Board Meeting
Strawberry Hill Estates Homeowners Association
Date: Saturday, August 29, 2015 noon

A meeting was held of the Strawberry Hill Estates Homeowners Association at the above time, and at the location requested by the Board President. The meeting was called by electronic mail, and all Board members received the meeting request and replied. The meeting location was at 5156 Lisch Drive as requested by the Board President.

The meeting was called to order by Motion at approximately noon.

Those in attendance at the meeting were:

Strawberry Hill Estates Board

President: David Walmroth, 734-478-5175 david.walmroth@gmail.com
Vice President and Secretary: Mary McLaughlin 734-646-5363 memc@ieee.org
Treasurer: Craig Mestach 734.417.9224 tsstitanic@gmail.com

Others in Attendance:

James Roach, Estates
Amanda Cole, Estates
Casey Cole, Estates
Dave Kelsey, relative of Amanda Cole

The main topic of discussion was the Cole request to build a storage building on their property. This request can be found on the link: https://www.dropbox.com/sh/h6zypdo725gtfg8/AABASpD93t2Iwq1YsizCM1m9a?dl=0

There was heated discussion about the request. Comments included:

- McLaughlin: In accordance with an email opinion from a building code expert, paragraph 2 of our Building and Use Restrictions allows a structure that is "incidental to residential use" which means a building related to the use of the main building.

- Roach: "Incidental" means something like a swingset, that the Coles were building a "pole barn," and that it wasn't allowed.

- McLaughlin: We might not want additional buildings, but they seem to be allowed the way the Rules are written now. There's no restriction on size of them

either, or the number allowed. The code expert said we should probably make our Building and Use Restrictions much more specific.

- The Coles clarified that their request was for a garage to store their antique cars, and that the structure would be consistent in quality and appearance of their home.

- Mr. Roach said only one attached garage was allowed, but concern was voiced that this statement was not clearly evident in the Building and Use Restrictions.

A vote was taken, and the Coles' request was denied with a vote of :

Walmroth: No
Mestach: No
McLaughlin: Yes, with the comment that the Building and Use restrictions appear to allow it, but that they need to be amended immediately to ensure clarity and consistency with our understanding, e.g., size of additional buildings incidental to residential use, quantity of buildings, and other edits as recommended by building experts; she further requested that the board get an outside *legal opinion* on whether the Building and Use restrictions allow this request, particularly the definition of "incidental to residential use."

Mr. Roach informed the Coles that they should not build their structure because Michigan Law would allow us to sue them and remove it. Mr. Kelsey asked if he was being threatened and that if Mr. Roach's comments were an attempt to intimidate him or his daughter (Amanda Cole) that it would not work. The Coles and Mr. Kelsey left the meeting.

After the departure of the Coles, Mr. Roach presented a letter and attachment he had previously drafted telling the Coles of the Board's decision and citing Michigan law that in his view supported removing the building if constructed. Note that Mr. Roach's work is appreciated as a contribution from an interested neighbor, but was not a *legal* effort under contract by the Board or derived from any Board request or decision to hire him.

Mr. Walmroth decided to sign the letter to the Coles and did so, confirming to them that the Board decision was "No," and that they should not proceed with their construction effort.

Ms. McLaughlin stated again that we needed an *independent legal opinion,* particularly on the definition of "incidental to residential use. She was concerned that an expert in the building code industry had a conflicting definition to Mr. Roach's upon which the other two Board members were relying, and that the Board should clarify its authority to independently initiate litigation without an Association Member vote. She also said that she personally felt that Mr. Roach had a conflict of interest in this matter since he is both an Association member/homeowner, and is attempting to represent the Board and

Association. She stated further, that should this matter go to litigation, we need to get the Association Members' vote to expend what could be substantial resources, and that we as the Board cannot encumber the Association's resources in that manner. She stated that given the litigious history in this neighborhood, she would not agree to hiring Mr. Roach to represent us, and if litigation was approved by the Association, we needed to hire an individual who is acceptable to the neighborhood.

Ms. McLaughlin asked that we get the independent legal opinion prior to sending the letter to the Coles. Mr. Walmroth said there was no need to delay sending the letter, but to "go ahead and get the Opinion," and if it should sway the decisions made today, that the Board could change its decision. Mr. Mestach agreed.

Ms. McLaughlin agreed to immediately get the legal Opinion. She agreed to having the letter sent to the Coles prior to receiving that legal Opinion, and she agreed to scan the letter and provide copies to the Board and the Coles. (Note: She subsequently did so, and mailed it certified mail to the Coles, as the pre-printed letter indicated, on Monday 8/31when the post office opened. At that time, she also sent the scanned letter to the Board and to the Coles, attaching the information that the board decided to get a legal Opinion and confirming the Board's request that the Coles not begin construction. She suggested there may be other means to resolve the problem, and hoped the legal Opinion would provide a recommendation on options.)

There was a Motion and second to close the meeting at approximately 1:15 p.m. on August 29, 2015.

Respectfully submitted,

Mary Eileen McLaughlin.
Vice President and Secretary,
Strawberry Hill Estates Homeowners Association

Strawberry Hill Estates I, II, III & IV
Home Owners Association
Board of Directors

VIA CERTIFIED MAIL

August 29, 2015

Casey and Amanda Cole
11060 Indianola Road
Whitmore Lake, MI 48189

Re: Building Plans for 11060 Indianola Road

Dear Mr. and Mrs. Cole:

We have received the documents you submitted on August 8, 2015 regarding your plans to build your proposed "garage." Your request for the required approval is **denied**, for the following reasons:

1) The submitted documents are not sufficient for the Board to determine the size, style, and finishes.
2) It appears from your submitted documents that you are planning on building a large pole barn, which is precluded by the applicable Building and Use Restrictions, as follows:
   a) Paragraph 2 limits a building site to one residential house with an attached private two car garage. You already have an attached garage. That paragraph precludes building a second detached "garage," and does not allow for building a large pole barn. Paragraph 7 also refers to a single attached two car garage.
   b) Paragraph 5 directs the Association to interpret the Building and Use Restrictions in such a way for the subdivision to be developed into a "beautiful, harmonious private residential area." A pole barn is not consistent with a private residential area.

Accordingly, your request to build a pole barn is denied. It has come to our attention that you have already begun clearing your lot for your proposed project. Please be advised that the Board has a duty to enforce the Building and Use Restrictions. Under Michigan law, these restrictions are to be enforced as written. Please see the attached Michigan Court of Appeals opinion in *Thom and Lockwood Hills Association v. Palushaj* (COA No. 3015678, Feb. 14, 2012). If you proceed with your unauthorized building, the Board will have no choice but to seek temporary and preliminary injunctive relief in court to prevent you from moving forward with your project, as well as recovering from you our attorney fees and costs so incurred.

Sincerely yours,

By: _____
David Walmroth, President

Please see attached addendum.

Strawberry Hill Estates I, II, III. IV
Home Owners Association
Board of Directors

August 29, 2015

Mr. Casey Cole and
Ms. Amanda Cole
11060 Indianola Rd
Whitmore Lake, MI 48189

Dear Mr. and Ms. Cole,

This letter is an addendum to the attached letter signed by Dave Walmroth, our Board President. The following occurred after you left the Board meeting today but prior to our official closure of the meeting.

As you are aware, the Board was not unanimous in its decision on this matter, i.e., to deny your request for the building construction on your property, due primarily to the definition of the term "incidental to residential use" used in our Building and Use Restrictions. Therefore, we did unanimously agree to obtain a legal opinion from a qualified attorney to advise us on this matter. You are aware, and I will confirm, that Mr. Roach's opinions presented at the meeting are those of a *neighbor* who does indeed happen to be an attorney. However, the Board did not contract with Mr. Roach for a *legal* opinion in this matter, nor did we contract with him for his services to draft the letter and attachments signed by Mr. Walmroth, nor is he a Board member.

I do caution you to not proceed with the construction of your building until the Board has a formal legal opinion in the matter. Mr. Walmroth noted that should that opinion convince the other board members that your request is allowable, we will be able to rescind the denial of your request.

If you have any further questions, please do not hesitate to contact me by email or phone.

Sincerely,

Mary Eileen McLaughlin
Vice President and Secretary
Strawberry Hill Estates Homeowners Association

STATE OF MICHIGAN

COURT OF APPEALS

GERALD THOM and AILEEN THOM,

Plaintiffs-Appellants/Cross-Appellees,

and

LOCKWOOD HILLS ASSOCIATION,

Intervening-Plaintiff,

v

SIMON PALUSHAJ and SACA PALUSHAJ,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
February 14, 2012

No. 301568
Macomb Circuit Court
LC No. 2004-003383-CZ

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order after remand. On appeal, plaintiffs assert that the trial court improperly balanced the equities on remand when it was required to issue an injunction. Plaintiffs also assert that the trial court erred in calculating the amount of attorney fees to which plaintiffs were entitled. Similarly, defendants also contest the trial court's calculation of reasonable attorney fees on cross-appeal. We vacate the trial court's orders and remand for further proceedings consistent with this opinion.

Plaintiffs live in the Lockwood Hills development in Macomb County. Defendants purchased the parcel of land adjacent to the parcel plaintiffs own. Several deed restrictions apply to the parcel of land defendants own. Of relevance to this litigation, one restriction provided that any home defendants built had to be a minimum of 100 feet from any adjacent homes. Another restriction provided that any home built upon defendants' lot had to be a minimum of 40 feet from the side lot line.

Plaintiffs subsequently approached defendants with concerns that defendants were planning to construct a home that would potentially violate the deed restrictions. Defendants

apparently sought the advice of counsel and concluded that the restrictions were no longer valid and did not apply to their planned construction. Defendants proceeded with construction of their home. As planned, the home was located 80 feet from plaintiffs' home and approximately 28 feet from the side lot line.

Plaintiffs sought an injunction preventing defendants from proceeding with the construction of their home as planned. The lower court denied the requested injunction after determining that the restrictions in question were each unenforceable or inapplicable and after determining that plaintiffs had "unclean hands." However, the trial court cautioned defendants to proceed at their own risk in determining whether to build the home as planned. Defendants did continue with the construction of the home without modification. When it was completed, defendants home exceeded 9,000 square feet in size. It was constructed with special features to aid one of their children, who has cerebral palsy and is confined to a wheelchair. Defendants also planted a hedge row at the edge of their property and built a limestone retaining wall to limit the visibility of their home from plaintiffs' property.

Plaintiffs appealed the trial court's decision to this Court, which reversed the trial court after finding that the restrictions were applicable and enforceable. In reversing the trial court, this Court observed that it was "not faced with a situation where by innocent mistake a house was built that slightly encroached into the setback zone. Rather, we have a substantial, intentional and flagrant violation of the setback requirement of Restriction 10." The Court stated that, on remand, "the burden is on the trial court 'for a determination of the appropriate remedy.' Accordingly, the trial court must fashion a remedy consistent with this opinion and consistent with the controlling opinion of [*Webb v Smith (Aft Sec Rem)*, 224 Mich App 203; 568 NW2d 378 (1997)]." *Thoms v Palushaj, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2007 (Docket No. 286074)*, quoting *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 208; 737 NW2d 670 (2007).

After this Court remanded to the trial court, plaintiffs filed a motion requesting the trial court to issue an injunction ordering the demolition or reconstruction of defendants' home. The court denied plaintiffs' motion and directed the parties to submit briefs regarding an appropriate remedy for defendants' violations of the deed restrictions. In their brief, plaintiffs again argued that the proper remedy for the violations was the destruction of defendants' non-compliant home. Defendants asserted that the trial court was permitted to fashion any remedy that it believed was equitable given the circumstances of this particular case. The trial court issued an opinion on May 1, 2008. In the opinion, the court stated that it did not believe Michigan law required the destruction of defendants' home. Rather, the court opined that trial courts were permitted to balance the equities in determining the proper remedy for the violation of a deed restriction. The trial court noted that its conclusion was consistent with this Court's opinion before remand. The court reasoned that if it was required to order the destruction of the home, this Court would not have instructed the trial court to determine the "proper remedy" on remand. Therefore, the court determined that it was necessary to hold an evidentiary hearing to determine the proper remedy. The court stated that in determining the proper remedy, it would consider:

> (1) balancing the hardships that plaintiffs may experience without injunctive relief against the hardship that defendants may experience if injunctive relief is granted; (2) whether injunctive relief is likely to involve future oversight/involvement by

> the court; (3) whether the deed restrictions provide for the recovery of monetary damages and, if so, the circumstances giving rise to, and the extent of, such recovery' and (4) a clear and specific list of documented damages claimed by plaintiff, including but not limited to (a) the formula used to calculate all claimed damages; and (b) any impact on property value directly related to the restriction violations, as opposed to overall poor economic conditions.

The court also indicated that it would consider whether circumstances in the subdivision had changed. However, the court later acknowledged that any consideration of change of circumstances was prohibited by this Court's previous opinion.

The evidentiary hearing began on September 29, 2009. At the hearing, plaintiffs maintained that a balancing of the equities was improper and asserted that the only proper remedy was the elimination of the conditions that violated the deed restrictions. Plaintiffs called Howard Babcock as an expert in real estate appraisals. Babcock testified that the deed restrictions in question provided plaintiffs with a unique property right. Specifically, property owners derive value from having increased space between their home and that of their neighbor and also derive value from living in a community with a consistent appearance. While Babcock could not place a monetary cost on the violation of the deed restriction, he testified that he did not believe the presence of defendants' home necessarily increased the value of plaintiffs' home. Babcock's testimony was followed by the testimony of Mr. and Mrs. Thoms, who testified that they felt crowded by defendants' home and believed that the proper remedy was to remove or adjust defendants' home. An architectural expert testifying on behalf of plaintiffs testified that defendants could have built a home of similar size and quality without violating the deed restrictions. The expert testified that the home could be brought into compliance with the deed restrictions by having portions of it eliminated and reconstructed. Any such work would take months to complete, would cost hundreds of thousands of dollars and would render the home temporarily uninhabitable.

In contrast to plaintiffs' expert witness, defendants called their own expert appraiser, Gary Gorgine, to discuss the effect of defendants' home on the value of plaintiffs' home. Gorgine testified that defendants' violations of the deed restrictions had no adverse impact on the marketability or value of plaintiffs' home. Rather, he concluded that defendants' home, which he described as pristine, enhanced the value of plaintiffs' house. In reaching that conclusion, Gorgine noted that plaintiffs' home lies on a lower grade of land than defendants' home and that there are no windows on the side of plaintiffs' home that faces defendants' home. Those factors, along with the landscaping in between the two homes, limited the visibility of defendants' home from plaintiffs' home. Likewise, defendants' real estate expert, Thomas Zbikowski, testified that defendants' home increased the value of plaintiffs' home. Defendants also called an architecture expert, Wolfgang Dorsch, to testify about the nature of the changes that would be needed to bring the home into compliance with the deed restrictions. Dorsch testified that approximately 6,000 square feet of the home would have to be demolished and reconstructed and that the total cost would be approximately $2,000,000. Mr. Palushaj testified that if they were forced to demolish and rebuild their home, his family would be financially ruined and would likely be forced to move into an apartment, which would be unlikely to accommodate the entire family.

After the evidentiary hearing, the trial court judge visited the parties' homes to personally examine the property. After making that visit, the trial court issued its opinion on April 30, 2010. Describing its visit to the property, the court stated that defendant's house was "barely visible from plaintiffs' property." The court also expressed disagreement with plaintiffs' claim that their property now felt crowded in by defendants' home. When considering that plaintiffs had failed to show any adverse economic impact created by defendants' home, the court concluded that plaintiffs' suffered minimal hardship as a result of the violation of the deed restrictions. In contrast, the court found that it was not feasible to bring defendants' home into compliance with the deed restrictions without completely destroying it. The destruction of the home would have a harsh impact on defendants' family, as the home was specially designed to accommodate their disabled child. Therefore, the court held that the proper remedy was to require defendants' to "pay all of the attorney fees and costs plaintiffs incurred in this action" and to require defendants and any future owners of the property to maintain the landscaping that limits the view between the properties.

Following the court's ruling, plaintiff's filed invoices with the trial court, which then conducted an in camera review to determine the amount of attorney's fees to which plaintiffs were entitled. Plaintiffs' asserted that they had incurred approximately $158,000 in attorney fees. The trial court issued an opinion in which it stated that its previous opinion should have stated that plaintiff was entitled to all "reasonable" attorney fees, as opposed to *all* attorney fees incurred. It then concluded that plaintiffs' attorneys unreasonably increased their hourly fees for all of the post-remand proceedings. The court stated that plaintiffs were entitled to a reasonable fee of $225.00 per hour for attorney fees. After concluding that the attorneys billed plaintiffs for 18 hours of work that was duplicative, the court held that plaintiffs were entitled to a baseline figure of $146,298.58. Because defendants were held to be in blatant violation by this Court, the trial court did not downwardly adjust that figure. In terms of costs, plaintiffs sought $37,216.76. The court granted plaintiffs the entire requested amount. As a result, the total costs and fees plaintiffs were awarded amounted to $183,515.34.

On appeal, plaintiffs first assert that the trial court, by concluding that it was permitted to balance the equities when crafting its remedy, failed to follow this Court's instructions on remand. Plaintiffs maintain that the trial court had no discretion and was legally required to order defendants to comply with the deed restrictions. We agree. Whether the trial court applied this Court's ruling on remand is a question of law that this Court reviews de novo. *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

As our Supreme Court explained in *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007), deed restrictions are a form of a contractual agreement and create a valuable property right.

> If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom 'freely to arrange their affairs' by the formation of contracts to determine the use of land. [*Id.*, quoting *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).]

Prior to remand, this Court determined that the deed restrictions had been violated and that those restrictions had to be enforced. The trial court was responsible for determining the *manner* of enforcement. In *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), our Supreme Court addressed an instance in which a trial court judge found that the parcel of land in question was subject to a series of deed restrictions, which were unambiguous. After making those findings, the trial court "took a long look back at the history of this property, and an equally long look forward at the nature of the improvement planned, and held, in effect, that it was within the power of a court of equity to effect a compromise." *Id.* at 525. Upon review, our Supreme Court stated that it was faced with the question of "whether the circuit judge sitting in equity had power to effect such a compromise in the fact of and at the expense of existing and valid residential restrictions, or whether such planning must be left to planning boards and private developers." *Id.* at 530. The Court concluded that it was "unable to find that this power lies in judicial hands." *Id.* The Court summarized the state of the law as follows: "As equitable exceptions to the general rule that the courts will enforce valid restrictions by injunction we find these: (a) Technical violations and absence of substantial injury; (b) Changed conditions; (c) Limitations and laches." *Id.*

Prior to remand, this court stated "the trial court must fashion a remedy consistent with this opinion and consistent with the controlling opinion of *[Webb]*." *Thoms*, unpublished op at 7-8. In *Webb*, the defendants purchased a parcel of land near a lake. Defendants' land was originally a portion of a larger parcel of land. *Webb*, 224 Mich App at 206. Under the controlling deed restrictions, only one dwelling could be built on each of the original parcels of land. Because a house was already situated on that original parcel of land, plaintiffs sought to block the construction of defendant's home. *Id.* Although defendants were aware of the existence of the deed restrictions, they chose to proceed with the construction of their house. *Id.* Eventually, the trial court determined that defendants were required to tear down their home. *Id.* at 208. This Court affirmed that decision. *Id.* at 214. In doing so, this Court rejected the defendants' argument that the trial court was required to balance the equities when crafting its remedy. *Id.* at 210. The Court noted that the amount of damages the defendants would incur if an injunction was issued was wholly immaterial to the process of determining a remedy. Therefore, because "courts regularly enforce injunctions based on valid restrictions," it held that the trial court did not err in failing to apply a balancing test. *Id.* at 211. The Court, citing *Cooper*, acknowledged that there were exceptions to the general rule of enforcing deed restrictions through injunctions. However, the Court found that none of those exceptions were applicable to the facts of *Webb* and refrained from reversing the trial court. *Id.* at 211-214.

On remand, the trial court rejected plaintiffs' argument that the deed restrictions had to be enforced through injunction. While the trial court acknowledged that none of the exceptions described in *Cooper* and cited by *Webb* existed in this case, it nonetheless determined that it had the discretion to balance the equities and consider the hardships of the parties when crafting its remedy. We cannot find legal support for that conclusion. Defendants urge this Court to adopt the approach taken in *Kernen v Homestead Dev Co*, 232 Mich App 503; 591 NW2d 369 (1998), *Kratze v Indep Order of Oddfellows*, 442 Mich 136; 500 NW2d 115 (1993) and *Hasselbring v Koepke*, 263 Mich 466; 248 NW 869 (1933). In each of those cases, the Courts stated that it is proper to balance the equities when determining whether an injunction should issue. However, those cases arose out of trespasses to land and interference with easements, and not out of the violation of a deed restriction. While the trial court may have been persuaded that the approach

of those cases should equally apply to deed restriction cases, that conclusion is not permitted by the rule explicitly set forth in *Cooper* and recited in *Webb*.

Because we determine that the trial court did not have the discretion to balance the equities in this case where the exceptions described in *Cooper* were not present, we vacate the trial court's order and remand with instructions to enter an order requiring defendants to bring their home into compliance with the applicable deed restrictions. We note that the portions of the court's order relating to landscaping and attorney fees are also vacated as they were the result of the court's conclusion that an injunction was not required. Consequently, we need not address plaintiffs' remaining issues on appeal or defendants' issue on cross-appeal. While it appears from the record that plaintiffs are unlikely to reach a compromise with defendants that will allow defendants to maintain their home as it currently exists, we note that such a compromise would perhaps best serve the interests of each of the parties.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering