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No. 99236-3

THE SUPREME COURT
OF THE STATE OF WASHINGTON

NOCHE VISTA, LLC, a Washington limited liability company,

Petitioner,

v.

BANDERA AT BEAR MOUNTAIN RANCH HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

COMES NOW the Bandera at Bear Mountain Ranch Homeowners Association (the "Association") and answers Noche Vista LLC's Petition for Review.

B. ASSIGNMENT OF ERROR

1. Whether Chelan County Superior Court correctly ruled that the Covenants unambiguously apply to Bandera Phase III, because the Covenants' plain language evidenced developer Jerry Scofield's intent to encumber and to include Bandera Phase III in Mr. Scofield's multi-phased development known as Bandera at Bear Mountain Ranch.

2. Whether the Court of Appeals correctly ruled that Mr. Scofield's Seventh Amendment to the Covenants, which amendment Noche Vista expressly requested, approved, and agreed to comply with prior to its acquisition of Bandera Phase III, effectuated Bandera Phase III's full annexation into Bandera at Bear Mountain Ranch, making the Covenants' rules and regulations for "Owners" of "Landholdings" in Bandera at Bear Mountain Ranch fully applicable to Bandera Phase III once that undeveloped tract of land was divided into "Landholdings".

C. STATEMENT OF THE CASE

The question before the Court of Appeals was whether the Covenants forming the residential subdivision Bandera at Bear Mountain Ranch ("Bandera") applied to Noche Vista, LLC's undeveloped and undivided real property that the Covenants legally described and defined as "Bandera Phase III". Court of Appeals Opinion, pg. 1-2.

While the Court of Appeals' opinion correctly states the material facts, the Association highlights the following facts that it believes important for this Court's consideration of Noche Vista's Petition for Review.

Despite wanting the Covenants' benefits – use of Bandera's common areas, utility easements, and road system – Noche Vista now claims the Covenants' development restrictions and assessment obligations do not apply to Bandera Phase III. CP 001-121.

To justify its use of Bandera's road system, Noche Vista admits Bandera Phase III is part of Bandera. It states that "the roads identified as part of the Bandera Development were identified and platted in order to serve and provide access to **all real property located within the Bandera**

Development, including the Noche Vista Property [Bandera Phase III]." CP 368 (emphasis added).

Despite its admission, Noche Vista still seeks a declaratory judgment despite nowhere in Bandera's Covenants, the amendments thereto, or Bandera's Plat, did the Covenants' Declarant, Jerry Scofield of Scofield Construction, state the Covenants excluded and did not apply to Bandera Phase III. CP 001-121.

Instead, Mr. Scofield unambiguously stated in the Covenants that the Covenants encumber and apply to all of Bandera, including Bandera Phase III, but exempted himself as developer, his successor declarants, and any future owner of Bandera Phase III from paying homeowners' "Assessments" until the "Owner" of Bandera Phase III subdivided that tract of land into one-acre lots that the Covenants define as a "Landholding". CP 019-057.

The Covenants' dispositive provisions encumbering Bandera Phase III and the rest of Bandera are found in the Covenants' introductory paragraph; the definitions of Bandera Phases I and II, Bandera Phase III, and Common Use Areas; and in paragraphs 12.4 and 12.5. CP 024-031, 053-054. These paragraphs state the Covenants apply to **all persons**

owning **any real property** in Bandera, which includes Bandera Phases I, II, III, and Bandera's Common Use Areas. Id.

Additionally, the Covenants' Seventh Amendment affirms that the Covenants encumber Bandera Phase III, including the Covenants' rules and regulations requiring "Owners" of "Landholdings" to pay "Assessments" once Bandera Phase III is subdivided into one-acre parcels. CP 311-312. As the Court of Appeals stated:

> Annexation of Phase III was accomplished by the execution and recording of the seventh amendment. Annexation could be by an amended declaration, and the seventh amendment was "made by the Declarant ... pursuant to Article 9, Section 9.2 of the Declaration," its "Amendment" provision. CP at 306. The amendment was made "prior to the end of the Development Period." CP at 317. It modified the Declaration "as to that property described on the attached Exhibit 'A,'" which included Phase III. CP at 307. It provided that the HOA, which was being incorporated simultaneously, would manage the common areas and amenities and enforce the Declaration as to "Bandera Phases I, III and III." CP at 308-09.

Court of Appeals Opinion, pg. 16.

In addition to the express terms of the Covenants and the Seventh Amendment, the undisputed extrinsic evidence supports that Mr. Scofield intended that the Covenants encumber and apply to Bandera Phase III, along with the rest of Bandera. Mr. Scofield's son-in-law who helped Mr.

Scofield develop Bandera, Christoffer J. Snapp, testifies that Mr. Scofield exempted himself as developer, his successor declarants, and any future owner of Bandera Phase III from paying homeowners' "Assessments" until the "Owner" of Bandera Phase III subdivided that land into one-acre lots that the Covenants define as a "Landholding". CP 302-303.

With its Petition for Review, Noche Vista renews its efforts to wriggle free of the Covenants, despite wanting Bandera's benefit (e.g. road use) and having acquired Bandera Phase III following its promise to comply with the Covenants and with the Seventh Amendment. CP 415-426.

D. ARGUMENT

The Court of Appeals' opinion affirming the trial court's summary judgment for the Association and against Noche Vista is not suitable for review under RAP 13.4(b)(1), (2), or (4). The opinion conflicts with no decisions of this Court or of the Court of Appeals. It correctly applies well-established law to Noche Vista's unique set of facts and offers no issues of substantial public interest.

1. No Conflict with Other Decisions

Notably, Noche Vista's Petition does not identify a decision of this Court or of the Court of Appeals at odds with the Court of Appeals' opinion

in Noche Vista v. Bandera. This omission is telling. The absence of any conflicting decisions supports this Court's denial of Noche Vista's Petition under RAP 13.4(b)(1) and (2).

As for Noche Vista's argument that the Court of Appeals chose to cite out-of-state authority in its opinion related to divisible developer rights, the court's opinion is consistent with Washington law's well-established and long recognized bundle of sticks concept of real property. Eggleston v. Pierce Cty., 148 Wn.2d 760, 64 P.3d 618 (2003); Manufactured Hous. Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), abrogated by Chong Yim v. City of Seattle, 194 Wn.2d 651, 451 P.3d 675 (2019).

Under Washington's bundle of sticks principle, ownership of title and ownership of the right to develop property are divisible. A developer can sell the developer's title to land, but retain the right to develop that same property. W. Main Assoc. v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986), abrogated by, Yim v. City of Seattle, 194 Wn.2d 682, 454 P.3d 694 (2019). For example, a developer can sell lots in a development and retain the right to later regulate, encumber, or alter lots (e.g. install roads or other improvements on reserved easements). Id.

When discussing a right of first refusal in relation to other property rights, the Washington State Supreme Court has described the bundle of sticks theory as follows:

> The United States Supreme Court has long held property consists of a "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it ... Although a right of first refusal to purchase property is a "preemptive" right it has nonetheless been held to be an interest in property as well. "It [a right of first refusal] is an interest in property, and not merely a contractual right, whereby the preemptioner acquires an equitable right in the property, which vests only when the property owner decides to sell ...
>
> [T]he right to grant first refusal is a part of "the bundle of sticks" which the *owner* enjoys as a vested incident of ownership. As Philip Nichols explains, in *The Law of Eminent Domain,* "property is often used to describe the corporeal object that is the subject of ownership, as well as the aggregate rights that an owner possesses in or with respect to such a corporeal object." 2 *Nichols on Eminent Domain* § 5.01[2][d], at 5–10 (3d rev. ed.1999) (footnote omitted). Property is not one single right, but is composed of several distinct rights, which each may be subject to regulation. "[T]he right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission....

Manufactured Hous. Communities of Washington v. State, 142 Wn.2d 347, 367, 13 P.3d 183, 193 (2000), abrogated by Chong Yim v. City of Seattle, 194 Wn.2d 651, 451 P.3d 675 (2019)

The Court of Appeals also cited in its opinion the Restatement (Third) of Property: Servitudes, which Restatement this Court has cited in the past as persuasive authority. Robbins v. Mason Cty. Title Ins. Co., 195 Wn.2d 618, 462 P.2d 430 (2020). "A servitude is a legal device that creates a right or obligation that runs with the land that can be, among other things, an easement, profit, or covenant." Id. (citing 1 Restatement (Third) of Property: Servitudes § 1.1). The Restatement reinforces Washington's long-established bundle of sticks concept. It states that the rights to develop and land ownership are divisible. One's development rights can encumber another's fee title as a servitude, just like one's easements or profits can encumber another's title. The Restatement reads:

> There is wide diversity in the types of land-use arrangements that can be implemented by servitudes. Depending on the nature and object of the arrangement, the parties may create servitudes whose benefits will be held personally, in gross, or appurtenant to another interest in land. They may create benefits to be held successively, first as an appurtenance to land, then, after the holder has parted with the interest to which it was appurtenant, to be held in gross. The parties may create servitude benefits to be held by many different holders in different capacities, concurrently and successively. In determining what the parties intended, the full range of possibilities should be kept in mind. Under the rule stated in this section, there are no limits on the kinds or combinations of servitude benefits that can be created.

Restatement (Third) of Property (Servitudes) § 2.6. cmt. c (2000).

In addition to the Restatement and the numerous out-of-state cases the Court of Appeals cited, the following Washington law further supports the court's opinion that development rights are divisible. W. Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 50 (1986)("[w]e have recognized that although less than a fee interest, development rights are beyond question a valuable right in property."); Burien Town Square Condo. Ass'n v. Burien Town Square Parcel 1, LLC, 3 Wn. App.2d 571, 416 P.3d 1286, review denied, 191 Wn.2d 1015 (2018) ("[t]he exercise of a development right does not include a transfer of those rights. Nor does the [Washington Condominium Act's] definition of development rights indicate that conveying property to a successor declarant results in the end of the period of declarant control ... ").

In Noche Vista's case, the undisputed facts are that through his entities, Jerry Scofield owned fee title to all of Bandera, including fee title to Bandera Phase III. CP 005, 299. Prior to any transfers of title, Mr. Scofield encumbered all of Bandera, including Bandera Phase III, with the Covenants. CP 004, 024-031, 053-054, and 110-117. As part of Bandera, Bandera Phase III benefited from Bandera's road system, walking trails,

and other common areas. CP 301, 330, and 368-369. Mr. Scofield then sold "Landholdings" in Bandera to third parties and conveyed the yet-to-be-divided tract of land, Bandera Phase III, to his lender. CP 425. Despite these conveyances, Mr. Scofield retained, pursuant to the Covenants' reservation of development rights, the right to continue to develop all the real property that made up Bandera, including Bandera Phase III. CP 031 and 050. The Covenants read as follows concerning Mr. Scofield's retained, divisible development rights:

> 1.11 "**Development Period**" means that period of time beginning as of the date of this Declaration and ending on the earlier of (1) thirty-five (35) years from the date hereof, or (2) written notice from Declarant to the Management [the Association] by which Declarant elects to terminate the Development Period.
>
> 9.2 Amendments. Commencing on the date of recording of this Declaration and continuing until the end of the Development Period, the Declarant has the absolute right and sole discretion to amend any provision of the Declaration, except as expressly limited herein, provided further that such amendment does not adversely affect marketability of title to any Landholding or impair the security of any Mortgage ... Any document amending this Declaration will be duly executed by the Declarant, or the president and secretary of Management as appropriate.

CP 031 and 050.

As for Noche Vista's annexation argument, the Court of Appeals' opinion does not establish new law regarding how one may annex real property into a multi-phase residential development. It cites well-established law describing how courts have long interpreted covenants. Court of Appeals Opinion, pgs. 12-13. The court then correctly applied that law to Noche Vista's unique set of facts and denied Noche Vista's efforts to wriggle free of the Covenants. See Court of Appeals Opinion.

Concerning Noche Vista's argument related to RCW 64.04.045(1)(f) and the Covenants' recording box, the Court of Appeals correctly identified this issue to be possible evidence of Mr. Scofield's intent, but did not dwell on the issue. Instead, the court correctly found the Covenants' Seventh Amendment dispositive, which ruling was correct for the reasons stated below. Id., pg. 19.

Based on the foregoing, this Court should deny Noche Vista's Petition.

2. No Substantial Public Interest

Due to the unique facts at issue on Noche Vista's appeal, the Court of Appeals' opinion is not of general public interest or importance. RAP 13.4(b)(4).

With its Petition, Noche Vista continues its efforts to wriggle free from the unique provisions of Bandera's Covenants, claiming one word in the "Landholding" definition, "annexation", should be construed against the entire text found in the 39 pages of the Covenants. Noche Vista is mistaken.

As indicated above, well-settled Washington law provides guidance to the public on how courts are to interpret covenants, including directing that for residential covenants, like those at issue in Noche Vista's case, covenants are construed to protect the homeowners who purchased property in the residential development in reliance on the covenants. Burton v. Douglas Cty., 65 Wn.2d 619, 399 P.2d 68 (1965); Wilkinson v. Chiwawa Communities Ass'n, 180 Wn.2d 241, 327 P.3d 614 (2014); Saunders v. Meyers, 175 Wn. App. 427,306 P.3d 978, (2013).

Citing no conflicting law, Noche Vista's Petition reargues the merits of its declaratory judgment action on which it lost at the trial court and again at the Court of Appeals. While the trial court and the Court of Appeals each identified different grounds on which the Association prevailed, both courts were correct.

The trial court correctly ruled that the Covenants unambiguously apply to and encumber Bandera Phase III. It reasoned:

> [T]he essential issue presented ... is whether the property described as tract 10 or phase III ("phase 3") is subject to the "Declaration of Covenants, Conditions, and Restrictions and Easements for Bandera at Bear Mountain Ranch" ("CCR's"). Despite plaintiff's best efforts to wriggle free of these legal restraints, the court answer the question yes ... [Noche Vista's argument] misses the mark ... [The Covenants] described the property encompassed by the CCRs, which included phase 3 ... Paragraph 12.5, in turn, provides that any person who acquires any interest in any of the real property subject to the declaration agrees to the applicability and enforceability of the CCR's. See also paragraph 12.4.

CP 661-662.

The Court of Appeals also correctly found that the Covenants encumbered Bandera Phase III. However, it first questioned the scope to which the Covenants burdened Bandera Phase III prior to the recording of the Seventh Amendment and before that tract was divided into "Landholdings". It stated:

> We agree with Noche Vista that we cannot treat as meaningless the statement in section 1.15's definition of "Landholding" that "The number of Landholdings maybe increased through annexation of Bandera Phase III." CP at 179. The definition of Landholding is critical to the definition of "Owner," and a number of provisions of the Declaration apply only to Owners. It is clear from that

> statement in section 1.15 and from the separately defined terms "Bandera Phases I and II" and "Bandera Phase III" that lots in Phase III could only become *fully* subject to the Declaration—subject to provisions applicable only to Owners—following annexation.
>
> By the same token, we cannot treat as meaningless Scofield's inclusion of Phase III in the Declaration, particularly where the statement that Landholdings "*may* be increased through annexation of Bandera Phase III" (emphasis added) is most reasonably understood as binding future owners of and within Phase III to being annexed in the manner provided by the Declaration. ...
>
> There would be no point in including Bandera Phase III in the Declaration if only to say that there was a "possibility" it could be annexed ...
>
> [A]rticle 10, dealing with annexation, suffices for that purpose. Including Phase III in the Declaration and binding it to the Declaration's terms is meaningful only because it binds Phase III to a method of annexation ...
>
> The Declaration provides that annexation is accomplished by an amendment executed by the declarant. ... The "Declarant" is Scofield. ... Until the end of the development period (defined as 35 years from the date of recording the Declaration, unless earlier terminated by the declarant in writing) the declarant was granted "the absolute right and sole discretion" to amend the Declaration, subject to its express limitations and a requirement to exercise the discretion reasonably, in a manner that would not impair marketability of title or the security of any mortgage.

Court of Appeals Opinion, pgs. 13-15.

The Court of Appeals, however, did not need to address the full scope of the Covenants' encumbrance on Bandera Phase III prior to the Seventh Amendment. Instead, it agreed with the Association that the Covenants' Seventh Amendment ended Noche Vista's case. The court accepted as correct the Association's argument that "if the seventh amendment was a good amendment that Mr. Scofield had the ability to sign ... the case is ... over for Noche Vista". Report of Proceedings (PR) at 24. It then ruled, as a matter of law, that the Seventh Amendment subjected Bandera Phase III to the full scope of the Covenants, which included Noche Vista, as an "Owner" required to pay "Assessments" once Noche Vista divided Bandera Phase III into "Landholdings". It stated:

> To summarize, the Declaration is reasonably understood to create one set of servitudes for "Owners," as defined, and a different servitude for Phase III: permission for the Declarant to annex it by amending the Declaration.
>
> Annexation of Phase III was accomplished by the execution and recording of the seventh amendment. Annexation could be by an amended declaration, and the seventh amendment was "made by the Declarant ... pursuant to Article 9, Section 9.2 of the Declaration," its "Amendment" provision. CP at 306. The amendment was made "prior to the end of the Development Period." CP at 317. It modified the Declaration "as to that property described on the attached Exhibit 'A,'" which included Phase III. CP at 307. It provided that the HOA, which was being incorporated

> simultaneously, would manage the common areas and amenities and enforce the Declaration as to "Bandera Phases I, II and III." CP at 308-09. It amended the Declaration to "eliminate [any] inconsistencies. CP at 317.

Court of Appeals Opinion, pg. 16.

Based on the foregoing, this Court should deny Noche Vista's Petition.

3. Association's Legal Fees and Costs

This Court should award the Association its legal fees and costs incurred to answer Noche Vista's Petition for Review. RAP 18.1.

The Covenants allow for fees and costs when the Association enforces the Covenants. The Covenants' Attorney Fees Clause reads in relevant part: "In the event any party employs legal counsel to enforce any covenant ... the substantially prevailing party shall be entitled to recover all reasonable attorneys' fees ... and all other costs and expenses not limited to court action." CP 055.

RCW 4.84.330 provides that attorneys and costs shall be awarded when a contract or covenants so require. Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997). RAP 18.1 allows for legal fees and costs incurred on appeal.

Here, the Covenants apply to and are enforceable against Noche Vista and Bandera Phase III, despite Noche Vista's efforts to wriggle free. To enforce the Covenants and defend against Noche Vista's declaratory judgment action, the Association employed Ogden Murphy Wallace, P.L.L.C. CP 001-008. The Association prevailed at the trial court and again at the Court of Appeals. It enforced the Covenants against Noche Vista. If this Court denies Noche Vista's Petition for Review, the Association will have again prevailed and successfully enforced the Covenants. RAP 18.1.

E. CONCLUSION

The Association requests this Court deny Noche Vista's Petition for Review and award it fees and costs. Noche Vista's appeal does not involve a significant legal question of interest to the public. It offers little to no presidential value and conflicts with no prior court decisions.

RESPECTFULLY SUBMITTED this 16th day of December, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On the 16th day of December, 2020, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in the Supreme Court of Washington State upon the following:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated December 16, 2020, at Wenatchee, Washington.

Rayanne N. Grim

December 16, 2020 - 11:20 AM

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