S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

GEORGE P. ASKER and CHARLOTTE ASKER, Plaintiffs/Counter-Defendants/Appellees,	UNPUBLISHED January 24, 2013
v	No. 303529
WXZ RETAIL GROUP/GREENFIELD, L.L.C., Defendant/Counter-Plaintiff/Appellant.	Wayne Circuit Court LC No. 06-625093-CZ

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant WXZ Retail Group/Greenfield, L.L.C., appeals as of right from a judgment, entered after a bench trial, holding that defendant violated restrictions in a 1964 deed by erecting improvements and buildings on its property without plaintiffs' consent, and ordering defendant to demolish and remove the buildings and improvements. We affirm.

This case arises from the development of a large parcel of commercial property located at the southeast corner of Greenfield and Joy Roads in Detroit. The property was originally owned by the Great Atlantic & Pacific Tea Company ("A&P"), which opened and operated a supermarket on the property. In 1964, A&P conveyed one section of the property to Billmax Corporation, which opened a Frank's Nursery and Crafts store ("Frank's Nursery") on the parcel, and it conveyed another section to the Michigan National Bank ("MNB"), which opened a bank branch on the property.[1] The deed for the MNB property contained the following restrictions:

> 1. The Grantee shall within two (2) years from the date hereof cause to be erected and fully completed upon said premises a brick building adopted for and which shall be used for a bank building.

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[1] For ease of reference, we will refer to each of the three parcels by reference to their original operators, namely, the "A&P property," the "Frank's Nursery property," and the "MNB property."

> 2. No improvements shall be placed upon said property until the site plan and architectural plans for the building or buildings to be erected thereon have been approved in writing by Grantor, which approval shall not be unreasonably withheld.
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> 3. That portion of the premises which is to be devoted to a parking area shall be improved in a manner similar to and compatible with the parking area already established by Grantor on contiguous property and shall be so constructed that traffic may flow freely between the respective parking areas of the parties, it being the intention that the respective customers and invitees of the parties may conveniently use the two parking areas.

The deed also prohibited the grantee from operating any sort of grocery or food retail store as long as the grantor operated a supermarket on the adjacent property.

Plaintiffs purchased the A&P property in 1981 and operated a grocery store on the site until 1987, when they began leasing the A&P property to the state of Michigan for office use by the Department of Human Services ("DHS"). The MNB property changed hands several times. It was vacant, and had last been used to operate a coin laundry business, when defendant purchased the property in 2006. Defendant intended to construct an Advance Auto Parts retail store on the MNB property. When defendant attempted to obtain plaintiffs' consent to construct a curb with an encroachment on the A&P property's right-of-way, plaintiffs refused consent. Defendant provided plaintiffs with excerpts from a site plan, but failed to disclose the full site plan and architectural plans. When defendant began construction activities, plaintiffs notified defendant that the project was in violation of the deed restrictions. Despite notice of plaintiffs' objections, defendant continued its construction of an Advance Auto Parts store, which included a detached two-car garage and a new dumpster enclosure. Defendant completed the project knowing that plaintiffs had not approved it pursuant to the deed restrictions.

Plaintiffs brought a complaint for injunctive relief and monetary damages against defendant. Plaintiffs alleged that defendant breached deed restriction No. 2, which required plaintiffs' approval of any improvements, and deed restriction No. 3, which prohibited defendant from interfering with the free flow of parking throughout the shopping center parking area. The parties filed cross motions for summary disposition. The trial court held that the restriction requiring plaintiffs' approval of improvements on defendant's property was no longer enforceable, but that plaintiffs could enforce the restriction requiring free traffic flow between the parking lots on the adjoining properties. In a prior appeal, this Court reversed the trial court's determination on summary disposition that deed restriction No. 2 was no longer enforceable. *Asker v WXZ Retail Group Greenfield*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2010 (Docket No. 290234) ("*Asker I*").[2] This Court explained:

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[2] Defendant did not cross-appeal the trial court's ruling enforcing deed restriction No. 3, the parking lot restriction. This Court commented that defendant's failure to file a cross-appeal with respect to that portion of the trial court's decision precluded consideration of that issue on

> [T]he second restriction provides that "no improvements shall be placed upon said property until . . ." Defendant contends that this language presumes that there has been no prior construction on the parcel and that when the second restriction is read in context with the first restriction, it is apparent that the disputed building restriction refers only to approval of the site plan and architectural plans for the intended bank. This is a reasonable interpretation, taking into consideration the reference to "no improvements." However, the second restriction specifically provides that no improvements shall be placed upon the property until the plans for the *building or buildings* erected thereon have been approved in writing by the grantor. The first restriction contemplated that "*a* brick building" would be built on the property to be used as "*a* bank." Use of the language "building or buildings" in the second restriction and of the singular "a" in the first restriction indicates that the second restriction was not necessarily intended to be applicable only to the originally contemplated bank. Given the ambiguity in the interplay between the first and second deed restrictions, whether the building restrictions required plaintiff's approval of defendant's proposed improvements on defendant's property presented a question of fact. The original parties' intent in the drafting of the provisions at issue cannot be ascertained from the language of the deed itself. Because the meaning of an ambiguous contract is a question of fact that must be decided by the jury or other trier of fact . . . summary disposition was inappropriate. [*Id.*, slip op at 3.]

On remand, following a bench trial, the trial court found that deed restriction No. 2 was intended to control not only the MNB development of the property, but also all future developments. The trial court also found that although defendant failed to provide plaintiffs with the required plans to seek approval of the improvements on the MNB property, "it would not have been unreasonable for plaintiffs to have not approved said site plans and architectural plans[.]" The court ordered that all improvements on the property in violation of the deed restrictions "be demolished and removed." Defendant now appeals.

Defendant first argues that the trial court violated the law of the case doctrine by finding that deed restriction No. 2 was unambiguous instead of analyzing extrinsic evidence to determine the intent of the original grantor, A&P. Application of the law of the case doctrine is a legal question that we review de novo. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

The law of the case doctrine "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine requires a lower court to follow an appellate court ruling on a particular issue where the facts remain materially the same. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). A lower court "may not take action on remand that is inconsistent with the judgment of the appellate court." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The trial court is bound to

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appeal. *Id.*, slip op at 1. The enforceability of the parking lot restriction is not at issue in this appeal.

strictly comply with the law of the case, as established by the appellate court, "according to its true intent and meaning." *People v Blue*, 178 Mich App 537, 539, 444 NW2d 226 (1989).

In *Asker I*, this Court determined that the interplay between the first and second deed restrictions rendered the restrictions ambiguous with respect to whether they required plaintiffs' approval of defendant's proposed improvements on the MNB property, and that it was necessary to determine the original parties' intent in the drafting of the provisions at issue. *Asker I*, slip op at 3. This Court noted that "'the meaning of an ambiguous contract is a question of fact that must be decided by the jury' or other trier of fact," and that "[i]n determining the meaning of an ambiguous contract, the trier of fact may consider extrinsic evidence." *Id.*, slip op at 2, quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW3d 447 (2003).

As defendant concedes, the trial court properly commented at the outset of trial that its task, as the trier of fact, was to "determine any ambiguities" because "[t]he parties' intent cannot be determined from the deed." Contrary to what defendant argues, however, the trial court did not resolve the issue of the original contracting parties' intent solely from the language used in the deed. Although the court commented that the deed was clear and unambiguous with respect to whether the deed restrictions were intended to run with the land, which was consistent with defendant's pretrial stipulation, the court relied in part on extrinsic evidence to resolve the disputed issues of the intended meaning of the deed restrictions. The court considered extrinsic evidence of similar restrictions in other deeds and leases to which the original grantor, A&P, was a party to determine the intent of A&P at the time the 1964 deed was executed. The trial court's decision-making process was consistent with this Court's mandate in *Asker I*. Accordingly, there was no violation of the law of the case established by this Court's prior decision.

Defendant also challenges the trial court's findings of fact and conclusions of law in resolving the issue of the intended meaning of the deed restrictions. "This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law." *Redmond v Van Buren Co*, 293 Mich App 344, 352; 819 NW2d 912 (2011). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009).

Defendant argues that the trial court was required to apply the rule of contra proferentem and construe the ambiguous deed restriction against plaintiffs, because they are successors to A&P, the drafter of the 1964 deed. We disagree.

