GOLF LEASE CONSISTENT WITH PUBLIC PURPOSE GIFT?

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In the case of *Drake v. City of Benton Harbor*, No. 287502, (Mich.App. 1/21/2010) plaintiffs challenged a state trial court order in favor of the City which had found 'a golf course falls within the definition of a "park purpose" and/or 'public purpose' " within the context of a private gift of land to the City. In so doing, the trial court had determined 'the unambiguous language in the property deed and consent judgment does not preclude the City of Benton Harbor from leasing a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corp. for use of the same as a golf course open to the general public."

In 1917, Mr. and Mrs. Klock gifted a 90-acre parcel of land with 1/2 mile of Lake Michigan frontage, known as Jean Klock Park, to the City of Benton Harbor ("Benton Harbor"). The deed to Benton Harbor specified that the property was conveyed upon:

> the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose; and at all times shall be open for the use and benefit of the public, subject only to such rules and regulations as the said City of Benton Harbor may make and adopt.

Until 2003, Benton Harbor had used and maintained Jean Klock Park consistent with the deed, i.e. as a public park and beach. In 2003, Benton Harbor announced its plan to sell part of the park to a private housing developer. Plaintiffs, along with a group of other Benton Harbor citizens, initiated a lawsuit against Benton Harbor challenging its right to convey the property under the assertion that such sale violated the covenants and restrictions in its deed.

This prior lawsuit was settled between the parties and resulted in the entry of a consent judgment on January 27, 2004. The consent judgment allowed for the sale of a portion of the property to the developer, but permanently enjoined (i.e. prohibited) Benton Harbor from the following:

> using any portion of the property depicted as "Jean Klock Park" for any purpose other than a bathing beach, park purposes, or other public purposes related to bathing beach or park use.

In 2005, Benton Harbor announced its intention to lease approximately 22 acres of the (now) 74-acre park to defendant Harbor Shores Community Redevelopment Corporation ("Harbor Shores") for the development and use of the land as a public golf course. Benton Harbor apparently signed a lease with Harbor Shores for this purpose. Plaintiffs thereafter initiated the lawsuit at issue here, alleging a breach of the parties' settlement agreement and violation of deed restrictions, and seeking an injunction.

In response, Benton Harbor contended that "the lease of a portion of the park for use as a public golf course serves a public purpose and is a 'park use' as a matter of law and as required by the 1917 deed and the parties' 2004 consent judgment." Defendant Harbor Shores reiterated this
same argument. Harbor Shores is a nonprofit corporation formed for the purpose of, among other things, fostering redevelopment and revitalization of blighted areas. The trial court granted summary judgment in favor of defendants Benton Harbor and Harbor Shores. Plaintiffs appealed.

INTERPRET DEED

On appeal, plaintiffs argued that "the Benton Harbor's lease of part of Jean Klock Park to Harbor Shores violates the restriction that the property be 'forever used' by Benton Harbor." In so doing, plaintiffs contended that "Benton Harbor is the only entity that may use the property." Accordingly, plaintiffs argued that "the lease of a portion of the property to Harbor Shores necessarily means that Benton Harbor is no longer using that portion of the property as required in the deed.” The state appeals court disagreed.

As noted by the appeals court, deeds are contracts and, therefore, "subject to the legal principles generally applied to contracts." Further, the court noted "the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable." Accordingly, in "construing a deed of conveyance" of land, the court acknowledged "the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof." Moreover, "in arriving at the intent of the parties as expressed in the instrument," the court found "consideration must be given to the whole of the deed and to each and every part of it." According to the court, "no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful."

Further, where "the terms of a contract are unambiguous," the court would apply "the plain meaning of the terms" and not allow outside evidence to refute the expressed language of the written document, in this case the deed.

When interpreting a restrictive covenant [here, the public use limitation in the deed], the intent of the drafter controls, and where the language of a restriction is clear, the parties are confined to the language employed. In addition, restrictions are generally construed against those attempting to enforce the restrictions, and all doubts are resolved in favor of the free use of the property.

In this particular instance, the appeals court, therefore, found Benton Harbor had to "use" the property "in the proscribed manner" as long as Benton Harbor owned the property. Accordingly, the appeals court applied these general principles of contract law to interpret the deed restriction requiring that that gift of land "shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose."

In the opinion of the court, when "read in context," the appeals court found it was "clear that this phrase is a restriction on the use of the property--not a restriction on Benton Harbor's right to convey or otherwise assign its right to use the property." Specifically, the appeals court found "[t]he phrase ‘used by said City of Benton Harbor’ is followed by clear provisions as to what uses are allowed.” Further, the court noted that the operative language in the deed clearly stated that
the property was conveyed upon "the express condition, and with the express covenant that said lands and premises shall forever be used by said City of Benton Harbor for bathing beach, park purposes, or other public purpose."

In the opinion of the court, this particular language in the deed "clearly contemplated that someone other than Benton Harbor may have some right, title, or interest (and thus, perhaps, use) in the property."

Had the deed intended to limit Benton Harbor to being the only entity to ever use the property, there would have been a period after "used by said City of Benton Harbor" and a list of allowable uses could have followed in a separate sentence. However, there is no period following "used by City of Benton Harbor." Instead there is a phrase which immediately follows the quoted language which modifies how Benton Harbor may use the property...

Clearly, while the deed was granted to Benton Harbor, it was contemplated that Benton Harbor may, at some time, assign some, if not all, of its interest in the property to another. Had this not been contemplated, there would be no need to include language referencing Benton Harbor's "assigns, heirs or legal representatives" of the "then owner or any tenant."

Having found "no ambiguity in the deed language at issue," the appeals court concluded it was not necessary to refer to extrinsic evidence in interpreting the deed restriction.

Here, the deed, when read as a whole, does not restrict the person or entity to use the property to Benton Harbor. As aptly noted by the trial court, "nothing in the deed or the consent judgment expressly prohibits the lease of part of the park to a private, nonprofit entity to carry out or implement a park purpose."

As a result, the appeals court rejected plaintiffs' assertion that "the deed requires that the property be exclusively used by only Benton Harbor is without merit." Further, the court found that "Benton Harbor is, in fact, using the property."

DEFINE "USE"

Because the term "use" was not defined in the deed, the court referred to "dictionaries to determine the plain, ordinary meaning of the word" to interpret the phrase "shall forever be used by said City of Benton Harbor."

Black's Law Dictionary (7th ed) defines "use" as "the application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." The American Heritage Dictionary (4th ed.) defines "use" as "to put into service or apply for a purpose; employ."
Applying the ordinary meaning of "use" to the facts of the case, the appeals court agreed with Benton Harbor that the lease was "putting the property into service and thus the lease is a "use" of the property." In so doing, the court found "Benton Harbor benefits from the property while still retaining title ownership of the same." Specifically, the court noted that "Benton Harbor derives monetary and other gain from leasing the property to Harbor Shores."

As defined by the court, "use", as it applies to real property, does not mean the thing itself, but means that the user is to enjoy, hold, occupy, and have the fruit thereof. On the contrary, "use" within the context of real estate includes "its occupancy, or cultivation, etc., or the rent which can be obtained for the same." As a result, the appeals court concluded "Benton Harbor's lease of the property for monetary gain is thus a use of the property" within the context of the deed.

PUBLIC OWNERSHIP?

On appeal, plaintiffs had argued further that "the deed also requires that property remain in public ownership, and the Harbor Shores lease allowing for it to operate a golf course on the property removes it from public ownership." The appeals court rejected this argument. In so doing, the court noted that "there is no proposed sale of the park to a private entity." On the contrary, the court found this case involved "the lease of a portion of the park to be used as a public golf course."

While plaintiffs contend that a lease valid for up to 105 years (such as the one at issue) is effectively a conveyance, plaintiffs have directed us to no binding Michigan law to support this position. Moreover, a provision in the lease provides that Harbor Shores acknowledges that its permitted use of the leased premises shall not be deemed an ownership interest, which remained with the Benton Harbor... The lease provides, among other things, that Harbor Shores cannot use the property for any purpose other than that specified in the lease absent the written consent of Benton Harbor;

As a result, the appeals court concluded that "the degree of control retained by Benton Harbor clearly indicates that the lease was not an effective conveyance."

[A]n oversight panel created by Benton Harbor and comprised of Benton Harbor city commissioners and residents must approve Harbor Shores proposed golf fees, determine whether Harbor Shores is in compliance with the agreement, and has the right to inspect the golf course and audit and review Harbor Shores' records at any time.

In the lease, Benton Harbor also retains the right to access the leased property for winter recreation (thus not even granting Harbor Shores exclusive use of the premises), requires that Berrien County residents be given discount rates, requires that the course be available for local high school competitions, and requires that at least 40% of the golf course employees be Benton Harbor residents.
PUBLIC PARK?

Plaintiffs had also contended that "Benton Harbor's lease of a portion of Jean Klock Park to Harbor Shores violates the restriction that the property be used for 'public' purposes or a 'public park purpose' and be 'open for the use and benefit of the public', as contemplated by the deed restrictions on the property (and the consent judgment)." In so doing, plaintiffs had maintained the court should "review evidence outside of the deed to ascertain whether a golf course was an intended use of the property or whether, as plaintiffs contends, the property was intended for use as a passive use natural park." The state appeals court rejected this argument. According to the court, it would only "look to extrinsic evidence" if the language of the deed is "ambiguous." Otherwise, the court acknowledged that it was required to "look first to the specific language in the deed to determine the meaning of the conveyance."

While the specific language of the deed restricted use of the property to "bathing beach, park purposes, or other public purpose," the court noted that the deed did not define "park purpose" or "public purpose." Accordingly, to interpret the meaning of the deed, the court would define these terms according to their common usage and understanding as follows:

"Park" is defined in the American Heritage Dictionary (4th ed.) as, among other things, "an area of land set aside for public use as a piece of land with few or no buildings within or adjoining a town, maintained for recreational and ornamental purposes."

"Recreation" is defined as "refreshment of one's mind or body after work through activity that amuses or stimulates; play."

"Public purpose" is defined in Black's Law Dictionary (7th ed.) as "An action by or at the direction of a government for the benefit of the community as a whole." Golf is generally referred to as a recreational activity, and a public golf course has been found by courts of our state to fall under the definition of both a "park" and a "public purpose."

While "Benton Harbor will lease a portion of the park to (non-profit) Harbor Shores for the operation of a golf course," the court found this particular golf course would still fall within the "plain, ordinary meanings of "both a public park and as serving a public purpose."

Benton Harbor still owns the underlying property and retains significant control over the property, even sharing in its physical occupation during non-golf seasons. Benton Harbor also requires that the course be open to the public during reasonable hours, without discrimination of any kind, and receives the profits from the same for the benefit of the city.

In the opinion of the court, the original drafters could have placed more specific and restrictive language in the deed if the clear intent was that "the park be used only in its passive, natural state as claimed by plaintiffs." Instead, the court found the drafters of the deed "chose to employ broader language such as "park" and "public purpose." As a result, the state appeals court
declined plaintiffs' invitation to look beyond the deed to consider other evidence to determine the intent of original gift for Jean Klock Park.

Because these terms have plain, ordinary meanings, we read and apply the deed as written. We do not find any ambiguity in the language employed in the deed, and thus need not review extrinsic evidence to determine the intent of the parties.

CONCLUSION & DISSENT

Having found that "a golf course falls within the definition of a 'park purpose' and/or 'public purpose,'" the state appeals court affirmed the judgment of the trial court in favor of defendants Benton Harbor and Harbor Shores.

On February 4, 2011, the Michigan state supreme court denied plaintiffs' petition to review the judgment of the state appeals court (Drake v. City of Benton Harbor, 488 Mich. 1037, 793 N.W.2d 244 (2011)). In so doing, one of the state supreme court justices issued the following dissenting opinion, expressing concerns about the potential adverse impact of this decision on future gifts of private land for public park purposes:

The only issue in this case concerns whether a "championship Jack Nicklaus" privately-owned golf course constitutes a "park use," consistent with J. N. and Carrie Klock's deed to the City of Benton Harbor of property to be designated as Jean Klock Park in memory of their daughter who had died in infancy. The City, having previously sold a portion of Jean Klock Park to a private developer for a residential housing development, now attempts to justify the use of a remaining portion of the park for a golf course on, among other grounds, "underutilization" of the park, "economic development," "jobs," and the establishment of a "tourist destination." However admirable these objectives, it is J. N. and Carrie Klock's intentions that control here, not those of the current city government, and the Klocks' intentions must control even if they are now viewed by the City as inconvenient to the pursuit of objectives preferred by the City.

In my judgment, and for reasons that require little more than resort to the customary understanding of the term "park" by ordinary users of our language, I believe that the City's use of Jean Klock Park, by leasing portions of it for 105 years to a private commercial entity, the Harbor Shores Community Redevelopment, Inc., for its use as a golf course, constitutes a breach of faith with the Klocks, and should be enjoined.

Although the City prevails today, it, and other communities throughout our state, may well come out losers tomorrow as later generations of philanthropists look at the legacy of J. N. and Carrie Klock and come to question the faithfulness of government in upholding their intentions after they too have passed.