S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DAVID RIBICK, DONNA RIBICK, CHARLES RICKMAN, SANDRA RYCKMAN, THOMAS HOLLOWELL, CAROL HOLLOWELL, and WILDWOOD RIVER NO 1 SUBDIVISION HOME ASSOCIATION, Plaintiffs-Appellants,	UNPUBLISHED June 6, 2006
v	No. 257468 Oakland Circuit Court LC No. 03-053897-CH
INVERRARY, L.L.C., ESTATE OF DELORES MURRAY, and TOWNSHIP OF COMMERCE, Defendants-Appellees.	

RICHARD BALAGNA, NORMA BALAGNA, STEPHAN DEMAR, and CONSTANCE DEMAR, Plaintiffs-Appellants,	
v	No. 257510 Oakland Circuit Court LC No. 03-053867-CH
INVERRARY, L.L.C., ESTATE OF DELORES MURRAY, and TOWNSHIP OF COMMERCE, Defendants-Appellees.	

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right from the order granting summary disposition, pursuant to MCR 2.116(C)(10), in favor of defendants. We affirm.

I

In 1972, Joseph Murray and Dolores Murray were the fee simple owners of the real property that is the subject of this action ("Subdivision"). The Murrays recorded a plat for the subject property with the county register of deeds on or around March 11, 1972. The plat was

recorded as the Wildwood River No.1 Subdivision. The plat included a 6.5 acre lot identified as "Outlot A" in the northwest corner of the subdivision. Upon Joseph Murray's death, Dolores Murray became sole owner of the subject property, and on March 5, 1975, Dolores Murray (hereinafter referred to as Murray) recorded a Declaration of Restrictions (Deed Restrictions) with the county register of deeds. The deed restrictions provided, among other things, that "no building" other than "one detached single family dwelling" shall be erected upon any "lot" within the subdivision.

On June 6, 1976, Murray conveyed to the County of Oakland, by warranty deed, the parcel of property identified as "Outlot A." A right of reverter was attached to the warranty deed, providing that Outlot A was conveyed for the purposes of providing a site for county water system pumping facilities, and when the county ceased using the site for that purpose, it would revert to Murray, her heirs or assigns.

The plaintiffs are lot owners with the subdivision. Plaintiffs Balagnas and Demars specifically own property adjacent to Outlot A, and a gravel road access site runs between their properties. The Balagnas' property is adjacent to the Outlot on the north and west. The Demars' property is adjacent to the Outlot on the south and west. Under the current township street ordinance, the proposed condominium project must have public, not private, roadways. The access site/gravel road to the Outlot is approximately thirty feet wide, but platted sixty feet wide.

On May 23, 1979, the Wildwood No. 1 Subdivision Home Association was created pursuant to the deed restrictions and enacted bylaws in October 1979. Murray executed a limited power of attorney granting the home association the authority to enforce her interests in the deed restrictions on June 18, 1980. Since 1980, the home association collected dues and made improvements to the Outlot, including a baseball backstop and a basketball court.

Murray transferred the remaining unsold lots in the plat to Wildwood River Land Development Company on September 24, 1980. In February 1983, the Wildwood River Development Company executed a limited power of attorney to the home association authorizing the association to enforce its interests in the deed restrictions.

On October 13, 2003, the county reconveyed Outlot A to Murray's estate[1] after the county abandoned the pumping facilities. Murray's estate subsequently conveyed "Outlot A" to defendant Inverrary, L.L.C. for the purpose of developing a site condominium project consisting of ten separate single family sites and a public road between the plaintiffs' properties. Defendant Commerce Township approved Inverrary's site plan for the condominium development.

Plaintiffs filed complaints in circuit court seeking a declaratory judgment preventing the proposed condominium development and access road, an injunction and damages. Plaintiffs alleged that the plain language of the deed restrictions provided only for the construction of single-family homes. Alternatively, plaintiff alleged the proposed development violated a reciprocal negative easement encumbering Outlot A, the bylaws of the home association, and

---

[1] Dolores Murray died on April 12, 1982.

section 222 of the Michigan Land Division Act, MCL 560.101 *et. seq*.[2] Plaintiffs Balagnas' and Demars' alleged the township's approval of defendant Inverrary's site plan constituted inverse condemnation and created a non-conforming use of their respective properties. Plaintiffs further requested that the trial court reverse the township's approval of the site plan under the trial court's power of superintending control.

