Does the Board of Directors of a Michigan Condominium Association or HOA have a Duty to Enforce the Master Deed, Bylaws or Other Restrictive Covenants?

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In Michigan, the terms of a master deed, bylaws or other restrictive covenants are contractual in nature. See Rossow v. Brentwood Farms Dev, Inc, 251 Mich App 652, 658, 651 NW2d 458 (2002). The Michigan Courts have generally held that a master deed, bylaws or other restrictive covenants are to be enforced as written.

…a breach of a covenant, no matter how minor and no matter how de minimis the damages, can be the subject of enforcement. As this Court said in Oosterhouse v. Brummel, 343 Mich. 283, 289, 72 N.W.2d 6 (1955), " 'If 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.' " (Citations omitted.)
Terrien v Zwit, 467 Mich 56, 65; 648 NW2d 602, 607 (2002).

Generally speaking, the master deed, bylaws or other restrictive covenants will charge the board of directors with enforcing these documents. Similarly, the terms of the governing documents and the Michigan Condominium Act require every owner to "…comply with the master deed, bylaws, and rules and regulations of the condominium project…" MCL 559.165. Accordingly, as a general rule, the board of directors of a condominium association or homeowner association is required to enforce the governing documents as written.

In addition, the Michigan Nonprofit Corporation Act, specifically MCL 450.2541, provides the following standard of care for a director a nonprofit corporation:

Sec. 541. (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:

(a) In good faith.
(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
(c) In a manner he or she reasonably believes is in the best interests of the corporation.
(2) In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:
...
(b) Legal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence.

The Michigan Supreme Court has previously held that acts of directors that are ultra vires subject a director to liability as they cannot be in good faith, reasonably prudent and/or in the best interests of the corporation. Dodge v Ford Motor Co, 204 Mich 459, 489; 170 NW 668, 678 (1919) ("The management of the corporation and its affairs rests in the board of directors, and no court will interfere or substitute its judgment so long as the proposed actions are not ultra vires or fraudulent.").

In the context of Condominium and Homeowner Associations, numerous courts have applied the principles of Dodge, and held that directors are subject to liability for failing to comply with the plain language of the governing documents, as such actions are ultra vires, i.e. beyond the power of the non-profit corporation. Recently, the South Carolina Supreme Court stated as follows:

"[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are ultra vires." Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987). The business judgment rule only applies to intra vires acts, not ultra vires ones. Kuznik, 342 S.C. at 605, 538 S.E.2d at 28. A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative. Seabrook Island Prop. Owners Ass'n, 292 S.C. at 348, 356 S.E.2d at 414.

Fisher v Shipyard Vill Council of Co-Owners, Inc, 409 SC 164, 180-81; 760 SE2d 121, 129-30 (2014), reh den (Oct. 27, 2014). See also Yusin v Saddle Lakes Home Owners Ass'n, Inc, 73 AD3d 1168, 1171; 902 NYS2d 139, 142 (2010) ("... the evidence submitted by the defendants in support of their cross motions indicates that their adoption of the subject rule was unauthorized by the condominium's bylaws and thus was not protected by the business judgment rule."); Sulcov v 2100 Linwood Owners, Inc, 303 NJ Super 13, 31; 696 A2d 31, 40 (1997) ("The business judgment rule does not apply to decisions that are beyond the limits of the by-laws.").

Accordingly, it is likely that the Michigan Courts would follow suit and hold that a director's failure to enforce the plain language of a master deed, bylaws or other restrictive covenant is a breach of fiduciary duty. However, as with any rule, there will always be exceptions. Potential exceptions to the enforcement of the plain language of the governing documents, include, but are not limited to:

- Reasonable Accommodations. The Michigan Condominium Act and the Fair Housing Act require the Board of Directors to provide a reasonable accommodation to someone with a disability. Accordingly, providing a reasonable accommodation is required even if doing so would be a technical violation of the governing documents.

- Illegality. The governing documents were not validly enacted and/or violate Michigan Law or Federal Law.

- Equity. The terms of the governing documents are not required to be enforced based on the following circumstances: (1)

technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. See Webb v Smith, 224 Mich App 203, 211; 568 NW2d 378, 382 (1997). The cases in which these exceptions have been applied are highly fact specific, and a Board of Directors should use caution before relying on one of the above circumstances to avoid enforcement of an association's governing documents.

In short, as a general rule, a condominium or homeowner association should enforce the master deed, bylaws or other restrictive covenants according to their plain language. If a board of directors believes that there may be a valid reason not to enforce the governing documents as written, the board of directors should consult with an attorney to obtain an opinion as to whether or not there is a legal justification for deviating from the enforcement of the governing documents. Pursuant to MCL 450.2541, a board of directors that relies on the opinion of counsel, will likely have the protections of the business judgment rule and be deemed to have been acting in good faith and in the best interests of the association. In contrast, a board of directors that arbitrarily decides not to enforce certain provisions of the governing documents, or makes decisions without the opinion of legal counsel, is subjecting themselves to potential liability. While boards may be tempted to ignore unpopular provisions in governing documents, these provisions should be fixed through the amendment process, unless there is a legal justification for not enforcing the same.

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