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VIA EMAIL ONLY: fjbals@earthlink.net

Mississippi Mountain Condominium Association, Inc.
c/o Mr. Fritz Balsley, Director
P.O. Box 10
DeSoto, WI 54624

RE: Interpretation of the Declaration of Mississippi Mountain, A Condominium

Dear Mr. Balsley:

You contacted me, on behalf of the Mississippi Mountain Condominium Association (the "Association"), to review and analyze the Declaration of Mississippi Mountain, a Condominium, which was recorded on August 14, 2006 with the Grant County Register of Deeds, along with the Second Amendment to Declaration of Condominium for Mississippi Mountain, a Condominium, which was recorded on August 7, 2017. I will refer to the August 14, 2006 document as the "Declaration" and the August 7, 2017 document as the "Amendment." You asked that I perform an independent evaluation of the Declaration and Amendment, review relevant statutes, regulations, codes, and case law, and provide an opinion to the Association as to whether or not the use of campers is addressed in any section of the Declaration or Amendment. I write to provide that opinion and the legal analysis in support thereof.

I. ISSUE

The issue is whether the Declaration and Amendment address and, more specifically, prohibit the use of "campers" on Units located in the Mississippi Mountain Condominium (the "Condominium"). For purposes of this analysis, "campers" shall include camping trailers as defined in Wis. Stats. § 340.01(6m)¹; fifth-wheel recreational vehicles

¹ "Camping trailer" means a vehicle with a collapsible or folding structure designed for human habitation and towed upon on highway by a motor vehicle. Wis. Stat. § 340.01(6m) (2018).

as defined in Wis. Stat. § 340.01(18m)²; recreational vehicles as defined in Wis. Stat. § 340.01(48r)³; and motor homes, as defined in Wis. Stat. § 340.01(33m)⁴. This opinion does not address the placement of manufactured homes as defined in Wis. Stat. § 101.91(2)⁵ or mobile homes as defined in Wis. Stat. § 101.91(10)⁶ on Condominium Units.

II. RELEVANT LAW

Interpretation of a restrictive covenant and, as a corollary, whether a covenant is too ambiguous to be enforced, are legal issues to be determined by the court. Zinda v. Krause, 191 Wis. 2d 154, 165, 528 N.W. 2d 55, 59 (Ct. App. 1995). It is well established in Wisconsin that public policy favors the free and unrestricted use of property; however, restrictions will be enforced if the intention of the parties is clearly shown in the covenants that affect the property. Voyager Village Property Owners Ass'n v. Johnson, 97 Wis. 2d 747, 749, 295 N.W. 2d 14, 15 (Ct. App. 1980). “[W]here the purpose of a restrictive covenant may be clearly discerned from the terms of the covenant, the covenant is enforceable against any activity that contravenes that purpose.” Zinda, 191 Wis. 2d at 167. A court must give effect to the purpose of a covenant as manifest by the language used. Id. at 166.

When interpreting a restrictive covenant, a court will look to the words actually used to determine whether the covenant is or is not ambiguous. If the meaning of a restrictive covenant clearing can be ascertained from the words of the covenant itself, its restrictions will be enforced. Zinda, 193 Wis. 2d at 166. If, however, the words employed in the restrictive covenant are ambiguous, a court will resolve disputes about the meaning of the restriction in favor of the free use of the property. Crowley v. Knapp, 94 Wis. 2d 421, 438 n.3, 288 N.W. 2d 815 (1980) (citing Schneider v. Eckhoff, 188 Wis. 550, 556, 206 N.W. 838 (1926)).

² “Fifth-wheel recreational vehicle” means a recreation vehicle that is towed by a vehicle with a flatbed frame so the trailer hitch of the recreational vehicle is bolted to the flatbed frame of the towing vehicle. Wis. Stat. § 340.01(18m) (2018).

³ “Recreational vehicle” means a vehicle that is designed to be towed upon a highway by a motor vehicle, that is equipped and used, or intended to be used, primarily for temporary or recreational human habitation, that has walls of rigid construction, and that does not exceed 45 feet in length. Wis. Stat. § 340.01(48r) (2018).

⁴ “Motor home” means a motor vehicle designed to be operated upon a highway for use as a temporary or recreational dwelling and having the same internal characteristics and equipment as a mobile home. Wis. Stat. § 340.01(33m) (2018).

⁵ “Manufactured home” means any of the following: (am) A structure that is designed to be used as a dwelling with or without a permanent foundation and that is certified by the federal department of housing and urban development as complying with the standards established under 42 USC 5401 to 5425. (c) A mobile home, unless a mobile home is specifically excluded under the applicable statute. Wis. Stat. § 101.91(2) (2018).

⁶ “Mobile home” means a vehicle manufactured or assembled before June 15, 1976, designed to be towed as a single unit or in sections upon a highway by a motor vehicle and equipped and used, or intended to be used, primarily for human habitation, with walls of rigid uncollapsible construction, which has an overall length in excess of 45 feet. “Mobile home” includes the mobile home structure, its plumbing, heating, air conditioning and electrical systems, and all appliances and all other equipment carrying a manufacturer’s warranty. Wis. Stat. § 101.91(10) (2018).

When language is clear and unambiguous, it will be given its obvious meaning. In interpreting the language of a restrictive covenant, a court will apply the plain and ordinary meaning of words. Tufail v. Midwest Hospitality, LLC, 2013 WI 62, ¶¶ 25-6, 348 Wis. 2d 631, 833 N.W. 2d 586 (2013). Courts commonly use dictionary definitions to determine the plain and ordinary meaning of words. Forshee v. Neuschwander, 381 Wis. 2d 757, 914 N.W. 2d 643 (2018).

A restrictive covenant is ambiguous if its language is reasonably susceptible to more than one interpretation. Zinda, 191 Wis. 2d at 165-66. “[I]f the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restriction will be enforced.” Id. “Intent” does not mean “the subjective intent of the drafter,” but rather, it refers to “the scope and purpose of the covenant as manifest by the language used.” Id. “If the language used is clear and unambiguous[,] it will be given its obvious meaning.” Bubolz v. Dane Cty., 159 Wis. 2d 284, 294, 464 N.W. 2d 67 (Ct. App. 1990). Language is not rendered ambiguous simply because it may be difficult to apply to the facts of a particular case. Stuart v. Weisflog’s Showroom Gallery, Inc., 208 WI 86, ¶ 20, 311 Wis. 2d 492, 753 N.W. 2d 448.

Accordingly, a court will need to determine whether the language of the Declaration and Amendment is ambiguous. If the language is unambiguous, the language controls and restrictions will be enforced as written. Tufail, 2013 WI at ¶¶ 25-6. If, however, the language is ambiguous, a court will resolve disputes about the meaning of the restriction in favor of the free use of property. Crowley, 94 Wis. 2d at 438 n. 3. Courts will interpret ambiguous restrictions narrowly. Forshee, 381 Wis. 2d at 769.

III. ANALYSIS

To determine whether the use of campers on Condominium Units violates the Declaration or Amendment, a court must apply the above-mentioned relevant law to the facts at issue.

The Declaration and Amendment contain multiple relevant provisions, specifically the following:

Article III. UNITS

3.01. Definition. “Unit” shall mean part of the Condominium intended for independent use of the Unit Owner.

3.02. Identification of Units. The Condominium shall initially consist of 76 units (individually a “Unit” and collectively the “Units”), each Unit being a separate cubicle of air as further described below.... Each owner of a Unit is referred to as a “Unit Owner.”

...

3.04. Improvements to Units. The Unit Owner has the right to construct a building and improvements within the Unit Owner's Unit, subject to building restrictions described in Section 8.03 and the other provisions of this Declaration. Any buildings and/or improvements constructed within a Unit shall be the exclusive property of the Unit Owner.

...

Article VIII. ALTERATIONS AND USE RESTRICTIONS

...

8.02. Use and Restrictions on Use of Unit. Each Unit shall be used for recreational, residential, and/or rental purposes and for no other purpose unless otherwise authorized by the Association prior to the commencement of such use.

...

8.03. Restrictions on Buildings and Improvements. The construction of buildings and other improvements within Units shall be limited by the following architectural and other restrictions:...

c. All homes, cabins, or other dwellings shall have at least 1,000 square feet of living area, exclusive of porches, garages, decks, patios, and/or a basement; two story [sic] dwellings shall have a minimum of 1,800 square feet of living area, exclusive of the same. Homes, cabins, or other dwellings with a walk-out lower level and an access door at grade level that has one side fully exposed to ground level will be considered a two-story home;⁷

Declaration of Mississippi Mountain, a Condominium, dated August 11, 2006 and recorded on August 14, 2006 with the Grant County Register of Deeds.

A court must interpret these provisions to determine whether the use of campers is permitted on Condominium Units.

⁷ Language as amended by the Second Amendment to Declaration of Condominium for Mississippi Mountain, a Condominium, dated August 1, 2017 and recorded on August 7, 2017 with the Grant County Register of Deeds.

A. Determine if the Declaration and Amendment are Ambiguous.

When evaluating the restrictive covenant, namely the Declaration and Amendment, the first step is to determine whether the Declaration and Amendment are reasonably susceptible to more than one interpretation. In doing so, we must apply the plain and ordinary meaning of the words used in the Declaration and Amendment and may use a dictionary to determine that meaning. We are to determine the intent of the Declaration and Amendment by looking at the scope and purpose of the documents as manifested by the language used therein.

1. Section 3.04 is Not Ambiguous and Not Applicable to Campers.

Section 3.04 states that "[t]he Unit Owner has the right to construct a building and improvements within the Unit Owner's 'Unit, subject to the building restrictions described in Section 8.03 and the other provisions of this Declaration.'" This language grants a right to "construct" a "building" and "improvements." Turning to the Merriam Webster Dictionary, "construct" is defined as "to make or form by combining or arranging parts or elements." www.Merriam-Webster.com. "Building" is defined as, "a usually roofed and walled structure built for permanent use (as for as a dwelling)." Id. "Improvement" is defined as "something that enhances value or excellence." Id.

When taken together, the plain and ordinary meaning of the words in Section 3.04 envision the arranging of parts to build a roofed or walled structure for permanent use or the combining of parts to create something that will enhance the value of the Unit. These words are not reasonably susceptible to any interpretation that would address the hauling and parking of a camper on a Unit. A camper is not a permanent structure and will not enhance the value of the Unit, as it is personal property, not a fixture. Accordingly, Section 3.04 is not ambiguous and would be enforceable to address and restrict construction of buildings and improvements. By its plain meaning, it is not applicable to campers.

2. Article VIII Is Not Ambiguous and Not Applicable to Campers.

As performed above, we must evaluate whether the provisions of Article VIII are ambiguous by being reasonably susceptible to more than one interpretation. We again must look to the plain and ordinary meaning of the words used and may obtain assistance from a dictionary to determine those meanings.

Regarding Section 8.02, the heading "Use and Restrictions on Use of Unit" reports to set forth what use is allowed and what restrictions are placed on each Unit. The section states that "[e]ach Unit shall be used for recreational, residential, and/or rental purposes and for no other purposes...". The section clearly allows Units to be used for "recreational" purposes. "Recreational" is defined as "of, relating to, or characteristic of recreation, a recreational area, recreational activities." Id. "Recreation" is defined as "refreshment of

strength and spirits after work.” Id. Camping on a temporary basis in a location other than someone’s primary residence is a time-honored recreational activity. This section, which allows recreational activity, unambiguously allows camping.

Section 8.03 sets forth “Restrictions on Buildings and Improvements.” The section states that, “[t]he construction of buildings and other improvements within Units shall be limited by the following architectural and other restrictions...”. Again, the Declaration uses the terms “buildings” and “improvements.” Those terms are preceded by the word “construction,” which is defined as “the process, art, or manner of constructing something.” Id. “Construct” is defined as “to make or form by combining or arranging parts or elements.” Id. Moving a prefabricated camper onto a Unit does not require any action that could be interpreted as the “making or forming” by “combining or arranging parts or elements.” Moreover, a camper is not a “building”, which is defined as a “roofed and walled structure built for permanent use.” A camper is also not an “improvement”, as the location of a camper on a Unit is not something that will enhance the Unit’s value. Accordingly, Section 8.03 is not ambiguous and does not apply to campers or the parking of campers on Units.

The provisions of the Declaration set forth above are not ambiguous therefore, will be enforced as written. As written, the provisions are inapplicable to campers, therefore, camping or the placement of campers on Units is permitted.

B. If Section 8.03 is Applicable, Determine if Subsection 8.03(c) is Ambiguous.

We all must be mindful of the fact that courts each bring their own read, life experience, and perspective to issues of contract interpretation. Accordingly, although I believe the analysis set forth above would prevail, there is a possibility it would not. If, for whatever reason, a court were to reach the conclusion that Section 8.03 regarding the restrictions on buildings and improvements would apply to the parking of campers on a Unit, the court must then determine whether Subsection 8.03(c) of the Amendment is ambiguous. I turn next to that analysis.

Subsection 8.03(c), as amended, states that, “[a]ll homes, cabins, or other dwellings shall have at least 1000 square feet of living area ...”. It is my understanding that opponents of the placement of campers on Units argue that the term “dwellings” applies to campers.

To determine the plain and ordinary meaning of the word “dwelling,” it is instructive to look to the dictionary definition of that word and also to its use in other statutes, codes, and regulations. The Merriam Webster Dictionary defines “dwelling” as “a shelter (such as a house) in which people live.” Id.

Dwellings can be temporary or permanent, such as seen in the application of federal diversity of citizenship rules, which distinguish between people “dwelling” in other states with no intention of making the new dwelling place their home. Greene v. Keim, E.D. Pa. 1948, 74 F. Supp. 950 (1948).

It is also apparent that dwellings can be either principal or secondary dwellings. For example, Federal Truth in Lending Regulations discuss the applicability of those regulations and refer to credit secured by the consumer’s “principal dwelling,” suggesting that a person can have more than one dwelling and that a vacation or other second home can also constitute a “dwelling.” See 12 C.F.R. § 226.1(d)(5)(1)(ii) (2018). However, those same regulations define “dwelling” as “[a] dwelling need not be the consumer’s principal residence to fit the definition, and thus a vacation or second home could be a dwelling. However, for purposes of the definition of residential mortgage transaction and the right to rescind, a dwelling must be the principal residence of the consumer.... Mobile homes, boats, and trailers are dwellings if they are in fact used as residences, just as are condominium and cooperative units. Recreational vehicles, campers, and the like not used as residences are not dwellings.” 12 C.F.R. § 226.2 (2)(a)(19) (2018).

Regulations of the Department of Agriculture regarding foreign quarantine notices governing gypsy moth host material from Canada define “recreational vehicles” as, “[v]ehicles, including pickup truck campers, one-piece motor homes, and travel trailers, design to serve as temporary places of dwelling.” 7 C.F.R. § 319.77-1 (2018).

It is noteworthy that Wisconsin’s Uniform Dwelling Code, which establishes uniform statewide construction standards and inspection procedures for one-family and two-family dwellings and modular homes, specifically exempts and does not apply to motor homes and recreational vehicles that are, or have been, titled through the Department of Transportation. See Wis. Admin. Code §§SPS 320.01; 320.05(9) (2018). Chapter 340 of Wisconsin Statutes, which sets forth general provisions for vehicles, defines “motor home” as, “a motor vehicle designed to be operated upon a highway for use as a temporary or recreational dwelling and having the same internal characteristics and equipment as a mobile home.” Wis. Stat. § 340.01(33m) (2018). The same chapter defines “recreational vehicle” as, “a vehicle that is designed to be towed upon a highway by a motor vehicle, that is equipped and used, or intended to be used, primarily for temporary or recreational human habitation, that has walls of rigid construction, and that does not exceed 45 feet in length.” Id. at § 340.01(48r). The significance of these provisions is that camping trailers, fifth-wheel recreational vehicles, recreational vehicles, and motor homes are all identified as “vehicles” under the Wisconsin Statutes governing vehicles and under the Wisconsin Department of Transportation procedures regarding titling, license plates, and so forth. Those camping vehicles are not governed by the Wisconsin Uniform Dwelling Code that sets forth standards for the construction and inspection of “dwellings.”

After considering the above-mentioned definitions and applications of the word “dwelling,” I conclude that the language in Subsection 8.03(c) is ambiguous. The word

“dwelling” is reasonably susceptible to more than one interpretation. If we adopt an interpretation consistent with the Wisconsin Uniform Dwelling Code, campers such as recreational vehicles and motor homes are not considered “dwellings,” but are vehicles. Under that interpretation, campers are not addressed by Subsection 8.03(c). If, however, we adopt an interpretation consistent with other case law and regulations that recognizes dwellings can be temporary in nature and can be secondary, that interpretation would lead to an interpretation that Subsection 8.03(c) does apply to campers. Given these inconsistent yet reasonable interpretations, I believe a court will be forced to find that the language of Subsection 8.03(c) is ambiguous as it applies to whether a camper is a dwelling.

When a restrictive covenant is found to be ambiguous, courts are directed to resolve disputes about the meaning of the restriction in favor of the free use of property. Crowley, 94 Wis. 2d at 434 n.3. The court must interpret the restriction narrowly. Forshee, 381 Wis. 2d at 769. Accordingly, a court, when narrowly interpreting the restriction and resolving the dispute in favor of the free use of property, should determine that the language of Subsection 8.03(c) does not apply to the placement of campers on Condominium Units.

C. A Narrow Interpretation of the Declaration is also Consistent with General Principles of Contract Interpretation Disfavoring Adding Unwritten Terms to Contracts.

The result suggested above, namely that the Declaration and Amendment do not prohibit the placement of campers on Condominium Units, is consistent with the general principle of contract interpretation under which courts refuse to write terms into contracts that were not included by the parties. It is well accepted that courts “will not read words into [a] contract that the parties opted not to include. Rather, [courts] apply contractual language as it is written. [The] court’s role, after all, is ‘not to make [the] contract[] ... but to determine what the parties contracted to do’.” Ash Park, LLC v. Alexander & Bishop, Ltd., 363 Wis. 2d 699, 720-21, 866 N.W. 2d 679 (2015) (citing Tufail, 348 Wis. 2d 631, ¶ 29).

In Voyager Village Property Owner’s Association v. Johnson, the deeds contained restrictive covenants prohibiting camping equipment that was not in use from being stored on lots. Voyager Village Property Owner’s Ass’n, 97 Wis. 2d at 748-49. The court found that the language was unambiguous and enforced the restriction, thereby enjoining owners from leaving their travel trailer on site during the week when the owners were only present on the weekends. Id. at 749-50.

Such a restrictive covenant could have been included in the Declaration and Amendment. It was not. Courts are not likely to add language to the Declaration and Amendment that was not written into the documents and was not what the parties contracted for.

IV. CONCLUSION

Based on the analysis conducted above, it is my opinion that the Declaration and Amendment do not prohibit or preclude Unit Owners from placing campers on Mississippi Mountain Condominium Units.

This opinion is generated solely for the use of my client, Mississippi Mountain Condominium Association, Inc., and is expressed for its benefit only. After reviewing this opinion letter, please do not hesitate to contact me with any questions.

Very truly yours,

CZAJKOWSKI HIGGINS & TISDALE, S.C.



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