STATE OF MINNESOTA

IN SUPREME COURT

A21-0700

Court of Appeals

Hudson, J.
Dissenting, Anderson, J., Gildea, C.J.

Windcliff Association, Inc.,

Respondent,

vs.

Filed: April 19, 2023
Office of Appellate Courts

Aaron Breyfogle, et al.,

Appellants.

Ken D. Schueler, John T. Giesen, Dunlap & Seeger, P.A., Rochester, Minnesota, for respondent.

Elizabeth J. Roff, Stellpflug Law PLLC, Minneapolis, Minnesota, for appellants.

S Y L L A B U S

1. If the language of a restrictive land use covenant is ambiguous, a court may consider extrinsic evidence of the covenanting parties' intent to resolve the ambiguity.

2. The interpretation of an ambiguous restrictive covenant is a question of fact for a jury unless the extrinsic evidence is conclusive as to the covenanting parties' intent; the jury should be instructed to strictly construe an ambiguity in a restrictive covenant

against a land use restriction only if the jury is unable to resolve the ambiguity from the extrinsic evidence by a preponderance of the evidence.

3. Because the restrictive covenant at issue is ambiguous and the extrinsic evidence does not conclusively resolve the ambiguity, the matter is remanded to the district court for a properly instructed jury to decide the meaning of the restrictive covenant.

Affirmed.

O P I N I O N

HUDSON, Justice.

Appellants Aaron and Abby Breyfogle (the Breyfogles) are homeowners in a common interest residential subdivision where lots are subject to restrictive land use covenants. One restrictive covenant purports to limit the size of outbuildings on lots to 1,200 square feet. This appeal arises out of a dispute between the Breyfogles and their homeowners' association, respondent Windcliff Association, Inc., (the Association), which argues that the Breyfogles' newly constructed, 1,656-square-foot garage violates the restrictive covenant. The Breyfogles argue that any ambiguity in the restrictive covenant must be strictly construed against the land use restriction as a matter of law. The district court, finding the covenant ambiguous, agreed with the Breyfogles' position and granted summary judgment in their favor. The court of appeals disagreed, concluding that the interpretation of the restrictive covenant was a question of fact for a jury.

We hold that the interpretation of an ambiguous restrictive land use covenant is a question for a jury unless extrinsic evidence proffered by the parties is conclusive as to the covenanting parties' intent. We further hold that a jury should strictly construe an

ambiguity in a restrictive covenant against the land use restriction only if the jury is unable to resolve the ambiguity from the extrinsic evidence by a preponderance of the evidence. Because we agree with the court of appeals that the extrinsic evidence here does not conclusively resolve the ambiguity in the restrictive covenant, we affirm the decision of the court of appeals and remand to the district court for a jury to decide the meaning of the restrictive covenant.

FACTS

The Breyfogles live in the Windcliff common interest residential subdivision in Wabasha County, Minnesota. Properties in the subdivision are subject to restrictive land use covenants contained in the Declaration Establishing Protective Covenants (Windcliff Declaration). The Association administers the subdivision.

At issue in this case is a covenant in the Windcliff Declaration, which states that "outbuildings shall have a maximum size of 1200 square feet (as per Wabasha County zoning restriction)." At the time the covenant was adopted in 2003, applicable zoning regulations in Wabasha County limited the size of accessory buildings detached from a residential property to 1,200 square feet. That size restriction was repealed in 2015, however.

In April 2019, the Breyfogles submitted to the Association plans to build a 1,656-square-foot unattached garage on their lot. The Association rejected the plans, citing the covenant restricting outbuildings to a maximum size of 1,200 square feet. The Breyfogles responded to the Association by asserting that the covenant was no longer in force because the Wabasha County zoning regulation had been repealed. The

Association countered by arguing that the repeal of the regulation did not impact the validity of the covenant.

The Breyfogles decided to proceed with building the garage. They received a building permit from the county in July 2019, and construction on the garage began that month. The garage has since been completed.

In October 2019, the Association filed suit against the Breyfogles in Wabasha County District Court, seeking to enforce the 1,200-square-foot size restriction in the Windcliff Declaration. Moving for summary judgment, the Breyfogles asserted that the covenant was unambiguous and required the Wabasha County zoning regulations to control the interpretation of the covenant.

In support of this contention, the Breyfogles offered the deposition testimony and affidavit of Sylvia Brown who, with her late husband Rodger Brown, developed the Windcliff subdivision and drafted the Windcliff Declaration. In her affidavit, Brown explained that she "intended the Covenants to comply with the Wabasha County zoning ordinances in effect at the time of creation and included specific references to the zoning ordinances to assure compliance with the zoning ordinances." In her deposition testimony, Brown explained that her intent in referencing the Wabasha County zoning restriction was to tie the 1,200-square-foot restrictive covenant to the 1,200-square-foot zoning restriction in place at the time, "in such a manner that the 1,200 square foot size restriction would be inapplicable if [the zoning restriction was] repealed by" the county. This statement was echoed in Brown's affidavit.

Moreover, the Breyfogles argued that even if the covenant were deemed ambiguous, Minnesota law required the ambiguity in the restrictive covenant to be automatically construed against the land use restriction as a matter of law.

In response, the Association argued that the covenant unambiguously limited the size of outbuildings in the Windcliff subdivision to 1,200 square feet. Moreover, the Association argued that Brown's testimony did not conclusively establish that her intent was for the county zoning regulations to control the meaning of the covenant. For example, the Association reasoned that Brown could not have intended for the zoning regulation to change the meaning of the covenant because in her deposition testimony, she stated that she did not expect that the county would change the zoning regulation and assumed that all lots in the subdivision would sell before any changes in zoning occurred. Moreover, when asked if she contemplated that she was "going to have to change this 1200-square-foot requirement for outbuildings," Brown answered equivocally, stating, "Well, I didn't plan on it, no," and "I don't know."

The district court granted summary judgment to the Breyfogles. The district court first held that the language of the restrictive covenant was ambiguous. The district court then looked to extrinsic evidence and held that Brown's affidavit and deposition testimony, when viewed in its entirety, conclusively established that the intent of the covenanting parties was for the county zoning regulations to control the interpretation of the covenant. The district court further held that even if Brown's testimony did not conclusively establish the meaning of the covenant, the court would be obliged to construe the ambiguous covenant against the land use restriction as a matter of law.

The Association appealed, and the court of appeals affirmed in part, reversed in part, and remanded. *See Windcliff Ass'n, Inc. v. Breyfogle*, No. A21-0700, 2022 WL 152013, at *1 (Minn. App. Jan. 18, 2022). The court of appeals agreed that the language of the covenant was ambiguous. *See id.* at *2–3. However, the court of appeals disagreed that Brown's affidavit and deposition testimony conclusively established the meaning of the covenant. *Id.* at *3. Moreover, the court of appeals disagreed with the Breyfogles' argument that an ambiguous restrictive covenant must be automatically construed against the land use restriction as a matter of law. *Id.* The court of appeals therefore concluded that the interpretation of the covenant was a question of fact for the jury, and it reversed the district court's grant of summary judgment on that issue and remanded. *Id.* at *3–4.[1]

We granted the Breyfogles' petition for review on whether a rule of strict construction against land use restrictions automatically applies to ambiguous restrictive covenants as a matter of law.

ANALYSIS

This case comes to us on review of the district court's grant of the Breyfogles' motion for summary judgment. We review a district court's grant of summary judgment de novo and, in doing so, view the evidence in the light most favorable to the party against whom the district court granted summary judgment. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019). Summary judgment is appropriate when there is no

[1] With respect to the interpretation of another covenant not relevant to our grant of review, the court of appeals affirmed the district court's grant of summary judgment. *Windcliff Ass'n*, 2022 WL 152013, at *4. The court of appeals also reversed, as premature, an award of attorney fees by the district court. *Id.* at *4–5.

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01; *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017).

I.

A.

When interpreting restrictive covenants, we have articulated the principle that "[r]estrictive covenants are strictly construed against limitations on the use of property." *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 26 (Minn. 1981) (citing *Mission Covenant Church v. Nelson*, 91 N.W.2d 440, 442 (Minn. 1958)). This rule of strict construction is rooted in the law's preference for the free, unrestricted use of one's property. *See id.* However, we have also stated that covenants restricting the use of property "will be given the full force and effect intended by the parties who created them . . . ." *Klapproth v. Grininger*, 203 N.W. 418, 419 (Minn. 1925).

The rule of strict construction first appeared in our case law over a century ago. In *Godley v. Weisman*, we found that the meaning of a restrictive covenant was "not free from doubt." 158 N.W. 333, 334 (Minn. 1916). Citing the rule of strict construction, the landowner argued that the ambiguous restrictive covenant should be construed against the restriction as a matter of law. *Id.* at 333. While acknowledging the vitality of the rule of strict construction, we explained:

> [I]f the rule stated by counsel means that, whenever the language of the restriction is such as to suggest doubt, either slight or grave, as to the meaning or extent of the alleged restriction, the court must forthwith forbear further consideration of the case and deny relief, then we do not concur.

Id. at 334. Rather, we stated that the "primary rule of interpretation" was " 'to gather the intention of the parties from their words . . . and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.' " *Id.* (quoting *Clarke v. Devoe*, 26 N.E. 275, 276 (N.Y. 1891)).

Since *Godley*, we have continued to invoke the rule of strict construction in the restrictive covenant context. In *Mission Covenant Church*, we sought to determine whether a restrictive covenant on one parcel of land applied to another parcel of land. 91 N.W.2d at 441–42. In doing so, we observed:

> [W]e must keep in mind a rule frequently enunciated in this state to the effect that inasmuch as the law leans in favor of the unrestricted use of property a strained construction will not be adopted in favor of restrictions. There is much authority that covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction and doubt will be resolved in favor of the unrestricted use of property.

Id. at 442 (citations omitted). Additionally, in *Costley*, we invoked the rule of strict construction in interpreting the term "dwelling" in a restrictive covenant that limited lot usage to "one dwelling and one garage." *See* 313 N.W.2d at 26. Noting that "courts will not adopt a strained construction in favor of restrictions," we determined that a group home for intellectually disabled individuals was a dwelling under the covenant. *Id.* We further explained that the surrounding circumstances of the group home, such as the "single housekeeping structure" and "the relatively permanent type of living situation," reinforced the conclusion that the group home was a "dwelling" under the covenant. *Id.*

B.

