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**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III**

GRIGG FAMILY, LLC and THE CITY OF WEST RICHLAND,

Appellants

v.

EDWARD COYNE et al,

Respondents.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT

CASE NO. 14-2-00629-0

Brief of Appellants- City of West Richland

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1. ASSIGNMENTS OF ERROR

The Court on December 19, 2017 issued the Order Granting Summary Judgment to Plaintiffs and Denying Summary Judgment to Defendants. City of West Richland assigns error to that order.

1.1 The Superior Court erred in granting the Respondent's Motion for Summary Judgment. CP 142

1.2 The Superior Court erred in denying Appellants Grigg Family LLC, and City of West Richland's Motion for Summary Judgment. CP 142

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

2.1 Whether the Superior Court erred in extending, by implication, the restrictive covenants to include restrictions not clearly expressed therein.

2.2 Whether the Superior Court erred in finding that the City of West Richland's proposed use does not comply with the clear language of the restrictive covenants.

2.3 Whether the City of West Richland is entitled to attorney fees and costs on appeal pursuant to RAP 18.

3. STATEMENT OF THE CASE

In 2011, Grigg Family, LLC (“Grigg”) purchased Lot 29 in the Canal Heights neighborhood of West Richland, Washington (“Canal Heights”). In 2013 Grigg purchased the adjacent Canal Heights lot, Lot 1. In the same year, the City of West Richland (“City”) purchased Lot 28 in the same neighborhood. As the owner of hardware stores, Grigg purchased Lots 1 and 29 with the intention of building a new hardware store (“Store”). CP 32 ¶ 4. The City is currently using Lot 28 as a storm drain, public city park, and a community garden. CP 32 ¶ 5. With the community garden, members of the public can pay the City a \$10 permit fee and use garden space to grow their own crops. CP 43 ¶ 4.

In an effort to stop Grigg and the City, the plaintiffs employed a number of legal tactics. CP 32 ¶¶ 6–10. Plaintiffs filed a claim under the Land Use Petition Act, which was dismissed, and a complaint to the Growth Management Hearing Board, which was also dismissed. CP 32 ¶¶ 6–7. Plaintiffs later appealed the Growth Management Hearing Board’s dismissal to the Superior Court and the Court of Appeals, with the Defendants being successful on the merits for both. CP 32 ¶¶ 8–9.

Plaintiffs also filed the pending declaratory action, claiming that the lots in Canal Heights are subject to certain recorded restrictive covenants (“covenants”). CP 32 ¶ 10. According to plaintiffs, the covenants designate the lots as residential, and thus no commercial use of the lots is permitted. Plaintiffs take the position that because the covenants state that the lots must be designated as residential that the lots may only be used for residential use and/ or purposes. However, plaintiffs’ assertion is incorrect as the covenants do not contain any such restriction on the lots. Rather, the plain language of the covenants clearly allows for commercial and other non-residential uses of the lots. Accordingly, Defendants’ current and proposed use of Lots 1, 28, and 29 does not violate the covenants.

4. ARGUMENT

4.1 Standard for Review

The Court of Appeals should apply the same standard of review as the trial court to determine whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326, 328 (1989). This standard

of review is *de novo*. Accordingly, the trial court’s conclusions and findings are not given the level of deference required under other, stricter standards of review. *Parkin*, 53 Wn. App. at 652–53 (for instance, a party may for the first time on summary judgment appeal challenge an affidavit because “appellate court engages in the same inquiry as the trial court.”).

By filing cross-motions for summary judgment, the parties essentially conceded that there were no material issues of fact. *State of Wash.*, 88 Wn. App. 925, 930, 946 P.2d 1235, 1237 (1997). Therefore, the thrust of the Court of Appeals’ review is whether the trial court’s legal conclusions were correct or erroneous in light of those undisputed and material facts. *State of Wash.*, 88 Wn. App. 925, 930, 946 P.2d 1235, 1237 (1997).

4.2 The trial court committed error when it extended, by implication, the restrictive covenants to restrict the use of Canal Heights lots for City of West Richland’s proposed use for a park and community garden when such restriction is not clearly expressed in the restrictive covenants.

Interpreting the language of a restrictive covenant is a question of law. *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, *rev. denied*, 117 Wn.2d 1002 (1991). “[T]he following rules govern the interpretation of restrictive covenants:

(1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning.

(2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of free use of land.

(3) The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.”

Parry v. Hewitt, 68 Wn.App. 664, 669, 847 P.2d 483 (1992) (hereinafter *Parry*) (citing *Burton v. Douglas Cy.*, 65 Wn.2d 619, 621, 399 P.2d 68 (1965) (*emphasis added*)).

When read in their entirety, there is no doubt that the covenants in question allow Defendants’ current and proposed use of Lots 1, 28, and 29. The original August 5, 1948, covenants stated:

1. “All lots in said plat, except Lot 30, shall be known and be described as residential lots. No structure shall be erected, altered, placed or to be permitted to remain on any residential building lot other than one

detached, single-family dwelling, not to exceed two stories in height, and a private garage for not more than two cars.

2. No residential structure shall be placed on any lot unless prior thereto or simultaneously therewith a septic tank installation is made in a manner approved by the Health Department, and all structures commenced to be built on said lot shall be completed within two years of the date of the commencement of such construction.

3. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be a nuisance to the remaining lots. No residential structure shall be erected or placed on any single lot with less than 600 square feet of floor space.”

CP 36.

Then, on January 6, 1949, the covenants were amended to the following:

“By Amendment recorded on January 6, 1949...paragraph 1 above now reads as follows; all lots in said plat, except lot 30, shall be known and be described as residential lots.” CP 36

From the plain language, it is clear that the intent of the parties to the agreement was to only mandate that the lots be described as residential. Notably absent is an express covenant limiting the uses and/ or purposes of the lots to *only* those uses and purposes that are residential or

restricting uses for a city park and community garden. CP 36. Without a “clearly expressed” restriction on the use or purpose, a restriction on how to describe the lots cannot be extended by implication to include a restriction on the lots’ use or purpose. *See Parry*, 68 Wn.App. at 669. Had the parties intended to limit the lots to only residential uses and/or with the intent to exclude parks and community gardens, language that “clearly expressed” such intent would and should have been included. CP 36.

Rather than ban or restrict, the covenants clearly permit lot owners to use their lots for other residential purposes including parks and community gardens. Furthermore, paragraph three (3) also allows lot owners to conduct other “activity” on their lots. CP 32 Once again, the covenants are completely devoid of any specific limitations of the lots to only residential use and/ or purposes. CP 36. Rather, the covenants expressly permit “trade” and other “activity.” CP 36.

4.3 The trial court erred in denying City of West Richland’s Motion for Summary Judgment because City of West Richland’s proposed use of Lot 28 complies with the clear and unambiguous language of the restrictive covenants.

As restrictions on the free use of land, the covenants in question are in “derogation of the common-law right to use land for all lawful purposes.” *Parry*, 68 Wn.App. at 669. Therefore, the covenants cannot “be extended by implication to include any use not clearly expressed.” *Id.*

Here, it is undisputed that the covenants do not contain a “clearly expressed” restriction on the lots to only residential use and/ or purposes. CP 32. Rather, the covenants only require that the lots be known and described as residential. CP 36. There is no “clearly expressed” restriction on the use of the lots. CP 36. Accordingly, this Court cannot by implication extend the covenants’ restriction that all lots be known and described as residential to include a restriction that all lots may only be used for residential use and/ or purposes. *See Parry*, 68 Wn.App. at 669.

The City’s other uses on Lot 28 also do not violate the covenants. In addition to the community garden, the City uses Lot 28 as a storm drain and a city park. CP 42. Once again, these uses are not specifically prohibited by the covenants. The covenants are devoid of any “clearly expressed” restriction on the lots to only residential uses and/ or purposes. CP 32. Rather, paragraph three (3) of the covenants clearly permit “trade” and other “activity” to be conducted on the lots. CP 36. Because the covenants clearly permit the City’s uses of Lot 28, the City is not in violation of the covenants

Interpreting the language of a restrictive covenant is a question of law. *Krein v. Smith*, 60 Wn. App. 809, 811, 807 P.2d 906, rev. denied, 117 Wn.2d 1002 (1991). “The following rules govern the interpretation of restrictive covenants:

- (1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning.
- (2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of free use of land.
- (3) The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when meaning is doubtful.

The covenants as amended allow for Defendant City of West Richland use of lot 28 for a City park. The Covenants as amended on January 6, 1949 read as follows:

“By Amendment recorded on January 6, 1949 . . . paragraph 1 above now reads as follows; all lots in said plat, except lot 30, shall be known and be described as residential lots.”

City of West Richland Parks are located throughout the City and most of the parks are located in residential neighborhoods. There is nothing in the record that indicates the City’s use of lot 28 for a City Park violates the covenant that the lot is residential. In fact notably absent from the covenants is an expression limiting the uses of the lots. The only thing it states is that the lots “shall be known as residential lots”. Without a clearly expressed restriction on the use, a restriction on how to describe

the lots cannot be extended by implication to include a restriction on the lots' use. *See Parry*, 68 Wn.App. at 669. Had the parties intended to restrict the lots use for City Parks, language that “clearly expressed” such intent would and should have been included. CP 36.

Restrictions on the free use of land are in “derogation of the common-law right to use land for all lawful purposes” *Parry*, 68 Wn.App. at 669. Therefore, restrictions on the free use of land cannot be “extended by implication to include any use not clearly expressed”. *Id.* Here, it is undisputed that the covenants do not contain a “clearly expressed” restriction on the lots. The covenants only require that the lots be known and described as residential lots. Accordingly, this Court cannot by implication extend the covenants' restriction that the lots cannot be used for a City Park. *See Parry*, 68 Wn.App. at 669.

The City use of Lot 28 is clearly permitted under the covenants. There are City Parks scattered throughout the City in residential neighborhoods. The only restriction of the covenants is that the lots be known as residential. The use of Lot 28 for a City Park does not change the nature of the lot. Public parks are scattered throughout residential neighborhoods in communities all over the State of Washington and throughout the United States. Therefore, the fact that the use of lot 28 is for a City Park does not change the nature of the lot.

4.4 ATTORNEY'S FEES AND COSTS

The City of West Richland respectfully requests that is Court award City of West Richland's attorney's fees and costs pursuant to RAP 18.1.

5. CONCLUSION

This court should reverse the trial court's ruling and deny granted Respondent's Motion for Summary Judgment. This Court should also reverse the lower court's ruling and grant City of West Richland and Grigg's Motion for Summary Judgment with an award for attorney's fees and costs.

RESPECTFULLY SUBMITTED this 15th day of June, 2018.



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