## MEMORANDUM DECISION




ATTORNEYS FOR APPELLANTS

James D. Johnson
Mark T. Abell
Jackson Kelly PLLC
Evansville, Indiana

ATTORNEYS FOR APPELLEES

J. Mark McKinzie
Patrick S. McCarney
Riley Bennett Egloff LLP
Indianapolis, Indiana

Shawn M. Sullivan
Terrell, Born, Sullivan & Fiester, LLP
Evansville, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Patrick T. Lattner and Susan L. Lattner,

*Appellants-Plaintiffs,*

v.

Daniel J. Emerson and Carrie B. Emerson,

*Appellees-Defendants*.

February 24, 2022

Court of Appeals Case No. 21A-PL-822

Appeal from the Vanderburgh Superior Court

The Honorable Gary T. Schutte, Judge

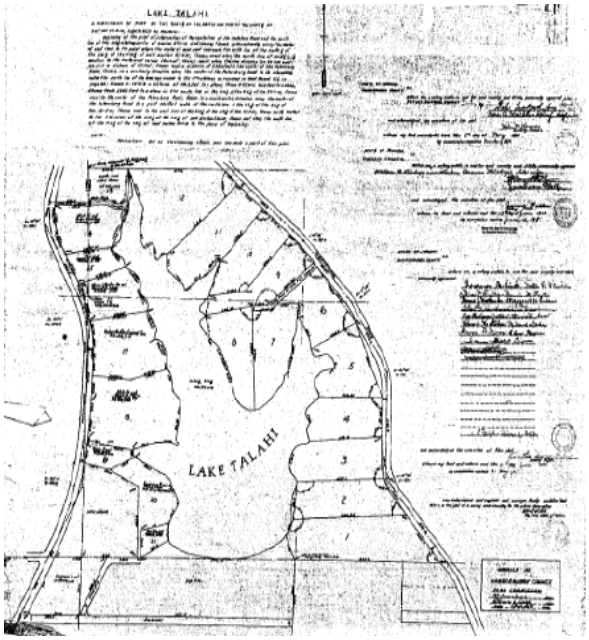
Trial Court Cause No. 82D06-2012-PL-5706

**Molter, Judge.**

[1] Daniel and Carrie Emerson have undertaken a pool construction project on their property, which includes a retaining wall located within twenty feet of the side property line that they share with Patrick and Susan Lattner. Believing the retaining wall violated the restrictive covenants of the neighborhood, which require that a "structure of any nature" not be located nearer than twenty feet to the side line of any lot in the neighborhood, the Lattners sought injunctive relief against the Emersons. The trial court, finding that the Emersons' retaining wall was not a "structure" under the restrictive covenants and thus that the Lattners had failed to succeed on the merits of their claim, entered judgment in favor of the Emersons, and the Lattners appeal. Finding no error in the trial court's judgment, we affirm.

## Facts and Procedural History

[2] The Lattners and the Emersons are neighbors in the Lake Talahi Subdivision ("the Subdivision") of Evansville, Indiana. The Lattners own Lot 7, and the Emersons own Lot 8. Those lots are on a small peninsula surrounded by water on the west, south, and east. The east side of the Emerson's Lot 8 and the west side of the Lattners' Lot 7 share a common boundary. The Subdivision was originally platted in 1948 and consists of approximately twenty residential lots that surround Lake Talahi. The Subdivision has a homeowner's association known as the Lake Talahi Club, which meets annually.




[3] The record plat of the Subdivision contains "Restrictions for Lake Talahi" ("the Restrictions"), which provide as follows:

> 1. All lots in said Subdivision shall be known and designated as residential lots. No structure shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling, a private garage and barn and other outbuildings incidental to residential use of the lots.
>
> 2. No part of said real estate shall be used for any business or commercial purposes, and no intoxicating liquor shall be sold on any part of said real estate.
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> 3. No building or structure of any nature, other than ovens and summer houses, shall be located on any lot nearer than fifty (50) feet, to the water's edge at high water level of the lake, and no such building or structure shall be located nearer than twenty (20) feet to the side line of any lots; PROVIDED, however, that for the purpose of this condition and restriction, all adjoining lots

owned by one person and used as a building site by him, shall be considered one lot, so that the restriction that no building shall be erected nearer than twenty (20) feet to the side line of any lot shall mean the side line of the lots used by said owner as one building site; PROVIDED further, however, that nothing herein contained shall prevent the owner of any lot bounded on any side or sides by the lake shore water edge, from constructing and maintaining a boat landing and a boat house upon said lot, provided the same shall not extend beyond the water's edge and the height of said landings and boat houses above such high water level of the lake, shall in no instance exceed forty (40) inches; PROVIDED further, however that nothing herein contained shall affect any structure now existing upon any real estate in said Subdivision. NO pier or dock shall be constructed or permitted in said lake except as provided in paragraph 17 hereof.

4. Any residence built upon any lot in the Subdivision shall be of high grade, standard type of construction . . . [S]ervants' quarters, guest houses, playhouses, garages, private greenhouses, or barns may be constructed . . . . provided only that any such structure must be of suitable standard type of construction.

5. No trailer, basement, tent, outbuilding, shack, garage, barn, or structure of any kind erected on any lot or lots in said Subdivision shall at any time be used as a residence, temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

6. [A] sanitary septic tank shall be installed for each dwelling erected in the Subdivision, such septic tank to be of such type and construction and so located on the individual lots as to meet the requirements of the Indiana State Board of Health . . . . Nothing contained herein shall prevent the construction of a cess pool or other similar device . . . .

> 7. No livestock, domestic animals, or poultry shall be allowed or permitted to be kept or raised on any lot or lots in said Subdivision; PROVIDED, however, that nothing herein contained shall prevent the owner of any lot from keeping any house-pet thereon, or from keeping ponies and saddle-horses - not to exceed three (3) in number; PROVIDED, further, however, that any structure used to stable any horse or pony shall not be located nearer than twenty-five (25) feet to the side line of any lot . . . .
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> . . . .
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> 13. Not more than four (4) boats belonging to any lot owner or his guests shall be permitted on the lake at any time.
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> . . . .
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> 15. Not more than (6) guests of any lot owner shall be permitted to fish upon the lake at any one time . . . .
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> 16. All lot owners shall keep their lots free of garbage, sewage, ashes, rubbish, bottles, cans, waste matter and other refuse . . . .
>
> 17. Since Lot No. 1 does not abut upon the Lake, the owner of said Lot shall have the right . . . to construct a pathway and steps thereon and to maintain a boat dock or pier . . . .

Appellants' App. Vol. II at 12–14; Ex. Vol. I at 49–52. The Restrictions do not define the term "structure."

[4] When the Restrictions were adopted, the Subdivision was new and many of the lots were undeveloped. The Restrictions were originally set to expire after

twenty-five years, but the residents re-adopted and extended the Restrictions via recorded agreements in 1972 and in 1998. The Restrictions have not been renewed and will expire on June 24, 2023. Appellants' App. Vol. II at 12; Ex. Vol. I at 38.

[5] In 2019, the Emersons decided to install a pool, and they told the Lattners of that intention. Once the Emersons began the planning process, it became apparent that options for pool placement on their lot were limited due to the uneven topography, the location of a septic tank, and the limitations imposed by the Restrictions. They hired an architect to draft initial plans for their project, which included construction of a "pool house" containing storage space, a restroom, and a lounge area. Appellants' App. Vol. II at 15; Ex. Vol. I at 169–70; Tr. Vol. II at 158.

[6] When the initial plans were drawn up, the pool house was situated about ten feet from the Lattners' property line—within the twenty-feet setback mandated by Paragraph 3 of the Restrictions. Appellants' App. Vol. II at 15; Ex. Vol. I at 169–70; Tr. Vol. II at 157–59. The Emersons at first believed this placement of the pool house would be out of the way and out of view for both the Emersons and Lattners—even though it would encroach upon the setback—because it was planned to be directly next to an exterior wall of the Lattners' garage, which had no doors or windows. Because of the proposed location for the pool house, the Emersons went to the Lattners in November 2019 to discuss the project and to obtain their consent before proceeding. After this discussion, the Lattners concluded the planned placement of the pool house was too close to

their property and asked the Emersons to modify their plans so that the pool house was outside the twenty-foot setback.

[7] The Emersons then had entirely new plans for their pool project drawn up that would not have any building within the twenty-foot setback. The Emersons instructed their architect to prepare plans that complied with the Restrictions' setbacks, and the architect conspicuously marked the setback requirement on the construction plans. When these new plans were drafted, the Emersons submitted them to the Lake Talahi Club's Building Committee ("the Committee") for review and comment, and the Committee approved the plans without raising any concerns or providing negative feedback.

[8] The Emersons then hired Elpers Brothers Construction, Inc. as the general contractor for the project, which was managed on site by Paul Elpers, who had about forty years of experience in construction. Before construction began, the Emersons had a surveying company identify and stake the precise lot line between the lots, and Elpers later requested that the surveyor return to the property to verify the lot line a second time to ensure measurements taken from the lot line were accurate. Elpers was aware of the twenty-foot setback mandated by the Restrictions and testified that, in his professional opinion and experience as a builder, retaining walls were not generally considered "structures" within the building trades and were not treated as such for the purposes of permitting. Appellants' App. Vol. II at 16; Tr. Vol. II at 150–51, 154–55.

[9] Because of the topography of the Emersons' lot, the pool project required substantial regrading and leveling to accommodate the planned construction. Due to these elevation changes, the project required installation of non-structural retaining walls to retain dirt and prevent soil erosion.

[10] Before the pool project, the Emersons' lot contained decorative white brick retaining walls in many locations throughout the property, including within twenty feet of the subject property line. The pool project's retaining walls were designed to aesthetically match the existing retaining walls and to be built with high-end materials. The plans for the pool project required a retaining wall to be installed on the East side of the Emersons' lot, next to the boundary between the parties' properties ("the Retaining Wall"). The Retaining Wall serves no structural purpose as to the larger pool project, and instead, its purpose is to retain dirt, while matching the existing aesthetic features of the Emersons' lot. The Retaining Wall is about eleven feet from the boundary between the lots at its closest point. The installation of the Retaining Wall did not require permits.

[11] When the footers for the Retaining Wall were installed in the fall of 2020, the Lattners objected to the Retaining Wall's proximity to their property line and sent a cease-and-desist letter to the Emersons. The Lattners also expressed concern that the pool project would lead to drainage issues on their property. Because the Lattners' property is situated downhill from the Emersons', the Lattners' property received water runoff from the Emersons' property before the pool project. Responding to the Lattners' drainage concerns, Elpers added a twelve-inch underground pipe and drainage system to the scope of the project, which diverted water from the Retaining Wall area all the way to the lake.

[12] Construction on the pool project continued since the fall of 2020, and substantial portions of the project are complete. At the time of the trial, the Retaining Wall was substantially in place, except for the white brick façade, and the pool project was poised to continue, dependent upon the weather and availability of raw materials.

[13] As part of the pool project, a licensed surveyor surveyed the boundary lines of the Lattners' and Emersons' lots and various improvements on both properties. The survey identified several improvements on the Lattners' property located within the twenty-foot and fifty-foot setbacks required by Paragraph 3 of the Restrictions, including the Lattners' own home, which is located 17.6 feet from the exterior wall to the property line and 16.3 feet from the roof to the property line. The Lattners' property contains a driveway, two fences, a firepit, a concrete pad for HVAC equipment, and a wooden deck built along the second floor of the Lattners' home that are all built within the twenty-foot and fifty-foot

setbacks. The Lattners' property also contains retaining walls, including some located within the fifty-foot setback. The Lattners have either built these features, maintained them or repaired them since purchasing their home, or otherwise allowed them to remain on their property in their current locations, while the Restrictions have been in force.

[14] Most of the properties in the Subdivision, including those belonging to the Lattners and the Emersons, have retaining walls built directly into the lake shore to prevent erosion. These retaining walls have existed for decades and are separately maintained by the individual homeowners. Sometimes, homeowners rebuild or replace these retaining walls in whole or in part—including at least one resident who altered the lakeshore in doing so. Mrs. Lattner testified that all of these retaining walls would be considered "structures" under her interpretation of the Restrictions. Tr. Vol. II at 49–51.

[15] The owners of many lots within the Subdivision have also erected improvements within the twenty-foot and fifty-foot setbacks established by the Restrictions. These features include privacy fences, masonry improvements, retaining walls, walkways, and driveways. Lots 1 through 4 and Lot 11, which are on the same street and same side of the lake as the Lattners' and the Emersons' lots, all have such improvements. Mrs. Lattner testified she was aware of such improvements throughout the neighborhood and acquiesced to their presence.

[16] On December 22, 2020, the Lattners filed their complaint, which requested several forms of relief, including a temporary restraining order, preliminary injunction, permanent injunction, and mandatory injunction. The Lattners further requested an emergency expedited hearing as to the preliminary injunction. The parties agreed to consolidate all motions for trial, and the trial occurred on March 17, 2021. On April 8, 2021, the trial court entered its "Findings of Fact, Conclusions of Law and Judgment," in which it found that the Lattners failed to carry their burden of proof on their claims for permanent injunction and entered judgment for the Emersons. The trial court found that the Retaining Wall is not a "structure," so it does not violate the Restrictions and the Lattners, therefore, failed to succeed on the merits of their claim for injunctive relief. The Lattners now appeal the trial court's judgment.

## Discussion and Decision

## I. Standard of Review

[17] The Lattners argue the trial court erred when it entered judgment against them based on the conclusion that the Retaining Wall was not a "structure" and thus did not violate the Restrictions. They had the burden of proof at trial, so they are appealing from a negative judgment. *Wilson v. Huff*, 60 N.E.3d 294, 298 (Ind. Ct. App. 2016). We will not reverse a negative judgment unless it is contrary to law, and when evaluating that question we consider the evidence and inferences from the evidence in the light most favorable to the appellee. *Id.* We do not give deference to the trial court's legal determinations. *Id.*

[18] The ultimate relief the Lattners seek is a permanent injunction. The decision to grant or deny an injunction is within the discretion of the trial court, and our review is limited to the determination of whether the trial court clearly abused that discretion. *Doe 1 v. Boone Cnty. Prosecutor*, 85 N.E.3d 902, 910–11 (Ind. Ct. App. 2017) (citing *City of Gary, Ind. v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, 1082 (Ind. Ct. App. 2009), *trans. denied*). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances or if it misinterprets the law. *Id.* at 911.

[19] Generally, the trial court considers four factors when determining whether to grant permanent injunctive relief:

> (1) whether the plaintiff's remedies at law are inadequate;
>
> (2) whether the plaintiff has succeeded on the merits;
>
> (3) whether the threatened injury to the plaintiff outweighs the potential harm from the injunction; and
>
> (4) whether granting the injunction is in the public interest.

*Id*. (quoting *Ferrell v. Dunescape Beach Club Condos.*, 751 N.E.2d 702, 712–13 (Ind. Ct. App. 2001).

## II. Injunction

[20] The trial court denied the Lattners' request for an injunction because (1) it determined the Retaining Wall is not a "structure" and therefore does not

violate the Restrictions; (2) the Lattners failed to demonstrate irreparable harm; and (3) the balance of equities weighed in the Emersons' favor. The first basis—that the Retaining Wall does not violate the Restrictions—means the Lattners' claim failed on the merits, and where the plaintiff's claim fails on the merits, a trial court of course may not issue an injunction. Because we agree with the trial court's conclusion that the Retaining Wall does not violate the Restrictions, we affirm the judgment on that basis and need not reach the issues of irreparable harm and balancing the equities.

[21] The provision at issue is Paragraph 3 of the Restrictions, which provides:

> No building **or structure of any nature**, other than ovens and summer houses, shall be located on any lot nearer than fifty (50) feet, to the water's edge at high water level of the lake, and no such building or **structure shall be located nearer than twenty (20) feet to the side line of any lots**; PROVIDED, however, that for the purpose of this condition and restriction, all adjoining lots owned by one person and used as a building site by him, shall be considered one lot, so that the restriction that no building shall be erected nearer than twenty (20) feet to the side line of any lot shall mean the side line of the lots used by said owner as one building site; PROVIDED further, however, that nothing herein contained shall prevent the owner of any lot bounded on any side or sides by the lake shore water edge, from constructing and maintaining a boat landing and a boat house upon said lot, provided the same shall not extend beyond the water's edge and the height of said landings and boat houses above such high water level of the lake, shall in no instance exceed forty (40) inches; PROVIDED further, however that nothing herein contained shall affect any structure now existing upon any real estate in said Subdivision. NO pier or dock shall be constructed

> or permitted in said lake except as provided in paragraph 17 hereof.

[22] Ex. Vol. I at 50 (emphasis added).

[23] "A restrictive covenant is an express contract between grantor and grantee that restrains the grantee's use of land." *Roberts v. Henson*, 72 N.E.3d 1019, 1026 (Ind. Ct. App. 2017). Restrictive covenants control many aspects of land use, including what may be built on the land, how the land may be used, and the alienability of the land. *Id*. They are a form of express contract, so we apply the same rules of construction and the same standard of review as other contract disputes. *Id.* But because these covenants restrict the free use of property, they are strictly construed, and doubts as to their meaning are resolved in favor of the free use of property and against restrictions. *Johnson v. Dawson*, 856 N.E.2d 769, 772 (Ind. Ct. App. 2007); *Renfro v. McGuyer*, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003), *trans. denied*.

[24] "Unambiguous language in a restrictive covenant must be given its plain, usual, and ordinary meaning." *Roberts*, 72 N.E.3d at 1026. "When the language in a restrictive covenant is ambiguous, we endeavor to give effect to the actual intent of the parties at the time the covenant was made, as determined from the whole instrument construed in connection with the circumstances surrounding its execution." *Centennial Park, LLC v. Highland Park Estates, LLC*, 117 N.E.3d 565, 570 (Ind. Ct. App. 2018). We consider ambiguous and unambiguous language together and apply the most reasonable interpretation. *Id*. If the intent of the parties cannot be determined within the four corners of the document, a factual

determination is necessary to give effect to the parties' reasonable expectations. *Roberts*, 965 N.E.2d at 1026; *Campbell v. Spade,* 617 N.E.2d 580, 584 (Ind. Ct. App. 1993).

[25] The word "structure" is not defined in the Restrictions, and we find that its meaning is ambiguous as to whether it includes something like the Retaining Wall at issue. The parties and the trial court looked to dictionaries and contextual clues throughout the Restrictions, but those do not yield a clear answer.

[26] It was important to the trial court that throughout other paragraphs in the Restrictions the term "structure" refers to "sizeable building-like constructions." Appellants' App. Vol. 2 at 24. Paragraph 1 ensures the neighborhood remains residential by limiting any "structure" to a home, garage, barn, and outbuildings incidental to residential use. Ex. Vol. 1 at 50. Paragraph 4 ensures quality construction, requiring that "any such structure"—like "servants' quarters, guest houses, playhouses, garages, private greenhouses, or barns"—"must be of suitable standard type construction." *Id*. Paragraph 5 preserves the aesthetics and orderliness of the neighborhood by prohibiting "any structure of a temporary character" from being "used as a residence." *Id*. Paragraph 7 provides that "any structure used to stable any horse or pony shall not be located nearer than twenty-five (25) feet to the side line of any lot." *Id*. at 51. As the trial court correctly notes, none of these "structure" references are to things like the Retaining Wall at issue here.

[27] However, the Lattners fairly point out that those references are within paragraphs having their own specific context—such as preserving the residential character of the neighborhood—which is different than the context of Paragraph 3, which relates to maintaining access and sightlines between properties through a set-back requirement. But looking more narrowly at the context of Paragraph 3 does not produce much clarity either.

[28] The purpose of setback requirements is to preserve access between the properties and to maintain clear sightlines. Tara J. Foster, Comment, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 Pace Envtl. L. Rev. 269, 270 (1988) (stating that setback requirements are a common form of regulations which can also be used as a mechanism for preserving view interests). With that in mind, it is unsurprising that the Lattners do not seem to disagree with the trial court that Paragraph 3 does not apply the setback requirement to things like fences, walkways, driveways, mailboxes, and lighting fixtures. Appellants' App. Vol. 2 at 25. Those improvements only minimally impinge and access and visibility. Yet, the Lattners argue that the Retaining Wall is a "structure" subject to the setback requirement because, they say, "the common sense reading of the term 'structure'" would include "anything permanently mounted into the ground," which the Retaining Wall is. Appellants' Br. at 26 n.6. But that definition would include things like walkways and driveways, which they agree are not covered by the setback requirement. Further illustrating the problem with their definition, many of their own property improvements would violate the setback requirements,

including: an exterior wall, a wood deck, a concrete pad for their HVAC, a white picket fence, a stone fire pit, an asphalt driveway, and a second fence.

[29] To be sure, there are other contextual clues in Paragraph 3 that support the Lattners' position, including that there is an exception for "ovens and summer houses," with a "summer house" presumably referring to a covered structure designed to provide a shady resting spot. *Summerhouse*, Merriam-Webster, https://www.merriam-webster.com/dictionary/summerhouse. The Retaining Wall seems similar in size and purpose to a "summer house." Assuming it would not qualify as a summer house (which is not an issue the parties raise), the fact that a summer house would otherwise be considered a "structure" but for the carveout might suggest that the Retaining Wall should be too. But that consideration is no more compelling than the conflicting considerations. There is nothing in the Restrictions which gives helpful guidance to the question of whether the Retaining Wall should be treated as a non-structure like a fence or a structure like a summer house.

[30] Given this ambiguity, the trial court was correct to consider other extrinsic evidence, which supported a conclusion that the Retaining Wall was not a "structure" under the Restrictions. Elpers, the Emersons' contractor, testified that the general purpose of retaining walls was to retain or hold back dirt and that was the reason the Retaining Wall was included in the Emersons' pool project. Tr. Vol. II at 153. Elpers also testified that he was aware of the twenty-foot setback mandated by the Restrictions and that, in his professional opinion and experience as a builder with over forty years' experience, retaining walls

were not generally considered "structures" within the building trades and were not treated as such for the purposes of permitting. *Id*. at 150–51, 154–55.

[31] Evidence was also presented that most of the properties in the Subdivision, including those belonging to the Lattners and the Emersons, have retaining walls built directly into the lakeshore to prevent erosion, which would be within the fifty-foot setback from the water's edge, and these retaining walls have existed for decades and are separately maintained by the individual homeowners. Ex. Vol. II at 40–48; Tr. Vol. II at 51, 166–68. Additionally, the owners of many lots within the Subdivision have also erected improvements within the twenty-foot and fifty-foot setbacks established by the Restrictions. Tr. Vol. II at 167–73. These features include privacy fences, masonry improvements, retaining walls, walkways, and driveways. Ex. Vol. II at 54–73; Tr. Vol. II at 169–73. That improvements like retaining walls are routinely erected within the setback requirement suggests the intent of Paragraph 3 was not to subject retaining walls to that requirement.

[32] In short, we cannot say the trial court clearly erred in finding that the parties to the restrictive covenant did not intend to include something like the Retaining Wall in the setback requirements. That is especially so given that any doubts are resolved in favor of the free use of property and against restrictions, *Johnson*, 856 N.E.2d at 772; *Renfro*, 799 N.E.2d at 547. The trial court, therefore, did not err in denying the Lattners' request for injunctive relief and entering judgment against them.

[33] Affirmed.

Robb, J., and Riley, J., concur.