

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE STOCKS and DEBORAH STOCKS,

Plaintiffs/Counter Defendants-
Appellees,

v

RIDGEWOOD HOMEOWNERS
ASSOCIATION,

Defendant/Counter Plaintiff-
Appellant.

UNPUBLISHED
November 4, 2008

No. 270615
Livingston Circuit Court
LC No. 04-021058-CH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right a circuit court order estopping defendant from enforcing a deed restriction that would prevent plaintiffs from constructing a shed/garage. We reverse and remand.

I. Basic Facts and Proceedings

This case arose after defendant denied plaintiffs permission to construct a shed/garage out-building on their lot within Ridge Wood Subdivision Number 2. The deed restrictions provided, in relevant part, that:

II. BUILDING RESTRICTIONS

No structure or improvement of any kind shall be erected or maintained on any Lot except as permitted by this Section II. Each structure or other improvement must receive architectural approval as provided in Section IV.

(a) One single-family dwelling may be constructed on each Lot. Each dwelling shall have an attached enclosed garage with space for at least two cars. No carport shall be erected or maintained on any Lot.

* * *

(e) A dwelling may have decks, patios and a below-ground swimming pool with related facilities such as fence, heater and pump. No above-ground pools shall be permitted.

(f) No trailer, tent, shack, shed, barn or temporary building of any design shall be erected or maintained on any Lot

Defendant based its denial on Section II (f) which provides that, “[n]o trailer, tent, shack, shed, barn or temporary building of any design shall be erected or maintained on any Lot” Plaintiffs maintained, however, that defendant had waived enforcement of the above provision because defendant allowed two lot owners in the subdivision to build pool cabanas next to swimming pools in their yards. Defendant admits that it allowed pool cabanas to be built as pool related facilities under Section II (e), which provides that, “[a] dwelling may have decks, patios and a below-ground swimming pool *with related facilities such as fence, heater and pump.*” (Emphasis added). The circuit court agreed with plaintiffs that a pool cabana was not a pool-related facility under the purview Section II (e), and that construction of the pool cabanas violated Section II (f). The circuit court further held that because defendant allowed the pool cabanas to be built in violation of Section II (f), defendant could not prevent plaintiffs from constructing a shed/garage.

II. Analysis

Defendant claims that the circuit court erred when it concluded that the pool cabanas were not a pool-related facility under the purview Section 2(e). Defendant further argues that even if the pool cabanas were constructed in violation of Section 2(f), defendant may nonetheless prevent plaintiffs from constructing a shed/garage.

A. Standard of Review

“The scope of a deed restriction is a question of law that is reviewed de novo.” *Bloomfield Estates Improvement Ass’n v Birmingham*, 479 Mich 206, 211-212; 737 NW2d 670 (2007). A claim of waiver is an equitable claim where the circuit court’s factual conclusions are reviewed for clear error and its ultimate conclusions are reviewed de novo. See *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 163; 677 NW2d 874 (2003).

B. Analysis

Here, even assuming that a pool cabana is not a pool-related facility under the purview Section II (e), we conclude that plaintiffs are not entitled to construct a shed/garage.

We reject the circuit court’s conclusion that defendant waived its right to prevent plaintiffs from constructing a shed/garage. In *Bloomfield Estates Improvement Ass’n, Inc v City of Birmingham*, 479 Mich 206, 737 NW2d 670 (2007), our Supreme Court iterated “the general rule that if a plaintiff has not challenged previous violations of a deed restriction, the restriction ‘does not thereby become void and unenforceable when a violation of a more serious and damaging degree occurs.’” (Citation and emphasis omitted). Here, there is no dispute that plaintiffs’ proposed shed/garage is in every way significantly larger than the pool cabanas. On the other hand, plaintiffs have presented no evidence that their proposed shed/garage is a less

serious and damaging violation of the deed restrictions. Accordingly, we cannot conclude that defendant waived its right to prevent construction of the proposed shed/garage.

For a deed restriction to be considered waived, the violations of the restriction must be so extensive that the original purpose of the restrictions has been defeated. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999). Even a relatively large number of violations do not necessarily establish waiver. *Id.* at 342. The existence of waiver is determined based on the facts of each case. *Id.* at 344.

Here, only two properties in the subdivision have cabanas. This itself does not demonstrate a sufficient change of character of the neighborhood justifying a finding of waiver. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999). Also, we are not persuaded that defendant intentionally abandoned enforcement of Section II (f). Rather, the record is clear that defendant approved the pool cabanas under Section II (e). Thus, even assuming that defendant improperly interpreted Section II (e) to include pool cabanas as pool-related facilities, there is no evidence that in approving the pool cabanas, defendant voluntarily relinquished enforcement of Section II (f). *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008). Indeed, the deed restrictions contain a provision that expressly provides that the, “[f]ailure to enforce any of the provisions hereof on any number of occasions shall in no event be deemed a waiver of the right to do so upon the reoccurrence of a breach or a new breach thereafter.” Thus, there is insufficient evidence to conclude that defendant waived enforcement of Section II (f).

Moreover, pursuant to the deed restrictions, defendant is empowered to exercise architectural control.¹ Specifically, Section IV provides that,

(g) The Developer² may refuse to approve any plans and specifications which, although complying with this Declaration, are not deemed by the Developer to be suitable or desirable for aesthetic or other reasons. In making its decision, the Developer may take into account such factors as it deems relevant, including the suitability of the proposed improvement, enlargement or alteration

¹ Section V(e) provides that:

At or before the time when the Developer has conveyed title to 116 Lots, the Developer shall transfer to the Association [Defendant] all of the rights, privileges, discretions, authority and duties reserved to the Developer under this Declaration, whereupon the Association [Defendant] shall have, exercise and discharge all such rights, privileges, discretions, authority and duties, and the Developer shall be fully released and discharged from further obligations in connection therewith.

² There is no dispute that under the deed restriction the developer conveyed to plaintiff “all of the rights, privileges, discretions, authority and duties reserved to the Developer . . .”

for the site on which it is to be located and its compatibility with the rest of the neighborhood. The purpose of the review process is to assure the development of an aesthetically pleasing, harmonious private residential neighborhood, and in the event of any disagreement the Developer's decision shall control.

Thus, regardless whether defendant improperly approved the building of pool cabanas, defendant retains authority to deny approval of proposed buildings "to assure the development of an aesthetically pleasing, harmonious private residential neighborhood." In denying plaintiffs' proposed plans, defendant specifically cited concerns that "the construction of a detached garage would harm the open space created in the subdivision and place a particular burden on the neighbors who would be forced to view the garage from their property." Defendant also stated that "the building of a detached garage provides a negative aesthetic effect on the subdivision . . ." Regardless whether defendant improperly approved the building of pool cabanas, plaintiffs' claim that defendant improperly excised its authority to deny plans to build a shed/garage is without merit.

We reverse and remand for an entry of judgment for defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher