NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2003 CA 2423R

WAYNE COSBY, KARI FITZGERALD, JOHN FITZGERALD, STAN MCDONALD, KEITH STEVENS, KAREN WILLIAMS, CARL WILLIAMS, AND PETER OELSCHLAEGER

VERSUS

HOLCOMB TRUCKING, INC., HENRY H. HOLCOMB, AND JOYCE M. HOLCOMB

J/P Pettigrew J. concurs in the Rehearing and dissents as to the opinion and assigns Reasons

ON REHEARING

AUG - 1 2007

BEFORE: CARTER, C.J., PARRO, PETTIGREW, MCDONALD, AND WELCH, JJ.

CARTER, C.J.

The appellants, the Holcombs, have petitioned this court for a rehearing of our May 4, 2007, decision affirming the trial court's judgment granting a preliminary injunction in favor of the plaintiffs. The rehearing is granted for the limited purpose of reviewing whether developer William King granted the

Holcombs a valid exemption from the restrictive covenant agreement on their lot located at 7719 Ben Fugler Road (the Front Lot).[1]

DISCUSSION

Charges imposed by the owner of an immovable in pursuance of a general plan governing building standards, specified uses, and improvements are called building restrictions. LSA-C.C. art. 775. Such a general plan must be feasible and capable of being preserved. **Id.** Building restrictions must be established by a juridical act executed by the owner of an immovable or by all the owners of the affected immovables. LSA-C.C. art. 776. In order to be effective against third persons, instruments establishing restrictions must be filed for registry in the conveyance records of the parish in which the immovable property is located. See former LSA-R.S. 9:2721A; see also current LSA-C.C. art. 3338; **Blessey v. McHugh**, 94-0555 (La. App. 1 Cir. 7/27/95), 664 So.2d 115, 119.

Building restrictions are incorporeal immovables and *sui generis* real rights likened to predial servitudes. LSA-C.C. art. 777. As real rights, building restriction clauses are not personal rights of the vendor; rather, they inure to the benefit of all other property owners under a general plan of development and are real rights running with the land. **Blessey**, 664 So.2d at 119. Once building restrictions are recorded in the public records, a subsequent acquirer of immovable property burdened with such restrictions is bound by them. **Blessey**, 664 So.2d at 119-120.

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[1] In their briefs to this court, the Holcombs referenced this court to several "Defendant Exhibits." Although not offered into evidence at the April 22, 2003, contradictory hearing on plaintiffs' motion for a preliminary injunction, the Holcombs are correct that the January 9, 1985, "Restrictive Covenant Agreement" and the June 30, 2002, "Approval of Developer and Waiver of Restrictive Covenants" were introduced into evidence at the September 19, 2002, hearing on the Holcombs' peremptory exception raising the objections of prescription and no right of action. The documents were filed into evidence as "Holcomb #10" and "Holcomb #12," mistakenly attached to other evidence, and not located and identified by this court until the Holcombs filed this application for rehearing.

As noted by the Louisiana Supreme Court, at the time this case was filed and argued, there was no dispute that the building restrictions herein constituted a general plan of development, that they were properly filed, and that they gave constructive knowledge of their contents to all prospective purchasers. **Cosby v. Holcomb Trucking, Inc.**, 05-0470 (La. 9/6/06), 942 So.2d 471, 475 **(Cosby II)**. We conclude that the Holcombs' Front Lot is part of the general development covered by the 1984 Restrictive Covenants, which by reference incorporated the 1982 Wedgewood Acres Restrictive Covenants.

The Louisiana Civil Code provides three methods for amending or terminating all or part of a building restriction plan: (1) abandonment under LSA-C.C. art. 782; (2) two-year peremption under LSA-C.C. art. 781; and (3) amendment or termination under LSA-C.C. art. 780. See **Diefenthal v. Longue Vue Foundation**, 02-1470 (La. App. 4 Cir. 1/7/04), 865 So.2d 863, 876, writ denied, 04-0366 (La. 4/2/04), 869 So.2d 883. The parties have not argued that there has been an abandonment of a particular restriction or a general abandonment of the whole plan under LSA-C.C. art. 782. Furthermore, the Louisiana Supreme Court has determined that a review of the record in its entirety "provides a reasonable factual basis for the trial court's finding that a noticeable violation first occurred in 2001 and therefore, the case has not prescribed" under LSA-C.C. art. 781. **Cosby II**, 942 So.2d at 479.

The Holcombs argue, in the alternative, that their use of the Front Lot is not limited by the 1982 and 1984 restrictive covenants prohibiting commercial activities due to the existence of two separate waivers granted to them by one of the developers, William King. In effect, the Holcombs argue that the existing restrictive covenants were amended or terminated, pursuant to LSA-C.C. art. 780,

so as to release their Front Lot from all or part of the restrictions when the building restrictions were recorded in 1984. Louisiana Civil Code article 780 provided:

> Building restrictions terminate as provided in the act that establishes them. In the absence of such provision, building restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least fifteen years, or by agreement of both owners representing two-thirds of the land area affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years.

The restrictions for the plan of development that are significant to this case are found in Sections 1, 7, and 16 of the 1982 Wedgewood Acres Restrictive Covenants and provide:

> 1.
>
> All tracts are hereby designated as residential, and they shall be used for none other than residential purposes. No building shall be erected, altered, placed or permitted to remain on any tract, other than one single-family dwelling, not to exceed two and one-half stories in height, with the usual and appropriate out buildings, enclosed barns, and private garage and/or carports designed to house no fewer than two automobiles.
>
> . . .
>
> 7.
>
> No house trailers, buses, commercial vehicles or trucks shall be kept, store[d], repaired, or maintained on any lot, servitude or right-of-way in any manner which would detract from the appearance of the subdivision. No structure of any temporary character, trailer, basement, tent, shack, or other out-building shall be allowed on any tract for a prolonged period of time so as to detract from the appearance of the subdivision, *unless approved by developer.*
>
> . . .
>
> 16.
>
> No building or structure shall be used to operate any commercial activity on any tract, and no commercial activity shall be conducted from any lot in this subdivision, *unless approved by developer.*

(Emphasis supplied.)

The Holcombs offer two documents as proof that they are not bound by the 1984 Restrictive Covenants, which incorporated the 1982 Wedgewood Acres

Restrictive Covenants: (1) a January 9, 1985, "Restrictive Covenant Agreement" executed by William King (the 1985 Waiver); and (2) a June 30, 2002, "Approval of Developer and Waiver of Restrictive Covenants" executed by William King (the 2002 Waiver).

Mr. Holcomb testified that when he and his wife purchased Lot P in Wedgewood Acres Subdivision in 1985, William King gave them written permission to operate their trucking business. The 1985 Waiver was executed by authentic act and specifies in pertinent part:

> [T]he undersigned developer does hereby grant permission to the undersigned property owner [Harry H. Holcomb, Jr.] to enter through public access and park on his premises his truck used in his profession.
>
> Be it further understood that [Holcomb] can maintain this truck for normal maintenance *but cannot enter into commercial maintenance in any form.*
>
> . . .
>
> [Holcomb] is allowed to construct and maintain a permanent structure for the housing of this truck as long as it is built to other subdivision restrictions and does not detract in any manner from the appearance of the subdivision.
>
> Detraction from the general appearance of the subdivision shall be determined by the developer.

(Emphasis supplied.)

When Lot P in Wedgewood Acres Subdivision was exchanged in 1992 for the Front Lot on Ben Fugler Road, the Holcombs did not perform a title search, nor did the Holcombs procure a new written waiver from the developers. Regardless, the Holcombs argue that the 1985 Waiver is equally effective in regard to their Front Lot because the 1985 Waiver does not specify a particular piece of property; rather, the rights contained in the 1985 Waiver are specific to the "undersigned property owner," namely, Holcomb.

In response, the plaintiffs submit that even if the 1985 Waiver should be construed as applicable to the Front Lot, under the terms of the Wedgewood Acres

Restrictive Covenants, the waiver is invalid. William King and Shirley King together established the 1982 Wedgewood Acres Restrictive Covenants. However, only William King signed the 1985 Waiver; Shirley King did not sign.

Moreover, the 1985 Waiver states its purpose is to clarify Section 7 of the 1982 Wedgewood Acres Restrictive Covenants. Section 7 is clear that "house trailers, buses, commercial vehicles or trucks shall [not] be kept, store[d], repaired, or maintained on any lot, servitude or right-of-way in any manner which would detract from the appearance of the subdivision." As noted by the Louisiana Supreme Court, there is no provision for a waiver of this portion of Section 7 and "servicing and maintaining commercial trucks on the property in a manner which detracts from the appearance of the subdivision, was not subject to the discretion of the developer in any event and is strictly prohibited." **Cosby II**, 942 So.2d at 477. Any attempt by the developers during the term of the restrictive covenant agreement to release property covered by the general plan of development from this particular restriction would be invalid.

The only discretion[2] the developers retained under Section 7 was to approve the presence of a "structure of any temporary character, trailer, basement, tent, shack, or other out-building ... for a prolonged period of time." However, as noted by the Louisiana Supreme Court, the plaintiffs did not object to the Holcombs' construction of the outbuilding. **Cosby II**, 942 So.2d at 473 n.2.

The Holcombs also may argue that the commercial activity on their lot was exercised pursuant to developer William King's discretionary approval under

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[2] To the extent the general plan does not specifically limit the power of the developer by the setting of guidelines or standards, the validity of the developer's actions are to be judged by whether he acts reasonably and in good faith. See **Cosby II**, 942 So.2d at 476. Reasonableness is evaluated by looking to the purpose behind imposing restrictions upon property contained in the general plan. **4626 Corp. v. Merriam**, 329 So.2d 885, 889 (La. App. 1 Cir.), writ denied, 332 So.2d 800 (La. 1976). The 1982 Wedgewood Acres Restrictive Covenants are clear: "All tracts are hereby designated as residential, and they shall be used for none other than residential purposes."

Section 16 of the building restrictions. We agree that the developers retained authority to approve certain other activity as defined within Section 16, including the conducting of commercial activity. But the authority granted the developers under Section 16 can only be exercised in light of the limitation placed in Section 7. Section 16 must be considered in the context of the entire framework of the "general plan." See LSA-C.C. art. 775; **Head v. Gray**, 41,290 (La. App. 2 Cir. 8/23/06), 938 So.2d 1084, 1089, writ denied, 06-2353 (La. 12/15/06), 945 So.2d 690. "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." LSA-C.C. art. 2050. As such, under Section 16, the developers retained the right to approve the use of a building or structure for commercial activity and to approve the conducting of commercial activity from one of the lots, excepting the keeping, storing, repairing, and maintaining of commercial vehicles or trucks.

The Holcombs offer, in the alternative, that their Front Lot was freed from the restrictive covenants by the 2002 Waiver signed by William King four months *after* the present suit was filed. The 2002 Waiver gave the Holcombs permission to operate Holcomb Trucking from their Front Lot. This document was filed in the public records of Livingston Parish on July 1, 2002. William King declares in pertinent part:

> A. It was intended by me and the Holcombs that the Restrictive Covenant Agreement we executed on January 9, 1985 to be applicable to the parcel now owned by Harry and Joyce Holcomb.
> B. I declare the Restrictive Covenant Agreement executed on January 9, 1985 to be applicable to the parcel now owned by Harry and Joyce Holcomb.
> C. I hereby declare that Harry and Joyce Holcomb are hereby *exempted from the restrictive covenants*, and further that they are hereby permitted to:
> 1. Operate Holcomb Trucking from the parcel they now own and occupy;

2. Bring trucks and trailers owned/operated by Holcomb Trucking and/or Harry Holcomb onto said property for the purposes of parking, cleaning and maintenance;
3. Maintain outbuildings and equipment needed in the operation of said trucking company and the trucks and trailers operated by it;
4. Park, store and maintain the school bus(es) operated by either Harry or Joyce Holcomb;
5. Have third party providers come to the property for the purpose of delivering parts, material, supplies, or other items needed for any of the above activities or to provide service for any of the vehicles operated by Holcomb Trucking and/or Harry and Joyce Holcomb.
6. Engage in any other activities needed for the operation of said trucks, trailers and buses.

(Emphasis supplied.)

As with the earlier 1985 Waiver, only William King signed the affidavit purporting to waive the building restrictions; Shirley King signed as a witness. However, Shirley King, Darron King, and Michele King joined William King in establishing the restrictive covenants on the Front Lots. The 2002 Waiver also fails to specifically identify the property affected, referring to it only as "property adjacent to, but outside of Wedgewood Acres Subdivision."

