COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1510 **Cir. Ct. No. 2006CV206**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CONCERNED NEIGHBORS OF LOTUS LAKE ESTATES, INC.,

PLAINTIFF-RESPONDENT,

V.

LOTUS LAKE ESTATES HOME OWNER'S ASSOCIATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Lotus Lake Estates Home Owner's Association appeals a judgment declaring: (1) the Association lacked authority to impose fines on homeowners as a means of enforcing restrictive real estate covenants; (2) the Association lacked authority to assess homeowners the expenses attributable to its

enforcement efforts; and (3) nonresident developers were ineligible to vote for members of the Association's board of directors.[1] We affirm.

BACKGROUND

¶2 Concerned Neighbors of Lotus Lake, Inc., a Wisconsin nonstock corporation consisting of residents of Lotus Lake Estates, commenced this action. Concerned Neighbors was formed to challenge certain policies and actions of the Association and its board. Concerned Neighbors alleged the Association's board had adopted a policy whereby the board imposed "fines" on property owners who violated terms of restrictive covenants pertinent to the subdivision. The board authorized its secretary to patrol the neighborhoods and issue noncompliance notices and fines.[2] Concerned Neighbors questioned the board's authority to impose fines and became upset at what they characterized as the "petty" infractions being cited. Moreover, Concerned Neighbors alleged the fines were imposed selectively, with some residents being cited repeatedly and others not at all, despite committing the same infractions. The most common infraction was parking a car in a driveway overnight, for which some residents have incurred thousands of dollars in fines. Outstanding fines imposed against residents totaled $65,090. The fined residents were not afforded a hearing, appeal rights, or any other due process.

[1] An amicus curiae brief of the Wisconsin Builders' Association, Inc., was not accepted for filing.

[2] The fines began at $25 per violation and doubled for repeat violations. Fines increased by $20 for each month they remained unpaid.

¶3 Concerned Neighbors also became concerned that the board would attempt to impose "assessments" to fund projects other than common area maintenance and improvement. The board members allegedly threatened to impose assessments on residents who challenged the board's authority to impose fines, and to impose assessments to fund the board's legal fees.

¶4 Concerned Neighbors further argued Lotus Lake residents were unable to exercise control over their own homeowner's association because the nonresident developers of Lotus Lake had adopted bylaws that classified themselves as "charter members" entitled to three votes for each vacant lot in the subdivision. Because of these super-majority votes, the nonresident developers were able to maintain control of the board and the Association.[3]

¶5 Concerned Neighbors sought declaratory judgment on these issues. In a written decision, the circuit court agreed with Concerned Neighbors and granted the request for declaratory judgment. The Association now appeals.

DISCUSSION

I. Fines

¶6 We turn first to the issue of the Association's authority to impose fines as a means of enforcing the restrictive covenants. The interpretation of restrictive covenants presents a question of law that we review independently of the circuit court. ***Zinda v. Krause***, 191 Wis. 2d 154, 165, 528 N.W.2d 55

[3] The covenants were initially recorded in 1995 and amended in 1996. The Home Owner's Association functioned as an informal, unincorporated association until its annual meeting on December 6, 2003. At that meeting, the membership voted to incorporate and the Association's bylaws were updated and adopted.

(Ct. App. 1995). It is axiomatic that restrictive covenants must be clearly stated and strictly construed because public policy favors the free and unrestricted use of property. *See* ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶7, 247 Wis. 2d 232, 634 N.W.2d 109.

¶7 In this case, it is undisputed the covenants do not explicitly authorize the imposition of fines. Nevertheless, the Association contends the authority to impose fines is consistent with the covenants' purpose. The Association relies upon paragraph 20 of the covenants, which provides it "shall have power to enforce these Protective Covenants in conjunction with any resident or in the name of all the residents." We are unpersuaded.

¶8 The question here is not whether the covenants may be enforced but, rather, how they may be enforced. Paragraph 21 of the covenants is entitled "Enforcement," and provides:

> If any party violates, or attempts to violate … conditions or restrictions herein provided, it shall be lawful for any party or parties in interest in the above described lands to institute and prosecute proceedings at law or inequity [sic] against the parties violating, or attempting to violate, either to prevent said violation or to recover damages.

¶9 As the circuit court correctly observed, paragraph 21 authorizes enforcement of the covenants through a court action for damages or injunctive relief. If it had been the intention of the drafters of the covenants to authorize the imposition of fines for violations of the restrictive covenants, it could have easily been expressed. *See* ***Crowley v. Knapp***, 94 Wis. 2d 421, 438 n.3, 288 N.W.2d 815 (1980). Indeed, even if the language used in the restrictive covenant was doubtful in its meaning, doubt would be resolved in favor of the free use for all lawful purposes by the property owner. ***Id.***

¶10 Second, it is not the drafters' subjective intent that is relevant but, rather, the covenants' scope and purpose as manifested by the language used. ***Zinda***, 191 Wis. 2d at 166. Absent a restriction imposed by express language, or a purpose clearly discernable from the covenants' terms, the Association had no authority to impose fines. *See* ***id.*** at 167. Nothing in the covenants' language suggests that imposition of fines is a legitimate means of enforcing the covenants. As mentioned, the covenants' language authorizes enforcement through court action for damages or injunctive relief.

¶11 The Association also insists that pursuant to paragraph 20 of the covenants it "shall be authorized to adopt reasonable rules and regulations" arising out of the protective covenants. Again, we are not persuaded. Paragraph 20 of the covenants provides the Association "shall be authorized to adopt reasonable rules and regulations pertaining to the use of easements, the common lands and facilities in Lotus Lake Estates." The covenants expressly limit the rule-making authority to easements and the common lands and facilities, and do not extend the power to impose fines for violations of the covenants on private property. We therefore reject the Association's attempts to legitimize the imposition of fines for violations of the restrictive covenants.[4]

II. Assessments

¶12 Similarly, the covenants' language limits the Association's power to impose assessments. Paragraph 20 authorizes the Association "to assess the residents of Lotus Lake Estates an annual fee for the construction and maintenance

[4] The parties do not discuss the issue of whether the fines were reasonable in amount. We need not reach the issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

of lands and facilities owned or benefitting the said residents in common." This provision does not extend the Association's authority to impose assessments for noncommon area expenditures. As with the imposition of fines, the bylaws cannot expand the board's powers in this regard, because the Association and the board must act within the scope of authority granted to them by the covenants. If the covenants do not authorize fines or assessments, the Association cannot circumvent the covenants by authorizing such activities through its internal operating bylaws.

III. Voting

¶13 Finally, the Association argues the circuit court erred by concluding the nonresident developers of Lotus Lake were ineligible to vote for members of the Association's board of directors. The covenants provide the Association "shall be governed by a Board of Directors elected by the residents of Lotus Lake Estates according to its Charter and Bylaws."

¶14 Here, the phrase "by the residents of Lotus Lake Estates" modifies "elected." Based on that plain language, voting rights are vested in "the residents of Lotus Lake Estates." The subsequent phrase, "according to the Charter and Bylaws," identifies the documents that govern how the elections by the residents are to occur.

¶15 The Association improperly subordinates the covenants' language, "elected by the residents of Lotus Lake Estates," and seizes upon the words, "according to its Charter and Bylaws." The Association insists the bylaws refer to

the nonresident developers as "the charter members,"[5] and the bylaws entitle the charter members to cast a super-majority vote "on all matters calling for a vote of the members." The Association notes the bylaws also provide the board of directors "shall be elected by the members at the annual member meeting."

¶16 However, the Association's reliance on the bylaws renders meaningless the covenants' express language that the board is "elected by the residents of Lotus Lake Estates." The Association would essentially construe the language to provide that it "shall be governed by a board of directors elected … according to its Charter and Bylaws." A construction that gives reasonable meaning to every provision is preferable to one leaving one part of the language useless or meaningless. ***Stanhope v. Brown County***, 90 Wis. 2d 823, 848-49, 280 N.W.2d 711 (1979).

¶17 Moreover, as the circuit court correctly observed, the covenants themselves expressly distinguish between residents and nonresidents in other provisions of the covenants. If the intent of the covenants was to allow the nonresident developers to gradually exit from overseeing the development, the drafters could have easily and clearly stated so in paragraph 20 of the covenants, as they did in paragraph 3. That paragraph establishes a period of nonresident developer control over the architectural approval committee and a mechanism for

[5] Although not argued by the parties, it appears language was inserted in Article II of an "updated" 2003 revision of the bylaws that accompanied the incorporation of the Association at the annual meeting on December 6, 2003. That revised bylaw provision stated: "For voting purposes each charter member vote shall be considered a residential membership." Because the nonresident developers were ineligible to vote for the board of directors, and their votes were voided, we conclude the developers were unauthorized to revise the bylaws in 2003 to provide that each charter member vote shall be considered a residential member. Moreover, we conclude this revision again amounted to an improper end-around the covenants by entitling the nonresident developers to vote for the board of directors through internal bylaws.

gradual control of the committee by the residents. The drafters could have provided a similar mechanism in paragraph 20, but did not. Therefore, the plain meaning of the words "elected by the residents" applies in paragraph 20 of the covenants to render the nonresident developers ineligible to vote for the board of the Association.

¶18 The Association insists without citation to authority, "If this were done by a local unit of government it would be an unconstitutional taking without compensation." We will not reach arguments unsupported by citation to legal authority. ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. Regardless, this case does not involve a government action, but rather private covenants subject to a standard of review that requires provisions be clearly stated and strictly construed. ***Pietrowski***, 247 Wis. 2d 232, ¶7.

¶19 The Association also contends the circuit court order violates WIS. STAT. § 806.04(11) (2005-06), which prohibits a declaration from prejudicing the rights of persons not made parties. The Association claims "this action is against the home owner's association, but it appears that it affects the individual declarants and every residential member as well." This argument is undeveloped and raised for the first time on appeal, and we need not reach it. *See*, *e.g.*, ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, the individual declarants are members of the Association's board and involved in this litigation.[6]

[6] At the circuit court, the Association questioned Concerned Neighbors' standing to sue, but the Association apparently abandoned the issue and it is not raised on appeal.

¶20 Finally, the Association emphasizes dicta in the circuit court decision, to the effect that "defendant is correct that this interpretation leads to an illogical result with the first resident becoming the sole member of the Board of Directors…."[7] However, the facts of record in this case do not establish how many residents initially purchased lots in Lotus Lake Estates or when the purchases occurred.[8] Accordingly, it would be speculative to conclude the first resident would become the sole member of the board.[9]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

[7] The entirety of the circuit court quote is, "While defendant is correct that this interpretation leads to an illogical result with the first resident becoming the sole member of the Board of Directors, the protective covenants distinguish residents from declarants in other provisions, and could have done the same thing here. They did not."

[8] We acknowledge WIS. STAT. § 181.0803 (2005-06), provides that a board of a nonstock corporation shall consist of three or more individuals. However, it is undisputed that the covenants creating the Association were recorded in 1995. The Association functioned as an informal, unincorporated association until it was incorporated on December 17, 2003. The record is silent as to how many residents occupied Lotus Lake on the date of incorporation and thus could have occupied seats on the board.

[9] The Association complains the circuit court erred in voiding the votes cast by the nonresident developers but simply argues "[t]his ruling raises more questions than there is room here to list. Chief among them are how far back does this go, and where do we go from here?" The Association fails in its brief-in-chief to demonstrate specific circuit court error in that regard. At any rate, Concerned Neighbors argues the circuit court was within its power to void the votes, pursuant to WIS. STAT. § 180.1833(2) (2005-06) (authorizing circuit court to cancel or alter illegal acts within a corporation). The Association does not reply to this argument regarding the statutory authority and it is therefore deemed conceded. ***Charlolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).