

STATE OF MICHIGAN

SUPREME COURT

CAROL DRAKE and CLELLEN BURY,

Plaintiffs/Appellants,

Supreme Court N^o _____

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' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

March 3, 2010

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

The Court of Appeals issued its opinion affirming the Trial Court on August 22, 2008.

Ex 1-B, COA Decision. The Trial Court granted Defendants' motions for summary disposition and dismissed Plaintiffs' case on January 21, 2010. **Ex 1-A, Trial Court Opinion.** This Application for Leave to Appeal was filed within 42 days of the date of the entry of the Court of Appeals' decision. This Court has jurisdiction to consider this Application for Leave to Appeal pursuant to MCR 7.302. Appellants ask that this Court reverse the decision of the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

- I. Does the City of Benton Harbor's lease of 22 acres of Jean Kock Park to Harbor Shores Redevelopment Inc., for use as part of a "Championship Jack Nicklaus Golf Course," and for a term of up to 105 years, violate the restriction that the property be "forever used by the City of Benton Harbor"?

Appellants answer: Yes.

Appellees will answer: No.

Court of Appeals answered: No.

- II. Does the City of Benton Harbor's lease of Jean Klock Park to Harbor Shores Redevelopment Inc. violate the restriction that the property be used for "public" purposes and be "open for the use and benefit of the public"?

Appellants answer: Yes.

Appellees will answer: No.

Court of Appeals answered: No.

INTRODUCTION

"In taking an inventory of life, we all take stock of the circumstances surrounding the happiest moments. The giving of this park to the city of Benton Harbor has been to Mrs. Klock and myself, the happiest moment of our lives. The deed of this park in the courthouse of St. Joseph will live forever. 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."

-J. N. Klock at the 1917 Dedication Ceremony for Jean Klock Park.

In 1917, John Nellis Klock and his wife Carrie deeded a 90 acre parcel of Lake Michigan frontage property to the City of Benton Harbor Michigan and surrounding communities to be used explicitly and forever as a public park and bathing beach. The property was dedicated "For the Children" and was named Jean Klock Park in memory of their daughter who died in infancy. The property was deeded "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; and at all times shall be open for the use and benefit of the public."

The current dispute arose when the City of Benton Harbor decided to lease 22.11 acres of Jean Klock Park to the private entity Harbor Shores Redevelopment, Inc. for up to the next 105 years. The leased portion of the park would be used as three holes of a privately owned and operated "Championship Jack Nicholas Golf Course," and greens fees for the course would be up to \$225 per round. Despite the covenants of the City in the Klock deed, the City entered into the lease with Harbor Shores. Plaintiffs filed suit to invalidate the lease agreement.

It is also important to understand that this is the second time Plaintiffs have been forced into court in order to protect Jean Klock Park. The first case, *Clellen Bury, et al, v City of Benton Harbor*, was brought when the City of Benton Harbor decided to sell a portion of the Park to a

private developer for a residential housing development. Plaintiffs challenged the City's right to convey the property because it violated the covenants and restrictions in the deed that were a part of the Klocks' gift to the City. *Clellen Bury* resulted in a Consent Judgment allowed for the sale of a portion of Jean Klock Park to the private developer in exchange for an injunction against any further privatization or conversion of the Park. Specifically, the Consent Judgment permanently enjoins the City from using any portion of Jean Klock Park "for any purpose other than a bathing beach, park purposes, or other public purposes related to a bathing beach or park use."

Plaintiffs suggest that there is no rational interpretation of either the deed restrictions or the consent judgment that would allow the park to be used for a privately owned and operated high-end golf course. Plaintiffs also suggest that this case is of major jurisprudential significance for the State. It is a case that involves the legacy of the Klock family, and it directly addresses how a legacy left as a gift to the City is to be treated. Plaintiffs believe that it is important to the jurisprudence of this state to address how such a legacy and gift should be honored and respected.

STATEMENT OF FACTS

The Gift of Jean Klock Park to the City of Benton Harbor

On May 4, 1917, J. N. Klock and Carrie E. Klock gifted Jean Klock Park to the City of Benton Harbor. The Park was given and named in memory of the Klocks' daughter, who had died prematurely. As indicated by Mr. Klock's comments at the dedication of the property, the purpose of the gift was to give the public a park for all people to enjoy, but especially a place for children.

Ex 2, Dedication Comments. Mr. Klock reaffirmed the purpose and motivation behind the gift in his autobiography, penned in 1932:

There is little joy in piling up money that you do not need, and so the majority of my earnings have been spent in providing beaches, parks, churches and schools. Our first major gift was Jean Klock Park, a half mile of Lake Michigan frontage, which was given to the city of Benton Harbor. I say "our" for my wife was very anxious to give this park to the city in memory of our little child. *Her untimely death made possible the giving to other children the share of our earnings which belonged to her, but which she could not use.* As the years

progressed larger gifts to other causes followed. [Ex 2, Excerpt of Klock Autobiography, emphasis added.]

In order to preserve the intended use of the park, the Klocks included the following express condition and covenant in the deed conveying the property to the City:

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 said City of Benton Harbor for bathing beach, park purposes, or other public purpose; 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. [Exhibit 4, Warranty Deed.]

The City of Benton Harbor accepted the gift of the property by resolution on May 7, 1917, and expressly recognized that its acceptance of the property was “subject to the conditions set forth in said deed.” **Ex 5, Resolution of the Benton Harbor Common Council.** The resolution further stated 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 intended it should be.” *Id.* Finally, the resolution notes 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’.” *Id.*

Historical Use of the Park

From its donation to the City until approximately 2003, the City maintained Jean Klock Park consistent with the purpose and intentions of the Klock gift. The City kept the park open to the public for “bathing beach” purposes along Lake Michigan, and interior lands where used for passive recreational uses like hiking, birdwatching, picnicking and outdoor education. During that time, the City undertook improvements to the park that were generally designed to enhance the passive recreational use of the property. For example, grants were obtained from the state of Michigan, including a 1989 grant awarded to the City for the purpose of dune preservation and wetland and wildlife habitat preservation, and a 1999 Recreation grant to increase pedestrian views of Lake

Michigan while protecting sensitive dune features. **Ex 6, 1989 Grant Application** and **Ex 7, 1999 State Recreation Grant Application**

The City also received a 1977 Land and Water Conservation Grant from the Federal Government for site improvements and construction of a bathhouse in the Park. This grant is particularly important for the procedural history of the case. As part of this grant, the City agreed to continue to maintain Jean Klock Park as a public park for public outdoor recreational use. The only way for the City to convey any interest in the property for non-public outdoor recreation uses is to request a “conversion” pursuant to 36 CFR §59.3. As explained in further detail below, a conversion was requested from the National Park Service in order to construct the proposed golf course in the park.

The Grand Boulevard Lawsuit and Consent Judgment

The first attack on the integrity of the Klock gift came in 2003. The City announced its intention to sell what it described as an “underutilized” part of Jean Klock Park in order to help the City with financial difficulties it was facing. On June 2, 2003, six members of the City Commission voted to sell part of Jean Klock Park to Grand Boulevard Renaissance, LLC, who intended to construct a residential development on the property.

Plaintiffs were part of a group of citizens who brought suit against the City over the Grand Boulevard development proposal in *Clellen Bury, et al. v City of Benton Harbor* (“*Clellen Bury*”), Case Number 03-3430-CE-F (**Ex 8**). Plaintiffs challenged the City’s right to convey the property because it violated the covenants and restrictions in the deed that were a part of the Klocks’ gift to the City.

The procedural details of that case are outlined with more specificity in Plaintiffs’ Motion for Preliminary Injunction filed with the Trial Court and part of the record. What is important for this brief is that *Clellen Bury* was resolved by a mediated settlement agreement and Consent Judgment. **Ex 8**. The Consent Judgment allowed for the sale of a portion of Jean Klock Park to the

private developer in exchange for an injunction against any further privatization or conversion of the Park. **Ex 8.** Specifically, the Consent Judgment permanently enjoins the City from using any portion of Jean Klock Park “for any purpose other than a bathing beach, park purposes, or other public purposes related to a bathing beach or park use.” *Id.*, ¶ 3.

The purpose of the Settlement Agreement and Consent Judgment was to preserve the Park for its historic public park uses and to prevent further development or appropriation of land within the Park for private developments. **Ex 9, Affidavit of Carol Drake; Ex 10, Affidavit of Clellen Bury.** It was never contemplated that the language of the Consent Judgment would allow the City to lease the property to be used as part of a privately owned golf course during the negotiations of the settlement. *Id.* Rather, the parties all understood that Plaintiffs’ purpose in agreeing to the settlement and Consent Judgment language was to preserve the rest of the Park for the historic public recreational uses once and for all. *Id.*

The Harbor Shores Golf Course Proposal

Jean Klock Park’s reprieve from development pressure was short lived. In July of 2005, the City and Harbor Shores publicly acknowledged that they wanted to use a large portion of Jean Klock Park for a golf course that would be part of a privately-owned mixed-use development consisting of commercial and retail buildings, residential homes, the golf course, a marina, and other recreational uses. The City and Harbor Shores proposed using 22 acres of Jean Klock Park for approximately three holes of the golf course. The rest of the golf course is owned by Harbor Shores, and is operated as a privately owned (but open to the paying public) golf course. The greens fees are currently set at \$125.00 for residents and \$150.00 for non residents for a weekend round of golf.¹

¹ See Harbor shores website: <http://www.harborshoresdevelopment.org>. The site also indicates that yearly passes are available for \$3,500 to \$4,500. This is contrasted with the per capita income for the City of Benton Harbor, witch is \$8,965 (the lowest in Michigan). See http://en.wikipedia.org/wiki/Michigan_locations_by_per_capita_income.

Those prices could be increased to as much as \$225.00 per round of golf. **Ex 11, Harbor Shores fees to cover broad range.**

In January of 2007, the City and Harbor Shores solidified their deal by signing a “Golf Course Agreement” allowing Harbor Shores to convert approximately 22.11 acres of Jean Klock Park into a Jack Nicklaus “championship” golf course for up to 105 years. See **Ex 12, Golf Course Agreement**. The Golf Course Agreement was expressly contingent on “[t]he Berrien County Circuit Court issuing an order confirming an amendment of the Consent Judgment governing existing Jean Klock Park . . . confirming that the Permitted Use of the Interior Park Property is a permitted use of the Interior Park Property for park purposes within sixty (60) days of the Effective Date.” *Id.*, emphasis added.

The City and Harbor Shores never met the Golf Course Agreement’s contingency to seek an amendment of the Consent Judgment. That is in part because before Harbor Shores could use the park for its golf course, the City first needed to get permission from the National Park Service for a “conversion” of the property.² A conversion is required when the City wants to use the park for something other than “public outdoor recreation uses.” The City and Harbor Shores went through the process for requesting a conversion, and on October 16, 2007, the National Park Service rejected the City of Benton Harbor and Harbor Shores proposal. **Ex 13, letter from National Park Service.**

The City and Harbor Shores then revised their conversion proposal, based on the comments in the NPS denial letter. On June 6, 2008, the City of Benton Harbor and Harbor Shores submitted a revised request for conversion from the National Park Service. As part of the City’s submission to the National Park Service, the City included a lease agreement (the “Harbor Shores Lease Agreement”) and a “Maintenance Agreement” that, by their terms, supercede the terms of the Golf Course Agreement. **Ex 14, Harbor Shores Lease Agreement, p. 2 and Ex 15, Harbor Shores Maintenance Agreement, pp. 1-2.**

² See 16 USC 460l-8 and 36 CFR 59.3.

Like the original Golf Course Agreement, the Harbor Shores Lease Agreement allows Harbor Shores to convert approximately 22.11 acres of Jean Klock Park into a Jack Nicklaus “championship” golf course for up to 105 years. **Ex 14.** Unlike the original Golf Course Agreement, however, the Harbor Shores Lease Agreement does not contain a provision making it contingent upon an amendment of the Consent Judgment. **Ex 14, Section 1.03 Contingencies.** There is no explanation in either the Lease Agreement or the revised submission as to why this contingency was removed.

The Trial Court’s Decision

Plaintiffs filed this action on July 8, 2008, seeking enforcement of the Klock deed restrictions and the *Clellen Bury* Consent Judgment and settlement agreement. Plaintiffs also asked for a preliminary injunction while the case was pending. Both Harbor Shores and the City asked for summary disposition in their initial responsive pleadings. The Trial Court held a hearing on all the motions on August 22, 2008. At that hearing, the Trial Court granted Defendants’ respective motions for summary disposition and denied Plaintiffs request for a preliminary injunction, holding that the City was authorized to lease its property to Harbor Shores to be used as part of a golf course.

Ex 1-A, Trial Court Opinion.

In particular, the Trial Court held that 1) a golf course is a park purpose, and 2) “[n]othing in the consent judgment expressly prohibits the lease of part of the park to a private, nonprofit entity to carry out or implement a park purpose.” **Ex 1-A, Trial Court Opinion at 75.** Therefore, the Trial Court concluded that the lease of the 22 acres to Harbor Shores for its golf course did not violate either the deed restrictions or consent judgment. An order was entered granting Defendants motions for summary disposition.

The Court of Appeals Decision

Plaintiffs filed a timely appeal with the Court of Appeals. The Court of Appeals affirmed the Trial Court's granting of Defendants' motions for summary disposition, holding that the property deed and consent judgment do not preclude the City from leasing a portion of Jean Klock Park for use as a golf course. **Ex 1-B, Court of Appeals Opinion at 1.**

Specifically, the Court of Appeals held that 1) the language in the property deed and consent judgment is unambiguous and therefore does not require the admission of extrinsic evidence to determine the intent of the parties, 2) a golf course is a "park purpose" or "public purpose," and 3) a lease with a term of up to 105 years is an appropriate "use" of the park by Benton Harbor in accordance with the deed. An order was entered affirming the Trial Court's grant of summary disposition for the Defendants, and the Appellants filed this timely application for leave to appeal.

ARGUMENT

I. Standard of Review

This Court reviews of a trial court's decision on a motion for summary disposition *de novo*. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The City's motion was made under MCR 2.116(C)(8). A motion brought under(C)(8), for failure to state a claim on which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. *Spiek v Mich Dep't of Transportation*, 456 Mich 331; 572 NW2d 889 (1998). The factual allegations contained in the complaint, along with any reasonable inferences that may be drawn from those allegations, must be accepted as true for purposes of evaluating the motion. *Brown v Mich Bell Telephone Inc*, 225 Mich App 617; 572 NW2d 33 (1997). Summary disposition under this sub-rule is only allowed where no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995).

Harbor Shores brought its motion under MCR 2.116(C)(10). In considering a (C)(10) motion:

'a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to a judgment as a matter of law. MCR 2.116(C)(10), (G)(4).'

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Smith v Globe Life Ins Co, 460 Mich 446, 454-55; 597 NW2d 28 (1999).

The interpretation of a contract is a matter of law, subject to de novo review. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Deed restrictions are interpreted like contracts. *Negaunee Iron Co. v Iron Cliffs Co*, 134 Mich 264, 279; 96 NW 468 (1903).

II. The City Must Comply with Both the Jean Klock Park Deed Restrictions and the Consent Judgment

Plaintiffs respectfully submit that the fundamental flaw in the Court of Appeals' reasoning is that the Court focused so much on the details of the language in the deed restriction and consent judgment that it failed to see the forest through the trees. Indeed, Defendants' strategy seemed to be to focus on individual words within the deed restriction and then cite a series of non-deed restriction cases to support its proposed interpretation. The Court also fell in this analytical trap, and the result is an opinion that fails to honor the intentions of both the donors and the parties to the consent judgment.

The key question is whether the specific terms and conditions of *this particular* lease violate the deed restrictions and **consent judgment**. The case law is clear that deed language should not be applied in a way that would defeat an obvious purpose for the restrictions. *Brown v Hojnacki*, 270 Mich 557; 259 NW 152 (1935). Therefore, the crucial starting point in analyzing this case is to review the way in which deed restrictions, restrictive covenants and consent judgments are to be construed. As explained in more detail below, the key concern is to look to the language of the restriction as a whole in order to give full effect to the intent of the restriction. Plaintiffs suggest that when one does so, the language clearly and unambiguously prohibits the lease entered into by Benton Harbor. Alternatively, and at the very least, there are ambiguities in the deed restriction language that prevent ruling in a way that allows the park to be used by a private entity for a privately run golf course (even if it is "open to the public").

A. Both Deed Restrictions and Consent Judgments Are Interpreted to Give Meaning to the Intent of the Parties

A deed restriction, or restrictive covenant, “is a contract created with the intention of enhancing the value of property and is a valuable property right.” *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). Because such covenants are based in contract, the intent of the drafter is deemed controlling. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). “[W]hen the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole.” *Village of Hickory Pointe Homeowners Ass’n v Smyk*, 262 Mich App 512, 515-516; 686 NW2d 506 (2004). Restrictive covenants are to be:

construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. [Brown v Hojnacki, 270 Mich 557; 259 NW 152 (1935) (additional citations and internal quotation marks omitted).]

As this Court stated in *Dep’t of Natural Resources v Carmody-Lahti Real Estate Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005):

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 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.*]

When the intent of the parties is unambiguous, the plain meaning of the terms may not be impeached with extrinsic evidence. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). A contract is ambiguous “when [a term] is equally susceptible to more than a single meaning.” *Lansing Mayor v Publ Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). If any ambiguity exists, the Court may look to extrinsic evidence.

Likewise, when interpreting consent judgments, courts apply contract law. *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). For contract interpretation, courts are guided by the intent of the parties based on the plain language of the contract itself, and — where more than one interpretation is available — should apply the one most reasonable and fair. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (citations and quotations omitted).

B. The Deed Restrictions and Consent Judgment Language

The deed language that coincided with the gift of the Park to the City reads:

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 said City of Benton Harbor for bathing beach, park purposes, or other public purpose; 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. [Ex 4, Warranty Deed.]

This Deed language contains two primary restrictions on the use of the property, with each one of those categories having two sub-parts. To help make Plaintiffs' analysis as clear as possible, those restrictions are as follows:

- 1) that said lands and premises shall
 - a) forever be used by said City of Benton Harbor
 - b) for bathing beach, park purposes, or other public purpose;
and
- 2) at all times
 - a) shall be open for the use and benefit of the public,
 - b) subject only to such rules and regulations as the said City of Benton Harbor may make and adopt.

If the City fails to meet any of these restrictions or sub-parts, then it is violating the deed restrictions. It is important to keep in mind that these are independent requirements or clauses.

The Consent Judgment supplements the deed restrictions and solidifies the requirement that the City may only use the property for bathing beach and park purposes:

The Court permanently enjoins the City from using any portion of the property depicted as “Jean Klock Park” . . . for any purpose other than bathing beach, park purposes, or other public purposes related to bathing beach or park use. **Ex 8.**

The Consent Judgment also clarifies that “other public purposes” must be related to bathing beach or park use, and not some other type of generalized “public purpose.” Like the separate clauses in the Deed restrictions, the City is independently required to comply with the Consent Judgment.

1. Leasing 22 acres of Jean Klock Park to Harbor Shores for 105 years is inconsistent with the requirement that the property be “forever used by the City of Benton Harbor”

The Court of Appeals incorrectly concluded that the phrase “forever used by said City of Benton Harbor” “does not restrict the person or entity to use the property to Benton Harbor.” **Ex 1-B, Court of Appeals Opinion at 4.** It made two errors in reaching this conclusion: first, it held that the restriction only applied to the manner in which the City could use the property and did not require the City to maintain ownership of it; and second, it concluded that the City retained enough control over the property through the lease, keeping it from becoming an outright conveyance. Both of these conclusions are in error.

a. The deed requires that the park be “forever used by the City of Benton Harbor”

The Court of Appeals held that the restriction that the property “shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose . . .” imposes “a restriction on the use of the property—not a restriction on Benton Harbor’s right to convey or otherwise assign its right to use the property In other words, as long as Benton Harbor owns the property, it must use it in the proscribed manner.” Court of Appeals Opinion at 3. This interpretation of the restriction entirely writes out the word “forever” from the restriction—the property “shall

forever be used by said City....” This Court has held that “no language in the instrument may be needlessly rejected as meaningless, but, if possible, all language of a deed must be harmonized and construed so as to make all of it meaningful.” *Dep’t of Natural Resources*, 472 Mich at 370. To conclude that the restriction allows Benton Harbor to convey away the property to whomever it pleases for any use renders the restrictive covenant meaningless. No reasonable person could believe this is what the Klocks intended. The Court of Appeals’ conclusion does not give meaning to the last sentence of the Restriction, which makes it clear that City is to be the entity using the property, not a private entity: “subject only to such rules and regulations as the said City of Benton Harbor may make and adopt.”

Moreover, the modifying prepositional phrase “by said City of Benton Harbor” means that not anybody can put the property into action or service. It must be the City of Benton Harbor. This also means that the selection of the noun “City” is very important. The drafter did not suggest that any other entity may “use” the property, as may have been implied by the term “people” or “governmental agency.” Here, the Lease Agreement specifically allows Harbor Shores to “use” the park for a golf course.

The Court of Appeals also looked to the form language from the deed that refers to “the said party of the second part [Benton Harbor], and to its assigns....” The Court of Appeals erroneously suggests that this language dispositively proves that the restrictions only apply to Benton Harbor’s ownership of the property, and that the property may be assigned to another in the future. While there is no question that the deed does reference “assigns,” the Court of Appeals reads too much into this reference. It is logical and consistent with both the Deed Language and Consent Judgment to have a subsequent municipal successor or assign to the City. However, in no way does this language imply some sort of private ownership. See *City of Huntington Woods v City of Detroit*, 279 Mich App 603; ___NW2d___ (2008). If anything, the reference to “assigns” is exactly the type of ambiguity in deed language that would require one to look further for the intent of the drafter. In this case, the Court of Appeals’ rationale would mean that the use of the park is limited to “bathing beach,

park purposes, or other public purpose” while the City owns the property, but those restrictions would not apply once the City transfers or assigns the property. Not only is this inconsistent with the other language of the deed discussed above, it is directly contrary to the Klocks’ clearly expressed desire that the park is to be preserved for public use forever:

The deed of this park in the courthouse of St. Joseph *will live forever*. 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. [Ex 2, emphasis added.]

b. Leasing the Park for up to 105 years is inconsistent with the deed language

A lease for rent does not, contrary to the Court of Appeals’ conclusion, fall within the appropriate uses allowed under the deed. The deed restriction recognizes the City’s stewardship role over the property for the citizens of Benton Harbor and the surrounding community. “Used by” tells us that it is the City, not another party, that is designated actor with respect to Jean Klock Park. Black’s Law dictionary defines the verb “use” as “to put into action or service : to make use of; to convert to one’s service; to employ; to avail oneself of; to put into action or service” and “by” as “through the means, act, agency or instrumentality of.” Black’s Law Dictionary, 6th Edition (1990). “Use” includes “that enjoyment of property which consists in its employment occupation, exercise or practice.” *Id.* The common usage of these two words, then, tells us that the Park is to forever be “put into action or service . . . through the agency or instrumentality of” the City.³

The Court of Appeals concluded that, even though the property is leased to Harbor Shores, it is still being “used” by the City, arguing the fact that “Benton Harbor derives monetary and other

³ It is important to note that the term “agency” as used in this definition means “the capacity, condition, or state of acting or of exerting power : operation.” *Id.* The synonym “operation” is particularly relevant to this case, as we could alternatively say that the Park is to be “put into action or service through the operation of the City.”

gain from leasing the property to Harbor Shores” means “that Benton Harbor is putting the property into service and thus the lease is a ‘use’ of the property....” **Ex 1-B, Court of Appeals Opinion at 4.**

By definition, a lease is exactly the opposite of use by the City. Black’s Law dictionary says a lease is an “[a]greement under which owner gives up possession and use for a definite term and at end of term owner has absolute right to retake, control and use property.” Black’s Law Dictionary, 6th Edition (1990), emphasis added. See also Cameron, Michigan Real Property Law, 3d Ed, 20.2 (2005) (“A lease is a demise, made by an owner of an estate, of a portion of his or her interest in it, for valuable consideration; it transfers that interest to another for a term less than the owner’s, granting the tenant the possession, use, and enjoyment of the portion conveyed during the period stipulated”); *Minnis v Newbro-Gallogly Co*, 174 Mich 635; 140 NW2d 980 (1913). By leasing 22 acres of Jean Klock Park to Harbor Shores, the City has relinquished “use” of that property. The very existence of a lease to that property is contrary to the “used by” requirement in the deed restriction.

The Court of Appeals improperly relied on two Michigan probate cases that concern distribution of assets from trusts or wills to support its conclusion that a lease for rent is an appropriate “use” under the deed. **Ex 1-B, Court of Appeals Opinion at 4.** Neither one of these cases involved interpretation of deed restrictions, or addressed whether a lease constitutes an appropriate “use” of a public park. Both only make passing reference to the term “rent,” but do not provide any analysis to support the argument that renting Jean Klock Park to Harbor Shores is “used by” the City. The first case, *Linton v Howard*, 163 Mich 556; 128 NW 793 (1910), addressed the question of whether a daughter and trustee could recover for expenses incurred taking care of her mother. The case includes a brief discussion of whether the daughter could have sold the property, the Court touches on what constitutes a usufructory interest in property. After the quote cited by both Defendants, the Court concludes with the statement that “[t]he term ‘use of’ has, in some cases in this court, been held to be ambiguous.” *Id.* at 562. The Court also goes on to state that it did not matter whether the daughter had the right to sell the property anyway, because she had not sold it and

had maintained it during her mother's lifetime. Similarly, *In re Moor's Estate*, 163 Mich. 353; 128 NW 198 (1910), looked to the term "use" in a Will to determine that the wife of the testator was given a life estate and not a fee interest in the property.

Neither of these cases involve actual leases. Nor do they refute the clear legal proposition that a lease is, by definition, the use of land. See *Minnis v Newbro-Gallogly Co, supra*. In this case, it is clear that Harbor Shores will be the one exclusively using and occupying the land during the golf season. Through the lease, the City expressly relinquishes its use rights for the property.

The Court of Appeals erred in concluding that "the degree of control retained by Benton Harbor clearly indicates that the lease was not an effective conveyance" and that the lease is therefore an appropriate use of the property. **Ex 1-B, Court of Appeals Opinion at 5**. A close reading of the lease agreement suggests that Benton Harbor will retain little meaningful control over the property. Section 2.01 provides that "[s]ubject to the conditions set forth in this Lease, the City of Benton Harbor hereby leases and demises to Harbor Shores and Harbor Shores hereby hires and leases from the City of Benton Harbor the Leased Premises." **Ex 14, Lease Agreement**. The Lease then goes on to provide "Jurisdiction" over the leased portion of the Park to Harbor Shores: "Harbor Shores, through its representatives, shall be in charge of the operation and maintenance of all portions of the Leased Premises and the Golf Course Improvements during the term of this Lease consistent with the Park Improvements and Maintenance Agreement and this Lease." *Id.*, Section 3.01, emphasis added. While the golf course is to be "open to the public," (Section 2.05), Harbor Shores is the exclusive party that will be operating and maintaining the golf course. *Id.*, Section 3.03. Harbor Shores has the right to mortgage its interest in the property. *Id.*, Section 7.13. Finally, the Lease is clear that Harbor Shores is provided "quiet enjoyment"⁴ of the property:

Section 7.15. Quiet Enjoyment. The City of Benton Harbor covenants that, upon Harbor Shores providing the consideration

⁴ "Quiet enjoyment" is defined as "A covenant, usually inserted in leases and conveyances on the part of the grantor, promising that the tenant or grantee shall enjoy the possession and *use* of the premises in peace and without disturbance." Black's Law Dictionary, 6th Edition (1990), emphasis added.

outlined hereunder and performing all of the terms, covenants and conditions Harbor Shores is to perform hereunder, Harbor Shores shall peaceably and quietly enjoy the Lease Premises hereby demised, free of claims of paramount title or of any Person claiming under or through the City of Benton Harbor, and free and clear of all exceptions, reservations or encumbrances other than those set forth herein, and those Harbor Shores subsequently approves in writing.

These lease terms make it clear that the City will no longer be using 22 acres of Jean Klock Park. Instead, Harbor Shores will be using the property for its golf course.

The Lease specifically allows a private entity to make the rules and regulations governing use of the Park, and gives the private entity the authority to operate and maintain the golf course. Once again, this further supports the fact that the Lease is inconsistent with the requirement that the property be “used by” the City. The Lease gives the right to Harbor Shores for quiet enjoyment of the property, along with the jurisdiction to enact rules and regulations for use of the golf course. Contrary to the Court of Appeals’ holding, Benton Harbor thus has not “retained significant control over the property.” Not only does Harbor Shores have jurisdiction and quiet enjoyment of the Park property, the City has very little control over what will happen on the property. During the golfing season, the City’s only input into the use of the Park is tangentially through the “Golf Course Oversight Panel.” The City is required to establish the Golf Course Oversight Panel by the Lease, and the membership of the Panel will include three voting members (two members of the City Commission and one City employee) and two non-voting members (one citizen who is also a CPA, and one representative of Harbor Shores). **Ex 14, Section 1.01(d)**. The City Council does not have any control over the Panel except for the ability to appoint members to the Panel.

