STATE OF MICHIGAN

COURT OF APPEALS

MILLPOINTE OF HARTLAND CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v DENISE CIPOLLA, Defendant-Appellee.	UNPUBLISHED May 11, 2010 No. 289668 Livingston Circuit Court LC No. 08-023628-CZ

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Plaintiff Millpointe of Hartland Condominium Association (Millpointe) appeals by right the trial court's orders denying summary disposition to Millpointe and granting summary disposition to defendant Denise Cipolla (Cipolla) pursuant to MCR 2.116(C)(10). We reverse.

This case arises out of Cipolla's construction of a pool in the back yard of her residential unit within Millpointe. The Millpointe of Hartland Bylaws restrict "accessory uses" behind residential units to placement no more than halfway between the residential unit and the property line. (This is generally referred to as "the 50% rule.) Cipolla's pool is located further back than halfway to the rear property line, and Millpointe sued to have the pool removed. Cipolla contends that the use restriction does not apply to her pool, either because pools are exempt from the definition of an "accessory use" or because Millpointe acted in such a way to induce Cipolla to reasonably rely to her detriment on being able to install the pool. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(10), this Court reviews all of the evidence submitted in the light most favorable to the nonmoving party to determine whether there exists a genuine question of material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). If the trial court finds no genuine issue of material fact but that the other party is entitled to summary disposition, the trial court may grant summary disposition to that other party under MCR 2.116(I)(2). *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 244-245; 760 NW2d 828 (2008). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

"Restrictions are not favored in law" and they will be "construed as found." *Putnam v Ernst*, 232 Mich 682, 688; 206 NW 527 (1925). But at the same time, it "is the policy of the courts of this state to protect property owners who have not themselves violated restriction in the enjoyment of their homes and holdings, free from inroads by those who attempt to invade restricted residential districts and exploit them under some specious claim that others have violated the restrictions." *Swan v Mitshkun*, 207 Mich 70, 76; 173 NW 529 (1919). Restrictive covenants are enforced as written where they are unambiguous, but any ambiguity is resolved strictly against the party seeking to enforce the covenant, and likewise any doubts are resolved in favor of the free use of the property. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008); see also *In re Nordwood Estates Subdivision*, 291 Mich 563, 568; 289 NW 255 (1939).

Cipolla argues first that the bylaw exempts swimming pools. We disagree. The bylaw at issue applies, by its terms, to "any accessory use in the rear of any Unit, except landscaping, playgrounds, and swings." All words in a contract must, if possible, be given effect. *Roberts v Titan Ins Co* (*On Reconsideration*), 282 Mich App 339, 358; 764 NW2d 304 (2009). Therefore, we agree that "playgrounds" must have been intended to refer to something other than "swings." A "playground" is "an area used by children for outdoor recreation, usu. containing play equipment such as slides and swings." *Random House Webster's College Dictionary* (2001 ed). Although swimming pools are used for outdoor recreation, a playground is an area that may contain structures for play purposes, whereas a swimming pool is a structure itself. The common lay understanding of what constitutes a "playground" simply does not include swimming pools. While ambiguity must be construed strictly against enforcement of a restriction, the courts do not strain to find or create an ambiguity, and we find none here.

Cipolla's other argument is that Millpointe may not enforce its bylaw, for several reasons. We first observe that the evidence in the record shows, contrary to Millpointe's assertions, that a prior board of directors of Millpointe appears to have genuinely attempted to alter the bylaws to permit accessory uses up to 75% of the way from the back of residences to their rear property lines. There is simply no other way to parse the plain language of the minutes from the board meetings. Furthermore, the evidence is, at best, unclear whether Cipolla received copies of those minutes or some other kind of documentation from her neighbor, who had been president of the board at the time of the attempted change. The president of the board at the time of the hearing, Michael Reid, testified that as far as he knew, the bylaws did not contain any provisions for granting individual property owners indulgences to carry on violations, nor did the board have the power simply to ignore violations, without amending the bylaws. Nonetheless, the foregoing is irrelevant because it is not disputed that the bylaws were not *actually* changed, if for no other reason than because they were never recorded with the Livingston County Register of Deeds.[1]

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[1] Millpointe argues that any attempt to change the bylaw would have been ultra vires and therefore absolutely void. An ultra vires act is "outside the scope of [an entity's] authority." See *Senghas v L'Anse Creuse Public Schools*, 368 Mich 557, 560; 118 NW2d 975 (1962). Conversely, "[c]ourts have held that when the power is shown in the municipal corporation to

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Therefore, the 50% rule is still a valid bylaw and functions as a deed restriction that the courts will enforce, absent a handful of exceptional circumstances. Cipolla argues, and the trial court found, that Millpointe is estopped from enforcing the bylaw. For estoppel to apply, one party must intentionally or negligently cause another party to believe something, that other party must act in justifiable reliance on that belief, and that other party would consequently be damaged if the first party is allowed to deny the truth of that belief. *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 218; 731 NW2d 472 (2007) (quotation omitted). We agree with Millpointe that any reliance by Cipolla was unjustified. Prior to, and during, the installation of her pool, she was given conflicting information about her pool's permissibility, including present and former board members telling her different things. She therefore was undisputedly given notice "of such facts that would lead any honest man, using ordinary caution, to make further inquiries," so she could not have justifiably relied on only one of the stories with which she was presented. See *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 534-535; 464 NW2d 713 (1990).

Millpointe argues that none of the other possibilities apply here. Because the 50% rule is a valid bylaw, the only established equitable reasons for the courts not to enforce it would be if the only violation was a harmless technical one, if there are changed conditions, or limitations and laches. See *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957). Cipolla does not argue that her pool is merely a harmless technical violation. Laches is essentially an equitable version of a statute of limitations defense, but concerned with the effect of a delay in enforcing a right rather than the fact of such a delay. See *Sloan v Silberstein*, 2 Mich App 660, 676; 141 NW2d 332 (1966). It is inapplicable here because Cipolla only argues that Millpointe waited too long to enforce *other* violations in the community, not that it waited too long to commence the instant action to enjoin *her* violation.

Cipolla makes the argument that there have been changed conditions in the context of a "waiver" argument. See *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955) ("Abandonment of restrictions by permitted violations and resultant change of character of the neighborhood amounts to a waiver."). It may well be that Millpointe's enforcement of bylaw violations has been carried on in an informal manner. But the record, as a whole, contains no evidence that the character of the Millpointe condominium project has changed so much that the original purpose of the bylaws has been defeated. See *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999). Cipolla's argument that Millpointe has not disproved waiver is irrelevant because there is no evidence to supporting waiver.

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[take some action], but there were irregularities in its execution, such corporation may be estopped to deny that the power was properly executed." *Bogart v Twp of Lamotte*, 79 Mich 294, 299; 44 NW 612 (1890). Because the attempted amendment was improperly carried out and there are no other impediments to enforcement of the existing bylaws, we need not consider whether the attempt really was ultra vires.

The 50% rule is a valid bylaw, and because Cipolla has not demonstrated the existence of any impediment to its enforcement, it therefore must be enforced as written.

Reversed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis