

Judgment rendered July 24, 2002.

NO. 35,509-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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PATRICK H. WRIGHT, JR., ET AL

Plaintiff-Appellant

versus

CHARLIE T. GRIGGS, JR., ET AL

Defendant-Appellee

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Originally Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 00-5166

Honorable Michael S. Ingram, Judge

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FRED R. McGAHA

Counsel for
Plaintiff-Appellant

RICHARD L. FEWELL, JR.

Counsel for
Defendant-Appellee

* * * * *

Before BROWN, WILLIAMS, SAMS (ad hoc), HIGHTOWER (ad hoc)
and KITCHENS (ad hoc), JJ.

WILLIAMS, J., concurs with written reasons.
BROWN, J., dissents with written reasons.
KITCHENS, J., dissents with written reasons.

SAMS, Judge

The plaintiffs appeal a judgment denying their request for a preliminary injunction to prohibit the defendants from using a subdivision lot as a roadway to access tracts of land located outside of the subdivision.

For the following reasons, we reverse and remand.

FACTS

The plaintiffs, Pat Wright, Jerry Brossett, James Jones, Johnny H. Williams, and John L. Gathright, are lot owners in the Northwood Estates Subdivision located in Ouachita Parish, Louisiana. The residential subdivision is subject to the building restrictions contained in the declaration of restrictions filed in the conveyance records of Ouachita Parish. In October 2000, the defendants, Charlie and Buffy Griggs and Ord and Martha Sullivan, purchased Lot 12 in the subdivision. They began using the lot as a means to access their property located outside of the subdivision. The Griggs own approximately 56 acres behind Northwood Estates and the Sullivans own a 17-acre tract behind the subdivision.

On December 20, 2000, the plaintiffs filed a petition seeking an injunction to prohibit defendants from constructing a roadway across Lot 12 for the purpose of using the lot as a means to access their property behind the subdivision. After a hearing, the trial court found that the defendants' use of Lot 12 for the sole purpose of gaining access to their other properties was not in contravention of the subdivision's restrictions and covenants. The trial court rendered judgment denying plaintiffs' request for a preliminary injunction. Plaintiffs appealed the judgment. This court's original opinion affirmed the trial court's judgment. *Wright v. Griggs*, 35,509 (La. App. 2d Cir. 2/8/02). Subsequently, we granted the

plaintiffs' application for rehearing.

DISCUSSION

The plaintiffs contend the trial court erred in refusing to issue an injunction prohibiting the defendants from using the lot as a means to access property outside of the subdivision. The plaintiffs assert that such a use is not for residential purposes and violates the building restrictions.

Building restrictions are charges imposed by the owner of an immovable in pursuance of a feasible general plan governing building standards, specified uses, and improvements. LSA-C.C. art. 775. Such restrictions are real rights running with the land and may be enforced by mandatory and prohibitory injunctions. LSA-C.C. art. 779. Once a plaintiff seeking an injunction has established a violation of a restriction, the burden shifts to the defendant to prove a termination or abandonment of that restriction. *Harrison v. Myers*, 25,902 (La. App. 2d Cir. 6/22/94), 639 So.2d 402. Building restriction clauses are to be understood in their common and usual meaning, in accord with their general and popular use. *Oakbrook Civic Association v. Sonnier*, 481 So.2d 1008 (La. 1986).

We will therefore examine the language used in the "Northwood Estates Declaration of Restrictions and Covenants [sic]" to determine whether the trial court erred in its interpretation of the instrument as allowing defendants' use of their lot, considering the document in its entirety. Article One of the covenants provides that "[n]o lot shall be used except for residential purposes." This article further states that "[n]o building shall be erected, altered, placed or permitted to remain on any lot other than one single-family dwelling not to exceed two stories in height." The restrictions

thereafter refer to buildings, dwellings, fences, parking, signs, animals, vegetable gardens, dumping, individual water supply, plumbing, sewerage disposal systems, electrical power, use of guns and use of the lake.

