STATE OF MICHIGAN

COURT OF APPEALS

ROBERT SCHEPER, KIMBERLY SCHEPER, RON KOSMAL, COLEEN KOSMAL, JACK WATKINS, SHIRLEY WATKINS, JOHN CLARK, and DALE CLARK,

Plaintiffs-Appellees,

v

RIVERGATE RIDGE HOMEOWNERS ASSOCIATION a/k/a RIVERGATE HOMEOWNERS ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 196002
Macomb Circuit Court
LC No. 95-001166-CH

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiffs' motion for summary disposition and denying defendant's motion for summary disposition. We affirm.

This case arises from defendant's 1994 proposal to construct a five-foot-wide asphalt pathway in the common area of the Rivergate Ridge subdivision known as "Open Space #2." Plaintiffs, who are homeowners whose subdivision lots abut the affected portion of Open Space #2, seek to halt the construction of the proposed pathway. In reaching its decision, the lower court relied on three documents that are relevant to this litigation. The first two documents were recorded in 1979 by the original developer of the subdivision, Rivergate Partnership. The first, the Covenant for Subdivision Open Space Plan, states in pertinent part:

5. Common Areas may be used for the following purposes:

A. Recreation of the residents and their families.

B. To provide a place for leisure strolls through a natural area.

* * *

9. Additional uses for the Common Area may be established if approved in writing by not less than fifty-one (51%) per cent [sic] of said lot owners.

The second, the 1979 Declaration of Restrictions, incorporates the Open Space Plan by reference and includes the following reference in Section 10: "Those matters relating to the Common Area and flood plain restrictions (Section 14) shall be observed in perpetuity and may not be amended." The third document is the Declaration of Restrictions recorded in 1989 by Columbia Homes, the land development company that purchased from the Rivergate Partnership the parcel where defendant proposes to locate the asphalt pathway. Section 13 of the 1989 Declaration of Restrictions states that "No asphaltic concrete will be used for sidewalks or driveways." Pursuant to section 9 of the Open Space Plan, defendant sought the approval of a majority of the Rivergate Ridge subdivision members to amend the plan to allow for construction of the proposed asphalt pathway in Open Space #2.

A court may render judgment in favor of the opposing party if the affidavits or other proofs show that there is no genuine issue of material fact. MCR 2.116(I)(1); *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994). Here, the lower court granted plaintiffs' summary disposition pursuant to MCR 2.116(I)(2) on three separate and alternative bases: (1) defendant's board of directors was improperly constituted, and therefore its action in submitting the proposal to construct the pathway is ultra vires; (2) the construction of the proposed pathway would be contrary to the Open Space Plan; (3) the construction of an asphalt pathway would be contrary to the 1989 Declarations of Restrictions. On appeal, defendant challenges all three bases. We review de novo the grant of summary disposition to determine whether plaintiffs were entitled to judgment as a matter of law. *Id.* at 86. Although we disagree with the lower court on the first basis for its decision, we affirm the lower court's decision because either the second or third basis provides proper grounds for granting plaintiffs summary disposition in this case.

Regarding the first basis for the lower court's decision, whether the board was improperly constituted, plaintiffs successfully argued that the board's 1994 proposal should be deemed ultra vires because the members of the association who elected the board members included lot owners of neighboring subdivisions, Rivergate Woods and Rivergate Farms, which were allowed to join the association in 1992. Plaintiffs argued that membership in the association should have been limited to lot owners in the Rivergate subdivision because the 1979 Declaration of Restrictions explicitly states that association membership is to "consist of the owners of the residential lots in Rivergate Subdivision." Additionally, the Open Space Plan states that the developer conveyed title to the common areas to the association as "Trustee for the benefit of the lot owners." The lower court granted plaintiffs summary disposition on this basis because it found no provision permitting defendant to include the residents of the neighboring subdivisions as members of the association.

Because the Open Space Plan and the 1979 Declaration of Restrictions were executed on the same day by the same party and were in relation to the same matter, the lower court properly

examined the documents together and construed them as one instrument. *West Madison Investment Co v Fileccia,* 58 Mich App 100, 106; 226 NW2d 857 (1975). In construing written conveyances, courts seek to ascertain the intention of the parties from the language used and the surrounding circumstances. *Wisniewski v Kelly,* 175 Mich App 175, 178; 437 NW2d 25 (1989). The parties are presumed to have intended a reasonable construction, and the courts generally resolve all doubts by adopting a construction that does not produce unusual or unjust results. *Id.*

Although the documents in this case do not expressly permit the association to add members who are not lot owners in the Rivergate Ridge subdivision, we believe that such a construction is reasonable. Allowing one association to act for three subdivisions within the same proximity is neither an unusual nor unjust result. We are additionally persuaded that no injustice exists because there is no evidence that the newly-formed association votes together on matters that concern only one subdivision. Thus, as defendant notes, the vote on the portions of the subdivision agreement relevant in this case was limited to members of the Rivergate Ridge subdivision because they were the only members covered by the Open Space Plan. Therefore, on this first basis, plaintiffs were not entitled to judgment as a matter of law.

