ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

DIVISION IV

CA07-62

February 20, 2008

CLOVERDALE NEIGHBORHOOD ASSOCIATION & TROY LAHA APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION [CV2005-6958]
V.	HONORABLE MARION A. HUMPHREY, CIRCUIT JUDGE
HERBERT GOSS & ELOISE GOSS APPELLEES	REVERSED AND REMANDED

This is a one-brief case involving a daycare business established by appellees in their home, which is located in the Cloverdale subdivision in Little Rock. Relying upon restrictive covenants contained in the bill of assurances, which was executed in 1958, appellants sought to enjoin appellees from operating their residential daycare business. Appellants appeal from the March 16, 2007 amended judgment in which the trial court denied and dismissed their complaint for injunctive relief. Finding error in the denial, we reverse and remand.

Appellants raise two points of appeal: 1) the trial court erred in concluding it concluded *sub silentio* that the language of the bill of assurance was ambiguous when the restriction stated: "No lot shall be used except for single-family residential purposes"; 2) the

trial court erred when it permitted appellees to continue their in-home daycare business in violation of the clear language of the bill of assurances because the cases cited by the trial court are distinguishable. These points of appeal are so intertwined that they can best be discussed together.

Standard of Review

Where a case is tried with the circuit court sitting as the trier of fact, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *White v. McGowen*, 364 Ark. 520, 222 S.W.3d 187 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id*. Disputed facts and determinations of credibility are within the province of the fact-finder. *Id*.

Restrictive Covenants Generally

Courts do not favor restrictions upon the use of land, and if there is a restriction on the use of land, it must be clearly apparent. *Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001). But, one taking title to land with notice that it is subject to an agreement restricting its use will not, in equity and good conscience, be permitted to violate its terms. *Id*. The general rule governing the interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *Id*. Where there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty,

freedom from that restraint should be decreed; but when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed, and it is improper to inquire into the surrounding circumstances of the objects and purposes of the restriction to aid in its construction. *Id*. However, such strict rules of construction shall not be applied in such a way as to defeat the plain and obvious purpose of the restriction. *Id*.

Here, the bill of assurance was recorded in September 1958. Paragraph 1 under the heading, "RESTRICTIONS," provides in pertinent part: "1. No lot shall be used except for single-family residential purposes." It is undisputed that appellees are residents of the Cloverdale subdivision, that they operate a daycare business in their home, and that they received a special-use permit to do so from the City of Little Rock.

Appellee Eloise Goss testified that she started the daycare business in 2001, that she was approved by DHS to care for ten children, and that she applied for a special-use permit from the City of Little Rock in 2004. She said that when she applied for the special-use permit, she was required to get a copy of the restrictive covenants. She stated that was the first time that she had read them.

Appellee Herbert Goss testified that he and his wife purchased the property at issue in November 1997; that they did not understand anything about the restrictive covenants when they purchased the property; and that they changed the structure of their home to accommodate the daycare operation, but that a person could not tell in driving by the house

that it was used for that purpose. He explained that his wife was keeping eight children currently and that seven vehicles bring the children to and from daycare five days a week.

Mr. Monte Moore, the zoning and enforcement administrator for the City of Little Rock, explained that the procedure for obtaining a special-use permit consists of completing an application form and cover letter, providing a copy of the bill of assurances for the neighborhood, and paying a filing fee. After that, the planning staff reviews the application and determines if there are any issues that need to be addressed, and then the application goes before the subdivision committee of the planning commission. Following that, the application goes to a public hearing before the planning commission. The planning commission then votes on whether to approve or not approve the special-use permit.

In paragraph four of the amended judgment, the trial court found:

> 4. That based upon the actual language in the Bill of Assurance and *Baldischwiler v. Atkins*, 315 Ark. 32, 864 S.W.2d 853, the Court finds that restrictive covenants are strictly construed against limitations upon the free use of property, with all doubts resolved in favor of the unfettered use of land. The Court also finds that the trend is not to place great limitations on the free use of property. Therefore, the Court finds in favor of the Defendants.

We have concluded that the trial court's reliance upon the *Baldischwiler* case is misplaced, and that it erred in denying the injunctive relief sought by appellants.

The *Baldischwiler* case is distinguishable from the situation presented here. In it, the property owners purchased their lots in reliance upon a covenant that *permitted* them to "cut" a street across two of their lots, and as our supreme court explained:

> [A]ppellees not only purchased Lots 24 and 25 relying on Oak Forest's covenant permitting them to establish a street, they also expended $2,800 in cutting that street.

> Appellants had at least constructive notice as early as 1986 that appellees had the right to use their two lots for street purposes; nevertheless, appellants failed to act to change the covenant pertaining to these lots until 1991. Even the right to enforce a restrictive agreement may be lost by laches or acquiescence, especially when one incurs expenditures. Appellees' position is even stronger here, since they incurred expenditures while relying upon a covenant which permitted them to cut a road. Appellants, having notice of appellees' special covenant and knowing how they could change that covenant under the bill of assurance, waited nearly five years before amending the subdivision's bill to bring appellees' two lots within the residential-dwelling restriction. In our view, appellants, by their delay, simply abandoned their rights to invoke the amending provisions of the Oak Forest bill of assurance. To hold otherwise would work an injustice on appellees.

315 Ark. at 36, 864 S.W.2d at 855 (internal citations omitted). Contrary to the trial court's reliance upon *Baldischwiler* to find in favor of appellees in the instant case, the supreme court's rationale actually supports appellants' position. That is, appellants purchased their property in reliance upon the covenant that *restricted* use to residential purposes, and appellees had at least constructive notice when they purchased their lot that anything other than single-family residential purposes was prohibited.

Moreover, with respect to the actual language used in the instant bill of assurance, we explained in *Briarwood Apartments v. Lieblong*, 12 Ark. App. 94, 98, 671 S.W.2d 207, 209 (1984):

> There is no ambiguity in the expression "No lot shall be used for other than residential purposes." Any 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 purposes of the parties in making the covenants, and without substantial injury to the neighborhood.

Also see Holaday v. Fraker, 323 Ark. 522, 920 S.W.2d 4 (1996). Similarly, we find no ambiguity in the phrase, "No lot shall be used except for single-family residential purposes,"

which is contained in the bill of assurances at issue in this case. At this point, we further state that a special-use permit, here recommended by an administrative agency of the City of Little Rock and approved by its planning commission,[1] is generally not accorded in property law the same measure of reliance as a recorded bill of assurances. Appellees' use of their lot went beyond single-family residential purposes to also include use as a daycare business. That use clearly violates the restrictive covenant contained in the bill of assurances. We therefore reverse and remand this case to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

PITTMAN, C.J., and MILLER, J., agree.

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[1]The trial court, in its ruling in favor of appellees, relied upon "the fact that the city has been involved to the extent of allowing this Special Use of this particular property for a daycare center...."