The 2002 Waiver not only purports to remove the residential use requirement from the Holcombs' Front Lot, it in effect seeks to terminate all restrictive covenants on that lot. The termination of restrictive covenant agreements is provided for in LSA-C.C. art. 780, which provides for termination "as provided in the act that establishes them." One such mode of termination that the parties may contractually agree upon is a provision for termination "upon the lapse of a period of time or upon the happening of an event." LSA-C.C. art. 780, 1977 Revision Comments (b); **Diefenthal**, 865 So.2d at 882. Section 18 of the 1982 Wedgewood Acres Restrictive Covenants provides:

> 18.
> These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded,

> after which time said covenants shall be automatically extended for successive periods of ten years, unless an instrument signed by the owners of the majority of the lots have been recorded, agreeing to change said covenants in whole or in part.

When the restrictive covenants were adopted in May 1984 upon development of the Front Lots, the document referenced the restrictive covenants established by William and Shirley King for Wedgewood Acres Subdivision and stated that those "restrictive covenants are made a part of this act by reference." With the exception of Section 3 of the 1982 Wedgewood Acres Restrictive Covenants, the "restrictive covenants shall be exactly as provided for in the restrictive covenants for Wedgewood Acres Subdivision." As such, Section 18 was adopted in 1984, and accordingly, the restrictive covenants are binding for a period of no less than twenty-five years from the date of recordation—December 15, 1982.[3] Any attempt by the developers to terminate the restrictions in whole or in part prior to the expiration of that term is invalid. See **Diefenthal**, 865 So.2d at 883.

CONCLUSION

Building restrictions are a means of insuring the lasting aesthetic and monetary value of property. **4626 Corp. v. Merriam**, 329 So.2d 885, 889 (La. App. 1 Cir.), writ denied, 332 So.2d 800 (La. 1976). Residents choosing to live in planned developments have a reasonable expectation that the restrictions will not terminate prior to the expiration date provided in the terms of the agreement and that modifications to the building restrictions will be reasonable and designed to maintain the essential character of the community for the benefit of all residents.

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[3] At least one circuit has held that incorporation of an earlier restrictive covenant agreement into a later agreement is a "renewal" of the terms of the original agreement, in effect restarting the delay within which the restrictive covenant agreement is binding. **Diefenthal**, 865 So.2d at 883. It is unnecessary for this court to address the issue for purposes of this appeal.

The 1984 Restrictive Covenants, which incorporate the 1982 Wedgewood Acres Restrictive Covenants, cover the Holcombs' Front Lot, and the Holcombs have failed to establish a valid waiver from the restrictions contained in the general plans. For the foregoing reasons, we maintain our earlier decree, affirming the judgment of the trial court granting the plaintiffs a preliminary injunction.[4] Costs on appeal are assessed to the appellants, Holcomb Trucking, Inc., Harry H. Holcomb, and Joyce M. Holcomb.

AFFIRMED.

[4] The principal demand for a permanent injunction can only be definitively disposed of after a full trial under ordinary process, even though the hearing of the summary proceedings to obtain the preliminary injunction might address issues on the merits. **McCurley v. Burton**, 03-1001 (La. App. 1 Cir. 4/21/04), 879 So.2d 186, 189.

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VERSUS

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BEFORE: CARTER, C.J., PARRO, PETTIGREW, MCDONALD, AND WELCH, JJ.

PETTIGREW, J., CONCURS IN PART AND DISSENTS IN PART, AND ASSIGNS REASONS.

PETTIGREW, J., concurring in part and dissenting in part.

I agree with the majority that a rehearing should be granted.

I must respectfully dissent from the majority's ultimate finding for the same reasons assigned in this court's earlier opinion, **Cosby v. Holcomb Trucking, Inc.**, 03-2423 (La.App. 1 Cir. 12/17/04) (unpublished) (Cosby I), which decision was reversed and remanded by the Louisiana Supreme Court in **Cosby v. Holcomb Trucking, Inc.**, 05-0470 (La. 9/6/06), 942 So.2d 471 (Cosby II).