Here, both Charlie Griggs and Ord Sullivan acknowledged that they purchased Lot 12 solely for use as an access road to their tracts of land located outside of the subdivision and that they did not intend to build a residence on the lot. The trial court opined that the present activity of the defendants did not violate the building restrictions.

However, in *Beyt v. Woodvale Place Apts.*, 297 So.2d 448 (La. App. 3rd Cir. 1974), the court found that the use of subdivision lots for a surfaced road to provide ingress and egress to apartments on adjacent land was a use other than for residential purposes and was a violation of the building restrictions. The court in *Beyt* determined that equity favored the home owners, who had relied on the restrictions when building their homes in the subdivision.

In the present case, the testimony established that Lot 12 will be used for access to the houses of the Griggs and the Sullivans and at least one other house. Thus, it is clear that defendants intend to use the lot as access to multiple houses located outside the subdivision, rather than to accommodate a single-family dwelling consistent with the general scheme of the subdivision as reflected by the covenants. Although this situation does not involve apartments as in *Beyt*, the use of Lot 12 to facilitate the traffic to multiple homes would surely violate the spirit of the covenants. The record does not support the defendants' attempt to distinguish the *Beyt* case from the present case by asserting that they are not creating a new roadway, but merely using an

existing easement road. The evidence shows that defendants have significantly changed the nature of the servitude from an intermittently used utility easement serving the subdivision to a regularly traversed thoroughfare serving large tracts of property outside of the subdivision.

Multiple dwellings may not exist now, but as previously noted, the defendants have unequivocally stated that such construction is planned. In *Guyton v. Yancey*, 240 La. 794, 125 So.2d 365 (La. 1960), the supreme court affirmed an injunction issued to prohibit a threatened violation of building restrictions by an owner who admitted that the house he planned to build would be in violation. Thus, the plaintiffs are not required to wait until a future date to exercise their right to enforce the restrictions. Based upon the defendants' intended use of Lot 12, the plaintiffs have shown a violation of the building restrictions.

The defendants also contend that the prior use of the easement by other subdivision residents violated the restrictions such that the plaintiffs' enforcement action has prescribed. Contrary to the defendants' contention, the evidence presented of infrequent uses of the easement to access other land does not demonstrate an abandonment of the restrictions or that the plaintiffs' action is barred by prescription. Consequently, this court is of the opinion that the fact of a preexisting servitude does not support the defendants' acknowledged intent to use the lot as a roadway to access two large tracts of land outside of the subdivision. After reviewing the record and considering the circumstances of this case, we conclude that the preliminary injunction should have been granted.

CONCLUSION

For the foregoing reasons, the trial court's judgment is reversed and the case is remanded to the district court for the issuance of a preliminary injunction enjoining the defendants from using, or permitting others to use, Lot 12 of the Northwood Estates subdivision as a roadway for accessing property outside of the subdivision, and further that the status quo be maintained pending a final determination of the parties' rights. Costs of this appeal are assessed to the appellees, Charlie and Buffy Griggs and Ord and Martha Sullivan.

REVERSED AND REMANDED.

WILLIAMS, J., concurring.

I respectfully concur. I write separately to reiterate the position that the defendants' use of the subdivision lot as an access road does not constitute a "residential purpose" and thus is a violation of the building restrictions, regardless of the number of houses planned for the property located outside of the subdivision.

Paragraph one of the declaration of restrictions states: "No lot shall be used except for residential purposes." The plaintiffs demonstrated that valid

building restrictions were created by the ancestor in title pursuant to a general plan with the intent that the subdivision lots would be used for residential purposes only.

Defendants argue that because the instrument creating the restrictions does not define the term “residential purposes” and is silent concerning use of subdivision lots as roads, this omission allows the use of the property as a roadway. However, this argument is not supported by a reasonable reading of the express language of the restrictions.

Although the restrictions do not expressly prohibit the use of a subdivision lot as a roadway, the designation of all lots as “residential” effectively bars the use of subdivision property for any purpose other than to construct a residence. *Concord Estates Homeowners Assoc. Inc. v. Special Children’s Foundation Inc.*, 459 So.2d 1242 (La. App. 1st Cir. 1984).

