KOCHER & GILLUM

John A. Kocher
Richard R. Gillum
James C. Barney

Attorneys at Law
101 ½ Madison Street
Port Clinton, Ohio 43452

Tel: (419) 732-3135
Fax: (419) 734-5644
sara@kochergillum.com

January 31, 2012

D. Jeffery Rengel
421 Jackson Street
Sandusky, Ohio 44870

George Wilber
211 E. Second Street
Port Clinton, Ohio 43452

Gary Kohli
Kohli & Christie
142 W. Water Street
Oak Harbor, OH 43449

Re: Cianciola, et al v. JIPOA

Dear Counsel:

Please find attached Appellees' Brief filed with the Court of Appeals, as well as an Amended Certificate of Service. Please contact Mr. Gillum if you have any questions.

Very truly yours,

Sara Gottron

sg
enclosures

IN THE SIXTH DISTRICT COUR OF APPEALS
OTTAWA COUNTY, OHIO

ELIZABETH J. CIANCIOLA, et al

Plaintiffs/Appellees,

v.

JOHNSON'S ISLAND PROPERTY OWNERS ASSOCIATION

Defendant/Appellant.

Court of Appeals Case No. 11-OT-031

Trial Court Case No. 10 CV 232H

Richard R. Gillum (0070227)
Kocher & Gillum
101 ½ Madison Street
Port Clinton, Ohio 43452
Tel: 419-732-3135
Fax: 419-734-5644
rich@kochergillum.com

NOTICE OF AMENDED CERTIFICATE OF SERVICE

Please take notice that the Certificate of Service attached to the Appellees' Brief filed January 30, 2012 did not include all necessary parties to this case. The Certificate of Service should serve:

D. Jeffery Rengel
421 Jackson Street
Sandusky, Ohio 44870

George Wilber
211 E. Second Street
Port Clinton, OH 43452

Gary Kohli
Kohli & Christie
142 W. Water Street
Oak Harbor, OH 43449

Respectfully submitted,

Richard R. Gillum (0070227)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon, D. Jeffery Rengel, 421 Jackson Street, Sandusky, Ohio 44870, George Wilber, 211 E. Second Street, Port Clinton, OH 43452 and Gary Kohli, Kohli & Christie, 142 W. Water Street, Oak Harbor, OH 43449 by ordinary U.S. Mail, postage prepaid, on the 31 day of January, 2012.

Richard R. Gillum (0070227)

IN THE COURT OF APPEALS
SIXTH DISTRICT
OTTAWA COUNTY, OHIO

ELIZABETH J. CIANCIOLA, et al

Plaintiffs/Appellees,

v.

FRED BODE, et al

Intervener Plaintiffs/Appellees,

v.

JOHNSON'S ISLAND PROPERTY OWNERS ASSOC.
an Ohio not-for-profit corporation

Defendant/Appellants.

Court of Appeals Case No: 11-OT-031

Common Pleas Case No: 10CV232H

APPELLEES' BRIEF

Richard R. Gillum (0070227)
James C. Barney (0063739)
Kocher & Gillum
101 ½ Madison Street
Port Clinton, Ohio 43452
Tel: 419-732-3135
Fax: 419-734-5644
rich@kochergillum.com

George Wilber
Wilber & Wilber
211 E. Second Street
Port Clinton, Ohio 43452

D. Jeffery Rengel
Rengel Law Office
421 Jackson Street
Sandusky, Ohio 44870

TABLE OF AUTHORITIES.

INDEX

I. STATEMENT OF THE CASE.

The fundamental question before this Court is: "**Does the Johnson's Island Property Owners Association, Inc. (JIPOA), as a stranger to title having never owned an interest in any of the property, have the authority to create restrictive covenants affecting all lots in Bay Havens Estates and Shiloh Subdivisions?**" Essential to Answering this question is: (A) An analysis of how JIPOA's Code of Regulations meets the tri-part test for creation of valid restrictive covenants set forth by this Honorable Court in *LuMac Dev. Corp. v. Buck Point. Ltd. (1988),* 61 Ohio App 3d 558, 562; (B) A determination of whether *Johnson's Island Property Owners' Association v. Nachman,* (11-19-1999) Ottawa County App. No. OT-98-043, 1999 WL 104835, actually held that the Articles of Incorporation were restrictive covenants and/or provided for the creation or enlargement of restrictive covenants; and (C) whether the *Baycliffs Homeowners Assc., Inc. v. Johnson's Island Property Owners Assc.* (2007) Ottawa County 04-CVH-202 case discussed below legally authorized the filing of the Code of Regulations.

Appellant, in its Statement of Facts points to certain powers granted to Johnson's Island Club, Inc. (JIPOA's predecessor hereafter included when referencing "JIPOA") in the Declaration of Restrictions. Appellant then asks this Court to draw inferences regarding the Developer's intent to expand upon the powers granted in the Declaration. The powers and authorities which were not granted in the Declaration are much more relevant to this action than the powers actually granted to JIPOA. Appellant fails to point out: (a) that there is no provision for the amendment of the Declaration; (b) that there is no requirement for lot owners to be members of JIPOA; (c) that there is no provision in

the Declaration for JIPOA to own and maintain common areas; (d) that there is no reference to any "common areas"; (e) that there is no provision for JIPOA to collect monies from lot owners; and (f) and no statements which directly support JIPOA S claimed right to amend, modify, or create restrictive covenants.

II. STATEMENT OF THE FACTS.

In 1956, Johnson's Island, Inc. (the "Developer") purchased the land in question for subdivision development, and subsequently created Bay Haven Estates in several phases. The Developer, as the fee owner of the real property, did in fact file several Declarations of Restrictive Covenants which were incorporated by their respective Plats of the Bay Haven Estates and Shiloh Subdivisions (R-44). The Developer did in fact grant JIPOA some powers under the Declaration.

Interestingly, the Developer did not give JIPOA the power: (a) to require owners in the subdivision to be members; (b) to own or hold title to common areas on behalf of the owners; (c) to collect dues from the owners; (d) to file liens against property owners; (e) to make rules and regulations governing non-members through its Code of Regulations; and most importantly (e) to amend, alter, expand, extend, or otherwise modify any Declaration which compromise the same total of the restrictive covenant affecting the Plaintiffs' real estate.

Clearly the Developer understood that the owner of the land must create the restrictive covenants as it did so in its name Johnson's Island, Inc. and not in the name of JIPOA (R-44). Other than the limited powers granted JIPOA by the Developer in the various Declarations of Restrictions, all other authority which JIPOA now claims was

granted to JIPOA by JIPOA is self serving, a nullity, and amounts to nothing more than a smoke screen.

JIPOA's Articles of Incorporation were filed with the Secretary of State in 1956 (R-44). Those Articles contain no provision which in any way can be interpreted as creating restrictive covenants or otherwise governing the non-member lot owners, nor would such a provision be enforceable. There is nothing in the Articles which purports to bind all lot owners and their heirs and assigns or which state that the Articles run with the land. Thereafter JIPOA amended/adopted its Code of Regulations in 1983 and several times thereafter including the Code of Regulations recorded in the office of the County Recorder and is at issue in this Case.

In 2007, JIPOA settled a law suit (*BHOA v. JIPOA* , Case No 04-CVH-202) it had with a neighboring subdivision association and a few individual lot owners (R-44). The parties to that suit entered into a Consent Judgment Entry, which by no means represented a well reasoned decision of a litigated issue. The Consent Entry created a road maintenance plan for the entire island and was purportedly done so on behalf all owners of property on Johnson's Island although all owners were not parties to the litigation. As part of the Consent Judgment Entry, the parties made several interesting representations:

> The Court has also been advised that the New Party Defendants, by and through their counsel, have ably represented those owners of property on Johnson's Island who may not be members of either BHOA or JIPOA.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment Entry and the Operating Agreement shall be recorded in the office of the Ottawa County Recorder and shall be binding upon all property on Johnson's Island, as further identified in Attachment E to the Operating Agreement; and

The Entry recites the fact that not all of those intended to be bound by the Agreed Entry were parties to the agreement or truly represented. A review of the Judgment Entry shows the problem with the claim that the New Party Defendants "ably represented" those owners who are not members and that the New Party Defendants cut a better deal for themselves than for the non-parties. There was no reason not to join the non-members because they were all identified in Exhibit E to the Consent Entry. It is disturbing that the identity of each of these individuals (including the Appellees) was known to the parties and the Court, yet they were not afforded the slightest due process before being purportedly bound by the Court's "Decision".

On or about June 7, 2007 JIPOA caused to be filed, or participated in the filing of a series of documents (collectively referred to as "Operating Agreement") in Book 1206 at Page 251, Ottawa County, Ohio, Official Records which purports to bind all lots on Johnson's Island to certain financial obligations purporting to be pursuant to *BHOA v. JIPOA* (R-44). Later, in 2009, Defendant filed its Code of Regulations Volume 1287, Page 252 which is at issue in this case based in part on the Operating Agreement and the *BHOA v. JIPOA* Consent Entry.

III. LAW AND ARGUMENT.

Any analysis of Appellant's Arguments must begin with an analysis of the Declaration of Restrictions. This Court laid out the initial standard of review in looking at issues relating to restrictive covenants in *Bailey Development Corp v. MacKinnon-Parker Inc.* (1977) 397 Ohio App.2d 307, 310 as follows:

> The general rule, **with respect to construing agreements restricting the use of real estate, is that such agreements are strictly construed against limitations upon such use, and that all doubts should be resolved against a possible construction thereof which would**

> **increase the restriction upon the use of such real estate**. Citing to *Loblaw, Inc. v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, 591-92. [emphasis added]

The Court in *Taylor v. Summit Post #19* (1938) 60 Ohio App 201, 203 clearly stated the principle that:

> A limitation upon the use of property is too serious a matter to be predicated upon mere inference. Such restriction pro tanto deprives the owner of the full use of his fee. If such restrictions are to be enforced and such limited use maintained, the existence of the agreement to restrict must not be left to mere conjecture and inference. It must be proven as a substantial fact. [emphasis added]

The *Taylor* Court goes on to uphold the principle that restrictions are not favored by law and states that if the words of a restriction are equally capable of two or more different constructions, the construction which least restricts the property will be adopted. *Taylor Id.* 203-204. *Taylor* further holds that the restrictions will not be extended beyond their words by implication. *Taylor Id.* 204.

The Supreme Court in *Hauke v. Ross,* (1973) 34 Ohio St. 2d 77, 90 held that if a covenant's language is indefinite, doubtful, and capable of contradictory interpretations, the Court must construe the covenant in favor of the free use of land. This was echoed by the Supreme Court two (2) years later in *Driscoll v. Austintown Assc.* (1975) 42 Ohio St. 2d 263, 276-277.

The Ohio Supreme Court as far back as *Hitz v. Flower* (1922) 104 Ohio St. 47, 55 maintained this position:

> Where doubt exists as to the meaning of the language used in the restrictive covenant affecting the title to real estate, such doubt will be resolved against the restrictions and in favor of the free use of the real estate. [emphasis added]

Finally, in *Exchange Realty Co. v. Bird* (1933) 16 Ohio Law Abs. 391 the Court held that restrictions cannot be extended by implication and all doubt should be

resolved in favor of the free use of property. The *Exchange Realty* Court further set forth that restrictive covenants should be strictly construed against the persons seeking to enforce them, and giving **no greater effect than their terms clearly intend**, and any doubt as to meaning should be resolved in favor of the Grantee in the free and natural use of the property.

The Court in *Exchange Realty* citing to *Hunt v. Held (1914)* 90 Ohio St. 280 went further and said:

> **If the common Grantor** in the case before us **had in mind** the exclusion of a building for the abode of more than one family, **he should have used language that would have expressed such an intention. The Court cannot read it into the covenant.** *Hunt Id* at 286. [emphasis added]

Contrary to the clear principals of law with regard to the interpretation of Restrictive Covenants, Appellant continually asks this Court to look at the intent of the Developer (not the clear language of the Declaration) and expand JIPOA's powers beyond what is written on the page. In accordance with the well settled law, this Court should not look past the enumerated language of the Declaration and Plats and should not draw any inferences in favor of the Appellees.

A. APPELANTS ARGUMENTS REGARDING THE NACHMAN DECISION.

At issue in this Case is Appellant's attempt to amend the Declaration of Restrictions (the only validly recorded Restrictive Covenants at issue in this case) through amendment or establishment of Articles of Incorporation/Code of Regulations. As this Court is aware, a Code of Regulations is a set of Rules for the internal governance of a not-for-profit organization under R.C. §1702.01 et seq. There is nothing in R.C. §1702.01 which authorizes placing restrictions on Real Estate. Despite what Appellant claims the *Nachman* decision means, if you read it carefully, the *Nachman*

Court did not hold that the Code of Regulations or the Articles of Incorporation of JIPOA are in fact restrictive covenants, nor did it hold that JIPOA can create restrictive covenants or otherwise amend the Declarations of Restriction through the Articles of Incorporation/Code of Regulations as the Appellant implies. The only thing that is clear from the *Nachman* Decision is that membership in JIPOA is completely voluntary. The case was remanded to determine the normal operating costs which were ultimately settled without decision between the individuals who were parties and the issue remains un-litigated.

Despite the fact that the *Nachman* Court stated that the Code of Regulations were "of record", the Court did not hold that they were restrictive covenants. There is nothing in the *Nachman* decision which would indicate that "of record" is synonymous with "in the chain of title" or otherwise creating restrictive covenants. In fact the words "chain of title" do not appear in the *Nachman* decision. Appellant is asking this Court to skip quite a few steps in analysis to go from a finding that the Code of Regulations are "of record" to finding the Court meant that the Code of Regulations are a valid restrictive covenant with independent power of modification.

Arguing that *Nachman* held that either (i) that the Articles of Incorporation/Code of Regulations are in fact restrictive covenants and give JIPOA the right to amend or impose new ones; or (ii) that "of record" is the equivalent of "chain of title" running with the land amounts to nothing more than a giant leap of faith and Appellant has no independent case law to support this giant leap.

JIPOA's argument is missing an understanding that, a determination whether individuals had notice or whether documents are "of record" is irrelevant until the

underlying restrictions are determined to be otherwise valid and enforceable. If the restrictions were not validly created, all the notice in the world would not cure them. *Sandy Beach Apt. Ltd. v. Mitiwanga Park Company*, Erie County Court of Appeals Nos. E-06-040, E-06-041, E-06-042. 2008-Ohio-606.

1. Are the Articles of Incorporation a restrictive covenant? Or do they authorize the creation or enlargement of restrictive covenants?

A restrictive covenant is defined as a limitation on the free use of land, denotes a contract in property law, and can only be created by a deed, or by agreement of the parties creating the restriction which is executed in accordance with the law for property conveyance. 10 O. Jur. 3D Buildings, Zoning, Land Control Section 4-5, P 207-208.

For a restriction to be a valid covenant running with the land, the following three criteria must be met: (1) the intent of the original grantor and grantee must have been that the covenant run with the land; (2) the covenant must either "affect" or "touch and concern" the land in question; and (3) there must be privity of estate between the party claiming the benefit of the covenant and the party who is called upon to fulfill it. See *Peto v. Korach* (1969) 17 Ohio App. 2d. 20, and *LuMac Id.* It is an undisputed fact that JIPOA has never owned the property and therefore is a stranger to title, having never been in the chain of title to any of the Appellees' properties. Because JIPOA has not owned the property, it cannot satisfy the tri-part test above. The original Declarations were not filed by a stranger to title, but by the Developers who owned the property. Those Declarations contain no provision for amendment or revision. JIPOA has no more authority than what is explicitly granted in those Restrictions, and cannot grant itself any further authority to restrict the Appellees' properties.

The Ohio Supreme Court generally held in *Spring Lakes, Ltd, v. O.F.M. Co.* (1984), 12 Ohio St. 3d. 333, that no owner of real estate is obligated to abide by restrictions or provisions **that do not appear in that owner's chain of title**. Neither JIPOA's Code of Regulations, nor its Articles of Incorporation, appear in any of Appellees' chains of title, nor does *Nachman* hold that they do. They may be "of record" giving notice to people, but they are not enforceable as they do not constitute restrictive covenants for the same reasons set forth by this Court in *Mitiwanga. Id.*

For the purpose of imposing restrictions on the real estate involved in this action, there must be evidence of privity of estate between JIPOA and the Appellees. *LuMac Id.* page 562. Privity of estate is not at all a new concept in real estate law. The Ohio Supreme Court first recognized this principal in *Easter v. The Little Miami R.R. Co.* (1862) 14 Ohio St. 48, and further recognized that it was not a new principal of law in 1862:

> There is a highly respectable authority that such a relation exists. It is said, in the case of *Morse v. Aldrich*, 19 Pick 449, 453: "**To create a covenant which will run with the land, it is necessary that there should be a privity of estate between covenator and covenatee**." Spencer's case, 5 Co. 16; Cole's case, Salk. 196; 3 Wils. 29; *Webb v. Russell,* T.R. 402; *Keppell v. Bailey, 2* Mylne & Keen, 517; *Vyvyan v. Aurthor,* 1 Barn. & Cress. 410. [emphasis added]

This privity issue has been well settled for centuries. Spencer's case (cited by the *Easter* Court above) was decided in 1582 and is the leading English case on the subject of covenants running with the land. See 35 O. Jur. 3rd Deeds §113.

There are two (2) ways privity of estate is created. Vertical Privity is defined as successive ownership or possession of the identical estate in the same property. *Metal*

Working Mach. Co. v. Fabco, Inc. (1984) 17 Ohio App 3d 91, 92. One is in vertical privity with another if he/she succeeds to an estate or interest formerly held by the other. *Id.* 92. Horizontal privity exists where the covenant is created as part of a conveyance of property between parties in privity. *City of Perrysburg v. Koenig* (1995) Wood App. No. WD95-11 (unreported).

JIPOA has no privity of estate with Appellees, nor does JIPOA have any interest in the land owned by Appellees. JIPOA doesn't even make a claim to an interest which would put it in privity with Appellees. In fact, JIPOA's statement of the facts acknowledges that the Developer owned all the property, that the Developer imposed the Declarations of Restriction, and that the Developer sold off the lots. The Developer was the only entity in privity with the Appellees and their predecessors and the Developer did not reserve the right for JIPOA to make, amend, enlarge or otherwise alter the Declarations of Restriction.

Rather than comply with over four hundred (400) years of law (that one is not bound by what is not in his chain of title), JIPOA has tried to extend the statutes regarding the internal governance of a voluntary non-profit organization to assert the right to encumber the real estate owned by non-members of JIPOA, regardless of the fact that this power was not granted to them in either the Plat or the Declarations of Restrictions.

2. This Court's Decision in *Mitiwanga* bars the arguments Appellant is making.

At the very core of Appellant's argument is the assertion that the Articles of Incorporation are "of record", Appellees had notice, therefore an amendment thereof (no matter how far the scope) is enforceable against all lot owners as if it were a restrictive

covenant. The only factual distinction between this case and *Mitiwanga* is that JIPOA's predecessor was mentioned in the original Declarations of Restrictions. In the case of *Mitiwanga,* like JIPOA in this case, the Mitiwanga Park Company claimed rights under its By-Laws as restrictive covenants which were filed for record long after the subdivision was created and the deeds out of the developer were recorded. *Mitiwanga* Id. ¶ 20-21.

The Mitiwanga Park Company argued that its By-Laws were "of record" because they were recorded and owners were on notice of the restrictions in much the same way JIPOA argues that the Articles of Incorporation are "of record". This Court held that since the Mitiwanga Park Company did not own the challengers' property at the time the By-Laws were created that the By-Laws were not validly created restrictive covenants and they were not binding on the lot owners in the subdivision regardless of actual or constructive notice. Id., at ¶37. The same principal applies here.

The critical issue in *Mitiwanga* was the authority to impose restrictions on real property, not notice. This case is on the four corners with *Mitiwanga.* In the *Mitiwanga* decision the Court of Appeals affirmed the *Nachman* decision stating that without a restrictive covenant requiring membership, lot owners who did not want to be members of the non-profit corporation could not be compelled to be members and were not bound by the corporation's internal rules. Id., at ¶38. Appellant can point to no restrictive covenant in the instant case which explicitly states that non-members are bound by the Association's rules.

3. Appellant's Stacking of Inferences.

Despite the well settled legal principal that every inference must be construed against expanding the restrictions, Appellant makes the following assertion at Page 14 of its Brief:

> "Again, the plain reading of the **rights** and **responsibilities** of JIPOA set forth in the Deed Restrictions clearly shows that the Developer contemplated and granted **control** and **maintenance** of **common areas** to JIPOA"

What is very troubling about this statement is that none of the words (highlighted above) appear anywhere in the Declaration of Restrictions ("common", "area", "control", "maintenance", or "responsibility"). The only place the word "right" appears is in Section 8 where the right of the Developer and JIPOA to enforce the existing restrictions is set forth. Other words that don't appear in the Declaration of Restrictions but which Appellant claim a clear reading asserts include "amend", "modify", "enlarge", "expand", "change", "incorporate", "articles", "code", "regulations", "inclusion", or "secretary of state".

B. JIPOA RESTRAINED FROM MAKING ANY FILINGS OR PUBLICATIONS THAT MAY CLOUD APPELLEES' TITLES.

Appellees concede that the only right granted to JIPOA under the Declaration of Restrictions is the right to enforce the Declaration of Restrictions at Section 8. The remaining arguments Appellant makes about the "toothless lion" referred to in the Kurfess "decision" are without merit. This decision was not a well reasoned decision of the Court after hearing facts and considering the applicable law, but an agreement made by the parties to that litigation, which did not include the Appellees. JIPOA entered that agreement purportedly on behalf of people who did not wish their property

to bound by that agreement, and were not parties to that law suit. JIPOA had no more authority to enter that agreement on behalf of Appellees, than it would have confessing monetary judgment on their behalf, or fully divesting their interest in their property.

1. 2007 *BHOA v. JIPOA* Judgment is of no binding effect on Appellees.

The 2007 *BHOA v. JIPOA* lawsuit cannot bind Appellees because Appellees were not parties to that case, a declaratory judgment action. Appellant does not present a case which holds that non-parties are bound to an agreement to which they did not consent.

The law sets forth that the *BHOA v. JIPOA* Court lacked subject matter jurisdiction to bind individuals not joined as separate parties. In *Gareau v. Holliday Lakes Property Owner's Association Inc.* (1991) WL 154056 (Ohio App. 6 Dist.)case was filed by a lot owner who was challenging an amendment to the Restrictive Covenants that authorized assessments to be increased without first obtaining written agreement of 2/3 of the owners. *Id.* The Trial Court dismissed the Complaint because of Gareau's failure to join all necessary parties (every lot owner) under R.C. §2721.12[1]. Holliday Lakes Property Owners' Association Inc. appealed claiming that it had the right to represent all owners in the subdivision as all owners of the subdivision were members of the Association, and it had the right to represent its owners. The Court of Appeals found:

> "Here we have the owners of a single lot in a subdivision requesting the Court to declare restrictive covenants affecting each and every property owner in that subdivision null and void." *Gareau* at Page 2.

[1] Revised Code §2721.02 provides in part: When Declaratory Relief is sought all persons shall be made parties who have a claim or any interest which would be affected by the Declaration. No Declaration shall prejudice the rights of persons not party to a proceeding.

The Court in *Gareau* concluded that all property owners were necessary parties because their interests were legally affected by Appellant's request for a Declaratory Judgment. *Gareau Id.* The absence of a party is a jurisdictional defect which precludes a Declaratory Judgment. *Gareau Id.* Since the Declaration dealt with the individual property rights, the Association could not represent the owners. As stated in *Bretton Ridge Homeowners Club. V. Deangelis* (1988) 51 Ohio App. 3d 183 at 185.

"Here all...owners were bound by the restrictive covenants and had a legal interest in the litigation that would determine their rights and liabilities...the owners who were not party to the suit had a legal interest that would be affected, and should have been parties to this suit which, though not res judicata, is precedent on other issues involved." *Id.* Because it lacked a requisite jurisdiction, the Trial Court did not err in granting the Appellee's Motion and dismissing the Appellee's Complaint. *Gareau Id.*

The statements in the Judgment Entry relied upon by the Defendants for the authority to file the Code of Regulations in this action are:

> a) the Court concludes that equity demands both Plaintiff and Defendants contribute their fair share to the normal operating costs, to the maintenance, repair, and improvements to Gaydosh Drive, the Causeway, Confederate Drive, and Memorial Shoreway;
>
> b) that all property owners, including Plaintiff and Defendants, have an obligation to contribute their fair share to the cost of maintenance;
>
> c) the BHOA and JIPOA shall have the right power and authority described in the Operating Agreement to bill and collect all assessments for the Road Commission from the owners of property on Johnson's Island, including, without limitation, to lien rights described in the Operating Agreement; and
>
> d) the Judgment Entry and Operating Agreement shall be recorded in the office of the Ottawa County Recorder's Office shall be binding upon all property on Johnson's Island.

Without question, each of those four (4) statements are declarations or requests for declaratory judgment. Bay Cliffs Home Owners Association (BHOA) pled the case as a Declaratory Judgment action (R-53).

The absence of a necessary party is a jurisdictional defect, which precludes a Declaratory Judgment. The failure to name all lot owners is a jurisdictional defect to the entry which cannot be cured. Without jurisdiction, the Decision is not in any way binding upon Plaintiffs, and as such, cannot be used as basis or justification for the filing of a Code of Regulations.

Further, In *West Clermont Edn. Assn. v. West Clermont Bd. of Ed.* (1980) 67 Ohio App. 2d 160,162, the Court held that a labor association lacked the capacity to sue on behalf of its members, and held:

> A 'real party in interest' is one who has a real interest in the subject matter of the litigation and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case.

Clearly, the Plaintiffs in this case, having purportedly had their property bound by the Consent Judgment Entry and subsequently by the Code of Regulations, were parties in interest and it is disingenuous to argue otherwise.

2. Ohio's Planned Community Statute R.C. §5312.01.

Appellant argues in the last paragraph before the conclusion that Ohio's Planned Community Statute (formerly S.B. 187) cures the filing of the Code of Regulations. The Trial Court made three specific findings in its decision which contradict this assertion.

> The Declarations make no reference to any owner's association or requirement of membership therein; nor is there any reference to anyone's ability to assess or lien. There is no mention of any owner's association

> maintaining or owning common areas. Further, there is no requirement that lot owners be members of any association.

A plain reading of the relevant section of R.C. § 5312.02(M) reveals that based upon the Court's proper interpretation of the Plat and Declaration of Restrictions,

> R.C. §5312.02(M) "Planned Community" means a community comprised of individuals for which a deed, common plan, or declaration ***REQUIRES*** any of the following:
> 1) that owners become members of an association that governs the community;
> 2) that owners or the association holds or leases property or facilities for the benefit of the owners;
> 3) that owners support by membership or fees property or facilities for all owners to use. [emphasis added]

The closest thing which Appellant could even argue is the language in the Articles of Incorporation which discusses the future development of common facilities, but falls woefully short of an obligation to maintain common facilities. In fact the record is clear that JIPOA did not even have any common areas until it purchased the club house in 1967. It has also been shown that the owners need not be members or pay fees.

In interpreting the Ohio Planned Community Statute Chapter 5312.01 *et seq,* this Court should recognize that the Statute authorizes a homeowner's association to impose restrictions upon the use, management, control and alienability of private property. It is a well established principal of Ohio law that Statutes or Ordinances of a penal nature which restrain the exercise of any trade or occupation, or the conduct of any lawful business, **or which impose restrictions upon the use, management, control, or alienation of any private property, will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed.** *State, ex rel, Moore Oil Co v. Dauben* (1919) 99 Ohio St. 406, 411. [emphasis added.]

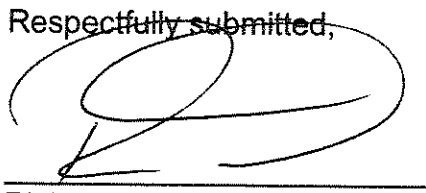
The *Dauben* case has been extensively cited since 1919 and the principles continue to be good law. Without question, the liens contemplated by the Planned Community Statute affect the alienability of private property and the language of the statute should be strictly construed against the Defendant who would be asserting rights thereunder. Strictly construing the statute, there is no way the Declaration or any of the deeds in Appellees' chains of title could be construed to require any of the three threshold obligations of the Planned Community Statute.

IV. CONCLUSION.

Appellant's arguments on this appeal all involve this Court reading into the Declaration, the Articles of Incorporation, the Appellees deeds and, the *Nachman* Decision words and clauses which simply do not exist. The entire argument essentially is an attempt to enlighten this Court on what the Developer or the Court really intended to state in these documents not that which actually appears in those documents. This is contrary to hundreds of years of well established real estate law. JIPOA is and always has been a stranger to the title to Appellees' real estate, and cannot meet the privity requirements to create a valid restriction. Without valid restrictions notice is wholly irrelevant to the analysis. As such the Judgment of the trial Court should be affirmed.

Furthermore, in light of this Court's recent decision in *Mitiwanga*, which predated the filing of the Code of Regulations, Appellees argue this Court to consider whether this appeal and the filing of the Code of Regulations as frivolous.

Respectfully submitted,



Richard R. Gillum (0070227)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon D. Jeffery Rengel , RENGEL LAW OFFICE, 421 Jackson Street, Sandusky, Ohio 44870, and George Wilber, Wilber & Wilber, 211 E. Second Street, Port Clinton, Ohio 43452 by ordinary U.S. Mail, postage prepaid, on the 30th day of January, 2012.

Richard R. Gillum (0070227)