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

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.

Official Reported Version

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

ZAHRA, P.J. (*dissenting*).

I respectfully dissent. Contrary to the conclusions reached by the majority, I conclude that the Land Division Act, MCL 560.101 *et seq.*, does not permit a court to change substantive private property rights through the plat-revision process. Further, I conclude that plaintiffs are not entitled to an easement by necessity, because they have access to the land through an existing drive easement, that they are free to enjoy it in the same manner as their predecessors always have, and that they acquired their interest subject to a restrictive agreement—which agreement would be all but nullified under the majority's opinion. Therefore, I would reverse the trial court's decision to the extent that it used the Land Division Act to alter the parties' substantive property interests. I would also affirm the trial court's determination that plaintiffs do not have an easement by necessity and that the easement in question is a drive easement limited to that use. I would remand for entry of an order granting defendants' motion for summary disposition.

I. The Trial Court's Decision

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 part of the complaint. 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 noted that plaintiffs had relied on *Feller v Sylvan Twp*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2000 (Docket No. 212624), in their motion for summary disposition "for the proposition that the court shall proceed to alter or vacate, correct or revise, the plat or

part thereof, unless there is a reasonable objection."[1] The trial court ultimately concluded that plaintiffs met the burden necessary, such that a revision of the plat, to include a utility easement coexistent with the central drive easement for the benefit of Lot 2, was warranted. The trial court observed that defendants "have already run utility lines under their own [south] drive easement" and, therefore, it found plaintiffs' argument, that defendants could not reasonably object to plaintiffs' request to amend or revise the plat to allow plaintiffs to run utility lines under the central drive easement, to be "very compelling." Further, citing *Yonker v Oceana Co Rd Comm*, 17 Mich App 436; 169 NW2d 669 (1969), the trial court also stated that defendants had not

> submitted any admissible evidence which would support a reasonable objection to [p]laintiffs' 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 [d]efendants relate [only] to private concerns and involve purely private interests.

The trial court thus 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. Analysis

On appeal, defendants argue that the trial court erred by allowing plaintiffs to acquire an interest in property through the plat amendment process under the Land Division Act. The majority agrees with the trial court, although for different reasons. Whereas the trial court relied on *Feller* and *Yonker*, as well as defendants' own conduct with respect to use of their south drive easement, the majority relies on its interpretation of the language of the statute. I conclude that both analyses are erroneous.

A. The Plat-Amendment Process

1. Rules of Statutory Construction

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. If the language is clear and unambiguous, judicial construction is not permitted. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). Unless defined in the statute, every word or phrase used should be given its plain and ordinary meaning, *considering*

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[1] This Court adopted the "reasonable objection" standard in *In re Gondek*, 69 Mich App 73; 244 NW2d 361 (1976), which was also cited by the trial court, with respect to the property interests at issue in that case. The majority addresses the trial court's determination with respect to this issue; however, because I conclude that the Land Division Act did not grant the trial court the authority to change the substantive property interests at issue in this case, this opinion will not address whether defendants needed to raise a reasonable objection to the petition.

the context in which the words are used. *Lewis v LeGrow*, 258 Mich App 175, 183; 670 NW2d 675 (2003). The court may consult a dictionary to determine the ordinary meaning of undefined words in the statute. *Id*. Additionally, 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).

2. The Land Division Act Does Not Authorize Changes in Land Interests Through the Plat-Revision Process

The key provision of the act at issue here, MCL 560.221, provides: "The circuit court may, as provided in sections 222 to 229[2] vacate, correct, or revise all or a part of a recorded plat." The trial court adopted the whole of MCL 560.221 as a judicial fiat to alter substantive property rights; the majority goes further by analyzing the words "vacate," "correct," and "revise" to authorize a change in the parties' substantive property interests. However, both analyses fail to note that the statute merely authorizes a change in "all or a part of a recorded *plat*."

The word "plat" is defined in the act as "a map or chart of a subdivision of land." MCL 560.102(a). This definition, together with a review of the other uses of the word "plat" in the act (see *Yaldo, supra* at 346), leaves no doubt that a plat is merely a two-dimensional description of physical property interests in some specific place; or, as the majority itself states: "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." *Ante* at ___ (emphasis added). Indeed, the majority appears confused when it continues by stating: "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." *Ante* at ___ (emphasis added). The words "description," "map," and "reflects," as used by the majority, are consistent with my conclusion that a plat is a map and not, by itself, a determination of substantive property interests. Moreover, the majority's notion that a "map of the subdivision filed with the final plat" indicates that the plat is something other than and in addition to a map of the subdivision (e.g., "filed with"), which by the terms of the statute it is not.

Additionally, the majority did not engage in analyzing the word "plat" as it is used throughout the statute. Had it done so, it would have found numerous examples within the act that support my conclusion.

MCL 560.103(3) states: "A survey and plat shall be made when any amendment, correction, alteration or revision of a recorded plat is ordered by a circuit court." If the statutory provisions at issue in this case stand for the proposition that a circuit court may change the

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[2] MCL 560.226(1) provides, in pertinent part: "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 . . . ."

substantive property rights of landowners, then a "survey" in order to make a new plat would be superfluous because the court would have already determined the changed boundaries.

MCL 560.105 conditions the approval of a final or preliminary plat, in part, on compliance with

> (d) The rules of the state transportation department relating to provisions for the safety of entrance upon and departure from the abutting state trunk line highways or connecting streets and relating to the provisions of drainage as required by the department's then currently published standards and specifications.
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> * * *
>
> (f) The rules of the department of environmental quality for the determination and establishment of floodplain areas of rivers, streams, creeks, or lakes, as provided in this act, as published in the state administrative code.

These provisions indicate that a plat must contain certain markings to show where the state has established roads, drains, and floodplains, i.e., where they exist on a map, not whether a landowner has property rights in them. Moreover, interests in property would be subject to approval of various state agencies—making them arbiters of property interests.

MCL 560.206(1), concerning reconciliation of boundaries within plat, states: "The surveyor making the plat shall reconcile any discrepancies that may be revealed, so that the plat as certified to the governing body shall be in conformity with the records of the register of deeds *as nearly as is practicable*." (Emphasis added.)

If plats were determinations of substantive property interests, then MCL 560.206(1) would eviscerate settled property law because property interests would no longer be subject to precise definition but would, instead, be defined as "nearly as is practicable." This cannot be so. Property law—most notably a determination of the true hairline between neighboring interests—is at its core a zero-sum proposition, in which the loss by one is the gain of another if neither can have more than the constant sum of both. The language of MCL 560.206(1) contemplates acceptable gray areas. No determination of substantive property interests would permit such a nebulous result. Interpreting a plat to be the equivalent of a map, as this Court is obligated to do under the statutory definition of the word "plat," a map may be marginally imprecise yet still serviceable by putting purchasers on notice of the approximate location of interests.

MCL 560.212 also makes it clear that a plat is nothing more than a description of preexisting land interests. It states, in pertinent part:

> Reference to any land, as it appears on a recorded assessor's plat is sufficient for purposes of assessment and taxation. Conveyance may be made by reference to the plat and shall be as effective to pass title to the land so *described* as it would be if the premises had been *described* by *metes and bounds*. The plat

> or record thereof shall be received in *evidence* in all courts and places as correctly *describing* the several parcels of land therein designated. [Emphasis added.]

Besides the recurring references in MCL 560.212 to a plat as merely a description of interests in land, analysis of other language within the provision supports this conclusion. First, the language "metes and bounds" refers to a description of land. See *Cramer v Ballard*, 315 Mich 496, 500; 24 NW2d 80 (1946). The term "metes and bounds" is also a legal, rather than an informal, description of land and is the oldest method of land description, dating to colonial America. 14 Powell, Real Property, § 81A.05[2][a] and [b]. But a description of land is generally not used as a means of determining rights in interests of the land. 14 Powell, § 81A.05[1][b].[3] See also *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999), in which this Court recognized that an adequate description of the land is but an essential part, among several, of a contract for the sale of land. So, rather than dictating that a conveyance took place, the plat represents merely an adequate description of land—thus fitting the rest of the language of MCL 560.212 that compels all courts to receive a plat as evidence of a particular property interest. Such evidence would be persuasive, but so would a recorded deed, or a mortgage, or other parts of a contract, or some other written instrument purporting to determine the interests at stake in a case. Allowing the trial court here to use a mere description of property interests to change substantive property interests would render all but useless other related written instruments introduced into evidence.

I also disagree with the majority opinion's application of the word "revise," which it uses as its chief means of supporting the conclusion that the statute gives a trial court plenary authority to alter substantive property rights.[4] On the contrary, I do not find any portion of the

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[3] "The description of the land should not generally contain a statement of the type of estate or interest that is being conveyed by the deed. (In other words, it should not include language describing an estate such as a fee simple or remainder, or another interest such as an easement or license.)" 14 Powell, § 81A.05[1][b].

[4] Specifically, the majority contends:

> "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* [*v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006)]. 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 relinquish an interest, to remove errors or faults from the plat, *or* to amend, improve, or update it. Therefore, defendants'

(continued…)

statute to be surplusage or rendered nugatory by my proposed interpretation. "Revise" means "to amend or alter" or "to alter . . . in order to correct, improve or update," *Random House Webster's College Dictionary* (2000), or "[t]o go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it[.]" Black's Law Dictionary (5th ed). Given these definitions, the statute allows the court to "revise" a plat so that it reflects a change in the underlying interests, even those arising other than by mistake, such as by abandonment of an easement or acquisition of an interest by adverse possession or acquiescence (in which case the revision would be to "update" the plat, as under the *Random House* definition) or where an easement by necessity can be established ("amending" it, as under the Black's Law definition). In any event, there is in this case no underlying change in interests—whether by conveyance, abandonment, mistake, etc.—that would allow the court to alter the plat to reflect that change.

Finally, given the restrictive covenant that exists in this case, I am troubled by the majority's conclusion that the Land Division Act allows a circuit court to change substantive property rights through the plat-amendment process. Plaintiffs do not dispute that they had notice of the restrictive agreement—it was signed on December 10, 1974, by Jane H. Henkle (plaintiff Janice H. Tomecek's mother and plaintiffs' predecessor in interest) and notarized. In fact, Henkle signed the restrictive agreement on the same day she signed the plat, and both documents were recorded with the Berrien County Register of Deeds and given the same liber and page number. "Under Michigan law, a covenant constitutes a contract, created by the parties with the intent to enhance the value of property." *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004), citing *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). "When interpreting restrictive covenants, therefore, when the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole." *Hickory Pointe Homeowners*, *supra* at 515-516, citing *Cooper v Kovan*, 349 Mich 520, 527; 84 NW2d 859 (1957). Thus, the majority's interpretation of the powers granted by the statute place it directly in conflict when, as in the case here, otherwise enforceable restrictive agreements exist, which covenants are nullified by such use of the act.

3. The Trial Court's Reliance Is Misplaced

I also do not find persuasive those cases the trial court cited and relied on for its determination. In *Feller*, this Court did not find it necessary to engage in statutory analysis to determine whether the act gives courts the ability to change substantive property interests by amending the plat. In *Feller*, the plaintiffs asked the trial court to use the act to vacate and relocate a road. The plaintiffs submitted

> documentary evidence of the agreement . . . which gave defendants access to their easement from the relocated Ridge Road. Lack of access to the easement was the basis of defendants' objection to the vacation and relocation of Ridge Road. Thus,

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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. [*Ante* at ___.]

> plaintiffs had shown . . . that the basis for defendants' objection had been eliminated. [*Feller, supra,* slip op at 2.]

Further, the Court in *Feller* noted that the easement itself—the defendants' substantive property interest—was otherwise unaffected by changing the plat. *Id.* at 3. In this case, defendants' substantive interest would be affected by changing the plat. Therefore, any reliance by the trial court on *Feller*, even if it were binding on this Court, is misplaced.

Similarly, *Yonker* involved an attempt by the plaintiffs in that case to vacate a county road. The road had been dedicated to the public and accepted by the county when the area was platted. A "dedication, gift or grant" of land vests a fee simple interest in the donee. MCL 560.253(1).[5] Moreover, the deeds of the plaintiffs—private landowners whose property abutted the road—"were made specifically subject to or excepted the road. The deeds to the land not subdivided[6] were made 'subject to highway or roadway, if any.'" *Yonker, supra* at 440. As such, no substantive private property interests were at stake as they are in this case. Notwithstanding that *Yonker* was decided under the predecessor of the Land Division Act, it is irrelevant here because the trial court used it for the rule that a defendant's reasonable opposition to a change in a plat must also be for a "public purpose." Here, the question is whether a circuit court may change substantive private property interests by changing a plat.

I conclude that, in order to change a plat under MCL 560.221, the trial court would have first had to determine that plaintiffs prevailed on a claim to change their substantive property interests in the drive easement, e.g., abandonment, necessity, mutual mistake in the conveyance, etc. In the absence of such a determination, the trial court should have concluded that it had no power to use the act to effect a change in such interests.

B. Plaintiffs Are Not Entitled to an Easement by Necessity

Plaintiffs claim on cross-appeal, as they did in the trial court, (1) that they are entitled to an easement by necessity because the original grantors intended that the owners of Lot 2 would be able to build a house there, (2) that other jurisdictions and authorities have granted or would grant similar easements for modern utility use, (3) that Michigan's jurisprudence should evolve

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[5] MCL 560.253(1) provides:

> When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.

See also *Martin v Beldean*, 469 Mich 541, 542; 677 NW2d 312 (2004).

[6] Part of the road was outside the plat.

along the same lines as that of other jurisdictions, and (4) that defendants would bear no burden by such a grant.

This Court reviews for clear error a trial court's determinations relating to the extent of a party's rights under an easement. *Blackhawk Dev Corp* v *Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). However, this Court reviews de novo a trial court's determination regarding summary disposition. *Id*. Easements are, generally, limited to a specific purpose. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005).

Only if the language granting the easement is ambiguous may a court use extrinsic evidence to determine the scope of the easement. *Blackhawk*, *supra*, at 48-49. Further: "The use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943).

The original grantors' intent, as expressed in the putative conveyances of 1978 and 1984, is irrelevant here because the language establishing the easement is unambiguous. The plat labels the easement at issue in this case "Drive Easement" and gives its dimensions. Further, the "Proprietor's Certificate" on the plat states, in pertinent part, that "the public utility easements are private easements and that all other easements are for the uses shown on the plat . . . ."

Michigan law recognizes that an easement by necessity may arise when a landowner has subdivided his or her property but has left himself or herself landlocked. *Chapdelaine v Sochocki*, 247 Mich App 167, 172-173; 635 NW2d 339 (2001). In *Chapdelaine*, this Court also determined that such an easement would be granted for access to the property unless the conveyance between the parties indicated their intent not to do so. *Id.* at 173.

In this case, plaintiffs are not landlocked—they still have access to Lot 2 by the drive easement. Therefore, because it is not necessary to relieve plaintiffs from being landlocked, no such easement can arise.

Alternatively, plaintiffs argue, and the majority agrees, that Michigan should adopt what plaintiffs refer to as a more modern approach to easements by necessity under 1 Restatement Property, 3d, Servitudes, § 2.15, p 202,[7] which reads:

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[7] More specifically, the trial court cited comment d to this section, which provides, in part:

> [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. [1 Restatement Property, 3d, Servitudes, § 2.15, comment d, p 208.]

> A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Our Supreme Court, in *Carmody-Lahti*, *supra* at 379 n 42, rejected an overly broad reading of a similar passage in the Restatement. Although *Carmody-Lahti* involved a railroad easement, which the Court distinguished from other types of easements, the Court observed that easements serve a particular purpose even though the "manner, frequency, and intensity"[8] of the particular purpose might change from time to time, which change would allow the dominant estate to be reasonably enjoyed. *Id.* Following *Carmody-Lahti,* I conclude that easements in Michigan may change by some degree, but they must retain the particular purpose for which they were created. In my opinion, the majority impermissibly changes the particular purpose of the drive easement in this case to include various utilities and sewer service.

Further, the so-called necessity in this case would not exist but for the restrictive agreement that plaintiffs had full knowledge of before acquiring their interest in the land. Put another way, plaintiffs now seek an easement by necessity for a situation that they, by way of their predecessors, created. If the restriction against building on Lot 2 did not exist, and plaintiffs could build a home using a well and a septic field, then a sewer easement would not be a necessity. In essence, the majority's creation of a new rule eviscerates an existing contract agreed to by plaintiffs.

For the foregoing reasons, I would reverse the trial court's determination that the Land Division Act permits a court to change substantive property rights through the plat-amendment process and would affirm the trial court's conclusions that the drive easement is limited to a right of passage and that plaintiffs are not owed an easement by necessity.

/s/ Brian K. Zahra

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[8] See 1 Restatement Property, 3d, Servitudes, § 4.10, p 592.