

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PLANNED PARENTHOOD MID AND  
SOUTH MICHIGAN, a Michigan non-profit  
corporation,

Plaintiff,

Civil Action No. 11-119441-CH

Hon. James M. Alexander

vs.

SHRI SAI-KRISHNA GROUP, L.L.C., a  
Michigan limited liability company,

Defendant.

Alan M. Greene (P31984)  
Krista L. Lenart (P59601)  
Attorneys for Plaintiff  
Dykema Gossett PLLC  
39577 Woodward Avenue, Suite 300  
Bloomfield Hills, MI 48304  
(248) 203-0700

James L. Carey (P67908)  
Attorney for Defendant  
23781 Pointe O'Woods Court  
South Lyon, MI 48178  
(248) 605-1103

**NOTICE OF HEARING ON PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY DISPOSITION**

TO: All Counsel of Record

Please take notice that Plaintiff's Motion for Partial Summary Disposition will be brought on for hearing before the Honorable James M. Alexander on Wednesday, September 7, 2011, at 8:30 a.m., or as soon thereafter as may be heard.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Alan M. Greene

Alan M. Greene (P31984)  
Krista L. Lenart (P59601)  
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(248) 203-0757 or (734) 214-7676  
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Date: July 21, 2011

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PLANNED PARENTHOOD MID AND  
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Attorney for Defendant  
23781 Pointe O'Woods Court  
South Lyon, MI 48178  
(248) 605-1103

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION**

Plaintiff Planned Parenthood Mid and South Michigan, by its attorneys Dykema Gossett PLLC, respectfully requests that, pursuant to MCR 2.116(C)(10), the Court enter judgment against Defendant Shri Sai-Krishna Group, L.L.C. on Count I of Plaintiff's Complaint because there is no genuine issue as to any material fact and Plaintiff is entitled to a partial judgment as a matter of law.

This case involves the construction of a restrictive covenant. Defendant owns a Comfort Suites Hotel in Auburn Hills. Plaintiff recently purchased an adjacent property developed with a vacant, speculative office building. Plaintiff's property is burdened by a restrictive covenant that

FEE

permits “restaurant, retail or office usage,” and Plaintiff purchased its property for use as a medical office building. Defendant now objects to Plaintiff’s proposed use of Plaintiff’s property for medical office use, relying on the restrictive covenant.

For the reasons set forth in the accompanying Brief and exhibits, Plaintiff’s use of its property for medical offices is not barred by the restrictive covenant as a matter of law. Furthermore, the Defendant has waived and/or is estopped from asserting that medical offices are barred by the restrictive covenant because Defendant acknowledged in writing that such use was authorized. Plaintiff asks this Court to determine, declare and adjudge that the restrictive covenant does not bar Plaintiff from using its property for medical office purposes and/or that Defendant has waived any argument and is estopped from asserting that a medical office use is prohibited by the restrictive covenant.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Alan M. Greene

Alan M. Greene (P31984)  
Krista L. Lenart (P59601)  
Attorneys for Plaintiff  
39577 Woodward Avenue, Suite 300  
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agreene@dykema.com

Date: July 21, 2011

STATE OF MICHIGAN

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PLANNED PARENTHOOD MID AND  
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corporation,

Plaintiff,

Civil Action No. 11-119441-CH

Hon. James M. Alexander

vs.

SHRI SAI-KRISHNA GROUP, L.L.C., a  
Michigan limited liability company,

Defendant.

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Alan M. Greene (P31984)  
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**PLAINTIFF'S BRIEF IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY DISPOSITION**

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DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•39577 WOODWARD AVENUE•SUITE 300•BLOOMFIELD HILLS, MICHIGAN 48304

**RULES**

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Plaintiff Planned Parenthood Mid and South Michigan (“Plaintiff”), by its attorneys Dykema Gossett PLLC, pursuant to MCR 2.116(C)(10), respectfully requests that the Court enter judgment against defendant Shri Sai-Krishna Group, L.L.C. (“Defendant”) on Count I of Plaintiff’s Complaint. As explained below, there is no question of material fact and Plaintiff is entitled to a declaration that the restrictive covenant at issue does not bar Plaintiff’s use of its property for medical office purposes.

### STATEMENT OF FACTS

Plaintiff is a Michigan non-profit corporation. Plaintiff owns property located at 1625 N. Opdyke, Auburn Hills, Michigan 48326 (the “Property”), which it acquired from Fidelity Bank in November 2009. Plaintiff paid \$733,150 for the Property. (*See* Closing Statement attached as Exhibit 1.) At the time Plaintiff acquired the Property, it was developed with a vacant, speculative office building constructed in approximately 2005. The interior of the building was never completed and it was never occupied.

Plaintiff acquired the Property for use as a medical office. Plaintiff’s proposed medical offices will provide a variety of health care services to women, men and teens without regard to race, gender, age, marital status, national origin, disability or sexual orientation. The Property is zoned “B-2, General Business Districts” by the City of Auburn Hills, which authorizes the Property to be used for, among other things, any principal use permitted in the “O” (or “Office District”). The City’s “Office District” zoning provides that “[t]he Office Districts are designed to accommodate office uses.” Medical offices and outpatient clinics are principal uses permitted in the Office District. (*See* Exhibit 2, excerpt from Auburn Hills Zoning Ordinance.)

Defendant is the owner of property adjacent to Plaintiff’s Property. Defendant’s property is developed with a Comfort Suites Hotel (the “Hotel”). Apparently, Plaintiff’s Property and Defendant’s property were at one time owned by the same entity – Torretta Investment



Company. Through an instrument entitled "Declaration of Restrictive Covenant," recorded on September 29, 1998 at Liber 18997, Page 273 with the Oakland County Register of Deeds (the "Restrictive Covenant"), Torretta Investment Company agreed to restrict Plaintiff's Property to "restaurant, retail or office usage." (See Restrictive Covenant attached hereto as Exhibit 3.) Plaintiff's proposed use of its Property for medical office uses clearly does not violate the Restrictive Covenant.

Even though a medical office is plainly an office use permitted under both the Zoning Ordinance and Restrictive Covenant, Plaintiff sought to confirm this plain meaning of the Restrictive Covenant with Defendant, prior to closing on its acquisition of the Property during the course of a due diligence period. Plaintiff's counsel thus wrote Defendant on October 8, 2010, asking that Defendant confirm the following:

My client intends to complete construction of the building interior with no change in the current building height, **and to use the building for medical offices.** Our understanding of the Covenant is that use of the building for office purposes would include medical offices, and we would like to confirm that you agree with that interpretation.

(See Letter attached hereto as Exhibit 4.) Defendant's principal executed the letter, acknowledging his agreement thereto, and returned the letter to Plaintiff's counsel. (See Exhibit 4.)

Plaintiff thereafter completed the acquisition of the Property, paying a substantial sum for same, and is now investing substantial additional resources to complete the interior build-out for its medical offices. But after Plaintiff acquired the Property, an attorney purporting to represent the Defendant wrote a letter to various City of Auburn Hills and Oakland County officials, attaching a copy of the Restrictive Covenant, and claiming that "[m]y client is concerned that the new owners of the Recently Purchased Property may have plans to develop the property in ways

that would violate my client's rights." (See January 31, 2011, letter attached hereto as Exhibit 5.) At the same time, Defendant's attorney notified Plaintiff of Defendant's objection to Plaintiff's use of its Property for medical offices, threatening to seek legal action to prevent what Defendant improperly characterizes as a breach of the Restrictive Covenant. (See Exhibit 6.) These threats to interfere with Plaintiff's lawful use of its Property in a manner permitted by local zoning and the Restrictive Covenant are improper and infringe on Plaintiff's property rights, and prompted Plaintiff to bring this action to remove the cloud on the title to its Property and seek the Court's declaration that the use of its Property for medical office purposes does not violate the Restriction. The facts are not in dispute and this matter is ripe for decision.

## ARGUMENT

### **I. Standards of Review**

A motion for summary disposition under MCR 2.116(C)(10) is properly granted when "the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law" and "[t]he trial court must consider affidavits, pleadings, deposition, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the non-moving party." MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). See also *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395; 572 NW2d 210 (1998). The motion tests the factual support for a claim and must identify the issues that the movant believes are undisputed. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

### **II. Because The Restrictive Covenant Broadly Permits Any "Office Usage" Of Plaintiff's Property, Plaintiff's Proposed Medical Office Use Is Not Barred By The Restriction.**

It is well settled under Michigan law that when questions arise about the construction or application of a restrictive covenant, **such covenants are to be strictly construed against those**

**creating them or claiming a right of enforcement**, and all doubts are to be resolved in favor of free use of the property. *See, e.g., Sylvan Glens Homeowners Ass'n v McFadden*, 103 Mich App 118; 302 NW2d 615 (1981); *Sampson v Kaufman*, 345 Mich 48; 75 NW2d 64 (1956); *Moore v Kimball*, 291 Mich 455; 289 NW 213 (1939); *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943); *Austin v Kirby*, 240 Mich 56; 214 NW 943 (1927). This is precisely because the imposition of a restriction on the use of a person's property results in the loss of valuable property rights. *See Kaplan v Huntington Woods*, 357 Mich 612; 99 NW2d 514 (1959). Further, restrictive covenants must be "enforced as written, and should not be extended by judicial construction." *Hill v. Rabinowitch*, 210 Mich 220, 224; 177 NW 719 (1920).

Here, the Restrictive Covenant at issue limits the Property to retail, restaurant or office usage. Consequently, the Property could not be used for residential or industrial use, but any office use is permissible, and the Restrictive Covenant must be construed narrowly to permit the free use of land. The right to use the land for "office" uses is extremely broad, and courts faced with similar broad language in deed restrictions have routinely refused to restrict the use of land beyond that which is expressly provided in the deed, and have refused to exclude particular types of the uses that are expressly permitted where the deed restriction language provides no such exclusion.

For example, the Michigan Supreme Court has twice held that a deed restriction for "residence purposes only" did not prohibit apartment buildings, and has rejected the argument that such language permitted only a single residence for a single family because "to give the language used this meaning would be to extend its scope beyond the expressed intention of the parties." *Casterton v Plotkin*, 188 Mich 333, 338; 154 NW 151 (1915); *Teagan v Keywell*, 212 Mich 649; 180 NW 454 (1920). *See also City of Livonia v Dep't of Social Services*, 123 Mich

App 1, 22; 333 NW2d 151 (1983), *aff'd* 423 Mich 466 (1985) (rejecting argument that deed restriction for “single family dwelling” prohibited an adult foster care small group home, and noting that “the Michigan courts have consistently given a liberal construction of the word ‘family’ when used in a restrictive covenant to include other favored social units in addition to a traditional family,” based, in part, on “the longstanding principle that land should be freely alienable” and “[r]estrictive covenants are to be strictly construed”).

Here, any construction of the Restrictive Covenant that prohibits Plaintiff’s proposed use of the Property as a medical office would be entirely unreasonable and inappropriate, and would directly contradict the above-cited authorities that prohibit courts from extending restrictive covenants beyond their written language. The Defendants’ position would require the Court to re-write the Covenant to provide that the Property may be used for “office” uses, *except for medical offices*, when the Covenant itself, “as written,” contains no such limitation. That position should be rejected by this Court, just as the *Casterton* and *Teagan* courts rejected the argument that the restrictive covenants in those cases permitted use of the properties for “residence purposes,” except for multi-family residence purposes.

Further, Plaintiff’s proposed medical office use is permitted under the applicable provision of the City of Auburn Hills’ zoning ordinance. The Property is zoned for General Business uses which specifically authorizes office uses within the City’s “O” or “Office” zoning district. A medical office is deemed by the Zoning Ordinance to be an office use and is specifically included as a principal use permitted in the “O” Office District:

## ARTICLE VII

### O, OFFICE DISTRICTS

The O Office Districts are designed to accommodate office uses. Office may be used as zones of transition between non-residential uses and major thoroughfares, and residential uses.

DYKEMA GOSSETT • A PROFESSIONAL LIMITED LIABILITY COMPANY • 39577 WOODWARD AVENUE • SUITE 300 • BLOOMFIELD HILLS, MICHIGAN 48304

SECTION 700. PRINCIPAL USES PERMITTED:

In the O Office Districts no building or land shall be used and no building shall be erected except for one (1) or more of the following specified uses, unless otherwise provided for in this Ordinance:

1. Office buildings for any of the following occupations: executive, administrative, professional, accounting, writing, clerical, stenographic, drafting and sales, subject to the limitations contained below in Section 701, Required Conditions.
2. **Medical offices and outpatient clinics. 24 hour emergency care facilities shall not be permitted in this district.**
3. Accessory buildings and accessory uses customarily incidental to any of the above principal permitted uses.
4. Uses determined to be similar to the above principal permitted uses in accordance with the criteria set forth in Section 1827 and which are not listed below as special land uses.

(Exhibit 2, emphasis added.)

In this case, there is no material question of fact that Plaintiff’s proposed medical office use of the Property is permitted under the Restrictive Covenant and under the applicable zoning ordinance. Thus, Plaintiff is entitled to declaratory relief and judgment with respect to Count I of its Complaint as a matter of law.

**III. Even If There Was Any Ambiguity In The Meaning Of “Office” Use, Which Ambiguity Would Have To Be Construed Against Defendant, Defendant’s Own Admission That A Medical Office Use Was Permissible Is Dispositive.**

Before Plaintiff closed on the purchase of the Property for more than \$700,000, it had an opportunity to conduct due diligence. When it discovered the Restrictive Covenant, its counsel wrote Defendant to confirm that a medical office use was permitted under the Covenant. Plaintiff wanted to avoid any disagreement with its future neighbor. Defendant’s principal executed the letter confirming the obvious – the Restrictive Covenant does not bar medical office uses of the Property. (See Exhibit 4.)

Defendant now appears to take the position that it can pick and choose and dictate to Plaintiff what types of medical office usages would be permissible or acceptable to Defendant, including the types of treatment, services, testing or other consultation activities.<sup>1</sup> There is no basis in the Restrictive Covenant or any applicable law to give the Defendant such discretion or control over Plaintiff's use and occupation of its own Property, and, even if there were, Defendant is estopped by its written acquiescence from doing so.

As the Michigan Supreme Court has recognized, "[t]he right to enforce a restrictive covenant may be lost by waiver or acquiescence where by failing to act one leads another to believe that he is not going to insist upon the covenant, and another is damaged thereby; or *where there has been acquiescence*, actual or passive, equity will ordinarily refuse aid." *Bigham v Winnick*, 288 Mich 620, 623; 286 NW2d 102 (1939) (emphasis added) (citation omitted).

Here, the undisputed facts demonstrate the unequivocal waiver and acquiescence by Defendant that Plaintiff's medical office is permitted under the plain language of the deed restriction broadly permitting "office" uses. (Ex. 4.) And there is no question that Plaintiff justifiably relied on Defendant's written representation in completing the acquisition of the Property for over \$700,000. Consequently, Defendant is estopped from flipping its position now to assert a contrary, waived position. *See Bigham*, 288 Mich at 624 (party could not enforce restrictive covenant where "no complaint or objection was made during all of the time that [the

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<sup>1</sup> Defendant appears to take the position that its admission with respect to medical office uses is not effective because the identity of Plaintiff as the purchaser was not disclosed. Such a position is without merit. The identity of the purchaser is not relevant to construction of the Restrictive Covenant, and Defendant has no right to dictate the identity of the owner of Plaintiff's Property. It does not matter whether the medical office use is for a group of radiologists, oral surgeons, pediatricians, urgent care doctors, or family general medicine (such as Plaintiff's practice). These are all medical office uses not prohibited by the Restrictive Covenant and authorized office uses under the City's zoning of the Property. Moreover, not only is it common practice for potential buyers of property not to disclose their identity during due diligence investigation, the Defendant never requested the identity of the purchaser, nor did Plaintiff refuse to identify itself.

other party] was making the expenditures in improving the premises for carrying on such business”); *see also Dunham Lake Prop Owners Assoc v Baetz*, No 237047, 2003 WL 21419268, at \*2 (Mich Ct App June 19, 2003) (copy attached as Ex. 7) (citing *Bigham*, and discussing trial court’s determination under the elements of equitable estoppel that “plaintiffs’ failure to enforce the deed restriction induced defendants to believe that such structures were permitted and that defendants justifiably relied on and acted on this belief” and “would be prejudiced if plaintiffs were allowed to deny the existence of the facts and require removal of their structure”).

**CONCLUSION**

For the reasons set forth above, Plaintiff is entitled to a declaratory judgment that its proposed use and occupation of its Property for medical office uses in a manner permitted and regulated by the City’s Zoning Ordinance does not violate the Restrictive Covenant.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Alan M. Greene  
Alan M. Greene (P31984)  
Krista L. Lenart (P59601)  
Attorneys for Plaintiff  
39577 Woodward Avenue, Suite 300  
Bloomfield Hills, MI 48304  
(248) 203-0757 or (734) 214-7676  
agreene@dykema.com

Date: July 21, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the Wiznet system which will send notification of such filing to all attorneys of record.

/s/ Alan M. Greene

Alan M. Greene (P31984)

Krista L. Lenart (P59601)

Attorneys for Plaintiff

Dykema Gossett PLLC

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Bloomfield Hills, MI 48304

(248) 203-0757 or (734) 214-7676

agreene@dykema.com

Date: July 21, 2011

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# EXHIBIT 1

# Buyer Closing Statement

William T. Sheahan Title Company  
32820 Woodward Avenue  
Suite 210  
Royal Oak, MI 48073

File Number: WS10867

Printed: 11/16/2010 at 10:06

Page: 1

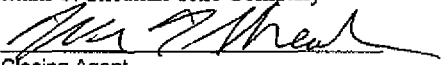
Seller: Fidelity Bank, a Michigan banking corporation  
Buyer: Planned Parenthood Mid and South Michigan, a Michigan non-profit corporation  
Property Location: 1625 N. Opdyke  
Auburn Hills, MI 48326  
City of Auburn Hills  
Settlement Date: 11/19/2010

Description	Charges	Credits
Sales Price	733,150.00	
Deposit		42,500.00
City/town taxes 11/19/2010 to 06/30/2011	17,130.17	
County taxes 11/19/2010 to 11/30/2010	375.65	
Delinquent Water/Sewer		784.28
Water/Sewer October Bill		60.98
Water/Sewer November Prorate		36.59
Settlement or closing fee	495.00	
Record Covenant Deed	21.00	
Recording Processing Fee	45.00	
Courrier Fee	30.00	
CASH DUE FROM BUYER		707,864.97
Totals:	751,246.82	751,246.82

Planned Parenthood Mid and South  
Michigan, a Michigan non-profit  
corporation

By: Matthew P. Bertram, Vice President of  
Finance, CFO

William T. Sheahan Title Company

By:   
Closing Agent

Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23

# **EXHIBIT 2**

## ARTICLE IX B-2, GENERAL BUSINESS DISTRICTS

### PREAMBLE

The B-2 General Business Districts are intended to serve the overall shopping needs of residents both within and beyond the City including convenience, comparison and highway needs.

### SECTION 900. PRINCIPAL USES PERMITTED:

In the B-2 General Business Districts no building or land shall be used and no building shall be erected except for one (1) or more of the following specified uses, unless otherwise provided for in this Ordinance:

1. Any Principal Uses Permitted in the O Office Districts or B-1 Limited Business Districts.
2. Any generally recognized retail business which supplies commodities on the premises, such as, but not limited to, groceries, meats, dairy products, baked goods or other foods, drugs, dry goods, notions or hardware, and household goods or products such as furniture, carpeting and lighting fixtures.
3. Any personal service establishment which performs services on the premises, such as, but not limited to, shoe repair shops, tailor shops, beauty parlors, or barber shops.
4. Professional offices of doctors, lawyers, dentists, chiropractors, osteopaths and similar or allied professions.
5. Banks with drive-in facilities may be permitted when said drive-in facilities are incidental to the principal function, and subject to the following conditions:
  - A. Drive-up windows shall provide at least ten (10) queuing spaces eighteen (18) feet long by ten (10) feet wide for each station. The lane containing the queuing spaces shall be separate and distinct from other access drives and maneuvering lanes for parking spaces. The queuing space lane shall have a clear width of ten (10) feet and be physically separated from access drives, maneuvering lanes and parking spaces with a landscaped area five (5) feet wide with raised curbs on all sides.
  - B. Drive-up stations shall provide at least five (5) queuing spaces eighteen (18) feet long by ten (10) feet wide for each station. The lane containing the queuing spaces shall be separate and distinct from other access drives and maneuvering lanes for parking spaces. The queuing space lane shall have a clear width of ten (10) feet and be physically separated from access drives, maneuvering lanes and parking spaces with a landscaped area five (5) feet wide with raised curbs on all sides.
6. Any retail business, service establishments or processing uses such as the following:
  - A. Any retail business whose principal activity is the sale of new merchandise in any enclosed building.
  - B. Any service establishment of an office-showroom or workshop nature of an electrician, decorator, dressmaker, tailor, shoemaker, baker, printer, upholsterer, or an establishment doing radio, television or home appliance repair, photographic reproduction, and similar establishments that require a retail adjunct.
7. Restaurants, or other places serving food or beverage (without drive-through or drive-in facilities), when located within a planned shopping center.
8. Accessory buildings and accessory uses customarily incidental to any of the above principal uses permitted.
9. Uses determined to be similar to the above principal permitted uses in accordance with the criteria set forth in Section 1827 and which are not listed below as special land uses.

*(Amended: 11-11-02 per Ordinance No. 710)*

*(Amended: 5-15-06 per Ordinance No. 779)*

### SECTION 901. REQUIREMENTS FOR ALL PRINCIPAL USES:

1. All business establishments, including contractors or builders, shall be retail or service establishments dealing directly with consumers, and without wholesale outdoor storage activities on site. All goods produced on the premises shall be sold at retail on the premises where

## ARTICLE VII O, OFFICE DISTRICTS

### PREAMBLE

The O Office Districts are designed to accommodate office uses. Office may be used as zones of transition between non-residential uses and major thoroughfares, and residential uses.

*(Amended: 7-09-01 per Ordinance No. 684)*

### SECTION 700. PRINCIPAL USES PERMITTED:

In the O Office Districts no building or land shall be used and no building shall be erected except for one (1) or more of the following specified uses, unless otherwise provided for in this Ordinance:

1. Office buildings for any of the following occupations: executive, administrative, professional, accounting, writing, clerical, stenographic, drafting and sales, subject to the limitations contained below in Section 701, Required Conditions.
2. Medical offices and outpatient clinics. 24 hour emergency care facilities shall not be permitted in this district.
3. Accessory buildings and accessory uses customarily incidental to any of the above principal permitted uses.
4. Uses determined to be similar to the above principal permitted uses in accordance with the criteria set forth in Section 1827 and which are not listed below as special land uses.

*(Amended: 7-09-01 per Ordinance No. 684)*

### SECTION 701 SPECIAL LAND USES PERMITTED:

The following uses may be permitted under the purview of Section 1818 by the City Council, after site plan review and Public Hearing by the Planning Commission, and subject further to such other reasonable conditions which, in the opinion of the City Council, are necessary to provide adequate protection to the health, safety, general welfare, morals and comfort of the abutting property, neighborhood and City of Auburn Hills:

1. Nursery schools, day nurseries and child care centers provided the following conditions are met:
  - A. Such facilities shall be located on major thoroughfares with an existing or proposed right-of-way of one hundred and twenty (120) feet.
  - B. Any area not used for parking in the front yard shall be kept in lawn, and landscaped in accordance with Section 1808.
  - C. Outdoor play areas shall be in the side or rear yard in the amount of one hundred (100) square feet for each child cared for, but at least a minimum of one thousand two hundred (1,200) square feet.
  - D. Whenever the school or center abuts a residential district, parking, drop off, and play areas shall be screened with an obscuring six (6) foot fence or wall, four foot six inch (4'6") high berm with landscaping in accordance with Section 1808, a twenty (20') foot wide greenbelt landscaped in accordance with Section 1808, or a combination of the above, whichever in the opinion of the Planning Commission and City Council, achieves the objective of screening and controlling noise levels.
  - E. Any other conditions which the Planning Commission and City Council deem necessary to assure that the residential character of the abutting neighborhood shall be maintained.
  - F. 24 hour facilities shall not be permitted abutting residential zoned property in this district.
2. Accessory buildings and accessory uses customarily incidental to any of the above special land uses permitted.
3. Special land uses determined to be similar to the above special land uses in accordance with the criteria set forth in Section 1828.

*(Amended: 7-09-01 per Ordinance No. 684)*

**SECTION 702. REQUIREMENTS FOR ALL USES:**

All uses shall be subject to the following requirements:

1. The outdoor storage of goods or materials shall be prohibited regardless of whether or not they are for sale.
2. Warehousing or indoor storage of goods or material, beyond that normally incidental to the above permitted uses, shall be prohibited.
3. Illumination of the business, and all vehicular and loading traffic, shall be controlled or channeled so as to not allow glare into the adjacent residential district, and shall be subject to the requirements of Section 1810, Exterior Lighting.

*(Amended: 7-09-01 per Ordinance No. 684)*

**SECTION 703. AREA AND BULK REQUIREMENTS:**

See Article XVII, Scheduled of Regulations, limiting height and bulk of buildings.

*(Amended: 7-09-01 per Ordinance No. 684)*

# **EXHIBIT 3**

LIBER 18997PG273

SP 29 98 286217

\$ 9.00 MISCELLANEOUS RECORDING  
\$ 2.00 REINDEMENTATION  
29 SEP 98 10:12 A.M. RECEIPT# 113  
PAID RECORDED - OAKLAND COUNTY  
LYNN D. ALLEN, CLERK/REGISTER OF DEEDS

DECLARATION OF RESTRICTIVE COVENANTS

These Restrictive Covenants are made this 8<sup>th</sup> day of September, 1998, by and between Paul Torretta on behalf of Torretta Investment Company, a Michigan co-partnership, of 990 E. Silver Bell Road, Lake Orion, Michigan 48360 (referred to in this instrument as "Torretta"), and Ghanshyamsinh D. Vansadia, of 3646 Hollensshade Dr. Rochester Hills, Michigan 48306 (referred to in this instrument as "Vansadia").

Torretta is the owner of the real property located in Auburn Hills, Oakland County, Michigan, and more particularly described in Exhibit A as attached hereto. In consideration of Ten (\$10.00) Dollars, receipt of which is acknowledged, Torretta grants and conveys to Vansadia, the following restrictions to be placed upon parcel "A": Parcel "A" may only be used or sold by Torretta for restaurant, retail or office usage. Any building constructed on Parcel "A" may only be two-story in height for restaurant or office usage (not including basement level with partial windows above grade) and one-story in height for retail usage.

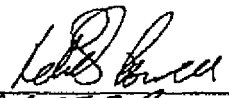
These restrictive covenants are for the benefit of and appurtenant to, the real property or any portion of it, owned by Vansadia, his successors and assigns more particularly described in Exhibit B, as attached hereto.

This Grant of Restrictive Covenants will run with the land and will bind and inure to the benefit of the parties to this instrument, their heirs, successors and assigns.

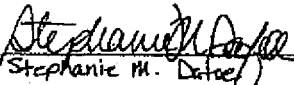
In witness, Grantor has executed this instrument on the date first written above.

WITNESSES:

Torretta Investment Company,  
a Michigan co-partnership

  
ROBERT S. Bowen


  
By Paul Torretta  
Its Managing Partner

  
Stephanie M. D'Arce

State of Michigan )  
County of Oakland) ss.

O.K. - KB

The foregoing instrument was acknowledged before me this 8<sup>th</sup> day of September, 1998, Paul Torretta, Its Managing Partner, on behalf of Torretta Investment Company, a Michigan co-partnership.

  
Michael J. Balian  
Notary Public, Oakland County, Michigan  
My Commission Expires: February 12, 2000

GRECO

DRAFTED BY:

WHEN RECORDED RETURN TO:

Michael J. Balian, Esq.  
Balian, Donovan, Messano & Mordell, P.L.C.  
33 Bloomfield Hills Parkway, Suite 100  
Bloomfield Hills, Michigan 48304

Michael J. Balian, Esq.  
Balian, Donovan, Messano & Mordell, P.L.C.  
33 Bloomfield Hills Parkway, Suite 100  
Bloomfield Hills, Michigan 48304

Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23

68134



9.00  
1.200  
JYT



LIBER 18997PG274

EXHIBIT "A"

PROPERTY DESCRIPTION (AS PER CITY OF AUBURN HILLS)

A PARCEL OF LAND LOCATED IN PART OF THE S.W. 1/4 OF SECTION 14, T.3N., R.10E., CITY OF AUBURN HILLS, OAKLAND COUNTY, MICHIGAN, DESCRIBED AS BEGINNING AT A POINT DISTANT ALONG THE WESTERLY LINE OF OPDYKE ROAD (100 FT. WIDE) N.02°30'00"E. 259.22 FT. FROM THE N.E. CORNER OF LOT 20 OF "COE COURT SUBDIVISION" AS RECORDED IN LIBER 68, PAGE 12, O.C.R.; THENCE S.89°49'26"W. 300.00 FT.; THENCE N.01°00'00"W. 205.93 FT.; THENCE N.89°03'05"E. 312.36 FT.; THENCE S.02°30'00"W. 200.00 FT. TO THE POINT OF BEGINNING. CONTAINING 1.43 ACRES OF LAND. SUBJECT TO ALL EASEMENTS AND RESTRICTIONS OF RECORD. PARCEL IDENTIFICATION No. 14-14-351-019.

Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23

LIBER 18997 PC 275

LIBER 18997 PC 275

PROPERTY DESCRIPTION (AS PER CITY OF AUBURN HILLS)

A PARCEL OF LAND LOCATED IN PART OF THE S.W. 1/4 OF SECTION 14, T.3N., R.10E., CITY OF AUBURN HILLS, OAKLAND COUNTY, MICHIGAN, DESCRIBED AS BEGINNING AT A POINT DISTANT ALONG THE WESTERLY LINE OF OPDYKE ROAD (100 FT. WIDE), N.02°30'00"E. 259.22 FT. FROM THE N.E. CORNER OF LOT 20 OF "DOE COURT SUBDIVISION" AS RECORDED IN LIBER 68, PAGE 12, O.C.R. AND S.89°49'26"W. 295.43 FT.; THENCE S.00°09'36"E. 40.00 FT.; THENCE S.89°50'47"W. 957.12 FT.; THENCE N.00°26'48"E. 264.14 FT.; THENCE S.89°03'05"E. 946.93 FT.; THENCE S.01°00'00"E. 205.93 FT.; THENCE N.89°49'28"E. 4.57 FT. TO THE POINT OF BEGINNING. CONTAINING 5.57 ACRES OF LAND. SUBJECT TO ALL EASEMENTS AND RESTRICTIONS OF RECORD. PARCEL IDENTIFICATION No. 14-14-351-018.

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# EXHIBIT 4



Dykema Gossett PLLC  
400 Renaissance Center  
Detroit, Michigan 48243

WWW.DYKEMA.COM

Tel: (313) 568-6800

Fax: (313) 568-6701

**Laura A. Weingartner**

Direct Dial: (313) 568-5417

Email: LWEINGARTNER@DYKEMA.COM

October 8, 2010

**Overnight Courier**

Mr. Ghanshyamsinh D. Vansadia  
Shri Sai Krishna Group, LLC  
c/o 3646 Hollenshade Drive  
Rochester Hills, Michigan 48306  
Tel. 248-340-9566

Re: Office Building located at 1625 N. Opdyke, Auburn Hills, Michigan

Dear Mr. Vansadia:

By way of introduction, I represent the potential purchaser of the unfinished building located at 1625 N. Opdyke, Auburn Hills, Michigan, adjacent to the parcel owned by Shri Sai Krishna Group, LLC, on which the Comfort Suites hotel is located. As part of my client's due diligence in connection with a potential purchase of the property, we have reviewed certain documents provided to us that have been recorded in the Oakland County real estate records.

Specifically, it has come to our attention that the Declaration of Restrictive Covenants between you and Paul Torretta on behalf of Torretta Investment Company, dated September 8, 1998, was entered into and recorded in the Oakland County Records at Liber 18997, Page 273. Following our review of the Covenant, we note that the site is restricted to one of three uses: restaurant, retail or office, with a further restriction on building height. My client intends to complete construction of the building interior with no change in the current building height, and to use the building for medical offices. Our understanding of the Covenant is that use of the building for office purposes would include medical offices, and we would like to confirm that you agree with that interpretation.

I look forward to discussing this matter with you further if necessary. However, if you agree that use of the building at 1625 N. Opdyke, Auburn Hills, Michigan, for medical office purposes is an acceptable use under the terms of the aforementioned Covenant, I would ask that you provide your signature of agreement where indicated below.

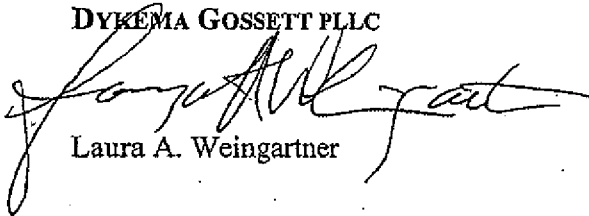
DyKEMA

Mr. Ghanshyamsinh D. Vansadia  
Shri Sai Krishna Group, LLC  
October 8, 2010  
Page 2

Please do not hesitate to contact me if you have any questions, comments or concerns.

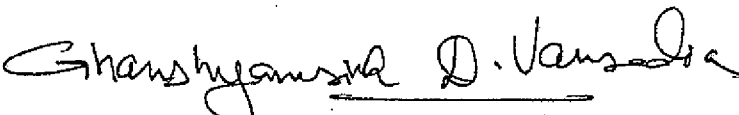

Best regards,

DYKEMA GOSSETT PLLC



Laura A. Weingartner

ACKNOWLEDGED AND AGREED:

By:   
Ghanshyamsinh D. Vansadia 

Dated: October 12, 2010

DET021367520.3  
ID/LAW - 101126/0002

# **EXHIBIT 5**

James L. Carey, Esquire  
Attorney & Counselor at Law

January 31, 2011

City of Auburn Hills  
Department of Public Services  
1500 Brown Road  
Auburn Hills, Michigan 48326

Oakland County Economic  
Development Services  
County Service Center  
2100 Pontiac Lake Road, Dept. 412  
Waterford, Michigan 48328-0412

City of Auburn Hills  
Community Development  
1827 N. Squirrel Road  
Auburn Hills, Michigan 48326

Oakland County Water Resource  
Commission  
1 Public Works Drive  
Waterford, Michigan 48328

James D. McDonald, Mayor  
1827 N. Squirrel Road  
Auburn Hills, Michigan 48326

Road Commission for Oakland County  
31001 Lahser Road  
Beverly Hills, Michigan 48025

Linda Shannon, City Clerk  
1827 North Squirrel Road  
Auburn Hills, Michigan 48326

Road Commission for Oakland County  
Permits & Environmental Concerns  
2420 Pontiac Lake Road  
Waterford, Michigan 48328

Peter E. Auger, City Manager  
1827 North Squirrel Road  
Auburn Hills, Michigan 48326

Laurie M. Johnson  
Economic Development Coordinator  
1827 North Squirrel Road  
Auburn Hills, Michigan 48326

**RE: Recent Purchase of 1625 North Opdyke Road, Auburn Hills, Michigan by  
Planned Parenthood Mid and South Michigan**

Ladies and Gentlemen:

I have been retained to represent the interests of Shri Sai-Krishna Group, L.L.C., the owner of the real property commonly know as 1565 N Opdyke Road, Auburn Hills, Michigan, 48326. In addition to any rights as an adjacent property owner, my client holds a recorded interest in the property recently purchased by Planned Parenthood Mid and South Michigan commonly known as 1625 North Opdyke Road, Auburn Hills, Michigan (the "**Recently Purchased Property**").

The purpose of this letter is to provide you with a copy of the recorded property interest that my client has in the Recently Purchased Property. My client is concerned that the new owners of the Recently Purchased Property may have plans to develop the property in ways that would violate my client's rights.

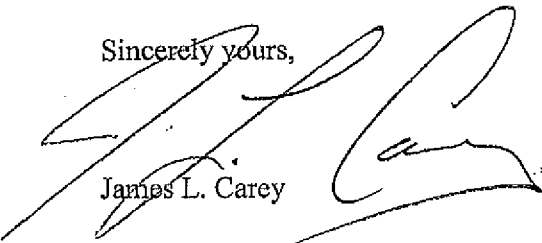
Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23

Letter to Governmental Entities & Persons  
January 31, 2011  
Page 2 of 2

Please feel free to contact me directly if you have any questions or concerns regarding my client's rights in the Recently Purchased Property. It is our hope that there will not be any need to resort to court action to safeguard my client's rights. I am contacting Planned Parenthood Mid and South Michigan directly to discuss these matters, but I wanted you to be aware of my client's concerns.

Thank you for your attention to these matters.

Sincerely yours,



James L. Carey

---

**James L. Carey, Esquire - Attorney & Counselor at Law**  
23781 Pointe O'Woods Court • South Lyon, Michigan 48178 • T: 248.605.1103 • E: [jameslcarey@hotmail.com](mailto:jameslcarey@hotmail.com)

Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23



LIBER 18997PG273

SP 29 98 2 8 6 2 1 7

\$ 9.00 MISCELLANEOUS RECORDING  
\$ 2.00 REMONUMENTATION  
29 SEP 98 10:12 A.M. RECEIPT# 118  
PAID RECORDED - OAKLAND COUNTY  
LYNN D. ALLEN, CLERK/REGISTER OF DEEDS

DECLARATION OF RESTRICTIVE COVENANTS

These Restrictive Covenants are made this 8<sup>th</sup> day of September, 1998, by and between Paul Torretta on behalf of Torretta Investment Company, a Michigan co-partnership, of 990 E. Silver Bell Road, Lake Orion, Michigan 48360 (referred to in this instrument as "Torretta"), and Ghanshyamsinh D. Vansadia, of 3646 Hollenshade Dr. Rochester Hills, Michigan 48306 (referred to in this instrument as "Vansadia").

Torretta is the owner of the real property located in Auburn Hills, Oakland County, Michigan, and more particularly described in Exhibit A as attached hereto. In consideration of Ten (\$10.00) Dollars, receipt of which is acknowledged, Torretta grants and conveys to Vansadia, the following restrictions to be placed upon parcel "A": Parcel "A" may only be used or sold by Torretta for restaurant, retail or office usage. Any building constructed on Parcel "A" may only be two-story in height for restaurant or office usage (not including basement level with partial windows above grade) and one-story in height for retail usage.

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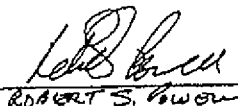
These restrictive covenants are for the benefit of and appurtenant to, the real property or any portion of it, owned by Vansadia, his successors and assigns more particularly described in Exhibit B, as attached hereto.

This Grant of Restrictive Covenants will run with the land and will bind and inure to the benefit of the parties to this instrument, their heirs, successors and assigns.

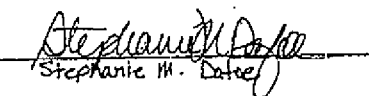
In witness, Grantor has executed this instrument on the date first written above.

WITNESSES:

Torretta Investment Company,  
a Michigan co-partnership

  
ROBERT S. NOWON

  
By Paul Torretta  
Its Managing Partner


  
Stephanie M. Dake

9.00  
+ 2.00  
RT

O.K. - KB

State of Michigan )  
County of Oakland) ss.

The foregoing instrument was acknowledged before me this 8<sup>th</sup> day of September, 1998, Paul Torretta, Its Managing Partner, on behalf of Torretta Investment Company, a Michigan co-partnership.

  
Michael J. Balian  
Notary Public, Oakland County, Michigan  
My Commission Expires: February 12, 2000

GRECO

DRAFTED BY:

Michael J. Balian, Esq.  
Balian, Donovan, Messano & Mordell, P.L.C.  
33 Bloomfield Hills Parkway, Suite 100  
Bloomfield Hills, Michigan 48304

WHEN RECORDED RETURN TO:

Michael J. Balian, Esq.  
Balian, Donovan, Messano & Mordell, P.L.C.  
33 Bloomfield Hills Parkway, Suite 100  
Bloomfield Hills, Michigan 48304

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LIBER 18997PG274

EXHIBIT "A"

PROPERTY DESCRIPTION (AS PER CITY OF AUBURN HILLS)

A PARCEL OF LAND LOCATED IN PART OF THE S.W. 1/4 OF SECTION 14, T.3N., R.10E., CITY OF AUBURN HILLS, OAKLAND COUNTY, MICHIGAN, DESCRIBED AS BEGINNING AT A POINT DISTANT ALONG THE WESTERLY LINE OF OPDYKE ROAD (100 FT. WIDE) N.02°30'00"E. 259.22 FT. FROM THE N.E. CORNER OF LOT 20 OF "COE COURT SUBDIVISION" AS RECORDED IN LIBER 68, PAGE 12, O.C.R.; THENCE S.89°49'26"W. 300.00 FT.; THENCE N.01°00'00"W. 205.93 FT.; THENCE N.89°03'05"E. 312.36 FT.; THENCE S.02°30'00"W. 200.00 FT. TO THE POINT OF BEGINNING. CONTAINING 1.43 ACRES OF LAND. SUBJECT TO ALL EASEMENTS AND RESTRICTIONS OF RECORD. PARCEL IDENTIFICATION No. 14-14-351-019.

LIBER 18997PG275

LIBER 18997PG275

PROPERTY DESCRIPTION (AS PER CITY OF AUBURN HILLS)

A PARCEL OF LAND LOCATED IN PART OF THE S.W. 1/4 OF SECTION 14, T.3N., R.10E., CITY OF AUBURN HILLS, OAKLAND COUNTY, MICHIGAN, DESCRIBED AS BEGINNING AT A POINT DISTANT ALONG THE WESTERLY LINE OF OPDYKE ROAD (100 FT. WIDE) N.02°30'00"E. 259.22 FT. FROM THE N.E. CORNER OF LOT 20 OF "COE COURT SUBDIVISION" AS RECORDED IN LIBER 68, PAGE 12, O.C.R. AND S.89°49'26"W. 295.43 FT.; THENCE S.00°08'36"E. 40.00 FT.; THENCE S.89°50'47"W. 357.12 FT.; THENCE N.00°26'48"E. 264.14 FT.; THENCE S.89°03'05"E. 916.93 FT.; THENCE S.01°00'00"E. 205.93 FT.; THENCE N.89°49'28"E. 4.57 FT. TO THE POINT OF BEGINNING. CONTAINING 5.57 ACRES OF LAND. SUBJECT TO ALL EASEMENTS AND RESTRICTIONS OF RECORD. PARCEL IDENTIFICATION No. 14-14-351-018.

Received for Filing Oakland County Clerk 2011 JUL 21 PM 01:23

# **EXHIBIT 6**

James L. Carey, Esquire  
Attorney & Counselor at Law

January 31, 2011

Planned Parenthood Mid and South Michigan  
3100 Professional Drive  
PO Box 3673  
Ann Arbor, Michigan 48104

**RE: Your Recent Purchase of 1625 North Opdyke Road, Auburn Hills, Michigan**

Ladies and Gentlemen:

I have been retained to represent the interests of Shri Sai-Krishna Group, L.L.C., the owner of the real property commonly known as 1565 North Opdyke Road, Auburn Hills, Michigan, 48326. In addition to any rights as an adjacent property owner, my client holds a recorded interest in the property commonly known as 1625 North Opkyke Road, Auburn Hills, Michigan 48326 (the "Recently Purchased Property"), which you purchased by covenant deed dated November 19, 2010.

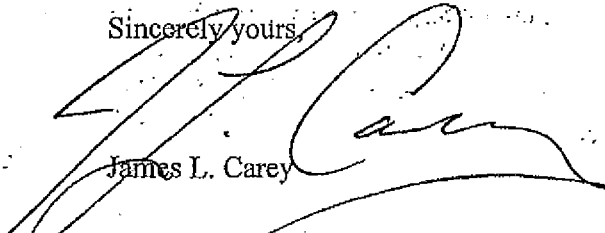
I am uncertain whether you are represented by counsel, although my client did receive a letter dated October 8, 2010, from Laura A. Weingartner of Dykema Gossett PLLC. In this letter, Ms. Weingartner claimed to represent an unnamed party interested in the Recently Purchased Property. If she is your attorney for these matters, please let me know and I will happily follow-up with her directly. If not, please forward this to your lawyer or let me know that you have decided against legal representation at this time.

My client does not know what your plans are for the development and use of the Recently Purchased Property, but we are very concerned about some rumored uses that have been circulating – uses that may be counter to my client's rights. We would like to meet with you to discuss what your plans are for the property. We think it would be wise to be sure that your use of the property does not force us to otherwise defend our rights in court.

Please contact me, or have your counsel contact me if you are represented, so that we can schedule a time to talk. We think it is very important that we reach resolution on your use of the property so that there are no misunderstandings. In light of our concerns, I am also contacting various departments of the local government so that they are fully aware of my client's rights regarding the property and its development. I have included a copy of the letter we have sent.

I look forward to hearing from you or your legal counsel so that we can address these concerns as quickly and efficiently as possible. My client and I look forward to working with you to reach an appropriate resolution. Thank you.

Sincerely yours,

  
James L. Carey

# **EXHIBIT 7**

Not Reported in N.W.2d, 2003 WL 21419268 (Mich.App.)  
(Cite as: 2003 WL 21419268 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Michigan.  
DUNHAM LAKE PROPERTY OWNERS ASSO-  
CIATION and Dunham Lake Civic Committee,  
Plaintiffs-Appellants,  
v.  
Rainer BAETZ and Carol M. Baetz, Defendants-  
Appellees.

No. 237047.  
June 19, 2003.

Before: TALBOT, P.J., and WHITE and MURRAY,  
JJ.

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiffs appeal as of right a judgment of no cause of action in this declaratory action to enforce recorded deed restrictions. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendants are the owners of property in "Dunham Lake Estates South" subdivision in Livingston County. The property is subject to deed restrictions that were originally recorded in 1964 and subsequently amended in 1965 and 1966.

The Declaration of Restrictions and Easements, as amended, stated in part:

#### A. RESIDENTIAL AREA REQUIREMENTS

1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two (2) stories in height and a private garage for not more than three (3) cars.

2. No building shall be erected, placed, or altered

on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Dunham Lake Civic Committee as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation....

Defendants' lot had a single-family dwelling with an attached garage. The dispute concerns a detached, enclosed structure, which has been characterized as a "building," "a storage building," and an "outbuilding." The structure was constructed of wood, without a cement floor or footings, and was approximately ten feet by twelve feet. It had a window and a double door. The structure was used primarily for storage of lawn equipment. The cost of construction was approximately \$2800. Defendants did not seek approval of the structure by the Civic Committee.

Plaintiffs filed this action seeking a declaration that defendants violated the deed restrictions and an injunction requiring defendants to remove the "outbuilding" from their property. Plaintiffs alleged that the "outbuilding" was not a dwelling or garage and that the deed restrictions did not allow "other outbuildings."

Following a bench trial, the trial court denied plaintiffs' requested relief and granted judgment to defendants. The court's opinion discussed in detail the inconsistencies in plaintiffs' interpretation of the deed restrictions, specifically in regard to the plaintiffs' definition of "building." The court did not expressly find that defendants' structure was a building. Rather, the court concluded that the evidence "justifies the application of the defense of estoppel, waiver, and laches."

This Court reviews equitable actions de novo, but reviews the court's findings of fact for clear error. Webb v. Smith (Aft Second Remand), 224 Mich.App 203, 210; 568 NW2d 378 (1997).

Plaintiffs argue that although the trial court referred to laches, the court did not analyze that doctrine and the evidence did not support its application.

Not Reported in N.W.2d, 2003 WL 21419268 (Mich.App.)  
(Cite as: 2003 WL 21419268 (Mich.App.))

We agree. Laches is an affirmative defense that requires both a delay in instituting an action to enforce the restriction and a showing of prejudice to the party asserting the defense. Rofe v Robinson (On Second Remand), 126 Mich.App 151, 154; 336 NW2d 778 (1983). Here, plaintiffs were aware of the purported violation as early as August 26, 1996, within two weeks after the structure was complete. Plaintiffs granted defendants' request for time to allow them to gather signatures for a petition to amend the restrictions. The deadline for obtaining the signatures, as extended by plaintiffs, was June 30, 1997. Defendants did not obtain the necessary signatures for their petition. In a letter dated July 2, 1998, plaintiffs asked defendants to remove the outbuilding. Defendants did not remove the structure. On April 23, 1999, plaintiffs commenced the instant action. Although the question whether plaintiffs acted with reasonable promptness in instituting the suit after the expiration of the June 30, 1997, deadline is debatable, there was no evidence that defendants were prejudiced by this delay. Absent some prejudice to defendants resulting from the delay, we agree with plaintiffs that the defense of laches was not applicable.

\*2 Plaintiffs next argue that the court erred in determining that plaintiffs lost the right to enforce the restrictive covenant through waiver. We agree.

Waiver of restrictions requires a showing that the character of the subdivision has been so altered as to defeat the original purpose of restriction. O'Connor v. Resort Custom Bldrs, Inc., 459 Mich. 335, 346; 591 NW2d 216 (1999), citing Carey v. Lauhoff, 301 Mich. 168, 174; 3 NW2d 67 (1942). "There is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." Rofe, supra, p 155. Here, the trial court found that plaintiffs had been inconsistent in application of the restrictions and that many structures within the Dunham Lake properties violated the plain language of the deed restrictions. However, defendants did not demonstrate a change in the character of the subdivision, and the trial court did not find that a change in character had occurred. Therefore, the evidence and the court's findings do not support the court's conclusion that the restriction had been waived.

Plaintiffs have not addressed the trial court's determination that they were estopped from enforcing

the restrictive covenant. In the context of negative covenants and deed restrictions, the term "estoppel" is often used in conjunction with the analysis of laches and waiver. See e.g., Bigham v. Winnick, 288 Mich. 620, 623; 286 NW 102 (1939); Carey, supra, p 174; Baerlin v. Gulf Refining Co. 356 Mich. 532, 534-536; 96 NW2d 806 (1959.) Here, however, the court referred to the elements of equitable estoppel as set forth in In re Yeager Bridge Co. 150 Mich.App 386, 394; 389 NW2d 99 (1986): "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." (Citations and internal quotation marks omitted.) The court essentially determined that plaintiffs' failure to enforce the deed restriction induced defendants to believe that such structures were permitted and that defendants justifiably relied on and acted on this belief. Defendants would be prejudiced if plaintiffs were allowed to deny the existence of the facts and require removal of their structure. The trial court noted that Michael Wolanin, who testified as plaintiffs' representative, acknowledged that a person looking at the other structures in the neighborhood might reasonably conclude that a structure like defendants' would be permitted. Indeed, Wolanin admitted that defendant's structure would be permissible as constructed if it were used as a playhouse, thus reinforcing the reasonableness of defendants reliance on the structure being permissible under the restrictive covenant. Plaintiffs have presented no argument challenging the court's findings concerning justifiable reliance on the part of defendants or the court's conclusion concerning equitable estoppel. Because plaintiffs have failed to address this basis for the court's decision, they are not entitled to reversal of the judgment. Roberts & Son Contracting, Inc v North Oakland Development Corp. 163 Mich.App 109, 111; 413 NW2d 744 (1987).

\*3 Moreover, we conclude that the judgment in favor of defendants was warranted because plaintiffs failed to establish a violation of the restrictions. Although the trial court did not expressly resolve the dispute between the parties concerning the whether defendants' structure was a "building" as that term is used in the restrictions, we conclude that plaintiffs' failure to establish the claimed violation is an additional basis for affirming the trial court's judgment.

Not Reported in N.W.2d, 2003 WL 21419268 (Mich.App.)  
(Cite as: 2003 WL 21419268 (Mich.App.))

The premise of plaintiffs' request for relief is that the deed restrictions prohibit any "building" other than a single-family dwelling and a garage and that defendants' structure is a prohibited building because it is neither a dwelling nor a garage. Plaintiffs had the burden of proof in establishing a violation of the restriction. Wilde v. Richardson, 362 Mich. 9, 12; 106 NW2d 141 (1960). "The provisions are strictly construed against the would-be enforcer, however, and doubts resolved in favor of the free use of property. Courts will not grant equitable relief unless there is an obvious violation." Stuart v. Chawney, 454 Mich. 200, 210; 560 NW2d 336 (1997) (citations omitted).

The term "building" is not defined in the restrictions. The absence of a definition in the restrictions does not necessarily lead to the conclusion that the term is ambiguous. Terrien v. Zwiil, 467 Mich. 56, 76; 648 NW2d 602 (2002). Rather, the term is to be interpreted in accordance with its "commonly used meaning." *Id.*

At trial, plaintiffs' evidence concerning the meaning of "building," as interpreted by the Civic Committee was presented by Wolanin, who had been a member of the Dunham Lake Civic Committee for approximately ten years. Wolanin acknowledged that the definition of "building" was "vague." No Civic Committee procedures, rules, regulations or guidelines governed the determination of what constituted a building. Although the Civic Committee did not have authority to approve a building that was not a dwelling or a garage, the Civic Committee assessed a structure that was not a residence or a garage on an individual basis using a "common sense definition" to decide if it would be deemed in conformance with the restrictions.

However, Wolanin's testimony did not present a coherent definition of the term "building."

According to Wolanin, whether a structure was a "building" depended in part on its proximity to the house or garage. Thus, a structure that was pushed up next to the house or garage or attached to the house or garage by latticework, for example, would not be considered a building. According to Wolanin, if defendants' structure were near the house, no one "would have a problem with that."

According to Wolanin, whether a structure was a "building" depended in part on whether it was cosmetically "unitized" and in harmony with the house. Thus, an enclosed structure built on a deck four feet from the home was not a violation of the restrictions because it was "unitized" with the deck and the house, regardless of its use. The same structure placed thirty to fifty feet into the yard would be "a real problem" for Wolanin.

\*4 According to Wolanin, regardless of proximity to the house and harmony with the dwelling, a structure used as a playhouse is not a "building." Playhouses were "outside the scope" of the restrictions. However, if the same structure is used for storage, it is a building. According to Wolanin, if defendants' structure had been used for a playhouse, it would not have been deemed to violate the restriction. Defendants' structure was deemed in violation of the restrictions not because of the structure itself, but because of what defendants put in it.

According to Wolanin, the deed restrictions were "getting at" metal or wooden storage buildings. However, he acknowledged that two metal storage structures had previously been approved by the Civic Committee.

Plaintiffs' theory was that defendants' structure violated the restrictions because it was a "building" other than a dwelling or a garage. However, rather than establishing a commonly understood meaning of the term "building," plaintiffs showed that the meaning of the term was uncertain and interpreted at the whim of the Civic Committee members.

Moreover, plaintiffs' position that the intent of the restrictions was to preclude "outbuildings," such as barns and storage structures, is undermined by a separate restriction referring to outbuildings.

#### A. RESIDENTIAL AREA REQUIREMENTS

9. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence, either temporarily or permanently.

The deed restrictions are grounded in contract, and in an action to enforce deed restrictions, the in-



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tent of the drafter controls.<sup>FN1</sup> *Stuart, supra*, p 210. As in other cases involving interpretation of contracts, this Court considers the instrument as a whole, and all parts are to be harmonized so far as reasonably possible. *Rofe, supra*, p 157; *Associated Truck Lines, Inc v. Baer*, 346 Mich. 106, 110; 77 NW2d 384 (1956). "Every word must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." *Id.* (Citations and internal quotation marks omitted.)

FN1. Because the intent of the drafter concerning the meaning of the restrictions is controlling, we do not agree with plaintiffs' contention that defendant Rainer Baetz' opinion that the structure was a building precluded defendants from maintaining that the structure was not a "building" as that term was used in the deed restrictions.

In this case, the provision in the deed restrictions prohibiting use of an "outbuilding" as a residence militates against plaintiffs' position that the restrictions prohibited "outbuildings" in all circumstances. A prohibition against use of a barn or "other outbuilding" as a residence is mere surplusage if these structures may not be "erected, altered, placed or permitted to remain on any lot" pursuant to paragraph 1 of the Residential Area Requirements. Instead, the prohibition on using a barn or "other outbuilding" as a residence implies that the listed structures are permitted when they are not used as a residence. The inclusion of this provision suggests that the drafter drew a distinction between "buildings" and "outbuildings," and the drafter's intent in limiting "buildings" to a house and a garage was not to ban outbuildings, such as defendants' structure.

\*5 In summary, plaintiffs bore the burden of establishing an obvious violation of the restrictions. *Wilde, supra*, p 12; *Stuart, supra*, p 210. Construing the restriction against plaintiffs and resolving doubt in favor of the free use of the property, we conclude that plaintiffs failed to sustain their burden of establishing that defendants' structure was a "building" in violation of the restrictions. *Id.* Thus, we affirm judgment for defendants because plaintiffs failed to establish that defendants' structure violated the restriction and because plaintiffs failed to challenge the

court's findings and conclusion concerning the application of equitable estoppel.

Affirmed.

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