

NEBRASKA COURT OF APPEALS

Boyles v. Hausmann, 2 Neb. App. 388

509 N.W.2d 676 (1993) · No. No. A-92-204 · Decided December 21, 1993

SUMMARY

The Nebraska Court of Appeals held that a majority of subdivision landowners lacked authority to amend restrictive covenants during the five-year principal term established by the 1990 covenant agreement. The court reversed the district court and remanded with directions to find invalid an attempted amendment imposing a 120-foot setback from Pioneer Hills Road. A concurrence additionally reasoned that a majority could not create new or more restrictive covenants without the consent of all landowners.

CASE DETAILS

COURT	Nebraska Court of Appeals
WRITING FOR THE COURT	Irwin, Judge; Connolly; Irwin; Wright
JURISDICTION	Nebraska
DECIDED	December 21, 1993
DOCKET	No. A-92-204
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from a district court judgment dismissing the Boyleses' petition for declaratory judgment concerning the validity of a subdivision restrictive-covenant amendment.
STANDARD OF REVIEW	Because the declaratory-judgment appeal presented questions of law concerning construction of the agreements, the appellate court reviewed the matter independently of the trial court's conclusion. The construction of the agreements was treated as a matter of law.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Larry R. Boyles, Olga J. Boyles v. Gary J. Hausmann, Renee S. Hausmann, et al.

TOPICS

- covenants and restrictions
- contract interpretation
- appellate procedure
- civil procedure
- real estate

PRACTICE AREAS

real estate

contracts

appellate procedure

civil procedure

QUESTIONS PRESENTED

1. Whether the January 1990 restrictive-covenant agreement authorized a majority of the current landowners to amend the covenants during the agreement's five-year principal period.
2. Whether the August 1990 amendment imposing a 120-foot setback was valid.

HOLDINGS

1. The January 1990 agreement made the covenants binding until January 1, 1995; the provision allowing amendment by a majority of the property owners became operative only after that principal period expired. Accordingly, a majority of the landowners lacked authority to amend the agreement in August 1990.
2. The appellate court could recognize the timing error as plain error because the error was evident from the record, prejudicially affected the Boyleses' substantial rights, and, if left uncorrected, would cause a miscarriage of justice.

KEY QUOTATIONS

“Here, a mere majority of the current landowners attempted to change the January 1990 agreement during the principal period, in contravention of the terms of the agreement. They did not have the authority to change the January 1990 agreement in August 1990, and it was plain error for the trial court to find in favor of the defendants.” (2 Neb. App. 395)

FACTUAL BACKGROUND

Pioneer Hills Subdivision was governed by recorded restrictive covenants adopted in 1973. The covenants provided that they would remain in effect through a specified principal period and thereafter could be changed by an instrument signed and recorded by a majority of the then-current landowners. The covenants were amended in 1983 and rewritten in January 1990 to provide that the covenants and related water-use regulations would continue until January 1, 1995. In August 1990, a majority of the landowners attempted to add a 120-foot setback requirement for residential structures and outbuildings, and the Boyleses challenged that amendment.

PROCEDURAL HISTORY

The Boyleses sued for a declaration of their rights under restrictive covenants governing Pioneer Hills Subdivision. The district court found generally for the defendants and dismissed the petition. The Nebraska Court of Appeals reversed after determining that the attempted amendment was made during the covenants' binding five-year principal period and remanded with directions to declare the amendment invalid.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for entry of an order finding the attempted August 1990 amendment invalid.

CASES CITED

- Drew v. Walkup, 240 Neb. 946, 486 N.W.2d 187 (1992)
- State Bd. of Ag. v. State Racing Comm., 239 Neb. 762, 478 N.W.2d 270 (1992)
- State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989)
- Baker v. St. Paul Fire & Marine Ins. Co., 240 Neb. 14, 480 N.W.2d 192 (1992)
- Lakeland Prop. Owners Ass'n v. Larson, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984)
- Van Deusen v. Bussmann, 343 Mo. 1096, 125 S.W.2d 1 (1938)
- Zito v. Gerken, 225 Ill. App. 3d 79, 587 N.E.2d 1048 (1992)
- State v. Nebraska Assn. of Pub. Employees, 239 Neb. 653, 477 N.W.2d 577 (1991)
- Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N.W.2d 619 (1956)
- Kauffman v. Roling, 851 S.W.2d 789, 793 (Mo. App. 1993)
- Hill v. Rice, 505 So. 2d 382, 383-84 (Ala. 1987)
- Johnson v. Howells, 682 P.2d 504, 505 (Colo. App. 1984)
- Dauphin Island, etc. v. Kuppersmith, 371 So. 2d 31 (Ala. 1979)
- White v. Lewis, 253 Ark. 476, 487 S.W.2d 615 (1972)
- Perkins v. B & W Contractors, Inc., 439 So. 2d 652 (La. App. 1983)