In support of his argument that construction of the deed restriction requires strict adherence to the principle that ambiguities are to be construed against the drafter, defendant directs us to *Patterson v Butterfield*, 244 Mich 330, 335-337; 221 NW 293 (1928), quoting *Austin v Kirby*, 240 Mich 56; 214 NW 943 (1927), for the statement that deed restrictions "will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property." Defendant also cites *Old Mission Peninsula Sch Dist v French*, 362 Mich 546, 550; 107 NW2d 758 (1961), in which the Supreme Court observed that "Michigan has consistently recognized that where a deed is ambiguous, its words are to be construed strongly against the grantors." The Court in *Old Mission Peninsula* also

stated, "This general rule of construction has greater applicability when the language concerned, as here, is in the nature of a limitation on the grant." *Id.* at 551, citing *Quinn v Pere Marquette R Co*, 256 Mich 143; 239 NW 376 (1931), and 16 Am Jur Deeds, § 309.

However, in *Klapp*, 468 Mich at 470-471, our Supreme Court held that the rule of contra proferentem, i.e., that ambiguities in a contract are to be construed against the drafter, "is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean." The Court stated:

> Accordingly, if the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or the nondrafter's view of the contract. In other words, if a contract is ambiguous regarding whether a term means "a" or "b," but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean "b," then the term should be interpreted to mean "b," even though construing the document in the nondrafter's favor pursuant to an application of the rule of contra proferentem would produce an interpretation of the term as "a." [*Id.* at 471-472.]

Consistent with *Klapp*, this Court noted in *Asker I* that the rule of contra proferentem is a rule of last resort. *Asker I*, slip op at 2.

Here, the trial court resolved the ambiguity by reference to other deeds and leases executed by A&P in which the grantor/lessee retained title to a back lot and imposed restrictions on the grantee/lessor that would prevent the servient estate from erecting buildings that would compromise the visibility and value of the grantor/lessee's property. Although defendant attempts to distinguish its own deed from the other A&P leases introduced into evidence, A&P's common intent in both deeds and leases was to protect its grocery store property from a diminishment in value that could result if the front property owner's improvements interfered with the free flow of traffic through all areas of the parking lot, created eyesores, or impaired the sightlines affecting the A&P property's visibility.

Plaintiffs presented evidence that A&P had consistently drafted leases in which it, as the anchor tenant of a shopping center, imposed restrictions on other tenants that preserved A&P's authority over the general character and appearance of the retail center. Defendant contends that leases are not competent evidence of A&P's intent with respect to a deed, because a lease is of limited duration. We are not persuaded that this distinction precluded the trial court from finding that the evidence was probative of A&P's intent, because a permanent conveyance would put A&P's stature at greater risk than a temporary lease. A&P would have a greater incentive, not lesser, to preserve its authority over property that is sold in fee rather than leased.

Defendant also argues that the leases are distinguishable because they contain specific provisions, such as setbacks, whereas the deed restrictions lack objective standards for approval. Defendant cites no authority for the proposition that a deed restriction requiring the consent of the grantor requires specific standards for measuring the reasonableness of any lack of consent. The trial court did not clearly err in finding that both the specific leases and the general deed

restriction reflect a similar intent to maintain the grantor's control over its shopping centers, either as a grantor or as a landlord. Moreover, the leases provide that the lessor may obtain the approval of the lessee to make improvements not meeting the specifications. The leases provided a basis for inferring the intent of the original grantor with respect to the continuation of deed restriction No. 2 beyond the development of the bank. Because extrinsic evidence was available to determine the intent of A&P, the drafter of the 1964 deed, resort to the rule of contra proferentem was not necessary.

Defendant next contends that the provision requiring the grantor's approval of the grantee's site plan and architectural plans is not enforceable because the standards for approval are not specifically set forth in the deed restrictions themselves, and the standards are not clearly indicated by an established general plan for development. Defendant relies on *West Bloomfield Co v Haddock*, 326 Mich 601; 40 NW2d 738 (1950). In that case, the defendant, a purchaser of property in a platted residential subdivision, planned to build a residence that was to include a medical clinic. *Id.* at 604. The plaintiff developer sought an injunction to prohibit the defendant from building the combined residence and clinic. *Id.* at 603-604. The deed restrictions prohibited any construction except for a residence and a garage on each lot. The restrictions prohibited manufacturing or commercial enterprises, and stated that "[a]nything tending to detract from the attractiveness and value of the property for residence purposes will not be permitted." *Id.* at 605. The restrictions further prohibited any site from "in any way be[ing] used for other than strictly residential purposes," but also stated that "[t]his shall not be construed, however, as preventing the practice of medicine." *Id.* The Supreme Court held that the plaintiff properly denied approval of the defendant's plans because the deed restrictions allowed the practice of medicine only as an incidental use to the residence. *Id.* at 611. The Court stated:

> We agree with defendants that as to a grantor who has reserved the right of approval: "He must not act in a high-handed, whimsical or despotic manner. He is required to consider the facts and must be fair and reasonable in approving or rejecting the plans submitted." But we are not in accord with defendants' contention that: "In the present case the restrictive covenant has as its purpose 'to insure the use to (of) the property for attractive residential purposes only' . . . " as defendants have attempted to construe this provision in their brief. Defendants' contended construction seems to be that if the building is of "attractive design" in its exterior appearance, then it complies with the restriction requirements. Obviously this is not so. As held by the circuit judge, plaintiff corporation was within its rights when in disapproving defendants' plans for the proposed structure it advised them in part as follows: "However desirable your project may be and however well suited your plans may be to its purpose, it does not come within the purview of the restrictions governing the properties which we have sold . . . " [*Id.* at 612-613.]

Haddock does not support the principle that a deed restriction requiring the grantor's approval of a grantee's building plans must specifically set forth the criteria for approval. The Court's statement that "a grantor who has reserved the right of approval . . . must not act in a high-handed, whimsical or despotic manner" does not support defendant's argument that the standards for approval must be specifically set forth in the deed restrictions. On the contrary, implicit in this statement is that a grantor's reservation of the right of approval may be upheld without

specific criteria, provided the grantor does not arbitrarily or capriciously withhold approval. Moreover, the issue in *Haddock* did not involve a controversy over the size, dimensions, or other external physical attributes of a structure, but the use of the property.

Defendant also cites *Adrmore Ass'n v Bankle*, 329 Mich 573; 46 NW2d 378 (1951), for the proposition that specific approval criteria are necessary unless the standards are clear from an established general plan for the development. In *Ardmore*, the deed restrictions for the subdivision at issue were written in 1926 and 1927, and required that all residences built in the subdivision cost a minimum of $6,500. The deed restrictions also required that plans and specifications for new residences must be approved by the grantors. *Id.* at 575-576. At the time of trial, the subdivision was 80 percent improved by "'high-class'" residential property. The plaintiff property owners association sought to enjoin the defendant from building two two-bedroom houses, at a cost of $10,800 and $10,400, respectively. On appeal, the defendant argued that the general plan restrictions were unenforceable in the absence of proof of a general plan, and that if such a plan existed, the defendant's proposed buildings complied with the plan. *Id.* at 576. The Court rejected the defendant's argument and held that "the trial judge properly took into consideration the type of homes in the subdivision and the intent of the original grantor as indicated by the steps taken to establish a general plan of construction and character of building." *Id.* at 578. The Supreme Court stated that "[b]uilding restrictions embodying a general plan of construction may be enforced if that plan has been maintained from its inception, and if it has been understood, accepted, relied on, and acted upon by all in interest." *Id.* at 578.

