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STATE OF MICHIGAN

IN THE SUPREME COURT

MATTHEW T. THIEL and
NICOLE M. THIEL,

Plaintiffs/Appellees, and

WILLIAM TRAYWICK and
MARCIA TRAYWICK,

Intervening Plaintiffs/Appellees,

v.

DAVID L. GOYINGS and
HELEN M. GOYINGS,

Defendants/Appellants.

MSC Docket No. 156708

COA Docket No. 333000

Allegan County Circuit Court
No. 15-55184-CK

/

*AMICUS CURIAE* BRIEF OF THE MODULAR HOME BUILDERS ASSOCIATION

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* v

STATEMENT OF QUESTION PRESENTED vii

INTRODUCTION 1

ARGUMENT 2

I. The Court of Appeals did not apply ordinary presumptions and principles of interpretation as to restrictive covenants. 2

II. The Court of Appeals's over-expansive reading of a restrictive covenant against "modular" homes threatens harm to Michigan homebuyers and builders. 7

CONCLUSION 11

RECEIVED by MSC 12/28/2017 2:25:20 PM

INDEX OF AUTHORITIES

Cases

Austin v Kirby,
240 Mich 56; 214 NW 943 (1927) 3

Bastendorf v Arndt,
290 Mich 423; 287 NW 579 (1939) 3, 5

Beverly Island Ass'n v Zinger,
113 Mich App 322; 317 NW2d 611 (1982) 3

Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham,
479 Mich 206; 737 NW2d 670 (2007) 2

Brown v Martin,
288 Mich App 727; 794 NW2d 857 (2010) 6

Chesapeake Estates Imp Ass'n v Foster,
265 Md 120; 288 A2d 329 (1972) 7

Cooper v Kovan,
349 Mich 520; 84 NW2d 859 (1957) 6

Darnell v Garett R Kern Const, Inc,
No. 257277, 2006 WL 1328879 (Mich Ct App, May 16, 2006) 5

Davis v Huey,
620 SW2d 561 (Tex, 1981) 4

Dean v. Monteil,
361 Mo 1204; 239 SW2d 337 (1951) 4

Flajole v Gallaher,
354 Mich 606; 93 NW2d 249 (1958) 3

Howell v Hawk,
750 NE2d 452 (Ind Ct App, 2001) 7

In re Norwood Estates Subdivision,
291 Mich 563; 289 NW 255 (1939) 3

Kelly v Carpenter,
245 Mich 406; 222 NW 714 (1929) 3

RECEIVED by MSC 12/28/2017 2:25:20 PM

RECEIVED by MSC 12/28/2017 2:25:20 PM

Life Techs Corp v Promega Corp,
137 S Ct 734; 197 LEd 2d 33 (2017) 10

Maatta v Dead River Campers, Inc,
263 Mich App 604; 689 NW2d 491 (2004) 6

McDonald v Farm Bureau Ins Co,
480 Mich 191; 747 NW2d 811 (2008) 5

O'Connor v Resort Custom Builders, Inc,
459 Mich 335; 591 NW2d 216 (1999) 2, 3

People v Hill,
486 Mich 658; 786 NW2d 601 (2010) 10

Phillips v Lawler,
259 Mich 567; 244 NW 165 (1932) 3

Price v High Pointe Oil Co,
493 Mich 238; 828 NW2d 660 (2013) 8

Rofe v Robinson,
415 Mich 345; 329 NW2d 704 (1982) 6

Sampson v Kaufman,
345 Mich 48; 75 NW2d 64 (1956) 3

Seeley v Phi Sigma Delta House Corp,
245 Mich 252; 222 NW 180 (1928) 5

Stuart v Chawney,
454 Mich 200; 560 NW2d 336 (1997) 2

Utah Transit Auth v Greyhound Lines, Inc,
2015 UT 53; 355 P3d 947 3

Webb v Smith,
224 Mich App 203; 568 NW2d 378 (1997) 7

Williams v Moser Farms Homeowners Ass'n, Inc,
No. 2007-CA-002104-MR, 2009 WL 413990 (Ky Ct App, February 20, 2009) 7

Yogman v Parrott,
325 Or 358; 937 P2d 1019 (1997) 4

Other Authorities

Breemer, *Hiner v Hoffman: Strict Construction of A Common Restrictive Covenant*, 22 U Haw L Rev 621 (2000).. 5

Little*, Riss v Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants,* 73 Wash. L. Rev. 433 (1998) 8

RECEIVED by MSC 12/28/2017 2:25:20 PM

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The MHBA is a national, non-profit organization representing modular homebuilders and manufacturers. As a general matter, the MHBA promotes the advantages of modular construction to builders, federal and local government agencies, and the general public. Those advantages are many. Among other things, the use of modular components in home building accelerates the construction phase, thereby reducing the number of interest payments on construction loans. Moreover, the incorporation of modular elements significantly reduces waste disposal, overhead, material, and labor costs compared to an entirely stick-built home. Meanwhile, these homes meet the same codes applied to site-built homes and present similarly high-quality design aesthetics.

In this case, Dave and Helen Goyings—two retired grandparents—seek leave to appeal from a decision ordering that their system-built, waterfront home to be torn down. Though the result is shocking enough, the path to the decision is of greater concern. In a rather ambiguous opinion, the Court of Appeals appears to have broadly and overliterally interpreted a restrictive covenant against "modular" homes, effectively labelling *all* homes built with modular components as "modular," regardless of the percentage of the home stick-built on the premises. Moreover, in finding that the Goyings's custom-designed, state-of-the-art home violated the restrictive covenant, the Court of Appeals expressly disregarded the purpose of the subject restrictive covenant.

The MHBA has an interest in the proper interpretation of the restrictive covenant before the Court given its position of special insight into the homebuilding industry. It understands—better than most—the nonsensical and destructive results that could follow from the Court of Appeals's approach. For example, elements such as roof trusses, duct work, or door and window

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systems are commonly manufactured off the construction site. Meanwhile, in the commercial realm, major multi-family developers, hotel franchises, universities, fast-food franchises, and Fortune 500 technology companies are all embracing modular construction for its speed, efficiency, and quality. So, under the Court of Appeals's view, the *majority* of homes and commercial buildings in the United States would become "modular" in nature, leaving them vulnerable to attack by restrictive covenants prohibiting such homes and buildings.

The MHBA's interest aligns with the interest of Michigan citizens because affordable housing is key to maintain Michigan's continued economic growth. Inappropriately limiting Michiganders' housing options through strained contractual interpretations does not serve anyone's interests, especially in the midst of tight market conditions. As it is, housing supply is not meeting demand, and buyers are faced with a record-low inventory of homes for sale in the starter and mid-level price points. In 2016, the Home Builders Association of Michigan is projecting a 4.2% increase in single-family permits, equaling 16,515 new single-family homes in 2017. This number is well below Michigan's historic average annual production levels. If nothing is done to change the current projection, it could be another decade before production levels rise to normal levels. And that decade-long rise may well be too late: if housing scarcity continues, then employers and citizens alike will look elsewhere when it comes time to expand.

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STATEMENT OF QUESTION PRESENTED

Appellants' application for leave to appeal asks this Court to consider whether a home is necessarily "modular"—subjecting it to a restrictive covenant against "modular" structures and requiring it to be torn down—whenever any aspects of that home are made from "standardized units or sections."

Plaintiffs-Appellees answer "Yes."
Defendants-Appellants answer "No."
The Circuit Court would answer "No."
The Court of Appeals would answer "Yes."
MHBA answers "No."

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INTRODUCTION

Restrictive covenants are not meant to be construed in an unflinchingly rigid way. Rather, like other contracts, restrictive covenants are meant to be construed with an eye toward their intended purpose. Because they concern an important right—the right to own and use real estate without encumbrances—these contracts should never be interpreted too broadly. Rather, this Court has recognized time and again that restrictive covenants should be interpreted *narrowly*, and even the clearest language must yield in certain equitable circumstances. And at the end of the day, all of these principles derive from one basic notion: contracts like these must align with common sense.

Here, however, the Court of Appeals dispensed with the ordinary rules for interpreting restrictive covenants, instead fixating on a single dictionary definition on the way to adopting an exceptionally broad construction of a covenant against "modular" homes. Now, it seems, all homes with modular *components* are inevitably defined as modular homes. That view is not only inconsistent with the way that these provisions are ordinarily read, but will also generate painful (and unnecessary) real-world consequences. Michigan homebuyers will find themselves with fewer choices. The choices they have will be more expensive. A budding industry will suffer. Two grandparents will lose their home.

The plaintiffs here would prefer to wave all this away, declaring this case just another restrictive covenants dispute that did not "make any new law or break new ground." But make no mistake: the decision here signals a shift that homebuyers and builders will well-understand: innovate at your own risk. The Court of Appeals's absolutist approach here—ordering the destruction of a 59% stick-built home after dubbing it "modular"—offers something new and decidedly troubling. This Court should grant the application and set that approach aside.

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ARGUMENT

Plaintiffs see no "meaningful precedent" to be made here, chiefly because this case involves restrictive covenants. No one doubts that restrictive covenants are evaluated on a case-by-case basis and turn, to some extent, on individualized facts. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). But case-specific tests apply in many areas of the law, and this Court has never declined to take up cases that implicate them. Indeed, were the appellees right, this Court would *never* bother itself with a restrictive-covenants case. Needless to say, it has. See generally, e.g., *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007); *Stuart v Chawney*, 454 Mich 200; 560 NW2d 336 (1997).

Contrary to what Plaintiffs say, the Court of Appeals's decision will have far-reaching effects in at least two important ways. First, the decision signals that the Court of Appeals will dispense with the ordinary rules of construction for restrictive covenants in at least some cases. Second, the decision will have collateral consequences on the housing market in Michigan, limiting consumer choice and harming Michigan homebuyers. Either of these reasons alone justifies a grant of the Goyings's application for leave. The Court of Appeals decision deserves to be set aside.

I. The Court of Appeals did not apply ordinary presumptions and principles of interpretation as to restrictive covenants.

It's a familiar idea: restrictive covenants must be interpreted strictly and in favor of the free use of property.[1] See *Stuart*, 454 Mich at 210 (holding that "[t]he provisions [of a restrictive

[1] As another court has explained, strict construction is a doctrine with teeth. "Strict construction is a limitation on the parties' freedom to contract. Instead of applying traditional rules of construction aimed at determining what the parties intended by the contractual language, the court imposes a requirement that certain language must be used to clearly and unequivocally

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covenant] are to be strictly construed against the would-be enforcer…and doubts resolved in favor of the free use of property.”). A restriction cannot be “enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.” *Flajole v Gallaher*, 354 Mich 606, 608; 93 NW2d 249 (1958). And where restrictions are ambiguous, “uncertainties are resolved in favor of the free use of the property.” *In re Norwood Estates Subdivision*, 291 Mich 563, 568; 289 NW 255 (1939); see also *Bastendorf v Arndt*, 290 Mich 423, 426; 287 NW 579 (1939) (“Where restrictions are ambiguous, it is axiomatic that uncertainties are resolved in favor of the free use of property.”). Beyond all that, courts will grant equitable relief for a purported violation of a restrictive covenant only when there is an obvious violation. See *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956) (explaining that courts will not grant relief in favor of the plaintiff when interpreting restrictive covenants “unless the right thereto is clear”).

This familiar principle of narrow construction in favor of the free use of real property is not one lightly ignored. Quite the opposite: Michigan courts have applied the principle repeatedly over time. See e.g., *O'Connor*, 459 Mich at 340-341; *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 325-326; 317 NW2d 611 (1982); *Phillips v Lawler*, 259 Mich 567, 570; 244 NW 165 (1932); *Kelly v Carpenter*, 245 Mich 406, 409; 222 NW 714 (1929); *Austin v Kirby*, 240 Mich 56, 58; 214 NW 943 (1927). The concept is perhaps one of the most oft-cited principles in real property law.

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show the parties' intent.” *Utah Transit Auth v Greyhound Lines, Inc*, 2015 UT 53, ¶ 31; 355 P3d 947.

The principle finds favor for good reason. As another court has put it, "this maxim serves at least four purposes: to avoid imposing a restriction on the buyer of property that the buyer cannot reasonably be expected to know, to allow full use of property, to reduce litigation by increasing certainty, and to promote uniform interpretation of like covenants." *Yogman v Parrott*, 325 Or 358, 366; 937 P2d 1019 (1997) (internal citation omitted). It also reflects the pervasive distaste that the law has held for restrictive covenants for decades. See, e.g., *Davis v Huey*, 620 SW2d 561, 565 (Tex, 1981) ("[I]t is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use[.]"); *Dean v. Monteil*, 361 Mo 1204, 1209; 239 SW2d 337 (1951) ("[R]estrictions on the use of land are repugnant to trade and commerce, contrary to the well recognized business policy of the country, and in derogation of common law[.]").

Here, however, the Court of Appeals seemed to apply the *opposite* presumption, latching on to a single word—"modular"—and stretching it to its broadest possible definition. In unchallenged factual findings, the Circuit Court held that the majority of the house that Plaintiffs attack here was stick-built on site. The parts of the home that were manufactured elsewhere did not afford a habitable residence until extensive work was performed on them on the construction site. The Goyings's system-built home possesses the same characteristics—in terms of aesthetics, quality, and price—as other homes in the same subdivision. For reasons like these, system-built homes have been described as something different than a modular home before.[2]

[2] Rather than look to the essential character of the home, Plaintiffs focus on ancillary agreements, reports, and permits that happen to refer to it as a "modular" home. But as the Goyings note, it is dangerous to assume that the meaning of a word in one context is the same in another. As to building permits, for instance, "[d]efinitions, adopted for legislative purposes in housing codes and zoning ordinances, cannot be employed in interpreting or construing a restrictive covenant running with land." *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252,

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See, e.g., *Darnell v Garett R Kern Const, Inc*, No. 257277, 2006 WL 1328879, at *3 (Mich Ct App, May 16, 2006) (describing a developer's decision to permit the construction of a system-built home in his subdivision, despite a restrictive covenant against "modular" homes, after the developer "came to the conclusion that [the system-built house] did not fit his intended definition of a modular home").[3]

Despite the uncontested facts, the Court of Appeals appeared to hold that the mere presence of modular *elements* or *components* in the home was enough to deem it a modular one. That turns the presumption of narrow construction on its head by expanding the class of homes to whom the restriction was meant to apply, all without any indication that this far-reaching result was ever intended.[4] It also appears to add words to the covenants, rewriting them to reach any residence that might contain a modular "unit." But see *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199–200; 747 NW2d 811 (2008) ("[C]ourts are not to rewrite the express terms of contracts."). Of course, other, narrower constructions were available, including the one pressed by the Goyings.

Ultimately, the Court of Appeals's approach does not respect the "intent and purpose" of the covenant. Property "restrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument." *Bastendorf*, 290 Mich at 426; see also Breemer, *Hiner v Hoffman: Strict Construction of A Common Restrictive Covenant*, 22 U Haw L Rev 621, 641 (2000) ("Courts increasingly rely on the general purpose of a covenant to determine what the parties meant by specific disputed terms."). And

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255–56; 222 NW 180 (1928).

[3] Unpublished cases are attached as Exhibit A.

[4] By the same logic, Michigan's domestic automakers would be making foreign vehicles, as those vehicles all include components that come from abroad.

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Michigan courts have already identified the ultimate aim of restrictive covenants like these: to "protect property values as well as aesthetic characteristics considered to be essential constituents of a family environment." *Brown v Martin*, 288 Mich App 727, 731; 794 NW2d 857 (2010); accord *Maatta v Dead River Campers, Inc*, 263 Mich App 604, 610; 689 NW2d 491 (2004) ("Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability."). The trial court, however, specifically held that the Goyings's home does not threaten the property values of other parcels in the subdivisions, probably because the aesthetics were indistinguishable from other homes in the community. Despite the uncontested finding that the essential purpose and intent of the Timber Ridge Bay restrictive covenants *would be met* by permitting the Goyings's home to stand, the Court of Appeals specifically declined to consider such evidence in holding that the Goyings's house did not comply.

Were all that not enough, the Court of Appeals's all-or-nothing approach to modular homebuilding and restrictive covenants is inconsistent with the courts' general respect for equity in this context. See, e.g., *Rofe v Robinson*, 415 Mich 345, 353; 329 NW2d 704 (1982) (considering whether application of a restrictive covenant would be "inequitable"). In particular, "[t]echnical violations" of a covenant do not require an injunctive remedy of the kind seen here if there is an "absence of substantial injury." *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957). Against that rule, consider what the trial court was faced with here: a home that (1) contained some elements constructed off-site, like many other homes in the same neighborhood; (2) looked just like other homes in the neighborhood; and (3) failed to cause, according the plaintiffs, anyone any kind of identifiable harm. Even if it could be said that the Goyings's home exceeded some unstated limit for modular components and thus became "modular" under the

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terms of the covenant, how is it equitable to order the destruction of a home in circumstances like these—where, unless a person was present at the time of construction, it would never be known that the house violated any covenant at all? Cf. *Williams v Moser Farms Homeowners Ass'n, Inc*, No. 2007-CA-002104-MR, 2009 WL 413990, at *6 (Ky Ct App, February 20, 2009) (finding only a "technical violation" of restrictive covenant requiring wood, masonry, or wrought iron fences where homeowners' association "approved fences made of aluminum designed only to mimic wrought iron, and not actually made of wrought iron"); *Howell v Hawk*, 750 NE2d 452, 459 (Ind Ct App, 2001) (holding that home did not violate restrictive covenant where, "[d]riving past the two homes, a person could not tell the difference [between the plaintiff's home and other homes in the subdivision]"); *Chesapeake Estates Imp Ass'n v Foster*, 265 Md 120, 125; 288 A2d 329 (1972) (invalidating restriction on modular home where it was not shown that the house was "any less attractive or valuable because it was factory-built instead of custom-built on the site"); contrast with *Webb v Smith*, 224 Mich App 203, 212; 568 NW2d 378 (1997) (affirming removal of a lakeside home built on a half-lot where no house was allowed, as the home diminished privacy, aesthetic enjoyment of the lake, and hurt property values). Absent some concrete impact, the Court of Appeals's decision enlists a court in the destruction of a fully-functional, aesthetically pleasing dream home merely because of another's abstract offense.

II. The Court of Appeals's over-expansive reading of a restrictive covenant against "modular" homes threatens harm to Michigan homebuyers and builders.

In opposing the application for leave, Plaintiffs take a blinkered approach to judicial precedent. Nevermind, they say, that not every house that contains modular components may constitute a "modular home." This case, they say, is an easy one, and it will have no consequences for anyone besides these two retirees. The "tougher calls to make at the margins," Plaintiffs reassuringly suggest, are apparently meant to wait until another day. That, of course, is

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not the way that appellate courts work. Case law often takes an incremental approach, extending one case from one context to another case in another context, and then another, and so on. See *Price v High Pointe Oil Co*, 493 Mich 238, 243; 828 NW2d 660 (2013) ("The common law is always a work in progress and typically develops incrementally[.]"). So, a decision defining "modular" broadly in this case will encourage later courts to do the same in the next one—and perhaps go a step further on the next go-around. Indeed, that path has already been taken in other states. *See* Little*, Riss v Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants,* 73 Wash. L. Rev. 433, 440 (1998) ("[S]ome courts that ostensibly employ the doctrine [of strict construction of restrictive covenants] have softened the rule.").

And academic debates about the nature of precedent aside, one thing is certain: a more expansive reading of a restrictive covenant limits choice, and the Court of Appeals's decision will have immediate effects on Michigan homebuyers and builders. The decision saddles an entire industry (system-built homes) with a label commonly found in residential restrictive covenants ("modular"). Faced with judicial authority broadly applying a restrictive covenant against homes containing *any* modular component, homebuyers will almost certainly be more reluctant to construct system-built homes and other structures like them. Those persons that do build them might now face a swift loss in court if they are unlucky enough to encounter aggressive neighbors and a solicitous court. A large swathe of the homebuilding market—a section of the market that offers high-quality, affordable homes—will be essentially foreclosed. That will in turn cost jobs in that industry. And with affordable housing inventory at a 15-year low and the Michigan housing market tightening, employers and employees alike will struggle to remain in this state if housing prices are unnecessarily raised by artificial constrains on consumer choice.

