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COMMON PLEAS COURT  
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JENNIFER WILKINS  
CLERK OF COURTS  
OTTAWA COUNTY, OHIO

IN THE COMMON PLEAS COURT OF OTTAWA COUNTY, OHIO

Elizabeth J. Cianciola, et al.	)	Case No. 10CV232H
Plaintiffs,	)	Judge Bruce Winters
v.	)	<u>DECISION AND JUDGMENT</u>
Johnson's Island Property Owner's Assn.	)	<u>ENTRY</u>
Defendants.	)	

Facts

Plaintiffs are a group of individual lot owners in Bay Haven Estates Subdivision ("Bay Haven") on Johnson's Island in Marblehead, Ohio. Bay Haven consists of five plats. Plaintiffs are not members of Johnson's Island Property Owner's Association ("JIPOA"), an Ohio not-for-profit corporation which consists of voluntary members who own property in Bay Haven Plats 1 through 5 or in the Shiloh Subdivision Plat. JIPOA provides various services to the residents of Johnson's Island, including road repair. Roads on Johnson's Island are privately owned.

JIPOA's predecessor, The Johnson's Island Club, filed Declaration of Real Estate Restrictions on July 26, 1956 ("the Declarations"), which Declarations applied to "Sub Lots 26 to 53, inclusive, 61 to 170 inclusive and 173 to 376 inclusive." Bay Haven Plats 1 and 5 were each filed with a copy of the Declarations. Plat 3 was filed with a modified version of the Declarations. The remaining Plats were filed without the Declarations. The Declarations make no reference to any owner's association or requirement of membership therein; nor is there any reference to anyone's

ability to assess or lien. There is no mention of any owner's association maintaining or owning common areas. Further, there is no requirement that lot owners be members of any association.

In 2004, a dispute arose over maintenance and improvements on Johnson's Island. On June 7, 2007, as settlement to a lawsuit involving Defendants herein, Defendants filed certain documents, including an Operating Agreement which provides for maintenance of roads for Johnson's Island. Plaintiffs herein were not parties to this lawsuit. On June 24, 2011, an Amended Code of Regulations was filed by JIPOA.

Motion for Summary Judgment  
Standard of Review

Civ.R. 56(C) provides that before summary judgment may be granted, the court must determine that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Osborne v. Lyles (1992), 63 Ohio St. 3d 326.

In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion. Morris v. Ohio Cas. Ins. Co. (1988), 35 Ohio St. 3d 45; Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64.

The burden of establishing that no genuine issues to any material fact remain to be litigated is on the party moving for summary judgment. Turner v. Turner (1993), 67 Ohio St. 3d 337; Fyffe v. Jenos Inc. (1991), 59 Ohio St. 3d 115, 120.

Once a party moves for summary judgment and has supported his or her motion by sufficient and acceptable evidence, the party opposing the motion has a reciprocal burden to

respond by affidavit or as provided in Civ.R. 56(C), setting forth specific facts explaining that a genuine issue of material fact exists for trial. Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St. 3d 48,52; Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115.

#### Analysis

Restrictive covenants are to be construed strictly against the restriction and in favor of the free use of land. Carranor Woods Property Owners' Assn v. Driscoll (1957), 106 Ohio App. 95. The owner of one property may enforce restrictive covenants against another property owner only where the covenants are for their mutual benefit. Dixon v. Van Sweringen Co. (1929), 121 Ohio St. 56. A covenant running with the land is one which intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely; the important consequence of a covenant running with the land is that its burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who never actually agreed to it. Blacks Law Dictionary.

When determining whether a covenant runs with the land, the following three factors must be met: 1) intent for the restrictive covenant to run with the land; 2) the restrictive covenant touches and concerns the land; and 3) privity exists. LuMac Dev. Corp. v. Buck Point Ltd. Partnership (1988), 61 Ohio App.3d 558. The element of intent is met if the original grantor and grantee at the time of the conveyance intended the covenant to run with the land. Id. Touching or concerning the land is a determination of whether the property was made more useful or valuable by the covenant. Id. Privity is a succession of interest or relationship. Metalworking Mach. Co., Inc. v. Fabco, Inc. (1984), 17 Ohio App.3d 91. One is in privity with another if he/she succeeds to an estate or an interest formerly held by the other. Id. Privity of the estate between the original grantor and subsequent grantees is generally required to enforce a restrictive

covenant. Peto v. Korach (1969), 17 Ohio App.2d 20. In addition to the above three requirements, when a person or corporation is seeking to enjoin the other person from violating a restrictive covenant, a notice requirement is added. Schurenberg v. Butler Cty. Bd. of Elections (1992), 78 Ohio App.3d 773. The requisite notice can either be "actual notice" or "constructive notice" established by recordation of a prior instrument containing the restriction. Id.

So long as an instrument is by law entitled to be recorded, the recording of such an instrument is constructive notice to all subsequent purchasers or lienholders of its existence and contents and entitles such persons to rely upon the information contained in the instrument.

Pinney v. Merchants' Nat. Bank of Defiance, (1904), 71 Ohio St. 173. The record of an instrument not in the record chain of title is not constructive notice to a person claiming under such chain of title; otherwise stated: the record of an instrument is constructive notice only to those who claim through or under the person executing it. Kiley v. Hall (1917) 96 Ohio St. 374.

Bylaws are not properly created restrictive covenants where the party attempting to enforce restrictions never owned the lots at issue. Sandy Beach Apt. Ltd. v. Mitiwanga Park Co. 2008 Ohio 606. Notice of the existence of the by-laws, whether constructive or actual, is irrelevant to their enforceability. Id. Furthermore, because the by-laws are not restrictive covenants, there is no statutory or common law principle that requires the subdivision lot owners to become a member of the association and share in the cost of the maintenance of the common areas.

Certainly, lot ownership can be a condition of membership, but membership cannot be mandated without a restrictive covenant. Johnson's Island Property Owners' Assoc. v. Nachman (Nov. 19, 1999), 6th Dist. No. OT-98-043 at 5. Associations may however, assess property owners for matters in its chain of title. Id.

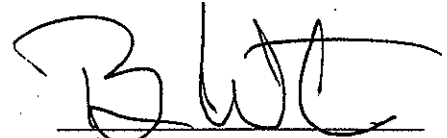
Another way to determine notice and intent of a covenant is through a general scheme or plan for that parcel of land. Berger v. Van Sweringen Co. (1966), 6 Ohio St.2d 100. The development of a plan is essential when dealing with community subdivisions where the grantor imposes restrictions for the entire tract. Id.

In the present case, JIPOA's restrictive covenants are nowhere in the Plaintiffs' chain of title. Further, the Code of Regulations for JIPOA are bylaws which govern the organization; they are not encumbrances against Plaintiffs' properties. The Operating Agreement, although binding upon those who executed the agreement, is not binding upon Plaintiffs who are non-parties to that agreement. Thus, JIPOA does not have the right to impose restrictions on the Plaintiffs' real estate through the Code of Regulations or the Operating Agreement, but does have the authority to assess Plaintiffs for their share of matters appearing in their chain of title such as platted roadways.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The Amended Code of Regulations and the Operating Agreement are unenforceable as to Plaintiffs' properties;
2. JIPOA and others acting in concert with JIPOA are hereby restrained and enjoined from directly or indirectly attempting to enforce the Amended Code of Regulations or the Operating Agreement against Plaintiffs and is further restrained and enjoined from making any filings or publications that may cloud Plaintiffs' titles;
3. JIPOA shall immediately execute and file with the Ottawa County Recorder, a release of Plaintiffs' property from the Amended Code of Regulations and the Operating Agreement.

Clerk of Courts shall send copies of this Decision and Judgment Entry to all counsel of record and pro se parties by regular U.S. Mail forthwith.

  
Judge