STATE OF MICHIGAN

COURT OF APPEALS

ENCHANTED FOREST PROPERTY OWNERS ASSOCIATION, Plaintiff-Appellee, v THOMAS SCHILLING and JEANNINE SCHILLING, Defendants-Appellants, and MATTHEW TOBIN and MICHELE TOBIN, Defendants.	UNPUBLISHED March 11, 2010 No. 287614 Otsego Circuit Court LC No. 07-012261-CH

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendants-appellants, Thomas Schilling and Jeannine Schilling (defendants), appeal as of right the order denying their motion for summary disposition and granting summary disposition pursuant to MCR 2.116(I)(2) in favor of plaintiff, Enchanted Forest Property Owners Association (the "EFPOA"), in this action in which the EFPOA sought to permanently enjoin defendants from using their property as a vacation rental. We affirm.

In September 2003 defendants purchased a vacation home on Lot 453 ("the property") in a residential subdivision known as Enchanted Forest No. 2 in Otsego County ("the development").

Documents Governing the Property

The development is subject to a document entitled "Supplementary Declaration of Building and Use Restrictions" that was recorded with the Otsego County Register of Deeds on March 28, 1972. The deed restrictions, which were drafted and recorded by the original development of the development, provide with regard to "use" in Section I that:

(1) All lots except Lot 513 shall be used as follows:

> Any structure erected shall be a private residence for use by the owner or occupant, except that Guthrie Lakes Development Corporation may make such reasonable use of the premises as is desirable for the development and sales of the lands included herein. No part of said premises shall be used for commercial or manufacturing purposes. This restriction shall not prohibit the use of designated lots or areas for the mutual use and benefit of all lot owners . . .

The deed restrictions also provide in Section VIII that:

> (1) Guthrie Lakes Development Corporation may form or cause to be formed a membership association having the following qualifications for membership:
>
> (a) The owners of each lot shall constitute the owners thereof as members of the Association . . .

The EFPOA is a nonprofit corporation and was incorporated in August 1983 as the development's membership association. The EFPOA's Articles of Incorporation state that the purposes of the corporation are:

> 1. To provide recreational facilities and activities for the benefit of its members.
>
> 2. To provide for the maintenance and improvement of the area within and around the subdivisions known as Enchanted Forest, Enchanted Forest No. 2, and Enchanted Forest No. 3 located in Otsego Lake Township, Otsego County, Michigan.

The bylaws of the EFPOA, as amended December 14, 1996, provide in Article IV, § 5(b), that each member of the EFPOA has a duty to "Comply with provisions of the Recorded Restrictions and other rules and regulations enacted by the Board which are not in conflict with State and Local provisions." The bylaws also provide in part in Article XII, Section 2, that

> The Board may make rules for the conduct of the members and the use of the Association property, and define and limit the privileges of the members and their guests, not inconsistent, however, with anything set forth in these Bylaws and in the Recorded Restrictions, Articles of Incorporation or laws of the State of Michigan which are applicable to the lots.

Article XVII, Section 1, further provides that:

> These bylaws may be amended by a two-third majority vote of the votes cast at a Membership Meeting provided notice of the purpose of the proposed amendment has been stated in the call for the meeting. These Bylaws may be amended by a two-thirds majority vote of the entire Board of Directors provided that notice of the amendment is proposed with the call of the meeting or that the final vote is held over until the next Board meeting.

Pursuant to Article XII, Section 2, the EFPOA Board of Directors promulgated the "EFPOA Rules and Regulations" (the "rules and regulations").[1] The "Governance" section of the rules and regulations provides in part:

> The Enchanted Forest Property Owners Association is governed by a Board of Directors, elected by Property Owners in good standing. The Board of Directors was established pursuant to Recorded Restrictions filed with Otsego County Register of Deeds. This document describes such restrictions as land use, type and size of construction and provides for maintenance fees, is binding on all Enchanted Forest Property Owners. . . . Over the years, Rules and Regulations have been established, amended and modified as needed, by the Board.

The rules and regulations contain a section entitled "Guests and Renters," which provides in part that:

> 1. Guests and Renters must abide by all these Rules and Regulations to the same extent as Property Owners. Failure to do so may result in the termination of privileges at the discretion of the Manager(s).

The EFPOA also published the EFPOA "Property Owners Handbook," effective December 12, 1987. The cover of the handbook refers to "Building Control & Restrictions" and "Rules and Regulations." The introduction to the handbook, under the heading "Building Control and Restrictions" states that "The following selected excerpts from the Recorded Restrictions . . . are intended as a guideline for individual lot use and improvement." Under Section A, entitled, "Use," the handbook provides in part that, "No part of said premises shall be used for commercial or manufacturing purposes."

Under the heading "Rules and Regulations," a paragraph entitled "Guests, Renters, Lessees," provides in part that "Guests, renters, and lessees will be required to abide by all regulations pertaining to property owners."

The Present Dispute

On April 1, 2005, defendants entered into an agreement with Pine-Cone Accommodations in which the latter was appointed exclusive rental agent for defendant's property and was specifically authorized to rent the property. Defendants do not dispute they have occasionally rented out their property, typically for periods of one week or less, for a rental fee. Records provided by Pine-Cone Accommodations reveal that the property was rented for 33 days in 2005, 29 days in 2006, 34 days in 2007, and 31 days between January 1 and March 31, 2008.

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[1] Reference to the EFPOA Rules and Regulations refers, unless otherwise noted, to EFPOA Rules and Regulations approved by the EFPOA Board of Directors on July 1, 2006. This is the earliest copy provided to this Court.

The EFPOA became aware that five property owners were using their property as vacation rentals, and on April 26, 2007, sent a letter to these owners, including defendants, that stated in part:

> The Deeded Restrictions prohibit any property, except lot 513, from being used as a commercial property. Property within the EFPOA is to be used as a private residence for use by the property owner and their guests. The use of your property as a vacation rental constitutes a commercial use, which is a violation of the Deeded Restrictions, and people who rent your property are customers, not guests. Be advised that your customers will not be afforded the use of the EFPOA amenities.
>
> Please cease utilizing your property as a vacation rental. . . .

Four of the five affected property owners ceased using their property as vacation rentals.[2]

On July 27, 2007, the EFPOA filed a complaint in which it alleged that defendant's vacation rentals are a commercial use in violation of the deed restrictions, and sought a permanent injunction prohibiting defendants from using the property for vacation rentals. The EFPOA also sought a preliminary injunction to enjoin defendants from using the property as a vacation rental until a final decision on the merits could be reached.

A hearing on the motion for preliminary injunction was held on August 8, 2007. Before accepting proofs, the trial court noted that:

> Well, the recorded building and use restrictions are the controlling document as to what activities are allowed or not allowed in the subdivision. It is true that the bylaws and rules and regs flow from those art—those recorded restrictions. That's the primary document.
>
> Any structure erected shall be a private residence for use by the owner or occupant, except that Guthrie Lakes Development may make use of the land for development and sales, et cetera. No part of said premises shall be used for commercial or manufacturing purposes. Again, they accept [sic: except] the Guthrie Lakes Development Corporation.
>
> Any structure erected shall be a private residence for use by the owner or occupant.
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> So, at this early stage, I mean, the building and use restrictions don't allow commercial activities. So you can present the rest of your proofs.

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[2] Initially, property owners Matthew and Michele Tobin did not cease renting their property and were included as defendants in the present lawsuit. They ultimately consented to entry of a permanent injunction and are therefore no longer involved in this suit.

The president of the EFPOA Board of Directors testified that the only type of rental contemplated by the EFPOA rules and regulations is a rental for long-term private residential use, "where you get your mail, where you live, where you come home from work, where you get up and go to work, where you, you know, raise your family, that sort of thing." Defendant Thomas Schilling testified that he relied on the EFPOA rules and regulations handbook, and its reference to "owners, guests, and renters," in reaching the conclusion that the rules and regulations specifically permit lot owners to rent their property as a vacation rental. Defense counsel urged the court not to grant the preliminary injunction, asserting that "there's an adequate remedy at law . . . Their remedy at law is to amend their bylaws and say we do not allow rentals of less than X duration." The trial court opined that defendant's use of their property as a vacation rental violates the deed restriction that property within the development be reserved for private residential use, and concluded, consistent with the position of defendants' counsel, that the EFPOA could amend its bylaws to reflect its position on short- versus long-term vacation rentals.

In August 2007, the EFPOA held a special meeting pursuant to Article XVII of the bylaws for the purpose of amending the bylaws. A newly enacted Section 8 was added to Article IV (Membership) of the bylaws that provided as follows:

> Section 8. (Rental of Property) No parcel of real property within the development may be rented or leased or may possession and occupancy of a parcel of real property within the development be given to a third party holding or acquiring an option to purchase a parcel of real property within the development.

Thus, the bylaws as amended August 25, 2007, prohibit rentals of any kind or duration. Additionally, the rules and regulations were revised to eliminate all references to "renter" throughout.

On October 12, 2007, the EFPOA filed a first amended complaint and second request for an injunction that was based on the restriction in the amended bylaws against rentals of any kind or duration. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants asserted that the use of their property as a vacation rental does not constitute use for a commercial purpose. They further asserted that the EFPOA's use of the amended bylaws to supercede the deed restrictions was illegal and unenforceable. In response, the EFPOA asserted that a vacation rental is a commercial use, and sought summary disposition pursuant to MCR 2.116(I)(2).[3]

On August 18, 2008, the trial court issued a written opinion and order in which it concluded, in pertinent part:

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[3] Following a hearing on July 7, 2008, the court asked the parties to brief the issue of whether the EFPOA board of directors could amend the bylaws by a vote of the directors or whether majority approval of the members was required.

> Defendants use of their property by renting it even to occasional renters constitutes a commercial use which is specifically prohibited by the Recorded Restrictions in Article I, Section 1. As such, the EFPOA Board of Directors has the power to enforce those binding restrictions against Defendants, by way of enjoining them from their continued vacation rental of the property."
>
> Furthermore, and even if this court were not to conclude that such a use of the property constituted a specifically prohibited commercial use, the same result would be reached. This is true for the reason that the EFPOA Board of Directors possesses the authority to amend the Bylaws without vote of the members. This right of the Board is preserved in MCL 450.2231, as well as supported by a lack of specific reservation within the Articles of Incorporation. Furthermore, and perhaps most significant, Counsel for Defendants acknowledged, at the hearing before this court on 08/08/07, that "Their [Plaintiff's] remedy at law is to amend their bylaws and say we do not allow rentals of less than X duration." While this 'admission' was made during oral argument on the issue of whether Plaintiffs were entitled to an injunction – and thus counsel was arguing that the existence of an adequate remedy at law would prevent the issuance of such an injunction – it nonetheless settles one of the main issues in this case. Plaintiff's Board of Directors is entitled to adopt, amend, or repeal the Bylaws pursuant to a concise, clear reading of MCL 450.2231(1), especially when such power was not reserved to the members in the Articles of Incorporation. Further, the power of the Board to amend is also preserved in Article XVII, Section 1 of the Bylaws as amended 12/14/1996. The EFPOA Board of Directors has amended the applicable Bylaws pursuant to the authority preserved to them by statute, their own Articles of Incorporation, and their own Bylaws. Counsel for Defendant has admitted that the Plaintiff has such a right. Taken together, these factors lead to the ultimate conclusion that the Plaintiff's Board of directors had the ability and power to amend the applicable Bylaws without member vote. . . .

I

Defendants argue that the trial court erred when it held that defendant's use of their property as a vacation rental is a commercial use. This Court reviews de novo the grant or denial of a motion for summary disposition. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The scope of a deed restriction is a question of law that is reviewed de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002).

The deed restrictions provide in Article IX that "The purpose of these restrictions is to insure the use of the entire plat for attractive *residential purposes*. The restrictions also provide in Article I that "Any structure erected shall be a *private residence* for use by the owner or occupant." The restrictions further provide that "No part of said premises shall be used for *commercial or manufacturing purposes.*" The legal question presented is whether restrictions permitting only residential uses and private residences, and expressly prohibiting commercial uses, preclude use of the property as a vacation rental. The deed restrictions do not define the terms "residential," "residence," or "commercial."

"Residential" and "Reside"

Although the deed restriction does not define "residential," where a term is not defined in a contract, "we will interpret such term in accordance with its 'commonly used meaning.' " *Terrien, supra* at 76-77, quoting *Henderson v State Farm Fire & Cas Co.*, 460 Mich 348, 354; 596 NW2d 190 (1999). Moreover, under the doctrine of *noscitur a sociis*, " 'a word or phrase is given meaning by its context or setting.' " *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318, 645 NW2d 34 (2002), quoting *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 437; 628 NW2d 471 (2001).

The term "residential" means "pertaining to residence or to residences." *Random House Webster's College Dictionary* (1997). "Residence" means "the place, esp[ecially] the house, in which a person lives or resides; dwelling place; home." *Id.* The term "residential" in the deed restriction thus refers to homes where people reside.

This conclusion is bolstered by the remaining language in the deed restriction, which states that "any structure erected shall be a *private residence* for use by the owner or occupant." Residence is defined, for non-insurance purposes, as "the place where a person has his home, with no present intent of removing, and to which he intends to return after going elsewhere for a longer or shorter period of time." *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 680; 333 NW2d 322 (1983) quoting *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933).

"Commercial Purpose"

The trial court, as well as both parties, cites *Terrien, supra*. In *Terrien*, the plaintiffs, property owners in a residential subdivision, brought an action against the defendant and other operators of for-profit "family day care homes" in that subdivision seeking enforcement of a covenant expressly prohibiting "commercial or business" uses of property within the subdivision. In concluding that the operation of a "family day care home" for profit is a commercial or business use of one's property, the Court noted both the common and the legal meanings of the term "commercial":

> "Commercial" is commonly defined as "able or likely to yield a profit." *Random House Webster's College Dictionary* (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id. [Terrien, supra* at 63-64.]

The Court also discussed the Court's previous discussion of the meaning of "commercial" activity in *Lanski v Montealegre,* 361 Mich 44; 104 NW2d 772 (1960):

> In *Lanski*, this Court addressed whether the operation of a nursing home was in violation of a reciprocal negative easement prohibiting commercial activity upon certain property. We determined that it was, observing that the circumstances were indicative of a "general plan for a *private resort area*" and that this suggested that a broad definition of "commercial" activity was intended. Therefore, "[i]n its broad sense commercial activity includes any type of business or activity which is carried on for a profit." We concluded that the operation of a nursing home was a commercial use because a fee was charged, a profit was

> made, the services were open to the public, and such an operation subtracted from the "general plan of the private, noncommercial resort area originally intended. [*Terrien, supra* at 64 (internal citations omitted).]

Given these definitions and case law, the *Terrien* court concluded that the defendants' "use of their properties is a commercial or business use, as those terms are commonly and legally understood." *Id.* at 65.

Intent of the Drafter

The deed restrictions are grounded in contract, and in an action to enforce deed restrictions, the intent of the drafter controls. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). As in other cases involving interpretation of contracts, this Court reads the instrument as a whole to give effect to the ascertainable intent of the drafter. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 505; 686 NW2d 770 (2004); *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983).

Reading the restrictions as a whole, it is clear that the one core purpose associated with the deed restrictions is to restrict use of the property in the development to private residential use. The drafter went a step beyond restricting the property to private residential use by prohibiting use of the property for commercial and manufacturing purposes, thereby eliminating any confusion that could have existed had use been simply limited to private residential use. See, e.g., *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 326; 317 NW2d 611 (1982) (a restriction *allowing* residential uses is generally viewed as permitting wider uses than a restriction *prohibiting* business uses). The "commercial purposes" prohibition is broad. As a whole, the language in the restriction expresses a clear intent to permit use of the property only for private residential use, and not for any use deemed to be a commercial purpose.

Defendants' Use of the Property

There is no dispute that defendants contracted with an agency to advertise their property as a vacation rental and did, in fact, rent the property for a fee. Although the financial documentation submitted by defendants shows that defendants did not make a profit when renting their property, this is not dispositive of whether the commercial purpose prohibition was violated. Defendants clearly indicated that they rented out the property to transient guests. Use of the property to provide temporary housing to transient guests is a commercial purpose, as that term is commonly understood. The trial court properly granted summary disposition in favor of the EFPOA on the basis of Article XI of the deed restrictions.

II

Defendants argue that the EFPOA is contractually bound to permit use of the property as a vacation rental, or, in the alternative, that the EFPOA is prevented from prohibiting such vacation rentals pursuant to the doctrine of promissory estoppel. Defendants have not previously raised these arguments and, therefore, they are not properly before this Court. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Nonetheless both of these arguments are based on defendants' mistaken assertion that the EFPOA bylaws and rules and regulations expressly permit use of the property as a vacation

rental. While both documents refer to "renters," neither document authorizes vacation rentals. To the contrary, the deed restrictions permit only private residential use, and prohibit use of the property for commercial purposes.

III

Defendants argue that the EFPOA board of directors does not have authority to amend the EFPOA's corporate bylaws. With regard to this argument, defendants are challenging statements made by the trial court regarding the ability of the EFPOA's Board of Directors to amend the bylaws to prohibit vacation rentals, or to distinguish between short- and long-term vacation rentals. The statements were made after the trial court concluded that defendants' use of their property as a vacation rental violated the deed restriction against use of the property for commercial purposes. The statements of the trial court regarding this issue do not constitute an actual decision of the trial court, but are mere dicta and not essential to its decision to grant summary disposition in favor of the EFPOA. *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 95; 610 NW2d 597 (2000) (defining dicta as "a principle of law not essential to the determination of the case"). Therefore, even assuming the trial court was incorrect, reversal would not be warranted.

We note, nonetheless, that defendant's argument that the EFPOA Board of Directors does not have authority to amend the bylaws to specifically prohibit vacation rentals, or to distinguish between short- and long-term vacation rentals, is without merit.

The Michigan Non-Profit Corporation Act, MCL 450.2101 *et seq.*, provides in relevant part:

> (1) Except if the power to adopt, amend, or repeal the bylaws is reserved exclusively to the corporation's shareholders, its members, or its board in the articles of incorporation:
>
> (a) The initial bylaws of a corporation shall be adopted by its incorporators, its shareholders, its members, or its board.
>
> (b) The shareholders, the members, or the board may amend or repeal the bylaws or adopt new bylaws.
>
> (c) The shareholders or members may prescribe in the bylaws that any bylaw adopted by them shall not be amended or repealed by the board.
>
> (2) The bylaws may contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation. [MCL 450.2231.]

Because the EFPOA's articles of incorporation does not reserve the power to adopt, amend, or repeal the bylaws exclusively to the EFPOA's members or its board, the members or the board may amend or repeal the bylaws or adopt new bylaws. The EFPOA bylaws provide in Article XVII, Section 1, that:

> These bylaws may be amended by a two-third majority vote of the votes cast at a Membership Meeting provided notice of the purpose of the proposed amendment has been stated in the call for the meeting. These Bylaws may be amended by a two-thirds majority vote of the entire Board of Directors provided that notice of the amendment is proposed with the call of the meeting or that the final vote is held over until the next Board meeting.

The trial court properly found that, pursuant to this section, a two-thirds majority vote of the entire board could amend the bylaws.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis