STATE OF MICHIGAN

COURT OF APPEALS

PAUL MARINO and LINDA MARINO,

Plaintiffs-Appellants,

v

GRAYHAVEN ESTATES LTD., LLC, GRAYHAVEN-LENOX LIMITED DIVIDEND HOUSING ASSOCIATION, GRAYHAVEN ESTATES DEVELOPMENT COMPANY, CHARLES BROWN, PULTE HOMES OF MICHIGAN CORPORATION, and PULTE CORPORATION,

Defendants-Appellees.

UNPUBLISHED
June 19, 2001

No. 215764
Wayne Circuit Court
LC No. 98-813922-CH

Before: Smolenski, P.J., and Holbrook, Jr., and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from orders granting summary disposition to defendants and denying plaintiffs' request for a temporary restraining order. Plaintiffs sought an injunction and damages for harm done by defendants development activity of property within plaintiffs' subdivision. Plaintiffs alleged that the development violated binding deed restrictions and reciprocal easements. We affirm in part and reverse in part.

At the heart of this case are the 1926 deed granted by the original developer of the property and the 1974 written waiver of deed restrictions granted by plaintiffs' predecessor in title. In an action to enforce a covenant, the intent of the drafter controls, but the provisions are to be strictly construed against the enforcer and doubts are to be resolved in favor of the free use of the property. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). The determination whether there has been a waiver of a restrictive covenant is to be based on the facts of the particular case. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 344; 591 NW2d 216 (1999).

The 1926 deed included a section captioned "Building Restrictions," that read: "The Grantee, for himself, and his administrators, executors, heirs and assigns agrees that he will conform to the following building restrictions and agreements so far as they may be applicable to the lot hereby conveyed viz[.] . . . ." This passage was followed by language restricting the

property to residential use and single family occupancy. The deed also included the following relevant language under the heading "Private Roads and Lagoons:"

> The Grantee hereby agrees to accept, and the Grantors agree to continue private roads as they are now laid out in GRAYHAVEN and as indicated on said private plat, and to permit them to remain in their present location unless they are changed by mutual agreement of all the owners of property abutting there on, and Grantee also agrees to maintain and keep in repair the portion of the private road abutting on his said premises. The foregoing covenants and agreements shall run with the land and be a charge upon it.
>
> With respect to the premises hereby conveyed Twenty feet off the West end thereof is occupied by Keelson Drive on said plat, and seventy-five (75) feet off the East end thereof is occupied by Starboard Lagoon on said plat, leaving a distance of one hundred fifty feet between the lagoon front line and the street front line of said plat.
>
> Lagoons and driveways shown on the plat above referred to are restricted and limited to private lagoons and private driveways for the benefit only of the Grantors or their heirs and of purchasers buying lots in GRAYHAVEN, and neither party hereto shall cause any obstructions to be made interferring [sic] with the free navigation and use of such lagoons and driveways, subject, however to easements for public utility purposes and such as may be incidental to the construction of improvements as herein set forth; provided, that Grantors reserve the right to dedicate to public use all those portions of said private driveways shown on the plat of GRAYHAVEN lying north of the south line of Riverside Drive.

The 1974 waiver of deed restrictions specified that that property owners agreed to waive

> all building or use restrictions heretofore created, whether by contract, deed, operation of law or otherwise . . . including specifically, but without limitation, any and all restrictions limiting the use of, or construction upon, any property within Grayhaven to single family residences and further waive, release and terminate any and all rights they may have to enforce any such building or use restrictions upon property within Grayhaven.

Plaintiffs first argue that the trial court erred in concluding that the 1974 waiver was not limited to the restrictions on single family residences and that they had not retained the right to enforce restrictions relating to the road and the lagoons. We disagree. In Michigan, "building" restrictions can include "use" restrictions. *Id.* at 342. Because these terms are not rigidly defined by Michigan case law, and because "restrictions" was used interchangeably with "restrictions and agreements" in the deed, we conclude that the intent of the parties to the deed should be construed not to create separate categories but to aggregate all the limitations.

The language of the waiver is unambiguously broad and inclusive. It states that "any and all building or use restrictions" were waived "without limitation." This Court has noted that there is no broader classification than the word "all," and "all" leaves room for no exceptions. *Romska v Opper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999). Where a term is defined by declaring what it "includes," it is susceptible to extension of meaning by construction to encompass other items not explicitly mentioned. *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994). We believe that the inclusion of the "single family residences" restriction in this case is clearly just a specific example of the restrictions waived.

Further, the collective decision-making, which from the deed appears only in relation to the location of the roads, was also exterminated by the clause waiving "any and all rights . . . to enforce any such building or use restrictions upon property within Grayhaven." Thus, while pursuant to the waiver plaintiffs were no longer bound by the restrictions in their own deed, they also lost the ability to force other Grayhaven property owners to adhere to the restrictions. Accordingly, the trial court was correct in dismissing plaintiffs' breach of deed counts because the deed restrictions had been waived and could no longer be enforced. The court's order granting summary disposition of Counts I and VII is affirmed.

Plaintiffs also assert that defendants' activities both overburden the easement on their property and interfere with plaintiffs' right to use the reciprocal easements on other property in the subdivision. There is little doubt that in this case the deed created easements in both the road and the lagoon. The original grantor could have described the lots as extending only between the road and the lagoon, but instead expressly included half the width of each as part of the lots conveyed. Furthermore, both parties agreed that these were easements. Thus, all island property owners were obliged to allow the others to use the road and lagoon portions of their parcels. Likewise, each property owner had a right to use the road and lagoon portions of the other parcels.

An easement holder may not materially increase the burden on a servient estate beyond what was originally contemplated. *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 577; 485 NW2d 129 (1992). Activities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate. *Schadewald v Brulé*, 225 Mich App 26, 40; 570 NW2d 788 (1997). The holder of easement rights has the privilege to make changes necessary for effective enjoyment of the easement unless the burden on the servient tenement is unreasonably increased. *Mumrow v Riddle*, 67 Mich App 693, 699; 242 NW2d 498 (1976). *Mumrow* sets forth a two-part balancing test: (1) whether the repair or improvement is necessary to effective enjoyment of the easement, and (2) whether the repair or improvement, if necessary, unreasonably increases the burden on the servient tenement. *Id.* at 700. This test does not appear in the trial court's reasoning, nor in defendants' brief on which the trial court based its ruling.

Although road improvements may constitute an unreasonable burden, depending on the circumstances, the issue whether defendants' improvements burdened plaintiffs' property was not litigated. See *Mumrow*, *supra* at 700; *Carlton v Warner*, 46 Mich App 60, 61-62; 207 NW2d 465 (1973). Neither did the trial court consider whether defendants' activities interfered with

plaintiffs' right to use their dominant estate; that is, their right to use the road and lagoon portions of the other island properties. The rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil. *Tittiger v Johnson*, 103 Mich App 437, 441; 303 NW2d 26 (1981). The owner of a fee subject to an easement may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement. *Id.* Defendants' proposed gate across part of the road, and the bridge and docks in the lagoons may be inconsistent with plaintiffs' right to use the road and to navigate the lagoons, interfering with their easement. Like the issue of defendants burdening the servient estate, the issue of their interfering with plaintiffs' easement rights was not explored by the trial court.

The extent of a party's right under an easement is a question of fact. *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998). Plaintiffs alleged three counts relating to the use of dominant and servient easements created by the deed. The trial court incorrectly dealt with these as being issues of the deed and waiver agreements. No factual findings were made regarding the extent of the burden, the necessity of the changes, or the inconsistency of defendants' actions with plaintiffs' rights. Because factual questions surrounding the easements remain, we remand for trial on the merits of Counts II, III, and VI.

Plaintiffs also argue that their request for injunctive relief should have been granted by the trial court. We disagree. An order granting or denying a request for injunctive relief is reviewed for abuse of discretion. *Schadewald, supra* at 39. Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law and there exists a real and imminent danger of irreparable injury. *Kernen v Homestead Development Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). We agree with the trial court that plaintiffs have failed to establish that injunctive relief should be granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). Plaintiffs did not prove that its easement rights were being irreparably harmed and did not show that defendants were taking any property not already belonging to the easement.

Affirmed in part; reversed and remanded in part. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.

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WHITE, J. (*concurring in part and dissenting in part*).

I concur in the majority's remand with respect to counts II, III and VI.

I also agree with defendants and the majority that the waiver provision was not limited to the restrictions regarding single family residences. By its own terms, the waiver clearly applied to "any and all building or use restrictions," and was explicitly not limited to those regarding single family residences. Thus, e.g., the provision stating that "[n]o docks, structure or obstructions of any nature shall be constructed in any lagoon" was waived.

I respectfully disagree, however, with the conclusion that the record made below establishes that "any and all building and use restrictions" refers to those paragraphs of the 1926 deed that set forth "agreements," as distinguished from "restrictions." The deed refers to "building restrictions and agreements" in both the paragraph introducing the restrictions and agreements and the paragraph that marks the end of the delineation of the restrictions and agreements. While most of the separately titled paragraphs located between these two paragraphs use language of restriction - - "no dwelling or structure shall," "all structures shall," etc., - - several paragraphs use language of agreement - -"grantee agrees," "grantors agree." Thus, the deed recognizes the recital of building restrictions and agreements as two separate categories. The waiver, however, refers to "any and all building and use restrictions," and does not mention "agreements." Under these circumstances, I conclude that the court erred in

concluding that by its terms the waiver applied to all provisions of the deed at issue, including those constituting "agreements." Whether plaintiffs can show a violation of the agreements is a separate question that should be addressed on remand.

Lastly, I agree that the court did not abuse its discretion in denying a preliminary injunction.

/s/ Helene N. White