916 N.E.2d 978 (Table)
Unpublished Disposition
Only the Westlaw citation is currently available.
(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Disposition of Cases by Unpublished Memorandum Decision in the Court of Appeals of Indiana ." Indiana provides by rule that "unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." Indiana Rules of Appellate Procedure 65(D). Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.
Court of Appeals of Indiana.

Nathan L. and Kimberly L. STEVENS, Appellants,
v.
Samuel, John and A. Elaine McDONALD,
and John D. and Susan J. Grant, Appellees.

No. 41A01–0907–CV–324. | Nov. 19, 2009.

Appeal from the Johnson Superior Court; The Honorable Kevin M. Barton, Judge; Cause No. 41D01–0708–PL–57.

Attorneys and Law Firms

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Thomas W. Vander Luitgaren, Brandi R. Foster, Van Valer Law Firm, LLP, Greenwood, IN, Attorneys for Appellees.

MEMORANDUM DECISION —NOT FOR PUBLICATION

FRIEDLANDER, Judge.

***1** Nathan and Kimberly Stevens appeal from a grant of summary judgment in favor of their neighbors, Samuel, John, and Elaine McDonald and John and Susan Grant (collectively, the Complainants) in the Complainants' action to enforce restrictive covenants. The Stevenses challenge the propriety of the grant of summary judgment as the sole issue on appeal.

We affirm.

The underlying facts are largely undisputed. Viewed in a light favorable to the Stevenses, the non-moving parties, the Stevenses owned and lived in a residence located on Lot 21 in Briarwood Subdivision, First Section, in Greenwood, Indiana. The McDonalds lived in a residence located on Lot 20 of Briarwood and the Grants lived on Lot 22 [1] of Briarwood. The Grants' and the McDonalds' respective lots were contiguous to the Stevenses' lot. The Stevenses' residence consisted of a single-family dwelling with an attached garage. Sometime prior to May 3, 2007, the Stevenses commenced construction of a large detached garage on their property. On May 3, 2007, Clinton Ferguson, Director of the Department of Planning & Zoning for the City of Greenwood, sent the following letter to the Stevenses:

> YOU ARE HEREBY OREDRED TO STOP WORK IMMEDIATELY ON THE BUILDING UNDER CONSTRUCTION UNDER CITY OF GREENWOOD PERMIT NO. 2006–902.
>
> (1) On-site inspections have determined that said construction violates Greenwood Zoning Ordinance No. 82–1, as amended. The minimum side yard building setback in an R–1 zoning district is 12 feet. Field measurements place your building addition at approximately 8.4 feet from the side lot line.
>
> (2) Construction on the site does not comply with plans submitted as part of the building permit application.
>
> YOU ARE HEREBY ORDERED TO REMOVE SAID BUILDING IN ITS ENTIRETY WITHIN 30 DAYS OF THE DATE OF THIS NOTICE.
>
> Failure to abate this violation (remove said building) will result in further legal action by the City of Greenwood.
>
> Please be aware that compliance with city ordinances and codes does not necessarily mean the building is in compliance with recorded subdivision covenants. I suggest that you review applicable covenants.

Appellants' Appendix at 19.

On the same day the foregoing notice was sent, the Architectural Control Committee of Briarwood Subdivision

Section 1 (the ACC) was formed following a meeting with Greenwood city officials. It would appear that Director Ferguson's May 3 letter did not have the desired effect. On July 20, the ACC sent the following letter to the Stevenses regarding the detached garage:

> This letter is being sent to you by the Architectural Control Committee (ACC) of Briarwood Subdivision Section 1.
>
> This committee was formed on May 3, 2007 during a meeting held at the Greenwood City Council Chambers with Mayor Henderson and his staff. The existence of this committee was communicated to you in the neighborhood meetings held at the Grant's [sic] residence in mid May....
>
> We are aware that you are making various changes and/or improvements to your existing dwelling. The ACC reminds you that any material change or improvements to existing structures on your lot requires that you submit a request in writing to the ACC stating the details of the intended change or improvement. Homeowners are required to provide the ACC a copy of the intended plans and materials specifications that are to be used. Again, please review the Covenants and restrictions closely, specifically # 2 prior to your moving forward with the re-siding project.
>
> ***2** Please note that the approval process of the ACC includes notifying contiguous property homeowners of the proposed alterations/changes. These homeowners will be requested to respond in writing of their opinions or concerns for the ACC to review your proposed changes within five days. The ACC will then come to a decision to approve or disapprove your application based on compliance of your plans with the Covenants. The Covenants are your legal obligation to follow, as they "Run with the Land" and are binding. See in particular Articles # 19, 20, and 21.
>
> Please forward your plans to the ACC on or before July 31, 2007....
>
> Please note that it is vital that you follow the timeline of the ACC's request. If we have not received requested information by July 31, 2007, then we will find it necessary to proceed further with any and all legal remedies afforded under the Covenants.

Id. at 18. On July 30, 2007, the Complainants filed a Complaint to Enforce Restrictive Covenants and Preliminary Injunction. In it, the Complainants sought an order directing the Stevenses to remove the garage, alleging that the garage violated Paragraphs 1, 2, and 4 of Briarwood's restrictive covenants. Covenant 1 states:

> No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling and a private garage. Garages shall be attached, and driveways shall be constructed of hard surface such as bituminous concrete or Portland cement concrete, unless otherwise approved by the architectural control committee.

Id. at 23. Covenant 2 states, in relevant part:

> No building shall be erected, placed, or altered on any lot until the construction plan and specifications and a plan showing the location of the structure have been approved by the architectural control committee as to quality of workmanship and materials, harmony of existing structures, and as to location with respect to topography and finish grade elevations....

Id. Covenant 4 states, in relevant part:

> No building shall be located on any lot nearer to the front lot line or nearer to the side street line that the minimum building setback line shown on the recorded plat. In any event, no building shall be located on any lot nearer than 40 feet to the front lot line, or nearer than 40 feet to a side street.
>
> No building shall be located nearer than 12 feet to an interior lot line on those lots meeting R–1 area classification....

Id. It is undisputed that the Stevenses' lot is zoned R–1.

On October 2, 2007, the Stevenses filed a motion to dismiss the complaint. On December 6, 2007, the trial court granted in part and denied in part the motion to dismiss. The motion was granted with respect to the allegation that the garage was not harmonious to existing structures, in violation of Covenant 2, and that the driveway was gravel, in violation of Covenant 1. The motion to dismiss was denied with respect

to the allegation that the garage was erected too close to an interior lot line, in violation of Covenant 4, and that the garage is an impermissible second garage, in violation of Covenant 1. We will discuss this ruling in greater detail below.

***3** On September 30, 2008, the Complainants filed a motion for summary judgment and designated materials in support thereof. In response, the Stevenses filed a Verified Notice of Defendants' Intent to Stand on the Pleadings in Response to Plaintiffs' Summary Judgment and Set Matter for Hearing. The parties subsequently waived a hearing and agreed that the trial court should decide the matter based solely on the materials submitted. On March 24, 2009, the trial court granted the Complainants' motion for summary judgment and ordered the Stevenses to remove the detached garage from their property. This appeal ensued.

The Stevenses appeal from a grant of summary judgment. Our standard of review in appeals from the grant or denial of a motion for summary judgment is well established:

> A party is entitled to summary judgment if no material facts are in dispute.... Ind. Trial Rule 56(C) ("[t]he judgment sought shall be rendered forthwith if the designated evidentiary matter shows 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"). When reviewing the propriety of a ruling on a motion for summary judgment, this Court applies the same standard as the trial court. Review is limited to those materials designated to the trial court. The Court accepts as true those facts alleged by the nonmoving party, construes the evidence in favor of the nonmoving party, and resolves all doubts against the moving party.

Estate of Mintz v. Conn. Gen. Life Ins. Co., 904 N.E.2d 994, 998 (Ind.2009) (some citations omitted). The trial court's decision on summary judgment " 'enters appellate review clothed with a presumption of validity.' " *Trustcorp Mortg. Co. v. Metro Mortg. Co., Inc.*, 867 N.E.2d 203, 211 (Ind.Ct.App.2007) (quoting *Malone v. Basey*, 770 N.E.2d 846, 850 (Ind.Ct.App.2002), *trans. denied*). Moreover,

> [a] grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment for the appellees, such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment.

Van Kirk v. Miller, 869 N.E.2d 534, 539–40 (Ind.Ct.App.2007) (citations omitted), *trans. denied.*

In support of their request for summary judgment, the Complainants designated, among other things, the restrictive covenants of Briarwood Subdivision, First Section. Three of those covenants are central to this appeal—Covenants 1, 4, and 10. As set out above and pertinent to the instant dispute, by inference Covenant 1 forbids multiple or detached garages and crushed stone driveways, while Covenant 4 forbids the placement of a building closer than twelve feet from an interior lot line. Covenant 10, which is cited by the Stevenses in support of their opposition to summary judgment, states:

> ***4** The Architectural Control Committee approval or disapproval as required in these covenants shall be in writing. In the event the committee or its designated representatives fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

Appellants' Appendix at 23. It does not overstate the matter to say that the resolution of this case hinges entirely on the interpretation of the relevant covenants. Therefore, we must determine the meaning of Covenants 1, 4, and 10 in the context of the facts of this case. The proper construction of the terms of a written contract is a pure question of law and we conduct a de novo review of the trial court's conclusions in that regard. *Grandview Lot Owners Ass'n, Inc. v. Harmon*, 754 N.E.2d 554 (Ind.Ct.App.2001). If a contract is deemed ambiguous because of the contract's language, as opposed to the extrinsic facts, its construction is a pure question of law to be determined by the court. *Id.* One purpose of restrictive covenants is to maintain

or enhance the value of land " 'by controlling the nature and use of lands subject to a covenant's provisions.' " *Id.* at 557 (quoting *Campbell v. Spade*, 617 N.E.2d 580, 583 (Ind.Ct.App.1993)). Restrictive covenants are generally disfavored in the law and will be strictly construed, resolving all doubts in favor of the free use of property and against restrictions. *Grandview Lot Owners Ass'n, Inc. v. Harmon*, 754 N.E.2d 554. Nevertheless, restrictive covenants are a form of express contract recognized under the law. *Id.* "The construction of a written contract containing restrictive covenants is a question of law for which summary judgment is particularly appropriate." *Id.* at 557.

The original intent of the parties who created the covenants in question must be determined from the specific language used and the situation as it existed at the time the covenant was made. *Grandview Lot Owners Ass'n, Inc. v. Harmon*, 754 N.E.2d 554. When determining the original intention of the covenanters, we are mindful that specific words and phrases cannot be read in isolation from other contractual provisions. Instead, we consider the contract in its entirety and attempt to construe contractual provisions so as to harmonize the agreement. *First Fed. Sav. Bank v. Key Markets, Inc.*, 559 N.E.2d 600 (Ind.1990). Finally, "[w]hen lands are granted according to a plat, the plat becomes part of the grant or deed by which the land is conveyed, with respect to the limitations placed upon the land. A duly recorded plat gives notice to all prospective purchasers of the restrictions contained therein." *Grandview Lot Owners Ass'n, Inc. v. Harmon*, 754 N.E.2d at 557.

We begin by observing that it cannot seriously be disputed that the Stevenses' detached garage violated Covenants 1 and 4. First, it was the second garage on Lot 21; second, it was detached from the dwelling; third, the driveway to it was not paved with a hard-surface material; and fourth, it was erected less than twelve feet from the lot line between Lots 20 and 21. The only way that a nonconforming structure can be erected, according to the subdivision's restrictive covenants, is with approval of the ACC.[2] It is undisputed that the Stevenses did not obtain such permission. This brings us to the nub of the Stevenses' argument on appeal, which is that Covenant 10 applies here to effect a waiver of the Covenant 1 requirement of ACC approval of nonconforming structures.

***5** To review, Covenant 10 provides that the ACC's approval would not be required if "the committee ... fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, *or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof* [.]" *Appellant's Appendix* at 23 (emphasis supplied). The Stevenses contend the highlighted language means in this case that because the instant suit was filed *after* their detached garage was completed, approval was not required and "the related covenants [were] deemed to have been fully complied with." *Id.* Pursuant to this line of reasoning, the parties and the court focused on the meaning of the adjective "related" in the phrase, "the related covenants[.]" *Id. The Stevenses contend that* "related" covenants refers to all of Briarwood's restrictive covenants, including the one providing that the ACC's failure to timely (i.e., before completion) approve any nonconforming structure or condition results in said nonconformity being deemed conforming.

The trial court squarely addressed and rejected this reasoning in its findings and conclusions accompanying its December 6, 2007 ruling on the Stevenses' motion to dismiss the complaint. Essentially, the court ruled that Covenant 10's waiver-of-approval provision applied only in those matters in which the ACC was authorized by the covenants themselves to exercise discretion. In Paragraph 11 of its ruling on the Stevenses' motion to dismiss, the court explained:

> However, the Court does not concur with the Defendant's interpretation of the restrictive covenants. Paragraph 10 provides that "approval will not be required." The sentence begins by reference to the approval of the architectural control committee. Hence, the completion of the project means that the approval of the architectural control committee is not required. The sentence continues as follows: "the related covenants shall be deemed to have been fully complied with." The interpretation advanced by the Defendants ignores the adjective "related" and effectively removes the word. The term "related" modifies covenants. To the extent that approval of the architectural control committee is not required, it can only refer to the "related covenants" in which the architectural control committee is given power of approval. Discretionary architectural control is provided under paragraph 2 of the restrictive covenants.

Id. at 37. Based upon this rationale, the court ruled that Covenant 1 granted the ACC the discretion to waive the restrictions that garages must be attached and driveways must be constructed of hard surface. Thus, such nonconformities in the Stevenses' improvements were deemed conforming by application of Covenant 10. Those particular allegations in the complaint did not survive the Stevenses' motion

to dismiss. On the other hand, the trial court ruled that Briarwood's plat did not confer upon the ACC the authority to waive Briarwood's restrictions against more than one garage on a lot and against building closer than twelve feet from an internal lot line. We agree with these rulings.

***6** Considering first the limitation of one garage per lot, Covenant 1 consists of three sentences. The first restricts lots in Briarwood to residential use. The second restricts buildings on each lot to "one detached single-family dwelling and a private garage." *Id.* The third sentence provides that garages must be attached and driveways paved, "unless otherwise approved by the architectural control committee." *Id.* In light of the language and grammatical construction of Covenant 1, the best interpretation is that it contemplates approved deviation from the requirements stated in the third sentence, but does not permit deviation from the restrictions stated in the first two sentences, i.e., residential use and a single house and garage. The same is true with respect to the restriction set out in Covenant 4, i.e., the ACC cannot approve deviations concerning the proximity of buildings to interior lot lines. These interpretations of Covenants 1 and 4 for purposes of the Stevenses' motion to dismiss foreshadowed the court's subsequent ruling on the Complainants' motion for summary judgment in that both involved the same question.

This brings us back to the contention that Covenant 10 operates to waive restrictions set out in Briarwood's restrictive covenants if a lawsuit is not filed prior to completion of the challenged building or condition. That is certainly true with respect to those restrictions the ACC is authorized to waive. The clear purpose of Covenant 10 is to motivate the ACC to act expeditiously on requests to erect or alter a building. By providing that approval will be presumed after thirty days or if the project is completed prior to the filing of a lawsuit, the plat effectively guarantees that a decision must be rendered within those time frames. This does not, however, affect restrictions that the ACC is not authorized to waive. Thus understood, "related covenants" can refer only to covenant restrictions that the ACC is authorized to waive. As set out above, such do not include the restrictions that there be only one garage per lot and that buildings must not be situated nearer than twelve feet to an interior lot line. Like applicable municipal and county zoning restrictions, no action or inaction on the part of the ACC can effect their waiver. The trial court did not err in rendering summary judgment of favor of the Complainants and granting the requested relief.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.

Parallel Citations

2009 WL 3878054 (Ind.App.)

Footnotes

1 The Grants' property also included a portion of Lot 21 as platted.

2 It must be borne in mind that even if they had obtained such approval from the ACC, there would still be the matter of compliance with applicable city and county zoning ordinances. The ACC's power does not supersede that of whatever governmental zoning boards have jurisdiction over the Stevenses' property. Thus, in this case, regardless of whether the subdivision had approved of the structure the Stevenses ultimately erected, the City of Greenwood had determined the garage was not in compliance with Greenwood R–1 zoning ordinances and ordered the Stevenses to remove it months before it was apparently completed. As a result, even had the Stevenses prevailed in the instant lawsuit brought by the Complainants, such would not have prevented the City from pursuing legal action to enforce its May 3, 2007 directive to tear down the structure. We mention this only in passing, as we herein affirm the trial court's order in the Complainants' lawsuit to remove the garage.