

FILED
12-13-2022
Barron County, WI
Sharon Millermon
2021CV000116

BY THE COURT:

DATE SIGNED: December 12, 2022

Electronically signed by Maureen D. Boyle
 Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

BARRON COUNTY

Cynthia K Goodwin Trust,

H. Geoffrey Peterson,

Macintosh Family Generation Skipping Trust Agreement,

PLAINTIFFS

21 CV 116

V.

Loch Lomond Beach Club, Inc.

DEFENDANT

Plaintiffs filed suit on April 28, 2021 requesting injunctive relief against Defendant Loch Lomond Beach Club, Inc. (LLBC), precluding it from implementing Policy 17, which was amended on August 8, 2020 and which governs temporary structures, and for an order declaring Policy 17 as contrary to the applicable restrictive covenants and finding it invalid. Following the initiation of this lawsuit, Policy 17 was amended once again on April 2, 2022, and Plaintiffs request that any policy allowing members to use temporary structures as permanent be declared contrary to the applicable restrictive covenants.

Defendant Loch Lomond Beach Club, Inc. moved the Court on July 21, 2022 for summary judgment dismissing Plaintiff's complaint on the merits and also to declare that the change in Loch Lomond Beach Club Policy #17 enacted on August 8, 2020 does not violate the relevant Covenants and Restrictions of the Loch Lomond Beach Club.

The parties agree that certain covenants and restrictions apply and there is no dispute over the relevant facts set forth below. However, the parties disagree over the interpretation of the restrictive covenants and whether the terms of the restrictive covenants are clear or ambiguous.

The Court issued its ruling in favor of the plaintiffs at the close of the motion hearing on September 13, 2022, however, now issues the decision in writing as requested.

FACTS

Plaintiffs are property owners in the Birch, Spruce, and Loch Lomond subdivisions located in Barron County, Wisconsin. The general articles of incorporation for all three subdivisions each contain the following language, or something substantially similar, regarding the purpose of the conditions, covenants and restrictions:

Article I General Purpose of Conditions The said property is being subjected by this Declaration to the restrictions, covenants, conditions, reservations, easements, liens and charges hereby declared to insure the best use and the most appropriate development of each building site thereof; to protect the owners of building sites against such improper use of surrounding building sites as will depreciate the values of their property; to preserve, so far as practicable, the natural beauty of said property; to guard against the erection thereon of poorly designed or proportioned structures and structures built of improper or unsuitable materials; to obtain harmonious color schemes; to insure the highest and best development of said property; to encourage and secure the erection of attractive homes thereon with appropriate locations thereof on building sites; to prevent haphazard and inharmonious improvements of building sites; to secure and maintain proper setbacks from streets; to provide for adequate free spaces between structures; and, in general, to provide for quality improvement to said property, and to thereby enhance the value of investments made by purchasers of lots, tracts and parcels therein.

Article II Covenants and Restrictions

1. Land Use. All lots, tracts and parcels of the said property shall be used only as herein set forth, and such designated usage can be changed only by the approval of Loch Lomond Beach Club, Inc., through its Architectural, Planning and Zoning Committee, hereinafter called the "Planning Committee", as provided in this declaration and in the Articles of Incorporation and By-Laws of said corporation. All lots of the plats of Birch (and Spruce and Loch Lomond) Subdivision of The Woods shall be used only for single family residence, except for such lots, tracts or parcels as are specifically designated upon the said plat for community, recreational or other purposes; provided, that nothing contained or mentioned in this declaration shall be construed to prevent the Declarants or its successors or assigns, from erecting and maintaining, or authorizing the erection and maintenance of structures and signs for the development and sale of said property while the same or any part thereof is owned by the Declarant, its successors or

assigns. Family is defined to mean persons related by blood or marriage, by legal adoption, or by operation of law.

2. Architectural Control. No structure or building shall be erected, placed or altered upon any lot, tract or parcel of the said property which does not conform to the Town of Cedar Lake and Barron County building regulations and to requirements established by the Planning Committee. No building shall be erected, placed or altered upon any lot, tract or parcel of the said property until the construction plans and specifications and a site plan showing the location of the structure and the grading of the lot, tract or parcel have been submitted to and approved in writing by the said Planning Committee. The work of construction of all buildings and structures shall be diligently and continuously prosecuted from the commencement thereof, and the exteriors of all such buildings and structures shall be completed or otherwise suitably finished within six months of said commencement. All buildings and structures shall be of new construction and shall be composed of materials approved by the Planning Committee, including wood, stone, brick, glass, steel, concrete, or like materials.

Each of the articles also contains the language restricting temporary structures. The language set forth in the Articles relating to the Birch and Spruce subdivisions is as follows:

7. Temporary and Other Structures. No structure of a temporary character, basement house, tent, shack, garage, trailer, camper, barn or any other outbuilding shall be used on any lot at any time as a permanent or seasonal residence or dwelling, except under a temporary written permit, which permit may be granted for a specific and limited time at the discretion of Planning Committee providing such use is in compliance with local Health Department regulations.

The Loch Lomond Subdivision uses similar language as set forth below.

8. Habitation of Temporary Structures. No structure of a temporary character, basement, tent, shack, garage, trailer or camper or any other outbuilding shall be used on any lot at any time as a permanent or seasonal residence or dwelling, except under a temporary written permit which may be granted upon specific time limitations of such use, in the discretion of the Planning Committee, providing such use is in compliance with local Health Department regulations.

The policy at issue in this case, #17, is set forth in the Loch Lomond Beach Club Policy and Procedures Manual, the modification of which in 2020 was the impetus of this lawsuit. Prior to 2020, LLBC utilized what was commonly termed a “leaves on, leaves off” policy. That is, temporary dwellings could be placed on lots in the spring when trees sprouted leaves and then must be removed in the fall when the leaves fell. Policy #17 read as follows:

**LOCH LOMOND BEACH CLUB POLICY AND PROCEDURES MANUAL POLICY #17:
EFFECTIVE DATE: 06/09/96 REVISED: 4/28/2012, 10/10/2015, 08/13/2016**

PROCEDURE: 1. TEMPORARY DWELLINGS Definition: Tent, travel trailer, tent trailer, R.V. NO MOBILE HOMES ALLOWED Reference: Barron County Ordinance 17.36

a. A Written permit from BOTH OF THE LLBC ARCHITECTURAL COMMITTEE AND BARRON COUNTY ARE REQUIRED. (Attachment 17A) A temporary dwelling permit must be obtained, returned and approved before placement will be allowed. This document may be obtained from the clubhouse manager. THE BARRON COUNTY PERMIT MUST BE OBTAINED FIRST AND A COPY PROVIDED TO LLBC OFFICE. A COPY WILL REMAIN ON FILE AT LLBC CLUBHOUSE. The LLBC permit allows temporary dwellings only on lots from April 1 to October 31. If temporary dwellings are not removed by October 31, LLBC Board of Directors reserves the right to assess an amount of \$500 plus cost of removal at the LLBC Board of Director's sole discretion Reference: Article II Section 8 of Covenants and Restrictions. Barron County Ordinance 17.36

The policy was amended in August 2020 to allow temporary dwellings to be occupied from April 1 to February 1. The text of the policy as amended is outlined below.

**LOCH LOMOND BEACH CLUB POLICY AND PROCEDURES MANUAL POLICY #17:
EFFECTIVE DATE: 06/09/96 REVISED: 4/28/2012, 10/10/2015, 08/13/2016, 8/8/2020**

PROCEDURE: 1. TEMPORARY DWELLINGS Definition: Tent, travel trailer, tent trailer, R.V. NO MOBILE HOMES ALLOWED Reference: Barron County Ordinance 17.36

a. A Written permit from BOTH OF THE LLBC ARCHITECTURAL COMMITTEE AND BARRON COUNTY ARE REQUIRED. (Attachment 17A) A temporary dwelling permit must be obtained, returned and approved before placement will be allowed. This document may be obtained from the clubhouse manager. THE BARRON COUNTY PERMIT MUST BE OBTAINED FIRST AND A COPY PROVIDED TO LLBC OFFICE. A COPY WILL REMAIN ON FILE AT LLBC CLUBHOUSE. The LLBC permit allows temporary dwellings to be occupied from April 1 to February 1.

The policy was then amended again during the pendency of this lawsuit and reads as follows:

LOCH LOMOND BEACH CLUB POLICY AND PROCEDURES MANUAL POLICY#: 17
EFFECTIVE DATE: 06/09/96 REVISED: 4/28/2012, 10/10/2015, 08/13/2016, 8/8/2020,
4/2/2022 (Enforcement: 10/31/22)

PROCEDURE: 1. TEMPORARY DWELLINGS Definition: Tent, travel trailer, tent trailer, R.V. NO MOBILE HOMES ALLOWED. Must be "road-worthy" Cannot exceed 8.5 foot wide by 45 foot long Reference: Barron County Ordinance 17.36

1. A Written permit from BOTH OF THE LLBC ARCHITECTURAL COMMITTEE AND BARRON COUNTY ARE REQUIRED. (Attachment 17A) A temporary dwelling permit must be obtained, returned and approved before placement of dwelling will be allowed. This document may be obtained from the clubhouse manager or by completing the form online at llbeachclub.com. The Barron County Land Use Permit and Sanitation Permit must be obtained and copied submitted with the LLBC Temporary Dwelling Permit application. A copy shall remain on file at the clubhouse.

The LLBC permit allows temporary dwellings to be occupied from April 1st to February 1st. Campers must be removed from the lots on a rotating schedule based on the division that your lot is located, as indicated below.

- Division 1, 2, 3 must be removed from their lot by October 31, 2022 and may return on April 1, 2023
- Division 4, 5, 6 removed October 31, 2023 -return April 1, 2024
- Division 7, 8, 9 removed October 31, 2024 -return April 1, 2025
- Division 10, 11, 12 removed October 31, 2025 -return April 1, 2026
- Repeat cycle

APPLICABLE LAW

This court consistently holds that public policy favors the free and unrestricted use of property. Accordingly, restrictions contained in deeds and in zoning ordinances must be strictly construed to favor unencumbered and free use of property. *Crowley v. Knapp*, 94 Wis.2d 421, 434-435 (1980).

A provision either in a zoning ordinance or in a deed restriction which purports to operate in derogation of the free use of property must be expressed in clear, unambiguous and peremptory terms. *Id.*

Further, when the meaning of the language in a restrictive covenant is doubtful, “all doubt, under the general rule, should be resolved in favor of the free use thereof for all lawful purposes by the owner of the fee.” *Zinda v. Krause*, 191 Wis. 2d 154, 165 (Ct. App. 1995), quoting *Crowley* at 438, n.3.

Whether the language of a restrictive covenant is ambiguous is a question of law. *Id.* The language in a restrictive covenant is ambiguous if it is susceptible to more than one reasonable interpretation. *Id.* at 166. However, if the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. *Id.* By intent we do not mean the subjective intent of the drafter, but the scope and purpose of the covenant as manifest by the language used. *Id.*

Where the purpose of a restrictive covenant may be clearly discerned from the terms of the covenant, the covenant is enforceable against any activity that contravenes that purpose. *Id.* at 167.

Restrictive covenants are to “be given the full force and effect *intended* (emphasis included) by the parties who created them.” *Zinda* at 168, quoting *Bubolz v. Dane County*, 159 Wis.2d 284 (Ct. App. 1990) and *Perkins v. Young*, 266 Wis. 33, 39 (1954), “..., the object which the restrictions were designed to accomplish is to be taken into consideration.”

A restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable. *Zinda* at 170.

DISCUSSION

Loch Lomond Beach Club (“LLBC”) was formed in 1968 to, among other things, maintain friendship among its members, to care for and maintain club properties, and to enforce restrictive covenants. It is comprised of 12 different subdivisions near the Red Cedar Lake chain of lakes in Barron County, Wisconsin. LLBC created policies to meet such duties, including LLBC revised Policy No. 17 (“Policy 17”), addressing temporary structures, which is at issue in this case. On or about August 8, 2020, Policy 17 was amended to permit tents, travel trailers, RVs and campers to remain on a property essentially year-round. Plaintiffs filed this lawsuit seeking a declaration from this Court that the amended Policy 17 was in violation of the Covenants and Restrictions governing their respective properties. Following the initiation of this lawsuit. Policy 17 was amended once again on April 2, 2022, to allow temporary dwellings, i.e., RVs of certain dimensions, to remain on lots year-round based on a rotating schedule.

Article 1 of each of the Covenants at issue contains the same language clearly designed to “secure the erection of attractive homes.” The language clearly sets forth the purpose of the covenants and restrictions as ensuring the best use and the most appropriate development of each building site to ensure the highest and best development of said property, i.e., encourage and secure the erection of attractive homes, while preserving the natural beauty of the property and protecting owners against improper use of surrounding sites, i.e., erection of poorly designed structures built of improper or unsuitable materials. In fact, Article 2 specifies that all buildings and structures shall be of new construction and shall be composed of materials approved by the Planning Committee, including wood, stone, brick, glass, steel, concrete, or like materials.

In accordance with the general principles outlined above, the covenant and restrictions specify that no temporary structure, including campers, shall be used on any lot at any time as permanent or seasonal residence, except under a temporary written permit that is granted at the discretion of the Planning committee for a specific and limited time.

The policies as written in 2020 and 2022 essentially allow the use of temporary structures as permanent or seasonal dwellings indefinitely albeit incrementally. While LLBC requires a permit, the permits are issued annually and with the 2022 modification, temporary structures may essentially remain year round for multiple years.

This is not consistent with the plain language of the covenants which clearly set forth the intention that attractive, single-family homes be erected so as to preserve the natural beauty and ensure the highest and best development while protecting owners against improper use of surrounding sites. The allowance of a temporary structure for a specific and limited time, e.g., an owner uses a camper while the home is being built, is certainly consistent with the intention of the parties who created them. However permitting temporary seasonal dwellings indefinitely, which is the practical effect of the current policies, is not.

While the defendants argue that campers could have been expressly prohibited as they were in an unrelated subdivision, “A restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable.” *Zinda* at 170. Restrictive covenants are to “be given the full force and effect *intended* (emphasis included) by the parties who created them.” *Zinda* at 168, quoting *Bubolz v. Dane County*, 159 Wis.2d 284 (Ct. App. 1990) and *Perkins v. Young*, 266 Wis. 33, 39 (1954), “..., the object which the restrictions were designed to accomplish is to be taken into consideration.”

This case is not unlike *Zinda* in which the restrictive covenant is clear and unambiguous and must be given the full force and effect intended by its creator, i.e., to secure the erection of attractive homes.

DECISION AND ORDER

Pursuant to Wis. Stat. 802.08(6), summary judgment is entered in favor of Plaintiffs. There are no genuine issues of material fact

The Court further declares pursuant to Wis. Stat. 806.04 that Policy No. 17, as amended in 2020 and 2022, violates the covenants and restrictions at issue in this case.

This is a final order for appeal.