



## **Case Summary**

Deborah Lebamoff appeals from the trial court's grant of summary judgment and order directing her to remove a detached pool house that was constructed on her property in violation of the restrictive covenant governing her subdivision. Specifically, Lebamoff contends that either the restrictive covenant does not prohibit a detached pool house or that the restrictive covenant is ambiguous and must be construed in her favor. Additionally, Lebamoff argues that the trial court erred by denying her request for summary judgment because the designated evidence demonstrates that the pool house meets the architectural standard contained in the restrictive covenant, or, in the alternative, the evidence presents a genuine issue of material fact that precludes the granting of summary judgment. Because we conclude that the restrictive covenant at issue does prohibit the construction of a detached pool house without the approval of an architectural control committee and the designated evidence demonstrates that there is no such approval in this case, we determine that the trial court did not err by granting summary judgment. We therefore affirm.

## **Facts and Procedural History**

In July 2002, Lebamoff became the owner of residential real estate legally described as Lot Number 16 in Section I of the Twin Eagles subdivision in Hometown, Indiana. Lebamoff lives there with her husband, Andy, and their children.<sup>1</sup> Lebamoff took title to this property by a Corporate Deed recorded in the Allen County Recorder's Office. The Deed states that Lot 16 was conveyed subject to "easements, assessments

---

<sup>1</sup> Deborah Lebamoff is the sole party of record, and references in this opinion to "Lebamoff" in the singular are references to Deborah.

and all restrictions of record.” Appellant’s App. p. 12. Specifically, Lot 16 was subject to the “Primary Dedication, Protective Restrictions, Covenants, Limitations, Easements and Approvals Appended to as Part of the Dedication and Plat of Twin Eagles Section I, a Subdivision in Perry Township, Allen County, Indiana” (hereinafter, the “Restrictive Covenant”), which was recorded in the Allen County Recorder’s Office in March 2002. *Id.* at 15.

The Restrictive Covenant, enforced by the Twin Eagles Neighborhood Association (“TENA”), provides in pertinent part:

ARTICLE I  
DEFINITIONS

\* \* \* \* \*

Section 8. “Dwelling Unit” shall mean and refer to the structure used as a residential living unit located upon a Lot, including the garage and any appurtenances.

\* \* \* \* \*

ARTICLE V  
ARCHITECTURAL CONTROL

No building, shed, fence, wall, swimming pool or spa, or other structure shall be commenced, erected or maintained upon any Lot, nor shall any exterior addition to or change or alteration therein be made until two sets of plans and specifications showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Architectural Control Committee. The Committee’s approval or disapproval as required in these covenants shall be in writing. No structure of any kind which does not comply fully with such approved plans shall be erected, constructed, placed or maintained upon any Lot, and no changes or deviations in or from such plans as approved shall be made without the Committee’s prior written consent. Neither the Developer, the Committee, nor any member thereof, nor any of their respective heirs, personal representatives,

successors or assigns, shall be liable to anyone by reason of any mistake in judgment, negligence, or nonfeasance arising out of or relating to the approval or disapproval or failure to approve any plans so submitted, nor shall they, or any of them, be responsible or liable for any structural defects in such plans or in any building or structure erected according to such plans or any drainage problems resulting therefrom. Every person and entity who submits plans to the Committee agrees, by submission of such plans, that he or it will not bring any action or suit against the Committee or the Developer to recover any damages or to require the Committee or the Developer to take, or refrain from taking, any action whatever in regard to such plans or in regard to any building or structure erected in accordance therewith. Neither the submission of any complete sets of plans to the Developer's office for review by the Committee, nor the approval thereof by that Committee, shall be deemed to guarantee or require the actual construction of the building or the structure therein described, and no adjacent Lot owner may claim any reliance upon the submission and/or approval of any such plans or the buildings or structures described therein.

\* \* \* \* \*

ARTICLE VI  
GENERAL POWERS AND DUTIES OF BOARD OF  
DIRECTORS OF THE ASSOCIATION

Section 1. Powers and Duties. . . .

\* \* \* \* \*

The Board of Directors shall have the following additional rights, powers, and duties:

\* \* \* \* \*

(q) to enforce the provisions of this Declaration and any rules made hereunder and to enjoin and seek damages from any Owner for violation of such provisions or rules.

\* \* \* \* \*

ARTICLE IX  
GENERAL PROVISIONS

Section 1. Residential Purposes. No Lot shall be used except for residential purposes. No building shall be erected, altered, placed or

permitted to remain on any Lot other than one Dwelling Unit not to exceed two and one-half stories in height. Each Dwelling Unit shall include not less than an end-loading three-car garage, which shall be built as part of said structure and attached thereto.

\* \* \* \* \*

Section 5. Garages. All Dwelling Units must have a full-size, attached, end-loading, three (3) car garage of at least 600 square feet. However, the Architectural Control Committee shall have the authority to approve any garage not in compliance with the restrictions set forth in this Section 5, subject to and in accordance with Article V hereof.

\* \* \* \* \*

Section 9. Temporary Structures and Storage. No structure of a temporary character, trailer, boat trailer, truck, commercial vehicle, recreational vehicle (RV) camper shell, all terrain vehicle (ATV), camper or camping trailer, basement, tent, shack, garage, barn or other outbuilding shall be either used or located on any Lot, or adjacent to any Lot, public street or right-of-way within the Subdivision at any time, or used as a residence, either temporarily or permanently.

Section 10. Storage Sheds. No storage sheds of any type shall be allowed on any Lot.

\* \* \* \* \*

Section 37. Enforceability. The Association, the Developer, and any Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereinafter imposed by the provisions of these Restrictions. Failure by the Association, the Committee, the Developer, or by any Owner to enforce any Covenant or Restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

Section 38. Partial Invalidation. Invalidation of any one of these Restrictions by judgment or court order shall in no wise affect any other provisions which shall remain in full force and effect.

\* \* \* \* \*

Section 43. Enforcement. In addition to the provisions contained in Article IV, Section 1 [providing that an Owner is responsible for

Assessments and costs associated with enforcing the obligation to pay Assessments owed], should any Owner violate any provision of these Restrictions, said Owner shall pay all costs and expenses incurred by the Association and/or the Developer, or its successors and assigns, in connection with the enforcement of these Restrictions, including, without limitation, all attorney fees and expenses, interest, and any cost of collection.

*Id.* at 15-16, 22-25, 27-29, 32.

During the summer of 2007, the Lebamoffs decided to build an in-ground pool and a detached pool house on their property. In September 2007, the Lebamoffs provided TENA with a sketch demonstrating the location of the pool and the pool house on the property, construction plans for the pool house, and landscaping plans for the area around the pool and the pool house. The plans demonstrated that the pool house would be built using the same architectural style and building materials as the home on the property. The Lebamoffs discussed the plans with at least thirteen other homeowners<sup>2</sup> in Twin Eagles who all indicated they had no objection to the plans. *Id.* at 214 (affidavit of Andy Lebamoff).

The TENA Board of Directors held a meeting on September 10, 2007, and reviewed the plans and discussed them with Andy at that meeting. The Board indicated that it was disinclined to allow the construction of detached pool houses. On September 25, 2007, the TENA Board of Directors sent the Lebamoffs a letter approving the request to build a pool but denying the request to build the pool house. The letter reads as follows:

The Board of Directors of the Twin Eagles Neighborhood Association (TENA) has, based on their architectural control authority,

---

<sup>2</sup> Lebamoff submitted the affidavits of these neighbors to the trial court, the trial court struck the affidavits, and Lebamoff does not contest the trial court's evidentiary rulings.

voted to approve the construction of your pool but not the construction of a pool house. After thorough review of the Covenants and discussion of the topic, we concluded it was not in the best interest of TENA to approve the construction of a building on your Lot other than additions attached to your primary dwelling unit, as we have discussed with Mr. Lebamoff already.

The Board appreciates your obtaining legal counsel in an attempt to clarify the Covenants. Meanwhile, the Board had already discussed the need to clarify several aspects of the Covenants, this issue being included. After carefully considering the options available, the Board has also voted to engage legal counsel to review and provide impartial guidance to the Board on how to clarify and/or amend the Covenants with respect to this and other issues. We will be certain to include your letter in the material provided to our legal counsel. Since the Board did not have such activity budgeted in 2007, the Board voted to make this a priority in 2008 and therefore plans to include the associated expenses in our 2008 projected budget. The Board will take the information obtained from our legal counsel into consideration and review your request in light of the counsel's recommendation, once it is available.

However, that does not diminish the authority of the Board to now make firm decisions based on a majority vote of the board under the architectural control authority given the Board nor diminish the responsibility of the Board to make timely decisions on what is in the best interest of the TENA based on the information presented. Therefore, the aforementioned view of the Board shall apply until such time as the TENA Board engages counsel to review the issue, the recommendations of counsel are incorporated, as determined appropriate by the Board, and the matter is reconsidered by the Board, if appropriate. Hence, as previously stated, by vote of the Board, your pool is approved but the pool house is not approved. As a result, construction of a pool house will be considered in violation of the Covenants.

Please contact the Board if you need further clarification.

*Id.* at 35 (formatting altered).

Despite TENA's denial, the Lebamoffs commenced construction of the pool house.<sup>3</sup> TENA then filed a complaint against Lebamoff, seeking declaratory judgment and injunctive relief both enjoining Lebamoff from violating the Restrictive Covenant and ordering the removal of all improvements on the property in breach of the Restrictive

---

<sup>3</sup> The building permit the Lebamoffs obtained indicates that the pool house is a sixteen foot by twenty-two foot structure with a kitchenette, half bath, storage, and a ten foot by twenty-two foot covered porch. Appellant's App. p. 36.

Covenant plus costs and attorney fees. In her answer, Lebamoff asserted a counterclaim for declaratory judgment seeking a determination that the Restrictive Covenant permitted the construction of the pool house and that TENA's rejection of the plan for the pool house was wrongful and unreasonable.

TENA then filed a motion for summary judgment along with designated evidence and a brief in support. Lebamoff filed a response and a cross-motion for summary judgment along with designated evidence and a brief in support. TENA filed a response to Lebamoff's cross-motion. The trial court held a hearing on the motions and later granted TENA's motion for summary judgment and denied Lebamoff's cross-motion for summary judgment. The trial court found no genuine issue as to any material fact and determined, as a matter of law, that Lebamoff violated the Restrictive Covenant, specifically, Article IX, Sections 1 and 9. The trial court permanently enjoined Lebamoff from maintaining the pool house and ordered that the pool house be removed within forty-five days of the order. The trial court also ordered that TENA could recover attorney fees and expenses, interest, and any cost of collection and set a hearing for damages. This order is stayed pending Lebamoff's appeal.

### **Discussion and Decision**

On appeal, Lebamoff contends that the trial court erred in granting TENA's motion for summary judgment and denying her cross-motion for summary judgment. Specifically, Lebamoff argues that either the Restrictive Covenant does not prohibit a detached pool house or the Restrictive Covenant is ambiguous and must be construed against TENA. Additionally, Lebamoff argues that the trial court erred by denying her

request for summary judgment because the designated evidence demonstrates that the pool house meets the architectural control standard, or, in the alternative, the evidence presents a genuine issue of material fact that precludes the granting of summary judgment in TENA's favor.

The law of summary judgment is well established. The purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Id.* On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. *Sizemore v. Erie Ins. Exch.*, 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Id.* at 1038-39. However, where the facts are undisputed and the issue presented is a pure question of law, we review the matter *de novo*. *Crum v. City of Terre Haute ex rel. Dep't of Redev.*, 812 N.E.2d 164, 166 (Ind. Ct. App. 2004). The fact that the parties filed cross-motions for summary judgment does not alter our standard of review. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), *trans. denied*. We consider each motion

separately to determine whether the moving party is entitled to judgment as a matter of law. *The Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 758 (Ind. Ct. App. 2009), *trans. denied*.

We turn now to the law of restrictive covenants. A restrictive covenant is defined as an agreement between a grantor and a grantee in which the grantee agrees to refrain from using her property in a particular way. *Holliday v. Crooked Creek Vill. Homeowners Assoc., Inc.*, 759 N.E.2d 1088, 1092 (Ind. Ct. App. 2001). One purpose of restrictive covenants is to protect or enhance the value of property by controlling the nature and use of the land subject to the provisions of the covenant. *Johnson v. Dawson*, 856 N.E.2d 769, 772 (Ind. Ct. App. 2006). Covenants are a form of express contract, so we apply the same rules of construction. *Id.* Construction of the language of a written contract is a pure question of law that we review *de novo*. *Id.*

Although Indiana law permits restrictive covenants, they are disfavored and will not be enforced if adverse to public policy. *Id.* If the language is clear and unambiguous, we give the language its plain, usual, and ordinary meaning. *Id.* at 773. If reasonable people could disagree about the meaning of a covenant, it is ambiguous and must be read in favor of the property owner. *See Stout v. Kokomo Manor Apartments*, 677 N.E.2d 1060, 1064 (Ind. Ct. App. 1997) (interpreting the terms of a leasing contract). When interpreting restrictive covenants, we strictly construe the terms, and all ambiguities are to be resolved in favor of the free use of property. *Renfro v. McGuyer*, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003), *trans. denied*. We determine the intent of the covenanting parties from the specific language and the parties' situation when the covenant was made.

*Johnson*, 856 N.E.2d at 772. We do not read specific words and phrases exclusive of the other provisions of the covenant; rather, we determine the parties' intentions from the contract read in its entirety. *Id.* We construe contractual provisions so as to harmonize the agreement and not render any terms ineffective or meaningless. *Id.*

First, Lebamoff argues that either the Restrictive Covenant does not prohibit a detached pool house or the Restrictive Covenant is ambiguous and must be construed against TENA. We disagree.

Lebamoff contends that TENA has already acknowledged that the Restrictive Covenant is ambiguous. In support of her argument, Lebamoff cites to the affidavit of TENA's secretary, Leslie Byrne, wherein she states that TENA's president, Steve Wurst, told her that the TENA board members could not decide whether the Restrictive Covenant permitted a separate structure like the pool house and that they would deny approval because it was not in TENA's best interest to approve the pool house without legal clarification. Appellant's App. p. 236. Lebamoff also cites to TENA's September 25, 2007, letter, which stated that TENA had already "discussed the need to clarify several aspects of the Covenants, this issue being included." *Id.* at 35. We do not agree that TENA admitted that the Restrictive Covenant is ambiguous such that the pool house must be permitted. TENA denied Lebamoff's request under the terms of the Restrictive Covenant and is now vigorously contesting Lebamoff's claim. But most importantly, whether the terms of a restrictive covenant are ambiguous is a question of law for the courts. *See Johnson*, 856 N.E.2d at 772.

We now address Lebamoff's arguments regarding the language of the Restrictive Covenant. Article IX, Sections 1 and 9 do not expressly address pool houses. However, Section 1 states that "[n]o building shall be erected, altered, placed, or permitted to remain on any Lot other than one Dwelling Unit. . . ." Appellant's App. p. 27. Section 9 states that "[n]o . . . basement, . . . shack, garage, barn or other outbuilding shall be either used or located on any Lot . . . ." *Id.* at 29. But the Restrictive Covenant allows for the construction of structures other than the Dwelling Unit if approval is granted by TENA under the terms and procedure provided in Article V.

First, the pool house is prohibited by Section 9, which forbids, among other things, outbuildings on a lot in Twin Eagles. "Outbuilding" is defined as "a building, such as a shed, barn, or garage, on the same property but separate from a more important one, such as a house." The New Oxford Dictionary 1214 (2001). The pool house is a building on the same property as the Dwelling Unit but is separate from it; thus, it is prohibited by the Restrictive Covenant. Nevertheless, Lebamoff argues that if we find that the pool house is an outbuilding prohibited by the Restrictive Covenant, then we must also conclude that Section 9 prohibits garages and basements because both are also listed in the section along with outbuildings. Lebamoff points out that the designated evidence shows that all the homes in Twin Eagles have garages and most have basements. Appellant's App. p. 216 (Affidavit of Andy Lebamoff). We do not agree with Lebamoff's interpretation of Section 9, as we interpret a contract to harmonize its provisions where possible. Regarding garages, Article IX, Section 1 makes clear that each Dwelling Unit is to include "not less than an end-loading three-car garage, which shall be built as part of said

structure and attached thereto.” Appellant’s App. p. 27. Article IX, Section 5 also addresses the construction of garages. Garages are not only permitted, they are required under the Restrictive Covenant. We can harmonize Section 9 by interpreting it to prohibit the construction of additional garages. As for basements, Section 9 states that no basement shall be either used or located on any lot. Even if, assuming *arguendo*, that all the basements in Twin Eagles violate Section 9, the Restrictive Covenant includes a non-waiver provision, Article IX, Section 37, which unambiguously states that the failure to enforce other violations of the Restrictive Covenant is not to be deemed a waiver of the right to do so thereafter. We have previously found similar non-waiver provisions in restrictive covenants enforceable. *See Dreter v. Duitz*, 883 N.E.2d 1194, 1203 (Ind. Ct. App. 2008) (“[W]e hold that the non-waiver provision of the Subdivision’s restrictive covenants is enforceable because it is unambiguous and its enforcement is not adverse to public policy.”), *reh’g denied*; *Johnson*, 856 N.E.2d at 775 (holding as a matter of first impression that non-waiver provisions in restrictive covenants are enforceable).

Second, Section 1 unambiguously states that no building other than the Dwelling Unit shall be constructed on a lot. Whether or not the pool house is an outbuilding, it is certainly a building. Altogether, the language of Article IX unambiguously demonstrates the covenanters’ intent to prohibit the unapproved construction of buildings other than the primary home on a lot in Twin Eagles.

Lebamoff argues that this language is nevertheless made ambiguous by the definition of Dwelling Unit, which includes “any appurtenances.” Appellant’s App. p. 16. Lebamoff argues that the pool house is a permissible appurtenance. “Appurtenance”

has been defined as “1: an incidental property right or privilege (as to a right of way, a barn, or an orchard) belonging to a principal right and passing in possession with it [and] 2: a subordinate part, adjunct, or accessory.” Webster’s Third New International Dictionary 107 (1993). Black’s Law Dictionary defines “appurtenance” as “[s]omething that belongs or is attached to something else.” Black’s Law Dictionary 111 (8th ed. 2004).

Lebamoff contends that the definition of appurtenance can include detached structures, like outhouses, garages, septic systems, water tanks, and barns. Although we agree that the general definition of “appurtenance” may be read to include detached buildings, in order to give effect to the language in Article IX and harmonize the provisions, we interpret the term appurtenance in the Restrictive Covenant to include attachments to the dwelling but to exclude detached buildings, like the pool house.

Finally, Article V provides that a structure, which otherwise might be prohibited by the Restrictive Covenant, can be erected provided that certain procedures are followed and the Architectural Control Committee approves the structure. Here, the Lebamoffs submitted their plans for the pool house, TENA denied their request for approval, and TENA provided the Lebamoffs with notice of the denial. However, the Lebamoffs knowingly<sup>4</sup> constructed an unapproved pool house on their property in violation of the Restrictive Covenant. *See Drenter*, 883 N.E.2d at 1203 (“Because there is no evidence that the Drenters complied with Paragraph 2 [titled “*Approval of Construction and Landscape Plans*” and providing the procedure whereby residents could seek approval

---

<sup>4</sup> When asked at her deposition whether she was aware that the pool house request was denied, Lebamoff answered affirmatively and stated that “[w]e discussed it and decided, yes, to go ahead” with construction of the pool house. Appellant’s App. p. 106.

for the erection of a structure], we must conclude that they erected their shed in violation of the Subdivision's restrictive covenants.”). The trial court was permitted to order that the offending pool house be removed from the property. *See Wedgewood Cmty. Ass'n, Inc. v. Nash*, 781 N.E.2d 1172, 1180 (Ind. Ct. App. 2003), *clarified on reh'g*, 789 N.E.2d 495 (Ind. Ct. App. 2003), *trans. denied*.

Nevertheless, Lebamoff argues that the trial court erred by denying her request for summary judgment because the designated evidence demonstrates that the pool house meets the architectural control standard, or, in the alternative, the evidence presents a genuine issue of material fact that precludes the granting of summary judgment in TENA's favor. Essentially, Lebamoff argues that the trial court was required to find under the designated evidence that the pool house met the terms of the architectural control standard and that the Architectural Control Committee should have approved the pool house plans, or, in the alternative, that a genuine issue of material fact remains as to whether the pool house meets the standard or should have been approved.

However, the trial court was not required to address the architectural control standard in this case, as the Lebamoffs constructed the pool house on their property in knowing violation of the Restrictive Covenant. When a resident believes that her request was denied by an architectural control committee in violation of a restrictive covenant,<sup>5</sup> it

---

<sup>5</sup> Lebamoff asserts that Indiana courts have not yet articulated a standard governing the review of architectural control decisions made by a committee pursuant to a restrictive covenant. We have previously upheld a trial court's judgment in favor of plaintiff-residents who alleged that a realty company and its directors, who also comprised the Architectural Review Board, committed constructive fraud by promising prospective purchasers that they would enforce the architectural control standards provided by a restrictive covenant such that only homes of comparable value would be built and then failing to enforce the standards. *Yeager v. McManama*, 874 N.E.2d 629 (Ind. Ct. App. 2007). But we have not yet addressed a case where a current resident merely seeks to hold an architectural control committee to the standards contained in a restrictive covenant when considering whether to approve or

is appropriate to seek declaratory judgment.<sup>6</sup> See *Little Beverage Co., Inc. v. DePrez*, 777 N.E.2d 74, 83-84 (“[T]he purpose of a declaratory judgment action is to quiet and stabilize legal relations and thereby provide a remedy in a case or controversy when there is still an opportunity for peaceable judicial settlement.”) (quotation omitted), *trans. denied*. Instead, Lebamoff deliberately breached the Restrictive Covenant by building the pool house. The unapproved pool house violates the Restrictive Covenant, and it was permissible for the trial court to order its removal.

In conclusion, the trial court did not err by granting summary judgment in TENA’s favor.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

---

deny a request to permit construction. We note that the majority of states that have addressed this question have provided that architectural control decisions are valid and enforceable as long as they are made reasonably and in good faith. Stacy R. Griffin, Annotation, Validity and Construction of Restrictive Covenant Requiring Lot Owner to Obtain Approval of Plans for Construction of Renovation, 115 A.L.R.5th (2004).

<sup>6</sup> We recognize that, in this case, Article V contains the following language:

Every person . . . who submits plans to the Committee agrees, by submission of such plans, that he . . . will not bring any action or suit against the Committee . . . to recover any damages or to require the Committee . . . to take, or refrain from taking, any action whatever in regard to such plans . . . .

Appellant’s App. p. 23. The issue of the enforceability of this particular provision is not before us and we express no opinion as to the enforceability of this provision in the Restrictive Covenant against Lebamoff.