

ORIGINAL

IN THE SUPREME COURT OF OHIO

Grace Fellowship Church, Inc.

On Appeal from the Trumbull County  
Eleventh Appellate District

Appellee

Case No.: 2013 CV 0030

v

Supreme Court Case No. 2014-0243

Jack Harned, et.al.

Appellants

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APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

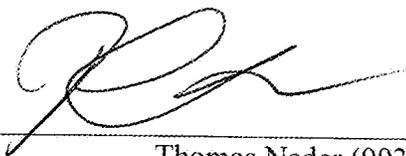
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Frank Bodor, Esq.  
Attorney for the Appellant  
157 Porter Street  
Warren, Ohio 44483  
330-399-2233

Thomas Nader (0039312)  
Attorney for Appellant Joseph Fire  
5000 East Market Street  
Warren, Ohio 44484  
330-395-7555

James Brutz  
410 Mahoning Avenue NW  
Warren Ohio 44483

Respectfully submitted,



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Thomas Nader (0039312)  
Attorney for Appellee  
5000 East Market Street  
Warren, Ohio 44484  
330-395-7555

RECEIVED  
MAR 13 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
MAR 13 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## MEMORANDUM IN OPPOSITION

### I. STATEMENT OF FACT

On March 24, 2011, Grace Fellowship Church purchased from two separate owners three parcels of land, two of which are at issue. The first parcel purchase being Seventy Acres from The Pirgowski Estate, Inc. through deed Instrument Number 201103240005476 Trumbull County Official Records. Record, Affidavit Kevin Wyndham. The second parcel purchased being Lot 13 of the Meadows Plat Vienna Township from Frank Scirocco through deed Instrument Number 201103240005475 Trumbull County Official Records. Id.

After this purchase, an employee of Grace Fellowship met with various neighbors within the Meadows Plat to discuss the Church's plans to build a church upon the land and build a driveway upon Lot 13. Id. The Restrictive Covenants that encumbered the Meadows Plat including Lot 13 were filed on August 7<sup>th</sup> 1989, and known as "Restrictions Covering All Lots and Parcels of Land in the Meadows Plat Vienna Township Volume 42 Page 52" at Official Record 498 Page 64 Trumbull County Records (hereinafter referred to as the 1989 Restrictive Covenants). A copy of which is attached hereto as Exhibit C. There is no dispute that the 1989 Restrictive Covenants did not restrict a driveway from crossing over a lot to allow for access to adjacent lands.

On December 5, 2011, Christopher J. Menci, Debra A. Menci, Matthew E. MacGregor, Stacy M. MacGregor, Robert E. Patterson, Charlene G. Patterson, Michael A. Machingo, Ronald Campbell, Mary D. Campbell, Robert L. Griffin, Cynthia R. Griffin, Larry P. Jones, Correy J. Jones, Dennis J. Mintus, Cindy S. Johnson and Nancy W. Hyde Trustee as owners within the Meadows Plat (hereinafter the "Appellants") did sign said document attempting to amend the 1989 Restriction Covenants by inserting additional restriction covenants. There is no dispute that

these named Appellants did not provide notice to the non-signing owners within The Meadows of their intent to record the 2011 Restrictions, that these Appellants did not provide Grace Fellowship Church of their intent to record the 2011 Restrictions, that no notice of an owners meeting was ever given to Grace Fellowship or that there was no vote taken by the Meadows owners before the 2011 Restrictive Covenant was recorded on December 5 2011.

In addition to the ownership of Lot 13 The Meadows, Grace is also the owner of a fourth foot wide easement across Lot 14 of the Meadows Plat. This easement was acquired for the benefit of the 70 acre parcel through a grant from Eric Kapp to the Piegowski Estate dated May 17, 2007 through Instrument 200705170013406 Trumbull County Official Records. Exhibit C. Therefore there are two separate property rights owned by Plaintiff that have been restricted and interfered with by the actions of the Appellants in recording the 2011 Amended Restrictive Covenants. Id.

II. THIS CASE DOES NOT INVOLVE A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST

The Eleventh District Court of Appeal's decision in the instant Grace Fellowship Church Inc. v Jack Harned Case No. 2013-T-0030, does not involve a question of public or great general interest.

Appellant's own argument belies their position. Other than the Court of Appeals decision before this case, there is only one other appellate decision in Ohio involving this question that case being Maasen v. Zopff 1999 Ohio App. Lexus 3422. In the Maasen case, the covenant that allowed for the owners to add new burdens to the land read as follows:" At any time these covenants may be amended by written consent of sixty percent of the then owners." See, Maasen

at page 2. In the instant matter, the covenant reads:

The covenants herein shall be construed as covenants running with the land and shall remain in effect until January 1, 1999, and thereafter, unless and except modified or changed by vote of 51% or more, of the lot or acreage owners of this Plat, the owner or owners being entitled to one vote for each lot owned or purchased on contracts. See, Maasen, page one.

The Eleventh District Court of Appeals decision did not challenge the legal propositions set forth in the Massen Case. In fact the Eleventh District Court of Appeals relied upon the criteria set forth in the Maasen Decision. At pages 7 and 8 of the Court of Appeals Opinion, the 11<sup>th</sup> District Court applied the facts of the instant case to the legal criteria set forth in Maasen. The Court of Appeal did not find that the Maasen conclusions of law were incorrect. The Court of Appeals instead found that the facts of the instant case distinguished the out come from that of Maasen.

The Massen Court and the instant Court of Appeals decision found that the factual differences of each case resulted in a different outcome in each case. The Maasen Court states: “[f]urther, the amendment was of record when Zopff acquired his title to Tract 12.” Maasen at 5.

Later the Maasen Court concludes:

A more compelling factor distinguishing the facts here from those in Iserman lies in the status of party who would avoid application of the restriction. In Iserman, that party owned the title to the lot before the restriction was adopted ... Here, Zopff did not own Tract 12 when Covenant 3 was amended to specifically prohibit public roads across the tract... . Maasen at 9.

The Eleventh District Court of Appeals in its decision recognized the distinction between the instant case and the facts of Maasen. As the 11<sup>th</sup> District stated:

We find no basis for following its [Maasen Court] holding, especially given the factual dissimilarities of the case. In Maasen, the court determined that a modification clause was valid and could be utilized to change the substance of the covenant to the extent 60 percent of the owners agreed. However, in its [Maasen] decision, the court specifically emphasized that another case, McMillan, discussed above, was distinguishable because the party owned title to the lot before the restriction was adopted. In Maasen, the purchaser did not own the tract when the amendment occurred and was only a

This case, as does the Maasen case, relied heavily upon the facts. The Appellants criticize the factual distinction made by the Eleventh District Court of Appeals with the Maasen decision claiming that a titled owner and a person signing a real estate purchase agreement as having the same interests. In fact it was the Maasen Court that stated that the factual issue of ownership was a deciding factor in the Maasen Court's decision. As the Maasen Court stated:

Zopff suggests such an equitable basis in his contention that the owners concealed their action from him, or at least failed to give him notice of it. However, there is no basis on which to find that Zopff was entitled to notice. He was not an "owner," and thus entitled to a vote, when the amendment was adopted and recorded in July. He became an owner only when he acquired his title to Tract 12 by warranty deed in September. When the amendment was adopted and recorded, Zopff's contract to purchase provided him no more than an equitable interest in the land. We cannot find that his equitable interest required the owners to somehow identify him in order to give him notice of their proceedings to amend covenant 3. The better reasoning, and sounder policy, is to require a purchaser such as Zopff to search the public records to learn of a recorded amendment before he accepts delivery of his deed.

The Maasen Court went on to further explain the rights of an owner versus a prospective owner as follows:

A more compelling factor distinguishing the facts here from those in *Iserman* lies in the status of party who would avoid application of the restriction. In *Iserman*, that party owned the title to the lot before the restriction was adopted and had committed by contract to allow a use on the lot that the subsequent restriction prohibited. Here, Zopff did not own Tract 12 when covenant 3 was amended to specifically prohibit public roads across the tracts, and he had not committed by contract to install one or have someone else do so. Zopff was then but a prospective purchaser by contract, which conditioned his promise to purchase on the restrictions applicable to the land involved. Zopff might have sought to rescind his contract to purchase Tract 12 after the new restriction was adopted, but he did not. We cannot find that the amendment damaged any legal or equitable interest that Zopff then held in any manner that would estop the other owners from now enforcing it against him. Maasen at page 2

It was not the Eleventh District Court of Appeals that focused upon these factual issues. It was the Maasen Court upon which Appellant now argues creates a case of public or great general interest.

Furthermore, both the Eleventh District Court of Appeals in this case and the Twelfth District in Maasen expended significant effort interpreting the restrictive covenants for both subdivisions relying upon long established rules of construction. Neither the Eleventh District Court nor the Maasen Court established new rules of law or rules of interpretation. Both Courts merely applied past precedent in interpreting the specific restrictive covenants for each development. These long standing rules of interpretation individual restrictive covenants do not rise to a level of public or great general interest.

### III. ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

*Appellants' Proposition of law incorrectly interprets the Court of Appeals decision. The notice of a landowner of the ability to modify existing restrictive covenants is only one factor in the analysis of the burden a new restriction places upon the owners of the subdivision lots*

The issue before the Eleventh District Court of Appeals and the Maasen Court revolves around the interpretation of the specific restrictive covenant for each subdivision. In the Maasen case, the covenant that allowed for the owners to add new burdens to the land read as follows: "At any time these covenants may be amended by written consent of sixty percent of the then owners." See, Maasen at page 2. In the instant matter, the Court of Appeals affirmed the findings of the trial court that the Meadows Plat did not provide owners the power to amend the restrictive covenants but only to change or modify the existing restrictions.

The Eleventh District Court of appeals relied upon the five criteria set forth in the Maasen decision when analyzing the enforcement of a changed restrictive covenant:

First, the restrictions "must be a part of the general subdivision plan" and applicable to all lots.... Second, "lot purchasers must be given adequate notice of the restriction." ..... Grace Fellowship Church v Harned (11<sup>th</sup> Dist 2013) 2013-T-0030 page 7-8 quoting Maasen v. Zopff(12<sup>th</sup> Dist, 1999) CA 98-10-135.

Both the Eleventh District as in the Maasen Court reviewed the decisions of other jurisdictions.

Courts across this country have held that such a retained power to modify or change existing restrictive covenants does not grant the power to add additional burdens upon the subject real

property. One case being Brier Lake vs. Jones, 710 So.2d 1054 (La. 1998). In the Brier Lake

case, the Louisiana Supreme Court addressed the attempt by owners in a subdivision to create

home owners assessments and liens rights for unpaid assessments. As the Supreme Court noted:

The core issue in this case is the validity of the method by which Brier Lake Estates attempted to amend the Original Restrictions. The Amended Restrictions were adopted by a majority vote of the landowners in accordance with the amendment provisions of the Original Restrictions. While the Amended Restrictions restated many of the restrictions in the Original Restrictions, it increased some restrictions that already existed and added others. Brier Hill at 1058.

The Supreme Court held that there is a difference between having the authority to amend or

change existing covenants by majority rule and imposing new restrictions upon the owner of real

estate with out his consent. As the Louisiana Supreme Court held:

A majority of lot owners in a subdivision may not "amend" existing, valid building restrictions to make them more burdensome or restrictive. Such an "amendment" or "modification" is in reality the creation of a new building restriction for which unanimous consent of all landowners in the subdivision is required under Article 776. Brier Lake at 1063

Both the Maasen and the Grace Fellowship decisions weighed these new burdens based upon

those five criteria. Notice was one of those criteria.

The Court of Appeals in Grace Fellowship citing the Michigan Court of Appeals in

McMillan v. Iserman 327 N.W.2d 559 (Mich.App. 1982). The Iserman case involved a group of

land owners who amended existing use restrictions to prevent another owner within the

subdivision from building a group home. Quoting in part the *Iserman* decision, the Grace Fellowship Court of Appeals stated: “The court held that “even with the knowledge that deed restrictions can be amended, lot owners have a right to rely on those restrictions in effect at the time they embark on a particular course of action regarding the use of their land. *Grace Fellowship* at page 10 citing Maasen, supraof Appeals in *Grace Fellowship*

The Eleventh District’s decision is supported by the *Maasen* decision. As the *Maasen* Court stated:

A more compelling factor distinguishing the facts here from those in *Iserman* lies in the status of party who would avoid application of the restriction. In *Iserman*, that party owned the title to the lot before the restriction was adopted and had committed by contract to allow a use on the lot that the subsequent restriction prohibited. Here, Zopff did not own Tract 12 when covenant 3 was amended to specifically prohibit public roads across the tracts, and he had not committed by contract to install one or have someone else do so. Zopff was then but a prospective purchaser by contract, which conditioned his promise to purchase on the restrictions applicable to the land involved. Zopff might have sought to rescind his contract to purchase Tract 12 after the new restriction was adopted, but he did not. We cannot find that the amendment damaged any legal or equitable interest that Zopff then held in any manner that would estop the other owners from now enforcing it against him.

An important aspect of this case was not only the right of Appellee to use Lot 13 under the restrictions that existed at the time of purchase. Also at issue was the continued use of an existing easement which use was appurtenant to the seventy acres already owned by Grace.

In this case, Grace Fellowship not only purchased Lot 13 in the Meadows Plat for \$75,000.00, which is the subdivision lot which is the subject to this lawsuit, but simultaneously purchased seventy acres of land immediately behind Lot 13 for \$213,750.00. At the time of the purchase of Lot 13 by Grace Fellowship and the land behind Lot 13, there was no restrictions which prevented a private driveway from crossing over Lot 13 to gain access to the seventy

acres. Plaintiff justifiably relied upon the ability to use Lot 13 as an access point in its determination to purchase the seventy acres. It is undisputed that the seventy acres owned by Grace was the dominant estate over an existing easement across Lot 14 of the Meadows Plat. The evidence was undisputed that the easement over Lot 14 in the same subdivision had benefitted the Seventy Acres since May 17, 2007. This easement which benefits the Seventy Acres owned by Grace has existed since 2007. Only after Grace purchased the seventy acres along with the easement rights over Lot 14, did the Appellants attempt to limit Grace's use of Lot 13. In reality, the Restrictive Covenants attempted to eliminate a property right previously purchased by Grace.

#### IV. CONCLUSION

The issue before this Honorable Court does not involve public or a great general interest and jurisdiction should be denied.



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Thomas C. Nader  
5000 East Market Street  
Suite 33  
Warren, Ohio 44484  
0039312

Certificate of Service

A copy of this Memorandum was this 12<sup>th</sup> day of March 2014 mailed to the following counsel.

Frank Bodor, Esq.  
Attorney for the Appellant  
157 Porter Street  
Warren, Ohio 44483  
330-399-2233

James Brutz  
410 Mahoning Avenue NW  
Warren Ohio 44483



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