Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00139-CV

THE CITY OF HOUSTON, Appellant/Cross-Appellee

V.

MARK REVELS, Appellee/Cross-Appellant

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 97-55462

O P I N I O N

Mark Revels appeals the trial court's order requiring him to remove a garage built in violation of a setback restriction in his deed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

About the beginning of March 1994, Revels began construction of a garage on his residential plot of land located in the Richmond Road Estates subdivision. Within a week, he received a letter from the Richmond Road Estates Civic Association notifying him that the location of his garage was in violation of the following setback restriction:

> [N]o residence, garage or out building shall be erected with any part of same (eave, porch, carport, or otherwise) closer than 20 feet to any inside property line, including side and back lines, of the tract upon which the residence is being constructed.

Revels disregarded the notice from the Association. When Revels continued construction, the Association notified the City of Houston of the violation. The City suspended Revels' building permit pending a resolution of the deed restriction dispute. The following year, Revels finished building the garage in violation of the City's order suspending his building permit.

The City filed suit against Revels to compel him to remove the garage. In response to the City's suit, Revels filed a counterclaim seeking a declaratory judgment that the setback restriction was void because the Association had waived or abandoned enforcement of the setback provision in the deed restriction by failing to enforce numerous pre-existing violations. After attempting, twice, to join the Association to his suit against the City, Revels filed a separate suit against the Association. Later, the trial court ordered consolidation of Revels' suits against the City and the Association. Revels also sought to recover attorney's fees from the City and the Association.

The trial court found that the Association had previously ignored other residents' similar violations; however, the court found no waiver or abandonment of the restriction. The court entered a permanent mandatory injunction ordering Revels to remove the garage. The trial court, however, found that the City had needlessly increased the costs of litigation and ordered the Association and the City to pay Revels $2,500 each in attorney's fees. Revels challenges only that portion of the trial court's order requiring him to remove the garage.

II. ANALYSIS

A. Waiver and Abandonment of Enforcement of Deed Restrictions.

In Revels' first point of error, he argues the trial court erred by entering a permanent injunction compelling him to remove his garage when a preponderance of the evidence clearly showed that the Association had waived or abandoned enforcement of the set-back provision in the deed restriction. Revels contends these affirmative defenses bar the City's enforcement of the restrictions. The City, which derives the authority to enforce deed restrictions from the local government code,[1] counters that because its function in suing to enforce deed restrictions is governmental in nature, it is immune to affirmative defenses.

Texas courts have recognized that certain affirmative defenses cannot be asserted against a municipality exercising governmental, as opposed to proprietary, functions. *See, e.g., City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970). This court recently held that municipal enforcement of deed restrictions constitutes a proprietary function. *Oldfield v. City of Houston*, 15 S.W.3d 219, 226 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that "because the City is not enjoined or required to enforce deed restrictions, such enforcement is a proprietary function."). Therefore, the City is not entitled to immunity from Revels' affirmative defenses of waiver and abandonment. Having determined that the City's claim is subject to these affirmative defenses, we must now determine whether they operate to bar the City's enforcement of the deed restrictions.

The Texas Supreme Court has set forth two factual situations where enforcement of deed restrictions may be refused: (1) where lot owners have acquiesced in such substantial violations within the restricted areas as to amount to abandonment of the covenant or waiver of the right to enforce it; or (2) there has been such a change in conditions in the restricted area or area surrounding it that it is no longer possible to secure, to a substantial degree, the benefits sought to be realized through the covenants. *Cowling v. Colligan*, 312

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[1] *See* TEX. LOC. GOV'T. CODE ANN. § 230.003 (Vernon 1999).

S.W.2d 943, 945 (Tex. 1958). Only the first scenario is at issue in this case.[2]

To establish the waiver and abandonment defense, a party must prove that the other violations are so great as to lead an average person to reasonably conclude that the restriction in question has been abandoned and its enforcement waived. *Id.* at 945–46; *Oldfield*, 15 S.W.3d at 226–27. Among the factors to be considered in making this determination are the number, nature, and severity of then-existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize, to a substantial degree, the benefits intended through the covenant. *Oldfield*, 15 S.W.3d at 227.

Texas courts have found that violation rates ranging from 1.9% to 8.9% were not sufficient to support waiver and abandonment,[3] while a violation rate of nearly 27% was sufficient to find waiver and abandonment.[4] While the violation rate is an important and often compelling consideration, it is not the only factor in the analysis. In addition, a court must consider the nature and severity of previous violations as well as the track record for

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[2] Revels does not argue a change of conditions within the neighborhood such that it is no longer possible to secure benefits by enforcing this deed restriction. *See Stephenson v. Perlitz*, 537 S.W.2d 287, 290 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

[3] This court recently found that a subdivision's 1.9% violation rate of deed restrictions, was "not so great as to lead the mind of the average man to reasonably conclude that the restriction in question had been abandoned and its enforcement waived." *Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n*, 25 S.W.3d 845, 847, 852 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In another deed restriction case, *New Jerusalem*, this court found a 2.4% violation rate insufficient to conclude that the restriction in question was abandoned or its enforcement waived. *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 669 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). Similarly, in *Stephenson*, the court found no evidence of acquiescence where 9% of the lots had violations. *Stephenson v. Perlitz*, 537 S.W.2d 287, 289–90 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). In *Zent*, the court found that a 14.3% violation rate did not constitute a waiver. *Zent v. Murrow*, 476 S.W.2d 875, 877, 880 (Tex. Civ. App.—Austin 1972, no writ). In *Tanglewood*, the court held that five violations of the main residence restriction, or 8.9% — none more than fourteen inches—were insufficient in number, nature and severity to constitute a waiver of the restrictive covenant's benefits. *Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39, 42, 44 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[4] The court in *Tanglewood* found abandonment of a setback restriction for attached garages and carports where 15 of 56 lots, or 26.8%, violated the ten foot sideline setback restriction and where at least eight of those extended more than five feet over the setback line. *Tanglewood*, 728 S.W.2d at 42.

enforcement of the restrictions. Indeed, an average person might reasonably conclude that a restriction had been abandoned if a single violation were severe, open, notorious, conspicuous and remained unchecked for a substantial period of time. *See Oldfield*,15 S.W.3d at 227 (stating "[t]he Texas Supreme Court has held that one of the waiver factors, the severity of the violation, may be of such magnitude so as to result in the waiver of a residential-only restriction" and citing *Sharpstown Civic Ass'n., Inc. v. Pickett*, 679 S.W.2d 956 (Tex. 1984)); *but see Jim Rutherford Invs., Inc. v. Terramar Beach Community Ass'n*, 25 S.W.3d 845, 852 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (finding that because appellant pointed to only one violation of the side setback restriction "one violation is not so great as to lead the mind of the average man to reasonably conclude that the restriction in question had been abandoned and its enforcement waived.").

Applying this standard to the facts of our case, we find that the trial court properly determined that there had been no abandonment or waiver of the setback restrictions. The evidence at trial showed the existence of five, and possibly six, violations of the setback restriction among the subdivision's 87 lots, a violation rate of less than seven percent. Three of the violators were members of the Association's board. Revels argues that these board members certainly knew about their own violations. However, Revels points to nothing in the record indicating that anyone had complained about the board members' violations or that the board had ignored any complaints made about existing violations of deed restrictions. The Association acknowledged that it did not undertake to police the subdivision for violations, but rather relied upon complaints of residents to bring the violations to the board's attention. The record contains evidence of the Association's prior acts of enforcement of the setback restriction, three of which the trial court specifically cited in its findings.

The trial court found that while the Association and the City had allowed violations, these violations were not sufficient to constitute abandonment. In addition, while violations of the deed restrictions were pervasive among the Association's board members,

the total number of violations in the subdivision was relatively small.[5] Moreover, none of the structures were as close to the property line as Revel's, with most structures in violation by ten feet or less. Revels admits that the other violations are easier to remedy than his own violation. Also, Revels' own deposition testimony supports the trial court's finding that he did not act in reliance on any existing violations in building his garage; rather, he appears to have discovered the other violations only after the Association notified him that his proposed garage would violate the setback restriction. Accordingly, we find there is sufficient evidence that the average person, when faced with these facts, could not have reasonably concluded that the Association had waived or abandoned enforcement of the twenty-foot setback restriction. We overrule Revels' first issue.

B. Validity of Permanent Injunction

In his second issue, Revels asserts that the trial court's permanent injunction requiring him to remove his garage is inequitable. Specifically, Revels complains that the court's order is not supported by a preponderance of the evidence.[6] We reject this argument.

The grant or refusal of a permanent or temporary injunction is ordinarily within the trial court's sound discretion, and on appeal our review is limited to whether the trial court's action constituted a clear abuse of discretion. *Jim Rutherford Invs. v. Terramar Beach Community Ass'n.*, 25 S.W.3d 845, 848 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Whenever the facts conclusively show that a party is violating the substantive

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[5] The record does not demonstrate that these five or six are the only violations of the deed restrictions in the Richmond Road Estates subdivision. However, it was incumbent upon Revels to bring forth evidence of any other violations which may exist, to support his waiver and abandonment theory. In the absence of such evidence, we must assume these are the only violations for purposes of our analysis.

[6] Appellant phrased this point of error to complain that the trial court's order was "not equitable" based on "application of a vague and uncertain test" and is "arbitrary and capricious under the selective enforcement finding." To the extent Revels failed to address these assertions in his appellate briefing, they are waived. *See* TEX. R. APP. P. 38.1(h).

law, the violation must be enjoined; in such a case, the trial court has no discretion to exercise. *Id*.

Applying the applicable standard of review to the facts of this case, we find no error in the trial court's issuance of a permanent injunction. The record clearly demonstrates, and Revels concedes, that he built a garage with a setback line only a few inches from his lot's rear boundary, thereby violating the twenty-foot setback restriction by well over nineteen feet. Moreover, the City ordered Revels to cease construction on the garage pending a resolution of the setback provision dispute. While Revels stopped temporarily, he later resumed construction, *without resolving the setback issue*. Accordingly, we find the trial court did not err in issuing the permanent injunction as it had no discretion to ignore the violation brought to its attention.

Finally, Revels complains about an unfairness inherent in the board's efforts to enforce the deed restrictions against him while many board members themselves were in violation of the same restrictions they sought to enforce. While Revels' point is a compelling one, the fact that most of the violators were board members, and presumably knew of their own violations, does not mean that they had knowledge of, and acquiesced in, the other members' or lot owners' violations. Moreover, Revels does not cite any part of the record which supports an interpretation that the board, as an entity, actually learned of others' violations before this litigation brought them to light. Finally, these violations, like Revels', are subject to the deed restrictions and may be enforced where the Association has not waived or abandoned their enforcement. We overrule Revels' second issue.

C. Denial of Motion for Continuance

In his third and final issue, Revels complains that the trial court erred in denying his motion for continuance as he was not given the requisite 45-day notice of the first trial setting. We review a trial court's denial of a motion for continuance for an abuse of

discretion. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997).

A court must provide "reasonable notice of not less than forty-five days to the parties of a first setting for trial . . . ." TEX. R. CIV. P. 245. However, where a party fails to timely and specifically object to the first trial setting on the basis of insufficiency of notice under Rule 245, he preserves nothing for review. *State Farm Fire & Cas. Co. v. Price*, 845 S.W.2d 427, 432 (Tex. App.—Amarillo 1992, writ dism'd by agr.).

Revels filed his motion for continuance roughly two weeks before the date set for trial. As grounds for a continuance, Revels informed the trial court of his previously planned and non-refundable, month-long vacation which spanned the dates set for trial. Noticeably absent from this motion, however, is any reference to insufficient notice under Rule 245. Although Revels reasserted the motion for continuance on the day of trial, he again failed to raise his complaint of inadequate notice under the 45-day notice requirement. While it appears that the trial court did not provide Revels with the proper 45-day notice under Rule 245, we find that Revels failed to preserve this issue for appellate review. Having found that he waived any complaint of insufficient notice of trial setting under Rule 245, we overrule Revels' final issue.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed June 21, 2001.
Panel consists of Justices Edelman, Frost and Cannon.[7]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Justice Bill Cannon sitting by assignment.