STATE OF MICHIGAN

COURT OF APPEALS

FRANK J. TOMECEK, JR., and JANIS H. TOMECEK,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

ANDREW LUCIAN BAVAS, JOYCE BAVAS, INEZ HILDEGARD BAVAS, STANLEY FRANCIS STASCH, JULIE STASCH, MARTHA STASCH, PATRICIA M. CURTNER, TIMOTHY V. MCGREE, PETER A. STRATIGOS, ALICE M. STRATIGOS, and PAMELA KRUEGAR,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees,

and

DEVEREAUX BOWLY, JR., MICHAEL L. JONES, LAURA L. AVERY, JULIA E. PIETRAS, DAVID N. DERBYSHIRE, ELLEN R. LA FOUNTAIN, JONATHAN RODGERS, ROYAL KENNEDY RODGERS, LEE STAHL, III, and SUSAN STAHL,

Defendants-Appellants/Cross-Appellees,

and

INDIANA MICHIGAN POWER COMPANY, d/b/a AMERICAN ELECTRIC POWER COMPANY, INC., MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, and BERRIEN COUNTY DRAIN COMMISSIONER,

Defendants-Appellees,

FOR PUBLICATION
July 3, 2007
9:15 a.m.

No. 258907
Berrien Circuit Court
LC No. 02-003707-CH

and

Official Reported Version

DANIEL JOHNSON, SCOTT LOESS, KATHLEEN LOESS, JANE HENKLE, RICHARD CRAGG, LOIS ZYER, ARTHUR C. MERTZ REVOCABLE TRUST, PETER LEVY, BENITA LEVY, LAKESIDE PROPERTY OWNERS, CHIKAMING TOWNSHIP, ROBERT FORKER, JR., NEW BUFFALO SAVINGS BANK, FIFTH THIRD BANK, SHORELINE BANK, SEMCO ENERGY, INC, SEMCO ENERGY GAS COMPANY, and SBC AMERITECH CORPORATION,

Defendants.

Before: Zahra, P.J., and Hoekstra and Owens, JJ.

OWENS, J.

Defendants/counterplaintiffs Andrew Bavas, Joyce Bavas, Inez Bavas, Stanley Stasch, Julie Stasch, Martha Stasch, Patricia Curtner, Timothy McGree, Peter Stratigos, Alice Stratigos, and Pamela Kruegar and defendants Devereaux Bowly, Jr., Michael Jones, Laura Avery, Julia Pietras, David Derbyshire, Ellen LaFountain, Jonathan Rodgers, Royal Rodgers, Lee Stahl, III, and Susan Stahl[1] appeal as of right, and plaintiffs Frank and Janis Tomecek cross-appeal as of right, the October 15, 2004, "Stipulated Corrected Judgment Partially Revising Plat of O.T. Henkle." We affirm.

I. Basic Facts and Procedural History

Plaintiffs and defendants are neighboring property owners in the O.T. Henkle Subdivision along Lake Michigan in Chikaming Township, Berrien County. The subdivision is

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[1] Defendants/counterplaintiffs-appellants/cross-appellees and defendants-appellants/cross-appellees are represented by the same counsel and have filed a single brief in this Court. For purposes of this opinion, we refer to them collectively as "defendants," without distinction based on whether they were also counterplaintiffs in the proceedings before the trial court. Defendants Indiana Michigan Power Company, the Michigan Department of Labor and Economic Growth, and the Berrien County Drain Commissioner have entered appearances in this matter as defendants-appellees and have retained separate counsel, but have not filed briefs. Therefore, we will not discuss them separately in this opinion.

bordered on the west by Lake Michigan and on the east by Lake Shore Road. Plaintiffs own Lot 2 in the subdivision and wish to build a home on this lot. However, by virtue of a 1974 restrictive agreement, they cannot do so "unless and until a municipal sanitary sewer line is made available to the premises." Lot 2 is landlocked, with ingress and egress afforded by way of a "drive easement" over Lots 1 and 3 from Lake Shore Road. Plaintiffs wish to use this drive easement to access sewer and other utilities. Defendants assert that this is an impermissible use of the drive easement.

The underlying facts are not in dispute. O.T. Henkle originally owned all the property in the plat. On his death, the property passed to C.W. and Virginia Henkle, Gladys Fairclough, and Jane H. Henkle (referred to by the parties as the "original grantors"). Before the property was platted in 1976, it was divided into six parcels, five of which were sold to the defendants or their predecessors in interest and one of which, Lot 2, was retained by the original grantors. In 1976, Lot 2 was conveyed to Jane Henkle and plaintiffs jointly.[2] Plaintiffs owned Lot 2 jointly with Jane Henkle from 1976 until 1999, when plaintiffs became the sole owners of the lot by quitclaim deed.

When Lot 1 was conveyed in 1967, it was conveyed subject to an easement for beach access and subject to another easement, for the benefit of Lot 2, for the installation, maintenance and repair of utility lines, poles, pipes, and conduits over the northerly five feet of Lot 1. However, in 1972, the portion of Lot 2 at which the utility easement abutted the property was conveyed to the owners of Lot 1, thus separating Lot 2 from the utility easement over the northerly portion of Lot 1. As a result, after the 1972 conveyance, Lot 2 lacked all access to utilities from Lake Shore Road.

In 1975, the O.T. Henkle plat was filed with the township.[3] The plat depicts an approximately 10-foot drive easement for Lots 3, 4, and 5 along the southern edge of the plat (referred to by the trial court and the parties as the "south drive easement"), a water easement running from Lake Shore Road through Lots 3 and 4 to Lot 5, and a 20-foot-wide drive easement over Lots 1 and 3 for the benefit of Lots 2 and 4 (referred to by the trial court and the parties as the "central drive easement").[4]

In 1978, the original grantors purported to grant to the township an easement for sewer lines within the south drive easement. It is undisputed that the original grantors no longer owned any legal interest in the property through which the easement was purported to be granted, having conveyed fee-simple title in Lots 3, 4, and 5 to defendants or their predecessors in interest before 1978.

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[2] Jane Henkle is O.T. Henkle's daughter and plaintiff Janis Tomecek's mother.

[3] A drawing of this plat is appended to these opinions.

[4] The northern half of the central drive easement is identical to the easement in the 1967 grant allowing for access to the "common beach area."

In 1984, the original grantors purported to convey to plaintiff Janis Tomecek fee-simple title to all areas identified on the plat as drive easements and parking easements. As with the purported 1978 grant of an easement for sewer lines, it is undisputed that this conveyance was ineffective because in 1984 the original grantors lacked any legal interest in the property containing the platted easements.

As the trial court noted, the dispute in this case is whether the central drive easement can also be used for the utility and sewer lines needed pursuant to the restrictive agreement for plaintiff to build on Lot 2. In their amended complaint, plaintiffs asked the trial court to (1) issue a declaratory judgment delineating the extent of the central drive easement as platted, (2) establish an easement by necessity for public utilities, coexistent with the central drive easement, and (3) correct or revise the plat to provide for a utility easement for the benefit of Lot 2, consistent with the intent of the original grantors that all lots in the plat have access to utilities and that the lot owners be allowed to build on them.

The trial court granted plaintiffs' motion for summary disposition delineating the extent of the central drive easement as platted. The court explained that a declaration of the extent of plaintiffs' rights in the platted easement was necessary in order to guide plaintiffs' future conduct and preserve their legal rights. The trial court then concluded that the platted drive easement was unambiguous. It entitled plaintiffs to use the easement as "a [right of] way which grants a right of passage over land." However, the trial court refused to establish an easement by necessity for public utilities, thus granting defendants' motion for summary disposition on that count.

Finally, the trial court considered whether plaintiffs were entitled to revision of the plat pursuant to MCL 560.221 and MCL 560.226(1). The trial court ultimately concluded that plaintiffs had met the burden necessary to warrant a revision of the plat to include a utility easement coexistent with the central drive easement for the benefit of Lot 2. The trial court observed that defendants "have already run utility lines under their own [south] drive easement," and, therefore, it found "very compelling" plaintiffs' argument that defendants could not reasonably challenge plaintiffs' request to amend or revise the plat to allow plaintiffs to run utilities under the central drive easement. Further, the trial court noted:

> . . . Defendants have not submitted any admissible evidence which would support a reasonable objection to Plaintiff's [sic] request to revise the plat, nor have they offered any admissible evidence of any reasonable objection which would be of any value to the public. All of the objections asserted by Defendants relate [only] to private concerns and involve purely private interests.

The trial court granted plaintiffs' motion for summary disposition, ruling that plaintiffs "may revise the plat to include a utility easement over the central drive easement for the benefit of Lot 2."

II. Judicial Revision of Plat

Defendants argue that the trial court erred when, basing its authority on the Land Division Act, it ordered the revision of the plat to create a utility easement for Lot 2 in the land subject to the existing drive easement to the property. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "The extent of a party's rights under an easement is a question of fact for the trial court, which we review for clear error." *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002), aff'd 468 Mich 699 (2003), citing *Dobie v Morrison*, 227 Mich App 536, 541-542; 575 NW2d 817 (1998). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). The proper interpretation and application of a statute presents a question of law that we consider de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

A. Effect of Plat Revision on Substantive Rights of Property Holders

The title of the Land Division Act, MCL 560.101 *et seq.*, notes that, among other things, the act is designed to (1) "regulate the division of land," (2) "provide for proper ingress and egress to lots and parcels," (3) "promote proper surveying and monumenting of land subdivided and conveyed by accurate legal descriptions," (4) "establish the procedure for vacating, correcting, and revising plats," and (5) "provide for the filing of amended plats[.]" Title of 1967 PA 288. MCL 560.125 sets forth the process for surveying and marking the subdivided property. This information is compiled on the plat, which is then recorded with the municipality. See MCL 560.131 through 560.198.

Defendants argue that MCL 560.221 through 560.229, which specify the statutory requirements for vacating, correcting, and revising plats, only govern revisions to the plat map to reflect existing property rights and do not affect the substantive rights of the lot owners. Therefore, they maintain, the trial court did not grant plaintiffs a substantive property right to a utility easement for Lot 2 when it granted their motion for revision of the plat map, because this revision did not transfer substantive property rights to plaintiffs, nor did plaintiffs successfully move the trial court under another theory of recovery to acquire utility easement rights to Lot 2. We disagree. Instead, we conclude that the provisions found in MCL 560.221 through 560.229 for vacating, correcting, or revising a plat are designed not only to alter the plat map filed with the municipality, but also to alter the underlying property interests reflected in the map. Accordingly, the plat revision ordered by the trial court pursuant to MCL 560.221 through 560.229 gave plaintiffs, as the owners of Lot 2, a substantive right to a utility easement in the land subject to the drive easement to the property.

The provisions of the Land Division Act indicate that a plat filed with a municipality is an official description of the subdivided parcel represented by the plat and the lots therein. First, the requirements of MCL 560.135 through 560.141 ensure that the map of the subdivision filed with the final plat accurately reflects the division of the property in the parcel. MCL 560.135 states:

> The map of the subdivision, as drawn on the final plat shall comply with [MCL 560.135 through 560.141]. It shall contain sufficient information to completely define, for the purpose of a resurvey, the location of any boundary, corner or angle point within the plat. All land lying within the boundaries of the plat shall be shown thereon in such a manner that title to the area may be clearly established as to whether dedicated to public use or reserved to private use.

MCL 560.136(a) requires that the plat describe the location of the exterior boundaries of the parcel "with reference to a corner or corners established in the government survey and indicated by distances and bearings. The Michigan coordinate system may also be used for referencing such government survey points." Further, the plat must include the lengths and bearings of these boundaries, MCL 560.136(b) and (c), the location of public utility easements, MCL 560.139, the location of streets, roads, alleys, parks, and other public or private commons, MCL 560.137, and the length, width, and bearing of each lot line included in the plat, MCL 560.140. These requirements ensure that the plat map accurately identifies both the parcel and the property divisions within the parcel.

More importantly, after a plat has been recorded, lots in the plat must be referenced by use of the plat caption and lot number and not, for example, by a metes-and-bounds description of the property. "When a subdivision plat has been recorded, the lots in that plat *shall* be described by the caption of the plat and the lot number for all purposes, including those of assessment, taxation, sale and conveyance." MCL 560.255 (emphasis added). "The word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 537; 669 NW2d 594 (2003). MCL 560.255 requires that a lot in a platted parcel of land be identified in all transactions by referring to the plat, and not by a metes-and-bounds description. As indicated in MCL 560.135 through 560.141, the metes-and-bounds description of the lot and the property rights appurtenant to that lot are included in the recorded plat and describe the rights associated with that lot. Because all transactions involving the platted lot (including sales and conveyances of the lot) *shall* be described by reference to the plat caption and lot number, the description found in the plat of the lot and of the property rights associated with the lot acts as the "official" description of the lot. Accordingly, changes to the metes-and-bounds description of the lot or to the rights associated with the lot must be made by changing the plat.

In turn, this means that the process of changing the plat pursuant to the requirements of the Land Division Act also changes the substantive property rights associated with lots in that plat. Accordingly, the provisions of the Land Division Act concerning the vacation, correction, or revision of plats, MCL 560.221 through 560.229, effectuate substantive changes to property rights in the subdivided parcel and reflect these substantive changes through a corresponding change to the plat map. Therefore, when the trial court revised the plat to grant plaintiffs a utility easement appurtenant to Lot 2, it did not merely alter the plat map, but awarded plaintiffs an underlying substantive right to the utility easement.

B. Trial Court's Authority to Revise the Drive Easement to Include a Utility Easement

On appeal, defendants do not challenge the trial court's determination that the drive easement set forth in the plat is unambiguous and includes only a right of passage over the land. Rather, defendants argue that, given the trial court's conclusion that the platted drive easement encompasses only a right of passage to Lot 2 and does not extend to allow the placement of utilities in the easement, the trial court clearly erred in subsequently finding that plaintiffs were entitled to revise the plat pursuant to MCL 560.221 and MCL 560.226 to provide for a utility easement in the drive easement. Defendants maintain that because plaintiffs had no independent right to a utility easement under any substantive property-law theory, the trial court exceeded its authority in revising the plat to depict such an easement.

"[W]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). Thus, the trial court's determination that the term "drive easement," as used in the plat, is unambiguous prevented further inquiry into whether the drive easement was intended by the proprietors of the plat to also provide Lot 2 with access to utilities. In other words, having determined that the term "drive easement" as used in the plat was unambiguous, well-settled principles of common law prevented the trial court from considering extrinsic evidence to interpret that term to include utilities or anything other than passage. Thus, in the absence of the Land Division Act, the trial court's finding regarding the meaning of "drive easement" would necessarily end the trial court's analysis and preclude any grant of relief to plaintiffs.

The Land Division Act, however, unequivocally grants the trial court the authority to "vacate, correct, or revise all or a part of a recorded plat" if an owner in the platted subdivision files a proper complaint seeking such relief. MCL 560.221 and 560.222. Defendants do not assert that plaintiffs failed to file a proper complaint, and there does not appear to be any basis for them to do so. Thus, the trial court was within the statutory authority granted to it by the Land Division Act when it further considered plaintiffs' request to revise the plat, regardless of its earlier determination that the term "drive easement" was unambiguous as a matter of common law. Accordingly, the question before us becomes whether the Land Division Act authorizes the trial court's ultimate decision allowing revision of the plat to provide for a utility easement for the benefit of Lot 2.

The Land Division Act provides that, "[u]pon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised," subject to certain exceptions not applicable to the instant case.[5] MCL 560.226(1). The Land Division Act neither

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[5] These exceptions include the following: a state highway or federal aid road, which shall only be vacated, corrected, or revised by the state transportation department; a county road, which shall only be vacated, corrected, or revised by the county road commission having jurisdiction over it; and a part of a street or alley under the jurisdiction of a city, village, or township or a public walkway, park, public square, or any other land dedicated to the public other than for pedestrian or vehicular travel, which shall only be vacated, corrected, or revised by both a (continued…)

delineates the circumstances under which a trial court may determine that revision to a plat is appropriate nor places or defines the burden of proof to be met in order to warrant revision.

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). When determining intent, a court must look first at the language of the statute. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). "If the language is clear and unambiguous, judicial construction is not normally permitted." *Id.* If reasonable minds can differ regarding the meaning of the language used, however, judicial construction is appropriate. *Id.* "[U]nless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Lewis v LeGrow*, 258 Mich App 175, 183; 670 NW2d 675 (2003). "If the language used is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary." *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 567; 331 NW2d 456 (1982). The court may consult a dictionary to determine the ordinary meaning of undefined words in the statute. *Lewis*, *supra* at 183. Moreover, when interpreting statutes, every word, phrase and clause must be given effect, and an interpretation that would render any part of a statute surplusage or nugatory should be avoided. *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006).

Again, the plain language of the Land Division Act allows a court to "order a recorded plat or any part of it to be vacated, corrected, or revised . . . ." MCL 560.226(1). *Random House Webster's College Dictionary* (2000) defines "vacate" as "to give up or relinquish" or "to render inoperative; annul," while Black's Law Dictionary (8th ed) defines "vacate" as "[t]o nullify or cancel; make void; invalidate[.]" "Correct" is defined as "to set or make right; remove the errors or faults from." *Random House Webster's College Dictionary* (2000). "Revise" is defined as "to amend or alter" or "to alter (something written or printed), in order to correct, improve or update" by *Random House Webster's College Dictionary* (2000) and as "[t]o go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it" by Black's Law Dictionary (6th ed). Defendants' interpretation of the trial court's authority under the act, specifically that it could only correct the plat to depict preexisting substantive property rights, would be persuasive only if the act afforded the court the authority to vacate or correct a plat. Defendants' interpretation ignores the term "revise" in the statute and renders the use of that term surplusage or nugatory. This is impermissible. See *Grimes*, *supra* at 89. By affording a trial court the authority to "revise" a plat, the plain language of the Land Division Act permits a trial court to act beyond merely correcting errors. Instead, MCL 560.226(1) allows a trial court to order the alteration of a plat to effect the relinquishment of an interest, to remove errors or faults from the plat, *or* to amend, improve, or update it. Therefore, defendants' assertion that the trial court was precluded from considering plaintiffs' petition for revision of the plat and their limited construction of the trial court's authority under the Land Division Act lack merit.

(…continued)

resolution or other legislative enactment of the governing body of the municipality and by court order. MCL 560.226(1)(a) through (c).

C. Reasonableness Requirement

Defendants argue that the trial court erred when it required them to articulate a reasonable objection that was of substance and of value to the public in opposition to plaintiffs' request to revise the plat. Defendants also argue that the trial court erred when it concluded that defendants' objection to plaintiffs' request to revise the plat to provide for a utility easement in the central drive easement was not reasonable. We disagree.

As noted earlier, the Land Division Act does not place or define the burden of proof that must be met to warrant revision under the act. It simply provides that, after hearing the parties, the circuit court may vacate, correct, or revise all or part of a recorded plat. MCL 560.221. In *In re Gondek*, 69 Mich App 73; 244 NW2d 361 (1976), this Court addressed the burden of proof under the version of the Land Division Act then in effect.[6] The Court explained as follows:

> We confront yet another case which requires that this Court supply key missing pieces to a legislative puzzle called the Subdivision Control Act of 1967, [MCL 560.101 *et seq*.]. We have previously encountered confusion in this act, and must conclude, again, that "these provisions emerged prematurely from the legislative drafting process". *Feldman v Monroe Township Board*, 51 Mich App 752, 755; 216 NW2d 628 (1974).
>
> The precise question we must face is the placement and the severity of the burden of proof in a proceeding brought to vacate all or part of a recorded plat. . . .
>
> A review of the law of vacating recorded plats is in order. Before the 1967 enactment of the Subdivision Control Act, the statutory scheme found in the Plat Act of 1929, 1929 PA 172, governed the making, approving, filing, recording, altering, and vacating of plats. Under the 1929 act, those objecting to the petition to vacate bore the burden of raising a reasonable objection to the petition.
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> "[T]he court shall proceed to alter or vacate, correct or revise, the plat or part thereof, *unless there is reasonable objection to making the alteration or vacation, correction or revision,* in which case the court shall not proceed to alter or vacate, correct or revise the plat, or part thereof unless it is deemed necessary for the health, welfare, comfort or safety of the public." Former [MCL 560.62]. (Emphasis added.)

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[6] In *Gondek*, this Court referred to the act as the Subdivision Control Act. However, the title of the act changed after the *Gondek* decision was released. Now, the Subdivision Control Act "shall be known and may be cited as the 'land division act.'" MCL 560.101, as amended by 1996 PA 591.

* * *

> When the 1967 legislation was enacted, repealing the 1929 law, the draftsmen neglected to include an indication of who was to bear the burden of proof and what the precise burden was to be. Provisions in the new law that concern petitions to vacate elaborate requirements of pleading, notice, and standing, see [MCL 560.221 through 560.226], but give no clue to the burden of proof. Section 226 surprisingly concludes:
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> "After requiring proof that the required notices have been given and after hearing all interested parties, the court may order dimensional changes to be *made* in a recorded plat, or may order a recorded plat or any part of it to be vacated, corrected or revised * * * ."[7]
>
> There is no indication of why a judge should order that a plat be vacated, nor any suggestion of which party must convince the court. It is as if the Legislature set a table for a banquet but forgot to serve the meal. [*Id.* at 73-75.]

The *Gondek* Court then determined that

> [t]he least confusing and, we believe, most proper solution is to declare that the prior law on burden of proof in proceedings to vacate a plat remains intact despite the 1967 act. We believe that it is more appropriate to perpetuate prior law that has not been expressly rejected by the Legislature than it is to fashion a new doctrine out of thin air. If there was a legislative intent to replace the "reasonable objection" test, we cannot find it. If we are in error in continuing the prior test—a doctrine, incidentally that stood for nearly 40 years—let the Legislature correct us. See *First National Bank v Michaels*, 57 Mich App 468, 469-472; 226 NW2d 526 (1975). [*Id.* at 77.]

The Land Division Act was amended in 1996, after this Court's decision in *Gondek*. However, those amendments again failed to address the applicable burden of proof. It is understood that the Legislature is presumed to act with knowledge of longstanding judicial and administrative interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991); *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 606-607; 673 NW2d 111 (2003). Thus, the Legislature's continued refusal to address the placement of the burden of proof under the Land Division Act can be considered as sanctioning this Court's decision in *Gondek*. See *Smith v Detroit*, 388 Mich 637, 650-651; 202 NW2d 300 (1972);

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[7] As discussed later, § 226 was amended in 1996 to provide: "Upon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised . . . ." MCL 560.226(1).

Glancy v Roseville, 216 Mich App 390, 394-395; 549 NW2d 78 (1996), aff'd 457 Mich 580 (1998).[8]

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs met their initial burden of presenting admissible evidence to support their contention that defendants could present no reasonable objection: the longstanding use of the south drive easement for utility access for Lots 3, 4, and 5. The burden then shifted to defendants to come forward with admissible evidence showing that their objection to plaintiffs' petition to revise the plat to allow for utilities in the central drive easement was reasonable, even though defendants were using the south drive easement for utility access. The trial court observed that defendants submitted no admissible evidence establishing a reasonable objection to the revision of the central drive easement to include an easement for utilities, especially given their longstanding use of the south drive easement for utilities. Instead, the trial court noted that defendants' objections related only to their private concerns and involved purely private interests, specifically, their purported interest in having Lot 2 remain vacant for their convenience.

The principles announced by this Court in *Gondek* remain applicable to actions under the Land Division Act. Therefore, the trial court did not err when it required defendants to state a reasonable objection when attempting to defeat plaintiffs' request to revise the plat to allow for utility access to Lot 2 through the central drive easement. Further, given the longstanding use of the south drive easement by certain defendants for access to utilities, the trial court did not err when it determined that defendants failed to meet their burden of providing admissible evidence of any reasonable objection to the revision.

Defendants reiterate that plaintiffs have the burden of establishing the extent of the easement. On this basis, defendants assert that the trial court erred in imposing a requirement that they offer a reasonable objection to the revision of the plat. This is the case when asking the trial court to interpret or declare the extent of an easement pursuant to common law. However, defendants offer this Court no authority for applying these rules to actions brought under the Land Division Act, in contravention of the *Gondek* Court's decision. Thus, defendants' assertions in this regard lack merit.

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[8] In *Jones v Dep't of Corrections*, 468 Mich 646, 657; 664 NW2d 717 (2003), our Supreme Court declined to apply the "reenactment rule," which imposes on the Legislature a duty to show its intention to repudiate a judicial construction with which it disagrees, explaining that such a rule "cannot be used as a tool to circumvent the plain and unambiguous language of a statute." Here, however, there simply is no language addressing the burden of proof. Thus, the notion that the Legislature's failure to act in the face of this Court's decision in *Gondek* sanctions that decision is not being offered "as a tool to circumvent the plain and unambiguous language of a statute," but to fill a gaping hole in the statute, which the Legislature has repeatedly declined to remedy. Our Supreme Court's holding in *Jones* is inapposite.

The trial court acted within its statutory authority under the Land Division Act when it considered plaintiffs' request to revise the plat. Moreover, it properly applied the principles set forth by this Court in *Gondek* in granting plaintiffs the requested relief.

D. Effect of Restrictive Agreement

Defendants argue that the trial court ignored the plain language of the restrictive agreement when it granted plaintiffs' requested relief. We disagree. Instead, we affirm the trial court's conclusion that the plain language of the restrictive agreement was not meant to "forever preclude" construction on Lot 2, but merely to prevent construction until sewer service was made available to that lot.

Restrictive agreements are grounded in contract. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). "[I]f contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). When a court construes a contract, the language used therein "should be given its ordinary and plain meaning." *Id.* at 722. "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Moreover, when construing the language of a restrictive agreement, "[t]he provisions are to be strictly construed against the would-be enforcer, . . . and doubts resolved in favor of the free use of property." *Stuart*, *supra* at 210.

Paragraph 3 of the restrictive agreement provides: "[I]t is hereby covenanted and agreed that no building, structure or dwelling shall be constructed on Lot 2 of said plat unless and until a municipal sanitary sewer line is made available to the premises." Defendants argued in the trial court that the language of the restrictive agreement prohibits construction on Lot 2 unless and until the owners of Lots 1, 3, and 4 grant Lot 2 an easement for municipal sewer service. The trial court disagreed with defendants' interpretation of the pertinent portion of the restrictive agreement, explaining as follows:

> Defendants argue that this limitation was meant to forever restrict any and all construction on Lot 2. A plain reading of this restriction contradicts Defendant's [sic] argument: if the grantors wanted to forever preclude any construction on Lot 2, the restriction would have stated as much in explicit language by ending the provision after the word "plat" [so that it read "[t]hat it is hereby covenanted and agreed that no building, structure or dwelling shall be constructed on Lot 2 of said plat"]. Defendants' argument in this regard must therefore fail.

The trial court's conclusion properly gives effect to all pertinent language in the restrictive agreement. Conversely, defendants' urged interpretation would render more than a third of the words used in paragraph 3 of the agreement surplusage and would add additional terms, specifically that the owners of the other lots controlled if and when Lot 2 would be developed. Given that constructions that render any part of a restrictive agreement surplusage or

nugatory must be avoided, *Klapp*, *supra* at 468, and that the language of a restrictive agreement must be strictly construed against defendants, with any doubts regarding the meanings of terms to be resolved in favor of the free use of property, *Stuart*, *supra* at 210, we conclude that the trial court did not err when it rejected defendants' interpretation of paragraph 3 of the restrictive agreement. Therefore, defendants' argument that the trial court ignored a valid restrictive agreement when it ordered the revision of the plat pursuant to MCL 560.221 and MCL 560.226(1) lacks merit.

III. Utility Easement by Necessity

On cross-appeal, plaintiffs argue that the trial court erred in declining to extend the doctrine of easement by necessity to provide for a utility easement to their property. Plaintiffs recognize that no Michigan court has extended this doctrine to encompass access to utilities, but they assert that, given that utility access is strictly necessary for a party to make reasonable use of property of this kind, this Court should do so. Whether Michigan law provides for the granting of an easement for utilities by necessity is an issue of first impression in this state and a question of law subject to review de novo. See *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Because the trial court, pursuant to the Land Division Act, revised the plat to create a utility easement for Lot 2, an easement by necessity was not necessary to provide utility access to Lot 2. Accordingly, to the extent that the trial court's revision of the plat to provide the utility easement is upheld, we affirm the trial court's decision not to grant plaintiffs an easement by necessity. However, we hold that if the trial court had not revised the plat, or if another method by which to create a utility easement had not been available, the trial court would have erred when it failed to grant plaintiffs a utility easement by necessity to access Lot 2. Although the trial judge was correct when he noted that easements by necessity for utilities have yet to be recognized by the appellate courts of Michigan, today we determine that such easements exist at common law in Michigan.

An easement by necessity "may be implied by law where an owner of land splits his property so that one of the resulting parcels is landlocked except for access across the other parcel." *Chapdelaine v Sochocki*, 247 Mich App 167, 172; 635 NW2d 339 (2001). The law presumes, in such situations, that the parties intended that the landlocked parcel be accessible, and, therefore, "[i]n a conveyance that deprives the owner of access to his property, access rights will be implied unless the parties clearly indicate they intended a contrary result." *Id.* at 173. As explained in *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980):

> Before an easement will be implied [from necessity], the party who would assert the easement must establish that it is strictly necessary for the enjoyment of the property. Mere convenience, or even reasonable necessity, will not be sufficient if there are alternative routes, even if these alternatives prove more difficult or more expensive. All implied easements are based on the presumed intent of the parties, but this sort is additionally supported by the public policy favoring the productive and beneficial enjoyment of property.

A grant of an easement by necessity requires a showing of reasonable necessity.[9] *Chapdelaine*, *supra* at 173; *Schmidt*, *supra* at 732. In *Schumacher v Dep't of Natural Resources*, 256 Mich App 103, 106; 663 NW2d 921 (2003), this Court stated, "The scope of an easement by necessity is that which is reasonably necessary for proper enjoyment of the property, with minimum burden on the servient estate."

It is undisputed that, before the trial court revised the plat to provide utility access to Lot 2 by way of the central drive easement, Lot 2 lacked access to utilities. 1 Restatement Property, 3d, Servitudes, § 2.15, comment d, p 208, explains that utility easements have become increasingly necessary for the reasonable enjoyment of property:

> [T]he increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justify [sic] the conclusion that implied servitudes by necessity will be recognized for those purposes. Whether access for other utilities and services has also become necessary to reasonable enjoyment of property depends on the nature and location of the property and normal land uses in the community.

Again, plaintiffs acknowledge that no Michigan court has extended the common-law doctrine of easement by necessity to encompass access to utilities. However, numerous cases from other states have determined that easements by necessity for utility access are appropriate given the need for utilities in modern life, public policy favoring productive use of land, and the need to effectuate the presumed intent of grantors of property. See *Smith v Heissinger*, 319 Ill App 3d 150, 155; 745 NE2d 666 (2001) (easement by necessity is not limited to ingress and egress only, but can exist for access to sewer lines, catch basins, and water supply so as to further the public policy favoring the full use of land); *Brown v Miller*, 140 Idaho 439, 443; 95 P3d 57 (2004) (easement by necessity "reasonably includes utilities for a single family residence"); *Cline v Richardson*, 526 NW2d 166, 169 (Iowa App, 1994) (easement for ingress

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[9] Older Michigan cases spoke of a requirement of strict or absolute necessity. See *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 609; 265 NW 474 (1936) (discussing a "right of way being one of strict necessity, if such right exists at all, and not one of mere convenience"). However, as this Court explained in *Schmidt*, *supra* at 733-735, traditionally, strict necessity was required for assertion of an implied *reservation* of an easement by the grantor as distinct from an implied *grant* of an easement to the grantee. This distinction was eliminated in *Harrison v Heald*, 360 Mich 203; 103 NW2d 348 (1960), at least with regard to easements implied from a "quasi-easement," that is, an obvious and apparent servitude existing in favor of one parcel over the other before severance of the two parcels. *Schmidt*, *supra* at 733-735. More recently, this Court declared that an easement by necessity requires that the party asserting the right to the easement establish that "the easement is *reasonably necessary, not strictly necessary*, to the enjoyment of the benefited property." *Chapdelaine*, *supra* at 173 (emphasis added). Thus, the law now seems settled that the necessary showing to warrant an implied easement, whether by necessity or by quasi-easement, is one of reasonable necessity, not strict necessity. *Id.*; *Schmidt*, *supra* at 735.

and egress includes a right to install utilities); *Morrell v Rice*, 622 A2d 1156, 1160 (Me, 1993) ("An easement created by necessity can include not only the right of entry and egress, but also the right to make use of the easement for installation of utilities, essential for most uses to which property may reasonably be put in these times."); *United States v 176.10 Acres of Land*, 558 F Supp 1379, 1381-1382 (D Mass, 1983) (easement by necessity includes the right to install utilities); *Huggins v Wright*, 774 So 2d 408, 412 (Miss, 2000) (providing easement by necessity for ingress and egress and for utilities).

Plaintiffs assert that the utility services they seek to access using the existing central drive easement are "not only 'normal in the area,' they are the same utilities the Defendants access through their '[south] drive easement.'" Plaintiffs further claim that utilities are necessary for plaintiffs to make reasonable use of their property, which at all times was intended to be used as a residential lot. Defendants argue that plaintiffs are not entitled to an easement by necessity for utility access because the doctrine of easement by necessity is limited to affording parties access to their property and plaintiffs have access to their property by way of the central drive easement. Moreover, defendants argue that the property is not rendered "unproductive" in the absence of access to utilities because plaintiffs can continue to use their property for beach access in the same manner as they have used the property for the past 30 years.

Given that the property is residential in character, that it has been approved for construction of a residence, that plaintiffs cannot construct their home without access to utilities, and that any additional burden on the servient estate caused by the placement of utilities in the central drive easement (beyond the period allowing for their initial installation) would seemingly be minimal,[10] and, moreover, given society's "increasing dependence in recent years on electricity" and other utilities, we conclude that plaintiffs' access to utilities would be "necessary to [the] reasonable enjoyment" of their property, consistent with "the nature and location of the property and normal land uses in the community." Restatement, p 208. Therefore, if access to utilities had not been provided through revision of the plat, plaintiffs would have been entitled to an implied easement by necessity allowing access to these utilities.

Accordingly, the common-law doctrine of easement by necessity includes not only physical access to landlocked property, but also access to utilities for properties landlocked from utilities unless, consistent with the traditional principles of easement by necessity, the parties to the conveyance that left the property without such access "clearly indicate[d] that they intended a contrary result." See *Chapdelaine, supra* at 173. This declaration affords any owner of Michigan property who does not have access to utilities a potential implied right to such access,

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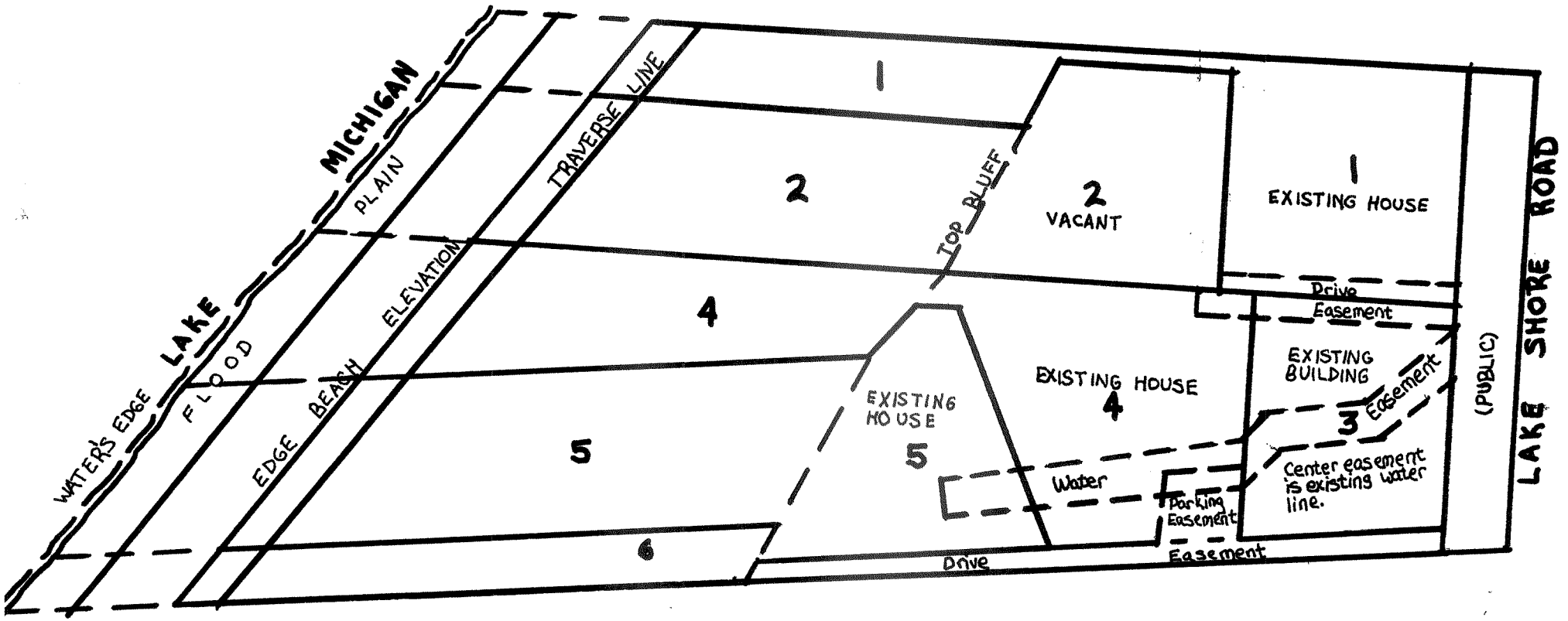
[10] Defendants assert that the additional burden on their properties would be significant. However, it is clear that the burden to which defendants object is not a result of the presence of utilities under the drive easement, but the result of allowing such utilities: the presence of a home on Lot 2. We note that defendants' desire that Lot 2 remain vacant is not a proper consideration in evaluating whether the presence of utility lines under the central drive easement constitutes an additional burden on the servient estates.

provided that there is no clear indication that a contrary result was intended *and provided that* access to utilities is necessary for the reasonable enjoyment of the property, given the location of the property and normal land uses in the community. This conclusion is consistent with both the principles underlying the doctrine of easement by necessity and the realities of modern life.

Affirmed.

Hoekstra, J., concurred.

/s/ Donald S. Owens
/s/ Joel P. Hoekstra


LAKE MICHIGAN
WATER'S EDGE
FLOOD PLAIN
EDGE BEACH
ELEVATION
TRAVERSE LINE
TOP BLUFF
1
2
2
VACANT
1
EXISTING HOUSE
4
Drive Easement
EXISTING BUILDING
3
Easement
EXISTING HOUSE
4
EXISTING HOUSE
5
5
Water
Parking Easement
Center easement is existing water line.
6
Drive
Easement
(PUBLIC)
LAKE SHORE ROAD