

Original

NO. 35838-7-II

Chm

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., et al**

Respondents.

APPELLANTS' REPLY BRIEF

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RCW 4.08.080

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ISSUES

1. Whether Bylaws of a homeowners' association in one plat are binding upon the Bichler property, located in an entirely separate plat, when they do not constitute an equitable servitude and cannot be construed to be an equitable servitude through the recording of the Goro Statement of Desire, which violates the statute of frauds?

2. Whether Respondent RISA has a right to enforce the Perimeter Plat CC&R's which do not touch and concern any property which RISA owns?

3. Whether RISA, a homeowners' association for the Plat of the town of Ryderwood, has associational standing to enforce a real covenant which does not touch and concern any property within the plat of the town of Ryderwood?

4. Whether RISA is an intended Third Party Beneficiary of the Perimeter Plat CC&R's where neither RISA's amended bylaws nor the Perimeter Plat CC&R's make reference to each other?

5. Whether Appellant Bichler is entitled to attorney fees?

STATEMENT OF THE CASE IN REPLY

The Respondent RISA is a non-profit corporation serving as a homeowners' association to benefit the homeowners of lots within the Plat of the town of Ryderwood. CP 35, Exhibit D. Appellant Bichler does not own any property within the Plat of the town of Ryderwood. Rather, the property in question in this appeal, and in the underlying lawsuit, is located in a separate plat, referred to in this appeal as the "Perimeter Plat", recorded in 1989. CP 35, Exhibit C. RISA does not own any property within the Perimeter Plat. CP 35, Exhibit C. RISA's bylaws were recorded in 1993. CP 35, Exhibit D. Those bylaws provide that: "Only an individual purchasing or owning a residence in the town of Ryderwood . . . shall be eligible for membership in this corporation." RISA's bylaws do not touch and concern Appellant Bichler's property in the Perimeter Plat. In 1993, a document was recorded in which Appellant Bichler's seller, Mr. Goro, expressed his "desire to belong" to RISA. CP 35, Exhibit F. The "Goro Statement of Desire" violates the statute of frauds in a number of respects.

ARGUMENT

1. The Bylaws do not constitute an equitable servitude, they do not touch and concern Appellant Bichler's property, and the Goro

Statement of Desire, which was recorded on the title to Appellant Bichler's property, fails to create an equitable servitude.

- a. The *Johnson v. Mt. Baker Presbyterian Church* decision is inapplicable to the situation before the Court of Appeals.

At no point has a court in this state found an equitable servitude between two properties which did not originate from the same grantor. A failed real covenant cannot be saved by the equitable servitude doctrine. If such were law, then real covenants would be superfluous.

Johnson v. Mt. Baker Presbyterian Church, 113 Wash. 458, 194 P. 536 (1920), cited by the Respondent RISA, held that Johnson could enforce a covenant restricting the construction of a church. The *Johnson* court reasoned that since almost all the lots in the plat (620 out of 800) had the same covenant on their individual deeds from the developer, the covenant should also apply to the church property even though the church's deed did not have the covenant language. The church property was located in the same plat. The *Johnson* court took into account the fact that the church, when purchasing the property, had contractually covenanted with the developer to conform to the same essential restrictions contained in the covenants of the other 620 deeds in the plat. The court found that the church was well aware of the restrictions on the other lots and had contracted for the restrictions to apply to its own lot. *Id.*

Importantly, the *Johnson* court stated that since Johnson could bring a claim against the developer for violating its agreement with *Johnson* that all lots in the plat be burdened by the deed restrictions, Johnson could then necessarily bring its claim against the party who bought one of the same lots from that developer. *Id* at 465-466.

The present case is far different from the fact pattern as found in *Johnson*. Appellant Bichler does not own a lot within the Plat of the town of Ryderwood at all. Appellant Bichler did not receive his lot from the same grantor as RISA. In fact, the Bylaws apply to a completely separate plat than the plat in which the Bichler lot is situated. By the RISA bylaws own language, Mr. Bichler could not qualify to be a member of RISA. Mr. Bichler did not have actual notice of the Bylaws which RISA seeks to enforce. Mr. Bichler did not contract with the grantor that he would conform to RISA bylaws. Mr. Bichler is in a fundamentally different position than the church in *Johnson*, and should not be burdened in the same fashion.

b. Elements of equitable servitudes are not present here.

i. Touch and Concern.

As discussed in the Appellant's Opening Brief at page 6, no evidence exists that the Goro Statement of Desire touches or concerns the

land. It provides no words of conveyance. It provides no legal description of the servient estate, the dominant estate, nor does it refer to any documents that have an adequate legal description of the subject property. The Goro Statement of Desire 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. *Lake Limerick County Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 260, 84 P.3d 295 (2004) see also *Dickson v. Kates*, 132 Wn. App. 724, 732, 133 P.3d 498 (2006).

RISA has merely used conclusionary statements to assert the touch and concern element which are insufficient.

ii. Notice.

The Goro Statement of Desire did not give notice to Mr. Bichler of the restrictions (Bylaws) which RISA now attempts to enforce. *Dickson* provides that notice of an equitable servitude either has to be actual or constructive. *Dickson* 132 Wn. App. at 735. Here there is no evidence that Bichler had actual notice of the restriction which RISA seeks to enforce, but instead RISA asserts that the notice was constructive, by virtue of the recorded Goro Statement of Desire. A recorded document can provide constructive notice if in the direct chain of title; but a party has no duty to look outside of the chain of title otherwise unless some information is

found in the chain of title which would “excite” a further inquiry. *Koch v. Swanson* 4 Wn. App. 456, 481 P.2d 915 (1971) and *Paganelli v. Swendsen* 50 Wn.2d 304, 311 P.2d 676 (1957).

Here the recorded document which contained the restrictions which RISA seeks to enforce is not in the direct chain of title of Bichler’s property but in fact is obliquely referenced by the Goro Statement of Desire. Such reference does not rise to the level of constructive notice or excitement to cause an inquiry by a reasonable person. An inquiry would only have revealed the existence of bylaws for a nonprofit corporation operating as a homeowner’s association for a neighboring plat. The reference which the Goro Statement of Desire makes is to the “desire to belong” to RISA not that Mr. Goro actually was a member of RISA or that the Bichler lot in the Perimeter Plat is actually bound by the Bylaws. CP 35, Exhibit F. The RISA bylaws, themselves, prevent Mr. Goro and Mr. Bichler from becoming members of RISA.

The Goro Statement of Desire cannot operate to create an equitable servitude. They cannot be deemed to have given to Mr. Bichler constructive notice of the application of the RISA bylaws to his lot in the Perimeter Plat. The Goro Statement of Desire did not touch and concern any property. It would be a significant departure from the well-settled law of real covenants for this Court to find, in this set of circumstances, that a

failed real covenant may be resurrected as an equitable servitude. Such a finding would render real covenants to be anachronisms.

2. RISA has no power to enforce the Perimeter Plat CC&R's through an assignment of rights.

a. RCW 4.08.080 does not provide for assignment rights.

RCW 4.08.080 does not allow for the assignment of the rights to enforce covenants that affect real property, nor do the Perimeter Plat CC&R's provide such right either, as asserted by RISA. In RISA's Respondent's brief at page 18 it asserts that the CC&R's provide the right to assignment. They do not. Section 10 of the Perimeter Plat CC&R's states that:

This agreement may be transferred and assigned to any subsequent owner, their heirs transferees, successors or assigns *upon the acquisition of a legal interest in any portion of the above property.* (Emphasis added). CP 35, Exhibit C.

Section 11 of the Perimeter Plat CC&R's states that "any persons *owning any real property* situated in this development may prosecute claims." CP 35, Exhibit C, section 11. The Perimeter Plat CC&R's say nothing about the assignment of claims to parties who do not have a legal interest in the property. Interestingly, the Perimeter Plat CC&R's list the

real property which is subject to them and does not include property owned by RISA.¹

- b. The language of the Perimeter Plat CC&R's does not allow for an assignment.

RISA asserts that somehow the actual Perimeter Plat CC&R language provided RISA the right to enforce the Perimeter Plat CC&R's. RISA asks this court to interpret a vague statement in the Perimeter Plat CC&R's, "this development" to mean both the Plat of the town of Ryderwood (RISA's physical boundary) and the Perimeter Plat (where Bichler's property is located). No reasonable interpretation can go that far.

"This development" most assuredly refers to the Perimeter Plat as it was platted and the lots which are specifically listed in the Perimeter Plat CC&R's. CP 35, Exhibit C. When the CC&R's were created, RISA had been in existence for many years. CP 35, Exhibit A.

Second, there is virtually no way to depict the Perimeter Plat without showing the Plat of the town of Ryderwood which is engulfed and surrounded by the Perimeter Plat. The fact that the recorded Perimeter Plat shows it surrounding the previously recorded Plat of the town of

¹ Tracts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of that survey recorded January 13, 1989 under Auditor's File No. 890113917 in Volume 9, Page 85 of surveys of Cowlitz County, Washington. CP 35, Exhibit C, second paragraph. These tracts constitute the Perimeter Plat which surrounds RISA.

Ryderwood does not make the Plat of the town of Ryderwood a part of “this development.”

The developer of the Perimeter Plat had the opportunity to execute a document which granted enforcement rights to RISA, and chose not to do so.

The attempted execution of the Goro Statement of Desire in 1992 is a tacit recognition by RISA that it did not have the enforcement rights in the Perimeter Plat CC&R’s. If RISA had had the right to enforce the Perimeter Plat CC&R’s, it would not have attempted to receive those rights from Mr. Goro and the other owners of lots in the Perimeter Plat, but would have just relied upon the 1989 Perimeter Plat CC&R’s.

- c. RCW 4.20.046 is the survivor statute, and does not make enforcement of real covenants assignable under these circumstances.

A chose in action is not assignable under these circumstances. The authority cited by RISA for assignment of a “chose in action” deals with the rights of a personal representative to bring actions on behalf of the estate they represent under RCW 4.20.046.

RCW 4.20.046 is the survivor statute, and RISA cites it as providing authority for the right to assign the enforcement of an interest in real property to another person. The survivor statute only provides the right of assignment to the personal representative of individuals who are

deceased. RCW 4.20.046. RCW 4.08.080 deals with the right to assign an action.

Cases cited by RISA do not show such assignment right either. *Cooper v. Runnels*, 48 Wn.2d 108, 110, 291 P. 2d 657 (1955) deals with the assignment of a cause of action in tort by or to the personal representative of an individual after that person has died. It does not provide a general right to assignment. *Cooper* also cites to *Slauson v. Schwabacher Bros. & Co.* 4 Wash. 783, 31 P. 329 (1892) which merely provides the right to assign a claim for money damages. Neither provides the right to assign a claim for enforcement of an interest in real property.

RISA has presented no authority for the right of Mr. Morris to assign his claim for enforcement to RISA, and only cites one case, from Texas in 1913, for such authority. Such authority is not enough to overcome the clear statutory authority which explicitly provides that a chose in action "for the payment of money" may be assigned. RCW 4.08.080.

Since the cause of action is for the enforcement of real covenants it may not be assigned.

3. Associational standing is not present.

As addressed in Mr. Bichler's Appellate Brief, RISA has no associational standing to bring the lawsuit. The trial court correctly held that no associational standing existed.

RISA's citation to *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978) does not support its contention that RISA has the right to assert its current claims. *SAVE* was an association created for the purpose of filing a specific lawsuit against the City of Bothell. The *SAVE* decision applies to a "government action." *Id.* at 867. Bichler is an individual not a government.

RISA argues that since it allegedly has six members who own property on the Perimeter plat, RISA therefore has standing to sue. Such membership, if true, is not part of the record on review, and has never been proven, nor was it even a consideration of the trial court. Therefore it should not be considered by this court. RAP 9.11.

Moreover, the RISA bylaws themselves limit membership as follows:

"Only an individual purchasing or owning a residence in the town of Ryderwood . . . shall be eligible for membership in this corporation." CP 35, Exhibit D.

RISA is not protecting an interest which is "germane" to its existence. The document which breathes life into RISA, the bylaws,

specifically states the reach of RISA action and limits that reach to its borders. CP 35, Exhibit D.²

4. RISA is not a third party beneficiary of the Perimeter Plat CC&R's.

No third party beneficiary was created by the creation of the Perimeter Plat. While clearly the Perimeter Plat surrounds the Plat of the town of Ryderwood (RISA's physical boundary) it does not incorporate RISA. CP 35, Exhibit C. The Perimeter Plat CC&R's were created after RISA came into existence. CP 35, Exhibit C; CP 35, Exhibit A. They could have referenced RISA and the adjoining owners of lots in the Plat of the town of Ryderwood had the developer of the Perimeter Plat so chosen.

RISA's 1992 amended Bylaws 1992 were adopted after the Perimeter Plat was recorded, yet they make no mention of the Perimeter Plat or the Perimeter Plat CC&R's. CP 35, Exhibit D. Even if the court looks to "surrounding circumstances" of the covenants, as suggested by RISA, the court cannot find clear evidence that RISA is an intended third party beneficiary.

² "Only an individual purchasing or owing a residence in the town of Ryderwood, County of Cowlitz, State of Washington, 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." (underline added) CP 35 at its exhibit D section 1.

The cases cited by RISA provide for the right to enforce covenants by other owners whose properties are burdened by those covenants. The cases do not address situations such as this where a property is not burdened by a recorded covenant. *Riss v. Angel*, 131 Wn.2d 612, 623-624, 934 P.2d 669 (1997) as cited by RISA deals with the enforcement of building restrictions on a property whose owner wanted to build in a way which the association of which he was a part did not like. *Riss* did not create a right in a homeowner's association to enforce a covenant against a neighbor of the plat. *Riss* merely allowed the use of "surrounding circumstances" to interpret the covenants themselves, not to create a covenant anew.

No contract has ever been produced or alleged to create a third party beneficiary in RISA. RISA is wrong when it asserts that a contract exists which creates such right, and has yet to cite to one case which would create such a relationship based on the facts of this case. Comparisons with homeowner associations like in *Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 295 P.2d 714 (1956) are not analogous as they are enforcing agreements between parties under the control of the association. *Id.* Here no such control exists.

RISA asks the court to stretch the rule of third party beneficiary to unreasonable proportions, which would allow any neighbor whose

property existed before a new plat was recorded next door the right to enforce the CC&R's of the new plat merely on the assertion that the CC&R's of new plat (with no contract to support) were created for the benefit of the old neighbor. This is a result that should be rejected by this court.

5. Appellant Bichler is entitled to attorney fees on appeal.

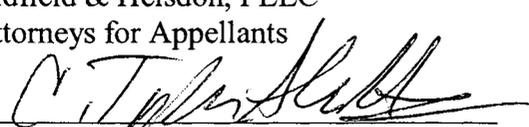
Bichler is entitled to his attorney fees on appeal as the RISA.

CONCLUSION

The Bylaws do not constitute an equitable servitude, they do not touch and concern Appellant Bichler's property, and the Goro Statement of Desire, which was recorded on the title to Appellant Bichler's property, fails to create an equitable servitude.

No proper assignment was made to RISA to enforce the Perimeter Plat CC&R's. Associational standing is not present to afford RISA the opportunity to enforce CC&R's of a neighboring plat, nor is RISA a third party beneficiary of the Perimeter Plat CC&R's.

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 11 day of October, 2007, at University Place, Washington.



Erica L. Johnson
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