

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

-vs-

Court of Appeals
No. 261139

ELK RAPIDS TOWNSHIP & ELK
RAPIDS TOWNSHIP BOARD,

Defendants-Appellants,

-and-

Antrim County Circuit Court
No. 04-8041-CZ

ELK RAPIDS SPORTSMAN'S CLUB, INC.,

Intervening Defendant,

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

Plaintiffs-Appellees,

-vs-

Court of Appeals
No. 261142

ELK RAPIDS TOWNSHIP & ELK
RAPIDS TOWNSHIP BOARD,

Defendants,

-and-

Antrim County Circuit Court
No. 04-8041-CZ

ELK RAPIDS SPORTSMAN'S CLUB, INC.,

Intervening Defendant-Appellant,

**BRIEF ON APPEAL OF ELK RAPIDS TOWNSHIP
AND ELK RAPIDS TOWNSHIP BOARD**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION OF THE COURT OF APPEALS

The Antrim County Circuit Court entered its final judgment on February 11, 2005. Elk Rapids Township and Elk Rapids Township Board timely claimed an appeal on March 1, 2005. This Court has jurisdiction pursuant to MCR 7.204.

STATEMENT OF THE QUESTIONS INVOLVED

I.

DID THE CIRCUIT COURT ERR IN INTERPRETING THE WILL CODICIL AND THE 1948 EXECUTOR'S DEED TO CONVEY ANYTHING OTHER THAN FEE SIMPLE ABSOLUTE TO ELK RAPIDS TOWNSHIP, IN AWARDING THE PLAINTIFFS A REVERSIONARY FUTURE INTEREST, AND IF THE DISPUTED LANGUAGE AMOUNTED TO AN ENFORCEABLE COVENANT, IN AWARDING A REMEDY THAT WAS OVERLY BROAD AND INCONSISTENT WITH THE CONTRACTUAL NATURE OF SUCH COVENANTS?

Plaintiffs-Appellees, Willard P Wilcox, Gordon W. Wilcox, Theodore W. Wilcox, David W. Palmer & Carolyn P. Shah answer "No."

Defendants-Appellants Elk Rapids Township and Elk Rapids Township Board answer "Yes."

Defendant-Appellant Elk Rapids Sportsman's Club, Inc. answers "Yes."

The Antrim County Circuit Court answers "No."

II.

DID THE CIRCUIT COURT ERR IN HOLDING THAT THE ELK RAPIDS TOWNSHIP ABANDONED ITS INTEREST WHEN THE FACTS PRESENTED SUGGEST OTHERWISE OR AT A MINIMUM PRESENT A GENUINE ISSUE OF MATERIAL FACT?

Plaintiffs-Appellees, Willard P Wilcox, Gordon W. Wilcox, Theodore W. Wilcox, David W. Palmer & Carolyn P. Shah answer "No."

Defendants-Appellants Elk Rapids Township and Elk Rapids Township Board answer "Yes."

Defendant-Appellant Elk Rapids Sportsman's Club, Inc. answers "Yes."

The Antrim County Circuit Court answers "No."

III.

DID THE CIRCUIT COURT ERR IN ALLOWING THE GRANTOR'S HEIRS TO PURSUE THEIR CLAIMS WHEN THEIR SILENCE REGARDING THE PROPERTY'S USE SHOULD HAVE BEEN FOUND TO ESTOP OR WAIVE THEIR CLAIMS?

Plaintiffs-Appellees, Willard P Wilcox, Gordon W. Wilcox, Theodore W. Wilcox, David W. Palmer & Carolyn P. Shah answer "No."

Defendants-Appellants Elk Rapids Township and Elk Rapids Township Board answer "Yes."

Defendant-Appellant Elk Rapids Sportsman's Club, Inc. answers "Yes."

The Antrim County Circuit Court answers "No."

STATEMENT OF FACTS

A. NATURE OF THE ACTION.

The heirs of Mina G. Wilcox filed this action against the Elk Rapids Township claiming to hold reversionary or other inchoate interests in real property that was conveyed to the Township by an executor's deed. (Complaint, Exhibit 2). The heirs contend that a codicil to Mina G. Wilcox's will entitles them to bring suit complaining that the Township had failed to fulfill the purpose of the grant of property. (Complaint, ¶¶ 15-69). After briefing and oral argument, the circuit court entered judgment. (Judgment Affecting Interests In Land, 2/10/05). From that judgment and related orders and rulings, Elk Rapids Township timely appealed to this Court.

B. THE CHARACTER OF THE PLEADINGS AND PROCEEDINGS.

On June 8, 2004, the heirs of Mina G. Wilcox filed this lawsuit in the Antrim County Circuit Court. (Complaint, 6/8/04). The heirs include Willard P. Wilcox, Gordon W. Wilcox, Theodore W. Wilcox, David Palmer, and Carolyn P. Shah. (Complaint, ¶1). The heirs' claim arises out of a conveyance of property from Mina G. Wilcox to Elk Rapids Township by an executor's deed. (Complaint, ¶2). Elk Rapids Township accepted the property at a regular township board meeting held on September 23, 1948. (Complaint, ¶9 and Exhibit 3 to Complaint). According to the heirs, Elk Rapids Township and its Board violated their duties by failing to establish a park for the public and failing to enforce the conditions of the gift. (Complaint, ¶10). The complaint included seven counts:

- Count I - The Dedication Of The Subject Property To Public Recreation Park Purposes Has Wholly Failed, Constituting Abandonment On The Part Of The Township And Resulting In The Township's Loss Of Title And Interest In The Subject Property In Favor Of Plaintiffs-Heirs
- Count II - Quiet Title

- Count III -
 - A. The Township Has Taken Land Donated To The Township, Which Was Dedicated To The Public For Specific Recreation Park Purposes, And Unlawfully Diverted It To Nonpublic, Non-Park Purposes
 - B. The 1986 Lease Violates Township Law, The Terms Of The Deed And Dedication, And Is Therefore Void *Ab Initio*
 - C. The November 7, 2003 Draft “First Amendment To Lease Agreement” Violates The Dedication, The Terms Of The Codicil, Executor’s Deed, And The Township’s Acceptance
 - D. The 1986 Lease And First Amended Lease Violate Township Zoning Laws, And Are Unlawful
- Count IV - An Unconstitutional Appropriation Of Property Or Lending Of Credit Is Contrary To Mich Const 1963, Art 9, § 18, And Art 7, § 26
- Count V - Declaratory Relief
- Count VI - Specific Performance And/Or Writ Of Mandamus
- Count VII - Injunctive Relief

The heirs sought a declaration that the Township failed to establish a park and that fee simple absolute title to the property be quieted in them, specific performance or mandamus to enforce the gift and its conditions in accordance with the terms of the codicil, deed, dedication, and acceptance, and declaratory and equitable relief preventing the Township from violating the terms of the gift. (Complaint, Relief Clause).

Elk Rapids Township answered the complaint and raised various affirmative defenses. (Answer to Plaintiff’s Complaint, 7/20/04). Elk Rapids Township basically denied that the heirs were entitled to relief under any theory pleaded. (*Id.*) Elk Rapids Township questioned whether the plaintiffs comprise a complete list of the heirs of Mina G. Wilcox. (Answer, ¶4). Elk Rapids Township admitted that the deed provided “for certain suggestions and wishes.” (Answer, ¶17). According to the Township, the codicil listed no requirements but only suggestions to be overseen at the discretion of the Township. (Answer, ¶35).

Elk Rapids Township admitted that the 1938 lease described the Sportsman's Club's premises as set forth in the plaintiffs' complaint but denied the accuracy of that description. (Answer, ¶22). According to the Township, the 1938 lease and subsequent conveyance "contained an incorrect description that did not accurately reflect the actual location of the gun club and the club has not essentially changed its location from 1938 to date." (Answer, ¶23). In other words, the description did not accurately reflect the land actually used by the club as its shooting range as of 1938 or 1948. (Answer, ¶22). Elk Rapids affirmatively averred that the Sportsman's Club has occupied essentially the same land from 1938 to present. (Answer, ¶22). The Township also averred that the survey and map presented by the plaintiffs' depicts the description as initially set forth but does not accurately depict the property used by the Sportsman's Club from 1938 until the present. (Answer, ¶35). According to the Township, this usage of the property occurred with the approval of the grantor and her immediate heirs. (Answer, ¶35). The codicil, will, and deed do not contain any legal description of the location of the Sportsman's Club. (Answer, ¶35).

Elk Rapids Township averred that it first was made aware of the position of some estate heirs in the fall of 2002 and, having received such notice, sought to erect signage identifying the property as the "Mina G. Wilcox Recreational Park" as complained of by the heirs. (Answer, ¶26). But the heirs asked the Township not to put up the sign. (*Id.*)

Elk Rapids Township pointed out in its answer that \$5,000 received from the Michigan Highway Department for property it took by eminent domain was used for the relocation of the entrance to the Sportsman's Club with the assistance and cooperation of Mina G. Wilcox's immediate descendants. (Answer, ¶29). These earlier heirs of Wilcox at no time demanded that these monies be used for the establishment of a park improvement fund although they were aware of and participated in the use of the funds for the relocation. (Answer, ¶30).

The Township noted that the executor's deed was first brought to the attention of the Township Planning Commission on September 3, 2002, and this was the first time that any of the heirs had suggested that the terms and conditions of the deed had not been adequately satisfied by the Township. (Answer, ¶46). The Township, representatives of the Sportsman's Club, and several of the heirs met to address these concerns. (Answer, ¶57). The Township also pointed out that it had voted that, in concept, it wished to provide for a continuation of the Sportsman's Club which had begun with the original lease between Mina G. Wilcox and the Sportsman's Club and continued per the suggestions in the will and deed. (Answer, ¶68).

The Township admitted that the shooting range is designed for dues-paying members explaining that this requirement is for safety reasons and no potential member who has indicated a desire to join has been excluded. (Answer, ¶93). According to the Township, the diminishment of the areas resulted from condemnation of a portion of the property. (Answer, ¶95).

The Township raised numerous affirmative defenses including laches, estoppel, consent, ratification and condemnation, waiver, the failure to provide notice, the doctrine of unclean hands, and the failure to state a claim on which relief can be granted. (Affirmative Defenses, ¶¶ 1-8). The Township objected to the plaintiffs' failure to join as necessary plaintiffs all of the potential heirs of Mina G. Wilcox. (*Id.*)

The Elk Rapids Sportsman's Club sought to intervene as a defendant. (Motion to Intervene, 8/6/04). The circuit court held a hearing on that motion. (Tr, 1/24/04). The circuit court granted that motion pursuant to MCR 2.209(A)(3) on the basis that the motion was timely and that the intervening party has interests that diverge from the Township. (*Id.*, pp 21-26). The circuit court limited the intervention to non-jury submissible matters that were within the scope of the litigation. (Tr, p 25). This ruling was embodied in an order. (Order, 8/23/04). The Elk

Rapids Sportsman's Club then filed its own answer to the complaint. (Elk Rapids Sportsman's Club Answer to Plaintiffs' Verified Complaint, 8/23/04). The Sportsman's Club also raised numerous affirmative defenses. (*Id.*)

The Township sought partial summary disposition on the basis of MCR 2.116(C)(8) and (10) arguing that the documents conveying the property to the Township contain no language creating a reversionary or inchoate right or interest in the property. (Township's Motion). Elk Rapids Sportsman's Club supported summary disposition as sought by the Township. (Elk Rapids Sportsman's Club Brief in Support of Elk Rapids Township's Motion for Partial Summary Disposition, 11/2/04).

The heirs opposed the Township's motion for partial summary disposition and requested summary disposition in their favor. (Plaintiffs' Response and Counter-Request for Summary Disposition, 11/5/04). The heirs agreed that the documents attached to their complaint are controlling. (Plaintiffs' Response, pp 2-3). But they disagreed with the Township and took the position that the terms of the codicil, executor's deed, and acceptance were not satisfied by the Township. (*Id.*, p 4). The heirs insisted that no public park exists and disputed the contention that they failed to give notice of the claimed misuse or non-use of the property. (*Id.*, p 5). The heirs also argued that the "dedication" should be strictly construed, that the Township owes a public trust obligation to preserve the claimed dedicated use, and that it had failed to do so, which amounted to abandonment. (*Id.*, pp 6-12).

The circuit court heard oral argument. (Tr, 11/15/04). The court characterized the motions as essentially cross motions for summary disposition. (Tr, 11/15/04, p 3). The Township argued that approximately fifty-seven years before this lawsuit, the Township was conveyed property pursuant to a codicil in Mina G. Wilcox's will. (Tr, 11/15/04, p 4). The Township recounted the history of that property including condemnation proceedings by the

State for US-31, which basically bisected the property. (*Id.*) The Township emphasized that the deed granted the property to the Township but contained no conditions or words of reverter. (*Id.*, p 5). The Township took the position that the suggestions and directions in the deed and codicil, which dealt with the development of a park, provided for a park at the Township Board's discretion. (*Id.*) The Township insisted that the language in the codicil gave the Township permission to lease the property at its discretion. (*Id.*, pp 8-9). The Township emphasized that the circuit court should determine the nature of the grant of property. (*Id.*, p 10). According to the Township, the deed conveyed all right, title, and interest in the property. (*Id.*, p 11).

The Elk Rapids Sportsman's Club also argued that the plaintiffs lacked any rights in the property. (Tr, 11/15/04, p 13). The Sportsman's Club focused on the nature of the language in the deed which specifically stated that Wilcox gave all right and title to the Township including all reversionary and remainder interests that she had when alive or at the moment of her death. (*Id.*, p 14). The Sportsman's Club also pointed to the condemnation proceedings, in which all of Mina G. Wilcox's children participated and in which lands were given to the Township and taken from the Township by the children. (*Id.*, p 15). During this time, no objection regarding the use of the property was ever raised.

The heirs insisted that the Township failed to fulfill its promise to establish a recreation park but turned the property over to the control of the Sportsman's Club. (*Id.*, p 17). They presented an argument that included a discussion of a reverter, a mention of the public trust doctrine, and an analysis of law governing dedications of property. (*Id.*, pp 16-21). They also asserted that the Township accepted the gift and thus was bound to carry out the directives in the codicil. (*Id.*, pp 22-23). The heirs also contended that the Township's conduct amounted to an abandonment of the gift. (*Id.*, pp 25-26).

The circuit court questioned the parties about their arguments and agreed to allow additional briefing on the waiver and estoppel issues. (Tr, pp 38-39). The circuit court then announced that the court would issue a written opinion. (*Id.*, p 39).

In a post-hearing brief, the Township urged the Court to conclude that the heirs retained no reversionary interest. In the alternative, the Township insisted that the plaintiffs were not entitled to any relief because they failed to give notice of any objections to the use of the property. (Defendant Elk Rapids Township's Post Hearing Brief, pp 2-4). Likewise, the Sportsman's Club insisted that the plaintiffs, by their sixty-year silence, induced the defendants to believe that the property's use conformed to the grantor's intentions, that the defendants relied on this belief, and that the plaintiffs were therefore estopped from disputing the use. (Defendant Elk Rapids Sportsman's Club Post Hearing Brief, pp 2-11). The club also insisted that the plaintiffs waived any rights they had by failing to object to the use of the property for almost sixty years. (*Id.*, pp 9-10).

The heirs also filed a post-hearing brief raising an entirely new issue of whether the doctrine of unclean hands applied to bar the defendants from asserting the defenses of waiver, estoppel, and notice. (Plaintiffs' Brief on Waiver and Estoppel, 12/3/04). They also argued that the facts did not suggest that they plaintiffs had waived their rights or should be estopped from their claims. (*Id.*)

The circuit court issued an opinion concluding that Mina G. Wilcox gave the property to the Township for use as a public park. (Opinion and Order on Cross-Motions for Summary Disposition, p 9). The circuit court also determined that the Township had accepted the dedication but subsequently abandoned it by "essentially giving the land to the private, members-only Sportsman's Club." (*Id.*) The circuit court observed that "by operation of law, the title to the property should revert to the Plaintiffs as heirs of Mina Wilcox." (*Id.*) But the circuit court

instead granted the Township 180 days to submit an approved plan for developing a public park. (*Id.*) The circuit court also ordered the Sportsman's Club to vacate the property within thirty days after the Township's approved plan is filed with the court. (*Id.*, pp 9-10). The circuit court allowed the Township the option of rejecting the "opportunity to satisfy the Wilcox grant by so notifying the Plaintiffs in writing." (*Id.*, p 10). In that event, the circuit court announced that the title would revert to the plaintiffs and the Sportsman's Club would be obligated to vacate the property within thirty days after the notice was filed. The circuit court ordered the plaintiffs to prepare a judgment based on its decision and order and submit it pursuant to MCR 2.602(B)(3). The plaintiffs did so. (Notice of Filing Pursuant to MCR 2.602[B][3]). The defendants timely objected to the proposed judgment and submitted their own proposed judgment. The plaintiffs filed a response to the objections, their own objections to the defendants' proposed judgment, and an alternate proposed judgment. The circuit court dispensed with oral argument on the judgment, granted both parties' objections, and entered its own judgment.

The defendants timely appealed to this Court.

C. MINA G. WILCOX'S BEQUEST AND THE USE OF THE PROPERTY SINCE THEN.

Mina G. Wilcox signed a codicil to her last will and testament on September 24, 1943.

(Complaint, Exhibit 1). It provided:

I direct my son, Paul Harlan Wilcox, as administrator of my estate, to deed to the township of Elk Rapids, a parcel of land from the undivided whole of my estate and that the division of the property, equally and jointly to my children, Helen Wilcox Bard, Paul Harlan Wilcox and Emily Wilcox Palmer shall be of the remainder of the property after the said parcel has been deeded to the Twoship [sic] of Elk Rapids. The parcel of land to be deeded to the township of Elk Rapids liex [sic] in Section 9 and Section 10 of Elk Rapids township and its full description is in the hands of Mr. Fitch Williams, lawer [sic], in Traverse City, Michigan, and, also, in the hands of the Antrim County Surveyor, Mr. H.L. Botsford. 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 wich [sic] the township of shall be permitted to lease to the Elk Rapids Sportsmans Club, the site of its present shooting range, at the disretion [sic] of the township

Board, for reasonable [sic] 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 considered as a temporary access and the Sportsman's Club should be allowed to do sufficient [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 face, color or creed.

In Witness Whereof, I have set my hand and [sic] seal, this 24th day of January, 1948 in the home of James M. Bard, Thornwood, New York.

At the time of her codicil, a portion of the property was leased to the Sportsman's Club.

(Complaint, Exhibit 4). The lease was for one dollar and other consideration and "the granting to the party of the first part [Mina G. Wilcox] two membership tickets without charge, it being understood that the users of said tickets shall be subject to all and every rule governing members of the Club," and was to remain in force for a term of ten years. (*Id.*)

An executor's deed effectuated the bequest after Mina G. Wilcox died. (Complaint, Exhibit 2). It provided:

The said party of the first part, by virtue of the power and authority to him given by the last Will and Testament of Mina G. Wilcox, deceased, late of Elk Rapids, Michigan, and for and in consideration of the sum of No Dollars, to be paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, forever, all those certain pieces and parcel of land situated in the Township of Elk Rapids, Antrim County, State of Michigan, described as follows: and to be entitled, The Mina G. Wilcox Recreation Park:

* * *

subject to the suggestions and directions set forth in the Codicil to the Last Will and Testament of Mina G. Wilcox, to-wit:

"...This parcel of land is given to the Elk Rapids Township for development of a public recreation field. It is my wish that the Township of Elk Rapids shall not relinquish ownership of the

parcel to any person or group, but I do wish the Township 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 for reasonable periods of time (for example, 5-year periods, for some appropriate annual rental. I suggest that the annual rental sums be put aside as a park improvement fund.

"At the present time the Elk Rapids Sportman's Club has a nearly expired lease for the site of its shooting range. It uses an unimproved drive entending [sic] from the Bay Shore road across the field to its shooting range. This drive should be considered as a temporary access and the Sportman's Club should be allowed to do sufficient grading to make the drive passable at its off-shoot from the Bay Shore road, pending the provision for a more permanent access which shold [sic] 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."

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise [sic] pertaining, 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 described premises, and every part and parcel thereof, with the appurtenances, to have and to hold, forever. And the said party of the first part, for the use set forth does covenant, promise and agree to and with the said party of the second part that he had not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby, or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are or at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever.

The Elk Rapids Township accepted the bequest, an acceptance certified in a document approved by the Township Board. (Complaint, Exhibit 3). That document provided that the Township accepted the park "subject to the suggestions and directions set forth in the codicil to the Last Will and Testament of Mina G. Wilcox." (Complaint, Exhibit 4).

In 1957, the State Highway Commissioner filed a determination of necessity and condemned part of the property in order to relocate Highway US-31. (Complaint, Exhibit 5).

This relocation created an undesirable situation because it cut through the center of the parcel of land bequeathed to Elk Rapids Township, severed part of it from the main part of the land, and cut off access to the Bay Shore Road. (Complaint, Exhibit 5). As a result, Elk Rapids Township conveyed property to Helen Wilcox Bard, Paul Harlan Wilcox, and Emily Wilcox Palmer, Mina Wilcox's three children, and one of the heirs of Wilcox conveyed a new right-of-way access because the new highway had cut off the road that had been previously used to get to the Sportsman's Club.

The Sportsman's Club has continued to operate on the property during this time. The first time any objection to this was raised occurred in 2002, when Carolyn Shah brought up the issue in connection with a request for a permit to approve an expansion of the Sportsman's Club. (Defendant Elk Rapids Sportsman's Club Post Hearing Brief, Exhibit L). Although each heir asserts childhood memories and family stories provide insight into the testator's intent, none of them assert contemporaneous knowledge about Mina G. Wilcox's views regarding the property. (Defendant Elk Rapids Sportsman's Club Post Hearing Brief, Exhibit L; Defendant Elk Rapids Sportsman's Club Brief, Exhibit E). The heirs also asserted in answers to interrogatories that several own contiguous property and do not like the proximity to the shooting range. (Defendant Elk Rapids Sportsman's Club Post Hearing Brief, Exhibit K). For example, David Palmer explained his interest as follows:

Carolyn and I own abutting property which is kept in a natural state compatible with the Township's environmental zoning. The intended purpose of the gift was for a public recreational park. Instead, the long term usage of the property by the Sportsman's Club for a shooting range detracts from our use and quiet enjoyment of our property. In addition we have safety and environmental concerns with the Club's use and how it impacts our property.

(Defendant Elk Rapids Sportsman's Club Post Hearing Brief, Exhibit K).

ARGUMENT I

THE CIRCUIT COURT ERRED IN INTERPRETING THE WILL CODICIL AND THE 1948 EXECUTOR'S DEED TO CONVEY ANYTHING OTHER THAN FEE SIMPLE ABSOLUTE TO ELK RAPIDS TOWNSHIP, IN AWARDING THE PLAINTIFFS A REVERSIONARY FUTURE INTEREST, AND IF THE DISPUTED LANGUAGE AMOUNTED TO AN ENFORCEABLE COVENANT, IN AWARDING A REMEDY THAT WAS OVERLY BROAD AND INCONSISTENT WITH THE CONTRACTUAL NATURE OF SUCH COVENANTS.

A. STANDARD OF REVIEW.

This Court reviews de novo whether a trial court properly denied a motion for summary disposition. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). A trial court must grant a motion for summary disposition when “[t]he opposing party has failed to state a claim on which relief can be granted.” MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests whether a claim is sufficient as a matter of law. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997) aff’d on other grounds 459 Mich 999; 595 NW2d 855 (1999). In other words, the court deciding the motion “determines whether the plaintiff’s pleadings allege a prima facie case.” *Garvelink v Detroit News*, 206 Mich App 604, 608; 522 NW2d 883 (1994) lv den 448 Mich 948; 534 NW2d 530 (1995). Pursuant to MCR 2.116(G)(5), a court may only consider the pleadings, accepting all well pleaded facts as true. *New Hampshire Ins Group v Labombard*, 155 Mich App 369, 372; 399 NW2d 527 (1986). In its analysis, the Court may make reasonable inferences from the allegations in the pleadings. *Harrison v Director of Dep’t of Corrections*, 194 Mich App 446, 449-450; 487 NW2d 799 (1992) lv den 441 Mich 887; 495 NW2d 383 (1992).

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review. *Spiiek v Dep’t of Transportation*, 456 Mich 331,

337; 572 NW2d 201 (1998). The Michigan Supreme Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(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 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).

B. REVERSAL IS REQUIRED BECAUSE THE CIRCUIT COURT ERRED IN INTERPRETING THE WILL CODICIL AND THE 1948 EXECUTOR'S DEED TO CONVEY ANYTHING OTHER THAN FEE SIMPLE ABSOLUTE TO ELK RAPIDS TOWNSHIP, IN AWARDING THE PLAINTIFFS A REVERSIONARY FUTURE INTEREST, AND IF THE DISPUTED LANGUAGE AMOUNTED TO AN ENFORCEABLE COVENANT, IN AWARDING A REMEDY THAT WAS OVERLY BROAD AND INCONSISTENT WITH THE CONTRACTUAL NATURE OF SUCH COVENANTS.

1. A REVERSAL IS REQUIRED BECAUSE THE CIRCUIT COURT FAILED TO IDENTIFY THE NATURE OF THE ESTATE CONVEYED TO ELK RAPIDS TOWNSHIP BASED UPON THE LANGUAGE IN THE DEED.

The classification of property interests, particularly those involving future interests, has long been a difficult subject for the courts. And this case presents no exception. In fact, these difficulties have resulted in the circuit court erroneously failing to classify a property interest owned by Elk Rapids Township as fee simple absolute. This error requires a reversal. In its discussion of the interests affecting the property, the circuit court characterized the bequest by Mina G. Wilcox as a "dedication," concluded that the Township had accepted but later abandoned it, ordered a change in the property's use, and held that title would "revert" to the plaintiffs if the Township rejected "this opportunity to satisfy the Wilcox grant" by notifying the plaintiffs of their intent to do so. (Decision and Order On Cross-Motions for Summary Disposition, pp 9-10). In fact, the Township owns the property by an estate of fee simple absolute conveyed to it by the executor's deed, which conveyed "all reversions and remainders." In lay terms, this means that the Township owns all the sticks in the proverbial bundle and Mina G. Wilcox and her heirs retained nothing, no remainder and no reversion.

This Court has recognized in prior decisions that a deed of conveyance, if not ambiguous in its terms, must be construed as written. In *Burling v Leiter*, 272 Mich 448, 454; 262 NW 388, 390 (1935), it was said:

One who owns a tract of land, or two or more adjoining lots, when no public or private rights are interposed, may sell any portion he pleases, and the terms of the grant as they appear from the language of the deed legally construed will measure the rights of the grantee. *Salisbury v. Andrews*, 19 Pick. 250, [36 Mass. 250]; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748.

This language from the opinion in *Burling* was referred to with approval in *Rusk v Grande*, 332 Mich 665, 669; 52 NW2d 548 (1952). The general rule is to determine the rights and obligations of the parties by giving effect to the plain meaning of the language employed. See e.g. *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562, 565 (1943) (“The general rule is that courts will follow the plain language in a deed in which there is no ambiguity”).

The circuit court failed to make this determination. Although the circuit court mentioned the absence of an express reverter clause in the deed, it did so as part of its recitation of the arguments of the Township. (Decision and Order On Cross-Motions for Summary Disposition, p 4). After recognizing the Township’s argument, the circuit court neglected to address it and failed to specifically determine the nature of the estate conveyed to the Township. (Decision and Order On Cross-Motions for Summary Disposition, p 4). Instead, the circuit court focused upon a discussion of dedications, the question of abandonment, and the defenses and remedies available. This constituted error.

2. ANALYSIS OF THE POTENTIAL ESTATES IN REAL PROPERTY REVEALS THAT THE CIRCUIT COURT EMPLOYED THE WRONG ANALYTICAL FRAMEWORK, RELIED ON THE WRONG DECISIONAL AUTHORITY, AND CONSEQUENTLY REACHED AN ERRONEOUS RESULT.

By statute any interest in land may be conveyed by deed. MCL 565.1. The deed is a written instrument that conveys title to real property and sets for the nature of the estate passed and the reservation, if any, of rights in the grantor. 7 G Thompson, *Thompson on Real Property* (J Grimes ed 1962 repl), § 3131, at 1-2. The deed will contain words of conveyance such as conveys and warrants, quit claims, bargains and sells, or grants and gives. Cameron, 1 Michigan Real Property Law: Principles and Commentary (1993), p 332. The deed traditionally includes a

habendum clause, which begins with the words “to have and to hold,” and then defines the extent of ownership being conveyed. A reddendum clause may also be included to set forth any exceptions or reservations to the conveyance. See e.g., *Patrick v YMCA*, 120 Mich 185; 79 NW 208 (1899).

When used in connection with real property law, the term “estate” is defined as the “interest which anyone has in lands, or in any other subject of property.” *Black’s Law Dictionary* (rev 4th ed, 1968) p 643. The concept arose in medieval England when, under the “feudal system, a vassal was granted the right by his lord to use certain land and retain profits from it under agreed conditions.” John G Cameron, 1 Michigan Real Property Law: Principles and Commentary, 233 (1993). Real property law concerned itself with the “ownership of estates in land rather than of the land itself.” *Id.*

It is hornbook law that estates can be classified according to the nature of the ownership interest conveyed. For example, estates may be vested or contingent. A vested estate is “fixed or settled in such a way that it is not contingent, or subject to being defeated by some condition.” *Id.* at 235. A contingent estate does not come into being until or may be defeated by the happening of a condition. *Id.* Estates may also be classified according to their period of duration. For example, estates may be for life, for years, estates at will, or by sufferance. *Id.* Estates are also classified according to the timing of enjoyment of the estate. *Id.* at 236. For example, an estate may be in possession or an expectancy.

An expectant estate is created by a grant, at the time the grant is delivered, or a devise, at the death of the testator. *Id.* Estates in expectancy are “divided into estates commencing at a future day, called future estates, and reversions.” *Id.* A fee simple estate that depends upon a precedent estate may be called a remainder and created and transferred by that name. For example, a life estate may be given to the testator’s wife with a remainder in his children. An

estate may also be subject to divestment. In that circumstance, the estate is vested but subject to being divested on the happening of a contingency.

A fee simple estate may be total and absolute and thus not subject to any condition. Or a fee simple estate may be conditional. Conditional estates may be created by deed or by will. *Id.* at 246 citing *Dolby v State Highway Comm'r*, 238 Mich 609; 278 NW 694 (1938) and *Johnson v Warren*, 74 Mich 491; 42 NW 74 (1889). When a fee simple does not vest until the happening of a condition, it is known as a fee simple subject to a condition precedent. On the other hand, when a fee simple estate vests but is subject to divestment upon the happening of a condition, it is either a fee simple determinable or a fee simple subject to a condition subsequent. See e.g., *Blanchard v Detroit, Lansing & Lake Michigan Railroad*, 31 Mich 43, 49-50; 18 Am Rep 142 (1875).

The question of whether language in a deed amounts to a condition subsequent or a covenant is often the subject of dispute. Cameron, *supra*, p 247. It is a critical distinction because a covenant is contractual while a condition subsequent may result in a loss of the property because the grantor has the power to terminate the original grant or the property automatically reverts back. See generally, Robert P Keil and Thomas R Wilks, *Possibilities of Reverter and Powers of Termination In Michigan*, 37 U Det L J 284 (1936). Michigan courts have struggled to differentiate between a fee simple determinable and a fee simple subject to a condition subsequent. A determinable fee creates an estate in fee simple but provides that the estate automatically expires upon the occurrence of a stated event. Keil, *supra*, at 285. Words commonly used to create a determinable fee include “until” or “so long as” or “during.” *Id.* On the other hand, a fee simple estate subject to a condition subsequent creates an estate in fee simple but provides that the grantor or his successor in interest has the power to terminate the estate created in this manner. *Id.* Words used to create this include “upon express condition

that” or “provided that” or other similar language. *Id.* The possibility of reverter exists in determinable fees and title reverts automatically to the grantor upon the happening of the condition. The power of termination exists in fees on condition subsequent and title does not revert automatically to the grantor upon a breach of a condition but remains in the grantee until the grantor or his heirs make an entry or take some step to terminate the estate. *Id.* at 285-286. Michigan courts have not always carefully analyzed the distinction but more often than not have interpreted deeds to create a fee simple estate subject to a condition because the law dislikes forfeitures. See e.g., *Blanchard, supra*. See also, *Quinn v Pere Marquette Railroad Co*, 256 Mich 143; 239 NW 376 (1931); *Dolby v State Highway Comm’r*, 283 Mich 609; 278 NW 694 (1938); *Halpin v School District*, 224 Mich 308; 194 NW 1005 (1923).

The circuit court failed to set forth any explanation of the basis for its conclusion that something less than a fee simple absolute estate was conveyed by the 1948 executor’s deed. Instead, the court appears to have focused almost entirely on its discussion of the doctrine of abandonment, its rejection of estoppel and waiver defenses, and its evaluation of the proper relief. Skipping over the requisite determination of the nature of the interest conveyed to the Township, the circuit court determined that the Township had abandoned or could abandon the property by not building a park; it therefore ordered the Township to begin planning for a park. In essence, without ever analyzing the language in the deed to identify the nature of Elk Rapids Township’s interest in the land, the circuit court determined that the Township owed an obligation which was abandoned. This was error.

Nowhere does the circuit court point to any language in the deed conveying the property for “as long as” it is used as a park. In fact, the deed itself contemplates that it would not necessarily or always be used as a park. Nowhere does the circuit court point to any language in the deed conveying the property “upon the condition that” it is used as a park or “provided that”

it is used as a park. See *Ditmore v Michalik*, 244 Mich App 569, 572; 625 NW2d 462 (2001) lv den 465 Mich 896; 636 NW2d 141 (2001) (“conveyance is given upon express condition that no buildings or structures of any kind shall ever be erected or permitted to remain...” and violation of the condition “shall cause the title to the property hereby conveyed to revert to the grantor, its successors and assigns”). Analysis of the deed reveals no words of condition. In fact, the language employed is consistent with a broad conveyance and expressly disclaims any reversionary interest. Thus, the very framework employed by the circuit court is inconsistent with Michigan real property law. Thus, a reversal is required to correct this error.

3. THE LANGUAGE IN THE DEED CONFIRMS ELK RAPIDS TOWNSHIP’S POSITION THAT THE EXECUTOR’S DEED CONVEYED FEE SIMPLE ABSOLUTE WITH NO REVERSIONARY INTEREST.

The executor’s deed contained the following granting clause:

The said party of the first part ... has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto said party of the second part, forever, all those certain pieces and parcels of land situated in the Township of Elk Rapids ... described as follows: and to be entitled, The Mina G. Wilcox Recreation Park....

(Complaint, Exhibit 2, Executor’s Deed). This language employs words traditionally used to convey a fee simple absolute. See *Ryan v Wilson*, 9 Mich 262; 1861 WL 3279 (1861). This interpretation of the language in the deed is further strengthened by the language regarding the interests conveyed to the grantee. That portion of the deed reads as follows:

Together with all and singular 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 by 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. And said party of the first part, for the use set forth does covenant, promise and agree to and with the said party of the second part that he has not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby, or by means whereof, the above mentioned and

described premises, or any part or parcel thereof, now are or may at any time hereafter shall or may be impeached, charged or encumbered in any manner or way whatsoever.

(*Id.*) This language contains all the traditional language to grant a fee simple absolute and no words of condition or limitation. It conveys “all the estate, right, title, interest, property, possession, claim and demand whatsoever,” language which is exceedingly broad. At the same time, it expressly disclaims any reversionary interest remaining in the grantor or those claiming under him. It did so by including words saying that the conveyance is “[t]ogether with all and singular tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof.” (*Id.*) In addition, the language specifically covenants that the grantor has done nothing to allow this grant to be “impeached, charged or encumbered in any manner or way whatsoever.” (*Id.*)

The only possible interpretation of this language that is consistent with Michigan real property law is that it conveyed fee simple absolute to the Elk Rapids Township. Not surprisingly, the plaintiffs spent little time discussing the language during proceedings below. The circuit court ignored it as well. Instead, the plaintiffs focused upon language from the will codicil and successfully persuaded the circuit court it should be deemed to override the conveyancing language in the deed. In particular, the executor’s deed provided that the grant was:

subject to the suggestions and directions set forth in the Codicil to the Last Will and Testament of Mina G. Wilcox, to wit:

... This parcel of land is given to the Elk Rapids Township for development of a public recreation field. It is my wish that the Township of Elk Rapids not relinquish ownership of this parcel to any person or group, but I do wish the Township 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 for reasonable periods of time (for example, 5-year periods, for some appropriate annual rental. I suggest that the annual rental sums be put aside as a park improvement fund.

(*Id.*) Mina G. Wilcox's codicil also contained other suggestions that were embodied into the executor's deed. The deed included this:

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 considered as a temporary access and the Sportsman's Club should be allowed to do a sufficient grading to make the drive passable at its off-shoot from the Bay Shore road, pending the provision for a more permanent access which should [sic] 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.

(*Id.*)

The circuit court erred in concluding that this language created a condition subsequent and thus a power of termination in the plaintiffs. The language in the will codicil contains no words of condition. Instead, the language contains "wishes" and "directions" regarding use of the property. The language also contemplates an ongoing presence for the Sportsman's Club, even going so far as to suggest a more permanent access route for it "when the field is needed for some recreational project." (*Id.*) This ongoing presence for the Sportsman's Club is also reflected in the language discussing leasing the property to the club at the Township's "discretion." (*Id.*) If this were a condition subsequent, it would not be written in discretionary language; nor would it be couched as a wish or hope rather than a condition.

Instead, these wishes and hopes do not effect or limit the grant of property. Michigan courts have found that "where there is no reverter clause, a statement of use is merely a declaration of the purpose of the conveyance, without effect to limit the grant." *Briggs v City of Grand Rapids*, 261 Mich 11, 14; 245 NW2d 555 (1932) citing *Quinn, supra*. These principles apply here to require a reversal. If the Township owns the property by fee simple absolute, and it does, then by definition there can be no reverter. Nor can there be any form of condition

subsequent or other form of defeasance, which can exist only in the lesser estate of fee simple defeasible. The trial court's analysis was inconsistent with the language in the deed. A reversal is therefore required.

4. THE LANGUAGE IN THE DEED DID NOT CREATE AN ENFORCEABLE COVENANT.

The Township argued below, and maintains on appeal, that, at best, the plaintiffs might have enforceable rights if the language in the deed amounted to a covenant or promise. *Weber v Ford Motor Co*, 245 Mich 213, 217; 222 NW2d 198 (1928). Of course, a covenant is enforceable as a matter of contract law, not in real property. Thus, even under this theory, which the circuit court did not accept, the plaintiffs would not have any reversionary interest. At best, they would have a right to enforce a claimed breach of the covenant in contract. Even misuse or nonuse of property in violation of an enforceable covenant does not mean that the property will revert to the grantor's heir. *Ford v Detroit*, 273 Mich 449; 263 NW2d 425 (1935) citing *Brown v City of East Point*, 148 GA 85; 95 SE 962 (1918), *Sowadzki v Salt Lake County*, 36 Utah 127, 142; 104 PA 111 (1909), and *Barclay v Howell's Lessee*, 31 US 498; 6 Pet 498; 8 L Ed 477 (1832). Instead, the court of equity may give relief by compelling performance of the covenant. Thus, if the language in the codicil is enforceable under any theory, it would be under a breach of a covenant theory. And in that instance, the remedy could only be an equitable remedy involving specific performance.

But the heirs are not entitled to relief even under this theory. The circuit court found no covenant and plaintiffs have pointed to none. In interpreting a covenant, the court looks to the language employed and, where clear and unambiguous, enforces it as written. *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925). A court of equity will not enlarge the scope of deed restrictions beyond the clear meaning of the language employed. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1938). The supposed intention of the parties

cannot overcome the express language used in the documents creating the claimed restrictions.

Little v Kin, 468 Mich 699, 700; 664 NW2d 749 (2003).

Applying these principles, the language relied on is not promissory; it offers suggestions and vests the decisions in the Township Board's discretion. The description of the manner of dealing with the property was not the grantor's "dictation," as she said herself in the codicil. And the conveyancing language was express, clear, and without exception. The plaintiffs persuaded the circuit court that some additional rights existed but neither they nor the court have pointed to specific promissory language. Thus, this covenant theory provides no basis for upholding the judgment.

ARGUMENT II

THE CIRCUIT COURT ERRED IN HOLDING THAT THE ELK RAPIDS TOWNSHIP ABANDONED ITS INTEREST WHEN THE FACTS PRESENTED SUGGEST OTHERWISE OR AT A MINIMUM PRESENT A GENUINE ISSUE OF MATERIAL FACT.

A. STANDARD OF REVIEW.

The standard of review for this issue is the same as for the previous issue.

B. THE HEIRS HAVE NOT ESTABLISHED THAT THE ELK RAPIDS TOWNSHIP INTENDED TO RELINQUISH ITS INTEREST IN THIS PROPERTY NOR HAVE THEY SHOWN AN EXTERNAL ACT BY WHICH THIS CLAIMED INTENTION WAS CARRIED INTO EFFECT.

The Township maintains that abandonment is not applicable here where a deed conveyed the property, which was formally accepted by the Township at a meeting. Indeed, any form of fee simple estate is legally incompatible with the plaintiffs' abandonment theory. The body of law governing abandonment applies to dedications by plat or by common law or by various other methods. Nevertheless, the circuit court concluded that the Township abandoned the land on the basis that the property was never developed for recreational park purposes. It predicated this conclusion on the fact that the Sportsman's Club occupies "all eleven acres of the land," did not have a lease for a number of years, and the park improvement fund was never established. (Decision and Order On Cross-Motions for Summary Disposition, p 7). In doing so, the circuit court cited three decisions, none of which are applicable here.

Roebuck v Mecosta County, 59 Mich App 128; 229 NW2d 343 (1975) does not stand for the proposition that the property at issue here was "abandoned" by Elk Rapids Township. It did not involve a conveyance through a deed. It dealt with the question of whether a township paid landowners for a right-of-way for a road when no deed or evidence of transfer was ever recorded. 59 Mich App at 129-130. Under a statute, if the road was never opened then it would

“cease to be a road for any purpose.” *Id.* at 131 citing MCL 221.22. In that case, the plaintiff would have had the full use of the property because the property interest conveyed for roads is traditionally only an easement rather than an estate in fee simple. This case provides no support for the circuit court’s ruling here.

Two of the other decisions relied on by the circuit court dealt with an entirely separate body of law for determining the rights and obligations of various parties when property has been dedicated for a use, such as a park or road, on a plat and that use has never been formally established. *West Michigan Park Ass’n of Ottawa Beach v Dep’t of Conservation*, 2 Mich App 254; 139 NW2d 758 (1966) (determining whether department of state government had accepted land on plat designated for “park, walks, roads”); *Village of Lakewood Club v Rozek*, 51 Mich App 602; 215 NW2d 780 (1974) (determining whether township accepted land marked on plat as park). These decisions are not helpful here. Unlike in these cases, the property at issue here was conveyed by executor’s deed to the Township. The Township indisputably accepted the conveyance—its acceptance was adopted by the Township Board, filed in land records, and is attached as Exhibit 3 to the plaintiffs’ complaint. The conveyance at issue here was a deed and not a dedication on a plat. The acceptance here was formal.

It is not at all clear, and no authority has been cited, for the proposition that property may be “abandoned” after it has been conveyed by deed and accepted, as is the situation here. See generally, *West Michigan Park Ass’n of Ottawa Beach v Dep’t of Conservation*, 2 Mich App 254; 139 NW2d 758 (1966) (dedication of park lands became irrevocable after it was accepted). Contrary to the circuit court’s analysis, *Roebuck* actually supports the Township’s position. The *Roebuck* court cited *Michigan State Highway Comm v St. Joseph Twp*, 48 Mich App 230; 210 NW2d 251 (1973) which made clear that nonuse of parkland dedicated to a township did not affect an abandonment of the land that had been dedicated. *St. Joseph Twp*, in turn, quoted 1

Callaghan's Michigan Civil Jurisprudence §§ 4-5 for the proposition that "[i]t is generally agreed that a fee simple interest in real property may not be abandoned, but that, in order to divest title to such an interest, other facts and circumstances must be shown, such as adverse possession, or a sale for nonpayment of taxes." *St. Joseph Twp, supra* at 48 Mich App at 237. The Court recognized the possibility of abandonment of land dedicated to a public use, but this historically involved plat dedications and not a fee simple estate conveyed by deed and accepted by the governmental entity.

In any event, the record is barren of any intentional act to relinquish the property and an external act by which the intention is carried out. The circuit court accepted the plaintiffs' assertion that the property was abandoned because the Elk Rapids Sportsman's Club was operating on it and no park improvement fund was established. But the circuit court's conclusion rests on the assumption that the Township's decision to allow the Elk Rapids Sportsman's Club to lease the property at little or no cost is inconsistent with the suggestions in the codicil to the will. But the codicil contemplated a continuation of a lease of property to the Elk Rapids' Sportsman's Club. In fact, Mina G. Wilcox made suggestions concerning how to change the entrance to ensure access to the Club "when the field is needed for a recreational field." The codicil made clear that the Township should retain ownership of the parcel; and it has. It also allowed for the Township to exercise its discretion concerning when and how the field should be used.

Contrary to the arguments of the plaintiffs, the Township's continuation of a lease to the Elk Rapids Sportsman's Club does not mean that the property is not being used for recreational purposes. Sport target shooting is "one of America's most popular recreational activities." David G. Cotter, *Outdoor Sport Shooting Ranges: An Endangered Species Deserving of Protection*, 16 T M Cooley L R 163 (1999). Quoting McQuillin's, the attorney general defined

“park” as “an open or enclosed tract of land adapted for, set apart, maintained at public expense and devoted to the purposes of pleasure, recreation, ornament and light and air for the inhabitants of the town or city near or in which it is located.” 42 US Op Attny Gen 269, 1964 WL 5135 (USAG). Other definitions noted by the attorney general included that “a park is predominantly open or outdoor area, with or without landscaping, buildings, or other man-made facilities, the purpose of which is to serve and promote the pleasure, recreation, amusement, health, welfare and enjoyment of the public.” *Id.* These definitions coincide with dictionary definitions of recreation, which means “refreshment,” “a means of enjoyable relaxation,” and “amusement.” *Random House Webster’s College Dictionary* (2001). The dictionary definition of “field” is also helpful. A field is “a piece of open or cleared land, esp one suitable for pasture or tillage” or “a piece of ground devoted to sports or contests; playing field.” *Id.* With these definitions in mind, it is clear that a shooting range can itself be a recreational field.

Nor is there any authority for the proposition that parks must be free of charge and open to the public without exception. Municipal golf courses, among many other varied recreational uses of publicly owned “park lands” would be jeopardized by acceptance of the plaintiffs’ argument. If the circuit court decision is allowed to stand, many other recreational uses of property may also be subject to challenge. For example, the Huron-Clinton Metropolitan Authority has an annual membership available to its users for a fee; and it is indisputably a park system. The Detroit Historical Society, the Detroit Institute of Arts, and other recreational facilities sell memberships for a fee, which entitle members to various benefits not available to the public at large. These memberships do not transform the facilities into private ones in a manner that defeats the public nature of their operations. Likewise, other parks or recreational uses have charges associated with their use and often have private entities operating those parks

or portions of the parks. Does outsourcing the concession stand mean that a park purpose has been abandoned?

The plaintiffs have not demonstrated that membership is not available to all who ask. Nor have they suggested that visitors cannot readily use the facilities with ease. The plaintiffs have also failed to show, nor could they, that the facilities are not easily and readily available to all who wish to use them. As a result, the Township's past decisions to allow the Sportsman's Club to operate its recreational field are not inconsistent with the hopes and wishes set forth in the codicil.

The premise of the circuit court's position that because the property is being used by the Sportsman's Club, it is not being used for recreational purposes, is false. Thus, the court's conclusion is wrong. In fact, the Michigan Legislature has recognized the validity of this recreational activity by enacting a statute to protect the operation of such recreational facilities if they conform to generally accepted operation practices. MCL 691.1541 *et seq.* See also *Twp of Ray v B&BS Gun Club*, 226 Mich App 724; 575 NW2d 63 (1997).¹ A reversal is therefore required.

¹Under the statute, a sport shooting range that is operated and is not in violation of existing law at the time of the enactment of an ordinance "shall be permitted to continue in operation even if the operation of the sport shooting range at a later date does not conform to the new ordinance or an amendment to an existing ordinance." MCL 691.1542a.

ARGUMENT III

THE CIRCUIT COURT ERRED IN ALLOWING THE GRANTOR'S HEIRS TO PURSUE THEIR CLAIMS WHEN THEIR SILENCE REGARDING THE PROPERTY'S USE SHOULD HAVE BEEN FOUND TO ESTOP OR WAIVE THEIR CLAIMS.

A. STANDARD OF REVIEW.

The standard of review for this issue is the same as for the previous two issues.

B. ESTOPPEL OR WAIVER APPLIES TO BAR THE GRANTOR'S HEIRS FROM OBTAINING EQUITABLE RELIEF.

The circuit court also erred in allowing the grantor's heirs to pursue their claims despite their silence in the face of what they contend are violations of the deed grant. As one scholar explained, "One cannot watch a building go up and then sue to have it taken down." Charles B Blackmar, *Unenforceability of Restrictive Covenants*, 46 Mich L R 654 (1948). Michigan courts have traditionally recognized that a "party may be estopped from challenging the consequences of his own inaction." *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118; 346 NW2d 911 (1984). Waiver is the intentional relinquishment of a known right. *Book Furniture Co v Chance*, 352 Mich 521; 90 NW2d 651 (1958). It falls within the family of doctrines, including waiver, estoppel, and acquiescence, that bar a party from challenging conduct or enforcing a right when that party has sat by in silence and acquiesced in the conduct. If a grantor permits property to be used in violation of a condition, "and especially if he stands by and allows valuable improvements to be made thereon, he will not be allowed to insist on a forfeiture, and thus acquire the improvements made upon the strength of his acquiescence." 3 Thompson on Real Property § 2053 quoted in *Weber v Ford Motor Co*, 245 Mich 213; 222 NW 198 (1928). See also *Barrie v Smith*, 47 Mich 130; 10 NW 168 (1881).

The history of the parties' involvement with and interaction regarding this property demonstrates that, if a right ever existed, it has been waived or the plaintiffs are estopped from enforcing it. Since the 1948 executor's deed conveyed this property to Elk Rapids Township, the Sportsman's Club has been operating on the same property. Heirs to the property, both Mina G. Wilcox's children and her grandchildren have lived in the area. Nothing about the operation of the Sportsman's Club has been secret or out of sight of the public—it is readily visible as it has been from the beginning. Yet, after sixty years, with no explanation for their silent acquiescence over the years, a group of heirs with neighboring property now seek to enforce a condition that will deprive the Township of its right to exercise its discretion concerning the use of this property. Their failure to take any step to object for all of these years when the operations of the Elk Rapids Sportsman's Club was readily visible to anyone observing the property and highly publicized in the local press as seen in the exhibits supplied at trial means that they are barred from complaining now.

The heirs have not only silently stood by, they have engaged in transactions intended to facilitate the continued operation of the Elk Rapids Sportsman's Club on this property. In 1959, after the State condemned part of the property, Mina G. Wilcox's children all participated in land transactions intended to ensure access to the Elk Rapids Sportsman's Club. (Defendant Elk Rapids Sportsman's Club Post Hearing Brief, Exhibits E and F). Also in 1959, Helen Wilcox Bard gave a three-acre parcel of property to the Township for the use of the Elk Rapids Sportsman's Club, under the same "instructions" as her mother had given the Township. (*Id.*, Exhibit G). In fact, the minutes reflect her intentional conduct to support the Township's relationship with the Elk Rapids Sportsman's Club:

Jerry Bradfield reported that Mrs. Helen Wilcox Bard, owner of lot number 05, which we had wanted to buy for more Club room, had informed him by phone, that lot number 05 would be presented to the Elk Rapids Township, which the same instructions as her mother had given the township her property for use of the

ERSC. This is a milestone in the progress of the ERSC. She mentioned that if there was some sand available from the big sand hill she would like it for certain parts of the Woodlands subdivision which parallels the north side of the Williams Road. The members authorized a thank you letter, a possible plaque both for the Club House and for her. This was later put into a motion by Muller, seconded by Hollenbeck, and carried.

(Id.) This transactions reflects acknowledgement of and support for the use of the property by the Elk Rapids Sportsman's Club on the property. Bradfield wrote back to thank Bard for the property indicating that it would be used "now and in the future, for the betterment of our organization and the community." *(Id., Exhibit H.)*

Although the plaintiffs argue that these transactions do not clearly reflect a waiver, at a minimum they create a fact question concerning whether the plaintiffs waived their rights. Thus, a reversal is required on this ground as well.

CONCLUSION AND STATEMENT REGARDING ORAL ARGUMENT

The issues raised in this appeal are of high public significance because they involve the right to control public property. Unless the lower court rulings are reversed, the question of the estate by which the Township owns the property will remain unclear. In addition, the effect of the trial court's ruling is to transfer control and decisionmaking about the property's use from the Elk Rapids Township through its elected Board to several of the heirs of the grantor. This would be a just outcome if the conveyancing language was consistent with such an intent. But it is not. Language in the conveyancing deed expressly gave the Township all rights including any remainders and reversions. Despite this, under the lower court's analysis, the Township is and will be unable to exercise all the rights of ownership.

The property law principles that control the outcome here are not new or unsettled. The record is not overwhelmingly large. But property law cases are often confusing—and this one presents a decision based on a rather muddled blurring of property law principles. If the panel that hears this case on the new expedited docket has any doubt whether a reversal in favor of the Township is in order, the Township respectfully urges it to order oral argument to clarify any questions concerning the facts and law at issue here. Oral argument would be particularly in order because of the public importance of the issue.

RELIEF

WHEREFORE, Defendants-Appellants Elk Rapids Township and Elk Rapids Township Board respectfully request that this Court reverse the judgment of the circuit court and all other adverse rulings and orders and remand either for entry of an order granting summary disposition in the Township's favor or, failing that, for trial on the merits of the claim and the Township's defenses, and that this Court grant the Township all relief appropriate in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

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