary injunction to prohibit defendants from continuing to build their home in its current location. Plaintiffs alleged that defendants were building their new house 70 feet in front of the timber line along Grand Traverse Bay, which was prohibited by the restrictive covenants. Moreover, plaintiffs claimed that the purpose of the restrictive covenants was to keep the lots desirable and uniform, and that by defendants placing their house so far forward, it was not uniform with nearby houses and blocked the lake views and site lines of the existing homes, thereby making them less desirable. The trial court initially granted the preliminary injunction, stopping construction of the house on lot 22. However, the court agreed to dissolve the injunction, after warning defendants that they continued to build at their own risk.

The trial court held a two-day bench trial, in which the parties presented the testimony of several witnesses, including expert arborists and foresters, and several photo exhibits. The trial court also visited the site with the parties. In an oral ruling, the trial court concluded that the term "timber line" was not defined in the covenants and was subject to multiple interpretations, as evidenced by the information presented by the parties' experts. Therefore, the court found that the term was ambiguous and that it was necessary to determine the intent of the drafter in regard to the location of the line. The court found that the restrictions, taken as a whole, were clearly in place to create, in part, a uniform western boundary and to preserve lot views, and that the location of the defendants' home violated both of these clear objectives. The court sympathized with

defendants, but ultimately observed that the lawsuit was filed after the footings for the home were poured and defendants were warned that the court could find the placement of the home violated the covenants. Therefore, the court ruled that defendants were required to remove the portion of the home that was outside the timber line. If it was rebuilt, in the absence of a successor organization to Grand Bay, defendants were required to obtain the approval of the adjacent landowners. However, the court stayed enforcement of the removal in anticipation that defendants would appeal. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

"The circuit court's findings of fact, if any, following a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo." *Ladd v Motor City Plastics Co*, 303 Mich App 83, 92; 842 NW3d 388 (2013). "The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made." *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386-387; 853 NW2d 421 (2014) (quotation marks and citation omitted). "The interpretation of restrictive covenants is a question of law that this Court reviews de novo." *Eager v Peasley*, 322 Mich App 174, 179; 911 NW2d 470 (2017) (quotation marks and citation omitted).

B. INTERPRETATION OF COVENANT

First, defendants argue that the trial court erred by concluding that the placement of their home violated the restriction in ¶ 4 and ruling that the offending section of the home be moved. We disagree.

A party's freedom to contract is held in high regard. The Michigan Supreme Court has "consistently support[ed] the right of property owners to create and enforce covenants affecting their own property." *Bloomfield Estates Improvement Ass'n v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (quotation and citation omitted; alteration in original). Restrictive covenants "allow the parties to preserve desired 'aesthetic' or other characteristics in a neighborhood, which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties." *Id*. Decisions concerning restrictive covenants are "premised on two essential principles, which at times can appear inconsistent. The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). As a result, cases involving restrictive covenants are decided on a case-by-case basis. *Id*.

"In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. Where the restrictions are unambiguous, they must be enforced as written." *Eager*, 322 Mich App at 180 (quotation marks and citation omitted). If a "term is not defined in a contract," the term will be interpreted "in accordance with its commonly used meaning." *Bloomfield Estates Improvement Ass'n*, 479 Mich at 215. "Moreover, under the doctrine of *noscitur a sociis*, a word or phrase is given meaning by its context or setting." *Id*. (quotation marks and citations omitted).

The Court is "not so much concerned with the rules of syntax or the strict letter of the words used as [it is] arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument." *Thiel v Goyings*, 504 Mich 484, 496; 939 NW2d 152 (2019). This Court determines "the intended meaning of the chosen language by reading the covenants as a whole rather than from isolated words and must construe the language with reference to the present and prospective use of property[.]" *Id*. (quotation marks and citation omitted).

In this case, the parties disputed the meaning of the restriction in ¶ 4 of the restrictive covenants, specifically the meaning of the term "timber line." As observed by the trial court, the parties presented differing opinions concerning the meaning of the term "timber line." Expert arborist Victor Foerster opined that the timber line meant trees of substance, or larger trees, in 1966 (when the subdivision was developed). Gordon agreed with this conclusion, stating that houses were required to be built in the forested area of the lot. Similarly, expert arborist Thomas Deering, who also testified for plaintiffs, concluded that timber line meant an area with harvestable trees. On the other hand, defendants believed that their home was within the timber line because there were trees between the house and the lake. The experts who testified on behalf of defendants believed that timber line meant where trees could and could not grow. Local real estate attorney Robert Parker believed that review of other areas in the declaration was necessary to determine the term's meaning.

The Merriam-Webster dictionary defines "timberline" or "tree line" as "the upper limit arboreal growth in mountains or high latitudes." *Merriam-Webster's Collegiate Dictionary* (11th ed). This case does not involve property in a mountainous region. Notably, however, the developer used the two-word phrase "timber line," which may have been intended to be interpreted differently than the recognized definitions for the single word "timberline." See *Thiel*, 504 Mich at 496; *Bloomfield Estates Improvement Ass'n*, 479 Mich at 215. The Merriam-Webster dictionary defines "timber" as "growing trees or their wood" or "wood suitable for building or carpentry." *Merriam-Webster's Collegiate Dictionary* (11th ed). As a result, "timber line" could mean a line of timber, such as a line of growing trees or a line of trees with wood suitable for building or carpentry.

In any event, the technical definition of "timber line," "timberline," or "tree line" is not automatically dispositive of the claims raised in this case and cannot be read in a vacuum. In other words, although the parties disagree on the definition of "timber line," resolution of the case requires determining what the developer meant by "timber line" and locating where the timber line is on the property. See *Thiel*, 504 Mich at 498-499 (explaining that in a dispute concerning whether the defendants' home, which contained modular components, violated the neighborhood's prohibition against modular homes, the definition of "modular" on its own was unambiguous, but consideration of the rest of the covenants was necessary to determine whether the home constituted a modular home). Moreover, "even an unambiguous term must be construed relative to the drafter's intent." *Id*. at 505. Therefore, the trial court did not err by considering the other provisions within the covenants to determine the intent of the developer.

Aside from the timber line boundary, the rest of ¶ 4 establishes eastern, northern, and southern boundaries for a home built on a lot. Indeed, a home cannot be constructed within 50 feet of Joe Marks Trail or 15 feet of the property line. There is also no dispute that a home cannot be built directly on the shore, or that there is some kind of western boundary. As a result, the

language of ¶ 4 is evidence of the developer's intent to maintain the uniformity of the lots by mandating where a house could be built. As observed by the trial court, it is interesting that the developer specifically chose not to a specify a distance for the western boundary like the others. As in, the developer purposefully declined to require that homes be built a certain amount of feet from the shore. The trial court believed that this decision was due to the natural, curvy line of the bay, and considering the features of the land, the developer chose a different ascertainable line of reference.

Gordon, who built several of the original homes in Woodcreek, opined (in a *de bene esse* deposition) that ¶ 4 required a property owner to build his or her home within the "woods" or the densely wooded part of the lot. Considering the text of ¶ 4 and photos of the property, we agree. An aerial photo from 1967 shows Joe Marks Trail, the shoreline, and a densely wooded area in between. The photo shows somewhat of a line of substantial trees that end where the land becomes sandy before the water. Contrary to defendants' position, we do not believe that the developer was concerned with where trees could and could not grow (biologically speaking), but where trees were already growing. We also disagree with the assertion that a few small trees existing between the home and the water complies with the covenants on the basis of other provisions, which emphasize uniformity, desirability, and protection of views of the bay.

The preamble of the declaration explained that the purpose of the restrictions was to keep the "lots desirable, uniform and suitable in architectural design." Further, the following covenant provisions were addressed in the lower court proceedings:

> 5. Boat houses are permitted but they may not be constructed along the shore of Grand Traverse Bay closer to the water than the dwelling. Boat wells and/or docks may be constructed provided that they are designed so as not to obstruct the view from any direction on the land.
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> * * *
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> 12. No building shall be erected or maintained of more than two stories in height. All outbuildings must be of same construction as residence building and conform to set back and location restrictions.
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> * * *
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> 15. No building shall be erected until the plans and specifications with the proposed site thereof identified have been submitted to and approved by Grand Bay, Inc., or their sucessors [sic].

Considering the entire declaration and various covenants, it is apparent that the location of buildings and conformity were important to the developer. This is evidenced by the requirement that the site of building plans be submitted to and approved by Grand Bay. As a result, it was not erroneous for the trial court to determine that there was a "line" in which houses were meant to be built behind, or at the very least, an area in each lot in which houses could be built.

Defendants assert that the trial court erred by concluding that there was a "line" that defendants were required to build behind and that the line did not even accommodate the existing

houses. However, in its oral ruling, the trial court acknowledged that the line slightly changed as one moved north to south along the plat as the timber line moved in relation to the shoreline. For instance, photos showed that there was a creek that ran along a lot south of lots 21 and 22. The vegetation grew differently south of where the creek emptied into the bay. The houses in that section of the subdivision are built closer to the shoreline, but remain within the wooded portion of the lots. The indication that the timber line may change throughout the subdivision is supported by the developer's decision not to specify a distance from which a property owner could build from the shoreline.

In any event, the trial court heard the testimony from several witnesses, viewed a multitude of photo exhibits, and visited the site with the parties. As a result, the court's determinations that there was a line in which property owners were required to build behind and that the defendants' home violated that line are not clearly erroneous. See *Chelsea Inv Grp LLC v Chelsea*, 288 Mich 239, 251; 792 NW2d 781 (2010) (explaining that "[t]he trial court's findings are given great deference because it is in a better position to examine the facts").

Defendants additionally argue that the trial court erred by finding that the proper remedy for the violation of the house placement was to tear down the portion of the house that encroaches over the build line. This argument is unavailing.

"[A] negative easement is a valuable property right." *Webb v Smith (After Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). Further, "[t]he judiciary's policy is to protect property owners who have complied with the deed restrictions." *Id*. at 210-211.[3]

> Michigan courts generally enforce valid restrictions by injunction. Moreover, courts typically do not consider the parties' respective damages . . . . Owners may enforce negative easements regardless of the extent of the owners' damages. When enforcing a negative easement, it is wholly immaterial to what extent any other lot owner may be injured by the forbidden use. The economic damages suffered by the landowner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions. Because courts regularly enforce injunctions based on valid restrictions and because the parties' damages are immaterial, the circuit court [does] not err in failing to apply a balancing test. [*Id*. at 211 (quotation marks and citations omitted).]

However, the "Supreme Court set forth three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches." *Id*.

[3] Indeed, the Supreme Court has explained that notwithstanding the rule of construction that all doubts in regard to a covenant are resolved in the fair use of property, "in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property." *O'Connor v Resort Custom Builders, Inc*, 459 Mich at 342 (quotation marks and citation omitted).

Therefore, contrary to defendants' assertion, the trial court was not required to apply a balancing test before determining a remedy. See *id*. Moreover, defendants' argument against an injunction appears to be rooted in fairness, rather than any of the aforementioned exceptions, and these exceptions were not discussed during the trial proceedings. In any event, plaintiffs expressed their concerns regarding the placement of the home before construction started. The lawsuit was filed once the footings had been poured. At a motion hearing, the trial court warned defendants that they continued construction at their own risk in light of the lawsuit. The court specifically warned that defendants may be required to remove their home if plaintiffs were successful. Accordingly, although removal may seem harsh, defendants were aware of the dispute and possible consequences early in the construction process. See *id*. at 214 (observing that "there is at least some indication that defendants improvidently continued with construction of their home with full knowledge of the nature of the dispute at hand. In that regard, defendants did so at their own peril."). In addition, the court pushed the parties to settle their disagreement among themselves, which is still an option that may preclude the removal of the home. See *id*.

C. STANDING

Defendants finally assert that, in light of the dissolution of Grand Bay, plaintiffs did not have standing to enforce the restrictive covenants. "Whether a party has standing is a question of law subject to review de novo." *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011).

"A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a valuable property right." *Terrien v Zwift*, 467 Mich 56, 71; 648 NW2d 602 (2002) (quotation marks and citation omitted). Restrictions for residential purposes, "if clearly established by proper instruments, are favored by definite public policy," and have long been enforced by the courts. *Id*. at 72 (quotation marks and citation omitted). Further, owners of property benefited by a restrictive covenant have standing to enforce it. *Indian Village Ass'n v Barton*, 312 Mich 541, 549; 20 NW2d 304 (1945). "[A] breach of a covenant, no matter how minor and no matter how de minimis the damages, can be the subject of enforcement." *Terrien*, 467 Mich at 65.

Defendants assert that plaintiffs did not have standing to enforce the restriction in ¶ 4 because they are not Grand Bay or its successors. However, plaintiffs, who own property that is benefited by the restriction, have standing to enforce it. See *Indian Village Ass'n*, 312 Mich at 549. See also *Civic Ass'n of Hammond Lake Estate v Hammond Lake Estates No. 3 Lots 126-135*, 271 Mich App 130, 135-136; 721 NW2d 801 (2006) (holding that the plaintiffs had standing to enforce a deed restriction prohibiting the use of motor boats on the lake even though the plaintiffs did not own lots in the subdivision containing the deed restriction).

To the extent that defendants argue that if Grand Bay had any successor, it was Joe Marks Trail Homeowner's Association, we disagree. Testimony at trial established that Grand Bay dissolved in 1999, five years after the developer's death. The parties did not provide any documentation showing that Grand Bay transferred any interest to Joe Marks Trail Homeowner's Association or any other entity. Moreover, although defendants sought an opinion from Joe Marks Trial Homeowner's Association, they did not do so until after the footings had been poured and the lawsuit had been filed. Therefore, defendants did not obtain approval of their building plans

before beginning construction as required by ¶ 15. In addition, plaintiffs did not claim that defendants violated the restriction in ¶ 15, and ¶ 4 does not include any approval by Grand Bay.

Lastly, defendants also assert that plaintiffs cannot step into the shoes of Grand Bay and approve or deny the placement of defendants' home. Because Grand Bay no longer exists, the trial court devised a plan for defendants to obtain the approval of adjacent landowners if their home was rebuilt on the basis of real estate attorney Parker's testimony. He explained that in cases similar to this one in which the developer no longer exists, he advised clients to obtain approval from adjacent landowners to avoid any legal issues in the future. The trial court adopted this process. Considering the circumstances present in this case and the history involving the parties, the adoption of this process was not erroneous.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Deborah A. Servitto