COURT OF APPEALS DECISION DATED AND FILED

November 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1610-FT

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT II**

LYLE ZABEL AND ANGELA ZABEL, JOHN NEUMAN AND KAREN NEUMAN, WILLIAM MANN AND SHIRLEY MANN, JOSEPH STEFANIK AND VIRGINIA STEFANIK, THOMAS SCHWALLER AND BARBARA SCHWALLER, AND LARRY ELLENBECKER AND ELLEN ELLENBECKER,

PLAINTIFFS-RESPONDENTS,

V.

KENNETH DOEPKER AND GAIL DOEPKER,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed in part; reversed in part.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Kenneth and Gail Doepker appeal from an order requiring them to undo shoreline improvements found to violate restrictive

covenants applicable to their property. The issues on appeal are whether the Doepkers violated the terms of the original covenant and whether the Doepkers' right to make the planned shoreline improvements became vested and unaffected by an amended covenant recorded by surrounding property owners. We affirm the trial court's finding that the shelter constructed over the boat slip violates the original covenant and must be removed. However, we conclude that the dock surrounding the slip, the slip itself, and the boat lift do not violate the original covenant and that the Doepkers' right to complete their plan for these improvements is not affected by the amended covenant prohibiting a boat slip or lift. Thus, we reverse that portion of the order requiring the Doepkers to remove the dock and boat lift and requiring restoration of the shoreline.

On August 30, 1996, the Doepkers purchased lot 17 in Coughlin Estates. The property has shoreline along a channel off the Wolf River in the Village of Winneconne, Winnebago County. The property was subject to a restrictive covenant dated October 10, 1988 (the original covenant). The covenant provides in relevant parts:

> There shall be no boathouses or other accessory or outbuildings built on any lots covered by these restrictions.
>
> On lots (6) through (19), lots (23) through (25), and lots (26) through (28), inclusive, there shall be no dock or pier constructed which shall extend into the channel more than five (5) feet and any such dock or pier shall run parallel to the shore line.
>
> These Protective Covenants may be changed with the written consent of the owners of sixty (60) percent of all the lots covered by these restrictions. No changes shall be effective until consent documents shall be recorded with the Register of Deeds for Winnebago County, Wisconsin.

In September 1996, the Doepkers proceeded to obtain necessary approvals to place riprap along their shoreline, dig out a boat slip behind the shoreline, and place a boat lift and shelter. On October 7, 1996, the Doepkers received permits from the U.S. Army Corps of Engineers and the Wisconsin Department of Natural Resources (DNR) for placing riprap. The riprap was in place by November 1996. On October 18, 1996, the Doepkers published a public notice about their application for a permit for construction of the boat slip. Objections to the application were to be sent within thirty days to the DNR.

Lyle Zabel, the Doepkers' neighbor, made a written objection and asked for a hearing on the Doepkers' permit application. By a letter of February 3, 1997, Zabel was informed that his request for a hearing was denied.

On February 5, 1997, the Doepkers received their permit from the DNR for construction of the boat slip. On March 15, 1997, the Doepkers signed a purchase agreement for a boat lift.

By April 6, 1997, a sufficient number of lot owners had signed an amendment to the restrictive covenant. The amended covenant provides:

> No owner of Lots 6 through 19, Lots 23 through 25 and Lots 26 through 28, may dredge the channel for the purpose of placing a boat slip or a boat shelter in any lot abutting the channel. In addition, no boat slip or boat shelter shall extend into the channel beyond the meander line of any lot. In addition, there will be no boat lifts on any above listed lots.

The amended covenant was recorded April 7, 1997. A copy of the amendment was sent to the Doepkers by certified mail. Receipt of the document was their first notice of the amended covenant.

The Doepkers proceeded with the boat slip project. Contracts for digging of the boat slip and installation of the complementary dock and shelter were executed on June 23, 1997. Zabel and other lot owners commenced this action on July 3, 1997, to enjoin construction in violation of the restrictive covenants. It appears that by the time the trial court granted a preliminary injunction on July 22, 1997, the project was complete but for the running of an electrical line and placing of the boat lift.

The facts are undisputed and only questions of law are presented regarding interpretation of the restrictive covenant and whether the amended covenant is applicable.[1] We address those questions mindful of the requirement that restrictions against property must be strictly construed in favor of the free and unrestricted use of property. *See* ***Crowley v. Knapp***, 94 Wis.2d 421, 434, 288 N.W.2d 815, 822 (1980). However, another consideration is appropriately noted at the outset. It is obvious that the amended covenant was executed solely for the purpose of stopping the Doepkers' boat slip project. The trial court noted the unconscionable lack of due process in the manner in which the amended covenant was effectuated. The opposing lot owners seek injunctive relief—a form of equitable relief. Equitable relief is dependent on the maxim of equity that one who seeks equity must have clean hands. *See* ***Kenosha County v. Town of Paris,*** 148 Wis.2d 175, 188, 434 N.W.2d 801, 807 (Ct. App. 1988).

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[1] The trial court states as a finding of fact that "construction of a boat slip and dock perpendicular to the shoreline of the canal violated" the original covenant. This is not a pure finding of fact. In reviewing mixed questions, the trial court's factual determinations relevant to the issue are reviewed under a clearly erroneous standard, but propositions of law applied to the factual determinations made by the court are applied without deference to the trial court's determination. *See* ***State v. Suchocki***, 208 Wis.2d 509, 515, 561 N.W.2d 332, 335 (Ct. App. 1997).

We first turn to the trial court's conclusion that the dock which surrounds the boat slip violates the original covenant's requirement that docks be parallel with the shoreline. The language of the covenant reflects that its purpose is to prohibit the placing of a dock which extends perpendicular into the navigable waters of the channel. The covenant reads: "there shall be no dock or pier constructed which shall extend *into* the channel more than five (5) feet and *any such dock or pier* shall run parallel to the shore line." (Emphasis added.) The phrase "any such dock or pier" refers back to a "dock or pier constructed which shall extend into the channel more than five (5) feet." Indeed, if it is the narrowness of the channel that this covenant is deemed to protect, as the property owners contend, the strict reading of the covenant to forbid only perpendicular extensions into the channel does no harm to its purpose.

The dock which surrounds the Doepkers' boat slip does not extend out into the channel more than five feet; it does not extend into the channel at all. Rather, the dock sits behind the shoreline, albeit perpendicular to the shoreline. The dock does not violate the original covenant.

The property owners argue that both the boat slip and boat lift constitute accessories prohibited by the original covenant. The covenant prohibits "boathouses or other accessory or outbuildings." The term accessory is used in describing types of buildings and therefore the covenant only prohibits accessory buildings. The boat slip and lift are in the ground. They are not buildings. If anything, those items are part of the pier or dock.

Above the boat slip is what the parties have characterized as a shelter. Although the structure has no walls so as to be a formal boathouse, it is constructed of wood and includes a wooden roof. It is not merely a canvas

canopy over the boat slip but a permanent structure. We agree with the trial court that the shelter is an accessory building which violates the original covenant.

The trial court also made a finding that construction of the boat slip violates the original covenant. In its oral ruling the trial court made reference to paragraph 3D of the original covenant, which provides:

> If the channel which traverses the "Coughlin Estates" Plat needs clearing or deepening, the owner of each lot adjoining the channel on either side shall be responsible and agrees to pay for a prorata share of the cost of clearing and deepening the same. The prorata share shall be determined by the number of feet of frontage a lot owner has on said channel compared to the total number of front feet bordering on the channel on both sides for lots covered by this agreement. Whether or not any part of said channel needs widening or deepening will be determined by a majority of the owners of the lots covered by these restrictions that are adjacent to the channel.

The trial court found that the "channel was widened or deepened, certainly widened to the point where they had to put a slip in there. That was not done with the majority of the owners per section 3D."

Strictly construed, section 3D of the original covenant provides a mechanism for property owners to take remedial steps in an effort to preserve the channel. What the Doepkers did in constructing the boat slip was not a clearing or deepening of the channel as a large-scale remedial measure. They cut into their own existing bank a twelve by twenty-four foot slip that was only three feet deep. No other frontage along the channel was affected. The finding that this was a clearing, deepening or widening of the channel within the scope of section 3D is clearly erroneous. Therefore, the original covenant was not violated by the construction of the boat slip.

We now consider the effect of the amended covenant. The trial court's written ruling concludes that the placing of the stone riprap violates the amended covenant. This is error because the riprap was in place before the amended covenant and therefore is a permitted nonconforming use. *See* ***Waukesha County v. Seitz***, 140 Wis.2d 111, 115, 409 N.W.2d 403, 405 (Ct. App. 1987).

We reject the Doepkers' contention that a property owner is only bound by the covenants in effect at the time he or she purchases the property and that a newly adopted covenant is effective only against persons who buy property after the covenant's adoption. This would render the power of the property owners to adopt amended covenants virtually useless.

The Doepkers argue that the amended covenant is invalid as to them because they were not given notice and an opportunity to be heard about the new restriction. The original covenant's provision that a change could be made "with the written consent" of sixty percent of the owners does not include any procedural safeguards. We need not decide what process was due to the Doepkers.

The dispositive issue is the vested rights doctrine which the Doepkers raise by their claim that it is inequitable to enforce the amended covenant. The vested rights doctrine is recognized in the context of determining the effect of amendments to zoning ordinances. Because negative covenants are a form of private exclusionary zoning, the vested rights doctrine is applicable when determining the effect of amendments to covenants. *See* 5 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 57.02[1], at 57-3 to 57-4

(4th ed. 1998) (similar constitutional and statutory limitations may be applied in some cases to both types of restrictions).

"The vested rights doctrine in the land use context protects the rights of landowners to continue the use of their property, and to obtain the benefit of ordinances in effect when they apply for them, notwithstanding changes in zoning statutes or ordinances." 6 RICHARD R. POWELL AND PATRICK J. ROHAN, POWELL ON REAL PROPERTY, ¶ 79C.15[4][a][i], at 79C-515 (1996). The theory behind the vested rights doctrine is that the property owner is proceeding on the basis of a reasonable expectation. *See* ***Lake Bluff Housing Partners v. City of S. Milwaukee***, 197 Wis.2d 157, 175, 540 N.W.2d 189, 196 (1995).

The question becomes: at what point did the Doepkers' right to complete their boat slip become vested? It is clear that the Doepkers purchased the lot with the boat slip in mind. Mere intent does not vest their right to proceed. *Cf.* ***Buhler v. Racine County***, 33 Wis.2d 137, 148, 146 N.W.2d 403, 408 (1966) (property owners obtain no vested rights in a particular type of zoning solely through reliance on original zoning).

In Wisconsin, one central factor has been recognized as vesting the right to proceed: the acquisition of a building permit. *See* ***Lake Bluff***, 197 Wis.2d at 172, 540 N.W.2d at 195. Other courts have considered whether prior to the amendment the property owner has made expenditures or incurred contractual obligations in substantial amounts, acted in good faith to comply with existing requirements, and acted in reasonable reliance on a valid permit; whether there has been expiration without an appeal of the period during which an appeal could have been taken from issuance of the permit; and whether the project adversely affects individual property rights or the public interest. *See* ***Petrosky v. Zoning Hearing***

Bd., 402 A.2d 1385, 1388 (Pa. 1979) (five factors to be weighed in determining whether one has equitably acquired vested rights); ***Town of Hillsborough v. Smith***, 170 S.E.2d 904, 909 (N.C. 1969) (vested right created when person "expends money in activity resulting in visible, physical changes in the condition of the land" or incurs contractual obligation for acquisition of equipment to be used in improvement). *See also* **State ex rel. Brookside Poultry Farms, Inc. v. *Jefferson County Bd. of Adjustment***, 125 Wis.2d 387, 395-96, 373 N.W.2d 450, 454 (Ct. App. 1985) *aff'd*, 131 Wis.2d 101, 388 N.W.2d 593 (1986) (implicitly approving the vesting of rights when expenditures are made in reliance on a permit from which no appeal was taken by rejection of Brookside's claim it had a vested right in the permit issued by the zoning committee because the expenditure of sums and improvements made on reliance on the permit occurred before the time to appeal the issuance of the permit had expired).

Prior to the adoption of the amended covenant, the Doepkers obtained the necessary permits from regulating agencies to advance their project and they expended sums in placement of the riprap. They published notice of their project. No appeal was taken from the DNR's issuance of the permit for the construction of the boat slip. The contract to purchase the boat lift was executed. At the time the DNR permit was obtained, it was winter and no additional efforts to advance the project could be made.

We conclude that the Doepkers' right to complete the project was vested prior to the adoption of the amended covenant. They had obtained the necessary permits. *See* ***Lake Bluff***, 197 Wis.2d at 177, 540 N.W.2d at 197 (in order for rights to vest to build under a particular version of a zoning or building code, the applicant must submit an application for a permit which conforms to the zoning or building code requirements in effect at the time of the application).

Since no appeal from the permitting process intervened, the Doepkers' expenditure of funds was reasonable. Moreover, because the opposing property owners conducted their campaign to adopt the amended covenant in secret, the Doepkers acted in good faith reliance on the issued permit in purchasing a boat lift. All was done until the weather would permit completion of the project. The amended covenant could not take away the reasonable expectation that the boat slip would be completed as planned and approved.

In summary, the Doepkers are required to remove the wooden shelter over the boat slip. That portion of the trial court's order is affirmed. The remaining portion of the order is reversed, meaning the Doepkers are not required to remove the riprap, dock, and boat lift and are not required to restore the shoreline to its original condition. No costs to either party.

By the Court.—Order affirmed in part; reversed in part.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.