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NO. 35838-7-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants

vs.

**RYDERWOOD IMPROVEMENT AND SERVICES
ASSOCIATION, INC.,**

Respondents.

APPELLANTS' BRIEF

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17 Wash.Prac. § 3.2

ASSIGNMENT OF ERROR

Appellants appeal the ruling of the Cowlitz County Superior court in the Amended Judgment Granting Permanent Injunction with Damages against Defendant Bichler and Southworth, filed on December 15, 2006, and the Supplemental Judgment filed on January 5, 2007 on the basis that the CC&R's and Bylaws which the trial court found applied to the subject property do not in fact apply.

ISSUES

1. Whether the trial court erred when it ruled that the "By-laws" for a physically adjacent association apply to the subject property through the Goro Statement of Desire?
2. Whether the trial court erred when it ruled that the Respondent RISA has a right to enforce the CC&R's which burden the subject property but not any property which RISA owns?
3. Whether RISA has associational standing to enforce a real covenant which does not benefit and burden the plat of the town of Ryderwood, which is the jurisdictional limit of RISA?

4. Whether RISA has any standing to sue (for violation of the CC&R's) in its own right, since it owns no property that is subject to the Perimeter Plat CC&R's?

5. Whether RISA is an intended Third Party Beneficiary of the Perimeter Plat CC&R's and therefore has a right to enforce the CC&R's which burden the Perimeter Plat?

STATEMENT OF THE CASE

In July 2005, suit was filed against Bichler for alleged violations of CC&R's and By-laws which RISA alleged applied to the subject real property. CP 1 at pg. 3-9.¹

After a protracted Summary Judgment motion in which the trial court requested supplemental briefing and argument over the course of two months a Amended Judgment Granting Permanent Injunction with Damages against Appellants Bichler and Southworth was entered on December 15, 2006. CP 109 at pg. 529-532.

The Second Amended Findings of Fact and Conclusions of Law provided that the current use of the subject property belonging to Bichler

¹ The original suit was filed by Mr. and Ms. Weaver, soon thereafter in December 2005, RISA intervened, and made essentially the same claims as Weaver for violations of By-laws and restrictive covenants. CP 15 at pg. 49-56.

was in violation of certain CC&R's and Bylaws. CP 108 at pg 526. These CC&R's and Bylaws essentially provided that the then current use of the subject property by the Bichler was violative of both. CP 108 at pg 526.² At the time of the December 15, 2006 judgment, the violative condition was present on the subject property. CP 108 at pg 526. Since that time the violative condition has been removed in such a way that apparently complies with the trial courts Amended Judgment Granting Permanent Injunction with Damages of December 15, 2006. CP 130 at pg. 586-589.

The basis for the court's decision that the Bylaws applied to the subject property was the existence of a recorded document that the court held caused the subject property to be bound by the "By-laws". CP 108 at pg. 526. This document has been referred to throughout this case as the "Goro Statement of Desire". CP 108 at pg. 526.³

The basis for the court's decision that the CC&R's applied to the subject property (Perimeter Plat) was that both a proper assignment had taken place of enforcement rights of the CC&R's to RISA, and that RISA had standing to bring the action to enforce the CC&R's. CP 108 at pg. 526-527.

² The violative condition relates to the presence and size of multiple RV's on the subject property and age restrictions related to ownership of the subject property.

³ The court in the Second Amended Findings of Fact and Conclusions of Law calls the "Goro statement of desire" the "Bylaws Agreement". CP 108 at pg. 526.

ARGUMENT SUMMARY PER - RAP 10.3(a)(6)

Bichler appeals the trial court's Amended Judgment of December 15, 2006 that certain "By-laws" of Ryderwood Improvement and Service Association Inc. (hereafter RISA) a private homeowners' association affecting a different plat than the plat in which the Bichlers' owned the property in question, apply equally to his real property. In addition, Bichler appeals the trial court's decision that CC&R's of the Perimeter Plat, in which Bichler's real property is situated, may be enforced by RISA despite the fact that it is not organized for the enforcement of the Perimeter Plat CC&R's, the Perimeter Plat CC&R's do not give RISA such enforcement power, and that RISA therefore lacks standing to enforce such CC&R's.

ARGUMENT

1. The "By-laws" of RISA do not apply to the subject property, since the document (Goro Statement of Desire) which purports to cause the "By-laws" to apply to the subject property violates the statute of frauds.

RISA's "By-laws" do not apply to the subject real property as the "document" (Goro Statement of Desire)⁴ which purports to create such application violates the statute of frauds in a number of respects.

A real covenant is an interest in land. *Dickson v. Kates*, 132 Wash.App. 724, 733, 133 P.3d 498 (2006); see also 17 Wash.Prac. § 3.2. RCW 64.04.010 requires that every conveyance or encumbrance on real property shall be by deed. RCW 64.04.020 requires that every deed shall be in writing, signed by the party to be bound, and acknowledged. A deed must contain a description of the property conveyed. *Dickson*, 132 Wash.App. at 133. *Howell v. Inland Empire Paper Co.*, 28 Wash.App. 494, 495, 64 P.2d 739 (1981). To comply with the statute of frauds, a description of the land must be sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description. *Id.* See also *Dickson*, 132 Wash.App. at 734. An agreement with an inadequate description is void. *Id.*

Here, the Goro Statement of Desire does not provide any legal description of the Perimeter property (servient estate), nor does it provide

⁴ The "document" in question is referred to as the "Goro Statement of Desire", as the previous owner (Mr. Goro) of the subject property at one time had allegedly written the document which purports to express Mr. Goro's "desire" to become a member of RISA. Please see RISA's Rebuttal to Bichler Response at CP 48 at Exhibit B for a copy of the "Goro Statement of Desire".

a legal description to the intended benefited (dominant) estates, nor does it refer to any documents that have an adequate legal description of the subject property. CP 48 at its Exhibit B.

The Goro Statement of Desire does not contain words of conveyance. It merely states the “desire” of whoever signed it. Without words of intended conveyance, there is no delivery. *Showalter v. Spangle*, 93 Wash. 326, 160 P. 1042 (1916). Intent to convey a present interest must be determined by the deed itself and the facts and circumstances of its execution. *Maxwell v. Harper*, 51 Wash. 351, 98 P. 756 (1909).

The Goro Statement of Desire does not purport to touch and concern the Perimeter Property owned by Bichler. It states that “this exception will be a permanent part and encumbrance on *said deed*,” but does not state that it touches and concerns *anything legally described*, nor does it identify what deed is the “said” deed. Real covenants do not bind deeds. They bind properties.

Nothing demonstrates a desire to bind successors-in-interest.

The Goro Statement of Desire is not signed by any person purporting to act on behalf of the property or properties constituting the dominant estate or estates.

One cannot tell from the Goro Statement of Desire whose signatures appear on it. There is no acknowledgement as to whose signatures appear on it in violation of RCW 64.04.020 and 64.08.060.

The Goro Statement of Desire, as a real covenant, is invalid as a matter of law and therefore the trial courts decision finding it valid should be overturned.

2. RISA does not have a right to enforce the CC&R's which burden the subject property as the "assignment" of Mr. Ronald Morris' "claim" to RISA was invalid.

Mr. Ronald Morris owns a tract of land located within the Perimeter Plat. CP 42 at pg. 214. The Morris tract is not in the plat of the town of Ryderwood. Id. It is only bound by the CC&R's which govern the Perimeter Plat along with Bichler's real property.⁵ Id.

The determination of what claims are assignable is governed by RCW 4.08.080. That statute states, in pertinent part, as follows:

Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, *for the payment of money*, by assignment *in writing*, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action, notwithstanding the assignor may

⁵ The Perimeter Plat is essentially a ring of properties that abut and surround the RISA plat.

have an interest in the thing assigned (emphasis added).

Mr. Morris' purported assignment is invalid for three reasons. First, the alleged assignment occurred August 6, 2006, only in reply to Bichler's response to summary judgment. (*Deposition of Ronald Morris*, pg. 11-12.) at CP 48 at its Exhibit D.

Secondly, RCW 4.08.080 requires an assignment of claims to be in writing.⁶ The assignment statute must be strictly construed as it is in derogation of the common law. RCW 4.04.010.

Third, only claims for payment of money are assignable under RCW 4.08.080. The statute does not authorize assignment of the right to enforce real covenants and equitable servitudes.

Even if the assignment was timely, it was invalid as it failed the necessary elements of a conveyance under the statute of frauds.

Under RCW 64.04.010, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed ...". Every deed "shall be in writing, signed by the party bound thereby, and acknowledged ...".

⁶ While certain actions may be assigned orally, the cases which can be found allowing such oral assignments dealt with assignments of actions for monetary damages involving corporate distribution of assets, *Zimmerman v. Kyte* 53 Wn. App. 11, 765 P. 2d 905 (1988), not actions for enforcement of real covenants or equitable servitudes, which are interests in real property.

RCW 64.04.020. Although it is an incorporeal right, an easement is an interest in land. *Berg v. Ting* 125 Wn.2d 544, 886 P.2d 564 (1995) citing *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 388 P.2d 949 (1964).

A conveyance of a covenant must also satisfy the statute of frauds. A covenant and an easement are rights that only have a conceptual existence but not a physical existence; that is, they are incorporeal rights.⁷ The same standard applies to a conveyance of covenants as it does to the conveyance of easements. The statute of frauds must be met or the conveyance is invalid. Here the conveyance (or as the RISA described it the “assignment”) of the claim with respect to the CC&R’s is ineffective, as it was merely contained in Mr. Morris’ declaration in Reply to Mr. Bichler’s Response to Summary Judgment. His declaration lacked a number of the requirements of the statute of frauds and therefore was invalid, making RISA enforcement of the CC&R’s invalid.

3. RISA has no associational standing to enforce real covenants that do not benefit and burden the plat of the town of Ryderwood.

⁷ RISA at the trial court level actually argued, *a priori*, that Mr. Morris may unbundle the property right sticks that he owns, and convey powers to enforce real covenants, which run with the land. By doing so, he would be changing a real covenant to a covenant in gross. There is no authority that could be found that the owner of a real covenant, which burdens and benefits other properties, can unilaterally change the nature of the real covenant to one in gross.

The trial court erred when it found that RISA had standing to enforce CC&R's on Bichler's property. Since RISA was organized to enforce its own covenants for the plat of the town of Ryderwood, RISA cannot demonstrate that it has standing to enforce the CC&R's of the Perimeter Plat. It cannot do so based on associational standing.

An association has the burden of establishing that it has standing to sue on behalf of its members. *Des Moines Marina Ass'n v. City of Des Moines*, 100 P.3d 310 (2004). An association whose interests are speculative or indirect does not have standing to sue. *Warth v. Seldin*, 422 U.S. 514, 95 S.Ct. 2197 (1975).

An association must meet all three of the following elements to have standing to sue: (1) the members of the association would otherwise have standing to sue in their own right; (2) the interests that the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the association's individual members. *Id.* RISA does not.

- a. Prong One of Association Standing: RISA's members do not have standing to sue in their own right.

Not all of RISA's members have standing to sue in their own right; in fact only one (Mr. Morris) out of hundreds apparently has authority to sue individually. *Save a Valuable Environment (SAVE) v.*

City of Bothell 89 Wn.2d 862, 576 P.2d 401 (1978) provides that RISA must show that all of its members interest are being protected by the action, not just one. *SAVE* dealt with a right of an association, specially created to dispute a governmental act, to sue the government which created a zoning regulation.

RISA claims associational standing to enforce only Mr. Morris interests in the Perimeter Plats. RISA asserts no claim on behalf of a group of its members but instead only one, in order to give itself standing when it should have none.

The valid certificated members of RISA, living in the plat of the town of Ryderwood, do not have standing to sue Mr. Bichler as individuals for violation of the Perimeter Plat CC&R's, unless they own a lot in the Perimeter Plat which is burdened by the CC&R's. *SAVE's* litigants all had individual standing to sue, RISA's members do not.

Timberlane Homeowners Ass'n, Inc. v. Brame, 79 Wash.App. 303, 901 P.2d 1074, (Div. 1 1995) provides a nearly analogous situation. In *Brame* a homeowners' association (HOA) tried to assert a claim on behalf of a member who would not assign his claim to the HOA in an adverse possession action brought by someone outside of the affected plat. *Brame*, supra. The court found that the bylaws did not grant the power to sue, but only to physically "maintain" the real property being adversely possessed.

Supra, Brame, at 312 (1995). The Court held that the HOA lacked standing.

RISA cannot meet the first prong of the test for associational standing.

- b. Prong Two of Association Standing: Mr. Morris' interests, which RISA seeks to protect in this lawsuit, are not germane to RISA's purpose.

RISA seeks to protect interests that are not germane to its purpose because it is trying to enforce CC&R's outside of its territorial jurisdiction. The RISA bylaws specifically provide the extent to which the association may go to protect the interests of its members, and that limit is at the boundary of the plat of the town of Ryderwood:

"Only an individual purchasing or owning a residence in the town of Ryderwood. . .shall be eligible for membership in this corporation. As soon as the buyer becomes a legal resident of the area under the jurisdiction of the corporation, the owner of the residence shall be entitled to one membership certificate. . .

The Board shall refuse those services for which the corporation was formed to other than bona-fide certificate holders, except as provided elsewhere in the by-laws. . .

[The Board has the power] to make rules and regulations not inconsistent with the bylaws of . . . the Association.

(Emphasis added).

CP 44 at its Exhibit G.

The purpose of any homeowners' association – like RISA – is to protect the covenants that benefit and burden the properties within its territorial jurisdiction, as defined by the document that creates the association. The interests of the members that the association steps forward to advance must not be simply interests that are *germane to the members*. The interests advanced must be *germane to the purpose of the association*. It cannot be created with unlimited territorial reach.

RISA's purpose is limited to the conduct of the owners of the properties within its territorial sphere – the plat of the town of Ryderwood, not the Perimeter Plat. CP 44 at its Exhibit G. The conduct of property owners outside of that area, including within the Perimeter Plat, is not germane to its purpose. In fact, the Perimeter Plat CC&R's make no mention of RISA. Importantly, when RISA adopted its 1992 Bylaws, it made no reference to the Perimeter Plat, which was created in 1989. CP 44 at its Exhibit G. Shared borders do not provide standing.

c. Prong Three of Associational Standing: RISA cannot enforce the Perimeter Plat CC&R's. Mr. Morris must participate.

Mr. Morris must participate as a party to the litigation. A real covenant cannot be turned into a covenant in gross through Mr. Morris' unilateral act. Since he owns the property in the Perimeter Plat, he must take enforcement action himself.

Therefore, the trial court erred when it found that RISA had standing to sue to enforce the CC&R's

4. RISA has no standing to sue in its own right, since it owns no property that is subject to the Perimeter Plat CC&R's.

RISA has no right to enforce any of the CC&R's on the perimeter plats personally, as it owns no property which the CC&R's benefit. During the CR 30(b)(6) deposition of RISA's speaking agent, Mr. Weaver, RISA identified the "Lake Property" as the property which RISA owns in the Perimeter Plat, upon which it holds out the hope of personal standing. CP 47 at its Exhibit F, *Deposition of RISA*, page 32 and its Exhibit 2. The CC&R's only touch and concern lots 1-21 of the Perimeter Plat. The Lake Property is not one of these lots. The testimony of RISA's speaking agent actually excluded the Lake Property from the effect of the Perimeter Plat CC&R's and therefore RISA has made the case that it has no personal standing.

Therefore it was an error for the court to find that RISA could enforce the CC&R's.

5. RISA is not an intended Third Party Beneficiary of the Perimeter Plat CC&R's and therefore can not enforce the Perimeter Plat CC&R's.

The drafters of the 1992 RISA Bylaws excluded the owners of properties in the Perimeter Plat (including the subject real property) from membership rights in RISA. CP 44 at its Exhibit G. The Bylaws of Respondent RISA speak for their self with respect to their intent.

Further, no right of enforcement was given by the Perimeter Plat CC&R's to RISA at any time.⁸

No benefits have been given to the Perimeter Plat by RISA and its Bylaws and therefore no equitable right to enforce the CC&R's which burden the subject property exists.

RISA argued at the trial court level, and the trial court apparently agreed, that since a neighboring piece of land is "benefited" by the CC&R's, therefore at some equitable level either party has the right to enforce the other's CC&R's. Such a premise is fallacious. The benefit of CC&R's comes from the reciprocal burden that is placed on all of those properties to which the real covenant applies. "Benefit" is not meant to be an ephemeral, existential term.

⁸ A 1988 letter from the developer of the Perimeter Plat (included as an exhibit to the Declaration of Charles Weaver) at CP 44 at its Exhibit H can be interpreted to mean that the Developer was considering making the two plats similar. To the extent that the Plaintiffs argue that it shows intent to make RISA a third party beneficiary, the Developers complete failure to expressly provide RISA any authority to enforce the Perimeter Plat CC&R's demonstrates an abandonment of any such alleged intent.

There are no cases in which a party who has no recorded CC&R's was allowed to enforce neighboring properties CC&R's just by virtue of being physically close.

Cases come close but don't actually provide such right. In *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999) a defendant mining company was enjoined from doing acts in violation of CC&R's which were recorded in the deed conveying the property, and which were recorded in the deeds of the Plaintiffs' property. *Garwall* was a dispute between parties where the actual language of the covenants was not readily apparent but it was clear that such covenants were recorded and affected the land.

In the present case there is no such analogy. Covenants which run with, are benefited by, or burden land can only, by their very nature, be enforced by a party whose land is encumbered by them. That is the nature of a real covenant and of an equitable servitude.

Metzner v. Wojdyla 125 Wn. 2d 445, 886 P.2d 154 (1994) provided that a party who is bound by a covenant (in that case prohibiting business activity, i.e., a daycare) may have that covenant enforced by a neighbor who also is benefited (recorded on their title) by such covenant. But *Metzner* provided no rights to a neighbor without a clear benefit running to them by virtue of the burden properties CC&R.

RISA is not an intended third party beneficiary of the CC&R's.

While it is clear that the CC&R's of the Perimeter Plat are similar to the RISA bylaws, RISA should not therefore be able to enforce them. The fact remains that they have differences, and even without such distinctions, even if they were mirror-image twins, that fact would not give one Homeowners' Association the standing to enforce the CC&R's of another plat.⁹

The Court should recognize that neither the RISA Bylaws nor the Perimeter Plat CC&R's make reference to the other. CP 44 at its Exhibits G and I. Had the drafters intended to include the other plat owners, they could have done so. Demonstration of an intent *by the original drafters* must be clear in order for a third party beneficiary theory to succeed. *Vogeler v. Alwyn Improvement Corporation*, 159 NE 886, (N.Y. 1928). Testimony about language contained in a 1992 Bylaw amendment is insufficient to show the original intent of the creators of the plat of the town of Ryderwood.

No credible evidence existed for the trial court to find that RISA was an intended third party beneficiary of the CC&R's and therefore the

⁹ It bears repeating that Bylaws do not constitute real covenants. The language of the RISA Bylaws is not relevant to show similar language. Lastly, the Bylaws RISA cites as relevant were executed in 1992 – three years after the Perimeter Plat CC&R's.

trial court erred when it found that RISA had the right to enforce the CC&R's.

CONCLUSION

The trial court committed error when it ruled that RISA could enforce the CC&R's of the Perimeter Plat as to Bichler's real property; the trial court also committed error when it ruled that RISA's "By-laws" applied to Bichler's real property. Therefore this court should reverse the trial court's decision and dismiss the action, as the determination of lack of standing by RISA deprives the trial court of jurisdiction over the subject matter of this dispute.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing Appellants' Brief to be served on the following:

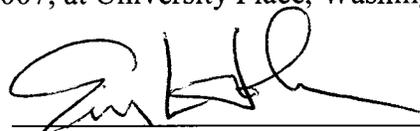
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DATED this 13 day of August, 2007, at University Place, Washington.


Erica L. Johnson
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