IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

GERALD JOE LAYNE, ET AL. v. PAUL TAYLOR, ET AL.

Direct Appeal from the Chancery Court for Sequatchie County
No. 1754 Jeffrey F. Stewart, Chancellor

No. M1999-021812-COA-R3-CV - Decided May 30, 2000

In this restrictive covenant case, Defendants, the owners of parcels of land in and adjoining a subdivision, appeal the trial court's decision to permanently enjoin the use of restricted lots in the subdivision solely as a means of access to unrestricted property adjoining the subdivision. We agree with the trial court that such proposed use would violate the restrictive covenant prohibiting any use "except for residential purposes" and affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded.

COTTRELL, J., delivered the opinion of the court, in which CANTRELL, P.J., M.S., and CAIN, J., joined.

Everett L. Hixson, Jr., Christine Mahn Sell, Jane M. Stahl, Chattanooga, Tennessee, for the appellants, Paul Taylor, Trustee, and Cindy Garner.

Edward Boring, Pikeville, Tennessee, for the appellees, Gerald Joe Layne, and wife, Beulah Layne; Randell Cady, and wife, Phyllis Cady; Jeffery Harmon, and wife, Kimberly Harmon; U.R. Anderson, Landon Greer, III, Alma Green, Norman Hatfield, and wife, Olivia Hatfield.

OPINION

Gerald Joe Layne, Beulah Layne, Randell Cady, Phyllis Cady, Jeffery Harmon, U.R. Anderson, Landon Greer, III, Alma Green, Norman Hatfield, Olivia Hatfield, and Freddie Hixson (collectively "Plaintiffs") all reside in Sequatchie Valley Estates, a subdivision in Sequatchie County. They filed this action against Cindy Gamer, a realtor who owned lots 14, 14A, and 16 in the subdivision as well as the adjoining "Boyd Property," a forty-seven acre tract outside, but contiguous with portions of, Sequatchie Estates. They also sued Paul Taylor, as trustee and co-owner of the land. The complaint sought an injunction to prevent lots 14, 14A, and 16 from being used for other than residential purposes in violation of a restrictive covenant binding on all lots in the subdivision. The trial court granted the injunction, and Ms. Garner appeals. For the following reasons, we affirm.

Property in Sequatchie Valley Estates was subject to restrictive covenants imposed:

> in furtherance of a plan for the subdivision, improvement, and sale of the land and . . . established and agreed upon for the purpose of enhancing and protecting the value, desirability, attractiveness of the lands and every part thereof.

The most pertinent restriction stated that "no lot shall be used except for residential purposes." Other restrictions regulated dwelling quality and size and prohibited dumping, the creation of nuisances, the use of temporary structures as residences, and the possession of livestock and poultry. The restrictive covenants also stated:

> These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of thirty years from the date these covenants are recorded after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

It is undisputed that these restrictions were in effect when Ms. Garner purchased lots 14, 14A, and 16.

Residences in the subdivision line both sides of its only street, Hill Road, which flows into public roads on either end. The subdivision contains forty-seven lots. Although some residents own more than one lot and use one lot solely for access to their residences, all their property is located within the subdivision.

Ms. Garner owned Heartland Realty. She bought the Boyd property in late 1996 or early 1997 and purchased the three lots in the subdivision later.[1] Much of the Boyd property fronts High Point Ridge Road, a paved public highway. After her initial purchase, Ms. Garner sold three tracts of the Boyd property located along that road to other individuals. Ms. Garner planned to build two houses, one for herself and one for her daughter, on approximately five and one half acres of the remaining Boyd Property which overlooked and adjoined Sequatchie Valley Estates. She intended to incorporate the two residences into the existing subdivision by building a driveway on some portions of lots 14, 14A, and/or 16 to access her property.

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[1]The record contains two quitclaim deeds from Mr. Taylor, as trustee and individually, dated July 10, 1998 conveying to Ms. Garner the Boyd property and lots 14, 14A, and 16. However, another resident of the subdivision, Dan Barker, who owns a number of lots in the subdivision, testified that he sold Ms. Garner lots 14, 14A, and 16. Other records indicate Mr. Barker was the former owner. *See* fn. 3. According to Mr. Taylor, he was a trustee for his mother, who was at one time in partnership with Ms. Garner. The record does not include the original warranty deed conveying the property to any of the parties.

Ms. Garner started clearing the land on which she intended to build her home. To facilitate this, a dirt road was cut from High Point Ridge Road to her home site. Loggers and a bulldozer used the road to clear the land. The timber and debris were removed by way of High Point Ridge Road. Some time after the clearing activity commenced, Plaintiffs circulated a petition expressing their hostility to Ms. Garner's plans and delivered it to her.

In mid-July 1998, Ms. Garner's crew, which was removing stumps from her land, cut through lot 14A to Hill Drive, the main road within the subdivision. Ms. Garner built and graveled an accessway[2] from Hill Drive through lot 14A to a terminus fifty to sixty feet into the Boyd property. Shortly thereafter, Plaintiffs commenced the underlying action seeking an injunction to prohibit Ms. Garner from building a permanent roadway on lots 14, 14A, and 16 in violation of the subdivision restrictions.

A temporary restraining order was issued, and on October 6, 1998, the trial court held a hearing to determine whether to issue a temporary injunction. The court heard testimony from several residents of the subdivision, including one individual who testified that he was able to navigate a two-wheel drive compact car over the length of Ms. Garner's road/driveway. Plaintiffs expressed their concerns that Ms. Garner would use the road to develop the Boyd Property by building a roadway from High Point Ridge Road through to Hill Road, resulting in a decrease in the value of their property and traffic problems. Ms. Garner testified that the sole purpose of the road/driveway at issue was to gain access to her and her daughter's planned residences and not to connect to other tracts on the Boyd Property. She also testified that the planned residences would in every way comply with the subdivision's restrictive covenants and that her building permit contemplated that the homes would be valued at $150,000, much greater than the minimum value included in the subdivision's restrictions. The court converted the TRO to a preliminary injunction. It prohibited Ms. Garner and all others from accessing the Boyd property through her lots in the subdivision pending a hearing on a permanent injunction.

On October 21, 1998, Mr. Taylor moved to dismiss, asserting that he no longer owned the property at issue and, therefore, was not a proper party to the lawsuit.

On October 26, 1998, Ms. Garner obtained preliminary permission from the City of Dunlap Planning Commission to resubdivide the Boyd property and lot 14A, and to incorporate into the subdivision the acreage on which she planned to build her and her daughter's houses.[3] In her

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[2]For obvious reasons, one set of parties prefers to call this accessway a "road," while the other prefers the term "driveway." We use the terms interchangeably because the result of the case is not dependent upon how the accessway is more appropriately characterized.

[3]The minutes of the meeting reflect approval of a motion "to approve preliminary plat to divide the middle lot and make two flag lots of the property of Dan Barker which has been transferred to Cindy Garner." The plat reflects that lot 14A would be divided into 2 lots, each joined with part of the Boyd property adjoining lots 14, 14A, and 16, thus creating two new lots at 3.56

appearance before the Planning Commission, Ms. Garner purportedly agreed to be bound by the subdivision's restrictive covenants.

The case was tried on November 17, 1998 to determine whether a permanent injunction should be entered. Mr. Taylor again sought to be dismissed on the ground that he had no interest in the property since it had been conveyed to Ms. Garner. It was established that the deed transferring the land to Ms. Garner had not been recorded. Ms. Garner testified that she was willing to be bound by the subdivision's restrictions, but admitted that she had not imposed those restrictions on the property through a recorded deed or otherwise. Evidence regarding her application to the Dunlap Planning Commission to include the lots she intended for the two residences in the Sequatchie Valley Estates subdivision was introduced. She also testified she had by deed imposed restrictions on the Boyd property lots she had sold that were stricter than the subdivision's restrictions.

After hearing the evidence, the trial court permanently enjoined Ms. Garner and Mr. Taylor from using the subdivision lots as a roadway or other means of access to the adjoining property. It found that the construction of a road on residential property was not consistent with a residential use of the land. It declined to dismiss Mr. Taylor from the action because at the time of the hearing, Ms. Garner had not recorded the deeds transferring the property to her. This appeal ensued.

I.

Because this case was tried below by the chancellor, our scope of review on appeal is *de novo* upon the record. All findings of fact made by the chancellor come to this court with a presumption of correctness, and, unless we find that the evidence preponderates against these findings, absent an error of law, we must affirm. *See* Tenn. R. App. P. 13(d); *see also Beacon Hills Homeowners Ass'n v. Palmer Properties, Inc.*, 911 S.W.2d 736, 737 (Tenn. Ct. App. 1995).

The issue presented is whether Ms. Garner's proposed use of her lots in the subdivision as a driveway to property outside the restricted subdivision violates the restrictive covenant applicable to those lots.

> Restrictive covenants on real property are to be recognized and enforced according to their terms. *Land Developers, Inc. v. Maxwell,* 537 S.W.2d 904 (Tenn. 1976). Because such covenants hinder the otherwise free use and enjoyment of property, they are to be strictly construed, with all doubts resolved in favor of the free use of one's property. *Parks v. Richardson*, 567 S.W.2d 465 (Tenn. App. 1977); *Land Developers, supra*. Nonetheless, the words of a restrictive covenant should be given a fair and reasonable meaning in order to effectuate the covenant's purpose. *McDonald v. Chaffin,* 529 S.W.2d 54 (Tenn. App. 1975); *see also Benton v. Bush*, 644 S.W.2d 690 (Tenn. App. 1982).

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acres and 2.05 acres each.

LaPray v. Smith, 804 S.W.2d 87, 89 (Tenn. Ct. App. 1990).

This court addressed a very similar situation in *Burnett v. Hamby*, No. 01A01-9610-CH-00452, 1997 WL 716882 (Tenn. Ct. App. Nov. 19, 1997) (no Tenn.R.App.P.11 application filed). In that case, the owner of 100 acres of land adjoining a residential subdivision bought a lot in the subdivision in order to construct a more aesthetic route to his residence, which was located on land bordering, but not within, the subdivision. The subdivision had covenants similar to Sequatchie Valley Estates, including a restriction stating, "No lot shall be used except for residential purposes." As here, residents of the subdivision, fearful the road would be used for development of the adjoining property, sued to enforce the restriction. Although the owner of the 100 acres testified that he had no plans to develop that property, he recorded nothing which would bind him to that testimony and expressed an unwillingness for the court to enter an order restricting use of the proposed road solely for access to his residence. *See Hamby*, 1997 WL 716882 at *2. The trial court concluded that:

> A literal interpretation of the covenants indicate to the Court that the setting aside of a fifty foot easement across the Defendant's [Hamby's] lot and constructing a roadway thereon is contrary to the restrictive covenants. The provisions of paragraph one of the restrictive covenants appear to be very restrictive. While a number of activities may be encompassed by the term "residential purposes" and while this term may not be extremely well defined, it is apparent to the Court that utilization of the lot as a roadway for ingress and egress to land outside of the subdivision is not embraced within the term "residential purposes. . . ."

Id. at *3. This court affirmed, basing its reasoning on the language in the covenant, identical to that at issue here, restricting land use to residential purposes only. This court held that the trial court "correctly found that Hamby's proposed use of the easement would not be for a residential purpose and would therefore violate the restrictive covenant." *Id.* at *7.

In reaching this conclusion, the court relied on a number of Tennessee cases, including *Laughlin v. Wagner*, 146 Tenn. 647, 244 S.W. 475 (1922). In *Laughlin*, the Supreme Court interpreted a restrictive covenant limiting lots on one street (Belvedere) to residential purposes as prohibiting use of a lot on that street for parking or access for two stores on adjacent lots not covered by the restrictive covenant. *Id.* In discussing the *Laughlin* holding, the *Hamby* court stated:

> The Court ruled that the restrictive covenant prevented the Belvedere side of the lot from being used for any purpose incident to a commercial use, including the construction of a driveway into an adjacent commercial lot outside the subdivision. *Id.* at 657-59. The Court permitted the lot to be used for purposes other than the construction of a residence, so long as the use was incident to a residential purpose: "If there be no building at all, [the lot] could be used for

purposes consistent with and incident to its use for residential purposes." *Id.* at 658. The Court concluded:

> From this interpretation it follows that the Belvedere side of this lot could not be made use of in such a way as that the manifest purpose would be to serve the business houses adjacent to it. For example, it could not be used as affording an intentional passageway or entrance into the business house. Any structure, whether strictly a house or not, such as a concrete driveway, which devotes the use of the property to the carrying on of a business, would be violative of this clause, but the use of the lot for decorative purposes, such as flower beds or as a walkway on the lot itself, would not violate the manifest intent and purpose of this clause.
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> In other words, any use of this lot which might be reasonably incident to its use for residential purposes is permissible, but it is not permissible to put the lot into service as an incident to the business houses on the adjacent portion of the lot.
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> *Id*. at 658-59.

Hamby, 1997 WL 716882 at *4-5.

Relying on this language in *Laughlin*, Mr. Hamby argued that his proposed use of the restricted lot for a driveway to his home on unrestricted land was incidental to a residential purpose. *See id.* at *5. The *Hamby* court disagreed, however, and approved the trial court's finding that "the restrictive covenants precluded use of any lot 'for purposes of an easement, roadway, or accessway to other property not bound by the restrictions, separate and apart from the residence located on that lot.'" *Id.* at *7.

This court in *Hamby* relied on *LaPray v. Smith*, 804 S.W.2d at 89, in addressing Mr. Hamby's "incident to a residential purpose" argument. *See id.* at *5-6. In the case before us, Ms. Garner also relied *LaPray*, but her reliance is undermined by the *Hamby* court's analysis of that case.

In *LaPray*, the defendant purchased a lot in a subdivision which had restrictive covenants forbidding use of the lots for anything other than single-family homes and expressly prohibiting use of the property for mobile homes. The defendant's parents owned property immediately adjacent to that defendant's lot, but not in the subdivision. They allowed the defendant to place a mobile home on their property. Thereafter, the defendant knocked a driveway space through the curb running across his lot in the subdivision and began using that lot to access his mobile home. After residents of the subdivision sued, the defendant argued that, under *Laughlin*, his use of the

lot conformed with the restrictive covenants because he was using it as a driveway and front yard to a single-family residence, the mobile home. *See LaPray*, 804 S.W.2d at 89.

The *LaPray* court rejected this argument, observing that "*Laughlin* does not support the Defendant's implied argument that residential use of unrestricted property is the only important concern in determining whether such unrestricted property may be used in conjunction with adjoining restricted property." Finding that the defendant's mobile home did not conform with the restrictive covenants, the court held that, consequently, use of the subdivision's lot as a driveway to that "residence" violated the covenants:

> Just as the *Laughlin* Court did not allow restricted property to be used in conjunction with adjoining unrestricted and non-conforming property, so the present Defendant must not be permitted to subvert the plain restrictions of the White Oak Covenant by using Lot 26 merely as a 'front yard' to unrestricted and non-conforming adjoining property.

Id. at 90.

To the *Hamby* court, *LaPray* stood for the proposition that:

> even if a restricted lot is used to benefit an adjoining residence, that use still may be disallowed if the adjoining residence does not otherwise conform with all the restrictions placed on the restricted lot.

Hamby, 1997 WL 716882 at *6.

Language in *LaPray* that, "[p]erhaps, if the Defendant had both the authority and the willingness to restrict the property outside the subdivision to the same extent as [the subdivision lot] is restricted, a different question would be presented,"[4] led the defendant in *Hamby* and Ms. Garner in this case to argue that because they were willing to subject the property adjoining the subdivision to the same or greater restrictions as those applicable in the subdivision, their driveway use of the restricted lots should be permitted.

This court in *Hamby* found it "noteworthy" that Mr. Hamby had not actually placed his property under the same restrictive covenants as the subdivision. *Hamby* at *6. We note that, just as in *Hamby*, the record fails to show that Ms. Garner has taken concrete action to place the

[4]In *Hamby*, this court noted that the plaintiffs had observed that this statement is *dicta*. Regardless of whether or not it is *dicta*, we are nonetheless presented herein, as was the court in *Hamby*, with a different set of facts from that in *LaPray* and, therefore, a different question from the precise issue addressed in *LaPray*.

Sequatchie Valley Estate restrictions upon her property.[5] The trial court herein found that although Ms. Garner expressed her willingness to be bound by the restrictions of the subdivision, it was "noteworthy that at the time of the trial the Defendant had not recorded her deeds nor had she recorded any restrictions on the five and one-half acres she wants to make part of the subdivision." Again, as in *Hamby*, the defendant here owns sufficient property that, should she decide to use the road at issue as a tool for development of the Boyd property, the present privacy and security the subdivision enjoys could be threatened.[6] *See id.* This court has considered important the privacy and security interests protected by restrictive covenants. *See Proffitt v. Sullivan*, No. 27, 1986 WL 2642 (Tenn. Ct. App. Feb. 28, 1986). In *Proffitt*, the trial court enjoined the defendant from building a road across two lots in a subdivision which restricted the use of its lots to residential uses, even though the road would merely join the two subdivisions. *See id.* at *1. This court affirmed, reasoning "'that using lots as a connecting street could not be considered a residential use, and that such a street would destroy the privacy and security of the restricted subdivision.' *Proffitt*, 1986 WL 2642, at *1-2." *Hamby*, 1997 WL 716882 at *6. Like the *Hamby* court, we find this reasoning "persuasive." *Id.*

Therefore, we agree with the trial court's holding that Ms. Garner's use of her subdivision lots to build a road to her property outside the subdivision would violate the restrictive covenants and is properly enjoined.

II.

Mr. Taylor argues that the trial court erred in refusing to dismiss him as a party because he has no ownership interest in the property at issue. He maintains that the quitclaim deeds transferring the property to Ms. Garner were valid whether or not recorded. The record is somewhat confusing regarding the relationship of Ms. Garner, Mr. Taylor, and Mr. Barker to the

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[5]Ms. Garner points to her efforts before the Dunlap Planning Commission, which she characterizes as her proposal to add her property to the subdivision, "by re-subdividing the lots that she owns in the subdivision to include this property." The record reflects such a proposal and "preliminary approval" by the Commission. Without more, we are not convinced that such application, which could be conceivably withdrawn or disapproved, provides assurance that the two lots in the Boyd property will become part of the subdivision and subject to the restrictive covenants. At the risk of also engaging in *dicta* (see fn.4), we observe that inclusion of the Boyd lots into the subdivision subject to the same restrictive covenants would present a different question.

[6]The record shows that Ms. Garner owned a real estate company, that she had placed restrictions on the use of the lots she sold from the Boyd property through inclusion in the deeds, and that she pursued re-subdividing her lots with planning officials. It follows that she would have some familiarity with the significance of recordation and of the requirements for binding property to restrictive covenants. Furthermore, she was represented by counsel in these proceedings who undoubtedly was familiar with these legal concepts.

real property. The record before us does not include any recorded deed reflecting ownership of the property. However, Mr. Taylor testified that his mother had been in partnership with Ms. Garner in the ownership of both pieces of property, and that he had been appointed as trustee for his mother's interest. He testified to some removal of timber activities on the Boyd property which he authorized and which occurred while he was trustee. The two quitclaim deeds entered in the record were both executed July 10, 1998, and transferred all of Mr. Taylor's interest, individually and as trustee, to Ms. Garner.