Finally, defendant cites to *Golf View Improvement Ass'n v Uznis*, 342 Mich 128; 68 NW2d 785 (1955), as being closely on point. In that case, the plaintiff owners association sought to enjoin the defendants from building a two-story dwelling with 984 square feet on the first floor and 812 square feet on the second. The plaintiff claimed that the proposed residence would violate the deed restrictions because it would have fewer than 1,100 square feet on each floor. *Id.* at 129. The deed restrictions did not state a fixed minimum floor area, but generally stated that "[n]o building shall be erected on said premises until the plans and specifications and location thereof has been approved in writing" by the grantor or homeowners association. *Id.* at 130. The minimum square-foot requirement was not stated in the deeds, but the plaintiff averred that a general plan had been established by the seven houses already built in the subdivision, six of which satisfied the 1,100 minimum, and one that was only 50 square feet below the minimum. *Id.* at 130. The Supreme Court held that the plaintiff failed to assert an enforceable restriction because "[t]here is no showing here of any action on the part of the common grantor which effected a general plan." *Id.* at 132. The Court held that the restriction would be enforceable only if it "start[ed] with a common owner," and that the "[s]ubsequent purchasers of some of the lots could not, by their own conduct, fasten a general plan on other lots whose owners had not consented thereto." *Id.* at 132. The Court did not, however, hold that the deed restriction itself was unenforceable for vagueness; only that the plaintiff did not reasonably withhold consent. The Court specifically stated that the case was distinguishable from *West Bloomfield Co*, 326 Mich 601, because "[t]he question at bar is whether the committee acted fairly and reasonably and within its powers in seeking to impose restrictions not included in the recorded agreement." *Id.* at 787. Moreover, the issue in *Golf View* was whether, in the absence of reciprocal covenants in a residential subdivision, a homeowners association could impose specific size requirements based on consistency with existing residences in the subdivision. The Court concluded that it could not because there had been no agreement to impose the requirements. In this case, by

contrast, the requirement of the grantor's consent for improvements was recorded in the deed, and defendant agreed to the restrictions by purchasing the property subject to those restrictions.

Accordingly, we reject defendant's argument that deed restriction No. 2. is unenforceable because it does not contain specific criteria for approval.

Defendant next argues that the trial court clearly erred in finding that plaintiffs did not unreasonably withhold approval of defendant's improvements. The testimony indicated that plaintiffs did not approve defendant's development because the new construction enlarged the footprint of the original building, in addition to adding a two-car garage and a dumpster enclosure. The new building was also closer to the street, creating a more imposing presence on the intersection than had been there before. Carl Zabell and plaintiff George Asker gave conflicting testimony regarding their subjective impressions of how the changes affected the visibility of plaintiffs' property. Defendant also insinuated throughout the trial that even if the improvements adversely affected plaintiffs' visibility, that was of little significance because plaintiffs no longer used their property for retail purposes, and the state of Michigan had not cancelled its lease or expressed any intention to discontinue leasing the property. Zabell testified that if plaintiffs were to return the A&P property to a retail use, they would have to replace the obsolete structure with new construction that would be highly visible from the intersection.

When the objective facts of the increased building footprint, the placement nearer the intersection, and the addition of the two-car detached garage are considered in conjunction with George Asker's testimony explaining how he believed those factors impacted plaintiffs' property, we are not convinced that the trial court clearly erred in finding that plaintiffs did not unreasonably refuse approval. Defendant proceeded with its plans knowing that plaintiffs had objected to the development, and without providing full architectural and site plans for plaintiffs' approval. Under these circumstances, we are not left with the definite and firm conviction that the trial court made a mistake.

Defendant lastly argues that the trial court abused its discretion in ordering complete demolition and removal of defendant's construction, rather than a less stringent remedy such as ordering defendant to submit plans to plaintiffs for modification of the construction. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998) (citation omitted). We review a trial court's decision to grant or deny an injunction for an abuse of discretion. *Id.* at 509-510. An abuse of discretion exists when the decision is outside the range of principled outcomes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

Defendant proposes that complete demolition of its improvements is unnecessary, and that the better remedy would be to order it to work with plaintiffs to find acceptable modifications. Defendant failed, however, to negotiate arrangements with plaintiffs when plaintiffs notified defendant of the deed restrictions and plaintiffs objected during the summer of 2006. Testimony established that defendant received a cease and desist letter in April of 2006, after demolition of the existing building had proceeded, but before construction of the new building had commenced. Defendant nevertheless began construction on the new building in

May 2006. Defendant also did not offer any evidence of how its development could be modified to allay plaintiffs' concerns about the visibility of their property, the impairment of sight lines, or the presence of the two-car garage. Under these circumstances, ordering complete demolition was not a remedy falling outside the range of principled outcomes.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto