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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000618-MR

JOHN GREENE AND
DIANNA GREENE — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 08-CI-00870

JAMES TURNER AND LINDA TURNER, HUSBAND AND WIFE; ROGER GULLETT AND ONEIDA GULLETT, HUSBAND AND WIFE; DANIEL MOORE AND REBECCA MOORE, HUSBAND AND WIFE; MARK SINGER; NATHANIEL GREY; AND DON LEIDECKER AND MARYM. LEIDECKER, HUSBAND AND WIFE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

ACREE, JUDGE: John Greene and Dianna Greene appeal the order of the Boyd Circuit Court granting summary judgment to James Turner, *et al.*, and imposing a

permanent injunction against Appellants. The injunction prohibits Appellants from using property in a Boyd County subdivision for commercial purposes. For the following reasons, we affirm.

Princeland Estates is a residential subdivision in Boyd County developed in the 1970s. A plat map of the subdivision shows a series of numbered lots in addition to an area marked "Tract A." A set of restrictive covenants governing Princeland Estates was recorded with the Boyd County Clerk in Deed Book 455, Page 160. The relevant portion of the restrictive covenant provides:

> The undersigned, Princeland, Inc., are the owners of a certain tract of land to be designated as Princeland Estates, do for the purpose of establishing a good residential section hereby impose the following restrictive covenants which shall apply to all lots in Princeland Estates.
>
> 1. A building plot may consist of one lot, two lots, parts of two lots, or one lot and part of another lot;
>
> 2. All lots shall be known and used solely as residential lots;
>
> 3. No structures shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two stories in height and a private garage. A split-level dwelling shall be considered as being (sic) a two-story dwelling.
>
> . . . .
>
> 6. No trade or like activity shall be carried on upon any lot or plot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood;
>
> . . . .

> 21. The conditions and restrictions herein set forth are to be covenants running with the title to the premises, and will be faithfully observed, kept and performed, provided, however, any one or more of such restrictions may be modified, waived, or suspended, or again revived at any time by a general instrument in writing to be recorded in the County Court Clerk's Office, signed by the then owners of two-thirds in number of the lots in the above subdivision, including those owned by Princeland, Inc. Such conditions and restrictions shall remain in force until July 1, 2003, and thereafter shall be considered to have been extended by the lot owners for successive periods of ten years each unless modified, waived, or suspended as above provided.

In 2005, Charles Martin Horton bought Tracts B, C, and F. He sold Tract F to Appellants in 2008. The deed which conveyed the land to Mr. Horton contained the following provision:

> The foregoing real estate is conveyed subject to all restrictive covenants imposed in Deed Book 455, Page 160, and in those certain plats recorded in Plat Book 27, Page 9; Plat Book 27, Page 20; Plat Book 28, Page 30; and Plat Book 28, Page 37, and to all restrictions, reservations, easements, and other matters previously imposed and appearing of record.

The deed which conveyed Tract F to Appellants provided that property was "conveyed subject to all restrictions, reservations, easements, covenants and conditions, if any, previously imposed and appearing of record."

After purchasing Tract F, Appellants began constructing a facility for pallet repair and automobile repair and resale on that property. Appellees, who also own property in Princeland Estates, brought an action to enjoin Appellants from constructing and operating a commercial facility on Tract F, claiming the

restriction against trade prohibited Appellants from doing so. The trial judge granted summary judgment to Appellees and enjoined Appellants from operating his business or constructing commercial facilities on Tract F. The trial court reasoned the restrictive covenants applied to Tract F because Tract F was "the same property acquired from Marty Horton by deed that makes the restrictive covenants specifically applicable to the Greens' [sic] property." This appeal followed.

On appeal, Appellants assert the trial court erred in applying the restrictive covenant to his tract. The explicit language of the covenant, he contends, applies to restrict the use of only lots, and not tracts, for commercial purposes. Appellees do not believe "lots" or "plots" of land are distinguishable from "tracts," and further point to the language of the two deeds which specifically reference the restrictive covenants in the Deed Book. This language, they argue, adopts the prohibition against commercial activity for the tracts, as well.

The only issue before us is whether the covenants operated to restrict Appellants from constructing and operating a commercial facility on Tract F. The interpretation of a restrictive covenant is an issue of law, and our review is therefore *de novo.*[1] *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.* 139 S.W.3d 521, 523 (Ky.App. 2003).

[1] Although the trial court's Summary Judgment and Permanent Injunction purports to reach only findings of fact, some of the enumerated "findings" are actually conclusions of law, including the finding that "the restrictive covenants (are) specifically applicable to the Greens' property." We will review them accordingly.

"The fundamental rule in construing restrictive covenants is that the intention of the parties governs." *Id.* at 522 (citing *Glenmore Distilleries v. Fiorella*, 273 Ky. 549, 117 S.W.2d 173, 176 (1938)). Where the parties' intentions are obvious, though imprecisely stated, the rules of construction will not operate to thwart those intentions. *Id.* (quoting *Ashland-Boyd County City-County Health Dept. v. Riggs*, 252 S.W.2d 922, 925 (Ky. 1952)). Since the decision in *Brandon v. Price,* 314 S.W.2d 521 (Ky. 1958), Kentucky has abandoned the rule of strict construction of restrictive covenants. *Highbaugh Enterprises, Inc. v. Deatrick and James Construction Co.,* 554 S.W.2d 878, 879 (Ky.App. 1977). We now view them, not as "restrictions on the use of property," which are generally disfavored, but as "a protection to the property owner and the public[.]" *Brandon,* 314 S.W.2d at 523. We ascertain the parties' intent by examining "the general scheme or plan of development and surrounding circumstances." *Colliver,* 139 S.W.3d at 523 (citing *Brandon*, 314 S.W.2d at 523).

