

IN THE COURT OF APPEALS OF IOWA

No. 4-154 / 93-0948

FILED

MAY 26 1994

CLERK SUPREME COURT

RICHARD A. FOUST, SHIRLEY J. FOUST,
JEFFREY R. TOLLEFSON and JULIE M. TOLLEFSON,

Plaintiffs-Appellees,

vs.

WILLIAM A. BRITTAIN, JR., and
NANETTE S. BRITTAIN,

Defendants-Appellants.

Appeal from the Iowa District Court for Polk County,
Ross A. Walters, Judge.

Defendants appeal from a declaratory ruling determining
their proposed construction of a detached garage would
violate restrictive covenants in an Urbandale residential
development. **AFFIRMED BY OPERATION OF LAW.**

Gary D. Ordway and Ronald M. Rankin of Patterson,
Lorentzen, Duffield, Timmons, Irish, Becker & Ordway,
Des Moines, for appellants.

Robert H. Laden of Hyland, Laden & Pearson, P.C.,
Des Moines, and Teresa A. Beyer, Des Moines, for appellees.

Heard by Sackett, P.J., and Cady and Huitink, JJ., but
decided en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5105(1) (1993).

AFFIRMED.

For affirmance: Hayden, Habhab, and Cady, JJ.

For reversal: Donielson, C.J., and Sackett and Huitink, JJ.

SACKETT, P.J. (writing separately)

The question in this appeal, from a ruling in a declaratory judgment action, is whether the trial court correctly determined a detached garage to be built in an Urbandale residential development would be in violation of the restrictive covenants of the development because its proposed location would not be in harmony with the existing structures in the tract. I would reverse.

Plaintiffs-appellees Richard A. Foust, Shirley J. Foust, Jeffrey R. Tollefson and Julie M. Tollefson and defendants-appellants William A. Brittain, Jr. and Nanette S. Brittain own lots in Keanwood, a seventeen-lot residential development of large, executive-sized homes in a wooded area in the city of Urbandale. The lots, each approximately two acres in size, were platted by the McKears, who are not parties to this suit, and were subject to a number of residential covenants, conditions and restrictions.

Defendants bought their property from the McKears. When they purchased the property, defendants asked the McKears if they could build a 26 foot by 32 foot detached garage and were told by the McKears the garage could be built if the city of Urbandale issued a building permit. Defendants applied to the city of Urbandale to issue a building permit. The city issued the building permit to build the garage. Plaintiffs objected to the building of the garage and filed this suit seeking a declaratory judgment finding the garage could not be built. Defendants

agreed to wait with construction until the litigation was finished.

The trial court, after a hearing, found the provision in the covenant requiring all homes to have attached garages did not prevent a detached garage from being built. The court found the design of the proposed garage was not objectionable under the covenants but, because of the planned location of the garage, it would not be "in harmony with" the existing structures in the tract and would prevent the plaintiffs' enjoyment of the natural surrounding and, consequently, was in violation of the covenants.

Defendants appeal contending the trial court erred in ruling the proposed garage would violate restrictive covenants.

The applicable portions of the covenants are:

No building or structure shall be constructed, altered or maintained on any lot(s) other than a single-family home or an attached patio home or any structure allowed by the zoning ordinance. All single-family homes shall contain a minimum of 1,400 square feet of living space exclusive of attached garages, breezeways and porches.

.....

No building shall be erected on any lot unless the design and location is in harmony with existing structures in the tract.

.....

All structures built in Keanwood shall blend in with terrain rather than contrast with it. The use of natural materials is encouraged, i.e., stained wood, stone, brick, and warm-toned shingles, as well as soft, earth-toned colors.

All exposed concrete block or tile foundations shall be painted, brick veneered, or stone veneered.

Restrictive covenants are agreements, promises in fact, between all homeowners who purchase property subsequent to the filing of the covenants. Compiano v. Kuntz, 226 N.W.2d 245, 248-49 (Iowa 1975). The promises serve to create a proprietary interest in the land subject to the covenants. United Properties, Inc. v. Walmsmith, 312 N.W.2d 66, 70-71 (Iowa App. 1981). When defendants purchased the land in the development their land was burdened with the covenants but conversely the land of the other owners in the development was also burdened. See Beeler Dev. Co. v. Dickens, 254 Iowa 1029, 1034, 120 N.W.2d 414, 416 (1963).

The garage will be in conformance with the zoning regulation of the city of Urbandale. The covenants only preclude the building of other structures not allowed by Urbandale zoning. There are no specific provisions in the covenants precluding the building of a structure or structures on the area where the garage would be placed.

Defendants contend "in harmony with", as used in the covenants, is ambiguous. Therefore, they are not restricted by the covenants the building be in harmony with existing structures. Defendants further advance what is "in harmony with" other structures is a subjective determination. Defendants argue there are a variety of ideas of what is a consistent, orderly or pleasing arrangement. They question the trial court's decision to

restrict their general freedom to use their land based on subjective expectations of neighbors who wish to continue to enjoy a view in their backyard where the restrictive covenants are void of any express limitations that would preclude construction of the garage.

Plaintiffs contend the words "in harmony with" are not ambiguous and do not lend themselves to more than one meaning by any reasonable person.

Where the words of a proposed restriction on the free use of property are ambiguous, they are strictly construed against parties seeking to enforce them and will not be extended by implication or construction beyond the clear meaning of their terms and doubts will be resolved in favor of unrestricted use of property. See Iowa Realty Co. v. Jochims, 503 N.W.2d 385, 386 (Iowa 1993); Maher v. Park Homes, Inc., 258 Iowa 1291, 1296-97, 142 N.W.2d 430, 434 (1966).

"In harmony with" is not defined by the covenants. Words of a contract must be given their commonly understood meaning. Iowa Realty Co., 503 N.W.2d at 386. Ambiguity exists if, after the application of pertinent rules of interpretation, a genuine uncertainty results as to which one of two or more meanings is the proper one. A.V. McDonald, 475 N.W.2d at 618-19 (Iowa 1981); Fraternal Order of Eagles, Waterloo Aerie No. 764 v. Illinois Casualty Co., 364 N.W.2d 218, 221 (Iowa 1985).

The trial court, in reaching its decision, noted none of the other lots had a similar structure nor did they have a building located on a similar place on the lot. The court noted there was a detached garage on one lot but it was constructed before the covenants were adopted.

I consider also the structures built in the development are not in a straight line, they are of different sizes and shapes on both sides of a winding street in rolling terrain. Plaintiffs Fousts obtained a variance for the placement of their home.

The trial court considered the phrase "in harmony with" to be commonly accepted as meaning a building that is in "agreement or accord with other buildings . . . so there is a consistent, orderly or pleasing arrangement of parts"

A definition of the word harmony is found in the dictionary but the definition of the word harmony alone does not supply direction to aid in determining that which has a pleasing effect. The covenant does specify the type of building materials and paints it considers harmonious, but it does not specify what placement of buildings are harmonious or what views are sought to be controlled. The determination of what is in harmony is determined by the values of the beholder. The phrase is susceptible to more than one reasonable interpretation. It is ambiguous. See A.Y. McDonald Indus., Inc. v. Insurance Co. of North America, 475 N.W.2d 607, 618 (Iowa 1991).

I agree with defendants that the words "location is in harmony with" are ambiguous absent further definition in the covenants.

If it had been the intent of the covenants to preserve a backyard view, the covenants could have restricted the construction of any outbuilding and could have specified green areas to be left vacant to preserve views. The covenants should clearly and explicitly define any restrictions on the owners' use of the land. See A.Y. McDonald, 475 N.W.2d at 619. The language on location does not clearly and explicitly define the owners' restrictions. I would reverse the trial court.

CADY, J. (writing separately)

An ambiguity may arise from language used in a document or from the application of the language to a particular factual situation. See 17A Am. Jur. 2d Contracts § 337 (1991). In this case, the disputed language of the covenant is not ambiguous or uncertain. We are required to give effect to the language used in the covenant in accordance with its commonly accepted and ordinary meaning. See Setterberg v. Sheaffer Eaton Inc., 473 N.W.2d 217, 220 (Iowa App. 1991). The common and accepted meaning of the phrase "in harmony with" is in agreement, accord and congruity. It has only one reasonable interpretation. The language clearly requires that no building may be "erected on any lot unless the design and location is in harmony with existing structures in the tract." (Emphasis added). The intention is clear. The lot owners promise symmetry in the design and location of structures in the development.

The more difficult question, perhaps, is whether the application of the language to the facts of this case renders the covenant ambiguous. Admittedly, there may be some factual situations which would produce uncertainty in applying the covenant. The phrase "in harmony with" is general in nature and necessarily allows for leeway. It is

understandable some covenants would be purposely written to allow for a degree of individual discretion.

The particular facts in this case, however, do not fall within the leeway provided by the covenant. Defendants seek to erect an 832 square foot building in their backyard to house and repair automobiles. No other lot in the development has a building located in the backyard. The location of the building would be totally inharmonious with the existing structures. It would clearly violate the "in harmony with" provision of the covenant.

A covenant is not ambiguous simply because the parties disagree over its interpretation. It is ambiguous only when a genuine uncertainty exists over two reasonable interpretations or constructions. Berryhill v. Hatt, 428 N.W.2d 647, 654 (Iowa 1988). The ambiguity must emanate from the language used, not the parties' subjective perception of the terms. See Reese v. First Connecticut Small Business Investment Co., 438 A.2d 99 (Conn. 1980). The only reasonable interpretation or construction of the covenant to the facts of this case is that the proposed building would not be in harmony with the location of the other structures in the development.