Regarding the second basis for the lower court's decision, we initially note that the lower court found that construction of the pathway would be contrary to the Open Space Plan not only because the pathway was incompatible with the terms of the Open Space Plan, but also because the Open Space Plan could not be amended according to section 10 of the 1979 Declaration of Restrictions. Unlike the lower court, we are not persuaded that section 10 prohibits the amendment to the Open Space Plan that defendant proposed in this case, but we agree with the lower court that the pathway is nonetheless prohibited because it violates the terms of the Open Space Plan.

Section 10 of the 1979 Declaration of Restrictions prohibits defendant from amending "those matters relating to the Common Area and flood plain restrictions (Section 14)." Section 14, which is titled "Department of Natural Resource Restrictions," provides that no filling or occupation of the flood plain areas will be allowed without the DNR's approval and imposes certain building restrictions applicable to the residences affected by the flood plain. Defendant's proposed pathway does not concern the subject matter of section 14; therefore, the prohibition in section 10 against amendments does not apply to this case and does not prevent construction of the proposed pathway.

Rather, construction of the proposed pathway is prevented because the pathway would violate section 5 of the Open Space Plan. When interpreting restrictive covenants, courts must give effect to the instruments as a whole. *Borowski v Welch,* 117 Mich App 712, 716; 324 NW2d 144 (1982). However, if there is any doubt as to the exact meaning of the restrictions, then the court must consider the developer's intention and purpose. *Id.* The court must construe the restrictions in light of the general plan under which the area subject to those restrictions was platted and developed. *Id.* Section 5 of the Open Space Plan restricts use of the common areas to "recreation of the residents and their families" and "leisure strolls through a natural area." The Open Space Plan apparently encompasses both of the common areas located within the Rivergate Ridge subdivision, Open Space #1 and Open

Space #2. Both areas contain a branch of the Clinton River but are not connected to each other. Open Space #1, which is not at issue in this case, also contains an approximately one-mile-long asphalt pathway. Thus, the Master Plan brochure for the Rivergate Ridge Subdivision includes a list of community features, stating in pertinent part: "A five-foot wide asphalt path winds through the natural park setting for jogging or biking."

Defendant would have us compare the existing pathway in Open Space #1 with the proposed pathway in Open Space #2, but we are not convinced that the two are analogous. The most obvious difference is the sizes of the two common areas. Open Space #1 consists of approximately twenty wooded acres, whereas Open Space #2 consists of only one to two acres. Additionally, the proposed pathway would not meander throughout Open Space #2 like the existing pathway in Open Space #1. Rather, defendant proposes to locate the asphalt pathway in the twenty-foot-wide access strip to Open Space #2 that is maintained by the surrounding homeowners, thereby providing the subdivision residents with a pathway to no specific destination. Last, the benefit to be gained from an approximately one-mile-long pathway on which to bike or jog is different from the benefit to be gained from the proposed pathway, which is only fifty yards long. For these reasons, the existence of the pathway in Open Space #2 does not compel us to find proper the proposed pathway in Open Space #2; rather, we are persuaded by plaintiffs' position that the proposed pathway would destroy the natural setting of Open Space #2. Accordingly, we hold that construction of the proposed pathway is prohibited by the restrictions of Section 5 of the Open Space Plan.

Moreover, because the proposed pathway is incompatible with section 5 of the Open Space Plan, we hold that the vote pursuant to Section 9 of the plan could not supplant the express restrictions of Section 5 and thereby permit defendant to construct the pathway. We believe that the intent of Section 9 was to allow a majority of lot owners to approve only those additional uses that are harmonious with the objectives delineated in Section 5. Therefore, the lower court properly granted plaintiffs summary disposition on this second basis.

Finally, regarding the third basis for the lower court's decision, defendant argues that the court erred in finding that section 13 of the 1989 Declaration of Restrictions limits its proposal because defendant proposes to construct a pathway from asphalt, not a driveway or sidewalk. We disagree. Section 13 states that "No asphaltic concrete will be used for sidewalks or driveways." In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. *Borowski, supra* at 716. Moreover, the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon. *Id.* at 717.

Therefore, although the parties have attempted to distinguish between the dictionary definitions of pathways, sidewalks and driveways, we review this covenant as a whole, being concerned more with the intent of the restrictor than the strict letter of the words used. We believe that by including Section

13 in the 1989 Declaration of Restrictions, Columbia Homes intended to maintain consistency of the concrete surfaces throughout the subdivision. Thus, Section 13 of the 1989 Declaration of Restrictions prohibits construction of the proposed asphalt pathway. Accordingly, the lower court properly granted plaintiffs summary disposition on this basis as well.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs