STATE OF MICHIGAN

COURT OF APPEALS

CHERRY HOME ASSOCIATION,

Plaintiff-Appellee,

v

KEITH V. BAKER and AMY B. HARRISON,

Defendants-Appellants.

UNPUBLISHED
October 21, 2021

No. 354841
Leelanau Circuit Court
LC No. 2019-010376-CH

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

In this case involving a restrictive covenant, defendants appeal as of right the trial court's declaratory judgment and injunction entered following a bench trial. On appeal, defendants argue that the trial court erred by adopting an arbitrary and legally incorrect standard for how short-term rentals are treated by plaintiff. Defendants also argue that, even if the trial court did not err, plaintiff waived the right to enforce the restrictive covenant concerning short-term rentals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendants co-own a lot within the Cherry Home community that is commonly known as "Serendipity." Cherry Home consists of 531 lots and approximately 230 homes. The lots in Cherry Home are subject to a declaration of covenants and restrictions drafted by the developer and recorded with the county register of deeds on August 27, 1965. The declaration states, in part:

> WHEREAS, Developer is the owner of the real property described in Article II of this declaration and desires to create thereon a residential community with permanent parks, playgrounds, open space, and other common facilities for the benefit of said community; and
>
> * * *
>
> WHEREAS, Developer has deemed it desirable, for the efficient preservation of the values and amenities in said community, to create an agency to

> which should be delegated and assigned the powers of maintaining and administering the community properties and facilities and administering and enforcing the covenants and restrictions and collection and disbursing the assessments and charges hereinafter created; and
>
> WHEREAS, Developer will cause to be incorporated under the laws of the State of Michigan, as a non-profit corporation, THE CHERRY HOME ASSOCIATION, for the purpose of exercising the functions aforesaid;
>
> NOW THEREFORE, the Developer declares that the real property described in Article II, and such additions thereto as may hereafter be made pursuant to Article II hereof, is and shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements, charges and liens (sometimes referred to as "covenants and restrictions") hereinafter set forth.

Article VII of the declaration is entitled "Building and Use Limitations." Section 1 states, in relevant part, as follows:

> All land which is subject to this Declaration shall be limited to residential use. No building shall be erected, altered, placed or permitted to remain on any property other than a one family dwelling and private garage or outbuildings incidental thereto.

Section 5 states as follows:

> Variance. The purpose of the foregoing Building and Use Limitations being to insure the use of the properties for attractive residential uses, to prevent nuisances, to prevent impairment of the attractiveness of the property, to maintain the desirability of the community and thereby secure to each owner the full benefits and enjoyments to his home with no greater restriction upon the free and undisturbed use of his property than are necessary to insure the same advantages to other owners. Any reasonable change, modification or addition to the foregoing shall be considered by the Developer and the Association and if so approved will then be submitted in writing to the abutting property owners and if so consented to in writing shall be recorded and when recorded shall be as binding as the original Covenants.

Article VIII of the declaration states in § 1, in part, that "[t]he covenants and restrictions of this Declaration shall run with and bind the land and shall inure to the benefit of and be enforceable by the Association, or the owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns." Section 4 states:

> Enforcement of these covenants and restrictions shall be by any proceeding at law or in equity against any person or persons violation or attempting to violate any covenant or restriction, either to restrain violation or to recover damages, and against the land to enforce any lien created by these covenants; and failure by the Association or any owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

There is no dispute that defendants' property is subject to the declaration and that the covenant runs with the land.

On August 20, 2019, plaintiff's attorney sent a cease-and-desist letter to defendants notifying them that short-term renting of their property to transient guests was not a residential use and violated Article III, § 1, of the declaration. Defendants responded that plaintiff did not have "any legitimate basis for the threats and demands set forth in your letter, and we further believe that the conduct of [plaintiff] (and its attorneys) exceeds [its] authority and is contrary to law. This conduct is interfering with the rights of the undersigned (and the rights of other homeowners) to the use and enjoyment of our property."

Plaintiff filed a complaint in the trial court, seeking an injunction against the short-term rental of defendants' property and a declaratory judgment that the declaration prohibited short-term rentals and that short-term rental was not incidental to a residential use. Defendants filed an answer and admitted that they had rented their property, but asserted that it was rented for use as a residence. Defendants further argued that the declaration did not expressly prohibit short-term rental, and even if it did, plaintiff waived enforcement of the covenant by its past conduct.

Following a bench trial, the trial court rendered an oral opinion. The trial court found that Serendipity was not used by defendants for a residential purpose, but instead, was used as a rental property. The trial court explained that "when you put [a property] on a[n online] platform offering it to the public at large . . . the purpose of that is raising money, it is not for a residential purpose." Next, the trial court rejected defendants' waiver argument, stating that plaintiff did not waive enforcement of the covenant merely because it did not enforce it "every time" there was a short-term rental. Moreover, there was an antiwaiver clause in the declaration, "which says that failure to enforce these provisions . . . in one instance[] does not prevent enforcement" in a later situation. Finally, the trial court fashioned an injunction prohibiting only defendants from renting their property for a term of six months or less: "[T]here are no other defendants in this case. I cannot render a judgment that is binding on some other homeowner—they weren't parties to the case."[1] This appeal followed.

II. STANDARD OF REVIEW

Matters involving the interpretation of restrictive covenants involve questions of law that this Court reviews de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008). "Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 836 NW2d 498 (2013) (quotation marks and citation omitted). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32-33; 896 NW2d 39 (2016). This Court

[1] We note that the trial court consolidated this case with three other cases that were filed by plaintiff against other lot-owners in Cherry Home on the basis of short-term rental. The declaratory judgment and injunction applied to the defendants in all four cases, but this appeal only involves defendants Keith V. Baker and Amy B. Harrison.

reviews a trial court's factual findings for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

III. INCIDENTAL TO RESIDENTIAL USE

Defendants assert that the declaration does not explicitly prohibit short-term rental. Instead, the trial court concocted an "arbitrary standard of 'not incidental to a residential use' " that permitted plaintiff to "create its own definition of proper [short-term rental]." Accordingly, defendants argue that the trial court should have dismissed plaintiff's complaint "for failure to seek a remedy that it could grant." We disagree.

MCR 6.201(A) provides that a court may grant any relief to which a party is entitled, "even if the party has not demanded that relief . . . ." To the extent that defendants are arguing that the trial court's discretion to grant relief was limited by plaintiff's request for relief, their argument is without merit.

"[P]roperty owners are free to attempt to enhance the value of their property in any lawful way, by physical improvement, psychological inducement, *contract*, or otherwise." *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (quotation marks and citation omitted). "Under Michigan law, a covenant constitutes a contract, created by the parties with the intent to enhance the value of property. As such, a covenant is a valuable property right." *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). "Because of this Court's regard for parties' freedom to contract, we have consistently support[ed] the right of property owners to create and enforce covenants affecting their own property." *Bloomfield Estates Improvement Ass'n v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (quotation marks and citation omitted; alteration in original). "At the same time, by their very nature, restrictive covenants can also negatively impact the free use of property." *Mazzola v Deeplands Dev Co, LLC*, 329 Mich App 216, 224; 942 NW2d 107 (2019). Therefore, courts must apply unambiguous restrictive covenants as written "unless the restriction contravenes law or public policy, or has been waived[2] by acquiescence to prior violations . . . ." *Eager v Peasley*, 322 Mich App 174, 180; 911 NW2d 470 (2017) (quotation marks and citation omitted). Restrictions that limit use for residential purposes are favored by public policy, but only if they are "clearly established" by the documents wherein they are found. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999).

Here, the plain language of the declaration clearly restricts the use of the lots in Cherry Home to residential use. The meaning of "residential" in a restrictive covenant is not a novel issue, but does require a fact-specific inquiry into the use. *Wood v Blancke*, 304 Mich 283, 289; 8 NW2d 67 (1943). In *Wood*, the plaintiffs owned subdivision lots and brought suit to enjoin the defendant lot owners from keeping, housing, or breeding racing pigeons upon their lots in alleged violation of a restrictive covenant in a deed restricting the use of lots for residence purposes only. *Id*. at 285-287. The Court concluded that incidental uses to a prescribed residential use may not violate the

[2] The issue of waiver is discussed in section IV.

covenant if the use was "casual, infrequent, or unobtrusive and result[ed] in neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents." *Id*. at 288-289. "[S]uch additional use must be so reasonably incidental to the prescribed use and such a nominal or inconsequential breach of the covenants as to be in substantial harmony with the purpose of the parties in the making of the covenants, and without material injury to the neighborhood." *Id*. at 289. The Court concluded that the maintenance and breeding of a flock of racing pigeons was not the usual, ordinary, or incidental use of one's property for "residence purposes only" and that the effectiveness of the restrictions would be destroyed if the defendants were permitted to house, raise, and breed racing pigeons upon their premises. *Id*.

In *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 324; 317 NW2d 611 (1982), this Court addressed a similar covenant in a subdivision deed that permitted only residential uses.[3] This Court concluded that the operation of a "family day care home" did not violate that covenant. *Id*. at 331. Stressing the relatively small scale of the particular daycare operation and that "[t]he only observable factor which would indicate to an observer that defendants do not simply have a large family is the vehicular traffic in the morning and afternoon when the children arrive and depart," this Court found this sort of daycare use to be residential in nature and not a violation of the covenant. *Id*. at 328.

In *O'Connor*, 459 Mich 335, the use and character restrictions provided: " 'No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than for the purpose of one single dwelling not to exceed two stories in height.' " *Id*. at 337. The Court concluded that "interval ownership" or "timesharing arrangements" violated the restriction. *Id*. at 337, 346. The Court reviewed *Wood* and reiterated that the term "residence" involved an inquiry beyond what structures were permitted on the property:

> Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. Notwithstanding this rule of construction, covenants restricting the erection of any building except for dwelling house purposes have been held to apply to the use as well as to the character of the building; and in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property. It is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings . . . . [*Id*. at 341-342 (citations omitted).]

The Court recognized that the issue of whether interval ownership violated the restrictive covenant was one of first impression and turned its attention to *Wood*'s instruction " 'that the usual, ordinary and incidental use of property as a place of abode does not violate the covenant restricting

[3] The covenant provided in relevant part that " '[n]o lot or building plot shall be used except for residential purposes.' " *Id*.

such use to "residential purposes only," but that an unusual and extraordinary use may constitute a violation . . . .' " *Id*. at 345, quoting *Wood*, 304 Mich at 288-289.

The Court then turned to the term "residential purpose" and adopted as its own the trial court's analysis, which was as follows:

> [W]hat's a residential purpose is the question. Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence. [*O'Connor*, 459 Mich at 345 (quotation marks omitted; alteration in original).]

The Court also quoted and approved of the trial court's determination that interval ownership was not a residential purpose:

> The people who occupy it, or who have these weekly interests in this property, they have the right to occupy it for one week each year, but they don't have any rights, any occupancy right, other than that one week. They don't have the right to come whenever they want to, for example, or to leave belongings there because the next resident, who is a one-fiftieth or one forty-eighth co-owner has a right to occupy the place, too, and the weekly owner has no right to be at the residence at any time other than during their one week that they have purchased. That is not a residence. That is too temporary. There is no permanence to the presence, either psychologically or physically at that location, and so I deem that the division of the home into one-week timeshare intervals as not being for residential purposes as that term is used in these building and use restrictions. [*Id*. at 346 (quotation marks omitted).]

In *Bloomfield Estates*, 479 Mich at 210, 215, the Court considered whether the use of a park as a " 'dog park' " violated a deed restriction limiting use of the land to " 'strictly residential purposes only.' " The Court interpreted the term "residential" as follows:

> The term "residential" means "pertaining to residence or to residences." *Random House Webster's College Dictionary* (1997). "Residence" means "the place, esp[ecially] the house, in which a person lives or resides; dwelling place; home." *Id*. The term "residential" in the deed restriction thus refers to homes where people reside. By using the terms "strictly" and "only," the deed restriction seeks to underscore or emphasize that restricted land may only be used for this purpose. [*Bloomfield Estates*, 479 Mich at 215 (alteration in original).]

There is no dispute that the declaration in the present case limited the use of the lots in Cherry Home to residential use. By limiting use to residential use, the restriction emphasizes that the lots may only be used for this purpose. Accordingly, the trial court properly applied the *O'Connor* definition of residence in this case.[4] To conform with the residential use restriction, the use must have been more than transitory, evidencing an intent to establish a permanence to the occupants' presence there. *O'Connor*, 459 Mich at 345. The weekly rentals in defendants' case do not establish the type of permanence needed to establish residential use. The evidence overwhelmingly showed that defendants' property had been used only for short-term rentals. The property was marketed through a company that advertised vacation rentals on various websites. Defendants do not reside at the property. The renters are transient guests who typically vacation at Serendipity for up to a week. Indeed, the trial court found that defendants' use of their property as a short-term rental is not a residential use, and defendants do not seem to dispute that short-term renting is not a residential use.

Defendants have made no attempt on appeal to otherwise demonstrate that the trial court erred by finding that they had used their property in violation of the declaration restricting use to residential use, or by enjoining defendants from using their property for short-term rental use. And contrary to defendants' suggestion, the trial court's ruling did not "prohibit [defendants'] [short-term rental activity], but open the door to more 'residential' friendly [short-term rental] activity." Rather, the court enjoined defendants from renting the property for a period less than six continuous months, presumably on the basis that such a rental is not a transient use but, rather, a residential use.[5] The trial court's decision to bar defendants' short-term rental activity and to allow rental activity for continuous periods of six months or more was not outside the range of principled outcomes. The court did not abuse its discretion by granting plaintiff's request for a declaratory judgment and injunctive relief because defendants' use of their property for a short-term rental purpose is not a residential use and violates the covenant limiting use of the lots to residential use.

IV. WAIVER OF RESTRICTIVE COVENANT ENFORCEMENT

Defendants argue that, even if they violated the restriction in the declaration by using their lot for short-term rental activity, plaintiff cannot enforce the restriction in light of its acquiescence

[4] As previously noted, Michigan law has held that a use that is incidental to residential use may not violate the covenant limiting use to residential use if it is casual, infrequent, or unobstructive, and causes neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents. *Wood*, 304 Mich at 288-289. Plaintiff sought a judgment declaring that short-term rental use was prohibited, and sought an injunction against short-term rental use that was not incidental to a residential purpose. Defendants' suggestion that the standard is "arbitrary and legally erroneous" and not recognized by Michigan law is misplaced. Nonetheless, the trial court did not apply the incidental use standard.

[5] Under the definition of "residence" in *O'Connor*, it seems there would be a continuity to presence when someone occupies a property for six months or more. The renters would have their possessions at the property and would be living there.

to other owners' short-term rental of their lots. That is, defendants contend that the restriction was effectively waived. We disagree.

Initially, the declaration contains an antiwaiver provision in Article VIII, § 4, that states that "failure by [plaintiff] or any owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." Under the plain language of the declaration's antiwaiver provision, the fact that plaintiff may not have enforced the restriction on residential use by acting to stop the use of short-term rental activity does not prohibit plaintiff from doing so now. The antiwaiver clause in the declaration provides plaintiff with the authority to enforce the declaration, even if prior or current board members failed to do so.

Whether a restriction has been waived is a question to be determined on the facts of each case presented. *O'Connor*, 459 Mich at 344. Frequent, unobjected-to violations of a restriction are suggestive of abandonment of a restriction. *Taylor Ave Improvement Ass'n v Detroit Trust Co*, 283 Mich 304, 311; 278 NW 75 (1938). However, the sheer number of violations does not necessarily establish waiver of the restriction. See *Carey v Lauhoff*, 301 Mich 168, 174; 3 NW2d 67 (1942). "The character, as well as the number, of claimed violations must be considered in determining whether the complaining property owners have waived or forfeited the benefit of the restriction." *Id*. "There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." *Rofe v Robinson (After Second Remand)*, 126 Mich App 151, 155; 336 NW2d 778 (1983). In other words, waiver might occur if unaddressed violations effectively destroy the purpose of the restriction. See *O'Connor*, 459 Mich at 346.

Additionally, when a plaintiff has not challenged previous violations of a deed restriction, the restriction " 'does not thereby become void and unenforceable when a violation of *a more serious and damaging degree occurs*.' " *Bloomfield Estates*, 479 Mich at 219, quoting *Jeffery v Lathrup*, 363 Mich 15, 22; 108 NW2d 827 (1961). "When determining whether prior acquiescence to a violation of a deed restriction prevents a plaintiff from contesting the current violation, we compare the character of the prior violation and the present violation. Only if the present violation constitutes a 'more serious' violation of the deed restriction may a plaintiff contest the violation despite the plaintiff's acquiescence to prior violations of a less serious character." *Bloomfield Estates*, 479 Mich at 219. "In general, a 'more serious' violation occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation." *Id*. See *Sheridan v Kurz*, 314 Mich 10, 13; 22 NW2d 52 (1946) (holding that a more serious violation occurred when noise caused by a later violation represented a dramatic increase from noise caused by an earlier violation). "That is, use that constitutes a 'more serious' violation imposes a greater burden on the holder of a deed restriction than the burden imposed by a previous violation." *Bloomfield Estates*, 479 Mich at 220.

In *Carey*, 301 Mich at 168, the defendant operated a general rooming and boarding house in violation of a single-dwelling use restriction. The defendant argued that the restriction had been waived because there were or had been 23 other rooming houses in the 189-lot subdivision. *Id*. at 173-174. But our Supreme Court noted that the violations alleged by the defendant consisted of only two or three instances of residents on the defendant's street renting a room or two. *Id*. at 175. The Court agreed with the trial court that the violations were not conspicuous or readily ascertainable, had not changed the residential character of the neighborhood, and were not of the scope and character of the defendant's violation. *Id*. at 174-175. Additionally, "in the past

plaintiffs or others have been somewhat active in instituting suits and in giving notices to persons who sought to violate the restrictions." *Id*. at 174. The Court concluded that by allowing the previous violations, the plaintiff did not waive enforcement of the restriction against the defendant. *Id*. at 175.

Defendants in this case contend that for over 50 years, plaintiff failed to enforce the residential use restriction and that short-term rental activity has been so prevalent that the restriction "provided little or no benefit to the other properties for the entire duration of the community (or at least until the last few years)." They contend that the evidence presented at trial "clearly indicated that the character of Cherry Home was never intended to be, nor has it ever been, of a nature that would prohibit [short-term rental]." Defendants maintain that it was difficult for the trial court to find a change in character in Cherry Home because the character of Cherry Home "has always been one that recognized and encouraged [short-term rental]." They point to testimony that former association board members engaged in short-term rental of their properties.[6]

A review of the testimony adduced at trial does not support the factual premise of defendants' argument. Instead, the testimony established that the short-term rental of property in Cherry Home was not widespread and that Cherry Home was primarily a neighborhood of primary or second homes for members. Many members were unaware that short-term rental activity had been taking place over the years. None of the witnesses who engaged in short-term rental activity testified that they informed plaintiff of their rental activity. Testimony was presented that plaintiff, or at least some of plaintiff's board members, were aware that some members had been using their property for short-term rental purposes. However, the testimony established that short-term renting was infrequent and casual, and that few, if any, complaints regarding rental activity had been brought to plaintiff's attention by lot owners. It may be that plaintiff's enforcement of violations of the declaration had been carried on in an informal manner as some witnesses suggested.

There was ample testimony at trial, however, that short-term rental activity began to increase with the advent of online rental platforms such as Vacation Up North, Airbnb, and VRBO, and that plaintiff began to receive numerous complaints from defendants' neighbors associated with the increased short-term rental activity, including increased noise and traffic, trespassing, loose and barking dogs, and unauthorized use of private Cherry Home amenities, among other complaints. Although there was testimony involving other members renting their homes, these instances were not as serious or damaging to the neighborhood as defendants' short-term rental activity. And, contrary to defendants' suggestion, the evidence does not support that the character of Cherry Home was one of short-term rentals such that the residential use restriction provided little or no benefit to the other property owners in Cherry Hill.

[6] Defendants have not cited any authority that the ultra vires actions of a board member bind the association.

The record, as a whole, contains inadequate evidence that the other, allegedly unenforced violations "altered the character of the . . . subdivision to an extent that would defeat the original purpose of the restrictions." *O'Connor*, 459 Mich at 346. Thus, the trial court did not clearly err when it determined plaintiff did not waive its ability to enforce the restriction.

Affirmed.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica