IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 28, 2001 Session

AMY WILSON, JUDITH JOHNSON, AND DANIEL POWELL
v.
WOODLAND PRESBYTERIAN SCHOOL

Appeal from the Chancery Court for Shelby County
No. CH-00-1455-1 Walter L. Evans, Chancellor

No. W2001-00054-COA-R3-CV

This case involves the application of protective covenants in a residential subdivision. The plaintiffs are homeowners in the subdivision. The defendant school is located adjacent to the subdivision and also owns two lots in the subdivision. These two lots are near the plaintiffs' lots. All lots in the subdivision are subject to a protective covenant which limits structures to one or two family dwellings and incidental outbuildings. The school began building a playground on its lots. The plaintiff homeowners filed a lawsuit to enforce the protective covenants. After trial, the trial court ordered the removal of permanent playground equipment but allowed use of movable playground equipment on the school's lots. The school then obtained the approval of a majority of the lot owners in the subdivision of an amendment to the covenants to remove the restrictions from the two lots owned by the school. In light of this, the school filed a motion to modify the judgment. The trial court denied the motion, finding that the amendment was void because it did not apply to all lots within the subdivision. The school appealed. We affirm, finding that the homeowners are not barred from enforcing the protective covenant and that, because the amendment to the covenant was neither applicable to all of the lots subject to the covenant nor approved by nearby affected lot owners, the amendment was invalid.

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

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and DAVID R. FARMER, J., joined.

Saul C. Belz, Robert S. Kirk, and Quitman R. Ledyard, Memphis, Tennessee, for the appellant, Woodland Presbyterian School.

Richard L. Winchester, Memphis, Tennessee, for the appellees, Amy Wilson, Judith Johnson, and Daniel Powell.

OPINION

The Defendant/Appellant Woodland Presbyterian School ("Woodland") is a school located adjacent to the Gates subdivision in Memphis, Tennessee. Woodland also owns two lots, lots 80 and 81, within the subdivision. Plaintiff/Appellees Judith Johnson and Daniel Powell are homeowners who own separate lots in the Gates subdivision which are adjacent to lots 80 and 81. Plaintiff/Appellee Amy Wilson owns a lot in the subdivision located across the street from lots 80 and 81.[1] The covenants for the Gates subdivision provide in pertinent part:

> These covenants are to run with the land and shall be binding on all persons & parties claiming under them until July 1, 1978, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of the majority of the then owners of the lots, it is agreed to change said covenants in whole or in part.
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> * * *
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> No structure shall be erected, altered, placed, or permitted to remain on any residential building plot other than a one or two family dwelling, not to exceed two stories in height, and a private garage for not more than two cars, and any outbuildings incidential (sic) to the residential use of the lot.
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> * * *
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> No noxious or offensive trade or activity shall be carried on upon any lot, now (sic) shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

In 1994, Woodland proposed a plan to construct a driveway on lots 80 and 81 to provide additional access to the school and church, and also proposed to build a playground on the remaining portion of the lots. When the plaintiff homeowners learned that Woodland intended to use the lots as a driveway and a playground, they sent a letter to Woodland advising the school that the proposed plan would violate the subdivision's restrictive covenants. Woodland thereafter abandoned its plans to construct a driveway and playground on lots 80 and 81. Despite this, in 1996, Woodland had the house on lot 81 removed, built a fence around the lot, and placed small, plastic, movable playground equipment on the lot.

In early March 2000, Woodland met with several residents of the subdivision to discuss developing lots 80 and 81 into a permanent playground. The plaintiff homeowners again sent a letter to Woodland expressing concern about the possible construction of a playground. Nevertheless, in early July 2000, Woodland began installing playground equipment. A third letter was then sent to

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[1] Amy Wilson, Judith Johnson, and Daniel Powell will be collectively referred to in this Opinion as "plaintiff homeowners."

Woodland, objecting to the construction of the playground and emphasizing that any expenses incurred by Woodland in the removal of the playground equipment would be "self-inflicted."

