

RESTRICTIVE COVENANTS IN MICHIGAN

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OVERVIEW

This article is a general review of Michigan cases dealing with the use of restrictive covenants in the context of residential deeds and building and use restrictions.¹

DEFINITION

As the term suggests, to impose “restrictive covenants” in a deed or a building and use restriction is an attempt by a grantor or developer of real property to create limitations on how the property can be used or developed. Restrictive covenants are primarily used to create, maintain and/or prohibit the continued use and development of general or specific characteristics within a particular area of real property. Under Michigan’s condominium act, developers or co-owners may impose reasonable restrictions or covenants running with the land upon a condominium unit in a condominium project.² The federal government is largely disinterested in local restrictive covenants, though Congress in the Telecommunications Act of 1996 provided the Federal Communications Commission with authority to prohibit deed restrictions which impair a viewer’s ability to receive certain satellite video programming signals.

Restrictive covenants have been created and enforced by homeowners, developers, condominium and subdivision associations and municipalities. The reasons and motives can be varied and site specific. One man in South Carolina has

even filed deed restrictions prohibiting the sale of his land to anyone named "Sherman" or who was born or lived north of the Mason-Dixon Line!³ Whether a covenant is to be regarded as personal, or one running with the land, will ultimately depend on the intention of the parties.⁴ However, reciprocal negative easements, once created and recorded in deeds as restrictions, are not personal and run with the land.⁵ Because they generally tend to enhance property values, building and use restrictions in residential transactions are favored by public policy⁶, and the judiciary will protect property owners who have complied with deed restrictions from violations of the restrictions by others.⁷

STANDING TO ENFORCE

In Michigan, the standing to enforce a restrictive covenant can be quite broad. By statute, any third-party beneficiary of a contract has the right to bring an action in the circuit court where the property is located to enforce the covenant.⁸ The Court of Appeals has held that restrictive covenants in a subdivision can be enforced by all the lot owners, even those who never signed the agreement, and where the original subdivision master deed restrictions have expired.⁹ However, because enforcement of restrictive covenants is an equitable action, courts seem prepared to fashion and promote relief they feel best suits the situation,¹⁰ even if the results might not be approved by all parties with standing.

INTERPRETING RESTRICTIVE COVENANTS

Restrictive covenants, like many contractual terms, occasionally suffer from ambiguity causing enforcement problems. Restrictive covenants are strictly construed against those claiming the right of enforcement, and all doubts are resolved in favor of

the free use of property.¹¹ Words used in such covenants must be given their ordinary meaning, and where clear and unambiguous, they must control.¹²

Many Michigan cases interpreting restrictive covenants have involved disputes over mobile homes. Evidently, improvements in the quality of manufactured homes and mobile home communities have not diminished the historically fertile ground of reported litigation pitting restrictive covenants against a property owner's use of his property.

Because they represent the general exercise the courts go through when evaluating restrictive covenants, the following are examples of restrictive covenants aimed at motor and mobile homes intended to regulate storage and/or usage which the Court of Appeals decided were either: (A) unreasonably ambiguous and could not be enforced against the homeowner or, (B) were sufficiently definite and the Court agreed could be enforced against the homeowner.

(A) Ambiguous and unenforceable:

1. "No tent, camping outfit or other temporary structure shall be erected, maintained or suffered to remain on said lots except such temporary structures as may be necessary for use in connection with the construction of such buildings and other structures as are permitted by this contract for such time and under such conditions as may be permitted in writing by said first parties."¹³

(Reason: Failed to specify "motor homes" for exclusion.)

2. "No house trailers or tents allowed on subdivision."¹⁴

(Reason: Too vague. Court declined to utilize statutory definitions of "trailer coaches" and "mobile homes" to determine the meaning of "house trailer")

3. "Temporary Structures: No temporary building of any kind erected on any parcel in this subdivision shall at any time be used as a temporary or permanent residence. Nor shall any trailer be used or kept thereon. Nor shall any equipment or material be stored thereon after the structure is completed. Nor shall any boat be used or kept thereon unless kept within [*sic.*] enclosed garage."¹⁵

(Reason: Though restriction includes "trailers," it does not include motor homes. This court concluded a trailer is not self-propelled.)

(B) Specific and enforceable:

1. "No house trailer, trailer, coach, tent or temporary shelter including fishing shanty, shall be parked, placed, erected or occupied on said premises, except an unoccupied trailer or fishing shanty may be totally stored in a garage thereon."¹⁶

(Reason: Though motor homes not mentioned, the drafters clearly intended to prohibit such type of vehicle.)

2. "No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time, as a residence either temporarily or permanently"¹⁷

(Reason: Use of clear and comprehensive language.)

3. "No structure of a temporary character, trailer, basement, tent, shack, mobile home or garage shall be used on any lot, at any time, as a residence, either temporarily or permanently."¹⁸

(Reason: Use of clear and comprehensive language.)

CHALLENGING RESIDENTIAL RESTRICTIVE COVENANTS

As neighborhoods change, the deed restrictions originally imposed on property intended to preserve certain characteristics may no longer be appropriate. Courts are frequently asked to exercise equitable discretion and either enforce the restrictive covenant as written for the benefit of the interested property owners, or to disregard its specific terms in light of the changed realities of the community. As one Court said, “restrictive covenants are not merely intended to apply and be enforced only so long as it is convenient to do so. However, it is just as certain that restrictive covenants ought not to be enforced when enforcement protects no one.”¹⁹

In O’Neal v Hutt,²⁰ the deeds to property in the Highland Terrace Subdivision all had the following restrictive covenant:

“The said subdivision known as “Highland Terrace” shall be used and occupied for single residence purposes only, and nothing shall be done or permitted thereon which shall or may interfere with or detract from such use and occupation thereof.”²¹

Dr. Hutt was a clinical psychologist and a member of the faculty at the University of Michigan. His neighbors objected to him seeing patients at his residence. The Court of Appeals upheld the injunction against consulting with or treating patients at Dr. Hutt’s residence, finding this contrary to the restrictive covenant. However, the Court did allow Dr. Hutt to consult or meet with others for the purpose of planning, researching, producing or writing books or other papers for publication or seminar use, finding these uses not incompatible with the activities generally contemplated in a residential setting.

In DeMarco v Palazzolo,²² the plaintiffs owned lots fronting on Ten Mile Road in the City of Roseville, Michigan. They sought to have the restrictive covenants limiting land use to residential purposes declared void. The once pastoral neighborhood had, over the last 20 years, changed significantly. Ten Mile Road, once a two lane street, had now been expanded to a four lane thoroughfare which in 1973, funneled traffic at a rate of 24,000 vehicles per day. All other properties in the immediate vicinity were being used commercially.

The issue in DeMarco was whether changes outside a covenanted subdivision may be considered in determining whether enforcement of reciprocal negative easements such as those involved here would still benefit a dominant estate. The Court concluded that the outside changes could be considered, and balanced the equities for both parties. The opinion allowed the plaintiff to develop its lot commercially, invalidating the restrictive covenant for that specific property. However, for the protection of the remaining residential owners, the Court ordered a greenbelt or fence area as provided by local ordinance to be established to separate the plaintiff's property from the rest of the other lots.

It is historically true that a restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business use.²³ In an unpublished opinion,²⁴ the Court of Appeals considered a business verses residential use issue affecting a subdivision where deeds restricted the lots to residential use. The defendant sold a two week interval (i.e. a time share) in his lot to his co-defendants. The Appellate Court reversed a permanent injunction against that use, declaring that "while interval ownership may be a business use, we find no reason to believe that non-

residential use associated with interval ownership will be obtrusive and detrimental to the property value of neighbors.” The testimony at trial indicated that it was acceptable for home owners to rent out their homes on a weekly basis all year long. While the type of ownership is different, in terms of use, the Court found that distinguishing interval ownership from year around renting creates a “distinction without a difference.”

Occasionally, those seeking to avoid the constraints of a restrictive covenant will argue that local zoning ordinances should prevail in the event of a conflict between the two. This is especially true when the restriction itself obligates the lot owner to comply with local zoning ordinances.

For example, in Rofe v Robinson (on second remand),²⁵ the land at issue was in the Hickory Knolls Subdivision along Telegraph Road which was originally zoned residential, and which had deed restrictions pertaining to defendant’s property which restricted the land to residential use only. There was additional language in the deed restriction which stated:

“No building shall be erected, altered or permitted on any part of the restricted premises except it shall conform to the provisions of any zoning ordinance enacted by any township, village, city or county wherein such part of the restricted premises may be situated which may be applicable and in effect at the time of actual construction, provided, that any departure or deviation from the provisions of such zoning ordinance permitted as provided by and in accordance with said ordinance may be made with the approval in writing of the owner but not otherwise.”²⁶

In 1968, Bloomfield Township rezoned 12 lots in the Hickory Knolls Subdivision to prohibit residential construction and permit only commercial construction. The defendants purchased two of the rezoned lots and commenced construction of an office building. The defendants believed the restrictive covenant did not apply to them because of the rezoning, and because the restriction had not been enforced against a construction company which was using lots in the subdivision for its offices.

Plaintiffs, residential owners of property in Hickory Knolls, wanted the property kept residential. On second remand, the Appeals Court decided this issue in favor of the plaintiffs. The Court found that while restrictive covenants are to be construed strictly against those seeking enforcement, and all doubts are to be resolved in favor of the free use of property, it was clear that the purpose and intent of the entire restrictive instrument was for residential development only. The language in the restriction regarding zoning standards was only meant to incorporate them insofar as those standards comport with the deed restrictions. It was not intended to establish zoning as the ultimate determinate of how the land would be developed.²⁷

Courts will decline to give affirmative relief under restrictive covenants when it appears the problem is simply poor drafting and the relief sought is unreasonable or unexpected under a common sense evaluation of the restriction's impact on the property. This was the case in McHenry v Ford Motor Company,²⁸ In 1925, Mr. McHenry, an attorney, owned 190 acres of land along the Huron River in Washtenaw County, Michigan. He conveyed 155 acres of this tract to the Ford Motor Company for the express purpose of flooding it with the waters of an artificial lake or reservoir

created by a dam which Ford Motor Company proposed to build downstream. The dam was completed in 1932.

By the time the lawsuit was filed in 1953, the waters of Ford Motor Company's reservoir had washed away and undercut Mr. McHenry's retained lands. He lost about 12 acres, including trees, shrubbery, fences and sump pump houses. The foundations of the residence building was threatened with collapse. Except for 5 or 6 acres, the remaining land was of no value and unsaleable.

The deed to the Ford Motor Company, which Mr. McHenry drafted, was full of restrictions. The gist of his lawsuit was that the waters from defendant's reservoir violated the restrictive use covenant which stated:

“. . . nor shall any part of said lands, or any waters thereon, be occupied or used in a manner that would render the remaining lands of the parties of the first part adjacent to or abutting upon the lands hereby conveyed unsuitable or undesirable for high class residence purposes; nor shall said lands be used otherwise than for the purpose of flowage”²⁹

The court refused to hold Ford Motor Company absolutely liable for the result of natural flowage. It found the restrictions to be unusual and unclear, and had no problem in construing the restrictive covenant most strictly against the grantor and person seeking to enforce it. The Court determined, “this rule of construction is especially applicable where the grantor is a practicing attorney, as in this case.”³⁰

LAND DIVISION ACT

As property is assembled, divided, platted and developed, restrictive covenants imposed upon that property are occasionally reviewed in the context of the Land

Division Act.³¹ In Brookshire - Big Tree Association v Oneida Township and 4M's Partnership, et al,³² a subdivision homeowners association sued to stop an adjacent development from using one of its lots as a threshold roadway. Lot 12 of the original subdivision, Brookshire Estates, was subject to various restrictive covenants, including one which provided that the lots be used only for "residential purposes," and only a single family dwelling may be constructed. The Township had granted preliminary approval for the adjacent developer's, 4M's, proposed plat. 4M's had purchased lot 12 and was using it as the connector from its subdivision to the Brookshire Estates subdivision.

The Court of Appeals found that 4M's could not circumvent the restrictive covenants, and had failed to follow the Land Division Act in their attempt to do so. Knowing they would not get the approval of all the other homeowners to allow lot 12 to be used for anything other than residential purposes, 4M's had attempted to "replat" the property without proper court action.³³ The court did not accept the developer's position that, as owner of lot 12, it could unilaterally "agree" to the replat of lot 12. The court said this would "lead to patently absurd results."³⁴

Platted subdivisions, as well as condominiums, often create architectural control committees which control how the lots or units may be used or developed. In Villa de Charlevoix Property Owners Association, et al v Dillworth, et al,³⁵ the plaintiffs argued that defendants violated the deed restrictions affecting all lots in the subdivision by allowing their property to be used for septic purposes without first obtaining the approval of the architectural control committee. The plaintiffs also claimed the defendants violated the Land Division Act by creating and conveying septic easements

to land outside the subdivision with easements for the installation of septic tanks and fields on portions of lots inside the subdivision. The court found that, in the face of conflicting testimony, the defendants had in fact obtained the approval of the plaintiffs architectural control committee for use of their lots as septic sites. The court further determined that such a conveyance was not a “subdivision” regulated by the Land Division Act. For a subdivision to occur, the court determined the grantee must acquire some exclusive rights in the subject parcel.³⁶ Because defendants got the necessary permission, and retained title to the lot, the easement neither violated the restrictive covenants nor the Land Division Act.

Municipal governments cannot use restrictive covenants to promote development agendas. For instance, in Eyde Construction Co. v. Meridian Township, before their final plat would be approved, the developers were compelled by the planning commission and the Board to convey to the Township a deed to a parcel (out of the larger developed project) with a restrictive covenant that the deeded land be used as a public park after the larger project was developed. However, the Court of Appeals found there is nothing in the Land Division Act which provides a municipality the authority to require as a condition for plat approval the dedication, donation or deeding of lands or rights to land for public recreational purposes.³⁷

RECENT CASES

The significance and enforceability of restrictive covenants in Michigan was recently addressed in two Michigan cases. In one, the defendant was rewarded for doing all he could to try and follow the covenants requirements. In the other case, the

defendant was ordered to tear down the house he had constructed because he built it in clear violation of the deed restrictions.

1. **Stuart v Chawney**.³⁸

The Michigan Supreme Court took this case to determine whether the defendants violated recorded subdivision restrictions when they built their home in the Village of Beverly Hills, Oakland County, in 1991.

In 1967, the Lincoln Green Subdivision was platted and by 1974, houses had been built on all 12 lots. In 1967, the developer had recorded a restriction declaration for the subdivision which included 25 provisions. Two are relevant to this dispute. One creates an “architectural control committee” that had the authority to pass on plans and specifications for development in the subdivision. The other concerned “committee approval” which essentially required written approval from the architectural control committee before construction of houses and such things and fences and decks.

In 1987, the Lincoln Green homeowners were notified that the owners of a large condominium project directly south of their subdivision were planning to construct new homes on abutting land. The neighboring developers agreed that a particular site they owned which faced the Lincoln Green cul-de-sac would be a single family site and would be subject to the restriction agreement recorded by the Lincoln Green developer in 1967.

In late 1990 and early 1991, Defendant Chawney, a licensed architect, sought through the Village of Beverly Hills and the Oakland County Register of Deeds to locate the subdivision committee authorized to approve his project. After much investigation, it appeared the Lincoln Green Subdivision had no specific homeowners association.

Apparently, issues regarding conformity with the Lincoln Green Subdivision building restrictions were referred to the association for the neighboring subdivision, Nottingham Forest. After submitting all his plans to the Nottingham Forest Association, by June 1991, Mr. Chawney had received all the necessary written approvals for the project.

After the site was cleared and excavation authorized by the City, the defendant was contacted by lawyers for a group of residents who were concerned that the design of the defendant's house was not "comparable and harmonious" with existing structures in the Lincoln Green Subdivision. Agreements could not be reached and suit was filed in Oakland Circuit Court. Following a bench trial, the court found that neither the plaintiffs nor any other subdivision lot owners constituted the architectural control committee contemplated by the 1967 restriction agreement. The court also found the requirement of an "harmonious" development to be vague, ambiguous and over broad on its face. Finally, the court found that since the defendants had first presented their plans in 1987, the facts and evidence justified applying the defenses of laches, estoppel and waiver. The plaintiffs had failed to take the proper action under the restriction agreement to protect their interests.

The Court of Appeals reversed for several reasons. First, it determined that the architectural control committee was irrelevant because each individual lot owner possessed a cause of action to enforce the restrictive covenants which ran with the land and were binding on the defendants. Second, the court felt that the requirement for an "harmonious" development was not overly vague or ambiguous. Finally, the court felt that the equitable defenses of laches, estoppel and waiver did not apply. Equity will intercede whenever a violation of a covenant is threatened.

The dissent in the Court of Appeals, (which was followed by the Supreme Court) agreed that the requirement for an “harmonious development” was not too vague, ambiguous or over broad. The dissent focused on the failure to establish the architectural control committee, in addition to the fact no official homeowners association had ever been formed. The dissent noted that “while the plaintiffs may have individual causes of action to enforce the provisions of the restriction agreement, the question remains whether there was a breach.” The dissent concluded that there was not, because there was no properly constituted committee to which the defendants were obligated to submit their construction plans.

The Supreme Court agreed. “There was no breach of the agreement because there was no properly constituted architectural control committee, i.e., no method for enforcing the standards of ‘beauty’ and ‘harmony’.”³⁹

The Supreme Court determined the plaintiffs had sufficient notice of the need for some sort of association to deal with building and development issues, but chose not to act. The tone of the opinion was sympathetic towards the defendant. “This is not an instance, however, where a purchaser of land subject to restrictive covenants either disregards them or flaunts them. The defendants sought both through the Village of Beverly Hills and the Oakland County Register of Deeds to locate the committee or association authorized to approve a proposed structure. They were informed by a Village official that they should seek approval from the Nottingham Forest Association, and were referred to Ms. Birch. Both she and the Village official gave the go ahead, and the defendants’ plans proceeded.”⁴⁰

The Court concluded the critical question was whether there was a breach of the covenant. Where the defendants complied with all government regulations and objective criteria under the agreement, and the entity charged with determining compliance with other standards did not exist, there was no violation to redress, on an individual basis or otherwise.

2. Webb v Smith, (After Second Remand) ⁴¹

This dispute began in 1988, when the defendants bought some lake front residential property in Midland County and began to build their home on it. The defendants conceded they built the home on property affected by two deed restrictions which prohibited its construction. As the Court of Appeals offers, "This case illustrates the folly of gambling on the prospect that Michigan's judicial system will ignore and fail to enforce the property rights of others. Defendant's gamble has resulted in the unfortunate outcome that they must now tear down the home that they built."⁴²

The restriction at issue states:

"No building or dwelling shall be placed closer than 20 feet from the front lot line, and not more than one building shall be used for dwelling purposes on each lot."

Defendants purchased one-half of a lakeshore lot in a residential subdivision. A home owned by third parties already existed on the other half of this lot. Defendants began construction of their home in March, 1989.

Plaintiffs owned lots adjacent to the defendants' lot. Plaintiffs argued that the construction of defendants' home violated both the subdivision's negative covenants and the Township's zoning ordinances. (The Township refused to take legal action

against defendants because it had already issued the building permit.) On April 8, 1989, plaintiffs filed suit to force defendants to remove their home.

A bench trial was held in May, 1989. The trial court held for defendants, finding the restrictions did not operate as negative reciprocal easements because defendants had no actual notice of them. (The defendants' deed did not recite the restrictions.) The Court of Appeals reversed and remanded, and the trial court again found for defendants, ruling the house did not violate the reciprocal negative easements. The trial court interpreted the term "front lot line" to denote the water line as opposed to the survey line. This, despite testimony to the contrary from the developer who specified where the survey line was for the appropriate point of reference with respect to the front lot line and that in his opinion he believed the defendants' home was constructed in violation of that restriction.⁴³

The Court of Appeals reversed again and remanded the case to the trial court to impose the appropriate equitable or legal remedy.

This time, the trial court found the defendants' lot was subject to the one dwelling per lot restriction. The court ordered defendants to remove their house from the lot, and this appeal ensued.

Here, the issues were notice, damages and equity. The court's opinion observed that defendants repeated assertion they were without notice of the restrictions, "defies logic." Defendants' own testimony established they knew of the deed restrictions on April 1, 1989, well before the contractor had finished building their residence. In fact, only the foundation and framing had been completed when the trial court issued its first

decision in May, 1989. The court of appeals held that the defendants could not then argue they built their home in good faith and a result of an “honest mistake.”

The court next rejected the defendants’ argument that damages should have been considered in lieu of the equitable remedy of tearing the house down. The defendants gave the court no authority to support their position. Furthermore, the court found the equities lacking in the defendants’ arguments.

Basic tenets of the law of restrictive covenants were reviewed. The court noted that a negative covenant is a valuable property right, and public policy favors use restrictions in residential deeds. The judiciary’s policy is to protect property owners who have complied with deed restrictions, which protect property values and aesthetic characteristics considered to be essential constituents of a family environment.⁴⁴

The court went on to observe that Michigan courts generally enforce valid restrictions by injunction. The parties respective damages are typically not considered. Owners may enforce negative easements regardless of the extent of the owners damages. When enforcing a negative easement, it is wholly immaterial to what extent any other lot owner may be injured by the forbidden use. The economic damages suffered by the land owner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions.⁴⁵

Our Supreme Court established three equitable exceptions to the general enforcement of restrictive covenants rule.⁴⁶ These are:

- (1) Technical violations and absence of substantial injury;
- (2) Changed conditions, and
- (3) Limitations and laches.

In this case, limitations and laches were not at issue.

Concerning defendants technical violations argument, the Webb court defined a technical violation of a negative covenant as a “slight deviation or a violation that can in no wise, we think, add to or take from the objects and purposes of the general scheme of development.”⁴⁷

The Smith’s house, built on a half lot where no house was allowed, was more than a “slight deviation” from the terms of the covenants. The court found that defendants’ house detracted from the covenants’ stated purposes of regulating construction to guarantee a level of privacy and aesthetic enjoyment to the subdivision’s landowners. Further, the house obscured the plaintiff’s view of the lake.

Finally, the court also disagreed with defendants’ last argument that conditions had changed in the subdivision so as to make enforcement of the covenants inequitable. The proofs in this case did not establish that the covenants’ purposes could no longer be accomplished. The court, in quantifying “changed conditions,” observed that “if something more than general growth was not required, it would place all residential restrictions in substantial jeopardy.”⁴⁸ The opinion was summarized with the comment, “We note that there is at least some indication that defendants improvidently continued with construction of their home with full knowledge of the nature of the dispute at hand. In that regard, defendants did so at their own peril.”⁴⁹

The court made an interesting dicta remark at the end of the opinion:

“Although we are legally bound to the result we announce in this opinion, the parties still have an opportunity to reach a private agreement more

palatable to each side that does not require the removal of defendants' home."

This remark is confusing since it suggests these two parties can potentially agree to waive enforcement of the restrictive covenants, to the exclusion of the other lot owners. For instance, what if the Smiths paid the Webbs enough money so the Webbs no longer were bothered by their obstructed view of the lake? Clearly, this would not inure to the benefit of the other lots and lot owners restricted by the covenants which they could also enforce. Does this opinion suggest that a private deal between these two neighbors might bar any future claims from other lot owners? Based on other case law reviewed in this article, the answer would seem to be no. As long as a breach of the restrictive covenant could be established, any lot owner affected could pursue remedies to compel compliance.

A recent unpublished Court of Appeals opinion supports the view that a court cannot enlarge, by judicial interpretation, the meaning of restrictive covenants where there was no ambiguity present. In Debois v Medendorp,⁵⁰ the issue was a 1982 consent judgment relating to lake access, mooring of boats and use of an access easement on the parties' property. The record did not reveal the identity of the owners of the lots listed in the 1982 judgment, and no lot owners other than the present parties were involved in this lawsuit. The 1982 consent judgment established "restrictive covenants running with the land" intended to "provide notice to all present and future owners of the lots affected." The parties disagreed on where the plaintiff was allowed to moor his boat. The clear language of the restrictive covenants in the 1982 consent judgment was very specific about how far from the shoreline a boat could be parked.

Instead, the trial court allowed the plaintiffs to moor their boat in the water beyond this restriction, within wading distance from the shoreline.

The Appeals Court found this to be an unreasonable enlargement of the restrictions. The Court found that although the parties to this lawsuit may not set aside the 1982 consent judgment, the restrictive covenants could be interpreted by the trial court only to accomplish the purpose intended by the parties to the 1982 consent judgment.⁵¹ The Court of Appeals found that because the restrictive covenant in the consent judgment was not ambiguous, the trial court could not judicially interpret the meaning and improperly enlarge the restriction.

SUMMARY

Restrictive covenants in deeds and building and use restrictions are effective tools to regulate the use and development of residential property. If specific and unambiguous, and so intended, they will run with the land and be enforced according to their terms, sometimes even if surrounding circumstances have changed. However, a party seeking enforcement, whether an individual or an association, must have complied with all the requirements of the restriction. For instance, if an architectural control committee is to be established as the entity charged with enforcing local "standards," it must in fact exist to obligate a new owner to comply with those standards. Because building and use restrictions in residential deeds are favored by public policy, the penalties for violating them can seem relatively harsh until one considers that they typically benefit not just one parcel but several, the owners of which most likely depend on the continuing enforcement of the restriction.

ENDNOTES

¹ This article does not address restrictive covenants or conditions in other areas, such as leases (e.g. Samir-Mary, Inc. v Efron Investors-II, 908 F2d 973 (CA 6 1990); Schuberg Inc. v The Kroger Co., 113 Mich App 310; 317 NW2d 606 (1982)); employment agreements (e.g. Neveux v Webcraft Technologies, Inc., 921 F Supp 1568 (ED Mich 1996); Rite-Way Disposal, et al v Vanderploeg, et al, 161 Mich App 274; 409 NW2d 804 (1987)); adult foster care facilities (e.g. Charter Township of Plymouth v D.S.S., 198 Mich App 385; 501 NW2d 186 (1993); Craig v Bossenberry, 134 Mich App 543; 351 NW2d 596 (1984)); racial covenants (e.g. U.S.A. v School Districts of City of Ferndale, 588 F2d 1339 (CA 6 1979)).

² MCL 559.146.

³ Henry Ingram, Jr. bought his property, 1,688 acres near Hilton Head, S.C., in January 1998 for \$1.2 million. He told local newspapers that “This is the prettiest piece of land in the country, and I want to keep it that way. I want to make sure no one has access to it that I don’t want to be there.” His deed restrictions prohibit the “Yankee race” from owning any part of the land, and anyone named “Sherman” (and even those with names whose letters can spell Sherman) can’t even set foot on the property. The restrictions might be enforceable since geography so far is not a protected class. In fact, Ingram’s restrictions specify that they should not be interpreted as discrimination against “Southern persons of African descent,” and any Southern black can buy the property at a 10 percent discount. (Source: The Dallas Morning News, Saturday, February 7, 1998.)

⁴ Sun Oil Company v Trent Auto Wash, Inc., 2 Mich App 389; 140 NW2d 551 (1966).

⁵ Sanborn v McLean, 233 Mich 227; 206 NW 496 (1925).

⁶ Beverly Island Association v Zinger, 113 Mich App 322, 325; 317 NW2d 611 (1982).

⁷ Bellarmino Hills Ass’n v. Residential Systems Co., 84 Mich App 554; 269 NW2d 673 (1978), lv den 405 Mich 836 (1979).

⁸ The pertinent portions of MCL A600.1405; MSA 27A.1405 are:

“Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.”

See, also Dorfman v State Highway Department, 66 Mich App 1; 238 NW2d 395 (1975)

⁹ There were two Dorfman, supra, cases. The first case, Dorfman v State Highway Department, supra, confirmed that all lot owners in the Huntington Woods Manor Subdivision could enforce their rights with respect to a 1958 restrictive covenant that the property be restricted to single family residential use. The State was attempting to construct the I-696 freeway through that area. In 1976, the plaintiffs commenced another action (Dorfman, et al v State Highway Department, 155 Mich App 57; 399 NW2d 437 (1986)) to compel the defendant State to acquire its interests in the restrictive covenant before it proceeded with the highway’s construction. That action was brought pursuant to the Uniform Condemnation Procedures Act, MCL 213.51, et seq.; MSA 8.265(1), et seq.

¹⁰ In Webb, v Smith, discussed infra, despite upholding the trial court requiring defendants to demolish their home which violated restrictions affecting lots in that subdivision., the Court of Appeals remarked that the parties could reach a private agreement “palatable” to the litigating parties. The opinion did not address the fact this private agreement still might conflict with the existing restrictions effective against and enforceable by all other lot owners.

¹¹ Sampson v Kaufman, 345 Mich 48, 50; 75 NW2d 64 (1956); Sylvan Glens Home Owners Association v McFadden, supra.

¹² North Cherokee Village Membership v Murphy, 71 Mich App 592; 248 NW2d 629 (1976); Sylvan Glens Home Owners Association v McFadden, 103 Mich App 118; 302 NW2d 615 (1981).

¹³ Colony Park Association v Dugas, 44 Mich App 467; 205 NW2d 234 (1973).

¹⁴ North Cherokee Village Membership v Murphy, supra.

¹⁵ Sylvan Glens, supra, at 122.

¹⁶ Borowski, et al v Welch, et al, 117 Mich App 712; 324 NW2d 144 (1982).

¹⁷ Timmerman v Gabriel, 155 Mont 294; 470 P2d 528 (1970), quoted in North Cherokee, supra.

¹⁸ Brownfield Subdivision, Inc. v McKee, 19 Ill App 3d 374; 311 NE2d 194 (1974), affirmed, 61 Ill 2d 168; 334 NE2d 131 (1975), quoted in North Cherokee, supra.

¹⁹ DeMarco v Palazzolo, 47 Mich App 444; 209 NW2d 540 (1973).

²⁰ 28 Mich App 295; 184 NW2d 297 (1970).

²¹ Id., at 296.

²² Supra.

²³ Beverly Island Association v Zinger, supra.

²⁴ Joseph L. O'Connor, et al, v Custom Resort Builders, Inc., et al, Court of Appeals Unpublished Opinion #189691, April 11, 1997, Antrim Circuit Court Case No. 94-006261-CH.

²⁵ 126 Mich App 151; 336 NW2d 778 (1983).

²⁶ Id., at 156, 157.

²⁷ Id., at 158.

²⁸ 146 F Supp 896 (ED Mich, 1956).

²⁹ Id., at 899.

³⁰ Id., at 901.

³¹ Formerly known as the Subdivision Control Act, MCL 560.101, et seq.; MSA 26.430(101), et seq.

³² 225 Mich App 196; 570 NW2d 294 (1997).

³³ MCL 560.104 requires that a “replat of all or any part of a recorded subdivision plat may not be approved or recorded unless proper court action has been taken to vacate the original plat or . . . all the owners of lots which are to be part of the replat agree in writing . . . “

³⁴ Brookshire, supra, at 201.

³⁵ 173 Mich App 560; 434 NW2d 192 (1988).

³⁶ This decision was based on a definition of “subdivision” under the prior Act. Section 102(d) presently states that “division does not include a property transfer between two or more adjacent parcels, if the property taken from one parcel is added to an adjacent parcel . . . “

³⁷ Eyde Construction Company v Charter Township of Meridian, et al, 149 Mich App 802; 386 NW2d 687 (1986).

³⁸ 454 Mich 200; 560 NW2d 336 (1997).

³⁹ Id., at 211.

⁴⁰ Id., at 212, 213.

⁴¹ 224 Mich App 203; 568 NW2d 378 (1997).

⁴² Id., at 206.

⁴³ This was reported in the first reported decision, Webb v Smith, (after remand) 204 Mich App 564; 516 NW2d 124 (1994).

⁴⁴ Webb, 224 Mich App 203; 210 & 211.

⁴⁵ Id., at 211. [NOTE: The term, “negative easements” used in the Webb, supra, and Cooper, infra, opinions should be deemed synonymous with “restrictive covenants.”]

⁴⁶ Id. at 211, quoting Cooper v Kovan, 349 Mich 520, 530; 84 NW2d 859 (1957).

⁴⁷ Webb, supra, at 212

⁴⁸ Id., at 213.

⁴⁹ Id., at 214.

⁵⁰ Court of Appeals Unpublished Opinion #200746, March 6, 1998, Lake Circuit Court Case Number 95-003900-CH.

⁵¹ The Debois Court then quoted Webb v Smith (after remand), supra, at 570.