MICHIGAN
REAL PROPERTY REVIEW

Published by the Real Property Law Section State Bar of Michigan

Winter 2011-2012, Vol. 38, No. 4

Contents

Deed Restrictions and Restrictive Covenants in Michigan—2012

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I. Overview

This article is a companion to the author's 2007 ***Deed Restrictions in Michigan***[1] and the 1998 ***Restrictive Covenants in Michigan.***[2] This latest review of select published and unpublished Michigan opinions through 2011 considers some of the various approaches recently taken by Michigan courts to resolve real property disputes involving deed restrictions or restrictive covenants.

For purposes of these articles, the terms "restrictive covenants" and "deed restrictions" should be considered synonymous. Generally, a restrictive covenant in a deed is a private agreement that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put. Some restrictive covenants, such as race-based restrictions on transfers, are unenforceable but do not necessarily void the deed.[3] Similarly, a deed restriction is a requirement, provision, or statement in a deed that impinges on the free use and enjoyment of the property by the grantee. Deed restrictions can be either covenants or conditions–a covenant being an assurance that something will be done, while a condition provides that the legal relationship of the grantor and the grantee will be affected when an event that may or may not happen takes place.[4]

The cases considered in the 1998 and 2007 articles have not been reversed or significantly criticized. Although some have been distinguished, they all remain a valid reflection of current Michigan legal analysis.

The organization of the cases in this article, like the others, is intended to be helpful to the practitioner. What is clearly reinforced over the 13 year span of reviewing this area of real estate law is that the particular facts of each dispute are what matter most. Although some concepts are immutable, most others are capable of profoundly subjective interpretation or application by the courts. It is therefore very important for the advocate to be especially sensitive to the evolution of the immediately surrounding real property uses and circumstances when arguing how deed restrictions or restrictive covenants might be enforced, or how they might be avoided.

1 William E. Hosler, *Deed Restrictions in Michigan,* 34 Mich Real Prop Rev 37 (Spring 2007).

2 William E. Hosler, *Restrictive Covenants in Michigan*, 25 Mich Real Prop Rev 81 (Summer 1998).

3 Black's Law Dictionary (9th ed).

4 Cameron, Michigan Real Property Law: Principles and Commentary (3d ed), § 22.2, p 1247.

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II. The Court's Equitable Discretion

Notwithstanding well-established precedent that unambiguous deeds or their restrictions are to be enforced as drafted, Michigan courts have nevertheless developed a practice of discretionary use of their plenary equitable power to interpret and/or reform a deed to include what the court perceives as the intended restrictions.

Johnson Family Ltd Partnership v White Pine Wireless, LLC [5]

In this published opinion, the appellate court considered whether the trial court could properly reform an unambiguous deed to include omitted deed restrictions notwithstanding the doctrine of merger. The facts included the defendant's construction of a cell tower that allegedly violated the restrictions. The original restrictions imposed against the property disallowed power, telephone, or other utility wires or conduits above the ground, or other unnatural improvements without the approval of the seller or his successor. The property was in turn sold, but those restrictions were inadvertently omitted from the deed. When the new buyer attempted to construct a cellular tower and the successor to the seller sued to prevent this, the trial court reformed the deed to include the restrictions. The appellate court conceded that although the general rule is that courts will follow the clear language in a deed in which there is no ambiguity, where a deed fails to express the "obvious intention of the parties, the courts will try to arrive at the intention of the parties." Consequently, the appellate court agreed with the trial court that the deed could be reformed, even though it was not ambiguous, to include the restriction. Although this decision appears to undermine the well established doctrine of merger, which seeks to merge into a final deed all provisions of a preceding contract, including all prior negotiations, both courts concluded that equity should relieve the seller and other similarly restricted properties from unreasonably harsh application of that doctrine. *Johnson* was remanded to the trial court to determine, in part, whether the cell tower at issue constituted "wires or conduits."

Millpointe of Hartland Condo Ass'n v Cipolla [6]

The case arose from Cipolla's construction of a pool in the back yard of her residential unit within Millpointe. The Millpointe of Hartland bylaws restrict accessory uses behind residential units to placement no more than halfway between the unit and the property line. This was generally referred to as the 50% rule. Cipolla's pool was located further back than halfway to the rear property line, and Millpointe sued to have it removed. Cipolla contended the use restriction did not apply to her pool, either because pools were exempt from the definition of an "accessory use" or because Millpointe acted in a way to induce her to reasonably rely to her detriment on being able to install the pool. The court disagreed. The bylaw applied, by its terms, to "any accessory use in the rear of any Unit, except landscaping, playgrounds, and swings." Although swimming pools are used for outdoor recreation, a playground is an area that may contain structures for play purposes, while a swimming pool is a structure itself. The court felt that the common lay understanding of what constitutes a "playground" did not include swimming pools. "While ambiguity must be construed strictly against enforcement of a restriction, the courts do not strain to find or create an ambiguity," and the court found none here. Because the 50% rule was a valid bylaw it functioned as a deed restriction the courts will enforce, absent a handful of exceptional circumstances. While Cipolla argued, and the trial court found, that Millpointe was estopped from enforcing the bylaw, the court agreed with Millpointe that any reliance by Cipolla was unjustified. She was given conflicting information about the pool's permissibility prior to and during its installation. Thus, she was undisputedly given notice of facts leading any honest person, "using ordinary caution, to make further inquiries."

City of Otsego v Walters [7]

Prior to 1978, the plaintiff-City bought a tract of farmland from the Eley family to develop a single-family residential community. It developed the farmland in six phases platting the first phase in 1978, and the sixth/last phase in 2002. The six phases contained a series of restrictive covenants intended to ensure the lots were used only for single-family residential purposes. The City altered the owner-occupancy required in all phases after the first two. In 1981, the City conveyed lot #5 by warranty deed to Otsego Public Schools, subject to the conditions, restrictions, limitations, and easements of record. The schools conveyed lot #5 to defendant-Walters' mother, subject to the same conditions. In 1983, the mother quitclaimed her

5 281 Mich App 364; 761 NW2d 353 (2008).