On July 27, 2000, the plaintiff homeowners filed a lawsuit against Woodland in chancery court, arguing that the construction of the playground was a violation of the subdivision's protective covenants and, in addition, a violation of Shelby County zoning ordinances. The plaintiff homeowners sought an order enjoining any further construction of the playground, as well as an order requiring the removal of the playground equipment that had already been installed. In its answer, Woodland asserted that the homeowners failed to object to the movable playground equipment used previously and failed to object to the permanent playground until the construction was 80% completed. Based on this assertion, Woodland argued that the plaintiff homeowners' claims were barred under the doctrines of estoppel and laches. Woodland also asserted that the plaintiff homeowners failed to complain about prior violations of the restrictive covenants by other property owners in the subdivision and that their claims were therefore barred by the equitable doctrine of "unclean hands."

A trial was held in September 2000. At the conclusion of the proof, the trial court found that the use of the lots as a playground did not violate the covenant against noxious or offensive activities. However, the trial court also concluded that the construction of a permanent playground violated the covenant restricting the building of structures to one or two family dwellings and incidental outbuildings. The trial court noted that the playground equipment installed by Woodland in July 2000 was brightly colored, embedded in concrete, and towered above the residential structures in the neighborhood. The trial court ordered Woodland to remove the permanent playground equipment but allowed Woodland to continue to use the lots as a playground so long as any playground equipment utilized was of a movable or portable nature.

After this order, Woodland began a campaign to amend the subdivision's protective covenants to exempt lots 80 and 81 from their coverage. The amendment procedures required an affirmative vote from the majority of lot owners in the subdivision in order to amend the covenants. Woodland collected signatures from 54% of the lot owners, none of whom were the plaintiff homeowners, and an amendment to the protective covenants was recorded in the Register's office. The amendment provides:

> The Protective Covenants. . . shall not apply to Lots 80 and 81 in the Gates Subdivision. Provided, however, that this Amendment shall only remain in full force and effect so long as said Lots 80 and 81 in the Gates Subdivision are used by Woodland Presbyterian Church or Woodland Presbyterian School as a playground.

In light of this, Woodland filed a motion pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure to modify the judgment. The trial court found that the amendment was not valid since it was not approved by the adversely affected lot owners, and concluded in addition that, under the amendment procedures, any amendment would not be effective until the end of the 10-year automatic renewal period. Consequently, on December 19, 2000, the trial court entered an order

denying Woodland's motion to modify or amend the judgment. Woodland now appeals from the original judgment as well as the denial of its motion to modify the judgment.

Woodland argues that the trial court erred in several respects. Woodland first argues that the restrictive covenants were abandoned by the homeowners' acquiescence to other nonconforming structures within the subdivision. In addition, Woodland argues that the plaintiff homeowners' claims are barred by the defenses of estoppel, laches, and unclean hands. Woodland also argues that the amendment removing the restrictive covenants from lots 80 and 81 was valid and that the trial court erred in denying Woodland's Rule 59 motion to modify the judgment. Lastly, Woodland argues that the trial court erred in declining to find that an amendment to the covenants adopted in1965 served to remove the restrictions from all lots in the subdivision. The plaintiff homeowners appeal the portion of the trial court's order which allows Woodland to maintain a playground on the lots so long as the playground equipment is movable.

We review the trial court's factual findings *de novo* accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); T.R.A.P. 13(d). The trial court's legal conclusions are reviewed *de novo* with no presumption of correctness. ***Campbell***, 919 S.W.2d at 35.

Woodland first argues that acquiescence to prior violations of the covenants, including purported violations by the plaintiffs, resulted in abandonment of the restrictive scheme and that, therefore, the trial court erred in enforcing the covenants against Woodland. In a similar vein, Woodland argues that the plaintiff homeowners may not seek equitable relief because one "who comes into a court of equity asking its aid, must come with clean hands." ***Brandon v. Wright***, 838 S.W.2d 532, 534 (Tenn. Ct. App. 1992). The record indicates that several lot owners, including some of the plaintiff homeowners, had movable playground equipment on their lots. In addition, Woodland had movable, plastic playground equipment on its lots prior to constructing the new permanent playground in July 2000. Woodland contends that the residents did not complain about these nonconforming "structures," and that therefore the restrictive scheme of the subdivision was abandoned.

The law of abandonment was discussed in ***Scandlyn v. McDill Columbus Corp.***, 895 S.W.2d 342 (Tenn. Ct. App. 1994). ***Scandlyn*** held:

> [I]n order for community violation to constitute an abandonment, it must be so general as to frustrate the object of the scheme with the result that enforcement of the restriction involved would seriously impair the value of the burdened lot without substantially benefitting the adjoining lots. Accordingly, sporadic and distant violations do not in themselves furnish adequate evidence of abandonment, although they may be considered in connection with outside changes.

Id. at 349 (citing 20 Am. Jur. 2d *Covenants, Conditions, Etc.* § 272 (1965)). Thus, in order to establish abandonment, the defendant must show that there were previous violations of the covenants

in which the community acquiesced, and that these violations frustrated the community's restrictive scheme.

Woodland asserts that the only distinction between the playground equipment located on homeowners' lots throughout the subdivision and the playground equipment on Woodland's playground is that Woodland's equipment is not movable. Woodland argues that the definition of a "structure" does not require it to be immovable, and concludes from this that the portable playground equipment on homeowners' lots are also nonconforming "structures." Based on this conclusion, Woodland contends that there was abandonment of the restrictive scheme of the subdivision.

The term "structure" is defined in Black's Law Dictionary as:

> Any construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built or constructed; an edifice or building of any kind.
>
> A combination of materials to form a construction for occupancy, use or ornamentation whether *installed* on, above, or below the surface of a parcel of land.

Black's Law Dictionary 1424 (6th ed. 1990) (emphasis added). Under this definition, a "structure" requires installation "on, above, or below the surface of a parcel of land." The trial court held that Woodland's playground equipment "constitutes . . . a structure because it is firmly affixed in concrete footing, and it is an immovable object." We find no error in this conclusion. Moreover, the plastic, portable playground equipment used by homeowners, as well as by Woodland, are not "structures." Therefore, the use of such portable playground equipment by homeowners is not a violation which can be the basis for finding abandonment of the subdivision's restrictive scheme. Likewise, the homeowners' use of backyard portable playground equipment provides no basis for Woodland's "unclean hands" defense.

Woodland next contends that the plaintiffs' lawsuit was barred by the defenses of estoppel and laches. Woodland asserts that, "rather than waiting until Woodland spent a quarter of a million dollars constructing the playground center and then suddenly running to the courthouse, the Plaintiffs should have brought this action back in 1996, when Woodland began operating a playground and maintaining moveable playground equipment on Lot 81."

The right to enforce a restrictive covenant may be forfeited by waiver or estoppel. In ***Scandlyn***, cited above, this Court held:

> The right to enforce a restrictive covenant may be lost . . . "where, by failing to act, one leads another to believe that he is not going to insist upon the covenant, and such other person is damaged thereby, or whereby landowners in a tract or subdivision fail to object to general

> and continuous violations of restrictions. If the party entitled to the benefit of the covenants in any way by inaction lulls suspicion of his demands to the harm of the other or if there has
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> been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse aid."

Scandlyn, 895 S.W.2d at 349 (quoting 20 Am. Jur. 2d *Covenants, Conditions, Etc.* § 273 (1965)).

In this case, the plaintiff homeowners sent three separate letters to Woodland officials beginning in 1994, informing them that the proposed playground was a violation of the restrictive covenants and that they would "take whatever legal steps are necessary." Any failure by the plaintiff homeowners to object to small movable playground equipment is inapposite since such equipment did not violate the restrictive covenant. Under these circumstances, Woodland's assertion that it was "lulled" into spending considerable sums installing permanent playground structures, embedded in concrete and "towering above" nearby homes, must be deemed fallacious.

Woodland also asserts the defense of laches. The doctrine of laches requires that a party seeking equitable relief assert his claim without unexcusable delay. ***Archer v. Archer***, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). Despite letters from the homeowners dating back to 1994, Woodland asserts that the homeowners were required to actually file suit prior to Woodland beginning installation of the permanent equipment. However, the plaintiffs' claim did not arise until construction of the permanent playground began in July 2000. The plaintiffs filed their claim shortly thereafter. Under these circumstances, the defense of laches would not bar the plaintiffs' claim.

Woodland next argues that the trial court erred in denying Woodland's Rule 59 motion to modify the judgment because an amendment to the covenants was adopted removing the restrictions from Woodland's lots. The amendment to the covenants was adopted by 54% of the lot owners, removing the restrictions from lots 80 and 81. The trial court found that the amendment was invalid because it did not apply uniformly to all lots within the subdivision and, in addition, the amendment could not become effective prior to the expiration of the 10-year automatic renewal period.

The parties agree that the issue of whether a restrictive covenant can be amended only as to individual lots within the area covered by the covenant is an issue of first impression in Tennessee. In support of its argument, Woodland cites Tennessee Code Annotated § 66-9-401 (1993), which provides: "Any waiver of a restrictive covenant applicable to a subdivision lot, when granted for a specifically named business, shall be effective as a waiver for any other business, regardless of name, which operates substantially the same type of business as the business for which the waiver was originally granted." Woodland argues that this statute permits the waiver of a restrictive covenant as to a particular lot within a subdivision. However, while the statute appears to allude to the waiver of a restrictive covenant for an individual business within the area covered by the covenant, it does not authorize such a waiver, and certainly does not address whether a non-uniform amendment may be adopted without the approval of lot owners who are adversely affected.

In this case, the trial court found that "it would be unfair and inequitable for the Court to allow owners who are not within immediate proximity of the subject lots to make decisions that adversely impact on the adjacent homeowners and not themselves." The trial court's reasoning is consistent with the Restatement (Third) of Property, which provides: "Amendments that do not apply uniformly to similar lots or units . . . are not effective without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be made." Restatement (Third) of Property: Servitudes § 6.10(2) (2000).

Courts from other jurisdictions addressing this issue are somewhat divided, but a clear majority require that, unless the amendment provisions provide otherwise, an amendment which applies to less than all lots must have either unanimous approval or, at least, approval of the adversely affected lot owners. ***See*** Patrick A. Randolph, *Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations?* 38 Santa Clara L. Rev. 1081, 1105 (1998) ("For the most part, the trend appears to integrate these [amendment] provisions narrowly in order to protect individual expectations of a uniform scheme from alterations effectuated by less than a unanimous group of homeowners."); ***La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz.***, 689 P.2d 178, 182 (Ariz. Ct. App. 1984) ("[I]f all of the landowners joined in an amendment it need not have a uniform effect."). ***But see Arthur M. Deck & Assocs. and NFM, Inc. v. Crispin***, 888 S.W.2d 56, 62 (Tex. Ct. App. 1994) (finding that, because the three subject lots were substantially different from other lots within the subdivision, amendments affecting only those three lots were valid).

For instance, in ***Licker v. Harkleroad***, the Georgia Court of Appeals dealt with a provision that allowed the covenants pertaining to a residential subdivision to be amended by a vote of "not less than 90 percent of the lot owners." ***Licker v. Harkleroad***, 558 S.E.2d 31, 33 (Ga. Ct. App. 2001). Ninety percent of the lot owners voted to amend the covenants in order to allow the defendants to construct a parking lot on three of the residential lots. ***Id.*** at 32. Several affected dissenting residents of the subdivision filed suit, asserting that the amendment was invalid because it did not apply uniformly to all lots in the subdivision. The Court initially noted that any ambiguity in the restrictive covenants should be construed "in favor of upholding the intent to create a residential use development with restrictions applicable to all lots." ***Id.*** at 34. The Court held "that amendments that remove the restriction against commercial use from less than all the lots are not valid without the consent of the adversely affected property owners." ***Id.*** (citing Restatement (Third) of Property (Servitudes) § 6.10(2) (2000)). Consequently, since the amendment was not approved by the affected property owners, it was invalid. ***Id.*** at 35-36. ***See also Lakeshore Estates Recreational Area, Inc. v. Turner***, 481 S.W.2d 572, 575 (Mo. Ct. App. 1972) (finding that "[t]he release of that right [to enforce covenants against other lot owners] may not be altered without their consent or its alteration in such a way as to be uniform as to all of the affected property").

In this case, the procedures for amending the protective covenants do not apprise purchasers that amendments to the covenants may apply in a non-uniform manner to lots within the subdivision. The amendment at issue here does not apply uniformly to all of the lots in the subdivision. Finally, since at least one of the property owners adversely affected by the proposed amendment is a plaintiff

in this suit and did not approve the amendment, it is clear that the amendment did not receive the approval of members of the subdivision "whose interests would be adversely affected. . . ." Restatement (Third) of Property: Servitudes § 6.10(2) (2000). Under these circumstances, we must agree with the trial court's conclusion that the amendment to remove the restrictions from lots 80 and 81 is invalid.

Woodland points out an amendment adopted in 1965 by a majority of lot owners in the subdivision, removing the restrictive covenants from application to lots 6 and 7 in the subdivision to permit the building of a gas station and convenience store.[2] Woodland notes the trial court's reasoning that, in order for an amendment to a protective covenant to be effective, it must apply uniformly to all lots in the subdivision. Based on this reasoning, Woodland argues that, since the 1965 amendment ostensibly applied to less than all of the lots in the subdivision, "the 1965 amendment freed all the lots within the Gates Subdivision from the strictures of the Protective Covenants . . ." This reasoning can only be characterized as sophistry. Assuming arguendo that the 1965 amendment is invalid because it applies to only two lots in the subdivision, this would merely invalidate the 1965 amendment and does not make the underlying restrictive covenant invalid.[3] The 1965 amendment has no bearing on the applicability of the restrictive covenant to Woodland's lots 80 and 81. The remainder of Woodland's arguments on appeal are pretermitted by our holding that the amendment to the protective covenants, adopted after the trial court's ruling in this case, is invalid.

The plaintiff homeowners argue on appeal that the trial court erred in allowing Woodland to continue using its lots as a playground so long as any playground equipment maintained on the lots was movable. The plaintiffs argue that such a ruling "allows an institutional use of property which, by restrictive covenants, is limited to residential use. Further, multiple 'moveable' pieces of playground equipment on two full lots could accommodate a substantial number of children creating a substantial amount of noise and . . . would constitute a continuing violation of the Memphis and Shelby County zoning ordinance." Elsewhere in the plaintiff homeowners' appellate brief, the homeowners scoff at Woodland's argument "that the neighborhood had agreed to the

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[2] Woodland filed a post-argument motion to include the 1965 amendment in the appellate record. The motion is granted.

[3] The illustrations listed in Restatement (Third) of Property: Servitudes § 6.10 include the following:

> The declaration for Green Acres provides for amendment of the declaration by the affirmative vote of owners of two-thirds of the lots. Lots in Green Acres are restricted to residential use, except for parcels owned by the association, which are restricted to recreational use. Three lots at the entrance to the subdivision fronting on State Route 5 are acquired by a grocery-store developer, which seeks and obtains the consent of the owners of two-thirds of the lots to an amendment that permits the three lots to be used for retail-commercial purposes. The owners of lots nearest the proposed development all oppose the amendment. The conclusion would be justified that the amendment is invalid without their consent.

Restatement (Third) of Property: Servitudes § 6.10, Illustration 7.

institutional playground [later erected by Woodland] by virtue of their having failed to sue the school in 1996 when a small plastic toy was placed on and moved around lot 81." As noted above, the use of such movable playground equipment is not a violation of the restrictive covenant prohibiting a structure other than one incidental to the residential use of the lot. From our review of the record, we find that the plaintiff homeowners failed to carry their burden of establishing that Woodland's use of such "small plastic toys" that are movable constitutes either an institutional use or a zoning violation. The trial court's holding in this regard is affirmed.

The judgment of the trial court is affirmed. Costs of this appeal are taxed equally between the appellant, Woodland Presbyterian School, and its surety, and the appellees, Amy Wilson, Judith Johnson, and Daniel Powell, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, JUDGE