COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP701 **Cir. Ct. No. 2008CV221**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HAWK'S LANDING HOMEOWNERS ASSOCIATION, INC. AND RICHARD S. WILLIAMS,

PLAINTIFFS-RESPONDENTS,

V.

KATHLEEN S. COX AND KIMBERLY C. WHALEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal concerns a dispute between the owners of a home in a subdivision and the Homeowners Association over a floodlight on a pole on the backyard sports court. The circuit court granted a

partial summary judgment against the homeowners, and, after a trial to the court, the court entered judgment ordering the homeowners to remove the light. The issues on appeal are: (1) Did the circuit court err in construing the Declaration of Covenants, Restrictions, and Conditions to require approval of the light by the architectural control committee of the Association? (2) Did the circuit court apply an incorrect legal standard or erroneously exercise its discretion in granting in part the motion in limine? (3) Did the circuit court apply an incorrect legal standard and make clearly erroneous factual findings in determining that the committee's denial of approval of the light was consistent with the Declaration and reasonable? (4) Did the circuit court correctly award attorney fees to the prevailing lot owner under the Declaration? (5) Should we exercise our discretionary power of reversal on the ground the real controversy has not been fully tried?

¶2 We resolve the first four issues by concluding that the circuit court did not err or erroneously exercise its discretion on any of these points. We decline to exercise our discretionary power of reversal because the real controversy has been fully tried. Accordingly, we affirm.

BACKGROUND

¶3 The Hawk's Landing Golf Club subdivision consists of 372 single family lots. It also contains one mixed-use site, a golf course, clubhouse, pool, and tennis courts, and these are segregated from the single family lots. The lots in the subdivision are subject to a Declaration of Covenants, Restrictions and Conditions ("Declaration"), which provides for the creation of a Hawk's Landing Homeowners Association made up of every lot owner. The Declaration also establishes an architectural control committee made up of three persons elected by a majority of persons holding title to any lot. After the developer ceases to have

title in any lot, this committee is charged with reviewing all building plans, specifications, site plans and landscape plans.

¶4 Kathleen Cox and Kimberly Whalen ("the homeowners") purchased a lot in the Hawk's Landing Golf Club subdivision, and on April 28, 2006, prior to completion of their house, they submitted a landscaping plan to the committee. The plan included, among other things, a 30-by-60-foot backyard sports court illuminated by a floodlight. The homeowners faxed additional information about the proposed light, indicating that it would be a sixteen-inch square box, with a 400-watt lamp, mounted on a seventeen-and-one-half-foot pole. On May 16, 2006, the committee approved the plans with some exceptions, one of which was that "[t]he lighting for the sports court will not be approved." The homeowners proceeded with the construction of the sports court without the floodlight.

¶5 In September 2007, the homeowners installed a three-light fixture, mounted on top of a freestanding seventeen-foot pole that was in the same location as that shown on the original landscape plan. The Association demanded that the homeowners immediately cease using the light at night and have the light and pole removed. When the homeowners did not do that, the Association and Richard Williams, president of the Association and owner of a lot, brought this action alleging that the homeowners had violated the Declaration by installing the floodlight on a freestanding pole without the committee's approval. The complaint sought an injunction preventing the homeowners from using the light, an order requiring that the light be removed, and attorney fees and costs under the Declaration.

¶6 The Association and Williams (the plaintiffs) moved for summary judgment, which the homeowners opposed on the ground that they had not

violated the Declaration. In addition, the homeowners moved for partial summary judgment on two grounds: (1) the Declaration did not give the authority to the committee to disapprove of the light on a pole; and (2) even if the committee had that authority, there had been approval by default under the terms of the Declaration because the committee did not follow the required procedure and its decision was untimely. That default approval, they contended, included the light they installed in 2007.

¶7 The circuit court rejected the homeowners' contention that the Declaration did not give the committee the authority to disapprove of a floodlight on a freestanding pole on a sports court. It also concluded that, based on the undisputed facts, there was no default approval of the light proposed in the initial plan but that was irrelevant because the undisputed evidence was that the light installed in 2007 was not the same light for which the homeowners requested approval in 2006. The court therefore granted summary judgment against the homeowners on these defenses. However, the court concluded there were material factual disputes on whether the committee acted reasonably in denying approval, post-installation, of the light installed in September 2007. Specifically, the court pointed to evidence submitted by the homeowners that other lights in the subdivision had been approved on poles that are as tall or are as obtrusive as the light they installed and that their light does not significantly impact their next-door neighbor. The court therefore denied the plaintiffs' motion for summary judgment and held a trial to the court on the issue of the reasonableness of that denial.

¶8 Before trial, the plaintiffs filed a motion in limine asking that the homeowners be precluded from introducing evidence either on the timeliness or the reasonableness of the 2006 decision. The circuit court granted the motion in part. The court reasoned that, because the installed light was not the same light as

the one proposed in 2006, any evidence about the procedural deficiencies and possible resulting approval by default in 2006 was irrelevant to the denial of approval of the light actually installed. However, the court decided, evidence on the reasonableness of the 2006 denial might be relevant to the reasonableness of the 2007 denial and it declined to grant that portion of the motion.

¶9 After a trial to the court, the court determined that the committee's decision was based on the evidence and consistent with the Declaration and that the committee acted reasonably and not arbitrarily. The court determined that the pole could remain on the sports court but it enjoined the homeowners from using the light and ordered that the light be removed within sixty days. The court also ordered the homeowners to pay the Association $48,551.21 in attorney fees and costs under the terms of the Declaration. The court denied the homeowners' motion for a new trial, and ordered the homeowners to pay Williams an additional $4,593.75 for attorney fees and costs for this motion.

DISCUSSION

¶10 On appeal the homeowners contend: (1) the Declaration does not authorize regulation of the floodlight; (2) the court erroneously exercised its discretion in partially granting the motion in limine; (3) the court's determination after trial in favor of the plaintiffs was based on an incorrect legal standard and clearly erroneous factual findings; (4) the court erred in awarding attorney fees under the terms of the Declaration; and (5) the real controversy was not fully tried.

I. Committee's Authority to Regulate the Floodlight

¶11 The first issue we address is whether the Declaration requires that the homeowners obtain approval from the committee for a floodlight on a

seventeen-foot pole on the sports court. Although our analysis differs somewhat from that of the circuit court, we agree with the court's conclusion that the Declaration requires committee approval.

¶12 The interpretation of a restrictive covenant is a question of law that we review independently of the trial court. ***Zinda v. Krause***, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995). We construe restrictive covenants strictly in favor of the free use of property, meaning that, in order to be enforced, a restriction must be unambiguous. ***Crowley v. Knapp***, 94 Wis. 2d 421, 434-35, 288 N.W.2d 815 (1980) (citations omitted). "If the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. By intent we do not mean the subjective intent of the drafter, but the scope and purpose of the covenant as manifest by the language used." ***Zinda***, 191 Wis. 2d at 166 (citations omitted).

¶13 Applying these principles, we conclude the Declaration plainly requires approval by the developer or the committee for a light on the sports court on a freestanding seventeen-foot pole.

¶14 Section 1.02 of the Declaration plainly states that "no building or other improvement shall be erected, placed or altered on any Lot until its construction plans and specifications shall have been approved in writing by the … Committee." The following portion of section 3.03 reinforces the statement in section 1.02 that no building or improvement may be either erected in the first instance or altered without committee approval:

> If such plans and specifications are not rejected, then the Owner of the Lot shall make any improvements or alterations in strict accordance with the submitted documents. All changes to such plans and specifications

> must be resubmitted to, and approved by, the Committee ….

¶15 We see no ambiguity in the meaning of "improvement" when applied to a sports court. Indeed, the homeowners do not argue that the sports court is not an improvement. Their argument is that the light is not an improvement. However, the plans and specifications for the sports court showed a light on a seventeen-foot pole. The only reasonable construction is that the light on the pole is part of the improvement that is the sports court. Thus, the light that was initially proposed had to be approved by the committee before being installed and, if a different light than that originally proposed was desired, then that had to be approved before installation.

¶16 The homeowners contend that the light cannot be subject to approval by the committee because the criteria for approval in sections 3.01 and 3.02—"quality of workmanship and materials, harmony of exterior design including exterior colors, size, location with respect to topography, and finish grade elevation in relation to the street elevation and the finish grade of adjacent structures and Lots"—is not applicable to a floodlight on a pole. We disagree. A floodlight on a pole on a sports court may be judged as to quality of workmanship and materials and "harmony of exterior design including exterior colors, size, location with respect to topography …." Section 3.01.[1]

[1] Section 3.01 of the Declaration provides in full:

(continued)

¶17 In addition, the general purpose statement of the Declaration, section 1.01, gives further definition to the applicable criteria in section 3.01. Specifically, as relevant here, the purposes of "preserv[ing] and maintain[ing] the natural beauty of the Subdivision … guard[ing] against the erection … of poorly designed or proportioned structures, [and] obtain[ing] harmonious improvements and use of material and color schemes" are considerations the committee is to take into account in evaluating the categories specified in section 3.01, both for improvements and alterations to improvements.[2]

> By the Developer. For all buildings erected or placed on any Lot, the plans, specifications, site plans and landscape plan must be submitted to the Developer, or the Developer's duly sworn authorized agent, or the Developer's successors and assigns, and be approved in writing by same as to quality of workmanship and materials, harmony of exterior design including exterior colors, size, location with respect to topography, and finish grade elevation in relation to the street elevation and the finish grade of adjacent structures and Lots, prior to commencement of any construction on any Lot.

Under section 3.02, "[a]fter the Developer ceases to have any title to any Lot, the plans, specifications, and site plans" must be submitted to the architectural control committee for "approval in writing by a majority of said committee as to all of the items enumerated in the preceding paragraph." There is no dispute that in this case any required submissions were to be to the committee rather than the developer.

[2] Section 1.01 of the Declaration provides in full:

> General Purpose. The general purpose of this Declaration is to help assure that the Subdivision will become and remain an attractive community; to preserve and maintain the natural beauty of the Subdivision; to ensure the most appropriate development and improvement of each Lot; to guard against the erection thereon of poorly designed or proportioned structures, to obtain harmonious improvements and use of material and color schemes; to ensure the highest and best development of the Subdivision; and to encourage and secure the construction of attractive structures thereon.

¶18 We do not agree with the homeowners that the absence of an express reference to lights in the Declaration requires construing the Declaration not to regulate them. The "strict construction" rule for restrictive covenants does not mean that "a restrictive covenant is enforceable only as to those activities specifically enumerated in the covenant itself. Rather, … where the purpose of a restrictive covenant may be clearly discerned from the terms of the covenant, the covenant is enforceable against any activity that contravenes that purpose." ***Zinda***, 191 Wis. 2d at 167. The same reasoning applies to the regulation of improvements and alterations to improvements. Because the purposes for regulating improvements are clearly discerned from sections 3.01 and 1.01, neither each improvement nor each feature of the improvement subject to regulation must be specified.[3]

II. Motion in Limine

¶19 The homeowners contend the circuit court employed an incorrect legal standard in granting the plaintiffs' motion to preclude evidence at trial on the defense that the light had been approved in 2006 by default. They assert that, because summary judgment was denied, the circuit court erred in relying on rulings it had made in the summary judgment context that the 2006 denial had

[3] Because we conclude that Sections 1.01, 1.02, 3.01, 3.02 and 3.03 plainly provide that a floodlight on a freestanding pole on a sports court must be approved under those sections, we do not address the plaintiffs' argument that section 3.07 requires this. That section provides:

> Alterations. No alteration in the exterior appearance of existing buildings, including but not limited to exterior remodeling and the construction of patios, decks, fences, and swimming pools, shall be made without the prior written approval of the Developer or the Committee, whichever is then applicable.

been timely and that the light installed in 2007 was not the light proposed in 2006. The homeowners rely on ***Holzinger v. Prudential Insurance Co. of America***, 222 Wis. 456, 269 N.W. 306 (1936), and ***Burkes v. Klauser***, 185 Wis. 2d 308, 517 N.W.2d 503 (1994).

¶20 The decision to grant or deny a motion in limine is committed to the discretion of the court, and we affirm if the circuit court applied the correct law to the facts of record and reached a reasonable result. ***Grube v. Daun***, 213 Wis. 2d 533, 542, 570 N.W.2d 851 (1997). Whether a circuit court applied the correct legal standard in exercising its discretion is a question of law, which we review de novo. ***Garfoot v. Fireman's Fund Ins. Co***., 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999).

¶21 We conclude that ***Holzinger*** and ***Burkes*** are not applicable here. ***Burkes*** holds that if there are disputed issues of fact as to whether a state official is entitled to qualified immunity on a claim under 42 U.S.C. § 1983, the proper procedure is to proceed to trial on the merits, not to hold an evidentiary hearing on the qualified immunity defense. ***Burkes***, 185 Wis. 2d at 329 (citation omitted). In this context, the court explained that the denial of summary judgment on the qualified immunity defense would not preclude raising that issue at trial. ***Id.*** ***Burkes*** and the federal cases the court cites are focused on the unique relationship between the procedure for establishing a qualified immunity defense and for establishing the merits of claims. They do not provide any guidance in this context.

¶22 In ***Holzinger*** there was a trial after a denial of summary judgment and one of the arguments of the appellant was that the circuit court had decided

the issue on appeal in denying the motion for summary judgment. The court rejected this argument, stating:

> The question presented for determination on the motion for summary judgment is whether judgment shall be entered upon the record as it stands. The denial of the motion makes a trial necessary, and the motion for summary judgment drops out of consideration. On a motion for summary judgment, the court does not try the issues,—it merely decides whether there is an issue for trial.

Holzinger, 222 Wis. at 461.

¶23 There are no facts in ***Holzinger*** on the specifics of the summary judgment motion, but it does not appear that the procedural posture there was similar to that in this case. The homeowners here moved for partial summary judgment on two defenses: that the Declaration did not require approval and, alternatively, that there was a default approval of the light actually installed. In other words, the homeowners were asserting that, as to these two defenses, there were no issues of disputed fact and they were entitled to judgment as a matter of law. The circuit court did not "find facts" but, rather, agreed with the homeowners that the facts on these two defenses were undisputed. However, it ruled as a matter of law that the undisputed facts did not establish either defense. The court did not deny summary judgment on these defenses but, in effect, it awarded summary judgment on these defenses to the plaintiffs. *See* WIS. STAT. § 802.08(6) (2007-08)[4] (court may grant summary judgment to non-moving party). The court *denied* summary judgment on the *plaintiffs*' claim because there were factual disputes on the propriety of the Association's disapproval of the light actually

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

installed. ***Holzinger*** does not provide support for the proposition that, after asking for summary judgment on particular defenses and having the court agree there are no disputed facts and rule as a matter of law in favor of the other party, the defendant may present at trial additional evidence in support of those defenses.

¶24 Because the homeowners do not provide authority or a developed argument that takes into account their own motion for partial summary judgment, we are not persuaded that the court was required to allow them to present additional evidence on those defenses at trial. Nonetheless, at the hearing the court did give the homeowners the opportunity to identify specific additional evidence that showed the light proposed in 2006 and the light installed in 2007 were the same. The court reasoned that, if the lights were not the same, then the additional evidence the homeowners wanted to submit on the deficiencies in the 2006 procedure to show a default approval was irrelevant. This is logical and based on a correct reading of the Declaration. Section 3.03 requires that, after approval, the improvements and alterations must be made "in strict accordance with the submitted documents."

¶25 However, the homeowners' response was not to describe or produce specific evidence that showed the lights were the same but instead to explain their theory that it did not matter which light the homeowners had described in their fax to the committee. We do not agree with the homeowners' assertion that they were prevented from describing or producing the evidence sought by the court because of interruptions by opposing counsel and the court. The court was attempting to get the homeowners' counsel to focus on the point the court identified as critical in the court's analysis, while counsel was apparently attempting to explain a disagreement with that analysis. Based on counsel's responses, it was reasonable for the court to conclude that the homeowners were not describing specific

evidence that showed they had proposed in 2006 to install the light they actually installed. Nothing prevented the homeowners' counsel from requesting clarification if he did not understand what the court was asking for; and nothing in the court's ruling prevented the homeowners from asking the court to reconsider its ruling upon the production of the evidence they believed made the requisite showing. However, it was not until the motion for a new trial, which we discuss later in this opinion, that the homeowners did this.

¶26 We conclude the circuit court did not apply an incorrect legal standard or erroneously exercise its discretion in deciding to grant in part the motion in limine.

III. Determination that Committee's Denial was Reasonable

¶27 In its ruling after trial the circuit court found that the homeowners had not sought approval from the committee for the light they installed in 2007. The court found that, after the light was installed, Williams, president of the Association, asked the committee what their position would be. As the court more fully explained later in denying the homeowners' motion for a new trial, the summary judgment submissions had created the impression that the homeowners had sought approval from the committee for the 2007 light after installing it. After the evidence at trial showed that this had not occurred, the court stated, it could have decided against the homeowners on this ground alone. However, the court decided that this would simply have prompted the homeowners to apply to the committee, which would have denied it, and there would have been a second lawsuit. Because the court had already heard all the evidence at the trial, the court proceeded to decide whether this "hypothetical" denial—that is, the denial the

committee would have given had permission been sought for the installed light—was consistent with the Declaration and reasonable. The court decided it was.

¶28 The homeowners contend that the court employed an incorrect legal standard in concluding that the committee's "hypothetical" denial was reasonable and consistent with the Declarations. According to the homeowners, the court should not have decided if the committee had a reasonable basis for not approving the light installed in 2007 because that is the equivalent of deferring to the committee and is not the correct standard where, as here, the Declaration establishes the criteria to consider.

¶29 The homeowners are correct that, where a restrictive covenant expressly sets forth the criteria for granting or denying approval, those are the exclusive criteria that may be applied. ***Pertzsch v. Upper Oconomowoc Lake Ass'n***, 2001 WI App 232, ¶10, 248 Wis. 2d 219, 635 N.W.2d 829. It is also true that, where a restrictive covenant contains no standards for approval, a refusal must be made in good faith and be reasonable. ***Dodge v. Carauna***, 127 Wis. 2d 62, 66, 377 N.W.2d 208 (1985). However, we do not agree that the circuit court here applied the latter standard instead of the former.

¶30 In making its ruling after trial, the circuit court expressly recognized that the criteria for approving the floodlight on the pole were contained in sections 3.01 and 1.01 of the Declaration. The court stated that, in addition, the decision could not be arbitrary or discriminatory. This requirement, which the court also referred to as one of reasonableness, was stated as an *addition* to the Declaration criteria, not as a substitute for it. The court apparently viewed this additional requirement as appropriate because one of the homeowners' challenges was that it was arbitrary and discriminatory not to grant permission for the light

they installed because other homeowners had equivalent lights. In other words, even if application of the criteria in sections 3.01 and 1.01 might warrant disapproval of a floodlight on a seventeen-foot pole on the homeowners' sports court, the circuit court was *also* requiring that the committee act without arbitrariness or discrimination in arriving at the decision to disapprove.

¶31 The court's findings of fact show that it did not substitute a reasonableness standard for the criteria in the Declaration but instead was considering both:

> Here, I find as a matter of fact that the primary reason that the landscape plan was not approved in 2006 and the landscape plan and the light that was part of it that was installed in 2007 would not have been approved was that that light was not in harmony with the rest of this subdivision. It was in fact the one and only light of its sort located anywhere else in the backyard of a subdivision, a permanent freestanding spotlight 17 feet up in the air. There was nothing like that anywhere else in the subdivision. And because of its size in the backyard, the committee determined that it was poorly designed and it was a poorly proportioned structure. Those are criteria that the committee was entitled to utilize in evaluating this light, and in this instance it was reasonable for the committee to reach that decision. It was not an arbitrary decision.

¶32 We see no reason in logic or in the case law that precludes the circuit court from applying a requirement of reasonableness *in addition* to applying the criteria in the Declaration.

¶33 The homeowners also contend that the court applied a legal standard that is inconsistent with ***Pertzsch***, 248 Wis. 2d 219, ¶¶13-14. There we held that an architectural control committee misconstrued a declaration criteria of "harmony of external design with existing structures" to mean that it could deny approval of a detached boathouse because there was no other such structure in the community.

The proper construction, we held, was that the committee had to compare the specific external design to the design of other existing structures. ***Id.***, ¶14. Important to our analysis was the fact that another provision specifically allowed boathouses with the permission of the committee. *See* ***id.***, ¶17. We do not find ***Pertzsch*** dispositive because of the difference in the language of the declarations. The Declaration here, section 3.01, does not limit "harmony of exterior design" by the modifier "with existing structures," but instead is followed by the broader language, "including exterior colors, size, location with respect to topography." Moreover, there is no language in the Declaration suggesting a specific intent to permit floodlights on poles.

¶34 In addition, the homeowners challenge as clearly erroneous two factual findings: (1) that the lights installed over the backboards of basketball hoops in the neighborhood did not impact on the neighborhood in the same way as did the light installed on the pole on their sports court; and (2) that an important feature of the harmony the committee was trying to maintain was the "open sky" aspect of the subdivision. We reject their arguments.

¶35 As for the first finding, there was ample evidence that the light the homeowners installed illuminated a larger area and was more intrusive than those installed over backboards. As for the second finding, we do not agree that the only support for it was the subjective views of two of the committee members. The court drew the reasonable inference from the layout, natural features, and topography of the subdivision that an important characteristic of the subdivision was an "open sky"; it relied on the evidence of what and how much this light illuminated; and it credited the testimony of the committee members who testified that the location and design of the light caused an illumination that was not in harmony with this important characteristic. This is consistent with the appropriate

role of the circuit court sitting as fact-finder: to weigh the evidence, to decide which reasonable inferences to draw from the evidence, and to assess the credibility of the witnesses. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 128, 588 N.W.2d 346 (Ct. App. 1998).

IV. Attorney Fees and Costs

¶36 Section 9.01 of the Declaration provides that any person "owning any Lot" has standing to bring an action against the persons violating the covenants or restrictions in the Declaration "and the prevailing party shall be awarded reasonable attorneys fees and costs." There is no dispute that Williams is a lot owner and that he has prevailed in this action, along with the Association. The circuit court concluded that he was entitled to attorney fees under this provision.

¶37 The homeowners contend the circuit court erred. Their position is that Williams is not entitled to attorney fees because the reason he joined in the law suit was that the Association cannot recover its attorney fees but he as an individual lot owner can recover his. They assert that, under Wisconsin law, contract provisions providing for attorney fees must do so unambiguously. *See* ***Hunzinger Constr. Co. v. Granite Res. Corp***., 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). In their view this means that, in order for Williams to recover, section 9.01 must expressly state a lot owner may recover attorney fees even though the Association is also bringing the action.

¶38 Whether the language in section 9.01 is ambiguous is a question of law, which we review de novo. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (1987).

¶39 We conclude that section 9.01 is not ambiguous and plainly provides for attorney fees for Williams whether or not the Association is also a party and regardless of Williams' motive in becoming a plaintiff. There is nothing in the language of this section that suggests either of these limitations.

V. Request for Discretionary Reversal

¶40 The homeowners ask that we use our discretionary power of reversal under WIS. STAT. § 752.35[5] and remand for a new trial on the ground that the real controversy was not fully tried. They assert that the real controversy was not fully tried for two reasons. First, they were precluded by the motion in limine from introducing evidence on their position that the light installed in 2007 was approved by default in 2006. Second, there was confusion generated by the court's mistaken impression before trial that the homeowners had sought approval from the committee in 2007 of the light they installed then and that approval was denied.

¶41 Courts have concluded the real controversy has not been fully tried "(1) when the jury was erroneously not given the opportunity to hear important

[5] WISCONSIN STAT. § 752.35 provides:

> Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted). When a party seeks a new trial on this ground, the party need not show a probable likelihood of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The power to grant a new trial when it appears the real controversy has not been fully tried "is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719 (citation omitted). Applying these standards, we decline to exercise our discretionary power of reversal for the following reasons.

¶42 With respect to the evidence excluded by the court's motion in limine, we have already concluded that the court neither erred in the legal standard it applied nor erroneously exercised its discretion. In the homeowners' circuit court motion for a new trial, they submitted the factual materials that, in their view, showed that two types of lights were submitted for the committee's review, and one was the light actually installed. In an affidavit, a consultant on sports courts who was working with the homeowners averred that he was contacted by telephone by one of the committee members, who wanted information on the light that was proposed to be installed. He discussed the two types of lights that were typically installed and told him the homeowners had not made a decision on which to install. After the conversation, he emailed to that member information about those two types of lights. A couple of days later he faxed to the homeowners information on one of the lights. There is no dispute that the fax stated that "[h]ere is the light system we have proposed including light specifications" and that the homeowners forwarded this fax to one of the committee members with the

added note: "[h]ere is some info that might help." There is also no dispute that the light described in this fax was not the one installed in 2007.

¶43 In addressing this aspect of the post-judgment motion, the court determined that: (1) the evidence set forth in the consultant's affidavit was not newly discovered evidence; (2) had the homeowners stated at the hearing on the motion in limine they had evidence to show the light installed was the same as the one proposed to the committee in 2006, the circuit court would have allowed them to present it at trial; and (3) even if they had informed the court of this as late as the day of trial, the court would have considered permitting them to present it after considering any prejudice claimed by the plaintiffs. In addition, the court stated that the consultant's affidavit did not show that the light proposed in 2006 was the light actually installed in 2007 because it is undisputed that the light faxed to the committee by the homeowners was a single-source light and the one installed was a multi-source light.

¶44 We agree with the circuit court that the consultant's affidavit does not show that the light proposed in 2006 was the same as that installed. The fact that the consultant discussed two options with one of the committee members and sent an email is irrelevant because it remains undisputed that the homeowners, who were the ones deciding what type of light to install, sent a fax to the committee depicting and describing a light that plainly has a different design than the light later installed. We also agree with the circuit court, as we have noted earlier, that, because the two lights are different, any evidence of the 2006 procedure showing approval by default is irrelevant.

¶45 As for the court's mistaken pre-trial impression that the homeowners had applied for approval in 2007 and approval had been denied, we do not see how

this caused the real controversy to not be fully tried. The court recognized its mistaken impression as soon as it heard this evidence at trial. Besides the evidence we have addressed in paragraphs 42-44, the homeowners do not explain what evidence was not presented at trial that should have been or what evidence was admitted that should not have been. We are satisfied that the real controversy was fully tried.

CONCLUSION

¶46 We affirm the judgment and the order of the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶47 DYKMAN, P.J. (*dissenting*). What the Hawk's Landing Homeowner's Association wants, and what the majority has given it, is the right of two members of the Association's Architectural Control Committee to tell any of the homeowners who live at Hawk's Landing what improvements they may make on their lot, from a birdhouse to a home. The committee is unlimited in how it determines what is allowed and what is prohibited. Prospective purchasers of a home or a lot in Hawk's Landing have no way to know whether they will be the victims of discrimination in the guise of the committee's purported exercise of discretion. Because the rights of homeowners and the association are governed by a Declaration of Covenants, Restrictions and Conditions, I have appended as an exhibit relevant parts of the declaration.

¶48 I agree with the majority opinion as to one issue. The Cox/Whalen light pole with lights is an improvement. Cox and Whalen's reliance on ***Kohn v. Darlington Community Schools***, 2005 WI 99, 283 Wis. 2d 1, 698 N.W.2d 794, for the appropriate definition of "improvement" is misplaced. The ***Kohn*** court held that bleachers were an "improvement" to real property for the purposes of WIS. STAT. § 893.89 (2007-08).[1] ***Kohn***, 283 Wis. 2d 1, ¶33. That is not significant when determining whether the Cox/Whalen light pole was an improvement for the purposes of the Hawk's Landing Declaration.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶49 The Hawk's Landing Declaration does not define "improvement." While § 1.02 of the Declaration requires that "No building or improvement shall be erected, placed or altered on any Lot until its construction plans and specifications shall have been approved in writing by the Developer or the Committee, whichever is then applicable," that is the last we see of the word "improvement" in the relevant sections of the Declaration. So, we need to look further to see how the association and the majority reach their conclusion that the Cox/Whalen light pole is a prohibited improvement.

¶50 The majority draws much or all of its conclusion from §§ 1.01, 1.02, 3.01, 3.02 and 3.03 of the Declaration, but cites only §§ 1.01, 1.02, 3.01 and parts of 3.02 and 3.03. Section 3.01 cannot be applicable here. Section 3.01 begins: "For all *buildings* erected or placed on any Lot, the plans, specifications, site plans and landscape plan must be submitted to the Developer …." (Emphasis added.) Apparently, the majority considers a light pole to be a building. That cannot be true. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 150 (10th ed. 1993) describes "building" as "a usu. roofed and walled structure built for permanent use (as for a dwelling)." Nobody lives on or in light poles. Nobody contends that the Cox/Whalen light pole is roofed or walled. Were 100 non-legally trained persons shown a light pole and asked what it was, perhaps one of them might answer: "That's a building." Plans, specifications, site plans and landscape plans are associated with buildings, not light poles. Section 3.01 is applicable to buildings, not light poles, and is therefore unhelpful in deciding this case.

¶51 Section 3.02 is of no more assistance. This section refers to "plans, specifications, and site plans," the same words used in § 3.01 to describe what is necessary for buildings. Light poles are not included as structures which must be submitted to the Architectural Control Committee. The only items an applicant is

required to submit are plans, specifications and site plans. As I have explained, these are words applicable to buildings, not light poles. No plan is necessary for a light pole. A light pole is a stick in the ground with a light on top. Specifications are for buildings. No specifications are needed to install a light pole. Buildings have site plans. Light poles can be stuck in the ground anywhere. Putting §§ 3.01 and 3.02 together, it is not reasonable to conclude that these sections were designed to regulate light poles.

¶52 Section 3.03. The majority quotes only a part of a sentence found at the end of § 3.03. Majority, ¶14. But the section begins by describing its applicability: "The plans, specifications, site plan and landscape plan *described in section 3.01* shall be submitted to the Developer or the Committee, whichever is then applicable." (Emphasis added.) I have explained that § 3.01 applies to *buildings*, and that a light pole is not a building. While § 3.01 is long and intricate, it describes a procedure inapplicable to light poles. While the majority's quote of a small part of § 3.03 is accurate, it fails to explain that "strict accordance" refers to § 3.01, which in turn refers to *buildings.*

¶53 So, where are we? The members of the Hawk's Landing Architectural Control Committee were given the power to approve or disapprove the Cox/Whalen light pole with nothing to guide or limit their unfettered whim. Two members of the committee have the unlimited power to control the structures, unlimited by size, shape or use for at least 234 families, a community larger than some villages. The two members can apply their value judgments, prejudices and personal preferences to everyone because the Hawk's Landing Declarations and the majority say they can.

¶54 This ending does not comport with Wisconsin's long held views as to the value of private property. In ***State ex rel. Bollenbeck v. Village of Shorewood Hills***, 237 Wis. 501, 507, 297 N.W. 568 (1941), the court observed:

> Covenants restricting the use of land are construed most strictly against one claiming their benefit and in favor of free and unrestricted use of property; a violation of the covenant occurs only when there is a plain disregard of the limitations imposed by its express words.

(Citation omitted.)

¶55 Recently, our supreme court noted: "Wisconsin public policy also favors the free and unrestricted use of property. In order to accommodate the principle favoring free and unrestricted use of property and the principle favoring individuals' right to freely contract in ordering their own affairs, we generally have said that documents such as the Community Declaration must be expressed in unambiguous language to be enforceable contracts." ***Solowicz v. Forward Geneva Nat'l, LLC***, 2010 WI 20, ¶¶34-35, 323 Wis. 2d 556, 780 N.W.2d 111 (citation omitted). And, "[e]ven at the risk of sanctioning unneighborly and economically unproductive behavior, this court must safeguard property rights." ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶31, 296 Wis. 2d 1, 717 N.W.2d 835.

¶56 Hawk's Landing Homeowner's Association might argue that giving two members of the Architectural Control Committee unlimited authority to exercise their will over all of Hawk's Landing homeowners' improvements is patently unambiguous. But that begs the question. Wisconsin's public policy favors the free and unrestrictive use of property. Only when there is a plain disregard of the limitations imposed by a restrictive covenant can we say that the covenant is violated. But to know the extent of the limitations, we must have

some idea of what is being prohibited. We have no idea. While requiring a light pole limitation or other specific limitations might make a restrictive covenant cumbersome, there should be some way to determine whether the myriad of possible improvements are or are not prohibited. If birdhouses or fixed swing sets are to be prohibited, a lot purchaser should have some idea of this. And if light poles are contrary to the welfare of the community, something short of a lawsuit should be included in the Declaration warning of this. Document drafters are not short of ingenuity; complete documents can be drafted.

¶57 Just as importantly, requiring some sort of limitation on absolute discretion prevents discrimination, either benign or pernicious, in the enforcement of a restrictive covenant. The notion that everyone should be treated fairly and on their merits is accepted by most. Giving unbridled power to two persons making up the majority of an Architectual Control Committee allows any unstated discrimination to avoid oversight. I would discourage this practice.

¶58 Although we have held that covenants lacking objective standards can be reasonable, ***Dodge v. Carauna***, 127 Wis. 2d 62, 66, 377 N.W.2d 208 (Ct. App. 1985), there is a vast difference between the covenant and structure in ***Dodge*** and the covenant and structure here. The ***Dodge*** covenant prohibited "buildings," and we reversed for further findings as to a playhouse elevated about five feet on wooden stilts. ***Id.*** at 63-64, 67-68. Here, the applicable covenants are specific and apply to buildings, not light poles. Only the majority considers a light pole to be a building. It is unreasonable for the majority to say that in cases of ambiguity, ties go in favor of those attempting to prohibit legal behavior. After ***AKG Real Estate, LLC***, and ***Solowicz***, ***Dodge*** cannot be used to authorize arbitrary decisions by architectural control committees. We do not accept arbitrary decisions void of

reasoning in circuit court decisions or in administrative appeals. We should not do so here either.

¶59 I conclude that while a light pole is an improvement, a restrictive covenant must at least give a warning of the improvements sought to be restricted to avoid being ambiguous. Merely writing that an Architectural Control Committee can prohibit any improvement it wants to is not enough. Accordingly, I would reverse the trial court's judgment and order and remand with instructions to dismiss the plaintiff's complaint. But I cannot do that alone, so I am limited to respectfully dissenting.

STATEMENT OF PURPOSE

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1.01. General Purpose. The general purpose of this Declaration is to help assure that the Subdivision will become and remain an attractive community; to preserve and maintain the natural beauty of the Subdivision; to ensure the most appropriate development and improvement of each Lot; to guard against the erection thereon of poorly designed or proportioned structures; to obtain harmonious improvements and use of material and color schemes; to ensure the highest and best development of the Subdivision; and to encourage and secure the construction of attractive structures thereon.

1.02. Architectural Control. No building or other improvement shall be erected, placed or altered on any Lot until its construction plans and specifications shall have been approved in writing by the Developer or the Committee, whichever is then applicable.

ARTICLE II

DEFINITIONS

The following definitions shall be applicable to this Declaration:

Association. The Hawk's Landing Homeowners Association, Inc., a Wisconsin nonprofit, nonstock corporation, its successors and assigns.

City. The City of Madison, Wisconsin.

Committee. The Architectural Control Committee described in Section 3.02.

Declaration. This Declaration of Covenants, Restrictions and Conditions.

Developer. JAKS Investments, LLC, its successors and assigns.

Lot. A portion of the Subdivision identified as a lot on the recorded plat of Hawk's Landing Golf Club, specifically excluding Outlots and specifically excluding lots 69, 70, 286, 322, and 323, which have been dedicated to the City for use as a park, and specifically excluding lots 53, 62, 63, and 117, which Developer intends to develop as multi-family and/or commercial uses, and lots 16, 17, 41, and 234, which Developer intends to develop as part of the Golf Course (as hereinafter defined).

Outlot. Any portion of the Subdivision identified as an outlot on the recorded plat of Hawk's Landing Golf Club.

Owner. The person or persons, including any business organization, having the power to convey the fee simple or land contract vendee's title to a given Lot.

Register of Deeds. Office of Register of Deeds for Dane County, Wisconsin.

Subdivision. The lands platted by the Developer as Hawk's Landing Golf Club, as the same may be expanded from time to time pursuant to Section 8.02.

ARTICLE III

ARCHITECTURAL CONTROL

3.01. By the Developer. For all buildings erected or placed on any Lot, the plans, specifications, site plans and landscape plan must be submitted to the Developer, or the Developer's duly sworn authorized agent, or the Developer's successors and assigns, and be approved in writing by same as to quality of workmanship and materials, harmony of exterior design including exterior colors, size, location with respect to topography, and finish grade elevation in relation to the street elevation and the finish grade of adjacent structures and Lots, prior to commencement of any construction on any Lot.

3.02. Architectural Control Committee. After the Developer ceases to have any title to any Lot, the plans, specifications, and site plans must be submitted to a committee of three persons elected by a majority of persons holding title to any Lot or Lots, for approval in writing by a majority of said committee as to all of the items enumerated in the preceding paragraph. The election of said committee (the "Committee") shall be held annually on the second Monday in January of each year at the site selected by the Developer or the previous Committee. Vacancies created between elections shall be filled by the remainder of the Committee. The Developer may at any time elect to assign to the Committee all of the Developer's approval rights described in this Declaration.

3.03. Procedure. The plans, specifications, site plan and landscape plan described in Section 3.01 shall be submitted to the Developer or the Committee, whichever is then applicable. A submission will not be complete and the fifteen (15)-day approval time set forth below shall not commence until all documents required in this Section have been submitted. All such submissions shall be to Developer at its principal place of business or to such address that the Committee may designate, whichever is then applicable, together with any applicable fee required under Section 3.04. Developer shall then consider such submission, or the chair of the Committee shall then call a meeting of the Committee to consider such submission, whichever is then applicable. Action of the Committee shall be by majority vote of the Committee members present at such meeting. A tie vote on an issue shall be deemed equivalent to rejection. The Committee, with the unanimous written consent of at least two (2) of its members, may take action without a meeting. The Developer or the Committee, whichever is then applicable, may approve, disapprove or approve subject to stated conditions, the plans and specifications. If the Developer or the Committee, whichever is then applicable, conditionally approves the plans and specifications, then the applicant shall be entitled to resubmit such plans and specifications. If the Developer or the Committee, whichever is then applicable, fails to render its decision on the plans and specifications within fifteen (15) days of their submission, or upon any resubmitted plans and specifications within seven (7) days of their resubmission, approval will be deemed to have been obtained and the applicable covenants, conditions and restrictions in this Declaration shall be deemed to have been complied with. If such plans and specifications are not rejected, then the Owner of the Lot shall make any improvements or alterations in strict accordance with

the submitted documents. All changes to such plans and specifications must be resubmitted to, and approved by, the Committee or the Developer, whichever is then applicable.

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3.04. Fees. The Developer or the Committee, by majority vote, shall from time to time adopt a fee schedule designed to defray the Developer's or the Committee's out-of-pocket costs incurred in connection with its review of any plans and specifications or of any resubmission of any such plans and specifications and may be adjusted at any time by the Developer or the Committee.

3.05. Liability. By approval of the plans and specifications submitted to the Developer or the Committee, neither the Developer nor the Committee shall be responsible for obtaining any approval necessitated by ordinances of the City, and neither the Developer nor the Committee gives any opinion or makes any representation that a building built pursuant to the plans and specifications will be structurally sound; or that the plans and specifications meet any city, county or state codes. Neither the Developer nor the Committee shall have any liability to any builder or Lot Owner with respect to the construction of and materials used in any building on a Lot. It shall be the builder and Lot Owner's sole responsibility to obtain all permits for construction of any improvements on a Lot.

3.06. Builders. For each building erected or placed on any Lot, the prime contractor or builder to be hired for construction of such building must be approved in writing by the Developer or the Committee, whichever is then applicable, prior to commencement of construction. The approval of the Developer or the Committee shall not be unreasonably withheld. Such approval may be withheld for reasons such as the proposed contractor's or builder's financial status, business history and prospects, building reputation or any other reason which would be similarly relied upon by a reasonably prudent businessman then developing a neighborhood of quality residential homes.

3.07. Alterations. No alteration in the exterior appearance of existing buildings, including but not limited to exterior remodeling and the construction of patios, decks, fences, and swimming pools, shall be made without the prior written approval of the Developer or the Committee, whichever is then applicable.

3.08. Existing Vegetation. The existing vegetation of each Lot, including trees of a diameter of three (3) inches or greater, shall not be destroyed or removed except as approved in writing by the Developer or the Committee, whichever is then applicable. In the event such vegetation is removed or destroyed without approval, the Developer or the Committee may require the replanting or replacement of same, the cost thereof to be borne by the Lot Owner. All such existing trees shall be protected during construction and preserved by wells or islands and proper grading.

3.09. Elevations. The elevation of a Lot shall not be changed so as to materially affect the surface elevation or grade of the surrounding Lots. A copy of all plot plans showing the elevation of lot corners and the first (1st) floor of the house shall be kept by the Developer or the Committee for the benefit of other purchasers in planning their individual elevations. Violation of the grading plan as submitted shall allow either the Developer or the Committee, whichever is then applicable, or any adjacent neighbor within the Subdivision a cause of action against the