Deed Restrictions In Michigan

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I. Overview

This article is a companion to the author's 1998 article, ***Restrictive Covenants in Michigan***[1], which provided a general background on the law and application of restrictions in conveyancing instruments and other documents recordable or otherwise effective against real property. This article reviews a selection of recent Michigan cases, both published and unpublished, representing a variety of legal and equitable concepts affecting deed restrictions and other limitations on the use or development of Michigan real property.

In order to assist the advocate, as well as discern current trends of the Michigan judiciary, the cases are organized into categories where the court enforced the restrictions, or determined that the restrictions as presented were partially or wholly avoidable. They are further arranged according to general subject matter.

Also considered are the condemnation cases, *Kelo v City of New London*[2] and *Wayne County v Hathcock*[3] and their effect on related deed restrictions.

II. Enforcing Deed Restrictions

A. Right of First Refusal

Randolph, et al v Reisig, et al[4] This case involves the enforceability of a right of first refusal to purchase adjacent lake front property in Newaygo County being offered for sale. The court of appeals concluded that the express and unambiguous terms of the property owner's agreement directs that the right runs with the land and binds the owners and their heirs, successors, representatives and assigns. The court found that the text of the agreement did not render the option ambiguous, and that a renewal provision did not transform the agreement into one of indefinite duration. This was relevant in part because the defendant claimed that the rule against perpetuities applied. The court found that the rule concerns rights of property only, and because an option contract did not create any interest in land, the rule against perpetuities was inapplicable.

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B. Construction without approval

Pointe Rosa Homeowners Association v Cicchini[5] This case concerns restrictive covenants involving a waterway in Macomb County. The defendant installed three pilings in the canal leading to Lake St. Clair that ran alongside his lot without first seeking or obtaining approval from the homeowners association. The plaintiff alleged a violation of the subdivision covenants and sought removal and an injunction. Negative covenants restricting land use are grounded in contract, and are valuable property rights. Enforcement is construed in light of the "general plan under which the restrictive district was platted and developed." The court referred to dictionary definitions for assistance in interpreting the restrictive covenants, and particularly the term "boathouse." The defendant testified that the three pilings constituted the first step of a fourteen piling structure that would not be covered, but would store watercraft. The court found the defendant violated the restrictive covenants by, in part, beginning construction without first obtaining written approval from the plaintiff.

Lauren Hills Home Owners Improvement Ass'n, et al v Kokko[6] This case from Oakland County shows the risks of ignoring deed restrictions. Mr. Kokko decided to build a detached two-car garage, despite express limitations in his subdivision's deed restrictions that any garage was to be attached to the residence. His reasoning was the belief that the homeowner's association had waived the right to enforce such restrictions since it had over the years allowed other detached buildings like sheds and playhouses, of varying sizes, to exist despite those also being prohibited by the restrictions. In fact, the association told Mr. Kokko that he could build a smaller detached storage shed. But construction of the garage commenced and after being sued by the association, the defendant convinced the trial court to dismiss the case. The court agreed that the association had indeed waived its right to enforce the deed restrictions "by failing to restrain other lot owners in the subdivision from erecting similar structures." The court of appeals reversed. The appellate court reasoned that the character as well as the number of claimed violations needed to be considered in determining whether the complaining property owners had waived or forfeited the benefit of the restriction. The court fund that "[e]ven after one or more breaches, equity will grant relief if the restriction can be shown to be of value to complainant, and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood." The court reviewed several Michigan cases on the topic, before revisiting the facts of the instant case and pointing out that while the association may have allowed sheds and other smaller structures of a temporary character, it had consistently refused to allow the construction of larger detached garages of a permanent nature like the defendant's. The court reversed the trial court, and remanded for entry of an order expressly requiring Mr. Kokko to raze the detached garage he just finished.

Village of Hickory Pointe Homeowners Ass'n v Smyk[7] This is another case where the home owners built at their own peril. Mr. and Mrs. Smyk constructed a backyard deck on their property in Washtenaw County. They initially submitted their plans for approval, but the plans did not meet the association's specifications.

Specifically, the Smyk's plans called for the deck railing to be connected to the deck floor around the perimeter, but the association wanted a clearance of some inches between the floor and the bottom of the railing. The Smyk's built anyway, and the association sued. On cross-motions for summary disposition, the trial court dismissed the case, finding that while the Smyk's indeed violated the subdivision covenants which gave the architectural committee sole and exclusive discretion to approve or disapprove virtually any plan or design, the breach was "*de minimis*", a technical violation without substantial injury to plaintiff. On appeal, the court of appeals reversed, and remanded for entry of judgment in favor of the plaintiff. Under Michigan law, a covenant is a contract, and a valuable property right. The court confirmed that, "[A] breach of a covenant, no matter how *de minimis* the damages, can be the subject of enforcement…If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the court to interfere by injunction." And, to make matters worse for the defendants who had to re-work their deck, the subdivision covenants also provided that any party successfully suing to enforce the covenants may also recover damages, including attorney fees and costs. The court awarded the association recovery of all of its reasonable attorney fees and costs from the Smyk's.

C. Amendments

Kamphaus, et al v Burns, et al[8] This case considers enforcement of size and placement restrictions regarding single family residences in a subdivision near Lake St. Clair in Macomb County. The original restrictions, created and recorded in 1943, were applicable to all ninety lots in the subdivision (including lot 47 at issue) and involved height and setback requirements. They were binding on all parties and ran with the land until 1975 when they would be automatically extended unless a majority of the then owners voted otherwise. Despite this restriction, they were amended in 1947. In 1975, the restrictions were expanded, purportedly by the required majority, adding prohibitions against "obstruction of the lakeward view of…abutting property owners" with screens, fences, buildings or pools. The defendants bought lot 47, razed the existing house, and built a house without obtaining approval of the plans from the association, and allegedly in violation of the restrictions. The suit which followed from the association was dismissed by the trial court which agreed with the defendants that the restrictions were not enforceable, in part because they had allegedly been improperly amended and therefore rendered invalid. The appellate court reversed. It concluded that the admitted evidence, while incomplete, suggested that the restrictions may have been effectively amended if all the owners of the lots voted in favor of the changes. The court worked through a thoughtful analysis of the history of the amendments, ultimately remanding the case with instructions. The significance of the case is the reminder that recorded restrictions may be effective despite questionable amendments.

Maatta, et al v Dead River Campers, Inc.[9] The plaintiff's owned lots in a subdivision in the Upper Peninsula's Marquette County where most buyers had for many years maintained "camps" or cabins on the land under license from the previous owner. The defendant was the new corporate association, and retained ownership of

lot 4 which had been used as a public access site, including a concrete boat ramp, pit toilets, and a parking lot. After experiencing numerous problems with excessive public use, the plaintiff's unsuccessfully tried to pass a shareholder resolution closing the site. The plaintiff's then sued and sought a permanent injunction against public access to lot 4, claiming that it violated restrictive covenants limiting the use of lots in the development to "single-family residential purposes and incidental recreational uses", and also forbade activities that were offensive, annoying, or created a nuisance. The plaintiff's successfully obtained a temporary injunction closing lot 4. In response, defendant drafted, and passed, a resolution that exempted lot 4 from the covenants at issue. After a bench trial, the court agreed that the resolution exempted lot 4 from the covenants, and that the "fair thing to do" would be to deny plaintiff's the relief sought. The court of appeals reversed. The court found that it was impermissible to amend by majority vote the restrictive covenants to remove restrictions from one lot while leaving them in tact for the remaining lots. "The mutuality of restrictive covenants would be destroyed if we were to allow the majority of owners, who might not be adversely affected because of their insulated location in the subdivision, to authorize offensive consequences for the minority by removing or imposing restrictions only on certain lots within the minority's areas." The court observed that lot owners have a right to rely on the restrictions, that all owners are bound equally. The court held that any non-uniform covenant amendments require the unanimous consent of the affected property owners.

Dean v Hanson, et al[10] Plaintiff subdivided a 20-acre parcel of land in Washtenaw County into five parcels. Parcel A consisted of approximately 10 acres, and the remaining lots B through E were approximately 2.5 acres each. The survey showed Parcel A contained a 7-acre easement for "common usage." Parcels D and E were sold to the defendants. A dispute arose when plaintiff decided to further subdivide the remaining three parcels he owned, including the land in Parcel A reserved for "common usage." The defendants recorded a claim of interest against this area, resulting in plaintiff's lawsuit. The complaint alleged various violations by the defendants of the building and use restrictions. (The case provides a good overview of recent Michigan case law interpreting and applying judicial treatment of deed restrictions.) The defendants counterclaim for a declaratory judgment barring the plaintiff from constructing more than one residential structure on the remaining lots, and barring the development of the area of "common usage" through the doctrine of reciprocal negative easements. Both the trial court and the court of appeals found for the defendants. A grantor of restrictions is not free to modify those restrictions once others have purchased a portion of the restricted property. The court found, "even with the knowledge that deed restrictions can be amended, lot owners have a right to rely on those restrictions in effect at the time they embark on a particular course of action regarding the use of their land, and subsequent amended deed restrictions should not be able to frustrate such action already begun." As to the plaintiff's claims, the court dispensed with them through an analysis of the three equitable exceptions to the strict enforcement of property restrictions fashioned by Michigan courts: 1) technical violations and absence of substantial injury, 2) changed conditions, and 3) limitations and laches.

Remsing v Hackney, et al[11] This case comes from Eaton County where the plaintiff, Mr. Richard W. Remsing, sued his subdivision homeowners association for an accounting and for violation of certain deed restrictions. After discovery, the defendants moved for summary disposition on the basis that the offending covenants and restrictions had been amended and plaintiff could no longer allege non-compliance. The defendants argued, and the trial court apparently agreed, that the amendments "clarified" the drafter's intent regarding certain restrictions, rendering plaintiff's case moot. The court of appeals disagreed. Because deed restrictions are grounded in contract, they cannot simply be "clarified", particularly without the involvement of the developer to explain his intent when they were drafted. The court found that what actually occurred was an "amendment" to the deed restrictions. And even though the defendants obtained approval for amending the restrictions from over eighty (80) percent of the lots as required by the covenants, they did not actually record those changes in an instrument, as also required by the restrictions. So, the court of appeals deemed them ineffective, reversed the summary disposition, and remanded the case for further proceedings.

D. Conflict with Code

Benz, et al v Pittsfield Charter Township[12] Mr. and Mrs. Benz sued the Township alleging that the defendant violated their rights and the law by enforcing a covenant in their deed restricting their property in Washtenaw County to residential use and a limited density of homes. The plaintiff's claim that the developer placed the restrictive covenant in its deed to the plaintiff's as a condition to the defendant's approval of the developer's planned unit development for a shopping center. The plaintiff's argued that the Township Zoning Act (repealed, now Zoning Enabling Act, Public Act 110 of 2006, MCL 125.3101, et seq.), did not specifically allow restrictive covenants and their use as zoning tools improperly circumvents procedural protections. The court disagreed. Under the old act (and continued in the new act) the Township has "vast conditioning authority" and an otherwise reasonable and related condition is not rendered invalid simply because it burdens property outside the PUD's bounds.

Bloomfield Estates Improvement Association v City of Birmingham[13] This dispute involved lot 52 of the Bloomfield Estates subdivision in Oakland County where the city of Birmingham was attempting to develop an off-leash dog recreation area (dog park). The plaintiff association sought to enjoin the dog park as a violation of a deed restriction recorded in 1915 where each lot was to be used for strictly residential purposes. In 1928, Bloomfield Township purchased the subject lot as part of a voter approved plan to include the property in its park land. Years later, the property was conveyed to the City of Bloomfield Hills, and later to the defendant via quit claim deed which included the reference "subject to the building and use restrictions of record." In the following years, although efforts were apparently directed to removing the restrictions, there was no evidence in the record that the deed restrictions were ever formally removed. In 2004, the defendant fenced off a portion of lot 52 pursuant to the dog park project and the plaintiff sued to enforce the deed restriction. The trial court found for the city, determining that the deed restriction was not violated because a dog park was

consistent with both a residential use and the defendant's zoning ordinance. The court of appeals reversed for the plaintiff. It confirmed that restrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument. Unambiguous restrictions are enforced as written. The court of appeals found the trial court erred as a matter of law by considering the defendant's zoning ordinance. The deed restriction contained no language indicating any intent to define residential purposes based on a municipalities permitted uses. The defendant could not affect the operation of a restrictive covenant through a definition in a zoning ordinance. "To so consider it would be to permit the legislative authority of the city to impair the obligation of the contract entered into between the parties to the conveyance." The court found that read in context and as a whole, the intent of the deed restriction was to ensure that lot 52 would be used only for a single family to live on. Some amount of deviation from that use is permissible where it is primarily being used for residential purposes and the deviation is incidental and harmless. In this case, the manner in which lot 52 was being used was clearly not a residential purpose, and it was irrelevant whether other lots or lot owners in the subdivision were harmed thereby. However, finding the deed restrictions applicable and that defendant was in violation of them did not end the court of appeals inquiry. It further concluded that the generations involved had clearly acquiesced in the defendant's use of lot 52 as part of a municipal park. To that extent, equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use. But, "plaintiff is only estopped from challenging the use to which it has acquiesced because estoppel can go no farther than the consent." Consequently, the plaintiff may not challenge the general use of lot 52 as a park, but may challenge the use of lot 52 as a dog park.

E. Waiver/Change of Circumstances

Matthews, et al v Winstanley, et al[14] The parties all lived in a subdivision adjacent to Woodward Avenue in Oakland County. The plaintiffs filed an action for declaratory relief to invalidate a deed restriction limiting their property to residential usage. The defendants filed a counterclaim seeking to enforce the same restriction. The plaintiffs complained that the expansion of Woodward Avenue created such extensive change in the character of the neighborhood in which the subdivision is located that the original purpose of the deed restriction cannot be achieved. The trial court granted the defendants summary disposition of the plaintiffs' complaint, and the court of appeals affirmed. Restrictions for residential purposes are particularly favored by public policy and are valuable property rights. The court adopted analyses from earlier cases where the fact that substantial changes in the character of the neighborhood outside the subdivision took place did not make it inequitable to enforce the restrictions. Although Woodward Avenue has changed substantially since the lots were platted, the plaintiffs did not show that their subdivision had been substantially eradicated. They could not show that their lots have been rendered unfit for residential use due to excess noise, traffic, dust or other harmful conditions resulting from increased commercialization or expansion of the road.

Tottis, et al v Dearborn Hills Civic Association, Inc, et al[15] This case involves the doctrine of waiver applied to restrictive covenants. The plaintiffs purchased a vacant lot in a subdivision in Wayne County burdened by two deed restrictions. The first restriction would prohibit plaintiffs from building any structure on the lot because it was not one entire residential lot as platted, but instead a split lot. The second restriction would prohibit the placement of plaintiffs' garage as indicated in the architectural plans. The plaintiffs sued, claiming the character of the neighborhood had changed in a manner that indicated the residents had abandoned the deed restrictions. The trial court found in favor of the defendants and permanently enjoined the construction of any structure on plaintiffs' vacant lot. The court of appeals reversed. It reviews equitable actions *de novo*, and further considers the findings of fact by a trial court sitting without a jury under the "clearly erroneous" standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. In this case, the court of appeals found the evidence established that the character of the neighborhood intended and fixed by the restriction had changed. Because there was no record of the defendants ever insisting on compliance with the deed restriction, and because the plaintiffs would be damaged if defendants were now allowed to enforce the restriction, the court found that defendants had waived any right to enforce the restriction. "The right to enforce a restrictive covenant may be lost by waiver if, by one's failing to act, he leads another to believe that he will not insist upon the covenant and the other is thereby damaged. However, where variations from deed restrictions constitute minor violations, the concept of waiver does not apply. There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." There was an extensive dissenting opinion which disagreed that the evidence showed that the neighborhood had changed, or that the trial court's factual findings were clearly erroneous. On appeal to the Supreme Court, the Court agreed with the dissenting view and reversed, reinstating the opinion and order of the trial court. The Court agreed that the trial court's conclusions the neighborhood had not undergone extensive changes was not clearly erroneous. There was no waiver of restrictions where the character of the subdivision had not been so altered as to defeat the original purpose of the restrictions.

F. Equity/Public Policy

Stevens, et al v Great American Title Company, Ness, et al[16] This case involves the application of the doctrine of equitable servitudes to enforce deed restrictions against new purchasers. The plaintiffs owned two adjacent parcels of land with frontage on Lake Angelus in Oakland County. In 1995, the Stevens' sold one of their parcels to Carpenter, the defendants' predecessor in interest, on land contract and executed a warranty deed conveying the property to Carpenter. However, the parties regarded this as only a partial closing because those documents did not reflect the intent of the parties and some changes were necessary. In early 1996, Stevens and Carpenter executed an addendum to the land contract which provided for more restrictive building limitations on the parcels sold than what was provided for in the deed. The deed was never amended. After they bought the property, the Nesses attempted to avoid the

deed restrictions claiming that the doctrine of merger precluded enforcing restrictions not memorialized in the deed. Both the trial court and the court of appeals disagreed. Both courts found that the doctrine of equitable servitudes was applicable to the facts of this case. "Equity will enforce a lawful restrictive agreement concerning land against a person who takes with notice of the contract. In such a case, the person violating the agreement, though not a party to it, is a privy in conscience with the maker." The court found that despite no proof of actual notice (defined by the court as actual possession of the land contract addendum) the evidence suggested the Nesses had sufficient constructive notice of the restrictions to determine they were enforceable against them.

Terrien, et al v Zwit, et al[17] The Michigan Supreme Court held that covenants restricting family day care homes in Muskegon County did not violate Michigan public policy and were enforceable. It reversed the decisions of the circuit court and the court of appeals, as well as several other published and unpublished cases on the topic. The Supreme Court concluded that a covenant barring any commercial or business enterprises was broader in scope than a covenant permitting only residential uses. The Court found significant the fact the restrictions at issue not only prohibited commercial or business activities, they also prohibited the mere storing of any equipment used in such activities. The Court found this a strong and emphatic statement of the restrictions' intent to prohibit any type of commercial or business use of the properties. The Court was not persuaded by an argument that "public policy" was in favor of such uses. It found that making social policy is a job for the legislature, not the courts. The majority quoted Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison* that the duty of the judiciary is to assert what the law "is," not what it "ought" to be. The court distinguished prohibitions such as racial covenants which would be clearly unenforceable. "It is not the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable upon a detached judicial view. Rather, absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." Again, the court felt such a decision should come from the legislature, not the judiciary. Both Justice Kelly and Justice Weaver authored separate dissenting opinions.

Lakes of the North Association v Twiga Limited Partnership, et al[18] This dispute involved lots in a resort subdivision in Antrim County which were sold by the state at tax sale. The plaintiff was the purchaser and refused to pay the post-tax sale assessments arguing the lots were no longer subject to the assessment because when title vested in the state, all encumbrances were extinguished pursuant to MCL 211.67. The trial court, court of appeals and Michigan Supreme Court all disagreed. The Court concluded that the term "encumbrance" as used in MCL 211.67 is ambiguous and judicial construction is appropriate. The Court analyzed the historic reasons for canceling past due taxes, assessments, and liens against foreclosed property, and concluded that restrictive covenants, especially those pertaining to residential use, enhance and preserve the value of real estate. "Preservation of property value will facilitate, not impede, the objective of the tax statute to restore the property to the tax rolls. Destruction of such covenants following a tax sale reduces the value of the property, and perhaps the other

properties within the community, because land owners would not longer be able to preserve its planned character. Planned unit developments are a modern trend in residential living. Deed restrictions and covenants are vital to the existence and viability of such communities, and if clearly established by proper instruments, are favored by definite public policy." The Court felt that the legislature did not intend to cancel such restrictions and covenants in the event of a tax sale. Finally, MCL 211.78k states that "all existing recorded and unrecorded interests in that property are extinguished, except a visible or recorded easement or right-of-way, private deed restrictions . . . , or other governmental interests." This was further confirmation that the restrictive covenants and covenants to pay association assessments were private deed restrictions not intended by the legislature as covenants to be canceled by a tax sale.

O'Connor, et al v Resort Custom Builders, Inc, et al[19] This case involves the enforcement of restrictions against interval ownership (time shares) of resort property. The Michigan Supreme Court reversed the court of appeals, finding such restrictions enforceable. The property is the Shanty Creek Resort in Antrim County. The restrictions require that no lot be used except for residential purposes, and occupied by not more than one family for residential purposes. The defendant constructed a home in the restricted subdivision and marketed "interval ownership" shares in the home. The plaintiff association sued to enjoin the sales, and the trial court granted that injunction. The court of appeals reversed, reasoning that the law favors the free use of property and deemed interval ownership not incompatible with "residential purposes." The Supreme Court disagreed. The Court reviewed the historical importance of restrictive covenants, and the fact that the resolution of any dispute must focus on the activity involved and how it parallels the ordinary and common meaning of use for residential purposes. The Supreme Court had never considered whether a residential-purposes restriction barred interval ownership or time sharing. It reviewed governing principles in previous opinions which seemed to be premised on two essential principles. That is, owners of land have broad freedom to make legal use of their property, and courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied. The Court recognized the necessity of deciding such matters on a case-by-case basis. Ultimately, the Supreme Court adopted the reasoning of the trial court which compared an owner's expectation and right to leave their belongings in a "residence," as compared to a time share participant who had to remove their belongings at the end of their weekly occupancy because someone else was coming in behind them. There was no permanence to their presence, either psychologically or physically. Accordingly, it was not "residential" within the definition of the restrictions. The Supreme Court further concluded that the plaintiffs had not waived the use restriction by allowing short term rentals, which they agreed was different in character to interval ownership.

G. Privity/Standing

Ronan, et al v Hofmann, et al[20] This case involves neighboring owners of property in the Arlington Heights subdivision in the city of Petoskey, Emmet County. At issue are recorded deed restrictions which limit the development of the plaintiffs'

property. The plaintiffs purchased several lots which included a recorded restriction that "no one shall built" or cause to be built any structure on any of the lots "that would tend to obstruct the view on the west side of said lots." The Ronan's sold one of the lots to one of the defendants. When the plaintiffs attempted to sell the remaining lots, the defendants informed the plaintiffs that they were enforcing the deed restriction regarding view that affected all of the lots. In the ensuing litigation, the trial court granted the defendants dispositive motion, concluding that sufficient privity existed with the original owners and that the property was intended to benefit from enforcement of the building restriction. The plaintiffs argue, in part, that the restrictions did not run with the land, but were rather a covenant personal to the original grantor and grantee 50 years ago. Both the trial court and the court of appeals disagreed. They found that the restriction was indeed related to the land, and not a personal covenant. The court felt it concerned the occupation and enjoyment of the property, passed with ownership, and was related to acts to be done or permitted with regard to the land or the estate conveyed. The court also found that because the restriction appeared in the recorded chain of title for both the grantor and grantee that the plaintiffs had constructive notice of it. The reference in the restriction that "no one shall build" was further confirmation that the restriction was not a personal one. The court disagreed that the plaintiffs were entitled to relief on the basis of a reciprocal negative easement, nor was the court persuaded that conditions at the property had changed the circumstances to render the restriction no longer enforceable.

III. Avoiding Deed Restrictions

A. Conflict with Code

McCabe et al v Horizons Unlimited, Remsing[21] Another case involving Mr. Remsing from Eaton County, this time as a defendant, involving signage in a residential subdivision. The defendant homeowner owned a home in a subdivision with deed restrictions against placing certain business signs within the subdivision. Mr. Remsing ran his real estate business out of his home and persisted in placing his business signs and brochures on his property, and on a trailer stored on the street in front of his house. Based on an interpretation of the relevant deed restrictions, the trial court enjoined certain activity, including the trailer sign and Mr. Remsing's home address sign which had the home numbers inscribed on a large wooden display suspended behind his mailbox from a stand made of PVC piping. The court of appeals affirmed all the trial court's ruling's except the trailer sign. The court of appeals noted that a local ordinance required that signs on trailers be imprinted with the owner's name and address for purpose of identification. Because this statutory requirement is incompatible with a covenant that prohibits placement of a sign on a trailer, that specific aspect of the deed restrictions was against public policy. "Contracts founded on acts prohibited by a statute, or contract in violation of public policy, are void."

B. Amendments

Slatterly, et al v Madiol, Shorewood Association, et al[22] This case involved neighbors holding lots in a community of summer homes in Saugatuck, Allegan County, and a dispute over the use of a driveway area. The plaintiff's had for years parked on the disputed space in exchange for access over a walkway on their lot leading to the beach. When the Madiols moved to the neighborhood and acquired the lot adjacent to the parking area, their survey disclosed that a portion of the disputed area was on their lot. Eventually, the Madiols informed the Slatterlys they could not park on their property, and placed a pile of landscaping timbers and sand on the disputed area which was "landscaped" into a barrier against any vehicle accessing the area. Soon thereafter, the Shorewood Association, (the owner of all the lots), amended the bylaws to include a provision requiring prior approval for a number of landscaping projects, including the building, removal or barrier of roads or driveways. The amendment also stated that any structure erected without the Board's prior approval "shall, in the sole discretion of the Board of Directors, constitute a nuisance and shall be subject to removal by the Board of Directors" in any manner they deem proper, at the stockholder's expense. Lawsuits ensued between many parties with multiple theories for relief. In pertinent part, the trial court deemed the amendment of the bylaws effective and ordered the Madiols to remove their barrier. On appeal, the appellate court reversed in favor of the Madiols. In part, the court found that the language of the amendment contained no manifestation of intent to effect retroactive application. The word "shall" in a statute indicates a prospective operation unless accompanied by other words indicating a contrary intent, and the court found no such words in the amendment.

C. Interpretations/Definitions

Darnell, et al v Garett R. Kern Construction, Inc. et al[23] This case involves a plaintiff homeowner upset because he perceived a "modular home" being built in his Washtenaw County subdivision when he saw four square boxes on trailers parked on the defendant's lot. The restrictive covenants clearly prohibit "modular homes" and in fact the developer of the subdivision expressly rejected a purchase agreement with language about building a modular home. The defendant's real estate agent then replaced the phrase "modular home" with the phrase "systems built home". Nothing else changed. This time, the agreement and plans were approved by the developer. The court found that the deed restrictions gave the developer "sole and exclusive" authority to approve construction plans and whether they fit within the restrictions. In reviewing the language of the restrictions, the court also noted that the term "modular home" was not defined. Consequently, the defendants were entitled to rely on whatever definition the developer gave the agreement, and his subjective approval was a confirmation that the plans complied with the restrictions.

Ribick, et al v Inverrary, et al[24] This decision involves a group of homeowner's suing to enforce deed restrictions that require, among other things, that "no building" other than "one detached single family dwelling" shall be erected upon any "lot" within this Oakland County subdivision. The plaintiff's were concerned because the plat

included a 6.5 acre lot identified as "Outlot A", a piece which had been separately reserved in the plat and in 1976, conveyed from the developer by warranty deed to Oakland County for the purposes of providing a site for county water system pumping facilities with the stipulation that once it was no longer used for that purpose, the land would revert to the developer or its heirs or assigns. Over time, the homeowner's association had maintained the parcel, and improved it with a baseball backstop and basketball court. In 2003 the County reconveyed Outlot A to developer's estate after the pumping facilities were abandoned. The estate then conveyed the property to the defendant for the purpose of developing a site condominium project with ten separate single family sites and a public road between the plaintiff's properties. The plaintiff's sued to enjoin the sale and intended use. Both the trial court and court of appeals held for the defendant. They found that Outlot A was specifically reserved as an easement, separate and apart from lots 1 through 41. The restrictions for single family detached homes only applied to the lots. The court held that, "[b]ecause it is improper to enlarge or extend the meaning of a restrictive covenant by judicial interpretation when there is no ambiguity present…we will not infer restrictions that are not expressly provided for in the controlling document." The court also disagreed that the doctrine of reciprocal negative easements applied because there were no facts to show any intent that the common grantor of the properties intended that Outlot A ever be treated the same as the other platted lots. Simply, these deed restrictions were avoided because they did not apply.

Soden, et al v Lakes of the North Association[25] The plaintiff's were some of the 8,028 lot owners in an Antrim County subdivision who sued the defendant owner's association over special assessments and the manner in which the votes for the assessments were obtained. The covenants required a quorum of 60 percent of all voting Members by proxy or in person. 30 days advance notice was required. The covenants allowed the board to call another meeting if the quorum was not attained at the initial meeting. The quorum requirement at any subsequent meeting would be reduced by one-half the number at the preceding meeting. Because 4816 votes would be needed to meet an initial quorum, which the defendant believed was "unattainable", the defendant gave just one 30 day notice which declared that an indefinite number of successive meetings on September 4th would occur beginning at 9:00am until quorum was met. At the initial meeting, only 1721 votes were represented. After a series of adjournments, just three "meetings" were required to achieve a quorum and approve the assessments later the same day. The trial court found that the defendants' interpretation of the notice requirements in the covenants were met and granted summary disposition in favor of defendant. The court of appeals reversed, agreeing with the plaintiff's that the quorum and notice requirements required the defendant to call and notice another meeting after the initial meeting failed to meet quorum, subject to fresh notice requirements rather than the procedure used by the defendant. The court recognized its authority to read the covenants "as a whole to give effect to the ascertainable intent of the drafter." As such, the court concluded that defendants' interpretation was "strained and overly technical" and effectively nullified the substance of the quorum requirement. A dissenting judge supported the trial court's decision,

finding that the majority read a "sequence" requirement into the covenants which he did not believe existed.

Dunham Lake Property Owners Ass'n, et al v Baetz, et al[26] The defendants owned property in the Dunham Lakes Estate South subdivision in Livingston County. On the same lot where they built their residence they constructed a detached, enclosed structure approximately ten feet by twelve feet which was used primarily for storing lawn equipment. It had been characterized as a "building", "a storage building," and an "outbuilding." The plaintiff sued the defendants alleging a violation of the deed restrictions and seeking the removal of the "outbuilding." The trial court denied the relief requested and granted judgment to the defendants. The trial court opinion discussed in detail the inconsistencies in the plaintiff's interpretation of the deed restrictions, specifically regarding the definition of "building." The trial court did not expressly find that the defendants' structure was a building. Rather, the trial court found the evidence justified the application of various equitable defenses, including estoppel. The court of appeals affirmed. The court felt that the plaintiff had not carried its burden of proof to establish a violation of the restriction that no "building" other than a single-family dwelling and a garage may be constructed. "Courts will not grant equitable relief unless there is an obvious violation." The term "building" was not defined in the restrictions. Apparently, the evidence taken from the plaintiff's witness created so many inconsistencies, and suggested so many examples of other "buildings" that the plaintiff had allowed that were not dwellings or garages, that the court did not believe strict enforcement of the covenant was contractually required or equitably appropriate.

Schoenherr, et al v Vernier Woods Development, LLC, et al[27] The residential parcels at issue are all part of the Pine Woods, a group of four parcels comprising the Lothrop subdivision in the City of Grosse Pointe Farms, Wayne County. They are bordered on the east end by Lothrup Road and on the west end by Charlevoix Road. They were platted in 1949 and conveyed with common deed restrictions. Each parcel was subsequently developed so that the homes, all of a contemporary design, were built on the east side of the parcels with the west side left in a natural wooded state. After purchasing one of the parcels, defendants razed the existing home and obtained preliminary approval from the city to divide the parcel into two home sites. The plaintiffs' sued for injunctive relief and a declaration which would preclude the defendants' development on the bases it violated deed restrictions and a general plan of development. The trial court held in favor of the plaintiffs, enjoining the defendants' construction plans. The court of appeals reversed. The court concluded the deed restrictions did not expressly prohibit dividing defendants parcel into two building sites, or limiting construction of the home to the east end of the parcel, or to a contemporary design. However, the court did agree that the deed restrictions expressly preserved the plaintiffs' right to enforce the restrictions obligating the defendant to seek approval of all construction plans, in a reasonable manner. Further, the court found no basis to conclude that a reciprocal negative easement barred defendant's development plan. The evidence did not show a scheme of restrictions imposed on the defendants parcel. "A reciprocal negative easement cannot be created retroactively by mutual agreement among common land owners to act in a certain way. Reciprocal negative easements

arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner." The court felt that the commonalities of the other parcels merely reflected the choices made by the original purchasers.

D. Mineral Rights

The Mable Cleary Trust v The Edward-Marlah Muzyl Trust, et al[28] This case involves mineral rights and the ability to exercise them in proximity to restrictive covenants affecting surface lands in Otsego County. The Otsego Ski Club sold land to a developer. The ski club retained an undivided fifty percent interest in the mineral rights. This interest was severed over a year before restrictive covenants were recorded against the surface lands. The court confirmed that the ski club's interest was not burdened by the covenants. "[O]nce a person's mineral rights have vested through the proper conveyance, no subsequent conveyance of or restriction placed on the surface estate will affect the mineral owner's rights."

E. Waiver/Change of Circumstances

Becker v Richards, et al[29] This case involves the plaintiff's failed effort to enforce what he viewed to be a negative reciprocal easement. Both plaintiff and defendants live in single family dwellings in a residential neighborhood along the northeast shore of Duncan Lake in Barry County. They live across the street from each other, in different plats created by the same developer. They also both own property in the other's plat, and also land in unplatted property abutting the backline of their respective property in one of the subdivisions. The suit was filed when plaintiff objected to the defendant's attempts to construct a pole barn upon the parcel defendant's owned in the unplatted land, and which was also not adjacent to the defendant's residential parcel. The plaintiff claimed the proposed pole barn violated the restrictive covenants affecting the subdivision he lived in which required the lots to be used for residential purposes. The trial court took much testimony, including an affidavit from the wife of the developer which seemed to support the plaintiff's argument. But the court also gained an understanding of how all the parties in the area used their property, including residential purposes, access and storage. Ultimately, the trial judge felt "it's just not common sense" for the defendants to be denied the ability to use their land as they intended, and rendered a judgment of no cause of action on plaintiff's complaint. The court of appeals affirmed. The appellate court, in a lengthy opinion, found that although it is settled law that owners of property may invoke a court's jurisdiction for even *de minimis* violations of restrictive covenants, "whether to grant relief is still within the discretion of the trial court." Negative covenants in deeds are construed strictly against the grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. The court found the facts of this case significant. The two subdivisions were platted by common grantors essentially comprising one residential neighborhood. Subdivision residents on the non-lake side of the road freely use or intend to use adjoining property outside the subdivision for pole barn storage. Under these circumstances, like the trial court, the appellate court concluded it was illogical to conclude the defendants proposed use of a pole barn is not also a residential use

incidental to their single-family dwelling on the lakeside of the road. In fact, the court found that even if plaintiff's interpretation of the restrictive covenants was correct and a pole barn had to be located on a lot with a supporting residential dwelling, that the plaintiff had waived strict compliance with that restriction.

Marino, et al v Grayhaven Estates Limited, Ltd, LLC, et al[30] Plaintiffs sought to enforce certain deed restrictions in the Grayhaven development along the Detroit River in Wayne County. The conflict involved interpreting and applying the 1926 deed granted by the original developer, and certain waivers of "all" deed restrictions in 1974 granted by the plaintiffs' predecessor in title. There was no dispute that the waiver included restrictions on single family residences, but the plaintiffs' claimed the 1974 waiver did not also include restrictions related to the road and the lagoons. The court of appeals reversed in favor of the defendants. The court found that in Michigan, "building" restrictions can include "use" restrictions. Because these terms are not rigidly defined by Michigan case law, and because "restrictions" was used interchangeably with "restrictions and agreements" in the deed, the court concluded that the intent of the parties to the deed should be construed not to create separate categories but to aggregate all of the limitations. The language of the waiver was unambiguously broad and inclusive. Thus, while pursuant to the waiver the plaintiffs were no longer bound by the restrictions in their own deed, they also lost the ability to force other Grayhaven property owners to adhere to the restrictions. However, the court also found in favor of the plaintiffs to the extent that it remanded the case for further consideration whether defendant's activities overburdened the easement and interfered with the plaintiffs' right to use the reciprocal easements on other property in the subdivision. "An easement holder may not materially increase the burden on a servient estate beyond what as originally contemplated." In a dissenting opinion, Judge White noted a distinction between "restrictions" and "agreements." She would have remanded the case for analysis of whether waiver of the restrictions also included any agreements.

F. Privity/Standing

Neal, et al v Miramichi Utilities, Inc.[31] The plaintiffs were lot owners in the plat of Lake Miramichi subdivision in Osceola County. The plaintiffs commenced the action against the defendant and various governmental defendants seeking revocation of restrictive covenants prohibiting private water wells and requiring payment to defendant utility company for water service. The government defendant was voluntarily dismissed. The trial court held for the plaintiffs and was affirmed by the court of appeals. The subject restrictive covenants indicated that after January 1977, the covenants may be amended or revoked upon the written agreement of at least two-thirds of the lot owners. The defendant objected, arguing basically that if the revocations were granted, and a majority of lot owners sink wells, the defendant would be forced out of business, leaving those lot owners unable to obtain well permits without access to potable water. The court found that defendant was without standing to assert this claim. Public health and safety was not a valid defense to the owner's rights to exercise their ability to agree under the terms of the restrictive covenants because the revocations themselves do not create a threat to public health and safety. The defendants' arguments failed to

produce any evidence other than contingent speculation that some lot owners might be without potable water, thereby violating the subdivision's residential purpose restriction.

G. Equity/Public Policy

Ridgewood Associates v McKinnon, et al[32] This case involves plaintiffs' assertion that defendants' day care operation in Montcalm County was prohibited by restrictive covenants governing use of land in the subdivision. The restrictions generally called for each lot to be used for single-family residences. The trial court granted plaintiffs' motion for summary disposition, but the court of appeals reversed. Although building and use restrictions in residential deeds are favored by public policy, restrictive covenants are construed strictly against the grantors and all doubts are resolved in favor of the free use of property. The court found that operation of a licensed day care home allowing no more than seven unrelated children was a residential use. (MCL 722.111). Although, the Michigan Supreme Court found in *Terrien v Zwit, supra,* that a day care provider who charges a fee for child care services may be involved in a commercial activity that may be barred by a restrictive covenant, the court of appeals in the instant case determined that defendants' day care home was a residential use and not barred by the residential restriction. The court felt the language in the restriction barring custodial use, construed strictly against the proponent of the restriction, was too vague to bar a day care home. The restrictive covenant at issue did not directly bar commercial use. It barred buildings and structures intended for or "modified to" commercial use. The defendants presented evidence that no modifications were made to the four bedroom single family home at issue. The court found the parties to the covenant could reasonably seek to limit the type of structures allowed, rather than to bar commercial activities that do not conflict with the character of the structures.

IV. Kelo v City of New London & Wayne County v Hathcock: What effect of condemnation on the rights of property owners similarly deed restricted?

Consider the example of a large subdivision comprised of lots typically restricted for development and use as single family residences, with additional deed restrictions for assessments related to interests in common areas. Then consider a *Kelo* or *Hathcock* type condemnation by the municipality of only a relatively small part of that subdivision. What are the rights or remedies of the other lot owners in the subdivision far from the property actually taken? Do deed restrictions fail of purpose because of significant condemnation? Do owners of restricted property that is not being condemned have any cause of action or right to damages as a result of the condemnation of other similarly restricted lots in their development?

The Michigan Supreme Court in *Johnstone v Detroit*, *G H & M Railway Co*[33] found:

> [O]wners of property in a subdivision in which, under a general plan, the property is restricted to specified uses, and in which the restrictions are valid, subsisting, and enforceable against the lands in the hands of private

> owners, are entitled to compensation upon the taking of any part of such subdivision for public use in violation of such restrictions; that, aside from nominal damages for destruction of the easement, the compensation is measured by the actual diminution in value of the premises of such owner as a result of the use to which the property taken is put; and that, in determining such diminution, the effect, by way of benefit as well as by way of injury, of such use is to be taken into account.

In *Allen v Detroit*[34], the Supreme Court also found that, "[B]efore [the condemning authority] can use a lot charged with [a deed] restriction for a purpose prohibited by the restriction, it must obtain, by purchase or condemnation, the title of all owners of any interest therein, and, when it has not done so, equity may properly intervene to preserve the *status quo* until such interests are acquired."

Even after *Kelo and Hathcock,* it almost certainly remains true that "restrictions will not be lifted unless the character of the subdivision has changed in such a way as to subvert the original purpose of the restrictions," *Rofe v Robinson,*[35] and even then the covenant holders will have to be justly compensated for their deprivation. *Johnston*[36]. In *O'Connor, supra,* the Court noted that "in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in deeds, nullification of the restrictions has been deemed a great injustice to the owners of property."[37]

Valuation might be difficult since "Michigan courts generally enforce valid restrictions by injunction." *Webb v Smith*[38]. However, just compensation will be the subject of hearings in every case implicating condemnation of land burdened by covenants, where "[o]wners may enforce negative easements regardless of the extent of the owners' damages."[39]

V. Conclusion

The eight years between articles shows consistency in Michigan law. Deed restrictions and covenants clearly established by proper instruments are still favored by definite public policy. The case law confirms that not only will historical reliance on enforced restrictions be protected, but modern trends in residential living such as planned unit developments will be supported and accommodated whenever reasonably possible. The Michigan Supreme Court has generally refrained from interpreting restrictive uses, concluding that disputes of such nature are typically better addressed by the legislature. But as communities wrestle with their evolving power of condemnation, the resultant effect on property owners with affected deed restrictions and covenants will necessarily add to the evolving role of the judiciary.

Endnotes

1. William E. Hosler, *Restrictive Covenants in Michigan* (Michigan Real Property Review, Vol. 25, No. 2, Summer 1998) ©1998.

2. *Kelo v New London*, 545 U.S. 469; 125 S. Ct. 2655; 162 L. Ed 2d 439; 2005 U.S. LEXIS 5011 (2005).

3. *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

4. *Randolph, et al v Reisig, et al*, an uncorrected published opinion of the Michigan Court of Appeals, issued October 3, 2006 (Docket No. 259943); ___ Mich App ___; ___ NW2d ___ (2006); See, also, *Brauer v Hobbs*, 151 Mich App 769; 391 NW2d 482 (1986).

5. *Pointe Rosa Homeowners Association, Inc. v Cicchini*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 5, 2006 (Docket No. 267101); See, also, *Mable Cleary Trust v Edward-Marlah Muzyl Trust, infra*; *Village of Hickory Pointe Homeowners Ass'n v Smyk, infra; Terrien v Zwit, infra*.

6. *Lauren Hills Home Owners Improvement Ass'n, et al v Kokko*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 26, 2005 (Docket No. 253523); See, also, *O'Connor v Resort Custom Builders, Inc., infra*; *Carey v Lauhoff*, 301 Mich 168; 3 NW2d 67 (1942).

7. *Village of Hickory Pointe Homeowners Ass'n v Smyk, et al*, 262 Mich App 512; 686 NW2d 506 (2004); See, also, *Terrien v Zwit, infra*; *Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957); *Borowski v Welch*, 117 Mich App 712; 324 NW2d 144 (1982).

8. *Kamphaus, et al v Burns, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 23, 2005 (Docket No. 261586); See, also, *Sanborn v McLean*, 233 Mich 227; 206 NW 496 (1925).

9. *Maatta, et al v Dead River Campers, Inc.,* 263 Mich App 604; 689 NW2d 491 (2004); See, also, *Ardmore Park Subdivision Association v Simon*, 117 Mich App 57; 323 NW2d 591 (1982); *McMillan v Iserman*, 120 Mich App 785; 327 NW2d 559 (1983); *Hubner v Trowbridge Farms Association*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 16, 2005 (Docket No. 260783).

10. *Dean v Hanson, et al*, unpublished opinion per curiam of the Michigan Court of Appeals issued November 18, 2003 (Docket No. 241317); See, also, *Pyne v Elliott*, 53 Mich App 419; 220 NW2d 54 (1974); *Webb v Smith* (*after second remand*), 224 Mich App 203; 568 NW2d 378 (1997); *Sampson v Kaufman*, 345 Mich 48; 75 NW2d 64 (1956).

11. *Remsing v Hackney, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 12, 2006 (Docket No. 259284); See, also, *Stuart v Chawney*, 454 Mich 200; 560 NW2d 336 (1997).

12. *Benz, et al v Pittsfield Charter Township*, unpublished opinion per curium of the Michigan Court of Appeals, issued January 27, 2004 (Docket No. 243133).

13. *Bloomfield Estates Improvement Association v City of Birmingham*, unpublished opinion per curiam of the Michigan Court of Appeals, issued March 14, 2006 (Docket No. 255340).

14. *Matthews, et al v Winstanley, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 18, 2003 (Docket No. 242472); See, also, *DeMarco v Palazzolo*, 47 Mich App 444; 209 NW2d 540 (1973); *Rolfe v Robinson* (*after remand*), 415 Mich 345; 329 NW2d 704 (1982).

15. *Tottis, et al v Dearborn Hills Civic Association, Inc, et al*, 467 Mich 945; 656 NW2d 525 (2003); See, also, *O'Connor v Resort Custom Builders, supra*.

16. *Stevens, et al v Great American Title Company, Ness, et al*, unpublished opinion per curiam of the Michigan Court of Appeals issued September 16, 2003 (Docket No. 233778); See, also, *Sun Oil Co. v Trent Auto Wash*, 379 Mich 182; 150 NW2d 818 (1967); *Nib Foods, Inc. v Mally*, 70 Mich App 553; 246 NW2d 317 (1976).

17. *Terrien, et al v Zwit, et al*, 467 Mich 56; 648 NW2d 602 (2002); See, also, *Beverly Island Association v Zinger,* 113 Mich App 322; 317 NW2d 611 (1982); *Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955); Susan Hlywa Topp, *Severed Minerals: Restrictive Covenants as Restrictions on Surface Use by the Mineral Owner* (Michigan Real Property Review, Vol. 32, No. 4, Winter, 2004).

18. *Lakes of the North Ass'n v Twiga Ltd P'ship*, 241 Mich App 91; 614 NW2d 682 (2000), *app den*, 465 Mich 924; 636 NW2d 521 (2001); *reconsideration denied*, 641 NW2d 855 (2002).

19. *O'Connor, et al v Resort Custom Builders, Inc, et al,* 459 Mich 335; 591 NW2d 216 (1999), *reconsideration denied*, 459 Mich 1251; 595 NW2d 843 (1999).

20. *Ronan, et al v Hofmann, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 24, 2006 (Docket No. 263106); See, also, *Greenspan v Rehberg*, 56 Mich App 310; 224 NW2d 67 (1974).

21. *McCabe, et al v Horizons Unlimited, Remsing*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 14, 2006 (Docket No. 260439).

22. *Slatterly, et al v Madiol, Shorewood Association, et al*, 257 Mich App 242; 668 NW2d 154 (2003).

23. *Darnell, et al v Garett R. Kern Construction, Inc., et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 16, 2006 (Docket No. 257277).

24. *Ribick, et al v Inverrary, L.L.C., et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 6, 2006 (Docket No. 257468); See, also, *O'Connor v Resort Custom Builders, Inc., supra*; *Margolis v Wilson Oil Corp*., 342 Mich 600; 70 NW2d 811 (1955).

25. *Soden, et al v Lakes of the North Association*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 24, 2006 (Docket No. 263459); *appeal denied*, 475 Mich 873; 714 NW 329 (2006); See, also, *Mable Cleary Trust v Edward-Marlah Muzyl Trust, infra*.

26. *Dunham Lake Property Owners Association, et al v Baetz, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 19, 2003 (Docket No. 237047); See, also, *O'Connor v Resort Custom Builders, Inc., supra*; *Stuart v Chawney, supra.*

27. *Schoenherr, et al v Vernier Woods Development, LLC, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued November 22, 2002 (Docket No. 235601); See, also, *Sylvan Glens Homeowner's Association v McFadden*, 103 Mich App 118; 302 NW2d 615 (1981); *Doxtator-Nash Civic Association v Cherry Hill Professional Building, Inc.*, 12 Mich App 468; 163 NW2d 262 (1968).

28. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust, et al*, 262 Mich App 485; 686 NW2d 770 (2004); See, also, *Borowski v Welch, supra;* Susan Hlywa Topp, *Severed Minerals: Restrictive Covenants as Restrictions on Surface Use by the Mineral Owner* (Michigan Real Property Review, Vol. 32, No. 4, Winter, 2004).

29. *Becker v Richards, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 3, 2004 (Docket No. 245423); *appeal denied*, 471 Mich 922; 688 NW3d 826 (2004); See, also, *Webb v Smith* (*after remand*), 204 Mich App 564; 516 NW2d 124 (1994); *R.R. Improvement Association v Thomas*, 374 Mich 175; 131 NW2d 920 (1965).

30. *Marino, et al v Grayhaven Estates Limited, Ltd, LLC, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 19, 2001 (Docket No. 215764); See, also, *Stuart v Chawney, supra*; *O'Connor v Resort Customer Builders, Inc., supra*; *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571; 485 NW2d 129 (1992).

31. *Neal, et al v Miramichi Utilities, Inc*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 22, 2002 (Docket No. 239746); *appeal denied*, 469 Mich 946; 671 NW2d 46 (2003).

32. *Ridgewood Associates v McKinnon, et al,* unpublished opinion per curiam of the Michigan Court of Appeals, issued August 20, 2002 (Docket No. 232281); See, also, *Beverly Island Association v Zinger, supra.*

33. *Johnstone v Detroit*, *G H & M Railway Co*, 245 Mich 65, 84; 222 NW 325 (1928).

34. *Allen v Detroit*, 167 Mich 464, 473; 133 NW 317 (1911).

35. *Rofe v Robinson*, 415 Mich 345, 352; 329 NW2d 704 (1982).

36. *Johnstone v Detroit,* pp. 84-85.

37. *Id*. at 341, citing *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625, 227 NW 772 (1929).

38. *Webb v Smith*, 224 Mich App 203, 211; 568 NW2d 378 (1997) (citing *Cooper v Kovan,* 349 Mich 520, 530; 84 NW2d 859 (1957).

39. *Id* at 211.