6 Unpublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 289668).

7 Unpublished opinion per curiam of the Court of Appeals, issued Nov 20, 2007 (Docket No. 275667).

interest to herself and Walters as joint tenants with rights of survivorship. The mother left the home in November 2002. In December 2002, Walters leased the home to a tenant. The City sent a letter informing her leasing the property violated the owner-occupancy requirement. Her attorney responded, saying the lease was temporary and Walters intended to sell. She was unable to find a buyer. The mother died in 2005 and Walters again leased the property. Plaintiff notified Walters the lease violated the owner-occupancy requirement and gave her 30 days to sell. Walters then conveyed her interest by quitclaim deed to herself and her business partner, defendant-Bolger. They conveyed the property to defendant-J & J Windigo, LLC. Walters and Bolger were the sole members of the business. In April 2006, plaintiff sued defendants asking the trial court to declare by renting the property, defendants violated the requirement the property be owner occupied and asking the trial court to permanently enjoin defendants from violating the restrictions applicable to the property. Since the plaintiff-City had standing to enforce the restrictive covenant and the covenant could properly be enforced, the trial court correctly granted summary disposition in favor of plaintiff.

Raymond v Holliday [8]

The court's equitable power to avoid the merger doctrine in a deed was exercised again in this case involving building density deed restrictions. The plaintiff received a deed that did not explicitly reference the building density restrictions, although his land contract and memorandum of land contract did. The court was not persuaded by the plaintiff's argument that the doctrine of merger served to eliminate the application of the deed restrictions. The court held that the covenant restricting building density on the land was collateral to the contract for the deed and constituted an obligation independent of any conveyance of title. The fact the memorandum of land contract was recorded, in addition to various other facts, led to the court's conclusion that there was no need to reform the actual deed. The intent of the material already available convinced the court that the building restriction was permanent and should run with the land.

Interestingly, Raymond argued that his status as a good faith purchaser precluded enforcement of the building restriction. A title search was conducted but failed to disclose the recorded memorandum of land contract. "While Raymond may have a viable action against the title company for their failure to thoroughly investigate the property and the records maintained by the Register of Deeds, it does not alter the fact that language existed in the Holliday/Verburg deed and the Verburg/Raymond deed indicating conveyance of the property was 'subject to easements and building and use restrictions of record.'" The court held that this language was sufficient to place Raymond on notice of the need to make further inquiry and precluded his status as a good faith purchaser.

III. Amendments to Deed Restrictions

Brown v Martin [9]

The parties owned lots in the same subdivision and all lots in the subdivision were originally subject to a restrictive covenant providing only residences or a necessary outbuilding were permitted on each lot to be used for single-family residential purposes only. The covenants could be amended 25 years after recording, and would automatically extend for the next 10-year period. Defendants remodeled their home and began operating a hair salon. Plaintiffs-Brown complained to defendants about the business, asserting it was operating in violation of the subdivision's land use restrictions. Thereafter, the required number of then lot owners passed an amendment to the covenant allowing for certain home-based businesses, including hair salons. Plaintiffs filed suit seeking declaratory and injunctive relief to enforce the original restrictive covenant, and to enjoin defendants from operating the hair salon in their home. Plaintiffs claimed the covenant could only be changed under the restrictions at the expiration of any automatic 10-year extension period.

In opposition, the Defendants contended the changes could occur at any time after the first 25-year period and with the consent of a majority of the then lot owners. The court disagreed, and concluded the trial court erred in finding the amendment took immediate effect. The plain language of the restriction at issue clearly provided automatic 10-year renewals "unless an instrument signed by a majority of the then owners of the lots has been recorded." The covenant prescribed a definite time period of 10 years for modification by a majority of the then lot owners. The 10 year automatic

8 Unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 297146).

9 288 Mich App 727; 794 NW2d 857 (2010).

extension language would be rendered meaningless if the covenant could be amended by a majority vote (less than unanimous) at any time thereafter. Thus, the plain language of the covenant caused the reference to "periods of ten years" to be a restriction on the frequency of the amendment by a less than unanimous vote. However, if by unanimous vote every then lot owner voted to amend or change the covenant, then the restriction as to frequency of amendment by majority vote would not apply, and a change by unanimous vote could be made at any time.

In this published opinion, the court reversed and remanded for entry of an order granting plaintiffs summary disposition and enjoining defendants from operating a beauty salon in their home until after the next ten year cycle or a unanimous vote of the then existing lot owners permits the use.

Katz v Riverwood Subdivision Homeowners Ass'n [10]

Plaintiffs contended the deed restrictions ceased to exist when they were not timely renewed in 1967. An extension of the restrictions was approved by 2/3 of the home owners a few months after the restrictions expired. The trial court concluded that while the 1967 agreement was not binding on the entire subdivision, it was binding on the parties to the agreement and their successors in interest. The appellate court concluded that case law established that an attempted extension of expired restrictions is not binding on a non-party to the agreement, but did not address whether an attempted extension is binding on a party to the extension or to a party's successor in interest. Since no case law directly addressed this issue, the court looked to general principles of contract law to determine whether the homeowners entered into a valid private agreement. In arguing the 1967 agreement was not binding on any of the homeowners, regardless of whether they were parties to it, the plaintiffs asserted such a holding would be illogical because the purpose of restrictive covenants would be negated if the restrictions did not apply to all the subdivision lots. They cited *Maatta*. The court concluded while *Maatta* contained language supporting plaintiffs' argument about the purpose of restrictive covenants, the factual distinctions of the case limited its applicability here.

The court held because "Michigan law values residential deed restrictions and the ability to enter into private agreements, and because plaintiffs cite no law or public policy that is violated by the enforcement of the deed restrictions," the parties to the 1967 agreement created a valid private agreement. However, the court agreed with plaintiffs the trial court erred in determining there was no genuine issue of material fact as to whether a change in circumstances rendered the restrictions invalid. Plaintiffs asserted the residential nature of the subdivision had changed and the restrictions were no longer practical. According to the Katz affidavit, a combination of factors had rendered plaintiffs' lot unsuitable for residential use. In granting defendants summary disposition, the trial court disregarded the affidavit, essentially making a credibility determination.

Pueblo v Crystal Lake Improvement Ass'n [11]

The trial court properly entered a final judgment in favor of the defendant-Crystal Lake Improvement Association. The case involved a dispute about the legality of bylaws adopted by defendant regarding the use of residential property within its subdivision, the dues payable to defendant, and whether additional lots could be made part of defendant by vote of its members, without amending the subdivision's plat.

Plaintiffs argued the trial court erred by refusing to apply the "continuing wrong" doctrine to find their challenge to defendant's 1979 bylaws was not time-barred. The court held this was an action challenging the validity of defendant's bylaws, which are a contract between a corporation and its shareholders. Thus, the action was governed by the six-year limitations period applicable to contract actions. Because the case was not filed until 2003, plaintiffs' challenges to defendant's 1992 and 1996 bylaws were time-barred. Applying the continuing wrong doctrine to plaintiffs' claims would extend the statute of limitations beyond the period intended by the Legislature. Thus, the trial court did not err in refusing to apply it.

IV. Reciprocal Negative Easements

The essential elements of a reciprocal negative easement are: (1) a common grantor; (2) a general plan; and (3) restrictive covenants running with the land in accor-

10 Unpublished opinion per curiam of the Court of Appeals, issued July 6, 2010 (Docket No. 288624).

11 Unpublished opinion per curiam of the Court of Appeals, issued Feb 13, 2007 (Docket No. 263231).

dance with the plan and within the plan area in deeds granted by the common grantor. Several cases have considered the enforcement of this phenomenon, which is based upon the basic fairness inherent in placing uniform restrictions upon the use of all lots similarly situated, notwithstanding that less than all of the deeds contain an express restriction.

Civic Ass'n of Hammond Lake Estates v Hammond Lakes Estates No. 3, Lots 126-135 [12]

This published case involved eight subdivisions surrounding one lake. Seven of the eight had restrictions that barred the use of motorboats. The association filed suit after lot owners began violating the restriction. The trial court granted an injunction against motorboat use and issued a judgment that the restriction applied. The appellate court agreed, affirming that the restriction was a negative reciprocal easement. The court reasoned that there was a comprehensive plan, and that the restriction applied to all of the subdivisions. The court held that a restrictive covenant against motorboats on a lake applied to all seven subdivisions surrounding the lake, including one whose deed restrictions did not include the prohibition, under the doctrine of negative restrictive easement. As to the question of standing, the court held that an owners association and its members had a sufficient interest in the common use and enjoyment of a lake to maintain an action to enforce common restrictions.

City of Ypsilanti v Taylor [13]

The Schneidewinds owned property in the City. In November 1956, they agreed to sell part of the property to Taylor and her husband. It was intended the property be transferred subject to certain building restrictions to be included in the deed. Later in 1956, the Schneidewinds transferred another part of the property to defendant Agosti. Although it was apparently intended the land sold to Agosti was to be subject to restrictions similar to the Taylor's property, the Agosti deed only stated the property was subject to "easements and restrictions of record." In 1957, Taylor and her husband acquired their property from the Schneidewinds. Most of the intended restrictions were detailed in the deed. In 1960, Agosti transferred her property to the City. The deed stated in part it was "subject to the restrictions contained in the instrument recorded in Liber 782, page 680…." However, Liber 782 did not contain a page 680.

The City sued to have the restriction be deemed unenforceable and the trial court agreed. The appellate court affirmed, concluding for the doctrine of reciprocal negative easements to apply, the Schneidewinds as the common grantors would have had to have transferred part of the property to Taylor subject to certain restrictions and then, at a later date, transferred another part of the property, previously retained, to plaintiff's predecessor in interest. What actually happened was the Schneidewinds transferred a part of their property to plaintiff's predecessor in interest without any significant deed restrictions before they transferred another part of their property to Taylor subject to express deed restrictions. Since the facts of the case did not support the creation of a reciprocal negative easement and this type of easement cannot arise retroactively, the restrictions imposed on defendant Taylor's property did not apply to the plaintiff City's land, which was sold by Taylor's predecessors in interest before she acquired her property.

Smiley v Grosse Pointe War Memorial Ass'n [14]

Plaintiffs sought to enjoin defendant from constructing multi-family residential condominiums along Lakeshore Drive after the defendant razed residences on two single family lots it bought, both of which are adjacent to another lot the defendant already owned. The strategy of the defendant was to own all lots arguably affected by the single family restriction, and then vote to eliminate that restriction and build multi-family units as allowed by ordinance. The plaintiffs based their claims in opposition on the express restrictive covenant recorded against both lots, as well as the doctrine of reciprocal negative easement. The trial court concluded that since the plaintiffs' and defendant's property all contained an express single-family dwelling restriction, the doctrine of reciprocal negative easements was inapplicable. However, the trial court also held that the plaintiffs lacked standing to enforce the express restrictive covenant because they did not own property in the subdivision in which defendant owned property.

12 271 Mich App 130; 721 NW2d 801 (2006).

13 Unpublished opinion per curiam of the Court of Appeals, issued Oct 23, 2007 (Docket No. 275032).

14 Unpublished opinion per curiam of the Court of Appeals, issued Feb 26, 2008 (Docket No. 275937).

The appellate court disagreed. It found that while the trial court correctly concluded the doctrine of reciprocal negative easement did not apply, in light of *Hammond Lake,* the trial court erred in finding the plaintiffs lacked standing to enforce the express restrictive covenants, and the court held because defendant's proposed construction of three multi-family residential condos, each containing four single-family condos, violated the express single-family dwelling restrictive covenant, the trial court also erred in granting defendant summary disposition.

In *Hammond Lake*, the court held plaintiffs had standing to enforce a deed restriction prohibiting the use of motorboats on the lake even though they did not own lots in the subdivision containing the deed restriction. The court concluded under *Hammond Lake*, plaintiffs had standing to enforce the express restrictive covenant applicable to defendant's property at issue even if their lots were not located in the same subdivision as defendant's property. Further, according to the plain and express language of the deed restriction, every building on defendant's property must be occupied by only one family. Thus, the court held in light of the plain language of the express restrictive covenant, defendant's proposed construction violated the covenant. The court remanded the case for entry of an order granting plaintiffs summary disposition and issuing a permanent injunction prohibiting defendant from using the property at issue in contravention of the express restrictive covenant.

Franklin Commons, LLC v Helman Woods Sub Homeowners Ass'n [15]

A construction company entered into a land contract in 1951. The property was comprised of Lots 1-78 and Outlot A. A plat for the property was recorded. In 1952 the construction company recorded building and use restrictions, including a restriction limiting construction to a single-family dwelling and associated structures on each lot. The restrictions permitted changes upon the approval of the "seller or his duly authorized representative" and the abutting lot owners. The construction company subdivided Outlot A in 1953 into lots 79-84. In 1974, two of the lots in the subdivision fronting a major road were rezoned from residential to commercial use. In 1986, a project began to construct a bank on the rezoned lots, but the project was abandoned. When another bank expressed interest in purchasing the lots and completing the project, the matter was resolved through entry of a consent judgment in 1993. Plaintiff obtained title to Lots 73 and 79-84 in 2002 and, seeking to commercially develop the property, filed this suit to establish that HWSHA could not enforce any deed restrictions or covenants limiting the use of the property to residential purposes.

As to HWSHA's standing, the court noted that that HWSHA owned the vast majority of Lots 45 and 48. As a landowner, HWSHA had the ability to enforce any restrictive covenants in the subdivision. Further, homeowner associations "that actively represent the interests of landowners are allowed to enforce deed restrictions" and HWSHA was active in representing the subdivision landowners' interests. The court also rejected plaintiff's argument that the restrictive covenants did not apply to Lots 79-84 because Outlot A was not covered by the single-family dwelling restriction. The court held that the subdivider's intent was "readily apparent from reviewing the words that the subdivider used" - "any lot whatsoever in said subdivision." The court concluded that in ordinary and generally understood language, an outlot is a type of lot and the phrase "any lot whatsoever" left no doubt as to the drafter's intent - "the building restriction is to apply to the entire subdivision, which includes Outlot A." The court also held that, *inter alia*, plaintiff's proposed commercial activity would not be a technical violation and the deed restrictions could be enforced. Thus, the court affirmed the trial court's order granting HWSHA summary disposition.

Long Island Court Homeowners v Vernier[16]

The court held the trial court abused its discretion by depriving defendants Great Lakes and Olgiati of the right to develop their property in a practicable manner, based on a temporary inconvenience to plaintiff and impermanent damage to the subdivision road, and reversed. The defendants planned to build 16 new homes in part of the subdivision. In 1970, a permanent injunction was entered to enforce restrictive covenants in the subdivision. Defendants' predecessors in interest (Verniers) were using the subdivision lots and an adjacent parcel for the operation of a public marina in violation of deed restrictions requiring residential buildings. The injunction prohibited persons engaged in commercial activity not involving resi-

15 Unpublished opinion per curiam of the Court of Appeals, issued Nov 4, 2010 (Docket No. 292952).

16 Unpublished opinion per curiam of the Court of Appeals, issued June 4, 2009 (Docket No. 283292).

dential use from using the road, which clearly allowed for commercial activity *if* connected to residential use. The court held the prior injunction did not provide any basis for the injunction issued by the trial court. The court applied a "balancing approach" and noted there was evidence construction traffic could harm the road and inconvenience other lot owners.

However, the evidence did not show the damage would be irreparable and when the residential project is done, the additional traffic resulting from 16 new homes will have no adverse consequences and the additional traffic resulting from the new homes will be negligible. Yet, the trial court enjoined defendants from using the road to build the development, suggesting they instead bring in the workers and material over water, by boat, or over a bridge, which they would have to build. These alternatives would be extremely costly and would make the proposed subdivision financially infeasible. The hardship imposed on the defendants by granting the injunction was much harsher than that which plaintiff would endure had the injunction been denied. The trial court abused its discretion.

Rice v Bowman [17]

Plaintiffs' alleged defendant violated deed restrictions by mooring a boat extending beyond his property line into a canal. Defendant owned a lot in the Belvidere Subdivision and portions of the abutting Venice Shores Subdivision lots extending 25 feet into the canal. An amendment to the original Venice Shores Subdivision restrictions provided nothing shall extend into the canals as platted from any property at any time. However, it was apparent from the face of the amendment defendant's predecessors in interest, and thus defendant, were not among the parties to the document. The amendment stated it includes all of the title holders in the Venice Shores Subdivisions 2 and 3, yet defendant's predecessors in interest, the Wilsons, were not included or mentioned as possible signatories and the listed property owners included only Venice Shores homeowners.

The question was whether the Wilsons were "owners" within the meaning of the amendment and whether defendant's property was properly restricted. Plaintiffs argued the owners of the Venice Shores homes on Lots 245 and 246 signed the amendment "on behalf of all owners of said lots." There was, however, no indication the Wilsons ever ceded to the homeowners of Lots 245 and 246, the right to sign for them or the Wilsons were even aware their property rights (and the rights of their successors in interest) were being restricted. While the amendment provided a majority of property owners could bind all owners, this presumably referred to a majority of the owners listed. While some of the listed Venice Shores homeowners declined to sign the amendment, the court saw no reason why those titleholders who were association members, whose names appeared on the amendment and were allowed to vote on the amendment, would not be bound by its covenants. The amendment clearly evidenced an intent to bind such lot owners. However, no such intent existed on the face of the amendment regarding the Wilsons. The trial court properly denied the plaintiffs' motion for summary disposition and granted summary disposition in favor of defendant.

Blaser v DeVries[18]

Third-party defendants (Bristols) created 7 lots in a township, 5 of which they sold to the plaintiffs. The deeds to the 5 parcels contained four restrictions (including that all homes built must have a minimum of 1,200 feet on the first level.) The recorded restrictions were not placed in the deeds to the other 2 lots. One of the 2 unrestricted lots was sold to Devries and Fowler (third-party plaintiffs/appellees) who later obtained a special use permit from the local county allowing them to build a second dwelling on their lot. The plaintiffs filed a complaint for declaratory relief that successfully imposed the four restrictions on the appellees' lot under a reciprocal negative easement theory.

After being sued, Devries and Fowler filed a third-party complaint against the Bristols and also First American Title Insurance Company (FATIC/appellant), alleging that it breached a title insurance contract and also seeking a declaratory judgment requiring FATIC to defend them in the underlying lawsuit. FATIC moved for summary disposition, claiming there was no coverage under the title insurance policy because it contained an "exception" for deed restrictions that did not appear in the chain of title, as well as an "exclusion" for title risks that did not arise until after the policy was in effect. The parties' dispute regarding this exclusion concerned *when* a reciprocal negative easement affects the property. FATIC claimed

17 Unpublished opinion per curiam of the Court of Appeals, issued Jan 15, 2008 (Docket No. 274968).

18 Unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2011 (Docket No. 297555).

that the easement would not affect the property until a court granted relief and imposed the easement. Devries and Fowler argued that the easement first applied, if at all, when the property was still owned by the Bristols. The appellate court agreed with Devries and Fowler – that is, concluding that the restrictions attach, if at all, from the time of the first deed that contained them, not when a court declares that the restrictions attach.

However, the title company was able to avoid liability under the policy to Devries and Fowler when the appellate court also found that the exception in the owners title policy from coverage for deed restrictions that did not appear in the chain of title was a clear and unambiguous provision in that contract and consequently, no duty to defend or indemnify existed in this case as a matter of law.

V. Interpretation of Restrictive Covenants

Tomecek v Bavas [19]

In this case decided by the Michigan Supreme Court, the plaintiffs owned a vacant landlocked lot in a platted subdivision along Lake Michigan on which they wanted to construct a home. A restrictive agreement covering the property stated, "it is hereby covenanted and agreed that no building, structure or dwelling shall be constructed on Lot 2 of said plat unless and until a municipal sanitary sewer line is made available to the premises." The plaintiffs sought to use the existing drive easement to access sewer and other utilities to their lot. The defendants argued that the restrictive agreement prohibited construction on Lot 2 unless and until the owners of the surrounding lots granted an easement to Lot 2 for municipal sewer service. The trial court held that the defendants' construction would render more than a third of the words used in the provision surplusage, and would add additional terms regarding the right of the other lot owners to control if and when Lot 2 could be developed. It concluded the defendants' construction of the deed restriction was properly rejected "[g]iven that construction that renders any part of a restrictive agreement surplusage or nugatory must be avoided … and that the language of a restrictive agreement must be strictly construed against the defendants, with any doubts regarding the meaning of terms to be resolved in favor of the free use of the property." The Supreme Court agreed, holding that the restrictive covenant merely prevented construction on Lot 2 until sewer service became available to the lot.

19 482 Mich 484; 759 NW2d 178 (2008).

Asker v WXZ Retail Group Greenfield [20]

Plaintiffs appealed from the trial court's order granting in part and denying in part the parties' cross motions for summary disposition. The trial court held that a restriction requiring plaintiffs' approval of any improvement on defendant's property was no longer enforceable, but plaintiffs could enforce a restriction requiring free traffic flow between the parking lots on the parties' adjoining properties. Plaintiffs argued the trial court erred in determining the 1964 deed restriction requiring approval of any improvements on defendant's property was no longer enforceable. The court agreed. "The case involved the meaning and enforceability of a deed restriction. A deed restriction is a contract between the buyer and seller of property." The court concluded that the original parties' intent in drafting the deed restrictions could not be ascertained from the language of the deed itself and must be decided by the jury or other trier of fact.

Greendome Petroleum, LLC v Fast Track Ventures, LLC [21]

Atlas is an authorized Marathon fuels distributor and a manager of Fast Track. Fast Track entered into a lease agreement with an option to purchase the property at issue. The option was later assigned to plaintiff-Greendome, which exercised the option. An exhibit attached to the warranty deed contained two relevant restrictive covenants. The first restrictive covenant prohibited the use of the property to sell, etc. non-Marathon motor fuels for 20 years. The second restrictive covenant stated the grantee agreed for 10 years from the date of the deed to not use the premises for the sale, etc. of petroleum fuels except the trademarked products distributed by Atlas or one of its subsidiaries.

According to plaintiffs' attorney, Atlas refused to sell plaintiffs gas unless they signed a seven-year contract. They began selling non-Marathon fuel products and filed this 20-count suit against Atlas, Fast Track, and Mara-

20 Unpublished opinion per curiam of the Court of Appeals, issued Aug 5, 2010 (Docket No. 290234).

21 Unpublished opinion per curiam of the Court of Appeals, issued June 16, 2009 (Docket No. 285671).

thon, seeking to enjoin the enforcement of the second restrictive covenant. Plaintiffs asserted they needed the restriction removed to be able to purchase Marathon products from another distributor. On the basis of the trial court's interpretation of the second restrictive covenant, it enjoined Atlas from interfering with plaintiffs' obtaining Marathon fuel, a product distributed by Atlas, from other distributors and stated Atlas did not have exclusive delivery rights to plaintiffs.

The court concluded the trial court's interpretation of the second covenant rendered it meaningless. Pursuant to the plain language of the first covenant, plaintiffs were obligated to sell only Marathon's trademarked products for 20 years. Pursuant to the plain language of the second covenant, they were obligated to use Atlas or one of its subsidiaries as the sole distributor of the Marathon products referenced in the first covenant for 10 years. "In other words, the second restrictive covenant sets forth the source of distribution of the Marathon products clearly described in the first covenant." Since the language of the restrictive covenants was unambiguous, they had to be enforced as written.

Schebel v The Pine Creek Ridge Home Owners Ass'n [22]

Plaintiffs sued the defendants-HOA, the Conservancy (a separate entity charged with preserving the natural resources in the subdivision), and Mezel, a Conservancy director, for declaratory relief and specific performance on the issues of riparian rights, construction and maintenance of nature trails in the subdivision, placement of a dam access road, and the validity of amendments adopted by the HOA. All the parties were subject to the covenants and deed restrictions in the PUD agreement. "The clear intent of the comprehensive lake management plan required by the PUD agreement was to limit the number of boats on the lakes." The Declaration also contained a provision specifically prohibiting landbound owners from mooring private watercraft in the portion of the two lakes adjacent to the subdivision. The court rejected plaintiffs' claim that if landbound owners could not use the boat launch, no one should be allowed to use it. Article III of the Declaration distinguished between the rights of dock privilege owners (DPOs) and landbound owners, and limited the landbound owners' rights as to lake access and riparian rights.

The court concluded that the Declaration, read in conjunction with certain other limitations (limiting landbound owners to common beach and dock areas) and other rights in the document clearly refuted plaintiffs' claim. The court also held, *inter alia*, the HOA had authority to move the dam access road and the trial court correctly found plaintiffs failed to show they suffered injury due to moving the road to a safer location.

Mushovic v Bloomfield Hills Sch Dist [23]

A 1955 deed gave the school district about 11.72 acres of land. The deed specifically "convey[ed] and warrant[ed] to Bloomfield Hills School District No. 2 . . . for the sum of $1.00 and other valuable considerations" the real property at issue. The deed also stated the conveyance was "subject to the restriction that these premises shall be used for School purposes only." The deed did not contain a reverter clause.

Later, the defendants built an elementary school on part of the property, which was in use by the district until 2009, when it was closed and leased for one year by another school district. Plaintiffs were nearby property owners, successors in interest to property owned by Callow, or parents as next friends and children who would have been able to attend the elementary school had it remained open. The defendants School District and Board of Education appealed the trial court's order establishing the "Callow" deed for real property as a charitable trust and compelling compliance with the terms of the trust as to operation of a Bloomfield Hills School on the property. On appeal, the court found that the limitation on use within the deed was not breached by the lease of the property to another school district. Also, that the issue of whether the school was to be used only for Bloomfield Hills students was moot. The court concluded the defendants' claims the trial court lacked subject matter jurisdiction and the plaintiffs lacked standing were without merit.

22 Unpublished opinion per curiam of the Court of Appeals, issued Sept15, 2009 (Docket No. 284177).

23 Unpublished opinion per curiam of the Court of Appeals, issued March 18, 2010 (Docket Nos. 293841; 293842).

Kloosterman v Garber [24]

The WLDC deeded the property to defendant's predecessors in interest in 1932. The deed conveyed the property, in fee simple, to the grantees subject to certain conditions, upon the happening of any of which the property was to automatically revert to WLDC. One of the conditions was that a uniform front building line was to be maintained and no building or part of a building constructed on the premises was to project beyond the front line of the dwelling on either side. WLDC was dissolved in 1945. In 1966, three surviving members of its board of directors executed and recorded a "Waiver of Reverter." After the defendant constructed a new lakefront home on the property, plaintiffs sued alleging, *inter alia*, the restrictive language in the deed constituted a restrictive covenant, which defendant violated by building her home closer than permitted to the lake. The trial court agreed with the defendant that the reversionary clause in the deed was no longer valid and the conditions in the deed were not separately enforceable from the reversionary clause.

On appeal, plaintiffs argued that the language constituted a restrictive covenant and focused on the fact the deed provided that the "conditions, restrictions, and limitations . . . shall run with the land," and on the purpose of building restrictions. The court noted the plaintiff's did not present any authority suggesting the language "shall run with the land," without regard to the presence of the reversionary clause or the "'conditional words in the frontispiece,'" meant the restriction was a covenant and not a condition. Plaintiffs also offered no authority indicating the 1966 waiver of WLDC's reversionary interest was sufficient to transform what was, until then, clearly a condition subsequent subject to reverter into a restrictive covenant. WLDC's intent to create a condition subsequent subject to a reversionary interest was clearly and definitively established by the plain language of the deed. Further, in the absence of an enforceable reversion, the underlying condition was no longer enforceable against the current property owner.

VI. Strict Construction of Deed Restrictions

Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham [25]

The Michigan Supreme Court affirmed the Court of Appeals in deciding that deed restrictions that required the land to be used for "strictly residential purposes only" meant just that. The City of Birmingham's use of the lot as a dog park clearly violated the restriction. It mattered not that the association had not contested the use for a long time. No waiver had occurred because use as a dog park was a more serious violation of the deed restriction in the Court's opinion given the circumstances.

City of Huntington Woods v City of Detroit [26]

In another published case, the trial court's grant of the plaintiffs' motion for summary disposition and request for a declaratory judgment pertaining to the proposed sale of the Rackham Golf Course was affirmed in part and reversed in part. The case involved a dispute concerning the authority of the defendant city to sell or convey its interest in the Rackham Golf Course (located in defendant Huntington Woods) where the deed included several conditions and a reversionary clause. In 2006, defendant's Planning and Development Department received an unsolicited inquiry from Premium Golf, LLC, seeking to acquire defendant's interest in the golf course. Plaintiffs filed an amended complaint for declaratory judgment and seeking an injunction.

Defendant asserted the trial court erred in determining it was precluded from transferring its interest in the golf course without first obtaining waivers from individuals with reversionary interests. Defendant contended as long as it conveyed the property subject to the deed restrictions there was no breach or abandonment sufficient to give rise to the reverter clause. Plaintiffs asserted defendant's interest in the property was merely an easement, which could not be conveyed to a private entity such as Premium Golf, LLC. Based on the plain and unambiguous language of the Rackham Deed, the court rejected plaintiffs' assertion and found a fee simple in the land was conveyed to defendant, rather than an easement.

24 Unpublished opinion per curiam of the Court of Appeals, issued July 1, 2010 (Docket No. 291108).

25 479 Mich 206; 737 NW2d 670 (2007).

26 279 Mich App 603; 761 NW2d 127 (2008).

The court held the intent of the Rackhams to create a condition subsequent was clearly and definitively demonstrated by the language contained in the deed. The court further held the language of the deed clearly evokes the intent of the Rackhams, as grantors, to restrict the use of the property as a golf course. Based on the unambiguous language used and the clearly stated intent of the grantors, the court held the Rackham Deed contained an express covenant precluding the use of the property for any purpose other than a public golf course.

The appellate court found that although defendant may sell the property, the trial court correctly concluded it must first secure waivers from those retaining reversionary rights to the property. However, the trial court failed to recognize additional restrictions required the golf course to remain *public*, and that the defendant may only sell the property to another public entity and not to a private entity, despite the retention of any conditions or assurances the property would remain a golf course open to the public.

Drake v City of Benton Harbor [27]

In 1917, the Klocks gifted a 90 acre parcel of land with a half mile of Lake Michigan frontage known as the Jean Klock Park, to the City. The deed contained a restrictive covenant requiring the parcel to be used for "bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public . . . ." Until 2003, the City used and maintained the parcel consistent with the deed. It then sold part of the park to a private housing developer. Plaintiff sued and the suit was settled and resulted in a consent judgment allowing for the sale to the developer and permanently enjoined the City from using any part of the park in contravention of the restrictive covenant. In 2005, the City announced its intent to lease about 22 acres of the now 74 acre park to Harbor Shores for development as a public golf course. The City signed a lease with Harbor Shores for this purpose. Plaintiffs filed this suit alleging breach of the settlement agreement in violation of the deed restriction and seeking an injunction. The court concluded the lease of part of the park to Harbor Shores was not an effective transfer of ownership of the park, contained language consistent with the restrictive covenant, and the City had an oversight panel which gave the City significant control over the property. The court also concluded based on relevant case law, the use of the property as a public golf course was consistent with the intent the property by used as a public park.

Orchard Estates of Troy Condominium Ass'n v Dawood [28]

The plaintiffs Komasaras developed the plaintiff residential condominiums. It appears the plaintiffs may have intended to record the bylaws along with the master deed, but failed to do so. Although the master deed referred to the bylaws, they were not attached as an exhibit, contrary to the language in the master deed. Rather, the subdivision plan was the only attachment to the master deed and the plan was recorded immediately after the master deed was recorded according to the liber and page numbers appearing on those documents. In accordance with the Michigan condominium act (MCL 559.101, et seq., the "Act"), the bylaws were inoperative because they were never recorded. Thus, plaintiffs had no cause of action against defendants to enforce the bylaws. Further, the plain language of the restrictive covenants supported the defendants' argument the covenants were also not binding because they too were never recorded. The restrictions were not binding on defendants, and plaintiffs had no cause of action against them for violation of the covenants.

Stocks v Ridgewood Homeowners Ass'n [29]

This case arose after defendant denied plaintiffs permission to build a shed/garage on their lot. Defendant based its denial on Section II (f), which provides "no trailer, tent, shack, shed, barn or temporary building of any design shall be erected or maintained on any Lot ...." Plaintiffs contended the defendant waived the enforcement of the provision because it allowed two lot owners in the subdivision to build pool cabanas next to swimming pools in their yards. Defendant admitted this and said the cabanas were allowed as "pool-related facilities" in another part of the restriction. The trial court agreed with plaintiffs the cabanas were not a pool-related facility, their construction violated Section II (f), and

27 Unpublished opinion per curiam of the Court of Appeals, issued Jan 21, 2010 (Docket No. 287502).

28 Unpublished opinion per curiam of the Court of Appeals issued Sept 18, 2008 (Docket No. 278514).

29 Unpublished opinion per curiam of the Court of Appeals issued Nov 4, 2008 (Docket No. 270615).

because defendant allowed the pool cabanas to be built in violation of restriction it could not prevent plaintiffs from building a shed/garage.

The court disagreed and held even if a pool cabana was not a pool-related facility under the restrictions, the plaintiffs were not entitled to build a shed/garage because defendant had not waived its right under the relevant restriction as held in *Bloomfield Estates*. For a deed restriction to be considered waived, "the violations of the restriction must be so extensive that the original purpose of the restrictions has been defeated," and even "a relatively large number of violations do not necessarily establish waiver," which did not happen here. Also, the defendant was empowered to exercise architectural control. Reversed and remanded for entry of judgment for defendant.

Thom v Palushaj [30]

The trial court erred by ruling in favor of the defendants on the plaintiffs' complaint seeking enforcement of certain deed restrictions. The trial court erred in finding Deed Restriction No. 6, which required two houses built on the same lot to be at least 100 feet apart, was inapplicable because Lot 81 had been split. The central issue was whether defendants' house had to be built at least 100 feet from plaintiffs' house because both were built on the original lot 81 or whether, because the lot had been split, this restriction did not apply. The trial court concluded because the lot had been split, the restriction did not apply. The court held despite the conveyance over the years of portions of an originally platted lot, restrictions within the deed restrictions on what may be built on a "lot" refers to the originally platted lots. For purposes of applying the deed restrictions, Lots 81A and 81B were required to be treated as a single lot, Lot 81.

VII. Enforcement and Sanctions

More and more frequently, it appears the courts are willing to employ stronger measures to enforce contractual restrictions.

Newberry Estates Homeowners Ass'n v Cook [31]

The subdivision was developed in 2005 and plaintiff promulgated its Building and Use Restrictions, a restrictive covenant, that year. The restrictions limited the use of the land to residential purposes and prohibited the erection of any building other than a single-family dwelling with an attached garage on the lot. Paragraph 14 allows the construction of "accessory structures" as long as they are less than 200 square feet in size. Defendants purchased lot 21 in 2005. In 2006 they made a request to alter lot 21 by building a 12 by 16 foot "shed" totaling 192 square feet on the lot. Plaintiff approved the request "subject to the community's governing documents." Later, defendants filed for a permit from the city, which was approved. Defendants began construction of the structure.

After construction began, plaintiff received more than one complaint about the structure and plaintiff inspected it. Plaintiff later told defendants that the building was not in compliance with the Building and Use Restrictions, asked them to stop construction, or otherwise comply with the restrictions. Plaintiff sued defendants alleging that in erecting the structure they breached the Building and Use Restrictions and the Declaration, and asked the trial court to order defendants to remove the structure. Plaintiff filed a motion for summary disposition. Defendants claimed, *inter alia*, that they had not received service of plaintiff's motion and did not have sufficient notice. The trial court concluded that defendants' structure violated the Building and Use Restrictions, ordered defendants to pay $2,700 in attorney fees, $294.66 in costs, and in a later written opinion ordered defendants to remove the structure within 30 days. If they did not do so, plaintiff was granted permission to abate or remove the structure at defendants' expense. Defendants argued the structure was an "accessory structure" because it was less than 200 square feet in size. The court disagreed because it did not comply with the other provisions of the Building and Use Restrictions, particularly where it was two stories high and interfered with a neighbor's use and enjoyment of her property. Thus, plaintiff was entitled to judgment as a matter of law. The court also held that the other issues defendants raised on appeal had no merit and affirmed.

30 Unpublished opinion per curiam of the Court of Appeals, issued Aug 23, 2007 (Docket No. 268074).

31 Unpublished opinion per curiam of the Court of Appeals, issued March 15, 2011 (Docket No. 295468).

VanBynen v Burton [32]

The trial court correctly granted defendants' motion for dismissal of plaintiffs' equitable theories in Count IV of their complaint after the conclusion of plaintiffs' proofs because they failed to establish the required elements of any of those theories. The case concerned lot splitting in violation of deed restrictions. It was undisputed all of the property owners were either actual parties to the deed restriction documents or took their property by a conveyance explicitly stating it was subject to encumbrances of record. Plaintiffs alleged four counts in their complaint. Count IV asserted waiver, acquiescence, abandonment, estoppel, change of conditions, and laches. Count IV was premised on the general theory defendants failed to enforce the deed restrictions and/or had violated them and thus, were no longer equitably entitled to enforce them. The court disagreed. Taking waiver, acquiescence, and abandonment together, all three required plaintiffs to show defendants knew about plaintiffs' lot splits in violation of the deed restrictions and they did nothing in response to this knowledge.

The trial court correctly determined none of the three doctrines applied because the testimony showed none of the plaintiffs gave notice to any of their neighbors they were splitting their lots, and when defendants learned of the lot splits, they reacted by protesting at a township meeting. The court held the trial court's factual findings were not clearly erroneous and plaintiffs did not show any right to relief on the basis of waiver, acquiescence, or abandonment. Further, plaintiffs had no right to relief on the basis of laches because whatever prejudice they suffered was of their own doing. The court also held, *inter alia*, the trial court properly granted defendants summary disposition on plaintiffs' claims for slander of title and tortious interference with a contract or business expectancy. Both claims require proof of some kind of malice and plaintiffs essentially conceded they had no evidence of malice. The trial court also properly concluded the deed restrictions were valid and binding.

Kamphaus v Burns [33]

Since there was no requirement in the subdivision association's bylaws requiring a lot owner to submit plans for proposed buildings and additions, defendant-Burns' home did not violate the two-story height restriction, his front porch and bay windows did not violate the setback requirements in the deed restrictions, and equitable exceptions to enforcement of the deed restrictions applied to his garage pillars and chimney despite the fact they violated the deed restrictions, the court affirmed the trial court's dismissal of plaintiffs' complaint and entry of judgment in Burns' favor.

However, the trial court abused its discretion in denying Burns' request for case evaluation sanctions. The court rejected plaintiffs' claim the trial court erred in failing to enforce the alleged plain and unambiguous language of the two-story height restriction, concluding the term "stories" as used in the deed restrictions referred to habitable living space, not simply any space above a second story. Further, the court agreed with the trial court's finding the space at issue was not a third story. The unfinished space contained structural components of the house and Burns used a very small portion of it for storage. The court also noted while plaintiffs' claimed the house "towers over" others in the neighborhood, the deed restriction was a "story" restriction, not a height restriction. The trial court also did not err in determining Burns' front porch and bay window were "architectural features" and thus, did not violate the setback requirements in the deed restrictions, which only applied to "structures." The court held the "technical violation" exception to enforcement of deed restrictions applied to the placement of the garage pillars, and while neither the technical violation nor the "changed conditions" exceptions applied to the chimney, the third exception, laches, did because plaintiffs "unduly delayed in seeking to enforce the restrictions," to Burns' detriment. The court also agreed with Burns he was entitled to case evaluation sanctions. He accepted the case evaluation for plaintiffs but they rejected it, they were later denied any relief, and their complaint was dismissed. Affirmed in part, reversed in part, and remanded for a determination of the amount of case evaluation sanctions to be awarded to Burns.

LeClear v Fulton [34]

Since the trial court incorrectly found there was no breach of the subdivision Declarations of Restrictions where plaintiffs-homeowners failed to obtain approval for removal of trees and did not address the issue of relief, the court reversed the trial court's judgment of no cause

32 Unpublished opinion per curiam of the Court of Appeals, issued April 14, 2009 (Docket Nos. 282726; 284333).

33 Unpublished opinion per curiam of the Court of Appeals, issued Feb 26, 2009 (Docket No. 279962).

34 Unpublished opinion per curiam of the Court of Appeals, issued May 20, 2008 (Docket 277225).

of action with respect to the breach of the covenant concerning the tree removal and remanded for further proceedings. Plaintiffs LeClear live in a subdivision subject to the recorded Declarations of Restrictions. The subdivision property was formerly co-owned by defendant Fulton, a proprietor who is entitled to enforce the declarations. Plaintiffs filed an action against defendant alleging claims for intentional misrepresentation and violation of the Michigan Consumer Protection Act, and defendant filed a counterclaim alleging plaintiffs violated the recorded deed restrictions by failing to get approval for their house plans and tree removal. The trial court dismissed plaintiffs' claim pursuant to defendant's motion for summary disposition. Following a bench trial, the trial court also found there was no cause of action as to defendant's counterclaim. LeClear admitted three trees were removed without approval and defendant gave permission to remove a fourth tree. The court held this was a breach of the declarations and regardless of the perceived importance of the trees to the subdivision or their interference with the desires of the homeowner, the prohibition against tree removal without permission was clear in the declarations. The court concluded even if the breach amounted to a "technical violation" not warranting injunctive relief it was nonetheless a breach. Plaintiffs' argument did not provide a basis for upholding the trial court's entry of no cause of action.