

Date: April 8, 2021

To: Members of the Troy Zoning Board of Appeals

From: Allan T. Motzny, Assistant City Attorney

Subject: Restrictive Covenants

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At the last ZBA meeting, there were questions regarding restrictive covenants, commonly referred to as deed restrictions, and their applicability to a request for a variance from the provisions of the zoning ordinance. The purpose of this memo is to address those questions.

The Michigan Supreme Court has held that deed restrictions are property rights that will be protected by the Court if they are of value to the property owner asserting the right. *Rofe v Robinson*, 415 Mich 345 (1982). The Court also held that a change in zoning cannot by itself, override prior restrictions placed in deeds. In the *Rofe* case, the Court held:

*“Zoning laws determine property owners’ obligations to the community at large but do not determine the rights and obligations of parties to a private contract. These are separate obligations, both of which may be enforceable.”*

Since zoning laws and deed restrictions are both enforceable, neither supersedes the other. Deed restrictions may be enforced regardless of what the zoning ordinance says. For example, if a person wants to build a deck that requires a setback variance, the Board may grant a variance if the Board is satisfied the requirements for obtaining a variance have been met, even if deed restrictions prohibit decks in the subdivision. However, someone in the subdivision could still initiate a separate court action to have the deck removed under the deed restrictions, despite the fact a variance allowing the deck was granted. Although deed restrictions must be reasonable to be enforceable, whether the restrictions are reasonable is an issue that would be decided by a court in a private action to enforce the restrictions. It is not an issue to be decided by the Zoning Board of Appeals.

Although deed restrictions have no bearing on the validity of the zoning ordinance, the Board may still consider deed restrictions in its analysis of whether a hardship or practical difficulty exists. For example, a property owner seeking a variance to place an addition on a home seeks a setback variance and proposes to place the addition on the east side of the home even though there is more open space on the west side. If there is evidence of a deed restriction that prohibits placing a structure encroaching upon an easement that runs through the west side of the property, the Board may consider whether the deed restriction contributes to the claim that there is a practical difficulty or a hardship. Thus, depending on the circumstances, the ZBA may consider the impact of a deed restriction in deciding whether to grant a variance.