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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000736-MR

HERITAGE HILL COMMUNITY
ASSOCIATION, INC. APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 15-CI-00174

CDF BUILDERS, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, the Heritage Hill Community Association, Inc. ("Association") appeals from an order of the Bullitt Circuit Court requiring the Association to approve building plans as submitted by Appellee, CDF Builders, Inc., without the additional requirements dictated by the Association. Finding no error, we affirm.

Heritage Hill subdivision is a development located in Shepherdsville, Kentucky, that was developed as a single-family residential community by Heritage Hill Properties LLC and others ("Developer"). The subdivision is divided into sections, each of which is comprised of different sizes and types of residences. The Developer drafted and filed in the Bullitt County Clerk's office Declarations of Covenants, Conditions and Restrictions that applied to the entire development. Article III of the Deed of Restrictions imposes restrictions on the architectural and design standards for all residences built in Heritage Hill. Specifically, Section 3.1(a)(i) provides:

> [N]o structure may be erected, placed or altered on any Lot, until . . . the type of exterior material . . . [has] been approved in writing by Declarant in its sole discretion. Declarant may further specify the requirements of such plans and specifications in the Design Guidelines (as defined below) or otherwise as shall be acceptable to Declarant.

Section 3.1(a)(iii) defining "Design Guidelines" states:

> Declarant reserves the right to compile and modify from time to time architectural design review and/or construction standards manuals and guidelines, or other written standards (collectively, "Design Guidelines"). All such manuals and guidelines constituting Design Guidelines shall, from time to time when issued by Declarant, be deemed to constitute a part of and be incorporated within this Declaration.

Section 3.8 of the Deed of Restriction further states that, "Notwithstanding anything to the contrary in this Declaration, Declarant reserves the right to reject

any plans that do not comply with such architectural and other standards set forth in the Design Guidelines, as may be issued from time to time by Declarant."

Subsequently, the Developer defaulted on the bank loans and the property was forfeited to various creditors. The lot at issue herein was acquired by CDF from a creditor after foreclosure. Also, following the foreclosure, the Association was formed. It is a homeowners' association created with the purpose and obligation of maintaining Heritage Hill, including enforcement of the Deed of Restrictions.[1]

CDF is currently the owner of two lots in Section 1-A of the subdivision. In April 2014, CDF submitted plans to the Architectural Review Committee, a sub-committee of the Association, to build a garden home on Lot 6. The plans were conditionally approved subject to the additional requirements that CDF include quoined corners and dimensional shingles in the construction. CDF balked at the additional restrictions due to the increased construction costs associated therewith. After a compromise could not be reached, CDF filed an action in the Bullitt Circuit Court seeking a declaration that the building plans as submitted were in compliance with the Deed of Restrictions as filed, and an order

[1] The trial court herein questioned the parties as to whether the Association could enforce the Deed of Restrictions or Design Guidelines since there is no recorded assignment of the Developer's rights to the Association. However, such is not an issue on appeal.

requiring the Association to approve the plans pursuant to the terms of the restrictions.

A bench trial was held on August 4, 2015. Curtis Greenwell, an owner of CDF, testified that the Association furnished no Design Guidelines and that none were contained in the restrictions he reviewed. He stated that the building plans for Lot 6, as well as another lot owned by CDF, were rejected because of the lack of quoined corners and dimensional shingles, neither of which he was aware were requirements. Greenwell explained that to add both requirements would have substantially increased his building costs. Next, Lisa Egbert, president of the Association testified that all of the homes that had previously been built in the garden home section of the subdivision did, in fact, have quoined corners and dimensional shingles. However, she conceded that neither requirement was set out in the Deed of Restrictions. Further, Egbert stated that no Design Guidelines were recorded in the county clerk's office, and that such had only been put on the Association's website in 2014, after CDF filed its building application. In fact, Egbert acknowledged that the Design Guidelines requiring quoined corners and dimensional shingles were not drafted or voted upon until after the submission of CDF's application.

On April 20, 2016, the trial court entered an order requiring the Association to approve CDF's plans as submitted. Therein, the trial court stated:

From [Egbert's] testimony it is clear that the Design Guidelines specifically requiring quoined corners and dimensional shingles were not in existence at the time the Plaintiff purchased Lot 6. Egbert's testimony implied that the fact that each of the other eight homes then existing in the neighborhood possessed dimensional shingles and quoined corners put the Plaintiff on notice that such features were implicitly incorporated in the Design Guidelines, despite the failure of the [Defendant] to explicitly incorporate this requirement.

Section 3.1(a)(iii) merely reserves the right to compile and modify written architectural design guidelines to be incorporated by reference in the deed restrictions. This Section does not grant the Declarant, or the Home Owner's Association as a successor of rights, the right or authority to bind landowners to unwritten, discretionary guidelines. The mere fact that eight other homes possessed these features is not sufficient to notify a potential purchaser of such restrictions.

Further, Section 3.1(a)(iii) does not grant the [Defendant] the right to bind existing landowners to the future creation or amendment of design guidelines. As discussed above, such imposition requires the consent of all landowners to be bound by a restrictive covenant. Therefore, Defendant does not have the authority to bind the Plaintiff, over objection, to the Design Guidelines as amended after the purchase of Lot 6. Therefore, this Court finds the requirement that the Plaintiff's building plan include quoined corners and dimensional shingles is invalid.

Therefore, the Court finds that Lot 6 is only bound by the Restriction's as recorded in the Bullitt County Clerk's Office and the Design Guidelines, as specifically existing at the time of purchase, as incorporated by reference therein. As there is evidence in the record and testimony at the bench trial that the application of the Plaintiff was conditionally approved subject to the two invalid

> conditions, the Court finds that the building plan submitted by the Plaintiff in compliance with the Restrictions.

The Association thereafter appealed to this Court.

As this is an appeal from a bench trial, our standard of review is set forth in Kentucky Rule of Civil Procedure (CR) 52.01. Under CR 52.01, the trial court is required to make specific findings of fact and state separately its conclusions of law relied upon to render the court's judgment. Further, those "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. In fact, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004) (*quoting Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). "If the trial judge's findings of fact in the underlying action are not clearly erroneous, i.e., are supported by substantial evidence, then the appellate court's role is confined to determining whether those facts support the trial judge's legal conclusion." *Commonwealth v. Deloney*, 20 S.W.3d 471, 473–74 (Ky. 2000). However, while deferential to the lower court's factual findings, appellate review of legal determinations and conclusions from a bench trial is *de novo*. *Sawyers v. Beller*, 384 S.W.3d 107, 110 (Ky. 2012).

In this Court, the Association argues that the trial court erred in determining that CDF was only bound by the written Design Guidelines existing at the time it purchased Lot 6. The Association interprets the trial court's order as holding that any modification to the Design Guidelines constitutes an "additional covenant" that requires consent of all property owners. The Association argues that contrary to the trial court's determination, the Deed of Restrictions herein gave the Association unfettered discretion to modify the Design Guidelines at any time and that such modifications were binding upon all current and future lot owners. Not only do we disagree with the Association's construction of the Deed of Restrictions, but we are of the opinion that it has misconstrued the trial court's opinion as well.

Over the last century, Kentucky's treatment of restrictive covenants has evolved significantly. Previously, Kentucky courts took the view that restrictive covenants burdened the free alienation of property and construed them strictly; any doubt regarding the grantor's intent was resolved against the enforcement of such covenants. *See Glenmore Distilleries Co. v. Fiorella*, 273 Ky. 549, 117 S.W.2d 173, 176 (1938). More recently, however, Kentucky has abandoned the rule of strict construction of restrictive covenants. *See Highbaugh Enterprises Inc. v. Deatrick & James Construction Co.*, 554 S.W.2d 878, 879 (Ky. App. 1977). Restrictive covenants are no longer viewed as "a restriction on the use

of property," which are generally disfavored, but rather as "a protection to the property owner and the public[.]" *Id.* As a result, "[t]he fundamental rule in construing restrictive covenants is that the intention of the parties governs." *Colliver v. Stonewell Equestrian Estates Association, Inc.*, 139 S.W.3d 521, 522 (Ky. App. 2003). Obviously, the intentions of the parties may be ascertained from express or implicit expression of intent. *Id.* Moreover, "[w]hether 'a general scheme and plan of a subdivision is present is [also] an important factor to consider in determining the purpose and intent of the restriction.'" *KL & JL Investments, Inc. v. Lynch*, 472 S.W.3d 540, 546 (Ky. App. 2015) (*quoting La Vielle v. Seay*, 412 S.W.2d 587, 592 (Ky. 1966)). Finally, incorporation by reference is an accepted method for setting out covenants and restrictions, and the failure to formally record those covenants and restrictions incorporated by reference within the language of the deed will not defeat the implicit intent of a developer. *Triple Crown Subdivision Homeowners Association, Inc. v. Oberst*, 279 S.W.3d 138, 141 (Ky. 2008).

Article III of the Deed of Restrictions unquestionably gives the Association wide discretion to modify, amend or update the building requirements for Heritage Hills. Furthermore, it is clear that any updated Design Guidelines are deemed incorporated by reference into the Deed of Restrictions. The problem herein, however, is that the Design Guidelines requiring quoined corners and

dimensional shingles that the Association seeks to impose upon CDF did not exist at the time CDF purchased Lot 6. Although CDF was fully aware of the restrictive covenants in existence, and even understood that the Design Guidelines could be modified at the Association's discretion and incorporated by reference within the recorded restrictions, there simply were no Design Guidelines setting forth the restrictions at issue either at the time CDF purchased Lot 6 or at the time the building application was submitted.

Contrary to the Association's argument, the trial court did not rule that *any* modifications of the Design Guidelines require the approval of all lot owners, but rather, citing to *Black v. Birner*, 179 S.W.3d 873 (Ky. App. 2005), the trial court concluded that owners of property subject to restrictions, must consent to the imposition of additional restrictions. In *Black*, the original developer for a subdivision had recorded a series of restrictions that automatically expired after a period of twenty years. Years after the restrictions' expiration, a group of homeowners in the subdivision readopted the original restrictions. The issue before this Court on appeal was whether the re-adopted restrictions were binding on all homeowners. A panel of this Court explained that there are three primary situations in which restrictions are validly imposed upon real property: (1) restrictions created by a developer at the time the property is being subdivided; (2) restrictions imposed by a grantor when selling a portion of his or her land; and (3)

restrictions agreed upon by the owners of the land for their mutual benefit. *Id.* at 878. This Court concluded that although the restrictions fell within the third category, they were nonetheless unenforceable:

> The barrier to their enforcement is precisely their lack of mutuality. They were created by an unspecified majority of lot owners, yet in order to be effective must bind all lot owners in the subdivision. Birner insists that it was not necessary to gain the consent of all the lot owners in order to make the restrictions binding. He argues that they were filed without any objections, that the original restrictions evinced an intent that the will of the majority should prevail, and that requiring unanimity is neither "practical, feasible, reasonable or fair." We disagree.
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> In a factually analogous case, *Brandwein v. Serrano*,[338 N.Y.S.2d 192 (N.Y.Sup.Ct. 1972)], a common grantor had created a development around a courtyard. The restrictions on the development stated that property owners were not permitted to fence their separate parcels, as this would obstruct the courtyard. The original declaration of restriction lapsed. Several months later, 62 of the 73 owners of the parcels on the block executed and recorded an "Extension Agreement" that provided for an extension of the courtyard restrictions found in the original declaration. Two lot owners subsequently fenced their properties; other lot owners sued to enforce the covenants against them. The Supreme Court of Queen's County, New York, held that the covenants were not enforceable, explaining that:
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>> Adjoining landowners may mutually covenant to bind their respective properties for their reciprocal benefit. The restrictions placed upon each produce a corresponding benefit to the other. **An agreement imposing a burden on property may be executed only by one who holds title to the**

> **property.** Non-consenting landowners are thus not bound by restrictions imposed and easements granted by the other landowners.

> Concluding, the court said that:
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> > It is in consideration of the whole common court that the parties to the Extension Agreement agreed to burden their parcels. The burdens they sought to extend were universal burdens. The parties could not accomplish their reimposition without the consent of all the landowners. The benefit they sought to preserve was the continued existence of the common mall, the usage of which they had benefited from since 1925. They could not achieve this benefit without the consent of all the landowners. For the agreement to be effective for the accomplishment of the intended result, the continuation of the neighborhood scheme, it was essential that all of the then owners of property within the block consent to the reimposition of the restrictions and easements. Accordingly, the court holds that the lack of assent on the part of some of the then owners of property on the block prevented the 'Extension Agreement' from ever attaining validity as a binding restriction upon the property of those persons who did properly sign it.
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> Similarly, in this case the 1988 restrictions were not signed by all the lot owners, yet the restrictions are "universal" in the sense that they require the consent of all lot owners to be effective, that is, to preserve the residential character of the subdivision.

Black, 179 S.W.3d at 879-880 (footnotes omitted) (emphasis in original).

Herein, the Association was granted the discretion to modify the Design Guidelines from time to time as it deems necessary. Nonetheless, its position that such discretion allows it to arbitrarily add or change a restriction without any notice to property owners defies Kentucky law and common sense. The Association maintains that its ability to modify the Design Guidelines is essential to ensuring "that the aesthetic nature of Heritage Hill does not become obsolete, or that builders [are] able to change the common aesthetic of Heritage Hill because of an oversight in the specific architectural and design restrictions enumerated in the Deed of Restrictions." We do not disagree. However, to adopt the Association's argument could essentially result in no one having the ability to comply with the requirement of submitting plans and having them approved if the Association has unfettered control to modify the Design Guidelines at any time. We are of the opinion that while the Association does have the discretion to modify the Design Guidelines, it simply cannot do so in the middle of the game and cannot adopt a standard not previously in existence to deny approval of an already submitted building plan.

For the reasons set forth herein, the Order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
John N. Billings
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BRIEF FOR APPELLEE:
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