The trial court found that Mr. Taylor, as trustee, held title to Lots 14, 14A, and 16 in the subdivision and to the Boyd property. The court also found, "He subsequently transferred his interest as Trustee and individually in these lands to Defendant, Cynthia Garner. At the time of the trial, however, Ms. Garner had not recorded these deeds and the registered title was still in the name Paul Taylor, Trustee."

Immediately after Mr. Taylor's testimony at the November 17 hearing, counsel renewed the motion to dismiss Mr. Taylor. In denying the motion, the trial court stated:

> Well, until they are recorded, I'm going to leave him in as a party because it may be necessary to bind these documents - - bind him as well as her in the event they rescind their agreement before these are recorded, so I'm going to leave him in at this point.

The complaint herein alleged that Paul Taylor, trustee, and Ms. Garner were adult owners of lots 14, 14A, and 16, each lying entirely within Sequatchie Valley Estates. Mr. Taylor's own testimony established that he had owned an interest in the property, as trustee or otherwise. He correctly asserts that the quitclaim deeds were valid, as between the parties, even though not recorded. *See Campbell v. Home Ice & Coal Co.* 126 Tenn. 524, 530, 150 S.W. 427, 428 (1912). However, we cannot disagree with the trial court that, until the deeds are recorded, the plaintiffs herein are entitled to protection from actions of the owners of record. Therefore, we affirm.

III.

For the first time on appeal, Plaintiffs present the issue of whether owners of property outside a restricted subdivision can incorporate their property into the subdivision over the objections of residents of the subdivision. They argue that the Dunlap Planning Commission, which gave preliminary approval to such incorporation, lacked the authority to do so. They also argue that no final approval has been obtained and seem to argue some procedural deficiencies in the Commission's usual course of conduct.

Any action or inaction of the Dunlap Planning Commission is simply not before us for review. Statutory methods of review of such decisions exist, and the case before us was not brought to challenge any action of the Commission. We can find nothing in the record to indicate that the trial court took any position on the validity or effect of the preliminary approval of Ms.

Garner's proposal.[7] The trial court referred to it in the court's discussion of Ms. Garner's willingness to have her property subject to the subdivision's restrictions.

> She has requested to be included in the subdivision by appearing before the Dunlap Planning Commission. Preliminary approval was given at the last meeting of the planning commission, but no final approval had been given at the time of the trial.

This court's task is to review allegations of errors made in the trial court. *See* Tenn. R. App. P. 36; *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991). Issues that were neither raised nor considered in the trial court present us with nothing to review. The record fails to show that plaintiffs raised this issue in the trial court. *See Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 734-35 (Tenn.1991); *Department of Human Servs. v. Defriece*, 937 S.W.2d 954, 960 (Tenn. Ct. App. 1996). Consequently, it is deemed waived on appeal. *See Devorak v. Patterson*, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995).

IV.

Accordingly, the decision of the trial court is affirmed and the case is remanded for such proceedings as are necessary. Costs of this appeal are taxed to Cindy Garner and Paul Taylor, for which execution may issue if necessary.

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[7]Ms. Garner is apparently under the impression that the trial court ruled on her proposal to include the two Boyd property lots in the subdivision, arguing in this court that the subdivision's restrictions do not preclude re-subdividing lots and that the Planning Commission rules allow changing the perimeters of a subdivision. We find nothing in the trial court's judgment or opinion addressing the validity of Ms. Garner's proposal. This lawsuit was not brought as a challenge to a decision by the Planning Commission.