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Division III
State of Washington
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Nos. 358259 and 360121

IN THE COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

GRIGG FAMILY, LLC,

Appellant,

AND

THE CITY OF WEST RICHLAND,

Appellant,

v.

EDWARD COYNE, et ux., et al.,

Respondents.

REPLY BRIEF OF APPELLANT GRIGG FAMILY, LLC

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I. INTRODUCTION

Appellant, Grigg Family, LLC (“Grigg”), submits this brief in reply to Respondents’. Despite Respondents’ arguments to the contrary, the lower court committed error in reaching its decision. First, the lower court erred in relying on and considering surrounding circumstances in interpreting the restrictive covenant language. Second, the lower court erred in finding that Grigg’s proposed use of its land violated the plain language of the restrictive covenants. Each of these led the lower court to erroneously grant Respondents’ motion for summary judgment and deny Grigg’s.

II. ARGUMENT

A. **The lower court committed error when it considered the “surrounding circumstances” in interpreting the restrictive covenants.**

Although previously briefed, it bears repeating that the rules governing the interpretation of restrictive covenants are as follows:

“(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 Cnty.*, 65 Wn.2d 619, 621, 399 P.2d 68 (1965) (*emphasis added*)).

Here, neither party has outright claimed that the language of the restrictive covenants is ambiguous, doubtful, or unclear. In their appellate briefing, Respondents did suggest however that the language “could” be doubtful. *See* Respondents’ Brief, pp. 6—8. The lower court also did not make a finding that the restrictive covenant language was ambiguous, doubtful, or unclear. *See* RP 35—41.

Despite this, the lower court nonetheless considered surrounding circumstances when interpreting the restrictive covenants. RP 37—41. Without finding the restrictive language ambiguous, doubtful, or unclear, the lower court could not consider surrounding circumstances. *Parry*, 68 Wn. App. at 669. The lower court’s decision and analysis was thus a clear error. *See id.*

B. Under the rules of interpreting restrictive covenants, the lower court should have found that Grigg's proposed use complies with the restrictive covenants' plain and unambiguous language.

"[I]nterpretation of a particular covenant is largely dependent upon the facts of the case at hand." *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993). "In interpreting the drafter's intent, we give covenant language 'its ordinary and common use' and will not construe a term in such a way 'so as to defeat its plain and obvious meaning.'" *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d at 250 (quoting *Mains Farm*, 121 Wn.2d at 816; *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997)). "The lack of an express term with the inclusion of other similar terms is evidence of the drafters' intent." *Wilkinson*, 180 Wn.2d at 251 (citing *Burton*, 65 Wn.2d at 622).

The applicable restrictive covenants have the following clear and unambiguous language:

"1. All lots in said plat, except Lot 30, shall be known and be described as residential lots.

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.

In summary, the ordinary and common use of the restrictive covenants’ language allows owners of Canal Heights lots to build any type of structure they want and to engage in any type of activity they want, even trade, so long as that activity is not noxious, offensive, or a nuisance. CP 36. However, the lots must remain designated as residential. CP 36.

1. Grigg’s proposed use complies with the restrictive covenants’ plain and unambiguous language.

Here, the restrictive covenants do not restrict Grigg’s proposed use of Lots 1 and 29. No “twisted reasoning” is necessary to reach this conclusion. The store Grigg wishes to operate will allow Grigg to engage in the trade of selling hardware and home goods. CP 32. Trade activity is allowed under the restrictive covenants so long as it is not noxious, offensive, or a nuisance. CP 36. The restrictive covenants also do not restrict the structure Grigg wishes to build. CP 36.¹ Lots 1 and 29 can and will remain “designated” as residential lots that permit trade activity.

Furthermore, Respondents once again did not argue with any specificity how Grigg’s proposed use would be noxious, offensive, or a

¹ The Respondents argue that the restrictive covenants’ septic tank requirement for residential structures undermines Grigg’s interpretation. However, this provision simply allows Grigg to install a septic tank or connect to city sewage if it so chooses. It does not undermine Grigg’s position or interpretation simply because nonresidential structures require septic tanks.

nuisance. *See* Respondents' Brief, p. 24. Similar to their argument to the lower court, Respondents generally assert that "large trucks making deliveries in a neighborhood, commercial size dumpsters, and that kind of traffic are offensive" to owners of residential lots. *Id.*; *see also* CP 50. This claim is unsupported by testimony, or evidence that these types of activities will in fact occur on Lots 1 and 29, and is nothing more than a conclusory statement without any analysis. *Id.*

Contrary to Respondents claim, they do in fact have to show Grigg's proposed use would be noxious, offensive, or a nuisance to prohibit its activities to be successful on summary judgment. CR 56; CP 36; *see* Respondents' Brief, p. 22. This is simply because the restrictive covenants only restrict activities that are noxious, offensive, or a nuisance. CP 36. To find otherwise would completely ignore the restrictive covenants' plain unambiguous language. CP 36.

Because the Respondents failed to provide specific support, in the form of testimony or other evidence, that Grigg's proposed use was noxious, offensive, or a nuisance, the lower court erred in granting Respondents' motion for summary judgment and denying Grigg's.

2. Respondents' and the lower court's interpretation of the restrictive covenants is at odds with the plain unambiguous language and contravenes case law.

Respondents argue that the residential designation “is in fact a prohibition on non-residential use, or at a minimum on use that is not compatible with residential use.” Respondents’ Brief, p. 20. For Respondents, allowing Grigg’s proposed trade activity would render the residential designation of the lots meaningless. *Id.* at p. 12.

This interpretation however is simply unsupported under the restrictive covenants’ plain language. CP 36. Grigg’s lots will remain designated as residential lots despite its nonresidential trade activity because the restrictive covenants not only require this, but also allow for it. CP 36. If the drafters wanted to limit the use of Canal Heights to only residential uses, they could and should have so provided. *See Burton*, 65 Wn.2d at 622.

Despite Respondents’ argument, the restrictive covenants are completely devoid of any language mandating that Canal Heights landowners use their land for residential uses or purposes only. CP 36. The lower court acknowledged this fact. RP 39. The plain language of the restrictive covenants instead clearly allows for any and all nonresidential activities, like trade, so long as the activities are not noxious, offensive, or a nuisance. CP 36. The restrictive covenants allow for trade activity even

despite requiring the lots be designated as residential. CP 36. Extending the covenants to restrict all nonresidential uses without this restriction being clearly expressed in the covenants contravenes case law. *Parry*, 68 Wn.App. at 669 (citing *Burton*, 65 Wn.2d at 621).

Utilizing the same rationale as Respondents, adopting Respondents' interpretation would in turn render the restrictive covenants' provision that specifically allows for nonresidential uses meaningless. Even Respondents' championed definition of "residential" renders the remaining language allowing trade meaningless. *See* Respondents' Brief, p. 15.

Contrary to Respondents' claims, the restrictive covenants do not allow only "some" type of trade or trade "up to some degree." *See* Respondents' Brief, pp. 7, 20. Rather, the restrictive covenants specifically allow for any activity, even trade, so long as it is not noxious, offensive, or a nuisance. CP 36. There is no other caveat as the Respondents suggest.

The restrictive covenants also do not require the Court to interpret the term "trade" in light of the term "residential." *See* Respondents' Brief, p. 20. If this were the case, then once again the drafters could and should have so provided. *See Burton*, 65 Wn.2d at 622. Respondents instruct this Court to add additional restrictions on the activities allowed under the restrictive covenants by implication vis-à-vis the mandate that the lots

must be designated as residential. Such extension of restricted activities contravenes case law and is at odds with the restrictive covenants' own plain and unambiguous language. *Parry*, 68 Wn.App. at 669 (citing *Burton*, 65 Wn.2d at 621).

3. By finding that the restrictive covenants do not allow the “type” of trade proposed by Grigg, the lower court erroneously extended a restriction by implication.

As previously briefed, the lower court found that the restrictive covenants allow for activities such as “hobby agriculture, produce stands, things like that,” but not Grigg’s proposed trade. RP 39—40. This finding was an erroneous extension of restrictions because the restrictive covenants do not have such limiting language. CP 36. Instead, the restrictive covenants only restrict activities that are noxious, offensive, or a nuisance. CP 36. The leap from the restrictive covenants’ very broad permissive language to the added restrictions found by the lower court was an extension by implication. RP 39—40. Thus, this ruling was erroneous and should be reversed. *See Parry*, 68 Wn.App. at 669 (citing *Burton*, 65 Wn.2d at 621).

Because the covenants clearly permit Grigg’s to conduct “trade” activity on Lots 1 and 29, the lower court should have found Grigg’s proposed use complies with the restrictive covenants. CP 36. Additionally, because the restrictive covenants do not contain a restriction on the “type

of trade” allowed under the restrictive covenants, the lower court’s extension of restrictions was erroneous. *Parry*, 68 Wn.App. at 669 (citing *Burton*, 65 Wn.2d at 621). The lower court should have granted Grigg’s Motion for Summary Judgment and denied Respondents’. CP 142.

C. Even if this Court finds that the restrictive covenant language is doubtful, ambiguous, or unclear, which it isn’t, the “surrounding circumstances” support Grigg’s interpretation.

Should this Court determine that surrounding circumstances are necessary to determine the drafter’s intent, which they are not, the Court can only utilize surrounding circumstances to “illuminate what was written, not what was intended to be written.” *Wilkinson*, 180 Wn.2d at 251 (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d, 683, 697, 974 P.2d 836 (1999)). Furthermore, the Court cannot consider “extrinsic ‘[e]vidence that would vary, contradict or modify the written word’ or ‘show an intention independent of the instrument.’” *Id.* (citing *Hollis*, 137 Wn.2d at 695).

To the extent the Court finds the January 6, 1949 amendments are “surrounding circumstances” as the Respondents claim, these amendments clearly demonstrate the drafter’s intent to allow for all nonresidential uses so long as they are not noxious, offensive, or a nuisance. This claimed “extrinsic evidence” is also the only evidence of intent that does not vary, contradict, or modify the written words of the restrictive covenants. *See Wilkinson*, 180 Wn.2d at 251.

1. If considered a “surrounding circumstance,” the restrictive covenants’ 1949 amendment supports Grigg’s interpretation.

Prior to the 1949 amendment, the Canal Heights lots could only have “residential structures”. CP 36. However, this restriction was eliminated with the 1949 amendment. CP 36. This amendment clearly demonstrates the drafter’s intent to allow for nonresidential structures to be built in Canal Heights. *See Burton*, 65 Wn.2d at 622. It is also clear that in only mandating that the lots be described as residential, but allowing for any activities, even trade, the drafters did not intend to limit the use of the lots to only residential uses as the Respondents claim. CP 36.

This interpretation is supported by case law as “[t]he lack of an express term with the inclusion of other similar terms is evidence of the drafters’ intent.” *Wilkinson*, 180 Wn.2d at 251 (citing *Burton*, 65 Wn.2d at 622). In *Burton*, the Supreme Court found that “[h]ad the intent been to restrict to restrict to residential use only, the parties could have so provided” in the restrictive covenants themselves. *Burton*, 65 Wn.2d at 622. Additionally, “[t]he fact that the parties designated ‘noxious or offensive or business trade’ as the only prohibited nonresidential uses is clear evidence of their intention that other nonresidential uses were permissible.” *Id.*

Despite Respondents analysis to the contrary, the legal analysis in *Burton* is in fact analogous to the case before the Court. Similar to *Burton*, the restrictive covenants in question do not have a clearly expressed covenant restricting the use of Canal Heights to only residential uses. CP 36. The lots must be described or known as residential; however, there is no express covenant limiting the uses and/ or purposes of the lots to only those that are residential. CP 36. Had the drafter intended to restrict the use of Canal Heights to only residential uses and/ or purposes, they could have so provided. *See Burton*, 65 Wn.2d at 622.

The restrictive covenants in question also allow for any type of structure to be built in Canal Heights. CP 36. Because of the January 6, 1949 amendment, there is no longer any requirement that the structures be “residential.” CP 36. This clearly demonstrates the drafter’s intent to allow for nonresidential structures to be built in Canal Heights. *See Burton*, 65 Wn.2d at 622. Accordingly, it is clear that in only mandating that the lots be described as residential, the drafter also did not intend to limit the use of the lots to only residential uses. This intent is especially clear in light of *Burton*. *See id.* at 619—22.

2. The Court cannot and should not consider the evidence Respondents offer in support of their interpretation.

Aside from their plain language interpretation, the only evidence Respondents offered to support their interpretation that the lots are limited to residential uses or uses that are compatible with residential uses only were pictures of Canal Heights lots as they exist in the present as well as recent zoning ordinances. CP 54, 86—109. However, these “surrounding circumstances” did not exist at the time of drafting and should not be considered as evidence of the drafter’s intent. CP 54; RP 26. To do so would be illogical.

Furthermore, Respondents’ extrinsic evidence and purported interpretation clearly contradicts, modifies, and varies the plain language of the restrictive covenants. Respondents’ Brief, p. 14—15; CP 36. Accepting Respondents’ claim that because Canal Heights lots have been used for residential purposes for 70 years means the drafter intended to allow only residential uses is directly contrary to the restrictive covenants’ written word. *See* Respondents’ Brief, p. 4; CP 54. Thus, this extrinsic evidence should not be utilized to contradict, modify, or vary the restrictive covenants’ written word. *Wilkinson*, 180 Wn.2d at 251.

Respondents also claim that Grigg introduced “surrounding circumstances” by discussing the City of West Richland’s then current use

of Lot 28. Respondents' Brief, p. 9. However, this claim is incorrect. The Respondents failed to mention, or possibly failed to recognize, that Grigg and the City filed a joint motion for summary judgment and a joint response in opposition to Respondents' motion for summary judgment. CP 17—19, 127. Any discussion of the City's use of Lot 28 was meant to demonstrate that it was in compliance with the restrictive covenants, nothing more. CP 20—30, 127—36.

Contrary to Respondents' claim, Grigg did not need to discuss the City's current use of Lot 28 to "hint" that the Respondents "acquiesced in uses that were not strictly 'residential.'" Respondents' Brief, p. 9. This is simply because the Respondents themselves acquiesced to the City's uses that were not strictly residential. RP 15.

"THE COURT: Okay. Currently you concede that [the City's] existing use does not violate the restrictive or protective covenants?"

MR. EDELBLUTE: Yes we do. We concede that." RP 15.

Now, the Respondents argue to this Court, for the first time, the exact opposite. *See* Respondents' Brief, p. 14—15, 16—27. To the extent that this admission is a surrounding circumstance, the lower court should only have used facts of the City's use to illuminate what was written in the restrictive covenants—i.e. that trade activity and all other nonresidential

uses are allowed so long as they are not noxious, offensive, or a nuisance. *Wilkinson*, 180Wn.2d at 251; CP 36.

Instead, the lower court used this and other evidence proffered by the Respondents to amend the restrictive covenants to only allow “some” trade and not the “type of trade” proposed by Grigg. RP 35—40. These restrictions are not clearly expressly in the restrictive covenants and should not have been added by implication from the surrounding circumstances offered by Respondent. *Burton*, 65 Wn.2d at 624; *Parry*, 68 Wn.App. at 669. The lower court’s ruling rewrote the restrictive covenants in violation of well-established case law. *Id.* Thus, the lower court’s decision was in error.

III. COSTS

Should Grigg prevail on appeal, it respectfully requests an award of costs allowed under RAP 18.1. In response to Respondents’ argument, Grigg specifically requests costs pursuant to RCW 4.84.010 and RCW 7.24.100 should it prevail.

IV. CONCLUSION

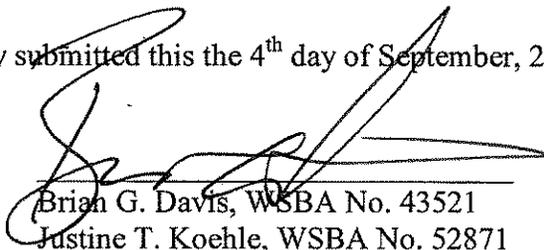
The restrictive covenants’ language is plain and unambiguous. Thus, the lower court’s consideration of surrounding circumstances was in error. Furthermore, Grigg’s proposed use of Lots 1 and 29 clearly complies with the restrictive covenants’ plain and unambiguous language.

The lower court should have granted Grigg's motion for summary judgment and denied Respondents'.

Even if the Court decides that the restrictive covenant language is ambiguous, which it isn't, the only applicable claimed "surrounding circumstances" that are dispositive of the drafter's intent are the January 6, 1949 amendments. Furthermore, the lower court's interpretation of restrictive covenants in light of the Respondents' evidence was clearly in derogation of case law as it extended restrictions not clearly expressed and consequently modified the restrictive covenants' written word.

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

Respectfully submitted this the 4th day of September, 2018.



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