

STATE OF MICHIGAN

SUPREME COURT

CAROL DRAKE and CLELLEN BURY,

Plaintiffs/Appellants,

Supreme Court N^o: 140685

v

Court of Appeals N^o: 287502

CITY OF BENTON HARBOR, a Michigan
municipal corporation; and HARBOR SHORES
COMMUNITY REDEVELOPMENT, INC., a
Michigan nonprofit corporation,

Lower Court N^o: 08-0247-CE
Honorable Scott Schofield, Niles Division
By Assignment

Defendants/Appellees.

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**PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF ON
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

October 26, 2010

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LEGAL ARGUMENTS¹

Plaintiffs have done their best to comply with the Court's request to avoid submitting a mere restatement of its initial Application for Leave to Appeal ("Plaintiffs' Application"). In light of the opportunity to aid the Court with supplemental briefing, however, the following brief more fully addresses some points raised by the Defendants-Appellees and the Court of Appeals.

I. THE DEED LANGUAGE UNAMBIGUOUSLY PRECLUDES THE CITY FROM LEASING THE PARK FOR 105 YEARS TO A PRIVATE ENTITY TO RUN A PRIVATE GOLF COURSE THAT IS OPEN TO THE PUBLIC

As argued in Plaintiffs' Application, the deed language that requires that Jean Klock Park "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," unambiguously precludes the City from leasing the park to a private organization, for over 100 years, for use as a "championship" golf course that charges annual fees amounting to nearly 50% of the per capita income of the City. Plaintiffs' Application, pp 5, 12-27. As further discussed in Plaintiffs' Application, the Court of Appeals erred and reached a contrary conclusion because it interpreted words outside of the context of the deed and did not give effect to the intent expressed in the deed as a whole. Plaintiffs' Application, pp 12-27.

To expand on these arguments, Plaintiffs will further explain why the City "using" the park by leasing it for use as a privately-run golf course is not equivalent to the City using the park for a publicly owned and operated park, as Defendants argue, let alone equivalent to using the park for a public park purpose within the meaning of the deed and the Consent Judgment.²

¹ Plaintiffs/Appellants incorporate and rely on Appellants' Initial Application for Leave to Appeal.

² As explained in Plaintiffs' Application on page 5, the Consent Judgment expressly stated that the "other public purposes" for which the park could be used are "other public purposes related to a bathing beach or park use." Therefore, it is clear that it would be insufficient for the golf course to serve a public purpose; it must serve a public park purpose or a public purpose related to a park. See Plaintiffs' Application, pp 24-26.

A. THE CITY IS NOT “USING” THE PARK FOR A “PARK OR OTHER PUBLIC PURPOSE” BY “USING” IT AS A RENTAL PROPERTY AND LEASING IT TO A PRIVATE ENTITY TO RUN HARBOR SHORES’ GOLF COURSE.

Defendants argue that using land by leasing it to a private entity still constitutes “using” it for a park or other public purpose because the City is leasing it for use as a “public” golf course. Defendant-Harbor Shores Response, pp 20-25; Defendant-City of Benton Harbor response, pp 12-15. Their reasoning is that the City is “using” a property if it is leasing it out for rent; this Court has long held that a “public golf course” is a “park” being used for a “public purpose”; and, thus, leasing a park for use as a golf course that is open to the public is the equivalent of “using” the park for “park purposes, or other public purposes.” There are several problems with this reasoning, all of which were implicated in the Court of Appeals decision.

First, the covenant is not merely that the City must “use” the park; it is that the City must use the park “for bathing beach, park purposes, or other public purposes.” As explained in Plaintiffs’ Application, renting the park to Harbor Shores gives the right to “use” the property to a private entity and not the City. Even if Defendants are correct that leasing a property for rental income can constitute “using” a property, however, that is not enough to satisfy the covenant because, although the City may be “using” the park, it is not doing so “for bathing beach, park purposes, or other public purposes.” It is “using” it as a rental property. This point is particularly important because the Court of Appeals apparently concluded that the City would be “using” the property within the meaning of the deed merely by using it for rental income. *Drake v City of Benton Harbor*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 287502) at *4 (“Court of Appeals opinion”). This conclusion is inconsistent with the unambiguous deed language.

Second, although the Court of Appeals and Defendants are correct that this Court has stated that a publicly owned and operated golf course can constitute a “park” being operated for public purposes for taxation, this case does not involve a publicly owned golf course. It involves a private golf course operated by a private entity that is open to the public. The Court of Appeals opinion fails to recognize the crucial distinction between a municipally owned and operated golf course, which

can be considered a “park” used for a “public purpose,” and a privately owned and operated golf course, which is not a park being operated for a public purpose. The cases cited in the Court of Appeals opinion, and discussed by Defendants, highlight this distinction. *Detroit v Oakland Co*, 353 Mich 609; 92 NW2d 47 (1958), was a case about a publically owned golf course, not a privately owned course with three holes located on leased public land. In determining that the golf course was not subject to a special drain assessment, the Court explained that the parties had stipulated to the golf courses’ public ownership, funding and use:

[T]he said golf course was opened for the use of the public in August, 1924, being dedicated to the general public by the City of Detroit and operated as a governmental function supported by tax funds appropriated therefor and same has been used continuously since August, 1924, for public purposes. [*Id.* at 616.]

The *Detroit* case did not hold that all golf courses are automatically parks that are being used for a public purpose. Rather, the Court’s holding in that case was expressly based on the fact that the golf course was owned and operated by a municipality, and, therefore, was “used for governmental or public purposes.”

The other case cited in the Court of Appeals opinion is *Golf Concepts v City of Rochester Hills*, 217 Mich App 21; 550 NW2d 803 (1996), a Court of Appeals opinion authored by then-Judge Corrigan. That case involved a question about whether a lease to use municipally owned property constituted a “concession agreement” under the lessee-user tax act. As the opinion explained, the purpose of that tax statute is to “eliminate the unfair advantage that private-sector users of tax-exempt property would otherwise brandish over their competitors who lease property that is privately owned.” *Id.* at 25. The Court held that a roughly 200 acre municipally owned golf course could be considered a public park, based on the *Detroit* case. The Court then went on to hold that the lease was not a concession, as it essentially privatized the golf course operation:

Also, the record does not contain evidence that the purpose of the golf course was reasonably related to the public purposes of respondent city. It appears that respondent merely privatized the operation of the golf course, thereby permitting petitioner to have an unfair advantage over entities leasing privately owned property. [*Id.* at 29.]

Golf Concepts highlights the fact that a particular use of property may be considered “public” when it is performed and controlled by a municipality, but it becomes “private” when it is performed and controlled by a private entity.

Ironically, under either of these two cases, the Harbor Shores Golf Course would not qualify for a tax exemption because it is a privately owned golf course constructed on mostly privately owned property. Both of these cases highlight the importance of municipal ownership and operation for a golf course to be considered a “public use” for tax purposes. And, neither the *Detroit* nor *Golf Concepts* cases involved the interpretation of a deed restriction. As such, neither case answers the question of whether leasing the park to a private entity (Harbor Shores) to use as part of a privately owned golf course that charges \$150 per round is consistent with the requirement that the park “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.”³

It is also important to note that the Court of Appeals and the Defendants blur the distinction between public and private use by using terminology that is unique to golf vernacular – what is considered a “public golf course.” While the *Detroit* Court was referring to a golf course that is owned and operated by a governmental unit, Defendants are using the term “public golf course” in the manner it is commonly used in the golf world – to refer to a privately owned and operated golf

³ Defendants also rely on other Court of Appeals taxation cases involving golf courses. Those cases are not binding on this Court and, regardless, are distinguishable for the reasons discussed on pages 21-22 of Plaintiffs’ Application. They are also not useful for determining the “common meaning” of the words in this deed, given that they are tax cases from the 1990s. Words are often given specialized meaning in the tax context that are consistent with their common meaning. For example, 26 USC 3121(w)(3)(A) defines for the purposes of that section of the Tax Code a “church” as a “a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church,” even though most people would probably not consider an elementary school, even if it is religiously-run, to be a “church” within the common meaning of the word.

Defendant-Harbor Shores cites one additional, unpublished Court of Appeals case that is not discussed in Plaintiffs’ Application, *Mushovic v Bloomfield Hills School Dist*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2010 (Docket No. 293841), but *Mushovic* is clearly inapplicable here. It involved a deed that restricted use of the land to a very different purpose - schools - and that used broader, less restrictive language than the deed restriction in this case.

course that is open to the public (as opposed to one that is open only to its members). A privately-owned enterprise is not automatically being operated for public purposes merely by virtue of the fact that it is open to the public, even if it is being operated on publicly-owned land. For example, most stores are “open to the public,” but no one would consider that the City would be using the park for a “public purpose” if it leased the land to Wal-Mart to open a store. Similarly, although a golf course that is owned and operated by the government and a private course that is open to the public are both sometimes referred to as “public golf courses,” they are not the same thing. The Court of Appeals, relying on *Detroit*, held that the deed permitted the City to lease the park to a private entity for use as a golf course because a “public golf course” is a park without recognizing or considering the significance of the dual meanings of this phrase.

Third and finally, even if opening a privately owned and operated golf course on city land could constitute a public park purpose, the *City* is not the one using it for that purpose. Instead, the City is using it as a profit-generating rental property, and Harbor Shores, *a private entity*, is the one using it for the supposed public purpose.⁴ Defendants repeatedly emphasize that the golf course will be operated as a non-profit organization, but this distinction lacks legal or philosophical significance for purposes of determining whether it will serve a “public purpose.” A non-profit is still a private entity, and there is no requirement under state or federal law that a corporation organized as a non-profit serve a public purpose. See 26 USC 501(c) and MCL 450.2108(3) and 450.2123. The state law is so broad that it defines a non-profit corporation as a corporation formed to carry out “any lawful purpose or purposes not involving pecuniary profit or gain for its directors, officers, shareholders, or members.” MCL 450.2108(3). Simply because an organization’s purpose is not for profit does not mean that it is intended to serve the public; indeed, there are many non-profit organizations whose purposes are to elevate the interests of a small subsection of the population over the contrary interests of the public at large.

⁴ Although Defendants emphasize the benefits they are working to provide the City, as discussed on pages 18-20 of Plaintiff’s Application, the limited involvement the City has in the golf course under the lease does not somehow transform this private enterprise into a public one.

Moreover, the fact that a certain activity is considered to have a public purpose when undertaken by the government does not mean that it automatically has a public purpose when undertaken by a private entity. For example, this Court has held that a city acquiring land and preparing it for development also constitutes a “public purpose” within the meaning of the tax statute. *Mt Pleasant v State Tax Comm’n*, 477 Mich 50, 54-55; 729 NW2d 833 (2007). If a private entity undertook those same activities, it would not mean that it was being done for a “public purpose,” even if the land was acquired through a lease from a city.

Use by a private entity is inconsistent with the specific deed language in this case. The deed does not just generally require that the land be used for certain purposes; it requires that the land “shall forever be used *by the said City of Benton Harbor* for bathing beach, park purposes, or other public purposes.” Indeed, this is a significant difference between this case and the case relied on by Defendant-Harbor Shores, *Central Land Co v Grand Rapids*, 302 Mich 105; 4 NW2d 485 (1942). In *Central Land*, the deed required that the land be used for park purposes; not that one specific user, such as the City of Grand Rapids, had to use the land for a park purpose.⁵ The Court of Appeals, again, adopted this faulty reasoning and held that the use was permitted, in part, on the basis that a golf course can qualify as a public purpose and did not consider whether *who* was undertaking the activity was significant to determining whether it had a public purpose.

B. THE OUT-OF-STATE CASES CITED BY DEFENDANT HARBOR SHORES DO NOT SUPPORT ITS POSITION.

Defendant Harbor Shores also looks to a series of out-of-state cases to support its argument that a lease for a golf course constitutes “using” property for a park purpose. These cases have no precedential value in Michigan, and they also do not provide any particular guidance for this case. To the extent that these cases are of any use, they simply reaffirm that there is no case that will give

⁵ Interestingly, the Court in *Central Land* reached its conclusion by looking behind the language of the deed restrictions to the purpose of those restrictions and the circumstances of their formation. *Central Land*, 302 Mich at 110.

the answer to how this Court should interpret this unique language in the Deed, in light of the unique circumstances in this case.

The first case cited by Harbor Shores is *Angel v City of Newport*, 109 RI 558; 288 A2d 498 (1972). There, the City leased a small portion of the park to an organization to develop an indoor recreational facility that was to be open to the public for no charge. The Court found that the lease was consistent with the gift, given that there was no charge for admission, the facility was on a very small part of the park, and there was a “change in circumstances” from the time of the dedication. Here, there clearly is a significant charge, 22 acres is a substantial portion of the entire park, and Michigan does not employ the same ‘change in circumstances’ rule as Road Island.

In *Bernstein v City of Pittsburgh*, 366 Pa 200; 77 A2d 452 (1951), the Court addressed whether plans to erect an amphitheater and lease it to the Civic Light Opera Association of Greater Pittsburgh for 10 years were allowed by the deed language. The key question in *Bernstein* was whether the use of the word “free” in the dedication meant that the Opera could not charge admission. The Court ultimately upheld the amphitheater plans as consistent, finding the word “free” did not require all activities within the park to be free. As an important contrast to this case, *Bernstein* involved a 10 year lease as opposed to a 105 year lease, and a civic opera charging some nominal price for admission instead of “Championship” golf course rates.

Harbor Shores also cites *Florida Little Major League Ass’n Inc v Gulfport Lion’s Little League Inc*, 127 So2d 707 (Fla App 1961), but there is no citation in that opinion as to what the language of the dedication was. This is also another case where there was only a 10 year lease, but there is no mention as to whether there was any charge for participation in the baseball league, and if so, for how much.

In *City of Port Arthur v Young*, 37 SW2d 385 (Tex Civ App 1931), the Court addressed whether property donated to the City for a “pleasure pier” could be operated by a lease. The Court reiterated that “[t]he intent of the parties in executing and delivering the deed of gift must answer

this question.” It then went on to hold that, based on the language and the circumstances surrounding the grant of the deed, a lease of the property was contemplated:

Only a short while after the deed was delivered the parties thereto executed between themselves a lease similar in its rights and obligations to the lease involved in this suit. They afterwards renewed this lease. These two contracts remained in force and the property was operated under them for ten years. Mr. Dunstan was again a bidder for this contract. *It thus appears that the parties themselves have construed the deed of gift and, we think, answered the question beyond all doubt that Dunstan, in deeding the property to the city, and the city in accepting the deed, intended that the property should or could be operated by and through suitable lessees.* Further, we think the very language of the grant to the city gave it that right, in that it was given the right to adopt reasonable rules and regulations in regard to the property. [*Id.*]

This case is significant for two reasons. First, it highlights that the deed restrictions in this case state that the property is to be open to the public, “subject *only* to such rules and regulations as the said City of Benton Harbor may make and adopt.” This is in contrast with *City of Port Arthur*, where the qualifying word “only” was not used. Second, the Court acknowledged that the intent of the dedication could be ascertained by the facts and circumstances at the time of, and after the dedication. Finally, it is worth noting that this is another case where the public was not charged admission by the lessee of the property.

The out-of-state case cited, *Slavich v Hamilton*, 201 Cal 299; 257 P 60 (Cal 1927), involved a lease between two municipal agencies for 25 years, with no charge for entry by the public. The Court upheld the lease as consistent with the terms of the grant, but also cautioned that the nature of the lease and the use must be examined:

A use for a public purpose may be utterly inconsistent with a use for park purposes. Under the well-settled principle of law generally applicable, if the city were undertaking to establish in Adams Park a city hall, fire-engine station, hospital, or jail, endeavoring to devote the property to the erection of municipal buildings or offices for use in the transaction of public business, we would have little hesitancy in saying that such purposes would be entirely inconsistent with the use of the property for park purposes. [*Id.*]

Finally, it is interesting to note that Harbor Shores points to these cases for the proposition that “the length of the lease does not lead to the conclusion that the Park is no longer being ‘used by’

the City.” Harbor Shores Brief in Response to Plaintiffs’ Application for Leave to Appeal at 29. However, each of the cases cited have substantially shorter leases than is the case here. The lease between the City and Harbor Shores is for an initial 35 year term, with the right to renew by Harbor Shores for two additional 35 year terms, or a total of 105 years. The longest lease in these out-of-state cases, on the other hand, was 25 years. The other leases were for 10 years. This just highlights the extraordinary term of the Lease for Jean Klock Park, which, as discussed on pages 15-20, 26-27 of Plaintiffs’ Application, is effectively a conveyance and is inconsistent with the deed language.

Because the unambiguous language of the deed and Consent Judgment exclude Defendants’ proposed use of the property, this Court should reverse the Court of Appeals.

II. AMBIGUITY AND THE PARTIES’ INTENT

For all the reasons discussed above and in Plaintiffs’ Application, Plaintiffs maintain that the deed unambiguously precludes Defendants’ use of the park as part of the Harbor Shores Golf Course. At a minimum, however, the Court of Appeals erred in determining that the language *unambiguously* reflected an intent to *permit* this use. If there is not an unambiguous intent to preclude leasing the park to a private entity for a golf course, then, at best, the language is ambiguous, and Defendants’ interpretation fails because it is contrary to all of the undisputed, extrinsic evidence of the parties’ intent. In addition to the errors in the Court of Appeals ambiguity analysis highlighted in Plaintiffs’ Application, the Court of Appeals also clearly erred because it applied the incorrect standards for “ambiguity,” and, regardless, even if the language is not patently ambiguous, the Court of Appeals did not have the benefit of this Court’s recent analysis of what constitutes a latent ambiguity in *Shay v Aldrich*, 487 Mich 648; ___ NW2d ___ (2010). If the language does not unambiguously prohibit the proposed use, then Plaintiffs urge this Court to hold, at a minimum, that the language is ambiguous and Defendants’ proposed use is thus prohibited because there is no material factual dispute that the uncontradicted extrinsic evidence of the parties’ intent does not indicate that they

ever intended or contemplated that the park could be used as a privately owned and operated golf course.

A. THE COURT OF APPEALS APPLIED THE WRONG STANDARD FOR DETERMINING WHETHER THERE IS AN “AMBIGUITY” IN A DEED RESTRICTION.

The Court of Appeals decision was based on an erroneous legal foundation because the Court applied the standard for determining whether a statute is ambiguous instead of the less stringent standard this Court uses to determine whether a contract is ambiguous. Although Plaintiffs maintain that the deed language was ambiguous under the more stringent ambiguity standard applied by the Court of Appeals, it was even more clearly so under the proper standard.

The Court of Appeals analysis was based on two crucial misstatements of law. The Court of Appeals first erred by stating that “[a] contract is ambiguous . . . ‘when [a term] is equally susceptible to more than a single meaning.’” Court of Appeals opinion at *3, quoting *Lansing Mayor v Pub Service Comm’n*, 470 Mich 154, 166; 680 NW2d 840 (2004). This is the standard for determining whether a *statute* is ambiguous; this Court has never applied this standard to determine whether a contract is ambiguous. Instead, this Court has repeatedly stated that “a contract is said to be ambiguous when its words may reasonably be understood in different ways.” *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999), quoting *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). See also *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003); *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001); *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 27; 517 NW2d 19 (1994); *Auto Club Ins Ass’n v DeLaGarza*, 433 Mich 208, 213; 444 NW2d 803 (1989); . The standard articulated in these cases has never been overruled. The *Lansing Mayor* quote relied on by the Court of Appeals was addressing when a statute is ambiguous and did not alter the ambiguity standard for interpreting a contract. Indeed, the *Lansing Mayor* opinion relied on and affirmed statements in an important contracts case addressing ambiguity, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), and did not overrule *Klapp* or the numerous

other contracts cases that are consistent with *Klapp*'s understanding of the ambiguity standard, including *Wilkie*, *Nikkel*, and *Raska*.⁶

The Court of Appeals second misstatement of the law was that “[a] contract is ambiguous when two provisions ‘irreconcilably conflict with each other,’” Court of Appeals opinion at *3, citing *Klapp*, 468 Mich at 467. Again, this Court has applied this standard when interpreting a statute, such as in *Lansing Mayor*, but never when interpreting a contract. Instead, this Court has stated that a contract is ambiguous “when its provisions are capable of conflicting interpretations,” and, thus, one instance where a contract is ambiguous is when its provisions irreconcilably conflict. *Klapp*, 468 Mich at 467. Even in *Klapp*, however, the Court did not apply the “irreconcilable conflict” standard; instead, the Court concluded that the contract was ambiguous because “there is no way to read the provisions of this contract in reasonable harmony.” *Id.* at 468-469.

B. UNDER THE PROPER AMBIGUITY STANDARD, IT IS EVEN MORE APPARENT THAT THE DEED LANGUAGE IS, AT A MINIMUM, AMBIGUOUS.

As discussed in Plaintiffs’ Application, the covenant language unambiguously supports Plaintiffs’ position, or, at a minimum, would be ambiguous under the more stringent standard applied by the Court of Appeals. Plaintiffs’ Application, pp 27-28. But it is even more apparent under the proper standard that the covenant language is, at a minimum, ambiguous.

To begin with, if both parties’ interpretation of the deed are reasonable, then the deed is ambiguous because “its words may reasonably be understood in different ways.” The Court of Appeals reasoning, if not flawed, is at least not the only reasonable interpretation of the text. For example, the Court of Appeals held that the deed language “shall forever be used by the said City of Benton Harbor for bathing beach, park purposes, or other public purposes” does not mean that the

⁶ The *Lansing Mayor* opinion relied on *Klapp* for the proposition that ambiguity is a finding of last-resort, and a footnote specifically explained that *Klapp* was relevant in spite of being a contracts case because the rule of last resort applied to both contractual and statutory interpretation. *Lansing Mayor*, 470 Mich at 165 n 6. The Court did not hold that the rules of contract and statutory interpretation have collapsed into each other.

land had to be forever used by the City of Benton Harbor and only indicates that, if the City happens to be using the land, then it should be used for bathing, park, or other public purposes. The Court of Appeals stated that if the parties intended the former meaning, then they would have simply said the land “shall forever be used by the City of Benton Harbor” and limited the uses in a separate sentence. Court of Appeals opinion at *3. As explained in Plaintiffs’ Application on pages 13-15, this reading is implausible and contrary to the language of the deed. But, at a minimum, the Court of Appeals erred in finding that the *only* reasonable way in the English language to promise that you will forever maintain the ownership of something for a specific use is to use two separate sentences. This also can be reasonably communicated in one sentence through the use of modifying prepositional phrases, such as those used in the deed. If the Court of Appeals reading of the deed is plausible, then, at a minimum, the deed may reasonably be understood in different ways such that it is ambiguous and the Court should look to the unconverted extrinsic evidence of the parties’ intent.

Further, if the Court of Appeals interpretation of the deed is correct, then, at a minimum, the provisions of the deed cannot be read in reasonable harmony, and this Court should hold that the deed is ambiguous. For example, the Court of Appeals held that the City is permitted to lease the park to a private entity because the deed conveyed the property to the City “and to its assigns, FOREVER,” and, thus did not contemplate or require that the City must be the only entity to ever “use” the property. Court of Appeals opinion at *3. As discussed in Plaintiffs’ Application on page 14, this is not the most natural reading of that language, but regardless, at best it renders the deed ambiguous.⁷ This conclusion is reinforced by application of the correct ambiguity standard. Even if the Court of Appeals interpretation of this language is plausible, then it is in direct conflict with the deed’s clear statement that the “lands and premises shall forever be used *by the said City of Benton Harbor* for bathing beach, park purposes, or other public purposes.” If the parties intended

⁷ As indicated in Plaintiffs’ Application, the most logical way to harmonize the language in the deed restricting use of the property to the City and this reference to “assigns” is that the deed contemplated other potential municipal ownership or changes in municipal structures in the future (but not private ownership or control of the property). In addition, much of the language cited consists of “form” deed language used at the time and prior to word processing.

the deed's reference to the City of Benton Harbor's assigns to mean that the City could assign its property rights to a private entity, then the only way to harmonize that with the covenant would have been to omit the italicized phrase "by the said City of Benton Harbor" or to instead write "by the said City of Benton Harbor and its assigns." Because the parties did neither of these things, this phrase is in conflict with the Court of Appeals interpretation of the "assigns" language. Likewise, a singular reference to "tenants" in a notice provision does not unambiguously give the City the right to lease the property to a private entity for a golf course. If anything, this provision contradicts the requirement that the City use the property "forever." Under *Klapp*, if two provisions of a contract are in conflict and cannot be read in reasonable harmony, the contract is ambiguous. Thus, at a minimum, the Court should find that this language renders the deed ambiguous.

If this Court finds the deed ambiguous and looks to extrinsic evidence of the parties' intent, it should reverse the Court of Appeals because there is no material factual dispute that the uncontradicted extrinsic evidence supports Plaintiffs' interpretation of the deed. As discussed in Plaintiffs' Application, on pages 2-4, extrinsic evidence demonstrates that both the City and the Klocks understood that the land would be available to all people, and particularly the children, of the Benton Harbor area, and those who "do not own a foot of ground," to enjoy the beach and the dunes and other passive, historical park uses. This understanding of the deed language is confirmed by the fact that the land was used consistently with the parties' intended purposes for decades, and the City even invested in this use of the property by building a bath house there in 1975. There is no evidence of any contrary understanding until the City decided to try instead to use the park for economic development, in direct contradiction with the deed and the Consent Judgment. Thus, because the undisputed extrinsic evidence demonstrates that the original parties never intended or contemplated that the City would ever enter a long-term lease with a private entity to use the park for a golf course, materially interfering with the primary purposes contemplated by the parties, if the Court finds the deed ambiguous, it should reverse the Court of Appeals decision as contrary to the parties' intent.

C. ALTERNATIVELY, THE UNCONTROVERTED EXTRINSIC EVIDENCE OF THE PARTIES' INTENT CREATES A LATENT AMBIGUITY AND DEMONSTRATES THAT DEFENDANTS' PROPOSED USE IS CONTRARY TO THE PARTIES' INTENT WHEN THE DEED WAS DRAFTED.

Even if the deed is somehow interpreted, on its face, to unambiguously permit the City to enter a long-term lease with a private entity to operate a golf course on the park land, this Court should still find that the Court of Appeals erred because the deed contains a latent ambiguity.⁸

It is well-established Michigan law that extrinsic evidence may not be used to interpret an unambiguous contract. See, generally, *Paul v Univ Motor Sales Co*, 283 Mich 587; 278 NW 714 (1938). In *Shay, supra*, this Court recently reviewed that there are two types of ambiguity under Michigan common law: latent and patent. *Shay*, slip op at 20. Extrinsic evidence is not permitted to show the existence of a patent ambiguity because the ambiguity appears on the face of the document. *Id.* In contrast, extrinsic evidence may be used to both identify and resolve a latent ambiguity because it “arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.” *Id.* at 21, 24, quoting *Hall v Equitable Life Assurance Society*, 295 Mich 404, 409; 295 NW 204 (1940). One instance where a latent ambiguity exists is “when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the ‘necessity for interpretation or a choice among two or more possible meanings.’” *Shay, supra*, at 20-21, quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964).

If the deed language somehow could be read on its face to allow the proposed use, Plaintiffs argue that this is a circumstance where, when the deed’s language is applied to the property, a latent ambiguity arises because the facts create the “necessity for interpretation or a choice among two or more possible meanings.” *McCarty*, 372 Mich at 575. These facts are analogous to those in *McCarty*, where the parties signed a sales contract agreeing that the defendant would pay plaintiff

⁸ The Court of Appeals stated that it could not consider extrinsic evidence because it found the deed unambiguous (Court of Appeals opinion at *4, *6, and *7), but neither the parties nor the Court had the benefit of this Court’s recent decision in *Shay* and its compilation of the historic case law governing the latent ambiguity doctrine.

a “commission on all orders secured by plaintiff.” *McCarty*, 372 Mich at 570-571. The plaintiff subsequently sought commissions for orders he had received for both “production” items and “prototype” items. *Id.* at 572. The defendant claimed that although the phrase “all orders,” on its face, was broad enough to unambiguously include both prototype and production orders, there was extrinsic evidence that the parties were only contemplating prototype orders when the contract was signed and did not intend the broader meaning that the language expressed. *Id.* at 572-573. The Court ultimately affirmed the trial court’s finding for plaintiff in that case because the plaintiff presented conflicting extrinsic evidence of the parties’ intent that the trial court found more credible, but the Court also affirmed that extrinsic evidence should be used to determine the parties’ intent in these types of cases when “some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings.” *Id.* at 575-576.

Similarly, in this case, extrinsic evidence should be admitted to show that, even if the deed language “park purposes” was unintentionally written broadly enough to allow the land to be leased to a private entity to run a golf course, the parties did not contemplate this broad meaning at the time the contract was formed. As discussed in Plaintiffs’ Application, on pages 2-4, and above, the extrinsic evidence all demonstrates that, at the time the deed was written, the parties contemplated only that the land would be used as a park to provide public access to the beach and the dunes, and other passive, historical park uses, particularly for the children of the area. The difference between this case and *McCarty* is that defendants have presented no contrary extrinsic evidence intent in support of their interpretation of the deed language. Indeed, there is no evidence that the parties intended the broad meaning of public park purposes that is urged by Defendants and was adopted by the Court of Appeals. Thus, as in *McCarty*, additional facts create the necessity for a choice between two possible meanings of the language, but, unlike *McCarty*, the undisputed extrinsic evidence demonstrates that the contracting parties shared the same intent at the time the deed was signed and covenant made. Because this intent is contrary to the Court of Appeals and defendants’ interpretation of the deed, the Court of Appeals should be reversed.

D. ANY AMBIGUITY IN THE DEED MUST BE RESOLVED IN FAVOR OF UPHOLDING THE INTENTION OF THE GRANT, AND NOT IN FAVOR OF “FREE USE OF THE PROPERTY.”

Finally, if this Court finds the language ambiguous, it should note that the Court of Appeals opinion incorrectly stated the applicable rules of construction. The Court of Appeals recited the rule of construction that “[deed] restrictions are generally construed against those attempting to enforce the restrictions, and all doubts are resolved in favor of free use of the property.” Court of Appeals opinion at *3, citing *Moore v Kimball*, 291 Mich 455, 461; 289 NW 213 (1939). This Court has stated that a Court should not rely on rules of construction to interpret unambiguous deed language. *Bloomfield Estates Improvement Ass’n Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). But if this Court finds the deed language ambiguous, it should note that this rule of construction would not apply to this case for at least two reasons.

First, this is the incorrect rule of construction for deeds involving an individual’s dedication of land for a public purpose. *Moore* states a rule that applies to deed restrictions in private transactions, but not where property is dedicated to public purposes. Instead, this Court has stated that a private individual’s dedication of property to a public purpose should be construed strictly according to the terms of the grant. *Baldwin Manor Inc v City of Birmingham*, 341 Mich 423, 430; 67 NW2d 812 (1954). Thus, under *Baldwin Manor*, the public purposes permitted by the deed restrictions should be construed strictly.

Second, even if the Court of Appeals proposed rule of construction applied, this Court has held that this rule should not be applied to ambiguous language “in such a way as to defeat the plain and obvious purposes of a contractual instrument or restriction” that are demonstrated by extrinsic evidence and the surrounding circumstances. *Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 152 (1935); see also *Nagaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279-280; 96 NW 468 (1903) (explaining that “[i]f there is a doubt as to the meaning [of a deed], courts will consider the situation of the parties, the subject-matter of the transaction, the acts, conduct, and dealing of the parties, in determining the meaning of any particular clause.”) Because the extrinsic evidence here

demonstrates that the restriction was intended to preclude the proposed use, a rule of construction should not be applied to defeat the purpose of this restriction.

Indeed, there is ample uncontroverted evidence that the Klock gift was given to the City of Benton Harbor in stewardship for the public, not to loan out to a private golf course development. The statements of John Klock, the express acceptance of the City and the long term historical use of the Park for passive recreation discussed in Plaintiffs' Application all make this intention clear.⁹ None do so, however, as powerfully as the words of Mr. Klock at the park's dedication:

Perhaps some of you do not own a foot of ground, remember then, that this is your park, it belongs to you. Perhaps some of you have no piano or phonograph, the roll of the water murmuring in calm, roaring in storm, is your music, your piano and music box....The beach is yours, the drive is yours, the dunes are yours, all yours. It is not so much a gift from my wife and myself, it's a gift from a little child. See to it, that the park is the children's.

CONCLUSION

For the above reasons, Plaintiffs Carol Drake and Clellen Bury respectfully request that this Court grant leave to appeal and reverse the Court of Appeals' decision. In the alternative, Appellants request that this Court peremptorily reverse the decision of the Court of Appeals.

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Date: October 26, 2010

By: 
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⁹ Likewise, the circumstances surrounding the Consent Judgment and the parties intention in crafting that agreement all support the conclusion that the Park Lease is not allowed by either the Deed Restrictions or the Consent Judgment.