

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE TOTTIS and TINA TOTTIS,

Plaintiffs/Counterdefendants-
Appellants,

v

DEARBORN HILLS CIVIC ASSOCIATION,
INC., GEORGE DARANY, DOROTHY
DARANY, TIMOTHY HORAN, JANE HORAN,
DR. WILLIAM KACH and ROBERT D. ROCK,

Defendants-Appellees,

and

SCOTT BAIN,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

June 18, 2002

No. 229996

Wayne Circuit Court

LC No. 99-932614-CH

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment, following a bench trial, granting injunctive relief to defendants and enjoining permanently the construction of any structure on plaintiffs' vacant lot. We reverse.

At issue are two deed restrictions concerning a vacant lot purchased by plaintiffs. The first restriction would prohibit plaintiffs from building any structure on the lot because it was not one entire residential lot as platted, but instead a split lot. The second restriction would prohibit the placement of plaintiffs' garage as indicated in architectural plans. Plaintiffs argue that the two deed restrictions do not apply to their property because the character of the neighborhood had changed in a manner that indicated that the residents had abandoned the deed restrictions. Specifically, plaintiffs argue that the restrictions were unenforceable against them under the doctrines of waiver and estoppel. We agree that the doctrine of waiver is applicable, making it unnecessary to address the estoppel claim.

This Court reviews equitable actions de novo. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999); MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Gumma, supra* at 221. This Court reviews a trial court's conclusions of law de novo. *Id.* Where the trial court's factual findings may have been influenced by an incorrect view of the law, our review of those findings is not limited to clear error. *Walter v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The right to enforce a restrictive covenant may be lost by waiver if, by one's failing to act, he leads another to believe that he will not insist upon the covenant and the other is thereby damaged. *Rofo v Robinson (On Second Remand)*, 126 Mich App 151, 155; 336 NW2d 778 (1983). However, where variations from deed restrictions constitute minor violations, the concept of waiver does not apply. *Id.* There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged. *Id.*

In the instant case, Article V of the restrictions expressly prohibits construction on split lots. This Court has recently held that construction on a lot where no house was allowed was not a technical, or a minor, violation of the restrictive deed. *Webb, supra* at 212. Therefore, plaintiffs' proposed plans to construct a house on the split lot constituted a major violation to the deed restrictions. The question that remains is whether defendants waived their right to enforce this restriction against plaintiffs.

A review of the facts in this case show that 43 out of 1,489 houses in the subdivisions were built on less than fully platted lots.¹ Four of the forty-seven houses on plaintiffs' street were built in violation of Article V. The evidence also shows that no action to enforce Article V was ever taken against any of the owners of houses that violated Article V, and defendant association, charged by the deed restrictions with approving the architectural plans, obviously had granted its approval for the construction of these houses. This evidence establishes that the character of the neighborhood intended and fixed by the restriction has changed. Because there is no record of defendants ever insisting on compliance with the deed restriction, and because plaintiffs would be damaged if defendants are now allowed to enforce the restriction, defendants have waived any right to enforce the restriction. Therefore, the trial court erred in enjoining plaintiffs from building a house on the vacant lot, and plaintiffs are entitled to entry of a judgment prohibiting enforcement of Article V as to plaintiffs' lot.

¹ Although the dissent maintains that we are reversing on a flimsy statistical basis, the dissent then proceeds to focus on a statistical percentage in support of her position. On forty-three separate occasions, a number we find significant in the context of a waiver discussion, persons were allowed to proceed with the monumental task of building homes on less than one fully plotted lot without a single challenge to their actions. We are left with a firm and definite conviction that the trial court committed a mistake in finding that the character of the neighborhood, as to building homes on smaller lots, remained unchanged.

Similarly, plaintiffs were entitled to injunctive relieve regarding the garage setback restrictions, Article VII, under the doctrine of waiver. Eleven of the forty-seven houses on plaintiffs' street were in violation of the garage setback restrictions. The evidence showed that no previous action was ever taken in the subdivision to enforce the provisions of Article VII. Furthermore, it is undisputed that, during the proceedings in the instant case, neighbors were allowed to expand their home in violation of Article VII. Pursuant to a settlement with defendant association, the association approved plaintiffs' second architectural plan, including the placement of the garage, and plaintiffs may proceed with the plan because the remaining defendants waived enforcement of the deed restrictions.

Reversed and remanded to the trial court for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly