Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-423

JULY TERM, 2018

Mary Feeny* v. Gregory Speer & Mitzi Speer	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 109-7-16 Lecv
		Trial Judge: Thomas Carlson

In the above-entitled cause, the Clerk will enter:

This is a dispute involving adjoining parcels of land in the Town of Stowe. Plaintiff filed a complaint for declaratory and injunctive relief alleging that defendants' use of their property as a multi-unit apartment building violates a restrictive covenant limiting the property to one dwelling unit. The trial court granted summary judgment to defendants, denied plaintiff's motion to amend the complaint, and plaintiff appealed. We affirm.

The following facts are not in dispute. Plaintiff and defendants own neighboring parcels that were originally part of a twenty-seven-acre parcel owned by Elizabeth Campbell. In 1980, Campbell applied to the Stowe Planning Commission for a permit to subdivide one acre containing her home and another dwelling from the remaining twenty-six acres. A large building used for many years as a commercial ski lodge and known as the "Camal Lodge" was located on the remaining parcel. The Commission approved her application as subdivision S-3-80.

The actual subdivision permit is not in the record. The Planning Commission's February 25, 1980 minutes state that the subdivision was approved and include the following comment: "We noticed the plat did not state that since this is in RR5, only 2 new dwelling units could be added in the future so that the max. density of 5 units on the 26 A is not exceeded. Unan. Approval was voted pending this addition on plat, along with specific acreage." The recorded plat map states that "[b]ased on approved Stowe subdivision S-3-80, the density of the 25 and ½ acre parcel to be conveyed shall only allow two additional dwelling units." The zoning records contain no mention of any restrictions on the use of the Camal Lodge.

In July 1980, Campbell sold the twenty-five-and-a-half-acre parcel, including the Camal Lodge, to David Powles-Hunt. There is no restrictive covenant in the deed of conveyance. The deed refers to the lands and premises conveyed being surveyed as shown on the plat referred to above, but does not explicitly refer to any restriction on the map. The deed grants a twenty-five-foot right of way through the one-acre parcel "to the dwelling house which is the principal structure on the land hereby conveyed," "for use in common with the Grantor, the Grantee . . . and the tenants and others holding under the Grantor and Grantee."

In December 1980, Powles-Hunt subdivided his parcel into a sixteen-and-a-half-acre parcel and a nine-acre parcel that included the Camal Lodge. The application was approved as reflected on another plat signed on behalf of the Commission in December 1980. That plat states that "[b]ased on approved Stowe subdivision S-3-80, the density of the retained parcel and Parcel A combined shall only allow two additional dwelling units." The "retained parcel" was the nine-acre Camal Lodge lot.

Powles-Hunt sold the sixteen-and-a-half-acre Parcel A to Nigel Harley in December 1980. The Powles-Hunt-Harley deed noted that the S-3-80 subdivision permit permitted only two additional dwelling units to be constructed on the two parcels. It stated that only one dwelling unit could be constructed on Parcel A, unless Powles-Hunt failed to obtain the necessary permits to construct or add one additional dwelling unit on the Camal Lodge lot within four years, in which case he would execute a release of the covenant permitting Harley to construct two dwelling units on Parcel A.

In November 1990, defendants purchased the nine-acre Camal Lodge property from Powles-Hunt's successors in interest. There is no restrictive covenant in the deed to defendants. The deed refers to the subdivision map and to the deed from Powles-Hunt to Harley, stating that the conveyance is subject to the rights, easements, right of way and covenants contained in that deed.

The Camal Lodge building was used for various purposes over the years. When Campbell subdivided her property in 1980, the building had multiple living spaces that were rented out to skiers, tourists, and long-term tenants. In 1990, when defendants purchased the property, it had six furnished apartments, which defendants rented for short-term and long-term stays. From 1994 to approximately 2004, defendants used the building as a bed and breakfast called the Inn at Turner Mill. In 2004, defendants returned to renting apartments to long-term tenants. Defendants provided copies of long-term leases for units in the building from 2006 to 2008. Plaintiff did not provide any evidence to dispute the fact that the building historically had been used as a multi-apartment building, including in 1980.

In November 2011, defendants applied for a permit to operate a guide service from the lodge building. The Stowe Development Review Board, which succeeded the Planning Commission, issued a permit stating that "[t]he parcel is occupied by the Inn at Turner Mill which currently contains 5 multi-family rental units and two lodging rooms."

In December 2015, defendants applied for a zoning permit for use of the lodge as a multi-unit apartment building in anticipation of selling the property. Defendants later withdrew the application, believing that they did not need a permit after all because the use of the building for apartments pre-dated town zoning regulations. In May 2016, the Town of Stowe notified defendants that they had violated current zoning regulations by converting the lodge from the approved use of five rental units and two lodging rooms to six rental units.[1]

In July 2016, plaintiff filed this action for declaratory and injunctive relief, alleging that defendants' use of their property as a multi-unit apartment building violates a restrictive covenant limiting the property to one dwelling unit. Defendants moved for summary judgment. In October 2017, the trial court granted defendants' motion. It determined that there was no express restrictive

---

[1] The notice of violation was eventually vacated in February 2018 by the environmental court.

covenant in any deed in defendant's chain of title that limited the internal use of the lodge building. Thus, plaintiff had no private right of action to enforce. The court rejected plaintiff's argument that a covenant existed because the property was part of a general-plan development. It further denied plaintiff's motion to amend her complaint.[2] Plaintiff appealed.

We review a decision granting summary judgment using the same standard as the trial court: summary judgment is appropriate if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Brousseau v. Brousseau, 2007 VT 77, ¶ 5, 182 Vt. 533 (mem.); V.R.C.P. 56(a). In determining whether a genuine issue of material fact exists, "we give the nonmoving party the benefit of all reasonable doubts and inferences." Id.

Plaintiff first claims that the trial court erred in determining that the 1980 deed from Campbell to Powles-Hunt contained no restrictive covenant. As explained above, it is undisputed that neither this deed nor any of the subsequent deeds contains an express limitation on the use of the Camal Lodge building. However, plaintiff contends that a covenant arises from the deed's reference to the 1980 subdivision plat map, which states that under the S-3-80 zoning permit, the twenty-five-plus-acre parcel "shall only allow two additional dwelling units." She argues that the Camal Lodge building is part of a broader twenty-five-plus-acre parcel that is collectively subject to a covenant for the benefit of plaintiff's property limiting development to two additional dwelling units, and defendants' act of renting units for long term habitation, rather than transient lodging, amounts to adding more than two additional dwelling units.

Although "recorded plats necessarily become subdivision permit conditions," In re Hinesburg Hannaford Act 250 Permit, 2017 VT 106, ¶ 17 (quotation omitted), we have never held, as plaintiff argues, that a zoning permit condition in a recorded subdivision plat referred to in a deed necessarily creates a privately enforceable restrictive covenant. We need not decide the issue here because even assuming a restrictive covenant may be created in this manner, the undisputed facts cannot support a finding that defendants have violated any deed restriction by renting multiple units in the lodge for long term residential use.

The plat map contains no language explicitly limiting the internal use of the lodge. To the extent that the quoted plat map restriction applies to the lodge building at all, its meaning is ambiguous. "When a covenant is ambiguous, the question of what the parties intended to prohibit is a question of fact to be determined on all the evidence." Mann v. Levin, 2004 VT 100, ¶ 17, 177 Vt. 261. If the extent of a restrictive covenant is in doubt, "the rule applied is that restrictions will not be extended by implication to include anything not clearly expressed, and doubts must be resolved in favor of the free use of land." Fassler v. Okemo Mountain, Inc., 148 Vt. 538, 542 (1987) (quotation omitted).

The circumstances surrounding the execution of the deed and plat do not indicate that the parties intended to limit the use of the units in the lodge building to transient lodgers. The undisputed evidence shows that the Camal Lodge was being used as multiple apartments at the time of the 1980 subdivision and subsequent conveyance from Campbell to Powles-Hunt. We agree with the trial court that the only reasonable inference to be drawn from the contemporaneous zoning records was that the Stowe Planning Commission considered the lodge to be a single

[2] The court also denied summary judgment on defendant's claim that plaintiff's action was barred by the statute of limitations because material facts were in dispute. Because we conclude that the trial court properly entered summary judgment in favor of defendants on the merits, we do not address the parties' arguments regarding the statute of limitations.

"dwelling unit" even though it contained multiple apartments.[3] The zoning district in which the property was then located allowed a total of five units on Campbell's original twenty-seven acres. The plat restriction permits "two additional dwelling units," indicating that the Commission considered each existing building—i.e., the two houses on Campbell's one-acre lot and the Camal Lodge—to be a single unit regardless of its internal use. There is no discussion in the zoning records of limiting the existing use of the Camal Lodge building, and the plat map does not refer to the internal use of the lodge. Nor does the Campbell-Powles-Hunt deed contain any such restriction. Rather, it acknowledges the existing use of the lodge as rental apartments, for it states that the right of way to the "dwelling house" on the Camal Lodge parcel shall be for use of "the tenants and others holding under the Grantor and Grantee." No reasonable factfinder could conclude from the above evidence that the plat map language was intended to prohibit the preexisting use of the lodge as a multi-unit apartment building.

Plaintiff argues in the alternative that a covenant limiting the use of the lodge building was created through a common development scheme for a general-plan development. See Patch v. Springfield Sch. Dist., 2009 VT 117, ¶ 8, 187 Vt. 21. A general-plan development is a "real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude imposed to effectuate a plan of land-use controls for the benefit of the property owners in the development or neighborhood." Creed v. Clogston, 2004 VT 34, ¶ 20, 176 Vt. 436 (quotation omitted).

The record does not support plaintiff's argument. There is some evidence that Campbell initially proposed her original two-lot subdivision to the Town as a "planned residential development" to allow her to divide the two housing units on one acre from the remaining acreage.[4] Even if this could be construed as evidence of Campbell's intent to restrict multiple long term residential rentals in the lodge building, intent alone is insufficient to create a general-plan development. See Patch, 2009 VT 117, ¶ 15 (holding that recording of subdivision plat map, inclusion of restrictive covenants in most deeds to subdivision lots, and evidence of intent to create common-plan development did not compel conclusion that general-plan development existed, absent declaration of covenants imposed at outset by developer or subsequent agreement among all lot owners). "The missing ingredient is a declaration of covenants imposed before the first lot was sold, or a subsequent agreement among all lot owners to impose a set of covenants on the involved land." Id. The record does not include an agreement among all lot owners or a declaration of covenants. The only limitation on the development of the parcel Campbell conveyed to Powles-Hunt derived from the Town's zoning regulations, as noted on the plat map, and not any deed covenants. This was insufficient to create a general-plan development under our law.

Finally, plaintiff argues that the trial court abused its discretion in denying her motion to amend her complaint. We see no abuse of discretion. Plaintiff's motion was filed on October 4, 2017, six months after the deadline for pretrial motions and over three months after defendants

---

[3] Plaintiff argues that the lodge contained only one residential "dwelling unit" and the remaining units were "lodging" units, which are not included in the density calculation. This apparently was the configuration in 2003, when defendants were using the building as a bed and breakfast. Plaintiff has not demonstrated that the same configuration existed in 1980, the relevant time period for our consideration. The record shows that the lodge was used as multiple rental apartments at that time.

[4] The civil engineer who assisted Campbell before the Planning Commission stated in his affidavit that the subdivision was ultimately permitted as a normal subdivision, not as a planned residential development.

moved for summary judgment. The court accurately noted that the proposed amendment did not add any new theory or cause of action that was not resolved by its summary judgment decision. It therefore correctly concluded that granting the amendment would be futile. See Perkins v. Windsor Hosp. Corp., 142 Vt. 305, 313 (1982) (explaining that amendment may be denied if dilatory or futile).

Affirmed.

BY THE COURT:

____
Beth Robinson, Associate Justice

____
Harold E. Eaton, Jr., Associate Justice

____
Karen R. Carroll, Associate Justice