The Golf Course Oversight Panel’s authorities and duties are outlined in Section 2.06 of the lease. These authorities and duties primarily include 1) the right to review and approve or deny (within certain parameters) the fee schedule proposed by Harbor Shores, and 2) to make sure Harbor Shores is complying with the terms of the Lease.⁵ Other than these items, the only other input that

⁵ The Panel has the right to visit the property at reasonable times for inspection, and to audit or review income and expenses of the golf course for a three year period. It is not clear from the
(continued...)

the City has during the golfing season is the right to review and approve locations for Harbor Shores' utilities on the property, and the right of to repair, maintain or improve the City's existing utilities on the property, so long as it uses its "commercially reasonable best efforts to minimize interference with the operation of the public golf course." **Ex 14, Sections 2.08 and 3.05.**

Section 1.01(I) provides that the City may use the park during the winter, or "non-golfing season," for activities that "do not impede the golf course operations or damage the golf course." The City and general public are prohibited from using any greens, tee boxes or sand traps during that time, and sledding is prohibited. In addition, the City is obligated to "make and adopt reasonable rules and regulations for the use of the Leased Premises by the public for such winter activities," with input from Harbor Shores and its chosen golf course Management Firm. *Id.*⁶

In contrast, *City of Kalamazoo v Richland Twp* provides a clear example of substantial oversight of a municipal golf course by the responsible municipality:

Richland Township did not contradict Kalamazoo's evidence of ownership of Eastern Hills [golf course]. As a home rule city, Kalamazoo is authorized to exercise its municipal powers to manage, control, and administer municipal property to advance its interest. M.C.L. 117.4j; M.S.A. 5.2083. Kalamazoo adopted the [Kalamazoo Municipal Golf Association's] constitution and bylaws in 1925. Any amendment of the KMGA's constitution or bylaws requires Kalamazoo's express approval. Furthermore, the KMGA's current constitution requires the affirmative vote of Kalamazoo's city manager, the assistant city manager for operations, or the director of finance before the KMGA may expend any money.

221 Mich App 531, 534-535; 562 NW2d 237(1997).

Unlike City of Kalamazoo, Harbor Shores is the entity that will be making the types of decisions described in the above quote, not the City of Benton Harbor. The City's only "control" of the property is to create a separate body to review the golf course rates, to make sure the lease is

(...continued)

terms of the Lease whether any other member of the City Commission or City government has the right to access the property or audit the records of the golf course, or whether that right is exclusively for the members of the Panel.

⁶ This past winter, the City and Harbor Shores locked up the park so that no person could enjoy the "winter activities" call for in the lease.

not breached, and to allow certain limited wintertime uses of the property. Plaintiffs suggest that there is no reasonable way to conclude that this limited involvement constitutes “control over” or “use by” the City.

In sum, when the language of the deed restrictions is looked at as a whole, it is clear that the proposed Lease is not consistent with the deed restrictions.

2. The deed restrictions and the Consent Judgment require the Park to remain public

The Court of Appeals erred in concluding that the language of the deed and consent judgment unambiguously allows Benton Harbor to turn a portion of the park into a high-end golf course. The Klocks’ intent in giving the Park to the City was clear: it was to be maintained as a passive use recreational asset for the community forever. Contrary to the Court of Appeals’ holding, the Klocks’ intent is unambiguously evidenced in the deed restrictions.

Again, the deed states that:

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 said City of Benton Harbor for bathing beach, park purposes, or other public purpose; 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. [Ex 4, Warranty Deed.]

The Consent Judgment supplements the deed restrictions and solidifies the requirement that the City may only use the property for bathing beach and park purposes:

The Court permanently enjoins the City from using any portion of the property depicted as “Jean Klock Park” . . . for any purpose other than bathing beach, park purposes, or other public purposes related to bathing beach or park use. Ex 8.

a. **The golf course is not consistent with the deed restrictions and the Consent Judgment Requirement that the Park remain a public park**

The Court of Appeals erred in holding that a golf course unambiguously falls within the meaning of “park purposes” or “other public purpose” under the deed. The Court reached this conclusion by mistakenly relying on two Michigan tax cases, which are inapposite to interpreting the language in the instant deed. **Ex 1-B, Court of Appeals Opinion at 6-7.**

In attempting to define what constitutes a “park” use, the Court of Appeals relies on two tax cases that address what constitutes a “concession” under Michigan tax law. While the question of whether this Lease would qualify as a “concession” under Michigan Tax Law is interesting, it has no bearing on the interpretation of the language of the Deed and Consent Judgment. This requires an analysis of the language used in the Deed or Consent Judgment and the intention of the parties, not an analysis of tax law for concession agreements.

In *City of Detroit v Oakland County*, upon which the Court of Appeals relies for support, the golf course in question had been constructed, owned and operated by the City. 353 Mich 609; 92 NW2d 47 (1958). This Court ruled that the golf course was exempt from taxes by statute because it served a governmental or public purpose. This reasoning does not lend itself to the facts in this case. Here, Harbor Shores, a private entity, plans to construct a golf course partly on city-owned parkland but mostly on private land, and as part of a much larger private development. Harbor Shores will also operate the golf course, with minimal involvement by the City of Benton Harbor.

In addition to *City of Detroit*, Harbor Shores cites a case that interprets the lessee-user tax act as to whether a privately operated golf course on public land is tax exempt.⁷ The court there found that a golf course was a public park based on the language and intent of the statute. However, the purpose and language of the lessee-user act are distinct from the Consent Judgment and deed

⁷ *American Golf of Detroit v City of Huntington Woods*, 225 Mich App 226; 570 NW2d 469 (1997); *City of Kalamazoo v Richland Tp*, 221 Mich App 531; 562 NW2d 237 (1997); *Golf Concepts v City of Rochester Hills*, 217 Mich App 21; 550 NW2d 803 (1996).

restriction at issue here, and a different definition of public park applies in this context. The lessee-user tax act provides:

(1) When any real property which for any reason is exempt from ad valorem property taxation is leased, loaned or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessees or users of this real property shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of this real property.

(2) Subsection (1) shall not apply to...

(b) Property which is used as a concession at a public airport, park, market, or similar property and which is available for use by the general public.... MCL 211.181.

The purpose of this 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.” *Golf Concepts v City of Rochester Hills*, 217 Mich App 21, 25; 550 NW2d 803 (1996). This purpose is entirely different than the purpose of both the deed restriction and the Consent Judgment, which is to preserve the recreational and conservation value of the land and to keep it open for public enjoyment. For this reason, the Court of Appeals’ interpretation of this tax statute is not applicable to the instant case because of the distinct language and intent of these restrictions.

The only case that involves a lease of a golf course by a private entity is *Golf Concepts v City of Rochester Hills*. However, in that case the Court ultimately found that the private entity did not qualify for the concession exemption and was subject to taxation. It is important to note that there was no deed restriction or covenant at issue in that case. Rather, the only issue was whether the private entity was exempt from taxation. In the end, the Court held that it was not.

There is nothing in this case that would indicate that a “public park” use unambiguously includes a golf course. To the contrary, the underlying intent of both the deed restrictions and the Consent Judgment was to preserve this property for its historical park uses, namely passive recreational use.

The language of the deed restrictions and Consent Judgment in this case must be construed to make all of the language meaningful. As explained above, there is a clear requirement for public ownership and use contained in the deed restrictions: “upon the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor....” **Ex 8** (emphasis added).

The Jean Klock Park covenant uses the term “public” twice, making it clear that this property was to remain in public ownership. The deed language goes on to state that the City shall use the property “for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public....” *Id.* The clause “or other public purpose” indicates that the drafter recognized that the City has a fiduciary responsibility to only allow use of the park for public purposes, and that park and bathing beach uses by the City would in fact be public uses. Indeed it would lead to an awkward and unusual interpretation of this language to conclude that the drafter meant the City shall use the property for private bathing beach, private park purposes, or other public purpose. It would also be difficult to ascertain how the City could maintain a private beach or park that would still be “open for the use and benefit of the public.” The logical interpretation of this language is that the covenant requires the City to continue to actively “use” the property for public purposes and in a way that is open to the public.

In a factually similar case, the Court of Appeals recently held that a privately-owned golf course is not a public use. *City of Huntington Woods v City of Detroit, supra*.⁸ In *City of Huntington Woods*, a golf course had been deeded to the City of Detroit with a restriction providing that it “shall be perpetually maintained by [the City] exclusively as a public golf course for the use of the public under reasonable rules, regulations and charges to be established by [the City].” *Id.* at 12. The City of Detroit planned to sell the golf course to a private entity that would maintain the course and keep it open to the public. The court in its decision emphasized that the intent of the deed restriction - that

⁸ Leave to appeal denied by *City of Huntington Woods v City of Detroit*, 483 Mich 887; 759 NW2d 875 (2009).

the golf course be kept in public ownership - was the central consideration. *Id.* The court looked to the fact that the word “public” was used twice in the deed restriction, that the property would remain a public golf course for the use of the public, much like the restriction in this case. *Id.* The court held that even though the City of Detroit intended to sell the golf course to the private entity with a proviso that it remain open to the public, that would still be contrary to the deed restriction:

[W]e determine that [the City] may only sell the subject property to another public entity and not to a private entity, despite the retention of any conditions or assurances that the property would remain a golf course open to the public. *Id.* at 13.

In *Huntington Woods*, the use of the word “public” twice was instructive because “all the language of a deed must be harmonized and construed so as to make all of it meaningful.” *Id.* at 12. The Court also looked specifically at this language because “dedications made by individuals ... are construed strictly according to the terms of the grant.” *Id.* at 13. The Court concluded that “[b]ased on the unambiguous language used and the clearly stated intent of the grantors, we find that the Rackham Deed contains an express covenant precluding the use of the subject property for any purpose other than a public golf course.” *Id.* *Huntington Woods* clearly stands for the proposition that a court must look to the entire language of the grant to harmonize all of the deed language.

In this case, both the language of the Deed and the Consent Judgment require that the Park be used “for bathing beach, park purposes or other public purpose[s].” Grammatically, the last clause of that sentence tells us that the drafter intended all of these uses to be public. The use of the word “other” is particularly important, as it clarifies that the preceding uses are also public. “Other,” as used in this context, means “additional.”⁹ The Deed language and Consent Judgment, then, explain that the Park may be used for “for bathing beach, park purposes or [additional] public purposes.”

Any other reading of this clause makes no sense. If the City can use the park for a private bathing beach or a private park, then the word “other” becomes surplusage. A court cannot find that

⁹ <http://www.merriam-webster.com/dictionary/other>.

parts of deed are surplus or nugatory. *Klapp v United Insurance Group Agency Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Determining that bathing beach and park purposes are also considered to be “public” is the only way to read this provision and give meaning to all the words used. There is no reason to include the word “other” if it does not characterize and describe the other two activities as “public.”

This language also highlights the importance of the *Huntington Woods* case. Before the Court of Appeals, Defendants attempted to limit this case to a requirement that “public” must be in front of any listed use in the deed restriction. But the holding in *Huntington Woods* is not so narrow. Rather, the Court in that case clearly explained that “all the language of a deed must be harmonized and construed so as to make all of it meaningful.” *Id.* at 12. The use of the word “public” twice in that case was determinative because it gave effect to all the language of the deed and, when taken as a whole, evidence a clear intent for public ownership. The deed language in this case, taken as a whole, is likewise clear. The deed provides for City ownership and exclusive City control over the property to be used for express public purposes and to always be open and available to the public. The Consent Judgment likewise confirms that the use of the property must be for these public purposes.

Similarly, the Court of Appeals erred by failing to look at the clause “for bathing beach, park purposes, or other public purpose” as a whole. As noted by this Court in *Belanger v Warren Consol School Distr Bd of Educ*, 432 Mich 575; 443 NW2d 372 (1989), “Where specific words follow general ones, the doctrine of ejusdem generis restricts application of the general term to things that are similar to those enumerated:

The rule ‘accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.’

The resolution of this conflict by allowing the specific words to identify the class and by restricting the meaning of general words to things within the class is justified on the ground that had the legislature intended the general words to be used in their unrestricted

sense, it would have made no mention of the particular words.” 2A Sands, Sutherland Statutory Construction (4th ed.), § 47.17, p. 166.

Id. at 583-84. Applying the doctrine of *eiusdem generis* to the instant case, it is unambiguously apparent that, when the terms “bathing beach” and “park purposes” are read together, the use suggested by these terms is the use to which the park has been put for the last ninety years – passive recreational use.

b. A lease for up to 105 years is effectively a conveyance

The long-term Lease between Harbor Shores and the City transfers the right to “use” the property to Harbor Shores. As is discussed above, the very definition of a lease means that the City is conveying the right to use the property to Harbor Shores. A lease for any term granting the right of a private party exclusive use of the park, for any term, would violate the requirement that the property be “used by” the City. The specific terms of the Lease confirm that Harbor Shores will have “Jurisdiction” over and “quiet enjoyment” of the property for the next 105 years.

Not only will 22 acres of Jean Klock Park no longer be used by the City for up to 105 years, the extraordinary length of the lease is effectively a conveyance of the property to Harbor Shores. It seems that Defendants recognized that it would be contrary to the Deed Restrictions and Consent Judgment to convey the park property to Harbor Shores in fee. The City and Harbor Shores, therefore, chose to enter into a long-term lease instead. They have attempted to characterize the Lease as something other than an “ownership interest” in the language of the lease. **Ex 14, Section 2.01.**

However, courts around the country have consistently looked beyond these types of platitudes and treated leases of such extraordinary length as equivalent to the conveyance of an ownership interest. *See JW Perry Co v Norfolk*, 220 US 472; 31 S Ct 465 (1911) (in a perpetually renewable lease for 99 years, long-term lessee is the virtual property owner and liable for taxes); *Cook v Salishan Properties Inc*, 279 Or 333; 569 P2d 1033 (1977) (99 year lease with automatic renewals of 20 year periods treated as a sale of the property to apply warranty of fitness); *In re Bergsoe Metal*

Corp, 910 F2d 668 (CA 9, 1990) (lessee treated as owner where the lease lacked a definite term); *US v Union Corp*, 259 F Supp 2d 356, 393-94 (2003) (Long-term lessee treated as de facto owner under CERCLA); *Brd of County Comm'rs v Greenshaw*, 241 Kan 119; 734 P2d 1125 (1987) (long-term lease of land treated as a sale for taxation purposes).

Because of the extraordinary length of the Lease Agreement, there is no practical difference between this lease and a conveyance. Even if one does not consider the lease a conveyance in form, it is a conveyance in substance.

3. If this Court finds that the meaning of the deed restriction is ambiguous, it must look to extrinsic evidence to determine the intent of the parties.

If this Court concludes that the meaning of the phrase “bathing beach, park purposes, or other public purpose” does not unambiguously exclude golf courses, it find the language at least ambiguous and should then look to extrinsic evidence to determine the parties’ intent. A contract is ambiguous “when [a term] is equally susceptible to more than a single meaning.” *Lansing Mayor v Pub Service Comm, supra*, 470 Mich at 166. If the Court finds that the terms “park purpose” and “public purpose” could mean either “passive recreational use” or “golf course,” looking to extrinsic evidence becomes appropriate.

In this case, the intent of the Klocks, as evidenced by statements made at the time of the deed, is perfectly clear, as evidenced by Mr. Klock at the park’s dedication ceremony:

The deed of this park in the courthouse of St. Joseph will live forever. 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. [J. N. Klock at the 1917 Dedication Ceremony for Jean Klock Park.]

Defendants make much of the fact that 40% of the golf course’s employees must be Benton Harbor residents, and that profits from the golf course will go towards redevelopment projects in Benton

Harbor. While redevelopment and employment are laudable goals, they are not goals which the Klocks' intended to be met through the development of the Jean Klock Park. As clearly evidenced by Mr. Klock's above statement, the park was deeded to the City in order to provide Benton Harbor residents with equally valuable assets that they likely would not otherwise be able to afford: a natural, beautiful place in which to rest, to hike, to swim, and to quietly enjoy.

III. This Case Involves Issues of Major Jurisprudential Significance and Significant Public Interest

MCR 7.302(B) provides the relevant grounds upon which the Court should grant leave in this case:

- (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an office of the state or one of its agencies or subdivisions in the officers official capacity.
- (3) the issue involves legal principles of major significance to the state's jurisprudence.
- (5) ... the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.302(B)(2), (3) and (5).

First and most obviously, this case is against Benton Harbor, one of the state's subdivisions as authorized by statute. Second, the case deals directly with how the municipalities of the state are to respect and treat a gift of land. As mentioned at the outset of the brief, the gift of Jean Klock Park was donated as a memorial to the Klock's deceased daughter. The gift was part of the Klock's legacy to the City and the community. It was also a gift given for a specific purpose – to remain as a park for the community to enjoy.

As the years have gone by, the City of Benton Harbor has begun to look at the park as an asset to be developed, rather than a legacy to be respected. Plaintiffs suggest that the jurisprudence of this state needs clear guidelines about how a gift and accompanying deed restriction are to be respected. This is especially the case in hard economic times, where a municipality might be more tempted to try and leverage land given as a gift in order to relieve short term financial pressures. It

is also important as there is a greater shift from government lead conservation to movements encouraging private conservation by land conservancies or land trusts. People who make a gift, who leave a legacy like that of the Klocks, should know that their legacy will be protected in the future.

Finally, Plaintiffs suggest that the above brief demonstrates that the decision of the Court of Appeals is clearly erroneous and will cause material injustice to the regular citizens of Benton Harbor. The real losers in this case are those who “do not own a foot of ground...have no piano or phonograph.” The park is no longer theirs.

CONCLUSION

For the above reasons, Plaintiffs Carol Drake and Clellen Bury respectfully request that this Court grant leave to appeal, reverse the Court of Appeals’ decision. Plaintiffs respectfully suggest that the issue of a consultant’s potential for conflict of interest is of particular jurisprudential significance and Michigan law would benefit from a confirmation that such a conflict can exist and is contrary to due process. In the alternative, Appellants request that this Court peremptorily reverse the decision of the Court of Appeals.

Date: March 3, 2010

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