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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

____/

SUPPLEMENTAL *AMICUS CURIAE* BRIEF OF THE
MODULAR HOME BUILDERS ASSOCIATION

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

The Court presented two questions for supplemental briefing.

1. Whether the Goyings's home is a "modular home" as defined by Timber Ridge Bay's "Declaration of Restrictions, Covenants and Conditions."

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

2. If so, whether the violation was a technical violation that did not cause substantial injury, *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957).

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

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INTRODUCTION

While the term "modular" may have conjured up images of low quality, pod-like homes in the past, modern "system-built" housing defies that outdated impression. System-built houses, like the Goyings's home, are custom-designed through state-of-the-art programs and efficiently built using modern factory assembly-line techniques. They are held to the same housing codes and standards as more traditional, stick-built homes. And an increasing number of cities and businesses across the country are turning to them as affordable—but aesthetically pleasing—high-quality housing options.

Plaintiffs endorse an absolutist attack against system-built homes. And though Plaintiffs downplay this case as a "one-off" without state-wide implications or harm, defining "modular" without an eye towards its modern meaning threatens to rewrite the way that *all* restrictive covenants are handled. Perhaps worse than that, Plaintiffs' favored definition limits consumer choice when it comes to where and how a person's home may be built. Restrictive covenants are not meant to be construed in a rigid way. Rather, like other contracts, restrictive covenants are meant to be interpreted with their intended purpose kept firmly in mind. Preserving the Goyings's home satisfies the covenant's purpose of maintaining an aesthetically pleasing neighborhood in Timber Ridge Bay. Further, applying this same purpose-focused approach, this Court (in *Cooper*) provided three equitable exceptions to the enforceability of restrictive covenants. One of those exceptions applies here, such that the Goyings's home should not be torn down even if the Court *does* deem it "modular." Ignoring that exception in this case would not only impact the Goyings—it will chill the progress of the entire housing industry throughout the state. This Court, then, should reverse the Court of Appeals's decision and affirm the decision of the Circuit Court.

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ARGUMENT

I. The Goyings's home is not a "modular home" as defined by the Timber Ridge Bay restrictive covenant.

As this Court knows well, "[r]estrictions in deeds will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property." *Austin v Kirby*, 240 Mich 56, 57; 214 NW 943 (1927). In other words, all doubts here are resolved in favor the homebuilders, the Goyings. Courts also agree that "negative covenants … are grounded in contract" and, "[i]n an action to enforce such a covenant, the intent of the drafter controls." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997); see also *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003) ("Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions…[T]he fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning.")[1]; *Borowski v Welch*, 117 Mich App 712, 716; 324 NW 2d 144 (1982) ("In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument.").

A restrictive covenant is just a contract, and a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 467. When, as in this case, a term is not defined in a restrictive covenant, courts "interpret such term in accordance with its commonly used meaning." *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002). "Terms in a particular trade are given their natural and ordinary meaning in that trade." *Ososki v St Paul Surplus Lines*, 156 F Supp 2d 669, 675 (ED Mich, 2001). But, "where a new and unusual word or

[1] Internal citations, alterations, emphasis, and quotation marks are omitted throughout.

phrase is used in a written instrument or where a word or phrase is used in a peculiar sense as applicable to a particular trade [or] business," such as the use of modular home in the Timber Ridge Bay restrictive covenant, "it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase." *Moraine Prods, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972). Extrinsic or parol evidence can assist courts "to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical." *Id*. Such evidence is frequently used to translate the language in a written instrument, such as a restrictive covenant, "from the language of trade into the ordinary language of the people generally." *Id*.

The Timber Ridge Bay restrictive covenant at issue does not define "modular home." Instead, it says only that "[a]ll 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." Plaintiffs say this contractual language clearly prohibits the Goyings's home from being located in their subdivision. Their view misunderstands both the nature of the restrictive covenant at issue in this case and the nature of "modular homes" in general.

First, the restrictive covenant itself says that its purpose is "to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein[.]" This purpose implies that the provision foreclosing "modular" homes should be applied narrowly—or not at all—as to a home that does not reduce the property value of neighboring residences and presents otherwise pleasing aesthetics. Here, no evidence suggests that the Goyings's home violates any "congenial" requirement or expectation in the neighborhood. Indeed, the trial court concluded—in a finding unchallenged by either Plaintiffs or the Court of Appeals—that the home

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is "not in violation of congeniality standards and does not endanger the value of the other parcels within the subdivision." Appendix A, Trial Court Opinion at 10c. Thus, the restrictive covenant's purpose is satisfied by applying a narrower construction of "modular" that excludes the Goyings's system-built home. And it's that satisfaction of purposes that should be decisive. See *Moulton v Lobdell-Emery Mfg Co,* 322 Mich 307, 310; 33 NW2d 804 (1948) (explaining that a contract must be "construed in the light of the circumstances existing at the time it was made" and in light of the "purpose sought to be accomplished"); accord *Shay v Aldrich*, 487 Mich 648, 672; 790 NW2d 629 (2010) ("In construing contractual provisions due regard must be had to the purpose sought to be accomplished by the parties[.]").

Second, the trade definition of "modular home" has changed since the restrictive covenant's 2006 drafting, and yesterday's understanding of "modular homes" does not describe the system-built homes of today.[2] Yes, Zachary Bossenbroek, the drafter of the restrictive covenant, testified that his intent at the time of drafting was to prohibit modular homes (along with mobile and manufactured homes) to maintain a "certain standard." Appendix A, Trial Court Opinion at 6c. But he based that decision on his "assumption…[that] modular homes…are not typically going to be of a standard and of [a]esthetic appeal as what a stick built home would be[.]" *Id*. Bossenbroek's assumption is no longer valid in 2018—at least as to the sort of home that the Goyings built. Bossenbroek did not anticipate the technological advancements and quality

[2] Plaintiffs once again focused their supplemental brief on ancillary agreements, reports, and permits that happen to refer to the Goyings's home as "modular." 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 example, "[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, 255-256; 222 NW 180 (1928).

standards that are now the status quo in the system-built housing industry. In other words, Bossenbroek's covenant was aimed at a problem—shoddy buildings akin to "mobile homes," "shacks," and "barns"—that simply doesn't exist as to a present-day system-built home. See, e.g., *Darnell v Garett R Kern Cons., Inc*, No 257277, 2006 WL 1328879, at *3 (Mich Ct App May 16, 2006) (describing a developer's determination that a "systems built home" was not what he intended to foreclose via a restrictive covenant that the developer drafted covering "modular" homes).[3]

On their face, system-built homes are indistinguishable from their stick-built cousins. Designers use state-of-the-art, computer-assisted design stations that aid them in customizing floor plans and producing drawings and material requirement lists. These homes are built to the same codes and standards as homes with more stick-built elements. Indeed, there's much about system-built homes that are *better* than their traditional counterparts. For instance, a quality-control process provides complete assurance that a home has been inspected for code compliance and workmanship. To ensure safety, regulatory, and quality compliance, in-plant inspectors as well as independent agencies inspect the homes on behalf of state and local governments.

And the proof is in the pudding: both the commercial and residential markets have embraced system-built structures as a way to combat rising material and construction costs and to avoid the uncertainties of weather delays, subcontractor no-shows, and missing materials. 461 Dean Street, a skyscraper, opened in 2016 next to the Barclays Center in Brooklyn, New York.[4]

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[3] Unpublished cases are attached as Ex. 1.

[4] *The World's Tallest Modular Skyscraper Welcomes Its First Residents*, available at, https://www.architecturaldigest.com/story/worlds-tallest-modular-skyscraper-welcomes-first-residents (accessed June 4, 2018).

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Ninety percent of the building's construction took place off-site and it reportedly cost developers twenty percent less than building a traditional skyscraper. CitizenM New York Bowery, a new hotel comprised of 210 factory-made pieces, opened in Manhattan in 2018.[5] The company that managed the hotel's construction praised the use of modern system-built construction and listed the reduced cost of labor and materials, expeditious time table, and minimized waste due to uniformity of design as only a few of the benefits. For these same reasons, system-built housing companies for the residential sector are establishing themselves across the country as an inexpensive—but high quality—alternative.[6] For example, in response to soaring home prices in San Jose, Palo Alto, and Cupertino, Google looked to the technique to build 300 homes for the tech giant's employees.[7] All this is to say that the modern system-built structure does not align with the now-defunct understanding of "modular" structures that dominated (or, perhaps more accurately, was *perceived* to dominate) the market in years past.

The modern trade use of system-built housing must be taken into consideration if—or rather when—this Court ultimately considers the definition of "modular home" as used in the twelve-year-old restrictive covenant here.

[5] *CitizenM New York Bowery Is a Modular Wonder*, available at, https://www.hotelbusiness.com/citizenm-new-york-bowery-is-a-modular-wonder/ (accessed June 4, 2018).

[6] *Napa housing projects demonstrate benefits of modular construction*, available at, http://www.sonomanews.com/business/8110666-181/napa-housing-projects-demonstrate-benefits (accessed June 4, 2018); see also *Modular home construction finds new fans around region*, available at https://www.ctpost.com/business/article/Modular-home-construction-finds-new-fans-around-12770903.php (accessed June 4, 2018).

[7] *Google Invests in Modular Homes to Combat Silicon Valley Housing Crunch*, available at, https://www.architecturaldigest.com/story/google-invests-in-modular-homes-combat-silicon-valley-housing-crunch (accessed June 4, 2018).

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Plaintiffs' approach—which would broadly apply a restrictive covenant in a manner that does not produce discernible benefits and does not serve the contract's original purpose—ignores the current housing shortage. Affordable housing inventory is at a 15-year low and the Michigan housing market is tightening. In the first three months of 2018, new home starts *declined* in West Michigan (where the Goyings built their home) because of a lack of construction workers and build sites. But system-built homes have had, and will continue to have, a significant positive impact on alleviating the rising prices for both materials and labor. Affirming the Court of Appeals's decision and ordering the demolition of the Goyings's home will chill the market and make Michigan homeowners and business owners wary of considering system-built homes and buildings as valid building options. A large segment of the homebuilding market that offers Michigan citizens high-quality, affordable homes will be essentially foreclosed. Employers and employees alike will struggle to remain in this state if housing prices are unnecessarily raised by artificial constraints on consumer choice.[8]

By recognizing that the Goyings's modern system-built home is *not* a modular home of the sort described in the Timber Ridge Bay restrictive covenant, this Court can endorse system-built housing as a worthwhile option for people looking to make Michigan their permanent home, free from the threat of restrictive covenants that target a type of home that no longer characterizes the system-built market.

II. The modular components of the Goyings's home were a technical violation of the Timber Ridge Bay's restrictive covenant and did not cause substantial injury.

Even if this Court were to determine that the Goyings's home was a "modular" home foreclosed by the covenant, the Court should not order its destruction. In furtherance of the well-

[8] See *Amicus Curiae* Brief of the Modular Home Builders Association pp 8-11 for further discussion on the negative economic impact of affirming the Court of Appeals's decision.

known rule to favor the "free use of property," this Court created three exceptions to the enforceability of restrictive covenants, and they remain the current standard:

a) Technical violations and absence of substantial injury;

b) Changed circumstances; and

c) Limitations and laches.

Cooper v Kovan, 349 Mich 520, 530; 84 NW2d 859 (1957). Although this Court has yet to define a "technical violation," the Michigan Court of Appeals adopted the definition of *Camelot Citizens Ass'n v Stevens*, 329 So 2d 847, 850 (La App 1976), which defined it as a "slight deviation" or violation that "can in no wise…add to or take from the objects and purposes of the general scheme of development[.]" *Webb v Smith*, 224 Mich App 203, 212; 568 NW2d 378 (1997), *leave to appeal denied*, 459 Mich 862; 584 NW2d 924 (1998). The *Webb* court further explained that "if any doubt arises surrounding the meaning of the restrictions the court must consider the sub-divider's intention and purpose." *Id*. After *Webb*, *Cooper*'s "technical violation" exception depended on a case-by-case analysis, evaluating whether the application of that exception would accomplish the purpose of the restriction within the general scheme of development.

The Court has continued to recognize an exception to equitable relief for cases involving mere "technical violations" of restrictive covenants. Five years after *Cooper*, this court issued its opinion on *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), another restrictive-covenant case that directly addressed the technical violation exceptions provided in *Cooper*. In *Terrien*, the defendants operated a licensed family day care home in violation of a restrictive covenant prohibiting the continued operation of family day care homes. The trial court found in favor of the defendants, holding that the restrictive covenant was contrary to Michigan's public policies. Although the Court of Appeals affirmed, this Court reversed and held in favor of the plaintiffs.

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Despite the defendants' argument that the day care was a mere technical violation, this Court held "[i]f the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant *affords sufficient ground* for the Court to interfere by injunction." *Id.* at 65 (emphasis added); see also *Vill of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512; 686 NW2d 506 (2004) (applying *Cooper*'s technical violation exception and ruling for the plaintiff because the breach was *de minimis* and without any substantial injury).

Plaintiffs argue that the Goyings's construction of their home was more than a "slight deviation" from the restrictive covenant and that the home is not protected by the *Cooper* technical violation exception. They even go so far as to suggest that *Terrien* and *Smyk* signaled the end for the *Cooper* technical violation exception and that, if the exception is still viable, courts only apply it rarely. But claiming as much misunderstands the law of today. See *Kamphaus v Burns*, No 279962, 2009 WL 485281, at *8 (Mich Ct App Feb 26, 2009) (rejecting the argument that the "the 'technical violation' exception is no longer viable law").

A close reading of *Terrien* reveals that the Court merely presented one "sufficient ground" to interfere by injunction; it did not mandate intervention in every case of possible restrictive-covenant violation. (In other words, *Terrien* defined a condition that was "sufficient" for an injunction but not one in which an injunction was always *necessary*.) Moreover, *Terrien* enforced a restrictive covenant despite *de minimis* damages primarily because the violation was a "substantial deviation from the deed restriction—not a slight deviation.… In other word[s], the first element of the technical violation exception was not met." *Id.* Likewise, in *Smyk*, the defendant's failure to submit plans before construction presented a substantial—not technical—violation of the deed restriction, regardless of damages. *Id.* In short, courts continue to apply the

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Cooper "technical violation" exception on a case-by-case basis. It is available—and should be applied—to the Goyings.

Decisions from other jurisdictions make plain that the building of a home with modular components does not materially offend restrictive covenants aimed at maintaining community aesthetics and property values. In *Chesapeake Estates Imp Ass'n v Foster*, 265 Md 120; 288 A2d 329 (1972), for example, the court invalidated a restriction against modular homes because the homes met "the median standards of the other dwellings therein" and were "varied in style and location in such a manner that they [did] not give the development a general appearance of a 'Levittown.'" *Id.* at 125. In fact, the court observed that modular homes "could very well be better and more lastingly built than a good many of the custom built homes in" the neighborhood because they are "are precision built to FHA standards. *Id.* Likewise, in *Howell v Hawk*, 750 NE2d 452 (Ind Ct App 2001), the Indiana Court of Appeals held that a modular home did not violate the neighborhood's restrictive covenant where the only difference between the other local stick-built homes and the modular home in question was that one "rests on a steel base and [the] modular home does not." *Id.* at 455. These cases recognize that a home does not offend a restrictive covenant merely because it can be labelled "modular." See also, e.g., *Kruse v Claar*, No. 02–1233, 2004 WL 61053, at *2 (Ct App Iowa January 14, 2004) (holding that a modular home did not violate a restrictive covenant targeted at "structures that could negatively impact the beauty and marketability of the subdivision" because "evidence was introduced that the quality of modular homes is equal if not superior to that of typical site-built homes").

Plaintiffs fail to provide any reported case law that addresses modular homes in particular; the little case law Plaintiffs do cite is inapposite to the circumstances here. True, the Court of Appeals in *Oakwood Meadows Homeowners Ass'n v Urban*, No 316193, 2014 WL 2935908 (Mich

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Ct App June 26, 2014) ordered compliance with a restrictive covenant. But the court's decision resulted because the defendants' proscribed outdoor pump house was visible over their backyard fence and "clearly [took] away from the purpose of the general scheme of the development," which was a "neighborhood free of sheds and outbuildings." *Id.* at *5. Likewise, in *Beach Front Subdivision Ass'n v Omran*, No 326976, 2016 WL 6495742 (Mich Ct App Nov 1 2016), *appeal denied*, 500 Mich 1022; 896 NW2d 787 (2017), *reconsideration denied*, 501 Mich 912; 902 NW2d 864 (2017), the subject lawn ornaments "detract[ed] from the objects and purposes of the general scheme of the development" and affected the subdivision's "aesthetic quality and uniformity." *Id.* at *1. In both cases, the plaintiffs showed how the covenant violations had identifiable, concrete, facially visible, and negative effects on the aesthetics of the subject homes and subdivisions.

Yet here, Plaintiffs do not—and, more importantly, cannot—point to a visual characteristic of the Goyings's home that either takes away from the "general scheme" of the neighborhood or is otherwise a source of substantial damage. Rather, Plaintiffs contend that the Goyings's home creates substantial damage merely by its abstract nature as a modular home. But the Goyings's so-called deviation from the restrictive covenant does not defeat the drafter of the covenant's stated purpose to "maintain a certain standard." Rather, the Goyings's home, much like the technical violations recognized in *Dean v Hanson*, No 241317, 2003 WL 22717941 (Mich Ct App Nov 18, 2003), "cannot be said to have caused [Plaintiffs] substantial harm" or "take[n] away from the general scheme of the subdivision." *Id.* at *7. See also *Gamble v Hannigan*, 38 Mich App 500, 505, 196 N.W.2d 807 (1972) (holding that a porch that extended over setback lines was a mere technical violation and should not be enjoined because it would not block other residents' view of a lake and substantial construction had already taken place). In fact, when driving through Timber Ridge Bay, a person would not be able to tell the difference between the Goyings's home and other

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homes in the subdivision. See *Howell*, 750 NE2d at 459 (holding that a 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]."). If anything, the Goyings's home increases the property values in the neighborhood. See Appendix B, Trial Exhibit 7, Appraisal by John A. Meyer Appraisal Company.

Moreover, the Goyings's decision to build a system-built home should not be taken as an *intentional* violation of the restrictive covenant. The Goyings's home is a one-of-a-kind designer home, not a cookie-cutter, trailer-like structure of the kind targeted by the covenant. They therefore had no reason to believe that they were in the wrong when they designed and built it. The Goyings were likely under the impression that their system-built home is distinctly different from the modular home conceived of and prohibited in the subject restrictive covenant. Rightfully so.

In short, the Goyings's technical violation of the restrictive covenant—if it can even be considered that—harms no one and, if anything, adds value to the Timber Ridge Bay subdivision. The Goyings did not build a conspicuous pump house in their backyard as in *Oakwood* or display large water fountains in their front yard as in *Beach Front Subdivision Ass'n*. They did not willfully violate a covenant and build a second home on their single-family lot like the defendants in one prior restrictive covenant case or operate a family day care in their home like another. Rather, the Goyings built an objectively stunning home that aligns with the "congenial" aesthetics and "certain standards" of its surrounding neighbors and—if anything—raises the property value. Plaintiffs can point to no *substantial* injury. The only injury that could result here is the injury to the housing market in the State of Michigan that would follow if the Court of Appeals is affirmed.

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CONCLUSION

Technological advancements and improvements in the housing market, especially during times of economic hardship, should be recognized and encouraged by the courts. The circuit court understood that, while a restrictive covenant is a contract, the law favors the free use of property. The modular housing industry has developed since the subject restrictive covenant was drafted, and the Goyings's home complies and exemplifies the "congenial" intent and purpose of the Timber Ridge Bay restrictive covenant. And even if the house at issue does fall within the reach of the restrictive covenant, the Goyings's home represents nothing more than a mere technical violation of that covenant without substantial (or any) injury. The Court should grant the Goyings's application for leave to appeal, reverse the Michigan Court of Appeals's decision, and reinstate the judgment of the Circuit Court.

Respectfully submitted,

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Dated: June 14, 2018

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Certificate of Service

I hereby certify that on June 14, 2018 TrueFiling 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 TrueFiling service list.

By: /s/ Michael R. Williams
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