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IN THE
COURT OF APPEALS OF INDIANA

DARREN CROUSER and ANGELA BRITTON,	)	
	)	
Appellants-Petitioners,	)	
	)	
vs.	)	No. 06A01-0901-CV-39
	)	
TOWN OF ZIONSVILLE PLAN COMMISSION and PHIL CRAMER,	)	
	)	
	)	
Appellees-Respondents.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0803-MI-158

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Petitioners Darren Crouser and Angela Britton appeal the trial court's order affirming the Town of Zionsville Plan Commission's ("ZPC") approval of Phil Cramer's minor plat submission. We affirm.

Issues

The Appellants raise two issues on appeal:

I. Whether the trial court erred in concluding that the ZPC's approval of the Cramer's Petition did not constitute a vacation of the existing plat; and

II. Whether the trial court erred in concluding that the ZPC's approval of the Cramer's Petition did not violate the Zionsville Subdivision Control Ordinance.

Facts and Procedural History

In 2007, Max Mouser, on behalf of Cramer, filed a Petition for Subdivision Plat Approval to further subdivide Lot 8 that Cramer owned in the Isenhour Hills Subdivision, Section II in Zionsville. According to the Petition, Lot 8 would be divided, creating Lots 8A and 8B. The plat for the subdivision had been recorded in 1951. Because sidewalks did not exist on the property at the filing of the Petition, Cramer also sought a waiver of Section 3.4 of the Zionsville Subdivision Control Ordinance, which requires the installation of sidewalks. This would permit Cramer to postpone installing sidewalks until sidewalks were installed in

the entire neighborhood.

The Petition was reviewed by the ZPC's Staff and Technical Advisory Committee. Based on its review, the Staff issued comments, opining that because Cramer had agreed to install a drainage swale along the south lot line of lot 8A, the engineering and all other aspects of the project were found to be satisfactory. The comments also included conclusions that the project was exempt from the Town's post-construction stormwater quality and quantity requirements, the changes to the property were not prohibited by the covenants on the plat, the division of the property was not vacating a plat, and that the Petition complied with the Zionsville Subdivision Control Ordinance.

The ZPC heard the Petition on January 22, 2008. After hearing the Petition and taking public comment, the hearing on the Petition was continued to February 18, 2008. After addressing concerns raised by some owners in the Isenhour Hills Subdivision, including Crouser, the ZPC approved the petition. The ZPC issued findings of fact that adequate provisions had been made for the regulation of the minimum lot depth and minimum lot area, for the widths, grades, curves and coordination of the subdivision of public ways, and for the extension of water, sewer and other municipal services.

On March 17, 2008, the Appellants filed a Petition for Writ of Certiorari in Boone County, challenging the ZPC's approval of Cramer's Petition. The Appellants contended that Cramer's Petition was a re-plat and was required to comply with Indiana Code Section 36-7-3-10 (the Vacation Statute). The Appellants' Petition also alleged that Cramer's Petition failed to comply with the Zionsville Subdivision Control Ordinance in that the

agreed drainage swale required compliance with section 3.6(C)(2)(c) of the Ordinance and that Cramer failed to submit evidence demonstrating compliance with the Zionsville Stormwater Management Ordinance. After conducting a review and hearing on the Writ, the trial court denied Appellants' request to declare the ZPC's decision illegal and affirmed the decision of the ZPC.

This appeal ensued.

Discussion and Decision

Standard of Review

Both the trial court and appellate court review the decision of a zoning board with the same standard of review. St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh County, 873 N.E.2d 598, 600 (Ind. 2007). "A proceeding before a trial court or an appellate court is not a trial *de novo;* neither court may substitute its own judgment for or reweigh the evidentiary findings of an administrative agency." Id. However, we conduct a *de novo* review of any questions of law decided by the agency. Burcham v. Metro. Bd. of Zoning Appeals Div. I of Marion County, 883 N.E.2d 204, 213 (Ind. Ct. App. 2008).

I. Vacation Statute

The Appellants first contend that the approval of the Petition was in violation of the Vacation Statute because Cramer was required to obtain the written consent of all of the subdivision lot owners for his petition. The Vacation Statute provides in relevant part:

> The owners of land in a plat may vacate all or part of that plat. All the owners of land in the plat must declare the plat or part of the plat to be vacated in a written instrument, and that instrument must be executed, acknowledged, and recorded in the same manner as a deed to land.

Ind. Code § 36-7-3-10(a)(emphasis added). The statute uses permissive language, "may," and is not a source compelling a landowner to vacate a plat in certain situations. Cramer's petition did not seek to vacate the platted subdivision, so its filing did not trigger the requirements of the statute. Nor do the Appellants claim that any provision of the Zionsville Subdivision Ordinance would require a vacation of the plat based on the division of the lot.

One situation that may require vacation of a plat is when the owners of a subdivision wish to modify the restrictive covenants contained therein. A restrictive covenant is an express contract where one party agrees to certain restrictions on the use and occupancy of land in exchange for consideration. King v. Ebrens, 804 N.E.2d 821, 826 (Ind. Ct. App. 2004). "The right of one owner of a lot to enforce restrictions upon other lots rests upon the ground that the restrictions were for the benefit of all the lots subject to the same restrictions." Wischmeyer v. Finch, 231 Ind. 282, 289, 107 N.E.2d 661, 664 (1952)(quoting 7 Thompson on Real Property, 4th ed., § 3606, p. 90). "When 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." Grandview Lot Owners Ass'n, Inc. v. Harmon, 754 N.E.2d 554, 557 (Ind. Ct. App. 2001)(emphasis added).

Because restrictive covenants are an express contract among all of the owners within a subdivision, it would require agreement of all the parties to that contract to modify the terms. See Wischmeyer, 231 Ind. at 289, 107 N.E.2d at 665 (The right to enforce restrictive covenants is not abrogated nor are the covenants modified "by the failure to mention them in the instrument of conveyance from a common owner to any person . . . after the plat has been

recorded."). Here, the Appellants do not claim that the division of Cramer's lot violates or requires the modification of any of the contractual restrictive covenants contained in the plat. Nor do they dispute the Appellees' statement that there is no restrictive covenant prohibiting the division of a lot within the Isenhour Hills Subdivision. In fact, the Appellants did not even submit a copy of the plat with its restrictions and covenants into evidence.

Without citation to authority, the Appellants argue that the configuration and number of lots in a subdivision plat are "factors like covenants and restrictions which are relied upon by landowners in their acquisition of their respective properties." Appellant's Br. at 7. Distilled to its core, the Appellants' assertion is that the layout and number of lots visually depicted in the plat is an implied term of the contract of every subdivision lot owner and that if a landowner within a subdivision creates a new legal interest within his lot that would add to the visual depiction of the plat, a vacation and replat of the subdivision is required. This argument was soundly rejected in Jones v. Nichols, 765 N.E.2d 153 (Ind. Ct. App. 2002), trans. denied.

Jones involved the question of whether the granting of a pedestrian easement across a lot in a subdivision required the vacation and replat of the subdivision. The Appellants in Jones argued that "a subdivision's recorded plat gives notice and communicates to the world its contents equally by both that which *is* affirmatively delineated and designated upon the plat (easements, roads, etc.) and that which *is not* seen upon the plat, i.e., an *absence* of a pedestrian easement across the rear Lot of 153." Id. at 156 (quoting Appellants' Brief). This

argument was supported by its reference to Wischmeyer.[1] However, the Jones court distinguished the holding in Wischmeyer by noting that an easement was different from a restrictive covenant as it is a legal interest in land created by a grant in a deed and is often permanent. Id. at 158. A restrictive covenant is a concept of equity from the realm of contracts. Id. As such, the Jones court concluded that the Wischmeyer holding did not indicate that a landowner may sue to prevent fellow landowners from granting easements. This holding rejects the contention that a lot owner within a platted subdivision cannot change the composition of the legal interests pertaining to his lot if such interests are not depicted on the plat.

Because Cramer's petition did not seek to vacate the plat of the Isenhour Hills Subdivision, no provision in the Zionsville Subdivision Control Ordinance requires vacation, and the division of his lot is not prohibited by a restrictive covenant, the approval of the petition did not violate the Vacation Statute.

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[1] Wischmeyer involved the issue of whether the owner of all the land in a subdivision, after the recording of the plat that includes restrictive covenants, could modify, change or eliminate the restrictive covenants as to certain lots by executing a deed that makes no reference to such restrictions to the first purchaser of lots. Wischmeyer v. Finch, 231 Ind. 282, 284, 107 N.E.2d 661, 662 (1952). The Wischmeyer Court explained that restrictions on a property could be created by express covenants in the deed or a deed that references the plat that contains restrictions. Id. at 664. Referring to the then applicable vacation statute,[1] the court also noted that a developer may freely modify restrictions in a plat until the first lot is sold. Id. at 663. However, the sale of the first lot "operates as a dedication of all the streets and alleys marked on such plat." Id. This equally applies to the restrictive covenants on the plat. "The right of one owner of a lot to enforce restrictions upon other lots rests upon the ground that the restrictions were for the benefit of all the lots subject to the same restrictions." Id. at 664.

The Wischmeyer court noted that the issue before it involved a possible modification and not the vacation of a plat. It concluded that the statutory rule for vacation applied to modifications as well because through successive modifications a plat could be entirely vacated. Id. Because the first sale of a lot served as a dedication of the streets and utility easements and the first purchaser could not accept the benefits of the survey of the plat without accepting the burden of the restrictive covenants, the court held that there was no modification of the restrictions of the plat by the failure to mention them in the first deed. Id. at 664-65.

II. Compliance with Subdivision Control Ordinance

Second, the Appellants contend, without elaboration, that the Petition did not comply with Sections 3.6(C)(2)(c) and 2.1(B)(9) of the Zionsville Subdivision Control Ordinance and that the ZPC had no authority to waive compliance. According to their Petition to the trial court, the Appellants allege that the creation of a drainage swale along the south line of lot 8a involves carrying water across private property, which requires compliance with Section 3.6(C)(2)(c) of the Subdivision Control Ordinance. This section provides that, "[w]hen a proposed drainage system will carry water across private land outside the *Subdivision,* appropriate drainage rights satisfactory to the *Plan Commission* shall have been secured[.]" However, the construction of the drainage swale would discharge to the road drainage swale, not private property, as noted in the Staff Comments. While it was noted in one of the hearings that there might be a preexisting drainage issue of water flowing from the road drainage swale onto a piece of private property, it does not follow that this preexisting issue precludes the approval of Cramer's Petition in accordance with Section 3.6(C)(2)(c) of the Subdivision Control Ordinance.[2]

In their Writ Petition, the Appellants also alleged that the lack of compliance with Section 2.1(B)(9) was the failure of Cramer to provide documentation demonstrating compliance with the Zionsville Stormwater Management Ordinance. However, the Appellants do not explain how the Cramer Petition is not exempted by Section 12-5 of

[2] One of the ZPC members also noted during this discussion that "a lot can have the same amount of coverage regardless of whether it's split or not. The percentage for coverage is the same. The area of the lot is the same. And therefore the coverage and the overall drainage is going to be the same regardless of whether it's split or not." Appellants' App. at 99.

Stormwater Management Ordinance, which was the conclusion of the ZPC and was affirmed by the trial court. The Appellants have not demonstrated that the trial court erred in affirming the approval of Cramer's Petition by the ZPC.

Affirmed.

DARDEN, J., and ROBB, J., concur.