STATE OF MICHIGAN

COURT OF APPEALS

DAVID A. BECKER,

Plaintiff-Appellant,

v

GARY L. RICHARDS and DENISE SUE RICHARDS,

Defendants-Appellees.

UNPUBLISHED
August 3, 2004

No. 245423
Barry Circuit Court
LC No. 02-000428-CH

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying his motion for summary disposition, granting defendants' countermotion, and entering a judgment of no cause of action on plaintiff's complaint for declaratory and injunctive relief to enforce negative reciprocal easements. MCR 2.116(C)(10), (I)(2). Plaintiff sought to preclude defendants from using the property they own in Noffke's Lake Shore Plat No. 1 to access an unplatted contiguous parcel of property to construct and use a pole barn ancillary to defendants' residence situated in Noffke's Lake Shore Plat. On de novo review, we conclude that the trial court did not clearly err by finding that defendants satisfied the criteria of *R R Improvement Ass'n v Thomas*, 374 Mich 175; 131 NW2d 920 (1965). Further, we conclude that the trial court did not err as a matter of law by applying the restrictive covenants to the facts and circumstances of this case and did not abuse its discretion by denying equitable relief to plaintiff. Therefore, we affirm.

I. Summary of Material Facts and Proceedings

Plaintiff and defendants live in single-family dwellings in a residential neighborhood along the northeast shore of Duncan Lake in Thornapple Township, Barry County. Defendants' home is situated on the lakeshore in Noffke's Lake Shore Plat (consisting of lots 1-64) established by Roy C. and his wife, Gustava E. Noffke in 1955. Plaintiff resides in Noffke's Lake Shore Plat No. 1 (consisting of lots 65-94) established by the Noffke's in 1957 and situated east of and generally parallel to Noffke's Lake Shore Plat.[1] Noffke Drive is between the two

[1] Unless otherwise specified, "the plat" refers to Noffke's Lake Shore Plat No. 1.

plats providing access to the lots of each. Plaintiff and defendants live across Noffke Drive from each other. Defendants also own a lot and a part of a lot in the plat totaling 100 feet in length along Noffke Drive immediately to the southwest and adjacent to plaintiff's property. In addition, both plaintiff and defendants own 100-foot-square parcels of unplatted property abutting the easterly backline of their property in Noffke's Lake Shore Plat No. 1. The record is not clear what restrictive covenants are attached to Noffke's Lake Shore Plat, but the following restrictive covenants[2] material to the present case are attached to Noffke's Lake Shore Plat No. 1:

> 1. The premises shall not be used for other than residential purposes consisting of not more than one one-family residential structure per lot, and in no event shall the premises be used for a boat livery, bait shop, store, tavern, or other commercial purpose, nor for the raising or keeping of live stock.
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> 2. No garage, tent, basement, outbuilding or trailer shall be used for a temporary or permanent residence on any lot or any part of this plat.
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> 3. No part of any building, including garage, shall be located nearer than five (5) feet from either side lot line, nor nearer than thirty (30) feet from either front or rear lot line.
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> 4. Each residence shall have: a minimum of 576 square feet of first floor space exclusive of porches and breeze ways; standard foundation of stone, brick, concrete or concrete blocks, outside walls shall be of standard drop wood siding, tongue and groove beveled siding, wood shingles, logs. two-inch tongue and grove planking, cinder or concrete blocks, stucco, standard bricks or stone finished in a workmanlike manner; roofs shall be finished with asphalt shingles, asbestos shingles, wood shingles, slate shingles, tile or in case of a flat roof the usual specifications for built up roofs shall prevail. New material must be used on all outside exposed areas. Each residence shall also have a minimum of two doors.
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> 5. All other buildings must conform to the material specifications of the residence.

Because defendants maintain their residence on their lakefront Noffke's Lake Shore Plat lot, their property within the Noffke's Lake Shore Plat No. 1 is vacant, and they do not intend to construct a residence on either it or the 100-foot-square parcel outside of the plat. The present case involves defendants' attempts to construct a pole barn upon their parcel outside of the plat, and plaintiff's assertion that defendants' doing so without constructing a residence upon either

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[2] These restrictions, and three others not pertinent here, were created by quit claim deed dated January 8, 1958 from Druzilla L. Powell conveying Noffke's Lake Shore Plat No. 1 to Roy C. Noffke and Gustava E. Noffke, husband and wife, as tenants by the entireties. The deed was recorded the same date at the office of the Barry County register of deeds in liber 257, page 34.

their property within the plat or on the parcel outside of the plat violates the restrictive covenants noted above.

In June 2002, defendants obtained a zoning compliance permit from the Thornapple Township zoning board to build a forty-foot by fifty-foot "pole barn" garage on the 100-foot-square parcel outside of the plat. Apparently, defendants decided to construct the pole barn on the parcel outside the plat instead of on their lot within the plat because the lot within the plat is zoned rural residential (RR), while the parcel outside of the plat is zoned agricultural residential (AR). And the Thornapple Township zoning regulations do not permit an isolated accessory building to be constructed on property zoned RR but do on property zoned AR.

Plaintiff appealed to the Thornapple Township zoning board of appeals challenging the issuance of the zoning compliance permit to defendants. Plaintiff asserted that granting defendants the compliance permit effectively enabled them to violate the restrictive covenants governing their property within the plat by allowing them to use it as a driveway to the pole barn on their parcel outside of the plat. Plaintiff asserted this did not constitute using the property within the plat for residential use as a single-family dwelling. The township zoning board denied plaintiff's appeal.

On July 18, 2002, plaintiff filed a two-count complaint against defendants. Count I alleged that plaintiff was entitled to a declaration that defendants' intended use of their property within the plat as a driveway to and from a pole barn located outside of the plat violated the restrictive covenants governing property within the plat. Plaintiff alleged that defendants' actions in this regard would violate the covenants and restrictions because defendants did not intend to construct a residence on their property within the plat and, thus, the driveway would not be accessory to residential use of the property. Plaintiff sought a preliminary order enjoining defendants from constructing the pole barn on the parcel outside of the plat unless they also constructed a principle single-family residence on their property within the plat. Count II of plaintiff's complaint similarly alleged that defendants' proposed use of their property within the plat would violate the restrictive covenants of the plat. On the same day the complaint was filed, the trial court issued a temporary restraining order and an order to show cause why a preliminary injunction should not be issued.

At the hearing on plaintiff's motion for a preliminary injunction, both plaintiff and defendant Gary Richards testified. During direct examination, plaintiff verified defendants' assertion that plaintiff's neighbor directly to the north has also constructed a pole barn on a parcel of land contiguous to his lot within the plat. But plaintiff maintained that the situation with his neighbor to the north was different because that neighbor maintained a primary residence upon his lot within the plat and used the pole barn incidental to the residence. Plaintiff contended defendants' intended to construct only an isolated accessory building.

Plaintiff admitted that he also intended to construct a pole barn upon his own parcel outside of the plat. Furthermore, plaintiff acknowledged that he planned to drive across his lot within the plat to get to his proposed pole barn because that would be his only means of access.

Defendant Gary Richards testified that defendants had used their lot within the plat since acquiring it as an extension of the yard for their lakefront residence. Richards also testified that

defendants have used their lot within the plat and parcel outside of the plat for parking cars and trailers, and that children play on them. During cross-examination, plaintiff acknowledged that defendants have used the property for overflow parking of cars, for parking trailers, and that children play on the property.

Richards also testified that although defendants intend to drive across their lot within the plat as a means of accessing the pole barn, they did not intend to construct a driveway made of gravel, asphalt, or any other material. Instead, Richards testified that defendants intend to drive across the grass on the lot within the plat, and that they have done so for years to access their parcel outside of the plat.

After hearing the above testimony and the parties' arguments, the trial court stated it was "quite unimpressed" with plaintiff's case, but ruled:

> Well, based on what I've heard . . . I think the merits of the case are very much up in the air in my mind at this point. I'm going to grant the preliminary injunction because I - - I don't - - primarily because I don't want the Defendants to go ahead and invest more money and then have to tear it down if I - - if I do rule in the Plaintiff's favor.

On October 9, 2002, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). In his brief, plaintiff relied on his interpretation of *R R Improvement, supra,* asserting that it required defendants' parcel outside of the plat to be subject to the restrictive covenants governing the lots within the plat, and also asserting that defendants' construction of an isolated pole barn, without the construction of an accompanying residence, would violate the restrictive covenants. In support of his assertion that defendants' construction of the pole barn violates the restrictive covenants governing the lots within the plat, plaintiff introduced an affidavit of Gustava E. Noffke, in which she stated "[t]he intention of myself and my husband with respect to the covenants and restrictions was that lots in the Plat not be used for the construction of isolated accessory buildings, such as garages, pole barns and the like, but that such structures would be permitted only if constructed incidental to a single-family dwelling constructed on the same lot."

Plaintiff also asserted that both he and the surrounding neighborhood would suffer irreparable harm if defendants were allowed to construct their pole barn. In support of his assertion, plaintiff presented the affidavit of Timothy J. Johnson, a professional land use planner who testified that, in his opinion, allowing isolated accessory buildings in residential neighborhoods may cause visual, maintenance, storage, pest, theft and vandalism problems, as well as promote the ability to conduct commercial activities in residential areas.

In response, defendants agreed with plaintiff that no genuine issue of material fact existed, but asserted that they, rather than plaintiff, were entitled to summary disposition pursuant to MCR 2.116(C)(10) under MCR 2.116(I)(2). Defendants argued that their use of their property within the plat would be incidental to their lakefront residence. Together with their response to plaintiff's motion for summary disposition, defendants also filed an affidavit of defendant Gary Richards.

In his affidavit, Richards testified that he had executed a document placing restrictions on defendants' 100-foot-square parcel of property abutting the plat "that are substantially similar to those restrictions affecting lots located with [sic] Noffke's Lake Shore Plat No. 1." Richards also reiterated that defendants had used their property within the plat for "recreation, overflow, parking, temporary boat and other trailer storage, and the like" since purchasing it, and that the property had been so used since 1993. Richards further averred he maintained the lawn; that defendants intended to keep and maintain the pole barn in good repair after its construction; that they would match its construction to their house on their lakefront lot; that they would not conduct any outdoor storage; and that they would continue to maintain the grounds of the lot within the plat. According to Richards, the pole barn would add to the aesthetic value of the neighborhood by "bringing indoors items that would otherwise be stored outdoors," and that defendants did not plan to install either a gravel or pavement driveway on their lot within the plat.

Plaintiff asserted in his reply brief that defendants' statements that plaintiff himself, as well as another neighbor, have violated the restrictive covenants by building or planning to build pole barns are erroneous because plaintiff and the neighbor either have built, or plan to build, pole barns only after constructing a residence upon their lots within the plat. Moreover, plaintiff asserted that defendants' argument that their pole barn constitutes residential use incidental to a place of abode is wrong because their home is not located upon their lot within the plat, and the restrictive covenants limit the use of lots within the plat to "single-family living quarters."

The trial court heard arguments of the parties on October 30, 2002. At the hearing, defendants moved to admit a certified copy of a quit claim deed placing restrictions on defendants' parcel outside of the plat, to which plaintiff did not object. The deed, dated October 23, 2002, and recorded October 30, 2002, quitclaims the 100-foot-square parcel outside the plat from defendants as grantors to defendants as grantees and contains the same eight restrictions that are contained in the January 8, 1958, quit claim deed from Powell to the Noffke's.

After the parties presented their arguments, the trial court noted that plaintiff contended that defendants could not use their land within the plat for ingress to and egress from their land outside of the plat unless: (1) they made their land outside of the plat subject to the same restrictive covenants governing lots within the plat, and used it in accordance with them, and (2) defendants' use the property within the plat to access the parcel outside of the plat does not "aesthetically or otherwise impair the restriction-assured enjoyment of home ownership in the subdivision." As to this latter criterion, the trial court reasoned:

> Based on the affidavits that have been submitted, my conclusion is that there will be no impairment of any restriction-assured enjoyment. It's to me an anomalous argument to say that because the Richards' home is located directly across the street from this lot instead of on the lot that they can't have the same sort of storage unit that other people in the neighborhood have, including Mr. Becker himself.

With respect to plaintiff's argument that defendants' use of a pole barn would violate the restrictive covenants limiting the property to residential uses because defendants' residence was not situated in the plat, the trial court stated, "[i]t just does not make sense to me given . . . the

Richards' home . . . [is] located contiguous to, directly across the street from, this plat." The trial court further reasoned and ruled:

> So it's just not common sense to me under the circumstances that the Richards would be prevented from using their property within and without the plat as they have intended to do and which apparently the township has allowed. So I recognize that the building restrictions take precedence over the zoning and building code, but I don't see that they're violated.
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> So for that reason I'm going to deny the Plaintiffs' [sic] motion for summary disposition and grant the summary disposition to the Defendants and enter a judgment of no cause of action.

On December 2, 2002, the trial court entered its order denying plaintiff's motion for summary disposition, granting defendants' countermotion, and rendering judgment of no cause of action on plaintiff's complaint. Plaintiff appeals by right.

II. Standards of Review

We must employ multiple standards of review. This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the opposing party's claim or defense. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court must consider evidence the parties submit in the light most favorable to the nonmoving party. *Id*.; MCR 2.116(G)(5). The court may grant summary disposition to the party so entitled as a matter of law when the proffered evidence fails to establish that a disputed material issue of fact remains for trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

We review de novo equitable actions to enforce covenants and negative easements restricting the use real property, but review the trial court's findings of fact for clear error. *Cooper v Kovan*, 349 Mich 520, 526, 84 NW2d 859 (1957); *Webb v Smith (Aft Sec Rem)*, 224 Mich App 203, 210; 568 NW2d 378 (1997); MCR 2.613(C). Although it is settled that owners of property, to which restrictive covenants have attached, may invoke a court's equitable jurisdiction to enforce even *de minimis* violations, *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002); *Oosterhouse v Brummel*, 343 Mich 283, 289; 72 NW2d 6 (1955), whether to grant relief is still within the discretion of the trial court. "Courts of equity . . . grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case." *Id* at 290. This does not mean the trial court must employ a balancing test but requests for equitable relief may denied on the basis of equitable defenses. *Webb, supra* at 211, citing *Cooper, supra* at 530. See, also, *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002).

III. Analysis

A. Overview

In the case at bar, the parties agree a trial was unnecessary. The parties also agreed that the restrictive covenants attached to lots in Noffke's Lake Shore Plat No. 1 are clear and unambiguous: the plat property may be used only for single-family residential purposes; commercial uses are prohibited; and, accessory buildings such as garages, or the pole barn at issue, are permitted when ancillary to residential use and other building restrictions are satisfied. Indeed, the parties only dispute whether defendants' proposed pole barn is a permitted ancillary residential use or whether it would be an "isolated" nonresidential use. Resolution of this dispute requires answering two questions. First, may defendants use their property in the plat to access their property outside the plat to erect the pole barn and use it ancillary to their residence across Noffke Drive? Second, because defendants' residence is not in the plat, would constructing and using the pole barn violate restrictive covenants applicable to the parcel of property on which the pole barn would be situated? We conclude that the trial court did not err answering these questions "yes" and "no," respectively.

B. Applicable Principles

We begin our analysis by noting some general principles governing these negative reciprocal easements. See *Webb v Smith (After Remand),* 204 Mich App 564, 572; 516 NW2d 124 (1994), quoting *Sanborn v McLean,* 233 Mich 227, 229-230; 206 NW 496 (1925). A covenant running with the land "is a contract created with the intention of enhancing the value of property, and, as such, it is a 'valuable property right.'" *Terrien, supra* at 71, citing *City of Livonia v Dep't of Social Services,* 423 Mich 466, 525; 378 NW2d 402 (1985). It is a fundamental principle of our jurisprudence that property owners may enhance the value of their property by entering into contracts for its protection. *Terrien, supra* at 71. This principle and its enforcement is "deeply entrenched in the common law of Michigan," supported by the bulwark freedom of contract. *Id.,* n 19. Thus, a strong public policy, "well-grounded in the common law of Michigan," supports "the right of property owners to create and enforce covenants affecting their own property." *Id*. at 70-71, citing *Wood v Blancke,* 304 Mich 283, 287-288; 8 NW2d 67 (1943). "Restrictions for residence purposes are particularly favored by public policy and are valuable property rights." *City of Livonia, supra* at 525. So, "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).

A related but sometimes contradictory principle provides that "owners of land have broad freedom to make legal use of their property." *Id*. Thus, restrictions upon property, or negative covenants, "are to be strictly construed against the would-be enforcer . . . and doubts resolved in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). "Courts will not grant equitable relief unless there is an obvious violation." *Id.*, citing *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956). See, also, *Wood, supra* at 287: "Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property." The principle that owners enjoy free use of their property is fundamental, and courts will not infer restrictions not expressly provided in the controlling documents. *O'Connor, supra* at 341.

In construing restrictive covenants, the intent of the restrictor is paramount as determined by reading the language of instrument as a whole in light of any general plan for development of the area subject to restrictions. *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925); *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). See, also, *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982). Like other contracts, where the language used in the instrument is clear and unambiguous, judicial construction may not expand or limit the restrictions. *Id*. at 716; *Webb (After Remand)*, *supra* at 572. "A court of equity will not enlarge the scope of deed restrictions beyond the clear meaning of the language employed." *Rofe*, *supra* at 158. Also, like other contracts, the purported intent of the restrictors cannot overcome the express language used in the documents creating the restrictions. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Moore v Kimball*, 291 Mich 455, 460-461; 289 NW 213 (1939).

> The supposed intention of the parties cannot overcome their express agreement, and a restriction will not be enlarged or extended by construction even to accomplish what it may be thought the parties may have desired had a situation, which later developed, been foreseen by them at the time the restriction was written. Where the language of the restriction is clear, the parties will be confined to the language which they employed. [*Id*. (citations omitted).]

Finally, as to applying favored reciprocal negative easements restricting property to only residential purposes, "decisions . . . depend entirely upon the facts in each particular case." *Cushing v Lilly*, 315 Mich 307, 311; 24 NW2d 94 (1946). As our Supreme Court opined in *Wood*, *supra* at 288-289:

> No clear and definite line can be drawn as to residential use of premises. It is a safe rule that the usual, ordinary and incidental use of property as a place of abode does not violate a covenant restricting such use to "residence purposes only," but that an unusual and extraordinary use may constitute a violation. Each case must be determined on its own facts . . . .

C. Use of Plat Property For Ingress To and Egress From Adjacent Property

We agree with the trial court and the parties that whether defendants may use their property in Noffke's Lake Shore Plat No. 1 for ingress to and egress from its contiguous unplatted property is controlled by *R R Improvement*, *supra*, in which our Supreme Court reviewed circumstances similar to those presented in the case at bar. In *R R Improvement*, the defendant owned a 70-foot wide strip of a lot within a subdivision that was subject to covenants and restrictions limiting the use of its lots to "strictly private residence purposes." *Id*. at 178-179. The defendant desired to use for residential purposes a much larger parcel of land she owned outside of the subdivision but contiguous to the subdivision lot of which she owned a part. *Id*. at 179-180. So, the defendant sought to gain ingress and egress between her parcel outside the subdivision and a platted road within the subdivision by grading and maintaining a connecting roadway over the 70-foot strip. *Id*. at 180. The defendant alleged that there was no other way to access her parcel outside of the subdivision "except by expensive bridging or similar crossing of the Rouge valley" and she had offered to impose the same restrictions upon her parcel outside of the subdivision as those governing lots within the subdivision. *Id*. at 180-

181. The trial court agreed with the plaintiff association that the defendant's proposed use would violate the restrictive covenants of the subdivision and permanently enjoined the defendant's proposed use of the 70-foot wide subdivision parcel. *Id*. at 178.

Although our Supreme Court remanded the case for further factual findings, it addressed the following issue because it was likely to recur, *id*. at 181:

> Considering a subdivision [restricted for residence purposes], where the owner of such lot-portion offers to impose upon abutting property (likewise owned by him) the same residential restrictions as are applicable to lots within the subdivision, may he utilize the aforesaid portion to connect such abutting property with one of the roadways of the subdivision without violating the residential restrictions?

In answering this question, our Supreme Court reviewed cases from other jurisdictions, noting that the defendant had built her case on *Bove v Giebel*, 169 Ohio St 325; 159 NE2d 425 (1959). *R R Improvement*, *supra* at 182. Our Supreme Court stated the so-called *Bove* rule by quoting the following reasoning from the Ohio court:

> "As to property in a subdivision, that is restricted to use for residence purposes only, there have been decisions preventing its use as a means of ingress to and egress from property outside the subdivision that is not restricted to the same extent as the property within the subdivision. However, we have found no cases involving a situation such as presented by the instant case where the property outside the subdivision will be restricted by its owners to the same extent as that within the subdivision. Hence, our conclusion is that the owners of a lot in a subdivision, which lot is restricted to use 'for residence purposes only,' may use such lot as a means of ingress to and egress from adjoining land that they own outside the subdivision if they impose upon such outside land the same restrictions that are applicable to lots within the subdivision." [*R R Improvement*, *supra* at 183, quoting *Bove*, *supra* at 330 (citations omitted).]

Our Supreme Court adopted the reasoning of *Bove*, with reservations, opining:

> We agree [with *Bove*], but with reservations. Before applying *Bove's* rule to this case, the trial court should be informed by due testimony whether and how, if at all, the present residential advantages enjoyed by [the subdivision] lot owners will or might be adversely affected by appellant's proposal; whether a new traffic burden or maintenance problem will thereby be cast on dead end South Hills road, or for that matter, upon any other part of the subdivision's roadways; whether the private roads of the subdivision as dedicated have since become public roads; whether appellant's intended specifications for grading of the west 70 feet of lot 15 and of location on parcel 3 of the two proposed homes will in any way, aesthetically or otherwise, impair the restriction-assured enjoyment of home ownership in the subdivision; whether strict conformity with the restrictions has been waived (as claimed by appellant in her vain motion to set aside summary judgment) and, in general, whether there are fair distinguished from carping or

> trifling reasons for denial to appellant of that which is sought by her. [*R R Improvement, supra* at 183-184.]