This appeal requires us to determine how these cases should apply when a court interprets an ambiguous restrictive covenant. Relying on the language of strict construction in *Mission Covenant Church* and *Costley*, the Breyfogles argue that once a court finds a restrictive covenant ambiguous, the court should automatically construe the covenant against the land use restriction as a matter of law, without reference to any extrinsic evidence to further determine the intent of the covenanting parties. In contrast, the Association relies on *Godley* to assert that general rules of contract interpretation apply to interpreting ambiguous restrictive covenants, and that the rule of strict construction should play no role in interpreting ambiguous restrictive covenants.

Neither position is entirely correct. On one hand, our precedent forecloses the Association's argument that there is no place for the rule of strict construction in Minnesota law. In the primary case relied upon by the Association—*Godley*—we explained that "it is undoubtedly the rule that" ambiguities in restrictive covenants are construed against the party seeking enforcement of the covenant. 158 N.W. at 334.

Moreover, we have continued to invoke the rule of strict construction over the past century. *See Costley*, 313 N.W.2d at 26; *Mission Covenant Church*, 91 N.W.2d at 442. And we have long adhered to the principle that the law favors the rights of the property owner to use her land as she wishes. *See Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608–09 (Minn. 1980). The Association offers no reason why we should reject this principle other than an "emerging modern view" that the rule of strict construction should be abandoned. But as the Breyfogles correctly note, a majority of

states still retain some form of the rule of strict construction. Therefore, we conclude that the rule of strict construction continues to apply to the interpretation of ambiguous restrictive covenants.

On the other hand, the Breyfogles' argument that ambiguous restrictive covenants are *automatically* construed against the land use restriction runs counter to our precedent on several fronts.

First, *Godley* squarely rejects this view, holding that a court should not "forbear further consideration of the case" and automatically apply the rule of strict construction if it finds that a restrictive covenant is ambiguous. 158 N.W. at 334. The Breyfogles argue that *Godley* is irrelevant because it did not deal with an ambiguous restrictive covenant, but instead with one "not free from doubt," which the Breyfogles consider to be a lower threshold than "ambiguity." This is a distinction without a difference, as *Godley* recognized that its observation applied to restrictive covenants afflicted with "doubt, either slight or grave." 158 N.W. at 334.

The Breyfogles alternatively argue that *Mission Covenant Church* and *Costley* superseded *Godley*. But both of those cases were unclear on where in the interpretative process the rule of strict construction comes into play, negating any suggestion that those cases superseded *Godley*. In fact, *Costley* implicitly followed *Godley* by considering the "surrounding circumstances" in interpreting an ambiguous restrictive covenant to "gather the intention of the parties." *Godley*, 158 N.W. at 334; *see Costley*, 313 N.W.2d at 26. And *Mission Covenant Church* did not concern the issue in *Godley*—the interpretation of

a covenant's meaning—but rather the question of whether a covenant existed at all. *See Mission Covenant Church*, 91 N.W.2d at 442–44.[2]

Second, the adoption of the Breyfogles' rule would conflict with our general practice that contract interpretation tools should be used to interpret restrictive covenants. *See Snyder's Drug Stores, Inc. v. Sheehy Props., Inc.*, 266 N.W.2d 882, 884 (Minn. 1978) (explaining that a restrictive covenant in a lease "should be interpreted no differently than other writings"); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 368–69 (Minn. 1979) (interpreting a restrictive covenant using the rules of contract construction). Under general rules of contract interpretation, ambiguities in a contract are resolved by admitting extrinsic evidence of "the facts and circumstances surrounding the transaction" to reveal the parties' intent. *Donnay v. Boulware*, 144 N.W.2d 711, 715 (Minn. 1966).[3]

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[2] The Breyfogles also invite us to overrule *Godley* to the extent it conflicts with an automatic rule of strict construction for ambiguous restrictive covenants. But because *Godley*'s approach is in accord with our modern trend in using contract interpretation tools to interpret restrictive covenants, we decline that invitation.

[3] Focusing exclusively on *Godley*, *Mission Covenant Church*, and *Costley*, the dissent protests that the tools of contract interpretation should not apply to ambiguous restrictive covenants. That position clearly conflicts with our holdings in *Snyder's Drug Stores* and *Turners Crossroad*. And despite the dissent's attempt to distinguish those cases as covenant not to compete cases, the reality is that the covenants in those cases both involved restrictions on the use of land, just like the covenant in this case. *See Snyder's Drug Stores*, 266 N.W.2d at 883 (covenant prohibited a business operating in "the sale of food products for consumption on the premises or the sale of drugs or medicines" of the same type as the lessee on the land); *Turners Crossroad*, 277 N.W.2d at 367, 369 (covenant prohibited the sale of liquor and food on the land except for the kinds typically sold at a baseball game). Moreover, the dissent offers no authority for its novel conclusion that the rules of interpretation depend on whether we are interpreting covenants that apply to commercial, as opposed to residential, property.

Our precedents reflect a resistance to using the blunt tools of interpretive canons to dispositively resolve ambiguities in contractual language.[4] *See Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66–67 (Minn. 1979) (explaining that the rule of strict construction against the drafter "does not . . . ineluctably lead to the conclusion that the drafter is to lose"); *see also Staffing Specifix, Inc. v. Tempworks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 693–94 (Minn. 2018). Recently, we explained in *Staffing Specifix* that the rule of strict construction against a contract's drafter (that is, *contra proferentem*), should be applied "only *after* an attempt is made to determine the parties' intent behind an ambiguous term, using extrinsic evidence if available." 913 N.W.2d at 694. This rule resonates in the restrictive covenant context, as we have long held that we strive to give covenants "the full force and effect intended by the parties who created them . . . ." *Klapproth*, 203 N.W. at 419; *see also LaValle v. Kulkay*, 277 N.W.2d 400, 403 (Minn. 1979) (same); *Rose v. Kenneseth Israel Congregation*, 36 N.W.2d 791, 798 (Minn. 1949) (same).

[4] The dissent notes two related exceptions: we will automatically construe ambiguous exculpatory and indemnification clauses against the party benefiting from the exoneration. *See Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 416–17 (Minn. 2018) (holding that indemnification clauses that are ambiguous in scope are unenforceable under strict construction); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982) (holding that exculpatory clauses that are ambiguous in scope are unenforceable under strict construction). However, the dissent fails to note that we have recognized a weightier public interest in strictly construing exculpatory and indemnification clauses because, unlike restrictive land use covenants, exculpatory and indemnification clauses prescribe the severe outcome of "reliev[ing] one party of the obligation to use due care" and "shift[ing] liability to innocent parties." *Justice v. Marvel, LLC*, 979 N.W.2d 894, 900–01 (Minn. 2022) (citations omitted) (internal quotation marks omitted).

In sum, the rule most consonant with our precedent is that the rule of strict construction against land use restrictions should be applied to ambiguous restrictive covenants only after attempting to discern the parties' intent, using extrinsic evidence if available.

II.

Notwithstanding our precedent applying contract interpretation principles to restrictive covenants, the Breyfogles offer a number of reasons why this should not be so. First, the Breyfogles and the dissent assert that while contract interpretation tools apply to writings involving parties with equal bargaining power, restrictive covenants involve parties with unequal bargaining power because covenants are "drafted by a developer and forced upon owners." This assertion misstates the law. Proof that a party lacked the opportunity to negotiate the terms of a contract is not alone enough to show a disparity of bargaining power. *See Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 891 (Minn. 1982). And as the Breyfogles recognize, homeowners can always persuade a homeowners' association to amend a restrictive covenant, showing that homeowners like the Breyfogles are not simply at the mercy of a developer's chosen covenants.

Second, the Breyfogles argue that while it is "expected and equitable" to strictly enforce contractual terms between original contracting parties, this expectation is not the case for restrictive covenants, where the litigants may be distant and remote from the original covenanting parties. But this argument overlooks the whole purpose of restrictive covenants. Restrictive covenants are meant to run with the land, such that the "successors

or assigns will be bound by the terms of the covenant" in the same manner as the original covenanting parties. *Turners Crossroad*, 277 N.W.2d at 369. It is therefore neither unexpected nor inequitable that future landowners, who stand in the shoes of the original covenanting parties, are held to the same land use restrictions as the original covenanting parties.

Third, the Breyfogles submit that the "strong public policy interest of free use of property" overrides the usual rules of contract construction. The dissent echoes this sentiment, strenuously arguing that our holding today "does not adequately protect the right to free and unrestricted property use." We disagree, as we can respect this public policy by affirming the validity of the rule of strict construction without contradicting our precedent applying contract interpretation rules to ambiguous covenants.

The Breyfogles finally offer several policy arguments for why ambiguous restrictive covenants should be automatically construed against the land use restriction; none are availing. The Breyfogles argue that as a governing body, the Association must adhere to federal due process guarantees, and that "enforcing a land use restriction that the owner had no actual notice of runs afoul of due process." But the Association is not a state actor and therefore not subject to the strictures of the Due Process Clause. *See State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999) (explaining that state and federal constitutional protections are triggered only by state action).

The Breyfogles also argue that their rule would simplify the process of interpreting ambiguous restrictive covenants, discouraging litigation among neighbors and saving landowners "discovery or trial expenses." But this rule respects only the landowner's

perspective. On the other side of the coin, such a rule defeats the legitimate expectations of neighbors that the "full force and effect" of a covenant will be carried out. *Klapproth*, 203 N.W. at 419.

Lastly, the Breyfogles observe that most states retain a rule strictly construing ambiguous restrictive covenants against limitations on land use. But a closer inspection of the cases cited by the Breyfogles reveal that in most of the cited jurisdictions, the rule of strict construction does not preclude an examination of extrinsic evidence to resolve the ambiguity in the restrictive covenant. *See, e.g.*, *Yogman v. Parrott*, 937 P.2d 1019, 1022–23 (Or. 1997) (applying the rule of strict construction only after examination of extrinsic evidence of the parties' intent did not resolve the ambiguity); s*ee also, e.g.*, *DuTrac Cmty. Credit Union v. Radiology Grp. Real Est., L.C.*, 891 N.W.2d 210, 216 (Iowa 2017) (explaining that extrinsic evidence is admissible to interpret the parties' intent in an ambiguous restrictive covenant); *River Dale Ass'n v. Bloss*, 901 A.2d 809, 811 (Me. 2006) (holding that "extrinsic evidence may be consulted to ascertain the grantor's intent" if a restrictive covenant is ambiguous).

In sum, these public policy arguments do not undermine our conclusion that the rule of strict construction against land use restrictions should be applied to ambiguous restrictive covenants only after attempting to discern the parties' intent with extrinsic evidence.

Therefore, courts interpreting the language of a restrictive covenant should begin by determining whether the language of the covenant is ambiguous—that is, "susceptible to two or more reasonable interpretations." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582

(Minn. 2010). If the language of the covenant is ambiguous, the court may consider extrinsic evidence of the covenanting parties' intent; however, the court may not grant summary judgment unless the extrinsic evidence is "conclusive" as to the parties' intent. *Donnay*, 144 N.W.2d at 716. If the extrinsic evidence is not conclusive as to the parties' intent, the interpretation of the ambiguous covenant is a question of fact for the jury. *Id.* In cases when the interpretation of an ambiguous covenant is submitted to a jury, the jury should be instructed that it should attempt to resolve the ambiguity from the extrinsic evidence. The jury should be further instructed that if it is unable to resolve the ambiguity from the extrinsic evidence by a preponderance of the evidence, it should then apply the rule of strict construction and construe the ambiguity in the covenant against the land use restriction.[5] *See Staffing Specifix*, 913 N.W.2d at 694 (recognizing that a party must offer extrinsic evidence to the jury that proves the meaning of ambiguous language by a preponderance of the evidence).

III.

Having determined the proper process for interpreting ambiguous restrictive covenants, we now apply that process here. The court of appeals determined that the restrictive covenant at issue is ambiguous, and that holding was not challenged on appeal. *Windcliff Ass'n*, 2022 WL 152013, at *2–3. Therefore, we attempt to ascertain the intent of the covenanting parties by examining extrinsic evidence of "the facts and circumstances

[5] We highlight the fact that at no point should a court apply the rule of strict construction where extrinsic evidence exists regarding an ambiguous restrictive covenant. Rather, the rule of strict construction is a tool for the jury if it is unable to resolve the ambiguity from the extrinsic evidence by a preponderance of the evidence.

surrounding the transaction." *Donnay*, 144 N.W.2d at 715. The interpretation of an ambiguous covenant is a question of fact for the jury unless the extrinsic evidence is conclusive. *Id.* at 716.

Here, the extrinsic evidence offered by the parties centered on the deposition testimony and affidavit of Sylvia Brown.[6] The district court found that Brown's affidavit and deposition testimony conclusively established the intent of the covenant's drafters. The court of appeals disagreed.

We agree with the court of appeals. To be sure, Brown's deposition testimony and affidavit include evidence in favor of the Breyfogles' interpretation of the covenant. Brown is clear that she intended to reference the Wabasha County zoning regulations with the covenant's parenthetical language, and in most of Brown's testimony, she states that her intent was to tie the restrictive covenant's meaning to the county zoning regulations. These statements are confirmed in Brown's affidavit.

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[6] Although the Breyfogles address how we should dispose of this matter under the summary judgment framework, the Association argues that "how Sylvia Brown's deposition testimony should be weighed" is not before us and requests supplemental briefing on this issue. But having decided that the rule of strict construction does not automatically apply to the covenant as a matter of law, we must examine Brown's testimony under the summary judgment standard to provide a final disposition of this case. Moreover, we see no need for supplemental briefing, given that both parties briefed how Brown's testimony should be weighed before the district court and the court of appeals, and both courts decided the issue. Therefore, the task of applying the summary judgment standard to Brown's testimony is adequately preserved for review. *See George v. Est. of Baker*, 724 N.W.2d 1, 8 (Minn. 2006) (holding that although appellant did not artfully raise an issue in his petition for review, the issue was adequately preserved for review because it had been presented to the district court and court of appeals).

However, we must view the evidence in the light most favorable to the party against whom summary judgment was granted—here, the Association. *See Henson*, 922 N.W.2d at 190. In her deposition testimony, Brown made several statements that, when viewed in the light most favorable to the Association, cast doubt on whether she intended the county zoning ordinances to affect the meaning of the restrictive covenant.

For example, Brown explained that at the time of the covenant's drafting, she did not expect that the county zoning regulations would change, undermining her assertion that her intent was to have the covenant's meaning change with the county zoning ordinances. Most critically, when asked if she contemplated that she was "going to have to change this 1200-square-foot requirement for outbuildings," Brown answered first, "Well, I didn't plan on it, no," and then "I don't know." Although a reasonable jury could consider these comments as outliers from the core of Brown's testimony, a reasonable jury could also conclude that they critically undermine Brown's other statements that she intended to tie the covenant's meaning to the county zoning regulations. It is not for us to weigh these competing inferences on a motion for summary judgment. *Senogles*, 902 N.W.2d at 42; *see also Donnay*, 144 N.W.2d at 716 ("It is generally recognized that summary judgment is not appropriate where the terms of a contract are at issue and any of its provisions are ambiguous or uncertain."). Viewed in the light most favorable to the Association, the evidence does not conclusively establish Brown's intent in drafting the covenant. The interpretation of the covenant is therefore a question of fact for the jury. *See Donnay*, 144 N.W.2d at 716.

Therefore, we remand this matter to the district court for a jury to decide the meaning of the ambiguous restrictive covenant. The jury should be instructed that it should attempt to resolve the ambiguity from the extrinsic evidence offered by the parties. The jury should be further instructed that if it is unable to resolve the ambiguity from the extrinsic evidence by a preponderance of the evidence, it should apply the rule of strict construction and construe the ambiguity in the covenant against the land use restriction.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals and remand to the district court for proceedings consistent with this opinion.

