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2012 IL App (3d) 110671-U

Order filed September 25, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

BRIAN J. WEGERER, MARCY K.	)	Appeal from the Circuit Court
WEGERER, RONALD R. McDERMOTT	)	of the 14th Judicial Circuit,
TRUST UTA 10/8/98, MARGARET A.	)	Henry County, Illinois
McDERMOTT TRUST UTA 10/8/98,	)	
TODD NICHOLSON and JANE	)	
NICHOLSON,	)	
	)	Appeal No. 3-11-0671
Plaintiffs-Appellants,	)	Circuit No. 10-CH-106
	)	
v.	)	
	)	
MICHAEL PORUBCIN and CHAE HEE	)	
PORUBCIN,	)	
	)	Honorable Charles H. Stengel,
Defendants-Appellees.	)	Judge, Presiding.

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PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in refusing to admit the county zoning ordinance into evidence. The trial court did not err in finding that defendants'

construction project is not prohibited by the restrictive covenants applicable to their property.

¶ 2 Plaintiffs, Brian and Marcy Wegerer, Todd and Jane Nicholson, and Ronald McDermott filed this action seeking an injunction ordering defendants, Michael and Chae Hee Porubcin, to demolish partially constructed tennis courts at their residence. Plaintiffs alleged that defendants' project violates numerous provisions of the Timber Ridge Homeowners' Association's (TRHA) restrictive covenants. Following a bench trial, the circuit court of Henry County found the project did not violate the covenants and entered judgment for defendants. Plaintiffs appeal, claiming the circuit court erred in barring one of their exhibits and when holding defendants' project did not violate applicable restrictive covenants.

¶ 3 BACKGROUND

¶ 4 While the manner in which the parties have reported the facts contained within the record on appeal greatly complicates our attempt to determine the relevant facts of this matter, the record reflects that the Porubcins bought two lots in Timber Ridge in 2001. In the summer of 2009, the Porubcins began talking with Troy Lewis about building tennis courts in their backyard. The lots in Timber Ridge were subject to restrictive covenants.

¶ 5 The relevant covenants read as follows:

"2.0 LAND AND BUILDING COVENANTS

2.2 Architectural Control

No building shall be erected, placed or altered on any

lot in Timber Ridge Tract II until the construction plans 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 the exterior design with existing structures, and as to location with respect to topography and finish grade elevation.

#### 2.4 Building Location

The locations of any residence, detached garage, other accessory building, swimming pool, etc., shall be approved by the Architectural Committee.

### 3.0 ADDITIONAL PROTECTIVE COVENANTS AND CONDITIONS

#### 3.6 Fences

No fence or wall or hedge row shall be permitted to extend nearer to any street than the residence itself.

#### 3.8 Grade Not Changed

No lot grade shall be substantially changed without prior written approval of the Architectural Control Committee, except as required by the developer for development purposes.

### 4.0 ARCHITECTURAL CONTROL COMMITTEE

#### 4.1 Membership

The Architectural Control Committee shall consist of James R. Hoorhusen, Kenneth D. Christensen and Bruce A. Peterson, of Oakwood Development Co., or the subsequent holders of their title in Timber Ridge.

#### 4.2 Procedure of the Committee

The Committee's approval or disapproval as required in these covenants shall be in writing. In the event that the Committee fails to approve within thirty (30) days after submission, approval shall be deemed to have been given."

¶ 6 The original estimate to build the courts, proposed by Lewis and accepted by the Porubcins, totaled \$232,500. The project commenced in September of 2009. Prior to construction, the Porubcins never sought approval from the Architectural Control Committee (ACC).

¶ 7 Prior to beginning construction, Lewis sent an e-mail to the Henry County Building Department advising that he would be starting the project and enclosing a site plan for consideration. On September 22, 2009, Lewis received a reply from Henry County informing him that no building permit was required.

¶ 8 Lewis began construction of the courts, using over 2,300 blocks to build a retaining wall for the project. Rock and gravel were delivered in tandem axle dump trucks totaling 131 loads, which equates to 1,757 total tons or 1,004 cubic yards.

¶ 9 Plaintiffs claim that McDermott, immediately after learning of defendants' project, e-mailed defendants on November 11, 2009. The e-mail prompted Mr. Porubcin to schedule a meeting on his property to discuss the matter with McDermott. McDermott testified that the meeting took place on November 13, 2009. McDermott and Porubcin walked the property during the meeting.

¶ 10 Four days later, on November 17, 2009, Steve Singley, the TRHA president, signed a letter which expressed concern over the magnitude of the project. The letter identified sections of the protective covenants, which TRHA claimed defendants' project violated. The letter further directed the Porubcins to suspend work on the project.

¶ 11 After defendants' receipt of the letter, a meeting took place at their home on Sunday, November 22, 2009. Adjacent property owners and other neighbors attended, as did Lewis. Mr. Porubcin was traveling and unable to attend the meeting. Following the meeting, Mrs. Porubcin instructed Lewis to resume construction of the tennis courts.

¶ 12 On November 23, 2009, Lewis contacted plaintiff McDermott to make him aware that Lewis intended to perform limited work to "button-up" the partially constructed wall to avoid wall damage from rain or erosion. Lewis indicated that once the project was buttoned-up, he intended to cease work until plans could be presented to the ACC. Lewis performed no work on the project after December 8, 2009.

¶ 13 The THRA held meetings to change the composition of the ACC from that required by covenant 4.1 to five members. A meeting took place on December 15, 2009, to effectuate this

change. On March 10, 2010, the Porubcins submitted to the five-member ACC a request for a variance involving the project. On March 25, 2010, the ACC denied the Porubcins' request and issued a final decision, noting numerous violations of the Timber Ridge Protective Covenants. Nevertheless, on June 21, 2010, the Porubcins informed plaintiffs of their intention to resume construction on the project. Two days thereafter, plaintiffs initiated this lawsuit.

¶ 14 The matter proceeded to a bench trial, which lasted four days, included testimony from nine witnesses and admission of over 120 exhibits. Relevant testimony, which is not discussed above, will be included in our analysis section below. The trial court announced its detailed and lengthy findings of fact and conclusions of law in open court on August 31, 2011. Thereafter, on September 7, 2011, the court issued a written order entering judgment for the defendants. This timely appeal followed.

¶ 15

#### ANALYSIS

¶ 16 The law regarding interpretation and enforcement of restrictive covenants is well settled.

“Restrictions on the use of property conveyed in fee are not favored, but courts will enforce restrictive covenants if they are reasonable, clear, definite, and not contrary to public policy. [Citation.] The interpretation of a restrictive covenant is a question of law. [Citation.] When interpreting a covenant, a court must give effect to the parties’ actual intent at the time the covenant was made. [Citation.] As with any other contract, the terms must be

given their ordinary and natural meaning when they are clear and unambiguous. [Citation.] When there is no ambiguity, there is no need to inquire into the intention of the parties.” *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1036 (2004).

¶ 17 Moreover, it has long been held in Illinois that courts construing restrictive land use covenants will resolve all doubts against the restrictions and in favor of the free use of property. *Newton v. Village of Glen Ellyn*, 374 Ill. 50 (1940). Restrictive covenants are to be strictly construed and will be enforced only if they are reasonable, clear and definite. *Vandelogt v. Brach*, 325 Ill. App. 3d 847, 853 (2001). The generalization that all doubts and ambiguities shall be resolved in favor of free use and against restriction cannot be used to ignore or override specific language of a restrictive covenant. *Mertel v. Howard Johnson Co., Inc.*, 191 Ill. App. 3d 114, 117 (1989).

¶ 18 As noted above, the interpretation of a restrictive covenant is a question of law. *Sadler*, 354 Ill. App. 3d at 1046. "We review questions of law *de novo*." *Taylor v. Police Board of City of Chicago*, 2011 ILL. App (1st) 101156, ¶ 47 (citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998)). Given these tenets, it follows that whether "a restrictive covenant is ambiguous is a question of law because that determination necessarily involves a construction of the restriction." *Fick v. Weedon*, 244 Ill. App. 3d 413, 416-17 (1993).

¶ 19 While these principles allow us to interpret the covenants at issue *de novo*, our review is still constrained by the findings of fact made by the trial court following the bench trial of this

matter. "The court's decision in that regard will only be overturned if the court's [factual] findings are against the manifest weight of the evidence." *Petty v. First National Bank of Geneva*, 225 Ill. App. 3d 539, 545 (1992). This mixed standard of review, to be employed in this matter, is similar to a breach of contract action where the interpretation of the contract is reviewed *de novo* (*Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007)), but findings which ultimately determine whether a breach occurred involve questions of fact and, as such, will not be disturbed on appeal unless those findings were against the manifest weight of the evidence. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. To be clear, we review the interpretation of the restrictive covenants *de novo* but afford deference to the trial court's findings of fact.

¶ 20 Plaintiffs raise numerous claims of error. All but one of these claims involve the trial court's interpretation or application of the aforementioned covenants. Plaintiffs' remaining claim of error is evidentiary in nature, as plaintiffs contend that the trial court erred in refusing to admit plaintiffs' exhibit No. 101 and in admitting defendants' exhibit No. 307.

¶ 21 I. Evidentiary Matters

¶ 22 Initially, we note plaintiffs fail to identify the proper standard of review in their arguments regarding evidentiary matters. Without citation to authority, plaintiffs contend we review the matter *de novo*. We do not. "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *Colella v. JMS Trucking Co. Of Illinois, Inc.*, 403 Ill. App. 3d 82, 90 (2010). An abuse of discretion occurs when no reasonable person would take the view

adopted by the trial court. *Id.* We "will not reverse on the basis of an erroneous evidentiary ruling unless the error was prejudicial or the result of the trial has been materially affected."

*Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 854 (2007).

¶ 23 Plaintiffs' exhibit No. 101 is a certified copy of the Henry County Municipal Ordinance. While the plaintiffs were allowed to refer to the document a number of times throughout the trial, the trial court refused to ultimately admit the document into evidence stating, "this is a restrictive covenant case, not a building set back case for the county." Plaintiffs argue it was error to suggest the zoning ordinances were irrelevant to this matter and ultimately deny admittance of the document, given the trial court's findings that at least one of the covenants is vague.

Plaintiffs argue that admitting the Henry County ordinances would have aided in the interpretation of covenant "2.2 Architectural Control" and covenant "2.4 Building Location."

¶ 24 Specifically, plaintiffs claim, "The Ordinance clearly defines a 'building' as being a 'structure' under its rules and definition section in Article V \*\*\*." Article V of the ordinance states as follows:

"Section 5.1 Rules

The language set forth in the text of this ordinance shall be interpreted in accordance with rules and definitions contained in this Article, except when the context clearly indicates otherwise.

\*\*\*

d. \*\*\* the word "building" includes all other structures of

every kind regardless of similarity to buildings \*\*\*.

#### Section 5.2 Definitions

\*\*\*

BUILDING. Any structure which is built for the support, shelter or enclosure of persons, animals, chattels or movable property of any kind, and which is permanently affixed to the land.

\*\*\*

STRUCTURE: Anything erected, the use of which requires more or less permanent location on the ground; or attached to something having a permanent location on the ground. A sign, billboard or other advertising medium detached or projecting shall be construed to be a structure." Henry County Zoning Ordinance Nos. 5.1, 5.2.

¶ 25 Again, the plaintiffs proclaim that admitting the Henry County ordinance would have aided the interpretation of the restrictive covenants. Given our standard of review, we cannot say that the trial court's decision was unreasonable or that no reasonable person would take the view adopted by the trial court. As such, we must affirm the trial court's ruling.

¶ 26 The trial court correctly noted that this is a restrictive covenant case and not a zoning matter. It then concluded that the zoning ordinance would not help in the interpretation of the

restrictive covenants and, therefore, denied their admittance. Arguably, the zoning ordinance muddies the waters one navigates in trying to define the terms of the covenants instead of bringing clarity to them. In one breath, the ordinance defines buildings as "all other structures \*\*\* regardless of their similarity to buildings" and in another, limits buildings to "any structure" built to support, shelter or enclose persons or animals. Clearly, the tennis courts and retaining wall are a structure, but not intended to shelter or enclose persons or animals. The drafters of the ordinance felt it necessary to provide a broad definition for terms "building" and "structure." The drafters of the restrictive covenants found it unnecessary to provide a similarly expansive definition. We acknowledge that reasonable minds may differ as to the import of the definitions contained within the ordinances. However, to reverse the trial court's decision regarding the admitting the zoning ordinance into evidence, we must find that no reasonable person would adopt the view taken by the trial court. We cannot make such a finding.

¶ 27 Next, we find defendants have waived any claim of error regarding defense exhibit No. 307. Supreme Court Rule 341(h)(7) mandates that appellants support their positions before the court with citations to authority. *United Legal Foundation v. Pappas*, 2011 IL App (1st) 093470, ¶ 15. While plaintiffs claim that the court erred when admitting defense exhibit No. 307, they provide no authority to support this argument. "Ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived." *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). We find plaintiffs have forfeited this issue.

¶ 28

## II. The Covenants

¶ 29 Plaintiffs identify numerous covenants, which they claim construction of the Porubcins' tennis courts violate.

¶ 30 A. 3.8 Grade Not Changed

¶ 31 As noted above, covenant 3.8 states:

"No lot grade shall be substantially changed without prior written approval of the Architectural Control Committee, except as required by the developer for development purposes."

¶ 32 The trial court found that any change in grade to the Porubcins' property was not substantial as contemplated by this covenant. Specifically, that trial court found there is a "change in grade, but it's not substantial. It's only a few feet in various places."

¶ 33 Plaintiffs note that our supreme court previously examined the word "substantial." In *People ex rel. Howard v. Chicago & E.I.R. Co.*, 296 Ill. 246 (1921), the court stated, "The word 'substantial,' as ordinarily used, means essential, material, or fundamental." *Id.* At 249. The issue address by the *Howard* court focused on whether an election officer met his duty "to furnish a ballot substantially in the form" prescribed by statute. *Id.* The court noted, "A substantial copy of the form of the ballot designated in the statute must evidently be one that contains the essence of the form in the statute—one giving the correct idea, but not necessarily the exact expression in the statutory form." *Id.*

¶ 34 Plaintiffs claim that since the Porubcins trucked in hundreds of loads of backfill and built a retaining wall which "rises 13 to 14 feet in some places," there can be no doubt that the grade

of the land was substantially changed. As such, plaintiffs argue the trial court erred in finding the Porubcins did not substantially change the grade of their lot. We disagree.

¶ 35 Reviewing the exhibits and evidence contained within the record on appeal, it is clear that the slope of the Porubcins' backyard is no higher at its highest point, that being the back of their house, than it was before the project started. It further appears the lowest point of the Porubcins' lot, that being the tree line behind the retaining wall, is, at most, only slightly lower, if at all, than it was before the project started. The trial court's finding that the grade has not been substantially changed is supported by the record, which indicates the highest point of the lot has not been altered whatsoever and the lowest point has, at most, been altered a foot or two. When reciting its factual findings, the trial court noted that prior to the project the Porubcins' backyard was "relatively flat" and "drained into a ravine and did have some slope to it." Evidence at trial indicated that the tennis courts will "have to drain one inch every ten feet" leaving them "relatively flat \*\*\*." It is important to note that evidence at trial also established that the Porubcins' property will still drain into the same ravine following completion of the project.

¶ 36 "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *In re Arthur H.*, 212 Ill. 2d 441, 464 (2004). The grade of the yard may not be exactly as it was before. However, with its highest point no higher than before and lowest point, at most, a few feet lower, the grade is essentially or fundamentally the same as it was prior to construction of the project. We hold the trial court's finding that the project has not substantially changed the grade of the Porubcins' property is not against the manifest weight of

the evidence.

¶ 37

#### B. 3.6 Fences

¶ 38 As noted above, covenant 3.6 states that no "fence or wall or hedge row shall be permitted to extend nearer to any street than the residence itself." The trial court found the Porubcins' garage is 41 feet, 6 inches from the cul-de-sac. Evidence indicated that a wall of the tennis court project is 54 feet to Timber Ridge Road. Plaintiffs argue to us, as they did the trial court, that covenant 3.6 requires measuring from the same starting point to determine the proper distance from the street to the house and any potential wall. Plaintiffs further argue that the term "residence" in the covenant excludes measurements from the garage and mandates measurements from the living quarters of the structure. As such, plaintiffs urge us to disregard the evidence in the record indicating that the Porubcins' garage is 41 feet, 6 inches from the blacktop of the cul-de-sac.

¶ 39 The trial judge correctly noted that "the covenants provide no instruction how or where to determine what the distance should be from\*\*\*." This led the trial judge to find the covenant vague, acknowledging that "there's two or more ways to measure, and when the words of the restriction are equally capable of two or more different constructions, the construction will be adopted which least restricts the free use of the land."

¶ 40 It has long been held that where " 'the words of a restriction are equally capable of two or more different constructions, that construction will be adopted which least restricts the free use of the land.' " *Cimino v. Dill*, 108 Ill. App. 3d 782, 786 (1982) (quoting 7 Thompson, *Real*

*Property* § 3160, at 109 (1962 Replacement)); see also *Boylston v. Holmes*, 276 Ill. 279, 285-86 (1916).

¶ 41 The manner in which the plaintiffs argue measurement should be made is not unreasonable or offensive to the covenant; that is, pick a point on a street nearest the fence and measure from that point to both the fence and the residence. However, the manner in which the Porubcins argue measurement should be made is also not offensive to the covenant; that is, if at any point the residence is closer to "any street" than the proposed fence, then the fence does not violate the covenant. As the covenant is open to multiple interpretations, the trial court properly adopted the interpretation "which least restricts the free use of the land." *Cimino*, 108 Ill. App. 3d at 786. We hold the trial court did not err in finding the project is in accord with covenant 3.6.

¶ 42 C. Architectural Control Committee Approval

¶ 43 Plaintiffs aver that it is beyond question that the Porubcins did not comply with the covenants mandating approval of this project by the Architectural Control Committee. Those covenants include the following:

"2.2 Architectural Control

No building shall be erected, placed or altered on any lot in Timber Ridge Tract II until the construction plans 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 the exterior design with existing structures, and as to location with respect to topography and finish grade elevation.

#### 4.1 Membership

The Architectural Control Committee shall consist of James r. Hoorhusen, Kenneth D.Christensen and Bruce A. Peterson, of Oakwood Development Co., or the subsequent holders of their title in Timber Ridge.

#### 4.2 Procedure of the Committee

The Committee's approval or disapproval as required in these covenants shall be in writing. In the event that the Committee fails to approve within thirty (30) days after submission, approval shall be deemed to have been given."

¶ 44 Plaintiffs disagree with the trial court's finding that the "proposed tennis courts being built by the Porubcins and the retaining wall and fence are not a building in accordance with section 2.2." Specifically, plaintiffs argue that the trial court's construction of the term "building" contained in covenant 2.2 failed to give effect to the intention of the creators of the covenant. Plaintiffs note that covenant 2.2 is titled "Architectural Control." They surmise that the trial court's focus on the term "building" within the covenant is misplaced, suggesting the trial court ignored "the entire wording" of covenant 2.2, which mandates approval by the ACC to ensure

"quality of workmanship and materials, harmony of the exterior design with existing structures \*\*\*." Plaintiffs, again turning to the county zoning ordinances, reassert their argument that the zoning ordinance "defines a 'building' to include 'structure,' and then defines 'structure' as anything erected in Henry County, the use of which requires more or less permanent location on the ground."

¶ 45 We cannot hold that the trial court erred, as a matter of law, when finding that a tennis court is not a building within the meaning of covenant 2.2. As noted above, when "interpreting a covenant, \*\*\*\* the terms must be given their ordinary and natural meaning when they are clear and unambiguous." *Sadler*, 354 Ill. App. 3d at 1036.

¶ 46 Certainly, a tennis court does not meet the definition of a "building" in the traditional sense. The trial court referred to Black's Law Dictionary when describing a "building" as "a structure with walls and a roof." Specifically, Black's Law Dictionary defines a building as a "structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like." Black's Law Dictionary (6th ed. 1990). This definition correlates to the traditional dictionary definition of a building: "something that is built, as for human habitation; a structure." The American Heritage College Dictionary (3d ed. 1993). We find nothing ambiguous about the term "building." Covenant 2.2 pertains to the "erection" of a "building," not the construction of a tennis court. As such, we hold the trial court did not err in finding covenant 2.2 inapplicable to defendants' project.

¶ 47 We also find no merit in plaintiffs' argument that excluding tennis courts or any similar

structure from the purview of covenant 2.2 would frustrate the actual intent of the developers of the property and drafters of the covenants. Plaintiffs argue that the trial court "ignored \*\*\* extrinsic evidence testimony of both developers James Moorhusen and Bruce Peterson," which supports their assertion that a tennis court is a building as contemplated by covenant 2.2.

¶ 48 Plaintiffs identify two pages of Peterson's testimony to support their claim that the trial court ignored the developers' testimony when construing covenant 2.2. Peterson does not discuss covenant 2.2 in these two pages of testimony. In fact, it appears Peterson never specifically discussed covenant 2.2. during his testimony. Moreover, the passage plaintiffs direct us to in Moorhusen's testimony reveals a general discussion of the covenants and no specific discussion of covenant 2.2. During this portion of Moorhusen's testimony, he claimed the general purpose of the covenants was to "make sure that the subdivision doesn't get unwanted items built or constructed that would be detrimental to the owners." When specifically asked what would constitute an unwanted item, Moorhusen replied, "A pole building, for example, maybe a swimming pool." Like Peterson, none of Moorhusen's testimony addressed covenant 2.2 or the inclusion of the term building within it. We find no merit in plaintiffs' assertion that the trial ignored extrinsic evidence, that being portions of the developers' testimony, which resulted in an erroneous interpretation of covenant 2.2. Again, when the terms of a covenant are clear and unambiguous, there is no need to resort to extrinsic evidence to derive the covenant's meaning. *Sadler*, 354 Ill. App. 3d at 1036. The plain wording of covenant 2.2 makes clear that it applies to buildings, not tennis courts.

¶ 49 Citing to *Rode v. Village of Northbrook*, 123 Ill. App. 3d 436 (1984), plaintiffs assert that Illinois courts have already determined that the term "building" includes structures of every kind, regardless of the similarity to buildings. At issue in *Rode* was whether a municipal zoning ordinance "limiting building height to thirty-five feet" applied to a party's proposed 245 feet high radio tower. *Id.* at 441. The *Rode* court did, in fact, hold as plaintiffs point out that the term building "includes all other structures of every kind, regardless of the similarity to buildings." *Id.* We do not read the *Rode* decision, however, as providing the definitive definition of the term "building" to be employed in restrictive land use covenant cases. The *Rode* court arrived at its decision that the tower was a building, for zoning purposes, given the applicable zoning ordinance not only defined both "building" and "structure," but also noted that the "word 'building' includes all other structures of every kind, regardless of the similarity to buildings." *Id.* The *Rode* decision does not persuade us that the drafters of covenant 2.2 intended the term "building" to include construction of a tennis court.

¶ 50 Plaintiffs also claim the trial court erred when interpreting covenant 2.4 which reads:

"2.4 Building Location

The locations of any residence, detached garage, other accessory building, swimming pool, etc., shall be approved by the Architectural Committee."

The trial court found that it is "clear that this proposed tennis court is not a residence, it's not a garage, it's not an accessory building or a swimming pool, and that the term 'etc.' is not defined in

the covenants, and it's vague." After finding the term "etc." vague, the trial court noted developer Peterson "was the only one who could testify as to what he said it meant, and he intended the word to include things they could not anticipate, technology not yet developed at the time that they wrote these covenants. A tennis court is something that's been around much longer than at the time that these covenants were entered into. He further testified it was not his intent to prohibit tennis courts." Therefore, the trial court found that "a tennis court is not within the intended scope of section 2.4."

¶ 51 Plaintiffs disagree. Plaintiffs note a tennis court is "of a like kind with the types of structures listed in section 2.4, and is included within the meaning of 'etc.' in that section."

Plaintiffs also take issue with the trial court's characterization of Peterson's testimony.

¶ 52 We hold the trial court correctly found covenant 2.4 vague. As noted above, there is nothing vague or ambiguous about the term building. Covenant 2.4 is titled "Building Location" yet, by its very terms, it applies to an item that is not a building; that being a swimming pool. This inconsistency is, in and of itself, reason enough for the trial court to determine that the terms of the covenant are vague. While Peterson did testify that the term "etc." was intended to cover items which could not be contemplated in the 1970s, such as a windmill or satellite dish, the trial court's analysis of extrinsic evidence to resolve the ambiguity in covenant 2.4 was unnecessary. When courts find the terms of a restrictive covenant vague or ambiguous, they do not turn to extrinsic evidence to attempt to interpret the terms but instead employ "the rule of construction in favor of the unfettered use of land \*\*\*." *Xinos v. Village of Oak Brook*, 298 Ill. App. 3d 520,

525 (1998); *Cimino*, 108 Ill. App. 3d at 786; *Engler v. Tenhaaf*, 74 Ill. App. 3d 799 (1979). We hold the trial court committed no error when finding covenant 2.4 cannot be used to prohibit construction of the Porubcins' tennis courts.

¶ 53

#### CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed.

¶ 55 Affirmed.