The parties filed competing motions for summary disposition. After hearing the parties' arguments, the trial court denied plaintiffs' motions. The trial court concluded that the failure of the deed restrictions to reference Outlot A failed to create a disputable issue of material fact that the restrictions applied. The trial court also concluded the proposed development did not violate the home association's bylaws as the subject property never became a part of the home association despite its actions in maintaining the land. In addition, the trial court determined that plaintiffs failed to establish a negative reciprocal easement, that the proposed development was not precluded under MCL 560.222 of the Land Division Act, and that plaintiffs' Balagnas' and Demars' inverse condemnation claims and claims that the proposed road would create a nonconforming use of their properties were premature. Plaintiffs now appeal.

II

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id*.

This Court also reviews equitable actions under a de novo standard. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d 378 (1997). However, determining the extent of a party's rights under a plat dedication is a question of fact reviewed for clear error. *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2003). The trial court's findings will be sustained unless this Court is convinced that it would have reached a contrary result. *Orion Charter Twp v Burnac Corp*, 171 Mich App 450, 459; 431 NW2d 225 (1988).

III

Plaintiffs first challenge the trial court's determination that the deed restrictions are not applicable to Outlot A. Plaintiffs contend that because the legal description of the entire property and the deed restrictions reference the recorded plat, which includes the Outlot, the deed restrictions apply. Alternatively, plaintiffs contend that the absence of a provision expressly excluding Outlot A or limiting the restrictions' applicability to other lots supports a

---

[2] The Subdivision Control Act was renamed the Land Division Act by 1996 PA 591, § 1.

determination that Murray intended to limit construction in the subdivision to one detached single family dwelling per lot, including Outlot A. We disagree.

The deed restrictions provide in relevant part:

> WHEREAS, DELORES MURRAY is the owner in fee simple and the Proprietor of the plat of the premises described as follows:
>
> Wildwood River Subdivision No. 1 of part of the Southwest 1/4 of Section 6, Town 2 North, Range 8 East, Commerce Township, Oakland County, Michigan . . .
>
> and,
>
> WHEREAS, *said recorded plat covers lots Number 1 through 41, inclusive*; and
>
> WHEREAS, it is the purpose and intention of this Declaration of Restrictions that the sale of the lots in WILDWOOD RIVER SUBDIVISION no. 1 shall be conveyed by the GRANTOR *subject to the reservation of easements, use and building restrictions* herein contained or set forth in said recorded Plat; . . .
>
> * * *
>
> 2. *No lots shall be used except for residential purposes*, and no building of any kind shall be erected . . . or permitted to remain on any lot other than one detached single family dwelling not to exceed two stories in height and a private garage for not more than three (3) cars. A garage must be constructed as part of the building referred to herein.
>
> * * *
>
> 19. Easements for the installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat.
>
> * * *
>
> 25. It is anticipated that the Grantor herein may develop adjacent land presently owned by it a WILDWOOD RIVER SUBDIVISION NOS. 2 and 3 and that said anticipated single-family residential developments shall be controlled by identical restrictions . . . . [Emphasis added.]

"Restrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter," *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 505; 686 NW2d 770 (2004), citing *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982), and strictly construed against grantors and the parties seeking to enforce the covenants. All doubts are to be resolved in favor of the free use of property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999); *Stuart v Chawney*, 454 Mich 200,

210; 560 NW2d 336 (1997). Courts should not infer restrictions that are not expressly provided for in the controlling documents. *O'Connor, supra* at 341, citing *Margolis v Wilson Oil Corp*, 342 Mich 600, 603;70 NW2d 8111 (1955).

Here, when read in context and as a whole, the trial court properly concluded that the restrictions limiting construction to detached single-family dwellings were inapplicable to Outlot A. The recitals to the deed restrictions plainly provide that the "recorded plat covers *lots* Number 1 through 41, *inclusive*," and that the sale of *lots* shall be conveyed "subject to the *reservation of easements*, use and building restrictions herein." Outlot A was specifically reserved as an easement,[3] separate and apart from lots 1 through 41. Plaintiffs cite to no language reflecting Murray's intent to apply the deed restrictions to "easements," "drainage facilities" or "the well site" which, when so used, by their very nature are not usable as "a one detached single family dwelling." Further, plaintiffs fail to cite any provisions in the deed restrictions or plat restricting development of Outlot A once it ceased to be used as a well site and reverted to Murray, her heirs or assigns. Because it is improper to enlarge or extend the meaning of a restrictive covenant by judicial interpretation when there is no ambiguity present. *Webb v Smith*, 204 Mich App 564, 572; 516 NW2d 124 (1994), we will not infer restrictions that are not expressly provided for in the controlling document. *O'Connor, supra* at 341. The trial court did not err in concluding that the deed restrictions are not applicable to Outlot A.[4]

Next, plaintiffs argue the trial court erred in determining that the proposed development was not barred by a reciprocal negative easement. We disagree.

The doctrine of reciprocal negative easements provides that "restrictions on the use of property not found in a party's chain of title may nonetheless arise by implication . . . where the owner of two or more lots situated near one another conveys one of the lots with express building restrictions applying thereto in favor of the land retained by the grantor." *Moore v Kimball*, 291 Mich 455, 459; 289 NW 213 (1939). In order to prove the existence of a reciprocal negative easement, a party must show a common grantor, a general plan or scheme of restriction, and restrictive covenants running with the land in accordance with such plan or scheme and within the plan or scheme area in deeds granted by the common grantor. *Cook v Bandeen*, 356 Mich 328, 337; 96 NW2d 743 (1959). Stated differently, "reciprocal negative easements run[] with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction." *Moore, supra* at 459.

Plaintiffs failed to establish an "express fastening" to Outlot A. "If a reciprocal negative easement attached to defendants' lot was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that

---

[3] The recorded plat indicates Outlot A is a "well site" with the notation "private easement for public utilities."

[4] Because we find the deed restrictions to be plain and unambiguous, *Dyball, supra* at 704, we need not review or address plaintiffs' examples of "subsequent circumstances" as evidence of Murray's intent to apply the restrictions to the entire subdivision. *Webb, supra* at 572.

time to it." See *Sanborn v McLean*, 233 Mich 227, 230; 206 NW 496 (1925). However, given the specific reservation of Outlot A as a well site and private easement, no reciprocal negative easement other than that expressed in the declaration of restrictions was created. Given the language of the deed restorations and the location and size of Outlot A on the recorded plat, it cannot be said with certainty that a purchaser had actual or constructive notice that the deed restrictions apply to Outlot A as one of the buildable lots. Clearly, it was not contemplated that adjacent property would not be further divided into smaller buildable lots.

Next, plaintiffs argue the proposed development and defendants' attempts to amend the subdivision plat violate the Land Division Act. Plaintiffs contend that under MCL 560.222, defendants were required to file a complaint in circuit court to revise a recorded plat. We disagree.

Generally, property must be platted in accordance with the Land Division Act, MCL 560.101 *et. seq*., whenever a "subdivision"[5] occurs. MCL 560.103(1). Subject to certain exceptions under MCL 560.108 and MCL 506.109, once a plat is approved and recorded, the Land Division Act requires "the owner of a lot in the subdivision, a person of record claiming under the owner or the governing body of the municipality" where the land is located, to file and action to "vacate, correct, or revise a recorded plat or any part of it." MCL 560.222; see also 560.266. However, "a division is not subject to the platting requirements" of the Land Division Act, "if the division . . . shall result in a number of parcels not more than" "4 parcels for the first 10 acres or fraction thereof I the parent parcel or parent tract." MCL 560.108. Nor is a division subject to platting requirements under the Michigan Condominium Act, MCL 559.101 *et. seq*. MCL 559.110(1) specifically provides that the Land Division Act "shall not control divisions made for any condominium project." See also *Williams v City of Troy*, 269 Mich App 670, 676; ___ NW2d ___ (2005), slip op at 4 (holding that the defendant was not required to vacate the subdivision plat under the Land Division Act before dividing the land into a condominium development pursuant to Michigan's Condominium Act).

Because the plain and unambiguous statutory language in MCL 554.110(1) must be enforced as written, *id*., defendants were not required to initiate an action to vacate the existing plat pursuant to the Land Division Act before seeking the township's approval of the proposed condominium development. The trial court did not err in finding the Land Division Act inapplicable to defendants' proposed development. *Williams, supra*.[6]

---

[5] Under MCL 560.102(f) a "subdivision" is defined, in part, as:

> the partitioning or splitting of a parcel or tract of land by the proprietor thereof or by his or her heirs, executors, administrators, legal representatives, successors, or assigns for the purpose of sale, or lease of more than 1 year, or of building development that results in 1 or more parcels of less than 40 acres or the equivalent, and that is not exempted from the platting requirements of this act by sections 108 and 109.

[6] Alternatively, "even if the Land Division Act were applicable to the current development, a

(continued…)

We also reject plaintiffs' next contention that the recorded plat expresses a clear intention to privately dedicate Outlot A to the subdivision for the sole purpose of water pumping facilities.

"[A] private dedication is deemed a sufficient conveyance to vest the *fee simple* of all land so marked and noted." MCL 560.253; *Martin v Beldean*, 469 Mich 541; 677 NW2d 312 (2004) (emphasis added). MCL 560.202(1) and MCL 560.204(1) require private dedications to be noted on the plat. *Id*.

In this case, the plat provides the following granting language:

> We as proprietors, certify that we caused the land embraced in this plat to be surveyed, divided, mapped and dedicated as represented on this plat and the streets are for the use of the public; that *the public utility easements are for private easements* and that all other easements are for the uses shown on the plat; that the shoreline extends to the water's edge and the Outlot "A" is to be used as a well site. [Emphasis added.]

The plat further indicates Outlot A is a "well site" with the markation "private easement for public utilities." Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. *Dyball, supra* at 704. The language of the plat belies plaintiffs' claims that Outlot A is a grant of a fee interest. At most, the subdivision lot owners possessed a private easement limited to the use of public utilities. Where a plat is recorded, the purchaser receives not only the interest as described in their deed, but also whatever rights as are indicated in the plat. See *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939). However, the easement was limited for the use of public utilities. "The use of an easement must be confined strictly to the purposes for which it was granted or reserved. . . . The owner of an easement cannot materially increase the burden of it upon the servient estate . . . ." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957), citing 17A Am Jur, Easements, § 115, p 723. Accordingly, the easement for a "public utility" became extinguished once the need for a water well ceased to exist. It is settled law that "[a] grant of an easement for particular purposes having been made, the right thereto terminates as soon as the purposes for which granted cease to exist or are abandoned or are impossible." *MacLeod v Hamilton*, 254 Mich 653, 656; 236 NW 912 (1931).

Here, Outlot A ceased to be used for water pumping facilities once the Township connected to the Detroit Public Water System. Plaintiffs provide no evidence that Outlot A is used or intended to be used as a public utility subsequent to the county's reconveyance of the Outlot to Murray's Estate. Accordingly, plaintiffs' rights "thereto terminate[d]" once the purposes for which the easement was granted ceased to exist.

(…continued)

"replat" would not be necessary under these circumstances" as defendants' "proposed condominium development clearly falls within the boundaries of the existing subdivision," thus the requirement that a "developer must take court action to vacate a recorded plat when a proposed development would change the boundaries of the plat" is not triggered. *Williams*, *supra* at 4, citing MCL 560.102(u); MCL 560.104.

Next, plaintiffs argue that the proposed development is violative of the home association's bylaws. We disagree.

Because the home association's bylaws were enacted in 1979,[7] three years after Murray conveyed the land to the county, the home association cannot claim ownership rights to the Outlot. As previously discussed, plaintiffs retained an easement for the use of a public utility. Accordingly, as the owners of an easement, the subdivision lot owners were under an existing duty to maintain the Outlot for its intended purpose. "It is the owner of an easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). Thus, the fact that the home association collected dues for general maintenance is insufficient to establish a controlling interest in the Outlot to overcome its obligation to use the Outlot for its specific intended purpose to avoid extinguishment of the easement. The trial court did not err in concluding that the proposed development did not violate the home association's bylaws.

Plaintiffs Balagnas and Demars next argue that the proposed public road which will run between their properties will cause their respective side yards to be in violation of the required 25 foot setback for a side street lot line. Plaintiffs contend the township's actions amount to a regulatory taking/inverse condemnation. We disagree.

Under Michigan law, a "taking" for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property. *Spiek v DOT*, 456 Mich 331, 334; 572 NW2d 201 (1998), citing *Electro-Tech*, *Inc* v *H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989). "A plaintiff alleging a de facto taking or inverse condemnation must prove 'that the government's actions were a substantial cause of the decline of his property's value' and also 'establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.'" *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 556-557; 688 NW2d 550 (2004) (citations omitted).

We initially agree the trial court erred in determining that plaintiffs' claims were premature on the grounds that they failed to exhaust their administrative remedies. See *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 665 n 20; 645 NW2d 50 (2002) (a plaintiff is not required to exhaust administrative remedies before bringing a taking or substantive due process claim). However, plaintiffs have not established a basis for reversal. Effective November 24, 2004, while this action was pending on appeal, the township amended the zoning

---

[7] The home association bylaws were enacted in October 1979 and provide at Article III, Section 3 in relevant part:

> Said dues may be used for such of the purposes as the Association shall determine necessary or desirable, including but not limited to: for maintaining and improving the 'outlot' and other easements for which the Association may become responsible . . . .

ordinance to designate plaintiffs' property as "conforming."[8] Accordingly, any alleged harm that would result if plaintiffs' properties had remained nonconforming is eliminated. More importantly, given plaintiffs' failure to provide *any* valuation evidence, *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), or any evidence showing affirmative acts by the township directly aimed at the plaintiff's property, plaintiffs cannot establish a taking de facto or otherwise. *Hinojosa*, *supra* at 556-557.

Finally, plaintiffs contend the trial court erred in summarily dismissing plaintiffs' superintending control claim.

Complaints for superintending control are governed by MCR 3.302, which provides in relevant part:

> (A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.
>
> (B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.304(A).

* * *

---

[8] The ordinance amendment provides, in relevant part:

* * *

> Article XX, Section 2002; Article XX, Section 2005; and Article XX, Section 2008, . . .are hereby amended . . . :

* * *

> 8. Structures Adjacent to Certain Access Roads: There exists in the Township a number of developed lots in established subdivisions that re immediately adjacent to outlots, private easements, or other vacant space intended at the time of platting to provide road access to adjacent vacant land intended for future development. Structures have been erected on these developed lots with side yards setbacks that would not have been permitted if an access road was in place at the time the structure was constructed. It is the intent of this sub-section to treat these unique parcels in such a manner that the restrictions on expansion or reconstruction of non-conforming structures set forth in this Section 2002, shall not apply. Therefore, any structure existing on the effective date of this ordinance that was erected prior to construction and installation of an access road over the outlot, private easement, or vacant space adjacent to the structure shall not be considered a nonconforming structure because of a deficient side yard setbacks, and shall be permitted to be enlarged, expanded, extended, or reconstructed as otherwise permitted by law or ordinance, provided the side yard deficiency is not further enlarged.

> (D) Jurisdiction.
>
> (2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorders court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

In this case, plaintiffs failed to establish that the township did not perform a clear legal duty. Moreover, plaintiffs had the right to appeal to the circuit court pursuant to MCL 125.293(a). Because an adequate remedy was available, the trial court properly dismissed the claim. *Shepherd Montessori Center Choe v Flint Charter Twp*, 240 Mich App 315, 3477; 615 NW2d 739 (2000) (if a plaintiff has a legal remedy by way of appeal, the court may not exercise superintending control and must dismiss the complaint).

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder