

STATE OF MICHIGAN  
SUPREME COURT

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CAROL DRAKE and CLELLEN BURY,

Supreme Court No. 140685

Plaintiffs-Appellants,

Court of Appeals No. 287502

v

Lower Court No. 08-000247-CE

CITY OF BENTON HARBOR, a Michigan  
Municipal Corporation, and HARBOR SHORES  
COMMUNITY REDEVELOPMENT, INC., a  
Michigan Non-Profit Corporation,

Defendants-Appellees.

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**AMICUS CURIAE BRIEF  
OF THE FRIENDS OF MICHIGAN PARKS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS'  
APPLICATION FOR LEAVE TO APPEAL**

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... ii

INDEX OF AUTHORITIES .....iv

STATEMENT OF QUESTIONS PRESENTED .....v

    I.    In 1917, the City of Benton Harbor accepted land that became Jean Klock Park. The deed restricted the land to be “forever used by [Benton Harbor] for bathing beach, park purposes, or other public purposes; and at all times shall be open for the use and benefit of the public[.]” A 2004 Consent Judgment further restricted a public purpose to only bathing beach or park uses. Here, Benton Harbor leased nearly 30% of the Park to a development corporation for use as a golf course. Does Benton Harbor violate the deed restriction by leasing a portion of the Park to a development corporation to generate income?.....v

    II.   The Court of Appeals interpreted the deed so that a public purpose is met and the public benefits when Benton Harbor leases the Park for income. The deed restricts Benton Harbor’s use of the Park to a public purpose that is for the public’s use and benefit. Where parks are at issue, this Court holds that the general public is the beneficiary, not just municipality’ own inhabitants. In light of this holding, did the Court of Appeals incorrectly hold that Benton Harbor serves the public by leasing the Park to generate income? .....v

    III.  The Court of Appeals deed interpretation isolated the word use and applied it only to the City of Benton Harbor and not the public as this Court defines it. Based on this improper interpretation, the Court of Appeals held that Benton Harbor did not violate the deed restrictions because the argument “could be made” that it was using the Park. Did the Court of Appeals show the deed’s ambiguity by relying on analysis based on an argument that could be made? .....v

INDEX TO EXHIBITS .....vi

STATEMENT OF INTEREST ..... vii

INTRODUCTION ..... 1

STATEMENT OF FACTS .....2

ARGUMENT.....3

    I.    Leasing Publicly Owned Parkland for Profit is not an Acceptable Use within the Context of the 1917 Deed Granting Jean Klock Park or the 2004 Consent Judgment. ....3

        a.   The Narrow Analysis Employed by the Courts of Appeals Violates the Rules of Interpretation. ....3

- b. The Court of Appeals Ignored Long-Standing Definitions of ‘parks’ when Interpreting Acceptable Use of Municipal Parkland. .... 7
- II. The Court of Appeals’ Holding that the Public Benefits from a Government Body’s Lease of Publicly Owned Land to a Private Party Poses a Danger to All Publicly Owned Parks. .... 8
  - a. The Court of Appeals Authorizes Government Bodies to Liquidate Publicly Owned Assets that are Held for Public Purposes to Recognize Short-Term Gains at a Long-Term Cost. .... 8
  - b. Benefits realized by Benton Harbor, Assuming Any, Do Not Accrue to All Park Users, only Residents of Benton Harbor, if at All. .... 9
  - c. The Lease Agreement Forces Residents to Pay for Access to Private Lands as a Prerequisite to Use Public Land. .... 9
  - d. Upon Lease Termination the Public Receives Likely Valueless Land. .... 10
- III. The Court of Appeals Analysis Demonstrates the Deed’s Ambiguity. .... 10
  - a. Court of Appeals Argument that Leasing is an Acceptable Use was Made on an Argument that *could* be Made; thus, Demonstrating Ambiguity..... 11
  - b. Ambiguity May be Resolved with Extrinsic Evidence and the Extrinsic Evidence Clearly Shows the Grantors’ Intent to Benefit the Public through Land for All to Enjoy..... 13
- CONCLUSION ..... 13

## INDEX OF AUTHORITIES

### Cases

|   |                                  |
|---|----------------------------------|
| <i>City of Gaylord v Beckett</i> , 378 Mich 273, 300; 144 NW2d 460 (1966).....  | 5, 6                             |
| <i>City of Huntington Woods v City of Detroit</i> , 279 Mich App 603, 621; 761 NW2d 127 (2008) .....  | 4                                |
| <i>Clark v City of Grand Rapids</i> , 344 Mich 646, 658; 55 NW2d 137 (1952) .....   | 7                                |
| <i>Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc</i> , 472 Mich 359, 370; 699 NW2d 272 (2005) .....                               | 3, 4                             |
| <i>Detroit Branch, N.A.A.C.P. v. City of Dearborn</i> , 173 Mich. App. 602, 606-607; 434 N.W.2d 444 (1988) .....                                | 6                                |
| <i>Drake v Benton Harbor, et al., unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 287502)</i> ..... | vii, 2, 3, 4, 5, 6, 7, 9, 11, 12 |
| <i>Farabaugh v Rhode</i> , 305 Mich 234, 240; 9 NW2d 563 (1943) .....   | 10                               |
| <i>Heino v City of Grand Rapids</i> , 202 Mich 363, 375-376; 168 NW 512 (1918) .....  | 5, 6, 9                          |
| <i>Mayor of Lansing v Pub Svc Comm'n</i> , 470 Mich 154, 166; 680 NW2d 840 (2004) .....   | 11, 12                           |
| <i>Negaunee Iron Co v Iron Cliffs Co</i> , 134 Mich 264, 280; 96 NW 468 (1903).....   | 11                               |
| <i>Purlo Corp v 3925 Woodward Ave, Inc</i> , 341 Mich 483, 487-488; 67 NW2d 684 (1954) .....  | 4                                |
| <i>Taylor v Taylor</i> , 310 Mich 541, 545; 17 NW2d 745 (1945) .....  | 10, 11                           |

### Other Authorities

|   |    |
|---|----|
| 37 Am Jur, Municipal Corporations, § 120, p 374 .....   | 5  |
| Merriam-Webster Dictionary, available online at <a href="http://www.merriam-webster.com">http://www.merriam-webster.com</a> ..... | 11 |
| Oxford American Dictionary, pg 194 (1980) .....   | 11 |

**STATEMENT OF QUESTIONS PRESENTED**

**I. In 1917, the City of Benton Harbor accepted land that became Jean Klock Park. The deed restricted the land to be “forever used by [Benton Harbor] for bathing beach, park purposes, or other public purposes; and at all times shall be open for the use and benefit of the public[.]” A 2004 Consent Judgment further restricted a public purpose to only bathing beach or park uses. Here, Benton Harbor leased nearly 30% of the Park to a development corporation for use as a golf course. Does Benton Harbor violate the deed restriction by leasing a portion of the Park to a development corporation to generate income?**

|                                   |            |
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| <b>Appellants Answered:</b>       | <b>Yes</b> |
| <b>Appellees Answered:</b>        | <b>No</b>  |
| <b>Court of Appeals Answered:</b> | <b>No</b>  |
| <b>Amicus Curiae Answers:</b>     | <b>Yes</b> |

**II. The Court of Appeals interpreted the deed so that a public purpose is met and the public benefits when Benton Harbor leases the Park for income. The deed restricts Benton Harbor’s use of the Park to a public purpose that is for the public’s use and benefit. Where parks are at issue, this Court holds that the general public is the beneficiary, not just municipality’ own inhabitants. In light of this holding, did the Court of Appeals incorrectly hold that Benton Harbor serves the public by leasing the Park to generate income?**

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| <b>Amicus Curiae Answers:</b>     | <b>Yes</b> |

**III. The Court of Appeals deed interpretation isolated the word use and applied it only to the City of Benton Harbor and not the public as this Court defines it. Based on this improper interpretation, the Court of Appeals held that Benton Harbor did not violate the deed restrictions because the argument “could be made” that it was using the Park. Did the Court of Appeals show the deed’s ambiguity by relying on analysis based on an argument that could be made?**

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| <b>Amicus Curiae Answers:</b>     | <b>Yes</b> |

**INDEX TO EXHIBITS**

1. May 4, 1917 Deed
2. City of Benton Harbor Resolution, May 7, 1917

## STATEMENT OF INTEREST

The Friends of Michigan Parks is a group of individuals who advocate for public parks in Michigan. The group formed for the purpose of filing an amicus curiae brief in *Drake v City of Benton Harbor* as it is considered by the Michigan Supreme Court. The mission of the Friends of Michigan Parks is to ensure the protection of Michigan parks from actions that threaten public parks from sale, lease, destruction, misuse, or non-park use.

The Friends of Michigan Parks sees terrible consequences for parks in Michigan if the opinion of the Court of Appeals is not overturned by this Court. The impact of that decision is that nearly any use of parks would be considered a public purpose and benefit, including leasing them for private commercial development. This weakens the deeds which protect many parks and removes a tool that is essential to protecting them. Parks are constantly threatened because they are one of the only sources of large, undeveloped land in many urban and suburban areas. In tough economic circumstances, governments are understandably tempted to give away parks or lease out parkland in return for short-term economic gain.

The opinion of the Court of Appeals also jeopardizes future giving by generous donors. If a property donor cannot expect the recipient government to honor the deed restrictions, then such donations will likely cease.

The Friends of Michigan Parks files this Amicus Curiae Brief to encourage the Michigan Supreme Court to grant Plaintiffs-Appellants' application for leave to appeal or peremptorily reverse the Court of Appeals.

## INTRODUCTION

The matter before the Court concerns the consequences of improper judicial interpretation of deed restrictions and a consent judgment. This Court is asked to consider whether the City of Benton Harbor (“Benton Harbor”) may lease publicly owned parkland to a private golf course without violating deed restrictions and a consent judgment. Amicus Curiae encourage this Court to also examine how the Court of Appeals came to its decision and the foreseeable consequences of the opinion of the Court of Appeals.

Amicus Curiae argue that the Court of Appeals confused a benefit to the City of Benton Harbor with two things: 1) a benefit to the public; and 2) a public purpose. The Court of Appeals essentially held that the public and Benton Harbor are the same entity. However, for nearly a century, this Court has held that when it comes to public parks, the benefiting public extends beyond municipal borders. Here, the public benefited by Jean Klock Park is not only the residents of Benton Harbor. The deed is restricted to uses that benefit the public. Using this Court’s broader definition of public in the context of parks, a benefit to Benton Harbor is not a benefit to the public as a whole.

Amicus Curiae ask that this Court to consider the danger that the lower court’s opinion creates. In tight economic times, such as now, a government body may be tempted to mortgage its assets for a short-term gain at a long-term cost. The Court of Appeals not only condones such actions, but tells a government body that doing so benefits the public and accomplishes a public purpose. This faulty line of reasoning endangers public parks throughout Michigan.

In this case, publicly owned land is taken from the many to benefit the few. The Court of Appeals employed a questionable analysis to reach its result. And it ignored this Court’s

opinions to do so. Amicus Curiae respectfully request that this Court reverse the opinion of the Court of Appeals.

### STATEMENT OF FACTS

Amicus Curiae, the Friends of Michigan Parks, largely relies on and respectfully incorporates the Statement of Facts contained in Plaintiffs-Appellants' Application for Leave to Appeal.

The Friends of Michigan Parks also wishes to draw attention to three specific aspects of *Drake v Benton Harbor, et al.*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 287502). All three aspects relate to the Court of Appeals interpretation of the deed and its analysis of the facts.

First, the Court of Appeals held that income generated by leasing publicly owned park is a use within the intended meaning of the 1917 deed because the monies paid will go to municipal coffers. *Drake, supra* at 4. Second, the Court of Appeals arrived at this result through an analysis relying on dictionary definitions. *Id.* at 4-6. Finally, it held that the deed's language was unambiguous while stating that "it could be argued that Benton Harbor is putting the property into service and thus the lease is a 'use' of the property . . . ." *Id.* at 4.

On September 15, 2010, the Michigan Supreme Court announced its consideration of Plaintiffs-Appellants' application for leave to appeal. The Court invited interested persons or groups to move the Court for permission to file amicus curiae briefs. The Friends of Michigan Parks is a small, ad hoc group of advocates for parkland preservation and protection. Members reside on both sides of Michigan, and includes: LuAnne Kozma (Novi), Christopher Reader (Grand Rapids), Ellen Smith (Commerce Township), James Meenahan (Commerce Township), and Kimberly and Scott Risk (St. Joseph). The Friends of Michigan Parks was formed following

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the Court's September 15, 2010, order for the purpose of moving the Court for permission to file an amicus curiae brief and to file an amicus curiae brief.

**ARGUMENT**

**I. Leasing Publicly Owned Parkland for Profit is not an Acceptable Use within the Context of the 1917 Deed Granting Jean Klock Park or the 2004 Consent Judgment.**

The 1917 Deed and the 2004 Consent Judgment both severely restrict the permissible uses of Jean Klock Park. The deed between J.N. and Carrie Klock (collectively, "the Klocks") and the City of Benton Harbor ("Benton Harbor") was conveyed

upon the express condition, and with the express covenant that said lands and premises shall forever be used by [Benton Harbor] for bathing beach, park purposes, or other public purposes; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as [Benton Harbor] may make or adopt.

**Exhibit 1.**

Similarly, the consent judgment between Plaintiffs-Appellants, amongst others, and Benton Harbor permanently enjoined Benton Harbor from using "Jean Klock Park" ("the Park") "for any purpose other than a bathing beach, park purposes, or other public purposes related to bathing beach or park use . . . ." *Drake, supra* at 2. The consent judgment further restricted the definition of public purpose. The Consent Judgment restricts a public purpose to only bathing beach or park use. The Court of Appeals improperly interpreted these restrictions by narrowly focusing on specific words, applying those words out of context, and using incorrect definitions.

**a. The Narrow Analysis Employed by the Courts of Appeals Violates the Rules of Interpretation.**

A court reviewing a deed of conveyance must give effect to the original parties' intent. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005). In *Carmody-Lahti*, which the Court of Appeals quoted in *Drake, supra* at 3, this Court stated:

In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of the parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.

*Id.* quoting *Purlo Corp v 3925 Woodward Ave, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954).

This Court has made clear that to understand the grantors' intent the deed must be read as a whole. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 621; 761 NW2d 127 (2008), citing *Carmody-Lahti, supra* at 370. In reading the entire deed, the reviewing court must: 1) examine the entire document; and 2) read the language together to give meaning to the grantor's intent. *Id.* Only by looking at these two aspects of the deed can a reviewing court comply with this Court's rule in *Carmody-Lahti*.

The Court of Appeals did not follow this Court's rule. Instead, the Court of Appeals focused very narrowly on specific words and the impact of those words on Benton Harbor. Primarily, the word "use" as it relates to Benton Harbor. *See Drake, supra*, at 4. This is in error. The deed states that the land must be used by Benton Harbor. See **Exhibit 1**. The deed restricts Benton Harbor's use to only "bathing beach, park purposes, or other public purposes[.]" See **Exhibit 1**. Benton Harbor's use is even further restricted by the covenant that "at all times [Jean Klock Park] shall be open for the use and benefit of the public." See **Exhibit 1**. The Court of Appeals focused on Benton Harbor's use; incorrectly assuming that a use by Benton Harbor is the public's benefit or a public purpose. *See Drake, supra*. In the context of a park, Benton Harbor's benefit, the public's benefit, and a public purpose are not the same. The Court of

Appeals was content that the use of the Park as an income generating asset satisfied the deed's requirements. *Drake, supra* at 4. In the general scheme of real estate matters leasing property for income is undisputedly a "use" of the property. However, leasing property for income within the context of benefiting the public and serving a public purpose – as required here – is not appropriate.

This Court has considered what constitutes a public purpose. In *City of Gaylord v Beckett*, 378 Mich 273, 300; 144 NW2d 460 (1966), this Court stated:

Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose.

\* \* \*

The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.

*City of Gaylord v Beckett*, 378 Mich 273, 300; 144 NW2d 460 (1966), quoting 37 Am Jur, Municipal Corporations, § 120, p 374.

When it comes to public parks, the public is not limited to those within the municipality's borders. *See id.* In *Heino v City of Grand Rapids*, 202 Mich 363, 375-376; 168 NW 512 (1918), this Court stated:

While, like public schools for education, public parks are primarily provided for the recreation, pleasure, and betterment of the people within the limits of the governmental organizations which maintain them, they are not by legal restraint or custom or in fact solely for the benefit of the municipality's own inhabitants, but when thrown open as public parks the public generally without distinction are permitted to visit them and freely enjoy the attractions and benefits gratuitously offered.

The Court of Appeals has recognized the rights of the non-municipal resident public to use a municipal park. *See Detroit Branch, N.A.A.C.P. v. City of Dearborn*, 173 Mich. App. 602, 606-607; 434 N.W.2d 444 (1988). In *Detroit Branch, N.A.A.C.P.*, the Court of Appeals has held that closing municipal parks to the non-resident public violates the equal protection clause. *See id.*

In *Drake*, the Court of Appeals reasoned that any benefit to Benton Harbor necessarily benefits the public; the public meaning only Benton Harbor's residents. The language in *Gaylord* may even support this reasoning. At first brush, this analysis appears attractive. But under these facts it is incorrect. The Court of Appeals analysis overlooked binding precedent in *Heino* that explains what constitutes the public in the context of public parks.

Using this Court's definition of public in the context of parks indicates that under the *Gaylord* test, Benton Harbor's use may be a private use. Benton Harbor receives a benefit, namely income. The residents of Benton Harbor may receive a benefit in terms of improved services or lower taxes. But the public, as this Court defines it, does not. *See infra* Part II.b. The *Gaylord* test when informed by *Heino's* definition of public shows that the public does not "receive and enjoy the benefit of the use." *Gaylord, supra; see also Heino, supra*. Thus, Benton Harbor's use does not comply with the deed or the consent judgment because the public does not benefit.

As the Court of Appeals held in *Detroit Branch, N.A.A.C.P.*, barring the general public from a municipal park deprives the public of a benefit to which it is entitled. *See Detroit Branch, supra*. Yet, this is the result of the Court of Appeals holding in *Drake*: a benefit will be taken away from the public-at-large provided the citizens of the immediate municipality are compensated.

Under the Court of Appeals analysis, Benton Harbor's use of the property to generate income is appropriate only because the Court of Appeals equated Benton Harbor, Benton Harbor's residents, and the public as one in the same. When properly considering the on point binding precedent, it becomes clear that Benton Harbor's use does not serve the same public purpose contemplated in the deed because the public is improperly limited in scope. Further, the public, as this Court defines it, does not benefit from Benton Harbor's use of the property. Therefore, Benton Harbor cannot lease the Park and comply with the deed's restrictions or the consent judgment.

**b. The Court of Appeals Ignored Long-Standing Definitions of 'parks' when Interpreting Acceptable Use of Municipal Parkland.**

Several times, this Court has considered what constitutes a park and how a park is defined. *See Clark v City of Grand Rapids*, 344 Mich 646, 658; 55 NW2d 137 (1952).

In *Clark*, this Court broadly defined parks stating:

A park may be a woodland preserve as well as a landscaped playground. To quote a few of the definitions of 'park' from Black's Law Dictionary, at 1325: 'A pleasure ground for the recreation of the public to promote its health and enjoyment. \* \* \* A piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament. \* \* \* A place for the resort of the public for recreation, air and light; a place open for everyone.

*Clark, supra* (emphasis added).

In *Drake*, rather than adhere to one of this Court's established definitions, the Court of Appeals uses a dictionary definition of park. The Court of Appeals even noted that it selected its definition of park from "among other things" park means. *Drake, supra* at 6. This Court recognizes that "everyone" benefits from parks. *See Clark, supra*. The Court of Appeals narrowly construed a benefit to Benton Harbor as benefiting its definition of the public, Benton Harbor, and accomplishing a public purpose. Using this Court's definition of park, the public does not benefit and a public purpose is not served. Amicus Curiae respectfully request that this

Court employ its definition and come to the correct result that Benton Harbor is violating the deed and the consent judgment.

**II. The Court of Appeals' Holding that the Public Benefits from a Government Body's Lease of Publicly Owned Land to a Private Party Poses a Danger to All Publicly Owned Parks.**

The opinion of the Court of Appeals threatens the sanctity and protection of one of Michigan's greatest resources: its parks. The municipal park is a common place for citizens to gather. Often, municipal parks are located on desirable real estate, as is the case in this matter. Here, the public loses a valuable natural resource and benefit so that Benton Harbor can generate income from leasing that natural resource.

**a. The Court of Appeals Authorizes Government Bodies to Liquidate Publicly Owned Assets that are Held for Public Purposes to Recognize Short-Term Gains at a Long-Term Cost.**

The Court of Appeals' decision endangers parks, particularly in light of current economic conditions. Communities across Michigan struggle with budget deficits and reductions in resources. The opinion of the Court of Appeals makes parks assets to liquidate. While this matter deals with a lease, this lease is for 105 years and Benton Harbor retains minimal role in the Park. For all intents and purposes, Benton Harbor has liquidated its property interest. Under the Court of Appeals reasoning the public purpose is satisfied provided a government body receives income from the park's lease; even a lease that few, if any, now living will see end. Taken to its logical conclusion, this presents the classic "slippery slope" scenario where public parks are leveraged for a short-term gain at significant long-term costs. Essentially, the city may mortgage everyone's benefit for the gain of few.

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**b. Benefits realized by Benton Harbor, Assuming Any, Do Not Accrue to All Park Users, only Residents of Benton Harbor, if at All.**

The Court of Appeals' reasoning also erodes this Court's nearly century old opinion that the public park belongs to more than just the municipality. *See Heino, supra* at 375-376. This Court recognizes that the resident of "municipality A" is benefited by the parkland in "municipality B." *Id.* However, as raised in Part I.a., this benefit of "municipality A" is lost when "municipality B" leases out its park, which violates this Court's ruling in *Heino*.

Here, the Court of Appeals assumes that Benton Harbor's residents benefit from Benton Harbor's leasing of the Park. As noted in Part I.a., Benton Harbor's residents may realize a benefit in the form of reduced taxes or improved services. However, the benefit is likely to be insignificant and largely intangible. There is no parity of benefit to Benton Harbor's residents. They lose a Park; a tangible, direct benefit. And in its place Benton Harbor's residents are compensated by an increase in municipal revenue. Even if the definition of public was limited to only the municipality's resident, the benefit incurred is severely disproportionate to the benefit destroyed. Even if the Court finds a benefit to the residents of Benton Harbor, it would not reach residents in other municipalities, as required by *Heino*.

**c. The Lease Agreement Forces Residents to Pay for Access to Private Lands as a Prerequisite to Use Public Land.**

The amount of the Park at issue is 22 acres of a 74-acre park. *Drake, supra* at 2. This is nearly 30% of the Park. The 22 acres will be used to develop three holes of an 18-hole golf course. *See* Order of the Michigan Supreme Court, September 15, 2010. The three holes represent one-sixth of the total course. In order for a member of the public to utilize the publicly owned land, she must pay for a round of golf and access the 22 acres through privately held lands. The small portion of publicly owned land is rendered inaccessible to the public without

utilizing private land at a fee. This effectively removes the Park from the public domain and places it nearly exclusively in the hands of private holders.

The deed specifically states that the Park “at all times shall be open for the use and benefit of the public.” **Exhibit 1.** Removing 22 acres from the Park, which are only accessible via a steep fee and private land, cannot be reconciled with the deed’s plain language that the Park must be open to the public at all times.

**d. Upon Lease Termination the Public Receives Likely Valueless Land.**

The lease term at issue here is 105 years. Assuming that the 22 acres is ever returned to the public, its condition will be drastically different and substantially less valuable than as conveyed. The public will be returned one-sixth of a golf course instead of a beautiful, natural environment.

The deed’s language includes the words “forever” and “at all times.” **Exhibit 1.** Thus, the future use was contemplated by the grantor. The grantor provided a natural environment for the public’s use and benefit forever and at all times. Upon the lease termination, the public will not receive what was contemplated in the deed.

**III. The Court of Appeals Analysis Demonstrates the Deed’s Ambiguity.**

The Court of Appeals interpretation that leasing the Park to a privately held golf course achieves a public purpose or benefits the public demonstrates the ambiguity within the deed. An ambiguous deed should be resolved with extrinsic evidence. *See Taylor v Taylor*, 310 Mich 541, 545; 17 NW2d 745 (1945). Where there is no ambiguity, the deed’s language controls. *Id.* But where ““there is an ambiguity, or if the deeds fail to express the obvious intention of the parties, the courts will try to arrive at the intention of the parties[.]”” *Id.*, quoting *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 563 (1943). If the deed’s meaning is in doubt, ““the courts will consider the situation of the parties, the subject-matter, and the acts, conduct, and dealings of the

parties with respect to the instrument.” *Id.*, quoting *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 280; 96 NW 468 (1903).

**a. Court of Appeals Argument that Leasing is an Acceptable Use was Made on an Argument that *could* be Made; thus, Demonstrating Ambiguity.**

In reaching its decision, the Court of Appeals made it clear that the deed’s language is subject to more than one acceptable interpretation when it stated

Here, Benton Harbor derives monetary and other gain from leasing the property to Harbor Shores [Community Redevelopment Corporation]. Because Benton Harbor benefits from the property while still remaining title ownership of the same, *it could be argued that Benton Harbor is putting the property into service and thus the lease is a “use” of the property . . .*

*Drake, supra* at 4 (emphasis added).

The Court of Appeals arrives at its conclusion based on an argument that “could” be made. Could is defined as

*past of can – used in auxiliary function in the past < we found we could go>, in the past conditional <we said we would go if we could>, and as an alternative to can suggesting less force or certainty or a form in the present <if you could come we would be pleased>*

Merriam-Webster Dictionary, available online at <http://www.merriam-webster.com/dictionary/could>

Even further, under “could be,” the Court of Appeals chosen phrasing, the Oxford American Dictionary writes “might be; *he could have been delayed*, this is possible.” Oxford American Dictionary, pg 194 (1980).

Could is used to describe conditional results, uncertainty, and possibilities. This Court holds that ambiguity exists where a term has an equal chance of having more than a single meaning. *Mayor of Lansing v Pub Svc Comm’n*, 470 Mich 154, 166; 680 NW2d 840 (2004).

Here, the Court of Appeals reached its conclusion through the following steps: (1) it selected a single term: use; (2) applied a dictionary definition to it; (3) read it out of context to the deed; (4) assumes that the public’s benefit and Benton Harbor’s benefit are one in the same; and (5) ultimately, determined that this analysis *could* support the position that a lease for income is an acceptable use of a park held for a public’s benefit. *Drake, supra* at 4. There is no dispute that leasing property for income is a property use in the general sense of real property law. However, when read in the context of the deed’s language, this is not a reasonable understanding. The deed states that the property “shall forever be used by . . . Benton Harbor for bathing beach, park purposes, or other public purposes; and at all times shall be open for the use and benefit of the public[.]” **Exhibit 1** (emphasis added).

The second clause is a separate restriction from the first. Benton Harbor’s use of the Park is appropriate provided that Benton Harbor’s use keeps the Park open “at all times” for the public’s use and benefit. Here, the Court of Appeals only analyzed use as it relates to Benton Harbor. It did not review Benton Harbor’s use in light of the public’s use and benefit.

The plain language of the deed contemplates two users of the property; Benton Harbor as a steward and the public as a beneficiary. However, the Court of Appeals mistakenly concludes Benton Harbor’s and the public’s use and benefit are identical.

After the Court of Appeals concludes its analysis, it determines – and shows its uncertainty – that taken together its analysis “could” be argued to satisfy the use restrictions within the context of the deed. “Could” demonstrates that the opposite argument is possible. Under *Mayor of Lansing*, this is an ambiguity. Amicus Curiae respectfully requests that this Court look to extrinsic evidence to understand the grantors’ intent.

b. **Ambiguity May be Resolved with Extrinsic Evidence and the Extrinsic Evidence Clearly Shows the Grantors' Intent to Benefit the Public through Land for All to Enjoy.**

Plaintiffs-Appellants ably argue the point that the grantor's intent was to provide a place for recreation for all, particularly children. As such, Amicus Curiae largely refer to and incorporate herein Plaintiffs-Appellants' application for leave to appeal regarding the Jean Klock Park dedication ceremony and the Klock autobiography.

Amicus Curiae seek only to bring to the Court's attention the Resolution of Benton Harbor accepting the Klocks' grant. See **Exhibit 2**.

RESOLVED FURTHER, That in behalf of the people, and especially the children of Benton Harbor and vicinity, that this Council extend to Mr. and Mrs. Klock their appreciation of this valuable gift together with the assurance that this Council will cooperate to make this park the blessing to humanity which the givers intend it should be

RESOLVED, also, that since Mr. and Mrs. Klock have given this largely for the benefit of childhood and as a memorial to their deceased child Jean Klock, that this land be named and shall be forever known as "Jean Klock Park."

**Exhibit 2.**

The readily available extrinsic evidence conclusively demonstrates that the Klocks intended that the Park be a place of respite for the public, as public is broadly defined, but particularly children in honor of their late daughter. The Court of Appeals analysis does not uphold the grantors' intent because it substitutes monetary gain to Benton Harbor for a park to benefit "the people, and especially the children of Benton Harbor and vicinity" and serve "as a memorial for their deceased child[.]" **Exhibit 2** (emphasis added).

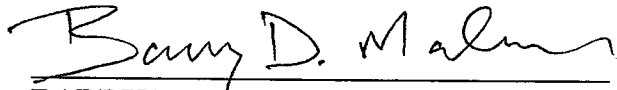
**CONCLUSION**

Amicus Curiae Friends of Michigan Parks respectfully request that this Honorable Court peremptorily reverse the Court of Appeals for the reasons stated within this Brief and Plaintiffs-

Appellants' application for leave to appeal; or grant Plaintiffs-Appellants' application for leave to appeal from the Court of Appeals decision to review its holding that leasing publicly owned parkland, held for a public purpose, is an acceptable use because of the income realized to the municipality. Should this Court be inclined to grant leave, Amicus Curiae would welcome an invitation to fully brief the issues presented within this Brief and Plaintiffs-Appellants' application for leave to appeal.

Respectfully Submitted,

**ADKISON, NEED & ALLEN P.L.L.C.**



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(248) 540-7400

Date: October 18, 2010



See Circuit Court Decree 102 Minn. Pg. 387  
113, 221  
(7/11/47)  
5/24/49

THIS INDENTURE, Made this 4th day of May in the year of our Lord one thousand nine hundred Seventeen, BETWEEN J.N.Klock and Carrie E. Klock, husband and wife, of Benton Harbor, Michigan, of the first part, and City of Benton Harbor, Berrien County Michigan, of the second part, WITNESSETH, That the said parties of the first part for and in consideration of the sum of One Dollar and other valuable consideration; to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release alien and confirm unto the said party of the second part, and to its assigns, FOREVER all that certain piece or parcel of land situate and being in the Township of Benton, in the County of Berrien and State of Michigan, and described as follows, to-wit: Commencing at the Northwest corner of Lot 113 in the Plat of Long Beach, thence Easterly along the Northerly line of Lots 113 and 116, Long Beach, to the Westerly line of Grand Boulevard in plat of Higman's Michigan Park, thence South-easterly along the Southerly and Westerly line of said Grand Boulevard on a line which at every point is Sixty-six (66) feet distant from the Northerly and Easterly line of said Grand Boulevard to the intersection of the Southerly line of said Grand Boulevard with the North and South line running through the center of Section 13, Town 4 South, Range 19 West; thence South along the East line of the Northwest Quarter of said Section 13 to the Paw Paw River; thence Westerly and Southerly down along said River to a point where the Westerly shore of said Paw Paw River intersects with the Southerly line of the Northwest Quarter of Section 13; thence Westerly along the Southerly line of the Northwest Quarter of said Section 13 produced to the low water mark of Lake Michigan; thence Northeasterly along the low water line of Lake Michigan, to the point where the North line of Lot 113 in Plat of Long Beach produced Westward intersects the low water mark of Lake Michigan; thence East along said line to the place of beginning. The above description includes all of Block 29 in Higman's Michigan Park and all the Plat of Long Beach, except Lot 115 and land West of said Lot and between same and Lake Michigan.

The aforesaid lands and premises are granted and conveyed upon the express conditions that said grantees, their heirs, legal representatives or assigns shall not allow, suffer, or permit any intoxicating liquors or drinks to be manufactured, sold, or given away upon said premises ( said covenant shall be construed as running with the land); that any violation of said conditons, or either of them, may be enjoined by said grantors by any court of competent jurisdiction without notice to the then owner of said premises, or any tenant thereof. The said premises above described are also conveyed subject to the rights of the public in the streets and alleys in the Plat of Long Beach. Said lands are also conveyed subject to the rights of A.P. Irven Sibley, Spencer and Edward C. Hegeler, under leases to build and construct private boat houses along and upon the Lagoon.

The covenant of warzanty herein does not apply to the pprtion of the above described lands lying between said Section 13 and Lake Michigan, it being understood that said first parties convey and quit-claim only such title as they may have to the parcel of land lying between said Section 13 and Lake Michigan, included in above description. Said lands and premises are conveyed to said City of Benton Harbor upon the express condition, and with the express covenant that said lands and premises

shall forever be used by the said City of Benton Harbor for bathing beach, park purposes, or other public purposes; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as the said City of Benton Harbor may make and adopt. Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder, remainders, rents, issues and profits, thereof; and all the estate, right, title, interest demand whatsoever of the said parties of the first part, either in Law or Equity, of, in and to the above bargained premises, with the hereditaments and appurtenances, TO HAVE AND TO HOLD the said premises as above described, with the appurtenances unto the said party of the second part, and to its assigns, FOREVER. And the said parties of the first part, for their heirs, executors, and administrators do covenant, grant, bargain and agree to and with the said party of the second part, its assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above described as of a good, sure perfect, absolute and indefeasible Estate of Inheritance in the law in Fee Simple, and that the said lands are free from all incumbrances whatever and that the above bargained premises in the quiet and peaceable possession of the said party of the second part its assigns, against all and every person or persons lawfully claiming, or to claim, the whole or any part thereof, will forever Warrant and Defend, except as aforesaid. IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered )  
 in the presence of )  
Humphrey S. Gray. )  
W.P. Harvey. )

J.N.Klock (L.S.)  
Garrie E. Klock. (L.S.)

State of Michigan.)  
 County of Berrien. )

SS On this 4th day of May, in the year one thousand nine hundred and seven, before me, a Notary Public in and for said County, personally appeared J.N.Klock and Garrie E. Klock, to me known to be the same persons described in and who executed the within instrument, who acknowledged the same to be their free act and deed.

Humphrey S. Gray.  
 Notary Public, Berrien County, Mich.

My commission expires Jan'y 18, 1921.

Recorded May 16th, A.D. 1917 at 9 A.M.  
A.A. Baushke, Register.

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 This Indenture, Made this 5th. day of September in the year of our Lord one thousand nine hundred and sixteen Between Eva Korman, Herman<sup>C.</sup> Wurz and Louisa Wurz, his wife, Harry Wurz, Margaret Myers, Elizabeth Geideman and Katherine Bachman of the first part and Robert F. Tanner and Rose E. Tanner his wife of the second part; Witnesseth, That the said Eva Korman, Herman C. Wurz & Louisa Wurz, his wife, Harry Wurz, Margaret Myers, Elizabeth Geideman & Katherine Bachman parties of the first part, conveys and warrants to the said Robert F. Tanner and Rose E. Tanner his wife parties of the second part, all that certain piece or parcel of land situate and being in the City of Miles County of Berrien, State of Michigan, and described as follows, to-wit:  
 Commencing at a point of the west line of Fifth Street in the City of Miles, at the northeast corner of land owned by Herman C. Wurz and described in a deed recorded in Liber I66 of deeds on page 266 in the office of the Register of deeds of Berrien County; thence west on the north line of said Wurz property eight (8) rods, thence



The Council met in regular session at the City Hall at 8:30 o'clock

P.M. Present- Mayor Sutherland, City Clerk, City Attorney, Aldermen  
Bernard, Bridgman, Friedman, Hall, Green, Mitchell, Wallace, Warner

The reading of the minutes of the previous meeting was dispensed with.

A communication was then received and read from J. N. Kleck offering  
to deed to the City of Benton Harbor approximately ninety (90) acres of  
land fronting on Lake Michigan, same to be used for a public park, whereupon  
the following resolution was introduced and read:

WHEREAS, on this date, May 7th, 1917, J. N. Kleck and Carrie E. Kleck,  
his wife, have tendered to the Common Council of the City of Benton Harbor,  
Michigan, a certain deed, wherein and whereby said parties transfer and  
convey to the City of Benton Harbor that certain parcel of land in the Town-  
ship of Benton, County of Berrien and State of Michigan, described as  
follows, to-wit:-

Commencing at the northwest corner of Lot 113 in the Plat of  
Long Beach; thence easterly along the northerly line of lots 113 and  
116, Long Beach, to the Westerly line of Grand Boulevard in the Plat of  
Higman's Michigan Park; thence southeasterly along the southerly and  
westerly line of said Grand Boulevard on a line which at every point is  
sixty-six feet distant from the northerly and easterly line of said  
Grand Boulevard to the intersection of the southerly line of said Grand  
Boulevard with the north and south line running through the center  
of section 13, town 4 south, range 19 west; thence south along the east  
line of the northwest quarter of said section 13 to the Paw Paw River;  
thence westerly and southerly down along said river to a point where the  
westerly shore of said Paw Paw River intersects with the southerly line  
of the northwest quarter of Section 13; thence westerly along the  
southerly line of the northwest quarter of said section thirteen pro-  
duced to the low water mark of Lake Michigan; thence northeasterly  
along the low water line of Lake Michigan to a point where the north  
line of Lot 113 in Plat of Long Beach produced westward intersects the  
low water mark of Lake Michigan; thence east along said line to the  
place of beginning.

The above description includes all of Block 29 in Higman's Mich-  
igan Park and all the Plat of Long Beach, except Lot 115 and land west  
of said lot, and between same and Lake Michigan, and

WHEREAS, said deed contains a covenant and condition that said lands  
shall forever be used by the said City of Benton Harbor for Bathing Beach,  
Park Purposes or other Public purposes, and at all times shall be open for  
the use and benefit of the public, subject only to such rules and regulations  
as the said City of Benton Harbor may make and adopt; Now, therefore,

RESOLVED, That the Common Council of the City of Benton Harbor, in  
regular session assembled, for and on behalf of the City of Benton Harbor  
does hereby accept said deed and does hereby accept the conveyance of the  
lands and premises in said deed subject to the conditions set forth in said  
deed; and,

RESOLVED, That said lands, above described, upon the delivery of said  
deed to the City of Benton Harbor shall be forever dedicated for Bathing  
Beach, Park Purposes and other Public Purposes, and at all times shall be  
open for the use and benefit of the public, subject only to such Rules  
and Regulations as the said City of Benton Harbor may make and adopt,

RESOLVED FURTHER, That in behalf of the people, and especially the  
children of Benton Harbor and vicinity, that this Council extend to Mr. and  
Mrs. Kleck their appreciation of this valuable gift together with the  
assurance that this Council will cooperate to make this gift a blessing

1-CONTINUED

to humanity which the givers intend it should be

RESOLVED, also, that since Mr. and Mrs. Klock have given this largely for the benefit of childhood and as a memorial to their deceased child Jean Klock, that this land be named and shall be forever known as "Jean Klock Park".

Alderman Hall moved the adoption of the foregoing resolution, same was supported by Aldermen Mitchell, and carried by the following vote on roll call:

Yeas- Aldermen Bernard, Bridgman, Friedman, Green, Hall, Mitchell, Wallace, Warner. Nays- None.

The following resolution was then introduced and read:

WHEREAS, in the year 1912 Messrs. Edward K. Warren and Charles K. Warren, of Three Oaks, Michigan, purchased and procured a tract of land fronting on Lake Michigan adjoining the City of Benton Harbor on the North and West, known as the Sand Dunes, and containing about 90 acres of land; and since that time said Warrens have refused to sell said lands except for the use and good of all the people; and for this purpose have been willing to accept for said lands the amount of their investment, which is much less than the actual value of said lands, and

WHEREAS, this action on the part of the said Warrens has made it possible for said lands to be acquired and conveyed to the City of Benton Harbor for Public Bathing Beach and Park purposes; Now, Therefore

RESOLVED, That the Common Council of the City of Benton Harbor do hereby commend the spirit and action of the said Warrens in purchasing and holding said lands for the purposes aforesaid; and, for and on behalf of the people of the City of Benton Harbor and community, do hereby express to said Warrens their sincere appreciation for their cooperation and assistance in making it possible for said lands to be dedicated forever for the good and happiness of mankind.

Alderman Mitchell moved the adoption of the foregoing resolution, same was supported by Alderman Hall, and adopted by the following vote on roll call

Yeas- Aldermen Bernard, Bridgman, Friedman, Green, Hall, Mitchell, Wallace, Warner. Nays- None.

Alderman Bridgman moved, supported by Alderman Bernard, that the City Clerk be instructed to forward to J. N. Klock and C. K. Warren, a copy of the resolutions passed relative to "Jean Klock Park"; motion carried by an affirmative vote of all the aldermen present.

The following druggist's liquor bonds, bearing the approval of the City Attorney, as to form, were then presented for the Council's consideration:

Hopkins Drug Company, a corporation, with Wm. E. Sheffield and Geo. H. King, as sureties.

Wm. E. Sheffield and Company, with Fred S. Hopkins and John E. Barnes, as sureties.

A. H. Wiggins, with Ben. Bishop and C. O. Brown, as sureties.

Gesse Leever, with W. A. Pardon and Arthur Friedman, as sureties.

Alderman Warner moved, supported by Alderman Wallace, that the sureties on the foregoing bonds be approved and accepted; motion carried by an affirmative vote of all the aldermen present.

A petition was then received and read asking the Council to take action in