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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-800

BRADLEY PERKINS and JUDY PERKINS APPELLANTS V. WARREN O. HENRY APPELLEE	**Opinion Delivered** February 11, 2010 APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CV-08-559] HONORABLE PHILLIP THOMAS WHITEAKER, JUDGE REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

Bradley and Judy Perkins appeal from an order of the Lonoke County Circuit Court declaring certain restrictions on their real estate valid and enforceable and, in accordance with those restrictions, mandating the removal of three oak trees and a metal storage shed from their property. On appeal, they argue that the trial court erred in finding that there was a "general plan of development" and that the metal storage shed violated the restrictions. We reverse and remand.

We first note our standard of review. Although we try cases that traditionally sounded in equity de novo on the record, we do not reverse a finding of fact by the trial judge unless it is clearly erroneous. *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988).

The restrictions at issue in this case were appended to the deed that the Perkinses received from Henry when they purchased the lot that their home now stands on. That deed

was recorded on November 18, 2005. There is a notation on the front of their deed that specifically references these restrictions. The document that contains these restrictions is captioned "ATTACHMENT TO THE WARRANTY DEED LAND USE RESTRICTIONS." It contains twelve numbered paragraphs. The scope of the restrictions is quite broad. For example, they proscribe subdivision of the residential lot, keeping of farm animals, outdoor burning, erection of overhead utility lines, and operation of a "commercial business." The same instrument grants the right to use the private runway that adjoins the property. This appeal, however, only concerns two provisions contained within paragraph 2. These provisions state: "No trees shall be planted or allowed to grow within seventy-five feet of the aircraft runway," and "All out buildings, unattached garages and other structures shall be constructed of material that is either brick or painted."

On July 31, 2008, Warren O. Henry filed a petition seeking a mandatory injunction that would compel the Perkinses to not only remove the previously mentioned oak trees and metal storage building, but also install a culvert to abate a standing-water problem and remove an electrical box servicing the Perkinses' property that encroached on Henry's land. The Perkinses prevailed on the culvert issue and the trial court declined to rule on the electrical box issue,[1] so only the portion of the order dealing with the oak trees and the metal storage shed is challenged on appeal.

The Perkinses do not dispute that three oak trees on their property are located within

[1] We nonetheless have jurisdiction because Rule 2(a)(6) permits the appeal of an interlocutory order when injunctive relief is at issue.

seventy-five feet of the runway. Likewise, it was also not disputed that the metal storage shed that the Perkinses placed on their property is "painted." However, while this latter fact would likely be dispositive of the Perkinses' second point, we do not reach it because we hold that the restrictions are unenforceable.

It is not always essential that there be a bill of assurance filed with the plat of a subdivision; the restricted use may be annexed to the conveyances of the land. *Harbour v. Northwest Land Co., Inc.*, 284 Ark. 286, 681 S.W.2d 384 (1984). However, for restrictions to be enforceable, there must be a "general plan of development." *Id.* The test for a general plan of development is whether substantially common restrictions apply to lots that are of "like character" or are "similarly situated." *Id.* We agree with the Perkinses that no general plan of development exists.

At the hearing, Henry testified that his plan for development of the approximately sixty-five acres that he owned since 1969, surrounding a private airstrip that he built in the 1980s, was "maybe an airpark." He stated that he had "laid out" residential lots "years ago," but that a change in health-department rules concerning septic systems made the size of these lots inadequate. Nonetheless, he said he intended to continue selling residential lots.

Henry admitted that after he sold the lot to the Perkinses, he conveyed another piece of property—his first residence—to Charles R. and Gloria J. Barnett, and that he did not put any restrictions in the deed. That deed was recorded on June 6, 2006. Although this property is, like the Perkinses' lot, adjacent to the runway, it contains no restrictions in their deed.

Henry, however, insisted that there were restrictions on that property, albeit different from the restrictions in the Perkinses' deed. Henry testified that the corner of his old shop was on the edge of the runway, and if that building was destroyed, the Barnetts would not be able to replace it in that location. He noted as well that the Barnetts were not allowed access to the private runway and that they were allowed to operate a commercial business.[2]

Henry further testified that his current residence was for sale, but that he had not yet restricted it. He, however, insisted that he intended to restrict it when he sold it. He conceded that his property contained trees that were allowed to grow within seventy-five feet of the runway. Additionally, he conceded that the hangar that he owned did not conform to the specifications stated in the Perkinses' restrictions, but suggested that he could "change" the restrictions.

We agree with the Perkinses that Henry failed to prove that there was a general plan of development. Henry's plan for the property was, by his own testimony, indefinite. Further, of the three residential lots about which evidence was presented, only one—the Perkinses'—had restrictions that were appended to the existing deed. Additionally, Henry admitted that the Barnetts' and his own residential lot violated the restrictions that he sought to impose on the Perkinses. We believe that the case at bar is analogous to *Harbour*, *supra*, where the supreme court held that where there are "many inconsistencies" in the restrictions

[2] At the hearing, Henry testified that he had also sold a lot to Darrell and Rhonda Reynolds. However, no copy of their deed was admitted into evidence and there was no testimony regarding what restrictions, if any, were imposed on their property.

in various deeds, a general plan of development cannot be found. Likewise, we hold that given the presence of written restrictions in only one of the three deeds of similarly situated properties, in addition to the significant differences in the type of structures and activities that are allowed on the these lots, a general plan of development does not exist, and consequently, the trial court erred in finding that the restrictions were enforceable.

Reversed and remanded.

KINARD and HENRY, JJ., agree.