

FILED

JUN 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 305589

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

WILLIAM L. and KATHLEEN SCHORER, husband and wife;
BARTON E. and CORIENE K. SCHORER, husband and
wife; and WILLIAM SPURGEON, a single man, BONNIE
DUNHAM; JAMIE and TINA MUNSON, husband and wife;
CURT WILLIAMS, a single man, RICHARD J. and DIANA L.
MAXWELL, husband and wife; and TOM J. and TAMI S.
LaFORTUNE, husband and wife,

Respondent,

vs.

BENTON COUNTY, a political subdivision of the State of
Washington; WALTER BEAR and JANE DOE BEAR, husband
and wife, SCOTT and SHEILA A. LOSEY, husband and wife.

Appellant.

APPELLANT BEAR'S BRIEF

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I. ASSIGNMENTS OF ERROR

Appellants assign error to the trial court as follows:

1.) The court erred in determining the legal description contained in the 1994 “Restrictions and Protective Covenants” is sufficient to burden the Bear’s property.

Issues pertaining to assignment of error: a.) Does the legal description include Appellant’s property? b.) Does the legal description satisfy the requirements of the statute of frauds?

2.) Assuming the legal description does include the Bear’s property, the court erred in determining the Appellants are prohibited from having a belly dump and diesel truck on their property.

Issues pertaining to assignment of error: a.) Does the Bear’s proposed use constitute a clear and plain violation of the covenants? b.) May the court review the covenants de novo and interpret them as a matter of law?

II. STATEMENT OF THE CASE

On December 21, 2007, Cynthia Bear purchased a 3.5 acre lot in Finley, Washington from Gene Ragsdale and Angie Glidden. (CP 71). The deed identified the property as being a part of Short Plat 2907. (CP 71). It was stipulated to the trial court that Short Plat 2907, which contains the Bear’s property, is part of Short Plat No. 655. (CP 31, paragraphs 4-7).

Subsequent to the purchase, Cynthia’s husband Walter submitted

an application to the County for a Special Use Permit, (CP 66, Findings of Fact 1 and 2). It has been Walter and Cynthia's desire to use the property as the base for a trucking/excavating business. (CP 66, Findings of Fact 1).

Notice of the proposed use was published in the Tri-City Herald and mailed to Mr. and Mrs. Bear's neighbors. (CP 66, Findings of Fact 4). A public hearing was conducted December 4, 2008. (CP 66, Findings of Fact 4). Several of the Bear's neighbors attended the hearing and three presented testimony in opposition to the application. (CP 64). Following this particular hearing, the Benton County Board of Adjustment granted the Bear's request for a Special Use Permit. (CP 69-70).

This lawsuit followed. (CP 1-15). Appellees asserted claims under RCW 36.70C, the Land Use Petition Act ("LUPA") and alleged the Special Use Permit should not have been granted by the County. (CP 1-15). They also asked the court to determine the applicability and scope of three separately recorded covenants/agreements they alleged should prevent the Bears from using their property as intended. (CP 1-15).

The parties stipulated to an order staying the LUPA claim pending decisions by the trial court on the claims for declaratory relief. (CP 26-28). The trial court declared two of the three to be invalid. (CP 218-220). The court upheld the third. (See attachments to the Notice of Appeal.)

Upon the trial court entering judgment on the claims for declaratory relief, the LUPA claims were also dismissed. (CP 383-385). The case then became ripe for an appeal. (See ruling of Commissioner

McCown filed March 8, 2012).

This case is on appeal because of the trial court's rulings respecting the "Restrictions and Protective Covenants" (hereafter the "covenants") recorded in 1994. (CP 160-162). The court upheld the covenants and concluded the covenants bar Mr. and Mrs. Bear from having a belly dump and a diesel truck on their property. The effect of the ruling is Mr. and Mrs. Bear cannot utilize their property as they had intended.

The covenants set out the legal description to which they apply. (CP 160). That description is as follows:

We, the undersigned, being owners of the following described real property, to wit:

That portion of the North half of the Southwest quarter of Section 28, Township 8 North, Range 30 East, W.M. Benton County, Washington, lying Westerly of a line extending from a point on the North line of said subdivision, which point is 835 feet East of the Northwest corner of the Northeast quarter of the Southwest quarter of said Section, to a point on the South Line of said subdivision which point is 400 feet East of the Southwest corner of the Northeast quarter of the Southwest quarter of said Section.

(CP 160). This is a metes and bounds property description. The parties stipulated, and it is thus undisputed, this metes and bounds description "describes lots 13, 16, 17 and 18" as identified in Exhibit "A" attached to the stipulated facts. (CP 32, #12)

Cynthia Bear owns lot 11 which was part of Short Plat 2907. (CP 74, 31). It is undisputed she has no interest in lots 13, 16, 17 or 18. (CP 74, 31-33).

Following the metes and bounds description setting forth the land

to which the covenants do apply, there are a series of clarifying exceptions setting forth descriptions of property to which the covenants do not apply.

(CP 160). The final “Exception” paragraph reads as follows:

AND EXCEPT County Roads and recorded easements. This legal description is for Short Plat 653 Lots 1 through 4, Short Plat 654 Lots 1 through 4, Short Plat 655 Lots 1 through 4, and Short Plat 656 Lots 1 through 4 . . . (Emphasis Added).

(CP 160). The Bear property is in Short Plat 655. (CP 74, 31).

Following the legal description are the substantive provisions of the covenants themselves. The covenants purport to restrict the use of the properties to which they apply. Among the covenants is the following language which is relevant to this appeal:

RESTRICTIONS AND OTHER USES: This property shall not be used for open storage for construction of rental equipment. No inoperable farm machinery, including tractors and trucks may be held on the property. No used machinery or scrap equipment, implements, automobiles or conspicuous parts of such equipment, which serve no purpose in operation of the estate, may be held or accumulated on the property.

(CP 161).

The covenants were signed by David and Linda Godwin and also by Edgar and Betty McKay. (CP 162). They were the owners of lots 13, 16, 17 and 18. (i.e. the metes and bounds description set out above) at the time. (CP 32, 33 Fact Stipulations paragraph 13).

The covenants speak to open storage for construction of rental equipment. (CP 161). Edgar McKay’s testimony was presented to the court by deposition. (CP 296-343). He was deposed by Appellees ostensibly to establish there had been a “scrivener’s error” and that the

covenant was meant to prohibit open storage for construction or rental equipment.

Mr. McKay rejected the contention testifying “[W]ell that might have been her intent (Linda Godwin’s) but it wasn’t mine.” (CP 321, Dep. Page 26, Lines 3-12). With regard to the “construction of rental equipment language” Mr. McKay testified “We had people living up there but had backhoes. A whole bunch of construction.” (CP 322, Dep., Page 27, Lines 8-23). Mr. McKay testified “[A] lot of people had trucks then.” (CP 320, Dep., Page 25, Lines 17-19). When the covenants were drafted he envisioned diesel trucks and road graders being parked on the property. (CP 319, Dep., Page 24, Lines 15-22).

Mr. McKay testified he had recently visited the property and found “It’s a mess.” (CP 303, Dep. Page 8, Lines 8-16). “There is only one decent place up there and that’s the guy on the hill (Walter Bear) that you are trying to move.” (CP 303, Dep., Page 8, Lines 17-20). Several units have junk piles with “garbage and everything else.” (CP 318, Dep., Page 23, Lines 18-15).

Following a bench trial, Judge Cameron Mitchell found the legal description to be adequate to bind the Bear property. (CP 389-397). Based on Mr. McKay’s testimony, the court refused to find a “scriveners error” with respect to what may be stored. (CP 395). Appellants are not appealing this aspect of the decision. The language relating to construction of rental equipment was upheld.

However, the court concluded the Bears’ holding of the diesel

truck and belly dump trailer do violate the covenants. (CP 391). This aspect of the decision is being appealed.

III. ARGUMENT

I. THE LEGAL DESCRIPTION IN THE COVENANTS DO NOT INCLUDE THE BEAR'S PROPERTY. As set out above, the metes and bounds description describes Lots 13, 16, 17 and 18. However, the Bears do not own any of these lots. They own Lot 11. Therefore, the court should determine the covenants ineffective as to their property.

II. EVEN IF THE DRAFTERS OF THE COVENANTS INTENDED THE BEAR PROPERTY TO BE INCLUDED, THE DESCRIPTION IS INSUFFICIENT TO DO SO AS A MATTER OF LAW. If the covenants were intended to bind the Bear property, they are ineffective in doing so as a matter of law. Under the statute of frauds, RCW 64.04.010, “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed” Clearly, the covenants in this case constituted a contract purporting to encumber real property. Therefore, the statute of frauds apply.

To comply with the statute of frauds a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description. *Bigelow v. Mood*, 560 Wn.2d 340, 341, 353, P.2d 429 (1960). See also *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) and *Key*

Design v. Moser, 138 Wn.2d 875, 881, 983 P.2d 653 (1999).

Further, an agreement containing an inadequate description of the property to be conveyed or encumbered is void and not subject to reformation. Howell v. Inland Empire Paper, 28 Wn.App. 494, 624 P.2d, 739 (1981), citing Schweiter v. Halsey, 57 Wn.2d 707, 710, 359 P.2d 821 (1961) and Forsburgh v. Sando, 24 Wn.2d 586, 589, 166 P.2d, 850 (1946).

The interpretation of language contained in a restrictive covenant is a question of law for the court. Krein v. Smith, 60 Wn.App. 809, 811, 807 P.2d 906 (1991). Thomas v. Nelson, 35 Wn.App. 868, 871, 670 P.2d 682 (1983).

A restrictive covenant is the equivalent of a negative easement “which curtails the owner of the servient tenement in the exercise of some of his rights in respect of his estate in favor of the owner of the dominant tenement or tenements.” Olympia v. Palzer, 107 Wn.2d 225, 728 P.2d 135 (1986).

In the case at bar, Judge Mitchell found the legal description to be adequate to bind the Bears’ property. He reasoned as follows:

“The Respondents Bears have also argued that the petition should be denied because the legal description contained in the document is insufficient to bind the Respondents because the metes and bounds description does not include the Respondents’ property and the reference to the short plat that actually does include the Respondents property is in the exception paragraph. The court does not find this argument persuasive in the instant case. While the reference to Short Plat 655 is in the paragraph beginning with the words “And Except,” the paragraph states that “this legal description is for Short Plat 653 Lots 1 through 4, Short Plat 634 Lots 1 through 4, Short Plat 655 Lots 1 through 4, and Short Plat 656 Lots 1 through 4, in Benton County, State of Washington.” It is undisputed that the Respondents Bears’ property is within Short Plat 655 as described as the “And Except” paragraph. Looking at the instrument as

a whole, the court finds the reference in this paragraph, regardless of its title, sufficient to describe the parcels of land bound by the instruments.” (CP 396, 397).

Appellants respectfully disagree with this reasoning and outcome. While it is undisputed the Bears’ property is part of Short Plat 655, and it is undisputed the covenants mention Short Plat 655, the covenants do not include Short Plat 655 as being land burdened by the restrictive covenant.

The language referring to Short Plat 655 says: “[T]his legal description is for . . . Short Plat 655 Lots 1 through 4.” (Emphasis supplied). A proper reading of this language is that “this description” refers to the metes and bounds description (i.e. Lots 13, 16, 17 and 18), and that that description is “for” the benefit of Short Plat 655 Lots 1 through 4, and the other designated “benefitted” properties.

Had it been the intent of the parties to have the covenants apply to Short Plat 655 Lots 1 through 4, this could have been clearly expressed. Inclusion of the word “for” (i.e. this description is “for” Short Plat 655) clearly affirms that the two descriptions are not the same and that one is “for” the other; as in burdened versus benefitted estates.

Extrinsic evidence regarding meaning may not include: (1) evidence of a party’s unilateral or subjective intent; (2) evidence that would show an intention independent of the instrument; or (3) evidence that would vary, contradict or modify the written word. *Hollis v. Garavell*, 137 Wn.2d 683, 974 P.2d 836 (1999); *Bloome v. Haverly*, 154 Wn.App. 129, 225 P.3d 330 (2010). The trial court essentially deleted the word “for” in the description to change the language to “[T]his description is

Short Plat 655” instead of being “for” Short Plat 655. By doing so, the court improperly varied/modified the language of the description.

In addition, the reference to Short Plat 655 is in an “exception” paragraph. (CP 160). This is additional support for the Bear’s contention their property was not part of the property to be burdened by the covenants.

The trial court decision improperly deletes all of the first four full paragraphs of the description, and adopts the fifth “AND EXCEPT” paragraph as the applicable legal description. Nothing in the language of the description suggests the “AND EXCEPT” paragraph as being the real description with the detailed paragraphs above being merely alternative or explanatory. (See e.g. *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951).

III. EVEN IF THE LEGAL DESCRIPTION INCLUDES THE BEAR’S PROPERTY, THE RESTRICTIONS AND PROTECTIVE COVENANTS DO NOT PROHIBIT THE PROPOSED USE. The portion of the covenants which is the subject of this appeal reads” “[N]o used machinery or scrap equipment implements, automobiles or conspicuous parts of such equipment which serve no purpose in the operation of the estate, may be held or accumulated on the property.” (Emphasis supplied). (CP 161).

The covenants do not prohibit the property being used as the base for a trucking/excavation business. The covenants specifically contemplate (in the sentence immediately prior) that operable farm

machinery “including tractors and trucks may be held on the property”. (CP 161). Livestock and other agricultural uses were also expressly contemplated. (CP 161). By prohibiting “used” machinery or “scrap” equipment, but not “new” machinery or “non-scrap” equipment, it is clear the purpose of the covenants were to prevent property owners from accumulating junk piles on their properties. As mentioned, the interpretation of the covenants is a question of law for the court. Krein, supra. This court may therefore make its own judgment de novo.

Restrictive covenants are in derogation of the common law right to use land for all lawful purposes and will not be extended by implication to include any use not clearly expressed. Burton v. Douglas County, 65 Wn.2d 619, 621, 399 P.2d 681 (1965). Doubts must be resolved in favor of the free use of land. Id; see also Parry v. Hewitt, 68 Wn.App. 664, 847 P.2d 483 (1992).

In Bloome v. Haverly, 154 Wn.App. 129, 225 P.3d 330 (2010) a “view” covenant was executed to facilitate the sale of a parcel of land uphill from a waterfront parcel. The covenant provided for the removal of certain trees from the downhill parcel as well as providing a framework for the future removal of other trees on the downhill parcel. A dispute arose when the owner of the downhill parcel decided to build a structure that would block the view of the uphill parcel. The court held that since the covenant did not prohibit construction, the owner of the downhill property could build; even if the result was some loss of view to the uphill parcel. The court did not define how much loss would be permitted.

Consistent with *Bloome* “[T]here must be shown to be a clear and plain violation of a restrictive covenant to justify the interposition of a court or equity to restrain.” *Miller v. American Unitarian Assn.*, 100 Wash. 555, 559, 171 Pl.520 (1918). And restrictive covenants are not to be “enlarged or extended by judicial construction even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen.” *Granger v. Boulls*, 21 Wn.2d 597, 599, 152 P.2d 325 (1944). Restrictions are not to be extended by implication to include any use not expressed. *Id.*

For example, in *Granger* the covenant provided that no “building or buildings [are] to be used or occupied for any other purpose than a private residence or dwelling.” *Granger* at 598. The court held this language did not prohibit the keeping of farm animals on the property. The usage of the land itself was not restricted. *Granger* at 5990. The court refused to expand the covenant.

In our case, the covenants do not prohibit the Bears from operating their trucking and excavation business. Had it been the intent of the covenants to restrict the property to residential use only, the parties could have so provided. *Burton v. Douglas Cty.*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965). To the contrary, our covenant specifically contemplates, with some exceptions, farm machinery, tractors, trucks, machinery and equipment being on the property.

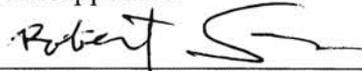
IV. CONCLUSIONS

For the foregoing reasons, Appellants Walter and Cynthia Bear

respectfully request the Court to reverse the trial court and conclude the Restrictions and Covenants do not apply to their property and do not prevent their proposed use.

Respectfully requested this 25th day of June, 2012.

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