STATE OF MICHIGAN
IN THE COURT OF APPEALS

WILLARD P. WILCOX, GORDON W. WILCOX, THEODORE W. WILCOX, DAVID W. PALMER, And CAROLYN P. SHAH,

Plaintiffs/Appellees

Court of Appeals
Case Nos. 261139 and 261142

Antrim County Circuit Court
Case No. 04-8041-CZ

v

ELK RAPIDS TOWNSHIP and ELK RAPIDS TOWNSHIP BOARD,

Defendants/Appellants

and

ELK RAPIDS SPORTSMAN'S CLUB, INC., a Michigan nonprofit corporation,

Intervening Defendant/Appellant.

_______________________________________/

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ELK RAPIDS SPORTSMAN'S CLUB, INC.'S BRIEF ON APPEAL IN CASE NO. 261142

* * * ORAL ARGUMENT REQUESTED * * *

Dated: May 4, 2005

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JURISDICTIONAL STATEMENT

On March 3, 2005, Intervening Defendant/Appellant Elk Rapids Sportsman's Club, Inc. ("ERSC" or the "Club") filed a timely claim of appeal from the Antrim Circuit Court's January 13, 2005 Decision and Order on Cross-Motions for Summary Disposition (attached as Appendix 1), and February 10, 2005 Judgment Affecting Interests in Land (attached as Appendix 2). (Court of Appeals No. 261142). On March 1, 2005, Defendants/Appellants Elk Rapids Township and Elk Rapids Township Board (collectively, the "Township") had filed a similar claim of appeal (Court of Appeals No. 261139). On March 11, 2005, this Court issued an order consolidating the appeals.

This Court has jurisdiction. MCR 7.203(A)(1). Administrative Order 2004-5 established an expedited appeal track for appeals such as this arising from orders granting or denying motions for summary disposition. On March 24, 2005, this Court issued an order denying ERSC's motion to remove this appeal from the summary disposition track.

STATEMENT OF QUESTIONS INVOLVED

Plaintiffs/Appellees ("Plaintiffs") are some of the heirs of Mina Wilcox, who gave land to Defendant/Appellant Elk Rapids Township (the "Township") in the 1940s. The Township allowed Intervening Defendant/Appellant Elk Rapids Sportsman's Club ("ERSC" or the "Club") to continue operating a shooting range on the land as the Club has done since the 1930's pursuant to a lease from Mina Wilcox. The Antrim Circuit Court ("Circuit Court") held that (1) the Township was required to establish a park on the land, and (2) the Club's use of that land was inconsistent with that requirement, so (3) the Township abandoned the land, which would revert to the Plaintiffs unless the Township developed a park that is approved by the Circuit Court.

1. DOES THE TOWNSHIP HAVE A FEE SIMPLE INTEREST IN THE LAND, WHICH IS NOT SUBJECT TO THE POSSIBLITY OF REVERSION TO SOME OF THE GRANTOR'S HEIRS?

Appellant ERSC answers:	Yes
Appellant Township presumably would answer:	Yes
Appellees/Plaintiffs presumably would answer:	No
The Circuit Court did not address this issue, but implicitly answered:	No

2. DID THE TOWNSHIP ABANDON THE LAND BY ALLOWING THE ERSC TO CONTINUE TO OPERATE A SHOOTING RANGE, AS THE GRANTOR HAD ALLOWED AND REQUIRED DURING HER LIFETIME?

Appellant ERSC answers:	No
Appellant Township presumably would answer:	No
Appellees/Plaintiffs presumably would answer:	Yes
The Circuit Court answered:	Yes

3. ARE PLAINTIFFS' CLAIMS BARRED BY CONSENT, WAIVER AND ESTOPPEL, DUE TO THEIR AND THEIR PREDECESSORS' CONDUCT OVER THE LAST 70 YEARS?

Appellant ERSC answers:	Yes
Appellant Township presumably would answer:	Yes
Appellees/Plaintiffs presumably would answer:	No
The Circuit Court answered:	No

INTRODUCTION

This appeal involves land that Mina Wilcox initially leased to the Elk Rapids Sportsman's Club, Inc. ("ERSC" or the "Club") in 1938 for use as a shooting range. Upon her death in 1948, Mina Wilcox gave the land to the Township in fee simple, with her express "wish" that the Townshp "shall be permitted to lease to the Elk Rapids Sportsman's Club, the site of its present shooting range, at the discretion of the Township Board" (Appendix 4). The Circuit Court held that the Township abandoned the land to Plaintiffs, who are some of Mina Wilcox's heirs, by allowing the Club to continue operating a shooting range on the land (including the provision of public services) as it had done since the 1930's pursuant to the lease from Mina Wilcox. The Court reversibly erred as a matter of law, and equity also bars Plaintiffs' claims, as further explained below.

STATEMENT OF FACTS

The Club was formed in December 1937 (Appendix 9, Exhibit A). On May 4, 1938, Mina Wilcox leased a portion of the land at issue to the Club, for the exclusive use of that land as a shooting range for ten (10) years, in return for one dollar ($1.00) and two memberships in the Club. The lease also expressly allowed the Club to improve the land for shooting range purposes. The lease relevantly stated:

> "This Indenture Made and Executed at Elk Rapids, in the County of Antrim and State of Michigan this 18 day of May in the year of our Lord one thousand nine Hundred and thirty-eight,
>
> By and Between Mina Gates Wilcox, party of the first part, and The Elk Rapids Sportsman's Club, party of the second part,
>
> Witnesseth: That the said party of the first part **in consideration of One Dollar ($1.00) and other considerations**, does hereby let and lease and the said party of the second part has agreed to take and does hereby take
>
> * * * [property description]

> For the **term of ten years**, commencing on the first day of May, 1938 and ending on the 30 day of May April, 1948.
>
> **This lease is to remain in full force and effect so long as the property above described is used for the purpose of a shooting range.** And the party of the second part agrees that the property herein described is to be used as a shooting range.
>
> The party of the first part agrees to allow the party of the second part access to above described parcel of land by way of a woods road . . .
>
> **It is understood and agreed that the party of the second part may make such improvements upon the above described shooting range as are suitable for its purpose and use.**
>
> * * *
> **The compensation for the exclusive use by the Elk Rapids Sportsman's Club of the parcel designated as a shooting range, and for the joint use of the road designated as an access thereto shall be rental of One Dollar ($1.00) and the granting to the party of the first part two membership tickets without charge**."
> (Appendix 3, emphasis added)

When Mina Wilcox died in 1948, she left the land to the Township. The January 24, 1948 Codicil to the Will of Mina G. Wilcox directed the administrator of her estate to deed the land to the Township for development of a recreation field at the Township's discretion. The Codicil contained no reversionary clause, and stated Mina Wilcox's "wish" that the Township could continue leasing the shooting range site to the Club, which should continue to have access to the land. The Codicil relevantly stated:

> "I direct my son, Paul Harlan Wilcox, as administrator of my estate, to deed to the Township of Elk Rapids
>
> * * * [property description]
>
> **This parcel of land is given to the Elk Rapids, Township for development of a recreation field. It is my wish that the Township of Elk Rapids shall not relinquish ownership of this parcel to any person or group, but I do wish the Township of shall be permitted to lease to the Elk Rapids Sportsman's Club, the site of its present shooting range, at the disretion [sic] of the Township Board, for reasonable periods of time (for example, 5**

> **yr. periods), for some appropriate annual rental sums be put aside as a park improvement fund**. At the present time the Elk Rapids Sportsman's Club has a nearly expired lease for the site of its shooting range. It uses an unimproved drive extending from the Bay Shore road across the field to its shooting range. This drive should be considerated [sic] as a temporary access and **the Sportsman's Club should be allowed to de suddicient [sic] grading to make the drive passable at its off-shoot from the Bay Shore road, pending the provision for a permanent access which should be designated by the Township Board, when the field is needed for some recreational project.** It is my suggestion, but not my dictation, that the permanent access be along the east-west quarter line, which is the southern boundary of said parcel. It is my understanding that the use of Michigan public parks is not denied to any person because of race, color or creed." (Appendix 4, emphasis added)

A July 5, 1948 Executor's Deed conveyed all interests in the land, including reversions and remainders, to the Township forever:

> **"The said party of the first part [executor] . . . has granted, bargained, sold and conveyed, and by these presents does grant bargain, sell and convey unto the said party of the second part [Township], forever**, all those certain pieces and parcels of land . . . described as follows: and to be entitled, The Mina G. Wilcox Recreational Park:
>
> * * * [property description]
>
> "subject to the suggestions and directions set forth in the Codicil to the Last Will and Testament of Mina G. Wilcox, to-wit:
>
> * * * [repeating Codicil]
>
> **Together with all** and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the **reversions and remainders**, rents, issues and profits thereof. **And all the estate, right, title, interest, property, possession, claim and demand whatsoever**, which the said testatrix had in her lifetime, and at the time of her decease, and which the said party of the first part has be virtue of the said Last Will and Testament or otherwise, of, in and to the above described premises, and every part and parcel, thereof, with the appurtenances, to have and to hold, **forever**." (Appendix 5, emphasis added)

On September 23, 1948, the Township Board accepted the land "subject to the suggestions and directions set forth in the codicil to the Last Will and Testament of Mina G. Wilcox" (Appendix 6, pp 2-3).

The size of the land has been reduced substantially since 1948, because the State of Michigan condemned, for US-31, about 5 acres of the land that Mina Wilcox gave to the Township. Mina Wilcox's heirs obtained the western portion of that land, which was severed by US-31 (8/19/04 TR 7; 11/15/04 TR 4; ERSC's answer to Plaintiffs' complaint, ¶¶ 27, 31).

In 1959, Mina Wilcox's children (Helen Wilcox Bard, Emily Wilcox Palmer (Plaintiff Carolyn Shaw's mother) and Paul Harlan Wilcox (the administrator of Mina Wilcox's estate, see Appendix 4) provided additional land that has been used to provide access to the Club, because US-31 severed the original land that Mina Wilcox gave to the Township (Appendix 9, Exhibits E and F).

In 1968, Helen Wilcox Bard gave the Township an additional 3 acres of land that was contiguous to the Club, at the request of the Club's Secretary/Treasurer, who sent her a thank you letter on behalf of the Club (Appendix 9, Exhibits G and H).

The Club continued to operate its shooting range and also significantly improved the property and provided benefits to the public (11/15/04 TR 7-8). There was no complaint or dispute. Plaintiffs, who are some of Mina G. Wilcox's grandchildren, first raised a concern in 2002 (Appendix 9, Exhibit L).

Plaintiffs sued the Township, claiming that the Township abandoned the land by failing to establish a park. On August 19, 2004, the Circuit Court heard arguments on the Club's motion to intervene, and entered an Order Granting Elk Rapids Sportsman's Club's Motion to Intervene as Defendant. On September 24, 2004, the Township moved for partial summary disposition. On November 2, 2004, the Club filed a brief in support of the Township's motion (Appendix 7). On November 5, 2004, Plaintiffs filed a Response to Defendant Township's Motion for Partial

Summary Disposition and Counter-Request for Partial Summary Disposition. On November 10, 2004, Plaintiffs filed a response to the Club's brief. On November 12, 2004, the Club filed a response to Plaintiffs' November 10, 2004 response (Appendix 8).

On November 15, 2004, the Circuit Court heard oral arguments, and allowed the parties to file post-hearing briefs. The Township and the Club filed post-hearing briefs on or about November 22, 2004 (ERSC's post-hearing brief is attached as Appendix 9). Plaintiffs filed a post-hearing brief on or about December 3, 2004.

On January 13, 2005, the Circuit Court issued a Decision and Order on Cross Motions for Summary Disposition (Appendix 1). On February 10, 2005, the Circuit Court issued an Order Settling Form of Judgment, and a Judgment Affecting Interests in Land (collectively attached as Appendix 2). The Court essentially held that the Township abandoned the land so it reverted to Plaintiffs, but the Township had 180 days (until July 15, 2005) to submit a plan to the Court for developing a park for the Court's approval (Appendix 1, p 9).

On March 1, 2005, the Township filed a timely claim of appeal (No. 261139). On March 3, 2005, the Club filed a timely claim of appeal (No. 261142). On March 11, 2005, this Court issued an order consolidating the appeals. The Club now files this brief seeking reversal of the Circuit Court's rulings.[1] Additional detail will be supplied below where it is best understood in context.

STANDARD OF REVIEW

Defendants moved for partial summary disposition pursuant to MCR 2.116(C)(8) on Count I (reversion) and Count II (quiet title) of Plaintiffs' complaint. Plaintiffs responded with a counter-

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[1] Proceedings continue in the Circuit Court, and matters such as the Circuit Court's "park plan" remedy are beyond the scope of this appeal; however, ERSC's position is that the additional Circuit Court proceedings are unfounded and must be vacated due to the reversible errors discussed in this appeal.

request for partial summary disposition pursuant to MCR 2.116(I) and MCR 2.116(C)(9) and (10).

Our Supreme Court recently stated the relevant standards for MCR 2.116(C)(8) and (10):

> "We review de novo a trial court's decision to grant or deny summary disposition. The Herald Co v Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. Wade v Dep't of Corrections, 439 Mich 158, 162; 483 NW2d 26 (1992). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. Id. At 163.
>
> "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. Smith v Globe Life Ins Co, 460 Mich 446, 454; 597 NW2d 28 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. At 454-455, quoting Quinto v Cross & Peters Co, 451 Mich 358, 362-363; 547 NW2d 314 (1996). MacDonald v PKT, Inc., 464 Mich 322, 332; 628 NW2d 33 (2001).

The relevant standards for MCR 2.116(C)(9) are similar to those for MCR 2.116(C)(8), as this Court explained:

> "MCR 2.116(C)(9) provides that summary disposition is appropriate where "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." A motion brought pursuant to this subrule is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true. Where the nonmoving party's defenses are "so clear untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery," summary disposition pursuant to MCR 2.116(C)(9) is warranted. Norgan v American Way Life Ins Co, 188 Mich App 158, 160; 469 NW2d 23 (1991), quoting Hazel Park v Potter, 169 Mich App 714, 718; 426 NW2d 789 (1988) (internal quotation marks omitted). Our review of motions for summary disposition is de novo. Stehlik v Johnson (On Rehearing), 206 Mich App 83, 85; 520 NW2d 633 (1994)." Grebner v Clinton Twp, 216 Mich App 736, 739-40; 550 NW2d 265 (1996).

To the extent that this appeal involves additional issues of law, the identical de novo standard of review applies. Terrien v Zwit, 467 Mich 56, 61; 648 NW2d 602 (2002).

ARGUMENT

I. THE TOWNSHIP'S LAND IS OWNED IN FEE SIMPLE, AND IS NOT RESTRICTED IN USE NOR SUBJECT TO REVERSION.

The Township owns the land in fee simple, pursuant to the terms of Mina Wilcox's Codicil and the deed from the administrator of her estate. There cannot be a reversion of land that is owned in fee simple. The Circuit Court neglected to recognize that such a reverter can occur only when the conveyance contains a reverter clause. The Court completely skipped the first question in the required analysis, which is what property interest did the Township acquire.

The language in the dedication documents is crucial. A reversion can occur only where there is (unlike here) a reverter clause. If that had been the case here, then the title in the land would have been a determinable fee upon condition subsequent. Quinn v Pere Marquette Ry Co, 256 Mich 143, 152; 239 NW 376 (1931). See also, for example, Baldwin Manor Inc. v City of Birmingham, 341 Mich 423, 425-26; 67 NW2d 812 (1954) (the instrument of conveyance contained a reverter clause that expressly stated: "It is specifically stipulated that the land deeded to the village by this instrument be used by the village as a park and for that only, and if not so used it is to revert to my heirs").[2]

In contrast here, the Executor's Deed broadly transferred all property interests, including reversions and remainders, to the Township forever (Appendix 5). There was no reverter clause in any document. Therefore, an unqualified title in fee simple passed to the Township. Quinn, supra, 256 Mich at 151 ("The rule is that the debasing of a fee is not favored by the law, but provisions tending thereto are to be construed against the grantor. [citation omitted] It seems to be the weight

[2] The Circuit Court cited Baldwin Manor, supra, 341 Mich at 429-32 (Appendix 1, pp 4-5). At the cited pages, however, our Supreme Court simply presented an overview of the law by quoting Am Jur and discussing some non-Michigan cases. The Circuit Court should have instead considered Michigan case law and the specific facts driving those decisions.

of authority that where there is no reverter clause, a statement of use is merely declaration of the purpose of the conveyance, without effect to limit the grant."). Accord, Briggs v City of Grand Rapids, 261 Mich 11, 14; 245 NW 555 (1932). There was no condition subsequent by which the Township could be divested of its property interest. Clark v City of Grand Rapids, 334 Mich 646, 653; 55 NW2d 137 (1952) ("The absence of a reverter clause is ordinarily controlling against construction of a provision as a condition."). Ms. Wilcox's statement of suggested uses of the land merely expressed the parties' intention that the deed was for a lawful purpose, and did not limit the Township's property interest. Quinn, supra, 256 Mich at 151.[3]

Since the Circuit Court skipped this dispositive issue, the Court's decision is fatally flawed, and reversal is required as a matter of law. There is no need to consider the Circuit Court's reasoning that assumes, contrary to the controlling law and documents, that the Township's property interest was subject to reversion.

II. THE TOWNSHIP DID NOT ABANDON THE LAND.

As explained above, the Township had a fee simple interest in the land that could not revert to Plaintiffs. Assuming for the sake of argument, however, that the Township had a lesser interest in the land, there was no abandonment that would operate as a reverter to Plaintiffs.

It is well established that there is no abandonment unless the use for which the property was dedicated "wholly fails." Clark, supra, 334 Mich at 658 (rejecting claim by grantor's heirs that city abandoned land that grantor conveyed to the city for park and recreation purposes); Kirchen v Remenga, 291 Mich 94, 113; 288 NW 344 (1939) (holding that erection of buildings on park lands

[3] Even where there are express conditions and reverter clauses in the dedicating instruments (which is not the case here), the courts have allowed various operations that are not strictly park activities. Central Land Co v City of Grand Rapids, 302 Mich 105; 4 NW2d 485 (1942) (holding that operation of oil wells on land conveyed to city for park purposes was not a substantial breach of a condition subsequent, so there was no reversion to the grantor); Dodge v North End Improvement Ass'n, 189 Mich 16; 155 NW 438 (1915) (holding that street car waiting building was not foreign to park purposes).

did not amount to an abandonment); Michigan State Highway Comm v St. Joseph Twp, 48 Mich App 230, 238; 210 NW2d 251 (1973) (holding that township did not abandon park by nonuse).

The instruments conveying the land to the Township did not require the Township to take any particular action at any particular time. Therefore, it is impossible for the dedicated use to have "wholly failed." The Circuit Court erred by essentially (1) re-writing the instruments conveying the land to the Township; (2) altering the Township's property interest in the land; (3) creating certain "park" requirements; and (4) holding that the Township did not satisfy those created requirements.

A. The Required Elements of Abandonment Are Not Satisfied.

The Circuit Court correctly recognized that two elements must be satisfied for abandonment to occur, stating:

> "Abandonment is composed of two elements, namely, an intention to relinquish the right or property, but without intending to transfer title to any particular person, and the external act by which such intention is carried into effect. Both of these elements must concur. Intention alone is insufficient, and, conversely, nonuser alone is insufficient to show an abandonment – it must be accompanied by some act or circumstance showing an intention to relinquish the property." (Appendix 1, p 7, quoting Roebuck v Mecosta County Rd Comm, 59 Mich App 128, 132; 229 NW2d 343 (1975).

Although the Court recognized the requirements for abandonment, the Court did not analyze or apply them. Instead, the Court cited two cases on dedication (Appendix 1, p 7, citing Village of Lakewood Club v Rozek, 51 Mich App 602; 215 NW2d 780 (1974) and West Michigan Park Assoc of Ottawa Beach v Dept of Conservation, 2 Mich App 254; 139 NW2d 758 (1966). The Court plainly erred, and the Court's reasoning is inherently flawed, since dedication and abandonment are separate concepts. It is undisputed that the land was dedicated to the Township and accepted by the Township (Appendix 1, pp 5, 7). The dedication therefore became irrevocable by either Ms. Wilcox or her successors in interest. Western Michigan Park Assoc of Ottawa Beach, supra, 2 Mich App at 266.

B. The Land Has Been Used Appropriately.

Plaintiffs had the burden of proving abandonment. Although they succeeded in misleading the Circuit Court, they did not, and cannot, carry their burden on the relevant criteria for abandonment. Roebuck, supra, 59 Mich App at 132 (holding that there was no abandonment, since there was no evidence of an intention to relinquish the property); Log Owners' Booming Co v Hubbell, 135 Mich 65, 69; 97 NW157 (1903) (holding that no intent to abandon could be implied merely from the lapse of time); Emmons v Easter, 62 Mich 226, 237; 333 NW2d 239 (1975) (holding that the record did not support a finding of abandonment); Ackerman v Spring Lake Twp, 12 Mich App 498, 502; 163 NW2d 230 (1960) ("Proof of abandonment must be borne by the asserting party [citation omitted]. There is insufficient support for such a conclusion in the present record").

Instead of applying the requirements of abandonment, as discussed above, the Circuit Court seemed to think that the Township abandoned the land through nonuse ("the dedicated public use was never established") or misuse ("even though the Defendant Township initially accepted the dedication, it ultimately abandoned the purpose of the dedication by effectively giving the property to a private club and making it impossible for the public to access and use the land for park purposes") (Appendix 1, p 7). It is well established that neither misuse nor nonuse constitutes an abandonment of land dedicated for a park, even where a reversion is stated in the instrument of dedication (unlike the present instruments that had no reverter clause). Clark, supra, 334 Mich at 654; Ford v City of Detroit, 273 Mich 449, 452; 263 NW 425 (1935) ("Neither misuse nor nonuse alone will be sufficient to constitute an abandonment of land dedicated to a public use so as to work as a reverter to the dedicators").

Assuming that misuse or nonuse are even relevant, the record demonstrates that there was no misuse or nonuse of the land. The Circuit Court's analysis was based on the faulty premise that a

"park" cannot include a shooting range. The Court cited no authority for its construction, which is contrary to well-established law broadly construing the term. See, for example, Grand Haven Twp v City of Grand Haven, 33 Mich App 634, 636; 190 NW2d 714 (1971), remanded, 386 Mich 754, reaffirmed, 38 Mich App 122; 196 NW2d 3 (1972), affirmed, 389 Mich 360; 207 NW2d 325 (1973). In Grand Haven, our Supreme Court adopted the Court of Appeals' opinion, which affirmed the circuit court's decision that an airport was a park, and quoted the circuit court's opinion finding: "There are ball parks, amusement parks, botanical parks, air parks, boat parks, camping parks and others too numerous to mention".

Shooting ranges are well-recognized as an appropriate use of land for recreational purposes. Smith v Western Wayne County Conservation Assoc, 380 Mich 526; 158 NW2d 463 (1968) (holding that gun club was not a nuisance, and rejecting attempt to enjoin its operation; Ray Twp v B&BS Gun Club, 226 Mich App 724; 575 NW2d 63 (1998) (upholding constitutionality of Sport Shooting Ranges Act, MCL 691.1541 et seq, and rejecting attempt to enjoin shooting range's operation); McNames v Rockford Park District, 185 Ill App 3d 291; 540 NE2d 1119; 133 Ill Dec 253 (1989) (holding that a park district had authority to provide shooting-range facilities as a recreational activity).

The record demonstrates that Mina Wilcox considered shooting to be recreation, and a shooting range to be appropriate on the land. She leased the land to the Club for 10 years in return for one dollar ($1.00) and two memberships in the Club (Appendix 3). She never mentioned swing sets or anything else that the Circuit Court apparently contemplates for its "park plan" remedy. Instead, she expressly required in her lease to the Club that the land continue to be used as a shooting range (Appendix 3). Her Codicil expressed her wish that the Township continue entering leases with the Club (Appendix 4). The Township appropriately leased the land to the Club, which appropriately provided recreational activities on the land.

The land is not closed to the public as the Court suggests (Appendix 1, p 7). The Club does not deny access based on race, creed, gender or other such criteria (8/19/04 TR 5-6; 11/15/04 TR 6). The Club is a nonprofit corporation that collects money to cover expenses, and maintains certain rules as necessary to safely operate a shooting range (ERSC answer, ¶ 43). It is also well known, and the Court might take judicial notice, that various state parks and state recreation areas have shooting ranges, and that there are certain hours of operation and other rules at shooting ranges.[4] Thus, there is no sound basis for the Circuit Court's apparent belief that the Club's shooting range is inconsistent with the use of the land for park purposes.

The Court indicated a belief that the Township should charge the ERSC higher rent, and establish a park improvement fund (Appendix 1, p 7). The only evidence of appropriate rent on this record, however, is Mina Wilcox's 10-year lease to the Club for one dollar ($1.00) and two memberships in the Club (Appendix 3). Moreover, it is undisputed that the Club provides various public services that benefit the community and relieve the Township from providing these public services. (11/15/04 TR 7-8). As for park improvements, the Club expended considerable funds to improve the shooting range, just as Mina Wilcox's 1938 lease to the Club expressly contemplated and stated (Appendix 3: "It is understood and agreed that the party of the second party may make such improvements upon the above described shooting range as are suitable for its purpose and use").

The Circuit Court also seemed to think that the land was being used improperly because a private entity (the Club) is operating the shooting facilities on the land (Appendix 1, p 7). Again, the Circuit Court cited no authority for its apparent belief, which is contrary to well-established authority

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[4] On April 12, 2005, SB 366 was introduced to amend the Natural Resources and Environmental Protection Act, MCL 324.101 et seq, to provide, in part: "On each day that a state park containing a designated shooting range is open to visitors, the department shall post a notice at the entrance to the recreation areas of the state park that states the hours of operation of the shooting range on that day."

recognizing that private entities may contract, operate and charge for facilities in parks. For example, in Huron-Clinton Metropolitan Authority v Attorney General, 146 Mich App 79, 80; 379 NW2d 474 (1986), this Court observed that at the park involved in the case, the "plaintiff or its various concessionaires charge fees for the use of a golf course, roller rink, boat riders, miniature golf course, tennis courts, binocular viewers, trackless train rides, boat shows and marinas." The circuit court entered a declaratory judgment against the plaintiff's proposal to lease parkland to a private entity for the construction, operation and maintenance of a water slide. This Court reversed, explaining, among other things, that the proposed lease did not violate the public trust, since the plaintiff was not selling the land, and was providing park facilities to the public. 146 Mich App at 86. Similarly, here, the Township leased the land to the Club, which has provided park facilities to the public.

III. PLAINTIFFS' CLAIMS ARE BARRED BY CONSENT, WAIVER AND ESTOPPEL.

The Circuit Court's decision should be reversed as a matter of law, as discussed above. For purposes of completeness, however, the Club respectfully submits that equity also bars Plaintiffs' claims.

The Club was formed in 1937 (Appendix 9, Exhibit A) and has continuously operated a shooting range on the land for nearly 70 years, beginning with the 1938 lease from Mina Wilcox (Appendix 3). The Club is well known in the community, particularly because it provides various community services (11/15/04 TR 7-8). The sounds of its shooting range are obvious to anyone who is near the land, and its improvements to the land are impossible to miss for anyone visiting it. Mina Wilcox's children expressly consented to this use, and actively aided that continuation of the Club's shooting range by making additional land transfers in 1959 to provide access to the ERSC (Appendix 9, Exhibits E and F), and in 1968 at the request of the Club's Secretary/Treasurer (Appendix 9, Exhibits G and H). This record evidence demonstrates that Mina Wilcox and her children were well

aware of the Club's operation of a shooting range on the land, and expressly consented to and even supported the Club's activities. There is no evidence that any of Mina Wilcox's successors complained, or even suggested some different use of the land for several decades. Plaintiffs acknowledged that they first raised a concern in 2002 (Appendix 9, Exhibit L).

Plaintiffs' claims are therefore barred. Kirchen, supra, 291 Mich at 117 (owners of lots dedicated for park purposes were estopped from questioning a beer tavern owner's right to maintain the tavern on the dedicated park land, where the lot owners permitted a building to be erected and used for many years without protest, and stood by and permitted the tavern owners to improve the building); Weber v Ford Motor Co, 245 Mich 213, 217-18; 222 NW 198 (1928) (assuming that deed created condition subsequent, the grantor was estopped to assert a breach of that condition subsequent, by not protesting nor asserting any rights for many years, with knowledge that improvements were being made). See also, Beulah Missionary Baptist Church v Spann, 132 Mich App 118, 124; 346 NW2d 911 (1984) ("a party certainly can be estopped from challenging the consequences of his own inaction.")

The Circuit Court's analysis completely misses the mark. The Court reasoned that the Plaintiffs did not know all of the facts because, for all they knew, the Township was continuing to lease the property to the ERSC as "Mina Wilcox had provided." (Appendix 1, p 9). The Township did maintain a landlord/tenant relationship with the Club, as discussed above and in accordance with Mina Wilcox's 10-year lease to the Club (Appendix 3), and her wish that the Township be permitted to continue leasing to the Club (Appendix 4). The absence of any problem means that Plaintiffs cannot complain in the first place, not that they can continue to complain. Assuming for the sake of argument that there was any lease problem, then the appropriate remedy is for the Township to enter into a different lease with the Club.

The Circuit Court further erred by failing to recognize that Plaintiffs' specific knowledge is irrelevant because Plaintiffs' parents cut off any rights that Plaintiffs (or succeeding generations) might have had to complain about the use of the land. Barrie v Smith, 47 Mich 130, 132; 10 NW 168 (1881) ("It is well settled that a condition subsequent may be waived, where broken, where the party has the right to avail himself of it, and this may be proven, as well by acts and conduct, as by an express agreement; and **where once waived it is gone forever**." (emphasis added)).

The Circuit Court's final statement that "title to real estate may not rest on estoppel . . ." (Appendix 1, p 9) lacks relevance. The Township acquired the land pursuant to the Executor's Deed (Appendix 5). Estoppel simply bars Plaintiffs' claims.

STATEMENT REGARDING ORAL ARGUMENT

The Club requests oral argument pursuant to MCR 7.214(E). As indicated above, the Circuit Court erred by confusing and violating legal principles that control a proper disposition of this case. The Club has attempted to present a clear and succinct discussion of the controlling law and relevant facts. Plaintiffs can be expected to present a far different analysis in attempting to support the Circuit Court's decision. Therefore, oral argument would likely assist this Court in resolving the issues presented, as well as any additional questions that the Court might develop in its own analysis.

CONCLUSION AND RELIEF

Intervening Defendant/Appellant Elk Rapids Sportsman's Club, Inc. respectfully requests that this Court issue an opinion (1) reversing the Antrim Circuit Court's January 13, 2005 Decision and Order on Cross-Motions for Summary Disposition (Appendix 1), and February 10, 2005 Judgment Affecting Interests in Land (Appendix 2); (2) granting Defendants/Appellants Elk Rapids Township and Elk Rapids Township Board's motion for partial summary disposition; and (3) denying Plaintiffs/Appellees' counter-request for partial summary disposition.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Dated: May 4, 2005 By: ___________________________________

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