

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CH ROYAL OAK, LLC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 14-143935-CK
Hon. James M. Alexander**

**ALIDADE MAIN NORTH, LLC,
Defendant/Counter-Plaintiff.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on “Defendant/Counter-Plaintiff’s Motion for Summary Disposition Regarding Interpretation of Development Agreement.”

This motion centers on the interpretation of the Second Amended and Restated Development Agreement entered into by Plaintiff, Defendant’s predecessor, and the City of Royal Oak. Specifically, the parties dispute whether Section 1.3 or Section 9.3 controls changes in **the use** of the property. This matters because, if Section 1.3 controls, then each party must only obtain the City’s approval for any change. But if Section 9.3 controls, then each party must obtain both the City’s and the other party’s approval.

As summarized in an earlier opinion:

In 2009-2010, Plaintiff considered buying a vacant lot from Defendant’s predecessor in interest – non-party Main Eleven North, LLC in order to build an entertainment venue (theaters, bowling lanes, and a restaurant). . . .

According to Plaintiff, in [order to] induce it to purchase the vacant lot, Main Eleven decided to leverage its underutilized parking garage and surface lot by providing a perpetual easement for parking and a share of parking revenue to Plaintiff as a part of the deal.

To that end, Plaintiff and Main Eleven negotiated three agreements: a Second and Restated Amendment (to a Planned Unit Development); a Parking Management Agreement; and a Declaration of Reciprocal Easement Agreement.

Main Eleven's interest was subsequently acquired by Bank of America, who sold the same to Defendant in May 2013.

Defendant now wishes to redevelop its portion of the development in order to fill retail space that has been vacant for over two years. Specifically, Defendant wishes to change the property from retail use to office use and is in final lease negotiations with office tenants. Defendant claims, however, that Plaintiff demands "material consideration" in order to agree to the change – even though it has been approved by the City.

As a result, Defendant now seeks the Court's interpretation of the parties' agreement to determine if Defendant needs only the City's approval or also needs Plaintiff's approval for such a change. To its end, Defendant now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Plaintiff seeks summary relative to its interpretation under (I)(2).

Both parties rely on written contracts to support their positions. Michigan law is well-established that "a court must construe and apply unambiguous contract provisions as written." *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As often repeated by our Supreme Court, "courts must ... give effect to every word,

phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

The Article 1 Recitals of the Development Agreement, at Section 1.3, provides:

The Developer and CH Royal Oak have submitted a Revised Project Plan for the Development Parcel which includes the following components: Main Art Theatre (925 seats); Main North Building (94 residential units, 27,516 sq. ft of office space, 6,680 sq. ft. of restaurant space, 9,539 sq. ft. of retail space, a 9,047 sq. ft. fitness center and 175 parking spaces to serve the residential and office uses in this building); a Parking Structure with 390 parking spaces, 2,800 sq. ft. of restaurant space and 2,240 sq. ft. of retail space; development of a surface parking lot with a minimum of 175 parking spaces on the Developer’s Parcel, and a cinema/bowling entertainment project (“Entertainment Complex”) on the CH Royal Oak Parcel. The CH Royal Oak Parcel is to be developed into and maintained only for the Entertainment Complex containing approximately 1,680 seats in ten (10) screens, a sixteen (16) lane boutique bowling facility in a one-story building of approximately 73,000 square feet with a mezzanine, all of which have been accepted by the City, subject to the Revised Project Plan being approved in accordance with all Laws and City Ordinances and including parking as required by Section 3.4. Site improvements including walkways, landscaping, driveways and drives, loading areas, parking stalls and other Improvements will be completed in accordance with the Revised Project Plan. The Entertainment Complex and all site/parking deck/right-of-way improvements are to be completed in a single phase as part of a comprehensive project. Any Adult Entertainment Facilities are specifically excluded from the Development Parcel. Any change to the approved Revised Project Plan shall require review and approval by the City.

The Easement Agreement, at Section 9.3, provides:

Amendment. This Second Restatement shall not be modified, altered or amended except by written agreement duly executed by the Developer, CH Royal Oak and City as authorized by the City Commission.

As stated, Section 1.3 describes a “Development Parcel” (Defendant’s portion of the development) and an “Entertainment Complex” (Plaintiff’s portion). Together, these descriptions are identified as the “Revised Project Plan” and, as stated, “[a]ny change to the approved

Revised Project Plan shall require review and approval by the City.” Defendant argues that, under this unambiguous provision, only the City is required to approve any changes to the Revised Project Plan – including any changes in use.

Plaintiff, however, contends that any changes in use, such as from retail to office, are subject to Section 9.3, which provides that **the Development Agreement** “shall not be modified, altered or amended except by written agreement duly executed by the Developer, CH Royal Oak and City as authorized by the City Commission.”

Plaintiff further argues that “several provisions of the [Development Agreement] refer to the scope of and approved property uses,” citing to Sections 4.5.9 and 4.4.6.

Section 4.5.9 of the Development Agreement provides: “The Developer, Lofts and CH Royal Oak agree to construct the improvements and to use their respective parcels exclusively and solely for those mix of uses defined in the Final Project Plan.”

And Section 4.4.6 provides: “The uses approved by the City Commission shall be valid for as long as the Developer and CH Royal Oak, or their successors or assigns, utilize their respective parcels for the approved uses pursuant to this Second Restatement and the Final Project Plan.”

“In light of these provisions,” Plaintiff argues, “it is clear that Section 9.3 relates to the entire scope of the site plan and/or development. As such, Section 9.3 requires each party’s consent when a party desires to change and/or expand the use of its property within the development.”

“In other words,” Plaintiff argues, “in the event a party seeks to change its designated property from retail to office space, consent from each party is required because use of the property as defined in the [Development Agreement] would be ‘modified, altered, or amended’

as provided in Section 9.3. The Court disagrees.

Defendant is not attempting to “modify, alter or amend” the Development Agreement; it is attempting to apply the Development Agreement as written in an attempt to modify the Revised Project Plan. As a result, Section 9.3 is not implicated by its own terms. And the Court rejects Plaintiff’s citation to Sections 4.5.9 and 4.4.6 as supportive of its argument. Each of those sections refer directly to the Final Project Plan (or “approved Revised Project Plan”),¹ which depends on City approval under Section 1.3 – not all party approval.

The Court notes that it makes sense that if a party is contemplating investing significant monies into developing an entertainment complex, that it may want contractual assurances that its neighbor and development partner will not use its property to develop a competing business or in a way that will otherwise adversely affect its business. As a result, the parties may contract for all-party approval of any change in use. Such agreements would appear commonplace in commercial real estate development. And when one party seeks to enforce its contractual right to approve use changes, it does not mean that it is attempting to act as a “private zoning authority.” Simply, Royal Oak did not contract away its zoning authority in the Development Agreement and specifically retains the same as a required signatory under the Agreement.

But just because it makes sense to contract for such rights, that (in itself) does not mean that the parties actually drafted the Agreement to accomplish that goal. And in this case, if that was the intent, it was poorly done.

For the foregoing reasons, because Defendant only seeks a change in the “approved Revised Project Plan,” the Development Agreement unambiguously provides that only City approval is required. And Section 9.3 is not implicated by such a request.

¹ The parties do not dispute that the “Final Project Plan” is the “approved Revised Project Plan” contemplated by Section 1.3. *See* Plaintiff’s Response Brief, at p 5; and Defendant’s Reply Brief, at p 4, fn. 2.

Plaintiff next argues that, should the Court find that the plain language of the Development Agreement is inconsistent with Plaintiff's interpretation, then "the parties' course of dealing and the affidavits attached [to Plaintiff's Reponse] provide extrinsic evidence that precludes finding in Defendant's favor." As a result, Plaintiff argues that such evidence should be considered to establish a latent ambiguity. Our Supreme Court has reasoned:

A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings. To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010) (internal citations and quotations omitted).

Indeed, this case presents a situation where the contract unambiguously provides just as Defendant maintains, but the parties' course of dealing establishes that Plaintiff's interpretation was the original intent and has been followed until now. As a result, the Court will properly examine extrinsic evidence to determine if the contract is susceptible to more than one interpretation.

Since its execution, the Development Agreement has been amended three times. The First Amendment is dated June 21, 2010. It was necessary because Defendant's predecessor "asked that the [Development Agreement] be amended to allow 'personal service establishments' as a permitted use within [its] parcel." In other words, the First Amendment accomplished just what Defendant seeks here – a change in use of its property. And this Amendment was signed by Plaintiff, Defendant's predecessor, and the City (all signatory parties).

The Second Amendment is dated July 29, 2010. It expanded the amount of property that

Plaintiff purchased from Defendant's predecessor for its Entertainment Complex. In other words, it changed the use of portion of the property into that used in Plaintiff's Entertainment Complex. This Amendment was signed by Plaintiff, Defendant's predecessor, and the City (all signatory parties).

The Third Amendment is dated March 17, 2014. It sought to change the use of a portion of Defendant's property from office to restaurant space for Defendant's tenant. This Amendment was signed by Plaintiff, Defendant, and the City (all signatory parties).

These Amendments establish that, not only has Defendant's predecessor acted in a manner consistent with Plaintiff's interpretation, but Defendant itself actually participated in the last amendment, which is wholly consistent with Plaintiff's interpretation. In other words, even Defendant acted in a way that was unnecessary under and completely contrary to its now proffered interpretation.

Plaintiff has also provided some email exchanges that accompanied the negotiations and execution of the Third Amendment that appear to establish that Defendant believed that all parties must agree to use changes.

The *Shay* Court continued (487 Mich at 669) (emphasis added):

The latent-ambiguity doctrine has a long history in Michigan law, as demonstrated by *Ives v Kimball*, 1 Mich 308, 313 (1849), in which this Court explained that a latent ambiguity may be shown by parol evidence:

There is no more useful, just and practical rule of law, than that which admits evidence of surrounding circumstances and collateral facts, within certain well defined limits, for the purpose of enabling courts to ascertain and carry into effect **the intention of contracting parties**. The cases in which this rule has been applied are almost innumerable.

It is well-settled that "[t]he primary goal in the construction or interpretation of any

contract is to honor the intent of the parties.’’ *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003); quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994).

With respect to the intent of the original contracting parties, Plaintiff also attaches the Affidavits of: (1) David Gillam, the former City of Royal Oak attorney; (2) Paul Glantz, Plaintiff’s Manager; and (3) Michael Southen, a commercial real estate broker with Signature Associates. All three of these individuals claim to have been directly involved in the negotiations that resulted in the Development Agreement. All three of these individuals understood the Development Agreement to provide just as Plaintiff suggests – that any proposed change in use must be approved by all signatories to the Development Agreement.

In its Reply Brief, Defendant attaches an email from Tim Thwing, the current Royal Oak City Planning Director, who claims that Defendant’s proposed use change is permitted with only City approval under the Development Agreement without any need for an Amendment. Indeed, the Court agrees. The Development Agreement unambiguously provides that such a change only requires City approval. But this has not been the course of dealing for these parties, nor (by all accounts before this Court) the intent of the original contracting parties.

For all of the foregoing reasons, the Court finds that the Development Agreement contains a latent ambiguity that requires examination of extrinsic evidence to determine its proper meaning.² And when all evidence is examined, the Court is left with one conclusion – the original contracting parties intended that any change in use of property must be approved by all parties.

² The Court will note that the current motion involves a different situation than that presented in Defendant’s prior motion for summary disposition. The prior motion involved a **patent** ambiguity that appeared on the face of the agreements – where there were two conflicting provisions regarding snow-removal cost. There is no patent ambiguity involved in the present motion.

The Court rejects Defendant's contention that any such interpretation of the Development Agreement would render it unconstitutional. As previously stated, in a commercial development deal, parties may contract for all-party approval of any change in use, and Royal Oak did not improperly contract away its zoning authority in the Development Agreement. Rather, the City (as a signatory to the Development Agreement) maintains the right to withhold approval on any change that would violate its zoning ordinance.

The Court also rejects Defendant's argument that Plaintiff previously breached the Agreement under its own interpretation. Defendant points to Plaintiff's June 2012 City-only request to convert space it was using within its Entertainment Complex from storage to an area designed for entertainment and classroom training parties. Only the City approved this change, which Plaintiff completed. But it did not change **the use** of the property from one type to another. It simply modified the format and allocation of space within the same type of use.

Defendant also points to Plaintiff's September 2014 City-only approval to change its 1,680 traditional-seat theatre into an 800-seat luxury recliner theatre. Once again, Plaintiff did not change the use or character of the property as a theatre. Because these two modifications did not change the use of the property from one type to another, they were not subject to all-party approval.

For the same reasons, these Plaintiff-requested, City-approved changes do not fall within the category of use-changes that require all-party approval under the parties' course-of-dealings, and therefore, are not extrinsic evidence supporting Defendant's interpretation. In fact, Defendant does not present any extrinsic evidence in support of its interpretation that would create a question of fact precluding summary disposition.

Conclusion

For all of the foregoing reasons and considering all evidence in the light most favorable to the nonmovant, the Court finds that there are no material questions of fact in dispute, and Plaintiff is entitled judgment as a matter of law. As a result, Plaintiff’s motion for summary disposition is GRANTED under (C)(10).

The Court finds that Plaintiff’s proffered interpretation is correct – the parties intended to require all-signatory approval on any **change in use** of property contemplated by the Development Agreement.

For the same reasons, Defendant’s motion is DENIED.

IT IS SO ORDERED.

July 15, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge