STATE OF MICHIGAN

COURT OF APPEALS

GEORGE TOTTIS and TINA TOTTIS,

Plaintiffs/Counterdefendants-Appellants,

v

DEARBORN HILLS CIVIC ASSOCIATION, INC., GEORGE DARANY, DOROTHY DARANY, TIMOTHY HORAN, JANE HORAN, DR. WILLIAM KACH, and ROBERT D. ROCK,

Defendants-Appellees,

and

SCOTT BAIN,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
June 18, 2002

No. 229996
Wayne Circuit Court
LC No. 99-932614-CK

Before: Murphy, P.J., and Jansen and Kelly, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's order granting injunctive relief to defendants and enjoining permanently the construction of any structure on plaintiffs' vacant lot.

Plaintiffs have owned, since November 1998, vacant land in Dearborn. The vacant land consists of two half-lots, rather than one full lot. With respect to plaintiffs' property, there are certain restrictive covenants that have been recorded with the Wayne County Register of Deeds since the early 1920s, and were renewed by a super-majority of the lot owners on December 30, 1999. The restrictive covenants prohibit the construction of a dwelling on any property that is "not one entire residential lot as platted, or one entire residential lot as platted together with contiguous portions of adjacent residential lots." The restrictive covenants also allow for an attached garage to be built, as long as it is ten feet from the nearest adjoining side lot and a minimum of ten feet farther than the front wall line of the house to which it is attached.

Plaintiffs sought to build a house on their property, but the association rejected the proposed plan in August 1999, because the plan violated the restrictive covenants. In fact, there

is no dispute that both plans submitted by plaintiffs violate the restrictive covenants. Plaintiffs filed suit in October 1999, seeking to remove the restrictive covenants against their property and to enjoin the class members from enforcing the restrictive covenants. After a bench trial in July 2000, the trial court ruled that the restrictive covenants were valid and enforceable and issued a permanent injunction preventing plaintiff from constructing a home on the property.

The majority opinion reverses the trial court's ruling, determining that defendants have waived any right to enforce the restrictions. The majority hinges its resolution on evidence that forty-three out of 1,489[1] houses in the subdivisions were built on less than one fully platted plot, that four of forty-seven houses on plaintiffs' street were built on less than one fully platted plot, and that no action was ever taken to enforce the plot requirement against any of the house owners who violated the plot requirement. The majority concludes that this evidence establishes that the character of the neighborhood intended and fixed by the restrictions has changed. With respect to the garage setback requirements, the majority notes that eleven of the forty-seven houses on plaintiffs' street were in violation of the garage setback restrictions and that no previous action was ever taken in the subdivision to enforce the garage setback requirements.

The majority opinion acknowledges that the trial court's factual findings are reviewed under the clearly erroneous standard of review, MCR 2.613(C), but does not apply that standard since the majority does nothing more than substitute its judgment for that of the factfinder. As clearly stated in *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990):

> A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed. While this standard gives the appellate judge more latitude than when reviewing a trial by jury, it does not authorize a reviewing court to substitute its judgment for that of the trial court; if the trial court's view of the evidence is plausible, the reviewing court may not reverse.

In its findings of fact, the trial court noted that "overall there were about 40 violations of approximately 1400 properties in that subdivision." The trial court noted that it had read all the cases cited by the parties with respect to waiver of the deed restrictions. The trial court stated that the cases indicated that unless the changes to the neighborhood had been extensive and unless there were numerous waivers of or exceptions to enforcements of the restrictive covenants, then the restrictive covenants were enforced.

Generally, the right to enforce a restrictive covenant may be lost by waiver if the failure to act leads another to believe that the covenant will not be enforced and the other is damaged. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 155; 336 NW2d 778 (1983). If the variations of the deed restrictions are minor violations, the concept of waiver does not apply. *Id.* There is also no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged. *Id.* Further, building and use restrictions in residential deeds are favored by public policy and it is the policy of the judiciary to protect property owners who have complied with deed restrictions from violations of those deed restrictions by others. *Id.* at 157.

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[1] This constitutes 2.8 percent of the houses being in violation of the restrictive covenants.

The question whether there has been a waiver to enforce a restrictive covenant is fact intensive, as recently stated by our Supreme Court:

> Our decisions 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.
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> To harmonize those principles and apply them properly, this Court has recognized the necessity of deciding such matters on a case-by-case basis. The circumstances of each case thus determine whether a particular use is prohibited by a residential restriction. . . .
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> With regard to whether a restriction has been waived, we likewise have said that "[w]hether or not there has been a waiver of a restrictive covenant or whether those seeking to enforce the same are guilty of laches are questions to be determined on the facts of each case presented." *Grandmont Improvement Ass'n v Liquor Control Comm,* 294 Mich 541, 544; 293 NW 744 (1940). [*O'Connor v Resort Custom Builders, Inc,* 459 Mich 335, 343-344; 591 NW2d 216 (1999).]

I find that the trial court's factual finding that the character of the neighborhood had not undergone extensive changes in spite of the violations of the covenants is not clearly erroneous. The trial court specifically noted that it had reviewed the photographs of the neighborhood submitted by the parties. It noted in particular that plaintiffs' proposed home was not in keeping with the general nature and character of the neighborhood because the photographs indicated that almost every home had a larger frontage that plaintiffs' property. Plaintiffs' contention that the trial court erred by focusing on the entire subdivision rather than on plaintiffs' street (where plaintiffs allege there is a heavy concentration of violations) when considering the violations is wrong as a matter of law because restrictive covenants must be construed in light of the general plan under which the *area subject to those restrictions* was platted and developed. *Rofe, supra* at 157, citing *Holderness v Central States Finance Corp,* 241 Mich 604, 607; 217 NW 764 (1928); *Borowski v Welch,* 117 Mich App 712, 716-717; 324 NW2d 144 (1982).

The majority is overturning the trial court on a flimsy statistical basis, rather than accounting for the true character of the neighborhood and the extent of the violations. The trial court acknowledged the violations and found that the violations were not extensive. The trial court's ruling that changed conditions must be extensive is in accord with case law. *O'Connor,* supra at 346; (the violations—occasional rentals—had not altered the character of the subdivision to the extent that would defeat the original purpose of the restrictions); *Gomah v Hally,* 366 Mich 31, 34; 113 NW2d 896 (1962) (validly imposed restrictions to residence use will be removed when extensive neighborhood changes have occurred); *Cooper v Kovan,* 349 Mich 520, 531-532; 84 NW2d 859 (1957); *Carey v Lauhoff,* 301 Mich 168, 173-174; 3 NW2d 67 (1942) (the character as well as the number of violations must be considered in determining whether the complaining property owners have waived enforcement of the restrictions); *Webb v Smith (On Second Remand),* 224 Mich App 203, 213; 568 NW2d 378 (1997). Further, the

violations do not support a finding that the character of the neighborhood has changed since the statistics show that the violations account for less than three percent of the total houses.

Lastly, I note that the trial court fully acknowledged that plaintiffs have spent $156,000 to buy the property to build their "dream house" on it and that the restrictive covenants precluded this. However inequitable this may appear, plaintiffs were fully aware of the restrictive covenants because the title commitment disclosed the restrictive covenants at closing and Mr. Tottis acknowledged at trial that he knew of the restrictive covenants no later than May 1999, three months before submitting the construction plan to the association. Moreover, economic damages suffered by the landowner seeking to avoid the restrictive covenants do not justify a lifting of the restrictions. *Webb, supra* at 211, citing *Rofe v Robinson*, 415 Mich 345, 350; 329 NW2d 704 (1982).

Here, the trial court's factual findings are entirely plausible and supported by the evidence adduced at trial and its legal conclusions are correct. I can find no error made by the trial court, and I would affirm.

/s/ Kathleen Jansen