Our Supreme Court provided further guidance to the trial court gleaned from *Cook v Murlin*, 202 App Div 552; 195 NYS 793 (1922), noting the New York case "sets the tone" for proceedings on remand. *R R Improvement, supra* at 184. The Court summarized this "tone" as follows: "Would grant of relief to appellant harm appellees in any way? If so relief should be denied. Otherwise relief should be granted in accordance with the ascertained equity of the case." *Id*. The Court explicated further by quoting *Cook, supra* at 559-560:

> "If plaintiffs' claim were to be upheld, it would result in doing a great injustice to defendants, without any corresponding benefit to plaintiffs. To permit this driveway to stand [would result in] . . . no possible harm . . . to plaintiffs, and they made no attempt on the trial to prove damages. To close this private driveway, which would result [in] . . . defendants [being] deprived of an easy, short, and convenient way of reaching East avenue over their own property, and [defendants] would be compelled to adopt, as their only way of ingress to and egress from the 11-acre tract, the inconvenient, dangerous, and much longer route by way of the Kelly road, and over the Rochester & Syracuse double-track railroad. In the case of *McClure v Leaycraft*, 183 NY 36, 44 (75 NE 961, 963, 5 Ann Cas 45), the court of appeals said:
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> "'An injunction that bears heavily on the defendant, without benefiting the plaintiff, will always be withheld as oppressive.'" [*R R Improvement, supra* at 184, quoting *Cook, supra* at 559-560.]

This Court followed *R R Improvement* in *Billiet v Aulgur*, 18 Mich App 391; 171 NW2d 463 (1969). In *Billiet*, the plaintiff subdivision property owner sought to enjoin the construction of roadway on a lot located within the subdivision, restricted to "no more than one single dwelling house . . . on a lot," from being used as a means of egress and ingress to property abutting the subdivision. *Id*. at 392, 395. The trial court issued a permanent injunction against the defendants' proposed use of their subdivision property, which was to construct a roadway 20 feet north of a common lot line they shared in the subdivision with the plaintiff's property and to maintain the 20-foot strip with grass and foliage. *Id*. at 392-393. The *Billiet* Court quoted *R R Improvement* extensively, and observed:

> The only requirement that apparently must be met before the [*Bove*] rule may be applied is that the restrictions of the two tracts be substantially identical. Defendants have apparently met that burden. On that basis the only question remaining is whether the testimony in this case provided sufficient information to satisfy the requirements established by [*R R Improvement*] at pages 183 and 184, justifying the non-application of the so-called *Bove* rule. (See [*R R Improvement*], *supra*, pages 183 and 184). [*Billiet*, *supra* at 396.]

The Court in *Billiet* noted that the trial court record contained no positive evidence on how defendants' proposal would adversely affect the residential advantages of the subdivision lot owners. *Id*. The Court was unimpressed with the plaintiff's testimony that he did not want to

be next to a road or have a corner lot. *Id.* Indeed, this Court found "no real indication in the record that plaintiff's objections to the roadway constituted any more than carping or trifling reasons for denial of defendants' construction of the roadway." *Id.* Further, the *Billiet* Court concluded that for a plaintiff to successfully preclude use of subdivision property to access property outside of the subdivision where the first part of the modified *Bove* rule was satisfied, the plaintiff must establish non-trifling injury. In the words of the Court,

> We feel that the test to be applied is not "harm [to] appellee[s'] in any way" but, rather, whether or not there is a non-trifling serious damage which would warrant "an injunction that bears heavily on the defendant." [*Id*. at 398.]

In the present case, defendants have satisfied the first prong of the modified *Bove* rule by imposing substantially the same restrictions upon their parcel outside of the plat as those governing the lots inside of the plat. The only remaining inquiry is whether plaintiff demonstrated that defendants' use of his plat property for ingress to and egress from their property outside the plat would adversely affect the residential advantages enjoyed by the plat lot owners. *R R Improvement*, *supra* at 183. Are plaintiff's objections fair, or merely "carping or trifling"? *Id*. at 184. Did plaintiff establish "non-trifling serious damage" that would warrant issuing an injunction against defendants? *Billiet*, *supra* at 398. We find no clear error in the trial court's factual conclusion that defendants' proposed use would cause "no impairment of any restriction-assured enjoyment" of the plat lot owners.

First, the record here supports the conclusion that defendants' "intended specifications for grading" of their property within the plat and placement of the proposed pole barn on the outside parcel "will not in any way, aesthetically or otherwise, impair the restriction-assured enjoyment of home ownership" within the plat. *R R Improvement, supra* at 184. Defendant Richards testified both by affidavit and during the hearing on plaintiff's motion for the preliminary injunction that defendants do not intend to construct either a gravel or asphalt driveway across their lot within the plat. They intend simply to drive across the grass as they have done since acquiring the properties. Thus, in essence, defendants' lot within the plat would remain as is: vacant and landscaped.

Moreover, even assuming that placement of a pole barn on the adjoining plat outside the plat violates strict conformity with the restrictive covenants, we believe that plaintiff has waived strict conformity because he has admitted that his neighbor to the north already uses his lot within the plat for ingress to and egress from a pole barn constructed on a parcel outside of the plat and that plaintiff himself intends to do the same. In addition, with regard to whether granting plaintiff relief would result in harm to defendants without any corresponding benefit to him, plaintiff admitted during the hearing on his motion for a preliminary injunction that utilizing his lot for ingress to and egress from his parcel outside of the plat would be his only means of access, just as it would be for defendants. Denying defendants easy access to their adjoining parcel would deny defendants the use which plaintiff and others enjoy.

Further, plaintiff has not alleged that defendants' use of their lot within the plat as a means of access to their parcel outside of the plat will impose new traffic burdens or maintenance problems upon Noffke Drive. Plaintiff asserts that defendants' use of their lot for access would unduly burden him because defendants own a lakefront residence and, therefore,

may utilize their pole barn for the storage of seasonal property such as boats. But plaintiff admitted that he intends to, and that his neighbor already does, utilize his lot within the plat for ingress to and egress from an intended pole barn. Further, during the hearing on plaintiff's motion for the preliminary injunction, defendant Richards identified a photograph depicting plaintiff's neighbor to the north backing a boat into his pole barn. Finally, plaintiff himself verified that defendants currently utilize their lot within the plat for overflow parking and for storing such things as boats and trailers.

The essence of plaintiff's objection appears to be that he would be forced to live next to a one-hundred-foot wide alley used as a driveway to the pole barn for cars, boats, lawnmowers, and other equipment instead of a residence. This objection, as well as plaintiff's claim that an "isolated" pole barn would create a risk of increased crime within the neighborhood, is the type of "carping or trifling" this Court rejected in *Billiet*, *supra* at 396. Accordingly, we conclude the testimony and evidence presented below supported the trial court's finding that defendants' use of their land within the plat will not adversely affect the present residential character of the subdivision, and that plaintiff has failed to present "fair distinguished from carping or trifling reasons for denial" to defendants of their ability to use their lot within the plat for ingress and egress. *R R Improvement*, *supra* at 184. Accordingly, defendants' use of their plat property to access property outside the plat for the ancillary residential purpose of a pole barn does not violate the restrictive covenants of Noffke's Lake Shore Plat No. 1 under the modified *Bove* rule.

D. Application of the *Bove* Restrictions

We next address whether defendants' proposed use of their parcel outside of the plat violates the restrictions defendants imposed to satisfy the modified *Bove* rule.

First, we conclude that plaintiff has standing to raise this issue. In most lawsuits to enforce restrictive covenants both the complaining party and the defendant trace ownership of their respective properties back to a common grantor who created the restrictive covenants. Thus, privity exists between the two parties, and as owners of subdivided property with restrictive covenants running with the land, each owner possesses standing to enforce even *de minimis* violations of the restrictive covenants. *Terrien*, *supra* at 65, 71-73. Indeed, by their very nature the covenants are *reciprocal* negative easements. See *Webb (After Remand)*, *supra* at 572, quoting *Sanborn, supra* at 229-230. Here, no privity or common grantor connects plaintiff to defendants' parcel outside the plat, nor was plaintiff a party to defendants' creation of the restrictive covenants attached to that parcel. Nevertheless, defendants clearly created the restrictions to protect the restriction-assured residential benefits enjoyed by the lot owners of Noffke's Lake Shore Plat No. 1. Accordingly, plat owners are members of a clearly identified class for whose benefit the restrictions were created, and as such, may enforce them as third-party beneficiaries. MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999); *Dorfman v State Highway Dep't*, 66 Mich App 1, 3-4; 238 NW2d 395 (1975).

Although we find that plaintiff has standing, we nevertheless conclude, as did the trial court, that the restrictions here do not plainly require that ancillary residential uses, in this case a pole barn, be situated on the same lot as the supporting "one-family residential structure." The first restriction simply provides that the "premises shall not be used for other than residential purposes consisting of not more than one one-family residential structure per lot." This

restriction, although clearly prohibiting more than one single-family dwelling per lot, says nothing about placement of accessory buildings. Further, restriction number one precludes commercial uses but plaintiff does not allege that defendants intend to use the pole barn for commercial purposes. Restriction number two precludes use of "garages" or other "outbuildings" as "a temporary or permanent residence," but again plaintiff does not allege a violation of this restriction. Finally, restrictions three through five regulate setback and building requirements for which there is no alleged violation. In sum, there is no clear or obvious violation of the restrictive covenants at issue so as to warrant injunctive relief. Accordingly, we must strictly construe the covenants against the would-be enforcer and resolve doubts in favor of the free use of property. *Chawney*, supra at 210; *Wood, supra* at 287. The fundamental principle that owners enjoy free use of their property precludes our inferring a restriction not expressly stated in the controlling document. *O'Connor, supra* at 341.

The parties agree the restrictions in the present case when read as a whole permit pole barns of the type defendants plan to use on their parcel outside the plat as a garage or outbuilding when used for residential purposes ancillary to a single-family dwelling. See, e.g., *Wood, supra* (a garage did not violate restrictions for "residence purposes only" but keeping a flock of racing pigeons in the garage did), and *Nelson v Goddard*, 43 Mich App 615, 617; 204 NW2d 739 (1972) (a garage was permitted accessory use under a zoning ordinance even though it was twice the size of the residence on the same lot). Provided it is not used for commercial purposes, or specifically prohibited, a private garage is always a permitted accessory use in a residential neighborhood. *People v Scrafano*, 307 Mich 655, 658; 12 NW2d 325 (1943). Therefore, we conclude that defendants' proposed use of a pole barn as an ancillary use to their single-family dwelling does not violate the applicable use restrictions. Even so, we briefly address plaintiff's arguments to the contrary.

First, the restrictions applicable to defendants' proposed pole barn are those defendants themselves imposed to comply with the modified *Bove* rule; not the restrictions applicable to Noffke's Lake Shore Plat No. 1. For this reason, the dispute over whether the Noffke's or Powell created the restrictions is misplaced because defendants created the pertinent restrictions. We find no ambiguity in the absence of express restriction on placement of outbuildings (except setbacks in restriction three) to permit consideration of extrinsic evidence of the drafter's intent, but if considered, it would be defendants' intent. It can hardly be doubted that defendants did not intend to preclude the very use they desired by restricting their parcel outside the plat. As for the restrictions applicable to the plat, we have already decided that defendants' access over their plat property to and from a pole barn does not violate its restrictive covenants.

Second, we reject plaintiff's assertion that uses outside a plat or parcel of property may not be examined to determine whether property restrictions are being violated. In *Scrafano,* it was the defendant's use of his vehicles in business away from the restricted property that rendered the storage of those vehicles in the defendant's garage a commercial use. Further, plaintiff's reliance on *Hilse v Sambrook*, 346 Mich 680, 683; 78 NW2d 649 (1956), and *Monroe v Menke*, 314 Mich 268, 274; 22 NW2d 369 (1946), for the proposition that "Michigan . . . cases uniformly hold that uses outside of a plat are irrelevant to the issue of compliance within the plat" is misplaced. The cited cases do not stand for the stated proposition. Rather, these cases hold that changes in the character of property uses surrounding a subdivision cannot abrogate or modify restrictions binding on the subdivision that have not otherwise been abandoned. Here,

restrictions have not been abrogated or modified; they have been satisfied because the use in question is a permitted ancillary residential purpose that is not clearly prohibited.

Third, plaintiff's reliance on out-of-state cases is also misplaced. Not only do such cases lack binding precedential value, *People v Brown*, 239 Mich App 735, 740 n 4; 610 NW2d 234 (2000), but they must necessarily represent only the application of the law of the particular state to the unique facts involved. For example, in two cited Montana cases,[3] garages for which no appurtenant residence was ever built were held to violate covenants restricting use to residential purposes. In *Sterling Realty Co v Tredennick*, 319 Mass 153; 64 NE2d 921 (1946), more detailed restrictions permitted the court to conclude the restrictions precluded garages on lots that did not contain a dwelling. *Id*. at 157. Moreover, the garage also violated restrictions regarding "architectural design, material and exterior finish." *Id*. at 156. And, in *Sandy Point Improvement Co v Huber*, 26 Wn App 317; 613 P2d 160 (1980), it is unclear whether the court's decision turned on the factfinder's determination that the defendant's "building plan, given its size and purpose, is not consistent with any reasonable interpretation of residential use," *id*. at 319-320, or upon the court's statement that if a garage is placed on an adjoining lot, it can "no longer deemed to be appurtenant and does violate such a restriction even though used in connection with a residence on an adjoining lot," *id*. at 320.

In reviewing the cited out-of-state-cases, we are reminded of our Supreme Court's admonition that in reviewing cases addressing restrictive covenants "[e]ach case must be determined on its own facts." *Wood, supra* at 289. And, in reconciling the principles of free use of property and enforcement of restrictive covenants, we must necessarily consider conflicts that arise on a case-by-case basis because the "circumstances of each case thus determine whether a particular use is prohibited by a residential restriction." *O'Connor, supra* at 343, 345. In this case, two subdivisions were platted by common grantors essentially comprising one residential neighborhood. Subdivision residents on the non-lake side of the road freely use or intend to use adjoining property outside the subdivision for pole barn storage. Under these circumstances, like the trial court, we conclude it is illogical to conclude defendants' proposed use of a pole barn is not also a residential use incidental to their single-family dwelling on the lakeside of the road.

Moreover, even if we were to agree with plaintiff's interpretation of the restrictive covenants, that is, for a pole barn to be an ancillary residential use it must be supported by a dwelling on the same lot, we would still conclude that the trial court did not abuse its discretion by denying plaintiff injunctive relief. Plaintiff's effort to distinguish plat owners having dwellings on the east side of Noffke Drive that have placed or plan to place a pole barn on adjacent property outside the plat from defendants' proposed use is without merit. Accordingly, plaintiff has waived strict application of the restrictive covenant as he interprets it (ancillary buildings must be on the same lot as the supporting dwelling).

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[3] *Tipton v Bennett*, 281 Mont 379; 934 P2d 203 (1997) and *Hillcrest Homeowners Ass'n v Wiley*, 239 Mont 54; 778 P2d 421 (1989).

A waiver will be found when it is demonstrated that the character of a subdivision has been altered "to an extent that would defeat the original purpose of the restrictions." *O'Connor, supra* at 346, citing *Carey v Lauhoff*, 301 Mich 168, 173-175; 3 NW2d 67 (1942). "'Whether 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 as presented.'" *O'Connor, supra* at 344, quoting *Grandmont Improvement Ass'n v Liquor Control Comm*, 294 Mich 541, 544; 293 NW 744 (1940). Further, a court must consider the character, as well as the number, of purported violations to determine whether the complaining property owners have waived or forfeited the benefit of the restriction. *Carey, supra* at 174.

In the present case, plaintiff admits that "many other landowners in the plat" have constructed pole barns on parcels outside of the plat without also constructing residences upon those parcels. Plaintiff also states in his affidavit that "[t]here are unplatted parcels which are contiguous to the Plat that are occupied by a pole barn or similar type of accessory building, but in each instance, the accessory building is incidental to a single-family residence that is located on a contiguous lot in the Plat." Further, plaintiff testified that his neighbor to the north has constructed a pole barn on a parcel outside of the plat without also constructing a house on the parcel, and that plaintiff himself intends to do the same. On brief, after acknowledging a pole barn is a permitted incidental residential use to a single-family residence if erected on the same lot in the plat or contiguous land subject to the same restrictive covenants, plaintiff again states that he and many other plat lot owners "have done or are planning to do exactly that." Accordingly, even if the restrictive covenants require a home to be built on the same lot as an ancillary pole barn, we conclude plaintiff has waived that strict compliance with that restriction.

We find plaintiff's arguments in contradiction to waiver to be without merit. Specifically, we reject plaintiff's arguments that the lots of plat owners who reside on the east side of Noffke Road have merged with adjacent property they have purchased on which they have or intend to erect pole barns.

First, plaintiff's reliance on subsection 1(e) of section 109 of the Land Division Control Act (LDA),[4] MCL 560.101, et seq., is misguided. Subsection (1)e, MCL 560.109(1)(e), is one of several criterion that must be satisfied before a municipality approves an application for a proposed division of land and requires that "[e]ach resulting parcel is accessible."

This provision merely states that a municipality may not approve a proposed division of a parcel land into individual lots unless each of the resultant lots will be accessible. It does not here require that parcels of land outside of the plat that are purchased by persons owning lots within the plat become part of Noffke's Lakeshore Plat Number 1 without the subdivision's being replatted pursuant to the requirements set forth in MCL 560.104. See *Brookshire-Big Tree Ass'n v Oneida Twp*, 225 Mich App 196, 199-201; 570 NW2d 294 (1997). Simply put, plaintiff or other plat owners may not unilaterally replat their lots. "To allow one lot owner to 'agree' to

[4] This act was formerly known as the Subdivision Control Act, but effective March 31, 1997, 1996 PA 591 amended the act's name to the Land Division Act.

replat his lot would mean that any lot owner unhappy with use restrictions concerning his lot could 'agree' to replat his lot, meaning that he would not be bound by the use restrictions. All such restrictions would quickly become unenforceable." *Id*. at 201.

In further support of his merger theory, plaintiff relies on an opinion of the Attorney General interpreting the provisions of the section 108 of the LDA, MCL 560.108. Section 108 permits a landowner to subdivide his property only a limited number of times within specified time periods without complying with the platting requirements of the LDA. The Attorney General opined that "[w]here a property owner conveys two contiguous parcels to the same purchaser at different times, the two parcels may be merged and treated as a single parcel for the purposes of determining whether five or more parcels have been created." OAG, 1977-1978, No 5361, pp 610, 617 (September 12, 1978). Again, plaintiff's reliance on this authority is misguided. Whether parcels have merged for purposes of compliance with a state statute governing land divisions is an entirely separate question from whether a merger has occurred for purposes of applying restrictive covenants running with the land, which are private contract and property rights. Accordingly, we do not believe that the Attorney General's opinion supports plaintiff's claim that by virtue of being purchased by a person owning a lot within the plat, a contiguous parcel becomes part of the plat without replatting. *Brookshire-Big Tree Ass'n, supra.*

For the same reason, plaintiff's argument that merger occurs under the township's zoning ordinance when plat lot owners also acquire contiguous parcels outside the plat, also fails. Plaintiff asserts that because section 7.6.6 of the zoning ordinance requires lots in "AR" zones be composed of a minimum area of 1½ acres, the lots outside of the plat (less than 1½ acres in size) must be considered to have merged with lots within the plat. Thus, plaintiff argues, these merged lots with dwellings (on plat lots) and pole barns (on the merged outside lots) comply with plaintiff's interpretation of the restrictive covenants. But, again, compliance with zoning requirements and compliance with private restrictive covenants are separate issues. Our Supreme Court summarized the relationship between zoning ordinances and restrictive covenants in *Rofe v Robinson*, 415 Mich 345, 351; 329 NW2d 704 (1982) (footnotes and citations omitted):

> Even if the zoning were relevant, it is well established in this state that a change in zoning cannot, by itself, override prior restrictions placed in deeds. 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. These are separate obligations, both of which may be enforceable.

In sum, plaintiff's arguments regarding merger between plat lots and outside parcels fail and strict compliance with his version of the restrictive covenants, if correct, must be deemed waived on the basis that plat owners have used adjoining parcels for placement of pole barns as ancillary residential uses. Consequently, the trial court did not err as a matter of law in applying the restrictive covenants to the facts and circumstances of this case and did not abuse its discretion by denying equitable relief to plaintiff.

IV. Conclusion

We hold that the trial court did not err as a matter of law in applying the modified *Bove* rule to the case at bar and did not clearly err in finding as a matter of fact that defendants had complied with the requirements of that rule. *R R Improvement, supra*; *Billiet, supra*. Further, we hold that the trial court did not err as a matter law nor clearly err in its factual findings by ruling that defendants' use of a pole barn ancillary to their residential use of their lakeside single-family dwelling did not clearly or obviously violate the restrictive covenants so as to warrant injunctive relief. Moreover, even if plaintiff's view of the restrictive covenants is correct, and a pole barn may not be used as an accessory use unless situated on the same lot as its supporting residential dwelling, plaintiff has waived strict compliance with that restriction. In sum, we conclude that the trial court did not err in applying the law, did not clearly err in finding the facts, and did not abuse its discretion by denying plaintiff's request for injunctive relief.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens

I concur in result only.

/s/ Helene N. White