

STATE OF MICHIGAN  
IN THE SUPREME COURT

CAROL DRAKE and CLELLEN BURY,

Plaintiffs/Appellants,

S. Ct. Docket No. 140685

v

COA Docket No. 287502

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

LC Case No. 08-0247-CE  
Hon. Scott Schofield, Niles  
Division By Assignment

Defendants/Appellees.

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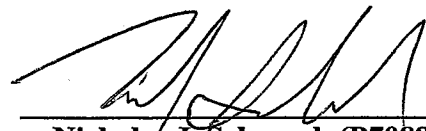
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AMICUS CURIAE BRIEF OF  
SAUGATUCK DUNES COASTAL ALLIANCE, DEFENSE OF PLACE,  
PRESERVE THE DUNES, WEST MICHIGAN ENVIRONMENTAL ACTION  
COUNCIL AND GREAT LAKES ENVIRONMENTAL LAW CENTER

NOV 22 2010



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## **STATEMENT OF PROCEEDINGS AND FACTS**

Amici Curiae Saugatuck Dunes Coastal Alliance, Defense of Place, Preserve the Dunes, West Michigan Environmental Action Council and the Great Lakes Environmental Center (Amici) rely upon the statement of Proceedings and Facts as set forth in Plaintiffs-Appellants' Application for Leave to Appeal. Amici now files this Amicus Brief in support of Plaintiffs-Appellants' Brief on Appeal.

## INTEREST OF AMICI CURIAE

The **Saugatuck Dunes Coastal Alliance** is a coalition of individuals and organizations working cooperatively to preserve and protect the natural geography, historical heritage and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River Watershed, beginning with the Saugatuck Dunes.

**Defense of Place**, a project of the Resource Renewal Institute, was founded in 1997. It is the nation's only organization founded solely to protect parklands, open spaces and nature preserves whose legal charters are threatened by sale, development and predatory changes in use. Defense of Place advocates for the inviolability of the principle of law that lands set aside "in perpetuity" for preservation or public use should never be sacrificed for economic or political motives. Any betrayal or manipulation of the donor's or institution's intent represents a loss of trust in all contracts that bind generations to a common heritage of land stewardship.

**Preserve the Dunes** is dedicated to protecting the sand dunes and adjacent duneland ecosystems in southwest Michigan from impairment and destruction by sand dune mining, overdevelopment and inappropriate use. Preserve the Dunes believes that the dune areas of Michigan are "a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural and ecological benefits to the people of Michigan and to people from other states and countries who visit this resource." Preserve the Dunes is active in the State of Michigan designated sand dune areas within Berrien, Van Buren, and Allegan counties. Preserve the Dunes believes that development in designated dune areas of Michigan should be limited to that which only will preserve the dunes, the dune ecosystem, and other special qualities of this beautiful and unique land-water formation and resource.

The **West Michigan Environmental Action Council** has been West Michigan's preeminent resource for environmental education and advocacy since 1968. Founded by a diverse group of concerned citizens and organizational stakeholders, WMEAC is a non-profit, 501C3 organization uniquely positioned to respond to emerging issues and new threats to West Michigan's natural and human ecologies. Its strategic focus is applied in two specific and interrelated program areas: Building Sustainable Communities and Protecting Water Resources.

The **Great Lakes Environmental Law Center** ("GLELC") is a Michigan nonprofit organization founded to protect the world's greatest freshwater resource and the communities that depend on it. Based in Detroit, the GLELC has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The GLELC was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law. The GLELC works in all three branches of government to promote the conservation, protection, and wise use of Michigan's public land.

Saugatuck Dunes Coastal Alliance, Defense of Place, Preserve the Dunes, West Michigan Environmental Action Council and GLELC are concerned that the outcome of this appeal could have significant impacts on public land and public access to the Great Lakes. Each organization has an interest in the development and clarification of Michigan land and property law and believes that this amicus curiae brief will aid the Court in weighing the legal issues.

## INTRODUCTION

Amici submit this brief to address two significant legal issues presented in this case: (1) whether the language of the existing deed is sufficiently ambiguous to allow appellant to introduce extrinsic evidence as to the drafter's intent; (2) whether the development of a golf course violates the restrictive covenant requiring that Jean Klock Park be "open for the use and benefit of the public."

It is critically important that land deeded to the public remain available for the public to actually use. John Klock dedicated this property to the people of Benton Harbor, in his daughter's name, with the intent that it was to remain in its natural state. To allow the City, after ninety-three years, to divest the public of its interest would not only defeat the intent of the drafter and generous donor, but could also subject numerous other public properties to the possibility of private sale, to the exclusion of the public at large.

As Michigan continues to struggle with a difficult economy, and Michigan residents face high unemployment, the opportunity exists for unscrupulous lawmakers and developers to promote projects that are not in the public interest. This dynamic puts natural, undeveloped, public land in a dangerous position. Michigan's publicly held lakeshore properties are particularly threatened by this dynamic and none of more import than the ecologically unique freshwater dunes that lines the western shore of the Lower Peninsula. Our tourism industry depends on public access to these unparalleled natural assets, not to mention the health and sustainability of the ecosystem itself. The threat is not just to the residents who will no longer be able to use the land for the purpose that it was intended, but also to the land itself. No public land would be safe from the threat of private development. No future generation would be assured public access to any undeveloped land that was gifted to the public. Without protection

those who would dedicate property for public use in perpetuity will not be guaranteed that their intent will be satisfied, and the public will suffer.

**(1) The Language of The Deed Is Ambiguous and Therefore Extrinsic Evidence Should Be admitted.**

In contract interpretation, the primary goal is to determine the intent of the parties.<sup>1</sup> If the plain language of the contract is ambiguous, the court may look to extrinsic evidence to determine the intent of the drafters.<sup>2</sup> The language of a contract is ambiguous if: 1) it contains irreconcilable provisions or 2) when it is "equally susceptible to more than a single meaning."<sup>3</sup> The Jean Klock Park deed was ambiguous and the lower court erred in determining otherwise. The plaintiffs should be permitted to enter extrinsic evidence to resolve any ambiguity as to the intent of the parties.

**(2) The Lease To Harbor Shores Violates The Deed Restriction That Jean Klock Park Be "Forever Used" By The City of Benton Harbor for "public purposes."**

A public property conveyed to a private party may still be considered a "public use" if the private owner remains accountable to the public.<sup>4</sup> However, certain restrictions may be held to be too vague.<sup>5</sup> The Jean Klock Park deed provides that "said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose." The imposition of admission fees to the golf course, the 105 year length of the lease, and the destruction of ecologically unique botany, wildlife habitat and land formations allows Harbor Shores too much discretion. This lease affectively conveys public land to a private entity against the terms of the original deed. When a dedication is made for a specific purpose, no party may

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<sup>1</sup> *Old Kent Bank v. Sobczak*, 243 Mich. App. 57, 620 N.W.2d 663 (2000).

<sup>2</sup> *Zurich Ins. Co. v. CCR & Co.*, 226 Mich. App. 599, 607; 576 N.W.2d 392 (1997).

<sup>3</sup> *Mayor of the City of Lansing v. Michigan Public Service Commission*, 470 Mich. 154, 166; 680 N.W.2d 840 (2004).

<sup>4</sup> *County of Wayne v. Hathcock*, 471 Mich. 445, 474; 684 N.W.2d 765 (2004).

<sup>5</sup> *Seymour v. Dalton Township*, 177 Mich. App. 403, 409; 422 N.W.2d 655 (1989).

use that property for any purpose other than that intended by the grantor.<sup>6</sup> A deed that restricts a property to public purpose cannot be conveyed to a private entity, even if the property is subject to restrictions that require it to remain open to the public.<sup>7</sup> A golf course is not a public purpose and is therefore a violation of the restrictive covenant in the Jean Klock Park deed.

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<sup>6</sup> *Baldwin Manor, Inc. v. City of Birmingham*, 341 Mich. 423, 430; 67 N.W.2d 812 (1954).

<sup>7</sup> *City of Huntington Woods v. City of Detroit*, 761 N.W.2d 127, 141; 279 Mich.App. 603 (2008).

## ARGUMENT

**I. The Court of Appeals erred in finding that the language in the Jean Klock Park deed was unambiguous. The deed 1) contains irreconcilable provisions, and 2) is equally susceptible to more than one meaning. Therefore, this court should allow plaintiff to present extrinsic evidence to show that the drafters of the contract intended that the property be left in it's natural state.**

**A. Standard of Review**

The trial court's award of summary disposition is properly reviewed de novo with respect to contracts.<sup>8</sup>

**B. In interpreting a contract, the court's goal is always to determine the intent of the drafter.**

By reading the contract as a whole, the court begins by applying the plain language of the document.<sup>9</sup> Deference is given to the words within the four corners, "presum[ing] that the parties understood the import of their contract and that they had the intention which it's terms manifest."<sup>10</sup> However, if the terms in the contract are ambiguous, the court must review extrinsic evidence to resolve such ambiguity. A contract is ambiguous if 1) more than one provision irreconcilably conflict or 2) it is "*equally* susceptible to more than one meaning."<sup>11</sup>

The Jean Klock Park deed (hereafter referred to as "The Deed") contained irreconcilable provisions. The Deed was conveyed "with the express covenant that said lands and premises shall *forever be used by said City of Benton Harbor* for bathing beach, park purposes, or other public purpose. . ." (emphasis added). Appellees contend that the word "forever" is used here to refer to the way in which the park should be used because there is no period after "Benton Harbor." However, the fact that there is no period only serves to further the contention that the

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<sup>8</sup> *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).

<sup>9</sup> *Old Kent Bank v. Sobczak*, 243 Mich. App. 57; 620 N.W.2d 663 (2000).

<sup>10</sup> *Zurich Ins. Co. v. CCR & Co.*, 226 Mich. App. 599, 603-604; 576 N.W.2d 392 (1997).

<sup>11</sup> *Id.* at 607.

word "forever" was meant to refer to the use by the City and the way in which the City may use the property. Further, the fact that the word "forever" immediately precedes the expression "be used by City of Benton Harbor" without any punctuation serves as a strong indicator that "forever" was meant as a modifier for the proceeding phrase. This sentence thereby specifies Benton Harbor as the only entity that may use the property.

The Deed later conveys ". . . the said premises as above described, with the appurtenances unto the said party of the second part [Benton Harbor], *and to its assigns, FOREVER. . .*" The provision seems to imply that the property may be conveyed and used by another entity. Although this language is often boilerplate, and was likely left in by accident, the ambiguity creates an irreconcilable conflict with the previous provision that the property "forever be used by [the] City of Benton Harbor."

Further, the same conflicting provisions provide evidence that this contract is equally susceptible to more than one meaning. As this court said in *Library Neighborhood Ass'n. v. Goosen*, "If reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists."<sup>12</sup> Since The Deed's provisions could reasonably be interpreted in more than one way, extrinsic evidence must be admitted to determine the actual intent of drafter including, but not limited to, any evidence of the purpose at the time The Deed was written and any subsequent use of the property.<sup>13</sup>

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<sup>12</sup> 229 Mich. 89; 2-1 N.W. 219 (1925).

<sup>13</sup> *Old Kent Bank v. Sobczak*, 243 Mich. App. 57, 64; 620 N.W.2d 663 (2000).

**II. The Court of Appeals erred in holding that the lease to Harbor Shores does not violate The Deed's restrictive covenant that the property be forever used by Benton Harbor. Because the lease gives Harbor Shores too much control over the property, the lease is impermissible.**

**A. Standard of Review**

Questions of law are reviewed de novo.<sup>14</sup>

**B. The lease to Harbor Shores allows the private entity too much discretion over property that was dedicated forever to The City of Benton Harbor for public use.**

This court has defined "public use" narrowly in *County of Wayne v. Hathcock*. In *Hathcock*, this court overturned its previous ruling in *Poletown Neighborhood Council v. City of Detroit*, which held that a private entity's contribution to the economy is a benefit constituting a "public use."<sup>15</sup> Instead, The Court in *Hathcock* determined that when a property is condemned, it is deemed a "public use" only if it falls under one of three categories: 1) condemning the property to a private party involved a "public necessity of the extreme sort otherwise impracticable[,]" 2) the private entity remains accountable to the public, or 3) the condemning of the land is based on public concern.<sup>16</sup> Since no evidence suggests that categories one or three are at issue in this case, the question is whether the lease to Harbor Shores contains sufficient restrictions to pass the "accountability" standard so as to be deemed a "public use."

Appellees rely on *Golf Concepts v. City of Rochester Hills*. In that case, the court determined a private corporation, which leased land from the city for the purpose of operating a golf course, was exempt from taxes on the grounds that the golf course fell within the exemption's definition of "public park."<sup>17</sup> The court held that the golf course was "equally

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<sup>14</sup> *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).

<sup>15</sup> 304 NW.2d 455 (Mich. 1981).

<sup>16</sup> *County of Wayne v. Hathcock*, 471 Mich. 445, 781-783; 684 N.W.2d 765 (2004).

<sup>17</sup> 217 Mich. App. 21, 23; 550 N.W.2d 803 (1996).

available to all members of the public without discrimination."<sup>18</sup> However, The City of Rochester Hills, and The City of Benton Harbor are not similarly situated. While it may be true in Rochester Hills that the majority of citizens could afford to pay the fees to use the land in question, high greens fees will prohibit use of the golf course by a majority of Benton Harbor Residents.

In *Seymour v. Dalton Township* a golf course owned by the public already existed, and the court determined that where the deed required that the land remain open to the public for use as a golf course, the public owner may not convey the land to a private owner. The Michigan Court of Appeals held that the private owner would retain "an unacceptable degree of discretion to run the golf course and related facilities as he saw fit" and therefore would not be exempt from taxes.<sup>19</sup> Further, in a similar case, *City of Huntington Woods v. City of Detroit*, the court stated that ". . . where the dedication is restricted to a particular purpose. . . it must be devoted to the particular purpose indicated by the dedicator." The court held that the property could not be sold to any private entity regardless of any conditions or restrictions on the private entity.<sup>20</sup>

The lease to Harbor Shores includes far too much discretion. Although Benton Harbor and Harbor Shores have included various provisions in the lease, they are either too vague, uncertain, or completely unrestrictive. First, The City of Benton Harbor seems to be aware that they may not convey the property to a private party in fee. Instead they have, cleverly, created a lease agreement. However, the lease is for a period of 105 years. Presumably, a lease is intended to ensure that the City retain an interest and power through the possibility of non-renewal. However, these purposes are defeated when the lease is for such a long period.

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<sup>18</sup> *Id.* at 25.

<sup>19</sup> 177 Mich. App. 403, 409; 422 N.W.2d 655 (1989).

<sup>20</sup> 269 Mich. App. 603, 625-626; 761 N.W.2d 127 (2008).

Second, the lease limits the use of the property during the winter season to specific activities.

Finally, the lease only restricts Harbor Shores from uses not permitted by Benton Harbor. This clause leaves the door open to applications for other uses, without any written restriction forbidding uses that are not public.

**C. A golf course is not a "public purpose" and therefore, the lease to Harbor Shores is a violation of The Deed.**

The Deed restricts use of Jean Klock Park to "bathing beach, park purposes, or other public purpose." As this court previously held in *Baldwin Manor, Inc. v. City of Birmingham*:

"... if a dedication is made for a specific or defined purpose, neither the legislature, a municipality or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication. . ." <sup>21</sup>

The language within the four corners of the deed is sufficiently ambiguous to allow the review of evidence outside of the deed to determine whether the conveyor of the property intended for a golf course to be included within the definition of a public purpose. Here the Court of Appeals applied the reasoning of *Golf Concepts v. City of Rochester Hills*, which held that a golf course was a public purpose in determining whether it was eligible for tax exemptions.<sup>22</sup> In addition to holding that it was open to the public, the Court of Appeals also held that the golf course was for the benefit of the public. However, when a use of a property restricts such a large section of the community through the imposition of fees, it can be said that any benefit to the public is limited. In *Seymour v. Dalton Township*, the court held that the restrictions on fees at a public golf course was insufficient, indicating that fees play an important

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<sup>21</sup> 341 Mich. 423, 430; 67 N.W.2d 812 (1954) (quoting 26 CJS, Dedication, § 65, pp 154, 155).

<sup>22</sup> 217 Mich. App. 21; 550 N.W.2d 803 (1996).

roll in determining whether a specific use is "public" or not.<sup>23</sup> Here the restrictions on the private entity are not sufficient to consider a golf course a "public use," or a "public purpose."

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<sup>23</sup> 177 Mich. App. 403, 409; 422 N.W.2d 655 (1989).

## **CONCLUSION AND RELIEF REQUESTED**

For the reasons stated above, Amici Curiae respectfully request that the Court grant the following relief:

- (1) Reverse the Court of Appeals holding that the language in the Jean Klock Park deed was unambiguous.
- (2) Reverse the Court of Appeals holding that the lease to Harbor Shores does not violate The Deed's restrictive covenant that the property be forever used by Benton Harbor.
- (3) Reverse the Court of Appeals holding that a golf course is a "public use."

**Respectfully submitted,**



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**Dated: 11/17/2010**