STATE OF MICHIGAN
IN THE SUPREME COURT

MATTHEW T. THIEL and NICOLE M. THIEL,

Plaintiffs/Counterdefendants-Appellees,

SC: 156708
COA Docket No. 333000

and

Allegan County Circuit Court
No. 15-55184-CK

WILLIAM TRAYWICK and MARCIA TRAYWICK,

Intervening Plaintiffs/
Counterdefendants-Appellees,

vs.

DAVID L. GOYINGS and HELEN M. GOYINGS,

Defendants/Counterplaintiffs-Appellants.

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# APPELLANTS' MOAA SUPPLEMENTAL BRIEF

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## Table of Contents

**Page**

## Table of Authorities

**Page(s)**

### Cases



### Rules



### Other Authorities

## Statement Regarding Jurisdiction

Defendants David and Helen Goyings seek leave to appeal from the Court of Appeals' August 8, 2017 decision (App C, 16-a) and September 20, 2017 order denying a timely motion for reconsideration (App D, 24-a). The Court of Appeals decision reversed the trial court's March 14, 2016 opinion and order following a bench trial (App A, 1-a) and April 27, 2016 final judgment (App B, 13-a). On March 28, 2018, this Court directed the clerk to schedule oral argument on whether to grant the application or take other action under MCR 7.305(H)(1). This Court has jurisdiction under MCR 7.303(B)(1).

## Questions Presented

The Court's March 28, 2018 order directed the parties to address:

(1) whether the defendants' home is a "modular home" as defined by Timber Ridge Bay's "Declaration of Restrictions, Covenants, and Conditions"; and

(2) if so, whether the violation was a technical violation that did not cause substantial injury, *Cooper v. Kovan*, 349 Mich 520, 530 (1957).

Defendants answer no to (1) and yes to (2).
Plaintiffs answer yes to (1) and no to (2).
The circuit court answered no to (1) and did not answer (2).
The Court of Appeals answered yes to (1) and did not answer (2).

## Introduction

David and Helen Goyings built their dream home. By all accounts, it is a beautiful house on a beautiful piece of waterfront property in Allegan County. It has a walkout basement, two-car garage, gabled roof, vaulted ceilings, stone columns, an expansive deck, and sweeping views of the lake. Dave and Helen are not wealthy, but they used savings from years working as a carpenter and construction-logistics manager to build a home they could be proud of and live out their retirement in peace and serenity.

The Court of Appeals ordered it torn to the ground. The Plaintiffs here are the Goyings' neighbors, but Mister Rogers' neighborhood this is not. Plaintiffs do not dispute that the home is attractive, that it *enhances* their property values, and that it is, in fact, of superior quality to other homes in the neighborhood. Plaintiffs, in short, do not dispute that they have suffered not a penny of damages or a tittle of other harm. But Plaintiffs nonetheless filed this action and mulishly litigated it all the way through trial—racking up tens of thousands in legal fees for all involved—because they didn't like the way the Goyings' house was put together. Specifically, they argue that the home violates a neighborhood restrictive covenant that bar the construction of a "geodesic dome, berm house, prefabricated or modular home, shack or barn," because the home contains three modular components that were constructed off-site and then integrated into the final design.

The circuit court rejected the Plaintiffs' cramped reading of the covenants, in a carefully reasoned 11-page opinion following a three-day bench trial. The court reasoned that the Goyings' "system-built" home was not predominantly modular and did not fit the definition of a "modular home" as that term is traditionally used or as it was used in the covenants. But the Court of Appeals reversed. The Court of Appeals flipped open a dictionary and discovered that

"modular" means, in essence, something containing a module. This, held the Court of Appeals, was the end of the story: the Goyings' home contained modules and was therefore a modular home. So it had to come down.

The Goyingses urge this Court to reverse. The Court of Appeals' reading—that any home that contains a modular component is a "modular home"—creates a glaring internal inconsistency in the text of the covenants. The relevant covenant bars construction of a "pre-fabricated *or* modular home," so if a "modular home" means "a home containing a modular component," then "prefabricated home" must mean "a home containing a prefabricated component." But *all* homes these days contain prefabricated components, like roof trusses, cabinet systems, and countless other materials built off site and then incorporated into the home. Indeed, the Plaintiffs here admitted that *their own homes* contain prefabricated components, including an elaborate "superior walls system" in which the entire foundation of one of their homes was prefabricated off-site in a factory and then dropped into place by crane. Yet the Court of Appeals went out of its way—even though no party had asked the court to reach this issue—to hold that the Plaintiffs' homes did *not* violate the covenant barring "prefabricated homes" (even though they contained prefabricated components), while the Goyings' home violated the covenant barring "modular homes" (because it contained modular components).

The Court of Appeals' decision is therefore a textualist mess, where a covenant barring "prefabricated or modular homes" bars homes that contain modular components but not ones containing prefabricated components. This is a reading the text simply cannot bear, and the Court of Appeals was not permitted to stretch the text to reach a result that brought down the Goyings' home but not any others. A more sensible reading—one that harmonizes the text rather than does violence to it—is that the covenant barring "modular or prefabricated homes" bars

only homes that are entirely or at least predominantly modular or prefabricated, as the circuit court held. After all, in the natural and ordinary use of the language, one would never call a home a "prefabricated home" if it contained a single prefabricated roof truss. Likewise one would never call a home a "modular home" if it contained, for example, a single modular bathroom component, or a sunroom or screened-in porch, or a modular shower or closet. It was *undisputed* in the record here that the Goyings' home was not entirely or predominantly modular—the modular components were only 41% of the home, *just 31%* of the total cost. (App H, 94-a.) The Court of Appeals did not mention these facts anywhere in its opinion, or explain how a home that was *not* predominantly modular could be a "modular home" within the meaning of the covenants. The Court of Appeals ordered it torn to the ground nonetheless.

And what for? This Court asked the parties to address whether any violation of the "modular home" covenant was a "technical violation that did not cause substantial injury" under *Cooper v Kovan*, 349 Mich 520, 530 (1957). If ever there were such a violation, this is it. Any injury to the Plaintiffs is not just insubstantial, it is non-existent. They have suffered no injury at all. Not a penny in damages—the Goyings' home actually puts money in their pockets. No aesthetic harm—it's undisputed that the Goyings' home is indistinguishable from any other lovely lakeside home in the neighborhood. The only injury Plaintiffs can muster is their gnawing knowledge that the Goyings' home has a few hidden module components in it. If there has been a less substantial injury in the history of Michigan jurisprudence, no party here has identified one. In the end, the Goyingses respectfully submit that any technical violation of the covenants and any miniscule injury to the Plaintiffs does not warrant tearing down their dream home. The Goyingses therefore ask the Court to reverse the Court of Appeals' decision and reinstate the decision of the circuit court.

## Statement of Facts

### 1. Helen and David Build Their Dream Home

Helen Goyings worked for years in the trucking, asphalt, and logistics industries, and her husband, David, worked 30 years as a certified union carpenter in Kalamazoo. (App H, 89-a, Trial Tr Vol 1, Helen at 106; App J, 126-a, Tr Vol III, David at 46.) In early 2015, approaching retirement, Helen and Dave set out to build their dream home on Big Lake in Allegan County, in a development known as Timber Ridge Bay. They wanted a quiet place with a "north woods feel" and "good fishing" that they could enjoy with their grandchildren for years to come. (App H, 75-a, Tr Vol I, Helen at 46; App J, 127-a, Tr Vol III, David at 47.)

Helen and Dave bought a lakefront lot in Timber Ridge, and began designing their home. On a recommendation from a friend, they selected Heritage Custom Builders, Cassidy Builders, and Ritz Craft Design to design and custom-build the home. (App H, 76-a, Tr Vol I, Helen at 48.) Helen and Dave looked at other builders, but "they just weren't to the quality that we wanted." (*Id.* at 80-a.) The builders Helen and Dave selected, on the other hand, had a reputation for "very high quality" and "wonderful" designs (*id.* at 76-a, 81-a), and one had recently won a national design award for its work. (App J, 122-a, Tr Vol III at 6.)

These builders specialized in "system-built" homes. That term was coined by famed architect Frank Lloyd Wright (App I, 110-a), and refers to an emerging hybrid building method of combining and blending traditional "stick-built-on-site" construction with off-site construction of certain modular components of the home. (See App J, 123-a, Tr Vol III at 8.) The quality of system-built homes is "[a]s good or better and in most cases better" than traditional stick-built construction. (*Id.* at 124-a.) This is because the system-built method has significant inherent advantages to the stick-built method. Primary among them is climate control: because the modular components are built indoors, builders don't have to deal with wet and warped lumber,

freezing and thawing, and damage to building materials. (See App I, 112-a-113-a, Tr Vol II, Coeling at 66-67.) There are no "nail pops" in ceilings and drywall, for example, because builders of system-built components can use special adhesives that would not adhere properly in an outdoor building environment. That adhesive construction is "much stronger than any nail or screw would be," and contributes to higher overall quality. (*Id.* at 115-a.) The components are also built on jigs that ensure every joist is built "square and true," something that is not possible in traditional on-site building. (App J, 125-a, Tr Vol III, Lindsley at 42.) In short, "it's a much better method of constructing a home." (App I, 112-a, Tr Vol II, Coeling at 66.)

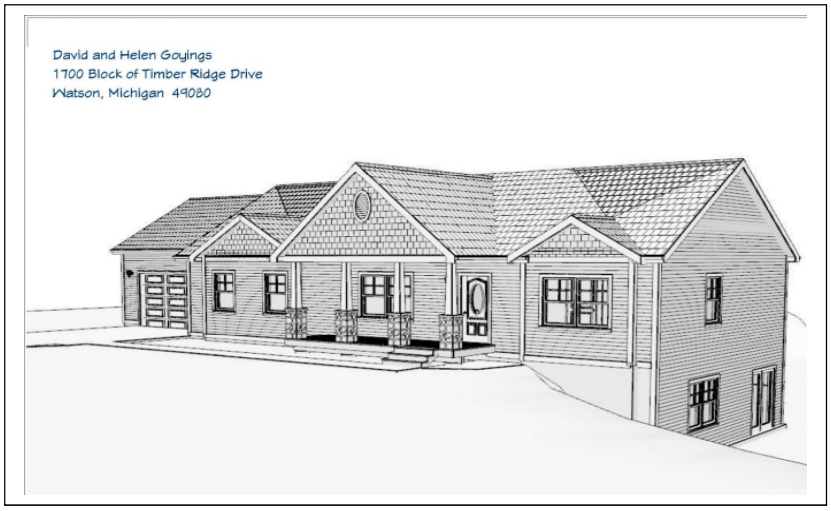
These system-built homes are a far cry from the "modular homes" of yesteryear. Unlike modular homes—which are low quality, not custom built, and nearly entirely built in a factory and then strapped to a foundation, ready-made to occupy after some simple hook-ups—system-built homes are high quality, custom-designed and custom-built, and tailored to the aesthetics of the surrounding area and the buyer's preferences. (See *id.* at 110-a, 111-a.) Builders "differentiate between the . . . lower price modular and the nicer system built"; modular homes are aimed at the "lower end buyer," the "very, very budget conscious buyer," whereas builders of system-built homes "are going for a nicer home, a nicer buyer, a nicer end result." (*Id.* at 110-a.)

Helen and Dave designed a system-built home. The majority of the home would be stick-built on-site. (App H, 77-a, 84-a, 94-a, Tr Vol I, Helen at 49, 98, 116.) The entire lower-level finished walkout basement would be built on-site, as would the garage, roof gables, roofing, front porch with stone columns, deck, and other portions of the home. (*Id.* 84-a – 86a.) The home would also incorporate three system-built components assembled in Ritz Craft's indoor facility, which would then be permanently secured to the foundation and incorporated into the design of the rest of the home. (*Id.* at 90-a.) These components were "not even close" to being

habitable on their own without extensive further construction—each one was "just a raw piece of construction material." (App I, 114-a, Tr Vol II, Coeling at 69.) The components, just by way of example, did not contain a furnace, plumbing, water heater, drain lines, or duct work, and needed considerable additional on-site construction before they could be incorporated into the home and habitable. (*Id.*) Ultimately, the home would be approximately 59% stick-built on-site and 41% modular components, with 69% of the total cost of the home being the stick-built portions and just 31% the modular components. (App H, 94-a, Tr Vol I, Helen at 116.)