Before beginning our analysis of the parties' intent, we must note that several items from the record which may have assisted us in our analysis are missing. Although the parties agree Tracts A-F are part of Princeland Estates, the plat map of the subdivision shows only Tract A. The location of Tract F, or Tracts B-E, was not apparent from a review of the plat map, and no description in the record or the briefs revealed its location or characteristics. Appellants also failed to properly designate for the record the video of the summary judgment hearing. While Appellants attempted to do so pursuant to Kentucky Rule of Civil Procedure

75.01, he did not identify the hearing by the date, and the video was omitted. It was therefore unavailable for us to examine for additional clues as to the scheme of Princeland Estates. Finally, there are three exhibits, labeled A, B, and C, which the verified complaint references, but which cannot be found in the record. Some of those items may have been included as exhibits during the summary judgment hearing, but any marks made on the exhibits to the verified complaint are not available for our review.

It is the duty of an Appellant to designate all portions of the record necessary for the appellate court to rule on alleged errors. *Burberry v. Bridges,* 427 S.W.2d 583, 585 (Ky. 1968). Furthermore,

> It is a rule of universal application in this and all other appellate courts that where all the evidence is not brought up on appeal, every fact necessary to support the finding or judgment of the lower court must be assumed to have been in favor of the successful party.

Wilkins v. Hubbard, 271 Ky. 780, 113 S.W.2d 441, 442 (1938). We proceed accordingly.

Appellants urge us to rely upon *Galbreath v. Miller*, 426 S.W.2d 126 (Ky. 1968), to conclude the word "tract" has a distinct meaning from the word "lot." If this is correct, the reasoning goes, the restrictive covenant for Princeland Estates restricts only lots to residential use. As the appellees did in *Galbreath*, Appellees herein assert the words "tract" and "lot" are interchangeable, and therefore any restrictions expressly applied to lots were also meant to restrict the development of the tracts. While we do not believe *Galbreath* stands for the proposition that the

words "tract" and "lot" can never be interchangeable, we do find considerable guidance from that case. The court in *Galbreath* addressed "whether this deed, in light of the plat, showed an intention of the developer to subject [the tracts] to the residential restriction which was admittedly imposed upon the numbered lots." *Id.* at 127.

First, to determine whether the parties intended the tracts and lots to be subject to the same restrictions, we examine the face of the plat. *Id.* The plat contains a series of numbered lots of various sizes and an area of land marked "Tract A." No other property is labeled a tract, though the parties agree there are other tracts in Princeland Estates. In *Galbreath*, it was "apparent the 23 acres were divided into two distinct classifications." *Galbreath*, 426 S.W.2d at 127. The tracts were larger than the numbered lots, and it was evident they were not part of the building lot plan.

Here, no such distinction is apparent. Although "Tract A" is labeled differently than the numbered lots, the size of the lots varies rather greatly. Lot 1 appears to be nearly twice the size of Tract A, while most of the lots are several times smaller. There is no uniformity of lots which lends the lone tract to ready distinction. Furthermore, because the other tracts are not labeled on the plat or described in the record, we cannot examine them to make additional observations about characteristics which might distinguish them from the lots. We must presume the characteristics of the missing tracts support a conclusion that they are indistinguishable from the lots.

Tract A is the only labeled section of property which does not face one of the streets labeled as part of the subdivision. This fact tends to indicate the tract was not meant to form part of the residential building scheme. Without more, however, we cannot say that fact creates a significant distinction.

Unlike the circumstances of *Galbreath*, the restrictive covenant in this case was not created in a deed, but originated in restrictions registered with the Boyd County Clerk. We must examine the language of the registered restricted covenant to determine if tracts and lots were treated as different types of property. The restrictive covenant begins: "The undersigned, Princeland, Inc., are the owners of a certain tract of land[.]" In this context, "tract" is used to describe the development as a whole, and not a distinctive type of property within the development.

Next, the restrictive covenant prohibits trade from occurring on "any lot or plot." A building plot may "consist of one lot, two lots, parts of two lots, or one lot and part of another lot[.]" There is no indication the word "lot" identifies a particular type of property in the subdivision; its use is generic. Given the use of the word "lot" to refer generally to the subdivisions of that development, it appears the parties intended to prohibit commercial activity on any portion of the whole development.

The deed granting the property to Horton makes the transfer subject to the restrictive covenants in the Deed Book, and the deed granting the property to Appellants conveys the land "subject to all restrictions, reservations, easements,

covenants and conditions, if any, previously imposed and appearing of record." This language reflects the restriction first imposed in the restrictive covenant. The prohibition against commercial activity in the "lots or plots" of Princeland Estates operated to prohibit such activity in any portion of the subdivision, including the tracts. The trial court's order was proper.

Because it was the intent of the parties to the restrictive covenant to prohibit "trade or like activity" from occurring on any parcel of land in Princeland Estates, the trial court's order was proper. We affirm.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

M. Kevin Lett
Ashland, Kentucky

BRIEF FOR APPELLEES:

Garis L. Pruitt
Catlettsburg, Kentucky