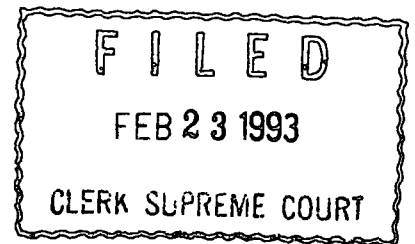


IN THE COURT OF APPEALS OF IOWA

No. 2-244 / 91-1605



IOWA REALTY CO., INC.,

Appellee,

vs.

JEFFREY AND CINDY JOCHIMS,
Husband and Wife,

Appellants.

Appeal from the Iowa District Court for Polk County,
Robert A. Hutchison, Judge.

Defendant homeowners challenge the district court's
ruling requiring them to remove their home satellite dish
in accordance with their residential development's
restrictive and protective covenants. **REVERSED.**

Roger J. Hudson of Smith, Schneider, Stiles, Mumford,
Schrage, Zurek, Wimer & Hudson, P.C., Des Moines, for
appellants.

William P. Hoyer of Belin Harris Lamson McCormick, A
Professional Corporation, Des Moines, for appellee.

Considered en banc.

SCHLEGEL, J.

Defendant homeowners, Jeffrey and Cindy Jochims, challenge the district court's ruling requiring them to remove their home satellite dish in accordance with their residential development's restrictive and protective covenants. The Jochimses contend the district court erred in determining: (1) section VIII of the building restrictions and protective covenants for Country Club Plat Number 2 applies to or includes a "satellite dish"; and (2) the satellite dish installed by the Jochimses is not "on" the garage or dwelling and therefore is not excepted under the section VIII covenants.

The Jochimses reside at 13420 Cedarwood Avenue, Clive, Iowa. They purchased their home in the exclusive development known as "Country Club Estates" from Iowa Realty Company, Incorporated. Section VIII of the protective covenants for the Country Club Plat provides:

No extension towers or antennas of any kind shall be constructed, modified, or permitted on any lot. Reasonable television or radio antennas are permitted on dwellings or garages.

After moving into their home in 1991, the Jochimses installed a satellite dish which was ten feet wide in diameter in their back yard. At approximately the same time, they constructed a fence which was seven feet tall around their yard to conceal the dish from view. When a neighbor complained about the satellite dish, the Jochimses

eventually installed a smaller satellite dish (six feet wide) on the southeast corner of their lawn. The satellite dish is mounted on a pole which is cemented into the ground, and the dish is further supported by metal brackets attached firmly to the Jochimses' garage. After installing this smaller dish, the Jochimses planted a row of fast growing flowering crab trees to further conceal the dish.

Iowa Realty then instituted a petition in equity seeking to have the satellite dish removed. The district court, with the consent of both parties, personally viewed the disputed satellite dish from the Jochimses' property and from the complaining neighbor's home. The court concluded that the Jochimses' satellite dish was in violation of section VIII of the restrictive covenants because it was not "on" the Jochimses' dwelling or garage. The court subsequently ordered the Jochimses to remove the satellite dish, and the Jochimses appealed.

Appellate review of an action in equity is de novo. Iowa R. App. P. 4 (1993). While the appellate court is not bound by the factual findings of the trial court, it will give weight to those findings, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7) (1993).

When the court is asked to interpret an agreement between parties, the objective is to ascertain the meaning and intention of the parties as expressed in the language

used. Gentler Store Prods. Co. v. Laub, 179 N.W.2d 628, 630 (Iowa 1970). The duty of the court is to give effect to the language of the entire agreement in accordance with the commonly accepted and ordinary meaning of the language. Id. However, when the court determines the intent of the parties is unclear because the wording of the restrictive covenant is ambiguous, the court will look to the rules of construction to give the words legal effect.

In Fischer v. Driesen, 446 N.W.2d 84, 86 (Iowa App. 1989), this court again stated the long-settled rule in Iowa concerning restrictive covenant construction:

[R]estrictions on the free use of property 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. (Citation omitted.)

Consideration of the language of the restrictive covenant in the present case reveals an ambiguity with respect to whether the covenant applies to or includes a satellite dish. We cannot say the restrictive covenant prohibits satellite dishes in Country Club Plat Number 2 by its terms. Furthermore, the evidence indicates the drafter of the covenant was well aware of the existence and prevalence of satellite technology when he drafted the covenant in October of 1988. In fact, the drafter specifically used the term "satellite dish" in a restrictive covenant he drafted for another residential

development ten months prior to drafting the covenant in the present case:

(o) no tower shall be constructed on any Lot, however, antennae and satellite dishes are permissible. . . .

In addition, the drafter apparently believed a difference existed between "antennae" and "satellite dishes" as evidenced by the fact that he referred to both separately in the above restrictive covenant.

Furthermore, on at least two subsequent occasions, Iowa Realty included the term "satellite dish" in drafting restrictive covenants:

No extension towers or antennas of any kind shall be constructed, modified or permitted on any lot. Reasonable television or radio antennas are permitted on dwellings or garages. As used herein, a satellite dish shall be deemed to be a "tower or antenna." (Emphasis added).

* * * *

No exterior towers, antennas or satellite dishes of any kind shall be constructed, modified, or permitted on the ground of any building plot. Reasonable television or radio antennas (not including satellite dishes) are permitted on dwellings or garages. (Emphasis added).

Since the covenant's language is ambiguous at best in the present case regarding the erection of satellite dishes, and since restrictions on use will not be extended by implication or construction beyond their clear and unambiguous meaning, we must strictly construe the restrictive covenant in favor of the unrestricted use of

property. Stockdale v. Lester, 158 N.W.2d 20, 22 (Iowa 1968). As a result, we hold section VIII of the building restrictions and protective covenants for Country Club Plat Number 2 does not apply to or restrict the use of satellite dishes. Accordingly, we conclude the Jochimses are entitled to the continued and uninhibited use and enjoyment of the satellite technology which their satellite dish affords them.

REVERSED.

All judges concur, except Donielson and Habhab, JJ., who dissent.

DONIELSON, J. (dissenting)

I dissent.

A satellite dish is used for one purpose, and for one purpose only -- as a television antenna. As such, the covenant was clear and unequivocal.

The trial judge was, in my opinion, correct in concluding a satellite dish is a television antenna. The covenant provides that a television antenna must be attached to the dwelling or garage, and it must be reasonable. The satellite dish was not so mounted, and it would not be reasonable to do so. I would affirm.

Habhab, J., joins this dissent.