

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30755
LANSING, MICHIGAN 48909

June 10, 2005

Richard Falardeau
Department of Environmental Quality
Drinking Water and Environmental Health Section
P.O. Box 30273
Lansing, MI 48909-7773

Dear Mr. Falardeau:

Re: Governmental Restrictions – Plat of Lake Isabella Airpark

The plat of Lake Isabella Airpark contains a notation that the plat is subject to restrictions:

This plat is subject to restrictions as required by Act 288 of 1967, as amended on certain lots with respect to the requirements of the Michigan Department of Natural Resources and/or the Michigan Department of Public Health, which are recorded in Liber 397, Page 54 of records of this county.

You have forwarded to me the "Building and Use Restrictions of Lake Isabella Airpark" which has no indication that it was recorded, but which I will assume are the restrictions recorded at Liber 397, Page 54 with the Isabella County Register of Deeds. You have asked whether the restrictions found in Section 29 may be waived by vote of owners of the lots in the plat as provided in Section 24.

Section 24 provides a means for lot owners to change the covenants governing the plat by vote:

These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the owners of the lots has been recorded, agreeing to change said covenants in whole or in part. The terms of this section do not apply to section thirty-three (33), which is in perpetuity.

Richard Falardeau
Page 2
June 10, 2005

However, Section 29 of the building and use restrictions provides that the restrictions in that section may only be changed by written agreement of certain governmental agencies:

The development of lots with individual on-site sewage disposal systems shall be prohibited on any of the lots of this plat, except a maximum number of 15 lots may place on-site sewage disposal systems. Any lots developed with individual water intake facilities shall be required to connect to the public water system and any lots developed with on-site sewage disposal systems shall be required to connect to the public sewage system as required under paragraph 30 of these restrictions. At such time as a public sewage system and water system is available for connection, the restrictions set forth in this paragraph shall cease and shall be null and void. Until such time as a public sewage and/or water system is available for connection to the lots in this plat, or, until a written agreement is reached between the Isabella County Board of Public works, the Central Michigan District Health Department and the Director of the Michigan Department of Public Health, or their successors, permitting herein provided for upon reviewing the status of development and the progress towards extending public sewers and/or water system these restrictions and limitations shall remain in full force and effect. All individual wells are to be drilled through a protective barrier to depth of approximately sixty (60) feet.

Section 29, as written in 1975, was consistent with the Subdivision Control Act of 1967, 1967 PA 288, MCL 560.101, where in Section 254, it stated:

Any restriction required to be placed on platted land by a public body given the authority to review or approve plats by the provisions of this act or which names the public body as grantee, promisee or beneficiary, shall vest in the public body the right to enforce the restriction in a court of competent jurisdiction against anyone who has or acquires an interest in the land subject to the restriction. The restriction may be released or waived in writing but only by the public body having the right of enforcement.

The provisions of Section 254 are now found in the Land Division Act, which amended the Subdivision Control Act of 1967. See MCL 560.254.

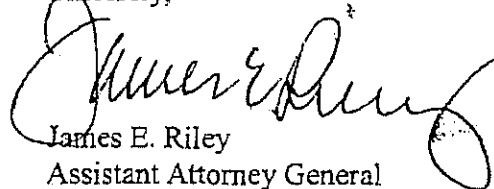
In 1974, the Michigan Department of Public Health indicated that its approval of the proposed plat was contingent upon the placement of those restrictions on the plat. The agency proposed, and the proprietors agreed, that no modification of the restrictions would occur without the written agreement of the Isabella County Board of Public Works, the Central Michigan District Health Department and the Director of the Michigan Department of Public Health, or successor agencies. All parties agreed that the restrictions were necessary to assure that the sanitary facilities constructed would not contaminate the ground or surface waters of the State of Michigan or otherwise endanger the public.

Richard Falardeau
Page 3
June 10, 2005

Both by the terms of the restrictions and by provision of law, only governmental agencies may waive or release the restrictions. No unilateral action by either the current property owners, who purchased these properties subject to restrictions, or the Village of Lake Isabella, may act to waive the plat restrictions. Case law is clear regarding the public policy behind such restrictions. In *Rofo v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983), the Court states "in construing restrictive covenants, the intent of the restrictor is paramount as determined by reading the language of instrument as a whole in light of any general plan for development of the area subject to restrictions." There is a strong public policy to support restrictive covenants for the purposes of ensuring the public health. *Wood v Blancke*, 304 Mich 283, 287-288; 8 NW2d 67 (1943).

The unilateral actions taken by the property owners are ineffective as to the governmental restrictions contained within Section 29. As successor to the Department of Public Health, the Department of Environmental Quality may enforce the restrictions pursuant to MCL 560.254. If this office can be of any further assistance in the resolution of this matter, please advise.

Sincerely,



James E. Riley
Assistant Attorney General
Environment, Natural Resources and
Agriculture Division
P.O. Box 30755
Lansing, Michigan 48909

JER:rsc

s:\nrd\ac\attys\riley 2005\ltr falardeau