Giving the word residential its plain and ordinary meaning, I conclude that the subdivision lot in question cannot be used solely as a means of passage. This conclusion is consistent with the building restriction language limiting construction on the subdivision lots to “one single-family dwelling.”

A reading of the building restrictions as a whole demonstrates that the general plan adopted by the subdivision contemplated the creation of a residential neighborhood with relatively large lots, comparable-sized homes and reduced traffic. The unreasonably strained interpretation of the building restriction language employed by the defendants and the trial court circumvents the legitimate purpose of the subdivision’s general scheme. Consequently, I conclude that the defendants’ use of Lot 12 as an access road,

or for any purpose other than the construction of a single-family residence, constitutes a prohibited violation of the building restrictions.

BROWN, J., dissenting,

I respectfully dissent. I believe that the trial court was right to deny a preliminary injunction. There was no showing of any intended commercial use of Lot 12 or of any structure having been built on the lot. All that has been shown is that defendants have used an existing servitude running the length of Lot 12 to access properties they own behind the subdivision.

Building restrictions are restraints on the use and disposition of immovable property. Accordingly, documents establishing building restrictions are subject to strict interpretation. Doubt as to the existence,

validity, or extent of building restrictions must be resolved in favor of the free and unrestricted use of the immovable property. La.C.C. Code art. 783; *Brier Lake, Inc. v. Jones*, 97-2413 (La. 04/14/98), 710 So.2d 1054.

Entrance into the Northwood Estates subdivision is from Arkansas Road onto Northwood Drive. Northwood Drive goes through the subdivision and dead-ends between Lots 15 and 27. Griggs and Sullivan own separate 56 and 17 acre tracts behind the subdivision. Griggs purchased a right-of-way from his 56-acre tract to the rear of Lot 12. This right-of-way runs through Sullivan's 17 acres. Griggs and Sullivan bought Lot 12. They have been using an existing utility easement road on Lot 12 and the right-of-way that Griggs purchased to get to their tracts.

The restrictive covenants show that Northwood Estates subdivision was intended to be a residential community free of commercial intrusions or activities. Except for one cul-de-sac, Northwood Drive is the only street in the subdivision. Northwood Drive is a public road maintained by the local governing body. The "single-family dwelling" clause in the covenants regulates only the type of structure that may be built on a particular subdivision lot, while the "residential purposes" provision restricts the use of the property in general. The word "residential" as used in the covenants is in contradistinction to "business" or "commerce." See *Concord Estates Homeowners Association, Inc., supra*, (cited in the concurrence).

It appears that we have not reached a majority view in this case. Two judges write to reverse the trial court, stating that "it is clear that defendants intend to use the lot as access to *multiple* houses located outside the subdivision, rather than to accommodate a single-family dwelling . . ." and

that “the use of Lot 12 to facilitate the traffic to *multiple* homes would surely violate the spirit of the covenants.” (Emphasis added). The “single-family dwelling” provision refers only to the type of building that can be constructed on the subdivision lot. How the acreage outside of the subdivision is used is not relevant to the provision governing the type of structure that can be built. It is relevant, however, to the general use restriction of subdivision lots, that is, whether the lot is being used to facilitate a commercial venture, such as, the apartment complex in *Beyt v. Woodvale Place Apts.*, *supra*, an oil and gas well, another subdivision or mobile home development.

The concurring judge writes that an access road can never be considered a residential purpose “regardless of the number of houses planned for the property located outside of the subdivision” and that “the designation of all lots as ‘residential’ effectually bars the use of subdivision property *for any purpose* other than to construct a residence (on the lot).” (Emphasis added). Yet, the only case cited in this concurrence defines residential use “as distinguished from buildings in which people conduct business or commerce.” *Concord Estates*, *supra*, at p. 1244.

There is no requirement or obligation that lot owners actually build a single-family home. The trial court found that Mr. and Mrs. Griggs had built a home on their 56 acre tract and that Mr. and Mrs. Sullivan intend to build a home on their tract. The majority opinion refers to a third home. On rehearing, it was argued that Griggs’ son intends to build a home on his parents 56 acre tract. Defendants are not proposing to use or develop Lot 12 to facilitate any commercial purpose or venture, but only for ingress and egress to their homes.

Defendants have not built any structure on Lot 12. A plat of the subdivision was approved by the Ouachita Parish Police Jury and recorded with the clerk of court. The plat established a 20-foot-wide servitude across Lot 12 “for service lines for electrical power, gas, water, telephone, sewer & drainage.” The testimony and briefs of both parties, however, state that the passage was created for and used only by the Greater Ouachita Waterworks to access a water well at the rear of Lot 12. A road which has existed for almost 30 years was constructed on this easement from Northwood Drive to the water well.

The majority opinion has now enjoined defendants from building any road or from any use of the easement on Lot 12. However, other residents of the subdivision may continue their use of this easement to access property in the rear of the subdivision. It is clear that this easement has been continuously used to access the property behind the subdivision for recreational purposes. Plaintiff, Patrick Wright, drives across Lot 12 on this existing road to get to his hunting lease which is a commercial rather than residential use. When the subdivision streets were flooded, homeowners used the utility road across Lot 12 for ingress and egress. It is incongruous that everyone may now use the easement across Lot 12 except the owners of Lot 12.

I further note that two other owners of lots in the subdivision have built passages from the street to the rear of their lots for access to lands outside of the subdivision. One of these owners does not have a residence on the lot and put up a gate because of the number of trespassers who used this road to get to the property in back of the subdivision. They each have used these passages for more than 20 years without objections.

Although the trial court did not reach the prescription issue, and the majority opinion gave it slight attention, the record supports a finding that it was well-known to homeowners in Northwood Estates that the utility easement road had been used for years to access property outside the subdivision.

KITCHENS, Judge Ad Hoc, Dissenting,

I agree with the dissent by Judge Brown, and I assign these additional reasons.

In my view, a preliminary injunction should not be issued to prevent any use of Lot 12, the lot in question, as a road, when that alleged use is speculative and has not yet occurred. The evidence before the trial court did not show at the time of trial a use of Lot 12 and easement thereon that would rise to the level of any commercial or business use of Lot 12, in violation of the restriction that “(n)o lot shall be used except for residential purposes.”

A good definition and explanation of the quoted phrase is found in *Thompson v. Squibb*, 183 So.2d 30 (Fla.D.Ct. of Appeal 2d 1966):

There is no ambiguity in the expression “shall be used for residential purposes only.” As employed in this covenant, the word “only” is synonymous with the word “solely” and is the equivalent of the phrase “and nothing else” Property restricted to use for residential purposes, so long as it is in good faith used for such, may be also used to a minor extent for the transaction of some classes of business or other pursuits so long as such is merely casual or unobtrusive and results in no appreciable damage to neighboring property nor inconvenience,

annoyance or discomfort to neighboring residents. However, such additional use must be reasonably incidental to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants, and without substantial injury to the neighborhood. (Citation omitted).

The trial court found that, at the time of trial, Mr. and Mrs. Griggs resided on their property outside the subdivision in question, and that Mr. and Mrs. Sullivan, intended to build a residence on their property outside the subdivision. Both intend to gain access to their single-family residences through the road and easement on Lot 12. Any other usage of Lot 12 is an inconsequential breach of the restriction, if any at all, and is merely casual and unobtrusive, and such usage has been shown to cause no appreciable damage, inconvenience, annoyance or discomfort for neighboring residents.

The denial of the preliminary injunction will still give appellants the opportunity to schedule a trial seeking issuance of a permanent injunction. At that trial, appellants will have the opportunity to produce further evidence to show that any usages of Lot 12 to which they object are more than inconsequential and cause substantial injury to the neighborhood.

For these reasons, I would affirm the holding of the trial court.