Affirmed.

D I S S E N T

ANDERSON, Justice (dissenting).

I respectfully dissent.

We have consistently reiterated that "restrictive covenants are strictly construed against limitations on the use of property." *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 26 (Minn. 1981); *see also Godley v. Weisman*, 158 N.W. 333, 334 (Minn. 1916); *Mission Covenant Church v. Nelson*, 91 N.W.2d 440, 442 (Minn. 1958). This rule of strictly construing restrictive covenants protects the " 'natural right to the free use and enjoyment of property and against restrictions.' " *Godley*, 158 N.W. at 334 (quoting *Schoonmaker v. Heckscher*, 157 N.Y.S. 75, 77 (N.Y. App. Div. 1916)). The question presented here is whether we meant what we said in our previous decisions announced over the last century, and I conclude we did. I would reverse the court of appeals and affirm the district court.

Strictly construing restrictive covenants and documents controlling land use is not new to Minnesota. *See Godley*, 158 N.W. at 334; *see also Int'l Lumber Co. v. Staude*, 175 N.W. 909, 911 (Minn. 1919) (explaining that any ambiguity in a deed should be "resolved in favor of the grantee, and a reservation in favor of the grantor is to be construed more strictly than a grant"); *Kettle River R.R. Co. v. Eastern Ry. Co.*, 43 N.W. 469, 473 (Minn. 1889) (acknowledging that the granting of an exclusive right of way for railroad purposes to a party and its successors or assigns was "in derogation of common right, [and] should receive a strict construction"). We also have regularly applied this rule when evaluating zoning ordinances—holding that a zoning ordinance "should be construed

strictly against the city and in favor of the property owner" and that "any restriction on land use must be clearly expressed." *Chanhassen Ests. Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984); *see Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 172 (Minn. 2006) ("[W]e narrowly construe any restrictions that a zoning ordinance imposes upon a property owner."); *see also* 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 18.04 (4th rev. ed. 1996) ("The consistent emphasis of the courts is upon the right of a landowner freely to use his property unless the limitations upon such use are clearly articulated."). Additionally, a rule of strict construction is not unique to Minnesota as multiple jurisdictions have articulated this rule, or some version of it, and acknowledged that the law favors the free and unrestricted use of property. *See, e.g.*, *Premium Point Park Ass'n v. Polar Bar*, 119 N.E.2d 360, 362 (N.Y. 1954); *Sainani v. Belmont Glen Homeowners Ass'n*, 831 S.E.2d 662, 666 (Va. 2019); *Forrest Const., Inc. v. Milam*, 43 S.W.3d 140, 145 (Ark. 2001); *Smith v. Ledbetter*, 961 So. 2d 141, 145–46 (Ala. Civ. App. 2006); *Cooper River Plaza E., LLC v. Briad Grp.*, 820 A.2d 690, 695–96 (N.J. Super. Ct. App. Div. 2003) (concluding a district court should not resort to extrinsic evidence when a restrictive covenant is ambiguous and subsequent purchasers lacked notice of the restriction).

The principle of protecting the right of a landowner to use property freely arises out of the more fundamental principle of valuing the right to property—a right protected under the constitutions of both the United States and the State of Minnesota. *See* U.S. Const. amend. V; Minn. Const. art. I, § 13; *see also Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063, 2071 (2021) ("The Founders recognized that the protection of private

property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.' " (quoting Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851))). "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. ___, 137 S. Ct. 1933, 1943 (2017).

Moreover, the fact that restrictive covenants may bind subsequent successors highlights the need for a rule of strict construction to appropriately uphold the right to use property freely. *See Cooper River Plaza,* 820 A.2d at 696 (noting that binding a subsequent party to ambiguous terms is "inconsistent with principles of contract law, which require sufficient definiteness of terms so that the performance required of each party can be ascertained with reasonable certainty, as well as knowledge of and acquiescence in the stated terms").

The court acknowledges our law requires the application of the rule of strict construction to ambiguous restrictive covenants. In an effort to implement this longstanding rule, the court uses a procedure that significantly limits, if not practically eliminates, the rule of strict construction. Following a determination that an ambiguity exists, the court would ask the jury to determine the intent of the parties based on whatever external facts and evidence is introduced by the parties, and only then apply a tiebreaker in favor of the party opposing the restriction if the jury cannot determine the intent of the

parties by a preponderance of the evidence.[1] This procedure essentially puts a property owner, who in the circumstances of our dispute here had no voice in the initial negotiations leading to the creation of the restrictive covenants, in the same position as any original party to a regular contract negotiated by parties of relatively equal sophistication and bargaining power. *See Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 693 (Minn. 2018). *Staffing Specifix* recognized that "[i]n cases involving parties of *relatively equal sophistication and bargaining power*, we have always treated *contra proferentem* as a supporting—not deciding—rationale," under which circumstances "extrinsic evidence must be considered before ambiguous terms are construed against the drafter." *Id.* (emphasis added). The court has now extended the tiebreaking rule from *Staffing Specifix*—which serves only a "supporting" role after extrinsic evidence must first be considered—to the context of restrictive covenants irrespective of whether the original party to the contract is now the party disputing the restriction, or whether the property owner was of relatively equal sophistication and bargaining power to the developer. *Id.* This provides minimal protection to property owners and does not adequately protect the right to free and unrestricted property use.

In 1916, we agreed that courts should "naturally lean in favor of the freedom of the property," and a restriction on property must "be construed most favorably to the one

[1] It is worth noting that the district court specifically asked counsel for both parties whether there was any need for a jury, and the parties told the district court there was nothing left for the jury to decide.

against whom [the restriction] is to be enforced." *Godley*, 158 N.W. at 334 (citation omitted) (internal quotation marks omitted).

In *Godley*, the party challenging the restrictive covenant argued that "where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, the doubt should be resolved against the restriction and relief denied." *Id.* at 333. We recognized that "the mere statement that the language of a deed is not free from doubt does not necessitate an order of judgment for defendant." *Id.* at 334. But we stated that "it is undoubtedly the rule that . . . the restriction shall be construed most favorably to the one against whom it is to be enforced." *Id.* (citation omitted) (internal quotation marks omitted). Nowhere in *Godley* did we suggest a role for the jury in interpreting a restrictive covenant. We stated that:

> The primary rule of interpretation is "to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met."

Id. (quoting *Clarke v. Devoe*, 26 N.E. 275, 276 (N.Y. 1891)). The phrase, "by considering such surrounding circumstances," is explained in Williston on Contracts, section 32:7: "Ordinarily, the circumstances surrounding the execution of a contract may always be shown and are relevant to a determination of what the parties intended by the words they chose." 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:7 (4th ed. 2012). Williston then explains that this interpretation does not run afoul of the parol evidence rule because:

> '[S]urrounding circumstances' do not embrace either the prior or contemporaneous collateral agreements of the parties or their understanding of what particular terms in their agreement mean. Rather, the term refers to the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties.

Id.

Thus, the reference to "surrounding circumstances" in *Godley*, aligns with a rule that requires a district court to invalidate a restriction of property if the court interprets the covenant to be ambiguous. Our decision in *Godley* does not require us to apply a weak rule of strict construction, nor do our decisions that reiterated and reaffirmed the rule. *See Costley*, 313 N.W.2d 21; *Mission Covenant Church*, 91 N.W.2d 440. In both *Costly* and *Mission Covenant Church*, we reaffirmed the understanding that the law disfavors restrictions of the use of property. *Costley*, 313 N.W.2d at 26; *Mission Covenant Church*, 91 N.W.2d at 442–43.

The court asserts that the position articulated by the dissent conflicts with our holdings in *Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc.*, 266 N.W.2d 882, 884 (Minn. 1978) and *In re Turners Crossroad Development Co.*, 277 N.W.2d 364, 368–69 (Minn. 1979). I do not agree. We are faced here with a question of first impression; none of the decisions cited by the court or the dissent deal directly with construing an ambiguous provision contained in a declaration establishing protective covenants governing a residential subdivision. *Snyder's Drug Stores* was about a "covenant against competition" in a lease agreement. 266 N.W.2d at 884. We noted that the underlying purpose of this type of covenant is to "protect the lessee from competition." *Id.* at 885. The parties were

sophisticated business entities negotiating with each other over provisions in a commercial lease agreement; here, as is usually the case with traditional real estate covenants restricting residential homeowners from using their own property in various ways, there were no negotiations to be had. *Turners Crossroad* is inapplicable because it dealt with restrictions in an agreement that the district court expressly concluded was not ambiguous. 277 N.W.2d at 369. We do not know what the holding in *Turners Crossroad* would have been with an ambiguous restriction; but at a minimum, our discussion in *Turners Crossroad* does not dictate the court's new method of dealing with ambiguous land use restrictions. *Snyder's Drug Stores* and *Turners Crossroad* simply are not dispositive here.

More generally, it is inapposite to apply contract-oriented decisions like *Snyder's Drug Stores*, *Turners Crossroad*, and *Staffing Specifix* to restrictive covenants purporting to indefinitely control the use of real estate; real estate development declarations are often not classic bargained-for contractual arrangements. Scholars have noted that restrictive covenants like the Declaration in this dispute, present unique challenges. *Cf.* Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & Pol'y 767, 770 (2014) ("The covenants [in common interest communities] are perpetual, non-negotiable contracts of adhesion, bundled with one of the most personal, expensive, and complicated purchases an individual will ever make—the purchase of a home.").

One of the fundamental differences between real estate covenants and general contractual arrangements is disparity in bargaining power. When significant disparities in bargaining power exist and we are faced with interpreting contractual provisions, we have

looked to the relative bargaining position of the parties. *See Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789, 791 (Minn. 2005) (considering disparity in bargaining power for exculpatory and indemnity clauses); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 891 (Minn. 1982) (analyzing bargaining power to determine the reasonableness of a forum selection clause); *Staffing Specifix*, 913 N.W.2d at 693 (considering the sophistication and bargaining power of the parties for applying the canon of *contra proferentem*, the rule in which ambiguous contract terms are construed against the drafter). Interpreting an ambiguous real estate restriction in a recorded real estate covenant for a residential subdivision in favor of the homeowner who had no opportunity to negotiate *any* of the terms binding that property owner is consistent with what we said in *Godley*, that a restriction on property must "be construed most favorably to the one against whom [the restriction] is to be enforced." *Godley*, 158 N.W. at 334 (citation omitted) (internal quotation marks omitted). Such an interpretation is also consistent with the unique features of recorded declarations imposed by the original developer. *Cf.* Boyack, *supra*, at 796 (arguing that declarations in common interest communities are adhesion contracts); Stewart Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. Rev. 273, 277–78 (1997) ("Most common interest communities are created by a single developer, not by agreement among neighboring landowners."); Uriel Reichman, *Residential Private Governments: An Introductory Survey,* 43 U. Chi. L. Rev. 253, 286 (1976) (noting that "the developer possesses nearly

absolute control over the community").[2] Given the unique challenges and values presented by restrictive covenants like the Declaration in this covenant, a different rule of interpretation is necessary than that for general contractual arrangements.

We have already recognized this need to strictly construe contracts involving unique contracting situations in the context of contracts containing indemnification and exculpatory clauses. Automatically construing ambiguous indemnification and exculpatory clauses against the party benefitting from the exemption overrides typical rules of contract interpretation because of the first principles at play in those circumstances—the law's disfavor in exonerating a party from liability. *See Dewitt v. London Rd. Rental*

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[2] The adhesive nature of this "contractual" relationship is illustrated by some of the specific provisions in the recorded Declaration Establishing Protective Covenants governing the lot and home owned by the Breyfogles. Those provisions included restrictions that stated:

> The Declarants, for the benefit of the land described on said Exhibit "A" and its present and future owners, hereby imposes upon the land described on Exhibit "A", the following conditions, restrictions, covenants and charges which shall run with the land and be binding upon and inure to the benefit of the owners thereof, their heirs, successors, administrators, grantees, assigns, mortgagees and lessees for a period of time as described in paragraph 20 below.

Paragraph 20 states:

> The above covenants, conditions and restrictions shall run with the land and be binding upon all *parties and persons claiming by, through, and under them. The Declarants shall remain in control* of the Covenants as long as Declarants have any ownership interest in the land described in Exhibit "A" and until Declarants have received full and final payment thereof. Thereafter these covenants shall renew automatically for successive periods of five (5) years unless within thirty (30) days before or after anniversary date of any of the aforementioned renewals, the then owners of at least 60% of the lots execute, sign and file an agreement to the contrary.

Ctr., Inc., 910 N.W.2d 412, 416 (Minn. 2018) (applying a rule of strict construction to an ambiguous indemnification provision because "we disfavor agreements seeking to indemnify the indemnitee for losses occasioned by its *own* negligence" (citation omitted) (internal quotation marks omitted)); *Solidification, Inc. v. Minter*, 305 N.W.2d 871, 873 (Minn. 1981) (applying a rule of strict construction to exculpatory clauses); *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 705 (Minn. 2013) ("We resolve ambiguous terms against the insurer, and construe such terms in favor of providing coverage to the insured.").

Similarly, we recently invalidated language in an exculpatory clause that clearly prohibited "any and all claims" simply because the "negligence" of the operator was not included. *Justice v. Marvel, LLC*, 979 N.W.2d 894, 901–02 (Minn. 2022). We acknowledged "that 'strict construction' in one sense means resolving ambiguity by adopting 'the narrowest, most literal meaning of the words without regard for context and other permissible meanings.' " *Id.* at 901 (quoting *Strict Interpretation*, *Black's Law Dictionary* (11th ed. 2019)). But we then applied an even more stringent rule of strict construction than the one advocated here by holding that "an exculpatory clause must use specific, express language that clearly and unequivocally states the contracting parties' intent," *regardless of whether the language is unambiguous*. *Id.* (citation omitted) (internal quotation marks omitted). A dispute involving an ambiguous restrictive real estate

covenant is no different—limitations on the use of property, like exonerating a party from liability, is not favored in the law, and thus compels a rule of strict construction.[3]

Property rights inure not only to the wealthy and powerful, but also to the highly leveraged first-time owner of a townhouse in a modest neighborhood; the former is well-positioned to endlessly litigate ambiguous terminology under the formula proposed by the court, the latter not so much.

Concluding that an ambiguous restrictive real estate covenant is not enforceable does not cast doubt upon the validity of restrictive covenants. Covenants imposing restrictions upon the use of property "will be given the full force and effect intended by the parties who created them, and where the language used is clear and unambiguous it will be given its obvious meaning." *Klapproth v. Grininger*, 203 N.W. 418, 419 (Minn. 1925) (citing *Godley*, 158 N.W. 333). But a restriction on the use of property may only be applied when the restriction is clear and unambiguous.

The court is rightly concerned with maintaining consistency in the manner in which we interpret and enforce contracts. I share that concern. Here, however, given legal principles protecting real property rights that predate the current dispute by more than a century and the nature, extent and adhesion characteristics of recorded real estate

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[3] The court claims that reliance on the exceptions pertaining to indemnification and exculpatory clauses is misguided because those exceptions protect a "weightier" public interest. "Weightier" is in the eye of the beholder; property interests are protected by both the state and federal constitutions, a protection not enjoyed by contractual indemnity and exculpatory provisions. *See* U.S. Const. amend. V; Minn. Const. art. I, § 13.

covenants, I would reverse the court of appeals and affirm the district court. The district court properly handled the interpretation of the restrictive covenant.

Because the restrictive covenant is ambiguous, the Breyfogles are entitled to summary judgment as provided by our rule of strict construction in the context of restrictive covenants governing the use of, and that run with, the land.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.