

RENDERED: OCTOBER 14, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001409-MR

FREDERICK J. CHILDRESS;
JANE L. CHILDRESS; HAROLD
E. AND SUE C. BUNCH; JOHN V.
AND HOLLY M. SIMKONIS;
PATRICIA G. ZIEGLER;
THEODORE F. AND MARGARET BIERE;¹
MARK D. WADDLE; MATTHEW G.
AND MARGARET J. CAREY;
KEITH E. AND LOIS J.
STADTMILLER; STANLEY L. AND
BARBARA B. FORSYTHE; DAVID W.
BRANDEL; K. J. CAHALAN;
PAULA A. KESSLER (CLORE); JOHN S.
AND MARSHA C. DEWITT; DENNIS
J. FAUSZ; LARRY B. AND SANDRA K.
GRIFFIN; MICHAEL J. AND PAULA
L. HASTINGS; JOHN H. AND ANN Y.
HOLMAN; DANIEL P. AND MICHELLE
L. HUFFMAN; CONNIE KREYLING;
ROBERT J. AND ELIZABETH S.
McDOUGALL; DORYNE L. NIPPERT;
GREGORY M. AND J. LINDA SANDY;
BRIAN J. AND TERRI ANN SCHIMP;
CHARLES S. AND PAULA K. STROUP;
BRUCE WALTON; GAYLE M. WELSCH,
TRUSTEE; TOM AND SHARON WYNN

APPELLANTS

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, SPECIAL JUDGE
ACTION NO. 02-CI-01415

TAYLOR DEVELOPMENT, INC. APPELLEE

¹ Both parties are deceased according to the prehearing statement filed in this Court on July 20, 2004.

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Frederick J. Childress and other property owners in the Winding Hills subdivision situated in Kenton County, Kentucky, appeal from the decision of the Kenton Circuit Court granting declaratory judgment in favor of Taylor Development, Inc., construing a restrictive covenant in the developer's favor. The property owners argue on appeal that the court erroneously interpreted the restrictive covenants to allow the developer to redraw the lot lines of three lots in Winding Hills subdivision into multiple lots in another, neighboring subdivision. The developer argues that there is nothing in the restrictive covenants prohibiting redrawing the lot lines, and even if there were, the appellants' claims are barred by the doctrine of laches. After a careful review of the record and applicable law, we affirm.

These tracts were acquired by Taylor Development, Inc., by transfer from its principal shareholder, Martin Taylor, in February 2001. Taylor acquired the three lots, identified on the original Winding Hills subdivision plat as lots 111, 112, and 113, in 1992 from individual owners, with the intent of combining the lots with adjoining property he already owned into

a new subdivision to be known as Edgewood Overlook. In 1992, landowners residing on Pinehurst Drive, on which the lots are situated, filed a complaint to prevent the intended development, but both the development project and the accompanying lawsuit were not advanced and the suit was dismissed in 1994 for failure to prosecute the action. Taylor revived the plan to develop the property and submitted an application for approval of a preliminary plat to the Kenton County and Municipal Planning and Zoning Commission for the Edgewood Overlook subdivision. The commission held a public hearing at which several of the adjoining landowners voiced their objections to the plan, but the commission approved the plat and none of the affected landowners appealed this decision.

After the time for appeal of the approval of the plat lapsed, the developer began work on the site, extending Pinehurst Drive and laying utility pipes and lines. After the construction work was complete and the developer began marketing the lots, an attorney for the landowners of Winding Hills threatened litigation, arguing that the restrictive covenants affecting lots 111, 112, and 113 would prohibit construction of more than one single-family home within the original boundaries of each lot. Taylor Development filed this declaratory judgment action, seeking confirmation that the restrictive covenants did not prevent redrawing the boundaries of the lots. The circuit

court held that the term "lot" was ambiguous in that it could be construed to mean either the original boundaries or boundaries as redrawn, and the court held the restrictive covenant should be construed narrowly so as not to prohibit redrawing the boundaries of the lots, since no minimum lot size was specified in the restrictive covenants. This appeal followed.

The appellant landowners argue that the restrictive covenants should prohibit the developer from building more than one single family home within the original boundaries of the lots as described. The developer, by turn, says that since the landowners did not appeal the decision of the planning and zoning commission approving the new plat, the original boundaries are extinguished and the new ones are in effect, and it does not intend to build anything other than single-family homes on the new boundaries, thus avoiding a violation of the restrictive covenants. The restrictive covenants do not include a minimum lot size, nor a specific prohibition against redrawing the boundaries of the lots. The covenants do state, among other things, that no lot shall be used except for residential purposes, that only one dwelling shall be built upon a lot, and that houses built upon the lots must meet a minimum interior square footage requirement. The circuit court held that the development of the Edgewood Overlook subdivision did not violate

the prohibition against multiple dwellings on a lot, agreeing with the developer's interpretation of the covenants.

Even though Kentucky no longer follows a rule requiring strict construction of a restrictive covenant, we are still not permitted to supply additional terms not contained in the actual language of the document. McMahan v. Hunsinger, 375 S.W.2d 820 (Ky. 1964). Here, the use of the word "lot" in the restrictive covenant does not, in the absence of language specifically indicating such intent, prevent redrawing of boundaries. The restrictive covenants could have contained a minimum lot size requirement or an express prohibition against redrawing the boundary lines of particular lots, but did not. Other states that have considered similar situations have reached this conclusion as well. See Turnley v. Garfinkle, 211 Tenn. 125, 362 S.W.2d 921 (1962), Robinson et al. v. Pacemaker Investment Co., et al., 19 N.C. App. 590, 200 S.E.2d 59 (1973). The circuit court's interpretation is correct, and will not be disturbed on appeal.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS DAVID
BRANDEL, K. J. CAHALAN, PAULA
KESSLER (CLORE); JOHN AND
MARSHA DEWITT; DENNIS FAUSZ;
LARRY AND SANDRA GRIFFIN;
MICHAEL AND PAULA HASTINGS;
JOHN AND ANN HOLMAN; DAN AND
MICHELLE HUFFMAN; CONNIE
KREYLING; BOB AND
ELIZABETH MCDUGALL; DORYNE
NIPPERT; GREG AND LINDA SANDY;
BRIAN AND TERRI SCHIMP;
CHARLES AND PAULA STROUP;
BRUCE WALTON, GAYLE WELSCH,
TRUSTEE; TOM AND SHARON WYNN:

Garry L. Edmondson
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BRIEF FOR APPELLEE:

Joseph L. Baker
Covington, Kentucky

NO BRIEF FOR APPELLANTS
FREDERICK J. AND JANE L.
CHILDRESS; HAROLD E. AND SUE
C. BUNCH; JOHN AND HOLLY
SIMKONIS; PATRICIA G. ZIEGLER;
THEODORE F. AND MARGARET BIERE
(BOTH ARE DECEASED; CURRENT
HOMEOWNER NOT REPRESENTED OR
ACTIVE IN LITIGATION); MARK D.
WADDLE; MATTHEW G. AND
MARGARET J. CAREY; KEITH E.
AND LOIS J. STADTMILLER AND
STANLEY L. AND BARBARA B.
FORSYTHE