

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

The Honorable Pat M. Donofrio, The Honorable Stephen L. Borello
and the Honorable Alton T. Davis

BLOOMFIELD ESTATES IMPROVEMENT
ASSOCIATION, INC.,

Plaintiff/Appellee

vs.

Docket No. 130990
Court of Appeals No. 255340
Lower Court No. 2004-056387-CH

CITY OF BIRMINGHAM,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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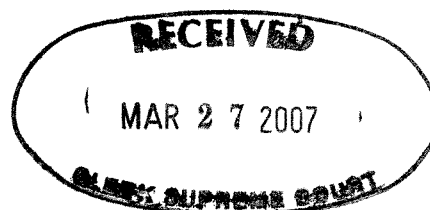


TABLE OF CONTENTS

Index of Authorities ----- ii

Introduction ----- 1

Argument ----- 1

 A. Appellee’s Counter-Statement of Facts ----- 1

 B. Enforcement of the Deed Restriction ----- 3

 C. Unobjectionable Park Uses ----- 6

 D. More Serious Use Analysis ----- 6

APPROPRIATE RELIEF ----- 9

CONCLUSION ----- 10

INDEX OF AUTHORITIES

CASES

PAGE

Boston-Edison Protective Ass'n v Paulist Fathers, Inc, 306 Mich 253; 10 NW2d
847 (1943) ----- 6-7, 10

Wood v Blancke, 304 Mich 283; 8 NW2d 67 (1943)-----4-5

COURT RULES

MCR 2.116(C)(10)-----10

INTRODUCTION

When looking at Appellee's Brief, the internal conflict of the Association's case shines through. The Association's Brief plays every angle as to the nature of the Park and how it fits into their subdivision deed restrictions. The Association cannot even decide whether a park is consistent with residential use. Regardless of how the Association fits the Park into its analysis, the result leads to the same conclusion, that the Association cannot prevent the Park from existing and continuing. Thus, the only question for this Court is whether or not an off-leash dog area may be prohibited. The Association's red herrings riddled throughout its Brief are of no help. The following will hopefully shed some light on and emphasize the fallacy of Appellee's positions.

ARGUMENT

A. APPELLEE'S COUNTER-STATEMENT OF FACTS

Upon a review of the Counter-Statement of Facts and Material Proceedings section of the Association's Brief, a number of discussion items are revealed. As is common throughout the Association's Brief, the Appellee is quick to proffer on page 4 of its Brief that none of the "special activities" that occurred at Springdale Park over the years occurred on Lot 52. Even assuming that statement to be true, that fact would not be the end all issue. The noted activities not only provide the history of the park uses at Springdale Park, but refute the concern raised by the Association that additional traffic and noise in the area would occur due to the off-leash dog area. Appellant discusses this smoke screen in Section D 2 below.

On page 6 of Appellee's Brief, the Association discusses a very salient fact, that the property obtained by Birmingham was to be used as a park. The Association knew full well that Birmingham was acquiring the land for use as a park. The Association's failure to object to

Birmingham's acquisition of the Subdivision lots for Park uses is telling. The Association believed then that the Park is consistent with residential use, which defeats its current position.

Beginning on page 8, the Association delves into the "not in my backyard" analysis. This does not aid its case. It is irrelevant whether the Springdale location for the off-leash dog area was the first area considered. As is frequently the case with decisions made by municipalities, the "not in my backyard" argument will be made. There were numerous reasons why this location was selected, including that there was fencing for 3 of the 4 sides in place, adequate parking, and that the Park has City Staff present during most hours of operation. No other location considered has all three elements.

The Association creates a picture that Birmingham, essentially under the cover of darkness, approved and erected the fencing at the Park. The decision to place the off-leash dog area in its current location was made on October 7, 2003 at the Birmingham Parks and Recreation Board meeting. On February 2, 2004 (nearly four months later), the Association's attorneys forwarded a letter to the City Manager requesting a "slow down construction of the proposed dog park until the matter could be discussed." Despite the passing of four months since the October 7, 2003 meeting, the Association states that "Birmingham quietly continued with its plans" and that "Birmingham very quickly completed the remaining chain-link fence" after the receipt of the letter. The October 7, 2003 meeting was a public meeting open to anyone who wished to attend as is required by the Open Meetings Act. There was nothing sneaky about this activity. The natural follow-up to the location decision was to commence with the erection of fencing. The decisions and actions of Birmingham were nothing but transparent.

On page 13, the Association notes that while the Court of Appeals held that the Park use violated the residential purposes restriction, the Association was found to have acquiesced to the

use of Lot 52 as a municipal park. It is important to note that the Association did not cross appeal the decision on acquiescence. Even now, the Association claims it never contested the use of Lot 52 as a park. While Birmingham believes that a park use is a permitted use under such a deed restriction, all parties (and the Court of Appeals) agree that the Association cannot challenge the use of Lot 52 as a park.

The Association maintains that no dogs were allowed in the Park until the dog area was completed. Even if this statement were true, it is nevertheless a red herring. If dogs were not allowed at the Park, it was simply because Birmingham decided not to allow dogs, not because having dogs at the Park is inconsistent with park use. Birmingham could also prohibit picnic baskets at the Park. Certainly, no one would contend that such a prohibition means that having picnics at the Park is not consistent with park use.

B. ENFORCEMENT OF THE DEED RESTRICTION.

1. Uses at Lot 52

The Association commences its Argument section by rehashing its principal red herring that, in its opinion, since the uses at the Park did not occur on the Lot 52 portion, the Association is not precluded from objecting to the off-leash dog area. On page 14 of its Brief, the Association tries to minimize what activities have occurred on Lot 52. It states:

Although Lot 52 was part of the greater park for over 75 years, it was also essentially a vacant lot with grass and few trees, only occasionally used by those park goers who happen to arbitrarily choose it over other, more traveled spots in the larger park.

However, this statement is contrary to the Association's own submitted evidence. Consider the Affidavit of Michigan Schneider, which states in paragraph 3 that the Lot 52 area has been a "...vacant field that has been occasionally used by people to walk on, have picnics, play games and activities, similar to what one would expect to see in an open area of a city park. The uses

have been unobjectionable.” Appendix 233a. (Emphasis added) Mr. Schneider purports to be directly affected by the off-leash dog area. His Affidavit indicates that the uses for Lot 52 are much more than the Association now wants this Court to believe and certainly are a far cry from “park goers who happen arbitrarily choose it over other, more traveled spots in the larger park.”

2. Rules of Construction; Public Policy

The Association discusses rules of construction beginning on page 15 of its Brief. While the parties do not differ on what the rules of construction are, the Association manipulates their application. In the usual case, there is public policy favoring enforcement of residential deed restrictions, but only when they are consistently enforced and unambiguous. The Association cites the case of *Wood v Blancke*, 304 Mich 283, 287-88; 8 NW2d 67 (1943) at the end of page 16 in relevant part, as follows:

[I]n strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property . . .

The Association omits application of how this public policy applies to the within appeal. In *Wood*, the “public policy” afforded the Association in protecting its deed restrictions are contingent. In the above quote, there are two conditions precedent. The first is “in strictly residential neighborhoods.” The Association maintains that a park is not considered “residential.” Thus, the City is unsure how the first condition is met, that being a “strictly residential neighborhood.” This Park has been in existence for over 75 years. Using the Association’s characterization of the Park use as not consistent with residential use, the neighborhood would no longer be a “strictly residential” neighborhood. Thus, public policy would not support enforcement of the deed restriction. More importantly, however, is the second condition, which requires that there have “always been compliance with the restrictive covenants in the deed.” In other words, the Association’s compliance with the restrictive covenants must

have been adhered to “always” according to the *Wood* case. The Association again falls on the wrong side. The Court of Appeals ruled as follows:

The record unambiguously shows that it was public knowledge even before Bloomfield Township purchased the lots that they would be used as a park. Indeed, they were acquired pursuant to voter approval of a park project. Lot 52 has been used for nonresidential purpose for at least 75 years. All involved parties were aware of this use, and they were apparently also aware that it violated the deed restriction. The parties have for several generation clearly acquiesced in defendant’s use of Lot 52 as part of a municipal park. To that extent, equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use. (Emphasis added) Appendix 421a.

Reliance on *Wood* does not help the Association as neither *Wood* condition is met. The Association chose not to cross appeal the Court of Appeals’ decision that the Association was prohibited from challenging a park use due to their decades of acquiescence. While Birmingham disagrees with the Court of Appeals’ conclusion that a park is not permitted, even if a park was contrary to the deed restriction, the park use can no longer be contested.

3. Pick and Choose.

The remaining issue is whether the off-leash dog area may be challenged. The Association admits it cannot challenge park use. On page 17, the Association states that it

. . . never sought to challenge Birmingham’s continued use of the restricted lots as they have been used in the past. The prior use has rarely subverted the value or purpose of the deed restrictions in preserving the character of the Subdivision, and, as discussed above, the Association did not object when Birmingham’s uses occasionally stepped over the line.

This paragraph goes to the heart of Birmingham’s argument that the Association seeks Court authorization to pick and choose what park uses they do and do not want. The Association admits that it did not object when Birmingham’s uses “occasionally stepped over the line.” The Affidavit of Michael Schneider, paragraph 3, likewise supports the Association members’ feelings that they are fine with certain park activities, but once a park activity is introduced that

they may not want, they want the right to object. Case law cited in Birmingham’s Brief, as well as the Association’s Brief, does not anticipate or approve the pick and choose approach.

C. UNOBJECTIONABLE PARK USES.

The Association creates a bright-line rule as to what constitutes objectionable park use by comparing activities (such as allowing dogs to roam) in the context of what one would allow on their personal properties. The Schneider Affidavit indicates that the general public has had picnics, played games and other activities on Lot 52, which were unobjectionable. Does it mean that the Association members would permit the general public to picnic, play games and other activities on their individual parcels? Of course not. Thus, this “rule” does not fit the situation.

D. MORE SERIOUS USE ANALYSIS.

1. *Boston-Edison*

The Association states that the case of *Boston-Edison Protective Ass’s v Goodlove*, 248 Mich 625; 227 NW 772 (1929) is applicable. However, the Association tries to ignore the actual language of the opinion. Birmingham maintains that the “more serious use” exception to waiver is contingent upon the nature of the original deed restriction violation. Contrary to the Association’s assertion, Birmingham did not create this interpretation, but merely used this Court’s language in the *Boston-Edison* case. The relevant portion is as follows:

While it is true that there has been no objection made to the defendant’s practicing medicine at his home and using it as a doctor’s office where patients consulted him, nevertheless, the defendant should not be able to violate further rights of plaintiff’s on account of his theretofore slight breach of the restricted covenants in his deed. Plaintiff’s are not estopped from preventing a most flagrant violation of the deed restriction on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions. While it is true that by their acquiescence they may not be able to enjoin defendant from continuing to use his present home to the extent that it has been heretofore used as a doctor’s office, they are still in a position to stop the more serious violation that would result . . . *Boston-Edison*, 248 Mich at 629-30.

This Court supplied qualifying language “slight breach” and “slight deviation,” not Birmingham. Likewise, Birmingham did not create the language “more serious violation.” Birmingham does not believe that this Court intended that those qualifiers be ignored or disregarded as dicta, but for the purpose of describing a particular scenario in which a waiver of a minor deed restriction violation would not prohibit a challenge to a “most flagrant violation of the restrictions”.

When applying this Court’s words, the ability to utilize the *Boston-Edison* case to contest what it perceives to be a “more serious violation” of the deed restriction is destroyed. It was not a “slight breach” or “slight deviation” that it waived. If a park is not a residential use as the Association wants this Court to believe, then this waiver is not one of a slight deviation or slight breach, but a “most flagrant violation” at its very core. Since the “waived” deed restriction violation was not a slight breach or a slight deviation, the Association cannot hide behind the *Boston-Edison* case to prohibit an additional park use, the off-leash dog area.

In his dissenting Opinion, Judge Borrello similarly distinguishes the *Boston-Edison* case. He would have precluded the Association from contesting the off-leash dog area as follows:

Obviously the facts of *Boston-Edison* and the case before us are so incongruous as to preclude adoption of *Boston-Edison* as any type of precedent for this case. Here, defendant did not engage in a slight variation of the restrictive building covenant. Seventy-five years ago, defendant made a parcel of land, which was subject to the restrictive building covenant, into a park. For seventy-five years it has been used as a park. Appendix 423a. (Emphasis added)

Again, the interpretation proffered by Birmingham in its Brief was not self-created, but involve the actual words of this Court in the *Boston-Edison* decision. Judge Borrello acknowledges that the same interpretation exists to this day, regardless of Birmingham’s interpretation.

2. Traffic and Noise

Starting on page 28, the Association continues its unsupported objection that the off-leash dog area would bring in more traffic and more noise. The fallacy of this argument is clear.

Assuming that none of the subjectively offensive uses at the Park never occurred on Lot 52, the uses in the Park over the years would have generated far more traffic and noise than the dog park will. The existing golf course and previous baseball diamonds with substantial grandstands, the clubhouse for dances and parties and tennis courts would likely draw more people and traffic and noise to this Park. It cannot be forgotten that traffic in this area is high to begin with as the Park borders a busy Quarton Road (16 Mile). The Association fears noise from a few dogs, yet they border an active railroad line. The City of Birmingham has not received noise, traffic or odor complaints since it opened the off-leash dog area in 2004.

These are nothing more than “not in my backyard” arguments. There have been no studies, experts or any other evidence presented by the Association other than what hand-picked residents feel. Existing traffic issues were recognized in a letter to Birmingham dated December 1, 2003, which claimed “As residents of this subdivision we are already impacted by the traffic to and from Springdale Golf Course without the benefit of being able to use the Golf Course without paying fees nearly 500% higher than a Birmingham resident.” Appendix 64a. The Association itself does not believe that this is a low traffic, serene area as it now tries to convince this Court. While a noise or traffic study is not required, it would have taken the Association’s arguments far beyond the mere opinion of the few “not in my backyard” objectors.

On page 32, the Association asserts that an off-leash dog area is not another park use. In response, a “Google search” for dog parks in Michigan showed many off-leash dog park areas are part of larger parks.¹ Several other communities and municipalities believe that off-leash dog areas are consistent park uses, contrary to what the Association may subjectively believe.

¹ Saline Dog Park (Saline/Ann Arbor) is located in Millpond Park; Orion Oaks Bark Park (Orion Township) is part of Orion Oaks Park; Lyon Oaks Bark Park (Lyon Township) is in Lyon Oaks Park; Cummingston Park Dog Run (Royal Oak) part of Cummingston Park; Lockman Park Dog Run (Royal Oak) part of Lockman Park; Mark Twain Park (Royal Oak); Quickstad Park Dog Run (Royal Oak); Wagner Park Dog Run (Royal Oak)

APPROPRIATE RELIEF

Birmingham relies upon its Brief on Appeal for its discussion on the appropriate relief if the Association prevails in this case. However, a brief word about the appropriate relief section starting of the Association's Brief is warranted. On page 35, the Association correctly indicates that if the Association is successful, Birmingham believes that the cost of removal of the fence would be proper. However, Birmingham also believes that the cost of constructing the fence is likewise proper, as it would put the City of Birmingham back in its original position.

The Association suggests that there is no issue of laches and, therefore, costs to Birmingham would not be appropriate. However, this is contrary to the facts in this case. The City of Birmingham had 75 years of precedent to rely upon in the Association's allowance of a park on Lot 52. It is Birmingham's position that an off-leash dog area is no different than the remaining Park area.

The Association attempts to utilize another red herring when it indicates that the dog park location was approved on October 7, 2003 without any actual notice to the Association residents. However, actual notice would not be required in such a decision. The Association residents had the same notice as any Birmingham resident. Agendas and the minutes are made available to any citizen who would like copies. As the Association quickly points out, there were a number of meetings where the location of the dog area was discussed.

The Association implies that subsequent letters to the City officers put Birmingham on notice that there would be litigation involved. However, the City of Birmingham frequently receives communications expressing support or objection to various City proposed projects. Further, there has never been any injunction against the City.

The Association ignores that chain-linked fences are not prohibited when it suggests that, if successful, the City should remove the added fence. There should be no requirement to remove any fencing. The only relief imaginable would be to cease using the off-leash dog area as a sanctioned City park use. However, the City is well within its means to generally permit dogs at Springdale Park, as is the case in any park. Thus, the presence of dogs at the Park cannot be prohibited. The Association freely admits that it is not in a position to contest the use of the Park as a municipal Park, nor did it appeal that portion of the Court of Appeals' decision.

CONCLUSION

Upon review of the Association's Brief on Appeal, one thing remains, the Association is not entitled to the relief as requested. A park is consistent with residential purposes only deed restriction. Even if a park use is deemed to be contrary to the deed restriction, the Association waived the right to contest that use. Thus, the remaining question is whether an off-leash dog area is a park use that can be contested. The Association is not permitted to hide behind the *Boston-Edison* "more serious violation" exception to waiver as the prerequisite criteria have not been met. Birmingham respectfully requests this Supreme Court reverse the decision of the Court of Appeals and reinstate summary disposition in the City of Birmingham's favor pursuant to MCR 2.116(C)(10).

Respectfully submitted,

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