The home was "100%" custom-designed by the Goyingses—every inch of it, including the system-built components. (*Id.* at 91-a.) Helen and Dave sat down with the builders and designed the layout using a CAD computer program called "Chief Architect," which is "software for designing homes with 3-D renderings and different views of the home" so that the builder "can get the house that they want right down to a t." (*Id.* at 79-a; App I, 113-a, Tr Vol II at 67.) For the components, the Goyings selected all of the options, including carpeting, flooring, colors, backsplashes, and beveled countertops. (App H, 92-a, 93-a, Tr Vol I, Helen at 113, 115.)

"There is no other home like it." (*Id.* at 91-a.) The final design reflects the custom tailoring and care that went into it:



(App G, 56-a, Trial Ex 27.)

The appraiser agreed. The Goyings' home was of "good quality construction" and "similar in quality to other homes within the neighborhood." (App I, 116-a, Tr Vol II, Snell at 131.) The appraiser did "not find any difference" in quality between the Goyings' system-built home and homes that were stick-built on-site. (*Id.* at 117-a.) The home "conforms to the neighborhood" in terms of "functional utility, style, condition, use, [and] construction." (App F, 34-a, Tr Ex 7, Appraisal.) The appraised market value of the improved property (the lot with the planned home) at the outset of construction was $330,000, which compared favorably to recent comparable sales of $272,134 and $289,000. (*Id.*)

**2. The Restrictive Covenants and Helen's Conversation with One of the Plaintiffs About the Covenants**

Certain lots in Timber Ridge Bay, including Plaintiffs' lots and the lot the Goyingses purchased, are subject to a set of restrictive covenants. (App E, 26-a, Tr Ex 3, Declaration of Restrictions, Covenants and Conditions.)[1] The stated purpose of the covenants is "to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein[.]" (*Id.* at Section 1.) Among other restrictions, the covenants provide the following:

> Miscellaneous Provisions. . . . All residences shall be stick built on site and no geodesic dome, berm house, pre-fabricated or modular home, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein. (Section I.C.4.)
>
> Relocated Residences. No residences, including modular, manufactured, mobile or prefabricated homes, may be moved from a location outside the Premises and placed or located within a Parcel within the Premises. (Section I.B.3.)

[1] Other lots in the area were not subject to the covenants, including prominent lots visible from the main entrance to the neighborhood, which contain an unattractive double-wide home and a pole barn. (See App J, 129-a, Tr Vol III, N. Thiel at 71.)

> Manufactured Housing Units. No manufactured homes, whether classified as a mobile home, modular home, or otherwise, and no prefabricated homes shall be permitted on any Parcel in the premises, regardless of which building codes are applicable to said homes. (Section I.B.4.)

Other covenants provided that any propane tanks in the neighborhood must be "buried or screened" (Section I.B.11), and that "[a]ll docks shall be floating and made of maintenance free materials." (Section I.B.16.)

Early in the design process, Helen Goyings approached her next-door neighbor, Plaintiff William Traywick, and discussed with him the Goyings' plans to include modular components in their home. (App H, 78-a, Trial Tr Vol 1, Helen at 62.) Helen has a "specific recollection" that she "absolutely did" inform Traywick that they were planning to include components that were "modular in nature." (*Id.* at 82-a, 83-a). Traywick remembers this conversation, and specifically recalls that Helen used the term "component," but does not recall the term "modular" being used. (*Id.* at 103-a, Traywick at 222.) The two also discussed the fact that Traywick had a permanent dock and an unscreened propane tank that plainly violated the covenants. (*Id.* at 87-a, 88-a.) With respect to the dock, Helen stated, "it's against the restrictive covenants but you have one." (*Id.* at88-a.) Traywick responded, "well, what's the big deal" (*id.* at 102-a, Traywick at 221), and "[n]obody cares about that" (*id.* at 88-a, Helen at 104).

### 3. Plaintiffs Sue Their Neighbors, and the Circuit Court Holds a Three-Day Bench Trial

Plaintiffs Matthew and Nicole Thiel filed suit on June 18, 2015, asking the Allegan County Circuit Court to halt the construction of the Goyings' home and to order the modular components removed or destroyed. (Dkt 1, Complaint.) On July 31, 2015, the Traywicks joined in. (Dkt 14, Motion to Intervene; Dkt 21, Order Granting Leave to Intervene.) The Goyingses filed counterclaims against the Thiels and Traywicks, asserting (among other things) that the Traywicks were in clear violation of the covenants restricting permanent docks and unscreened

propane tanks; that they had waived and were estopped from enforcing compliance with the covenants; and that if the Plaintiffs were correct that the Goyings' home was a "modular home" in violation of the covenants because it contained modular components, then Plaintiffs' homes would be "prefabricated homes" in violation of the covenants because they contained prefabricated components. (Dkt 9, Counter-Complaint.)

The case proceeded to a bench trial before Judge Margaret Zuzich Bakker on February 23 through 26, 2016. The court heard extensive testimony from Helen and David Goyings, each of the Plaintiffs, representatives from the builders who worked with the Goyingses to design and construct the home, the drafter of the covenants, and the residential appraiser. All told, the court heard from nine witnesses over three full days of trial, heard extensive argument from counsel, and heard testimony and argument spanning over 500 trial transcript pages.

**4. The Trial Court Rules Against Plaintiffs, and Declines to Tear Down the Goyings' Home**

Following the trial, Judge Bakker issued an 11-page opinion rejecting Plaintiffs' claims. The court found that the "testimony was uncontroverted that the home when completed would be a visually attractive home, and that the quality of the home was equal to or superior to other homes that could have been 'stick built' on site." (App A, 1-a, March 14, 2016 Opinion and Order at 3.) The court found, in fact, that the unrebutted testimony showed the Goyings' home would be of "superior quality" to a traditional stick-built-on-site home: "The modules were constructed out of the same materials as a 'stick built' on site home, and the testimony of the manufacturer, as well as the representative of the building contractor, was that it would be of superior quality to a 'stick built' on-site home." (*Id.*)

The court noted that the term "system built" was "similar to, if not synonymous with, modular," but the Goyings' system-built home nonetheless did not violate the covenants barring

the construction of a "modular home." (*Id.*) The court reasoned that "[t]he majority of the residence is being stick built on site," and "[t]he modules here are not a residence as they are delivered; additional construction is required to add in the electrical, duct work, plumbing, roof, and the various components that make a house a habitable home." (*Id.* at 9.) The covenants do "not clarify what percentage of a home is allowed to be prefabricated before the entirety of the home is barred by the restrictions," and "[t]he parties here have allowed for other types of components to be prefabricated: trusses, foundation, cabinets, etc." (*Id.*) And "[i]f a home having prefabricated components is allowed to remain in Timber Ridge Bay, this home, containing components built elsewhere, must be allowed to remain." (*Id.*)

Moreover, held the trial court, "it is clear that Defendants' home is not in violation of congeniality standards and does not endanger the value of the other parcels within the subdivision." (*Id.*) "In looking at the pictures of the home provided by the Plaintiffs, it is apparent that the home is not an eyesore and it is unlikely that anyone would know that the home had been built anywhere but on the property." (*Id.* at 9-10.) Indeed, "[n]one of the Plaintiffs could identify how the physical appearance of the Defendants' home would affect the esthetics, value, or congeniality of the other parcels in" Timber Ridge Bay. (*Id.* at 6.) The court found that "[t]he aesthetics, quality and value are of the same standards as the other homes which exist and will be built within the subdivision." (*Id.* at 10.)

Ultimately, the trial court "decline[d] to find that Defendants' home is in violation of the wording of the deed restrictions, covenants and conditions." (*Id.*) "While the restrictions, covenants, and conditions in this deed may not seem to be ambiguous in their wording, they did not contemplate a home of the type built by Defendants"—one that "does not neatly fit into the category of modular or stick-built on site[.]" (*Id.*) The court concluded that "[w]hile an entirely

modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay, the home designed by Defendants is sufficiently constructed, valued, and congenial as to allow it to remain." (*Id.*) The court therefore rejected Plaintiffs' claims, and rejected their request to tear down the Goyings' home. (*Id.*)

The March 4, 2016, opinion did not expressly address the Goyings' counter-complaint, so the trial court entered an amended order on April 27, 2016. The court ordered that its earlier opinion be amended to include language that "none of the parties have violated the restrictive covenants" and that "there has been no equitable estoppel and waiver." (App B, 13-a, April 27, 2016, Amended Order at 1-2.)

**5. The Court of Appeals Reverses and Orders the Goyings' Home Torn to the Ground**

The Court of Appeals reversed. The court reasoned that the term "modular home" was not ambiguous, and the "defendants' tortured use of the term 'systems built' at trial [did not] render the covenant unambiguous [sic]." (App C, 16-a, Slip Op at 6.) The court reasoned that "*The Random House Dictionary of the English Language Second Unabridged Edition*, p 1237, defines 'modular' as '1. Of or pertaining to a module or a modulus. 2. Composed of standardized units or sections for easy construction or flexible arrangement: *a modular home; a modular sofa*." (*Id.*) The court held that "[t]he restriction should have been accorded its ordinary and generally understood or popular sense, without technical refinement." (*Id.*) "Justified or not," reasoned the Court of Appeals, "there is a perception that modular homes are of lesser quality and will bring down the value of the neighborhood. The restrictive covenant was drafted for that precise reason." (*Id.* at 6-7.) The court "affirmed the trial court's order to the extent it denied defendants' counter-claim," but reversed the trial court' decision with respect to Plaintiffs' claims. (*Id.* at 1, 7.) The trial court, held the Court of Appeals, "should have granted judgment in plaintiffs' favor and ordered defendants to remove the modular home." (*Id.* at 1.)

## Argument

### I. Standard of Review

This Court's cases construing restrictive covenants "are premised on two essential principles, which at times can appear inconsistent." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). "The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied." *Id.*

"To harmonize those principles and apply them properly, this Court has recognized the necessity of deciding such matters on a case-by-case basis." *Id.* In undertaking that case-by-case analysis, "[t]he restrictions must be construed in light of the general plan under which the restrictive district was platted and developed." *Borowski v Welch*, 117 Mich App 712, 716-17; 324 NW2d 144 (1982). Courts place the burden squarely on the party seeking to enforce the covenant: "Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property." *Wood v Blancke*, 304 Mich 283, 287; 8 NW2d 67 (1943); see also *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997) ("negative covenants are grounded in contract," and their "provisions are to be strictly construed against the would-be enforcer").

An appellate court "reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding of fact is clearly erroneous only when, "after reviewing the entire record, th[e] Court is left with a definite and firm conviction that a mistake has been made." *Id.*

## II. Plaintiffs Do Not Challenge Any of the Circuit Court's Factual Findings; It is Therefore Undisputed on Appeal that the Goyings' Home Is Visually Attractive, of Superior Quality, and Meets the Value and Aesthetics Standards of the Surrounding Development

Plaintiffs did not challenge in their appeal below *any* of the circuit court's factual findings. (See Appellant's COA Br at 1-19.) This means that all of the following facts are undisputed in this appeal:

- The Goyings' home is of "superior quality" to a traditional stick-built-on-site home. (App A, 1-a, Opinion and Order at 3.)
- The Goyings' home is "visually attractive." (*Id.*)
- "it is apparent that the home is not an eyesore." (*Id.* at 9.)
- "The majority of the residence is being stick built on site." (*Id.* at 9.)
- "it is unlikely that anyone would know that the home had been built anywhere but on the property." (*Id.* at 9-10.)
- "The modules here are not a residence as they are delivered." (*Id.* at 9.) Instead, among other things, "additional construction is required to add in the electrical, duct work, plumbing, roof, and the various components that make a house a habitable home." (*Id.*)
- "The parties here have allowed for other types of components to be prefabricated: trusses, foundation, cabinets, etc." (*Id.*)
- The Goyings' home "does not endanger the value of the other parcels within the subdivision." (*Id.*)
- "None of the Plaintiffs could identify how the physical appearance of the Defendants' home would affect the esthetics, value, or congeniality of the other parcels in" Timber Ridge Bay. (*Id.* at 6.)
- "The aesthetics, quality and value are of the same standards as the other homes which exist and will be built within the subdivision." (*Id.* at 10.)

In short, it is undisputed in this appeal that the Goyings' home is a visually attractive, superior-quality, majority-stick-built home that fits with the character of the neighborhood and enhances the value of the entire development.

## III. The Circuit Court Correctly Held that the Goyings' Home Does Not Violate the Covenant Barring Construction of a "Modular Home"

### A. The Goyings' home is not a "modular home" within the meaning of the covenants.

The question on appeal is thus whether the Goyings' visually attractive, superior-quality, value-enhancing home violates the neighborhood's covenants and should be torn to the ground. The circuit court correctly held that it does not and should not.

Plaintiffs rely on section 1.C.4 of the covenants, which bars the construction of a "geodesic dome, berm house, prefabricated or modular home, shack or barn." (See Appellants' COA Br at 12, calling these the "relevant terms" of the covenants and the terms the Goyings violated.) Plaintiffs argue that there is "absolutely no ambiguity; a modular home is not permitted to be erected[.]" (*Id.* at 12.) Plaintiffs argue, and the Court of Appeals agreed, that the Goyings' home is "clearly" a "modular home" within the meaning of section 1.C.4 because the home undisputedly contains modular components. (*Id.* at 2, 12.) As the Plaintiffs testified at trial, in their view the covenants are absolute, and if the home contains anything more than "zero percent" modular components, it violates the covenants. (See App H, 98-a, Tr Vol I, M. Thiel at 205.) Thus, under Plaintiffs' and the Court of Appeals' reading, if a home contains a single modular component, it is a "modular home" that violates section I.C.4.

The circuit court correctly rejected such a crabbed reading of the covenants. Indeed, as the circuit court recognized, Plaintiffs' reading creates a glaring internal inconsistency. The covenant bars a "pre-fabricated *or* modular home"; thus, what goes for "prefabricated" goes for "modular." So if it were true that a "modular home" means "a home that contains a modular component"—as Plaintiffs urge—then it would necessarily be true that "prefabricated home" means "a home that contains a prefabricated component." But Plaintiffs themselves reject that reading, and for good reason. If the covenants barred any home containing a prefabricated

component, *their own* homes would violate the covenants. The Traywicks admit that their home is built on prefabricated foundation walls that were built in a factory, shipped on trucks to their lot, and then dropped by crane into the foundation. (App H, 99-a, 100-a, Trial Tr Vol I, W. Traywick at 215-16.) It was, in fact, an *elaborate* prefabricated building technique called a "superior walls system" that is remarkably similar to the system-built technique used in the Goyings' home—"they build the components at a factory and [then] they are shipped to site" to be slid into place and bolted together to form the foundation. (App I, 109-a, Trial Tr Vol II, Sharpone at 23.) And the Thiels' home, like nearly every home these days, likewise contains prefabricated components such as roof trusses that are built off-site and then incorporated into the home. (See, *e.g.*, App H, 96-a, Tr Vol I, M. Thiel at 165: "I understand how common it is to have components that are constructed and then brought to the site and then put together.") So the Plaintiffs' reading is self-defeating: If their reading of the covenants were correct, the courts would have to tear down one of their homes to bedrock and rip the roof off the other. That's good reason to believe that Plaintiffs' reading of the covenants is not the best one.[2]

Other uses of the term "modular home" in the covenants confirm that Plaintiffs' reading does not work. Plaintiffs and the Court of Appeals relied almost exclusively on Section I.C.4 and barely mentioned the other uses of the term in the covenants. But these other uses are relevant to the term's definition as well. When a term or phrase is used repeatedly in a

[2] Plaintiffs also argued below that the Goyings' home violated the covenant providing that homes must be "stick built on site," but they abandoned that argument on appeal. (See Appellants' COA Br.) Again, for good reason—there are no Abe Lincoln-style homes built these days, where lumber is harvested from the land and then assembled stick by stick into a home on-site. Plaintiffs' homes certainly were not constructed this way. As Plaintiffs admit, and as the circuit court expressly found, countless components of a home—including "trusses, foundation, cabinets, etc."—are built off-site and then transported to the worksite for incorporation into the home. (App A, 1-a, Opinion and Order at 9.) Plaintiffs therefore wisely do not make this argument on appeal, because it would result in the demolition of their homes as well.

document, "that phrase should be given the same meaning throughout." *See Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010); see also Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 170, Presumption of Consistent Usage Canon ("A word or phrase is presumed to bear the same meaning throughout a text"). So the term "modular home" must mean the same thing in the berms-and-barns covenant as in the other covenants.

Section 1.B.3 of the covenants, for example, is titled, "Relocated Residences." It provides that "No *residences*, including modular, manufactured, mobile or prefabricated homes, may be *moved* from a location outside the Premises and *placed* or located within a Parcel within" Timber Ridge Bay. (App E, 28-a, Covenants Section 1.C.3; emphasis added.) Thus, a "modular home" within the meaning of the covenants is defined as a type of "*relocated residence*"—a "residence" that may be "moved" from outside the neighborhood and then "placed" on a lot in Timber Ridge Bay. But it is undisputed that the Goyings' home does not fit that definition. The modules were in no sense a "residence" that was moved from outside the neighborhood and placed on a lot, like a trailer or mobile home would be. As the builder confirmed, the modular components were "not even close" to being habitable on their own without extensive further construction—each one was "just a raw piece of construction material." (App I, 114-a, Tr Vol II, Coeling at 69.) As the circuit court expressly found—a factual finding Plaintiffs do not challenge on appeal—"[t]he modules here are not a residence as they are delivered; additional construction is required to add in the electrical, duct work, plumbing, roof, and the various components that make a house a habitable home." (App A, 1-a, Opinion and Order at 9.) In short, under the plain language of the covenants, a "modular home" must be a "relocated residence" (the former is defined as a subset of the latter), and it is undisputed that the Goyings'

home is not a relocated residence. The Goyings' home is therefore not a "modular home" within the meaning of the covenants.

Other language provides even more support for that conclusion. Section 1.B.4 of the covenants is titled "Manufactured Housing Units," and provides that "[n]o *manufactured homes*, whether classified as a mobile home, modular home, or otherwise, and no prefabricated homes shall be permitted[.]" (App E, 28-a; emphasis added.) So here a "modular home" is defined as a subset of "manufactured homes" or "manufactured housing units." But the Goyings' home clearly was not that either. Indeed, nowhere do Plaintiffs argue that the Goyings' home is a "manufactured home" or "manufactured housing unit," which is commonly understood to mean things like low-quality trailers or pre-fabricated mobile homes. (*See* Appellants' COA Br.)

Taking all of these uses of "modular home" together, then, the circuit court arrived at a sensible definition of the term "modular home" in the covenants: "While an entirely modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay," the Goyings' home did not meet those criteria. (App A, 1-a, Op and Order at 10.) The covenants certainly bar construction of a low-quality, unattractive "relocated residence" and "manufactured home" that is entirely or primarily built off-site and then transported and placed on a lot in Timber Ridge Bay. But the Goyings' home undisputedly was not that.

This reading avoids internal inconsistency and harmonizes each of the uses of "modular home" in the covenants. Thus the prohibition on "modular homes" does not bar "any home that contains a module," as Plaintiffs urge, but rather bars precisely the sort of structure commonly understood to be a traditional modular home. Where a term is not defined in a restrictive covenant, "we will interpret such term in accordance with its commonly used meaning."

*Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). And a "modular home," as that term is commonly used, is entirely or predominantly built off-site and then relocated to a lot essentially ready-made to occupy. It is generally a low-cost, low-quality, visually unattractive structure that is cheaply made in a factory and then strapped to a foundation and habitable after some basic plumbing and electrical hookups. (See, *e.g.*, App I, 110-a, Tr Vol II, Coeling at 61, modular homes are aimed at the "lower end buyer," the "very, very budget conscious buyer.") Indeed, that was how the *Plaintiffs themselves* understood the definition of "modular home." Plaintiff Matthew Thiel testified that he used to live in one. (App H, 97-a, Tr Vol I, M. Thiel at 168.) As he describes it, his modular home was "low quality," quickly deteriorated into a "stage of disrepair," and was overrun with "varmints" due to the poor "quality construction associated with it." (*Id.*) His wife, Nicole Thiel, testified that she had a similar understanding of "modular homes." In her view, a "modular home" is essentially the same thing as a manufactured or mobile home in a trailer park: "I don't want to live in a modular home park. . . . There is one across the highway in Martin, behind the car wash." (App J, 128-a, Tr Vol III, N. Thiel at 68.) *That's* what a "modular home" is under its "commonly used meaning"; and the Goyings' high-quality, visually attractive, custom-designed, value-enhancing home undisputedly is not that.

Indeed, this is essentially a casebook example of the doctrine of "*noscitur a sociis*." That doctrine provides that "a word or phrase is given meaning by its context or setting"—it is "known from its associates." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002); see also *Bloomfield Estates*, 479 Mich at 215 (same). The doctrine recognizes the reality that "[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *G.C. Timmis & Co v Guardian Alarm*

*Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). Thus, "words grouped in a list should be given related meaning," and "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the [document] as a whole." *Id.* (internal quotation marks omitted). See also *Reading Law*, p 195, Associated-Words Canon ("birds of a feather flock together"; so when several words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar"). So, for example, if a document contains a list of objects like "tacks, staples, nails, brads, screws, and fasteners," it is "clear from the words with which they are associated that the word *nails* does not denote fingernails and that *staples* does not mean reliable and customary food items." *Id.* at 196.

This means that when construing the covenants here, courts don't pluck a word or two, examine one of its literal definitions stripped of all context, and conclude that "modular home" must mean "any home that contains a module." Although that may be *a* definition of "modular home" when "read in isolation," the context and setting of that term in the Timber Ridge covenants suggest it means "something substantially different" here. *G.C. Timmis*, 468 Mich at 421. Indeed, the context and setting of the term "modular home" in the covenants fairly *scream* a meaning other than the simplistic definition the Plaintiffs urge. Specifically, the term "modular home" in the covenants is nestled in the following list of terms: "geodesic dome, berm house, prefabricated or modular home, shack or barn." (App E, 31-a, Covenants, Section I.C.4.) When a term is grouped in a list like this, courts seek its most general "common quality" with the terms around it—"the least common denominator, so to speak." *Reading Law* at p 196; see *G.C. Timmis*, 468 Mich at 421. And what "common qualities" immediately leap to mind when reading a list that includes structures like shacks, barns, and berm houses? Cheap. Ugly. Low

quality. Eyesore. Indeed, Plaintiff William Traywick said it well: This covenant was aimed at preventing "unusual" structures, to "maintain the aesthetic value" and "consistency" of the neighborhood. (App H, 101-a, Tr Vol I at 218.) Thus, grouping the term "modular home" with things like shacks, barns, and berm houses suggests that the term bars structures having qualities in common with these sorts of structures. See *G.C. Timmis*, 468 Mich at 421-22. These "associates," in other words, give meaning to the term "modular home," and that meaning does not cover the Goyings' high-quality, visually attractive, custom-designed dream home.

This reading harmonizes each of the uses of the term "modular" in the covenants, and also squares with the stated purpose of the covenants, the polar star that guides the interpretation of each covenant: "to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein[.]" (App E, 27-a, Covenants Section 1.) Whereas a true "modular home," as that term is commonly understood, would detract from congenial occupancy of Timber Ridge Bay and would diminish the value of neighboring parcels due to low-quality and unattractive construction, the Goyings' home does neither. In fact, it is undisputed here that the Goyings' home *promotes* the congenial occupancy of Timber Ridge and *increases* the value of neighboring parcels. As the circuit court expressly found, and as Plaintiffs again do not challenge, "it is clear that Defendants' home is not in violation of congeniality standards and does not endanger the value of the other parcels within the subdivision." (App 1, 1-a, Opinion at 9.) This factor strongly suggests that the circuit court was wise to distinguish between a classic "modular home" and the high-quality custom home the Goyings' built, and strongly suggests that the term "modular home" in the covenants does not cover the Goyings' home.

Another common-sense principle of law further confirms this reading. "Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce

them, and all doubts are resolved in favor of the free use of property." *Wood*, 304 Mich at 287; *Stuart*, 454 Mich at 210 (negative covenants "are to be strictly construed against the would-be enforcer"). This sort of "judicial gloss" has fallen into disfavor of late, and perhaps a better statement of the rule is that it simply places the burden of persuasion on the would-be enforcer rather than the homeowner. So if the scales are balanced between the enforcer's construction of the covenant and the defending homeowner's, the homeowner prevails. In other words, as between two plausible readings of a restrictive covenant—one that would require a high-quality, high-value, visually attractive home to be ripped apart board by board, and the other that would permit retired grandparents to enjoy the free use of their lakefront dream home—courts will sensibly enough favor the latter. *See id.*

**B. The circuit court got it right.**

There was therefore a reassuring wisdom to the circuit court's decision. The court noted that it had a duty to enforce the plain language of the covenants as written, even if that would be devastating to the Goyingses. (See App A, 1-a, Opinion and Order at 7: "an unambiguous deed restriction will be enforced as written.") The circuit court was not, as the Court of Appeals suggested, "striv[ing] to find an equitable solution." (App C, 16-a, Slip Op at 6.) But good textualism does not mean blindly accepting a hyperliteral definition of the term "modular home," eyes averted from the actual context of that term in the covenants. See *Reading Law* at p 39 (courts should seek the *fair* reading of a text, not a *strict* meaning; "strict constructionism" is a "hyperliteral brand of textualism that we equally reject"). Nor does good textualism mean accepting a definition of "modular home" that would do linguistic violence to the words surrounding that term—such that a covenant barring a "prefabricated or modular home" would bar a home containing modular components (like the Goyings') but not one containing

prefabricated components (like the Plaintiffs'). See *Reading Law* at p 40 (rejecting a "'viperine' construction that kills the text from reading it . . . hyperliterally").

The circuit court instead read the covenants reasonably, harmoniously, and in context. The covenants do "not clarify what percentage of a home is allowed to be prefabricated before the entirety of the home is barred by the restrictions," and "[t]he parties here have allowed for other types of components to be prefabricated: trusses, foundation, cabinets, etc." (App A, 1-a, Opinion at 9.) Thus, the circuit court rationally concluded that "[i]f a home having prefabricated components is allowed to remain in Timber Ridge Bay, this home, containing components built elsewhere, must be allowed to remain." (*Id.*)

In short, the circuit court recognized the nuance and reality here: the covenants simply "did not contemplate a home of the type built by" the Goyingses. (*Id.* at 10.) The Goyings' hybrid, system-built home "does not neatly fit into" any of the categories described in the covenants. (*Id.*) And that being the case, "[w]hile an entirely modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay, the home designed by Defendants is sufficiently constructed, valued, and congenial as to allow it to remain." (*Id.*)

**C. The Plaintiffs' remaining arguments fail.**

Plaintiffs argue that the circuit court "read the 'modular home' provision of the Restrictive Covenant out of existence[.]" (Appellants' COA Br at 2; see also *id.* at 14.) Not so. As the circuit court recognized (and as just quoted in the paragraph above), the covenant still bars precisely the sort of structures that leap to mind when we read covenants barring a "geodesic dome, berm house, prefabricated or modular home, shack or barn," or a "relocated residence" or "manufactured home." Specifically, the covenants bar cheap, low-quality eyesores that are entirely or predominantly built in a factory and then dropped down on a lot in Timber

Ridge Bay. The covenants would still bar, for example, the sort of modular home that Mr. Thiel used to live in (the one overrun by varmints), and the sort that his wife fears (the ones in the "modular home park" across the highway behind the car wash). The circuit court gave the term "modular home" its plain meaning *in context*; the court did not read it out of the covenants.

Plaintiffs counter that "there was no evidence that there is such a thing as a 'modular home' that does not require completion of some finishing work on-site[.]" (Appellants' Br at 2-3.) But there's a big difference between "some finishing work" that is required to bolt together and hook up the traditional "modular home," and the extensive on-site construction that was required to integrate the modular components into the Goyings' home. So while there might be tougher calls to make at the margins in other hypothetical situations—since the covenants do "not clarify what percentage of a home is allowed to be prefabricated before the entirety of the home is barred by the restrictions" (App A, 1-a, Op at 9)—it was not close here with respect to the Goyings' majority-stick-built home. For the Goyings' home, it is undisputed that the "majority of the residence is being stick built on site" (*id.*) and the modular components were "not even close" to being habitable and each was "just a raw piece of construction material." (App I, 114-a, Tr Vol II, Coeling at 69.)

Plaintiffs and the Court of Appeals also scolded the circuit court for suggesting that the covenants were ambiguous and coming up with a "self-created definition of 'modular.'" (See Appellants' COA Br at 13-14.) The Goyingses agree with Plaintiffs that words in a restrictive covenant do not "become[] magically ambiguous" whenever they are not specifically defined; otherwise virtually all written documents "would be rife with ambiguity" and interpreted variously in "'words mean whatever I say they mean' fashion." (See *id*. at 13; quoting *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002).) But the problem for the Plaintiffs here is that the

term "modular home" is not a self-defining term that has a fixed meaning in all contexts. And the relevant context here—the "context and setting" of the term as used in the covenants—shows that "modular home" must mean something different than the "home with a module" definition that the Plaintiffs and the Court of Appeals claim is the "ordinary and generally understood meaning" of that term. (Appellants' COA Br at 13; see App D, 24-a, Slip Op at 6.) And that's true whether the term is considered ambiguous (Plaintiffs would lose because the surrounding circumstances show that the Goyings' home is not a "modular home") or unambiguous (Plaintiffs would lose because, as shown above, the context and setting of the term "modular home" in the covenants shows it does not cover the Goyings' home). So affirming the circuit court's judgment does not depend on finding an ambiguity in the contract; the judgment should be affirmed either way.

Plaintiffs also point to "documents created before the litigation" in which various builders and inspectors described the Goyings' home as a "modular home." (Appellants' COA Br at 11.) But it is undisputed that these builders and inspectors were not reading the covenants when they used this term, nor were they suggesting that their use of the term had the same meaning it did in the covenants. (Nor would their views on the matter have any relevance to a court's interpretation of the covenants here.) Instead, these documents simply reinforce the reality that the term "modular home" does not have a fixed, precise meaning across all contexts. So a home could be considered a "modular home" for home-inspection or appraisal purposes, but still not a "modular home" as that term is used in the covenants—a "relocated residence" of the quality and aesthetics of a shack, barn, or berm house.

The Plaintiffs also argue that tearing down the Goyings' home is required "regardless of the effect" and regardless of the "perceived harshness to the Goyings." (Appellants' COA Br at

16-17.) Plaintiffs concede that they have suffered not a single penny of damages (the Goyings' home increases the value of their homes), but they say this is "wholly immaterial"; the house should come down anyway, because they want it to. (*Id.* at 18.) (Make no mistake, this is precisely the relief they seek, despite euphemistically asking for an order "enforcing the restriction" and "requiring that the Goyings' modular home be removed." *Id.* at iii, 16.) But the case they cite in support of those assertions, *Webb v Smith*, 224 Mich App 203, 205; 568 NW2d 378 (2010), is distinguishable because the defendants there "concede[d] that they built their home on the property despite two deed restrictions that prohibited the construction," and simply "gambl[ed] on the prospect that" they could get away with it. That is nothing like the situation here, where the Goyingses designed their home in accordance with a good-faith, reasonable reading of the covenants, actually discussed their plans to include modular components in the home *with one of the Plaintiffs*, who did not object in any way, and then built a beautiful, high-quality home that fit with the character of the neighborhood and increased the value of all of the homes in the area, including the Plaintiffs'. Suffice it to say on this score that the circuit court was wise to reject the Plaintiffs' hardline, "tear it down and ignore the consequences" stance, and instead adopt a more reasonable, nuanced, and context-specific construction of the covenants that was faithful to their text and ultimately fair to all the parties.

## IV. Any Violation of the Covenants was a Technical Violation that Did Not Cause Substantial Injury to Plaintiffs and Therefore Does Not Compel the Courts to Tear a House Down

In the end, nothing here requires a court to tear down the dream home of two retired grandparents. This Court has recognized an "equitable exception[] to the general rule that the courts will enforce valid restrictions by injunction," for "[t]echnical violations and absence of substantial injury." *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957) (citing 26 CJS Deeds § 171). "Because no Michigan court has defined a 'technical violation' in this context,"

the Court of Appeals has adopted a definition (although this Court has not) "which characterized a technical violation of a negative covenant as a 'slight deviation' or a violation that 'can in no wise, we think, add to or take from the objects and purposes of the general scheme of development.'" *Webb v Smith*, 224 Mich App 203, 205; 568 NW2d 378 (2010) (quoting *Camelot Citizens Ass'n v Stevens*, 329 So2d 847 (La App 1976)).

The Goyings' alleged violation of the covenants can only be described as "technical," and it is undisputed that Plaintiffs have not suffered "substantial" injury. Plaintiffs have suffered *no* injury: the Goyings' home *increases* their property value and it is undisputed that "[t]he aesthetics, quality and value are of the same standards as the other homes which exist and will be built within the subdivision." (App A, 1-a, Trial Court Op at 10.) So for goodness' sake, why tear it down? It will forever be a mystery—to Helen and Dave at least—why the Plaintiffs have persisted in their aggressive prosecution of this lawsuit. For some reason, the Plaintiffs have taken it upon themselves to be the steely eyed enforcers of an aggressive and expansive reading of restrictive covenants that they themselves cannot and have not complied with for years. A world where neighbors run off to court to ask a judge to tear down a retired couple's dream home—not because the home is an eyesore or at all detracts from the congeniality or value of the surrounding area, but because they think it violates their hyperliteral, schoolmarm's reading of snippets of a restrictive covenant—is unfathomable to the Goyingses, as it should be to us all.

The Plaintiffs justify their behavior by resort to the slippery slope. If the Goyingses are permitted to build a "modular home," they ask, what will stop future residents from building true low-quality modular homes and turning Timber Ridge Bay into the dreaded "modular home park" that Mrs. Thiel fears? But surely this is something that could be worked out between neighbors, without tearing one of their homes to the ground. Helena and Dave have sensibly

proposed adopting an architectural control committee for the neighborhood, for example, so that issues like these are addressed up front and in a fair manner for all parties. (See App H, 95-a, Trial Tr Vol I, Helen at 119.) Such a committee might also work up amendments to the covenants to clarify with more precision what types and percentages of prefabricated or modular components are permitted, since obviously some must be permitted under any reasonable reading that wouldn't result in a bulldozer leveling the whole neighborhood.

But whatever the Plaintiffs' motivations, it is undisputed on this record that their harms are truly insubstantial, if not nonexistent. For this reason, controlling law says the courts are not required to tear the house down. *Cooper*, 349 Mich at 530. This Court should decline the Plaintiffs' invitation to do so.

**Conclusion and Relief Requested**

David and Helen Goyings respectfully request that the Court grant this application for leave to appeal, reverse the Court of Appeals decision, and reinstate the decision of the trial court.

Respectfully submitted,
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Dated: May 9, 2018

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