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A weakened "system-built" sector would be a tremendous loss for Michigan. System-built homes, and other buildings like them, offer significant benefits that should not be unnecessarily excluded from our neighborhoods. In many ways, these sorts of homes are indistinguishable from their more conventional, stick-built cousins. A system-built house is simply a form of construction involving a standardized construction process and elements (or components) built off-site. A quality-control process assures that a home's components have been inspected for code compliance and workmanship. In-plant inspectors, as well as independent agencies, inspect the home on behalf of our state and local governments. These homes look like any other homes, and manufacturers can build modular components for any style. The classic "modular" roof line is no longer classic. Modular homes are custom-designed; producers use state-of-the-art, computer-assisted design stations that aid them in customizing floor plans and producing drawings and material requirement lists. By doing work off-site, buyers get a better, less-expensive home in less time. Builders gain efficiency through modern factory assembly-line techniques. Then, the home can travel to workstations where all the building trades are represented. That trade work is never delayed by weather, subcontractor no-shows, or missing materials. This initial off-site work can also proceed while other initial work is happening on-site, such as the laying of the foundation. All the while, materials are shielded from the elements. Once the components are integrated, buyers enjoy greater energy efficiency, because quality engineering and construction techniques significantly increase the energy-efficiency of the home.

Meanwhile, overly rigorous enforcement of a "modular" restrictive covenant would produce little benefit to the community. After all, these homes are *not* mobile homes, and they are not HUD-code manufactured houses. No wheels or steel chassis lie underneath; these

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buildings are placed on permanent foundations. They are built to the same codes and standards as more traditional, stick-built homes. Quite simply, concerns about aesthetics or other issues common to "mobile" or "manufactured" homes are imagined, as reflected in the aesthetically pleasing home that the Goyings built—and others like it:

In short, system-built homes bear little resemblance to the other structures listed in the relevant restrictive covenant, including "shack[s]," "barn[s]," "mobile home[s]," "berm house[s]," and "geodesic dome[s]."[5] Squeezing them out aids no one.

Indeed, because of the benefits that these elements offer, incorporating modular components has become very popular. About 3-4% of all new home construction in the United States is "full" modular construction. But that number is an understatement because, again, nearly every new home, including homes in Timber Ridge Bay, incorporates some degree of "offsite" or "prefabricated" components or elements. Modular elements are also not limited to residential construction, as multi-family developers, hotel and fast-food franchises, universities,

[5] As the Goyings explain, the dissimilarity between their home and the other structures listed in the restrictive covenant provides more reason to believe that their house was not intended to be covered. "A word is given more precise content by the neighboring words with which it is associated." *Life Techs Corp v Promega Corp*, 137 S Ct 734, 740; 197 LEd 2d 33 (2017) (internal alterations omitted); see also *People v Hill*, 486 Mich 658, 668; 786 NW2d 601 (2010). The system-built home that the Goyings have is quite unlike the temporary, non-residential, or otherwise aesthetically displeasing buildings listed in the same covenant. The listed items imply that the covenant was directed at buildings equivalent to blight—but the Goyings home is not blight by any means.

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and tech giants are all incorporating modular elements into their constructions plans. Expansively applying restrictive covenants like the one at issue here would stifle that innovation in Michigan. That approach would not only harm the homeowners who stand to benefit, but would also take jobs from those working in the industry.

The Court of Appeals's opinion promises to squelch consumer choice, preclude many from pursuing a favorable housing option, and limit a promising industry. Though Plaintiffs wish it to be "hyperbole," it is an unfortunate reality.

CONCLUSION

Although landowners have the right in Michigan to create covenants, those limits must be given a reasonable reading. Unfortunately, the Court of Appeals here reversed a circuit court that had it right to begin with. The application for the leave to appeal should be granted, and this Court should reverse and reinstate the judgment of the Circuit Court.

Respectfully submitted,

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Dated: December 28, 2017

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Certificate of Service

I hereby certify that on December 28, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the Odyssey File and Serve system, which will send notification of such filing to all counsel of record and/or a copy will be sent via first class U.S. Mail to all counsel not listed on the Odyssey service list.

By: /s/ Michael R. Williams
Michael R. Williams (P79827)